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PROSPECTS FOR NARROWING THE GAP BETWEEN DOMESTIC AND
INTERNATIONAL INSTITUTIONAL AND PROCEDURAL SAFEGUARDS IN
CANADIAN, AMERICAN AND AUSTRALIAN REFUGEE PROTECTION
DECISIONMAKING

BY GERALD PAUL L.R. HECKMAN

In the current context of increasingly restrictive state policies towards refugee protection claimants, academic assessments of the sufficiency of the institutional and procedural safeguards surrounding refugee protection decision making must be grounded in a careful, methodical review of the scope and content of international human rights norms.

International conventions guarantee protection claimants a hearing providing them a full opportunity to present their protection claims, a fair hearing before an independent tribunal, and the right to enjoy an access to judicial remedies equal to that afforded by states to their own citizens.

A comparison of the refugee protection systems of Canada, the United States, and Australia reveals that these states allow for the final adjudication of protection claims by decision makers insufficiently protected from executive influence, restrict the ability of refugee protection claimants to seek judicial review of protection decisions and employ procedures that deprive protection claimants of an opportunity to fully and fairly present their protection claims.

Only entrenched constitutional norms can forestall determined legislative efforts to restrict the rights of protection claimants. However, drawing on an unqualified conception of state sovereignty developed

before the advent of contemporary international human rights law, courts have broadly construed the powers of government over the admission and removal of non-citizens. Canadian and American courts have read down constitutionally entrenched institutional and procedural rights as they apply to non-citizens.

Given hostile government attitudes towards protection claimants, gaps between domestic procedural and institutional safeguards and international guarantees may be bridged only if courts harmonize their construction of refugee protection statutes and constitutional rights with international human rights norms. The migration of international norms into domestic law may be facilitated in states whose courts adopt a particular conception of public law, which claims that the role of judges is to identify and give effect to fundamental societal values by interpreting, where possible, statutes and written constitutions in such a way as to ensure that government officials act in conformity with these values. Under this conception of public law, judges must construe refugee protection statutes and constitutional rights consistently with the human rights norms expressed in ratified international treaties because these are *prima facie* evidence of the existence of similar or identical fundamental norms in domestic law.

A RELATIONAL ACCOUNT OF FREEDOM OF EXPRESSION

BY RICHARD JOCHELSON

Canadian freedom of expression jurisprudence purports to apply the guarantee of freedom of expression in light of other constitutionalized values, most importantly, equality values. Traditionally, such equality-based concerns have resulted in Canadian courts restricting the scope of constitutional protection for freedom of expression, particularly in the context of objectionable speech. This view of equality understates and perhaps misunderstands the interaction of equality and expressive freedom. Equality can work to expand and even protect free expression in certain cases. The Supreme Court of Canada treats speech differently depending upon whether the speech is hateful or obscene. This discrepancy is best rectified by analyzing speech as a relational freedom with many stakeholders. A holistic understanding of the interaction of equality and free expression provides the impetus for a reworking of the Supreme Court of Canada's approach to objectionable speech in order to advance a unified approach. Since causal evidence of harm is elusive in many expressive freedom cases, this "relational account" of speech is

an essential tool in analyzing the harmful effects of speech as it propagates throughout society.

INTERGENERATIONAL SUSTAINABILITY AND TRADITIONAL
KNOWLEDGE IN NATURAL RESOURCE MANAGEMENT IN NIGERIA

BY GANIU ADEYEMI OKE

Researchers have attempted to unravel the mystery behind the resource management challenges in Africa. However, relatively little attempts have so far been made to understand the indigenous philosophical underpinnings and traditional perceptions to natural resource governance in the region. Several Westernized approaches proffered as solutions to the problems have proved less successful in Africa particularly at the local communities, as they run counter to the existing indigenous institutional structures. Often times, rather than help in solving particular resource management challenges, they end up generating more problems for the local people by overheating the already-fragile polity in terms of socio-cultural conflicts, economic segregations, and political fragmentations.

This research is an attempt to fill the gap in the literature. It identifies a number of relevant indigenous practices of natural resource governance at the local communities for purposes of mainstreaming them into the legal regime of achieving intergenerational sustainability in resource governance. It focuses on the natural resource management regime of Nigeria and adopts the Yoruba communities of Southwestern Nigeria as its case study. It proposes a new theoretical framework for achieving socially equitable and environmentally sustainable resource governance in Nigeria. The suggested framework is based on the hybrid system, being a resource governance strategy that harmonizes both indigenous and modern regimes of resource management into one regime for achieving sustainability in the interest of both present and future generations.

In arguing the need for integrating traditional systems and indigenous institutions of resource governance, the thesis vividly illustrates traditional conceptions of sustainability as understood by the local communities in Nigeria as: "Suitable practice(s) within the acceptable traditional norms for carrying out nature-related activities in ways and manners that, without violating local customs and traditions, will ensure the provision of food and general survival of the family and their unborn children".

The research concludes that attaining sustainable resource management in Nigeria is inextricably linked to the extent to which traditional-based indigenous systems of resource use are identified, harmonized and/or integrated into the modern patterns of resource governance in line with the proposed hybrid systems. This position is informed by the similarity of the traditional and modern conceptions of sustainability, which advocates effective resource management in the interest of both present and future generations. The research argues that the integration of both would solve the seemingly insurmountable challenges of natural resource management in Nigeria by exploring the existing socio-political structures of the country as a pluralized, multi-ethnic/cultural entity. The thesis asserts that this would make for achieving intergenerational sustainability in natural resource management for and in the interest of both present and future generations of Nigerians.

AT THE LIMITS OF COVERTURE: JUDICIAL IMAGINATION AND
WOMEN'S AGENCY IN THE ENGLISH COMMON LAW

BY KAREN PEARLSTON

Until the third quarter of the nineteenth century, the common law doctrine of coverture framed English women's legal relations. The doctrine operated to submerge a woman's legal personality into that of her husband. More specifically, coverture precluded married women from owning property, making contracts, and suing or being sued. Yet the economy could not function without them, and many exceptions to coverture developed that operated in specific situations. As coverture grew in breadth and complexity in the early modern period, the exceptions to the doctrine grew as well. How those exceptions were established, expanded, and applied is important for understanding both the history of women and the development of the substantive law.

The core of this dissertation is a study of exceptions to coverture and their reception in the common law courts in the last half of the eighteenth century. This task, however, requires analysis of much earlier developments in the common law. The dissertation therefore covers pre-eighteenth-century exceptions to the doctrine and traces the development of particular exceptions into the eighteenth century, uncovering several early examples of issues that would prove to be ongoing. These issues touch on the contradictions inherent in a system

in which women were denied formal economic rights yet frequently engaged in economic activity.

The balance of the project closely examines the operation of exceptions to coverture at the eighteenth-century common law courts. It is based on an analysis of reported cases, treatise literature, and available archival records. It traces the Mansfield court's acceptance, rejection, regularization, and expansion of particular exceptions to coverture, and then addresses whether and how those exceptions were accepted or rejected by the Kenyon court.

Finally, the dissertation engages with the historiography of women on topics including women's legal relations, their working and family lives, and the public/private division. It shows that serious engagement with legal sources enhances our understanding of women's history by clarifying the nature of the legal relations of which married women were a part. Although there were many ways in which married women could ignore or circumvent coverture, it remained the framework for their legal relations.

THE RHETORIC OF EQUALITY: A BURKEAN ANALYSIS OF *VRIEND*

BY MOIRA E. PHILLIPS

This thesis argues for a new way of looking at legal decisions by applying Kenneth Burke's rhetorical theory. I have selected section 15(1) *Charter* cases, the *Vriend* case in particular, as models for my application of three of Burke's key theories: identification (the process by which groups are connected by means of a shared concept), courtship (the process by which individuals are brought together through various kinds of rhetorical appeals), and dialectic of constitutions (the deliberative process by which competing values are recognized or denied). In recent years the Court has had great difficulty agreeing on the interpretation and application of the *Charter* and finding appropriate remedies that recognize the fluctuating nature of equality. Burke's theories open up these decisions to a different kind of scrutiny and reveal the Court's underlying strategies, motives and values. These values are particularly visible in situations where there is no appropriate precedent or authoritative text for the Court to look to in its resolution of *Charter* equality claims. Court-created constructs such as the introduction of thresholds and the selection and selective incorporation of precedents are the hallmarks of these decisions.

In the first chapter, I deal with the origin of classical rhetoric and the emergence of rhetorical theory in the twentieth century. I also review critical theory which deals with the connection between law and literature. Chapter 2 describes the case law in four areas where Court-created rhetorical constructs are used: analogous rights, comparator groups, legislative silence, and the reading-in remedy. In Chapter 3, I set out Burke's rhetorical theories in detail and provide examples to facilitate understanding. In Chapters 4 and 5, I apply Burke's theories to the majority judgment in *Vriend*. I use *Vriend* because it is a watershed case which confronts issues of sexual orientation, legislative silence, and the reading-in remedy. It is also a lens through which a series of Court-imposed thresholds and tests such as comparator groups and human dignity can be viewed from different perspectives. I conclude that Burke's principles can be successfully applied to all case law once rhetorical fundamentals have been established and Burke's theories understood.

THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE ON
DIRECT TAXATION AND THE RULE OF REASON DOCTRINE:
PRESERVING CONSISTENCY BETWEEN THE PRINCIPLES OF
COMMUNITY LAW AND INTERNATIONAL TAXATION

BY ELIE S. ROTH

This dissertation critically reviews the decisions of the European Court of Justice to date in the area of direct taxation. Recent decisions of the Court have considered the interaction of national tax measures enacted by EC member states with the provisions of the EC Treaty. These judgments have generally tended to uphold the principles of European Community law prohibiting member states from discriminating against nationals of other EU member states or from creating statutory or administrative barriers to the exercise of the fundamental freedoms guaranteed by the EC Treaty, often at the expense of some considerable degree of the fiscal sovereignty or autonomy of the particular member state whose laws were the subject of challenge. In many cases, these decisions have resulted in the application of judicial principles that have a significant potential to erode the taxing jurisdiction, and as a result the domestic tax base, of particular member states within the European Union, and in others have increased the potential for economic double taxation within the Community.

It is argued that the non-discrimination principles developed by the European Court of Justice in its jurisprudence concerning direct taxation have been interpreted so broadly that they have the potential to lead to inconsistencies in their application, resulting in indeterminacies in the resolution of conflicting jurisdictional tax claims. From the perspective of the EC member states, these developments have restricted their ability to structure their national tax systems so as to enable them to fully exercise their taxing jurisdiction in accordance with fundamental international tax policy principles. The ability of member states to enact international anti-avoidance rules, and thus to protect their domestic tax base, has been significantly curtailed, as has their ability to rely on tax policy as an economic measure in pursuing national savings, spending or investment incentives. From the perspective of taxpayers, the Court's jurisprudence has created considerable uncertainty in the application of national tax measures, which ultimately results in increased litigation costs and potentially in unequal treatment of taxpayers in comparable circumstances. Moreover, despite the Court's broad interpretation of the EC Treaty fundamental freedoms, it has, to date, failed to extend the non-discrimination principle to prohibit economic double taxation, arguably one of the most significant impediments to cross-border employment, establishment and capital investment.

These results have the potential to significantly impede the harmonization of direct taxation within the European Community by virtue of the disparate response of EC member states to the judicial decisions rendered by the Court. The provisions of the EC Treaty specifically reflect the reluctance on the part of member states to harmonize their corporate and personal income tax systems.

While the Court has developed a "rule of reason" doctrine, pursuant to which discriminatory or restrictive national tax measures may be justified in exceptional circumstances, it has interpreted these circumstances extremely narrowly. A more expansive interpretation to the potential grounds of justification that the Court has considered to date in its rule of reason doctrine is warranted, pursuant to which a more pragmatic and reasoned test would be applied, which takes into account the specific objectives of the particular national tax measure under consideration within the framework of accepted international tax policy and other relevant principles. In the absence of a formal method of resolving cases involving direct taxation pursuant to the judicial non-discrimination principle under Community law, the Court must judge

each case on its merits under the rule of reason doctrine, balancing the extent to which the particular fundamental freedom at issue is infringed (which, by its very nature, would entail an evaluation of how serious the contravention is and the effects thereof) with the implications of a finding that the national tax measure contravenes Community law. This balancing approach must, of necessity, include an analysis of the resultant budgetary and revenue consequences and tax policy principles such as neutrality, inter-nation equity (and, in particular, the appropriate allocation of taxing jurisdiction between EC member states), administrative simplicity and legal certainty.

In reaching this determination, it is argued that the Court must have regard to its own institutional limits, recognizing in applying the rule of reason test that even if the domestic tax provision at issue may restrict the fundamental freedoms in a significant manner, the effects of a ruling that the measure contravenes Community law may in certain circumstances be so detrimental or far-reaching that the appropriate response must involve a coordinated legislative approach on the part of the member states. While this approach may well give rise to some initial degree of additional uncertainty inherent in the litigation process before the European Court of Justice, it should ultimately result in a more effective balancing of the provisions of the domestic tax legislation of member states with developing principles of Community law and lead to a more consistent administration of the national tax systems of member states in a manner that complies with the underlying principles reflected in the EC Treaty.

HOME STATE OBLIGATIONS FOR THE PREVENTION AND REMEDIATION OF TRANSNATIONAL HARM: CANADA, GLOBAL MINING AND LOCAL COMMUNITIES

BY SARA L. SECK

Canadian mining companies, stock exchanges, mining professionals, and the Canadian government itself, play a significant role in global mining. This dissertation explores whether Canada has a legal obligation to regulate to prevent and remedy human rights and environmental harm associated with Canadian mining companies operating abroad. Canada and global mining serve as a case study to explore the broader question of whether home states have obligations under international environmental and human rights law.

The key claims examined in this dissertation are as follows. First, the exercise of unilateral home state jurisdiction over transnational corporate conduct does not violate jurisdictional principles of public international law. Rather, international law is permissive of such jurisdiction. Secondly, beyond permissibility, the secondary rules of the international law of state responsibility discourage the direct attribution of transnational corporate conduct to the home state due to reliance upon agency principles. However, rethinking attribution and responsibility in causal terms suggests that a home state's failure to regulate to prevent and remedy harm, where such obligations exist under a primary rule, could lead to direct home state responsibility for corporate wrongdoing. Third, the primary rules of international environmental and human rights law, and the international law of sustainable mineral development, suggest that there is an emerging obligation for states, including home states, to regulate to prevent and remedy transnational harms.

The dissertation draws upon Third World Approaches to International Law (TWAAIL) to argue that home state claims that the exercise of extraterritorial jurisdiction infringes the sovereignty of host states are suspect if Third World sovereignty is understood as never having been the sovereign equality presupposed under contemporary principles of international law. Ultimately, the dissertation proposes a regime of home state regulation structured in keeping with a cosmopolitan democratic vision of transnational governance and reflecting a concept of interactive jurisdiction that gives voice to subaltern local communities. Unilateral implementation of the proposed regime could then be viewed as a contribution to customary international legal process and while at the same time serving as a counter-hegemonic tool for subaltern local community resistance.

THE CRIMINAL LAW JURISPRUDENCE OF JUSTICE PETER CORY

BY MARIE COMISKEY

This thesis is a study of Justice Cory's criminal law jurisprudence while on the Supreme Court of Canada from 1989 to 1999. It begins with an examination of the academic debate on the ideal form of judicial biography and canvasses the major theories of judicial decisionmaking. The thesis suggests that Justice Cory was more likely to uphold Charter rights infringements for regulatory offences or offences with a significant regulatory context. A quantitative analysis is conducted of

Justice Cory's approach to the admission of evidence under section 24(2) of the Charter and his use of the curative proviso. The thesis also explores the significant impact that Cory's experience as a trial judge had on his conceptualization of the role of an appellate judge. Finally, the thesis discusses Cory's theory of judicial decisionmaking and his philosophical approach to issues of punishment, extra-territoriality and sexuality.

THE RESPONSIBILITY TO PROTECT HUMANITY FROM GENOCIDE AND
THE COMING END OF UN CHARTER ABSOLUTISM: MORAL, LEGAL
AND POLITICAL IMPLICATIONS

BY GEOFFREY DUCKWORTH

The following thesis canvasses the emergence and development of a right of humanitarian intervention in the historic context of the dialectic between state sovereignty and human rights. The writer posits that the modern day dialectic is really a proxy for the centuries-old struggle between ancient conceptions of natural justice and positivist constructions of law, and investigates both the time of the drafting of the UN Charter in order to arrive at a richer understanding of the development of opposing strands of norms and ideologies. Against this backdrop, the thesis arrives at 1989, a time of boundless optimism within the liberal democratic world. In-depth case studies are conducted of the 1990's crises in Somalia, Bosnia-Herzegovina, and Rwanda, and these detail the legal challenge posed by humanitarian intervention to absolutist norms of state sovereignty and non-intervention. The thesis finds that while Article 39 of the Charter has been transformed into a vehicle for multilateral armed intervention to prevent genocide—particularly after the adoption of a form of “responsibility to protect” at the September 2005 UN World Summit—the Security Council cannot be relied upon as the final resort for peoples facing genocide. The writer does not contest the fact that the preponderance of the community of nations has not yet openly recognized a right of unauthorized humanitarian intervention. Nevertheless, he concludes that state practice and *opinio juris* have evolved to the point where the Charter prohibition on the use of force is no longer absolute when the world's most vulnerable peoples are attacked in a manner that shocks the human conscience.

THE TORT LIABILITY OF DIRECTORS TO PARTIES OUTSIDE THE CORPORATION

BY NICOLAS JUZDA

There are currently operating in Canada a number of judicial approaches to the question of when directors may be found liable to parties outside the corporation for tortious corporate acts. These include the position that directors can never be found liable if they are acting in the course of duty, that judges may find them liable if to do otherwise would create injustice, that they are liable only if their own personal behaviour was tortious, that they may be liable if the corporation is a sham, and that there are certain categories of offences that impose liability (such as fraud) while other offences do not.

In addition to the general problem of co-existing and therefore unpredictable doctrines, none of these approaches is fully satisfying individually. The one that comes the closest to being an appropriate balancing of the potential policy utility of director liability with the need for a coherent doctrine is the third, where liability follows direct involvement in the harm. But it proves poorly suited to areas where inaction, rather than action, causes harm.

The strict liability standard imposed for some statutory offences, with its attendant "due diligence" defense, offers the potential to fill this gap. It has proven a workable balance between the need to protect society by controlling corporate acts and the need of directors to be able to effectively manage corporate business without undue risk of liability.

ALIENATION, RESISTANCE AND AGENCY IN INTERNATIONAL HUMAN RIGHTS: THE CASE OF IRAN

BY FATEMAH HAJIHOSEINI

Today, international human rights laws have become a powerful moral-legal system seen by many as heralding freedom, equality and dignity for all human beings. However, as law (any law), can be both emancipatory and repressive, this thesis explores how the laws of human rights can exclude and alienate the norms and values of other moral-legal systems, such as Islamic law. The claim and aspiration to "universality" is a key characteristic of modern human rights which embodies the duality of emancipation (aspiring to uphold the dignity of all humans) and repression (alienating the values and norms of other moral-legal systems through the politics of universalism). By

deconstructing the universalist claim of human rights, this thesis seeks to explore whether dialogue can be established between the moral-legal discourses of Islam and human rights through the instrumentality of resistance and the exercise of agency in order to create a “new universal” theory of human rights. In this context, the statements of the Islamic Republic of Iran are used a case study to see whether points of dialogue exist and if so what to do they suggest for the project of “universalizing” human rights.

“IF IT AIN’T BROKE, WHY FIX IT?”—THE REFORM OF THE LAW
GOVERNING PERSONAL PROPERTY SECURITY INTERESTS IN
COPYRIGHT AND THE FILM FINANCING MODEL

BY JULIA S. SHIN DOI

This thesis examines the reform of the law governing personal property security interests in copyright and the film financing model. It is uncertain in the law governing personal property security interests in copyright whether a secured party must register the security interest in the personal property security registration system or register of copyrights or both in order to perfect that interest. This thesis examines whether there is a need to reform the law given that the uncertainty in the law has remained for over a decade and certain industries, such as the film financing industry, have operated despite the legal uncertainty.

The first Chapter establishes a three part theoretical framework for the next three chapters; Chapter 2 sets out the legislation governing security interests in copyright, the relevant caselaw, and proposals for the reform of the law; Chapter 3 reviews film financing transactions; Chapter 4 reviews the law reform efforts; and Chapter 5 sets out the conclusion and recommendations. These Chapters develop the central argument of this thesis that the uncertainty in the law has little practical impact on secured financing transactions in the film industry, which predominantly uses security interests in copyright. In light of this, in order to strengthen investment in the new intellectual property based economy, the film finance model, in particular, the role of the completion guarantor and government tax credits/subsidies, should be carefully considered as an effective way to leverage intellectual property in other industries, rather than simply reforming the law which may be costly and not have the intended effect.

This thesis concludes that if the law is reformed, the federal model for reform would, on balance, satisfy the underpinning interests

of intellectual property law and achieve the ideals of completeness, systemization, and certainty sought in personal property security legislation. In particular, this thesis recommends resolving the legal uncertainty by requiring registration of a personal property security interest in copyright in the register of copyrights only, and not the personal property security registration system, or both. This thesis cautions that the practical benefits of further reforming the law by introducing a new federal secured transactions system are unclear and may be unconstitutional.

The examination of the law reform process in this thesis suggests that the uncertainty is more of a legal problem rather than a business obstacle. As a result, the reform of the law and resolution of that uncertainty may not significantly strengthen investment in the innovation sector.

THE GLOBAL CITY AS A LEGAL CONCEPT

BY GREGORY JOHN SMITH

This thesis reassess Gerald Frug's analysis of the 'city as a legal concept' for the global era. Where Frug highlights city powerlessness and the legal foundations of inequality between neighbouring municipalities, the importance of urban economies to global capitalism has engendered new sets of local and regional inequalities based on the predominance of advanced service industries. Analyzing Toronto's formation into a 'global city,' this thesis explores the legitimacy and efficacy of local law with reference to Toronto's internal diversity and emergence as a 'competitive city.' Two case studies ground this thesis' analysis: the ongoing reform of Toronto's municipal law, and the relationship between federal immigration policy and professional accreditation in Canada. Where the former problematizes legal reform efforts based on extraterritorial phenomena—allowing Toronto to better compete in the global economy—the latter highlights emerging normative inconsistencies within the law based on the growing complexity and diversity of urban societies.