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Neo-Naturalism: A Fresh Paradigm in International Lawⁱ

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Abstract: Dhall (2009: in print) posited that quantum holism can provide an alternate justification for human rights. This paper explores how such a foundation challenges aspects of International law and assertions of cultural relativism that have stymied the on-going development of a universal human rights culture.

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The current age is characterised by an unprecedented integration of legal systems, economies and cultural exchange across the global community. The drive to understand ourselves in light of on-going developments in knowledge and re-cast divisions that fragment the world population is gaining momentum. One meme that has sought to assist this process through the promotion of peace, order and good government is the culture of human rights.

However, several problems have emerged with the traditional formulation of human rights. They assail the acceptance of a human rights culture as the hegemonic norm in public law across all jurisdictions; some 'Eastern' jurisdictions assert that human rights are a 'Western' construct and use this argument to reject the notion of human rights as a form of cultural imperialism. Furthermore, the practical application of human rights principles when subordinated to the operation of international law conventions permits practices that are against the fundamental nature of those principles: the practice of extraordinary rendition; and those seeking asylum often face poor treatment in foreign jurisdictions to name two.

Preliminary Observations

Dhall (2009: in print) posited a new ontological foundation for human rights that draws from a culture of science in general and quantum mechanical unified field theories in particular. This paper discusses how a justification for human rights on this basis may advance the dialogue and the development of human rights. However, two important preliminary points need to be raised:

First that the process for the systematic and sustainable integration of new knowledge into an existing system is in three distinct steps; to define a new concept (or re-define an existing one); to assess implications of the defined concept in light of the functional environment pertaining to that concept; and finally to articulate the necessary reforms and provide avenues for that integration to occur. Accordingly this paper acknowledges that the functional reality of the environment in which nation-states apply human rights is subject to swathe of additional influences; political

expediency of rule; the operation of internal law, manifesting legitimate expressions of cultural relativism and economic rationalism.

The second point relates to careful scrutiny that is required of the relationship between the law and the specific aspects of science used to develop the proposed ontological basis of human rights. The complexity of the relationship between law and science is not too dissimilar to that between law and medicine captured in the elegant expression in which Windyer J observed that law is 'marching with medicine but in the rear and limping a little' (*Mount Isa Mines Ltd v. Pusey*ⁱⁱ). This situation, whilst frustrating to those on the edge of research seeking guidance from the law in its various forms, ensures that premature regulation avoids errors of fact. The consequences for prematurely integrating new developments into law may be dire. This manifest in legal scholarship as an epistemological problem, that of determining when knowledge is legitimate and when it is systemically desirable that it influences the fabric of the law.

However, since knowledge follows an iterative path there is some pressure for steady reform, as there is a logical need to incorporate a systemic mechanism by which paradigm-altering information may be integrated, normative values and institutional constructs revised to maintain the currency of social institutions. This becomes particularly necessary if erroneous information is given a place within the body of understanding both individually and across our whole society.

Dhall (2009, in print) showed that the ideological foundation for human rights doctrines in the western world can be traced to Natural Law, which itself can be bifurcated into Ecclesiastical and Stoic streams. The Natural Law foundation is partially responsible for allegations that human rights are a 'Western' construct. He provided an alternative basis for human rights by evolving an ontological construct of holism that increasingly moved from a predominantly internal epistemology with a strong ethno-cultural or religious focus toward an external epistemology that relies upon the culture of science. This foundation of holism is corroborated by various disciplines within the empiricist community; quantum mechanical field theories and transpersonal psychology (Grof, 2000; Laszlo, 2003; 2007). It is of interest that many mystical traditions and analytic philosophy corroborate such a structure (Esfeld,

2001; Harner, 1980; Khan, 1990; Zimmer 1951). Furthermore, he adduced a body of new knowledge justifying the existence of human rights as a foundation for public law. The term 'Neo-Naturalism' is proposed to distinguish this particular ideological substratum for human rights from the long-established justifications that rest upon traditional Natural law foundations. Whilst the ontological construct and epistemology of this paradigm was explored more fully by Dhall, his main argument is as follows:

Neo-Naturalism is a discrete paradigm of analysis emerging in the several sciences such as unified field theories in quantum mechanics and transpersonal psychology (Grof, 2000); looking at quanta in an entangled state or in superposition, and from remarkable evidence of observations of coherence in the fields of cellular biology, cosmology and consciousness research (Laszlo, 2003; 2007). These findings assert that physical reality is fully described by a duality comprising classical physical reality and a supervening singular state.

Whilst this raises many issues, two are of particular significance. The first is that Cartesian duality describes only a part of reality, the penultimate, rather than ultimate structure of reality. The second is that Neo-Naturalists rely upon an epistemological process that tends toward empiricism. In legal theoretical discourse, empiricism as method for establishing the legal scope for an individual's right is considered as lying within the tradition of legal positivism. Thus, Neo-Naturalists embrace the mode of inquiry employed by Positivists, yet espouse a structure of reality more consistent with Natural law. It is in this point of distinction from the existing paradigms of jurisprudence, inter alia, that Neo-Naturalism may legitimately be categorised as a separate paradigm for describing the existential nature of reality.

As noted, several problems assail human rights in practice; some of these problems can be attributed to both the current formulation of human rights and also to the environment in which human rights operate. The current paradigm in international law rests upon the tradition of positivism and as such, employs utilitarian empiricism as the method by which the scope of protection afforded by any freedom or restraint is assessed. This is in contradistinction to human rights doctrines, the central tenants of which can be stated as universal and inalienable rights predicated upon equality.

Utilitarian empiricism as a basis for moral theory has allowed legal pragmatists to subordinate human rights to a state-centric paradigm in international law. This is one contentious aspect of the human rights debate that will be influenced by a Neo-Naturalist foundation for Human Rights doctrines.

A final concern is the aspect of international law that allows countries that have ratified treaties to enact only those articles that ‘suit’ them. This effectively gives states the power to control both the practice of human rights law and the theory, since they can exercise discretion in domestic enactment. This paper is an exploration of how the human rights construct grounded on quantum holism proposed by Dhall (2009: in print) can, *inter alia*, advance the development of a universally acceptable model of human rights.

I. International Lawⁱⁱⁱ

A. Challenging the State-Centric Focus of International Law

Bodin in *Six Livres de la Republique* of 1576 laid the foundations of modern international law (Beaulac, 2003). However, Grotius is regarded as the ‘father’ of international law and is widely believed to have championed the secularisation of natural law in the modern age via his assertion that it would subsist even if God did not exist, ‘*etiamsi daremus non esse Deum*’. The thrust of early jurisprudence in international law centered on protecting the sovereignty of nations, not protecting the rights of individuals. This concept is apparent in the *Treaty of Westphalia* of 1648. This treaty ended the thirty-year war by placing the states of Western Europe on an equal footing and affirming their mutual autonomy. The initial state-centric direction of international law has evolved into the doctrine of sovereignty, which is at the base of non-intervention in the domestic affairs of nation-states. This is regarded as providing a rampart against the international protection of both human rights and the environment (Triggs, 2006).

However, the preeminent respect for sovereignty is a double-edged sword in respect of the practical application of human rights. Whilst it has been noted that human

rights are subordinate to the competing rights and values of sovereignty, Chinese officials and scholars believe that ‘sovereignty is the foundation and basic guarantee of human rights’ (Xie and Nui, 1994 extracted Donnelly). Further, the Beijing Information Office of the State Council claims that ‘[t]he rights of each country to formulate its own policies on human rights protection in light of its own conditions should...be respected and guaranteed’ (Chinese Government, 1993 extracted from Donnelly). The Chinese position reflects the notions of social-contractarians such as Locke, Kant, Paine and Hobbes in that the state is essential to ensure the availability of human rights since they are not be available to *humans in nature* (Freeman, 2001). This notion is impossible to assess definitively as the concept of humans in nature is a hypothetical.

Several problems arise from the practical application of human rights within a state-centric paradigm. Firstly, the conventions of international law in its current form do not stipulate that ratifying a treaty equates to creating an automatic adoption into domestic law. Whilst some jurisdictions adopt this practice, a nation-state need not enact all aspects of ratified treaties, and the articles not entrenched in domestic legislation offer a dubious level of protection, if any. This is apparent in Australia,^{iv} where ambiguous common law protection is available in the form of ‘legitimate expectation’.

The Minister for Immigration and Ethnic Affairs v Teoh^v held that there is a ‘legitimate expectation’ that administrative officials will inform themselves about treaty obligations accepted by Australia. Mason CJ and Deane J stated:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law...[R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government will act in accordance with the Convention. That positive statement is an adequate foundation for legitimate expectation...that administrative decision makers will act in conformity with the Convention.

Whilst the High Court has affirmed the notion of ‘legitimate expectation’, *Minister for Immigration and Multicultural Affairs Ex parte Lam*^{vi} showed the court itself will restrict the application of the rule in *Teoh*. Prominent jurists from around the world have framed the relationship between ratified treaties and domestic law in terms that indicate a ratified treaty is a guideline to assist the interpretation of any given law in the absence of the relevant government having an express policy (Kirby, 1999). Whilst this articulates a use for ratified treaties in domestic matters, it does not alter the essentially dualist approach to international and domestic jurisdictions. The relationship between ratified treaties, articles not domestically enacted and the scope and nature of rights available to the citizen is ultimately unclear to citizens of many nations, including Australia (Griffith and Evans, 2001). Uncertainty in the law is undesirable as it subverts Rule of Law; ergo, resolving the discord would be systemically desirable, as it would affirm the Rule of Law in the relevant jurisdictions.

A second problem that arises from state-centric sovereignty is that whilst human rights are owed only to citizens of a nation-state (and foreign nationals in their territory or otherwise subject to their jurisdiction or control) there are notable exceptions. The concept of nation-states acting in the ‘national interest’ is one such example in which human rights are given a ‘back seat’ as illustrated by the following two case studies of mandatorily detaining asylum seekers in Australia and the practice of extraordinary rendition.

B. Case Study 1: Mandatory Detention of Asylum Seekers in Australia

Whilst the Australian government dispensed with the policy of mandatory detention of asylum seekers in July 2008, this issue is an example of human rights being subordinated to political considerations. The change in policy was the result of a change in government at a national election. The direction of policy reform is toward an increasingly liberal adoption of human rights, however, the legal mechanisms in place allow for a reversion of policy if it is deemed politically expedient. As such, this issue can be used to demonstrate how easily a policy of mandatory detention can be reinstated. The relevant legislation is Section 176 of the Australian *Migration Act 1958* (Cth):

This Division is enacted because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in immigration detention until he or she:

(a) leaves Australia; or

(b) is given a visa.

The question of establishing who is caught by this provision boils down to the interpretation of two key phrases, ‘national interest’ and ‘designated person’. The broad definition attached to ‘designated person’ during the policy of mandatory detention for asylum seekers could not be challenged by the ambit of judicial discretion afforded under the concept of ‘legitimate expectation’ as the policy itself was expressly articulated. This policy of mandatory detention prompted three UN treaty bodies to publish observations on Australia's obligations towards asylum-seekers. All three noted incongruity between ratified obligations and domestic legislation. The Committee on the Elimination of Racial Discrimination (CERD) recommended the ‘faithful’ implementation of international refugee law. The Human Rights Commission (HRC) recommended policy changes on mandatory detention under the *Migration Act*. The Committee against Torture found ‘an apparent lack of appropriate review mechanisms for ministerial decisions’ on people who may face torture if deported (Amnesty International, 2001). The findings of those bodies did not change the government’s policy orientation. The latitude afforded when acting in the ‘national interest’ does not preclude any future express change in policy regarding the definition of ‘designated person’ having an even wider scope than during the policy of detaining asylum seekers. Indeed, legislation in Australia currently under review but still in force, allows those detained to be invoiced for their detention (Mottram, 2009).

C. Case Study 2: Extraordinary Rendition

Acting in the ‘national interest’ is also at the root of the practice of extraordinary rendition, specifically in relation to the United States led ‘War on Terror’. Extraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals (Weissbrodt and Bergquist, 2006).

It involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation. Weissbrodt and Bergquist have tested the practice of extraordinary rendition against international human rights instruments and has found that the practice breaches numerous conventions in the UDHR, ICCPR, ICESCR, both the *Convention and Protocol Relating to the Status of Refugees*, the *Convention Against Torture*, the *Vienna Convention on Consular Relations* and the *Geneva Conventions*.

The practice of extraordinary rendition is predicated on the discretion afforded to nation-states under a state-centric paradigm in international law, notwithstanding that the United States is a jurisdiction in which ratified treaties are self-executing. This means that the practice of extraordinary rendition was able to be put into operation even though the human rights treaties ratified by the United States created rights and liabilities without the need for further action by Congress.

D. Commentary on the Case Studies

The fact such practices are permissible undermines the Rule of Law in a manner analogous to jurisdictions that adopt a formal dualist approach. In such cases, the rights contained in the ratified treaty are not assimilated into the domestic jurisdiction with absolute clarity. Tempering the perception of absolute discretion residing with nation-states which may inflict fundamental and gross human rights violations, the doctrine of *jus cogens* provides a degree of comfort in the forum of international law. *Jus cogens* is defined in the *Vienna Convention on the Law of Treaties 1969* as a ‘norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. However only certain rights are classified as non-derogable and the doctrine of non-intervention in state affairs must be balanced.^{vii} Thus, intervention by the international community is only possible in the direst of circumstances and any discussions centered on triggering active intervention will be subject to a swathe of additional influences, such as economics and political expediency. This shows that the protection offered by conventions such as the UDHR, ICCPR and ICESCR falls well short of being ‘inalienable’, notwithstanding ratification by member states; this

highlights the tension between state-centric and human-centric concerns in human rights enforcement.

The global historical record of accomplishment for implementing human rights shows a fitful application. Notwithstanding the articulation of both Natural law and human rights principles, numerous atrocities have been committed in the evolution of human societies. These have included abundant instances of genocide, the practice of slavery, the torture of prisoners, the imprisonment of political dissidents and the observation of abject poverty with cold detachment. It is apparent that some of the most significant areas of concern in the implementation of human rights are attributable to preeminence of state-centric sovereignty in international law. This position is increasingly difficult to sustain in a rapidly globalising world, as the concept is emerging that nations conduct themselves as good 'global citizens'. Furthermore, a strict demarcation along geo-political boundaries of responsibility for protecting human rights further fragments our world view and thus weakens the 'universal' aspect of human rights in practice.

One avenue of challenging the current legal status-quo may emerge from developing a Neo-Naturalist basis to human rights grounded in an acknowledgement that every person in the world is subject to supervening holism. In developing a human rights regime derived from holism, an appeal is made to legal pragmatists that seek 'the liberation of thinking about law from superstition and dogma so that laws [can] be based on objective, ascertainable, scientific facts' (Triggs, 2006). As stated prior, holism is an epistemologically justifiable ontological construct that legitimises recognition of human rights, and further creates an imperative for their recognition.

The ontology of quantum holism employed in Dhall (2009: in print) is distinguishable from the claims of weak epistemology assailing the foundational claims currently employed to substantiate human rights doctrines because it is the product of diligent scientific research. This is arguably the most significant aspect of research into theories of holism employing structural realism. Recognising holism as epistemologically valid mandates a paradigm shift in international law. There is no doubt that evolution will be needed at the institutional level, as the operational construct of international law is inadequate to incorporate such a change. Whilst the

process of reform is complex and time consuming, it is the nature of the law that its content and institutions are imbued with sufficient flexibility to adapt to change.

II. Exploring Cultural Relativity and Challenging Conceptions of Human Rights as Imperialism

One further aspect of the human rights dialogue that will be assisted by the emergence of a strong basis is a challenge to the allegation that human rights are a Western imperialistic construct. Historically, some Eastern countries claim that human rights derive from ‘Western’ values as opposed to Eastern values.^{viii} Recently, Singaporean government official, Kausikan (1993) posits the ‘myth of the universality’ and provides a concise exposition on the substance of the debate:

The diversity of cultural traditions, political structures, and levels of development will make it difficult, if not impossible, to define a single distinctive and coherent human rights regime that can encompass the vast region from Japan to Burma, with its Confucianist, Buddhist, Islamic and Hindu traditions. Nonetheless, the movement toward such a goal is likely to continue. What is clear is that there is a general discontent with the purely Western interpretation on human rights.

Kausikan states that in a culturally diverse planet the tension between traditional value systems and human rights doctrines is irreconcilable. Donnelly (2003) notes that cultural relativism is an ‘undeniable fact; moral rules and social institutions evidence astonishing cultural and historical variability’. Consequently some jurisdictions are able to reject human rights doctrines outright, such as Indonesia, Singapore and some nation-states in the Middle East. Further, there is perceived hypocrisy by the ‘champions’ of human rights as the chasm between the protection afforded by theoretical and practical human rights regimes discourages some nation-states from ratifying human rights conventions. Feldman (2005) states ‘...if the United States aimed to demand accountability with international norms, it had better begin by actively and visibly upholding those norms itself’.

However, consensus on a large scale is apparent, as evidenced by ratification of ICCPR and ICESCR by 152 and 149 countries respectively. Moreover, a degree of conceptual agreement between East and West is evident in upholding human rights insofar as the *Bangkok Declaration of March 1993* is congruous with the *Vienna Declaration and Program of Action on Human Rights 1993* in noting that human rights are ‘universal, indivisible and interdependent’.^{ix} In spite of this, one significant point of distinction between the two Declarations is a caveat written into the Bangkok Declaration which stresses that human rights should be considered with reference to the principles of sovereignty and non-interference in the internal affairs of the state. Ghai (1994) cautions that the arguments posited must be absorbed with circumspection as:

Perceptions of human rights are reflective of social and class positions in society. What conveys as a picture of a uniform Asian perspective on human rights is the perspective of a particular group, that of the ruling elites, which gets international attention. What unites these elites is their notion of governance and the expediency of their rule. For the most part the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and occasional repression.

It is clear that notwithstanding many manifestations of consensus among the international community, much needs to be resolved in the drive for a universally accepted model of human rights.

A. Comments on Cultural Relativism in Light of Neo-Naturalism

The basis of human rights posited by Dhall (2009: in print) is relevant to the current debate on Human Rights as universally normative notwithstanding legitimate cultural relativism. Firstly, because it is derived from the culture of science and not ethno-culturally vested, it disarms any criticisms *prima facie*. Further, the on-going exploitation of discretions afforded under international law would be untenable if the Neo-Naturalist basis to human rights is accepted. The transition to a human-centric paradigm would mitigate perceptions of hypocrisy as suggested by Feldman.

It should be noted that the basis of human rights vests in empirical research into an ontological aspect of nature and its substratum is epistemologically valid and hence, universally applicable. Paradoxically, an acceptance of a Neo-Naturalist foundation to human rights precludes forcing such values on any individual or jurisdiction as freedom of thought and conscience are also human rights. However, the increasing acceptance of human rights based on an ontological structure employing a defensible non ethno-cultural foundation will ensure that pressure grounded in rationality mounts on jurisdictions that reject human rights out of hand.

It must be acknowledged that cultural relativity is an immutable aspect of the globe in which we live, and accordingly human rights doctrines must reflect this in their implementation. Whilst, relativism does notionally fragment universal human rights, a solid empirical substratum promotes a strong position to advocate for a truly universal agreement on their fundamental value and content. Different jurisdictions will still have to synthesise these human rights into culturally appropriate laws. Thus, while the role of the nation-state shall remain a critical element in the enforcement of human rights in a human-centric paradigm, reformulating the quintessential notion of a nation-state is essential.

It has been observed that an international norm of *weak cultural relativism* is rapidly establishing itself as the hegemonic reality, as demonstrated by the overlapping consensus in existing conventions (Donnelly, 2003). One of the aspects of the Neo-Naturalist basis to human rights proposed by Dhall (2009: in print) is that it resides in the ontological structure of nature, accordingly it is an intrinsic aspect of human life and thus transcends any given culture.^x Further, holism as a basis to human rights is congruous with diverse cultural traditions. Kausikan's concern that human rights are irreconcilable with diverse cultures is allayed, because to varying degrees, a concept of holism derived from an epistemological process tending toward internalism underpins the cultural traditions in the belief systems he cites (Cranston, 1973; Khan, 1990; Marcin, 2006; Zimmer, 1951). These predominantly internally justified constructs of holism exist within ethno-cultural or religious traditions that are specific to the jurisdiction in question.

Neurological research articulates that the relationships between perception, cognition, social consensus and emotional value create the sense of Truth in an individual's belief matrix (Newberg and Waldman, 2006). This informs our understanding of ethno-cultural conflict by showing that human beings have a biological predisposition to reject beliefs perceived as different to their own, even if they are similar in substance but not form. By increasingly understanding the relationship between individual and cultural value formation, a new platform is provided by Neo-Naturalism upon which the perceived differences between cultures can be contextualised and rational processes embraced. In a globalising and increasingly interconnected world this understanding can be employed to reduce conflict and articulate areas of commonality with deeper appreciation for the human condition that also takes into account the human neurological propensity to categorise, and hence arbitrarily fragment the world population.

Kausikan also notes that diverse political systems may not be compatible with human rights. Ghai's (1994) perspective casts aspersions on the extent to which Kausikan's arguments can be taken to reflect the full scope of the Asian perspective on human rights. However, one critical methodological aspect that will need careful consideration is how the relatively abstract construct of holism is codified into a suite of human rights and how those rights will compare with the existing rights regimes. The methodology employed in this process must be non ethno-cultural specific yet methodologically sound in order to avoid charges of cultural imperialism. That said, it is interesting to note that many of allegations of western cultural imperialism appear to overlook the history of the UDHR.

In June 1947, in the lead up to the UDHR being drafted, numerous submissions were received by UNESCO sent by profound thinkers representing the varied cultural traditions that enrich the world. The level of congruity between the principles espoused in the human rights doctrines and these diverse customs was shown to be significant as typified by such traditions as the Chinese position through the submission of Confucian philosopher Chung-Shu Lo and the Islamic world view through the Muslim poet Humayin Kabir. It was noted at that time that there was vigorous debate around the ideologies of various participants in the drafting process, however, there was a fundamental agreement over the list of fundamental rights

(Glendon, 2001). In addition, the members of the committee charged with the drafting the UDHR were drawn from different cultural backgrounds, including Lebanese philosopher Charles Malik, French philosopher Rene Cassin and P.C. Chang from China (Malik, 2000). The significant level of global input into the articles that constitute the existing human rights doctrines should not be overlooked when considering allegations that human rights are a manifestation of western cultural imperialism. Efforts to secularise human right doctrines in the future will only be enhanced with the ontological structure espoused by modern theories of holism.

One element of Kausikan's view is that differing levels of development characterise the mosaic of nation-states in the modern world. This observation offers a valuable insight to human rights dialogue as it highlights that the cost of providing human rights to people in a poor country may exceed the resources of the government in question. This issue was one of the driving forces behind the *Declaration on the Right to Develop 1986*.^{xi} The proposed basis to human rights extends the obligation to provide human rights beyond the state-citizen relationship, by virtue of seeking to justify a human-centric paradigm. The cost of providing human rights to the people of poor nations (e.g. civil infrastructure, schools, food and health and medical supplies) would have to be partially offset by first world countries. However, this issue is one example that illustrates the complex environment in which human rights operate. It creates a new legal problem from conflicting claims within the law itself, as the substantial redistribution of wealth is contrary to legal property rights, as currently constructed.

Balancing the existing legal status quo, economic rationalism, prudent economic management and policy with universal and inalienable rights will require further attention. Whilst it is clear that a human rights framework derived from scientific research extends a deontological obligation toward the intelligentsia and powerful nations to work toward an appropriate modification of institutional systems, the proposed basis to human rights needs to integrate with the functional reality of the environment in which they operate. This illustrates one of many issues that will require consideration, as a Neo-Naturalist basis to human rights will challenge the standards by which we judge the success or failure of all social institutions.

III. Reflections on Neo-Naturalism as a Fresh Paradigm in International Law

Chief Justice Spigelman in his keynote address to the Ninth International Criminal Law Congress held in Canberra in 2004 noted that the tension between the positivist and Naturalist concept of human rights is problematic and requires resolution (Spigelman, 2004). The Neo-Naturalist foundation of human rights proposed in Dhall (2009: in print) can resolve some of the existing dilemmas. However, several issues require further analysis.

The first question is whether the Neo-Naturalist basis for human rights posited in Dhall (2009: in print) would materially alter the substance or classification of existing rights. Prima facie, it is logical that a degree of change may be required. The current consensual basis to human rights tacitly accepts equality, inalienability and universality. A degree of 'tweaking', if not wholesale reform would most likely be required in our institutions and procedures if a precise formulation of these concepts were taken to be the central elements of human rights. Therefore, a definitive answer to the question posed above can only be ascertained after a deeper study of both the constituent elements of Neo-Naturalism and the existing human rights content and infrastructure. A deconstruction of the methodology originally employed to codify the ethos of human rights into the particular articles drafted also needs to be undertaken. Such thorough exploration will ensure that the methodology employed when codifying the principles of Neo-Naturalism will be sound and not ethno-culturally specific.

Whilst this paper has sought only to integrate a Neo-Naturalist legal basis to human rights, several socio-political aspects that will require further diligent analysis were exposed. Developing nations may lack the physical infrastructure to develop and implement a universal human rights culture. In such situations, the provision of infrastructure would beggar first-world nations and would not necessarily provide the aspired level of protection. Protection is provided by the proper operation rather than mere existence of human rights infrastructure. Lawyers are aware of this bifurcation,

as this notion is demonstrated in the gulf between formal and substantive justice. Thus, the integration of Neo-Naturalism would require that social, economic, cultural and ecological considerations be taken into account. It may be argued that retains status-quo as it would prima facie identical to the current policy. However, one may retort that the imperative for assisting the development of universal human rights is enhanced if holism is accepted as an ontological aspect of nature. This contrasts with the existing, dominant paradigm, which specifically asserts that Cartesian duality characterises human existence.

If the Neo-Naturalist basis to human rights is accepted then for the implementation of such a rights régime a second question will also require resolution. How would this basis necessitate modifications to the institutions and mechanisms of both human rights and international law? It was demonstrated that one such change is the transition from a state-centric to human-centric paradigm in international law. The substantive content of a human-centric paradigm will need express deliberation for a resolution of complex issues. A human-centric paradigm mandates greater congruency between ratified treaties and domestic legislation. This would affirm Rule of Law and is essential to ensure effective concept transfer. Clearly, moving from theory to practice will be complex. Legitimate cultural relativism needs to be nurtured, whilst totalitarianism must be eschewed. Such concerns are not limited to developing nations; the detention of Dr. Mohammad Haneef provides a recent Australian example in a first world nation. It is a central precept of the Australian legal system that an accused person is innocent until proven guilty. The deprivation of human rights when subjected to arbitrary detention treats the accused as though they are both guilty and 'no longer human enough' to warrant the protection of human rights (Amnesty International, 2007). The laws that allowed this to occur are justified in the 'national interest'. Such practices are incongruous with the Rule of Law. However, at the same time the protection of the Australian public needs to be assured as far as possible. How the human-centric paradigm can resolve such tensions will require more in-depth research of the specific areas of law. The central issue of this problem is to clarify the relationship of human rights to the democratic process; and to resolve whether they should remain subordinate, or whether as proposed in this paper, systemic reform should be implemented to elevate human

rights concerns to a level at which they may override other aspects of the process of governance.

Kirby (2009) observed that an imperfection in democratic systems of government is the presumption that the people have the power to change laws once enacted. The functional reality of democracy is different: not all parts of that process are open to the direct influence of the public. In the Australian democratic model the composition of the Executive limb of government is drawn from the Legislature. Furthermore the functional head of the Executive limb of government, the Crown representative (Governor-General), is nominated by the Prime Minister. The effect of these conventions is to undermine the Tripartite Separation of Powers doctrine. This doctrine was explored in 1748 by French philosopher Charles Montesquieu in his *magnum opus*, *L'esprit de Lois*, and was central in the formation of the Australian Rule of Law. Whilst the adopted conventions do function, there is a need for systemic reform to ensure that the Australian public have their civil liberties enshrined and protected.

The third question is to determine to what extent the notion of 'Western Imperialism' would need to be swept aside in many Eastern countries. It has been suggested that in open societies in which a conflict of ideals exists, people should be simply given a choice. Thus, families are able to choose whether to live by traditional values or in compliance with human rights ideals. It is suggested that this would be the appropriate manner to resolve that tension and that such a choice reflects the global trend toward the hegemonic norm of weak cultural relativism (Donnelly, 2003). However, a difference of opinion may arise within family units. This is problematic, as inter-familial disputes are particularly sensitive issues in many Eastern countries. This shows that even the proposed solution is not a holistic answer. The solutions to issues requiring resolution prior to the implementation of a universal human rights framework are not easily come by, notwithstanding an acceptance of the phenomena of quantum holism and the subsequent evolution of an ontologically derived human rights regime.

Clearly further research is required to understand, integrate and implement current scientific advances into our intellectual conception of human beings and then into the

existing legal, political, social and economic structures. Firstly the question is how these revelations should shape the law in general and human rights in particular. Modern politics is organised around the existence of the nation-state, and an emerging global reality is one in which the constituent population of any and every nation-state is becoming increasingly disparate. For example, the 2006 Australian census endorses this notion in finding that 64.1% of the Australian population come from a 'non Australian' background (Australian Bureau of Statistics, 2006). This has resulted in a trend away from identifying countries along geo-political, ethnic or cultural lines. The identity of the nation-state is evolving toward juridical entities that consist of ethnically diverse populations who share a common political life, predicated on Rule of Law. Donnelly (2003) notes :

Impartial public law, rather than charisma, divine donation, custom, inheritance, power, virtue or even the will of the people is increasingly seen as the source of legitimate authority...The transition from nationalist to territorial and juridical conceptions of political community has been closely associated with an ideology of human rights. One's rights depend not on who one is but simply on the fact one is a human being...this has taken the form of an emphasis on equal rights for all citizens.

The ultimate legitimacy of nation-states depends on an increasing reliance on Rule of Law. A stable Rule of Law is predicated upon impartiality and legal certainty, which in turn mandates an equal treatment of all citizens. This is doubly poignant in the modern age, as if one is deemed *persona non grata*, justifiably or otherwise, developments in technology render the likelihood of apprehension far greater than in by-gone ages. It becomes increasingly essential that an individual possesses fundamental, inalienable rights that ensure justice, as evidenced by the treatment of prisoners such as David Hicks and Mamdouh Habib (Lasery, 2007; Southwood, 2005). Indeed, the changing face of modern society mandates a degree of flexibility in order for our legal institutions to retain relevance. A high-level UN panel noted (United Nations, 2004):

technological revolution... has radically changed the worlds of communication, information processing, health and transportation has eroded borders, [and] altered migration.

The above extract, reiterates the observations that we live in a world in which our knowledge base is rapidly expanding and that any and every society contains a multiplicity of conventions and institutions. These conventions and institutions are grounded in humanity's penchant for iterative development that rely upon the construction of inherently abstract memes. These memes affect our social interactions and institutions, such as the Rule of law, economics and systems of governance. As a result, the diligent enquirer is led to a profound observation. There is a strong emergent need to adapt, evolve and adjust *ourselves* to new knowledge if we are to retain intellectual and moral integrity. This in turn creates a deontological obligation that falls foursquare upon the shoulders of the intelligentsia, to disseminate viable models that are better suited to the current information age. Manifestations of such change abound, one such example is A.P Shah's judgement in the Delhi High Court of July 2009 that decriminalised homosexuality. It drew from a multiplicity of sources, both domestic and international to articulate jurisprudential reason. Whilst critics of such jurisprudential reasoning assert that the approach is akin to 'looking for friends across a room full of people', such a process allows the judiciary to deal with issues avoided by law makers (Kirby, 2009). It should not be overlooked that a tension exists between the long-term goals of peace, order and good government and the often short-term focus of elected officials, as policy positions are usually subject to the need to be re-elected.

A further advantage of drawing from diverse sources of epistemologically valid data is that it avoids the ethno-cultural subjugation of a populace and fosters an environment in which the normative manifestation of the human rights culture is a 'hybridised vernacular' of global public reason (Iverson, 2009). This hybridised vernacular is the voice of moral human agency as human rights are already employed as the standard by which systems of government are judged by other nation-states (Sellars, 2002). Recent commentaries on presidential elections held in Iran illustrate this (Nebehay, 2009; Human Rights Watch, 2009).

This paper has sought to discuss the integration of a Neo-Naturalist paradigm into both international and human rights law. Neo-Naturalism draws upon an epistemology more in step with a rapidly secularising and increasingly interconnected

world, yet retains a meaningful and material congruity with the various wisdom traditions woven into the tapestry of human society. The congruence of Neo-Naturalism with many of the various world's wisdom traditions is attributable to the shared notion of ontological holism. Many traditional value systems espouse some form of holism (Dhall, 2009 in print). As we march toward the future, it is logical that the form our societies take is one that moves toward a greater access to justice for all. Indeed, such reform is systemically desirable as it affirms Rule of law through greater legal certainty. However, while the practical environment in which human rights operate is complex and subject to an assortment of additional influences, the need for reform of human rights in an age of cultural diversity and confrontation remains paramount. This keeps us in step with the progress in the understanding of the human condition in an emerging global community.

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ⁱⁱ (1970) 125 CLR 283.

ⁱⁱⁱ The discussion of the status-quo contained in this paper draws from the excellent work of Gillian Triggs (2006) and Jack Donnelly (2003).

^{iv} For example the rights of same sex couples is addressed in the ICCPR, however, homosexual marriage is disallowed by express legislation in Australia.

^v (1995) 183 CLR 273.

^{vi} (2003) 214 CLR 1.

^{vii} Article 4(2) of the ICCPR, provides that art 6, 7,8(1) and (2), 11, 15, 16 and 18 are non-derogable.

^{viii} The discussion plotting the development of the existing inter-cultural tensions was influenced by Triggs 881 – 990.

^{ix} *Vienna Declaration* art 5, *Bangkok Declaration* preamble.

^x A culture is an environmental aspect of a human life, as opposed to an ontological aspect of human beings.

^{xi} Particularly Arts 4.2 and 10.