Université de Montréal

Of Law and Land and the Scope of Charter Rights

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RÉSUMÉ

L'application extraterritoriale de la *Charte canadienne des droits et libertés* soulève la question du rôle du principe de territorialité dans la détermination de l'étendue des droits constitutionnels. De façon plus générale, elle soulève la question du rapport entre territoire et droit. Cette thèse explore, dans un premier temps, les jalons de la méthodologie territorialiste en abordant les prémisses qui sous-tendent l'ascension du principe de territorialité comme paradigme juridique dominant. Les anomalies de ce paradigme sont par la suite présentées, de façon à illustrer un affaiblissement du principe de territorialité. Par la suite, l'auteure entreprend de déterminer le rôle du principe de territorialité dans l'établissement de l'espace occupé par la *Charte canadienne des droits et libertés* en situation d'extraterritorialité. Les développements jurisprudentiels récents attestent de la prédominance du paradigme territorial, mais de nombreuses difficultés d'application sont rencontrées. Après avoir testé la viabilité de ce paradigme, l'auteure entreprend de définir un nouveau cadre analytique permettant de répondre à la question de l'application de la Charte en situation d'extraterritorialité sans se référer à la position géographique du demandeur, ni à son appartenance à une certaine communauté politique pré-déterminée. Ce cadre repose sur une conceptualisation de la notion d'autorité étatique transcendant l'exercice d'un pouvoir coercitif de l'État fixé à l'intérieur de ses limites territoriales. Une autorité relationnelle, qui s'appuie sur l'idée que tout pouvoir étatique tire sa source de la Constitution et, conséquemment, doit être assujetti à son contrôle.

Mots-clés

Territorialité, *Charte canadienne des droits et libertés*, autorité, droits fondamentaux, constitutionnalisme, géographie du droit.

SUMMARY

This thesis is about the relationship between law and territory, and more particularly, about the relationship between the principle of territoriality and the scope of Charter rights. The author first introduces territoriality as dominant legal paradigm and analyses its underlying premises. The challenges that territoriality and methodological territorialism have recently faced are also examined. The purpose of the first part of this thesis is to show that the territorial paradigm is not immune to challenge, and to provide conceptual tools to get out of the "territorial trap". The author then looks at how, and to what extent, territoriality currently shapes the scope of Charter rights. By analysing cases on point, the author concludes that although territoriality is, officially, the answer to the question of the scope of Charter rights, in practice, the principle does not provide sufficient guidance to the judiciary. The territorial principle's normative weaknesses are added to its practical inability to determine the scope of Charter rights. In order to examine potential alternatives to the territorial principle, the author examines the parallel debate regarding the extraterritorial scope of American constitutional rights. American courts, rather than endorsing strict territoriaity, emphasize either the membership of the claimant (the subject of constitutional litigation), the limitations on state actions (the object of constitutional litigation), or pragmatic concerns in order to determine whether a constitutional protection applies in an extraterritorial context. The author then proceeds to examining how an alternative model could be developed in Canada in the context of extraterritorial Charter cases. She argues that the personal entitlement approach, when superimposed on the territorial paradigm, brings more injustice, not less, in that people can be sufficiently related to Canada to trigger a state action, but insufficiently connected to trigger Charter protection, hence creating a state of asymmetry. She also argues that territoriality, if understood in Westphalian terms, leads to the belief that a state action is not an action within the authority of the Canadian government if it is conducted outside of Canada, hence shielding these actions from constitutional srcutiny. The model the author advocates is based on a notion of relational authority and it seeks to emphasize not the place where a government act is performed, nor the identity of the persons subject to it, but the idea that any exercise of government power is potentially amenable to constitutional scrutiny.

Keywords

Territoriality, extraterritoriality, *Canadian Charter of Rights and Freedoms*, authority, rights, constitutionalism, legal geography.

TABLE DES MATIÈRES

DÉDICACE

À l'amour de ma vie, Mike, l'homme patient.

À ma mère Ibtisam, dont je suis si fière d'être la fille et qui conjugue le verbe donner à tous les temps.

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INTRODUCTION

> *Trois degrés d'élévation du pôle renversent toute la jurisprudence. Un méridien décide de la vérité (...). Plaisante justice qu'une rivière borne! Vérité au deçà des Pyrénées, erreur au-delà.*[1]

This thesis is about the relationship between law and land, and how this relationship determines the scope of Canadian constitutional rights. It draws on what has been referred to as "the geography of law".[2] Its purpose is threefold. First, it aims at describing the foundation and evolution of the legal paradigm of territoriality, and the challenges it faces. Second, it assesses the role that territoriality plays, in Canadian law, when the scope of the *Canadian Charter of Rights and Freedoms*[3] is at issue. Third, it proposes an alternative analytical framework to the determination of the scope of Canadian Charter rights that transcends territorial patterns and looks for a correlation between the display of governmental authority and the scope of the Charter in extraterritorial cases.[4]

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[1] B. Pascal, *Oeuvres complètes*, La Pléiade vol. II (Paris: Gallimard, 2000) – *Pensées-Misère*, at 560, para. 56.

[2] See, for example, K. Economides *et al*., "The Spatial Analysis of Legal Systems: Towards a Geography of Law?" (1986) 13 Journal of Law and Society 161.

[3] Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11, which came into force on April 17, 1982 [hereinafter the"Charter" or the "Canadian Charter"].

[4] In general, extraterritorial cases are cases where the Canadian government exercises some sort of authority outside of the Canadian territory. This definition is discussed further in Chapter One, text accompanying note 29, and in Chapter Three, *infra* note 413.

An assessment will be made of the role that territoriality currently *plays* in Canadian law; of the role it *can* realistically play; and of the role it *ought* to play in the debate regarding the scope of constitutional rights. The original contribution of this thesis will consist in devising an analytical framework which will help solve complex issues involving constitutional rights, territory and state authority.

Challenging the bond between law and land can be seen as an ambitious project because territoriality is often associated with the very nature of law. In 1947, Ernest Lorenzen downplayed the paradigmatic value of territoriality by reducing that principle to a simple rule.[5] It is a rule which states have "seen fit to select", and in doing so their choice "depends entirely upon considerations of policy which each sovereign state must determine for itself."[6] In his view, the "exclusive power to determine the legal consequences of operative facts (…) does not follow from the nature of sovereignty nor from any self-evident theory of territoriality."[7]

This thesis fully endorses Lorenzen's *mise en garde* and applies it to the question of how fundamental rights are to be distributed and whether such distribution should follow territorial lines. Therefore, the starting point of this thesis is that the traditional relationship between territory and law, and more particularly between territory and constitutional law, is not immune to challenge.

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[5] E. G. Lorenzen, *Selected Articles on the Conflict of Laws* (New Haven: Yale University Press, 1947).
[6] *Ibid.* at 11.
[7] *Ibid*.

The five chapters which compose this thesis are divided as follows. Chapter One traces back the origin of territoriality and identifies the main premises on which this legal paradigm is built. Not only has this principle become the dominant legal paradigm, it has also generated a "territorialist epistemology".[8] That epistemology, also called methodological territorialism or methodological nationalism, is the lens through which most legal questions are looked at. This is what has been dubbed the "territorial trap".[9]

A major part of Chapter One is dedicated to the criticisms of territoriality, whether they come from legal pluralism, cosmopolitan legal theory, human geography, etc. Legal pluralism, for instance, takes stock of the changing role of the state, which moved from being at the top of the normative pyramid to a place in the network of relations which have emerged from the postnational model of governance.[10] Since the control over territorially-defined boundaries is one of the state's constitutive elements (an assumption put forward by Weber[11] and seldom questioned), questioning the traditional role of the state results in a downplaying of the territorial paradigm embedded into it.

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[8] N. Brenner *et al*., eds., *State-Space, A reader* (Malden, MA: Blackwell Pub., 2003).
[9] J. Agnew, "The territorial trap: the geographical assumptions of international relations theory" (1994) 1 Review of International Political Economy 53.
[10] See generally F. Crépeau, ed., *Mondialisation des échanges et fonctions de l'État* (Bruxelles : Bruylant, 1997). See also F. Ost & M. van de Kerchove, *De la Pyramide au Réseau? Pour une théorie dialectique du droit* (Bruxelles : Facultés universitaires Saint-Louis, 2001).
[11] According to Max Weber, the modern state is "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory" [emphasis in original]: M. Weber, "Politics as a Vocation", in H.H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (Oxford: Oxford University Press, 1946) at 78. See also N. Brenner *et al*., "Introduction: State-Space in Question" *in* N. Brenner *et al*., eds., *State-Space, A reader, supra* note 8 at 2.

Another challenge comes from a critical assessment of the unfulfilled promise of territoriality, that is, the assumption that territoriality is ethical[12] because it spreads law evenly within a fixed territory and thereby is a vehicle for equality. By looking into this unfulfilled promise, I explore why it is problematic to justify territoriality by its equalizing mission.

Territoriality is often associated with sovereignty and, consequently, with state authority. Because the state is conceived, under methodological territorialism, as the fixed territory over which a sovereign exercises coercive authority exclusively, non-formal exercises of authority, exercises of authority without sovereignty, or exercises of authority outside of the territory, are not accounted for. In other words, if states are conceived of as each enjoying mutually exclusive authority over a certain, fixed territory not to be interfered with by any foreign influence (the assumptions underlying the Westphalian notion of territoriality), the attribution of legal consequences to fact patterns that differ from those covered by the territorial paradigm becomes impossible.

To exit that "territorial trap", the territory will have to be defined in a way that does not necessarily relate to geography; as Andrea Brighenti suggests, there can be more than one territory in a single geographical area.[13] Similarly, the territory over which state authority is exercised does not necessarily coincide with the geographical space

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[12] On "ethical territoriality", see L. Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants* (2007) 8 Theoretical Inquiries L. 389.
[13] A. Brighenti, "On Territory as Relationship and Law as Territory", *infra* note 21.

of that state. By "unbundling" sovereignty and territoriality (as cultural and human geography scholars advocated many years ago)[14] and, I will argue, by developing a concept of relational state authority, it will be possible to get out of the trap.

In Chapter Two, I question whether, and to what extent, the principle of territoriality determines the application of Canadian law in general and Canadian constitutional law in particular. In order to do so, I first look at how the legal paradigm of territoriality influences the ability of Parliament to enact ordinary legislation, how it impacts on the validity of such legislation, etc. I then consider the way territoriality impacts on the recognition of standing to raise a constitutional challenge and how it interferes with the assessment of the scope of application of the Charter pursuant to s. 32 of the Charter.

These steps will bring me to conclude that Canadian courts, when invested with the task of defining the extraterritorial scope of constitutional rights, have embraced the paradigmatic territorial model both when determining the scope of the Charter *inside* Canada and when determining its scope *outside,* that is, in the context of a government action performed outside Canada. The research also demonstrated that there is a lack of in-depth discussion of potential alternatives to territoriality in the caselaw, perhaps mirroring the paucity of relevant theorization in Canadian legal doctrine. The competing membership model, for instance, which allocates rights

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[14] See, for example, J. G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) International Organization 47, no. 2 [hereinafter "Territoriality and Beyond"].

based on someone's personal status, and according to which rights increase as far as the person climbs the "membership ladder,"[15] is not even discussed.

The embrace of the territorial paradigm, consecrated in the pivotal *R. v. Hape* case,[16] rather seems to have been deduced from the belief that should the Charter be recognized extraterritorial scope, it would injure foreign relations and prejudice foreign states. The force of the territorial paradigm was so strong that it led the majority of the Court to hold that an extraterritorial application of the Charter was altogether "impossible".[17]

My intuition, based on a close scrutiny of the arguments raised in *Hape*, is that the normative weaknesses of territoriality should prevent it from guiding our courts in the future. Consequently, the next step I will undertake is to verify to what extent the territorial paradigm has determined the scope of Charter rights in cases rendered after *R. v. Hape,* whether they follow, distinguish, or reject it. This research, presented in Chapter Three, demonstrates that territoriality, though officially embraced by courts, is not followed in a principled way, a situation which leads to a high degree of confusion in the caselaw. I note that some judges apply the territorial paradigm and conclude that the application of the Charter is "impossible" when extraterritorial

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[15] Alex Aleinikoff speaks of concentric circles of membership: A. Aleinikoff & al., *Immigration and Citizenship: Process and Policy*, 6th ed. (Thomson/West, 2008). Carolina Nunez views it as a "membership ladder": see C. Nunez, "Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker" (2010) Wis. L. R. 817 at 825 [hereinafter "Fractured Membership"]. See also, on the membership ladder, L. Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants, supra* note 12 at 390-391.

[16] *R. v. Hape*, [2007] 2 S.C.R. 292 [hereinafter "*Hape*" or "*R. v. Hape*"].

[17] *Ibid.* at para. 85.

elements are involved, but others devise alternative models; some squeeze in personal entitlement criteria, others simply disregard the territorial rule; others yet apply exceptions to the pure territorial rule. The conclusion that can be drawn from courts' rulings, if any, is that although strict territoriality is formally the dominant paradigm when it comes to defining the scope of Charter rights, in practice that strict rule cannot correctly depict the state of the law. At this point, similarities can be drawn between the challenges that territoriality faces at the theoretical level (coming from different "islands of theorizing"[18]), and the challenges that it faces in the specific area of Charter law.

Now criticising and acknowledging the limitations of the territorial approach raise the question of which alternative model could provide a more just result, a more coherent body of law, and a better fit with Canadian constitutional theory? In order to launch this reflexion, Chapter Four evaluates various alternative theoretical approaches that have been devised in the United States, drawing some parallels with the debate over the scope of constitutional rights protected by the US Bill of Rights.[19] After analyzing the caselaw, I observed that American courts started by embracing territoriality but quickly moved to devise alternative models, some focusing on the identity of the constitutional subject and the need to establish

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[18] M. Burgess & H. Vollaard, "Introduction: analysing Westphalian states in an integrating Europe and a globalised world", in M. Burgess & H. Vollaard, eds., *State territoriality and European Integration* (London & New York: Routledge, 2006) at 4.

[19] U.S. Const. Amendments 1-10 (1791) [hereinafter "U.S. Bill of Rights" or "American Bill of Rights"].

membership, others on the state action itself as being inherently limited, no matter where or against whom the state power is exercised.[20] But the most recent, and therefore dominant approach, is one which blends notions of membership, territoriality, limited-government, but which also makes paramount pragmatic arguments regarding the practical capacity of the US government to respect and ensure the constitutional provision at stake in an extraterritorial context.

With this in mind, I will proceed, in Chapter Five, to the elaboration of a new approach to the determination of the scope of Canadian constitutional rights. The alternative model will respond to the observed limitations and the normative deficiencies of territoriality as legal paradigm, and, arguably, should prove better than the options currently considered. In order to elaborate this approach, I will first rule out what I label the "personal entitlement" alternative, akin to membership, a model which has very recently been integrated in the reasoning of courts in extraterritoriality cases. Requesting that people, whether citizens or foreigners, be "entitled" to claim Charter rights creates an asymmetrical situation where political authority is exercised, but where the Constitution does not rule. I then proceed to redefine political authority as a relation between the state and the recipient of the state action rather than a display of coercive force by the territorial sovereign, as understood by methological territorialism.

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[20] These two approaches roughly correspond to the two poles of constitutional theory which I develop in Chapter Four: the constitutional subject (associated with the idea of a contract of association among "the people"), and the constitutional object (associated with the idea of a contract of government, which grants limited powers to the newly formed government).

The framework that I will propose in Chapter Five follows four steps. The first step relates to the *applicability* of the Charter and the second addresses *standing.* The third step relates to the determination of the existence of a *violation* of a Charter provision and the fourth goes to the appropriate *remedy.* All four steps presuppose a non-territorialist epistemology and a desire to exit the territorial trap.

This approach will meet the normative propositions which this thesis defends: first, that any exercise of state authority takes its root in the Constitution and as such must be amenable to judicial scrutiny. Second, that geography ought not to determine the content of the constitutional obligations to which the government is bound. Third, that authority is relational, not physical, and that it ought to be understood as more than the coercive orders of a territorial sovereign.

CHAPTER ONE:

THE RISE AND FALL OF TERRITORIALITY

> *To describe territory as a piece of land is, so to speak, like describing money as a piece of metal or paper. By doing so, one misses the whole picture.*[21]

I. INTRODUCTION

This chapter seeks to explore the relationship between law and land by explaining how the legal paradigm of territoriality came into being, what assumptions underlie it, and what challenges can be made to that paradigm.

The following two sections of this chapter provide definitions of key concepts, taking into account the territorial epistemology in which those definitions are embedded. Section IV describes the historical rise of territoriality, while section V discusses its underlying legal assumptions.

At that point, both the assumptions underlying the domestic application of the paradigm and those underlying its application in the international sphere will be examined. Finally, section VI focuses on several challenges that the paradigm

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[21] A. Brighenti, "On Territory as Relationship and Law as Territory" (2006) 21 Can. Journal of Law and Society 65 at 79.

currently faces. These challenges relate to some of the features characterizing the territorial paradigm but are in no way exhaustive.[22]

The purpose of this first chapter is to argue that although territoriality is still the dominant legal paradigm, like any other paradigm, it is not immune to challenge. As Thomas Kuhn suggests, the very structure of scientific revolutions takes its roots in the exceptions or anomalies which weaken a dominant paradigm and ultimately may lead to its replacement,[23] in other words, to a paradigm shift. My purpose however is not to build an alternative legal paradigm but rather to illustrate some of territoriality's weaknesses. This, in turn, will help prepare the ground for a challenge of territoriality as a principle governing the scope of application of Canadian constitutional rights, the object under study in this thesis.

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[22] A different type of challenge is one conducted by Michael Mann who contrasts two views of the state: the institutional and the functional. According to Mann, territoriality is only helpful to understand the *institutional* limitations of the state, mainly the control by the government over a "territorially defined area on which a ruler exercices an exclusively binding rule-making power and the monopoly of physical violence". On the other hand, state *functions,* such as the military, ideological and economic powers of the state are not, themselves, territorially limited See M. Mann, "The Autonomous Power of the State: its Origins, Mechanisms" *in* N. Brenner *et al.*, eds., *State-Space, A reader*, *supra* note 8 at 53.

[23] T. Kuhn, *La structure des révolutions scientifiques* (Paris : Flammarion, 1972), ch. VIII "Nature et nécessité des révolutions scientifiques" at 115 & ff.

II. DEFINITIONS

Territory is a constitutive element of the state.[24] According to the definition of the state that Max Weber put forward, the state is a "human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory".[25] Territoriality, in Cornu's *Vocabulaire juridique*, can be defined as the "*vocation d'un Droit à s'appliquer uniformément sur l'ensemble d'un territoire*".[26] This definition assumes that law has a purpose, a vocation, which is that it ought to be applied *uniformly* throughout a territory. Territoriality, accordingly, posits that the vocation of law is its uniformity within a certain territory, and that territory corresponds to the state's geographical borders.

There is certain circularity in these definitions. The territory is an element of the state; the state exercises control over a single territory; and law is contained within that territory. The result is that what we know about the law is based on what we know about the state. We construct our idea of the law based on our idea of the state, and the territory of law appears static and state-centric.

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[24] G. Cornu, *Vocabulaire juridique*, 8th ed. (Paris, Presses Universitaires de France, 2009) at 917 (defining le "territoire" as "Élément constitutif de l'État dont il forme l'assise géographique et dont il détermine le champ d'exercice des compétences").
[25] M. Weber, "Politics as a Vocation", *supra* note 11 at 78 [emphasis in original].
[26] G. Cornu, *Vocabulaire juridique, supra* note 24 at 917 (under "territorialité").

Under another reading, however, territoriality is "a form of behavior that uses a bounded space, a territory, as the instrument for securing a particular outcome."[27] In this definition, propounded by cultural and human geography scholars, territoriality is defined as a behavior, or, as Sack holds, a "strategy to establish different degrees of access to people, things, and relationships."[28] Territoriality is viewed, here, as the result of a dynamic behavior or an active strategy, a vision which emphasizes the absence of immutability of both the concept and its borders. The definition of territoriality cannot be neutral. Hence, attempting to define that concept is of a limited practical value.

Let us now turn to the concepts of extraterritoriality and intraterritoriality, which are central to this thesis. The former refers to the scope of application of the law inside the state. The latter, to its scope of application outside the geographical borders of the state. According to Raustiala, intraterritoriality, when applied to the specific question of rights, refers to the question "whether there are internal demarcations with regard to legal rights", whereas extraterritoriality refers to "[w]hether these rights extend abroad".[29] In this thesis, extraterritoriality refers to whether constitutional rights can extend abroad *when government action is performed in a foreign country*.

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[27] P. F. Taylor, "The State as container: territoriality in the modern world system", *in* N. Brenner *et al*., eds., *State-Space, A reader, supra* note 8 at at 101 & ff.
[28] R. D. Sack, *Human Territoriality: Its Theory and History* (New York: Cambridge University Press, 1986) at 20. As a result of this definition, Sack posits that "both the boundaries of a territory and the means by which they are communicated are not unalterable": *ibid.*
[29] I borrow these definitions from Kal Raustiala: see K. Raustiala, *Does the Constitution Follow the Flag*? *Territoriality and Extraterritoriality in American Law* (New York: Oxford University Press, 2009) at 26.

In adopting these definitions, even in adopting the concept of extraterritoriality and intraterritoriality, I am aware that what separates *intra* from *extra* is a border pictured in the traditional sense, as a fence, separating states which take the appearance of self-contained units. But the borders which separate each individual state, one may argue, are hardly unporous. In the work of sociologist Didier Bigo, for example, borders are networks, not straight-lined but pixellized, not single but multiple[30] and, one may add, not static but dynamic. Human geographers also view borders not as "static features of state power" but rather, as features whose "forms and functions within the geopolitical system have been modified continually –sometimes quite dramatically – through struggles on various spatial scales".[31] The territory, the border, the state, intra and extra territoriality: these concepts carry their own set of assumptions grounded in territorial epistemology, to which I now turn.

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[30] D. Bigo, "Frontières, territoire, sécurité, souveraineté", online: <http://cerisco pe.sciences-po.fr>, November 30, 2010, at 7 (page last consulted on August 1st 2011): "The alternative is not between the border as a line or no border at all, but between the border as a line (a perception which continues to colonize political imagination) and a border as a network made of a multiplication of passage points. In this alternative narrative, the border relates to an exchange and interplay among various pressure points rather than being simply a wall." (my translation). See also : D. Bigo & *et al.*, "Introduction. Logiques de marquage : murs et disputes frontalières" (2009) 73 Cultures et Conflits 7-3.

[31] N. Brenner *et al*., "Introduction : State Space in Question", in N. Brenner *et al.*, eds., *State-Space, A reader, supra* note 8 at 8.

III. TERRITORIAL EPISTEMOLOGY

Territoriality is not only a legal paradigm: it is an epistemology called methodological territorialism.[32] It colors, in other words, the relationship between the object of study and the subject who conducts the study. Methodological territorialism implies that concepts are defined, hypotheses are construed, empirical evidence is gathered and conclusions are drawn all according to the territorial paradigm.[33] John Agnew expressed this reality by referring to the "territorial trap",[34] i.e. the trap in which most social theorists have fallen because they assume Weber's definition of the state and take it literally.

Agnew identifies three reasons why this "geographical unconscious"[35] has permeated modern thinking. The first one relates to the belief that the state possesses sovereign control over its territorial borders. This, in turn, implies "mutually exclusive, territorially self-enclosed, and unitary state actors". The second reason is that the domestic and the foreign state are epistemologically contrasted, as the distinction between intra- and extraterritoriality indicates. The third reason is that the state is

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[32] See G. Nootens, "Liberal nationalism and the sovereign territorial ideal" (2006) 12 (1) Nations and Nationalism 35 and N. Brenner, "Beyond state-centrism? Space, territoriality, and geographical scale in globalization studies" (2006) 28 Theory and Society 39 at 45-46.

[33] This definition of methodological territorialism is given in J.A. Scholte, "What is 'Global' about Globalization?" in D. Held & A.G. McGrew, eds., *The Global Transformations Reader: an Introduction to the Globalization Debate*, 2nd ed. (Cambridge: Polity Press, 2004) 84 at 89.

[34] J. Agnew, "The territorial trap: the geographical assumptions of international relations theory", *supra* note 9.

[35] Here I take the account made by Neil Brenner *et al.* of John Agnew's work: see N. Brenner *et al.*, "Introduction: State Space in Question", in N. Brenner *et al.*, eds., *State-Space, A reader, supra* note 8 at 1.

viewed as a "static, timeless territorial "container" that encloses economic and political processes."[36] All three combine to create a territorially-anchored conception of state space and, as Neil Brenner suggests, they may even lead to a space-based fetishism.[37] This fetishism affects many fields of study, and, I suggest, the legal one in particular.

Methodological territorialism has repercussions both within the state (the state is seen as container of one nation) and outside the state (states are seen as mutually exclusive containers in international relations). Applied *within* the state, methodological territorialism is akin to methodological nationalism, which is rooted in the belief that the nation-state is the necessary (and only) representation of modern society.[38] One area of tension in methodological nationalism is the difficult conceptualization of the relationship between nation(s) and state in multinational states. Geneviève Nootens suggests that the same territorial bias influences how one perceives the (territorial) limits of a nation. Liberals, she argues, are too attached to the territoriality principle to be able to overcome what she calls the "statist assumption", i.e. the idea that a nation is necessarily coterminous with the territorial

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[36] N. Brenner *et al*., "Introduction: State Space in Question" in N. Brenner *et al*., *State-Space: A reader, supra* note 8 at 2.
[37] *Ibid.*
[38] For a critique of methodological nationalism, see U. Beck & E. Grande, *Cosmopolitan Europe* (Cambridge: Polity Press, 2007) at 174.

boundaries of a state, with the various consequences such a conception involves for the status of minorities.[39]

Another difficulty, perhaps more on point, is the problematic conceptualization of extraterritorial rights: according to the territorial orthodoxy, the law of the sovereign is valid only within a specific territory. As power is exercised within defined boundaries, the territory becomes a condition precedent for the very existence of the dominant legal order. As Otis suggests, the territorial orthodoxy posits that outside of the bounded territory, no legal order subsides, no sovereignty can be affirmed.[40] In other words, the existence of a legal order *in the positivist* sense is contingent upon the territorial boundaries of the state[41] because territoriality serves as an *assise de juridicité* that helps recognize valid rules. It is but one of the criteria that mark the *validity* of legal rules, but an essential one: it is, as Alland and Rials put it, "*une*

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[39] G. Nootens, "Liberal nationalism and the sovereign territorial ideal", *supra* note 32 at 36. Non-territorialist theorists include Otto Bauer and Karl Renner who put forward, near the end of the 19th Century, the national cultural autonomy model (NCA). This model initially sought to "preserve the territorial integrity of Austria by separating nationalities from the state and from each other (…). Based on non-territorial autonomy, this approach suggests that nations are not necessarily coincident with a particular territory – hence, citiziens who declared their membership to a certain nation may do so wherever they reside in the state. See the analysis of the NCA made by Rainer Baubock in "Political autonomy or cultural minority rights? A conceptual critique of Renner's model", in E. Nimni, ed., *National Cultural Autonomy and its Contemporary Critics* (New York: Routledge, 2005) 97 at 102. Note that non-territorial paradigms are not necessarily more "minority-friendly". In personality-based regimes, "minorities within self governing minorities" can be vulnerable: see J.-F. Gaudreault-DesBiens, "Religious Courts, Personal Federalism and Legal Transplants" in R. Adhar & N. Aroney, eds., *Sharia in the West* (Oxford: Oxford University Press, 2010) at note 15.

[40] G. Otis, "Territorialité, personnalité et gouvernance autochtone" (2006) 47 C. de D. 781 at para. 4. The two premises underlying the territorialist orthodoxy are : "1) il n'y a de pouvoir et d'ordre juridique que par le territoire; 2) il n'existe de pouvoir et d'ordre juridique que dans le territoire."

[41] *Ibid.* This chapter addresses, below, challenges from legal pluralism which posit the existence of legal orders which are not territorialized but personalized.

limite spatiale de validité des normes."[42] Hence, valid extraterritorial law or rights become an oxymoron, impossible to reconcile with the territorial orthodoxy, excluding, for the moment, any qualification of that orthodoxy, which will be discussed below.

In addition to their validity, the scope of application of legal norms is also determined by the territory. Physical presence within a specific territory constitutes a 'discriminating factor' regarding the application of a legal norm.[43] In other words, "territorial borders, generally speaking, delineate areas within which different sets of legal rules apply."[44] It is thus acknowledged that the trigger for law's application is, as a general rule, not someone's personal ties with the state, but someone's physical presence in a certain territory (again, excluding alternative bases of jurisdiction, which will be discussed below). This has led some authors to reflect on the quasi-metaphysical or "magical"[45] role played by physical presence as a determinative criterion in an increasingly virtual world.

But here is how the territorial trap works: if rights are traditionally conceived as valid only within the state, applicable only to people physically in the state, and belonging

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[42] A spatial limitation to the validity of norms (my translation): see D. Alland & S. Rials, eds., *Dictionnaire de la culture juridique, supra* note 78 at 1475 and ff., under "territoire" (citing Kelsen, Shoeborn, Delbez & Barberis). Perhaps it would be more accurate to talk of the operability of rules, rather than their validity, for a rule may be validly enacted but be declared inoperative because territoriality's imperatives have not been followed.
[43] *Ibid*. under *territoire*.
[44] D.R. Johnson & D. Post, "Law and Borders- The Rise of Law in Cyberspace" (1996) 48 Stan. L. Rev. 1367.
[45] K. Raustiala, "The Geography of Justice", *supra* note 79.

only to the members of a state-based nation, how can those rights be seen as extending to the outer sphere, i.e. *extraterritorially*? They will not, if one stays in the territorial trap. They may, if one gets out of it: hence, the present analysis.

After acknowledging these considerations, I am now in a position to explain why, notwithstanding the criticisms faced by the territorial epistemology, I will use the very concepts and definitions described above, including extraterritoriality and intraterritoriality, in order to put in question the authority of the territorial paradigm as it applies to the question of the scope of Canadian constitutional rights. This is not paradoxical but simply due to the fact that the territorialist epistemology also impregnates my analysis. Borrowing from the work of H.L.A. Hart on the distinction between the internal and the external point of view on law, my inquiry is internal to the extent that it uses the very concepts and discourse known to the current territorialist paradigm in order to criticize it and ultimately to reject it *on its own playground.* Recall François Ost and Michel Van de Kerchove's warning that to reconsider positivism, for example, one may very well have to use the tools and the lenses which positivism taught us to use. It is important however not to confuse "the observed realities and the conceptual tools with which to observe those realities."[46]

The possibility of conceptualizing law as disentangled from a physical conception of territoriality will be the theoretical contribution of this thesis. In the rest of this

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[46] F. Ost & M. van de Kerchove, *De la Pyramide au Réseau? Pour une théorie dialectique du droit*, *supra* note 10 at 21 (my translation).

Chapter, and in the following ones, I will work with extraterritoriality and intraterritoriality as though territory is physical and borders are fixed because such are the meanings that the dominant legal discourse gives these concepts. In Chapter Five, however, I will suggest that the legal question which motivated this thesis be considered not in terms of extra- or intraterritoriality but in terms of relational territoriality.

As previously announced, the next section addresses the historical evolution of territoriality and the consecration of territoriality as the dominant legal paradigm.

IV. HISTORY AND TERRITORIALITY

The relationship between law and territory is often associated with the Peace of Westphalia, 1648, which put an end to the Thirty Years War. The Peace of Westphalia marked the rise of the absolute power of a sovereign within the territorial boundaries of the nation-state. As such, it is viewed as operating a shift from the system of multiple allegiances and parcellized sovereignty which existed during medieval times in Europe.[47] It also marked the passage from the predominance of personality of laws, which characterized the Greek and Roman and Middle Ages eras, to the predominance of territoriality of laws. Of course, the shift from

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[47] On the other hand, the "multilayered system of authority in Europe" did not suddently come to an end, although this is what "the myth of Westphalia" suggests: see, on this point, S. Beaulac, *The power of language in the making of international law: the word sovereignty in Bodin and Vattel and the myth of Westphalia* (Leiden, Boston: Martinus Nijhoff, 2004) at 70-71.

personality to territoriality did not mean that both legal bases could not continue to coexist to a certain degree, as they have always done.[48]

In ancient Athens, the application of law was a function of the identity of persons, rather than the territory on which they lived. The Greeks identified non-citizens excluded from full-participation within the City or *polis* by various terms, including *xenos* (the foreigner); *metoikos* (the resident alien) and *doukos* (the slave).[49] The *metoikos,* or metics were not members of the political community of the City in which they lived and worked. Citizenship was acquired only by birth to (one or two) parents who were citizens. Altogether, only about 10% of the population was composed of citizens.[50] Though residing and working in Athens, and being taxed and having military duties,[51] the metics had few political rights. Because of who they were, law did not attach to them in the same way as to Athenian citizens, even though they found themselves within the territorial boundaries of the *polis*. Their children, though born and raised in Athens, never became citizens.[52]

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[48] According to Maurizio Lupoi, it would be an overstatement to characterize the medieval period as embracing the personality of law, rather than the territoriality of law. He prefers the more prudent statement according to which from the early Middle-Ages on, "in some matters, territorial law must give way to the law under which the individual was born (…)." See M. Lupoi, *The Origins of the European Legal Order* (Cambridge: Cambridge University Press, 2006) at 389.

[49] E. Román, *Citizenship and its Exclusions* (New York: New York University Press, 2010) at 17-18.

[50] To be a citizen of Athens, men had to be "aged 20 or over, of known genealogy as being born to an Athenian citizen family, to be a patriarch of a household, a warrior –possessing the arms and ability to fight- and a master of the labour of others, notably slaves." See R. Bellamy, *Citizenship – A very short introduction* (Oxford: Oxford University Press, 2008) at 31.

[51] *Ibid*.

[52] Metics were confined to labor-intensive work but sometimes they rose to the level of wealthy merchants.

Aristotle himself was a metic. When attempting to justify the existence of a class of residents excluded from political membership in Ancient Greece, Aristotle referred to a certain "excellence" required for accession to citizenship,[53] while agreeing that the *polis* has the entire discretion to determine who will become a citizen.[54] Others raised the contractualist argument of "good behaviour in exchange for fair treatment", although such a justification seems incapable of accounting for the exclusion of resident aliens who would adapt well to the state demands but would still be left without political membership.[55] The topic of alienage or foreignness is not uncommon among Greek play writers who even tend to focus on the reverse myth of the alien: both Oedipes and Oreste symbolize not the "estrangement of a native youth from his city", but rather the reverse process in which "a man arrives as a stranger in a city and then reveals it to be his homeland."[56]

Under Roman law, the civil law (*jus civile*) extended only to Roman citizens. Non-citizens (were they *Latini* or *Perigrini*) were excluded from the realm of Roman civil law unless a treaty between Rome and their city provided otherwise.[57] Contrary to

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[53] This account of Aristotle's views on political membership is made by Michael Walzer in *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books Inc, 1983) at 54 [hereinafter *Spheres of Justice*]. Walzer doubts, however, that Aristotle believed in excellence transmitted by birth. See also, on Artistotle and the "excellence of a citizen", E. Román, *Citizenship and its Exclusions, supra* note 49 at 18.

[54] See J. H. Carens, "Immigration, Democracy, and Citizenship" in O. Schmidtke & S. Ozcurumez, eds., *Of States, Rights and Social Closure: Governing Migration and Citizenship* (New York: Palgrave Macmillan, 2008) 17 at 20.

[55] M. Walzer, *Spheres of Justice*, *supra* note 53 at 53-55.

[56] V. Farenga, *Citizen and Self in Ancient Greece: individuals performing justice and the law* (Cambridge: New York University Press, 2006) at 368.

[57] E. Cuq, *Les institutions juridiques des Romains envisagées dans leurs rapports avec l'État social et avec les progrès de la jurisprudence*, vol. 1 (Paris: E. Plon, Nourrit et Cie, 1891) at 399. For instance,

the *latini*, who enjoyed the right to vote and the right to enter into contractual relations with Romans, the *peregrini* had no political rights or civil rights.[58] The *peregrini* were excluded from the realm of most Roman laws; the law which applied to them was their own national law, but only when disputes arose among *perigrini* from the same nationality; as for disputes among *peregrini* who came from different places, or disputes between *perigrini* and Roman citizens, the applicable law was the *jus gentium*, a system of laws which at the time provided for modes of acquisition and disposition of property, as well as modes of entering into contractual obligations.[59] The *jus gentium* evolved from the law of *peoples*, to the law of *nations*, and is now known as international law.[60]

Though in Ancient Rome law attached predominantly to persons rather than territory, this was not always the case: according to the *postliminum* theory, for example, the "Roman citizen which crossed the territorial borders of Roman territory lost the right

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the second treaty with Cartages from 406 held that Cartagenes living on roman territory were entitled to enter into legally binding contracts: *ibid*. at 398.

[58] P. F. Girard, *Manuel élémentaire de droit romain 1929* (Paris: Dalloz, 2003) at 120-123 [hereinafter *Manuel élémentaire de droit romain*].

[59] P.F. Girard, *ibid.* at 124-125. According to Henry Maine, the *jus gentium* was applied in these cases as a sort of compromise between leaving the *perigrini* completely outside the legal system, and applying Roman law. The former was risky, especially considering the importance of commerce and foreign trade. The latter was seen by Romans as "usurpation of their birthright". The *jus gentium* represented the body of rules that were common to both Romans and members of different Italian communities from which the peregrine originated; it was "the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil." (emphasis in original): H. S. Maine, *Ancient Law,* 3rd ed. (New York: Henry Holt & Cie, 1875) at 46-47.

[60] John Rawls defines the Law of Peoples as a "particular political conception of right and justice that applies to the principles and norms of international law and practice." See J. Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 2000) at 3. See also M. D. Walters, "The Common Law Constitution and Legal Cosmopolitanism", in D. Dyzenhaus ed., *The Unity of Public Law* (Oxford: Hart Pub., 2004) at 439.

to invoke the law of his country, but would recover that right once he set foot again on that soil."[61] As years passed by, the distinction between citizens, *latini* and *perigrini* was maintained, although thanks to military necessity and, later, fiscal incentives, emperors were prompted to extend citizenship status, as citizenship was both a requirement to become a legionnaire, and a condition to levy certain taxes.[62] It was only under Justinian that the "constitution" finally encompassed all inhabitants of the Empire.[63]

During the Middle Ages in Europe, the exercise of political authority depended upon personal characteristics or status, with the Holy Roman Emperor and the Pope holding authority over Christendom across Europe.[64] Medieval Europe was composed of multiple layers of jurisdiction, with authority spreading across several territorial lines. In other words, medieval Europe was truly pluralistic, both in terms of juridical multiplicity and sources of authority. Political authority came from kings and popes and churches and cities and corporations. Canon law was superimposed on and mixed with secular law (feudal, mercantile, manorial and urban law).[65]

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[61] E. Cuq, *Les institutions juridiques des Romains, supra* note 57*,* at 400 (our translation). Note that only citizens benefit from this rule.
[62] P.F. Girard, *Manuel élémentaire de droit romain, supra* note 58 at 128-129.
[63] In the year 212, the Edict of Caracalla gave citizenship in principle to all inhabitants of the Roman Empire, in order for the Emperor to be able to claim the 5% succession tax on citizens' inheritance: P.F. Girard, *Manuel élémentaire de droit romain, ibid.* at 129.
[64] J. Fitzpatrick, "Sovereignty, Territoriality and the Rule of Law" (2002) 25 Hastings Int'l & Comp. L. Rev. 303.
[65] See, generally, H.J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983).

During the late Middle Ages, and until the Thirty Years War, feudal geopolitics was the rule. According to Teschke, feudalism involves "de-centralisation and personalization of political power by lords, creating the parcellised sovereignty of the medieval 'state'."[66] None of the holders of political authority at that time – pope or emperor – "enjoyed a monopoly in the means of violence guaranteeing exclusive control over a bounded territory."[67] Territory itself kept changing size, fluctuating according to land acquisition, marital connections and martial exploits. Not only was territory subject to changes in size, it was also fragmented and subjected to various rulers: "territoriality was vertically mediated and horizontally perforated by the various layers of sub-infeodation, so that one patch of land could have several political masters with differentiated claims to it."[68] This is largely due to the social, economic and political facets of feudalism which allowed for both de-centralisation and personalization of power in the hands of multiple lords.[69]

The end of feudalism corresponds to the beginning of the modern state which is often dated to the Peace of Westphalia.[70] So the Westphalian Peace of 1648, by putting an end to the Thirty Years War and rejecting both the spiritual authority of the Pope and the political authority of the Holy Roman Emperor, allowed the territorial legal

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[66] B. Teschke, "The metamorphose of European territoriality: a historical reconstruction" *in* Michael Burgess & Hans Vollaard, eds., *State territory and European Integration* (London & New York: Routledge, 2006) 37 at 51.
[67] *Ibid.* at 41.
[68] *Ibid*. at 44.
[69] *Ibid*.
[70] *Ibid.* The rise of the modern state corresponds to the end of feudalism and, arguably, the beginning of capitalism. However, as capitalism did not immediately follow 1648, it has been submitted that following the Peace of Westphalia, the notion of a 'state' remained the medieval one until capitalism made its entry.

paradigm to take root. The Westphalian conception of the nation-state concentrated all authority and power into a single sovereign who exercised absolute control over territory. This conception is echoed in Thomas Hobbes' construction of the nation-state: "(…) the dominion followeth the dominion of the place of his residence. For the soveraign of each Country hath Dominion over all that reside therein."[71] Sovereignty as an attribute of statehood became possible when each sovereign was given a fixed territory to administer and rule.[72]

State equality, on the other hand, was possible *because* each sovereign recognized the territorial integrity of all other sovereigns. For Vattel, this equality rested on an analogy with natural persons: since men are naturally equal, and since men compose nations, then nations are naturally equal.[73] Simply put, the rise of territoriality allowed the principle of equality of states to be fully expressed.[74] Equality of states on the international plane, and sovereignty within the internal legal order, are perhaps the most-often mentioned legal implications of the rise of territoriality in the post-Westphalian order.

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[71] T. Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1991), Chap. 20, para 103, p. 140.

[72] The rise of the nation-state and that of sovereignty are not necessarily simultaneous, although frequently approached together. As Wayne Hudson points out, sovereignty pre-exists the modern state: "sovereignty was not produced by the modern state, and there were no states in the modern sense at the time that the alleged theorists of modern sovereignty (Hobbes, Bodin and Locke) were writing, or even until the nineteenth century": W. Hudson, "Fables of Sovereignty" in T. Jacobsen, C. Sampford & R. Thakur, eds., *Re-envisioning Sovereignty: the end of Westphalia?* (Aldershot & Burlington: Ashgate, 2008) 19 at 24.

[73] See J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon press, 1963) at 36. While Emerich de Vattel theorized the concept of equality of states through an analogy between the individual and the state, Grotius exemplified the link between sovereignty and equality in its masterpiece *Droit de la guerre et de la paix* (Paris: Guillaume et Cie., 1867).

[74] See G. J. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Order* (Cambridge: Cambridge University Press, 2004) at 30.

Territoriality ensured the supremacy of the state within its geographical borders, while sovereignty ensured its independence on the international plane. The transition from parcellized territory to consolidated borders, as well as from authority that was based on personal status, to authority based on territorial control, marked the passage "from a non-spatial ontology to a territorial one"[75] even if, at the wake of Westphalia, the notions of an organized nation-state with a single sovereign having absolute power over the state's territory were still embryonic.[76] Nonetheless, and to paraphrase Sir Henry Maine, the evolution of society has been generally one *away* from status.[77]

V. TERRITORIALITY AS A LEGAL PARADIGM

The territorial paradigm is twofold: it involves an inner dimension, and an outer dimension. Picture a border: the question of how the distribution of rights ought to be made inside this territory is a question to be solved inside the state, *intraterritorially*. But this is just the flip side of the coin: the fact that laws apply on a territorial basis inside a country does not explain why or whether, on the outside, those same laws would or would not apply too. In other words, the justifications for adopting (or

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[75] C. Ansell "Restructuring Authority and Territoriality" *in* C.K. Ansell & G. Di Palma, eds., *Restructuring territoriality: Europe and the United States compared* (Cambridge: Cambridge University Press, 2004) at 6.

[76] As pointed out by Gerry Simpson, "the vestiges of papal control remained until the Congress of Vienna formally dismissed the Empire". G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Order, supra* note 74 at 30. See also on the "myth of Westphalia", S. Beaulac, *supra* note 47 at 91 and ff.

[77] Sir Henry Maine, in *Ancient law,* wrote that the evolution of modern society has been characterized by a movement "from status to contract": *supra* note 59.

denying) intraterritoriality and those for adopting (denying) extraterritoriality are not necessarily the same. In the next sections, both justifications will be addressed. Note however that criticisms and challenges are reserved for Section VI.

A. External justifications: territorial jurisdiction and state equality

Territoriality is both a rationale for attributing *compétence*, and a basis for exercising jurisdiction.[78] With the rise of the nation-state, the territorial space became the legal space. Since then, the power and authority of the sovereign state became legally congruent with the territorial boundaries of that state.[79] Under international law, this is translated into Ulrich Huber's two maxims, that first, "the laws of each state have force within the limit of that government and bind all subjects to it, but not beyond"[80] and second, that "all persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof."[81] Jurisdiction

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[78] D. Alland & S. Rials, eds., *Dictionnaire de la culture juridique* (Paris: PUF, 2003) at 1475, under "*territoire*": "*Le critère de territorialité est notamment attributif de compétence à un organe, par exemple à une juridiction – on parle alors du ressort territorial des tribunaux- ou, plus généralement, il est attributif de compétence d'un ordre juridique particulier*."

[79] K. Raustiala, "The Geography of Justice" (2005) 73 Fordham L. Rev. 2501 at 2509.

[80] E. G. Lorenzen, *Selected Articles on the Conflict of Laws, supra* note 5 at 136 (paraphrasing Huber's *De Conflictu Legum* first and second maxim). Note that, as expressed in the Introduction, Lorenzen is circumspect about the authority of those maxims, and views them as public policy choices rather than a priori principles: *ibid.* at pp. 10-12.

[81] E. Lorenzen, *Selected Articles on the Conflict of Laws*, *supra* note 5 at 137 (paraphrasing U. Huber's De Conflictu Legum three maxims).

was and still is understood as primarily territorial, and this understanding greatly contributed to the promotion of international state equality.[82]

It is appropriate to first examine the meaning of "jurisdiction". It is a word composed of the Latin words "juris" and "dictio", which mean "to pronounce justice" or "to render justice". This includes, according to the Webster's Encyclopedic Dictionary, the power to administer and enforce the law.[83] Vaughan Lowe defines jurisdiction as "the sphere of authority exercised by a state, agency of the state, international juridical or administrative organization, (…) over places, persons, or things."[84]

There are three recognized types of jurisdiction: enforcement, prescriptive and adjudicative jurisdiction. The first relates to the power of the state's executive to execute laws, the second to the power of the state's parliament to make and apply laws; and the third to the ability of the state's courts to adjudicate these matters.[85] In principle, it is often said that jurisdiction is primarily territorial; however, this is only true in relation to *enforcement* jurisdiction. A state may not go to another state and arrest people or conduct investigations without that state's consent. By contrast, it is acknowledged that a state may extend its prescriptive and adjudicative jurisdictions

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[82] According to G. Simpson, *supra* note 74, the Peace of Westphalia "formalised the acquisition of full sovereignty within a system of ethically and legally equal states" (at 31).
[83] *The New Lexicon Webster's Encyclopedic Dictionary of the English Language,* Canadian edition (New York: Lexicon Publications Inc., 1988).
[84] J. Gould & W. L. Kolb, *A dictionnary of the social sciences* (London: Tavistock Publications, 1964) at 360.
[85] See V. Lowe, "Jurisdiction" in M. Evans, ed., *International Law* (Oxford: Oxford University Press, 2003). See also S. Coughlan, R. Currie, H. Kindred & T. Scassa, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6 Can.J.L.&T. 29.

abroad, if no rule of international law forbids it.[86] Since international law currently does not forbid any state from so extending its laws, such as a bill of rights, for instance, to its citizens wherever they may be, it may be concluded that in that regard, states are free to do as they wish.

By extending its laws to its citizens wherever they may be, a state would exercise jurisdiction on the basis of nationality, which is one of the recognized non-territorial bases of jurisdiction.[87] Nationality, for one, remains a relevant factor for the application of extraterritorial laws in certain circumstances.[88] For if jurisdiction were exclusively territorial, a forum court could not apply a foreign law without upsetting the balance of foreign relations: a problem which Huber reflected upon since it was raised in seventeenth-century Dutch politics, when the recently-independent Netherlands were concerned with the way foreigners were treated. Ill-treatment was viewed as impeding commerce with foreign states and thus a strategy had to be developed which would ensure that foreigners could "keep" their rights while on Dutch soil.

Huber had formulated his first two maxims establishing the predominance of territorial jurisdiction cited above; but he formulated a third one as an answer to the

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[86] *The case of the S.S. "Lotus", (France v. Turkey),* PCIJ, Ser. A., No. 10, 1927 [hereinafter *the Lotus case*].
[87] The most common bases of jurisdiction are the territorial principle, the nationality principle, the passive personality principle, the protective principle and the universal principle: H. Kindred & al., *International Law Chiefly as Interpreted and Applied in Canada,* 6th ed. (Toronto: Emond Montgomery Publications, 2000) at 516-519.
[88] See V. Lowe, "Jurisdiction", *supra* note 85. See also C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008).

question of "how rights acquired under the laws of one nation could have effect within the territory of another."[89] In order to *mitigate* the effects of his first two maxims, Huber used the principle of comity between states. His third maxim provides that

> Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.[90]

Comity allows sovereign states to apply foreign laws (or rights) in their territory *unless* a prejudice to the state, or to its subjects, is felt. It is fundamental to understand that comity was conceived as a permissive tool, not a prohibitive one, and that it acts as a mitigation of territoriality, not its driving force – a subject on which further comments will be made in Chapters Three and Five, when Canadian caselaw will be discussed.

B. Internal justifications: territoriality and liberal ideology

That territoriality has emerged from the elevation of the nation-state is understandable. But equality of states on the international plane and state sovereignty

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[89] According to William Dodge, Huber sought to address the specific issue of "foreign rights in a world of exclusive territorial sovereignty". See W. S. Dodge, "International comity in American courts", UCLA Conference Papers, online: American Society of International Law <http://www.asil.org/files/dodge.pdf>, (page last consulted August 1st 2011). See also H. E. Yntema, "The Comity Doctrine" (1996) 65 Mich. L. Rev. 9.

[90] E. Lorenzen, *Selected Articles on the Conflict of Laws*, *supra* note 5 at 137 (paraphrasing Huber's De Conflictu Legum three maxims).

in international relations do not justify why inside the state, law is presumed to have territorial application, i.e. why its *vocation* is to apply evenly within a certain political community, as the definition by Cornu suggests.[91]

The answer to that question comes from liberal theory, which embraced territoriality because that tool was perceived as being able to achieve the equality of all those situated within the same territory and to consolidate the social bonds which unite them. In fact, political theorists consider that status relationships are irreconcilable with liberal society: universalism within the political community or the constitutional order is seen as a better choice than having different levels of inclusion based on each person's status.[92] Territoriality, as an organizing principle, rests on an idea of equality for all of those physically within the territorial boundaries, *whatever their status.*

This is not to say that territoriality has no other foundations or purposes. Other rationales may be invoked, for example, the need to preserve democratic legitimacy by obtaining the consent and the political participation of the governed, provided they are not merely passing by but intend to reside in the state.[93] Or the idea that

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[91] Recall that the definition was "*vocation d'un droit à s'appliquer uniformément sur le territoire"*: G. Cornu, *Vocabulaire juridique, supra* note 24.
[92] R. Ford, "Law's Territory: A History of Jurisdiction" (1999) 97 Mich. Law Rev. 843 at 900.
[93] J. H. Carens, "On Belonging: What we Owe People who Stay" (2005) 30:3 Boston Review. See also J.H. Carens, "Immigration, Democracy, and Citizenship", *supra* note 54. According to Cairns, in modern democracies, "political legitimacy rests upon the inclusion of the entire settled population. Democracy requires the consent of the governed –not those who are subject to its laws for a few days while passing through, but rather those who are subject to its laws on an ongoing basis throughout their lives." *Ibid.* at 22.

state- imposed obligations and the rights of the people subjected to these obligations because they live in this territory ought to be correlated. Another rationale could be that the factual ties of interdependence which bind those who live on a certain territory must be given recognition, irrespective of formal admission.[94]

The claim here is that it is *ethical* to apply the same rules to people who live in the same place.[95] As Ghislain Otis mentions,[96] while personality of law fosters diversity and complexity, territoriality of law carries a message of uniformity. Indeed, territoriality rejects the notion of differential levels of inclusion and considers the maintenance of partial membership statuses as illegitimate under liberal and democratic principles.[97] That concept is coined by Linda Bosniak as *ethical territoriality.*[98]

These considerations lead to the concept of equality and the links that such concept has with the principle of territoriality. In that field, it is the oft-cited work of Michael Walzer's *Spheres of Justice*[99] which will be of guidance. Walzer agrees that territoriality is linked to the idea of equality. He argues for the inclusion of all

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[94] Many of these rationales are explored by Carolina Nunez in "Fractured Membership", *supra* note 15 at 829-834. Nunez goes further by suggesting that those underlying elements be not, anymore, dependent on territoriality itself; that they are self-fulfilling premises. Her thesis is that membership should nowadays be related to these elements without having to resort to territoriality, which has become superfluous in the edification of a membership theory.
[95] And to people who are, according to methodological nationalism, part of a same nation, a same society.
[96] G. Otis, "Territorialité, personnalité et gouvernance autochtone", *supra* note 40.
[97] L. Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants", *supra* note 12 at 391.
[98] *Ibid*.
[99] M. Walzer, *Spheres of Justice, supra* note 53 at 59-61.

members within the territorial boundaries of a state, rejecting the caste system, or any system that allows the tyrannical rule of citizens over aliens, of members over non-members.[100] Walzer illustrates the idea of equality and membership within the territorial lines as the result of a compromise between the freedom of a state to accept or refuse entry to any outsider, but the obligation to treat all those within as equals. A sovereign may have the discretion to establish any policies of admission justified by the needs of the state, but once a person is admitted within the territory, equality must be guaranteed by the state. Walzer rejects the existence of a class of "live-in servants", or any system which allows for the creation of a caste or an inferior social class: "no community can be half metic, half-citizen, and claim that its admissions policies are acts of self-determination or that its politics is democratic."[101] Accordingly, once admitted, "all those men and women who live within the territory, work in the local economy, and are subject to local law"[102] must have the right to become citizens, or full members of the political community, and have their share in the distribution of security and welfare. Citizens cannot rule over non-citizens with whom they share the same territory without acting beyond their sphere, in a form of tyranny. All "eligible men and women hold a single political status",[103] and such political inclusiveness is the prerequisite for his theory of

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[100] *Ibid*.
[101] *Ibid.* at 62.
[102] *Ibid.* at 60.
[103] *Ibid.* at 62.

distributive justice. What makes aliens entitled to become members is the fact that they are "subject to the state's authority".[104]

This approach is to be contrasted with the Roman and Greek views of equality: whether one adopts the classical Greek view that "all citizens are equal as law makers", or the classical Roman view that "all citizens are equal under the law"[105] the notion of equality was truly limited to citizens, and the *polis* had full discretion to determine who would become a citizen.

In theory, the exclusion of a certain group on the basis of personal characteristics can be seen as a threat to legitimacy and democracy[106] because in the territorial matrix, the *demos* is being constructed as a single, unitary group. The 'demotic value' of territoriality refers to the assumption that within one territory, there is but one *demos*.[107] Territoriality performs a uniting and equalizing task: if the *demos* is one and only, the rights and obligations that arise among all its members are the same.[108] Territory is a "public space indifferent to ethno-cultural differences".[109] Thus territoriality is (again, officially) characterized by the inclusion of all inhabitants of a

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[104] *Ibid.* at 61.
[105] The two classical positions are summarized by R. Bellamy, *Citizenship: a very short introduction, supra* note 50 at 29 & ff.
[106] J.-F. Gaudreault-DesBiens, "Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives" *in* R. Adhar & N. Aroney, eds., *Sharia in the West* (Oxford: Oxford University Press, 2010) 59: "Therefore, the actual or perceived exclusion of a particular group, religious or otherwise, becomes an important issue form the standpoint of legitimacy and democracy".
[107] See the comments made above on methodological nationalism, *supra* note 38. See, for example, Rowan William's criticism of legal universalism and the "exclusionary monism that the ideology of abstract legal universalism has brought about": J.-F. Gaudreault-DesBiens, "Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives", *ibid.* at 60.
[108] G. Otis, *supra* note 40 at para. 5.
[109] *Ibid.* at para. 6.

state within the same political community and within the same legal order, governed by the same power. Needless to say, many of these characteristics will be challenged in the following section.

Challenging the assumptions underlying "ethical territoriality" does not mean that one should return to the personality principle, which, as Nootens points out, "has rather been identified with ethnicist conceptions of the nation-state, non-liberal systems of tolerance […] and institutional systems of discrimination".[110] On the other hand, it is necessary to double-check whether the territorial principle, which "has been closely identified with modernity and with more inclusive conceptions of the political community",[111] still performs its function.

To sum up, this section has outlined the premises underlying territoriality as a legal paradigm. On the outside, territoriality is built on the notion of state equality, which itself relies on the idea that a sovereign's authority is normally limited to his own territory, over which he exercises absolute power. On the inside, the powerful rationale that justified the endorsement of territoriality is its promise of equality, its ethno-neutral character, its homogenization potential. Based on the premises explored above, territoriality is posed as a legal paradigm: law's space is truly equated with the land's borders.

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[110] G. Nootens, "Liberal nationalism and the sovereign territorial ideal", *supra* note 32 at 37.
[111] *Ibid*.

If the purpose of this section was to establish territoriality as the dominant legal paradigm, the purpose of the next one is to identify weaknesses or anomalies in this paradigm which may provide us with tools to reconceive the relationship between law and land. The purpose of this exercise is to move away from the container metaphor or the territorial trap. Bertrand Badie who views territoriality as a social construct rather than a fact of nature advocates the uprooting of the territorial paradigm from its foundational premises: "*Toutes les constructions sociales ont dû émerger en un lieu donné, dans un contexte précis, à l'initiative d'acteurs particuliers: pour autant, elles ne sont pas toutes prisonnières de leurs origines*."[112] In the next section, several challenges to territoriality as a legal paradigm will be addressed.

VI. SEVEN SINS

It may often seem that the territorial paradigm bears the sign of modern rational thinking.[113] However, recently, its ability to describe and prescribe the scope of application of legal norms has been questioned. As Burgess and Vollaard point out, shifts in the 'territorial pattern' have been observed from the standpoint of several

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[112] B. Badie, *La fin des territoires* (Paris: Fayard, 1995) at 73 ("all social constructs necessarily emerged in a specific context and area, thanks to the initiative of particular actors; and yet they are not all prisoners from their origins").
[113] F. Ost & M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit, supra* note 10 at 127.

areas of social science, or "islands of theorizing".[114] Disciplines as varied as those of political science, international relations, public administration, history, federal theory, comparative politics and political geography have reassessed the role of territoriality. In the next section, I will address seven of these challenges (or sins!), bearing in mind that they are in no way exhaustive. For each challenge, I will refer to one or more of the elements of the territorial paradigm addressed in the previous sections of this chapter. Where applicable, I will give practical examples to support these challenges. Although I attempt to separate them, these challenges do overlap and so this categorization is imperfect. Note that the challenges address both the wrongful exclusion of those located within the territory, and the wrongful exclusion of those located without it, a strategy similar to that put forward by Shachar in her challenge of birthright privileges.[115]

The first challenge takes stock of the fact that so far, territoriality has been studied, viewed and described through legal positivist lenses. The emerging constitutional

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[114] M. Burgess & H. Vollaard, "Introduction: analysing Westphalian states in an integrating Europe and a globalised world" in M. Burgess & H. Vollaard, eds., *State territoriality and European Integration, supra* note 66 at 4.

[115] Ayelet Shachar uses a similar classification in her challenge of the birthright citizenship principles: "This problem has two dimensions. First, it may lead to inadequate inclusion of non-members who habitually reside within the polity's territorial jurisdiction, but nevertheless lie outside the ascriptive reach of its *demos.* (…) Second, we must consider certain "extraterritorial" voice deficiencies. Here the main concern is that reliance on the criteria of birthplace and parentage is underinclusive. It may systematically exclude relevant stakeholders who physically reside outside the territorial jurisdiction of the decision making community, but who are nonetheless significantly affected by its decisions." See A. Shachar, "Against birthright privilege: redefining citizenship as property" *in* S. Benhabib, I. Shapiro & D. Petravonic, eds., *Identities, Affiliations and Allegiances* (Cambridge: Cambridge University Press, 2007) 257 at 264 [hereinafter "Against birthright privilege"]. There is a strong parallel between challenging birthright citizenship and challenging territoriality because, as Nootens points out, "in the model of the nation state, citizenship is usually granted on the basis of the territorial principle." See G. Nootens, "Liberal nationalism and the sovereign territorial ideal", *supra* note 32 at 36.

discourse, however, is one involving legal pluralism and more particularly, pluralist constitutionalism. This discourse repositions the place of the state and its role as law-maker; it also defines the constitutional polity outside of the nation-state system.

The second challenge relates predominantly to the internal justification for territoriality: the idea that territoriality, as a construction of liberalism, promotes neutrality and equal application of the law to all those physically present within the sovereign's territory. It questions the alleged *uniform* application of law, the centerpiece of the definition of territoriality.

The third challenge relates to the external justification of territoriality: that of delimiting state enclaves with authority and sovereignty closely tied to the territory of the state. This challenge also relates to methodological territorialism which views the locus of state authority as solely reduced to the state's geographical borders, and those geographical borders as delimitating the legal order. By demonstrating that law does not stop at a sovereign's borders anymore, or that a sovereign's authority is increasingly exercised abroad, the inability to conceptualize authority as disentangled from sovereignty becomes a handicap.

The fourth challenge is ontological: it relates to the very meaning of territory. Is territory a mere piece of land, or a complex web of relations? This is not so much a challenge to the concept of territoriality, as it is a criticism of the narrow view that

territoriality is merely a relationship between law and territory, defined as physical land.

The fifth challenge is based on moral grounds and is voiced by cosmopolitanism. Globalization discourse is beyond the scope of this section but it needs to be addressed albeit to illustrate that territoriality is "increasingly compromised and anachronistic" and suffers from the absence of "coherent underlying theory to justify its continued use as a conclusive jurisdictional principle."[116]

The sixth challenge addresses the choice of "physical presence" as the sole criterion for attributing rights: by manipulating their borders, state officials are increasingly able to determine more aggressively who gets in. Thus, territoriality is being instrumentalized.

The seventh challenge is based on the difficult application of the territorial legal paradigm in societies which do not fit squarely within the premise of methodological nationalism: i.e. one nation, one society, one territory. Canada is one example, and although territorial federalism is a common model, a look into personal federalism is warranted, not to offer an alternative, but rather to illustrate some shortcomings of territoriality.

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[116] K. Raustiala, "The Geography of Justice" *supra* note 79 at 2528.

A. Legal pluralism and territoriality

So far, territoriality has been looked at primarily through positivist lenses.[117] The premises underlying territoriality are all tied up in an understanding of law as the articulation of the sovereign's will, produced only by the sovereign, to which the subjects must obey: that is, to monist positivism, as defined by John Austin.[118] Territory, as a founding element of statehood, is an essential component of the state-centrism which characterizes monist positivism[119] to the extent that the notion of territory is that of a geographically static bounded land.

And yet positivism is facing challenges and to say that legal scholarship is particularly skeptical about it would be an understatement. Many authors do not link positivist legal theory with territoriality, but address general issues regarding the role of the state in the legal system.[120] François Ost and Michel Van de Kerchove, among few others, make the link between positivism and territoriality. They argue that the three functions traditionally associated with the territorial paradigm (maintaining a

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[117] See generally, on positivism, M. Troper, "Le positivisme comme théorie du droit" in C. Grzegorczyk & al., eds., *Le Positivisme Juridique* (Paris: L.G.D.J., 1992) 273 at 281 & ff. See also N. Bobbio, "Sur le positivisme juridique" in *Mélanges Paul Roubier*, t. 1 (Paris : Dalloz et Sirey, 1961) 52.

[118] J. Austin, *The Province of Jurisprudence Determined* (London : Hart, 1954).

[119] D. Alland & S. Rials, eds., *Dictionnaire de la culture juridique, supra* note 78 under *territoire.* See also the definition by Max Weber, *supra* note 11.

[120] I endorse Anderson's classification of the three different narratives of legal pluralism: classical legal pluralism (which underlines the existence of law outside of the Westphalian state paradigm), post-colonial legal pluralism (which recognizes the existence of non-state law in various loci of society) and globalization and legal pluralism (which argue for a cosmopolitan approach to law): G. W. Anderson, *Constitutional Rights after Globalization* (Oxford: Hart Publishing, 2005) at 45-49. See also M.-M. Kleinhans and R.A. Macdonald, "What is Critical Legal Pluralism?" (1997) 12 Can. J. L. & Society 25.

political frontier, creating a national identity, and favoring economic interventionism or protectionism) have been revisited on account of the end of the state monopoly on the creation of norms, and the rejection of the vision of a single legal order. According to these authors, the substitution of the monist legal order with a pluralistic legal system takes the shape of "une pluralité d'ordres juridiques distincts et non parfaitement coordonnés *simultanément valides* sur un même territoire à l'égard des mêmes personnes."[121] In that way, the new pluralism is reminiscent of the medieval, parcellized and fragmented sources of authority and legal orders.[122] The modern European order offers a perfect illustration of this new pluralism, with the increased level of integration and the coexistence of multiple layers of normativity.[123]

The concept of territory may also be viewed from non-positivistic lenses, as one of the next sections demonstrates. What is more, the territory covered by constitutional law is also undergoing changes. Constitutional law is traditionally fixed in a certain "territory": that covered by the constitutional polity. Legal positivism, with the help

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[121] F. Ost et M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit, supra* note 10 at 130 [emphasis added]. My translation: "a plurality of legal orders distinct and not perfectly coordinated simultaneously *valid on the same territory*, with regard to the same persons." These considerations are particularly relevant to how territoriality is handled in Canadian law, as we will see in Chapter Two and Five. More particularly, territoriality is tied to the perceived impossibility that authority be exercised by the state outside of the attributes of sovereignty: authority itself, in other words, cannot be understood outside of the state matrix.

[122] Though one must take into account the fact that the very existence of a State, with its organized authority and its monopoly on coercion, makes such comparisons imperfect M. Burgess & H. Volaard, *supra* note 66 : "invoking the term 'neo-medievalism' for understanding contemporary political territoriality is as semantically anachronistic, as it is misleading in explanatory terms", because medieval geopolitics was based on the competition of lords to maximize domination through the acquisition of land and power.

[123] See, generally, A.-J. Arnaud, *Pour une pensée juridique européenne* (Paris : Presses Universitaires de France, 1991).

of methodological nationalism, affixes that polity on the same canvas as the nation-state. But legal pluralism posits that the constitutional polity and the nation-state are not necessarily a mirror image of one another. In Gunther Teubner's view, for example, modern constitutionalism moves away from the nation-state both by stepping into the transnational context and inside the private sector.[124]

An alternative conception of constitutionalism seeks to recognize new constitutional entities.[125] Recall Nootens' warning about the difficulty to extricate oneself from the statist assumption, i.e. the idea that a nation's territory is necessarily coinciding with the territorial boundaries of a state.[126] Such extrication is not, however, unprecedented. New constitutional entities such as the EU provide an example of the questions raised by pluralist constitutionalism, notably when it comes to answering "how to translate key constitutional criteria, such as foundational authority, jurisdictional delineation and representation, in [a] new setting."[127] There are no ready-made answers to these questions, but this is precisely the point, since the premise underlying postnational constitutionalism is that new constitutional entities

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[124] G. Teubner, "Fragmented Foundations: Societal Constitutionalism beyond the Nation State" in P. Dobner & M. Loughlin, eds., *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) 327 at 328.

[125] Some authors suggest recasting the notion of constitutionalism to include private parties, notably large corporations whose actions resemble political power. See G. W. Anderson, *Constitutional Rights after Globalization, supra* note 120 and D. Schneiderman, *Constitutionalizing economic globalization: investment rules and democracy's promise* (Cambridge/ New York: Cambridge University Press, 2008) at 185 and ff.

[126] G. Nootens, "Liberal nationalism and the sovereign territorial ideal", *supra* note 32 at 36.

[127] See G.W. Anderson, *Constitutional Rights after Globalization, supra* note 120 at 150.

"are not anchored in any of the conventional forms or symbols of legitimacy."[128] The search for a constitutional nexus beyond the traditional, liberal approach to constitutionalism has led Anderson to conclude rightfully that "the meaning of constitutionalism can never be fixed, but has to be subject to constant re-examination and re-evaluation in terms of its contemporary relevance and value."[129] Legal pluralists thus encourage the conceptualization of the constitutional subject as not necessarily the citizen of the nation-state.

As the following chapters illustrate, the establishment of a "constitutional nexus" beyond the traditional, territorial and state-centric approach does not necessarily lead to a more inclusive vision of the constitutional subject. To some extent, the flexible constitutional nexus has been used in order to narrow down the scope of those who may claim constitutional protection, or membership in the constitutional polity.

B. Equality and (un)ethical territoriality

The demotic value of territoriality –one of its underlying premises- is perhaps its weakest feature. Calling ethical territoriality a "chimera", Linda Bosniak argues that the concept of ethical territoriality is in fact a fiction; in other words, that the distinction between the inside and the outside is not significant in terms of normative

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[128] J. Shaw, "Postnational Constitutionalism in the European Union" (1999) 6 Journal of European Public Policy 579 at 585 (as cited in G.W. Anderson, *ibid.* at 151).
[129] G.W. Anderson, *supra* note 127 at 151.

implications, and certainly not a vector of equality within the border. The border is not one, but it recreates itself inside the geographically bounded territory.[130]

People who are physically present within the same territory, but who are entitled to lesser rights, exemplify the fact that, to borrow from Bosniak, the "internally-implemented border" establishes different levels of rights entitlements. Territoriality is a double-edged principle, and, as Walzer and Bosniak argue, it is a principle which allows us to be picky at the borders (for, if membership is to mean something, it must be up to the current members to decide on which criteria it is allocated), but commands us to be universalists within the borders. Yet with growing inequalities and discrimination between foreigners and nationals, it becomes impossible to "have our universalist cake on the inside, and eat our particularistic cake at the border".[131]

If territoriality and methodological territorialism were truly adequate legal paradigms, as a general principle, those within the bounded territory would be part of the same *demos.* This, in turn, would imply that equality is distributed among all members evenly, and that access to membership would be decided on the criteria of physical, territorial presence alone. Yet this is almost never the case even if one excludes rights strictly limited to citizens such as the right to vote because, as I will explain, territoriality promises an equality which it cannot deliver. Hence, the choice

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[130] L. Bosniak, "Ethical territoriality", *supra* note 12 at 399.
[131] L. Bosniak, *ibid.* at 397.

of territoriality as a legal paradigm *internally* cannot rest on an assumption, that of a unified, ethno-neutral demos, which is out of phase with the modern state.

Many examples could be given, but two are particularly on point if we turn to Canadian law.

In Canada, most efforts to theorize the notion of political membership have been carried out from the immigration perspective[132] or from political science scholarship such as that of Alan Cairns. In his view, the Canadian Charter of Rights and Freedoms acts as "reminding the citizenry that it possesses rights as a protection against governments in ordinary times".[133] Cairns goes on to say that the Charter is a reminder "that the base of the constitutional order is composed not of subjects but of right-bearing citizens on whose behalf the business of government is undertaken."[134] His claim that the Charter gives citizens rights against governments equates, perhaps

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[132] See F. Crépeau, "La protection du réfugié au Canada" in *Contemporary Law: Canadian Reports to the International Congress of Comparative Law, Athens, 1994* (Montreal: Yvon Blais, 1994) 754; D. Galloway, "Strangers and Members: Equality in an Immigration Setting" (1994) Can. J. L. & Juris. 149; H.P. Glenn, *Strangers at the gates: refugees, illegal entrants, and procedural justice : a report prepared for Employment and Immigration Canada* (Cowansville : Yvon Blais, 1992) ; H. Cyr, *Le droit des étrangers en situation irrégulière* (1998) Annuaire international de justice constitutionnelle 137.

[133] A. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queens University Press, 1992) at 76. For a critique of the proposition that the Charter transferred "power to the people", see M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada, supra* note 143 at 2-4. The Charter in his view rather empowered the judiciary, an unelected, unaccountable body to decide on social and political issues under the guise of legalism. For a balanced critique of the undemocratic impact of the Charter, see D. Smiley, "A Dangereous Deed: The Constitution Act, 1982", *in* K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy & The Constitution Act* (Toronto: Methuen Publications, 2003) 74 at 91.

[134] A. Cairns, *ibid.* [emphasis added].

unwillingly, *citizens* with *people*[135] and has sparked a debate over the question who are Cairns' 'Charter Canadians' and who are the 'non-Charter Canadians'.[136] In Cairns' view, even if the Charter does not seem to "elevate citizens above non-citizens" (regrettably?), the Charter does enhance the status of citizenship in Canada in an indirect fashion.[137]

These debates have not explored whether the term *citizen* is at all relevant or properly chosen when it comes to identifying the constitutional subject.[138] Moreover, as Galloway points out, legislatures have not been asked to establish a theory of political membership and courts have "either not had the inclination or not had the opportunity to develop a doctrine of membership which would specify both the rights of members and non-members and would specify the factors on which

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[135] *Ibid* at 6. The author points out that the rights of the *Charter* are not limited to citizens, they apply to aliens as well. Nonetheless, in Cairns' view, the Charter did enhance the status of citizenship: "The fact that the Charter's benefits are not confined to citizens, with its corollary that much of the Charter does not appear to elevate citizens above non-citizens, leads easily to the conclusion that the citizenship consequences of the Charter are negligible. This, however, is to restrict inappropriately the significance of citizenship to the distinctions it creates among the general public of citizens and non-citizens alike" (*ibid.* at 75).

[136] See I. Brodie and N. Nevitte, "Clarifying Differences: a Rejoinder to Alan Cairns's Defence of the Citizens' Constitution Theory", *infra* note 138.

[137] It is indirect because it contributes to show the discrepancy between a government-controlled amending procedure, and citizens' (people) controlled Charter. The locus of sovereignty is not the same for both: while it lies with governments in the context of amendment formula, it lies with the citizens (the people) who are the beneficiary of rights protected in the Charter. Thus the Charter and the references to citizenship contribute to show the discrepancy between a government-controlled amending procedure, and a citizens' (people) controlled Charter. See A. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform, supra* note 133 at 76.

[138] See A. C. Cairns, "A Defence of the Citizens' Constitution Theory: A Response to Ian Brodie and Neil Nevitte" (1993) 26 Can. J. Pol. Sc. 261; I. Brodie & N. Nevitte, "Clarifying Differences: A Rejoinder to Alan Cairns's Defence of the Citizens' Constitution Theory" (1993) 26:2 Can. J. Pol. Sc. 269.

determinations of membership should be based."[139] As a result, there is still some room for further study of territoriality and membership in Canada.[140] In particular, the relationship between holding full political membership (i.e. citizenship), being a constitutional subject, and enjoying full constitutional rights needs to be explored further. As Donald Smiley points out, the Canadian Parliament has the last word when it comes to political membership since its power to modify the conditions of access to citizenship is not limited by the Charter.[141]

1. Political membership, territoriality and rights

As a starting point, it is useful to look at how the distribution of constitutional rights in Canada, and more particularly the right to vote, was initially effected. Canada, from a historical standpoint, did not embrace a territorial approach to law when it came to allocating the right to vote. Full membership in the political community in Canada is a franchise initially bestowed upon a small portion of the population. In 1867, when property qualifications limited the franchise, women and aboriginal people were "disenfranchised" and the country "could not be considered

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[139] D. Galloway, "Strangers and Members : Equality in an Immigration Setting", *supra* note 132 at para. 26.

[140] And this is not only the case in Canada. There is a "remarkable lack of theoretical consensus" on how the idea of political memberhsip is to be "regarded": E. R. Thomas, "Who Belongs? Competing Conceptions of Political Membership" (2002) 5 European Journal of Social Theory 323 at 327. Thomas suggests that there are at least five bases on which political membership or citizenship can be attributed (blood, culture, belief, contract, and monetized contract), but she points out that the distribution of most social and economic rights is not, aside from some exceptions, contingent upon citizenship: *ibid.* at 328-336.

[141] D. Smiley, "A Dangereous Deed: The Constitution Act, 1982", *infra* note 133 at 93.

democratic"[142] at least according to today's standards. The property requirement was abandoned in 1898, and by 1917 women acquired the right to vote (except in Quebec where they did so in 1940). By the 1950's discriminatory laws against Chinese, Japanese and South Asian Canadian (citizens or not) were repealed,[143] and by 1960 even native people living on a reserve were enfranchised.[144]

Today, with the entrenchment of the Canadian Charter of Rights and Freedoms, Canadian citizens enjoy full constitutional rights, and most constitutional rights are enjoyed not only by Canadian citizens, but also by permanent residents and foreigners.[145] On the other hand, new divisions emerge and cast doubt on the supposed universality of Canadian law within the territory. I will now address these challenges, starting with the treatment of aboriginal peoples in Canada.

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[142] I. Greene, *The Charter of Rights* (Toronto: James Lorimer & Cie Publishers, 1989) at 10.
[143] In 1903, the British Columbia legislation which prohibited people from Japanese origins, even if they were naturalized, from voting in provincial elections was upheld (*Cunningham v. Homma* [1903] A.C. 151, C.C.S. 45). Cited in M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994) at 6.
[144] I. Greene, *The Charter of Rights, supra* note 142 at 10.
[145] In Chapter Two, I develop this point further : see text accompanying notes 301 and ff.

2. Aboriginal peoples and territoriality

Until the end of the 1960's, aboriginal peoples in Canada were denied the right to vote in provincial and federal elections. The *Indian Act*[146] applied to registered Indians only. Registration was and still is a 'choice': originally, native people could choose to register, and thus become "entitled to certain treaty rights, including land on a reserve, perpetual hunting and fishing rights (…)".[147] However, by doing so they were excluded from the Canadian political community and were denied the right to vote. If, on the other hand, they chose to renounce their Indian status, they would have their citizenship proclaimed and would receive a sum of money and a piece of land. As Harold Cardinal summarized, "[t]his choice gave access to liquor and the vote, the same privileges accorded to any citizen of Canada."[148] In other words, the choice was between political membership in one polity, or in another, but one could not be part of both at the same time.

Land has always been of the essence to aboriginal peoples, even if pre-Colombian societies were not operating upon the European model of territoriality. Self-governance implies a certain control over that land. But the creation of reserves, closed territorial units within the territorial state, removed them from the sphere of political membership. This is not to say that Indians reject the reserve system, or ask

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[146] *Indian Act*, R.S.C. 1985, c. I-5.
[147] H. Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969) at 19.
[148] *Ibid*.

for the repeal of the *Indian Act.* As Cardinal points out, in response to Jean Chrétien's (then Minister of Indian Affairs) proposal to "Get rid of the Indian Act" and "Treat Indians as any other Canadians"[149]:

> We do not want the Indian Act retained because it is a good piece of legislation. It isn't. It's discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights.[150]

The creation of territorial *enclaves* can be justified by the need to recognize Indians' right to self-governance and autonomy and to give effect to the treaties signed between the Canadian government and the Indian peoples. Yet the end result is the creation of two political memberships, and the regulation of the residents of the reserves by laws that apply to no one but them.[151]

Two Supreme Court cases (*Drybones*[152] and *Lavell*[153]*)* are relevant in this context. Courts struggled with the claim that legal consequences attached to Indians and not to other Canadians solely by virtue of their identity as registered Indians. Thus laws, which were presumed to have the same effect across the territory, were fragmented

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[149] *Ibid* at 29.
[150] *Ibid* at 140.
[151] Take, for example, the offence of "being intoxicated off a reserve": *The Queen v. Drybones*, [1970] S.C.R. 282.
[152] *Ibid*.
[153] *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349.

and applied only to certain people based on personal, not territorial, characteristics. The question of distinct treatment was complicated by the fact that in order to invalidate enacted provisions of the *Indian Act,* courts had also to overcome the fact that the *Canadian Bill of Rights*[154] was not constitutionally entrenched. Nonetheless, in *Drybones*, the offence of being intoxicated off a reserve was declared discriminatory by six judges, but three refused to invalidate the impugned *Indian Act* provision. Justice Pigeon dissented, pointing out that the equality principle simply meant that all Indians had to be treated on an equal footing across provinces.

In *Attorney General of Canada v. Lavell,* the opposite view prevailed, with the majority of the Supreme Court of Canada refusing to declare inoperative the provision that denied an Indian woman her status as Indian when she marries a non-Indian. The fact that such a provision applied only to Indian women, rather than Indian men, was not seen as a violation of the *Canadian Bill of Rights*, and the provision was upheld.[155]

With the adoption of the Charter and Canada's "rights revolution",[156] individual rights became at the core of Canadian constitutionalism. Many areas of rights protection improved, notably in the way in which the right to equality protected

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[154] S.C. 1960, c. 44.
[155] Since then, many challenges were laid. In *McIvor v. Canada,* 306 DLR (4th) 193, the British Columbia Court of Appeal held some provisions of the *Indian Act* to be unconstitutional; as a consequence, Bill C-3 *Gender Equity in Indian Registration Act* came into force on January 1st, 2011.
[156] See, on this expression, L. E. Weinrib, "'This new democracy…' Justice Iacobucci and Canada's Rights Revolution" (2007) 57 U. of T L.J. 399 at 403.

aboriginal peoples,[157] but fundamental questions such as whether acts and decisions of aboriginal institutions ought to be subjected to the Charter remain controversial. That aboriginal peoples can invoke Charter rights when provincial or federal enactments violate the Charter is unequivocal. But whether the Charter applies to decisions and enactments of aboriginal institutions has been debated.[158] For some, the *culture* of individual rights is irreconcilable with the sense of duty and obligation which perfuses aboriginal traditions[159] as well as the belief that if rights are to be recognized, they ought to be collective, not individual rights. The Charter can be perceived by these authors as an arrogant, colonialist tool used to tone down the specificity of aboriginal culture. According to Patrick Macklem, for example, the Charter poses "a risk to the continuing validity of Indigenous difference".[160]

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[157] See *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203. Justice L'Heureux-Dubé recalled that the approach to equality which prevailed in *Lavell* was rejected in *Andrews v. Law Society,* [1989] 1 S.C.R. 143 at para. 87.

[158] See *Six nations of the Grand River Council v. Henderson*, [1996] O.J. No. 1953 (O.C.(G.D.)), which concerned the review of a by-law infringing section 15 of the Charter, and *Grismer v. Squamish Indian Band*, [2006] F.C. 1398 (CanLII), which concerned the judicial review of the *Membership Code* of 2000 (Band Membership rules promulgated under section 10 of the *Indian Act,* R.S.C. 1985, c. I-5). Justice Martineau rejected the Band's argument that the Code is shielded from Charter scrutiny and found that s. 15 was infringed because the Code discriminated against adopted children. For further reading, see M. Morin & D. Blanchette, "Custom, Matrimonial Property and the Indian Act", *on file with authors.*

[159] For Dan Russell, while "rights theory" has been known to the common law system for long, it is less popular among aboriginal societies, who are "premised on an ethic of care and responsibility" and who "have traditionally been interested less in rights than in concepts of personal obligations": D. Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000) at 117-118.

[160] P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto : U of T Press, 2001) at 195.

This line of argument is reminiscent of that taken by the province of Quebec when the adoption of the Charter was under discussion.[161] But it is far from rallying all authors. Otis, for example, suggests a broad reading of s. 32, and advocates that the principle of "good governance" supersede a strict or literal reading of that section.[162] Good governance, for Otis, means simply that when an authority exercises public functions, that authority is clothed with the attributes of government and hence, its actions ought not to be immunized from Charter scrutiny.[163] The test is one of the *nature* of the action, not one based on the identity of the ruler. In any event, the fact that aboriginal people have occasionally attempted to strike down aboriginal decisions and enactments via a Charter challenge tends to support that position.[164]

3. Foreigners and territoriality

Under Canadian law, as a general rule, foreigners and citizens are to be treated alike.[165] Aside from some recognized exceptions, such as the right to vote expressly

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[161] See A.-G. Gagnon & G. Laforest, "The future of federalism: lessons from Canada and Quebec" (1993) 48 International Journal 470.
[162] G. Otis, "La gouvernance autochtone avec ou sans la Charte canadienne?" in G. Otis, ed., *Droit, Territoire et Gouvernance des Peuples Autochtones* (Saint-Nicholas: Presses de l'Université Laval, 2004) 127 at 149.
[163] *Ibid.* at 153.
[164] See the cases cited by G. Otis, *ibid.* at 140, notes 40 to 43.
[165] Henri Brun and Christian Brunelle question whether the citizen, the resident and the foreigner have the same rights under the Charter in H. Brun & C. Brunelle, "Les statuts respectifs de citoyen, résident et étranger, à la lumière des chartes des droits" (1988) 29 *Cahiers de Droit* 689; they conclude that notwithstanding some exceptions, the general rule is that they do: at 730. See also *Winner v. S.M.T. (Eastern) Ltd*., [1985] S.C.R. 887 as authority for the statement that Canadian citizens, permanent residents and foreigners are in principle entitled to the same rights and same obligations. *Contra*: H. Cyr contends that the entitlement of foreigners to constitutional rights depends on where they are located on the spectrum between full membership and no ties at all. Cyr argues that constitutional rights are based on either membership criteria (like the right to vote under section 3) or the inherent

reserved for Canadian citizens, there are some exceptions to this rule: when applying for a public sector position, for example, distinctions based on citizenship status do not necessarily amount to discrimination. In *Andrews*, the Supreme Court of Canada examined the denial of access to the provincial bar of a non-citizen who had otherwise fulfilled all the requirements for entry.[166] The Court established that as a general rule prioritizing Canadian citizens over foreigners was not discriminatory provided there was a link with the activity at stake, i.e. provided the distinction was rationally linked to the tasks to be performed. In the present case, however, possessing Canadian citizenship was held to be a discriminatory measure, since the Court found it had no link with the exercise of the legal profession.[167] In another case, the Supreme Court of Canada found that policies which limit non-citizens' access to public service jobs could violate section 15, but that such violation was justified on the grounds of creating a "sense of unity and shared civic purpose."[168] Aside from these work-related distinctions, which are not trivial, foreigners and citizens enjoy fundamental freedoms and rights and the right not to be deprived thereof in the same fashion. They enjoy the same right to free speech, the same right to life, etc. If there are work-related distinctions, those should be made on principled, not arbitrary bases. There must be, in the end, a rational connection between the citizenship status and the right that is being denied.

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character of rights (like the right to liberty under section 7): see generally H. Cyr, "Les droits et libertés des étrangers en situation irrégulière", *supra* note 132.

[166] *Andrews v. Law Society of British Columbia*, *supra* note 157.

[167] The distinction was not justified by "the legitimate work of government" and hence could not be validated.

[168] *Lavoie v Canada,* (2002) 1 S.C.R. 769*,* para. 57.

Recently, however, fundamental rights appear to resonate differently whether one is a citizen or not. Anti-terrorism law is an area where the lack of political membership is unconnected with the threat of security (which justifies the negation of a right). Nonetheless, distict treatment based on citizenship status has been validated by the Supreme Court of Canada. Under the *Immigration and Refugee Protection Act* ("IRPA"), only foreigners and permanent residents are subject to the procedures of security certificates. Citizens can face the provisions of the *Anti-terrorism Act*[169] if the act is in force. This distinction, some of the persons subjected to a security certificate alleged, is unconstitutional on the ground of equality (and, more importantly perhaps, on the ground that it violates fundamental freedoms and imposes undue detention time).[170]

The Supreme Court of Canada in *Charkaoui*[171] rejected the allegation of discrimination. The reasoning of the Court can be summarized as follows: (1) only Canadian citizens have the right to remain in Canada, as per s. 6 of the Charter; (2) only non-citizens can be deported on the ground of national security, and before they are deported, only they can be detained and have a security certificate issued against them; (3) as a result, as long as the detention is linked to the immigration procedure, section 15 of the Charter cannot be invoked to displace section 6 of the Charter. The Supreme Court of Canada found that the detention measures were linked to the

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[169] S.C. 2001, C-41.
[170] Before the constitutional challenge of these provisions, the detention of foreigners could be of an indeterminate duration, and an initial order could not be judicially reviewed before 120 days had lapsed. Citizens, for their part, could have a Court decision after 48 hours.
[171] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 129 & ff.

ultimate objective of deportation, which is an immigration law measure. Thus, because only non-citizens may face indefinite detention if they are suspected of being involved in terrorist-related activities, this situation is not, according to the Supreme Court of Canada, in violation of the right to equality.

There are two distinct issues with this ruling. First, if we follow the Court's line of reasoning, the connection with deportation measures means that the government plans on returning the detainees to their country of origin, irrespective of whether they face risks of torture upon return or not. But in doing so, the government would violate the *Convention against Torture*[172] and the general principle established in *Suresh*[173] and in *Jaballah* according to which deporting someone to torture violates the Charter.[174] On the other hand, if the government does not expulse the holders of security certificates, it will detain them for an indeterminate period and then, the connection with immigration law would be even more tenuous. Just by reading the Court's reasons, it is not clear which option would be preferable.[175]

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[172] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* Can. T.S. 1987 No. 36.
[173] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.
[174] *Re Jaballah*, [2006] C.F. 1230.
[175] Compare the Supreme Court's contradictory findings, in *Charkaoui*, that the IRPA "may in fact permit lengthy and indeterminate detention" (at para. 105) but that, contrary to the UK legislation, it "does not authorize indefinite detention" (para. 127). In the French version of the reason, the same word is used: the IRPA "peut en fait permettre une détention prolongée ou pour une durée indéterminée" (at para. 105); and the IRPA "n'autorise pas la detention pour une période indéterminée" (at para. 127).

Second, if I draw a parallel with the reasoning of *Andrews*,[176] it seems, with all due respect, that the real question is not whether detention is rationally linked to deportation or immigration law, but whether national security-based detention is rationally linked to citizenship. And to this, an affirmative answer would need to be evidence-based.[177]

And it might be difficult to gather such evidence. In the UK, the House of Lords faced a similar challenge in *A. v. Secretary of State (Belmarsh Detainees)*[178], in which it held that the British anti-terrorist legislation regulating control orders was discriminatory under the *European Convention on Human Rights* because it applied only to non-British citizens. According to the law Lords, nothing proves that foreigners are more likely to threaten national security than British citizens; consequently, nationality is an irrelevant consideration when establishing national security laws. History has proved the House of Lords right: three of the four suspects of the London July 2005 attacks were British nationals, born and raised in the UK to Pakistani parents. If we look at this situation through membership lenses, it appears

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[176] *Andrews v. Law Society, supra* note 157. Equality does not mean identity of treatment, but if "a rule bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational or professional qualifications, it infringes s. 15 equality rights". In other words, the distinctions are discriminatory because based solely on the status of citizenship, without regard to the attributes or merits of individuals in the group. To be valid, a distinction based on citizenship must be relevant to the issue at bar.

[177] See also J. Shapiro, "An ounce of cure for a pound of preventive detention: security certificates and the Charter" (2008) 33 Queen's L. J. 519: "the fact that detention occurs as part of a deportation scheme (of non-citizens) is irrelevant: the focus of the discrimination analysis should have been on the ease with which a security certificate permits a non-citizen to be deprived of liberty." (at para. 66).

[178] *A and others* **v.** *Secretary of State for the Home Department,* [2004] UKHL 56.

that in the UK, in this matter, non-citizens are included in the same sphere of membership as citizens, a fact which their presence within the territory suggests.

Territoriality posits that inside the Canadian territory, the right to equality belongs not only to citizens but also to permanent residents and to foreigners. If the right to equality applies to all those present in Canada, unless specifically provided, how is the *Charkaoui* result possible? The suspicion of foreigners may be attributed to what Crépeau and Nakache call a "securitization agenda"[179] or what David Lyon, writing in the aftermath of the September 11th 2001 attacks, calls the "culture of suspicion".[180] This culture is the result of a combination of increased surveilance techniques and anti-terrorism legislation which generates profiling categories such as "Muslim-Arabs". Profiling leads to the scrutiny of otherwise common actions such as sending money home or merely attending university as far as one is of Middle Eastern origin. All these initiatives lead to discrimination and to the exclusion of the "suspicious category".[181] They emphasize "social distinctions and divisions".[182]

If we return to the *Charkaoui* case, the distinction between citizens and non-citizens not only goes against the principles of equality and the idea that there need to be a rational connection between the deprivation of rights and citizenship status. It also

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[179] F. Crépeau & D. Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12 IRPP Choices at 4.
[180] D. Lyon, *Surveillance after September 11* (Malden, MA: Polity Press & Blackwell, 2003) at 37 and 45-53.
[181] *Ibid.*
[182] *Ibid.*

runs afoul of our engagement, as a society, to the legal principle of fraternity[183] because, as former Justice Gonthier wrote, "threads of fraternity" run through each case which seeks the achievement of substantive equality.[184] While the policy-reasons behind this choice are beyond the scope of this thesis, it is clear that they cannot be sustained on the tenuous justification of powers inherent in immigration law.[185]

4. Summary

Political membership and equal access to constitutional rights by foreigners and aboriginal peoples raise issues of *intraterritoriality,* or territoriality from "within". They highlight the fact that political membership and the entitlement to equal rights have not, and do not follow territorial lines, even if the principle of territoriality is often justified by this ethical argument. The purpose of identifying these weaknesses is simply to tone down the paradigmatic value of the principle and to demonstrate that it promises more than it delivers.

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[183] See N. Desrosiers, "Réflexions critiques sur les implications de la 'fraternité'", Symposium in honour of Charles D. Gonthier, Faculty of Law, McGill University, 21 May 2011 [unpublished].
[184] G. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill L.J. 567 at 577.
[185] See also, on this point, M. Duffy & R. Provost, "Constitutional canaries and the elusive quest to legitimize security detentions in Canada" (2009) 40 Case West. Res. J. Intl'l. L. 531.

C. Authority and territoriality

Territoriality, as explained above, determines both the existence of a legal order and the *assise de juridicité*, i.e. the normative platform of that legal order. In other words, that the law of each sovereign stops at the border of its territory, beyond which there is no legal order, is one of the theoretical foundations of the territorial paradigm. Yet one cannot say that today law is kept within the territorial boundaries of each state; instead, states do, quite frequently, exercise state authority abroad. The question is whether they can exercise this authority free of the constraints of the Constitution *because* they act outside of this territory.

As explained earlier, in the definition of territoriality, the holder of absolute authority is the sovereign, and the only place where that authority is exercised is within the geographically defined state territory. The work of Jean Bodin left the Sixteenth century with the notion that sovereignty is indivisible and absolute, i.e. "that the exercise of supreme authority could not be restrained within [the state's] territory by any independent agent."[186] There is, thus, a convergence between authority, territory and sovereignty.

And yet this convergence has not gone unchallenged. The cultural geography or human geography movement has been a particularly powerful voice against the

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[186] J. H. Franklin, ed., "Introduction" in Jean Bodin, *On Sovereignty : Four chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992) at xxiii.

mainstream approach to territoriality by advocating the "unbundling" of territoriality, sovereignty and authority. John Ruggie characterized the "bundling" of sovereignty with territoriality as a remnant of the Westphalian heritage which embodies the double presumption that (a) "each state commands a monopoly of legitimate power within its own domain and is entitled to exercise it without legal interference" and that (b) this monopoly is exercised in a domain delineated by "self-enclosed, mutually exclusive borders".[187]

The "unbundling" of the two ideas of sovereignty and territoriality is precisely what allows the exercise of some kind of authority without the attributes of sovereignty to produce normative consequences that are, technically, reserved to state action. What was previously introduced as the container metaphor, i.e. the vision of each individual state as a container, exercising political control on the inside and international relations on the outside, is not anymore an adequate representation of reality.[188]

To a certain extent, the unbundling of territoriality, sovereignty and authority has already occurred. And states' involvement in foreign countries has already led to many claims, by foreigners, that legal consequences, including damages, must flow

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[187] J. G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) International Organization 47, no. 2.
[188] See R. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1992).

from these displays of authority. Many of these claims, though not expressly mentioning it, relied on the unbundling of sovereignty and authority.

In *Al-Saadoon*, for example, the United Kingdom Court of Appeal denied to Iraqi applicants the benefit of the *Human Rights Act*[189] provisions and the European Convention of Human Rights on the basis that British officers, when operating their detention facility in Iraq, were not entitled to the prerogatives "which ordinarily fall to the State's executive government".[190] In other words, they had control over a detention facility, and they had control over the persons arrested and detained, but they were not acting *as government*. The House of Lords denied to hear the appeal, but the European Court of Human Rights found, interestingly, that those elements of control were sufficient to establish the United Kingdom's jurisdiction (*de facto* and *de jure*) under section 1 of the the European Convention on Human Rights (the jurisdiction provision).[191] The European Court found that the European Convention of Human Rights could control the impugned actions of British authorities in Iraq, even if they did not hold *all* the prerogatives of government.

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[189] *Human Rights Act 1998,* 1998 c-42.
[190] *Al-Saadoon v. Secretary of State for Defence*, (2009) EWCA (Civ) 7, at para. 39.
[191] *Al-Saadoon and Mufdhi v. United Kingdom,* App. No. 61498-08, ECtHR, 2 March 2010 (judgment on the merits) at para. 140. In the decision on admissibility, the nature of *de facto* and *de jure* control was expounded: *Al-Saadoon and Mufdhi v. United Kingdom,* App. No. 61498-08, ECtHR, 30 June 2009, at para. 88. More recently, in the decision by the Grand Chamber in *Al-Skeini,* the Court found that the British authority did exercise "some of the public powers normally exercised by a sovereign government" when it was acting in Iraq: *Al-Skeini & Others v United Kingdom* [2011] ECHR 1093 (7 July 2011) at para. 149. The House of Lords had accepted this reasoning for only one of the six claimants. The European Court extended it to all six. More will be said on this development: see text accompanying footnotes 207 and ff. & 856, *infra*.

The relationship between authority and sovereignty transpires from the recent Canadian case in *R. v. Hape*.[192] Canadian officers thoroughly investigated the premises of Richard Hape, a Canadian citizen operating a business in Turks and Caicos. The Royal Canadian Mounted Police technical team searched the premises and seized materials without a mandate, and filed these documents during Hape's trial in Canada. Mr. Hape attempted to have these documents removed from the court's record on the basis of an infringement of section 8 of the Charter (protection against unreasonable search and seizure), and to sections 7 and 11 as well (right to a fair trial). Canada argued that its authority could be exercised without constitutional checks *because* those checks normally only limit actions performed by the sovereign, acting as sovereign. The Supreme Court of Canada agreed: it concluded that M. Hape could not claim the benefit of section 8 of the Charter and justified this conclusion (among other justifications) by the fact that when acting in Turks and Caicos, Canada lacked the *authority* to perform actions normally reserved to sovereign states.[193] As a result, Charter limitations on the state power to conduct search and seizure could not operate as a check on Canada's actions in Turks and Caicos.

On the other hand, Canada's involvement in Guantanamo Bay has led to one instance of unbundling sovereignty, authority and territory. The Canadian Secret Intelligence Service (CSIS) interrogated Mr. Omar Khadr, a Canadian citizen captured in

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[192] *R. v. Hape*, *supra* note 16.
[193] *Ibid.* at paras. 69 and 81.

Afghanistan and detained in Guantanamo, and forwarded the results of these examinations to the American authorities. When Mr. Khadr demanded to have access to these records, he was denied disclosure on the basis that the Charter, and the disclosure obligation derived from section 7, did not *apply* to him because, presumably, when Canadian officers were conducting these interrogations, they were acting outside of the purview of the Charter.

The Supreme Court of Canada ruled however that section 7 of the Charter did apply to Mr. Khadr, notwithstanding that he was detained outside Canada, and ordered the government to disclose the results of these examinations to him.[194] Two years later, the Supreme Court of Canada issued another judgment in the Khadr saga, reiterating its finding of a Charter breach.[195] Although these cases will be explored in other parts of this thesis, it is crucial to point out from the outset that the unbundling was not justified by the recognition that Canada exerted some form of authority which had to be subjected to constitutional limitations irrespective of where this authority was exercised; rather, it was recognized because of the role that the Court gave to international norms. It is only because the actions violated key international human rights obligations that the Court found that the Charter could apply extraterritorially.

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[194] *Canada v. Khadr*, [2008] S.C.R. 125 [hereinafter *Khadr-1*].
[195] *Canada v. Khadr*, [2010] S.C.R. 44 [hereinafter *Khadr*-2]. This judgment raises particular issues regarding the choice of remedy: instead of ordering repatriation, as the lower courts had done, the Supreme Court rather left the government a discretion to decide what remedy could be appropriate, in the sake of protecting the prerogative of the executive in foreign affairs. Can it be said, for example, that in doing so, the Court "re-territorialized" the scope of application of the Charter? These issues will be discussed in Chapter Three, *infra,* text accompanying notes 452 and ff.

In the United States, the same debate is taking place. The issue, here again, boils down to whether the *sovereign* can exercise a certain type of *authority* in a foreign state without being constrained by the provisions of its domestic bill of rights. In *Boumediene,* for example, the American Government argued that detainees at Guantanamo Bay were not entitled to file habeas corpus briefs before US courts because the US Constitution did not apply outside of the US territory. In particular, the government pleaded that to determine the reach of the constitutional right at stake, one must use a "formalistic, sovereignty-based test"[196] which relies on territoriality as its main component. Since Guantanamo Bay is outside of the territorial jurisdiction of the United States, the argument goes, the Constitution cannot produce legal effects on that territory.

The majority of the Supreme Court disagreed: in order to determine whether the US Constitution constrains extraterritorial actions, a functional approach should be followed: it is not a yes or no type of inquiry.[197] In passing, the Supreme Court in *Boumediene* addressed the question whether the scope of application of the Constitution could, itself, be determined by government. In its opinion, to grant the government such power to "switch the Constitution on or off at will"[198] would run

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[196] *Boumediene v. Bush,* 553 U.S. 723 (2008); 128 S.Ct. 2229 [hereinafter *Boumediene*] at 2257 (Kennedy J., plurality opinion).
[197] This approach is explained in Chapter Four, see text accompanying note 676, *infra*.
[198] *Boumediene v. Bush, supra* note 196 at 2259 (per Kennedy, J.).

afoul the separation of powers doctrine as expounded by Marshall J. in *Marbury v. Madison.*[199] It is up for the courts, not the executive, to make such a determination.

The second case involved the detention of prisoners in Bagram, Afghanistan. The government also opposed the application of the US Bill of Rights on the basis of a lack of *de jure* and *de facto* sovereignty over the Bagram base in Afghanistan, which, contrary to Guantanamo Bay, was a theater of war. The trial court[200] held that the claimants were entitled to habeas corpus in the same fashion as were prisoners held in Guantanamo, but the Court of Appeals quashed the decision, distinguishing the *Boumediene* set of facts by holding that, contrary to Guantanamo Bay, Bagram was an active theater of war, and that it would be impractical for the United States to provide constitutional guarantees in a war setting.[201] In other words, the exercise of authority must be accompanied by other criteria to trigger the application of constitutional limitations, including pragmatic ones. The extent of the control exercised by American authorities on the foreign territory is but one of the factors to weigh in the balance.

All of these cases illustrate the discrepancy between the territorial paradigm, which, under Westhpalian orthodoxy, relies on the premise that each sovereign exercises its absolute authority within its territorial borders, and the facts on the ground. Though

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[199] *Marbury v. Madison,* 5 U.S. 137 (1803).
[200] *Al Maqaleh, et al., v. Gates, et al.,* 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 1:06-cv-01669) (Bates, J.).
[201] *Al Maqaleh v. Gates*, 605 F. 3d 84 - Court of Appeals, Dist. of Columbia Circuit 2010 [hereinafter *Al Maqaleh v. Gates*].

many of these cases do not present the extraterritorial application of bills of rights as a fragmentation of the unity of authority, sovereignty and territoriality, this fragmentation is a necessary step if one is to hold that authority, wherever exercised, and irrespective of whether it is clothed in the full attributes of territorial sovereignty, should be exercised in accordance with the Constitution.

D. The meaning of "territory" and territoriality

So far, the territorial paradigm has relied on a strictly physical conception of the territory. In the definition section, I briefly addressed the fact that competing notions of territory exist and render a definition exercise difficult. Nonetheless, it is essential to specify what is meant by alternative conceptions of territory. First, an alternative conception is built on an abstract notion of territory. Contrary to law, which is frequently conceived as immaterial, law's territory is often exclusively understood in a material or physical sense. Constitutional law, for example, can be conceived as written and unwritten, tangible and intangible. In Canada, constitutional conventions and implicit principles top off and even displace the constitutional text on some occasions; but according to the territorial orthodoxy, the space of constitutional law is territorial, and the territory is itself conceived as land, as geography.

But, one may ask, what about relational spaces? What about relational territory? Consider the work of Andrea Brighenti on the relational aspects of territory. Brighenti illustrates how the traditional dichotomy between *jus sanguini* or personal

jurisdiction and *jus soli* or territorial jurisdiction becomes annihilated if one entertains a relational conception of territory.[202] Strict "territorial jurisdiction" and "personal jurisdiction" can both be seen as *territorial*. In the first case, the territory is in fact the locus of the relationship between land and law, while in the other case the territory is the relationship between people and law. The relational conception of territory means that the territory cannot be reduced to its physical space: the territory is both space and relation.

It can be argued that the House of Lords, in its decision in *Al-Skeini*,[203] favored a relational conception of the territory by drawing a distinction between the *legal system* to which the *Human Rights Act*[204] applies, and the *people and conduct* to which it applies. Only the former is linked to "physical geography". The latter is not. The facts of that case were as follows: five Iraqi nationals were killed by British military patrols in Basra. The sixth one, Mr. Mousa, was seized at the hotel where he was working; he was detained in a British military base, where he was severely beaten by British troops. He died of his injuries shortly thereafter. At issue was whether a public authority acting outside of the United Kingdom's territory could nonetheless be acting within Parliament's legislative grasp and give rise to the remedies provided for in the *Human Rights Act*. In other words, the House of Lords had to determine whether the *Human Rights Act* could have extraterritorial scope,

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[202] A. Brighenti, "On Territory as Relationship and Law as Territory" (2006) 21 Can. Journal of Law and Society 65 at 84.
[203] *Al-Skeini and others v. Secretary of State for Defence*, [2007] UKHL 26 [hereinafter Al-Skeini].
[204] *Human Rights Act, supra* note 189.

contrary to the presumption of territoriality of statutes and the principle of comity among nations.

The Lords (and Baroness Hale of Richmond) found that the Act *could* have such an extraterritorial scope. One of the explanations given was the distinction between the *legal system* to which it applies – in this case, the British legal system – and the people or conduct to which it applies. That the Act is deemed to apply only within the British legal system does not preclude its application to conduct of British officials operating abroad which impacts people physically outside of the British territory. The "territory" of law, in this perspective, is not superimposed on the British territory, but to the relationship between the United Kingdom, the British *conduct* and the *people* subjected to it:

> In particular, there is an important difference between *the legal system* to which any Act of Parliament extends and the *people* and *conduct* to which it applies. (…) As Lord Hoffmann pointed out, in para 1 [of the decision in *Lawson v Serco Ltd* [2006] UKHL 3; [2006] ICR 250]:
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> "It is true that section 244(1) [of the 1996 Act] says that the Act 'extends' to England and Wales and Scotland ('Great Britain'). But that means only that it forms part of the law of Great Britain and does not form part of the law of any other territory (like Northern Ireland or the Channel Islands) for which Parliament could have legislated. It tells us nothing about the connection, if any, which an employee or his employment must have with Great Britain."

> The Human Rights Act extends to England and Wales, Scotland and Northern Ireland: see s 22(6). But by itself this tells us nothing about the public authorities to which section 6(1) applies, or about the acts to which it applies, or about the people for whose benefit it applies.[205]

But there is more. To be able to win their case, the six appellants had to demonstrate in addition that they fell within the jurisdiction of the United Kingdom under article 1 of the *European Convention on Human Rights*.[206]As Lord Rodger of Earlsferry recalls, the teachings of the European Court of Human Rights define jurisdiction in section 1 of the ECHR as strictly territorial.[207] Again, all six victims were physically in Basra, Iraq, an area the Lords deemed outside of the territorial control of the United Kingdom's army. One of the deceased, Mr Mousa, died pursuant to beatings he was inflicted in a British detention camp by the British. The Secretary of State accepted that "since the events occurred in the British detention unit, Mr Mousa met his death "within the jurisdiction" of the United Kingdom for purposes of article 1 of the Convention". The other five were shot by British officers during military patrols by British troops. The House of Lords recognized to Mousa the relief sought, but denied it to the five others.

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[205] *Ibid.* at paras. 86-87.

[206] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [hereinafter the *ECHR* or *The European Convention on Human Rights*].

[207] *Al-Skeini, supra* note 203 at paras. 68 and ff. He adds, at para. 69, that "it would have been open to the European Court to depart expressly from *Bankovic* and to explain why it was doing so. Nothing like that has happened, however." Four years later, the European Court of Human Rights took up the challenge and ruled that the European Convention of Human Rigths applied to all six plaintiffs. It clarified (and diluted) previous European caselaw by holding that although jurisdiction is primarily territorial, i.e. confined to the member state's territory, there are "exceptions" to that principle and those exceptions need not be limited to controlling foreign territory: see *Al-Skeini & Others v United Kingdom* [2011] ECHR 1093 (7 July 2011) at paras. 131-142.

In order to account for the possibility that five victims be outside the *territorial* jurisdiction of the United Kingdom, and that one be within it, while all six died in the same *geographical* area, it is necessary to look beyond the territory as mere physical space. The territoriality of the Convention (and, arguably, that of the *Human Rights Act*) must depend on the *connection* between the acts of the public authority and the persons subjected to these acts. It is relational: both instruments may cover actions of British officials in their dealings with civil population, mediated by the British legal system. But both require, as a prerequisite, that there be a necessary degree of involvement by the British public authority, and in that case, the House of Lords found that the involvement was made through the British authority's exercise of control over the violation perpetrated against only Mr. Mousa's rights. The European Court agreed, and extended this reasoning to all six applicants by identifying a sufficient "jurisdictional link" between these applicants and the United Kingdom.[208]

E. Cosmopolitanism and territoriality

Globalization has often been invoked as a primary challenge to territoriality. Cosmopolitanism, transjudicialism and globalization discourses abound[209] and tend

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[208] The Court found that the United Kingdom exercised in Iraq "some of the public powers normally to be exercised by a sovereign government", in particular the maintenance of security. As such, the UK had "authority and control" over the victims of those security operations, and this is sufficient to create a jurisdictional link for the purpose of Article 1 of the Convention: *ibid.* at para. 148.

[209] See generally, D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995); S. Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005); A.-M. Slaughter, *The New World Order* (Princeton: Princeton University Press, 2005); S. Benhabib, *The Rights of Others*

to suggest that globalization has signalled "the end of territories".[210] That observation, however, is only true if globalization is thought to lead to the destruction of geographical frontiers, which in turn is believed to lead to the absence of fixed territories.[211] This is not always the case, as will be seen below.

A prominent advocate of cosmopolitanism, David Held, denounces the traditional "congruence" between state policies or decisions and the territorially-delimited recipients of those actions.[212] In his view, there are too many global interconnections to hold that domestic policies only impact the domestic territory. The fact that "territorial boundaries" still demarcate "the basis on which individuals are included in and excluded from participation in decisions affecting their lives" is irreconcilable with the fact that "the outcome of these decisions often 'stretch' beyond national frontiers."[213]

Held makes the following observation: "[e]xisting systems of geo-governance have failed to provide effective democratic mechanisms of political coordination and change."[214] He specifically looks at the Westphalian model of governance to

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(Cambridge: Cambridge University Press, 2004). See also S. Chauvier, *Du droit d'être étranger: Essai sur le concept kantien d'un droit cosmopolitique* (Paris: L'Harmattan, 1996).

[210] The expression is from Bertrand Badie's *La fin des territoires, supra* note 112.

[211] Sociologist Didier Bigo warns us against too soon an equation: globalization can multiply rather than erase territorial lines. See D. Bigo, "Frontières, territoire, sécurité, souveraineté", *supra* note 30 at 7.

[212] D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995) at 16. The other false assumption is that there is symmetry or congruence "between citizens-voters and the decision-makers whom they are, in principle, able to hold to account;" *ibid* at 16.

[213] *Ibid.* at 18.

[214] *Ibid.* at 268.

conclude that its efficacy has been seriously challenged and undermined by the emergence of the global order (consisting of the rise of global economy, the expansion of international organizations, etc.).[215] Cosmopolitan democracy is an alternative, more promising governance model which relies on a greater role played by the United Nations. The UN becomes not only a potential forum for international questions, but also "an autonomous agency" capable of sustaining the new democratic polity.

In practice, the first steps towards the achievement of cosmopolitan democracy are the reform of the United Nations Security Council, the enhancement of political regionalization, the establishment of compulsory jurisdiction for international tribunals and the establishment of a single military force for all nations.[216] The cosmopolitan model would then bear close resemblance to political state structures, by seeking "the creation of an effective transnational legislative and executive, at regional and global levels, bound by and operating with the terms of the basic democratic law." To enforce the new "law" enacted by the new "democratic international assembly" and enshrined within the national parliaments, there needs to be coercive mechanisms as well.[217]

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[215] *Ibid.*
[216] *Ibid.* at 279.
[217] *Ibid.* at 275-276: "it is dangerously over optimistic to conceive the cosmopolitan model without coercive powers, because tyrannical attacks against democratic law cannot be ruled out."

The establishment of cosmopolitan membership presupposes a global order consisting of "multiple and overlapping networks of power"[218] and multiple polities in which one may become a member. Under cosmopolitan citizenship, membership is recast not in terms of one's belonging to a territorially-anchored community, but rather in terms of one's belonging to the global world order *and to multiple polities*. Legal cosmopolitanism presupposes a conception of the community that transcends national borders. The globalized world itself becomes the new polity (containing several different and overlapping ones).

And this is where a grey zone lies. Held suggests that people will be able to enjoy membership "in the diverse communities which significantly affect them and, accordingly, access to a variety of forms of political participation."[219] He adds that citizenship will be *extended* "to membership in all cross-cutting political communities, from the local to the global."[220] But he suggests, as I mentioned above, that national parliaments adopt the new "cosmopolitan democratic law"[221], which implies that, to the very least, those parliaments will remain in place. If my understanding is correct that the Westphalian model is not extinguished but simply becomes *one of the* models out there, I think an important challenge comes from the basic principle that the closest level of governance is usually the most efficient, fair

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[218] *Ibid.* at 271.
[219] *Ibid.* at 272.
[220] *Ibid.*
[221] *Ibid.*

and accountable one to the citizen.[222] There might not be a great incentive to "go global".

On the other hand, if the Westphalian model is altogether annihilated and all membership boundaries are removed, there is, as Shachar predicts, a risk of "throwing out the baby with the bath water",[223] i.e. losing the current benefits of a direct link between the citizen and the state, while not being sure to provide an equivalent set of benefits (and obligations) to global citizens. For Shachar, this is one of the reasons why world citizenship is not the best way to embrace a more inclusive allocation of political membership.[224]

The problem of political legitimization of cosmopolitan action is an illustration of the dichotomy between state-centric structures, and global, cosmopolitan ones. If political legitimacy is "*déjà difficile dans un cadre national, elle le devient d'autant*

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[222] According to Anthony Scott and Albert Breton, lower levels of jurisdiction are, in principle, "more responsive to the desires and demands of local citizenry" as they "deal with fewer citizens, possibly more homogeneous groups of preferences, and with local issues." See A. Breton and A. Scott, *The Economic Constitution of Federal States* (Toronto, University of Toronto Press, 1978), at 5-6. David Held's conception can be contrasted with other visions of cosmopolitanism which rely on a combination of global management *and* proximity with local populations: see K. Benyekhlef, *Une possible histoire de la norme: les normativités émergentes de la mondialisation* (Montreal: Thémis, 2008) at 690.

[223] A. Shachar, "Against birthright privilege: redefining citizenship as property" *supra* note 115 at 270. Shachar questions why "accidents of birth should acquire such significant legal meaning in the process of defining entitlement to political membership" (*ibid.* at 263).

[224] In *The Birthright Lottery*, Shachar examines two potential remedies for the distribution problems caused by birthright citizenship: the abolition of borders, advocated by cosmopolitanism; and the resurrection of borders. Regarding the former, she also argues that abolishing bounded communities and statehood mechanisms may erase each state's "distinct and inevitably complex history, identity narratives, political struggles, social experiments, linguistic diversity" and lead to a "disintegration of the social bonds" within the community. See A. Shachar, *The Birthright Lottery* (Cambridge: Harvard University Press, 2009) at 45 and following. Recall that one of the underlying purposes of territoriality is the fostering of community ties: see C. Nunez, "Fractured Membership", *supra* note 94.

plus dans un cadre cosmopolitique pour lequel nous manquons de détails et dont la netteté conceptuelle est encore en devenir."[225] If such political legitimization has been taken into account in David Held's model, which, as pointed out above, bears close resemblance to the nation-state but on a global scale, it is more difficult to tackle it when cosmopolitanism "n'est précisément pas un régime national projeté à grande échelle."[226]

Irrespective of these shortcomings, cosmopolitan democracy is a model through which challenges to territoriality can be expressed and, if it leads to global constitutionalism, cosmopolitan democracy can help assess a new scope for constitutional rights. This is how it can be useful to this thesis. Supporters of global constitutionalism reject the principle that rights should follow territorial lines. They conceive each person as a member of a larger, non state-centered, polity. Globalists believe in the "important idea that all mankind has inalienable natural rights against the government."[227] They support the idea that there is no "inherent spatial dimension to the law"[228] and this applies to constitutional law as well. In the United States, for example, Louis Henkin advocates a reading of the US Bill of Rights which would not only encompass those "who were party to the compact" but also "of

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[225] K. Benyekhlef, *Une possible histoire de la norme: les normativités émergentes de la mondialisation, supra* note 222 at 689.
[226] *Ibid.* at 686, citing U. Beck, *Pouvoir et contre-pouvoir de l'ère de la mondialisation* (Paris : Flammarion, 2003) at 111.
[227] J. Andrew Kent, "A Textual and Contextual Case against a Global Constitution" (2007) 95 Geo. L.J. 463 at 470.
[228] K. Raustiala, "The Geography of Justice", *supra* note 79 at 2550.

all others who come within [the United States'] jurisdiction."[229] Henkin adds that "[t]he choice in the Bill of Rights of the word "person" rather than "citizen" was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings."[230]

I will not, at this point, further develop global constitutionalists' arguments. For the moment, I only underline the fact that global constitutionalism is being endorsed neither by American courts (as Chapter Four will show) nor by Canadian courts (as Chapter Five will show). This is not to say that it has no potential to mitigate the territorial paradigm in Canadian law: global constitutionalism has been connected by at least one author to the idea of a "common law constitution"[231] which is contrasted with the territorial Westphalian legal system. According to Mark D. Walters, the emergence of the common law constitution can be seen as an answer to the problem of rigid territorial law. The common law constitution can be tied to Kant's cosmopolitan law, which posits a global legal order that would transcend territorial boundaries.[232] In this view, states would be bound by global law, whether or not they consent to it and legal black holes (such as the one in which Guantanamo Bay detainees find themselves, being subjected to neither domestic constitutional law, nor international humanitarian law) would be eliminated.

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[229] L. Henkin, "The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates" (1985) 27 Wm & Mary L. Rev. 11 at 32.
[230] *Ibid.*
[231] M. D. Walters, "The Common Law Constitution and Legal Cosmopolitanism" *in* D. Dyzenhaus, ed., *The Unity of Public Law, supra* note 60 at 441.
[232] See, generally, I. Kant, *Toward Perpetual Peace and other writings on politics, peace and history*, edited by P. Kleingeld *et al.* (New Haven: Yale University Press, 2006); see also D. Archibugi, "Immanuel Kant, Cosmopolitan Law and Peace" (1995) 1 E.J.I.R. 429.

Again, more will be said on the issue of global constitutionalism in the last two chapters. For the moment, is bears noting that cosmopolitanism attempts to establish normativity outside of methodological nationalism based on the postulate that all human beings can be part of a supra-national polity by virtue of their humanity rather than their political membership in a bounded community. As such, it is irreconcilable with the Westphalian territorial ideal.

F. Border manipulation and territoriality

What is the consequence of over-emphasizing physical location (within a state's territory) as a trigger for the application of law in general, and constitutional rights in particular? If rights are attributed on the basis of physical presence only, this may prompt states to do everything in their power –executive or legislative – to limit access to their territory. And in doing so, they would not necessarily breach any obligations or duties, as the right of the state to control entry is not challenged: "the stranger who arrives at the border claiming a political right to the same advantages of membership as a citizen will meet a state apparatus which is deaf to all political rights except those of members".[233]

According to Dworkin, political officials not only have the right but a duty to favor members over strangers, as they are entrusted with "a special and complex responsibility of impartiality among the members of the community, and of partiality

[233] D. Galloway, "Strangers and Members: Equality in an Immigration Setting", *supra* note 132.

toward them in dealings with strangers."[234] Less explicitly, Rawls recognizes that governments must, as agents of a people politically organized, maintain the integrity of the territory in which they live, qualified as an *asset*. This asset, in this perspective, needs to be cared for by the people who inhabit the land, and shielded from migrating people's trespass. According to Rawls, "it does not follow from the fact that boundaries are historically arbitrary that their role in the Law of Peoples cannot be justified."[235] Walzer is yet another voice supporting the right of governments to limit entry. His theory of distributive justice both allows for and defends the "(limited) right of closure, without which there could be no communities at all, and the political inclusiveness of the existing communities. For it is only as members somewhere that men and women can hope to share in all the other social goods –security, wealth, honor, office and power –that communal life makes possible."[236]

One consequence of adopting a strict territorial approach to the allocation of rights is the proliferation of blocking strategies: aggressive government policies stopping foreigners from getting in. In other words, allocating rights on the basis of territorial presence only inevitably invites manipulation of the frontier and governmental over-reaction.[237] This is shown, for example, when governments do not hesitate to

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[234] R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 173.
[235] J. Rawls, *The Law of Peoples, supra* note 60 at 38-39.
[236] M. Walzer, *Spheres of Justice, supra* note 53 at 63.
[237] S. Benhabib, *The Rights of Others, supra* note 209 at 117 and ff. questioning Walzer's premise that the Sovereign has an absolute right to decide who gets inside the border, opening the way to governmental abuse.

intercept refugees on the high seas to prevent them from entering the territorial waters and hence, becoming entitled to constitutional rights.

In Canada, such a result was very clearly in the mire of the legislator when, as a consequence of the Supreme Court decision in *Singh v. Canada (Minister of Employment and Immigration)* the immigration legislation was amended. In the *Singh* case, a majority of the Supreme Court held that the challenged right to freedom, liberty and security, and the right not to be deprived thereof except in conformity with the principles of fundamental justice, apply equally to all those within Canadian territory, including refugee status applicants.[238] The decision prompted the Canadian government to adopt a series of legislative measures designed to limit access *to* Canada, including the *"Deterrents and Detention Act",* or Bill C-87,[239] which allowed Canadian authorities to "turn away ships at sea by force" if they had reasonable grounds to believe that they carried people in violation of the Act (i.e. without proper travel documents). Recently, in the aftermath of the arrival, on board the MV Sun Sea, of almost five hundred Tamil asylum seekers in August 2010, the Conservative government introduced Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act.* Under this proposed legislation, the Minister may order that the arrival of a group of people be designated as an "irregular arrival" if it meets certain criteria; automatically, the foreign

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[238] *Singh v. Canada (Minister of Employment and Immigration),* [1985] 1 S.C.R. 177 [hereinafter *Singh v. Canada* or *Singh*]. This decision will be analyzed thoroughly in the next chapter.
[239] For a thorough analysis of the post-*Sing* legislative response, see M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada,* supra note 143 at 244-248.

nationals that are part of that group become "designated foreign nationals". They can be detained, and their detention cannot be reviewed any sooner than 12 months after the day of initial detention[240] and under no circumstances any time sooner (compare to 48 hours for permanent residents, foreign nationals and persons detained under the authority of a security certificate). The Bill also increases by 20 times the fines that the operator of a vessel may be charged if he refuses to comply with a ministerial order not to enter Canada (from $10 000 to $200 000) for a first contravention.[241]

In the United States, the case in *Sale v. Haitian Center* is famous for the Supreme Court's recognition of the right of authorities to intercept refugees on the high seas to prevent them from reaching US territorial waters.[242] In Australia, similar strategies led to the adoption of the Pacific Solution after the interception of the MV Tampa, a boat carrying about 430 Afghan and Iraqi refugees.[243]

These examples emphasize the fact that the combination of a focus on territoriality and a vision of the territory as the state's geographical borders may result in states being actively engaged in not only controlling their borders but also in moving them,

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[240] New s. 57.1(1) of *the Immigration and Refugee Protection Act,* Clause 12 of Bill C-4 : *An act to amend the Immigration and Refugee Protection Act, the Balance Refugee Reform Act, and the Marine Transportation Security Act* (short title : *Preventing Human Smugglers from Abusing Canada's Immigration System Act*), introduced on 16 June 2011.
[241] New s. 17 of the *Marine Transportation Security Act,* Clause 27 of Bill C-4, *ibid.*
[242] *Sale v. Haitian Centers Council Inc.,* 509 U.S. 155 (1993). See also O. Barsalou, "L'interception des réfugiés en mer: un régime juridique aux confins de la normativité" (2008) 12 *Lex electronica,* online : <http://www.lex-electronica.org/articles/v12-3/barsalou.htm>.
[243] See M. Crock, "In the Wake of the *Tampa* : Conflicting Visions of International Refugee Law in the Management of Refugee Flows", (2003) 12 Pac. Rim. L. & Pol'y J. 49. See also O. Barsalou, "L'interception des réfugiés en mer: un régime juridique aux confins de la normativité" (2008) 12 *Lex electronica,* online : <http://www.lex-electronica.org/articles/v12-3/barsalou.htm>.

stiffening them and, as Shachar suggests, "resurrecting" them. In so doing, state actors contribute to the creation of a "fortress mentality" and the fuelling of xenophobia.[244] They also end up creating sub-territorialized categories: in Canadian immigration law, for example, if Bill C-4 is enacted, we will be witnessing the creation of another class of people, the "designated foreign national" who has made an "irregular entry" and who will be subjected to a wholly different set of rules by virtue of this "irregular entry".

G. Multinational states and territoriality

In multicultural states, the ethic of inclusion posited by territoriality can lead, paradoxically, to "exclusionary monism".[245] In federal systems of government, legislative and executive powers are divided along territorial lines, and it is assumed that all those living within a certain territory, such as a province, will be subjected to the same body of rules. But what happens when non-territorialized groups (religious groups, for example) make claims for personalized institutions, tribunals, schools, etc.? Personalized models of governance (such as personal federalism) can be used in order to reconcile conflicting identities. According to Gaudreault-DesBiens, personal federalism originates in non-Western legal communities and it has, until

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[244] A. Shachar, "Against Birthright Privilege", *supra* note 223 at 274.
[245] See, for example, Rowan William's criticism of legal universalism and the "exclusionary monism that the ideology of abstract legal universalism has brought about": cited in J.-F. Gaudreault-DesBiens, "Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives" *in* R. Adhar & N. Aroney, eds., *Sharia in the West* (Oxford: Oxford University Press, 2010) 59 at 60.

recently, been "frowned upon by Western scholars as backward and illiberal."[246] Whether or not it should be transplanted in Western societies, and what to do of claims by a certain segment of the population for separate institutions is beyond the scope of this discussion. But there is a parallel to be made between personal federalism and the claim that the contours of the nation are not necessarily concomitant with those of the state and, more generally, that the identity of the constitutional subject is not necessarily reducible to that of the citizen of the nation-state. And there is a point to be made that sometimes, personalized arrangements may offer the potential to reconcile religious and state systems by allowing believers to opt out in certain situations, thus creating more interactions between the two systems.[247] The downside, however, is that those measures exacerbate the dilution of identities and create "potential legitimization problems".[248] All in all, territoriality may work better in nation-states, since methodological territorialism (or nationalism) meets there with fewer obstacles.

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[246] J.-F. Gaudreault-DesBiens, "Religious Courts, Personal Federalism and Legal Transplants", *in* R. Adhar & N. Aroney eds., *supra* note 39.

[247] J.-F. Gaudreault-DesBiens, "Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives", *supra* note 245 at 61, citing A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

[248] On "potential legitimization problems" for personal federalism models, see Gaudreault-DesBiens, *ibid.,* at 167 and ff. The possibility that certain people be governed by a personalized body of rules, for example, by legal rules derived from one's religious beliefs, triggers fundamental issues "from the standpoint of legitimacy and democracy": see J.-F. Gaudreault-DesBiens, "Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives" *in* R. Adhar & N. Aroney, eds., *Sharia in the West* (Oxford: Oxford University Press, 2010) 59.

VII. CONCLUSION

The purpose of this chapter has been to analytically deconstruct the territorial legal paradigm by looking first at epistemological concerns, then outlining the historical rise of the legal paradigm, its theoretical premises, and the challenges it faces today.

The propositions that were challenged included two foundational claims: that territoriality is *ethical* and that territoriality equates *law* with *land*. By scrutinizing the effect of these propositions I demonstrated the inability of the territoriality paradigm to accurately *describe* the operation of legal orders today. Moreover, I argued in favor of the ontological consideration of territory as not merely a piece of land, but as a relationship *mediated by space*. The seven challenges to territoriality demonstrated its weaknesses. Those weaknesses will be kept in mind when, in the following chapters, I will look into the territorial paradigm as it affects the operation of Canadian constitutional law and more particularly Charter law.

In the next chapter, I begin by looking at the power of the Canadian constituent to enact legislation with extraterritorial effects, before analyzing how and to what extent Charter law has followed the territorial paradigm. These observations will pave the way to Chapter Three, where I will tackle the inability of the territorial paradigm to solve in a coherent and predictable way how rights ought to be allocated. In doing so, I will untie the knot between state power, constitutional rights, and territory.

CHAPTER TWO:

TERRITORIALITY IN CANADA: TERRITORIAL LAWS AND TERRITORIAL RIGHTS

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[249]

I. INTRODUCTION

This chapter explores whether and to what extent the principle of territoriality governs the scope of application of Canadian constitutional rights. I will first look at how the principle of territoriality impacts on the validity of ordinary legislation, both federal and provincial. I will then address the role of the principle of territoriality in the interpretation of the scope of human rights instruments. In particular, I will focus on the Charter of rights, a part of the *Constitution Act, 1982*[250] by looking at issues of intraterritoriality and extraterritoriality.

The part dedicated to intraterritoriality addresses the question of the scope of the Charter within Canada and mainly aims at identifying the rights-bearers or the

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[249] *R. v. Cook,* [1998] 2 S.C.R. 597 [hereinafter *Cook* or *R. v. Cook*].
[250] Schedule B to *The Canada Act 1982*, c. 11 (U.K.).

creditors in Canadian constitutional law's structure of rights. By contrast, the part dedicated to extraterritoriality will seek to establish the scope of application of the Charter when a claimant (foreigner or Canadian citizen) challenges the constitutionality of actions performed by a Canadian authority abroad, or the constitutionality of legislation to which he is subject. As will be seen, the territorial principle impacts not only on the interpretation of each right, but also, on the recognition, or denial, of standing to sue. At the end of this chapter, which relies heavily on caselaw as main source of data, the reader should get a very good indication of how – and to what extent - territoriality shapes Canadian Charter law.

In Chapter One, I raised the question whether *sovereign* states can exercise *authority* free of the constraints of the Constitution *because* they act outside of the territorial paradigm. In this Chapter, and the next, I will look at how this argument is being phrased in Canadian constitutional law.

II. TERRITORIALITY AND ORDINARY LEGISLATION

A. Extraterritoriality and the validity of federal legislation

Because of Canada's colonial past, Canadian law was initially defined in relation to British law. The scope of Canadian law, and Canadian constitutional law, used to be that which British Parliament granted. The British Parliament, being sovereign, was entitled to adopt any law it saw fit, whether it applied in Britain, in the colonies, or

elsewhere. Canada, as a colony, was initially prevented from adopting any kind of legislation with extraterritorial effects for fear of interfering with British law, which was supreme over its own.[251]

As of 1867, Canada was engaged in the road toward independence from the United Kingdom. Since the text of the *Constitution Act, 1867*[252] contained no territorial limitation, it was left to courts to interpret whether the Canadian Parliament enjoyed the power to make extraterritorial laws or not. Knowing that the right to enact extraterritorial laws is one of the attributes of state sovereignty,[253] the Privy Council was careful to interpret this silence as not a bar to extraterritorial legislation. In *A.G. Canada v. Cain,* the Privy Council examined the validity of an act of the Dominion Legislature which delegated to the Attorney General the power to order the deportation of an immigrant, thus allowing the government to constrain a person outside of the territorial boundaries of the colony. The Privy Council held that such extraterritorial constraint was a necessary effect of the power of expulsion, a power clearly within the government's authority, and thus rejected the ultra vires plea.[254]

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[251] See the *Colonial Laws Validity Act*, 1865, 59& 60 Vict. C. 14. Excluded, 22 & 23 Geo. 5. C. 41; 11 & 12 Geo. 6 c. 7 s. 1, sch. 1. Section 2 provides that "any colonial law which is (…) repugnant to the provisions of any Act of Parliament (…) shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." These impediments attached to fisheries, taxation, navigation, aviation, marriage, criminal law, copyright, right to deportation, etc.: see Maurice Ollivier, *Le Statut de Westminster: Étude de l'évolution politique au Canada,* Summary of a doctoral thesis submitted at the Faculty of law, Université de Montréal, 18 February 1933 - Excerpt from the Revue Trimestrielle Canadienne, March 1933, at 12.
[252] U.K., 30 & 31 Victoria c.3 (formerly the *British North America Act*).
[253] M. Ollivier, *supra* note 251 at 11.
[254] (1906) A.C. 542 (P.C.).

In *Croft v. Dunphy,*[255] the Privy Council reversed the Supreme Court's invalidation of the 1928 *Canadian Customs Act* which provided that a Canadian vessel "hovering" outside of the territorial waters could be seized and forfeited if it had on board dutiable goods. In this decision, Lord Macmillan held that the Canadian Parliament possessed the power to enact laws with extraterritorial reach by virtue of international law and usage.[256] More significantly, the Lords held that the federal Parliament had plenary legislative powers, in this respect, within the limits imposed by the Constitution. Considering the silence of the *Constitution Act, 1867*, the Lords declined to infer such limitation and declared the law valid on the basis of the *Constitution Act, 1867* alone.

It is interesting to note that the Lords' conclusion did not rely upon the *Statute of Westminster, 1931*[257] which, at the time of rendering the decision, had already been enacted. Rather, it relied on the fact that the federal "Parliament's legislative power is not subject to a territorial limit."[258] In any event, any doubts regarding the Canadian Parliament's extraterritorial legislative powers were lifted with the enactment of section 3 of the *Statute of Westminster*, providing that the Dominion of Canada had "full power to make laws having extraterritorial operation". This grant of power was consonant with the progress Canada was making in terms of gaining its

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[255] [1933] A.C. 156.
[256] *Croft v. Dunphy*, *ibid* at 163.
[257] 1931 (U.K.) c. 4; R.S.C. 1985, Appendix II, No. 27.
[258] *Ibid.* at 282. Thus it can be argued that the *Statute of Westminster* only officialised a pre-existing practice, as the Dominion of Canada enjoyed the power to enact extraterritorial legislation even before the *Statute of Westminster* granted it.

full sovereignty. From the enactment of the Statute of Westminster and on, Canada's power to enact extraterritorial laws was associated with its sovereignty on the international plane. In 2007, it came as no surprise when the Supreme Court of Canada recognized that "Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada."[259] It does so in a variety of fields, briefly evoked below, section C.

B. Extraterritoriality and the validity of provincial legislation

Contrary to the federal Parliament, provincial legislatures remained as a general rule incapable of enacting extraterritorial legislation. One of the arguments invoked to deny provinces the capacity to enact extraterritorial legislation is the fact that provinces do not hold sovereign status under international law. This lack of international personality allegedly makes them ineligible to the power of adopting extraterritorial legislation.[260] Other reasons for limiting the power to enact extraterritorial statutes have been inferred from section 132 of the *Constitution Act*, 1867, which can been interpreted as granting to the federal executive the exclusive power to sign and ratify treaties.[261] Another justification stems from the words "in

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[259] *R. v. Hape, supra* note 16 at para. 65.
[260] See, on this point, F. P. Varcoe, *The Constitution of Canada* (Toronto: The Carswell Company, 1965) at 13: "First of all, extra-territorial power depends upon international law the basis of which is the understanding between the persons concerned, namely the international persons or Sovereign states. A province is not in this category and is not recognized as a legal person by international law."
[261] *Ibid.* at 14. On the other hand, the Privy Council declined to derive, from s. 132 of the Constitution Act, 1867, any power related to the implementation of treaties. Entering into a treaty is an executive act that does involve neither Parliament nor legislative assemblies in Canada. Even if the provinces generally lack the capacity to enter into treaties, they are competent to enact implementing legislation

each province" or "in the province" that can be found in sections 92, 92A, 93 and 95 of the *Constitution Act,* 1867.[262]

Whatever the value of these arguments, and despite the general prohibition against the provincial enactment of extraterritorial legislation, it is generally accepted that provinces do have the ability to enact legislation that has extraterritorial effects provided there is a *sufficient connection* between the province and the subject matter of the legislation. In other words, the effects of a provincial enactment may be extraterritorial, but this will not trigger a declaration of invalidity as long as the pith and substance of the act is intraprovincial.[263] This can be seen as a rule mitigating the principle of territoriality of laws.

The Supreme Court of Canada expounded the steps to follow to examine the validity of a potentially extraterritorial provincial legislation in two recent cases. According to the Court in *Imperial Tobacco*, the validity of a provincial legislation will, as usual, be determined by looking at the pith and substance of the impugned legislation. If the pith and substance of the legislation is tangible, "i.e., something with an intrinsic and observable physical presence", the question whether it is 'in the

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for matters falling within the provincial heads of powers: see the "Labour Conventions" case (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326). For a challenge of the traditional approach, see Hugo Cyr, *Canadian Federalism and Treaty Powers-Organic Constitutionalism at Work* (Brussels/New York: P.I.E. Peter Lang, 2009).

[262] See, for example, *Unifund Insurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63 at para. 51; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86 at 128.

[263] See *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at para. 38, citing E. Edinger, "Territorial Limitations on Provincial Powers" (1982) 14 *Ottawa L. Rev.* 57at 94. See also, on provincial powers of taxation and its effect on non-residents, *Dunne v. Quebec* (Deputy Minister of Revenue), [2007] 1 S.C.R. 853.

province' will be a matter of *physical* location.[264] But if it is intangible, such as the creation of a civil cause of action, the Court must look at the *relationship* between "the enacting territory, the subject matter of the legislation and the persons made subject to it"[265] which must share a sufficient connection. The "sufficient connection" doctrine elaborated by the Court in that context stems from the interpretation it gave to the dual purposes of s. 92, namely to ensure that the provincial legislation has a meaningful connection to the province enacting it, and to ensure that a province respects the legislative sovereignty of the other provinces when enacting and purporting to apply its laws.[266]

The 'sufficient connection' doctrine, as will be seen later, is a multi-faceted tool. It can be seen at play when the validity of legislation is in question, but also in the context of private international law disputes. Whether or not there is a "sufficient connection" is a question raised when jurisdiction *simpliciter* or *forum non*

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[264] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at para 30: "One need only look to the location of the matter. If it is in the province, the limitations have been respected, and the legislation is valid. If it is outside the province, the limitations have been violated, and the legislation is invalid."

[265] *British Columbia v. Imperial Tobacco, ibid.,* para. 36. Of course, whether the pith and substance of the legislation is tangible or intangible, and characterization issues in general, are debatable. In *Global Securities Corp. v. British Columbia (Securities Commission)*, *supra* note 263*,* the Court found the provincial legislation's pith and substance to be the regulation of securities, a matter clearly within provincial jurisdiction over property and civil rights. In the recent debate regarding the proposal for a single securities commission, characterization of securities is an issue in itself. See the decision of the Court of Appeal of Quebec and that of Alberta, and the pleadings before the Supreme Court of Canada. In the *Reference re. Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457, the characterization of the impugned provisions was also an issue (is it criminal law, or health law, hospitals and property in the province).

[266] *British Columbia v. Imperial Tobacco, ibid*., para. 27.

conveniens are argued.[267] Under these rules, the choice of forum depends on the finding of a sufficient connection between the court or forum and the facts of the case. The connection might be sufficient to justify the court to take jurisdiction, but insufficient to authorize the application of the law to the case at bar.[268]

If I return to the validity of provincial laws, the next question is when the valid, provincial legislation applies to extraprovincial elements. According to the Supreme Court, such application must be conditioned by "the requirements of order and fairness that underlie our federal arrangements".[269] In other words, even if the legislation is valid, and there is a sufficient connection to ground jurisdiction, the Court must still be satisfied that order and fairness within the federation is protected before applying the law to the facts of the case.[270] The Court must be satisfied that the application of the legislation will not interfere inappropriately with the interests of the foreign (or extraprovincial) jurisdiction.

This flexible way of conceiving extraterritoriality in the provincial space is not surprising for one author for whom it is obvious that "law does not deal directly with

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[267] See, generally, *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022.
[268] *Unifund Insurance Co. v. Insurance Corp. of British Columbia, supra* note 262 at para 80. In such a case, the courts would take jurisdiction and apply the law of another province, such as was the case in *Tolofson v. Jensen, Ibid.*
[269] *Unifund Insurance Co. v. Insurance Corp. of British Columbia, ibid*. at para. 56.
[270] *Ibid.* at para. 68. These concerns have been summarized as "comity" concerns. On comity between provinces, the Supreme Court had this to say in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289: "Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside the province that that province finds objectionable. This is no doubt part of sovereign right, but it certainly runs counter to comity."

tangible objects but deals with intangible things such as "rights", "duties", "corporations", etc." and that, therefore, "we cannot expect the territorial principle to apply in a purely physical sense." According to that scholar, "[t]he location of the tangible thing to which those conceptual entities are related is just one of the ways in which we connect law with space." [271] The ultimate test is thus properly understood as one of sufficiency of the connection between the enacting entity and the legislation it adopts, not one of physical territoriality.

The elements developed by the judiciary with relation to provincial extraterritoriality –the sufficient connection test, the consideration of order and fairness in the federation, the refusal to limit the analysis to tangible objects and physical locations[272] – all militate in favour of a flexible approach to the validity and applicability of ordinary statutes when issues of extraterritoriality arise.

To sum up, both the federal legislature and the provincial ones are able, to some extent, to enact laws with extraterritorial effect. While the provinces have to demonstrate a substantive connection and the protection of order and fairness in the federation, the federal Parliament apparently faces no limitations. As the next section demonstrates, however, the presumption of territoriality of norms bars potentially undue extraterritorial legislative powers.

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[271] H. Cyr, *Canadian Federalism and Treaty Powers-Organic Constitutionalism at Work, supra* note 261 at 245. See also F. Chevrette & H. Marx, *Droit constitutionnel: notes et jurisprudence* (Montreal: Presses de l'Université de Montréal, 1982) at 1176 defining extraterritoriality as the "absence de lien ou de connexité entre la mesure adoptée et les intérêts et pouvoirs de l'autorité publique qui l'adopte."
[272] See, on the question of the pollution of marine waters, *R. v. Crown Zellerbach Canada Ltd*., [1988] 1 S.C.R. 401.

C. The presumption of territoriality of laws

Although Parliament's legislative authority is *not* territorially limited, a presumption of interpretation has been crafted by courts, requesting that if Parliament intends to give extraterritorial scope to its legislation, it must make this intention clear.[273] Federal laws are deemed to apply only within Canada, and they are presumed to apply to the whole of Canada.[274]

The presumption of territorial application of legislation was established in English law in 1896 in the case in *R. v. Jameson*[275] and it has been incorporated into the Canadian common law system. From the beginning of its application, the presumption was viewed as the domestication of "international law principles of territorial sovereignty".[276] These principles were received in the Anglo-Canadian common law system via the rules of reception of customary international law into Canadian law. According to these rules, Canadian laws are presumed to be intended to apply to "all persons, things and events within the boundaries of the enacting

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[273] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,* [2004] 2 S.C.R. 427 at para. 55: "While the notion of comity among independent nation States lacks the constitutional status it enjoys among the provinces of the Canadian federation (*Morguard Investments Ltd. v. De Savoye*, *supra* note 267 at 1098), and does not operate as a limitation on Parliament's legislative competence, the courts nevertheless presume, in the absence of clear words to the contrary, that Parliament did not intend its legislation to receive extraterritorial application" [hereinafter *Society of Composers*].

[274] See s. 8(1) of the *Interpretation Act,* R.S.C., 1985, c. I-21, which provides that "Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment".

[275] [1896] 2 Q.B. 425. Lord Russell of Killowen : "If there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom (…)" at 430, cited in R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 592.

[276] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes, Ibid*.

jurisdiction", and not to apply to all things outside of it.[277] A finding of a clear legislative intent to extend the application of the Canadian legislation extraterritorially is sufficient to rebut the presumption. Today, many federal statutes expressly or by implication reach out of the Canadian territory: the *Criminal Code*[278] provisions regarding war crimes, highjacking an aircraft, etc.; the *Immigration and Refugee Protection Act*[279] provisions regarding extradition and deportation; the *Income Tax Act*[280] provisions regarding taxation of Canadian citizens (or companies) residing abroad, etc.

When there is no express extraterritorial reach, the interpretation of the scope of a provision is made in accordance with the presumption of territoriality, mitigated by the "real and substantive connection" test which the Supreme Court of Canada elaborated in *Society of Composers*.[281] This test is inspired by the "sufficient connection" test developed in the caselaw regarding the interpretation of extraterritorial provincial statutes mentioned above.[282] This is how the doctrine of the "real and substantial link" can be said to have migrated from intra-provincial cases to federal jurisdiction cases. Under that approach, courts will authorize the application[283] of Canadian law to situations occurring extraterritorially if there is a

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[277] *Ibid*.
[278] R.S.C. 1985, c C-46.
[279] R.S.C. 2001, c. 27 (hereinafter: IRPA).
[280] R.S.C. 1985, c. 1 (5th Supp.).
[281] *Society of Composers, supra* note 273.
[282] See above, discussion accompanying footnote 264.
[283] Contrary to provincial enactments, it is the applicability, and not the validity of the federal legislation that triggers the 'real and substantial link' test. It is clear that the federal legislation is

reasonable connection between Canada and the facts occurring abroad. This principle had already grounded the jurisdiction of Canadian courts in criminal matters in *Libman v. The Queen*,[284] where the Court held that when there is a real and substantial link between the commission of an offence and Canada, Canadian courts have jurisdiction to hear the prosecution, wherever the offence was committed.[285] In *Society of Composers,*[286] the majority of the Court reiterated that the "real and substantive" test can help ascertain whether or not the federal *Copyright Act* can apply to cases with extraterritorial (or extraneous) elements.[287] Note that LeBel J., in his dissenting opinion, rejected that approach. He would have limited the real and substantial connection test to the cases for which it was initially developed, i.e., inter-provincial litigation involving the constitutional value of comity among

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valid; the questions are whether it applies to foreign elements and whether the matter falls within the courts' jurisdiction.

[284] [1985] 2 S.C.R. 178 (per LaForest J.).

[285] *Libman, ibid.,* at para. 74: "I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law (…)." (per LaForest J.)This does not mean that the presumption of territoriality of laws does not apply to the *Criminal code*, R.S.C. 1985, c C-46. Section 7 of the *Criminal code* formalizes the presumption. But its application is flexible. See also *United States of America v. Lépine*, [1994] 1 S.C.R. 286.

[286] *Supra* note 273 (per Binnie J.).

[287] The question was whether the *Copyright Act*, R.S.C. 1985, c C-42 applies to the following situation: an Internet server located in the United States transmits music to an Internet server located in Canada. According to Currie, if the real and substantive connection test is met, the conduct ought to be construed as if it were occurring in Canada, hence, the laws have no extraterritorial application. This leads Currie to conclude that a conduct occuring wholly outside Canada such as the breach of a probation order is, nonetheless, within Canada's *territorial* jurisdiction. See R. J. Currie, *International & Transnational Criminal Law* (Irwin Law, Toronto, 2010) at 421.

provinces. The real and substantial connection test is, in his view, inconsistent with the territoriality principle.[288]

According to some authors, the real and substantive connection test is not a mitigation of the principle of territoriality, but rather, an expression of it. For Pierre-André Côté, for instance, one of the main challenges is ascertaining whether or not an activity *is* occurring outside the Canadian territory. Determining the existence of an extraterritorial effect is often more difficult than determining whether the legislator intended to vest the enactment with an extraterritorial effect.[289] Accordingly, one does not necessarily speak of an "extraterritorial effect" of the legislation merely because the law reaches out to persons or things located abroad. Indeed, if there is a substantial link with the enacting jurisdiction, Côté and others believe that courts should not even speak of *extraterritorial* legislation.[290]

Whether or not one agrees with the mitigating effects of the "substantive connection" test found both in the context of a challenge to the validity of provincial laws with

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[288] *Society of Composers, supra* note 273 at para. 152. LeBel J. would have applied the presumption of territoriality of laws by looking at the intention of the legislator to ascertain whether the Act was meant to be given extraterritorial effect. Absent a clear legislative intention, the Act does not apply to the case at bar, *notwithstanding* any real or substantial link between Canada and the relevant set of facts. *Ibid*. at para. 147-148.

[289] P.-A Côté, *The interpretation of legislation in Canada,* 3rd ed. (Scarborough : Carswell, 2000) at 203.

[290] Robert J. Currie shares the same opinion in "Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?" (2007) 11 Can. Crim. L.Rev. 141 at 163. See also R. J. Currie, *International & Transnational Criminal Law, supra* note 287 at 421. See also, on this point, H. Cyr, *Canadian Federalism and Treaty Powers-Organic Constitutionalism at Work, supra* note 261 at page 244, footnote 768.

extraterritorial effects (such as in *Global Securities*[291]) or in the context of establishing the applicability of federal laws to partly extraterritorial fact patterns (such as in *Society of Composers*)[292], we can conclude that the territoriality paradigm is alive and well and occupies the field in the interpretation of ordinary legislation in Canada. We can also conclude that there is room for a flexible interpretation of both provincial and federal legislation if substantial connecting factors are present. Both provincial and federal laws are interpreted as being *prima facie* territorial, unless there is a sufficient, or real and substantial connection between the enacting legislature and the facts occurring abroad. The approach is thus not one of strict territoriality, but one that takes into account some functional elements. As the next section demonstrates, the tempering of the principle of territoriality is not found in the same degree when constitutional enactments, rather than ordinary legislation, are affected.[293]

III. TERRITORIALITY AND THE CHARTER

In this part, I will explore how territoriality influences the determination of the scope of application of Canadian constitutional rights in Charter litigation. Other Canadian

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[291] *Global Securities, supra* note 263.

[292] *Society of Composers*, *supra* note 273. See also *R. v. Stucky*, 240 C.C.C. (3rd) 141; 2009 ONCA 151 (CanLII) (leave to appeal to the S.C.C. granted, 2009 CanLII 33009 (S.C.C.) - 2009-06-25). Another area where territoriality principles and federalism intersect is that of securities regulation, and whether the regulation of securities ought to fall within the trade and commerce federal power (under s. 91(2) of the *Constitution Act,* 1867). See, on this point, N. Karazivan & J.-F. Gaudreault-DesBiens, "On Polyphony and Paradoxes in the Regulation of Securities within the Canadian Federation" (2010) 49 Can. Bus. L. J. 1.

[293] One endorsement, discussed below, is the concurrent opinion of Gonthier and Bastarache, JJ.S.C., in *R. v. Cook*, *supra* note 249 at paras. 133 and ff.

constitutional enactments will not be addressed. The only entrenched instrument is the Canadian Charter of Rights and Freedoms. Other human rights protection tools, such as the *Canadian Bill of Rights*[294] or provincial bills of rights, are technically ordinary legislation. Their spatial reach is not immediately relevant to the present thesis, but it could be the subject of future research work.

The geographical scope of Charter rights will be explored by focusing both on the intraterritorial scope of the Charter and its extraterritorial reach.[295]

My research conducted on jurisprudence and legal scholarship demonstrates that the Charter has a predominantly territorial reach, with territory being defined as the space within the geographical borders of Canada. Moreover, it shows that there are several strategies that have been devised to circumscribe that reach, and special attention will be given to the strategy to limit *standing* and the strategy to limit *application* according to geographical location.

Prior to starting the analysis of the scope of the Charter, a general comment must be made. This inquiry into the strategies to ground territoriality is fundamental because the main channel for bringing government actions or decisions to scrutiny is through a Charter application under s. 24(1), which allows courts to order a remedy when a

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[294] S.C. 1960, c. 44.

[295] As mentioned in Chapter 1, I borrow from Kal Raustiala the distinction between intraterritoriality and extraterritoriality of constitutional instruments. While intraterritoriality refers to the scope of application inside the geographical borders of the state, extraterritoriality refers to its application to foreign elements.

right has been infringed. By contrast, when the validity of a law or legislative provision is being challenged, the claimant must take the route of s. 52 of the *Constitution Act, 1982*, which provides that any law violating the Constitution is of no force or effect.[296] As a result, judicial review of government decisions or legislation on Charter grounds is completely reliant on the question of the Charter's application. Once the territorial red flag has been raised, the Charter may simply be said not to apply to the actions of Canadian authorities. And if the Charter is said not to apply to those government acts, the constitutional review will fail altogether and the state action will go unchecked[297] unless, if there are concerns with the "legality, reasonableness and fairness" of the government action, an application for judicial review on administrative grounds is filed, e.g. under s. 18 of the *Federal Courts Act*.[298]

This being said, I now look at the intraterritorial scope of the Charter (A), followed by its extraterritorial scope (B).

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[296] On the "different remedial purposes" of ss. 52(1) and 24(1), see *R. v. Ferguson,* [2008] 1 S.C.R. 96. The Court stresses that section 24(1) provides a personal remedy against unconstitutional government action, whereas section 52(1) provides a general remedy against unconstitutional legislation. Contrast with the majority opinion in *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441 at para. 39 (per Dickson J.) : "I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the *Charter* is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52."

[297] *Amnesty International v. Canada,* 2008 FCA 401 (CanLII), [2009] F.C.R. 149 at para. 3: "the application for judicial review would fail if the Charter is not found to apply to the actions of the CF (the Canadian Forces) (…)". Of course, claims under the *Canadian Bill of Rights* or provincial human rights statutes are possible but for the reasons just provided their territorial scope is not under scrutiny.

[298] See *Canada (Attorney General) v. Telezone Inc.*, [2010] 3 S.C.R. 585 at para. 24. See also *Manuge v. Canada,* [2010] 3 S.C.R. 672.

A. Intraterritoriality

In Chapter One, I outlined the need for a deeper theorization of the question of the Charter's intraterritorial scope.[299] I also underlined the challenged raised by unethical exclusions or divisions which impact on aboriginal peoples and foreigners' access to constitutional protections such as the right to equality.[300] I will now look further into the scope of the Charter, and, more particularly, into its material and personal scope. To which actions does the Charter apply? And who is entitled to claim violations?

1. Application

The legislative history of s. 32 shows that initially, the text of s. 32 ought to have read as follows:

> This Charter applies (a) to the Parliament and government of Canada ~~in respect of~~ *and to* all matters within the authority of Parliament … and (b) to the legislature and government of each province *and to* ~~in respect of~~ all matters within the authority of the legislature of each province.[301]

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[299] See above, text accompanying notes 132 and ff.
[300] See above, text accompanying notes 146 and ff.
[301] The words "in respect of" were substituted after a meeting in November 1981. It is unclear whether the change was operated in order to restrict the Charter's scope to the public domain only: see D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 115. See the Joint Parliamentary Committee and the *Minutes of Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,* 1st session, 32nd Parliament, 1980-1981, 43:41 and 38:49.

Thus, the words initially selected "and to" seemed to allow for broader application, including to the private sector. Such prospect probably prompted the change of wording, which was made "without political instructions by a drafting committee of officials, after the politicians had reached agreement."[302] But according to Dale Gibson, one should not rely too much on the exact wording of s. 32 to deduct the scope of application of the Charter, for "the application section played no role in the accord reached by federal and provincial politicians on 5th November 1981, or in the deliberations that led to it."[303]

Under the current wording, the Charter applies (1) *to* the executive and legislative branches of government, (2) *in respect of* either legislative or executive actions performed (3) under the authority of Parliament. This goes for both federal and provincial levels.

Only "public" actions attract Charter scrutiny. This includes any actions performed by the Canadian government or its agencies, but also actions by non-governmental organizations exercising government functions or implementing government policy.[304]

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[302] D. Gibson, *The Law of the Charter: General Principles*, *ibid*. at 115.
[303] *Ibid.*
[304] A commendable discussion of "who is bound" by the Charter (including whether the private sector is) can be found in D. Gibson, *The Law of the Charter: General Principles, ibid.* at 88-120. See also *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] 2 S.C.R. 295. See also *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 and *Mckinney v. University of Guelph,* [1990] 3 S.C.R. 229. In *Greater Vancouver*

According to Brunelle, the task of clarifying the identity of the duty-holder under the *Charter* was bestowed upon courts, and their rulings were mainly driven by liberalism's core values: the promotion of individual autonomy, the suspicion of state interventionism, and the protection of private property.[305] These values converged in identifying a single duty-holder of the Charter's provisions: the state. In other words, the Charter limits and restrains state action (*l'action gouvernementale*). Essentially, what Brunelle presses is that the state ought to abide by constitutional norms so that individuals can *benefit* from the Charter's protection.[306] Individuals, and private parties, are not the debtors, but the creditors.

According to Pierre Issalys and Denis Lemieux, the government administration will be targeted by section 32 of the Charter only to the extent that, in each relevant case, the executive exerts sufficient control over the action (the organic criteria); and the function exercised by the state action is public in nature (the functional criteria)

Transportation Authority, the Supreme Court of Canada summarized the steps to follow in order to engage the Charter pursuant to section 32 of the Charter. It held that "there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*." (*ibid.* at para. 16).

[305] C. Brunelle, *L'application de la Charte Canadienne des Droits et Libertés aux institutions gouvernementales* (Scarborough : Carswell, 1993) at 3. According to F. A. Hayek, the suspicion against state interventionism is only directed towards the exercise of coercive powers. "Government may render in addition (…) many services which involve no coercion except for the raising of the means by taxation; and apart perhaps from some extreme wings on the liberal movement, the desirability of government undertaking such tasks has never been denied.", F.A. Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (London: Routledge & Kegan Paul, 1978) at 144.

[306] Brunelle, *ibid.* at 4.

which means that the state action must be characterized by "l'unilatéralité, le commandement et la contrainte".[307]

2. Standing

Who is the Charter constitutionally designed to protect? When the Charter was enacted in 1982 there was not much consensus about who the "creditors" and who the "debtors" of the obligations enshrined in this document were to be, or what was the identity of the subject of Charter rights. According to Brunelle, a sacrifice of clarity and predictability was made for the sake of obtaining a viable political agreement.[308] Obviously the intraterritorial scope of the Charter can be deduced from the wording of the Charter itself. The right to vote is limited to citizens (section 4), and so is the right to enter and remain in Canada (section 6) and minority language educational rights (section 23). Otherwise the Charter refers to "everyone", "every individual", "anyone", words that leave no one out, at least literally. Thus, a plain, legalist argument can be made that everyone, except when specified otherwise, can raise a Charter infringement.

The case on point on the intraterritorial scope of the Charter is *Singh v. Minister of Employment and Immigration*. This case addressed the scope of application of

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[307] P. Issalys & D. Lemieux, *L'action gouvernementale: précis de droit des institutions administratives,* 2nd edition (Cowansville: Yvon Blais, 2002) at 23 (para. 1.13).
[308] C. Brunelle, *L'application de la Charte Canadienne des Droits et Libertés aux institutions gouvernementales*, *supra* note 305 at 1-2.

section 7 of the Charter, which protects *everyone's* right to life, liberty and security and the right not to be deprived thereof unless in accordance with the principles of fundamental justice. The facts of the case were as follows. The appellants had been denied refugee status under the then *Immigration Act, 1976*. Four of them were denied admission into Canada at a port of entry while the other three had already been admitted in Canada and were living there when they submitted their refugee status claim. All appellants argued that the provisions in the Canadian legislation infringed their right to a fair hearing guaranteed under section 7 of the Charter. According to Wilson J., writing for the majority, the word "everyone" in section 7 "includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law."[309]

As to the question of whether the claimants' right to security was infringed, the Court found that it was, not on account of the rights to protection given to refugees (the appellants' refugee claims had not yet been recognized), but because the determination of their rights ought to have been done in accordance with the principles of fundamental justice. In other words, they have no *right* to remain in Canada, as immigration is a privilege not a right. But they have the right to due process in the consideration of their claim and due process does not vary according to the identity of the claimant.

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[309] *Singh v. Canada*, *supra* note 238 at para. 35. See generally, on that case, T. Clark, *Singh to Suresh: the Canadian Courts and Human Rights Obligations* (Victoria, BC: Trafford Publishings, 2006) and P. Eliadis, "The Swing from Singh: The Narrowing Application of the Charter in Immigration Law" 26 Imm. L.R. (2d) 130, 1995.

The three judges writing a concurrent opinion omitted altogether the question of the Charter application, and preferred aligning their ruling under the *Canadian Bill of Rights.* In doing so, they avoided both the territoriality issue and the issue of whether the right to security could have been infringed given the lack of an enforceable "right" to remain in Canada.

Since this decision was rendered, section 7, and most Charter rights, have been interpreted as being claimable by everyone *physically present* in Canada, and, as such, *physically amenable* to Canadian law. Although the case is not technically decided on the legal issue of standing (the Court rather framed the issue in terms of application), but rather framed in terms of application (i.e., establishing that Charter rights *apply* evenly within the Canadian territory, irrespective of the identity of the constitutional claimant), there is a need to reserve the word "applies" to the state action and the state actors involved. The Charter *applies* to state action performed by government actors. Standing, not application, determines who is *entitled* to claim a Charter infringement. Some of the confusion can be attributed to the wording used in *Singh*. And, as the next part will show, Wilson J.'s words, though directed toward an *inclusive* application of the Charter to asylum seekers, have been widely cited in order to exclude any extraterritorial reach of Charter rights.

3. Summary

It is possible that anti-discrimination policies that burgeoned after the Second World War in Canada and abroad and culminated with the adoption of the Charter justified the selection of an objective criterion (territoriality) over a subjective criterion (personality or status or entitlement) when it came to defining the intraterritorial scope of the Charter.[310]

Despite the fact that the general rule is one of "universality within", it is important to remain sceptical about territoriality's promises. As explained in Chapter One, the myth of universality within the borders is confronted to a reality check when one considers the rights of foreigners, of aboriginal peoples, etc. Nonetheless, the general principle is that rights apply evenly within the territorial borders, i.e., intraterritorially.

B. Extraterritoriality

So far it is acknowledged that the Charter applies to government acts, and that the right bearer, if he is amenable to Canadian law, understood as physical presence on Canadian territory, can claim a Charter infringement. But this tells us nothing of the *proximity* between the right bearer and the duty holder: is there a need for physical

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[310] It is a principle of interpretation of ordinary legislation that a domestic law is deemed to apply throughout Canada, and not be limited to certain people or certain locations: s. 8(1) of the *Interpretation Act, supra* note 274.

presence, either on the part of the debtor (the state), or the creditors (the individuals)? In other words, that the Charter imposes limitations[311] on state actions to the benefit of individuals is beyond dispute. But the questions as to where the action must be performed (here or there), who are the "individuals" (citizens or foreigners) able to challenge that action, and where must they be located (in Canada or abroad) in order to raise a Charter challenge are disputed. The purpose of the next section is to explore *where* should a state action take place for the Charter to apply, and whether only government acts taken *in Canada*, which effects are felt *in Canada*, trigger the application of the Charter.

In order to do so, I will examine the caselaw involving a Charter claim in the context of an extraterritorial action, defined as an action by the Canadian government performed abroad. I will also look at the challenge of legislation by someone not physically in Canada. This research demonstrates that courts consider that the Charter is purely territorial, and there are two ways in which this principle finds application: through the interpretation of s. 32 application criterion; and through the requirement for standing in constitutional litigation. In refusing to grant standing to initiate judicial review proceedings on the basis of a lack of physical presence within

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[311] The *Charter* prevents the government from violating rights and freedoms. It can also be seen as imposing positive obligations to respect the rights enshrined therein. See discussion in C. Brunelle, *L'application de la Charte Canadienne des Droits et Libertés aux institutions gouvernementales*, *supra* note 305 at 37-38. The case in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 left the door open for a possible recognition that section 7 may be interpreted as imposing positive obligations on the state, a step which the Federal Court was ready to make, but which the Supreme Court denied in its *Khadr-2* decision, *supra* note 195. Further discussion of this issue will be found at text accompanying footnotes 454 and ff.

the Canadian territory, for example, courts display the first strategy, which will be the focus of section (a).

In denying that the Charter "applies" to Canadian state actions occurring outside of Canada, and thereby restricting constitutional review on the basis of the lack of application of Charter standard, courts display the second strategy, which will be the focus of section (b). According to this argument, the Charter cannot not apply to government acts *because* those acts are carried out abroad, and not in Canada.

1. Extraterritoriality and standing

b) The interpretation of Singh

In *Singh,* the majority of the Supreme Court, Wilson J. writing, expressed "some reluctance" to conclude that "persons who are inside the country are entitled to the protection of the Charter while those who are merely seeking entry to the country are not."[312] Were the Charter merely to apply to those who made their claim after being admitted to Canada, the Court would be encouraging those who evade the operation of Canadian law by first getting in Canada through illicit means and then filing their refugee applications. Wilson J. found that section 7 of the Charter entitles all appellants to the rights they are asserting, not because they were physically on Canadian soil (in Wilson's view, the four appellants who were denied access at a

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[312] *Singh v. Canada, supra* note 238 at para. 53.

port of entry were physically on Canadian soil just because Canadian officials had the powers to detain and release them), but because they were "amenable to Canadian law".[313]

It is thus unfortunate that Wilson J.'s reasoning, which leaves no doubt as to the rejection of the strict territorial approach, has been interpreted as precisely endorsing it. The fact that the scope "includes", per Wilson J., "any person that by virtue of territorial presence is amenable to Canadian law" has been transformed and now means that only those persons who are physically in Canada have standing to raise constitutional challenges. As a result of this metamorphosis, people claiming a Charter infringement but who are not territorially present can be deprived of standing to raise constitutional infringement.

This metamorphosis is apparent in *R. v. Terry*.[314] Justice McLachlin, as she then was, held in this case that the absence of extraterritorial reach of the Charter was based on *Singh* and its affirmation of the Charter's territorial limits:

> This Court has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity. In *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177, *Charter*

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[313] *Ibid.* at para. 35.
[314] *R. v. Terry,* [1996] 2 S.C.R. 207.

> protection of refugees was confined within the borders of Canada.[315]

The Federal Court also shared this interpretation of *Singh*. In *Ruparel v. Canada*[316] for example, Justice Muldoon was handling an application for *certiorari* and *mandamus* requesting the immigration agent to reconsider the visa application of the plaintiff, and for an order declaring that a provision of the *Immigration Act* was inconsistent with the Charter because it discriminated among applicants who committed an offence in their country of origin based on their age. The requests for *certiorari* and *mandamus* were not the focus of the Court's decision. Justice Muldoon directly went to the constitutional analysis; he agreed that the impugned provision violated section 15 of the Charter (the equality provision), and that such violation was not justified under section 1 of the Charter, but he refused to give effect to this conclusion because the claimant, he held, lacked standing. Referring to Justice Wilson's ruling in *Singh* that "every human being who is physically present in Canada" is protected by the Charter, he came to the conclusion that physical presence was a prerequisite for raising the Charter. Relying on the territorial principle, he found that the claimant could not possibly succeed in his application, even if the legislation was, objectively, breaching section 15 of the Charter.

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[315] *Ibid.* at para. 16.
[316] *Ruparel v. Canada*, [1990] 3 F.C. 615.

Aside from referring to *Singh,* Muldoon J. relied on a decision of the Federal Court of Appeal in *Canadian Council of Churches* which, in passing, reiterated that lack of territorial presence was a bar to recognizing standing to raise Charter claims.[317]

Following this decision, the Federal Court, trial division, has heard several cases involving the challenge of a legislative provision instigated from a claimant abroad. As the next section shows, the approach put forward by Muldoon J. in *Ruparel* has been generally followed,[318] irrespective of the fact that a decision of the Supreme Court, seven years later, ruled that a claimant who was denied citizenship and was deported to the United States had standing to challenge the constitutionality of the Canadian legislation on the basis of section 15 of the Charter.[319]

c) The "Muldoon approach"

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[317] MacGuigan J.A. rendered the decision in *Canadian Council of Churches v. Canada,* (1990) 2 F.C. 534 (C.A.). In this decision, MacGuigan J.A. examined the claim that the *Immigration Act* of the time breached sections 2, 7, 8 and 10(b) of the Charter because it deterred lawyers from assisting refugees seekers outside of Canada, and because it denied refugees a right to counsel. Regarding the last claim, the Court found that "the claimants affected would all be non-citizens outside Canada with no claim to admission, and therefore beyond the scope of the Charter" (*ibid.* at 563). The case contains distinctions between standing and cause of action which have been criticized by the Supreme Court of Canada in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236.

[318] *Chazi c. Quebec (Procureur général)*, (2007) 64 Admin LR (4th) 287, aff'd [2008] R.J.Q. 2035 (C.A.); *Deol v. Canada (Minister of Citizenship and Immigration)*, (2001) 211 F.T.R. 12, aff'd 215 DLR (4th) 675 (C.A.); *Kassam v. Canada (Minister of Citizenship and Immigration)*, [1997] 138 F.T.R. 60; *Lee v. Canada*, [1997] 126 F.T.R. 229.

[319] *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358. The Court held that the appellant did not "lack standing to raise the discrimination created by the impugned provisions of the *Citizenship Act.* On the contrary, he is the real target of these provisions, and the one with the most direct interest in having them subjected to *Charter* scrutiny." (at para. 81).

In *Lee v. Canada*,[320] Muldoon J. applied his own reasoning developed in *Ruparel* to the question whether a Taiwanese national who was denied a visa application may allege that the decision was discriminatory as it was based on an alleged policy to deny all applications by Taiwanese nationals. The organization supporting the applicant pleaded that "judicial review is the only way to effectively challenge the allegedly discriminatory Canadian immigration policy towards citizens to Taiwan." Muldoon J. disagreed and attributed the lack of standing to the absence of foreign nationals' right to enter Canada. The logic is that if you do not have the right to enter, you do not have the right to complain about the state's policies and laws. [321]

In *Deol v. Canada,*[322] Muldoon J. was seized with a motion for judicial review of a decision of the Appeal section of the Immigration and Refugee Board. The decision rejected the appeal of the plaintiff from a decision by an immigration officer denying an immigration visa to the father of the claimant for health purposes pursuant to section 19(1)a)ii) of the former *Immigration Act*. This section allowed an officer to refuse to issue a visa to an applicant whose health condition posed excessive demands on Canada's health care system. The claimant argued that the decision was void on a few administrative grounds, as well as because it breached section 15 of the Charter (right to equality).

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[320] *Supra* note 318.
[321] According to Muldoon J. (*ibid.*): "It is trite law that no one has the right to enter Canada without the Crown's (i.e. executive branch's) permission. (…) Conformity with Canadian law is all [applicants] need, nothing more nor less."
[322] *Deol v. Canada* (F.C.), *supra* note 318.

Relying on *Ruparel,* Justice Muldoon denied standing to raise Charter infringement to the applicant on the following basis:

> Canada does not purport to subject other nations and other peoples to the laws of Canada. The *Canadian Charter of Rights and Freedoms*, by its section 52, (sic) subjects all the provincial and federal laws in Canada to itself, but it does not dare to subject other States' laws or people to itself.
>
> (…)
>
> Persons residing abroad, who are not citizens of Canada have no standing to invoke the *Charter*: Madam Justice Wilson in *Singh et al v. M.E.I.*, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177 at pp. 201-02; as to lack of standing - *Canadian Council of Churches v. Canada*, [1990] 2 F.C. 534, (F.C.A.) at p. 563, where the *Canadian Bill of Rights* was also invoked in an immigration matter. Also illustrative of this proposition is *Ruparel v. M.E.I. and Secretary of State*, [1990] 3 F.C. 615 (F.C.T.D.).
>
> (…)
>
> This Court is, therefore, unable to offer the applicant's father the protection and comfort of the *Charter*, because he is a non-citizen residing in India. In matters of immigration, Canada is entitled to pick and choose and may assuredly reject people with serious health disabilities. Canada is simply not the world's great milch-cow (sic) when it is sought to confer Canada's own human rights and freedoms on the world's other peoples.[323]

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[323] *Ibid.* at paras. 39-42.

There was some confusion about whether the claimant was invoking her own section 15 rights, or whether she was claiming in her father's name; but Muldoon J. statement lets us believe that he took the claimant's arguments as if they related to her father, and rejected them accordingly.

On appeal to the Court of Appeal, Evans J.A., writing the decision, confirmed Muldoon J.'s treatment of the administrative grounds.[324] As to the Charter grounds, Evans J.A. decided to take for granted the proposition that the claimant's father could not plead that the decision to deny his application violated the Charter. Since counsel for the appellant conceded that "the protection of the Charter does not apply to Mr. Singh in his dealing with the Canadian government abroad", Evans J.A. announced that he "shall proceed on this assumption."[325] He then analyzed whether the claimant's daughter's rights were infringed, and concluded that they were not, considering that the *Law*[326] criteria applicable to a section 15(1) challenge were not met.

The "Muldoon approach" was rejected in *Crease*.[327] This case concerned an application to determine preliminary questions of law in an action for grant of citizenship under s. 5(2)b) of the then *Citizenship Act*. The facts were as follows: the plaintiff was born in Venezuela in 1943. His mother, a Canadian citizen, was still a

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[324] *Deol v. Canada* (F.C.A.), *supra* note 318.
[325] *Deol v. Canada, ibid.* Here, the concession made by counsel for the appellant prevented the Court form ruling on the issues of Charter application and standing.
[326] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497.
[327] *Crease v. Canada,* [1994] 3 F.C. 480, 78 FTR 192.

British subject at the time of the plaintiff's birth (because Canadian citizenship was non-existent until the first *Citizenship Act of 1947*). The plaintiff applied for Canadian citizenship under the said Act, but his application was denied on the grounds that he was not born abroad to a Canadian citizen mother. He alleged that he was being discriminated against on the basis of his age, a prohibited ground under s. 15 of the Charter. Had he been born a few years later, he argued, he would have been entitled to Canadian citizenship. The government argued that the plaintiff ought to be denied standing to request a declaration of unconstitutionality of paragraph 5(2)b) of the Act because he is a non-resident living outside of Canada. The Court disagreed: it granted standing, but concluded that there was no violation of section 15(1) of the Charter.

According to the trial judge, the application of the *Citizenship Act* has an inherent 'extraterritorial' component. Moreover, granting standing would not, in a case involving this legislation, amount to the prohibited application of the Charter to a foreign country's justice system, or to a foreign authority. In other words, there is no legitimate concern that justifies denying standing to someone directly affected by the Canadian legislation at stake. Finally, although it was not clear why that mattered, a sufficient connection with Canada was established, as Mr. Crease's mother was now a Canadian citizen.

Aside from *Crease,* the "Muldoon approach" is either endorsed, or left unchallenged by courts. Interestingly, it is not a bar to obtaining relief when administrative

grounds are being alleged: in *Zhang v. Canada (Minister of Citizenship and Immigration)*,[328] Justice Blais denied judicial review based on Charter grounds because no factual basis was provided in support of the Charter argument, but granted it on administrative grounds. He concluded as follows: "Notwithstanding the dismissal of the Charter claim, the conclusion that the refusal of the visa was based on an erroneous finding of fact justifies the intervention of the Court."[329]

In *Yuen (Guardian) v. Canada (Minister of Citizenship and Immigration)*,[330] Rothstein J., as he then was, denied judicial review on administrative grounds because the visa officer made no mistake with regards to the challenges raised, i.e., his decision that the applicant and her husband were not separated for the purposes of paragraph 9(2)(a) of the *Immigration Regulations*. In relation to the Charter claim, however, Rothstein J., as he then was, found that there was a lack of factual basis necessary to engage a Charter application. If a factual basis were present, it is unclear whether Rothstein J. would have considered the claim without applying the "Muldoon approach" and without denying standing.

The reluctance to overturn the "Muldoon approach" sometimes leads courts to assume, without deciding, that the claimans are entitled to file a Charter application, as was the case in the Quebec Court of Appeal judgment in *Chazi v. Canada*

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[328] *Zhang v. Canada,* (2003) 244 F.T.R. 299.
[329] *Ibid.* at para. 27.
[330] *Yuen (Guardian) v. Canada (Minister of Citizenship and Immigration)*, (1997) 140 FTR 81.

(Attorney general).[331] The plaintiffs of the case were two applicants who unsuccessfully attempted to obtain a visa to immigrate to Québec. They argued that the immigration Directive enacted under the provincial regulation was contrary to the equality provision of the Canadian Charter, in that it discriminated against people who, in North Africa, work "under the table" and hence cannot see their work experience as a validly recognized experience in the calculation of their immigration application. The Court of Appeal referred to the ongoing debate regarding whether Charter rights can be raised by non-citizens outside of Canada, citing *R. v. Hape* but also *Ruparel, Canadian Council of Churches* and *Crease,* and recognized that the question "n'est pas facile à trancher"[332] but refused to settle the point whether non-citizens living abroad can invoke the Charter, as it was deemed unnecessary. The Court preferred analyzing the merits of the application taking for granted that the Charter did apply to the applicants, but ultimately found no Charter violation.

A recent case on point suggests that the denial of standing on territorial grounds is alive and well. When George Galloway attempted to come to Canada, he was dissuaded by a statement made by Canada Border Service Agency which deemed him to be a threat to national security. When discussing, hypothetically, whether M. Galloway could argue that a government decision (the CBSA statement was ruled not to be one) violated his freedom of expression guaranteed under section 2 of the Charter, the Court found he could not because "he is not a Canadian citizen, was

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[331] *Chazi v. Québec*, *supra* note 318.
[332] *Ibid.* at para. 90.

outside of Canada at the time the impugned actions took place and lacks any "nexus" to Canada".[333]

In the end, it seems that someone not physically in Canada can hardly have standing to challenge, on Charter grounds, legislation, administrative directives or government actions to which he is subject. This situation, as explained above, derives from the interpretation of the case in *Singh* in which, it is worth recalling, Justice Wilson merely held that people inside Canada, who are amenable to Canadian law, *can* benefit from a Charter provision. She did not reflect on who cannot. The fact that her reasons have been interpreted as denying standing to those not physically in Canada is, consequently, both unwarranted and unfortunate.[334]

But there is more. It is difficult to explain that regarding the same government act, standing rules may differ to the extent that one may have standing to argue that a government decision was unreasonable,[335] but lack standing to argue that it breached

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[333] *Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)*, 2010 F.C. 954 (CanLII) at para. 81. The Toronto coalition who took up his claim would have had to be granted standing, because George Galloway had no standing on his own.

[334] The restrictive view on standing was also criticized by D. Galloway, "The Extraterritorial Application of the Charter to Visa Applicants" (1991) 23 Ottawa L.R. 335.

[335] Section 18.1 (1) of the *Federal Courts Act*- provides that anyone directly affected by a state action has standing to instigate judicial review proceedings. As the bulk of judicial review on administrative grounds cases filed in the Federal Court demonstrate, physical presence is no requirement for standing. See, for example, *Doret v. Canada (Citizenship and Immigration)*, 2009 F.C. 447 (CanLII). In that case a Haitian national sought to set aside, by applying for judicial review, the visa officer's decision refusing her application for a temporary resident visa. She was in Haiti but wished to be represented by someone who is not a solicitor in Canada. The Court denied her motion, holding that she could not be represented by a lay person. At para. 12 (per De Montigny J.F.C.): "Although Ms. Doret cannot enter Canada, she could have retained and instructed legal counsel so as to have her case heard before the Federal Court." The Court invoked, among others, rule 369 of the *Federal Courts Rules*, SOR/98-106 which allows a party to request that a motion be decided on written representations.

section 15 of the Charter (the equality provision). Why, in other words, when it comes to examining the conformity of a decision with the Charter, a whole different rhetoric takes shape and judicial review becomes contingent upon territorial presence? There is an increasing overlap between Charter challenges and challenges on administrative law grounds.[336] If an administrative decision, based on the exercise of a discretionary power, is allegedly violating the Charter's principle of fundamental justice *and* denying procedural fairness, the Charter grounds may absorb altogether the administrative grounds. In such a case, denial of standing in Charter litigation could prove fatal to the claimant.

There is perhaps a belief, shared by some judges, that in order to claim a Charter right, one must first satisfy a threshold of admissibility, i.e., demonstrate personal entitlement. This belief is more clearly articulated in the next series of cases, which deals with Charter application. There is also a silent assumption that because people have no right to be admitted *to* Canada, they have no right to complain about its laws and policies (c.f. Justice Muldoon's rhetoric).

To sum up, it appears that the territorial paradigm is embedded in the determination of standing to raise the unconstitutionality of a legislative or governmental action. Many judges will capture, through the denial of standing, the idea that people who

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[336] See E. Fox-Decent, "The Charter and Administrative Law: Cross-Fertilization in Public Law" in C. Flood & L. Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 169, explaining three approaches to the review of decisions allegedly violating a Charter right: the "orthodox approach" which consists in choosing the Charter framework; the "administrative law approach", which uses only the administrative law grid; and a mixed approach: *ibid.* at 182.

are not physically in Canada are not part of the constitutional polity and do not possess Charter rights to start with.

As the next part demonstrates, the same, territorial conception is also embedded in the determination of the scope of application of the Charter under s. 32, and in the interpretation of the scope of protection of many Charter rights.

2. Territoriality and Charter application

To what extent, if at all, does the territorial principle affect the determination of the scope of application of the Canadian Charter of Rights and Freedoms in extraterritorial cases? To answer this question, I have analyzed the caselaw on point, which starts in 1990, when a case raising the application of s. 24 of the Charter to Canadian citizens outside of Canada came before the Supreme Court of Canada.

The case concerned two Canadian citizens (B. and C.) who were promised protection by the RCMP in exchange for their testimony at a third party's trial. The trial judge refused to order the protection of B and C on account of the fact that they were now outside of Canada, outside of the reach of the Canadian Charter. Cory J.S.C., with whom four justices concurred, was inclined to conclude that s. 24 of the Charter did apply to B and C,[337] notwithstanding their physical absence from Canada, because of

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[337] *R. v. A.,* [1990] 1 S.C.R. 995.

the "special circumstances of the case."[338] McLachlin J., on the other hand, held that it did not. She was not convinced that "the (trial) judge erred in declining to grant an order for protection of B and C under s. 24(1) on the ground that they were outside the country" mostly on the basis of the unenforceability of such an order outside the borders of Canada.

This case did not involve an action by the Canadian government performed in a foreign country: the decision to deny protection was taken in Canada. The "extraterritorial" element was only the physical presence of the claimants in a foreign country at the time of their Charter application. Hence, its usefulness for my thesis is limited.

Between 1990 and 2007, several cases struggled with the question of the application of the Charter to actions of the Canadian government performed abroad: these are the cases relevant to my analysis. During these years, the caselaw evolved towards the establishment of an analytical framework guiding the application of the Charter in extraterritorial cases.

In 2007, the Supreme Court of Canada issued a landmark decision in *R. v. Hape*,[339] in which it clarified its stance on the extraterritorial application of the Charter, or, more precisely, the lack thereof. This decision is pivotal: it reversed precedent,

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[338] Those circumstances included the Canadian citizenship of B and C as well as the fact that the RCMP had made the undertaking to protect B and C while they were still in Canada; in addition, the fact that B and C found themselves in another country was partly due to a decision of the RCMP.
[339] *R. v. Hape, supra* note 16.

applied the presumption of territorial application of statutes to the Charter[340] and made a sweeping statement regarding the "impossible" extraterritorial application of the Charter.[341]

Five years have passed since this decision was rendered. I sought to verify whether the territorial rule, or the pure territorial paradigm, fared well in succeeding caselaw. Given the short laps of time, I looked at decisions of all jurisdictions which discuss the *Hape* ruling, whether they follow, distinguish or reject it. My results are provided in Chapter Three. Given the importance of *Hape* in the development of a Canadian theory on the scope of constitutional rights, I have divided the following sections into sub-sections composed of (a) the law before *Hape*; (b) the decision in *Hape*; and, in Chapter Three, the follow up on the law post-*Hape*.

a) The law before Hape

Before *Hape,* the Charter applied to extraterritorial actions performed by the Canadian government, provided no objectionable effect was felt by the foreign state. This analytical framework was developed over a series of cases, the first being *Harrer*.[342] In this case, the role of the Canadian officials in the alleged Charter

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[340] *Ibid.* at para. 69: "As the supreme law of Canada, the *Charter* is subject to the same jurisdictional limits as the country's other laws or rules".
[341] The exact words used are "extraterritorial application of the *Charter* is impossible", *R. v. Hape, ibid.* at para. 85. However, as will be seen, two caveats are outlined in the majority opinion.
[342] *R. v. Harrer,* [1995] 3 S.C.R. 562.

violation was nil. The case, however, introduces an interesting distinction between levels of involvement sufficient to trigger Charter application.

The facts of the decision are as follows. A Canadian citizen was interrogated in the United States by American marshals. At her trial in Canada, the accused tried to have the evidence excluded on the basis of s. 24(2) of the Charter and the violation of her right to have a second 'right to counsel' warning. The Supreme Court of Canada rejected her claim, holding that the Charter is "confined" to the governments of Canada, the provinces and the territories; in this case, none of the entities mentioned in s. 32(1) were involved in the impugned actions.[343] The Charter did not apply to the actions of foreign police forces and the US marshals were not bound to give the accused a second warning, as requested by Canadian law. Since there was no Charter breach, there could be no remedy under s. 24 of the Charter. However, the Court retained the discretion to exclude evidence if to admit it would violate the right to a fair trial pursuant to section 11d) of the Charter (a right which is applicable to a trial conducted in Canada, as such was the case). But again, no violation of a fair trial right was demonstrated. Justice LaForest specified that the result could have been different had one of the following scenarios been present: either the Canadian authorities conduct the interrogation themselves; or they mandate the American officers to act as their "agents" in furthering a criminal investigation in Canada.

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[343] *Ibid.* at para. 12.

A year later, in *Terry*,[344] the Supreme Court reiterated the opinion that the Charter cannot limit the actions of foreign authorities and reflected further on the degree of involvement of Canadian officers needed to engage the Charter. The case concerned an interrogation conducted by American authorities in the United States, but this time, the foreign officials were acting pursuant to a request from Canada. At his trial in Canada, the accused tried to have the evidence excluded on the grounds that he was not given a 'right to counsel' warning in accordance with Canadian law. The Court refused to apply the Charter to the acts of the American police officers, even if they were in fact cooperating with the Canadian police. According to McLachlin J., "Charter standards cannot be imposed on US authorities operating in their jurisdiction" and principles of comity forbid such an encroachment on foreign states jurisdiction. Enforcement is governed by the sovereign state alone. In support of that conclusion, McLachlin J. drew an inference from *Singh*, mentioned above, in which case, she said, the application of the Charter to refugees was "confined" to the Canadian territory.[345]

In *Schreiber*[346], the involvement of Canadian authorities was slightly more substantial: Canadian officials had written a letter requesting Swiss authorities to provide them with confidential information regarding Mr. Schreiber's Swiss accounts. These searches were allegedly carried out without warrants. The majority of the Court held that the actions were undertaken in Switzerland, by Swiss

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[344] *R. v. Terry,* [1996] 1 S.C.R. 207.
[345] *Ibid.* at 216.
[346] *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841.

authorities, and that the role of Canada was merely to have "sent a letter". The Charter, in such case, could not apply to limit the actions of Swiss authorities. Lamer C.J. reached the same result but on different grounds: contrary to the majority, he held that the Charter did apply to the case: Canadian officials, in his opinion, ought to respect the Charter wherever they act:

> "[Canadian officials] are clearly subject to Canadian law, including the Charter, within Canada, and in most cases, outside it. (..) Moreover, because they are Canadian, there is no reason to be concerned with comity. They can be expected to have knowledge of Canadian law, including the Constitution, and it is not unreasonable to require that they follow it."[347]

On the facts of the case, however, Lamer J. found that there was no violation of the appellant's Charter right not to be subjected to unreasonable search and seizure because he had no expectation of privacy regarding his banking documents in Switzerland. To further complicate the split, Iacobucci and Gonthier JJ. dissenting, found that the Charter did apply to Mr. Schreiber, and that there was a violation of his right to be free from unreasonable search and seizure:

> The right to privacy, as it has been interpreted under the *Charter*, protects <u>people and not places</u>. The impact on the individual of a search and seizure of bank records is the same whether the search and seizure took place in Canada or in Switzerland. The respondent has a reasonable expectation of privacy with respect to banking information no matter where the accounts are held. It is entirely reasonable, in my view, that the

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[347] *Ibid*. at para. 16 (Chief Justice).

> respondent should expect that Canadian authorities will not be able to request the assistance of Swiss authorities in obtaining his Swiss bank records without first obtaining some form of judicial preauthorization in Canada.[348]

It was finally in *R. v. Cook,*[349] a case which dealt with actions of Canadian officials in the United States, that the majority of the Court walked the line and expounded the analytical framework that will be used in order to determine if the *Charter* can have extraterritorial scope in future cases. The facts allowed such a leap, as the actions were carried out by Canadian police officers and not, contrary to previous caselaw,[350] by foreign authorities (whether acting at the request of Canada or on its behalf). In this case, the Canadian police was handed the respondent, an American citizen suspected of having committed murder in Canada, after his arrest by American officers. During the examination in New Orleans conducted by the Vancouver police, the Canadian officers failed to properly advise the accused of his right to counsel. The question was whether their actions were amenable to Charter challenge even if they were performed outside of Canada. The Court said yes. And the identity or nationality of the Charter claimant had nothing to do with that ruling.

Three opinions were filed: the majority opinion, written by Lamer J., establishes a two-part test and relies on the nationality of the Canadian officers to trigger Charter application; the concurrent opinion, signed by Gonthier and Bastarache JJ., relies on

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[348] *Ibid*. at para. 56 (Iacobucci J.). Emphasis in text.
[349] *Supra* note 249.
[350] See *R. v. Harrer*, *R. v. Terry* and *Schreiber v. Canada*, respectively at notes 342, 344 and 346.

the control exercised by the Canadian government to trigger Charter application; and the dissenting opinion, authored by L'Heureux-Dubé and McLachlin JJ., rejects both and would have found the Charter inapplicable.

The five judges signing the majority opinion proposed a two-part analytical framework for determining the extraterritorial application of the Charter. In the first part, an inquiry is made into the existence of an action falling within s. 32(1) of the Charter (i.e. a matter within the authority of either the federal or the provincial or territorial governments and performed by any of these actors). In the case at bar, the impugned actions fell within the purview of s. 32(1) of the Charter by virtue of Canada's involvement in the investigation. Canadian detectives conducted the investigation, and the powers they enjoyed were derived from Canadian law. The Charter applies to their actions *prima facie*, unless an adverse effect to the foreign state is proven (the second step).

In the second part of the test, the Court must make sure that the application of the Charter does not interfere with the sovereign authority of the foreign state and generate an objectionable extraterritorial effect. In the present case, the Court found that no such adverse effect was proven. American territorial sovereignty would not be violated if the actions of the Canadian investigators came under Charter scrutiny. The lack of an objectionable effect was emphasized by the fact that the investigators were Canadian nationals, and that Canada could legitimately exercise jurisdiction on the basis of nationality without violating the sovereignty of the United States.

In other words, extending the Charter to reach Canadian officials abroad did not cause any prejudice to the US because Canadian law was not made to apply to *foreign* officials' conduct. For the Supreme Court, requesting that Canadian police officers interrogating an accused give proper 'right to counsel' warning was not intrusive on the foreign officials because the targeted actions were those of Canadian officers, with relation to a murder committed in Canada, in view of a trial in Canada. The extension of the Charter to those facts "does not violate the principle of state sovereignty by imposing Canadian criminal law standards on foreign officials and procedures."[351] Nor does it open the floodgates by conferring Charter rights to "every person in the world". The Charter was thus found to apply to the actions of the Vancouver detectives in New Orleans as they related to the American citizen accused of murder.

The majority of the Court then considered whether there was a Charter breach. It found that the instructions given by the Canadian police to the accused were confusing and misleading as to the nature of the right to seek legal advice. The police officers were evasive[352] and failed to enlighten the appellant as to the opportunity to obtain legal advice. Moreover, their conduct was found to bring the administration of justice into disrepute. The evidence was thus excluded under s. 24(2) and a new trial was ordered.

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[351] *R. v. Cook*, *supra* note 249 at paras. 53-54.
[352] The advice was given in these terms: "And that means basically, and I realize that probably means nothing, but basically what it means is you can talk to somebody, get advice." *R. v. Cook*, *ibid*. at para. 58.

Bastarache and Gonthier JJ., concurring in the result, agreed that the Charter applied to the Canadian officers in the case at bar, but disagreed as to the legal basis for such application. In their view, the nationality of the Canadian officers was irrelevant. By virtue of s. 32(1)(a), the Charter applies to police officers wherever they act and irrespective of their nationality because the police is part of the government and the government is one of the two bodies mentioned in s. 32(1)(a). But for the Charter to apply to their actions, they need to be in control of the specific features of the operation which led to the alleged Charter breach. If they are not, the Charter will not apply to them, even if they cooperate with foreign authorities. It is a sort of "winner takes all", and not a selective application to such or such part of the investigation.

This being said, even if the Charter applies to the Canadian authorities who control the operation in a specific set of facts, the Charter will only apply *prima facie*. If an objectionable effect is felt by the foreign state, the claim will still be denied. Such objectionable effect can be felt if the foreign state has more connections with the facts of the case than Canada[353] or if the foreign state's laws are in conflict with the requirements of Canadian law. In the case at bar, there was no objectionable effect because the Charter was not made to apply to foreign officials, only to Canadian

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[353] To substantiate this test, reference was made to the "objective territoriality doctrine", a doctrine developed in international law which posits that a state can, *prima facie*, exercise jurisdiction when there is a "real and substantial link" between the state and the matter: *R. v. Cook, ibid.* at paras. 135-136.

ones; it did not impose an obligation to investigate, it did not violate foreign law; it only regulated *how* the investigation will be conducted.[354]

So far the majority and concurring opinions looked at the compatibility of the actions of the Canadian authorities with the Charter, and not at whether Mr. Cook enjoyed any Charter rights. By contrast, the two dissenting judges opined that the majority and concurring judges "missed a crucial step".[355] In their opinion, the Court ought to have determined first whether the accused, who is neither a Canadian citizen nor was physically present on Canadian soil at the time of the impugned action, was the holder of a Charter right. This determination must be made prior to deciding "whether there has been action by a s. 32 government that infringed that right".[356]

In other words, and this is the material point, the Charter binds the Canadian authorities only in so far as the recipient of the state action is the beneficiary of a Charter right. Because of the lack of pleadings on this issue, the dissenting judges did not extrapolate on whether Mr. Cook, as a non-citizen in a foreign country, enjoyed Charter rights. Instead, they moved directly to the question whether there was a government act within the meaning of section 32 of the Charter.

On that question, their opinion is diametrically opposed to that of the concurring judges. The fact that the investigation takes place in a foreign country acts as an

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[354] *R. v. Cook, ibid.* at para. 142-143.
[355] *Ibid.* at para. 85.
[356] *Ibid.* at para. 87.

automatic bar to the application of the Charter: it is not the degree of control which determines whether or not the Charter applies, but geography.

In their opinion, Canadian officials conducting operations abroad are immune from Charter challenges because in these circumstances, they are not acting in "a matter "within the authority" of Parliament or provincial legislatures, as required by s. 32."[357] They have no legal authority and do no act *with the legal attributes of government*. In other words, because Canadian officials were cooperating with American authorities on American soil, the Charter did not apply to their actions, "even if the action being challenged is attributable to a government listed in s. 32." Again, this conclusion is made possible because in Justice L'Heureux-Dubé's view, on a foreign territory, the Canadian government "no longer has authority, and Canadian officials, in the sense of having the coercive powers of the Canadian state behind them, are never really "controlling"."[358]

The terms 'within the authority' receive here a different meaning: *authority* is coterminous with *territorial sovereignty*. Territorial sovereignty allows the state actor to be clothed with the attributes of government, a prerequisite for s. 32(1) application. Conversely, for Bastarache and Gonthier JJ., authority relates first and foremost to the control exercised by the state actor: if the Canadian police were in

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[357] *Ibid.* at para. 93.
[358] *Ibid.* at para. 96. Furthur discussion on this point will be found in Chapter Five, Section III.

control of the operation, then the matter would be 'within the authority' of Canada, wherever the action is carried out.

In the end, the dissenting judges' conclusion that the Charter did not apply to Canadian authorities did not prevent them from allowing, if need be, the exclusion of evidence at trial. Evidence can be excluded "whether or not a Charter right applied to the gathering of that evidence" if admission of that evidence would lead to an unfair trial contrary to section 11(d) and section 7 of the Charter. In the case at bar, the dissenting judges were of the view that the case for an unfair trial had not been made and held the evidence admissible.

b) The case in R. v. Hape

i. The case in a nutshell

In July 2007, the Supreme Court of Canada in *R. v. Hape*[359] overruled *R. v. Cook* and the approach based on the evaluation of the prejudicial effect, on a foreign state, of the Charter's application in extraterritorial cases. Justice LeBel, writing for a majority of five, followed the teachings of the dissenting opinions of L'Heureux-Dubé and McLachlin JJ. in *R. v. Cook* and went even further by holding that the "extraterritorial application of the Charter is impossible".[360] Just like the dissenting

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[359] *R. v. Hape, supra* note 16.
[360] *Ibid.* at para. 85.

opinion in *R. v. Cook,* LeBel J. equates the word "authority" in s. 32(1) with full-fledged territorial sovereignty. In his view, a state action performed in a place where Canada enjoys no territorial sovereignty cannot trigger the application of the Charter because it is not a matter within Canadian authority. Two concurrent opinions were filed: one by Justice Binnie; and one by Justice Bastarache, signed also by Abella and Rothstein JJ. The case stands for the principle that when Canadian officials perform actions abroad, they are shielded from Charter scrutiny, but with two caveats. The first caveat is the presence of the foreign state's *consent* to the application of Canadian law (to Canadian officers). The second is the gross violation, by Canadian officers, of Canada's international human rights obligations.

ii. Facts of the case

Lawrence Richard Hape was a Canadian businessman suspected of money laundering. The Royal Canadian Mounted Police (RCMP) started an investigation in Canada, and through the use of undercover agents, discovered that the appellant operated an investment company in Turks and Caicos (T&C). The RCMP officers sought and obtained permission to conduct part of their investigation in T&C. Without any warrants from T&C courts, the RCMP entered and searched the appellant company's premises twice in February 1998; prior to that, the RCMP's technical experts had entered the premises several times to examine the alarm systems, locks, reception areas and cameras. The Canadian investigators knew that there was no warrant authorizing them to enter the premises of the company, but

they relied on T&C police officer's "expertise and advice regarding the legalities of investigations conducted on the Islands".[361] On March 14, 1998, they entered and searched twice -whether or not there was a warrant authorizing these entries searches was debated at trial, but no warrant was produced. During those entries and searches, a T&C detective exercised surveillance outside of the building while RCMP officers were downloading information onto portable hard drives and scanning documents from client files, company records and banking documents.[362]

The appellant was with charged and convicted of money laundering contrary to the *Controlled Drugs and Substances Act*. During his trial at the Ontario Court of Justice, he sought to exclude the evidence obtained as a result of these searches on the basis that the Charter applied *to the actions of the Canadian police* officers in T&C and that the evidence was obtained in violation of *his right* under s. 8 of the Charter to be secure against unreasonable search and seizure.

At trial and on appeal, the *R. v. Cook* two-step test was applied, and it was held that there was an action falling within s. 32, in the sense of a cooperative investigation in which Canadian police took part, but that the extraterritorial effect was indeed objectionable because the Charter was perceived as being applied to foreign officials.[363] On appeal before the Supreme Court, the sole issue to be decided was

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[361] *Ibid.* at para. 7
[362] *R. v. Hape, ibid.* at para. 9.
[363] *Ibid.* at para. 19: "In light of that fact, [the trial judge] concluded that there was a potential conflict between the concurrent exercise of jurisdiction by Canada on the basis of nationality and by Turks and

whether section 8 of the Charter applied to searches and seizures conducted by Canadian officials in a foreign country.

iii. Textual reading

The first step that the Court undertook was the textual or plain reading of s. 32(1) of the Charter. It came to the conclusion that on its face, s. 32 does not impose any territorial limitations. It states *who* is bound (federal Parliament and government, provincial legislature and government), in respect of *which* matters (those within the authority of governments and parliaments, federal and provincial), but not *where*. Since the drafters chose not to establish the jurisdictional scope of the Charter, it falls upon the Court to interpret it. Contrary to the approach developed in *R. v. Cook* and the preceding cases, which sought to define the scope of the Charter via a two-prong test based on the presence of a state action and the absence of an objectionable extraterritorial effect, LeBel J. embarked upon a study of international law principles and how they relate to the Charter.

iv. The role of international law

Caicos on the basis of territoriality. Juriansz J. held, as a result, that the Charter did not apply. He therefore dismissed the application (…)." The objectionable effect resulted from an alleged conflict between the concurrent jurisdictions of Canada on the basis of nationality and that of T&C on the basis of territoriality, a position the Court found quite distinct from that of Justice Lamer's in *R. v. Cook*, *supra* note 249, where the absence of an objectionable effect was supported by the fact that the Charter was there applicable only to Canadian actors, as opposed to foreign authorities.

According to the majority opinion, international law is central to the determination of the scope of the Charter, and the scope of the Charter is, pursuant to the treatment of international law, strictly territorial. Several routes were taken in order to reach this result.

The first route is through the presumption of conformity of Canadian law with customary international law, which makes certain core principles automatically binding in Canadian law. What are the customary principles engaged here? LeBel J. dwells extensively on the notion of state sovereignty, as one of "key customary principles of international law"[364] not to be meddled with easily. Respect for the equality of foreign states, and the principle of non-intervention, are also considered as "key".

In my view, there is a problem with this limited selection of international law principles. Canada's "obligations under international law" deriving either from custom or convention are not limited to the principles of sovereignty, equality of states, non-intervention and comity. If one is to undertake the review of international custom, surely state sovereignty and equality are not the only principles that bind Canada. The Supreme Court could have referred to *jus cogens* obligations, for example, since it is a core body of international norms enforceable *erga omnes*.[365] Selecting certain principles of international law has serious consequences when one

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[364] *R. v. Hape, ibid.* at para. 40.
[365] See, for a similar line of argument, J. Lobel, "Fundamental Norms, International Law, and the Extraterritorial Constitution" (2011) 36 Yale J.I.L. 306.

considers the application of the presumption of conformity of Canadian law with international law, which applies to international customary and treaty law.

The second route taken leads to the application of the international principle of comity, a principle interpreted as entailing the respect of differences between a state's own legal system and the foreign state's, to which it turns for mutual legal assistance. If comity is not respected, the sovereignty of the other state may be threatened. In explaining this point, LeBel J. refers with approval to the deference shown in *Kindler v. Canada (Minister of Justice)*,[366] where the Supreme Court refused to intervene so as to limit the United States' decision to impose death penalty to an accused which Canada extradited.[367]

I think it is important to note, however, that *Kindler* was strongly diluted if not overruled in *United States v. Burns*,[368] a case in which the Supreme Court of Canada put aside the rule of non-inquiry and comity considerations to order the Canadian government to request assurances that death penalty will not be imposed on extradited persons from Canada.

The third way to achieve the above-presented result is through the use of principles of jurisdiction. According to the Court, "the international law principles of jurisdiction" are "integral to the principle of state sovereignty" of which the "primary

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[366] *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779.
[367] *R. v. Hape, ibid.* at para. 48.
[368] [2001] 1 S.C.R. 283.

basis is territoriality."[369] The Court distinguishes between prescriptive, adjudicative and enforcement jurisdiction. Prescriptive jurisdiction is the "power to make rules, issue commands or grant authorizations that are binding upon persons and entities."[370] Enforcement jurisdiction is the "state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter), which might be referred to as *investigative jurisdiction*".[371] Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force.[372] The Court also distinguishes between territoriality, as the primary basis of jurisdiction, and other bases such as nationality, passive personality and universal jurisdiction.

The manner in which these principles of jurisdiction have been interpreted by the majority is problematic. According to LeBel J., states cannot exercise extraterritorial jurisdiction unless they can rely on "a permissive rule derived from international custom or from a convention."[373] This is only partially correct. It is true that *enforcement* of laws is limited to the territorial basis of jurisdiction.[374] Any attempts "to enforce domestic law directly in the territory of a foreign state are prohibited in all but the most exceptional circumstances".[375] This is a rule of international law and it is reflected in the partial excerpt cited by LeBel J. from the *Lotus* case. But the full

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[369] *R. v. Hape* at paras. 57-60.
[370] *R. v. Hape, supra* note 16 at para. 58.
[371] *Ibid*.
[372] *Ibid*.
[373] At para. 65, citing an excerpt of *The Lotus Case, supra* note 86.
[374] At para. 60. This foreshadows the Court's reversal of *R. v. Cook*, *supra* note 249.
[375] *R. v. Cook*, *ibid.* at para. 131 (per Bastarache J.).

excerpt also shows that when a state seeks to *prescribe* its laws or *adjudicate* their application on foreign land, it may do so *unless* there is a prohibitive rule to the contrary. In other words, a *permissive* rule is only necessary if a state seeks to enforce its laws abroad; if it seeks to exercise prescriptive jurisdiction, it does not need any, but it must be wary of any *prohibitive* rule to the contrary. The relevant excerpt of the *Lotus* case in full reads as follows:

> "(…) failing the existence of a permissive rule to the contrary, [the State] may not exercise its power in any form in the territory of another State. (…).
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad (…). Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law (…)"[376].

Early in the judgment LeBel J. states that "the issue of applying the *Charter* to activities that take place abroad implicates the extraterritorial enforcement of Canadian law."[377] As mentioned earlier, the treatment of jurisdictional principles led the Court to conclude that enforcement of the Charter, and of any law, is limited to

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[376] *The Lotus Case*, *supra* note 86.
[377] *R. v. Hape*, *supra* note 16 at para. 33.

the Canadian territory, unless the consent of the foreign state is obtained.[378] Canadian law can be enforced *in another country* only with the consent of the host state,[379] says the Court.

There are two nuts to crack here. First, the assumption that this case is concerned with the extraterritorial enforcement of Canadian law is ill-founded. Applying the Charter to Canadian officials does not constitute "enforcement" of *Charter* law abroad. It is rather an exercise in prescriptive jurisdiction, which international law recognized is not limited to a state's territory.[380] The enforcement of the Charter is triggered with section 24, itself entitled "Enforcement". In the case at bar, the enforcement would have been carried *in* Canada, at the Canadian trial, in the form of a request to have the evidence excluded.

The second hurdle is the "consent" test. Kent Roach rightly observed that the majority invented a test that did not exist in Canadian law.[381] In my view the problem does not necessarily lie with the idea of consent. It lies with the question "consent to what?" and the fact that the Court confuses enforcement of criminal law with enforcement of Charter law. In order to conduct such an investigation, the RCMP must clearly have obtained the consent of the T&C authorities. Had they entered T&C and conducted an investigation without the consent of the host state, it would

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[378] *Ibid.* at para. 65.
[379] *Ibid.* at para. 69.
[380] See P.-H. Verdier, "International Decisions – *R. v. Hape*" (2008) 102 *Am. J. Int'l L.* 143.
[381] K. Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) 53 Criminal Law Quarterly 1-4.

be on point to invoke the *Lotus* case because the sovereignty of T&C would have been jeopardized and Canada would be violating international law. But once Canada has obtained the consent of the host state to conduct investigations, the focus shifts to *how* Canada is going to exercise jurisdiction, not *whether or not* it violates international law in doing so.

The confusion may stem from the fact that in conducting the investigation in Turks and Caicos, the Canadian officials were in fact enforcing Canadian *criminal* law. But in doing so, I repete that they had obtained the consent of the foreign authorities, and no one argued that these actions constituted improper extraterritorial application of *criminal* law. The ability of police to conduct an investigation *is* an exercise of enforcement jurisdiction.[382]

Canadian officers, *in enforcing Canadian criminal law,* should continue to act within the Charter prescriptions; they should not be acting as if the Charter ceased to regulate their activities as soon as they crossed Canada's borders. And yet, this is what the majority of the Court contends. In my view, the question ought to have been whether Canada, in *enforcing its criminal law abroad,* ought to be bound by the Charter. Again, it is not the Charter that the police sought to enforce abroad, but criminal law. And when it comes to criminal law, T&C consented to have RCMP

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[382] See S. Coughlan *et al.*, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization", *supra* note 85 at 32: "Investigation is similarly circumscribed, and state officials such police cannot exercise their executive powers on the territory of another state without that state's permision."

officers operate and investigate on its territory. It accepted to have RCMP officers searching and seizing premises located within their territorial sovereignty. It is hardly conceivable that they would have objected to a situation where, while enforcing Canadian criminal law, RCMP officers would be bound by Canadian procedural protections.

What is unfortunate is that because the Court qualified the relevant jurisdictional question as one of "enforcement", it made the following syllogism, already alluded to earlier: "Since extraterritorial enforcement is not possible, and enforcement is necessary for the Charter to apply, extraterritorial application of the Charter is impossible."[383]

Finally, the fourth route taken is that of the presumption of territorial application of statutes: the Charter, just as any other legislation, is presumed to apply only in Canada, since it is "subject to the same jurisdictional limits as the country's other laws or rules".[384] LeBel J. recognizes that the Constitution authorizes Parliament to pass legislation governing conduct of "non-Canadians" abroad.[385] On the other hand, he adds, the exercise of this power must be "informed by the binding customary principles of territorial sovereign equality and non-intervention".[386] These principles,

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[383] *R. v. Hape, supra* note 16 at para. 85.
[384] *Ibid.* at para. 69.
[385] Again, the majority considers that the Charter is here made to "apply" to non-Canadians, whereas I contend that if it did apply, it would have applied to *Canadian* officers, not foreign officers.
[386] *R. v. Hape*, *supra* note 16 at para. 68.

according to LeBel J., request that a state consents to having another state enforce its laws on its territory.

A few final observations on the use of international law are now warranted. Despite the mistaken qualification of jurisdiction, and the limited selection of international law principles, there is yet another problem with the use that the Court made of international law. While there are precedents recognizing the relevance of international law to define the content of rights, the Court proposes a new usage of international law: that of interpreting the scope of the Charter.[387] The argument goes, ultimately, that those principles, which bind Canadian courts (state sovereignty, state equality, territorial jurisdiction, non-intervention, etc.) command that s. 32 be interpreted as prohibiting extraterritorial application of the Charter.

The role here given to international law comes as a surprise since international law does not usually limit the protections granted by domestic law. As Stephen Toope and Jutta Brunnée persuasively argued, international human rights law should serve as a "floor", rather than a "ceiling" for the rights enshrined in the Charter.[388] In *Reference Re Public Service Employee Relations Act (Alta)*, Justice Dickson held that the Charter was "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has

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[387] Recall that according to LeBel J., courts should "seek to ensure compliance with Canada's binding obligations under international law": *R. v. Hape, supra* note 16 at para. 56.

[388] J. Brunnée & S. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 C.Y.I.L. 3 at 34), citing *Slaight Communications Inc. v. Davidson,* [1989] 1. S.C.R. 1038 and *R. v. Cook, supra* note 249, in which it was made clear that international law should not be allowed to restrict the scope of the *Charter*.

ratified."[389] If substantive human rights are to provide minimum protection, *a fortiori,* rules such as those governing jurisdiction can hardly be seen as allowing for a major cut in s. 32 since that provision establishes the scope of *all* these Charter rights; in other words, to limit s. 32 on account of international law means to limit all the substantive rights enshrined in the Charter.[390]

v. The problem with authority

According to the judges signing the majority opinion, the territorial scope of the Charter, which results from the complex analysis of international law just described, is also "dictated by the words of the *Charter* itself".[391] If early in the opinion they held that the Charter was silent as to its territorial scope,[392] this silence seems to have vanished when they found, later on, that "the *Charter's* territorial limitations are provided for in s. 32".[393]

Where in section 32(1) can one find the so-called territorial limitations? It is through the definition of the word 'authority' that such a conclusion is made possible:

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[389] [1987] 1 S.C.R. 313 at 349. His dissenting opinion was endorsed by the majority in *Slaight Communications Inc. v. Davidson, ibid*.
[390] See also Anne Warner LaForest, discussing that the rights set out in several treaties should represent a "baseline and not the outside limit of rights provided under the Charter": A. Warner LaForest, "Domestic Application of International Law in Charter Cases: Are We There Yet ?" (2004) 37 U.B.C.L.Rev. 157. The same point was made by Bastarache J. in *R. v. Cook* (at para. 146 ff.).
[391] *R. v. Hape*, at para. 69.
[392] *Ibid.* at para. 33.
[393] *Ibid.* at para. 69.

> In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.

This definition of "authority" echoes that of Justices L'Heureux-Dubé and McLachlin JJ, dissenting in *R. v. Cook*, discussed earlier in this chapter. Authority is coterminous with territorial sovereignty: if Canada does not exercise territorial sovereignty, it has no legal, coercive authority. But this interpretation of the word *authority* in section 32(1) is not consistent with the other two words which follow "*authority* of Parliament", which suggest a reference to the division of powers and the respective competence of the provincial legislatures and the federal parliament. In addition, this interpretation of the word authority is inconsistent with the majority and concurrent opinions in *R. v. Cook,* the precedent on point. In fact, the *Hape* majority felt that the Cook majority "failed to give due consideration to the wording of s. 32(1)."[394]

As a result, the test expounded in *R. v. Cook*, which provided that the Charter will apply to the activities of the Canadian police abroad if the impugned act falls within s. 32(1) of the Charter and if the application of the Charter does not create an

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[394] *R. v. Hape, supra* at para. 82.

objectionable extraterritorial effect by threatening the foreign state's sovereignty,[395] was overruled.

The problem with *R. v. Cook,* according to LeBel J., is the absence of a distinction between enforcement jurisdiction and prescriptive jurisdiction. The case ought to have been characterized as one involving the extraterritorial *enforcement* of Canadian law. Instead, it was treated as a "conflict between concurrent jurisdictional claims" (i.e., a conflict between nationality and territory as jurisdictional prescriptive bases). The comments I made earlier regarding the qualification of the facts in *Hape* as raising the "enforcement" of the Charter do not need to be repeated. It is sufficient to mention that in *R. v. Cook,* the Canadian police was conducting a criminal investigation in the United States, enforcing the criminal law provisions abroad by conducting investigations. It was not enforcing the Charter, and I do not believe the Court erred in *R. v. Cook* by failing to qualify this exercise of jurisdiction as "enforcement".[396]

Another reason to overturn the *R. v. Cook* precedent is that, according to LeBel J., it is difficult to apply in cases which "vastly" differ from the *R. v. Cook* scenario. In his opinion, some situations are much more problematic than the mere giving of an oral warning for a right to legal advice. Such is the case for the issuing of a warrant: if a search is to be conducted in accordance with section 8 of the Charter, a warrant

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[395] *R. v. Hape, supra* note 16 at para. 140 (per Bastarache J., concurring).
[396] See my comments on the same issue above, text accompanying note 382.

needs to be issued by a Court of competent jurisdiction; how can this be possible if a warrant is not even required in the foreign jurisdiction –not to mention the possibility that it be unknown to the foreign legal system?

It is true that forcing a foreign jurisdiction to issue a warrant when this legal tool does not even form part of its procedural law can be seen as intrusive on the sovereignty of the foreign state. But there is no need to do so: Canadian courts are competent to issue such a warrant, even though the Canadian authorities are not competent to enforce it – such possibility was expressly recognized by the Supreme Court of Canada in 2007.[397] In that case, the ability of Canadian courts to issue injunctions with extraterritorial effect was recognized, even though it was acknowledged by the Court that the injunction could not be *enforced* in the foreign country. This fact did not strip the courts from their power to issue the injunction.

If we return to the failure to give "due consideration to the wording of s. 32(1)",[398] it seems that differing views on what the concept of authority entails are the roots of the Court's overruling it prior caselaw. In Chapter Five, I will return to these varying

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[397] *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc*., [2007] 1 S.C.R. 867 at para. 6: "First, we agree with Dussault J.A. that the Superior Court had jurisdiction over the application for an injunction and other incidental relief. He stated the following, at paras. 32-36: [TRANSLATION] I cannot accept the respondents' argument that a court of competent jurisdiction could lack the power to issue an injunction with purely extraterritorial effects. (…) The possibility that the Superior Court would have difficulty sanctioning a failure to comply with its orders does not affect its power to issue an injunction. As Barclay J. of the Saskatchewan Court of Queen's Bench pointed out, "[a]lthough the Courts are reluctant to grant injunctions against parties not within the jurisdiction, the power does exist" (*Super Seamless Steel Siding of Canada Ltd. v. Eastside Machine Co.* (1993), 103 Sask. R. 293, at para. [47], citing Robert J. Sharpe, *Injunctions and Specific Performance*, Toronto, Canada Law Book, 1983, at para. 123, and loose-leaf edition, 2005, at para. 1.1190). (…)"

[398] *R. v. Hape, supra* note 16 at para. 83.

conceptions of authority. For the moment, I only wish to address why the interpretation of the word *authority* given by the dissenting judges in *R. v. Cook* was endorsed by the *R. v. Hape* majority, so that matters within the authority now means, for the Court, matters within the territorial sovereignty of the executive.

According to the Court, the presence of a state action is not sufficient to trigger section 32(1) and the application of the Charter. The state action in question must *also* be within the "plenary authority" of the executive branch:

> It is as a result of its territorial sovereignty that a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders, and this authority is limited only by the dictates of customary and conventional international law.[399]

This link between the Charter, authority and coercion was made later in the decision:

> When it applies, the *Charter* imposes limits on the state's coercive power. It requires that state power be exercised only in accordance with certain restrictions. As a corollary, where those restrictions cannot be observed, the *Charter* prohibits the state from exercising its coercive power.[400]

The Court acknowledges that criminal law is a matter within the authority of the Canadian Parliament. But if the investigation is carried abroad, the reasoning goes,

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[399] *Ibid.* at para. 59.
[400] *Ibid.* at para. 97. See also at para. 80.

the matter ceases to be "within the authority of Parliament" because Parliament has no power to authorize enforcement abroad:

> The activity in question must also fall within the "matters within the authority of" Parliament or the legislature of each province. A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, *because they have no jurisdiction to authorize enforcement abroad*.[401]

It is true that Parliament or provincial legislature rarely enjoy the power to authorize enforcement abroad: it is the task of the executive branch of government to obtain this authorization from foreign states. What is perplexing on the other hand is that the positioning of a state action, i.e. pure geography, makes something which was within the authority of the Canadian government suddenly outside of it. The Court's view of "matters within the authority of Parliament" is novel. It links authority with, and exclusively with, coercive power. And since coercive power is an attribute of territorial sovereignty, it limits the exercise of authority to the foreign sovereign. Hence, exit extraterritoriality.

vi. The new methodology

In short, the general rule is that the Charter does not apply to the actions of Canadian officers abroad, but there are two caveats. These exceptions are either the consent of

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[401] *Ibid.* at para. 94 [emphasis added]

the foreign state to have Charter standards applied (to Canadian officials, presumably), or the violation, by Canadian officials, of Canada's international human rights obligations.[402] If none of these exceptions are met, and if what the claimant seeks is the exclusion of evidence pursuant to s. 24(2) of the Charter, the judge retains the discretion to exclude evidence on the basis of the right to a fair trial.

vii. The concurrent opinions

The analysis would not be complete without a look at the serious concerns raised by four of the nine justices in their concurrent reasons. Bastarache J., writing for himself, Abella and Rothstein JJ., felt that the Charter was a "flexible document" that could be made to apply to Canadian officers operating abroad "without jeopardizing the need for comity". He disagreed with the reading down of the words "within the authority" made by Lebel J. He also disagreed with the finding that the Charter cannot apply extraterritorially unless consent can be shown. Reverting to the *R. v. Cook* ruling, he found that the Charter did apply to the actions at bar since criminal investigations are matters *within the authority* of Parliament, even if thos actions are performed abroad.[403]

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[402] The second caveat will be explained when *Khadr-1,* a case in which the exception was applied, is discussed, *infra* note 430 and ff.

[403] *R. v. Hape, supra* note 16 at para. 160 (per Bastarache J., Abella and Rothstein JJ. concurring): "I think section 32(1) includes all actions of Canadian police officers precisely because s. 32 does not distinguish between actions taken on Canadian soil and actions taken abroad. It would be unprincipled, in my view, to draw a distinction the moment a Canadian police officer's foot touches foreign soil."

There was, however, no violation of section 8 because the content of this right has to be interpreted according to context. The determination of what constitutes an unreasonable search depends on contextual and purposive factors.[404] Of particular relevance to this determination is the existence of a gap between the human rights protections granted by the Charter, and those that the foreign state law requires. If the difference can be justified by the need for Canada to be involved in fighting transnational crime or other motives, there will be no violation of the Charter. On the other hand, if these procedures are *substantially* inconsistent with basic Canadian values, they will give rise to a breach of a Charter right.

Put differently, the analysis shifts to the interpretation of the right at stake, a process which offers the needed flexibility to account for differences in laws and procedures among countries.[405] It is not totally clear whether the determination that, in the case at bar, the search was reasonable is the result of a section 1 limitation analysis (as paragraph 169 seems to suggest), or merely the result of the section 8 reasonableness analysis (as paragraph 173 seems to suggest). In any event, the concurring judges contextualized the content of the section 8 right.[406]

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[404] The Court cites *Hunter v. Southam,* [1984] 2 S.C.R. 145 (the purpose of s. 8 is to protect the privacy of individuals against unjustified state interference); *R v. Evans,* [1996] 1 S.C.R. 8 (a person must have a reasonable expectation of privacy); and *R. v. Caslake,* [1998] 1 S.C.R. 51 (a search is reasonable if it is authorized by law, the law is reasonable and the manner of the search is reasonable).
[405] *Ibid.* at para. 169 and 174 (per Bastarache J.).
[406] A similar approach has been taken by the US Court of Appeal, 2nd C., when it defined the scope of the Fourth Amendment as it applies to an American citizen who was searched, without a warrant, outside of the United States, by American officials: *In re Terrorist Bombings of United States Embassies in East Africa*, 552 F.3d 157 (2d Cir. 2008) [hereinafter *El-Hage*]. The Court fractioned the

Justice Binnie, also concurring, criticized LeBel J.'s denial of "*any* extraterritorial effect" to the Charter. He noted in passing that neither the Crown nor the intervener asked "that *Cook* be revisited, much less overruled".[407] He did not agree with using the facts of *R. v. Hape* to elaborate a whole new approach establishing that Canadian citizens can never enjoy Charter rights abroad, when no such arguments were pleaded by (experienced) counsel:

> Constitutional pronouncements of such far-reaching importance ("extraterritorial application of the Charter is impossible") were not even on the radar screen of the parties and intervener to this appeal.[408]

Justice Binnie would have left such theorization to future cases. After reading Justice Binnie's opinion, the majority of the Court responded by adding that "We cannot always know what new issues might arise before the courts in the future, but we can trust that the law will grow and evolve as necessary and when necessary in response." Skeptical that the majority opinion leaves such room to evolve, Justice Binnie concluded in these words: "The law of the Constitution can only "grow and evolve" if the Court leaves it the flexibility to do so."[409]

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content of that right, so that when a search is carried extraterritorially, the Fourth Amendment does *not* include a right to a mandate, but includes the expectation that searches will be reasonable. In addition, it would appear that when it comes to the interception of their communications, American citizens travelling abroad would be excluded from the protection of the Fourth Amendment: see decisions discussed by Mosley J. in *X(Re), infra* note 421 at para. 77.

[407] *R. v. Hape, supra* note 16 at para. 187.

[408] *Ibid.* at para. 189.

[409] *Ibid.* at para. 191 (in response to LeBel J., para. 95).

3. Summary

This chapter explained how the principle of territoriality models Canadian Charter law. It started with an examination of the power of Parliament and provincial legislatures to enact ordinary laws with extraterritorial effect. It then analysed two vehicles through which the principle of territoriality impacts on Charter litigation: the denial of standing to raise constitutional infringement and the denial of the application of the Charter to actions performed by Canadian officers abroad.

Until 2007, the *R. v. Cook* precedent allowed the extraterritorial application of the Charter to Canadian officers, provided that in doing so, it did not cause an objectionable effect on the foreign state.

In *R. v. Hape*, a new test adopting a strict territorial approach was developed. This new test defines the concept of "authority" found in section 32 as referring to the plenary attributes of territorial sovereignty; it poses that rights are domestic and territorial, unless an exception can be carved out, and that exception either relies on the consent of the foreign state to have Canada's Charter apply to Canada's officers, or on the violation of international human rights law. In that territorial matrix, geography can make an action which was within the authority of Parliament (e.g., criminal investigations) become, suddenly, outside of it.

In discussing the *R. v. Hape* ruling, I tackled several problematic aspects of the decision, including the reliance on selective international law to limit the scope of the Charter, the qualification of enforcement jurisdiction, the definition of authority, the newly devised requirement for consent, etc. In the next chapter, I will verify whether the strict territorial approach developed in *R. v. Hape* has been generally followed by lower courts and by the Supreme Court, or whether workable alternatives to the territorial matrix have been, or can be developed.

CHAPTER THREE:

THE TERRITORIAL PARADIGM IN CHARTER LAW AFTER *HAPE*

I. INTRODUCTION

Chapter Two addressed the rise of territoriality as a dominant paradigm in Canadian Charter law. Its conclusion was that the Supreme Court in *R. v. Hape*[410] operated a shift in the approach to constitutional rights and territoriality, trading the "objectionable effect" test established in *R. v. Cook*[411] for one that looks only to the physical boundaries of Canada and matches constitutional law's space with these physical boundaries. The Supreme Court of Canada, in devising this new doctrine, rejected the idea that various points of attachment may bind law, state, people and territory outside of the geographical matrix, when it comes to Charter rights.

The previous chapter identified some normative shortcomings in the *Hape* majority opinion, including the sweeping finding that extraterritorial application of the Charter is "impossible", based on a restrictive selection of international law principles (territorial sovereignty, state equality and non-intervention) and on a flawed application of the concepts of "enforcement" jurisdiction and "authority".[412] With these criticisms in mind, I now assess, in this chapter, the impact of this

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[410] *R. v. Hape*, *supra* note 16.
[411] *R. v. Cook*, *supra* note 249.
[412] See text accompanying notes 359 and ff., above.

doctrine on the caselaw published since 2007, when the *R. v. Hape* decision was rendered, and until 2011, when this thesis was completed. Has the *Hape* doctrine fared well? Or do judges attempt to refine it, limit it, or expand it? If the said doctrine is fraught with difficulties of application, triggering more than one "exception" to the rule, the argument that pure territoriality is fit to govern the ultimate quest for establishing the scope of Canadian constitutional rights, already weakened by the previous analysis, will be further damaged. The need to devise an alternative analytical process to establish such scope will then be confirmed, because it will appear that pure territoriality is both *normatively* and *descriptively* unable to determine the scope of application of Charter rights.

II. THE SCOPE OF THE CHARTER AFTER *R. V. HAPE*

This section proposes to examine the legacy of the *Hape* ruling by looking at the caselaw discussing this case from July 2007 to July 2011.[413] Those cases, in turn, have been classified according to the constitutional right at stake (sections 6, 7, 8, 10, 14 and 15 of the Charter), even if they all relate first and foremost to the question of applicability of the Charter, governed by section 32 of the Charter. The purpose of this analysis is not to revisit the scope and interpretation of any or all of these rights, but rather, to assess whether the *R. v. Hape* test can be said to provide the judiciary

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[413] Caselaw was retrieved from the CanLII database and double-checked with the Quicklaw Lexis-Nexis search engine. Cases from all Canadian courts and provinces have been included provided they refer, consider, distinguish or follow the *R. v. Hape* decision, and provided they involve an action performed by Canadian officers outside Canada.

with adequate guidance as to the scope of Charter rights. As this section demonstrates, while some decisions follow the *R. v. Hape* ruling closely, others distinguish, develop exceptions to it, or simply disregard it.

A. Section 8 of the Charter: defining search and seizure

Section 8 of the Charter provides that "[e]veryone has the right to be secure against unreasonable search or seizure". The potential extraterritorial scope of this provision has been argued in a case[414] concerning an application by the Canadian Security Intelligence Service (CSIS), to the Federal Court, for the issuing of a mandate under the *Canadian Security Intelligence Service Act*.[415] In this case, it is CSIS, the government agency, which argued in favor of the application of the Charter to its activities overseas, in order to obtain a mandate to validate some of its actions overseas. The Court denied the application because the search and collection of material that CSIS proposed to conduct related to people who were outside of the Canadian territory. The Court ruled, following *R. v. Hape,* that Canadian law must be interpreted as having territorial scope, and that in the absence of the foreign state's "consent", the mandate would authorize "activities incompatible with the customary principles of equal sovereignty and non-intervention and comity of nations".[416] Issuing these mandates would "violate the territorial integrity of the foreign state" because they would entail the extraterritorial enforcement of Canadian law abroad.

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[414] *Re Canadian Security Intelligence Act,* 2008 FC 301 (CanLII) (Blanchard J.).
[415] R.S.C., 1985, c. C-23.
[416] *Ibid.* at para. 52.

By contrast with the government's position in *R. v. Hape*, CSIS argued that the Charter "was intended to apply, and does apply, to security intelligence investigations outside Canada."[417] Counsel for CSIS pressed that CSIS needed the mandate in order to protect its officers from potential criminal law suits in Canada which would be based on the absence of a judicial authorization to pursue the investigations abroad and a potential violation of section 8 of the Charter. Operating without a mandate would, in CSIS' view, put the officers at risk of violating the Charter.[418] Paradoxically, the Court felt that issuing the mandates would place Canada in violation of international law and found no exception to the rule that the Charter does not apply to the actions of CSIS abroad. As a result, the Court refused to issue the mandates.

This Court applied strictly the analytical framework devised by the Supreme Court in *R. v. Hape* and held that no exception to the principles of sovereign equality, non-intervention and territoriality justify the granting of the mandate,[419] its analysis was also grounded on a teleological interpretation of the CSIS Act. After finding that the text leads to no express or implicit extraterritorial powers of national security investigation, the Court compared the provision of the CSIS Act with other legislative provisions in which Parliament expressed itself clearly as to the extraterritorial scope of the legislation and found that, *a contrario*, the Parliament in

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[417] *Ibid.* at para. 53.
[418] *Ibid.* at para. 57.
[419] *Ibid.* at para. 54.

this case did not intend to exercise its power to adopt laws with extraterritorial application.

CSIS argued but to no avail that the collection and analysis of national security intelligence *cannot* be limited to the Canadian soil, and that an extraterritorial mission is implicitly conferred upon it. The Court insisted that no power to investigate abroad was clearly conferred in the present case.[420] All in all, the consideration of international comity and the domestic interpretation of the statute converged to support the finding that unless an exception to the *R. v. Hape* test is found, no mandate to carry investigations abroad would be issued to CSIS.

This Federal Court decision was distinguished in another case involving an authorization to collect information. Because CSIS sought a mandate to authorize investigative activities *in Canada* and irrespective of the fact that those communications originated from abroad, the Federal Court, Justice Mosley writing, granted the mandate.[421] According to the Court, the decisive factor is whether the interception of communication, and the searches, seizures and examination of information, occur entirely in Canada, or not. If they do, it means that the warrant

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[420] CSIS invoked the 1977 McDonald Commission which recommended that the collection of security intelligence be not limited to the Canadian territory, as well as the testimony of the then Attorney General Robert Kaplan who declared during the 1984 House of Commons debates on the adoption of CSIS Act (Bill C-9) that it would be too stringent to limit security investigation to Canadian territory, given the fact that investigated persons sometimes travel abroad and in these case the Service might wish to keep track of these people during these trips. See also : *Commission d'enquête sur certaines activités de la Gendarmerie royale du Canada* (McDonald Commission)- Second Report–vol. 1, "*La liberté et la sécurité devant la loi*", August 1981, 660-666.

[421] *X(Re),* (2010) 1 F.C.R. 460; 2009 F.C. 1058 (CanLII).

will be executed within Canada, which poses little difficulty. On the other hand, if "the location of the intercept must be construed as occurring abroad, the Court, applying the principles set out in Justice Blanchard's decision, would have no jurisdiction to issue a warrant authorizing such activities."[422]

But there is more: Justice Mosley questioned the legitimacy of authorizing the interception of communications which originate from a foreign country, "knowing that the collection of such information in a foreign country may violate that state's territorial sovereignty."[423] If it were to strictly apply the teachings, established in *R. v. Hape,* that "a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law", it had to concede that territorial sovereignty of the foreign state prohibited even those activities. But to do so, it would have had to deny CSIS the authorization to intercept those communications, a situation which would threaten the security of Canada.

Justice Mosley thus mitigated the *Hape* ruling by holding that "(t)he norms of territorial sovereignty do not preclude the collection of information by one nation in the territory of another country, in contrast to the exercise of its enforcement jurisdiction."[424] This statement goes even farther than what was pleaded, as it was repeatedly acknowledged that no collection would occur abroad in the present

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[422] *Ibid.* at para. 49.
[423] *Ibid.* at para. 64.
[424] *Ibid.* at para. 74.

case.[425] At the same time, the statement takes stock of the fact that technology has made it unnecessary nowadays to physically cross borders to obtain this crucial information, hence, no violation of a foreign state's sovereignty is felt.[426] While Mosley J. reflects on the fact that information, in modern times, travels across borders just as quickly as the individuals who pose security risks do, suggesting that sticking to strict territoriality may unduly restrict security agencies' activities, his approach is territorialist because the absence of physical crossing of borders is the reason why, ultimately, he had no objection to issuing the requested mandates.

The *R. v. Hape* ratio was also followed in *R. v. Tan,*[427] a case in which the Canadian police, after travelling to Malaysia and arranging to meet with the Royal Malaysian Police, collected fingerprints and interrogated the claimant in Kuala Lumpur. The British Columbia Supreme Court found that it did so under the authority of the Malaysian police, which allowed the interviews only as long as the claimant consented to them. The Court found no evidence that the Royal Malaysian Police consented to have the Charter apply on its territory "so as to open the Malaysian interview and the Malaysian Fingerprints to *Charter* scrutiny".[428] It held:

> In *Hape* the majority concludes that the *Charter* does not apply to the actions of police officers who are operating on the territory of other states except in

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[425] *Ibid.* at paras. 44, 46, 59, 65.
[426] *Ibid.* at para. 74, citing J.L. Goldsmith, "The Internet and the Legitimacy of Remote Cross-Border Searches" (2001) U. of Ch. L.F. 103.
[427] *R. v. Tan,* (2010) B.S.S.C. 1948 (CanLII).
[428] *Ibid.* at para. 33.

> exceptional circumstances. Those exceptional circumstances are that the foreign state grants permission for Canadian law to be applied on its territory. This is supported by a consideration of section 32 of the Charter, which in its relevant respect restricts the Charter's territorial reach and limits to matters "…within the authority of Parliament…" (citations omitted).
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> In my opinion, the evidence falls well short of establishing even a *prima facie* case that there was agreement to apply Canadian law.[429]

This concludes the survey of section 8 decisions issued after *R. v. Hape*. They mostly endorse *Hape*'s strict territorial approach.

B. Section 7 of the Charter: defining fundamental justice

The right to life, security and liberty, and the right not to be deprived thereof except in accordance with principles of fundamental justice, is guaranteed under section 7 of the Charter. The principles of fundamental justice include the right to a fair trial and due process of law. The caselaw has traditionally recognized that disclosure of evidence is a principle of fundamental justice, and recently added to the list the duty to protect, both of which are examined in their extraterritorial dimensions.

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[429] *Ibid.* at paras. 36-37.

1. Disclosure of evidence

The case of *Khadr-1*[430] marks a departure from *R. v. Hape* because the Supreme Court of Canada took the exception which the majority in *R. v. Hape* recognized, and gave it full meaning. The decision was rendered only a few months after *R. v. Hape* was decided.

The facts are as follows. Omar Khadr is a Canadian citizen arrested at the age of 15 in Afghanistan, held in Guantanamo Bay since 2002 and charged in 2005 with the offence of killing an American soldier in Afghanistan during one of the battles which opposed American forces to Talibans. In the course of his detention, he received the visit of Canadian CSIS officials, who interrogated him and passed the fruits of the investigation to US officials. In preparation of his trial in the United States, Mr. Khadr sought the disclosure of CSIS' materials in application of the principles developed in *R. v. Stinchcombe*.[431] The Canadian officials refused to disclose the fruits of their investigation because, relying on *Hape,* they believed that the Charter "does not apply to the conduct of Canadian agents operating outside Canada".[432]

The Supreme Court of Canada disagreed. If ordinarily international law principles of comity prevent the extraterritorial application of the Charter, as expounded in *Hape*,

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[430] *Supra* note 194.
[431] [1991] 3 S.C.R. 326. This case holds that the Crown must disclose all the information it possesses to the accused, and more specifically any evidence that weakens its own case, but may strengthen the accused' case.
[432] *Khadr-1*, *supra* note 194 at para. 17.

this rule stops where Canada is found in breach of its core human rights obligations, again under international law:

> If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.[433]

In other words, pure territoriality of Canadian Charter rights is discarded as a governing principle when Canada participates in a process that violates its international obligations. By developing this exception, the Court attempts to reconcile the "not unanimous"[434] opinions of the Supreme Court judges in *Hape* –an understatement, given the rejection by four of the 9 judges of the 'new' principles regulating the extraterritorial application of the Charter.

Why did the Court choose to resort to international law, instead of finding that the "domestic" human rights obligations, embodied in the Charter, commended its application? One possible answer is that in doing so, it avoided to rule on s. 32 interpretation, i.e. on the question whether the Charter operates to limit Canadian actions abroad, and the relevance, or irrelevance, of geography in deciding whether

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[433] *Ibid.* at para. 19.
[434] *Ibid.* at para. 18.

section 7 applies. As a result, the scope of the Charter is now examined through the lenses of international law.

This shift from the domestic to the international can be incapacitating to claimants who, according to the concurring judges in *R. v. Hape*, would be left to argue on the basis of "uncertain and disputed" international law; or to Canadian officers, who would have to become familiar with this body of law and master the catalogue of Canada's international obligations.[435]

More importantly, this case need not have been treated as one involving an exception to the pure territorial paradigm, which prohibits the application of the Charter to foreign officials. It was nowhere pleaded that the Charter imposed obligations on the foreign authorities themselves. All that Omar Khadr requested was the disclosure of information held by Canadian authorities pursuant to his section 7 rights. Nor were Canadian authorities pleading that they could not disclose the information because to do so would violate American law or American sovereignty. They rather argued that the Charter simply did not apply to them abroad and, hence, that Omar Khadr could not invoke his section 7 rights against them.

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[435] *R. v. Hape, supra* note 16. Per Bastarache, Abella and Rothstein JJ., (at para. 173): "(…) I have difficulty in seeing how, in practice, Canadian officials will know when this point has been reached. Is the expectation that Canadian officers become knowledgeable in international customary law — an area of law whose content is uncertain and disputed? Practically speaking, I believe it is preferable to frame the fundamental rights obligations of Canadian officials working abroad in a context that officers are already expected to be familiar with — their obligations under the *Charter*." Per Binnie J. (at para. 187): "This is not the case, in my respectful view, for the Court to determine whether Canadian citizens harmed by the extraterritorial conduct of Canadian authorities should be denied *Charter* relief (except if faced with a criminal trial in Canada) and be left to arguments about Canada's international law obligations." *R. v. Hape, supra* note 16.

Khadr-1 illustrates the difficulty of the *R. v. Hape* matrix to handle issues that address directly the behaviour of Canadian authorities. The Court developed an exception to the *Hape* doctrine, but it left unanswered the underlying question of how the Charter's scrutiny of the exercise of state power is affected by geography. It also failed to specify whether the connecting factor of the nationality of Mr. Khadr was relevant in the invocation of section 7. The possibility to rely on a US Supreme Court judgment characterizing the process as violative of international law was convenient in the circumstances of the case, but it is unlikely that, in future cases, the determination of a violation of international law would be as "easy". Hence, the unanswered questions just evoked were left for another day.

Some of these questions were raised in a later case involving two Guantanamo Bay detainees who, while not holding Canadian citizenship, were interrogated by CSIS in Guantanamo Bay.[436] Both asked the Court to order CSIS to disclose the content of these interrogations in order to assist them in their *habeas corpus* petitions pending in the United States. They argued that section 7 of the Charter applied to them on the basis of *Khadr-1,* even though they were not Canadian citizens.

Blanchard J. delivered the judgment and in doing so, he developed a two-step analytical framework to resolve Charter extraterritoriality issues. The first question that he examined was whether the Charter "applies" to the Canadian officers

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[436] *Slahi v. Canada (Justice)*, 2009 F.C. 160 (CanLII); 186 CRR (2d) 160; 340 FTR 236 (Blanchard J.).

conducting the interrogations in Guantanamo Bay. On the basis of *Khadr-1,* as well as *R. v. Hape,* Justice Blanchard found that the Charter does apply to the Canadian officers "participating in the interviews of the Applicants in Guantanamo Bay, since they too were involved in a process that violates Canada's international law obligations". However, in the second step of his analysis, Blanchard J. found that section 7 of the Charter was *not* engaged because the applicants were not Canadian citizens and they lacked any other nexus with Canada.

In other words, the Court opined that the Charter *applies* to the Canadian officers, but that the Applicants, as non-Canadians, cannot *assert* Charter rights. The absence of Canadian citizenship would have been remedied had the Applicants been in Canada at the time of the violation. Thus, the word "everyone" in section 7 of the Charter does not really mean everyone subjected to a Canadian state action. It must be read as to say "everyone with a connecting factor to Canada". Canadian citizenship is considered as one of the connecting factors, physical location in Canada is another one, and facing a criminal trial in Canada is a third connecting factor identified by the Court.[437]

An inquiry into the identity or entitlement of the constitutional claimant starts taking shape, though one may feel uneasiness at the possibility that even had *Slahi* been tortured by Canadian officers, under this ruling, he would not have been able to allege a Charter infringement, since he is not a Canadian citizen, he is not physically

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[437] *Ibid.* at para. 47.

in Canada and he does not face charges in Canada. Although I discuss it at length in Chapter Five, I note in passing that this position is highly questionable because it puts too much emphasis on the identity of the potential rights holder and too little on the state action itself and on the identity of the state officials who performed it.

For the moment, if that is the test, one needs to examine it in-depth. So how does the Court arrive at such a reading of the term "everyone"? The court first cites the case in *R. v. A*.[438] Recall that *R. v. A.* is a case which holds that a Canadian citizen outside of Canada can enjoy some Charter rights if certain exceptional circumstances are met.[439] It says nothing on the potential Charter rights of non-citizens. Devising *a contrario* argument in this case is speculative, and justifying a membership entitlement on the basis of a speculation does not constitute sound legal reasoning, with all due respect.

The second case considered was *R. v. Cook.*[440] Recall from the discussion in Chapter Two that the majority of the Court in that case held that the Charter applied to an American citizen in contact with a Canadian authority abroad. Yet the trial judge in *Slahi* cited the dissenting opinion of L'Heureux-Dubé and McLachlin JJ., in which concerns are raised about the potentially unlimited scope of the word "everyone". If,

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[438] *Supra* note 337.
[439] In that case, the applicants were Canadian citizens, and they sought and obtained relief under s. 24(1) of the Charter even though they were outside of Canada at the time of the request, because they had secured an arrangement with the RCMP in Canada prior to leaving the country. See previous discussion of this case at text accompanying footnotes 337 and following.
[440] *R. v. Cook*, *supra* note 249. See previous discussion of this case at text accompanying footnotes 351 and following.

in *R. v. Hape,* LeBel J. endorsed Justice L'Heureux-Dubé's opinion regarding the definition of authority, he did not comment on how the word "everyone" should be interpreted. In addition, LeBel J. did not comment on the citizenship of Mr. Hape, a Canadian citizen; nor did he make any observations on any entitlement or nexus requirements. His approach was territory, not entitlement, driven.

Finally, Blanchard J. found "most compelling"[441] the Supreme Court's finding in *Khadr-1* that section 7 imposed "a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen".[442] There is a small contradiction here: in the same paragraph, the Supreme Court found that "an *individual's* s. 7 right to liberty" was engaged, and that such right imposed a duty on Canada to provide disclosure to "the *individual*".[443] Is the use of the word "individual" accidental? There is insufficient evidence to decide on this point.[444] In any event the Supreme Court did not at all address this question, either because Mr. Khadr was a Canadian citizen, or because his citizenship was irrelevant, or because the issue was just not pleaded.

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[441] *Slahi, supra* note 436 at para. 45.
[442] *Khadr-1, supra* note 194 at para. 13.
[443] *Ibid.* [emphasis added].
[444] Moreover, what to make of the conclusion of the Federal Court, in a different case, that there is a principle of fundamental justice, derived from section 7 of the Charter, which imposes on Canada "the duty to protect *persons* in Mr Khadr's circumstances" [emphasis added]: *Khadr v. Canada (Prime Minister)*, 2009 F.C. 405 (CanLII); [2010] 1 F.C.R. 134 at para. 71 (per O'Reilly J.). This case was appealed and led to the Supreme Court of Canada decision in *Khadr-2*, addressed next, in the sub-section entitled "Duty to protect".

The Federal court's sketching of an entitlement requirement, part of which contains a narrow reading of section 7 word "everyone", relies on a questionable reading of precedent. While the Court's analysis can be welcomed for its discussion of entitlement or membership requirements, analytically, its conclusion that precedent "teaches that section 7 Charter protections may be available to non-Canadians when they are physically present in Canada or subject to a criminal trial in Canada, and that Canadian citizens, in certain circumstances, may assert their section 7 Charter rights when they are outside Canada"[445] is both incorrect and speculative. It is incorrect to hold that s. 7 rights "may be available" to non-citizens in Canada because the *Singh* decision held precisely that they *are*. It is speculative because it makes a point that the Supreme Court, up to now, has not made, that is, reserving the ability to raise extraterritorial Charter infringements to Canadian citizens.

The appeal was rejected by the Federal Court of Appeal, Evans J. writing. The certified question was whether the trial judge, by adding a requirement of a "sufficient nexus" with Canada, went beyond the *R. v. Hape* and *Khadr-1* precedents, which did not discuss the citizenship of the claimants, or their entitlement to claim Charter rights by virtue of their belonging within the Canadian polity.

Evans J.A. pressed first that the Charter "normally applies to governmental action within Canada and was drafted with that in mind".[446] He then examined the argument

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[445] *Slahi, supra* note 436 at para. 47.
[446] *Slahi v. Minister of Justice et al.,* 2009 F.C.A. 259 (CanLII) at para. 5 (Evans J.A.).

that the trial judge's focus on nexus is inconsistent with *Khadr-1* and *R. v. Hape,* two decisions which, again, involved Canadian citizens. In doing so, Evans J.A. concluded that there was no such inconsistency, since, in these cases, it was "implicit" that the nexus requirement was met, considering the Canadian citizenship of each claimant. In other words, Evans J.A. suggests, though not explicitly, that the Supreme Court of Canada in *R. v. Hape* and *Khadr-1* meant that the Charter could only limit the actions of the Canadian government when the target of those actions is either a Canadian citizen or a permanent resident or (arguably) has some other nexus with Canada.

To sum up, these cases not only adopt the teachings of *R. v. Hape* regarding the territorial paradigm: they add a requirement of entitlement to rights, based on citizenship or some other nexus with the constitutional polity, to authorize an exception to that principle. Only Canadian citizens or permanent residents can argue that the Canadian government violates its obligations under international human rights law, so as to avoid the pure territorial application of the Charter to a fact pattern. It is difficult to predict whether the "entitlement" approach devised by Evans J.A. will be adopted by lower courts; for the time being, since the Supreme Court of

Canada dismissed the application for leave to appeal from the judgment,[447] it is assumed that *Slahi* is good law.

2. Transfer of prisoners

The *R. v. Hape* ratio was applied in *Amnesty International v. Canada (Canadian Forces)*[448] where the Federal Court held that the Charter did not apply to Canadian Forces in the transfer of Afghan prisoners to Afghan authorities in Afghanistan, even if the transfer were to expose the prisoners to a risk of torture.

As a starter, the Court's opening statement shows that there is some confusion on the identification of the issue at bar. The trial judge first said that the issue at stake was whether the Charter "applies to the conduct of Canadian Forces personnel (…)", but added in the next sentence, that "For the reasons that follow, I have concluded that detainees (…) do not have rights under the *Canadian Charter of rights and freedoms."*[449] The confusion has an impact on the application of the consent test. Indeed, applying *R. v. Hape*, the Court found that while Afghanistan had consented to the application of Canadian law to all Canadian personnel,[450] it had not consented

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[447] *Mohamedou Ould Slahi v. Minister of Justice and Attorney General of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police*, 2010 CanLII 7376 (SCC).
[448] *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 F.C. 336 (CanLII) ; [2008] 4 F.C.R. 546 (Mactavish J.).
[449] *Ibid.* at paras. 1-2.
[450] *Ibid*. at paras. 168-170.

to Canada applying the Charter to Afghan detainees. Consequently, the Court dismissed the application.

The confusion was taken to another level on appeal. Justice Desjardins pointed out that "In his oral submission, counsel for the applicant indicated that his claim pertains to the application of the Charter on the actions of CF (Canadian Forces) personnel as opposed to individuals detained by the CF." Desjardins J.A. then added that "This new characterization still supposes that the Charter would apply to foreigners *since restraint of CF personnel is possible only if foreigners indeed have Charter rights*."[451]

And it seems that they did not. The appellants pleaded that *R. v. Hape* left the door open for extraterritorial Charter application if Canada is found in violation of its "core human rights obligations". Clearly, the exception exists, and it was applied in the first *Khadr* case[452] where the Supreme Court of Canada declared that section 7 of the Charter applied to a Canadian citizen detained in Guantanamo Bay, because of Canadian officers' involvement in a process that violated basic international norms. But the Court rejected the appellant's proposition that this exception applied here. Distinguishing and narrowing down *Khadr-1*, it held that that case dealt with the application of the Charter to a Canadian citizen regarding information obtained by

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[451] *Amnesty International Canada v. Defence Staff for the Canadian Forces, supra* note 297 at para. 16 [emphasis added]. Holding a Charter rights appears as a prerequisite for the limitation of state action.
[452] *Khadr-1, supra* note 194.

Canadian officials while participating in a foreign process which violated international law. This fact pattern was "miles apart" from the current case, where "foreigners, with *no attachment whatsoever* to Canada or its laws, are held in CF detention facilities in Afghanistan".[453]

The fact pattern may be miles away from *Khadr*, but this allusion casts doubt as to *Hape's ratio decidendi*, for Mr. Hape was a Canadian citizen with many connecting factors to Canada; he was seeking to exclude evidence collected by Canadian officials and produced at a Canadian trial for a crime allegedly committed in Canada. By referring to the absence of any attachment whatsoever, the Court justifies its decision to exclude the Charter in the case at bar, but also –perhaps unwillingly- shows that the all-or-nothing approach advocated in *Hape* is difficult to reconcile with cases where there is a strong attachment with Canada.

Moreover, while the Supreme Court in *Khadr-1* did not limit its conclusion to Canadian citizens, the Court of Appeal read in such a limitation. In doing so, it added personal entitlement criteria to *R. v. Hape,* and, at the same time, it compromised its impact.

While these decisions endorse and apply the *Hape's* doctrine, the cases that follow have all attempted to dilute its impact. As the next section illustrates, *Hape's* doctrine has not been followed consistently: judges have tried to bend it, weaken it, if

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[453] *Amnesty International Canada v. Defence Staff for the Canadian Forces*, *supra* note 297.

not discard it altogether. A close scrutiny of the post-*Hape* legacy shows the need for a more flexible approach to defining the scope of constitutionalism, a polycentric one which allows for the consideration of various points of attachment and various expressions of authority.

3. Duty to protect

A few months after the Supreme Court decision in *Khadr-1* was rendered, Mr. Khadr who was still in Guantanamo Bay, filed an application for judicial review of the decision of the Canadian government to not order his repatriation to Canada. Justice O'Reilly, for the Federal court of Canada[454] granted the application and ordered Canada to seek the repatriation of Mr. Khadr. The Court held that the principles of fundamental justice guaranteed under section 7 of the Charter include a "duty to protect" people in situations similar to that of Mr. Khadr and ordered the repatriation of Mr. Khadr.

This decision is interesting because it shows the confusion that a strict territorial approach can lead to when it is applied to a factual situation which has more than one location. The very first step that the Court undertook was to ascertain whether there is a reviewable decision. It found that there is a decision, even a policy, against requesting Mr Khadr's return to Canada. As such, this decision can be subjected to judicial review at any time. Even if the subject-matter of the decision is foreign

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[454] *Khadr v. Canada (Prime Minister)*, *supra* note 444 (O'Reilly J.).

affairs, a matter derived from the crown prerogative, the decision is still subject to judicial review if it directly affects "the rights or expectations of an individual"[455] or if "a right guaranteed by the Charter is violated".[456] The next step was for the Court to determine whether the Charter –and specifically section 7 - applied to the actions of the Canadian officials. But its focus shifted from the decision not to request repatriation, which it had just examined, to the actions of Canadian officers in Guantanamo Bay back in 2003-2004. It found that if the Charter applied in *Khadr-1,* surely it must have applied where the Canadian officers knowingly interrogated Omar Khadr, as the present case suggests.[457] It is thus perplexing that the actions which trigger Charter application are not those for which the Court established its judicial review power.

Once application is established, the Court examined the allegation of a section 7 violation by inquiring first into the principles of fundamental justice which are engaged. In order to assess whether refusing to request the repatriation of Mr. Khadr violated section 7, the Court went on to identify the applicable principles of fundamental justice, i.e., principles that are legal in essence, that attract a broad consensus regarding their role in the fair operation of the legal system, and which are sufficiently precise to guide the assessment of deprivations of life, liberty or security

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[455] *Ibid.* at para. 41, quoting *Smith v. Canada (Attorney General)*, (2009) F.C. 228, (2010) 1 F.C.R. 3 at para. 26.
[456] *Ibid.* at para. 40, quoting the decisions in *Copello v. Canada (Minister of Foreign Affairs)* 2003 FCA 295, 3 Admin. L.R. (4th) 214 and *Black v. Canada (Prime Minister),* (2001), 54 O.R. (3d) 215 (C.A.).
[457] *Khadr-2, ibid.* at para. 52.

of the person. These principles emanate from our domestic legal order, but they are, "in addition", "informed by Canada's international obligations".[458]

It bears noting that the Court did not invoke previously recognized principles of fundamental justice; rather, it attempted to uncover a new principle of fundamental justice based solely on Canada's commitments at international law, notably under the *Convention against torture*, the *Convention on the Rights of the Child* and the *Optional Protocol on the Involvement of Children in Armed Conflict*.[459] The Court conducted a review of the obligations binding Canada under these treaties and concluded that Canada was in breach thereof. The *Convention on the Rights of the Child,* for example, requires Canada to "take steps to protect Mr. Khadr from all forms of physical and mental violence (…)" ; Canada, contrary to these obligations, "implicitly condoned the imposition of sleep deprivation techniques on (Mr Khadr), having carried out interviews knowing that he had been subjected to them."[460]

In doing so, the Court disregarded the rule of construction of treaties according to which the scope of a treaty is normally limited to the territorial jurisdiction of the contracting state.[461] According to this rule, the *Convention on the rights of the child*

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[458] *Khadr-2, ibid.* at para. 55.
[459] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36; *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3; *Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict*, May 25, 2000, [2002] Can. T.S. No. 5.
[460] *Khadr v. Canada, supra* note 444 at para. 63.
[461] *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, Article 29: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in

only imposes obligations on Canada with regard to children within its jurisdiction, usually understood as territorial.[462] The same can be said regarding the *Convention against torture*.[463] Nonetheless, the Court held that these obligations justified (implied?) a new principle of fundamental justice under the Charter: the "duty to protect *persons* in Mr. Khadr's circumstances".[464] It can be argued that with this decision, Canada became one of the first jurisdictions to recognize a constitutional duty to exercise some form of diplomatic protection.[465]

In the Court's opinion, the refusal to repatriate Mr. Khadr constitutes a breach of the duty on Canadian authorities to protect people placed in circumstances similar to his. Since that duty is breached, the person is entitled to a remedy. In the case at bar, the

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respect of its entire territory". Further discussion of the extraterritorial scope of treaties will be found in the Conclusion of this thesis.

[462] Article 2(1) of the *Convention on the Rights of the Child* holds that "State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction (…)".

[463] Article 16 reads that a state party is bound to respect the Convention "in any territory under its jurisdiction." The extraterritorial reach of the *Convention against torture,* and the drafting history, is discussed in C. Forcese, "Spies Without Borders: International Law and Intelligence Collection", (2011) 5 Journal of National Security Law and Policy 179 at 205. Although the breach found by the Court relates to the passing of information to the US, an action which violates the terms of the Convention which prohibts the use of torture-based evidence in *any* proceedings: *Khadr v. Canada, supra* note 444 at para. 64.

[464] *Ibid.* at para. 71 [emphasis added]. Note that the Court does not use the words 'Canadian citizens'.

[465] Although to fall strictly within the framework of diplomatic protection, one must face an international wrongful act performed by a foreign state on a foreign national. Here, it is the actions of the Canadian authority which triggered the protection of Khadr, rather than the actions of the United States of America. Similar questions were raised in the United Kingdom in the case in *Abbasi and Another v. Secretary for Foreign and Commonwealth Affairs & Secretary of State for the Home Department,* [2002] E.W.C.A. Civ. 1598*,* but the English Court of Appeal denied the existence of any obligation to repatriate British citizens when they are held and even tortured abroad (by foreign officials). In *Kaunda v. President of the Republic of South Africa*, (2005) 4 SALR 235 (CC)*,* the Supreme Court of South Africa denied that from the South African Constitution could be inferred a duty to protect. At most, there is a duty on the part of government officials to duly consider a request for protection. Even countries where diplomatic protection is guaranteed by the Constitution, such as in ex-soviet countries and Germany, the right is not enforced by Courts, who rather recognize discretion on the part of the government: see *Hess.* These cases are discussed at length in N. Karazivan, "Diplomatic protection: taking human rights extraterritorially" (2006) 44 Can. Yb. Int'l L. 299.

only remedy that appears "capable of mitigating the effect of the *Charter* violations" caused by Canada's investigations in Guantanamo Bay is the order to seek the repatriation of Mr. Khadr.[466]

When questioned about the existence of a sufficient causal connections between the acts of Canadian officials and the deprivation suffered by Mr Khadr so as to engage the Charter, the Court again falls back on the Canadian officials' conduct of 2004: "the necessary degree of participation is found in Canada's interrogation of Mr. Khadr knowing that he had been subjected to treatment that offended international human rights norms to which Canada had specifically committed itself."[467]

In the end, there is confusion on the connecting factors needed to extend the application of section 7 to a situation which contains one or many extraneous elements. The conclusion on the applicability of the Charter and the presence of a section 7 violation did not rely on Mr. Khadr's nationality and therefore left unanswered the question whether a person subjected to Canadian state action abroad must be a Canadian citizen in order to be able to challenge a governmental decision under the Charter, or must hold other connecting factors. In other words, entitlement requirements, if any, are not made clear. By holding that section 7 of the Charter implies a "duty to protect" as a principle of fundamental justice, and by holding that this duty to protect applies to *persons* that are in the same situation as Mr Khadr,

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[466] *Khadr v. Canada, supra* note 444 at para. 78.
[467] *Ibid.* at para. 83.

there is a point to be made that the territorial paradigm has been challenged. But because Mr. Khadr is a Canadian citizen, it may also be argued, though I do not subscribe to this argument, that citizenship is an implicit requirement for Charter application –an argument implicit in the ruling in *Slahi* and *Amnesty International*.

On appeal, the repatriation order was upheld, but on different grounds.[468] A symmetry between the action judicially reviewed, and the Charter application, was restored. For the two judges writing the majority judgment (Nadon J.A dissenting), the remedy is indeed the repatriation order, but the breach is not caused by the refusal to repatriate; rather, it is caused by CSIS' conduct in 2004.

While not rejecting the finding of a principle of fundamental justice imposing a "duty to protect", the Court qualified the repatriation order as a remedy to the breach caused by Canadian officers in 2004, when they conducted the interrogation of Mr. Khadr in Guantanamo. Notwithstanding the fact that the impugned conduct at bar was not CSIS involvement, but rather, the government's refusal to repatriate,[469] the Court chose to rest its conclusions on the former. And in its opinion, the only action which could remedy the breach in 2004 made by the Canadian officers who, knowingly, interrogated an accused subjected to torture, is an order to seek repatriation. The Court seemed to recognize that to go from a breach in 2004 to a

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[468] *Canada (Prime minister) v. Khadr,* 2009 F.C.A. 246 (CanLII); [2010] 1 F.C.R. 73.
[469] That this is the question at bar is expressly recognized by the Court, *ibid.* at para. 64.

remedy of repatriation in 2009 requires a little "logical extension".[470] Nonetheless, in the absence of a convincing argument by the Canadian government's counsels, the "extension" was validated.

The Supreme Court of Canada ultimately, in *Khadr*-2[471], upheld the lower courts' finding that section 7 of the Charter had been violated because of the actions of Canadian agents in 2003 and 2004 (not, as the trial judge had found, because of the refusal to repatriate Mr. Khadr which violated a principle of fundamental justice). Contrary to the Appeal Court, however, the highest tribunal found that the proper remedy was not the order to request Mr. Khadr's repatriation. Rather, the choice of remedy would be left to the government who is best suited and has the required expertise to make that call.

In this saga, the lack of discussion of the role of citizenship or nationality, or of the type of connection that is required in order to trigger the application of the Charter, and the several actions which are brought to Charter scrutiny, make the scope of Canadian constitutionalism even fuzzier and leaves many open questions. What if Mr. Khadr was not a Canadian citizen? Would the actions of CSIS abroad trigger the same need for a "remedy"? What is the "extraterritorial action" in this case? And if CSIS had not conducted interrogations in Guantanamo Bay in 2004, would the Court

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[470] *Ibid*. at para. 57.
[471] *Khadr-2*, *supra* note 195.

have ordered repatriation? What does it mean to be in a situation *similar* to that of Mr Khadr? Young? Canadian? Tortured? All three?

C. Section 6 of the Charter: defining mobility

Section 6 applies only to Canadian citizens, and its first paragraph protects the right to "enter, remain and leave" Canada. Of these three actions, it is, by far, the right to *remain* in Canada which has occupied the courts, thanks to extradition cases. Though the right to *enter* Canada is less discussed in the caselaw, it is this aspect of mobility rights which contains an extraterritorial dimension worth examining. Of course, if a Canadian citizen enjoys the right to enter Canada, it is implied that this person is *not* in Canada at the time of exercising his or her right. In *Kozarov v. Canada,*[472] the Federal Court clarified this point and held that section 6 of the Charter applied extraterritorially in a way to guarantee the return of a Canadian citizen to Canada *after* his sentence has been served. However, while he serves that sentence in the US, his transfer to Canada is subject to the conditions established by legislation. The Court thus rejected the claimant's argument that s. 6(1) provides him with a prima facie right to enter Canada. The government tried to rely on *Hape* to dismiss the applicant's case, but to no avail, as that case concerned the application of the Charter to state actions committed outside of Canada; in *Kozarov,* the activity in question was the decision to refuse the transfer of the prisoner, an action "made in Canada".

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[472] *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 F.C. 866 (CanLII); 33 F.T.R. 27 (Harrington J.).

The Court added: "If one were to say the Charter had no application to Mr. Kozarov while he was outside Canada, then his constitutional right to return to Canada, once his sentence is served, would be violated."[473]

A more contentious aspect of mobility rights concerns the right to a passport. Traditionally, there was a debate as to whether section 6 of the Charter implied a positive right to the issuance of a passport.[474] Recently, the question was examined by the Federal Court, which recognized the *extraterritorial* and *positive* right to be issued a passport as a part of a Charter guarantee.[475] The recognition that Canada's actions may be challenged by Canadian citizens despite the lack of geographical nexus (although the relevant facts occurred in an embassy) was not rooted in a rejection of the *R. v. Hape* reasoning. In that way, that decision does not form part of

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[473] *Ibid.* at para. 33. Both parties agreed that the Federal Court of Appeal should exercise discretion and address the "important question of constitutional law", that is, the question of the application of section 6 of the Charter to the *International Transfer of Offenders Act*. But the Court of Appeal, Evans J.A. writing, dismissed the appeal for mootness (Mr. Kozarov had, by then, finished serving his sentence and was deported to Canada): 2008 F.C.A. 185 (CanLII). Compare this case with *R. v. Singleton,* 2010 B.C.S.C. 1855 (CanLII), in which the Supreme Court of British Columbia held that "the law of extraterritoriality" applies to the claim that the Charter is violated by the refusal of Canada to seek the return of a Canadian citizen serving his sentence in the United States. Following *R. v. Hape*, the Court found that the Charter does not apply to the extradition proceedings pertaining to the claimant (at paras. 186-192).

[474] The Supreme Court of Canada has not clarified its stance on the issue. Some scholars writing before the Federal Court of Canada's recognition of a right to passport believed that section 6(1) carries a constitutional right to the issuance of a passport : see J.B. Laskin, "Mobility Rights under the Charter" (1982) S.C.L.R. 89 and A.J. Arkelian, "Freedom of movement of Persons Between States and Entitlements to Passports" (1985) 49 Sask. L.R. 15. These references are taken from M.-R. N. Girard, "L'article 6 de la Charte canadienne des droits et libertés: la liberté de circulation et d'établissement, un volcan dormant?" *in* G.A. Beaudoin & E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (Markham: Lexis Nexis, Butterworths, 2005) 413 at 432-433. Peter Hogg, on the other hand, was not convinced that section 6(1) created a right to the issuance of a passport: see P.Hogg, *Constitutional Law of Canada,* 4th ed. (Scarborough: Carswell, 1997) at 1048. Today however there is little doubt that such right exists: P. Hogg, *Constitutional Law of Canada,* 5th ed. Suppl. (Toronto: Thomson/Carswell, 2007-) at 46-3.

[475] *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 F.C. 580 (CanLII); [2010] 1 F.C.R. 267.

our sample of cases *post-Hape* which distinguish it, or follow it. Nonetheless, it provides additional insights on how to reconsider the territorial paradigm.

In *Abdelrazik*, the appellant sought and obtained an order directing Canada to issue an emergency passport as a remedy for the violation of his Charter right to enter Canada, a right guaranteed under paragraph 6(1) of the Charter. Mr Abdelrazik, a dual Sudanese and Canadian citizen, was living in the Canadian embassy in Sudan while awaiting the issuance of a Canadian passport. Canada refused to issue that emergency passport on the basis of the alleged involvement of Mr. Abdelrazik in terrorism-related activities. Canada also alleged that in refusing to issue a passport it was complying with UN Security Council 1267 Committee, since that Committee had listed Mr. Abdelrazik as an associate of Al-Qaeda, "thus making him the subject of a global asset freeze, arms embargo and travel ban."[476] The Federal Court found that even if the issuance of a passport is a matter of royal prerogative, and even if section 10.1 of the *Canadian Passport Order,* which allows the Minister discretion to grant or refuse a passport, has been found to be constitutionally valid, it does not follow that the impugned *decision,* as opposed to regulatory or legislative provision, is beyond scrutiny.

The Court held that the Charter right to enter Canada had been violated by Canada, even though the applicant was in no instance present on Canadian territory while the violation occurred. Admittedly, he was in the Canadian embassy for part of the

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[476] *Ibid.* at para. 3.

period during which his detention lasted. But the Court didn't rely on this fact. According to Zinn, J., "where a citizen is outside Canada, the Government of Canada has a positive obligation to issue an emergency passport to that citizen to permit him or her to enter Canada; otherwise, the right guaranteed by the Government of Canada in subsection 6(1) of the Charter is illusory."[477]

This section 6(1) interpretation finds echo in Passport Canada's guidelines, which provide that a citizen has access to procedural fairness and natural justice should he be denied passport privileges; such a directive, in the Court's opinion, recognizes "the special relationship that exists between a citizen and his country."

Once again, the *R. v. Hape* matrix, or the pure territorial doctrine, appears to be unable to handle issues relating to the scope of rights, when the claimants of these rights are outside of the geographical space of Canada. Here the Court did not even apply the *Khadr-1* exception, i.e. it did not try to find an international obligation that Canada has violated in order to trigger the application of the Charter via section 32. This would have been difficult, since Canada was alleging its *observance* of international law to justify the refusal to issue a passport to Mr. Abdelrazik. The Court rather opted for an interpretation of section 6 which would not make the rights protected therein "illusory". It thus proceeded via an interpretation of the meaning of a right to *mobility*.

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[477] *Ibid.* at para. 152.

The Canadian government did not file an appeal of that judgement; it issued the passport shortly after the ruling. It can thus be said that for the moment, section 6 of the Charter can be invoked by Canadian citizens regardless of their physical location.

D. Section 10 of the Charter: defining arrest and detention

Section 10 of the Charter provides that everyone arrested or detained has the right to be informed of the reasons of the arrest or detention, the right to receive legal advice and the right to *habeas corpus*. In the case in *R. c. Cech*,[478] the Québec Superior Court found that the right to legal counsel could be held by a Canadian citizen subjected to an arrest by Canadian police officers in the Dominican Republic. In that case, Cournoyer J. cited the *Hape* ruling and acknowledged LeBel J.'s concern that police officers do not have the practical ability to respect their Charter obligations when they conduct their obligations abroad. However, it distinguished *Hape* and held that police officers who choose to arrest someone outside of Canada must be able to ensure that person a right to legal counsel, especially given modern technological tools which make it easy to contact a lawyer from all around the world. Thus, the Court concluded that Canadian officers had violated section 10 of the Charter, a ruling that positively ignores the territorial rule established in *Hape* and which rests on a pragmatic approach to the question of how 'hard' it truly is, for Canadian officials operating abroad, to comply with the Charter. Obtaining a mandate ranks

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[478] 2009 QCCS 1041 (CanLII).

higher, obviously, than merely giving the accused a list of legal counsels contact information. In the Court's view, Canadian officers would have been able to comply "independently" with their Charter obligations.

Paradoxically in the same decision the Court did follow *Hape* but in relation to another issue raised by the respondent, that is, the impropriety of the actions posed by Canadian officers in the Dominican Republic. According to the applicant, his arrest, sequestration and deportation warranted a stay of proceedings, a question which, in the Court's view, "necessitates the examination of the extraterritorial scope of the Charter". The Court applied the general rule against the extraterritorial application of the Charter, unless a manifest breach of international human rights law is found (the *Khadr-1* exception). The Court found no evidence that Canada was violating international law in a manner which could trigger a *Khadr-1* exception.[479] Quite the contrary, the Supreme Court of the Dominican Republic had ruled that the actions of the Canadian officers were legal, contrary to the US Supreme Court ruling on the legality of the Guantanamo Bay detention measures. So the Court denied the respondent's claim that his arrest and abduction violated the Charter.

In that case, the strategy manifestly used by the Court consists in separating the issues at stake: contrary to the *Hape* ruling, the "all or nothing" approach was implicitly rejected. Whether the Charter applied to the facts depended on the type of conduct that was being challenged. If the conduct is the abduction and arrest, and

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[479] *Ibid.* at paras. 201-206.

neither exception recognized in *R. v. Hape* is found, there will be no extraterritorial application of Charter rights. If, on the other hand, the challenged action consists in refusing to inform the accused of his right to legal counsel, then the strict territorial approach devised in *R. v. Hape* is rejected, because from a pragmatic point of view, compliance with the Charter is relatively easy.

E. Section 13 of the Charter: defining self-incrimination

Section 13 provides a witness "who testifies in any proceedings" with a guarantee against self-incrimination.[480] In the case in *King v. Drabinsky,*[481] the Ontario Court of Appeal found that section 13 of the Charter could be used to exclude statements made during US proceedings if a trial were to be held in Canada. The Court of Appeal held that s. 13 of the Charter would apply to someone who made a statement outside of Canada, if that statement were to be used in a Canadian trial. In making this finding, the Court implicitly conferred an extraterritorial scope to section 13.

The possibility for a Canadian court to strike out evidence that was obtained abroad if the admissibility of that evidence would be unfair to the accused was recognized in *Hape*. However, *Hape* also ruled that section 8 of the Charter, a substantive provision, had no application outside of Canada. *Hape* stood for the propositions that the searches conducted abroad by the RCMP were immune from section 8 scrutiny,

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[480] A *caveat* applies to prosecutions for perjury or for the giving of contradictory evidence.
[481] 2008 O.N.C.A. 566 (CanLII); 91 O.R. (3d) 616. Application for leave to the Supreme Court of Canada denied.

but that the materials obtained were still subject to exclusion *ex post facto* under section 7 and 11d) during a trial in Canada. By contrast, the Court of Appeal of Ontario found that section 13 would have applied directly to the accused, had he made the incriminating statement, without the need to resort to the fair trial guarantee embodied in section 7 and 11d) to exclude the impugned evidence.[482]

F. Section 15 of the Charter: defining equality

Recall that in at least one case, the Federal Court of Canada held that a Canadian law that is discriminatory can be challenged on Charter grounds by a non-citizen, from outside of Canada.[483] That case is contrasted with several other cases which held the opposite, denying plaintiffs standing to challenge the constitutionality of Canadian legislation.[484] These cases were discussed in Chapter Two, in the section pertaining to standing issues; they precede *Hape.* As opposed to the caselaw reviewed up to now, they do not challenge actions of Canadian officials, but Canadian legislation.

In *Chazi c. Québec (Procureur general)*,[485] the Quebec Court of Appeal denied standing to claimants who attempted to invoke a breach of section 15 of the Charter

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[482] Sections 7 and 11 were seen as another 'potential avenue' of recourse (*ibid.* at para. 35). The distinction is not trivial : evidence obtained in breach of the Charter may be excluded under s. 24(2) of the Charter, while evidence not obtained in breach of the Charter, but nonetheless breaching the accused' right to a fair trial if admitted as evidence, can be excluded under s. 24(1) of the Charter (in combination with ss. 7 and 11d).
[483] See *Crease v. Canada, supra* note 327.
[484] *Ruparel v. Canada*, *supra* note 316; *Deol v. Canada (Minister of Citizenship and Immigration)*, *supra* note 318; *Kassam v. Canada (Minister of Citizenship and Immigration)*, *supra* note 318.
[485] *Supra* note 318. The case was discussed at text accompanying 331.

caused by a provincial immigration directive. The claimants were neither Canadian citizen, nor were they physically present in Canada. They argued that the provincial immigration legislation discriminated against people who, in North Africa, work "under the table" and hence cannot see their work experience validly recognized in the calculation of their immigration application. The Court referred to the ongoing debate regarding whether the Charter rights apply to non-citizens outside of Canada, citing *R. v. Hape* but also *Ruparel, Chazi* and *Crease,* and recognized that the question "is a difficult one to decide"[486] but refused to settle the point whether non-citizens living abroad can invoke the Charter, as it was unnecessary. Instead, it analyzed the merits of the application taking for granted that the Charter did apply to the applicants, but ultimately found no violation of section 15.

By reviewing conflicting caselaw, and recognizing that no clear guidance can be taken from the said review, the Quebec Court of Appeal implicitly acknowledged that the *R. v. Hape* territorial approach has its own limitations. The Court preferred to assume, or take for granted, that the Charter applies to the government act under scrutiny, instead of challenging precedent, or trying to build an alternative theoretical framework to that devised in *R. v. Hape.* Although its prudence is to be commended, it is, will all due respect, time to undertake such a conceptualizing effort.

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[486] In the decision, the precise terms are "la question est difficile à trancher" : *Chazi c. Québec, supra* note 318 at para. 90.

III. CONCLUSION

Several findings can be made based on the preceding review of *Hape's* legacy. First, sections 6, 7, 10, 13 and 15 of the Charter have been given, to a certain extent, extra-territorial effects in such way as to cast considerable doubt on the purely territorial approach raised in *Hape.* Second, when the "human rights exception" devised in *R. v. Hape* is raised, there is doubt as to the necessity of displaying connecting factors with Canada such as holding Canadian citizenship or facing trial in Canada prior to being able to raise Charter infringement when physically abroad. Third, the fact that the Charter *applies to* a certain action performed by a Canadian officer is not conclusive of whether the target of that action will be able to raise the Charter infringement. In certain circumstances, the Charter's application to an impugned action is contingent upon a prior finding that the claimant is indeed the holder of the right infringed, a finding which signals the establishment of a personal entitlement criterion in addition to the territorial one.

These findings have to be added to those which Chapter Two allowed us to make, i.e. that although when interpreting the scope of ordinary legislation, courts can devise functional tests, when they interpret the Charter's scope, the territorial principle is binding to the point of rendering the Charter application "impossible", subject to the two caveats discussed above. What makes the application "impossible" is, again, a narrow reading of the concept of state authority, and a flawed application of the concept of enforcement jurisdiction, coupled with a restrictive selection of

international law principles such as the principle of state equality, non-intervention and territorial sovereignty. On the other hand, a review of caselaw following *R. v. Hape* demonstrates that in practice, extraterritorial application of the Charter is far from being "impossible". But it is difficult to predict when it is "possible", and that, in itself, is problematic.

The least that can be said, based on the study of the caselaw, is that if pure territoriality officially binds Canadian courts, in reality it is crippled with exceptions and variations. If I return to the theory of changing paradigms and the hypothesis that territoriality is the dominant paradigm in Canadian law, this means that although territoriality is the governing paradigm when Charter rights are alleged, it is fraught with anomalies and exceptions which betray confusion with not only what the law is, but what it should be. This state of confusion and under-theorization brings attention to the need to search for an alternative model, one which could more successfully help in predicting the law in hard cases than the inquiry about "in or out" which currently binds our courts.

The motivation behind this search does not only stem from the finding of incoherence and under-theorization of the law. It also comes from the realization, based on recent caselaw, that a theory based on personal entitlement to rights may be pointing at the horizon (see the Federal Court of Appeal cases in *Amnesty*

International[487] and *Slahi*[488]), a theory which, if adopted, would be illiberal and contrary to Canadian ideals.

The challenges faced by the territorial paradigm, underscored in Chapter One, find echo in the demonstration, in Chapters Two and Three, of the limitations of that principle in Canadian law. Chapter Four will serve as a springboard to the final reflexion, in Chapter Five, on a possible analytical framework alternative to the territorial paradigm. As such, Chapter Four will be dedicated to the review of the rich doctrinal and jurisprudential debates over the extraterritorial application of the US Bill of Rights. These debates are illuminating, not only because they led to the progressive abandonment of territoriality as a principle guiding the determination of the scope of constitutional rights, demonstrating that such abandonment is possible, but also because they explore theoretical approaches which, once comparative law concerns are taken in consideration, find echo in our own constitutional order.

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[487] *Supra* note 297.
[488] *Supra* note 436.

CHAPTER FOUR:

THE SCOPE OF AMERICAN CONSTITUTIONAL RIGHTS

I. INTRODUCTION

About fifteen years ago, Gerald Neuman, in *Strangers to the Constitution*, asked the following question: "the Constitution begins with 'We the People'. Where does it end?"[489] To answer this question, American scholars have looked at how and to what extent the territoriality principle determines the identity of the constitutional subject, the scope of constitutional rights, and the applicability of constitutional limitations to governmental actions in cases where a foreign state action is involved. As this chapter unfolds, the debate over the geographical scope of the American Bill of Rights –a debate which started with the Spanish-American War and reached its climax with the events taking place after September 11, 2001 –will serve as the anchor for a theorization of the constitutional subject, the scope of constitutional rights and the applicability of constitutional limitations to state action in Canadian law.

Obviously, many differences punctuate Canadian and American constitutionalism, not the least being the latter's military past, imperialist tendencies and acknowledged

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[489] G. L. Neuman, *Strangers to the Constitution : immigrants, borders and fundamental law* (Princeton : Princeton University Press, 1996) at 3 [hereinafter *Strangers to the Constitution*].

habit of exporting its laws. As Grundman says, the United States' main three exported products are "rock music, blue jeans, and United States law."[490] While Grundman focused on legislative enactments such as the *Civil Rights Act of 1964*,[491] whose provisions have been recognized some extraterritorial scope, my main focus will be the entrenched *United States Bill of Rights (1791)*.[492] As will be seen, American legal scholars as well as Supreme Court judges have developed over the years certain alternatives to the territoriality paradigm. Each alternative theory elects one paramount consideration as its foundation and as a justification for including or excluding elements from the scope of application of the US Bill of Rights. For some, it is the identity of the constitutional subject which is paramount (the "people" approach); for others, it is the principle that any state action ought to be matched by reciprocal constitutional limitations (the "mutuality" approach); and for others yet, pragmatic considerations ought to transcend any other criteria for the recognition of constitutional rights in a given case (the "functional" approach).

These theories occupy different locations on the spectrum of law's space, which is not, technically, state-specific or nation-specific. The point is not to transplant them into Canadian law, but to use them as beacons to enlighten the debate in Canada. But because the decision to analyze American constitutional law, and no other, must be justified, section II of this Chapter will do so, in addition to drawing essential

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[490] V. Rock Grundman, "The New Imperialism: the Extraterritorial Application of United States Law" (1980) 14 Int'l Lawyer 257.
[491] Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964.
[492] U.S. Const. Amendments 1-10 (1791).

differences between both systems. The third section addresses the scope of constitutionalism in both its subject and object dimensions. The fourth will overview the American caselaw on the scope on constitutional rights, and address how the two poles previously identified are applied in the case law. The last section will organize in five different themes the available alternatives to pure territoriality, and offer conclusive remarks.

II. COMPARATIVE ISSUES

The debate over the scope of constitutional rights and freedoms is alive and well in the United States. To some extent, it is perfectly understandable that these questions figure prominently in the US legal landscape. The US has developed a tradition of extraterritorial military occupation and interventions in foreign countries.[493] But the same cannot be said of a country such as Canada, or at least, not to the same extent. Nonetheless, as Lorraine Weinrib points out, after the Second World War, the "thought and practice" of American courts (the Warren Court) "influenced the constitutional development of many countries."[494] Although American constitutionalism is sometimes subject to the exceptionalism discourse,[495] in modern

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[493] The United States intervened in the Philippines, Nicaragua, Honduras, Haiti, Dominican Republic, Panama, Korea, Viet-Nam, Iran, Iraq, Bosnia, Afghanistan, etc., not to mention its involvement in the two World Wars.

[494] L. Weinrib, "The postwar paradigm and American exceptionalism", in S. Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 84 at 87.

[495] On Amercian exceptionalism, see generally M. Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005); see also S.M. Lipset, *American exceptionalism: a double-edged sword* (New York: W.W. Norton, 1996) and S. G. Calabresi, "A

times, its influence is still palpable, as shows the adoption of legislation similar to the *Patriot Act* in several countries.[496] What happens in terms of scholarly debate in the US cannot be underestimated, especially when Canada is undergoing similar challenges raised by its military presence in Afghanistan, its participation to some interrogations undertaken in Guantanamo Bay and its other displays of executive authority outside the Canadian border.

Of course, one must not lose sight of the differences between the two constitutional traditions, including the designation of the "people" who triggered the constitutional moments and, secondly, the concept of limited-government. In addressing these differences, I will keep in mind this exchange between Alan Watson and Pierre Legrand regarding the role of legal transplants. Legrand, in an article analyzing Watson's work, dismissed as follows the virtue of comparative law and the possibility of legal transplants:

> The ethics of comparative analysis of law lie elsewhere. Comparative legal study is best regarded as the hermeneutic explication and mediation of different forms of legal experience within a descriptive and critical metalanguage. Because insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other. (…) Comparison must not have a unifying but a multiplying effect: it must aim to

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Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law" (2006) 86 Boston L. R. 1335.

[496] See B.E. Withaker, "Exporting the Patriot Act? Democracy and the 'war on terror' in the Thirld World" (2007) 28:5 Third World Quarterly 1017.

> organize the diversity of discourses around different (cultural) forms and counter the tendency of the mind toward uniformization.[497]

Replying to this passage, Watson went as follows:

> I confess I do not see any substance in this, or in what follows. In no way do I comprehend from it how understanding of law is increased, whether with regard to its development or with the relationship of law and society. I wonder who would deny that the comparatist must be aware of differences? But he must also be aware of the similarities and their causes.[498]

Watson believes that "borrowing is usually the major factor in legal change".[499] Whether or not one may borrow a theory, as opposed to a legal rule, is part of the reflexion which follows, bearing in mind that change or successful transplants do not have to result from formal endorsements but can arise from newly acquired "reasoning templates".[500]

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[497] P. Legrand, "The Impossibility of Legal Transplants" (1997) 4 Maastricht Journal of European and Comparative Law **1**11.
[498] A. Watson, "Legal Transplants and European Private Law", vol 4.4 (2000) Electronic Journal of Comparative Law, online: <http://www.ejcl.org/ejcl/44/44-2.html>.
[499] *Ibid*.
[500] See J.F. Gaudreault-DesBiens, "Underlying Principles and the Migration of Reasoning Templates: A Trans-Systemic Reading of the *Quebec Secession Reference*" in S. Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 178. See also J.-F. Gaudreault-DesBiens, "Religious Courts, Personal Federalism and Legal Transplants" in R. Adhar & N. Aroney, eds., *Sharia in the West, supra* note 39.

A. The People

In the British constitutional model, it can be argued that the ultimate holders of sovereignty are not the people, but the Parliament. The electorate elects representatives and delegates them their sovereign powers, a delegation "absolute since, though a trust is reposed in them not to abuse the powers thus delegated to them, this trust in such cases is a matter only for moral sanctions and the courts are not concerned with it (…)."[501]

Such a statement may seem to contradict Locke's affirmation that "the people" withholds the ultimate power to overthrow a government acting illegitimately, that the people is the ultimate holder of sovereignty. But there is no contradiction, only evolution of dominant paradigms over the years. If the sovereignty of the people was a convenient tool to use against the Crown at the time of uprisings in the early and mid-17th century, that principle gave way to the principle of parliamentary sovereignty towards the end of that century, after the restoration of the monarchy. The British Parliament, at that time, "usurped the role of 'the people' in the constitutional imagination."[502]

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[501] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 72-73.
[502] M. Loughlin, "Constituent power subverted: from English constitutional argument to British constitutional practice", in M. Loughlin & N. Walker, eds., *The paradox of constitutionalism: Constituent power and constitutional form* (Oxford : Oxford University Press, 2007) 27 at 28.

Even so, the exact role of "the people" in British constitutionalism, and the identity of the Constituent remain difficult to grasp. As Martin Loughlin concludes, ever since the English civil war,

> all the most basic constitutional ideas –such as sovereignty (does it vest in the commons, or in the crown-in-parliament?), the people (do they speak through their local communities, or the several nations, or is this purely an abstraction?), or rights (are these a set of 'fundamental' claims or simply concessions conferred by law?) – has remained in a state of irresolution.[503]

In Canada, the ultimate source of constitutional legitimacy has to be considered in view of the two major constitutional turning points, the adoption of the *Constitution Act,* 1867 and the adoption of the *Constitution Act,* 1982, which includes the *Canadian Charter of Rights and Freedoms*. With the adoption of the former instrument, the Canadian Parliament became sovereign and, following the British tradition, the sovereignty of Parliament became the fundamental principle of constitutional law. With the adoption of the second instrument, however, the sovereignty of Parliament lead way to the principle of constitutional supremacy. The entrenched Charter of Rights was now able to trump the express will of the elected representatives forming the legislature. The question of who is the constituent power in Canada and/or who is the "sovereign" has been addressed by constitutional law scholars, but there are no clear answers.

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[503] *Ibid.* at 47.

According to Luc B. Tremblay, there are several reasons to believe that the supremacy of the 1867 Constitution cannot be attributed to the "expression of a sovereign people having an original right to establish or consent to their own principles of government." [504] In 1867, the adoption of the Canadian Constitution was made by the British Parliament who adopted an ordinary statute. At that time, the Canadian Parliament was on its way to becoming sovereign, and judicial review of Canadian laws was based on the supremacy of British laws. In addition, when interpreting the constitutional text, courts rarely referred to the original intent of the Fathers of the Confederation; they consider words "paramount" and give little weight to the "original intention" of the Framers.[505]

Another way of putting it is to see the 1867 Constitution as more "Burkean" than "Lockean", as does Peter Russell, because the Fathers of the Confederation, wishing to reassure British officials foreseeing the potential loss of another North American colony, referred to the Sovereignty of the Parliament, rather than the will of the people, as the source of legitimacy of the Constitution.[506] Edmund Burke doubted the

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[504] L.B. Tremblay, "Comparative Perspectives on Judicial Review in Canadian Courts: *Marbury v. Madison* and Canadian Constitutionalism: Rhetoric and Practice" (2004) 36 Geo. Wash. Int'l L. Rev. 515 at 523.

[505] *Ibid.* at 523-525. In *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, the Court held that "The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life." (*ibid.* at para. 22).

[506] P. Russell, *A Constitutional Odissey: Can Canadians Become a Sovereign People?,* 3rd ed. (Toronto : University of Toronto Press, 2004) at 10. See also, on other aspect of Burke's constitutional thoughts, D. Schneiderman, "Edmund Burke, John Whyte and Themes in Canadian Constitutional Culture" (2006) 31 Queen's L.J. 578 at 587 and ff. On the "Lockean" Constitution, see D. Jenkins, "The Lockean Constitution: Separation of Powers and the Limits of Prerogative" (2011) 56 McGill L.J. 543.

"capacity of each rational individual to discern fundamental political truths" but believed in the collective wisdom built on generations of "uninterrupted social conventions and understandings" which form an organic constitution.[507] By vesting the Parliament with ultimate sovereignty, the 1867 Constitution was based on the belief that the collective wisdom of elected parliamentarians would lead them to respect the democratic tradition of Canada.

Throughout the years, there has been a paradigm shift from the sovereign will of the Parliament to that of the People of Canada, a "revolutionary"[508] shift consumed with the Constitution's patriation in 1982 and the entrenchment of the Canadian Charter of Rights and Freedoms. According to Russell, with this revolution, Canadians became "basically Lockean, not Burkean, in their constitutional aspirations". They believed in the supremacy of the individual rather than on collective wisdom.

There is evidence, according to Tremblay, which supports the view that the 1982 Constitution encapsulates the Sovereign People thesis, even though the *Canada Act, 1982* was, formally, another (but the last one) of British Parliament's enactments. In *Skapinker*[509], for example, the Supreme Court of Canada downplayed the importance of the British Parliament's enactment of the 1982 Constitution; in *Re Motor Vehicle Act,* it referred to the decision to entrench the Constitution as one taken "by the

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[507] Russell, *ibid.*
[508] *Ibid.* at 5. Russell adds that most Canadians now embrace the "idea that a constitution to be legitimate must be derived from the people –a dreadful heresy to our founding fathers", and that such ideal "may be the only constitutional ideal on which there is popular consensus in Canada": *ibid.*
[509] *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

elected representatives of Canada".[510] Commenting on this "rhetoric shift", Tremblay signals that from 1982 and on, the Constitution would "derive its normative force from the fact that the people living in the colonies in 1867 and the Canadian people living in 1982 (…) had an original right to establish for their future the political institutions of their choice."[511] In other terms, from 1982 on, the Constitution derived its legitimacy "from the people"[512] according to a Canadian "version of the 'Agency of the people' thesis."[513] And by conceptualizing the Constitution as a "people's compact",[514] the Supreme Court of Canada gave it an ex-post facto legitimization.

To a certain point, the discussion on the identity of the Constituent and the holder of sovereignty is moot, in that no consequence directly flows from the decision to attribute either to the people or to Parliament the role of sovereign or constituent. In Martin Loughlin's opinion,

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[510] *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 at para. 16. See also LB Tremblay, "*Marbury v Madison* and Canadian Constitutionalism: Rhetoric and Practice" (2004) 36 George Washington Intl L Rev 515.

[511] Tremblay, *ibid.* at 528.

[512] Tremblay, *ibid.* at 529.

[513] Tremblay, *ibid.* at 528. That thesis was famously expounded in *Marbury v. Madison, supra* note 199 and has been one justification for the legitimization of judicial review in the United States. It may be difficult to import the agency of the people thesis, considering the shaky foundations that have been attributed to that concept and to its role in *Marbury v. Madison.* According to Learned Hand, for instance, "when the Constitution emerged from the Convention in September, 1787, the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court, and *a fortiori* of the lower courts, were to be authoritative upon the executive and the legislature. Each of the three 'Departments' was an agency of a sovereign, the 'People of the United States.' Each was responsible to that sovereign, but not to one another (…)". See Learned Hand, *The Bill of Rights; the Oliver Wendell Holmes Lectures, 1958* (Cambridge: Harvard University Press, 1962) at 27. See also, on the "invention" of constitutionalism in *Marbury v. Madison,* J.-F. Gaudreault DesBiens, "La Cour Suprême des États-Units comme Pouvoir et Enjeu Politique", in M. Fortmann & P. Martin, eds., *Le système politique américain,* 4th ed. (Montreal: PUM, 2008). On criticisms of *Marbury v. Madison*, see generally J.E. Nowak & R.D. Rotunda, *Constitutional Law,* 8th ed. (St-Paul: West, 2010) at 6 and ff.

[514] This expression is from J. Leclair, "Judicial Review in Canadian Constitutional Law: A Bried Overview" (2004) 36 Geo. Wash. Int'l L. Rev. 543 at 546.

> it would be a mistake to assume that sovereignty resides in a specific locus, whether that be the king, the people or an institution such as parliament. Sovereignty ultimately inheres in the form which the political relationship takes.[515]

Nonetheless, a few nuances are warranted. First, in my view, the 1867 Constitution was adopted by probably more 'people'[516] than the 1982 Constitution, which was the product of executive action, one that involved neither the legislative assemblies' votes, nor the people's accord.[517] As Roderick Macdonald points out, it is ironically an instrument of the control of government…adopted and designed by government. Macdonald goes further, wondering whether "social psychiatrists may some day uncover why the government whose actions finally prompted thoughtful Canadians to ponder the need for an entrenched Charter should have been the one to foist such a

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[515] M. Loughlin, *The Idea of Public Law* (Oxford : Oxford University Press, 2009) at 83. This is a conclusion drawn by Loughlin based on the definition of public power as a political relationship. I will expand on this conception in Chapter Five, when I discuss the definition of government authority.

[516] In the negotiations which led to the adoption of the 72 Resolutions of Quebec in 1864, the maritime legislative assemblies did not vote. However, both Chambers of the Union Parliament (what is now Quebec and Ontario) voted in favor of the Resolutions. It is true however that two years later the 69 Resolutions of London were adopted "*sur lesquelles ni le peuple, ni la législature ne sont invités à se prononcer dans aucune des trois colonies*" : see J.-Y. Morin & J. Woehrling, *Les Constitutions du Canada et du Québec, du Régime Français à nos jours* (Montreal: Thémis, 1992) at 153. See also Gil Rémillard, *Le fédéralisme canadien,* t. 1, "La Loi constitutionnelle de 1867" (Montréal: Québec Amérique, 1983) at 138. And see W.F. O'Connor, *Rapport présenté en conformité d'une résolution du Sénat à l'honorable président du Sénat par le conseiller parlementaire au sujet de la mise en vigueur de l'Acte de l'Amérique britannique du Nord de 1867, de l'incompatibilité entre ses dispositions et leur interprétation judiciaire, et de matières connexes* (Ottawa : Edmond Cloutier, 1941) at 9.

[517] Regarding the 1982 Constitution, Morin and Woehrling *(ibid.)* add that "les gouvernements du Canada anglais –fédéral et provinciaux- ont agi sans mandat électoral clair et sans consulter la population" (at 467). Identifying a democratic deficit, these authors recall that none of the provincial legislative assemblies voted in favor of the project and that public audiences were conducted nowhere but in Alberta.

document upon them."[518] Peter Russell justifies this "top-down form of democracy" as a necessity in a society as "deeply divided" as that of Canada, where agreement can be reached only by "leaders who speak effectively for their respective segments of the community".[519] That quest, according to Tully, "involves the change from an earlier stage of elite constitutionalism to an age of democratic or participatory constitutionalism, in which citizens have a say in the formulation and ratification of constitutional change."[520]

This brings me to the second comment, regarding the identity of the people whose will is sovereign in Canada, considering the alleged inability of the Canadian people to "constitute themselves" as a sovereign people given the very deep "differences on fundamental questions of political justice and collective identity".[521] Is there only one "people" in Canada, and what are the constitutive elements of the definition of "people"? In the *Quebec Secession Reference,* the Supreme Court had the opportunity to reflect on those issues, and found, among others, that

> The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the

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[518] R.A. Macdonald, "Postcript and Prelude – the Jurisprudence of the Charter: Eight theses" *in* E.P. Belobaba & E. Gertner, eds., *The New Constitution and the Charter of Rights: Fundamental Issues & Strategies,* (1982) 4 Supreme Court L.R. 321 at 323 [hereinafter "Postcript and Prelude"].
[519] P. Russell, Constitutional Odissey: Can Canadians Become a Sovereign People? *supra* note 506 at 5.
[520] J. Tully, "Democratic Constitutionalism in a Diverse Federation", in J. F. Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999), 37 at 38.
[521] P. Russell, *supra* note 506 at 5.

> Constitution, to effect whatever constitutional arrangements are desired within Canadian territory (…).[522]

But the Court, at the same time, supported a more complex definition of "the people of Canada",[523] by recognizing the plurality of "legitimate majorities" resulting from the necessary combination of two essential principles, democracy and federalism.

Third, and notwithstanding the Supreme Court's judgments vesting the people with the role of a constituent, the lack a constitutional movement which took its impulse from the people, or from the bottom up, and the lack of participation of one quarter of the population of Canada, i.e. the province of Quebec in the Constitutional reforms of 1982, demonstrate a democratic deficit.[524] Even so, the legitimacy of the Canadian Constitution and, more specifically, of the Charter, has been confirmed with practice.[525] Borrowing from Joseph Raz, it can be said that the 1982 Constitution got its "legitimacy through practice"; as other instruments, the 1982

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[522] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at para. 85.

[523] The Court held that "It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. (…) A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province." (*ibid.* at para. 66).

[524] Such deficit is also to be found in the United States, where the rhetoric of inclusiveness contributed to (successfully) creating the myth of "the people as a constituent power", but where, in reality, relatively few people are actually included in the "We the People": see Russell, *supra* note 506 at 5 and at 8.

[525] On the Quebec population "legitimizing this instrument by practice", see S. Choudry & J.F. Gaudreault DesBiens, "Frank Iacobucci as Constitutional Maker: From the Quebec Veto Reference to the Meech Lake Accord and the Quebec Secession Reference", (2007) 57 University of Toronto L.J. 165 at 169.

Constitution is self-validating "in that [its] validity derives from nothing more than the fact that [it is] there."[526]

All this to say that the distinctions between the American expression "we the people" and the identity of the Canadian constituent point to the care one must take when comparing the US definition of the constitutional subject (which follows in Part III) with the Canadian one, if any, since that definition depends at least partly on the presence or absence of a "people's compact"[527] thesis and the inclusiveness or exclusiveness which the concept of "people" entails.

B. Limited-government

Another difference between the two constitutional systems lies in the principle of limited government which characterizes American constitutional law, premised on the ideas that rights pre-exist government, that government is inherently limited in its actions, and that the people retain the balance of undelegated powers.[528] This difference can be attributed to the political context during which, and against which, constitutionalism emerged in each respective tradition. Whereas in the United States, the Constitution was an instrument aimed at limiting government actions, inspired by the perceived abuses of an overly powerful English Parliament and an unduly greedy

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[526] J. Raz, "On the authority and Interpretation of Constitutions: Some Preliminaries", in L. Alexander, ed., *Constitutionalism: Philosophical foundations* (Cambridge: Cambridge University Press, 1999) at 173.
[527] J. Leclair, "Judicial Review in Canadian Constitutional Law: A Bried Overview" *supra* note 514.
[528] See generally R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention" (2007) 62 N.Y.U. Ann. Surv. Am. L. 637.

metropole, the Canadian Constitution did not fulfill the same goal. If the American Constitution is born of *revolution*, the Canadian one mirrors its gradual *evolution* from a colony to an independent state.[529]

Historically, the British Constitution was based on the presumption that the King held all powers, except those appropriated by Parliament. The *residuary* discretion (i.e. everything which Parliament left standing) defined the Crown prerogative; and so the balance of sovereign power was not within Parliament's hands, but within the hands of the King. The Revolution of 1688 did not overrule this state of affairs, but mainly rendered it symbolic. The Parliament was seen as the best vehicle for the protection of the people, better even than the people itself. Thus, the prerogatives of the Crown became, as the years passed, thinner and thinner. And since it was (and still is) in the power of Parliament to legislate and transform any former prerogative into a legislated field, the powers of Parliament are not, at least theoretically, "limited".

There is a link between limited government and the identity of the ultimate holder of sovereignty, which has just been discussed. For a long time, British legal philosophers did not believe that the Sovereign could even have limited powers. For instance, John Austin, just like Hobbes, believed that the sovereign was not bound by its own laws. Austin defines law as commands backed by threats made by a sovereign who is not in the habit of obeying anyone and to whom everyone is in the

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[529] *Reference re Secession of Quebec*, *supra* note 522, paras. 33-48.

habit of obeying.[530] His sovereignty is thus unlimited, because one cannot command himself. As Waluchow contends, "the notion of limited sovereignty is, for Austin (and Hobbes), as incoherent as the idea of a square circle."[531] And so the sovereign must be a third person or body of persons both "internally supreme and externally independent".[532]

Austin is not crystal clear on the crucial point of *who* that sovereign is. It may be argued that for Austin, the sovereign is neither the Queen, nor the legislature, but the people.[533] On the other hand, Hart used this ambiguity in Austin's theory to attack its concept of law: if we accept that the commanders *are* the people, we reach, in Hart's view,

> a blurred image of a society in which the majority obey orders given by the majority or by all. Surely we have here neither 'orders' in the original sense (expression of intention that *others* shall behave in certain ways) or 'obedience'.[534]

If we return to Canadian law, it is trite that the British philosophical heritage has modeled the Canadian Constitution of 1867 and gave supreme power to Parliament. It is also well documented that as of 1982, the courts were bestowed with the

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[530] J. Austin, *The Province of Jurisprudence Determined* (London: Hart, 1954).
[531] W. Waluchow, "Constitutionalism", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition) E. N. Zalta, ed., online: <http://plato.stanford.edu/archives/fall2008/entries/constitutionalism/>, footnote 3 (page last consulted on 24 August 2011).
[532] H.L.A. Hart, *The Concept of Law, supra* note 501 at 25.
[533] Hart makes the point that Austin did not identify the sovereign with the legislature. In his view, in "any democracy it is not the elected representatives who constitute or form part of the sovereign body but the electors" *ibid.* at 72.
[534] *Ibid.* at 74.

function of exercising judicial review of legislative and executive action based on the supremacy of the Canadian Constitution and that since that time, the supremacy of Parliament yielded to the principle of constitutional supremacy. Even if Parliament holds the remainder of the Crown's prerogatives, judicial review in Canada means that *all* executive and legislative powers, including the exercise of the Crown's prerogative by cabinet, ought to be subjected to Charter scrutiny.[535] In short, although there may not be a formal "limited-government theory" in Canadian law, the adoption of the 1982 Constitution had the effect of limiting the sovereignty of Parliament and the powers of government. Hence, the differences between the two systems as regards the idea of limited powers ought not to be over-estimated.

III. THE TWO POLES OF CONSTITUTIONALISM AND SOCIAL CONTRACT THEORY

Inquiries relating to the scope of constitutionalism usually start with the social contract theory. As Locke pointed out, "all peaceful beginnings of government have been laid in the consent of the people."[536] Although we commonly refer to 'the' social contract, there are in fact two contracts: a contract between the people to form a polity, and a contract between that newly formed polity and the government –the sovereign.[537] Authors may diverge as to the existence of one or two of these

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[535] *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441.
[536] J. Locke, *The Second Treatise of Government and A Letter Concerning Toleration* (Mineola: Dover Publications Inc., 2002), Chap. XI, para. 112.
[537] G. Neuman, *Strangers to the Constitution*, *supra* note 489 at 9.

contracts, or as to the absolute or limited powers of the sovereign and the people, but most agree with these two dimensions of the social contract.

While the contract of association focuses on the *people* and the identity of the parties to the social contract, the contract of government focuses on the limitations imposed on the actions of the newly formed *government*. Both aspects are capital for the creation of the political society, but the liberal and the republican ideals attribute different weight to each of these aspects.

The republican version of the social contract, championed by Rousseau, focuses on the people's capacity, as a polity, to govern itself. It is a republican approach which reifies the *association* between members of the political community. Each citizen therefore plays a double role; the citizen becomes a party *within* his own government, and acts as a member of that body, with the ultimate goal of self-governing himself. That conception is "collectivist rather than individualistic, and emphasizes civic duties rather than focusing primarily on rights."[538]

On the other hand, the liberal version of social contract theory, promoted by Locke, focuses on the contract of government, i.e., the contract which transfers to the government the responsibility to govern, leaving "the duties on the side of the

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[538] M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (London, New York: Routledge, 2010) at 219 [hereinafter *The Identity of the Constitutional Subject*]. See also D. Ivison, "Republican Human Rights?"(2010) 9 E.J.P.T. 31 at 32-34.

government, and the rights on the side of the people."[539] Locke emphasizes the role of the state as an instrument at the service of the citizens. Its function is primarily to advance the pre-political rights and interests held by the citizens.[540] The authority of governmental power is subjected to natural law, because the government itself is established by a "fundamental natural law", which is "the preservation of the society and (as far as will consist with the public good) of every person in it."[541]

In the next two sections, these two poles, i.e. the constitutional subject and the object of constitutionalism, will be addressed.

A. The constitutional subject

The purpose of this section is not to review social contract theories in search for a description of the parties to the social compound. Rather, it is to ponder whether social contract theories can enlighten today's debate regarding the identity of the people who can be entitled to constitutional rights. As such, the work of Michel Rosenfeld, *The Identity of the Constitutional Subject*[542], which is the most recent and most complete scholarship on that issue, represents an invaluable contribution that may serve as a springboard to my reflection.

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[539] This position is summarized by Neuman, *supra* note 489 at 10.
[540] Rosenfeld, *ibid*. at 219.
[541] J. Locke, *The Second Treatise of Government and A Letter Concerning Toleration, supra* note 536, Chap. XI, para. 134, p. 242. See also Neuman, *Strangers to the Constitution, supra* note 489 at 10 (referring to J.W. Gough, *The Social Contract* (Oxford: The Clarendon Press, 1936). According to Neuman's reading, Locke replaces the contract of government with the concept of a fundamental positive law establishing the government.
[542] M. Rosenfeld, *The Identity of the Constitutional Subject*, *supra* note 538 at 219.

Rosenfeld takes the social contract theory as a starting point for reflecting on the identity of the constitutional subject. As will be shown, social contract theory then becomes an anchor for a state-centric vision of the constitutional subject. Rosenfeld's argument can be said to run as follows: although the social contract theory refers metaphorically to a contract, and not historically to a specific event (the social contract, *per* Kant, ought to be conceived as "an idea of reason"[543]), it appears that there must be some grounding in the reality. At the time social contract theorists such as Hobbes, Rousseau and Locke developed their theory, the contract was understood as one between people living in relative proximity, within the confines of the nation-state. Accordingly, the notion of extraterritorial citizenship (or claims for extraterritorial understanding of rights) is an oxymoron, as citizenship ought to be viewed as the expression of a contract of association between people in the same polity, sharing "contiguous space".[544] Inside this contiguous space, the requirement for sharing cultural and ethical values varies according to the type of model followed, i.e., whether one elects the republican model, which requests a high level of social cohesion, or the liberal model, characterized by a relatively low level of social cohesion and a broad spectrum of diverging interests.[545]

These observations on the social contract theories lead Rosenfeld to draw "salient" conclusions as to the identity of the constitutional subject: "from the standpoint of social contract theory", he says, "the contract of association could conceivably be

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[543] Quoted in Rosenfeld, *ibid.* at 19.
[544] *Ibid*. at 218.
[545] *Ibid*. at 220.

among all human beings, but the contract of government only seems plausible within the confines of the nation-state." If one adopts the republican vision of the social contract, the need for a geographically defined compound appeals to the senses even more, because the need for social cohesion is greater than in the liberal version of the social contract. That is because the republican ideal relies on shared beliefs and convictions,[546] in the absence of which "it would be impossible to carve out any cogent general will." Conversely, in the liberal ideal, there is no need to build such a common identity "beyond that conferred by mere spatial contiguity." As the state is empowered to enforce rights pre-existing the social contract, all that is needed is that members of the compound be 'spatially contiguous'[547] or, in other words, that they find themselves within the territorial confines of the state.

Spatial contiguity is a concept which bears striking resemblance with territoriality, and, coincidentally, it is a concept which appears in history at the same time as the territorial paradigm. And so both the republican and the liberal versions of social contract theory consider that territoriality is a *sine qua non* condition to constitutionalism.

What are the implications of Rosenfeld's stance on social contract theory as it relates to the scope of constitutional rights? Constitutional (domestic) rights are to be

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[546] See, for example, on the equality of condition, beliefs, intelligence and wealth of the pilgrim settlers: A. de Tocqueville, *Democracy in America – translated, edited and with an introduction by H. C. Mansfield and D. Winthrop* (Chicago: University of Chicago Press, 2000), volume 1, part 1, chapter 3.

[547] Quotes in this paragraph are from M. Rosenfeld, *The Identity of the Constitutional Subject, supra* note 538 at 220-221.

understood as being "tied to the nation-state or to a particularly tightly knitted supra-national political entity, such as the EU"; on the other hand, (international) human rights are universal. This means, according to Rosenfeld, that whereas "all human beings everywhere are entitled to exactly the same human rights which ought to foreclose diverging interpretations from one polity to the next", constitutional rights "only concern those within the relevant polity."[548] Because the constitutional subject is traditionally "anchored within the confines of the nation-state", defining cosmopolitan citizenship or constructing the identity of the transnational constitutional subject becomes difficult.[549]

In this view, the constitutional subject is *not* transnational or cosmopolitan. Who, then, is the constitutional subject? Rosenfeld hints, in the early chapters of his book, that the constitutional subject is an entity which ontologically cannot be described as a presence but as "absence" or "lack". In his view, the constitutional subject is always under construction, because the parameters of the constitution itself appear to be in constant evolution. A theory aimed at constructing the constitutional subject, i.e., a theory defining the "who" *and* "for whom" constitutional protections apply needs, in his opinion, constructivist interpretative tools which borrow from Hegel

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[548] Michel Rosenfeld acknowledges later that some variations within the content of the 'universal' human right is inevitable, while many constitutional guarantees tend to be convergent (Rosenfeld, *ibid.* at 255). Ideally, he says, both regimes ought to be integrated. This integration may be necessary considering the difficulty to distinguish (domestic) constitutional rights from (international) human rights, especially in Europe: contrast the *Human Rights Act 1998, supra* note 189, with the document which inspired it, the *European Convention for Human Rights, supra* note 206.

[549] All the quotes in this paragraph are from M. Rosenfeld, *The Identity of the Constitutional Subject, ibid.* at 252-253.

and Freud: "negation, metaphor and metonymy".[550] His description is relational: the constitutional subject is to be defined according to its interactions with other subjects.[551]

I agree with the difficult representation of the constitutional subject. On the other hand, the definition of the constitutional subject as being reduced to people sharing social cohesion, or 'shared beliefs and convictions', seems too modest, whether one embraces the republican or the liberal model. In fact, equality can be jeopardized if it is tied to the idea of membership among people forming part of the *demos*. To be part of the *demos*, one must share membership ties, develop a sense of belonging, enjoy the possibility of cohesion.[552] If one does not qualify for these membership ties, there can be no claim for equality. Thus Carl Schmitt, who supports the democratic or republican notion of equality, argues that equality ought to be specifically limited to the people forming part of the *demos* – the others being excluded.[553] Arguably, being part of the *demos* is not necessarily linked to a physical space. A person may be traveling, or living abroad and still be a part of the *demos* of her original state. This may explain why American law traditionally recognized US

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[550] Rosenfeld, *ibid.* at 35-36.
[551] Rosenfeld, *ibid.* at 37.
[552] See D. Galloway, "Noncitizens and discrimination: Redefining Human Rights in the Face of Complexity" in O. Schmidtke & S. Ozcurumez, eds., *Of States, Rights and Social Closure: Governing Migration and Citizenship* (New York: Palgrave Macmillan, 2008) 37 at 39.
[553] Schmitt distinguishes between two different concepts of equality: one derived from democracy, and one derived from liberalism. It is the former which supposes a limited *demos*: see C. Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy" in D. Dyzenhaus, ed., *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1999) 159 at 161 and ff.

citizens traveling abroad the same protection as if they were physically in the US. They just don't cease to be "we the people" when they travel abroad.

In the liberal ideal, the social cohesion is displaced by the people's inherent equality, as persons rather than as members. The dilution of membership may be criticized, but in general the potential for inclusiveness which the dilution allows is seen as a positive development. The notion of equality is thus wider, but perhaps more diluted than in the republican matrix.[554] In both of these visions, however, it appears clear that 'spatial contiguity' is not *the* dominant criteria for inclusiveness in the realm of the constitutional polity, although it certainly is a relevant one. It is relevant to the republican ideal, because it contributes to developing membership ties. It is relevant to the liberal ideal, because this liberal ideal was largely built upon the belief that societies are closed *territorial* units.[555]

B. The constitutional object

What is the object of constitutionalism? If we return to Locke's theory, we find that the sole purpose of political power is to secure and preserve the goods of each member of the society, with no other end than to achieve the tranquility of the people, their safety, and their general interest.[556] The power of the state is limited to

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[554] See D. Galloway, "Noncitizens and discrimination" *supra* note 552 at 39.
[555] See J. Rawls, *Political Liberalism* (New York : Columbia University Press, 1993) at 19.
[556] J. Locke, *The Second Treatise of Government and A Letter Concerning Toleration*, *supra* note 536, Chap. IX, para. 131.

the original delegation of power made by the people to the government, and such delegation is itself limited by whatever powers the people possessed in the state of nature:

> Though the legislative, (…) though it be the supreme power in every commonwealth, yet, First, it is not nor can possibly be absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person, or assembly, which is legislator; it can be no more than those persons had in a state of nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself; and nobody has an absolute power over himself, or over any other, to destroy his own life, (…). And having in the state no arbitrary power (…) but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, to that the legislative can have no more than this. Their power, in the utmost bounds of it, is limited to the public good of the society.[557]

As the people does not possess the power to abuse of the life of others or to exercise arbitrary power, such a power cannot have been delegated and hence, cannot be exercised by the state. The emphasis is placed on the limited powers delegated to the political authority, because, in the state of nature, the powers of the people were themselves limited.

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[557] J. Locke, *ibid.* Chap. XI, para. 135.

In the event the political entity abuses of the powers delegated to it, and hence loses the legitimacy with which it had been invested, the people, for whom the legislative acts as a fiduciary, and whom Locke associates with the holder[558] of sovereign power, retain the right "to remove or alter the legislative".[559] This power is rooted in Locke's view that all powers given to the attaining of an end (here, the end is the self-preservation of the people's liberties and properties) are "limited by that end".[560] Executive and legislative powers must be exercised in accordance with fundamental law, lest the very purpose for the creation of the political authority will be defeated. As such, the identity of the people who placed their liberties and rights in the hands of government is not especially relevant or important to Locke. On the other hand, the object of constitutional actions, i.e., state power, whether legislative or executive, is the main focus of his theory. If a state action infringes the initial purpose, the self-preservation ideal, the legitimacy of that government may be lost.

While the social contract theory can provide an adequate tool to understand the differences between the constitutional subject and object, one must be careful (not) to derive from these theories stringent conclusions. For example, to argue that the social contract ought to be conceived as limited to the nation-state is tautological, since social contract theories were configured at a time where the body politic was not permeated by a migrating flux, but rather composed of static, generally

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[558] There is an ambiguity in the identification of the sovereign power. The people withold the title to sovereign power, but do not exercise that power. The legislative power, as long as it stands, is the actual sovereign. Locke, *ibid.* Chap. XIII, para. 149-150.
[559] Locke, *ibid.* Chap. XIII, para. 149.
[560] *Ibid.*

homogeneous populations.[561] Even a state-centric definition of the identity of the constitutional subject is unable to answer the question of *who* composes the "nation-state" body politic. Does it include aliens? Does it extend to citizens wherever they may be? Consequently, the guidance that social contract theories may provide to the understanding of the scope of constitutional rights must be weighed carefully.

This lengthy discussion was necessary to introduce American caselaw. Although in Canada, as the previous chapters outlined, courts do not typically refer to this type of argument, in the United States, as the following sections demonstrate, the "membership" approach is rooted in social contract theory. Hence, it is relevant to understand its shortcomings, with the view to discarding membership as a realistic alternative to territoriality, especially when no alternative has been, to this day, proposed in Canada.

IV. THE SCOPE OF US CONSTITUTIONALISM

In *We the People,* Bruce Ackerman advises that in order to discover the meaning of the American Constitution,

> (W)e must approach it without the assistance of guides imported from another time and place. Neither Aristotle

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[561] See W. Kymlicka, *Multicultural citizenship – a liberal theory of minority rights* (Toronto: Oxford University Press, 1995). According to Kymlicka, liberal theories were built on the archetype of the ideal society, a closed society where people who shared the same origin, language and culture coexisted.

> nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern of constitutional thought and practice.[562]

In the next two sections, the scope of US constitutionalism will be ascertained without reference to the social contract theory *per se*, but with reference to the debates that animated the early days of US constitutionalism in the judiciary and among the Founders.

A. Intraterritorial constitutionalism

1. History

The question of the identity of the constitutional subject was particularly debated in the early days of the US Constitution. It was agreed that parties to the social contract, whether seen from the liberal or the republican angle, included the men who negotiated the Constitution, the Framers of the US Constitution in 1787, and their descendants who tacitly consent to being bound by the contract.[563] But of course such a definition of the constitutional subject, even if accurate,[564] is unduly restrictive: in a country of immigration such as the US, that definition appears

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[562] B. Ackerman, *We the People: Foundations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991) at 3.

[563] Neuman, *Strangers to the Constitution*, *supra* note 489 at 9. Regarding the difference between actual or tacit consent and hypothetical consent, see Neuman, *ibid* at footnote 39.

[564] One could also argue, as will be later explained, that the Constitution was not established by people, but by the states: see *supra,* text accompanying note 605.

insufficient, not to mention that in 1787, according to Rosenfeld, there was no "people", but a bundle of peoples from all participating colonies.[565] As Rosenfeld points out, the terms "We the people" rather covered-up for "glaring lacks of peoplehood, nationhood or statehood."[566]

In 1798, eleven years after the adoption of the Bill of Rights, the adoption of the *Alien and Sedition Acts*[567] provided the needed platform to sustain such a debate. The *Acts* allowed the deprivation of aliens' rights without due process and denied them trial by jury by subjecting them to deportation on mere suspicion grounds through a presidential order issued *ex parte.*

The debate over the validity of the *Acts* followed the same lines as the more general quest for establishing the scope of constitutionalism expounded above. It was structured around two poles: the individual or subject pole, and the government or object pole. Those who argued for the validity of the *Acts*, the Federalists, claimed that a certain category of people such as resident aliens ought to be excluded from the social contract because they were simply not a party to the compact given the

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[565] *Contra*: one can argue that what made the US government possible was the equality of conditions and similar political traditions which reigned in the colony: see Alexis de Tocqueville, *Democracy in America*, *supra* note 546. But then even Tocqueville distinguishes between New-England and the Southern colonies, which had different aspirations.

[566] M. Rosenfeld, *The Identity of the Constitutional Subject*, *supra* note 538 at 159.

[567] There were four Acts. The *Naturalization Act* extended from five to 14 years the period of residence required for alien immigrants to become full U.S. citizens (1 Stat. 566). The *Alien Act* authorized the President to expel, without a hearing, any alien deemed "dangerous to the peace and safety" of the United States or whom the president suspected of "treasonable or secret" inclinations (1 Stat. 570). The *Alien Enemy Act* authorized the president to arrest, imprison, or banish any resident alien hailing from a country against which the United States had declared war (1 Stat. 577). Finally, the *Sedition Act* (1 Stat. 596) made it an offence to make any defamatory statement as to the federal government or the President [hereinafter "the Alien and Sedition Acts"].

"nativist twist"[568] of the social contract.[569] Being rightless, aliens could claim that their rights were infringed. And they were rightless because –whatever the force of this argument - their presence on American land is a privilege, not a right. This approach is based on membership criteria and it is endorsed by scholars and judges who narrowly interpret the terms "we the people" in the Constitution and equate them with "we the citizens". Those who champion this view consider the Constitution "as a contract among the American people, for their sole benefit."[570] To that textual interpretation must be added the assumption that what it takes to be a part of the polity, loyalty, patriotism, etc., are all qualities with which the aliens were thought to be deprived.[571]

At the other end of the spectrum, Madison and Jefferson attacked the validity of the *Acts* by devising an approach which looked for parameters such as authority and obedience rather than membership and entitlement. When authority is exercised by the government, those powers ought to be regulated by constitutional limitations; if authority is exercised on aliens, and obedience is demanded from them, the powers exercised by the government ought to be subjected to the Constitution.

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[568] G. Neuman, *Strangers to the Constitution, supra* note 489 at 54.
[569] The Democratic-Republican Party at the time opposed the Acts which had been carried forward by the Federalists led by President John Adams. Jefferson was Vice-President at the time and opposed the Act.
[570] G. Neuman, *Strangers to the Constitution, supra* note 489 at 56.
[571] Neuman, *ibid.* at 56: "many in the nation expressed concern that foreign immigrants were insufficiently attached to the good of the country or to republican principles." Referring to the work of Gordon Wood, *The Creation of the American Republic 1776-1787* (The University of North Carolina Press, 1968) the author explains the argument as follows: "Each man must somehow be persuaded to submerge his personal wants into the greater good of the whole. (…) A republic was such a delicate polity precisely because it demanded an extraordinary moral character in the people."

Ontologically, those who support this approach consider the Constitution as granting the federal government only limited, enumerated powers, which means that the Congress cannot assert unlimited powers over aliens. This is the argument conducted by Madison in 1800, in the Report on the Virginia Resolutions which he authored at the time of the debates over the validity of the *Acts* and more generally by Republicans who felt that "grave dangers to the liberty of the citizens would result"[572] from the Congress acting as if aliens held no rights and were completely vulnerable to the exercise of abusive state power. In their view, allowing usurpation of rights would constitute a precedent for future violation of *citizens'* rights.

This rationale was coupled with equity considerations: if the said person is subjected to government action, i.e., if she temporarily obeys the sovereign, the Constitution ought to be engaged and the rights it protects ought to be applicable, irrespective of the citizenship of the person involved. The Report authored by Madison goes as follows:

> [i]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet, it will not be disputed, that as they owe, on one hand, a temporary

[572] G. Neuman, *Strangers to the Constitution*, *supra* note 489 at 57.

> obedience, they are entitled, in return, to their protection and advantage.[573]

It is on these grounds that the validity of the *Acts* was debated. These Acts were never submitted to the Supreme Court for judicial review, a mechanism really consecrated with *Marbury v. Madison*[574] a few years later. It is fair to say that the membership approach has never been favored by the judiciary, although the "membership" discourse is not at all absent from the Supreme Court's caselaw.[575] The "authority and obedience" approach has also received mitigated approval from courts; both contributed to the understanding of whether, how and why aliens in the United States are entitled to constitutional rights.

With time, resident aliens[576] have been recognized a vast array of due process rights, to the extent that the text of the Constitution did not expressly exclude them. The end

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[573] See *Madison's Report on the Virginia Resolutions (1800),* Reprinted in 4 Elliot's Debates 556 (2nd ed. 1836).
[574] *Supra* note 199.
[575] See, for example, the case in *Verdugo-Ur quidez, infra* note 632, discussion at text accompanying notes 642 and ff.
[576] When we speak of aliens, a distinction must be drawn between *deportable aliens* and *inadmissible aliens.* While the former have successfully entered American soil, the latter are presumed, under the *entry fiction*, to have never set foot on American soil, regardless of the length of time they spent there. And while the former enjoys due process and equal treatment, the latter holds –at least traditionally- no constitutional right at all. See B. Slocum, "Immigration: Both Sides of the Fence: the War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law" (2007) 84 Denv. U.L.Rev. 1017 at 1023. In *Gilbert v. Attorney General,* 988 F. 2d 1437 (5th Cir. 1993), for example, the plaintiffs, Cubans living in the United States since 1980, were indefinitely detained by the American government after having served their criminal sentence. Their deportation to Cuba was pending, but Cuba refused to admit them back. The Court held that the plaintiffs could not challenge their detention because they held no due process rights enabling them to forge a complaint (*ibid.* at 1439-1440). This rule has been alleviated recently, at least as it allows the indefinite detention of inadmissible aliens under s. 231(a)(5) of the *Immigration and Nationality Act* (8 U.S.C. 1221). This provision was read down to limit the "undefinite" detention of both deportable and inadmissible aliens to a term of 6 months for deportable aliens, *Zadvydas v. Davis,* 533 U.S. 678 (2001) and, more recently, for inadmissible aliens, *Clark v. Martinez,* 543 U.S. 371 (2005).

of the Civil war brought further clarifications. The *Civil Rights Act* and the Fourteenth Amendment made the courts recognize that resident aliens are "persons" and that they are entitled to due process and equal protection, a reality confirmed by the Supreme Court in *Yick Wo v. Hopkins*[577] and *Wong Wing v. United States*.[578] In 1982, the Supreme Court held that illegal aliens were protected by the Equal Protection Clause.[579] More recently, the courts reaffirmed that aliens in the US enjoy if not all constitutional rights, at least the Due process Clauses of the 5th and 14th Amendments.[580]

Aside from the context of aliens, the question of the territorial scope of US constitutional rights has been raised with relation to two other groups of people: Indians, and African American slaves. Regarding the second group, the "membership" approach was omnipresent as African American slaves were, under Justice Taney's court, excluded from the protection of the Constitution. For that matter, the case in *Dred Scott* is famous for its holding that black people were not

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[577] 118 U.S. 356 (1886). The case confirmed that resident aliens are protected by the Fourteenth Amendment. But see *Fong Yue Ting v. United States,* 149 U.S. 698 (1893), at 711: "the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace", is "an inherent and inalienable right of every sovereign and independent nation." See the dissent by Field J.: "the existence of the power thus stated is only consistent with the admission that the government is one of unlimited and despotic power, so far as aliens domiciled in the country are concerned" (*ibid*. at 755-756).

[578] 163 U.S. 228 (1896). The case confirmed that resident aliens are entitled to the protection of the Fifth and Sixth Amendments.

[579] See *Plyler v. Doe,* 457 U.S. 202 (1982).

[580] See *Rosales-Garcia v. Holland,* 322 F. 3d 386 (6th Cir. 2003) at 409: "all aliens are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." In addition, the Court in that case casts doubts as to whether the entry fiction can apply to "deprive aliens living in the United States of their status as 'persons' for the purposes of constitutional due process."

part of the 'people of the United States'. The way the issue was framed is itself indicative of the spirit of the time: the question at stake was whether

> a negro whose ancestors were imported into this country and sold as slaves became a member of the political community formed and brought into existence by the Constitution of the United States, and as such became entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?[581]

According to the Taney Court, the "African race was not intended to be included, and formed no part of the people who framed and adopted the Declaration of Independence." It did not matter whether Scott was a citizen of his own state or not, because no state could "'introduce a new member into the political community created by the Constitution". The Court reached the conclusion that Scott was not a citizen of Missouri, and that the Circuit Court had no jurisdiction to hear the case.[582]

The Court in *Dred Scott* went further to dismiss the case, and examined the effect, on Scott, of having moved with his master from a state where slavery was entrenched, to a territory where slavery was prohibited and where the constitutional right to property was not clearly protected, since it was thought that the Constitution was

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[581] *Dred Scott v. Sanford,* 60 US 393 (1857). See also, generally, D.T. Koning & al., eds., *The* Dred Scott *case: historical and contemporary perspectives on race and Law* (Athens, Ohio: Ohio University Press, 2010).
[582] *Dred Scott, ibid.*

only binding on and within states. The plaintiff claimed that by leaving the state of Missouri, where he was slave, and entering the territories that are now known as Minnesota, he became a free man. Such result was provided by the Missouri compromise, an act of Congress which prohibited slavery in the territories. But because the effect of that compromise was to deprive the plaintiff's master from his right to enjoy his property, that provision was held unconstitutional. In a twisted way, *Dred Scott* pleads in favour of a non-territorial approach to the US Constitution and constitutional rights.[583]

When the Fourteenth Amendment was adopted, the effects of that ruling were reversed, as from then on, "all persons born or naturalized in the United States" became American citizens. But even though the wording of that Amendment is clear, Indians, born in the US, were still excluded from the American polity.[584] In *Elk v. Wilkin*[585], the Supreme Court found that Indians tribes were not part of the American people; they were not citizens, even though they renounced their tribal allegiance[586] which meant that, for the Court, Indians were "within the United States for some purposes, but not others."[587] That leads one commentator to conclude that "even in the era of "strict" territoriality, territoriality was not truly strict. Indians were plainly

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[583] See also, on that point, the judgment in *Downes v. Bidwell, infra* note 615.
[584] The *Indian Citizenship Act of 1924*, Public Law 68-175, 43 Stat. 253 (1924) did put an end to the exclusion of Native Americans from citizenship.
[585] 112 U.S. 94 (1884).
[586] *Ibid.* at 99.
[587] K. Raustiala, *Does the Constitution Follow the Flag?, supra* note 29 at 43.

born within the geographic borders of the United States, but they nonetheless fell outside the bounds of the Fourteenth Amendment."[588]

Today most of the rights protected by the American Bill of Rights can generally be said to extend to anyone physically on the US territory and hence within US jurisdiction.[589] Some rights are reserved to citizens, and the wording of the Bill of Rights leaves no doubt as to which those are. But most rights –including the right to equal protection –are not thus limited. The Fourth Amendment guarantees the right of "people" to be secure in their "persons", whereas others, such as the Eight Amendment, are drafted in the passive voice, stipulating that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." On the other hand, national security, military needs, the war against terror, etc., have been countervailing factors which narrowed down the scope of those guaranteed rights. Being a US citizen does not necessarily, or at least not anymore, guarantee that constitutional rights will be recognized.[590]

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[588] Raustiala, *ibid.*

[589] *See Mathews v. Diaz*, 426 U.S. 67 (1976) at 77: "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons [*i.e.*, non-citizens] from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted).

[590] In the case in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), the US citizen was recognized due process rights, but the content of the due process rights was diluted because of the "military context" irrespective of the fact that Hamdi was a US citizen detained in South Carolina. The ruling is still an improvement of his situation: he was initially deprived of *habeas corpus* rights pursuant to the *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001).

2. Summary

The previous discussion relates to *intraterritoriality*. The cases and the examples provided related to events occurring within the US territory. Many questions remain open, when it comes to identifying the constitutional subject or the applicable constitutional limitations *outside* of the geographically defined boundaries of the United States: What happens to citizens who travel abroad? What about aliens subjected to US laws in a foreign jurisdiction? Are constitutional guarantees mobile? Do they follow the flag? What about the exercise of state authority? Is it always subjected to the constitutional restrictions? These are the questions which the next section addresses.

B. Extraterritorial constitutionalism

In assessing the scope of US constitutionalism when the extraterritorial application of the Bill of Rights is involved, the two poles discussed above resurface: at one end, theories which limit the scope of constitutional rights to the people of the United States rest on membership considerations. Those who are physically outside are not members of the constitutional polity; hence they can claim no violation of their rights by US state actors. At the other end of the spectrum are approaches which look at the exercise of state authority and the limitations which the Constitution attaches to this exercise of authority. According to these approaches, the primary focus of the quest for establishing the scope of constitutionalism must be the state action itself.

Whether someone is entitled or not to the protection of the Constitution is not the primary interrogation; rather, the question is whether the State exercised its authority in conformity with the constitutional limitations which apply to it. As will be seen, both approaches, as well as intermediate ones, have been endorsed by the Supreme Court. While it is not easy to split these two approaches according to chronology (as in many cases, the majority endorses one approach and the dissenting opinion, another), two phases have been identified: from the territorial phase to the functional phase; and from the functional phase to recent challenges.

1. Territoriality and the birth of the functional approach

The US Constitution contains no geographical limitations. Initially, the scope of the Constitution reflected the physical boundaries of the State; it can even be said that it reflected the physical boundaries of the *states,* i.e. states as a compound, excluding other entities such as the territories, the District of Columbia or Indian territories.[591] The view was predominantly territorialist, and even the concept of territory was narrowly defined. Recall that territoriality implies that "as each sovereign is supreme within its geographical borders, its law, all of its law, and only its law, is there in

[591] On the status of Indian territories and that of territories such as Puerto Rico, Guam, etc., see J.-F. Gaudreault-DesBiens, "Les reconfigurations territoriales aux États-Unis et au Canada: Quelques Prolégomènes" (2010) 10 *Diritto Pubblico Comparato ed Europeo* 1028.

force."[592] What corresponds to the geographical borders in times where territories were being conquered, ceded or occupied was subject to discussion.

That territoriality determines the scope of the US Bill of Rights is the conclusion of the 1891 Supreme Court decision *In re Ross*.[593] In that case, a seaman who assaulted and killed another seaman on board an American ship in Japanese waters, attempted to invoke the constitutional right to be indicted and tried by a jury, even though his trial was held in Japan. The Court notoriously held that "the Constitution can have no operation in another country"[594] and that declaration was taken to embody the consecration of the territoriality paradigm in US constitutional law. The guarantees the Constitution affords "apply only to citizens and others in the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."[595] More specifically, the Court's position was that the US Constitution establishes a government *for* the United States and not *for* any other country.

The Court's understanding of the issue at bar was that the claimant sought to apply the US Constitution to the foreign government. In fact, the claimant was tried by the American consul in Japan, who had jurisdiction over him pursuant to a treaty entered into by the United States and Japan. Interestingly, in order to ascertain jurisdiction

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[592] K. Roosevelt, "Application of the Constitution to Guantanamo and the Conflict of Laws: Rasul and Beyond" (2005) 153 U. Pa. L. Rev. 2017 at 2044.
[593] 140 U.S. 453 (1891) [hereinafter *Ross* or *In re Ross*].
[594] *Ibid.* at 464.
[595] *In Re Ross, supra* note 593 at 464.

over the accused, despite the fact that he was technically a British citizen, Field J. had to argue this way:

> While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was a native born. As an American seaman, he could have demanded a trial before the consular court as a matter of right, and must therefore be held subject to it as a matter of obligation.[596]

The fact that he was subject to the laws of the United States, but could not claim the protection of the Constitution, was not perceived as contradictory or paradoxical. In fact, the Court talked of a bargain:

> While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture.[597]

The case in *Ross* has been characterized by the Supreme Court in later cases as a "relic from a different era" and it has, since then, been "directly repudiated by numerous cases".[598] Over the years, its ruling that the US Constitution cannot be operative in another country was challenged. Although the principle of territoriality

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[596] *Ibid.* at 479.
[597] *Ibid.* at 465.
[598] *Reid v. Covert,* 354 U.S. 1 (1957) at 12 [hereinafter *Reid v. Covert* or *Reid*].

seemed an adequate answer to the question of the application of the Constitution at the time of *In re Ross*, the case in itself lacked a theorization effort. In announcing that that decision was "one of those cases that cannot be understood except in its peculiar setting", the Supreme Court later[599] acknowledged that the authority of the case had in fact long been questioned.

One of the first opportunities to question it came with the incorporation of the territories ceded by Spain at the end of the Spanish American War in 1898, including Guam, the Philippines and Puerto Rico. As a territory, Puerto Rico was not a foreign state. But it was neither officially part of the US unless it had been incorporated by an Act of Congress. The status of territories was thus compared to that of a foreign country for some purposes, and considered part of the United States for others. The question whether the US Constitution applies within the territories as it does within the states ignited many debates among congressmen, senators, judges, etc., at the turn of the 19th century and gave rise to the Insular cases,[600] a series of cases debating the territorial or extraterritorial scope of the US Constitution.

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[599] *Reid v. Covert, ibid*.

[600] Apart from *Downes v. Bidwell,* 182 U.S. 244 (1901), other Insular cases include *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (in which the provisions on indictment by grand jury and jury trial were held inapplicable in Hawaii); *Dorr v. United States*, 195 U.S. 138 (1904) (in which the jury trial provision was held to be inapplicable in the Philippines); *Ocampo v. United States*, 234 U.S. 91 (1914) (in which the Fifth Amendment grand jury provision was held inapplicable in the Philippines); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (in which the Sixth Amendment right to jury trial was held inapplicable in Puerto Rico).

Downes v. Bidwell[601] is one of the Insular cases rendered in 1901 and it is the leading case on the territorial scope of the US Constitution[602], and, more specifically, on the question of the scope of constitutional rights. The case analyzed the claim that the US Constitution does not apply to and in the territory of Puerto Rico, a territory that had not been incorporated to the United States by Congress at the time the dispute arose. The judgment is deeply divided: White J. signed the judgment of affirmance, with which Shiras and McKenna JJ. concurred. Justice Brown concurred on the results, but filed a different opinion, as did Justice Gray. The dissenting voices were those of Fuller, Brewer, Peckham and Harlan JJ., the latter signing his own opinion as well.

The facts of the case are as follows. Under the *Foraker Act*,[603] goods imported from the territory of Puerto Rico into the state of New York were subject to certain duties. Plaintiff imported oranges from Puerto Rico and paid the said duties under protest. He submitted that Congress, in enacting the *Foraker Act,* violated the uniformity clause of the US Constitution, according to which duties ought to be uniform "throughout the United States"[604]. Since Spain ceded Puerto Rico to the United States in the aftermath of the Spanish American war, the argument was, Puerto Rico automatically became a part of the United States. Congress was bound by

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[601] *Ibid.*
[602] Later cases endorsed the distinction between incorporated and unicorporated territories, such that the Constitution only applies in full in incorporated territories destined for statehood; and only in part in unicorporated territories: see *Balzac v. Porto Rico*, 258 U.S. 298, 66 L.Ed. 627, 42 S.Ct. 346 (1922). See also *Dorr v. United States,* 195 U.S. 138 (1904).
[603] *An Act Temprarily to Provide Revenue and a Civil Government for Porto Rico, and for Other Purposes*, 31 Stat. at L. 77 (approved April 12, 1900) [hereinafter *Foraker Act*].
[604] See U.S. Const. art I, §8, cl. 1.

constitutional limitations when legislating for the territories, whether or not Congress actually legislates to incorporate Puerto Rico. And since the *Foraker Act* contradicts the uniformity clause by imposing duties upon products from Puerto Rico, the Act was unconstitutional.

The majority of the Supreme Court dismissed the plaintiff's arguments and found the legislation constitutionally valid because the uniformity clause did not apply extraterritorially, i.e., outside of the territory of the United States at the time. The dissenting judges, for their part, felt that the uniformity clause applied in the territories so that the legislation was unconstitutional. Three types of arguments were raised in support of both positions: the 'founding myth' argument; the 'separation of powers argument'; and the 'core body of rights' argument.

a) Founding myth

Let's consider first the concurrent opinion of Brown J. In his opinion, from the text of the 1787 Constitution and the constitutional debates preceding its adoption, it cannot be inferred that the Framers had in mind, at the time of the enactment, that newly acquired territories ought to be "considered part of the United States". What was in their mind was, rather, that the Constitution was "a union of states, to be governed solely by representatives of the states; (…)"[605] In other words, "the

[605] *Downes v. Bidwell*, *supra* note 600 at 251.

Constitution deals with states, their people, and their representatives."[606] The constitutional terms 'throughout the United States' simply mean 'among or between the several states' which, in turn, designate "the states whose people *united* to form the Constitution and such as have since been admitted to the Union upon an equality with them."[607] Even though Puerto Rico does belong to the United States, it is not a part thereof and so cannot be targeted by the Uniformity clause. In that conception, the states are seen as the original parties to the Constitution, at the exclusion of other territories.

The belief that the Constitution speaks only to states because they initially delegated their powers to Congress can be related to the founding myth of American constitutionalism. According to this belief, states are the sole parties to the Constitution, and they willfully chose not to limit the power of Congress in dealing with territories –that power becoming potentially absolute.[608]

Chief Justice Fuller and the dissenting judges demonstrate that this interpretation of the founding myth is false –that the true parties to the US Constitution are not the states, but the people. In fact, Brown J.'s opinion failed to convince the other eight judges that Puerto Rico was not a part of the United States. The "absolute silence" as to the status of the territories did not make them outside of the United States.

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[606] *Ibid*.
[607] *Ibid.* at 277-278.
[608] In supporting the finding that states are the "parties" to the Constitution, Brown J. quotes extensively the work of historian Thomas Benton, *Historical and legal examination of that part of the decision of the Supreme Court of the United States in the Dred Scott case : which declares the unconstitutionality of the Missouri Compromise Act* (New York : D. Appleton & Co., 1857).

Judges however diverged as to what that finding entailed. For the majority of the Court, the fact that Puerto Rico was a part of the United States did not mean that all of the provisions of the US Constitution ought to be applicable over there. The Constitution is operative everywhere Congress acts because there is no authority of Congress outside of the Constitution.[609] But whether a specific provision is *applicable* to a certain set of facts is another question. In that matter, Puerto Rico had not been "incorporated" into the United States for the purposes of the Uniformity clause. The result is that although Puerto Rico is subject to the sovereignty of the United Sates and owned by it, it was not incorporated into the United States in order to make *every* Constitutional provision applicable.[610]

Needless to say, this schizophrenic situation was criticized by the dissenting judges, who found that Puerto Rico was part of the United States and, as such, all of the provision of the Constitution, including the Uniformity clause, were herein applicable. In particular, they vividly disagreed with the view, expressed by Brown J. and not rejected by the White majority, that the Constitution was established by the states. The people, not the states, established the Constitution. If there were a compact, Harlan J. wrote, it was "a compact between the People among themselves". This founding myth argument has two implications. First, it means that the Constitution "speaks to all people, whether of states or territories, who are subject to

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[609] *Downes v. Bidwell, supra* note 600 at 291-292 (per White J.).
[610] *Ibid.* at 341 (per White J.).

the authority of the United States".[611] Second, it yields to the conclusion that the US government, including Congress, is necessarily bound by the Constitution in whatever acts it takes.

Quoting extensively from *Marbury v. Madison,*[612] the dissenting judges agreed with Marshall J. that the government was created by the people and that its powers are limited by the Constitution. As a "government of enumerated powers", the exercises of governmental powers "is restricted to the use of means appropriate (…) to constitutional ends."[613] Thus, there can be no Congressional power shielded from the limitations the Constitution imposes and no such thing as the power to enact legislation for the territories without having to comply with the written Constitution.

b) Separation of powers

In Justice Brown's opinion, because Congress has repeatedly and consistently proclaimed that the US Constitution does not apply in the territories unless Congress legislates to that effect, courts cannot, unless they proclaim themselves to be politically supreme, reverse that state of affairs.[614] And since Congress had not yet legislated in order to recommend the incorporation of Puerto Rico, the courts should defer to Congress and avoid interfering. Brown J. added that courts, contrary to Congress, have not been "harmonious" in their judgments regarding the scope of the

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[611] *Ibid.* at 378 (per Harlan J.).
[612] *Supra* note 199.
[613] *Downes v. Bidwell* at 359 (per Fuller C. J.).
[614] *Ibid.* at 276 (per Brown J.).

Constitution and its potential extension to the territories and in foreign states. And if many cases seem to extend the Constitution to the territories, an analogy based on these cases must in large part be discarded because they either rest on obiter, or cannot be compared to the specific facts of the case. Brown J. conceded that *Dred Scott* was a "strong authority in favor of the plaintiff", because the Supreme Court had found that the right to the protection of ones' property, including the right to own slaves (slaves were held to be a kind of property), extended beyond states and fully applied within the territories. Nonetheless, he managed to distinguish the case on the grounds that the elimination of slavery and the taxation of products, the two acts of Congress at stake in the respective cases, were not 'analogous'.[615]

The separation of powers argument was rejected by the majority of the Court and the dissenting judges. The "departments", says White J., cannot elect to apply the Constitution here or there.[616] The dissent also dismissed the claim that the legislative branch could decide whether to extend the Constitution to the territories or not, as this paves the way to "legislative absolutism".[617] As a result, the role of the judiciary –here, the Supreme Court- as arbiter in cases which raise the question of the scope of application of the Constitution - is reaffirmed.

c) Core body of rules

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[615] *Ibid.* at 274 (per Brown J.).
[616] *Ibid.* at 289 (per White J.).
[617] *Ibid*. at 379 (per Harlan J.).

According to Brown J., even though the Constitution does not apply in the territories, the Congress is not free to abuse its powers or exercise an unbridled discretion. Some prohibitions, which "go to the root of the power of Congress to act at all, irrespective of time and place"[618] are operative in the territories. Indeed, some prohibitions apply to the competence of Congress to pass a bill limiting rights; as such, these limitations are not spatially contained.[619] To support this finding, Brown J. refers to the Anglo-Saxon legal tradition which allows a pragmatic, informal control over legislative enactments. In other words, Congress is not free to violate some fundamental or natural rights, which (though not explicitly said) pre-exist Congress. For instance, the inability to enact *ex post facto* laws; to enact a law establishing a religion; to abridge freedom of speech; or to limit due process of law all fit in this category of natural rights which limit the actions of Congress whether or not the US Constitution is found applicable outside of its 'borders'.[620] Brown J. does not provide tools to distinguish which rights qualify as sufficiently "fundamental";[621] nor does he provide ways to enforce such prohibitions to act. Rather, he referred to the British legacy of "natural justice inherent in the Anglo-Saxon character", which needs no literal

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[618] *Ibid.* at 277.
[619] Brown J. refers to provisions phrased in the passive voice, such as "Congress shall make no law respecting an establishment of religion": *ibid* at 277.
[620] *Ibid*.
[621] Brown J. does not explain which rights are part of this core and, as such, are always applicable, irrespective of geography: "We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application" (at 277). And, furthermore: "We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence" (at 283).

expression to work. Great reliance is put on the "wisdom and discretion of Congress" not to abuse the powers bestowed upon it.[622]

The majority led by Justice White partly endorsed this view, which is the decisive part of the judgment: White J. held that that since the authority of Congress to govern the territories emanates from the Constitution, all provisions of the Constitution are *potentially* operative therein. It rests upon the judiciary to determine which provision *actually* applies in certain circumstances. To make that finding, the Supreme Court must undertake a *functional* analysis. There is a certain core body of prohibitions which ought never to be infringed by Congress because they are "an absolute denial of all authority under any circumstances or conditions". These limitations "cannot be under any circumstances transcended, because of the complete absence of power."[623]

This approach relies on the distinction between two types of constitutional rights or constitutional "restrictions": those which regulate a granted power; and those which withdraw "all authority on a particular subject".[624] The latter are applicable everywhere, irrespective of time and place, to Congress. This distinction between two categories of rights, according to White J., is widely accepted.[625] If there is a

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[622] See *Downes v. Bidwell*, *ibid.* at 280-281, citations omitted.
[623] *Ibid*. at 294 (per White J.). The rights which form part of this "core" are not listed but White J. hints that the 5th Amendment prohibiting Congress from depriving any person of life, liberty or property without due process of law would be included in the list: *ibid.* at 297.
[624] *Ibid* at 295 (per White J.).
[625] *Ibid.* at 296 (per White J.): "The distinction which exists between the two characters of restrictions (…) has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories (…)".

core body of constitutional restrictions which always limit Congress actions, irrespective of legal spatiality, the crucial question task, in each case, is to determine whether the provision alluded to actually applies to Congress in legislating in a certain field. In the case at bar, because Puerto Rico had not, by the time the *Foraker Act,* become an integral part of the United States, the uniformity provision was not applicable to it, presumably because it was not part of the core, fundamental restrictions which apply irrespective of time and place. Consequently, the majority affirmed the constitutional validity of the *Foraker Act*.

Justice Harlan, dissenting, did not share the faith displayed by Justice Brown in the dedication to natural justice that Anglo-Saxon legal tradition has shown. It is precisely the rejection of that confidence which gave the impulse for a written Constitution, says Harlan J. The "wise men who framed the Constitution, and the patriotic people who adopted it" were not satisfied with confidence in the elite's inclination and habit of not abusing its powers. That is why written rules and enforcement mechanisms were adopted.[626]

The other dissenting judges, led by Fuller J., expressed doubts as the existence of two sets of rights, some core, others not, the application of which should be subject to a functional criteria. Their approach to the scope of constitutional provisions focuses mainly on the exercise of governmental power, or, going back to the two poles of constitutionalism identified above, to the object rather than the subject.

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[626] *Ibid.* at 381-382 (per Harlan J.).

According to their view, there is no support in legal doctrine or caselaw for distinguishing between certain rights and certain prohibitions. All prohibitory provisions apply to Congress for *all* purposes, because the powers delegated to Congress by the people are not "enlarged by the expansion of the domain within which they are exercised."[627] As the power to raise taxes and duties comes from the Commerce clause, its exercise is "subject to the requirement of geographical uniformity".

d) Summary

To sum up, the majority and dissenting opinions in *Downes v. Bidwell*[628] encapsulate many of the discursive arguments underlying the theorization of constitutionalism: on the one hand, the founding myth and the identity of the constitutional subject; on the other hand, the focus on the exercise of state authority and the limitations which ought to apply irrespective of time and place. The lowest common denominator of all the opinions in this case is that there is a core body of fundamental rights which act as a restriction to state action irrespective of the question whether the Constitution applies here or there. In other words, territoriality is not the most decisive factor in allocating the scope of those core constitutional rights. Nor is membership of a certain population into the polity.

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[627] *Ibid* at 359 (per Fuller, C.J.). See also the opinion of Harlan J. at 385
[628] *Downes v. Bidwell, supra* note 600.

In order to know whether a specific provision is applicable to a certain set of facts, the case suggests that a functional analysis must be carried on. Even if the analysis concludes that the said provision does not apply in the case at bar, the recipients of governmental action are not vulnerable to abusive conduct. They may invoke certain fundamental guarantees which limit state action irrespective of time and place. The question is just what precisely is comprised in the bundle of rights which, all judges agreed, always restrict government's actions.

The functional approach devised in *Downes v. Bidwell* has occasionally been referred to as the "global due process"[629] approach. To some extent, the *Boumediene* decision of the Supreme Court, 107 years later, can be seen as an endorsement of that decision. The Court held, in discussing the separation of powers, that the executive cannot "switch the Constitution on or off"[630]; it also held that *habeas corpus* rights applied, in these specific circumstances, to aliens in Guantanamo Bay. However, it would be misleading to argue that US constitutionalism is simply an endorsement of that approach. It is rather riddled with the opinions of several judges of the Supreme Court as well as scholars specializing in the area of territoriality and constitutionalism, developments to which I now turn.

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[629] Term coined by Gerald Neuman in *Strangers to the Constitution, supra* note 489. Note that the terms 'due process' may be misleading, as the Court extended the core body of rights to include free speech, freedom of religion, etc.
[630] *Boumediene v. Bush, supra* note 196.

2. Transformation and reemergence of the functional approach

The functional approach underwent several transformations since *Downes v. Bidwell.* The first case explored in this section is *Reid v. Covert,*[631] a case which extended the protection of the Constitution to American citizens without the need to resort to the functional analysis, as there was, for the Court, no ground for distinguishing between categories of constitutional rights. The second case examined is *United States v. Verdugo-Urquidez*,[632] a case in which the functional analysis was discarded with relation to aliens targeted by a US state action carried outside of the territory of the United States. That case limited the Fourth Amendment protection to people with a "substantial connection with" the US. And lastly, as mentioned earlier, the case in *Boumediene v. Bush*[633] restored the functional analysis as it applies to US government acts targeting aliens abroad, especially with relation to the exercise of the *Habeas Corpus* writ.

a) Reid v. Covert or the rejection of the functional approach in relation to citizens

Ms. Covert, an American citizen, murdered her husband, a sergeant in the US Air Force, on an American airbase in England. She was tried by a court martial in a process which did not afford the right to jury trial. She was found guilty of murder

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[631] *Reid v. Covert, supra* note 598.
[632] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) [hereinafter *Verdugo-Urquidez*].
[633] *Boumediene v. Bush, supra* note 196.

and sentenced to life imprisonment. She then filed a petition for a writ of habeas corpus alleging her constitutional rights were violated, given the absence of a jury trial.

The District Court granted the writ and held that the claimant, an American citizen, could not constitutionally be tried by a military court pursuant to the *Uniform Code of Military Justice*.[634] The government appealed directly to the Supreme Court, which overruled the District Court, holding that the constitutional rights at stake – Article III and the Fifth and Sixth Amendments- did not protect an American citizen in a foreign land, even in its dealings with the American Government.[635] The Supreme Court found that the US Constitution did not apply in foreign states.

Surprisingly granting re-argument, the Supreme Court reversed itself by holding that mere geography should not control the relationship between American citizens and their government. It privileged the notions of citizenship and exercise of governmental authority over that of geography or territory. In its opening statement, Justice Black (with whom the Chief Justice, and Douglas and Brennan JJ. concurred):

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority

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[634] *Uniform Code of Military Justice*, 64 Stat. 107, 10 U.S.C. Chap. 47.
[635] *Reid v. Covert, supra* note 598.

> have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[636]

Interestingly, the majority of the Court considered that *all* constitutional limitations apply to the US government and that no cherry-picking allows deciding which limitation is fundamental and which is not. In other words, the Court explicitly rejects what seemed to be, for the majority in *Downes v. Bidwell,* a well-known and undisputed distinction.[637] It also implicitly rejects the foundation of the "functional approach" when American citizens are involved:

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.[638]

Justice John Marshall Harlan II, the grandson of Justice John Marshall Harlan who wrote the dissenting judgment in *Downes v. Bidwell,* signed a concurrent opinion which applied the functional approach devised by the White J. majority in that case

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[636] *Ibid.* at 6 (citations omitted).
[637] See the discussion of the opinion of Justice White in *Downes v. Bidwell, supra* note 625.
[638] *Ibid.* at 8-9.

to the situation of American citizens. Stressing that the question of which constitutional provisions apply overseas is ultimately "the issue of what process is 'due' a defendant in the particular circumstances of a particular case", Justice Harlan embraced a flexible analytical framework to determine which provision applies in such and such circumstances. In other words, courts should abstain from endorsing the "rigid and abstract rule" that Congress is bound by every single constitutional provision, just as they must refrain from holding that "the Constitution 'does not apply' overseas".[639] If it would be impracticable and anomalous for Congress or the executive to exercise its powers subject to a specific guarantee of the Constitution, that guarantee will not apply extraterritorially.

As a result, four out of five judges signing the majority opinion held that *every* constitutional provision applied extraterritorially to protect American citizens, whereas only one endorsed the functional approach. How is this split to be reconciled with *Downes v. Bidwell*, a case in which the majority of the Court found that only *some* fundamental rights applied to people living in Puerto Rico, and in which four dissenting judges found that they *all* did?

Again, this decision can be explained by reverting to the two poles of constitutionalism introduced in this chapter, the focus on membership or the constitutional *subject*, on the one hand, and the focus on governmental authority or the constitutional *object*, on the other. The identity of the constitutional subject was

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[639] *Ibid.* at 74.

relevant, though not necessarily central to the opinion of the majority. It served as a justificatory function: in order to justify why the functional approach was not needed when American citizens were concerned, the Court distinguished *Downes v. Bidwell* on the basis of the fact in this case, the constitutional subject was a population with different mores, dissimilar traditions and institutions.

Regarding the other pole, the governmental authority factor was referred to by both the majority and concurrent judges. Considerations of equity or reciprocity and the fact that the powers of any branch of the government cannot be exercised "free from the restraints of the Constitution"[640] were predominant. In the words of Harlan J., "The powers of Congress, unlike those of the English Parliament, are constitutionally circumscribed. Under the Constitution, Congress has only such powers as are expressly granted or those that are implied (...)."[641] It is difficult to conceive of a state action that would be shielded from the Constitution because it would assume that some actions which necessarily derive from an express or implied constitutional power nonetheless can be exercised in parallel to the Constitution. Needless to say, territoriality was not a controlling factor for either the majority of the Court or the concurring judges.

Following *Reid v. Covert,* several cases confirmed the applicability of the US Bill of Rights to American citizens abroad. The Court of Appeals found, for example, "well

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[640] *Ibid.* at 15 (*per* Black J., judgment of the Court).
[641] *Ibid.* at 67 (*per* Harlan J., concurring).

settled" the fact that "the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens."[642] Moreover, it held in *Rosado v. Civiletti* that "the Bill of Rights does apply extraterritorially to protect American citizens against the illegal conduct of United States agents."[643]

c) *Verdugo-Urquidez*[644] and the rejection of functionalism in relation to aliens

In *Verdugo-Urquidez*, the functional approach devised in *Downes v. Bidwell* to determine which constitutional right applies outside of the territory of the United States was not applied. The facts of the case are as follows. The respondent was a Mexican national whom American officers 'transported' against his will from Mexico to the US. Upon his arrival in the United States, he was arrested as part of an investigation of narcotic-related offenses. Following his arrest, American officers, working in concert with Mexican officers, conducted a search of the respondent's properties in Mexico and seized documents relevant to his alleged trafficking activities. The respondent sought to exclude this evidence at trial, an application which was granted by both the District Court and the Court of Appeals, both

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[642] *United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974). That case concerned a Fourth Amendment challenge to the overseas wiretapping of a non-U.S. citizen. The Court of Appeals found that the Fourth Amendment protects aliens as well as citizens abroad since it "refers to and protects "people" rather than "areas" or "citizens" (…) No sound basis is offered in support of a different rule with respect to aliens (…)" (*ibid.* at 280).

[643] 621 F.2d 1179, 1189 (2d Cir. 1980) (*obiter dicta;* citation omitted). That case concerned a Fourth Amendment challenge to a search conducted abroad by foreign authorities.

[644] *United States v. Verdugo-Urquidez*, *supra* note 632.

considering that the Fourth Amendment applied to the warrantless searches conducted abroad.

By a majority of six, the Supreme Court denied the application, on the basis that the Fourth Amendment did not apply to investigations conducted by American officers on the property of a non-resident alien. Rehnquist J. delivered the plurality opinion, Kennedy J. concurred in the result, and Brennan J. delivered a dissenting opinion, with which Marshall J. concurred. Justice Blackmun filed a separate dissenting opinion.

The plurality opinion developed an approach based on a strict conception of membership and focused mainly on the identity of the constitutional subject. It ruled that the terms "the people" refer to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered a part of that community."[645] That class of persons is composed of citizens but also of other people who develop certain connections with the United States, the extent of which is unclear. In the case at bar, the majority found that the respondent had not developed those connections: as he was a non-resident alien; he was brought against his will to the US, i.e. without the intention of forming connections with the US; the searched premises were in Mexico, not in the United States. Therefore, the opinion goes, he lacked sufficient connections with the United States to be protected by the Fourth Amendment.

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[645] *Ibid.* at 265.

The plurality opinion also relied on an originalist argument: the available "historical data"[646] showed that "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the federal Government against aliens outside of the United States territory."[647] Because the Framers and their contemporaries never suggested that the scope of the Fourth Amendment would be so large as to restrict the authority of government agents abroad, the Court interpreted this silence as proof of domesticity. As to the possibility that a functional approach be used to underscore which rights are *due* an alien facing trial in the United States, the Court denied the application of that approach because, contrary to *Reid v. Covert*, he was not an American citizen.[648]

Justice Kennedy wrote a concurrent opinion which proved to be of great importance since it was later endorsed by the Supreme Court in the case in *Boumediene,* which we will address below, and represents today the state of the law on that issue. Justice Kennedy refused to develop a "membership" approach. In his opinion, the question

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[646] The Court refers mainly to *The Federalist Papers*. In The Federalist, 84, Hamilton suggests that a Bill of Rights would not even be necessary, and could even be harmful, considering the fact that the government lacks any power of search and seizure in the first place: "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations (…) For why declare that things shall not be done which there is no power to do?" A. Hamilton, J. Madison & J. Jay, *The Federalist Papers,* edited with an introduction by L. Goldman (Oxford/New York: Oxford University Press, 2008) 84, 420-421. It is unclear how this element supports the finding that the clause was directed only towards resident aliens or property located in the United States.

[647] *Verdugo-Urquidez, supra* note 632 at 266.

[648] Renhquist J. endorses Harlan J.'s concurrent judgment in *Reid v. Covert, supra* note 598, but deducts from it a debatable conclusion. His point is that if *Reid v. Covert* concurrent opinion put forward a functional due process approach with relation to American citizens (an approach rejected by the majority), *a contrario,* a non-citizen is not entitled to the protection of due process which that approach may procure. See Renhquist J., *Verdugo-Urquidez, ibid.* at 270: "Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding."

of the identity of the constitutional subject, at least at the time the Framers established "We the people", is irrelevant. More particularly, the question of who were the people at the time of the enactment of the Fourth Amendment is irrelevant to "any construction of the powers conferred or the limitations imposed" and cannot ground the exclusion of certain persons from its realm.

Justice Kennedy referred to Harlan J.'s opinion in *Reid v. Covert* that constitutional provisions should be applicable unless to do so would be "impracticable and anomalous" and held that the same reasoning applies when aliens are involved. He held that in this specific case, to hold the government bound by the Fourth Amendment would indeed be impracticable and anomalous, especially given the "differing and perhaps unascertainable conceptions of reasonableness and privacy" that characterize Mexican law. It is unclear whether Kennedy J. believes the right to be applicable, but not violated,[649] or simply inapplicable.[650] What is clear is that Kennedy J., rather than distinguishing between citizens and aliens, proposes a unified approach which amounts to a "global due process" approach.[651] According to this approach, even aliens can benefit from constitutional guarantees if a contextual and pragmatic analysis demonstrates that it is necessary and feasible to extend these

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[649] As shown by this passage: "I agree that no violation of the Fourth Amendment has occurred in the case before us", *Verdugo-Urquidez, ibid.* at 278.
[650] As shown by this passage: "If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply. But that is not this case", *Verdugo-Urquidez, ibid.* at 278.
[651] Term coined by Gerald Neuman, see further in G. L. Neuman, "Extraterritorial rights and constitutional methodology after *Rasul v. Bush*" (2005) 153 U. Pa. L. Rev. 2073 at 2076.

protections in the circumstances of the case.[652] In the course of analyzing the considerations of each case, territoriality undoubtedly plays a role, but it is not the controlling factor.

A review of that case would not be complete without referring to the dissent entered by Brennan J., who starts as follows:

> The Court today creates an antilogy: the Constitution authorizes our Government to enforce our criminal law abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law.

The approach which Brennan J. favors is one which focuses on the limited exercise of authority delegated to the government. He rejects an approach which would center on membership qualifications and which establishes a class of constitutional subjects. His opinion rests on arguments of fundamental fairness, reciprocity and national values; a rebuttal of the textual interpretation of the right at stake proposed by the plurality; and a reminder of the pre-existing nature of rights over government. He emphasizes the controlling effect of the Constitution over state action, and in his opinion the nature of governmental authority clearly outweighs considerations pertaining to the identity of the constitutional subject.

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[652] *Verdugo-Urquidez*, *supra* note 632 at 277-278 (Kennedy, J. concurring).

Brennan J. believes that people, whether aliens or citizens, on whom the government imposes obligations of obedience, ought to expect that the government will obey the Constitution in return. This is required by "fundamental fairness and the ideals underlying our Bill of rights".[653] In other words, if the government imposes "societal obligations", in turn it ought to be "obliged to respect certain correlative rights, among them the Fourth Amendment." It is the vulnerability to oppressive government, which is blind to one's alienage or citizenship status, which entails an obligation on the government to respect correlatively certain rights. Reciprocity is elevated to the rank of "fundamental principle", recognized "since the time of the Framers", including Madison in his speech regarding the *Alien and Sedition Act*.[654]

Brennan J. attacks the "sufficient connection" test endorsed by the plurality opinion, criticizing the refusal of the plurality to "discuss the underlying principles upon which any interpretation of that test must rest."[655] Of these underlying principles is the role or purpose of the Bill of Rights, an integral part of the US Constitution. The Constitution, according to Brennan J., does not create rights; it prohibits the government from infringing "rights and liberties presumed to be pre-existing." In his opinion, "the focus of the Fourth Amendment is on what the Government can and cannot do, and how it may act, not on against whom these actions may be taken." And, for greater clarity, Brennan adds that "Bestowing rights and delineating

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[653] *Verdugo-Urquidez, ibid.* at 284 (Brennan J., dissenting).
[654] *Ibid.* at 284-285 (Brennan J., dissenting). The passage he quotes from Madison's Report on the Virginia Resolutions (1800) was cited above, *supra* note 573.
[655] *Ibid.* at 286 (Brennan J., dissenting).

protected groups would have been inconsistent with the Drafter's fundamental conception of a Bill of Rights as a limitation on the Government's conduct with respect to all whom it seeks to govern."[656]

Conceptually, Brennan J. views constitutional rights as pre-existing the government, and the government as being granted only limited powers because, contrary to the British *Bill of rights* of 1688, the US Bill of Rights was enacted not by Parliament, but by the people.[657]

A key statement of Brennan J. is the rejection of the textualist approach, which in his opinion did not support the kind of conclusions drawn by the majority. The fact is that throughout the drafting history of the Fourth Amendment, "no speaker or commentator, pro or con, referred to the term "people" as a limitation."[658] In other words, from the silence of the Framers, one cannot read in limitations.

Another major contribution of this opinion is the suggestion that the level of protection afforded by the constitutional right at stake may vary according to the factual context of each case. If national security is threatened, for example, the expectation of privacy may very well be different than in a context of a drug-related investigation. To say that the Fourth Amendment "applies" does not mean that it is automatically violated if a mandate is not obtained. That approach has received

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[656] *Ibid.* at 288 (Brennan J., dissenting).
[657] This argument echoes the distinction made by Hamilton in *The Federalist Papers*, 84, *supra* note 646. See also discussion in this chapter under "Limited government", section II-B, above.
[658] *Verdugo-Urquidez*, *supra* note 632 at 289 (Brennan J., dissenting).

recent echo from the Court of Appeals ruling in *El-Hage*, regarding the content of the protection to which an American citizen is entitled when he invokes the overseas protection of the Fourth Amendment.[659]

d) The case in *Boumediene*[660] or the reemergence and consecration of functionalism

Before *Boumediene* is analyzed, it is important to examine the *Eisentrager* precedent of 1950, in which the Supreme Court of the United States denied the extraterritorial application of a constitutional provision.[661] *Eisentrager* concerned the ability of 21 German nationals detained under the custody of the US Army in Germany to file habeas corpus petitions in US courts. As non-resident aliens, captured and tried in China, and detained in Germany, the plaintiffs were deemed to lack standing to litigate in US courts and were found to possess no Fifth Amendment rights.[662] The language of the Court seemed to equate the scope of the Constitution with that of the territorial sovereignty of the US, which is why that case has been associated with the territoriality paradigm: the detainees, said the Court, "at no relevant time were within any territory over which the United States is sovereign; (…) the scenes of their

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[659] *El-Hage, supra* note 406. In addition, this approach has received some support in the Supreme Court of Canada caselaw: in *Schreiber,* this approached was endorsed by C.J. Lamer, concurring in the result, and finding that there was no expectation of privacy in the context of the case; in *Hape,* it was endorsed by Justices Bastarache, Abella and Rothstein, who adopted a contextual interpretation of the right not to be submitted to unreasonable search and seizures: see discussion in Chapter II, text accompanying notes 347 and ff. and notes 404 and ff.

[660] *Boumediene v. Bush, supra* note 196.

[661] *Eisentrager v. Forrestal,* 174 F. 2d 961 (D.C. Cir. 1949), Rev'd. 339 U.S. 763 (1950) [hereinafter *Eisentrager*].

[662] *Ibid.* at 777. The relative weight of each of these factors is not discussed.

offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[663] According to some, the authority of the case is limited by the military context in which it took place. Justice Brennan observed, for instance, that the Court, in *Eisentrager,* "rejected the German nation's' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers."[664]

The case in *Boumediene* resolves the question of the extraterritorial application of the constitutional Suspension Clause,[665] a question left open after *Rasul v. Bush*.[666] The question at issue in *Boumediene* was whether the *Military Commissions Act*[667] violated the Suspension Clause of the Constitution. In fact, the issue to be determined was whether the Suspension Clause can be invoked by 'enemy aliens' detained in Guantanamo Bay, such as to render the *Military Commissions Act* unconstitutional.

The US government pleaded that *Eisentrager* was a precedent binding the Court with regard to the finding that the Constitution does not protect aliens detained overseas, and that the test to be followed in order to determine the reach of the constitutional

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[663] *Eisentrager v. Forrestal*, 339 U.S. 763 (1950) at 778.
[664] *Verdugo-Urquidez, supra* note 632 at 291 (per Brennan J., dissenting).
[665] Art. I, para 9, cl. 2, U.S. Constitution. The provision prohibits the suspension of the writ of habeas corpus except in time of invasion, rebellion or when public safety requires it.
[666] *Rasul v. Bush,* 542 U.S. 466 (2004). That case recognized to the plaintiffs, who were detainees in Guantanamo Bay, a statutory right to habeas corpus, as opposed to a constitutional right.
[667] Pub. L. 109–366, 120 stat. 2600, enacted Oct. 17, 2006.

provision at stake was a "formalistic, sovereignty-based test"[668]. The sovereignty-based test relies on territoriality as its main component: since Guantanamo Bay is outside of the territorial jurisdiction of the United States, the Constitution cannot produce effects on that territory.

While the Court of Appeals supported that view[669], the Supreme Court rejected it. The majority, led by Kennedy J., found that the aliens detained in Guantanamo Bay were entitled to the protection of the Constitution, notwithstanding the fact that they were not American citizens, nor detained in the United States. The enemy aliens detained in Guantanamo Bay were found to enjoy the constitutional privilege of habeas corpus for three reasons.

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[668] *Boumediene v. Bush, supra* note 196 at 2257 (Kennedy J., plurality opinion).

[669] The majority of the Court of Appeals found that the Constitution had no extraterritorial effect, mainly on three grounds. First, the Suspension Clause was found to protect the writ of habeas corpus in its historical, original form, i.e., as it existed in 1789. The majority held that no case or treaty shows that the British writ, which existed in the UK prior to the founding of the United States, extended to aliens beyond the Crown's dominions. Second, the majority was inspired by the Eisentrager ruling which "ends any doubts about the common law habeas corpus". Nothing in the case law or statutes or the constitution allows for the extension of the writ to aliens. And finally, there is no recognition in the case law of the "de facto sovereignty", which would treat Guantanamo Bay, even if formally outside of the US territory, as a territory under effective control of the United States. A strong dissent was entered by Rogers J., holding *inter alia* that *Eisentrager* ought to be distinguished on the basis that the detainees are not advocating a positive right to the writ, but rather, that the Congress is prohibited, by the Constitution, to suspend the writ. In other words, the government being one of limited powers, the focus shifts to whether the Congress had the power to suspend the writ, and not as to whom has a positive right to the writ. Whether or not Guanatanamo Bay detainees had a positive right is only the next step; the first is to determine whether the Congress was empowered to act as it did. Considering Congress had no power to suspend habeas corpus without providing a reasonable alternative to the writ, Rogers J. moved to evaluate the said alternative provided by the US government. He found that the tribunals created by the MCA had a poor due process record and that the lack of divulgation of information to detainees, the admissibility of torture obtained evidence, and the lack of counsel representation were a non-credible alternative to the writ. See *Boumediene v. Bush,* 476 F. 3d 981 (2007).

First, the absence of a jurisprudential or historical precedent as to whether habeas corpus extends to prisoners held outside of the US in a territory over which the US exercises total military and civil control cannot be read as signaling the absence (or presence) of such privilege, because the assumption on which that inference rests, i.e. that "the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before the Court",[670] is misleading.

Second, the question whether a state exercises sovereignty over a certain territory must be severed from the question whether constitutional rules apply on that territory. A state may see its domestic laws apply in a territory over which it has not claimed *de jure* sovereignty. Therefore, the fact that Cuba retains official sovereignty over Guantanamo Bay is not conclusive of the question of which legal rules apply there. Nor is the denial, in *Eisentrager,* that aliens enjoyed constitutional rights*,* for in that case the US lacked *both de jure* and *de facto* jurisdiction over the Landsberg Prison where claimants were being detained. Thus the myth that constitutional law follows territorial jurisdiction –or territoriality – was deconstructed.

Third, and what is most relevant for our purposes, the Court rallied all the preceding caselaw and identified a "common thread" which runs from the Insular cases to *Reid v. Covert* and from *Eisentrager* to *Rasul v. Bush*. That "common thread" is the endorsement of a functional approach, an approach which ultimately relies on

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[670] *Boumediene v. Bush, supra* note 196 at 2251 (Kennedy J., plurality opinion).

pragmatic considerations prior to determining the scope of the American Constitution, and which posits that no one is automatically barred from claiming its protections. That thread is, apparently, what has assisted the courts, in the last century, in their attempt to determine, in each case, whether the constitutional guarantees can be invoked in a specific fact pattern. Those cases showed sensitivity to "practical considerations" and whenever these considerations impeded the application of a constitutional right, the Court found the said right inapplicable.

It might be argued that the Court's analysis rests on a partly selective, partly tainted reading of precedent. In other words, in order to give these cases a "fit", to borrow from Dworkin, the Court had to bypass some key findings made by its own bench in the past. The Court denies for example that *Reid v. Covert*, discussed above, embraced a bright line rule, and believes it actually promoted a functional approach. In reality, the plurality opinion refused to undergo a functional analysis when citizens' rights were at stake; for the majority of the Court in that case, the Constitution was fully applicable. The Supreme Court's gloss is selective, as it is limited to Harlan J. and Frankfurter J. concurrent opinion that did support the functional analysis, whereas the majority rejected it.[671]

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[671] *Ibid.* at 2256 (Kennedy J., plurality opinion) : "That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court's disposition) these considerations were the decisive factors in the case."

Another instance of selective reading is its analysis of *In Re Ross*[672] and the refusal to consider that it was overruled by the plurality in *Reid v. Covert*, again siding with the concurrent judges Harlan and Frankfurter.[673] Finally, the Court rejected the distinction traditionally carried by courts between aliens and citizens when it comes to extraterritoriality –a distinction which Justice Kennedy himself endorsed in *Reid v. Covert*[674] and which formed the basis of Justice Rehnquist's plurality opinion in *Verdugo-Urquidez.*[675]

Notwithstanding its selective reading of prior caselaw, the Court is not to be blamed for its willingness to pretend that the new approach is in fact very old. If one looks carefully, there was indeed a golden thread in the series of cases cited by the Court, but it is a thread which runs through the Supreme Court's concurrent opinions, not through the opinions of the majority of the Court at each relevant time. The functional approach was first expounded by the concurrent opinion of the Court in *Downes v. Bidwell* (opinion of White J.). Then it was recycled and expanded by Harlan and Frankfurter's concurrent opinion in *Reid v. Covert*, which opinion itself was endorsed by Kennedy J.'s concurrent opinion in *Verdugo-Urquidez*. Now that

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[672] *Supra* note 593.
[673] In the case in *Reid v. Covert* both Harlan J. and Frankfurter J. refused to consider that *In re Ross* had been overruled. But the majority did: see text accompanying note 598.
[674] He held in that case that "the distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Reid v. Covert, ibid.* at 276 (per Kennedy J.). In *Boumediene v. Bush,* Justice Kennedy clearly downplays the importance of citizenship as a controlling factor: see excerpt cited at footnote 671, above.
[675] *Supra* note 632.That case held that aliens are not 'the people' whom the Constitution protects: see text accompanying notes 644 to 658.

Kennedy J. signs the plurality opinion in *Boumediene,* for the first time, the "impracticable or anomalous" test is able to inform the majority's opinion.

Contrary to prior caselaw, the Court gave guidelines for the application of the functional analysis. The first criterion to consider is the identity of the constitutional subject; the Court will look here at the citizenship of the person or, as in the case at bar, at the status of the detainee and "the adequacy of the process through which that status determination was made." The second criterion is territorial: the Court will look at "the nature of the sites where apprehension and then detention took place". Here it is not only the nature of the site, but also the extent of the control exercised on these sites which will be evaluated. The third criterion relates to the "practical obstacles" that may be faced if the constitutional guarantee is to be recognized, i.e., is it impractical or anomalous to do so?[676]

In applying these criteria to the case at bar, the Court found (1) that the procedural protections of the detainees, when their enemy combatant status was being determined, were limited; (2) that the control exercised by US officials in Guantanamo Bay was sufficient to bring the prison within the US jurisdiction; and (3) that there was no practical impediment to recognizing habeas corpus in the case at bar, and no risk of causing friction with Cuba, the "host government". The Suspension Clause was thus found to have "full effect at Guantanamo Bay".

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[676] *Boumediene v. Bush, supra* note 196 at 2259 (Kennedy J.).

So far, three familiar elements can be retrieved from this list of criteria: the identity of the constitutional subject, which corresponds to the first criterion; the territoriality principle, which corresponds to the second; and pragmatic considerations, which correspond to the third. One criterion is missing: the limited nature of governmental power, and the fact that each and every state action is to be subjected to the Constitution. The Court thankfully did not neglect this capital point, although it did not integrate it in its functional analysis. Answering the government's arguments, the Court rejected the proposition that the political branches could "govern without legal constraint" by exercising some powers, while denying formal sovereignty. In addition, the separation of powers argument was raised, and the Court found that if the Constitution grants several powers to the Congress and President, it does not grant "the power to decide when and where its terms apply." It is up for courts to make that finding. Even then, there is a strict minimum that courts will always recognize, because "[e]ven when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject to "to such restrictions as are expressed in the Constitution" (citations omitted)."[677] The Court stressed that the political branches do not have "the power to switch the Constitution on or off at will".[678]

Boumediene concludes our survey of American caselaw regarding extraterritorial constitutionalism. The functional approach it establishes is truly flexible, and may

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[677] *Ibid.* at 2259 (Kennedy J.).
[678] *Ibid.*

take into consideration many, without prioritizing any, constitutional values. On the other hand, Scalia J. is right to declare that the functional test "does not (and never will) provide clear guidance for the future."[679]

In its aftermath, the US Court of Appeal applied the functional approach to determining whether a US citizen was entitled to Fourth and Fifth Amendment protection. In *El-Hage,* the Court concluded that the Fourth Amendment applies to extraterritorial searches of US citizens, but not completely. That is, the reasonableness of the searches criteria does apply, but the warrant provision does not.[680] Hence documents obtained from searches conducted abroad which do not meet the reasonableness criteria of the Fourth Amendment will be stricken out if their production is sought at a trial in the United States. This opinion clarifies the situation of US citizens who used to be said to "travel" with their Bill of Rights. By suggesting that the scope of protection of a constitutional right may vary according to the facts, the Court in *El-Hage* hinted towards a "functional" approach even as it concerns US citizens. And in so doing, it fortified the finding, first suggested by Harlan and Frankfurter JJ. in *Reid v. Covert,*[681] then endorsed by the plurality in *Boumediene v. Bush,*[682] that even in relation to US citizens, there is no clear-cut answer. The only consensus out there may be that the territoriality principle ought not to weigh too heavily in the balance.

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[679] *Ibid.* at 2302 (Scalia, J., dissenting).
[680] *El-Hage, supra* note 406.
[681] *Supra* note 598.
[682] *Supra* note 198.

Recently, in *Al-Maqaleh v. Gates,* the U.S. Court of Appeals applied the *Boumediene* framework to the case of Bagram detainees who claimed habeas corpus protection while detained in Afghanistan. The Court reached a different result: the constitutional privilege of habeas corpus was found to be inapplicable to detainees held in the Bagram base. The Court distinguished the *Boumediene* set of facts by holding that contrary to Guantanamo Bay, Bagram was an active theater of war, and that it would be impractical for the United States to provide constitutional guarantees in a war setting.[683]

V. TERRITORIALITY AND ITS ALTERNATIVES

Attempting to summarize the several approaches outlined in the preceding review of the caselaw is not easy. All have been given attention by courts, and all have received, to a certain extent, the approval of various judges. It is the degree of attention and approval which varies. While one can try to theorize the courts' holdings, and put in place all the pieces of the puzzle, the end result does not flow from a meta-principle. Rather, the construction of the right approach results from a deliberative choice. It is not a deduction from some *a priori* principle. This deliberative choice faces objections and must be able to rebut these in order to remain the "best" option. The deliberative choice is thus a dynamic, not static approach to the question of constitutional law and geography.

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[683] *Al-Maqualeh v. Gates, supra* note 201.

There are three theoretical tendencies that can be distilled from the American experience in the field of geography and constitutional rights. They each focus on a different value or object: people, state power, and pragmatism. In terms of the two poles underlined previously in this chapter, we can say that the first approach focuses on the identity of the constitutional subject, while the second focuses on the identity of the constitutional object. The third approach blends these two considerations into a pragmatic analysis.

Needless to say, strict territoriality or the territorial paradigm are not, currently, key factors for ascertaining the scope of the U.S. Bill of Rights. Although it was the leading principle in 1898 behind *In re Ross,* it has been massively criticized by US scholars – not to mention overruled by judges[684] or confined to its facts.[685] It has been characterized as a "poor system"[686], "demonstrably false"[687], because it cannot account for the fact that the legislation and the executive do in fact extend their arms extraterritorially. Hence, alternatives to this approach have been devised.

A. Of people

The first alternative to the territorial paradigm is an approach which focuses on entitlement, membership, or the constitutional subject, and is commonly associated

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[684] See, for example, the plurality opinion in *Reid v. Covert*, supra note 521 at 12
[685] See, for example, Justice Frankfurter's concurrent opinion in *Reid v. Covert*, *ibid.* at 50.
[686] L. Kramer, "Vestiges of Beale: Extraterritorial Application of American Law" (1991) Sup. Ct. Rev. 179, 211.
[687] *Ibid*.

with the plurality opinion of Rehnquist J. in *Verdugo-Urquidez*. It rests on a restrictive interpretation of the terms "we the people", words that were read as targeting citizens, and, to a limited extent, resident aliens, provided they share sufficient connections with the United States. This approach partially rejects territoriality, as it elects, as a criteria for allocating constitutional rights, membership in the political community. Citizens, it is assumed, remain members of that political community notwithstanding their physical location, and they can be deemed to travel with their Bill of rights in their backpack.

Within the US territory, there is a "series of concentric circles in which non-citizens can be placed closer or further from the center of the "national community", depending on their status as residents or non-residents in the US and whether they are in the country voluntarily or involuntarily."[688] Needless to say, in such a doctrine, aliens *abroad* hardly belong to the peripheral concentric circles, not to mention the core ones.

In this theory, the scope of the constitutional protections is conditioned by the social contract theory and its quest for identifying the constitutional subject. If we return to Rosenfeld, constitutional rights are to be understood as being "tied to the nation-state or to a particularly tightly knitted supra-national political entity, such as the EU" and

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[688] R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention" (2007) 62 N.Y.U. Ann. Surv. Am. L. 637 at 659.

therefore, those rights "only concern those within the relevant polity."[689] Of course, the participants in the relevant polity may vary. For Locke, for instance, being born under a certain government does not automatically mean that someone is a member of the civil or political society. Each man must pronounce a declaration according to which he agrees to be bound by the laws of some government; in other words, each man must consent, either expressly or tacitly, to become a subject of the said government. Interestingly, Locke suggests that territorial presence, even sporadic, can be sufficient to tie that person to the sovereign, irrespective of membership ties:

> (…) every man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent (…) whether his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and in effect it reaches as far as the very being of any one within the territories of that government.[690]

Hence the idea of applying a theory of concentric circles or spheres of membership within a specific territory does not find echo in the social contract theory. And as to the question of applying such a theory outside of the territorial boundaries of a state, the social contract theory offers even less support for such a proposition. In fact, the premise underlying the expression of consent to being bound by the laws of a

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[689] M. Rosenfeld, *The Identity of the Constitutional Subject, supra* note 538 at 252-253.
[690] J. Locke, *The Second Treatise of Government and A Letter Concerning Toleration, supra* note 536, Chap. VIII, para. 119. Note that in this case, the person is not necessarily part of the political society, nor his he a subject or member of that State. To become so, one must make actual entry, take a positive undertaking, promise and expressly agree to become member of that State : *ibid.* at para 122.

government, and hence be part of the social compound, must not be overlooked. Both the person and her property must be free at the time of entry into the social contract. That each person is naturally free, and that nothing but her free consent can put her under the control of another power[691], is the premise, and the prerequisite for membership into the social contract.

Conversely, when non-resident aliens are made subject to American law as a result of a governmental action, be it legislative or executive, there is often no freedom to consent, or at least, no reasonable expectation of consent. Whereas immigrants and refugees and temporary workers can be assumed to "consent" to being bound by the rules of a certain state, the state of their own choosing, there is no expectation that someone living in China or Canada but who is brought under the umbrella of US law because they commit a tort or a crime or infringe somehow US legislation, or someone abducted such as Mr. Verdugo-Urquidez, would, or even could, consent thereto. Because of the lack of voluntary and free will that characterizes many extraterritorial assertions of power, and consequently the improbability[692] of obtaining consent, whether hypothetical or tacit or express, the application of the social contract theory to the question of extraterritorial constitutionalism may be altogether inappropriate.

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[691] *Ibid.* at 233.
[692] Or even an impossibility to do do so: see G. Neuman, *Strangers to the Constitution, supra* note 489 at 112.

Interestingly, under the membership theory, both the "people" principle and the territoriality principle coexist. With relation to citizens, the principle of territoriality is trumped by membership in the political community, because it is assumed that citizens, wherever they may be, are still part of the "relevant polity" –at least traditionally. According to that same theory, foreigners would be able to claim constitutional rights only to the extent of their belonging to the sphere of membership. But their territorial absence constitutes, in itself, a bar to their membership in the political community.

In practice, the membership approach –which postulates that *who you are* determines *what rights* you are entitled to – cannot be said to be binding right now. Although it was championed by some judges, including Chief Justice Rehnquist in *Verdugo-Urquidez,* it is an approach that lost ground recently, in a process which culminated in the case in *Boumediene*, providing a "long overdue repudiation" of the *Verdugo-Urquidez* ratio decidendi.[693] Moreover, the recent trend to modulate the protection to which US citizens are entitled when physically outside the United States signals that the membership approach is not even capable of providing American citizens – arguably the 'perfect' members –with full constitutional coverage.[694] To the very least, it can be asserted that membership is not a permanent or stable status, but a dynamic state which can evolve with varying circumstances.

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[693] G.N. Neuman, "The Extraterritorial Constitution after *Boumediene v. Bush*" (2009) 82 Southern California Law Review 259.

[694] Relating to the Fourth Amendment, see the decision *El-Hage, supra* note 406, where the Second Circuit Court of Appeals held that the criterion of reasonableness of a search applied to searches performed on US citizens abroad, but not the warrant provision.

B. Of state power

The second approach emphasizes the constraints that the government faces whenever it imposes its authority on someone, irrespective of the locus of the action itself. It focuses mainly on the object, i.e. the state action, and not on the person targeted by this action, or the constitutional subject. One of its proponents is the first Justice Harlan, who held, in *Downes v. Bidwell*,[695] that "wherever power is exercised in the name and under the authority of the United States", the Constitution follows. Another supporter is Justice Brennan, who held, in *Verdugo-Urquidez*,[696] that whenever the government seeks to impose its rule, fairness requires that it act within constitutional constraints. In doing so, the "fundamental principle of mutuality", or reciprocity, is promoted.

Because one can be targeted by a state action irrespective of one's citizenship or other personal characteristics, this approach rejects distinctions based on the identity of the constitutional subject. It also rejects a distinction between certain fundamental rights and others: in this view, all rights are potential limitations to state action. Ontologically, rights are seen not as an asset in the hands of certain entitled participants, but rather as *limitations* on state action.

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[695] *Downes v. Bidwell*, *supra* note 600 at 385 (per Harlan J., dissenting).
[696] *Verdugo-Urquidez, supra* note 632 at 284 (per Brennan J., dissenting).

Many legal scholars believe that this approach, or a similar one, ought to be championed. According to Gerald Neuman, for example, "government's interference with the freedom or property of any human being must be justified, and when the justification relies on the individual's obligation to obey U.S. law, the criteria for justification include government's respect for constitutional rights".[697] In other words, whenever the US government *imposes an obligation* on a person, and that obligation emanates from the operation of US law, that person is entitled to the whole protection of the Bill of Rights. There is thus a "correlation between rights and governing authority", because "the framework of rights is designed to legitimate government's claim to obedience."[698]

It has been suggested that the problem with this view may be that virtually every state action, every exercise of federal state power, would "trigger correlative constitutional rights",[699] leading to a potentially universal application of the US Bill of rights. The military would even have to "give enemy soldiers hearings before shooting them in battle". In addition, the perspective that in their interactions with the American government, aliens abroad enjoy the same rights as American citizens would appear "impractical, and perhaps absurd."[700]

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[697] G. Neuman, *Strangers to the Constitution*, *supra* note 489 at 108-109.
[698] G. Neuman, "Extraterritorial rights and constitutional methodology after *Rasul v. Bush*", *supra* note 651 at 2077.
[699] K. Roosevelt, "Application of the Constitution to Guantanamo Bay: Guantanamo and the Conflict of Laws: *Rasul* and Beyond", *supra* note 592 at 2057-2058.
[700] *Ibid.* at 2058.

That it may be impractical is possible, but it is not, normatively, a reason to reject the postulate that there ought to be a correlation between rights and government action. There is no need to consider that *anyone* can claim constitutional rights: the trigger is the presence of an identifiable government act authored by American officers abroad.

In the end, this approach relies on a conception of the purpose and function of constitutional rights, which posits that rights

> do not purport to state moral duties that are owed by all persons and groups; rather they state more exacting requirements that American citizens considered necessary constraints on the government's exercise of sovereignty.[701]

This conception of rights tied to and contingent upon state power makes sure that, contrary to universalism, it does not attempt to "enforce in the broader context constraints chosen for the narrower one."[702]

One must be careful not to define too narrowly the type of state action which triggers the application of the US Bill of Rights. If obedience to law is selected as the criterion to trigger the application of constitutional guarantees, some situations will be excluded. It has been argued, for example, that when the government acts outside of the margins of the law, such as when he detains prisoners incommunicado and lays no charges against them, "the government is not asserting any obligation on the

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[701] G. Neuman, *Strangers to the Constitution, ibid.* at 110-111.
[702] *Ibid.*

part of the non-citizen to comply with U.S. laws."[703] This distinction is not only too formalistic, it is incorrect: the use of force is a (brutal) claim for the obedience of law. It is the most coercive claim for obedience, and it should not be excluded from the realm of actions triggering the application of constitutional rights, unless Courts are to sanction the assertion of naked force.[704]

There is, in addition, no reason to limit this approach, as Neuman suggests, to law enforcement situations, or to situations in which American criminal law is at stake and an accused is facing a trial in the United States.[705] Nothing in the conceptualization of rights as correlated to government power require such restriction. According to the "limited-government theory", any government action, whenever deployed, ought to be limited by constitutional provisions, irrespective of the territory where the action takes place or the identity of the people subjected to that state action. This theory implies that a certain method must be followed in order to determine whether a constitutional provision applies to a situation involving extraterritorial components. In particular, the very first question one must ask is whether the government is empowered by the Constitution to act as it did.[706] It does not matter that the person affected by the state action is not a member of the polity;

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[703] R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention", *supra* note 688 at 660-661.
[704] See, on this point, G. Neuman, "Closing the Guantanamo Loophole" (2004) 50 Loy. L. Rev. 1 at 52.
[705] G. Neuman, "After Guantanamo: Extraterritoriality of Fundamental Rights in U.S. Constitutional Law", online: <www.juspoliticum.com/After-Guantanamo.html>, (text last consulted on August 1st, 2011).
[706] This approach finds support with scholars Robert Knowles and Mark Falkoff as well as Justice Roberts, from the Federal Court of Appeal in *Boumediene.* See generally R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention", *supra* note 688.

since the question is primarily whether the government had the power to act, the constitutional check operates notwithstanding the identity of the constitutional subject.

Such a framework necessarily considers that the Bill of rights is "unrestricted by person or place". [707] To some extent, it also denies that a certain group, or members, established only for themselves that the power of their government was limited. According to Louis Henkin, this implies a view of the "social compact" as:

> (…) not merely an arrangement for mutual protection; it is a compact to establish a "community of righteousness." It declares that a government instituted to secure rights must respect those rights. The United States must secure and respect not only the rights of the people who were party to the compact, but also of all others who come within its jurisdiction. If, in a world of states, the United States is not in a position to secure the rights of all individuals everywhere, it is always in a position to respect them. Our federal government must not invade the individual rights of any human being. The choice in the Bill of Rights of the word "person" rather than "citizen" was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings. [708]

Of course, from a strictly legal standpoint, there are no precedents which make the recognition of certain constitutional rights to aliens abroad impossible, or

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[707] A. Kent, "A Textual and Historical Case against a Global Constitution", *supra* note 227 at 470.
[708] L. Henkin, "The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates", *supra* note 229 at 32.

undesirable.[709] Quite the contrary, the Supreme Court has even hinted that it may take that turn when it comes.[710] In the end, the approach which I labelled "of state action" takes for granted, and focuses on, an action performed by the American government. What distinguishes some versions of that approach is the level of authority attached to such state action. For Neuman, the state action must impose an obligation linked to the enforcement of criminal law (the scenario of *Verdugo-Urquidez,* for example); for limited-government theorists, any state action may be subjected to constitutional limitations if it is demonstrated that the government lacks the express power to act as it did –irrespective of the claim-rights of the recipients of that state action. In both cases, there must be an ascertainable legislative or executive act, i.e., an action undertaken by the American government targeting the claimant, before constitutional rights can be invoked.

C. Of pragmatism and practicalities

The third approach, which is also the current state of the law in the United States, is the pragmatic or functional method of determining the scope of application of relevant constitutional protections. The main value fostered by this approach is pragmatism. The identity of the constitutional subject constitutes one step of the analysis; another step looks into the exercise of state authority, and the degree of

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[709] R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention" *supra* note 688 at 661-2.
[710] A. Kent, "A Textual and Historical Case against a Global Constitution", *supra* note 227 at 476, referring to the decision in *Rasul v. Bush,* and especially footnote 15 of that decision.

control exercised by the American government; it considers *de jure* but also *de facto* jurisdiction. Finally, the third, crucial step examines whether the application of these factors would bring an "impractical or anomalous" result (the pragmatic component). To all this must be added the acknowledgment that, according to the separation of powers doctrine, it is not for the government to decide when or whether it will be bound by the Constitution. The government cannot, generally, act free of legal constraints.

The approach thus described is like a melting pot. What transcends this melting pot however is the practical ability of the United States to secure constitutional rights in a particular case. In general, this approach instates a presumption that the Constitution will constrain any type of American state action, irrespective of geography, unless there are "impractical or anomalous" obstacles to so.

This approach is not new. Justice White in the Insular case of *Downes v. Bidwell,*[711] introduced a century ago the idea that if all the provisions of the Constitution are potentially operative on a given territory, not all are applicable to a certain factual context.[712] That approach was recycled by concurrent Justice Harlan in *Reid v. Covert*[713] and extended to US citizens; it was then endorsed by concurrent Justice

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[711] *Supra* note 600.
[712] *Ibid*. Among elements that help decide whether a provision is applicable, White J. cites the situation of the territory concerned and the practical impact of imposing the Bill of rights to a population with wholly different mores, cultures and values. Comity is also one element which ought to be taken into consideration.
[713] *Supra* note 598.

Kennedy in *Verdugo-Urquidez*[714] and finally it became the law through Kennedy J's plurality opinion in *Boumediene.*[715] While the factors evolved, a common thread of that approach is the rejection of the normative distinction between citizens and aliens in the quest for establishing the constitutional scope of the Bill of Rights. Thus, the main criterion it values is not that of the identity of *the people*, nor that of inherently limited *state action*, but that of *practicality*.

Pragmatists blend territoriality, limited-government, and also look at the identity of the subject claiming the constitutional protections but without ordering or prioritizing these criteria. To criticize this choice one may borrow from "rule skepticism" adversaries and point to the fact that there is an undeniable correlation between the values of the decision-maker and the result of his analysis[716] as well as the criteria the decision-maker elects. This difficulty has been seen at play in the *Al Maqaleh v. Gates* decision, where the Court of Appeals gave much weight to the practical impediments that granting habeas corpus rights to claimants would cause *to the war effort.*[717] That Bagram was in an active theater of war (Afghanistan) was, for these judges, the most decisive "practical" concern.

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[714] *Supra* note 632.
[715] *Supra* note 198. The factors are different than those suggested by White J.: those in *Boumediene* include the citizenship or status of the claimant, the nature of the sites where the apprehension (or infringement) occurred, the degree of control exercised, and practical obstacles: see text accompanying note 676.
[716] R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention" *supra* note 688 at 662.
[717] *Al-Maqaleh v. Gates, supra* note 201.

Of course, any pragmatic approach cannot determine "a priori the scope of due process rights to which [claimants abroad] would be entitled"[718] nor can one avoid that the flexibility of the approach leads to "manipulation".[719] This lack of guidelines is what Justice Scalia, dissenting in *Boumediene,*[720] underlined. But more importantly, it seems that the definition of the scope of constitutional rights ought to rest on fundamental principles rather than pragmatic considerations. In other words, even though a certain dose of pragmatism may be necessary *in* the theorization of the scope of constitutional law, the theory in itself should not be reduced to the question of convenience or practicality.

VI. CONCLUSION

This chapter has demonstrated that in the United States, the principle of territoriality is at best *one* criterion to take into consideration when determining the scope of constitutional law in a specific fact pattern. The physical place where a state action takes place or the physical location of the recipient of a state action is at best, under the functional approach, *one of the* criteria to be weighed. I have also outlined the three alternatives or legal doctrines that have emerged, bearing in mind Justice Frankfurter's warning that they must always be tied to the facts which triggered their construction:

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[718] R. Knowles & M.D. Falkoff, "Toward a Limited-Government Theory of Extraterritorial Detention" *supra* note 688 at 662.
[719] *Ibid.* at 663.
[720] *Supra* note 198; the dissenting opinion of Justice Scalia was cited at note 679, above.

> Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots.[721]

Each of these legal doctrines focus on a different element of constitutional theory: a) the identity of the constitutional subject, or membership or entitlement considerations; b) the state action as a limited exercise of delegated power; and c) plain, pragmatic considerations, i.e., the practicality for the government to respect rights is such or such context.

In the previous chapters, the survey of Canadian case law demonstrated that, apart from the "international human rights" exception developed in *R. v. Hape*,[722] and followed in *Khadr-2*,[723] Canadian courts officially embrace pure territoriality when it comes to ascertaining the scope of Charter rights when a claimant challenges the constitutionality of an action performed by Canadian officers abroad. But the review also demonstrated a discrepancy between the cases following *Hape* and the official doctrine, pointing to the need for an alternative model. Contrary to Canadian law, American constitutional law has demonstrated an ability to generate various answers to the problem of extraterritorial constitutionalism. Nonetheless, establishing the scope of constitutionalism in the US is still a "work in progress" after all these years,

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[721] *Reid v. Covert, supra* note 598 at 50.
[722] *Supra* note 16.
[723] *Supra* note 195.

and after all these cases. If this is so, *a fortiori*, in Canada, the construction of an anlternative model, to which Chapter Five now turns, is really just starting.

CHAPTER FIVE:

THE SCOPE OF CHARTER RIGHTS BEYOND THE TERRITORIAL PARADIGM

I. INTRODUCTION

This chapter seeks to revisit the role that territoriality plays in determining the scope of the Canadian Charter of Rights and Freedoms in extraterritorial cases. It proposes to move away from pure territoriality to an alternative analytical framework based on the correlation between the assertion of state authority through government actions and the operation of constitutional limitations. It argues that complex questions arising outside of the familiar matrix of 'citizen vs. the state' need complex answers which cannot be reduced to the 'in or out' dichotomy. Law and territory are not coterminous and they cannot be tied together without a correlational component which will be outlined in this chapter.

Again, the starting point is the reading of each Charter provision. Generally speaking, Charter rights are not limited to specific people. "Everyone" and "every person" are the words generally used.[724] To a certain extent, a literal reading could mean that *everyone in the world* enjoys the right to life, irrespective of the presence of an action by the Canadian government. But to adopt such view is to endorse

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[724] I discussed the identity of the "creditors" and the wording of Charter provisions in the text accompanying note 305, Chapter Two above.

universalism and cosmopolitanism, and I have no intention of doing so.[725] I will rather focus on finding alternatives to the current territorial application of Charter rights beyond territoriality, but without embracing universalism or global constitutionalism.

In order to do so, two alternatives to territoriality will be discussed. Note that there are conceptual overlaps between territoriality and each of these two approaches and I will identify them in due course.

A first option would be to focus on the constitutional subject, his ties with the political community, and his entitlement to rights, in order to determine whether constitutional rights apply. I label this the "personal entitlement" approach.[726] There are some recent developments in Canadian law which tend to support an approach

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[725] In Chapter One, I introduced, as one challenge to pure territoriality, the model of cosmopolitan democracy which David Held developed: see text accompanying notes 212 and ff., above. I also illustrated the difficulties of application of this model: *ibid.*

[726] Physical presence in a given territory and personal status are two of the main competing approaches to rights distribution. There is a certain degree of variation in the meaning given to these two broad categories, and particularly to "personal status". They can be both labeled as 'membership models' (as, for example, in the work of C. Nunez, "Fractured Membership", *supra* note 15 at 825). Or they can be referring to two different models, labelled territoriality and membership, the word "membership" here meaning the personal ties one shares with the community, as a part of a social contract/constitutional compound inquiry (as, for example, in the work of G. Neuman, *Strangers to the Constitution, supra* note 489 at 6-8). In general, Michael Walzer argues that political membership (citizenship) may not be denied to those whom the state already admitted: M. Walzer, *supra* note 53 at 61-63. Political membership refers, here, to citizenship. But this statement says nothing about whether people not admitted in the territorial state can still benefit from constitutional protections if state authority is exercised upon them. In such a case, whether these people, i.e., foreigners, may nonetheless argue that a state action is unconstitutional raises questions of "entitlement". That is why I prefer to use the terms "personal entitlement" rather than "membership", i.e., to avoid any confusion between the claim for political membership and the claim for constitutional rights. "Personal entitlement" inquiries can then be applied to both Canadian citizens (members) and foreigners (non-members) on whom state authority is exercised extraterritorially.

based on personal entitlement. I will explain why I do not consider this alternative as the best option for Canadian constitutionalism.

The second option is to focus on the object of constitutionalism, or the display of authority, and the correlation between authority and rights. I label this the "authority" approach. I will argue that this approach best corresponds to Canadian constitutionalism and ought to be preferred, but that it requires a redefinition of the meaning of authority which surpasses the teachings of the Supreme Court of Canada in *R. v. Hape*.[727]

The second part of this chapter will develop the alternative analytical framework. Physical presence on Canadian territory becomes, in this analytical framework, a *relevant* but not a *determinative* factor to the determination of the scope of protection of a right. Entitlement is evacuated as an illiberal factor in the weighing of constitutional limitations which should apply to an act of government. Pragmatic/practical considerations are not elevated to a legal doctrine, but they may find their place within the finding of a violation of a Charter right.

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[727] *Supra* note 16.

II. CONSTITUTIONAL SUBJECT/ PERSONAL ENTITLEMENT

A. Personal entitlement and Charter law

There is a new trend towards inquiring into the prior entitlement of a constitutional subject when determining the scope of Charter rights. The inquiry goes along these lines: is this person entitled to claim a Charter right? Does she hold constitutional rights to start with? Is this person a member of the social contract/compound and does she share sufficient ties with the Canadian polity in order to denounce a Charter infringement?

The claim is, generally, that only entitled persons ought to have access to the constitutional rights guaranteed by the Charter. The existence of a government act which can be attributed to one of the entities listed in section 32 of the Charter is not enough to trigger the application of the Charter. One must, in addition, be *entitled* to claim Charter rights.

Concerns about the identity of the constitutional subject were explicitly[728] articulated in the dissenting opinion of L'Heureux-Dubé and McLachlin JJ. in *R. v. Cook*[729] and

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[728] They were implicitly evoked by the majority of the Supreme Court of Canada in *R. v. A, supra* note 337. In that case, the majority of the Court held that the protection of the Charter could be invoked by Canadian citizens given the "special circumstances" of the case, including the Canadian citizenship of the claimants and the fact that the initial undertaking to protect the witnesses was issued by the RCMP in Canada while the claimants were still there.

[729] *R. v. Cook*, *supra* note 249.

are embedded in the proposition that the Charter *creates* rights. Such proposition entails, conversely, that to be able to raise a Charter challenge one must first demonstrate that one *possesses* Charter rights. Contrary to the majority of the Court, the dissenting judges believed that the claimant in *R. v. Cook*, being neither a Canadian citizen nor physically present in Canada at the time of the alleged violation, did not hold Charter rights in the first place. As a consequence, they believed that the judges who ruled in favor of the application of the Charter missed "a crucial first step", that is:

> a determination of whether the person claiming a *Charter* right is indeed the holder of a right under the Canadian constitution. The question of whether the claimant holds a right, in my view, must logically be determined prior to the question of whether there is state action involved that may have infringed that right.

To be clear, if the appellant wishes to allege that while he was in jail in Louisiana, the Canadian government breached section 10(*b*) of the Charter, he must first show that he held section 10(*b*) rights under the Canadian Constitution.[730]

The dissent's focus on the personal status of the recipient of the state action was unprecedented. First of all, the majority of the Court in *R. v. Cook* showed not the least of concern about who was on the receiving end of the government act. They were persuaded that the Charter ought to apply to the government action at bar

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[730] *Ibid.* at paras. 85-86 (per L'Heureux-Dubé and McLachlin J.S.C., dissenting).

because of the Canadian state actors involved.[731] In addition, in the caselaw which preceded *R. v. Cook,* no such concern for the personal entitlement of the claimant was voiced. In *R. v. Harrer,* for example, despite the Canadian citizenship of the appellant, the Court denied the application because the government involved in the impugned activities was not one of those listed under s. 32(1) of the Charter.[732] In *R. v. Terry*,[733] the citizenship of the appellant was not even discussed; the Court focused on the fact that the Charter did not apply to California police actions, even though those actions were requested by Canada. And in *Schreiber*,[734] the Court repeated that the Charter would not apply to the actions undertaken by Swiss officials under Swiss law in Switzerland because its application was confined to the governments listed in section 32(1) of the Charter and sending a letter did not represent sufficient involvement on the part of the Canadian government. That Mr. Schreiber was a Canadian citizen was irrelevant.

In all these cases, the Charter was referred to as limiting government, the only question being whether one of the entities listed in section 32(1) of the Charter was involved.

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[731] *R. v. Cook, supra* note 243. Where the majority and the concurrent opinions differ is in what weight ought to be given to the nationality of the state actors. For the majority, it was nationality, as a recognized basis of jurisdiction, which triggered an exception to the general rule of territoriality. The Court's conception of nationality however is broad: nationality of state actors can be met by "entry into state service". Even so, the Court must be satisfied that the police officers owe *allegiance* to Canada. By contrast, for the concurring judges (Bastarache and Gonthier JJ), the nationality of the Vancouver police officers was irrelevant; it mattered only that the actions were those of a Canadian public authority exercising a sufficient degree of control. The justification was not derived from international law's recognized basis of jurisdiction but rather on the notion that Canadian law must scrutinize the actions of its state actors, whatever may be their nationality.

[732] *R. v. Harrer*, *supra* note 342 at para. 12 (per LaForest J.).

[733] *R. v. Terry*, *supra* note 344 (per McLachlin J.).

[734] *Schreiber v. Canada (Attorney General)*, *supra* note 346.

Not only was the dissent in *Cook* unprecedented, it was also not immediately followed by the Supreme Court in *R. v. Hape* and in *Khadr-1*, although this silence was later attributed to the fact that both decisions dealt with Canadian citizens, arguably the most "perfect members" or the most "entitled" people. In these cases, the Supreme Court returned to a strict territorial approach, with the caveats already mentioned, but without weighing the Canadian citizenship of the two claimants.

Although absent for a while from the caselaw, the entitlement approach was recently twice endorsed by the Federal Court of Appeal.

The first of these cases is *Amnesty International,* in which the Federal Court of Appeal held that the Charter could not restrain the actions of Canadian Forces personnel because foreigners, to whom those actions were directed, did not "have Charter rights."[735] The fact that there was "no attachment whatsoever" between the Afghan prisoners and Canada meant that the prisoners could not claim that the actions of Canadian agents were unconstitutional. Here, the assumption that the Charter creates rights to certain people, rather than limits the actions of the Canadian government, triumphed.

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[735] *Amnesty International Canada v. Defence Staff for the Canadian Forces, supra* note 297 (F.C.A. decision) at para. 16.

The personal entitlement requirement was also endorsed by the Federal Court in *Slahi,*[736] in which two Guantanamo Bay detainees who were interrogated by Canadian officials in Guantanamo were denied their Charter application. Both alleged a right, pursuant to section 7 of the Charter, to receive disclosure of any material information collected by Canadian officials and transferred to US authorities. The Federal Court decided that the Charter *applied* to the actions of Canadian agents, but that the claimants *could not raise* section 7 of the Charter as they had not shown sufficient connections with Canada. Both had resided in Canada for various periods of time (the wife and son of one still lived in Montreal at the time of the challenge), but they were neither Canadian citizens, nor permanent residents; hence, they were not *members* of the group of people *entitled* to raise Charter violations.

On appeal before the Federal Court of Appeal, the question raised was whether the trial judge, by adding a requirement of a "sufficient nexus" with Canada, went beyond *Hape* and *Khadr-1*, which did not even discuss the citizenship of the claimant or, in theoretical terms, his personal entitlement to Charter rights. Evans J.A. wrote the decision and pressed that the Charter "normally applies to governmental action within Canada and was drafted with that in mind".[737] He then examined the argument that the trial judge's focus on nexus was inconsistent with *Khadr-1* and *Hape,* two decisions which, again, involved Canadian citizens. In doing

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[736] *Slahi v. Canada (Justice), supra* note 436 (F.C.).
[737] *Slahi v. Minister of Justice et al., supra* note 446 at para. 5 (F.C.A.).

so, Evans J.A. concluded that there was no such inconsistency, since, in these cases, it was "implicit" that the nexus requirement was met, considering the Canadian citizenship of each claimant.

In the end, what it means to be entitled is not that clear: to hold Canadian citizenship is not sufficient (e.g., *Hape*). A fortiori, other forms of "nexus" are also sufficient, such as facing a trial in Canada (again, e.g., *Hape*) or having resided therein and being on the target list of Canadian security authorities (e.g., *Slahi*).

It may be too early to speak of a new theory, but the "personal entitlement" approach is developing. It seems to be used *in addition* and not *alternatively* to the territorial approach. Once personal entitlement is established, Courts are ready to consider whether the territorial principle ought to be exceptionally sidestepped. This was the scenario envisaged by the Supreme Court in *R. v. Hape* and given effect to in *Khadr-1*.[738] I believe that the trend to look for personal entitlement is, for the reasons that follow, inconsistent with Canadian constitutional law. Hence, personal entitlement should not be among the factors which help determine the scope of Charter rights.

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[738] *Supra* note 194. It could be lifted if any of the following two scenarios occur: either the foreign state consents to the Charter being applicable to Canadian forces, or Canadian state actions are violating Canada's international human rights obligations.

B. Personal entitlement and Canadian constitutionalism

The first problem with requesting personal entitlement is that it creates a situation of asymmetry and a legal void. Some connection to Canada must surely be present in order to justify the extraterritorial action by Canadian officials (say CSIS deciding to interrogate a detainee in Guantanamo Bay). At the same time, those links with Canada are said to be insufficient to trigger Charter protection. In other words, although there is a *sufficient* basis to trigger an act of the Canadian government, the same basis is *insufficient* to trigger Charter application.

Asymmetry in this context leads to a legal vacuum, a place where the government can act but the Constitution does not rule. Such a situation is at odds with the idea that the executive must be held accountable for its actions, and that no action can be rooted outside of the Constitution. The "focus of judicial review", according to Lorne Sossin, is "holding the executive to account".[739] By creating a gap between the scope of public authority and the extent of constitutional scrutiny, the courts have created a vacuum, a place where certain government actions such as those that are part of an investigation, or those performed on foreigners whom the government of Canada intends to sue (or not) in Canadian courts, are shielded from constitutional scrutiny.

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[739] L. Sossin, "The Ambivalence of Executive Power in Canada", in P. Craig & A. Tomkins, eds., *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006) 52 at 83.

Avoiding gaps where the executive can act outside of the purview of the Constitution is a major role performed by the rule of law[740] and, in Canada, "the status of the rule of law is superior and antecedent not only to legislation and judicial decisions but also to the written constitution".[741] The rule of law, in Canada, requires that normative vacuum be avoided, because the maintenance of a positive legal order is a necessary condition for the rule of law to be maintained.[742] If certain decisions go unchecked, the government enjoys the power to render a whole category of matters outside of the sphere of justiciability. This would go in a direction opposite to that taken with the adoption of the Charter[743] and which still guides our Courts today.[744]

Imposing a personal entitlement threshold would also allow the government to decide to whom the Constitution applies, simply by arranging that some activities take place outside of Canada, where few people will be able to meet the personal entitlement threshold. Reaching outside of Canadian territorial waters, for instance, or conducting examinations overseas (strategies explored in Chapter One when I

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[740] See, on legal black holes and the suspension of constitutional freedoms and the rule of law, D. Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27 Cardozo L. Rev. 2005.

[741] L.B. Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal/Kingston: McGill/Queen's University Press, 1997) at 3.

[742] *Re. Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[743] According to Peter Hogg, "[t]he major effect of the Charter has been an expansion of judicial review." P. W. Hogg, *Constitutional Law of Canada*, 2011 Student Ed. (Toronto: Carswell, 2011) at 36-5.

[744] See, for example, *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (*Insite*), where the Supreme Court held that the decision by which the Minister exercised his discretion to refuse an exemption had violated the Charter: "The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. If the Minister's decision results in an application of the [legislation] that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally." (*ibid.* at para. 117).

discussed the danger of manipulating the borders)[745] could be perceived as strategically wise if one wants to avoid the burdens of constitutional review. [746]

In Chapter One, I also argued that the word "territory", if it is defined according to territorial epistemology, can have no other meaning than that of physical land.[747] To reach outside of the "territorial trap", the constitutional territory ought to be seen as a virtual space the boundaries of which delimit the state's permissive sphere of action. If state action falls outside of the perimeter traced by the Charter, it is *per se* amenable to review, whether someone has shown personal entitlement to this right, or not.

Does this mean that the Constitution, and the Charter, must be perceived as instruments imposing negative obligations on government rather than vesting the population with positive rights claims? Or that one must conceive of the Canadian Constitution as merely recognizing pre-existing rights, rather than creating and distributing new rights? There are no easy answers to these two questions but two comments may be made.

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[745] See text accompanying notes 233 and ff., in Chapter One.
[746] Such is not necessarily the position of the government of Canada: as seen in Chapter Three, Canadian authorities are sometimes the ones that are pressing for the application of the Charter abroad, so as to protect themselves from subsequent challenges to the admissibility or reliability of evidence collected overseas. See *Re Canadian Security Intelligence Act,* 2008 FC 301, *supra* note 414, and *X(Re), supra* note 421.
[747] See text accompanying note 202 and ff., in Chapter One.

First, it may be true that some rights impose only negative obligations, such as the right to be free from unreasonable search or seizure,[748] but other rights, such as language rights, do not fit that bill as they may trigger positive obligations on the Canadian government.[749] With regards to the rights to life, liberty and security and to fundamental justice, which are protected by section 7 of the Charter, it is generally recognized that the Charter does not impose positive obligations on the part of the state[750] but such positive obligations have been recognized in the context of section 6 of the Charter.[751] It is thus difficult to devise a legal doctrine based on whether the Charter imposes positive or negative obligations because it does both.

Second, constitutional theory in general posits that rights pre-exist government.[752] Modern constitutionalism accepts that one of the roles of the Constitution is to protect those rights through the mechanism of constitutional review of a state action.

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[748] The same can be said about the Fourth Amendment. In *United States v. Verdugo Urquidez,* Brennan J., dissenting, held that: "the focus of the Fourth Amendment is on what the Government can and cannot do, and on how it may act, not on against whom these actions may be taken." See the decision, *supra* note 632 at 288, and the discussion accompanying note 656.

[749] Language rights (s. 23 of the Charter) and the remedy to a violation thereof were discussed in *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3.

[750] Although it does not mean that it never will: see discussion on this point by Justice O'Reilly, of the Federal Court, trial division, in the *Khadr* repatriation case: *supra* note 444 at paras. 79 and ff. (distinguishing *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429).

[751] The right to enter and leave Canada entails a positive obligation on the part of the Government of Canada to issue a passport to a Canadian citizen, lest the right be illusory: *Abdelrazik v. Canada (Minister of Foreign Affairs)*, *supra* note 475.

[752] This is not limited to the common law tradition and the works of John Locke but also applies to continental ones: Carl Schmitt said of certain, fundamental rights : "dans l'État de droit bourgeois les droits fondamentaux ne sont que les droits qui peuvent être considérés comme *antérieurs et supérieurs à l'État*, que l'État n'octroie pas dans les conditions prévues par les lois (…) mais qu'il reconnaît et qu'il protège comme antérieurs à lui, et auxquels il ne peut porter atteinte que d'une façon mesurable en principe et seulement selon une procédure réglementée" : C. Schmitt, *Théorie de la Constitution*, coll. Léviathan (Paris : Presses Universitaires de France, 1993) at 301. See, generally, J.-F. Gaudreault-DesBiens & N. Karazivan, "The 'public' and the 'private' in the common law and the civil law traditions: some comparative remarks", *forthcoming* in 2012 (Ashgate) at 8 and ff.

As Sharpe and Swinton point out, rights and freedoms "did not spring from a vacuum in 1982."[753] The common law was, and still is, a vehicle for the protection of rights which, to paraphrase Dicey's third prong of the rule of law principle,[754] are the *result* of the decisions of courts rather than the *product* of a written declaration. In other words, the common law or "judge-made rights"[755] have been an important part of Canadian law prior to and after the enactment of the Charter. On the other hand, it is also possible to view constitutional rights as a creation of the Charter,[756] because it is only since 1982 that Courts were explicitly allowed, by virtue of s. 24(1) of the Charter and s. 52(1) of the Constitution Act, 1982, to invalidate government actions and legislative provisions violating the entrenched Charter. And also because some provisions, like those regarding multiculturalism, aboriginal rights, language rights, were novelties at the time.

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[753] R. J. Sharpe & K. E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 6.

[754] A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* 10th ed. (New York : St-Martin's Press, MacMillan, 1967). The supremacy of the rule of law includes according to Dicey three elements: first, that no one may be punished except for a breach of law and before "the ordinary Courts of the land"; second, that everyone, irrespective of rank or status, is subject to "the ordinary law of the realm"; and third, that fundamental rights are "inherent in the ordinary law of the land"; that is, constitutional laws are "not the source but the consequence of the rights of individuals, as defined and enforced by the Courts" (*ibid.* at 110-121).

[755] R. J. Sharpe & K. E. Swinton, *The Charter of Rights and Freedoms, supra* note 753 at 6. In addition, section 26 of the Charter provides that the written guarantee in the Charter of "certain" rights and freedoms does not deny the existence of "any other rights or freedoms that exist in Canada".

[756] See, for example, P. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L. J. 87 at 89-90: "I do not believe in "natural rights". If that makes me a positivist, so be it. I do not know how to identify natural rights, from whence they derive their authority, or what the legal effect of their breach could be. To me, rights are creatures of the law. The rights guaranteed by the *Charter of Rigths* are legally enforceable because they are contained in a supreme constitutional instrument, not because they reflect the natural rights of man (or woman)." According to Peter Hogg, the Charter "was made in Canada, not in heaven" (*ibid.*).

In the face of these conflicting answers, it becomes difficult to devise an analytical framework according to whether the right at stake entails a positive obligation or a negative one, or both, and whether people enjoyed that right before the Charter was enacted, or whether the Charter created a new right. The approach which characterizes Canadian law ought to be devised at the level of principle. It has to transcend each and every possibility and, at the normative level, argue for a general principle.

In my view, adopting "personal entitlement" considerations entertains a vision of the Constitution which has little or no consonance with Canadian constitutional principles. It is problematic to argue that holding rights is a prerequisite for the Canadian government to conform to the Charter, because at least one of the main purposes of the Canadian Constitution and the entrenchment of fundamental freedoms has been and still is to check *government* actions and to prevent abusive use of power.

Knowledge of the United States experience with the membership approach is useful: it teaches that connecting judicial review to the identity or membership of the person who raises a Charter infringement can lead to questionable results, as the analysis of the decision *Verdugo-Urquidez* demonstrated above.[757] Conceiving the Constitution

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[757] See text accompanying notes 644 and ff., in Chapter Four.

as the product of a social contract[758] between the government and a limited group of entitled people (citizens or locals of the founding states, or even a group of states[759]) is not the dominant tide in American constitutionalism. And if it this is not so in a country where the initial impulse to enact the Bill of Rights came from "the people", *a fortiori,* in Canada, a country where the government imposed on itself the limitations of an entrenched Charter and where the "sovereign people" myth came much later and sort of retroactively,[760] personal entitlement or membership within a certain community ought not to become a legal basis for distributing constitutional rights (especially when the plain reading of the constitutional text does not support this "personal entitlement" approach).

III. CONSTITUTIONAL OBJECT/ AUTHORITY

The second alternative to pure territoriality, which I will now examine, is an approach which focuses on the exercise of authority by the Canadian government. Instead of emphasizing the identity of the constitutional subject, this approach rather

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[758] As noted in the text accompanying notes 537 and ff., above, two types of contracts co-exist: the contract of association and the contract of government. According to James Tully, the concept of a "liberal democracy" involves two aspects "which always exhibit a certain tension". The first aspect is associated with John Locke and posits that "a democracy should limit the exercise of political power by means of fundamental laws, charter of rights and freedoms, checks and balances, and procedures." The second aspect is associated with Rousseau and posits that "these limits, whatever they are, must be self-imposed if they are to be legitimate: the people themselves must agree on the conditions by which they govern themselves through a process of democratic deliberation." See J. Tully, "Democratic Constitutionalism in a Diverse Federation", in Joseph F. Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell, supra* note 520 at 38.

[759] See text accompanying notes 608 and ff., in Chapter Four.

[760] See text accompanying notes 516 and ff, in Chapter Four.

looks at the government action itself and establishes a correlation between the display of executive power and the scope of the Charter.

At the present moment, no such correlation exists because authority and sovereignty are bundled: Courts cannot conceive that Canadian "authority" can be exercised outside of Canada's "sovereignty". And as sovereignty is territorially anchored, Canadian Courts are unable to view authority outside of the Canadian territory. As a result, actions which, although attributable to a Canadian public authority, are not exercised in the context of its full-fledged sovereignty, are removed from the spectrum of reviewable actions. This situation originates from the dissenting opinion of McLachlin and L'Heureux-Dubé JJ. in *R. v. Cook* and it was given full force by the majority of the Supreme Court of Canada in *R. v. Hape*.

In the next two sections, I will discuss how authority is treated in Charter law, and I will argue that although it is binding law in Canada, the current position is premised on a too narrowly defined concept of authority.

A. Authority and Charter caselaw

If one reads plainly section 32, it seems intuitive to believe that the words "within the authority" ought to refer to the list of powers contained in sections 91 and 92 of the

Constitution Act, 1867.[761] In other words, that they ought to refer to the exercise of legislative or executive power conferred by the Constitution to each of the targeted governments.

However intuitive it may seem, it is not the interpretation given to "authority" in extraterritorial cases. In a statement which went largely unnoticed, the dissenting judges in *R. v. Cook*, when considering the potential application of the Charter to the investigation at stake, held that the impugned government conduct (the omission by the Vancouver police to inform the accused of his right to legal counsel when he was arrested in the US) was not a matter "within the authority" of the government of Canada, and thus that it fell outside the purview of section 32 of the Charter. McLachlin and L'Heureux-Dubé JJ. opined that because the impugned state action was carried outside of Canada, in a place where the government of Canada exercised no "coercive powers"[762], the actions of the Canadian police were not "within the authority" of Canada. The argument here is that *because* a state action was performed outside of the geographical boundaries of Canada, it is a state action that does not fall within the spectrum of "acts of sovereignty" of Canada:

> As La Forest J. stated in *McKinney v. University of Guelph*, 1990 CanLII 60 (S.C.C.), [1990] 3 S.C.R. 229, at p. 262: "Government is the body that can enact and

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[761] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. According to Robert Currie, interpreting authority as the Supreme Court did in *Hape* is "rather dubious" since the words 'matters within the authority of Parliament' have "always been understood to refer to subject matter and division of powers in section 91 and 92 of the *Constitution Act*." See R. J. Currie, *International & Transnational Criminal Law, supra* note 287 at 532.

[762] *R. v. Cook*, *supra* note 249 at para. 96 (per L'Heureux-Dubé & McLachlin JJ).

> enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual." These attributes of government are not present when officials work under the authority of a foreign government.[763]
>
> (…)
>
> On territory under foreign sovereignty, the Canadian government no longer has authority, and Canadian officials, in the sense of having the coercive powers of the Canadian state behind them, are never really "controlling".[764]

The assumption in other words is that the type of state action which triggers Charter scrutiny is not just any executive state action; it must be derived from the exercise of coercive authority *which can only be exercised territorially*. The term 'authority' mentioned in section 32, means, in this view, that the action which is subjected to Charter scrutiny must emanate from a legal entitlement to exert *coercive* power.

This type of discourse equals 'authority' with full-fledged 'sovereignty', because (echoing Bodin's definition of state sovereignty, and the Westphalian concept of state generally) only a sovereign acting within his territorial borders can exert this type of authority. Geographical considerations in this case result in a loss of authority which has the effect of removing an action from (or preventing it from reaching) the realm of judicially reviewable state actions.

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[763] *Ibid.* at para. 93.
[764] *Ibid.* at para. 96.

The majority in *R. v. Hape* agreed with this view. Justice LeBel concluded that Canada's involvement in Turks and Caicos, including the RCMP's technical team's search and seizure of the premises of Mr. Hape, did not constitute a display of Canadian authority within the meaning of section 32 of the Charter. According to the Court, as long as Canada was acting outside of the geographical boundaries of the country, there was no "authority" in the sense of full-fledged sovereignty; hence the requirement of section 32, i.e., that a matter be within the authority of either the executive or legislative branch, was not met.[765]

Again, we may observe the Court's endorsement of a conception of authority as coercion, coercion as the prerogative of state sovereignty, and sovereignty as tied to the territorial state. The fact that the decision was rendered under the aegis of "enforcement jurisdiction" instead of prescriptive jurisdiction illustrates more acutely the disproportionate role played by the coercive character of law in the Court's reasoning.[766] Were the same actions displayed in Canada, they would necessarily

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[765] According to the majority of the Court, "(t)he fact that a state actor is involved is not in itself sufficient". The Court adds: "A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislature, because they have no jurisdiction to authorize enforcement abroad": *R. v. Hape, supra* note 16 at para. 94.

[766] Scholars identified the Court's inadequate use of the concept of 'enforcement' jurisdiction: see P.-H. Verdier, "International Decisions – *R. v. Hape*" (2008) 102 Am. J. Int'l L. 143. See also C. Forcese: "The supreme Court acknowledges this distinction (between enforcement and prescriptive jurisdiction" (see paras 60 *et seq.*). The Court then muddies the issue by implying, however, that the application of the Charter must necessarily engage extraterritorial enforcement jurisdiction": see C. Forcese, http://craigforcese.squarespace.com/national-security-law-blog/2008/3/14/extraterritorial-application-of-the-charter-to-canadian-forc.html and, more generally, C. Forcese, *National Security Law : Canadian Practice in International Perspective* (Toronto : Irwin Law, 2008).

have triggered Charter scrutiny.[767] Thus, it is possible to conclude that geographical considerations can take a state action outside the authority of Canada and Canadian courts –and, to a certain extent, outside the authority of law.

This concept of authority is now, officially, part of Canada's response to the question of the extraterritorial application of the Charter.[768] Note that this endorsement is fairly new: at the time it was articulated in *R. v. Cook*, the judges forming the majority of the bench did not share this view. Justices Gonthier and Bastarache held that the Charter applied to a governmental action either because of the governmental nature of the powers exercised, "or because the actor is actually a part of the government."[769] The Charter thus "applies to officers of the Canadian state who are abroad, independent of whether they exercise governmental powers of coercion or not."[770]

For the majority in *Cook*, however, the Charter applied by virtue of the Canadian nationality of the police officers engaged in the alleged breach. In doing so I believe the Court went too far in its emphasis on state actors. Public power "vests not in the individual but in the office itself".[771] Bastarache and Gonthier JJ., the concurring

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[767] The Court held that "criminal investigations" are "clearly within the authority of Parliament and the provincial legislatures when they are in Canadian territory; it is just as clear that they lie outside the authority of those bodies when they are outside Canadian territory" (*ibid.* at para 94).
[768] It was applied, for instance, in *R. v. Tan, supra* note 427.
[769] *R. v. Cook*, *supra* note 249 at para. 118 (per Bastarache & Gonthier JJ, concurring).
[770] Quoted from headnotes and p. 661 of the decision.
[771] M. Loughlin, *The Idea of Public Law, supra* note at 79. That the individual must be dissociated from the office equally applies to the person of the Sovereign, and its public office. Hence, the classical public law distinction between imperium and dominium also allows the conceptualization of

judges, on the other hand, had the right take: they emphasized the concept of *office* over the identity of the *officers*. It is not the nationality of police officers, but the fact that they exercise a public office, which should trigger Charter application. Their approach was more in tune with the traditional approach to section 32, which posits that the Charter applies either to government, or to a non-governmental entity which implements a government policy or otherwise exercises a government function.[772]

But again, the emphasis on the office, rather than on the place where that office is exercised, is not the state of the law at the present moment, as the review of the *Hape* decision, and those which followed it, demonstrated. In the next section, I will critically assess the syllogism just expounded, i.e. that because authority is reduced to coercive power, coercive power is the attribute of the sovereign, and sovereignty is only exercised within a fixed territory, Canadian state actions performed outside of Canada cannot be "within the authority" of Canada and therefore do not trigger Charter protection.

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a public authority as distinct from the person of the Sovereign and the expression of its sovereignty. See F. Chevrette, "*Dominium et Imperium*: l'État propriétaire et l'État puissance publique en droit constitutionnel canadien" in B. Moore, ed., *Mélanges Jean Pinault* (Montreal : Thémis, 2003) 665.

[772] See the cases cited in *supra* note 304.

B. Authority and Canadian constitutionalism

1. Authority and coercion

The concept of authority currently adopted by the Supreme Court squarely fits within the Westphalian territorial paradigm and legal positivism, both discussed in Chapter One.[773] My position is that authority ought to be understood as more than orders backed by threats, more than coercion. It is not mandatory for the state to hold the capacity to coerce in order to exercise a normative power. Hence, the term authority should receive a much larger meaning than the one currently given to it by our Supreme Court. One may take stock of the way the House of Lords (as it then was) defined the concept of "public authority" in the case in *Al-Skeini.*[774] In that case, the House of Lords pointed out that the British "public authority" acting in Iraq does not lose its "authority" by virtue of the place where it acts. Lord Roger of Earlsferry held:

> (…) where a public authority has power to operate outside of the United Kingdom and does so legitimately - for example, with the consent of the other state – in the absence of any indication to the contrary, when construing any relevant legislation, it would only be

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[773] The territorial paradigm relied on the sovereign equality of states, on the exercise of absolute authority of a single sovereign on a territorially-bounded state, on the perception of that authority as coercion: see text under the heading V, "Territoriality as a Legal Paradigm" and under the heading VI-A, "Legal pluralism and territoriality" both in Chapter One.

[774] *Al-Skeini and others v. Secretary of State for Defence, supra* note 197.

> sensible to treat the public authority, so far as possible, in the same way as when it operates at home.[775]

The ability to exercise full enforcement and coercive powers in a certain territory is not the only way of exerting "authority". As exemplified by H.L.A. Hart's rebuttal of Austin's definition of law as "orders backed by threats", rules enacted by the state are not all about coercion; they can be about change; about jurisdiction; they can be rules about rules.[776] Conceptualizing law as coercive authority eclipses the normative force of rules which inheres "in the diverse ways in which the law is used to control, to guide, and to plan life"[777] outside of court-imposed sanctions. According to Hart, "[t]hose who exercise these powers to make authoritative enactments and orders use these rules in a form of purposive activity utterly different from performance of duty or submission to coercive control."[778] Conversely, the fact that someone is under an obligation to do something merely implies that a *rule*, with normative force, exists: it does not necessarily mean that there is an *obligation* understood as leading to coercive sanctions.[779]

Take for example actions performed by Canadian government officials. A consulate official denying a passport or a visa officer denying a visa are not exercising a power

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[775] *Ibid.* at para. 53.
[776] H.L.A. Hart, *The Concept of Law, supra* note 501. Hart challenges the concept of law as coercive orders. He addresses the "variety of laws", i.e. the existence of laws which do not fit the Austinian description, such as rules imposing duties on those who make the order or rules which confer power to people instead of requiring them to act in a certain way: *supra* note 501.
[777] *Ibid.* at 39.
[778] *Ibid.* at 41.
[779] *Ibid.* at 83. See also C. Groulier, "La distinction de la force contraignante et de la force obligatoire des normes juridiques. Pour une approche duale de la force normative" *in* C. Thibierge et al., *La Force Normative: Naissance d'un Concept* (Paris: LGDJ, 2009).

of coercion as such. Nonetheless, those acts do constitute displays of *authority* because they are performed by officials exercising some of the powers or attributes of government. There is no legal basis for ascertaining that the state must exercise *all* the prerogatives of government to be able to exercise some form of authority. These actions, as long as they produce *effects* on the targeted individual, and modify his or her individual situation, are actions within the authority of the Canadian government. To borrow from Santi Romano, when the existence and the effectiveness of a normative order vary according to the conditions dictated by another normative order, there is legal relevance between the two.[780] This relevance is based on a principle of effectivity. Although Romano applies this concept of relevance to legal orders and institutions other than the state, I believe it is equally applicable here.

All actions of Canadian officials should be treated as executive actions amenable to review and not be removed from the sphere of reviewable actions because of geography. When the RCMP performs a search and seizure abroad such as in *R. v. Hape*, or when CSIS conducts an interrogation such as in the *Khadr* cases, they are exercising some form of authority, and whether this authority is coercive or not should not determine whether Canadian officials may do as they please or whether they must act according to Charter limitations.

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[780] S. Romano, *L'ordre juridique* (Paris : Dalloz, 1975) at 106 and ff.

Focusing on coercive authority is not only inadequate it also "obscures more of the law than it reveals"[781] by ignoring the various types of rules that characterize it. Anna Grear sums it up well: to over-emphasize the "control of power" aspects of the law "could under-emphasise the ways in which law can also be conceived of as a co-ordinative, facilitative phenomenon". [782] It also disregards the profound evolution which the modern state went through, from effectively being a police-state in the Middle Ages to becoming the welfare-state, with the multiple modes of expression of its authority.[783]

2. Relational authority, territoriality and sovereignty

What does it mean for the government to exercise public authority? According to Martin Loughlin, political power "is generated from the particular relationship that evolves between the sovereign and subject, government and citizens." [784] More than a relationship, Loughlin views public power as an expression of "partnership", a partnership which relies on the loyalty of the people to the political system. But if authority is so defined, and I endorse the notion that political power is relational,[785] its very existence ought to depend on facts and practice. It depends on

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[781] H.L.A. Hart, *ibid.* at 48.
[782] See A. Grear, "Theorizing the rainbow? The puzzle of the public-private divide" (2003) 9 *Res Publica* 169 at 177.
[783] For a review of the transformation of the modes of regulation of the state, see K. Benyekhlef, *Une possible histoire de la norme, supra* note 222 at 28-34.
[784] M. Loughlin, *The Idea of Public Law, supra* note 515 at 78-79.
[785] *Ibid.* at 79.

effectiveness.[786] And if it does, surely the relationship can be seen as independent of territorial borders, for if it were not, there would not be a state action to start with.

Conversely, in Canada, authority is defined not in view of the results it produces (is it effective or not), or the relationship it establishes between the state and the target of constitutional action. It is determined by the place where the Canadian officials performed the action, by pure geography.

The Canadian view is, as a result, perfectly concomitant with the traditional Westphalian ideal, expressed in Chapter One, according to which states exercise their authority exclusively within their territorial borders. It fits nicely within the "container metaphor" explained in Chapter One, and it corresponds to what Ruggie called the double presumption that (a) "each state commands a monopoly of legitimate power within its own domain and is entitled to exercise it without legal interference" and that (b) this monopoly is exercised in a domain delineated by "self-enclosed, mutually exclusive borders". [787] The current view sustains that the territory provides a spatial limitation to the validity of norms, or actions of government: for an action without authority cannot be valid.[788]

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[786] The concept of "effective sovereignty" is developed by J. Agnew, *Globalization & Sovereignty* (Lanham, Maryland: Rowman & Littlefield Pub., 2009) at 6 and ff. Instead of opposing *de jure* and *de facto* sovereignty, Agnew suggests that "de facto sovereignty is all there is when power is seen as circulating and available rather than locked into a single centralized site such as 'the state'" (*ibid*. at 7).
[787] J. Ruggie, "Territoriality and Beyond", *supra* note 187.
[788] See the definition of *territoire* provided by Alland & Rials, *supra* note 42.

However, this view disregards the fact that states can accept that an external agent imposes its *authority* on their territory.[789] It also disregards the fact that many states do not view the territorial border as a bar to the state action they wish to take. The current conception is blind to the fact that the exercise of state authority is not, at least not anymore, perfectly adjusted to any state's territorial borders.[790] It entertains the anachronistic belief that only the state (i.e. the sole producer of normativity) can bind the people living under its (vertical) authority, because only that state holds coercive powers. Diagonal authority, on the other hand, and the relation which is created between the state and the constitutional subject, is eclipsed by the conceptualization of authority as necessarily and exclusively tied to the sovereign territorial state. Finally, the current view also creates a state of asymmetry, similar to that created with the "personal entitlement" requirement, where the state can act, but where the Constitution does not rule. These gaps, for the reasons explained above, ought to be avoided if respect for the rule of law is to be maintained.

As explained in Chapter One, the Canadian view can be contrasted with the situation in other states. Courts in the United Kingdom (and the European Court for Human

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[789] Caporaso and Jupille endorse a concept of sovereignty as the "capacity to exclude external authority structure" and, conversely, the capacity to accept such a display of external authority. See J. A. Caporaso & J. Jupille, "Sovereignty and Territoriality in the EU", *in* C. K. Ansell & G. Di Palma, eds., *Restructuring Territoriality: Europe and the United States Compared*, *supra* note 75, 67 at 71. See also J. A. Caporaso, "Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty" (2000) 2 International Studies Review 1 at 15.

[790] According to John Agnew, "political control and authority" are not "necessarily predicated on and defined by strict and fixed territorial boundaries: see J. Agnew, *Globalization & Sovereignty* (Lanham, Maryland: Rowman & Littlefield Pub., 2009) at 113. See also S. Sassen, *Territory-Authority-Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2008) at 406: "formal and de facto features of [Territory-Authority-Rights] allow us to grasp foundational change arising from inside complex systems rather than simply as a consequence of external forces."

Rights) refused to consider that the government needs to possess *all* the attributes of government to be held into account.[791] Similarly, in the United States, a formal sovereignty-based test was rejected in favor of a functional approach to determining the scope of application of the U.S. Bill of Rights.[792] There is no impediment in Canadian law for embracing a similar shift and providing a relational definition of authority.

To the contrary, the disentanglement of sovereignty, territoriality and authority makes it increasingly hard for the judiciary to entertain a conception such as the one we are dealing with at the moment. It is possible to view authority outside of the physical territory, if one agrees that sovereignty is only the most perfect form of authority, what McMahon calls "supreme authority"[793] or, as Lasswell and Kaplan argue, the "highest degree"[794] of authority. It is only this highest degree of authority which needs to be territorially based if we are to preserve the principle of independent, sovereign, territorial states. But any display of authority need not be associated with legal sovereignty, lest the container metaphor will be revived.

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[791] See *Al-Saadoon, supra* note 190, and *Al-Skeini, supra* note 203.
[792] See *Boumediene, supra* note 196.
[793] C. McMahon, *Authority and Democracy: A General Theory of Government and* Management (Princeton: Princeton University Press, 1994).
[794] H. Lasswell & A. Kaplan, *Power and Society: A Framework for Political Inquiry* (New Haven : Yale University Press, 1950), cited in C. Ansell, 'Introduction', in C. Ansell & G. Di Palma, eds., *Restructuring territoriality: Europe and the United States compared*, *supra* note 75, 3 at 7.

One of the elements which distinguishe sovereignty from authority is the fact that, contrary to sovereignty, authority is not "inextricably linked to territoriality."[795] The fact that sovereignty may be the "ultimate, supreme, or final binding authority within a territory" does not deny the fact that "other authorities have always existed within and beyond the territorial state."[796] In other words, sovereignty and authority are in a gradation relationship, they are not a reflection of each other. It is consequently unfortunate that the current Canadian approach cannot envisage that the action of a Canadian public authority abroad constitutes a display of "authority" because the sovereignty on that territory is not exercised by Canada but by of a foreign state.

C. Summary

This section has demonstrated that 1) territoriality, if understood in Westphalian terms, leads to the belief that a state action is not *necessarily* a state action within the authority of Canadian public officers if it is conducted outside of the geographical boundaries of Canada; and that 2) the personal entitlement approach, when superimposed on the territorial paradigm, brings more injustice, not less, in that people can be sufficiently related to Canada to trigger a state action, but insufficiently connected to trigger Charter protection, hence creating a state of asymmetry instead of reciprocity.

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[795] *Ibid*. at 7.
[796] *Ibid*.

Pure territoriality as a legal paradigm ought to be abandoned in favor of a normative approach which fits with the idea that judicial review of state action should depend on the identification of a reviewable state action rather than be premised on the geographical position of the claimant or the geographical location of the exercise of authority. The extension of Canadian laws and Canadian executive powers overseas should create a *prima facie* presumption that the actions performed by state actors will be brought to scrutiny under the Constitution, without which those actions could not have been authorized. To make an analogy: the Canadian executive should be estopped[797], or should be opposed a *fin de non-recevoir* when it argues (if it does) that the Charter cannot control its actions because it acted overseas and therefore wasn't acting as government.

The rejection of the *personal entitlement* criteria is rooted in the need to establish a correlation between the scope of government authority and the scope of the Constitution, so that no gaps are left. Right now, the use of personal entitlement factors goes in the direction of further territorial entrapment, not away from it. This is the case because it is only where Canada appears to be violating its international obligations that the potential for the extraterritorial application of the Charter is open. In the absence of *jus cogens* violations, the territorial paradigm and the territorial concept of authority apply in full force and effect.

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[797] On the application of estoppel to public law, see D. R. Knight, *Estoppel (principles?) in public law: the substantive protection of legitimate expectations*, LL.M. thesis, University of British Columbia, 2004 [unpublished]. See also, Sir A. Mason, "The Place of Estoppel in Public Law" in M. Groves, ed., *Law and Government in Australia* (Sidney: Federation Press, 2005) 160.

An approach which focuses on the display of *authority* and the object of constitutionalism, rather than establishes a threshold based on personal entitlement, better responds to extraterritorial Charter cases. But as the last section demonstrated, the medieval definition of authority currently endorsed by our courts is not the one that I advocate. The concept of authority which I advocate is a concept of authority as relation more than coercion. Based on the demonstration above, the best approach to Canadian extraterritorial Charter cases seems to be one which focuses not on the subject of constitutional litigation, but on the object of constitutional litigation, i.e., the exercise of public authority, provided authority is given a meaning more in tune with modern law. This approach will be articulated in the next part of this chapter.

IV. A NEW APPROACH TO THE SCOPE OF CHARTER RIGHTS

The purpose of the following analytical model is to fulfill the predictability function of law, which is an inherent part of the rule of law. It is also to avoid the shortcomings of both the territorial paradigm, and the personal entitlement option, which lead to asymmetrical and unjust results.

The proposed framework pays due respect to the idea that the executive branch of government may only act within the purview of the Constitution and that no authority lies outside of it. It allows for emphasis to be put on state action rather than on the individual (entitled or not) or the place (inside or outside Canada) in which he

finds himself. It also leaves room for a flexible, pragmatic take on the scope of protection of a certain right while not elevating pragmatism as a doctrine.

The proposed framework follows four steps. The first step considers the *applicability* of the Charter and the second addresses *standing.* The third step relates to the determination of the existence of a *violation* and the fourth goes to the *remedy.* All four steps presuppose a non-territorialist epistemology, i.e. a desire to exit the territorial trap. More particularly, this approach reflects the normative propositions that this thesis supports: first, a public authority is a public authority wherever it acts; second, geography ought not to tailor the content of the constitutional obligations by which the government is bound; third, authority is relational, not physical, and its existence does not rely on territoriality.

A. Government action: authority, not territoriality

The first question relates to the existence of an action of the Canadian government, i.e. an action performed by one of the entities listed in section 32(1) of the Charter. Since I am primarily concerned with actions other than legislative ones, this refers to the federal and provincial executive and all of the government administration at each level. Denying a passport, conducting examinations on discovery, searching premises and seizing evidence for a trial are all actions that are clothed with governmental authority. They are governmental because they emanate from the executive branch of

government, ultimately through the exercise, by the relevant Minister, of a discretionary power.

When it is not clear that the Canadian government has been involved, but when the type of activity performed is one which is akin to government function, the caselaw already discussed points towards a 'nature of the function' test instead of a questioning of who the author of the state action is.[798] In *Godbout v. Longueuil (City),* LaForest J.S.C. warned that should the focus be on the institution rather than on the action itself, governmental entities could be tempted to "simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*."[799] There is no reason to depart from this analytical framework when the government, or one of its agents, chooses to act outside of Canada.

Where the action is performed by a foreign government (and there was no passing-off), there is no doubt: the Charter cannot and will not apply. Foreign governments are not the entities targeted by section 32 and our legislation still grants immunity to foreign states.

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[798] See discussion above, *supra* note 304. In *Greater Vancouver Transporation Authority,* the Supreme Court of Canada held that the Charter applies to all of the actions of government, "either because of its very nature or because the government exercises substantial control over it", and to those activities performed by non-governmental entities which are "governmental in nature", or which can be assimiltated to "governmental activities". See *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, *supra* note 304 at para. 16.

[799] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 48 (writing for himself, McLachlin and L'Heureux-Dubé JJ; Gonthier, Cory and Iacobucci JJ. concurring on this point).

Where there is doubt as to the involvement of Canadian state actors, such as when there is collaborative work done and it is difficult to ascertain whether Canadian officers did commit the impugned act, I suggest we revert to the precedent of *Suresh v. Canada (Minister of Citizenship and Immigration)*,[800] in which the Supreme Court found that there ought to be a "sufficient causal connection" between the participation of the Canadian government and "the deprivation ultimately effected", to engage the Charter. If Canada simply was "a passive participant", the Charter would not have been engaged.[801] Similarly, in *United States v. Burns,*[802] the Supreme Court of Canada made sure that Canada's involvement was a "necessary link in the chain of causation".[803] And in the case which dealt with the possible existence of a duty to repatriate Omar Khadr, the Federal Court was convinced there was a "necessary degree of participation" of the Canadian government prior to engaging the Charter.[804] On the other hand, in *Schreiber,* the fact that the Canadian government sent a letter to Swiss authorities was insufficient to trigger Charter application.[805]

To sum up, there is an inquiry to be made into the necessary involvement of Canadian authorities before the Charter is applied to a specific action. But Canadian

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[800] *Suresh v. Canada, supra* note 173 at paras 54-55.
[801] *Ibid.* at para. 55.
[802] *United States v. Burns, supra* note 367.
[803] *Ibid* at para. 54.
[804] *Supra* note 444 (O'Reilly J.).
[805] *Supra* notes 346 and 347.

law already provides us with tools to measure the degree of involvement of Canadian authorities.

This analysis brings the following result: the Charter will apply to any government act performed by Canadian officers, irrespective of the identity of the constitutional subject or the territorial space. As Peter Hogg concludes, s. 32 "requires that there must be action by a Canadian legislative body or government for the Charter to apply."[806] Aside from that requirement, he says, "it seems likely that there is no independent requirement of a connection with Canada in order to receive the benefit of Charter rights."[807]

B. Standing, not membership

The fact that the Charter applies to certain actions of the government does not mean that anyone can launch a Charter challenge. The claimant in a constitutional challenge ought to be the direct victim of the alleged violation, i.e. the person must not claim on behalf of someone else, unless that person is unable to claim herself and the other criteria for public interest standing are met. In other words, the normal rules of standing are applied, and when it comes to section 24(1) of the Charter (the remedy provision), there is no doubt that the person claiming a remedy must be directly prejudiced by the impugned government act.

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[806] P. W. Hogg, *Constitutional Law of Canada*, *supra* note 743 at 37-3.
[807] *Ibid*.

Chapter Two identified many cases where standing was denied to applicants who wished to raise the unconstitutionality of legislative provisions but who were not physically present on Canadian soil. However, when government "decisions" or actions were involved, the question of standing seldom arose (with the exception of the case of George Galloway, in which the problem of standing was raised in *obiter*). There is no systematic treatment of the standing question, but the argument that physical presence determines standing, as discussed in Chapter Two, ought to be rejected because the rules of standing do not speak of territory; rather, they look for a sufficient connection between a claimant and the impugned state action. It is the fact that someone is directly affected by a state action that results in standing. Or the fact that, though not being directly affected, the person is nonetheless the one that is in the best position to submit a challenge to courts, the others not being able to do so.[808] In these considerations, physical presence and personal entitlement are absent. Hence, there is no need to import them in the analysis, in the way it is occasionally done, and to deny standing on theses bases.

To deny standing to someone directly affected by a state measure just because that person happens to be in *another country* goes against the spirit and wording of standing rules. One may be living across from the Court house but be unable to file a claim. Conversely, one may be in another country, but perfectly able to hire counsel

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[808] See generally, *Canadian Council of Churches v. Canada,* [1992] 1 S.C.R. 236 for public interest standing.

to make representations on his or her behalf.[809] The idea behind the standing requirement is to strike the proper balance between access to justice, on the one hand, and the efficiency of the administration of justice, on the other. As Bogart suggests, the fear of opening the floodgates of litigation, often involved in support of a restrictive approach to standing, is often unfounded. The "meddlesome interlopers" are, in his view, "phantoms" because litigants are naturally kept away from undue litigation by "the costs of litigation (…) and a pervasive aversion to being involved in the legal system".[810]

The idea of standing, as Antonin Scalia points out, is to exclude *people*, not *issues*. But when all the people "who could conceivably raise a particular issue" are excluded, the issue is, essentially, excluded as well.[811] Take the case of Mr. Ruparel, who challenged the constitutionality of the provisions of the then *Immigration Act* which, in his view, discriminated on the basis of age by requesting a longer probation period for applicants who committed a crime when they were younger than 18 years old.[812] Who, if not someone denied entry because he committed a crime a year too early, has interest to raise that challenge?

It appears to me that once standing is *granted,* and once the Charter is said to *apply*, it is not advisable that the claimant be told, by our Courts, that he or she is unable to

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[809] See rule 369 of the *Federal Courts Rules*, *supra* note 335.
[810] W. A. Bogart, "Standing and the Charter: Rights and Identity", in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 1 at 5-6.
[811] A. Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers" (1983) 17 Suffolk U. L. Rev. 881 at 892.
[812] *Ruparel v. Canada, supra* note 316.

raise the Charter infringement. This situation, which was discussed at length under the "personal entitlement" section above, was the one resulting from the Federal Court of Appeal cases of *Amnesty International*[813] and *Slahi*.[814] Under my analytical framework, once the claimant is recognized standing, there is no reason to hold that she does not have "sufficient connections" with Canada, and deprive her of rights which her standing entitles her to claim. This view is consonant with Sir Stephen Sedley's observations on the evolution of public law, noticing a:

> "contemporary shift in the perception of public law from a system which merely offers a different path to the vindication of private rights to a system of invigilation of the legality of governmental action. It focuses attention, in particular, on the fact that public law is concerned not necessarily with rights (which inhere in the individuals) but with wrongs in the conduct of the state (which may but do not necessarily invade individual rights).[815]

C. The violation of a Charter provision

If the Charter is said to apply to a certain government action, and the claimant is recognized standing to raise the challenge, the next question ought to be whether

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[813] *Supra* note 297. In that case, public interest standing was recognized, the Charter was said to apply, but the detainees could not benefit from its provisions because they failed the "personal entitlement" test (they did not possess sufficient ties with Canada to make them "entitled" to Charter rights). Here, the problem may stem from the asymetrical situation where public interest standing was recognized to the organization, but personal entitlement was requested from the detainees.

[814] *Ruparel v. Canada, supra* note 316.

[815] Sir S. Sedley, "The Common Law and the Constitution", 1996 Radcliffe Lecture, reproduced in *London Review of Books,* Vol. 19, 8 May 1997, p. 10. Cited in C. Himsworth, "No Standing Still on Standing" in P. Leyland & T. Woods, eds., *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone, 1997) 200 at 206 [emphasis added].

there has been a violation of any of the provisions of the Charter. There is flexibility in this questioning if one defines the content of a right according to the relationship between the state and the claimant. In my view, it is more legitimate for a Court to find that the Charter applies to the actions of Canadian authorities abroad and to recognize standing to a claimant even if the claimant suffered the violation outside of Canada, but to hold that, in the case at bar, there has been no infringement of the Charter because of the interpretation of the scope of protection of this right.

Consider section 8, which protects the right to be free from unreasonable search or seizure. As I mentioned above, the Charter establishes a virtual space the boundaries of which correspond to the state's permissive sphere of action, on the inside, and to the protected area of personal freedom, on the outside. Any action which is performed outside of that perimeter is unconstitutional if it cannot otherwise be redeemed under section 1 of the Charter, to which I will come next. But where the boundary lies is not necessarily fixed; it may be dynamic; it may be relational.

The relational determination of the scope of protection of a right can take into account elements of geography. This means that the scope of protection of a right may be modulated, though not determined by, the geographical context, as well as by the interest the right seeks to protect, the proximity between state and subject, etc.

Consequently, the scope of protection of each right may vary according to location, as it may vary according to other factors. This is not completely unknown to the

Canadian constitutional tradition: in relation to the right to freedom of expression, for example, the Supreme Court of Canada in *Canadian Broadcasting Corporation v. Canada* held that the content of the right can be modulated according to the location where the statement takes place.[816]

In the extraterritorial context, this approach has been occasionally endorsed by Supreme Court justices. The physical location of a claimant may, for example, lower the standard of what is reasonably expected in terms of protection against search or seizure. Support for this view can be derived from the opinion of Lamer C.J. (as he then was) in *R. v. Schreiber*[817] on the question of the interpretation of section 8 and the legitimate expectations of a person who had chosen a living in Switzerland. Justice Lamer found that the Charter applied to the activities at stake, but that the claimant had no reasonable expectation of privacy in the circumstances of the case. In *R. v. Hape,* as well, the content of the right to be free from unreasonable search and seizure was modeled according to space, as Justices Bastarache, Abella and Rothstein suggested.[818] This does not imply that territory determines whether the government breaches a Charter provision or not, but that the territory is one factor to be considered in assessing the content of the right at stake and the existence of a

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[816] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19. At para. 35, the approach to freedom of expression was explained:"(…) all expressive content is, *prima facie*, worthy of protection" but "an expressive activity may be excluded from s. 2(*b*) protection because of how it is undertaken — the *method* of expression — or because of the *location* where it would take place."
[817] *Supra* note 346.
[818] *R. v. Hape, supra* note 16. This aspect of the concurrent opinion is discussed at note 404, above.

violation. As such, I fully subscribe to the statement that section 8 of the Charter "protects people, not places".[819]

The bottom line is that the question of "which interest does the right seek to protect" must guide the determination of the scope of protection of each constitutional right engaged, as advocated in *Re Motor Vehicle Act*[820] and *R. v. Big M Drug Mart*.[821] It is an approach which, rather than being general in scope, is tailor-made and is determined by the particular relation and correlation between the state authority and the person subjected to it in each case.

If I apply this approach to the case of someone attempting to come to Canada to make a speech before a Canadian audience, but who is denied entry because of the content of the speech, the question of which interest does freedom of expression seek to protect will arise. The relationship between the Canadian audience, the speaker, the Canadian government and the Charter right will be addressed; and territorial considerations may be given weight, if they truly are an obstacle to the recognition of the right at stake.

Elements of a similar approach can be found in American law too. The US Court of Appeals found, in *El Hage,* that the Fourth Amendment applied extraterritorially.

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[819] *Schreiber v. Canada (Attorney General), supra* note 346 at 56 (per Iacobucci and Gonthier JJ., dissenting).
[820] *Re B.C. Motor Vehicle Act*, *supra* note 510 at para. 24.
[821] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at para. 116 & ff.: the Court analyzes the purpose of the guarantee or the "interests it was meant to protect."

Regarding the content of the right, however, it found that it did not imply an obligation, on the part of the American agents, to obtain a search mandate; on the other hand, it required that the search be reasonable.[822] Kermit Roosevelt has advocated that American courts ask what the interest to protect is, and whether physical borders have anything to do with the scope of protection sought.[823] As well, Stephanie Stern endorses this approach in relation to the Fourth Amendment. In her opinion, the right to be free from unreasonable search and seizure is primarily relational, not territorial; hence, the approach which consists in conflating "privacy, a concept that is essentially relational, with the protection of physical space" is doomed to failure.[824] On the other hand, Stern agrees that expectations of privacy vary across societies, cultures and context. As such, the scope of protection of the right, in any given case, can be expected to vary.

Finally, Timothy Zick made a similar argument in relation to the First Amendment.[825] Zick examined, among others, the relationship between a domestic audience and a foreign speaker. He wondered whether the First Amendment applied in those cases, and what would be the content of the protection one is entitled to. While American Courts tend to recognize the First Amendment rights of the *audience*, they have not, so far, recognized the *foreign speaker* any constitutional

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[822] *Supra* note 406. This aspect of the judgment is discussed at note 659, above.
[823] K. Roosevelt, "Application of the Constitution to Guantanamo and the Conflict of Laws: Rasul and Beyond", *supra* note 592.
[824] S. Stern, "The Inviolate Home: Housing Exceptionalism in the Fourth Amendment" (2010) 25 Cornell Law Review 904 at 924-926.
[825] T. Zick, "Territoriality and the First Amendment: Free Speech at and beyond our Borders" (2010) 85 Notre Dame L. Rev. 1543.

protection. However, they could do so if they analyzed the underlying justifications of the right at stake.[826]

Of course, conflicting underlying values must be reconciled, and it would be up to the judiciary to draw a balance between these values. Jennifer Nedelsky's relational take on constitutional rights may find echo here.[827] Her relational approach to rights is structured around three steps: first, asking what the values at stake in each Charter right dispute are; second, "asking what kinds of relationships would foster those values"; third, verifying what type of relationship would be structured by an alternative definition of the right, and "whether those relationships will foster the values at stake."[828]

A relational analysis of the scope of protection of Charter right may lead to a less predictable outcome or more discretion for judges to look into the specific right at stake and the interest to protect. However, the same discretion allows courts to weigh underlying values and to consider, if they must, geographical considerations. In

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[826] Regarding the protection of free speech, Zick identifies three justifications: the search for truth; the promotion of self-governance; and the achievement of self-fulfillment. Not all three justifications bring the same answer to the question of the extraterritorial scope of the First Amendment. Self-governance, for instance, may justify that we grant the protection to a foreigner delivering a speech to a US audience, but self-actualization (of the foreigner) may not: *ibid*. at 1618.
[827] J. Nedelsky, "Reconceiving Rights as Constitutionalism" (2008) 7 Journal of Human Rights 139; J. Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Review of constitutional studies 1-26.
[828] J. Nedelsky, "Reconceiving Rights as Constitutionalism", *ibid.* at 142.

doing so, the relational analysis makes those considerations part of context, and not a threshold of admissibility.[829]

At any level of the analysis, the question of imputability arises. What if Canadian actors are acting in collaboration with foreign agents? Are they really "causing" the violation? The same question which was raised at the level of Charter application (is there an action by a government targeted by section 32?) arises here (is the violation caused by the government action targeted by section 32?). Again, the Supreme Court of Canada gave sufficient guidance in *United States v. Burns* for Courts to ascertain whether, in each case, the "linkage is strong enough":

> While the Canadian government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that *potential* result. The question is whether the linkage is strong enough and direct enough to invoke s. 12 in an extradition proceeding, especially where, as here, there are many potential outcomes other than capital punishment.[830]

In the end, the Court found that there was no violation of section 12 of the Charter (protection against cruel and unjust punishment) by Canadian actors since Canada would not have directly inflicted the potential death penalty; on the other hand,

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[829] Territoriality will not be totally evacuated: as Raustiala suggests, "(s)patial location can help determine what is reasonable, but it should not be used to formalistically dichotomize the availability of rights" and, generally speaking, "where that government acts ought to be largely irrelevant to an inquiry of what rights might restrain that power". See K. Raustiala, "The Geography of Justice", *supra* note 79 at 2555

[830] *United States v. Burns, supra* note 367 at para 54.

section 7 of the Charter (protection of life, freedom and security) was found to have been breached by Canada.

Once a Charter right has been infringed, in some cases,[831] the next step will be to look at whether the infringement is justified by the imperatives of a "free and democratic society" set out in section 1 of the Charter. The test developed in *R. v. Oakes*[832] (the Oakes test) encapsulates the ideas of "proportionality" and "minimal impairment"[833] and more generally the idea that no right is absolute. Considerations of practicality may be argued at this point too: if it is only administratively burdensome or *impractical*, Courts may not be convinced that the infringement ought to be justified. On the other hand, if it is impossible or highly prejudicial to comply with the Charter, and if the impairment is minimal, the Courts may well find that the infringement is justified.

Whether one conceives of rights as inherently limited, or whether one sees "limitations of rights as specification of the rights' content and scope"[834] might impact on where and at which level of the constitutional litigation the debate will be

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[831] In *Alberta v. Hutterian Brethren of Wilson Colony,* [2009] 2 S.C.R. 567, the majority of the Supreme Court of Canada distinguished between the constitutional challenge of legislation, which triggers a section 1 analysis, and the challenge of a government decision, which does not. The former is of general application, while the latter is personalized and involves an inquiry into the type of remedy under section 24(1) of the Charter (at paras. 66-69). Even so, Courts sometimes explore the section 1 analysis when a decision (rather than a law) is challenged: see, for example, the *Insite* decision, *supra* note 744 at para. 137.

[832] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[833] See generally L. B. Tremblay & G. Webber, *Essais critiques sur l'arrêt R. c. Oakes* (Montréal : Thémis, 2009).

[834] G. Webber, *The Negotiable Constitution: On the Limitation of Rights* (New York: Cambridge University Press, 2009).

had, but again, under recent guidance by the Supreme Court of Canada, government actions or decisions should not be subjected to a section 1 analysis.

D. The constitutional remedy

Once a violation of the Charter has been identified, the last question is what remedy is appropriate considering section 24(1) of the Charter, which reads as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

A violation caused by actions of the Canadian government lead to a remedy under s. 24(1) of the Charter. By contrast, when the validity of a law or legislative provision is being challenged, the claimant must take the route of s. 52 of the *Constitution Act, 1982*, which allows Courts to strike unconstitutional legislation, read in, read out, or devise other interpretive techniques targeted at the validity of constitutional legislation.[835] Only the remedies under s. 24(1) will be examined here.

When the claimant files a section 24(1) claim, the next question is what type of remedy that section allows. The Supreme Court recently held that:

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[835] On the "different remedial purposes" of ss. 52(1) and 24(1), see *R. v. Ferguson,* [2008] 1 S.C.R. 96. The Court stresses that section 24(1) provides a personal remedy against unconstitutional government action, whereas section 52(1) provides a general remedy against unconstitutional legislation.

> The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.[836]

Aside from declarations, which are helpful when "the claimant has suffered no personal damage",[837] a claimant may seek constitutional damages. The Supreme Court in *Ward* clarified the principles applicable to the attribution of monetary damages, and established that the determination of those damages follows principles similar to those inherent in tort law. Damages may serve three purposes: compensation; vindication; and deterrence.[838] One must bear in mind, however, that actions for damages may be either actions for public law damages (including constitutional damages), or actions in tort, although both claims may co-exist.[839]

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[836] *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 at para. 34.
[837] *Ibid.* at para. 37.
[838] *Ibid.* at paras. 27-29: "(…) [c]ompensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety (…). Vindication, in the sense of affirming constitutional values, (…) focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection": *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society. Finally, deterrence (…) like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. (…) Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future."
[839] Double compensation, on the other hand, has to be avoided: *Vancouver (City) v. Ward*, *idid.* at paras. 35-36.

Section 24(1) also allows Courts to devise remedies that force the government to take action in order to protect a right, such as the obligation to build language schools in order to respect minority language educational rights;[840] or they can order the government to grant someone a "discretionary" exemption if the denial of such exemption breaches Charter rights.[841] Courts may, as well, abstain from ordering the government to act in a certain way, out of deference for the expertise that it has in a specific field. [842]

Finally, a last point ought to be made regarding the role of comity in extraterritorial Charter challenges. In choosing the proper remedy, Courts have the necessary leeway to act in a manner not to upset international relations. They retain the ability to consider comity in the choice of remedy[843] considering the relationship between the Canadian authorities and foreign states. The problem is that at the present moment, in Canada, Courts can consider comity both at the level of Charter application *and* at the level of Charter remedy. In my view this is due to a mistaken reading of the term "comity".[844] The question whether a Charter right limits or

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[840] See *Doucet-Boudreau, supra* note 749.
[841] See *Insite, supra* note 744.
[842] See *Khadr-2, supra* note 195 (refusal to order repatriation of Omar Khadr). This case raises perplexing issues on the extent of judicial review when the Crown prerogative of foreign affairs is invoked.
[843] Such as happened when the Supreme Court of Canada refused to order the repatriation of Omar Khadr : see *Khadr-2, supra* note 195.
[844] I introduced, in Chapter One, Huber's definition of comity as a tool which *allows* a state to recognize a foreign state's laws or actions on its own territory, not as a *shield* against such recognition. The Supreme Court of Canada endorsed this view: see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.,* [2002] 4 S.C.R. 205 at para. 15 and ff. However, in *United States of America v. Dynar*, [1997] 2 S.C.R. 462, the Supreme Court used comity as a shield to the extraterritorial application of the Charter: at para. 123: "There is no doubt that the *Charter* applies to extradition proceedings. Yet s. 32 of the *Charter* provides that it is applicable only to Canadian state actors.

constrains a conduct by Canadian officers overseas should not trigger comity considerations because the foreign state is not prejudiced. At least such is the case in other jurisdiction, where comity tends to be treated as a red herring when the actions of the domestic, rather than the foreign government, are scrutinized.[845]

To sum up, this analytical framework supports the three normative propositions introduced earlier: (1) all actions under the authority of the Canadian government are potentially amenable to Charter scrutiny; (2) geography ought not to determine which Charter rights limit the government action; (3) personal entitlement inquiries should not determine the scope of application of the Charter.

Pursuant to principles of international comity as well, the *Charter* generally cannot apply extraterritorially (…)". The Court endorsed a similar view in *R. v. Terry*, [1996] 2 S.C.R. 207, at para. 16, McLachlin J. writing, holding that the SCC "has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity". In *R. v. Hape,* LeBel J. held that "As a result of the principles of sovereign equality, non-intervention and comity, Canadian law and standards cannot apply to searches and seizures conducted in another state's territory" (*supra* note 16 at para. 87).

[845] In the United Kingdom, see *Al-Skeini and others v. Secretary of State for Defence, supra* note 203 at para. 44 and ff. (considering that no offense to comity and to the sovereignty of a foreign nation would be felt if the UK *Human Rights Act* were made to apply to a UK public authority). In Australia, a similar comment was made regarding the act of state doctrine in *Habib v Commonwealth of Australia*, [2010] FCAFC 12 (at para. 37) "The heart of the matter then is that Mr Habib alleges before a Court exercising federal jurisdiction that Commonwealth officers acted outside the law. The justiciability of such allegations is axiomatic and could not be removed by Parliament still less the common law. No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament."

CONCLUSION

This thesis has so far explored the relationship between territory and domestic human rights law, focusing on the Canadian Charter of Rights and Freedoms but also analyzing, for comparative purposes, the scope of the American Bill of Rights.

A brief recall of the conclusions which I came to is warranted at this point. From an analytical point of view, Chapter One demonstrated that the territorial paradigm is too embedded in methodological nationalism to stand scrutiny; that it is built on premises which were valid at the time of the rise of the nation-state, but which do no longer reflect today's complex web of relations, authority and power; and that it faces several challenges which cast doubt on its ability to remain the exclusive tool to ascertain the scope of law. One of these challenges was the difficulty in conceptualizing authority as unbundled from sovereignty and territoriality. Another was the discrepancy between the liberal ideal of "ethical territoriality", the assumption that within territorial borders law is homogeneously applied to a single *demos*, and the demonstrated absence of such universal application of law in general, and in Charter law in particular. A third challenge related to the meaning of the term "territory", which is traditionally seen as a piece of land, but which comprises an inherent relational component.

Chapter Two and Three focused on Canadian law. Chapter Two outlined territoriality as a principle of interpretation of domestic legislation, less strictly applied when

ordinary statutes are interpreted than when the scope of the Charter is at issue. When reviewing the reasoning underlying the leading case of *R. v. Hape*,[846] Chapter Two identified many questionable findings regarding the definition of authority, the choice of binding principles of international law, and the characterization of enforcement jurisdiction. The vision put forward in that decision was decisively Westphalian, even though some caveats were made.

The purpose of Chapter Three was to look into the viability of the pure territorial paradigm in Canadian caselaw subsequent to *Hape* involving the extraterritorial application of the Charter. This study led to the finding that the caselaw is neither coherent nor principled on this issue. Territoriality appeared as an insufficient basis for ascertaining the scope of the Charter. As a result, the deconstruction of the territorial paradigm in Chapter One, the criticism, in Chapter Two, of the reasoning which led to its endorsement in Canadian Charter law, and the observation that the tool is conceptually unable to account for the discrepancy between courts' rulings on extraterritoriality, all lead to a search for potential alternatives to that paradigm.

The quest for alternative models led me to analyze, in Chapter Four, the debate on the extraterritorial application of the US Bill of Rights. I concluded that in the United States, at least three approaches have been devised as an alternative to pure territoriality: one of these approaches emphasizes membership or entitlement to rights, and focuses on the *subject* of constitutional litigation; another one emphasizes

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[846] *Supra* note 16.

the limitation of state action, and focuses on the *object* of constitutional litigation; and a third makes pragmatic factors paramount, while blending membership and territorial approaches as well as endorsing, in principle, the idea that any exercise of state authority has to be brought to constitutional scrutiny.

Based on the demonstration that territoriality is, both in theory and in practice, unfit to guide the ascertainement of the scope of Charter rights in hard cases, Chapter Five proceeded to articulate of a new analytical framework for Canadian Charter cases involving extraterritorial elements. After discarding the newly emerged "personal entitlement" model, I endorse a concept of relational authority which puts the emphasis on the relationship between the state and the recipient of the state action and the amenability of every state action to judicial review, irrespective of the place where the display of authority was made. This model moves away from methodological territorialism and argues that the decisive factor for Charter application should not be mere geography, which tends to further the container metaphor, but the presence of an action by the Canadian government. On the other hand, when it comes to ascertaining the scope of protection of each Charter right at stake, the courts must inquire into the interests which the right seek to protect and the type of relationship which would be fostered by the extraterritorial application of such or such right in any given case.

The thread running through this thesis is that the emergence of less formalistic relations between law, people, state power and territory is a crucial step in the

development of modern constitutional law and modern law generally. International law is no exception: the way in which the parallel debate on the extraterritorial application of human rights treaties evolved in recent years can attest of that evolution. This thesis would thus not be complete without contextualizing the Canadian question in the wider debate regarding the extraterritorial application of human rights treaties.

Over the recent decades, both the *European Convention on Human Rights* and the *International Convention on Civil and Political Rights* (the "ICCPR")[847] have been at the forefront of the debate regarding the extraterritorial scope of human rights obligations.[848] Both treaties, and the caselaw they generate, can influence Canadian law and can be invoked, and often are, before Canadian courts. When it comes to interpreting the Charter, they have persuasive value which can determine how similar legal issues ought to be decided at the national level.[849] In addition, because Canada ratified the ICCPR and its Optional Protocol, the observations of the Human Rights Committee are also persuasive sources of authority which can influence the development of Canadian law. What is more, because the Canadian test on

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[847] *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47.

[848] The most recent contribution to that debate is that of M. Milanovic, *Extraterritorial application of human rights treaties: law, principles, and policy* (Oxford; New York: Oxford University Press, 2011). See also, D. McGoldrick, "Extraterritorial Application of the International Covenant on Civil and Political Rights", *in* F. Coosmans & M. T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp-Oxford: Intersentia, 2004), 42 at 52. M. O'Boyle, "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic'" in F. Coosmans & M. T. Kamminga, eds., *ibid.* at 125.

[849] This role was explained by Justice Dickson, dissenting in *Re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313. His reasons were later endorsed in *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038. See also, generally, S. Beaulac, *Handbook on Statutory Interpretation – General Methodology, Canadian Charter and International Law* (Markham : LexisNexis, 2008).

extraterritoriality currently integrates[850] the question whether Canada is violating its international obligations when it acts abroad, the scope of application of the ICCPR becomes all the more relevant.[851]

Although this thesis generally posits that international law should not determine, and certainly not limit, the scope of Canadian Charter rights,[852] it does not entail that international law is altogether irrelevant. I have argued against resorting to international litigation in order to obtain *Charter protection*. As Justice Binnie pointed out in *R. v. Hape*, plaintiffs should not be left to argue about whether an international obligation exists,[853] whether it has been breached, and how to enforce a remedy. It seems counter-intuitive that one should need to do the gymnastics of first finding out whether the ICCPR, or any other treaty, has been breached, in order to determine whether the Charter is applicable. On the other hand, the interpretative force of these treaties is undeniable, and it ought not to be eclipsed by a purely domestic analysis of the application of the Charter.

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[850] See *Khadr-1, supra* note 194 at paras. 18-19 and at para. 26: "The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations."

[851] When these obligations arise from treaty law (as opposed to customary international law), the questions of when and *where* the treaty is breached arise. As a result, as as suggested by Craig Forcese, the exception based on the violation of Canada's international obligations incorporates by reference the law on extraterritoriality of human rights treaties. The Charter could be binding if and only if Canada violates certain fundamental international obligations, and to make that assertion, one must demonstrate that Canada was bound by those obligations in the first place. See C. Forcese, "Extraterritorial Application of the Charter to Canadian Forces", online: <http://craigforcese.squarespace.com/national-security-law-blog/2008/3/14/extraterritorial-application-of-the-charter-to-canadian-forc.html>. See also, generally, C. Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008).

[852] I discuss the role played by international law principles (the principles of international sovereignty, state equality and non-intervention) in this context in Chapter Two, in the text accompanying notes 365 and ff.

[853] *R. v. Hape, supra* note 16 at para. 187.

Although Canada is bound by many other treaties, such as the *Convention against torture* and the *Convention on the rights of the child* which also raise the question of their territorial scope,[854] I will limit my comments to the ECHR and the ICCPR and illustrate that the evolution of this body of law follows the lines advocated in this thesis, i.e. towards a less formalistic approach to law, state authority, territory and rights.

Under Article 1 of the ECHR, the obligation to secure the rights and freedoms set out in the Convention was traditionally interpreted as binding on member states only with relation to what happens inside their territory. In exceptional cases such as where the member state occupies another state, the ECHR could apply to actions performed by a member state outside of its territory, provided the place where those actions were performed fell within the "legal space" of the Convention (Iraq, for example, fell outside that legal space). Finally, the Convention was thought to be indivisible, such that if a single right applied extraterritorially, *all* the rights guaranteed by the Convention were also applicable.[855] The emphasis was decisevly put on the *place* where the state action was performed.

A recent development modified, and clarified, the state of the law. In *Al-Skeini & Others v United Kingdom*,[856] the Grand Chamber held that although jurisdiction

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[854] Those were discussed in the text accompanying notes 459-463.
[855] Those were the findings of the leading case in *Bankovic & others v. Belgium & 16 other contracting States* (Application no. 52207-99, 2001).
[856] [2011] ECHR 1093 (7 July 2011) at paras. 131-142 (briefly discussed at note 207, above).

under Article 1 of the Convention is primarily confined to the member state's territory, there are "exceptions" to this principle and these exceptions are not limited to the control of a foreign territory. The Grand Chamber accepted that control of the violation, which entails an analysis of the degree of control exercised on the person subjected to it or on the violation itself, could make the Convention applicable extraterritorially.[857] The Court also reversed its prior finding that the Convention was indivisible. More flexibility is now built in the jurisdictional clause of the ECHR.

Regarding the ICCPR, the jurisdictional clause provides that a state party is bound to respect and ensure the provisions of the Covenant to all individuals "within its territory and subject to its jurisdiction".[858] The Human Rights Committee has read that provision in a disjunctive way: as a result, a violation of the ICCPR can be recognized either when a state acts within its territory *or* when the individual subjected to its actions is within its jurisdiction, provided the state party exerts a sufficient degree of control over the person which claims protection. In the words of the Human Rights Committee:

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[857] However, in later developments (*Issa v. Turkey,* Application no. 31821/96, ECtHR, 16 November 2004), the Court opened up the scope of application to a situation when a state party exercises territorial control of an area (Iraq, not within the "legal space" of the Convention) and performs an action which, had it been performed domestically, would violate the Convention. This was in tune with the case in *Loizidou v. Turkey*, ECtHR 23 March 1995, Series A vol. 310, para. 62, in which the Court held that the obligation to secure the rights and freedoms set out in the Convention derives from the exercise of "effective control" over an area outside the national territory, whether exercised directly, through armed forces, or through a subordinate local administration., which had extended the Convention to an area controlled by the state party (Turkey).

[858] ICCPR, Article 2(1).

> A state party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[859]

In *Lopez Burgos v. Uruguay*, [860] the Human Rights Committee declared that it was not barred from considering an application related to the conduct of State agents perpetrating acts in violation of the Covenant on foreign soil. The emphasis was not on the *place* where the violation occurred, but rather on the *relationship* between the individual and the respondent State Party.[861] The Committee found that it would be "unconscionable" to treat actions differently depending on the place where they were performed.[862]

In accepting the notion of "effective control", the Human Rights Committee did not specify that control must be exerted *over the territory*. In fact, the emphasis is not on where the action is performed, but on the relationship that is established by that display of authority. As put by Scheinin, when the ICCPR is given extraterritorial effect in cases of denial of passport to citizens residing abroad, assassinations, or abduction, control over the *territory* is not the standard; rather, there must be control

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[859] *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*: 05/26/2004, CCPR/C/21/Rev.1/Add.13. (General Comments), para. 10.
[860] *Lopez-Burgos v. Uruguay,* Communication No. R. 12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) at 176 (1981).
[861] *Ibid.* Note that this comment was made in the context of Article 1 of the Optional Protocol to the ICCPR.
[862] *Ibid.* at para. 12.

over the person, or control over the facts and events giving rise to the human rights violation.[863]

As a result, both treaties are now interpreted as allowing some form of application outside of the territory of each member state. Even if the parameters for extraterritorial application differ, it may be argued that these developments support the analytical framework and the normative claims which my thesis expounded with regard to Canadian law: (1) that authority is relational; (2) that all state actions are potentially amenable to judicial review, and (3) that the place where a state action is performed ought not to determine the constitutional limitations which attach to it. All three can find echo on the international plane, although this does not mean that the "effective control" test under international law is directly applicable in Canadian law, for instance. Further research needs to be done before we can draw parallels between the notions of effective control, for example, and that of the "necessary degree of participation" or "the sufficient causal connection" which are necessary to trigger the application of the Charter. The starting point for that future research could very well be that there are no more static frontiers between domestic and international law, as there are none between intra- and extraterritoriality. There is a border, still, but it is moving

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[863] *Ibid*.

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