THE THEORY AND INTERPRETATION OF HUMAN RIGHTS IN AUSTRALIA AND GERMANY: A COMPARATIVE ANALYSIS

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INTRODUCTION

Human rights is a topic of immediate interest in Australia and Germany. It is a controversial subject, much discussed in both countries but at different levels. In Australia, the literature on the jurisdiction and jurisprudence of human rights is controversial and mainly concentrates on the development of and justification for the *existence* of human rights under the Australian Constitution.[1] In Germany, the position is quite different because human rights expressly exist in codified form under the German Constitution. On the other hand, discussion in Germany concentrates on the techniques for the proper *interpretation* of human rights.[2]

However, underlying the discussion in both countries is a more basic issue, centered on the fundamental character of human rights and the nature of their objectives and scope. This concerns the theory or theories that influence and guide countries when they are interpreting human rights. It is the purpose of this article to examine the comparative position that exists in Australia and Germany within this context.

RECOGNITION OF THE EXISTENCE OF HUMAN RIGHTS

The first question in any discussion of this nature is whether human rights are recognised and protected in a particular country. In Germany, the

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1 Wilcox MR, An Australian Charter of Rights? (1993, Law Book Co Ltd, Sydney) 194; Charlesworth, "Australia's split personality: implementation of human rights treaty obligations in Australia" in Alston P and anor (eds), Treaty-Making and Australia: Globalisation versus Sovereignty (1995, Federation Press, Sydney) 129; Gibbs, "A Bill of Rights" (1994-1995) Australian International Law Journal 3.

2 Boeckenfoerde, "Grundrechtstheorie und grundrechtsinterpretation" (1974) Neue Juristische Wochenschrift 1529; Ossenbuehl, "Die interpretation der grundrechte in de rechtsprechung des bundesverfassungsgerichts" (1976) Neue Juristische Wochenschrift 2100; Stern K, Das Staatsrecht der Bbundesrepublik Deutschland, Band III/2, Allgermeine Lehren der Grundrechte (1994, CH Beck Verlagbuchhandlung, Muenchen) 1636.

answer is easily found since it is a civil law country. Human rights, defined as the "equal and inalienable entitlements of all individuals"[3] are explicitly recognised and codified in detail in Articles 1-20 and Articles 101-103 of the German Constitution. According to the Constitution, and more specifically Article 1(3), human rights directly bind all governmental powers, namely, the legislative, executive and judicial powers. They are to be observed in each and every act of government. Since the rights are found in constitutional provisions as fundamental rights, they can only be altered under special conditions pursuant to Article 79(3) of the Constitution. Where the material substance of human dignity is concerned, the rights cannot be changed at all under Article 79(3). As a consequence, human rights are considered absolutely inalienable in Germany.

In Australia, the answer is comparatively harder to find. As rightly pointed out by Charlesworth, Australia has "an excellent [human rights] reputation ...at the international level".[4] It has signed a significant number of international instruments which deal with fundamental rights, and these include the 1948 UN Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights signed in 1972. However, a chasm seems to exist between the recognition of fundamental rights as established by these instruments on the one hand, and their domestic implementation by Australia on the other hand.[5]

The situation in Australia is similar to that in England where *explicit* guarantees of human rights do not exist. There is no guarantee in the Australian Constitution nor in the Constitutions of the Australian States. Nor do they exist in a special Bill of Rights like that which exists in the United States. Hence, it is no wonder that human rights in Australia is an oft discussed and controversial subject, including the question on whether Australia should have a Bill of Rights.[6]

Although there are no explicit constitutional guarantees regarding human rights in Australia, it does not mean that human rights do not exist.

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[3] Howard and anor, "Human dignity, human rights and political regimes" (1986) 80 American Political Science Review 810.

[4] See Charlesworth note 1 at 129.

[5] Ibid.

[6] See Wilcox note 1 at 194, especially 219-231; Gibbs note 1 at 3. For a parallel discussion in England see Robertson G, Freedom, the Individual and the Law (1993, Penguin, London) XIII.

Moreover, it does not mean they are unprotected. It has now been established that under the Australian Constitution, there are *implied* protections for human rights. Although this view restricts the constitutional "doctrine of parliamentary supremacy",[7] they "provide considerable protection for those who come into confrontation with government".[8] The implied guarantees have been strengthened by the recognition that there is a body of human rights existing at the international level, resulting in a "legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[9] The High Court of Australia has found various implied constitutional guarantees of individual freedom, especially in sections 51(xxxi), 80, 116-117 of the Australian Constitution.[10] For example, in *Australian Capital Television v Queensland*[11] and *Nationwide News Pty Ltd v Wills*[12] the High Court found an implied constitutional right of freedom of communication.

Although the discussion so far shows that human rights are constitutionally recognised and protected in both Australia and Germany, the *techniques* for their protection have been cursorily shown to be different. Under the German Constitution, fundamental civil rights are explicitly codified. In Australia, although not explicit, the same rights have been implied into the Australian Constitution and as such exist as constitutional guarantees. This takes the discussion to the next step, namely, on the techniques for the interpretation of human rights that had been used by the Australian High Court and the German Federal Constitutional Court.

The Interpretation of Human Rights

As stated above, once the existence of human rights are established, the next question is how they should be interpreted. The reason is, generally

7 Per Mason CJ in Australian Capital Television Pty Ltd v Commonwealth (1992) 108 Australian Law Reports 577, 592.
8 Wilcox note 1 at 219.
9 Mabo v Queensland (No 2) (1992) 175 Commonwealth Law Reports 1 per Brennan J at 42.
10 For example see Street v Queensland Bar Association (1989) 168 Commonwealth Law Reports 461; Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501; Australian Capital Television v Commonwealth (1992) 108 Australian Law Reports 577.
11 (1992) 108 Australian Law Reports 577.
12 Ibid at 681.

speaking, "no system of rules can be made so clear that it applies itself".[13] The question of interpretation is unavoidable because human rights are usually couched in general language and formulated in a broad and abstract style.[14] As stated by O'Connor J:

> [I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development or our community must involve.[15]

Therefore, in practice, human rights inevitably need to be interpreted. They cannot simply be applied by a reading of their words, without a consideration of their purpose or function. When their existence is challenged, as seen in the *Australian Capital Television case* where the "[human] right of communication" was in issue, one has to first discover what the "right of communication" means. Does it mean freedom of speech? Or does it include freedom of the press? If so, what does "press" mean? Is it restricted to the written word? Does it include other media like television and radio broadcasts and so forth?

METHODS OF CONSTITUTIONAL INTERPRETATION

It is a truism that "the proper interpretation of laws constitutes one of the most vital concerns of lawyers".[16] However, when answering the questions raised above, it is not possible to utilise the traditional methods of interpretation. The reason is that human rights are international in nature and strictly speaking, dependent on a universal concept of the *theory* of human rights. Only such a theory can give the interpretation a starting point and consistent approach; if not, a process that should be methodological and consistent would become inconsistent and arbitrary in nature.

Take, for example, the case concerning the meaning and scope of the "right of communication". It is not sufficient to only look at the relation between text and context. In Germany, the interpreter would look for several indices

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[13] Fuller LL, Anatomy of the Law (1968, FA Praeger, New York) 100.

[14] See Boeckenfoerde note 2 at 1529; Latham, "Interpretation of the Constitution" in Else-Mitchell R, Essays on the Australian Constitution (1961, Law Book Co Ltd, Sydney) 9.

[15] Jumbuna Coal Mine, No Liability v Victorian Coal Miners' Association (1908) Commonwealth Law Reports 309, 367, 368.

[16] Fuller note 13 at 115.

to establish the existence of the right, namely, the words used, the structure, intention and historical meaning of the constitutional term.[17] In practice, this is not problematic because human rights are codified in Germany.

In Australia, the interpreter would face greater difficulties because, as stated before, human rights are not expressly enumerated in the Australian Constitution. The tools of statutory interpretation are prescribed in the 1901 Acts Interpretation Act (Cth) where an "adequate" technique of interpretation would need to be found, especially in sections 15AA and 15AB.[18] Or the interpreter may use a more general approach by examining the temporal or historical context, the context of the constitution as a textual system or the so called "inter-textual" context, namely, "the relationship between the Constitution and other writings" of the legal tradition.[19]

At a glance, the use of the above established methods of interpretation by Australian and German interpreters appears to be objectively and methodically consistent.[20] It is submitted that the practice and reality are quite different. It is fallacious to believe that in interpreting a particular word or phrase the interpreter simply draws out the "objective" meaning by certain techniques. In practice, the interpreter has a range of tools at his or her disposal. As stated by Wilcox: "The outcome of a case is sometimes affected by the personal characteristics of the judges, including their life experiences, personalities and values".[21]

Of the above, values is the most important, especially in the context of human rights. It has been noted that "[a]ll interpretation depends on the prior existence of conventions and understandings".[22] According to Fuller, what is basically interpreted is not a word, but "an institution and its

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17 The right of communication is protected under Article 5 of the German Constitution; see Larenz K, Methodenlehre der Rechswissenschaft (1979, 4th ed, Springer-Verlag, Berlin) 307 et seq.

18 See in detail Latham note 14 at 8.

19 For a detailed comment on the textual interpretation of the Australian Constitution see ibid at 1. Also see Booker K and ors, Federal Constitutional Law: an Introduction (1994, Butterworths, Sydney) 280.

20 Boeckenfoerde note 2 at 1529.

21 Wilcox note 1 at 238.

22 Booker note 19 at 279.

meaning" because the lives of human beings are affected by it.[23] It is submitted that this refers to *ideology*, defined as a set of prevailing beliefs in a certain society.[24] Hence, interpretation is "a process of adjusting the statute to that which is to be applied".[25]

Therefore, although it is necessary to interpret human rights in a traditional manner first and foremost, it should also be at a *microscopic-level*. But before the exercise is carried out, one should clarify on a *macroscopic-level* the "fundamental presuppositions" of the interpretation[26] or the prevailing ideological basis for interpretation.[27] In this context, the deliberations may be classified as a cross between the so-called *interpretivism* and *non-interpretivism* methods according to the American theory of constitutional interpretation.[28]

According to this theory, constitutional interpretation should follow the constitutional text only and its authority should not be disputed. Where human rights are concerned, and since they are vague and abstract, the initial search for the ideological basis for the interpretation is indispensable and a reasonable expectation. It is only after these "pre-interpretive" fundamental questions have been answered that the interpretation of human rights by traditional means and on a microscopic level can be possible. If not, it would not be deemed sensible or useful.[29]

THE FOUR MAIN THEORIES OF HUMAN RIGHTS

Human rights are defined as the "equal and inalienable entitlements of all individuals".[30] The meaning and scope of this definition are dependent on the theory underlying it. Generally speaking, theories have their point of reference in the notion of how society works or should work, and this is also within the context of certain ideology. In other words, it depends on how the relationship between the individual and society is construed or

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23 Fuller note 13 at 58.
24 Stern note 2 at 1637.
25 Fuller note 13 at 59.
26 Wilcox note 1 at 239.
27 Larenz note 17 at 185.
28 Goldford, "The political character of constitutional interpretation" (1990) XXXIII:2 Polity 255, 261-266.
29 Boeckenfoerde note 2 at 1529; Stern note 2 at 1678.
30 Howard note 3 at 810.

constructed. With regard to the theory of human rights, there should be a connection between interpretation and ideology. Once the theory is established, interpretation becomes possible and easier, as an expression of a certain ideology. Therefore, the theory of human rights is a useful instrument when determining what the rights are and when analysing judicial decisions.

There are basically four main theories which either individually or in combination form the ideological basis for every interpretation of human rights.[31] They are the (1) general or liberal theory, (2) democratic-functional theory, (3) democratic-institutional theory, and (4) theory of human rights as democratic values. The theories may be divided into *two fundamental categories* depending on the "differing assumptions about the self in its relation to politics".[32] The first theory represents the so-called "standard liberal democracy" model. In contrast, the others are representative of the "expansive democracy" model.[33]

ANALYSIS OF THE THEORIES

The Standard or General Liberal Democracy Model

The general or "standard liberal democracy" model is represented by the ideal of the liberal theory of human rights. In this conception, human rights are seen as the individual's claim to freedom *vis-a-vis* society (the state). This individualistic conception of society was rooted in the "enlightenment era" of the eighteenth and nineteenth centuries when events like the industrial revolution, the French Revolution and their sequels took place. These events had created "the private individual separate from society"[34] as an autonomous person. The concept is essentially based on an assumed *conflict* between the private individual on the one hand and society on the other, and as such is different to the model of "expansive democracy".

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31 In accordance with Boeckenfoerde's view: see note 2 at 1530; Stern note 2 at 1681.

32 Warren, "Democratic theory and self-transformation" (1992) 86 American Science Review 8.

33 The expression is that used by Warren: ibid. Although there are other classifications, they often differ only in the choice of expression and categories. For example, see Howard note 3 at 801 where five types of "societies" (instead of "models") are referred to: (i) traditional, (ii) liberal, (iii) communism, (iv) corporatism and (v) development dictatorship.

34 Howard ibid at 804.

According to the standard liberal democracy model theory, the presupposed conflict forms the historical basis and the logical justification for human rights.[35] The thrust of this model is exclusively *negative* and acts as the sole limitation on the state's power. The task of human rights is to keep society at a safe distance from the private and autonomous individual. Accordingly, from the individual's perspective, the corresponding freedom for the individual which results is necessarily *absolute*. "Freedom" in this sense means "freedom *from* something", not "freedom *to* do something". Herein lies the core difference between the "liberal" and the "expansive democracy" model.[36]

Consequently, human rights "are viewed as (morally) prior to and above the state".[37] Freedom is deemed to be a "natural" phenomenon and by no means created by the state. In that respect, and representing the idea of natural law, human rights are nothing but negative areas of competence for society. The individual's freedom is generally unlimited, whereas the authority of the state to intervene in certain areas of freedom is generally limited.[38] Human rights are therefore necessarily pre-political, and exclusively and privately orientated. Since they guarantee an absolute and unlimited sphere of freedom from public interference, they can never be related to any social purpose.[39]

The Expansive Democracy Model

The expansive democracy model is represented by the other three theories and each is fundamentally different to the "liberal" theory of human rights. What the three have in common is the notion that the relationship between the individual and society is basically seen as *non-conflictual*.[40] "Freedom"

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35 Ossenbuehl note 2 at 2101.

36 See discussion below.

37 Howard note 3 at 804.

38 Boeckenfoerde note 2 at 1530, 1531.

39 The weakness of the liberal theory of human rights is obvious. The individual is seen in a quite idealistic way as absolutely independent, autonomous and autarkical. However, it is quite obvious that the individual cannot realise its freedom without society. The liberal model does not take into account that everyone is both an individual and a member of society at the same time. The individual as a "zoon politician" necessarily needs society to put its freedom and its rights into effect. If a person synonymous with human being, individual and society, the expressions "freedom" and "right" (meaning "law") would be senseless and superfluous.

40 But referring to the so-called "traditional society": see Howard note 3 at 808; Warren

in this context, therefore, is *relative*. It is deemed a "freedom *to* do something" in relation to society. As Howard and Donnelly point out: "[E]veryone's interests are incorporated into the higher value system represented by the political-religious-legal decision makers. Man and society are assumed to be separable."[41]

In the expansive democracy model, human rights are classified as *political rights*. They find their justification in the interaction of the individual within society. The individual's use of the freedom and his or her interaction with others necessarily attract political implications. From this point of view, the classification of human rights as pre-political, natural and negative rights, rights which keep society and the state at a safe distance from one another, makes no sense. In contrast, their *positive dimension* and the right to use the individual freedom within society *for particular purposes*, give the concept of human rights a sense and direction.

Herein lies the difference between the liberal model and the expansive democracy model. Herein also lies the *ideological* justification for human rights. The focus in the expansive democracy model is more on society than on the individual as a free person.[42] Although individuals are regarded as worthy "of equal respect and concern", it is most important to note that they are "members of society performing prescribed roles".[43] In fact, this represents a non-liberal, "communitarian" society, a society "that gives ideological and practical priority to the community...over the individual".[44]

Depending on the different kinds of positive functions of human rights that exist within society, it is possible to distinguish the three theories. The first, the democratic-functional theory, focuses on the role of the individual in the democratic *process*. The second, the democratic institutional theory, concentrates on democratic *institutions*. The third, the theory of human rights as democratic values, interprets human rights without regard to the individual but embodies certain essential democratic *values*.

note 32 at 8.

41 Ibid.

42 Stern note 2 at 1685.

43 Howard note 3 at 808.

44 Ibid.

a. Democratic Functional Theory

The democratic functional theory focuses on the individual's role in democratic society. This causes a shift of emphasis from freedom as an absolute good to freedom as an instrument for the democratic procedure. It is the latter that acts as the means which makes it work.[45] Consequently, human rights are not rights for the individual as an individual; rather they are rights for the individual as a constituent member of the democratic process.[46] Thus, the use of freedom is dependent on the value it has for the democratic society itself. If there is none, there will be no human right.

b. Democratic Institutional Theory

The democratic institutional theory goes one step further by separating individual freedom from the concept of human rights. This theory almost exclusively concentrates on "objective democratic institutions".[47] Individual freedom and human rights are virtually deemed to be no more than abstract fictions and tend to become "institutionalised". The freedom of the individual is embodied in and realised through "democratic institutions"[48] such as the free press, the family, and so on. It is for society, in the form of the state, to delimit the scope of freedom within these institutions. This theory is therefore at juxtaposition to the liberal notion of human rights as a natural, pre-political and absolute concept.[49]

c. Theory of Human Rights as Democratic Values

Like the democratic-institutional theory, the theory of human rights as democratic values also separates individual freedom from the concept of human rights. However, it is even more abstract than the democratic-institutional theory. It tries to construe human rights as embodiments of abstract democratic values and not as democratic institutions like the press or the family. An example of such a value is "human dignity".[50]

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45 Stern note 2 at 1685.
46 Boeckenfoerde note 2 at 1534.
47 See Luhmann cited by Stern note 2 at 1692.
48 Boeckenfoerde note 2 at 1533.
49 Ossenbuehl note 2 at 2103.
50 Stern note 2 at 1684.

When values are abstract, they appear completely separated from individual liberty. But when human rights are claimed as an individual's right to unlimited freedom as part of an objective system of values, it tends to reflect a community's basic ideology.[51] Thus, in this context, the human right of freedom of communication is non existent unless freedom of communication is both recognised and protected as a value in society. As a consequence, certain behaviour would be seen as legitimate (for example, the legitimate use of freedom) if it is deemed appropriate and in accordance with the objective system of values.

It is submitted that this concept and its analysis are absolutely contrary to the traditional notion of human rights. When used, it may even be possible to argue that human rights do not exist at all. For instance, instead of being an absolute guarantee for individual freedoms in a particular society, the theory of human rights as democratic value allows that society to use it to argue the suppression of that exact freedom. This extreme view argues that human rights not only fail to limit social (governmental) power but they actually legitimatise the use of this power *against* the individual. As stated by Howard and Donnelly, "[o]nly liberalism, understood as a regime based on the political right to equal concern and respect, is a political system based on human rights."[52] Gibbs CJ has stated that a fundamental objection to a Bill of Rights is that "it is undemocratic as it transfers the right to make policy decisions from elected parliament to unelected judges."[53] On the contrary, and in the light of the above discussion, it is submitted that it is fundamentally wrong to assume that a Bill of Rights is undemocratic. In fact, a Bill of Rights is beyond doubt a linchpin in a democracy.

Gibbs CJ's quotation is an excellent example that illustrates the enormous consequences that may result from the application of a particular theory of human rights. For instance, the effect of Gibbs CJ's assumption may result in a general denial of the existence of human rights, and this may happen if there is a tyrannical majority in a particular society. The consequences for minority groups in such circumstances would be tragic.[54]

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51 Boeckenfoerde note 2 at 1533.

52 Howard note 3 at 816.

53 Gibbs note 1 at 3.

54 This may be a cynical albeit consistent interpretation of Gibbs' statement on fundamental rights: "The recognition that one person has a right will usually mean that the right or liberty of another person is restricted"; see Gibbs note 1 at 8. It may also be an unintended anarchistic perspective, for it denies the basic idea and function

It appears that Gibbs CJ's observation resulted from the use of a human rights theory that is based on the expansive democracy model. It is submitted that if he had not used that theory, he might not have concluded that an express Bill of Rights was undemocratic. If he had used the liberal approach, he would have reached an opposite conclusion. He would also have concluded that the recognition of an individual's fundamental rights, albeit challenged by the majority in a society, would be protected if they are deemed linchpins and touchstones in a democratic society. Human rights establish minimum standards and as such should be immune from the tyranny of the majority.

THE AUSTRALIAN AND GERMAN PRACTICE

Following the establishment of the theoretical basis of interpretation, we now turn to an analysis of the practical aspects surrounding the recognition of human rights in Australia and Germany. Accordingly, an examination of how the courts in those countries deal with the issue of human rights will be discussed. It appears that the courts in both countries have applied human rights theories in a haphazard way, the result of the arbitrary use or selection of human rights. There seems to be no considered use of the theory or theories in a systematic, methodical or comprehensive manner. It will be shown later that the courts have tended to slip in and out of two or more theories within the same case, even when there is only a single human right in issue in that case. An analysis of the cases presented below will provide some of the reasons for the inconsistency.

As far as one can see, neither the High Court of Australia nor the German Federal Constitutional Court *explicitly* follows a certain theory. Neither court has ever expressed its preference for one or other theory when interpreting human rights.[55] Further, an analysis of the cases will reveal that the decisions of the courts did not make use of a consistent *implied* theoretical basis.

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of law in general (namely, to harmonise and optimise the individual's freedom in interaction with others). It is respectfully submitted that Gibbs' viewpoint in fact means the end of all law.

[55] For the German perspective see Boeckenfoerde note 2 at 1530; Stern note 2 at.1680. For the Australian perspective see Wilcox note 1 at 210.

To illustrate, the *Lueth case* from Germany[56] and the *Australian Capital Television case* from Australia[57] will be examined. They were chosen for their similarities and their decisions will be shown to be representative paradigms for their respective jurisdictions. Both were important landmarks in the development and interpretation of human rights in their respective countries and both mainly dealt with the right of freedom of communication.

The Lueth case

The *Lueth case* is the leading decision on the interpretation of the right of communication in Germany. The central and decisive question which the German Federal Constitutional Court was confronted with was the following: is a person permitted to publicly demand a general boycott of a film that was made by a politically questionable director under the right of free communication in Article 5 of the German Constitution?

The Court's decision in the *Lueth case*, commonly recognised as a landmark case on German jurisdiction, was not controversial. What were controversial was its jurisprudence, the manner in which the court arrived at its conclusion and the judicial reasoning which was enunciated. The controversy arose because the manner in which the court had arrived at its decision, including its reasoning, appeared to be fairly arbitrary and inconsistent. Although the judges had to interpret a single human right (freedom of communication) in that case, they had used different theoretical concepts for the interpretation of that right. They had concluded that freedom of speech was a subgroup of freedom of communication.

The Court started with a *liberal conception* of human rights. At pages 204 and 205, the Court held:

> Primarily human rights have to protect the individual's freedom against society; they are the individual's claim to keep the state at a distance. This follows from the history and the structure of the German Constitution. The human rights are codified under the Articles 1 to 20 of the Constitution, ie before all other constitutional regulations. This is

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[56] 7 BVerfG 198.

[57] (1992) 108 Australian Law Reports 577.

> to emphasise the individual's general precedence over the governmental power.[58]

However, on the same page,[59] the Court had also followed a completely different theory and concept when it used *the theory of human rights as democratic values*. The Court held:

> The German Constitution is not and does not want to be a value free system. In codifying the human rights in its first part, the constitution is laying down an objective system of values... This objective system is binding and influence every part of the German law...Human rights are objective rules.

The Court continued with similar phrases like "a value system of human rights"[60] or "the human-right-standard of value".[61] It also referred to "the values on a whole, which the German people have accomplished and fixed in their Constitution at a certain time"[62] before finally deciding at this juncture that "the BVerfG has to enforce the value of a certain human right".[63]

At a later stage, the Court took another unexpected turn by pointing out the following:

> The human right of free speech is one of the most important human rights of all. As such, it *per se* constitutes an *essential* of a free and democratic community. It is due to this right that a competition of opinions becomes possible. This is the indispensable condition of nearly all other forms of freedom.[64]

It is submitted that the sentiment expressed in the above paragraph was quite obviously connected to the *democratic-institutional theory* of human rights. The reason is the shifting of the perspective from the individual to

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58 The writer is personally responsible for any translation from the German to the English language in this article.
59 7 BVerfG 198, 205.
60 Ibid at 205.
61 Ibid at 206.
62 Ibid.
63 Ibid at 207.
64 Ibid at 208 (italics added).

the democratic society itself. Freedom of speech had now become "institutionalised" as an essential condition of democracy whilst, on the other hand, the individual's claim for freedom against society became nearly out of view.

Another illustration supports this observation. At page 208, the German Federal Constitutional Court had emphasised the state itself as the centre of attention and stressed "the great importance of the right of free speech for the liberal-democratic state."

At the conclusion of the judgment, the Court appeared to yet again change direction on the perspective and theoretical basis for the interpretation of human rights. Up until then, the Court had interpreted the right of free speech in the light of the liberal model. It had used the theory of human rights as democratic values, followed by the use of the democratic institutional theory. At the conclusion, the judges interpreted the right of free speech within the *democratic-functional* context. By using this last model, the Court conceived freedom of speech not as an individual right but as a simple instrument to make the democratic process work. Accordingly, the Court held:

> Most important is the freedom of speech, where the speaker wants to make a contribution to the *public* opinion - not, where the right is just needed in an exclusive private debate between individuals... The more an expression of opinion concerns public matters, the more it can be assumed that this expression is protected by the freedom of speech.[65]

The Court had earlier stated:

> The freedom of speech must be interpreted in the light of its exceptional significance for the liberal-democratic state.[66]

The above examples clearly illustrate that the German Federal Constitutional Court in the *Lueth case* did not follow a consistent concept of human rights for the interpretation of the right of freedom of speech. In fact, it applied no less than four basically different concepts for the analysis of a single regulation. This regulation was Article 5 of the German

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65 Ibid at 212 (italics added).

66 Ibid at 198.

Constitution. It is submitted that their approach was not justified nor can it be justifiable or understandable. The judges did not give a single reason for their use of various interpretation theories and, as such, their action (or inaction) gives the impression of arbitrariness and inconsistency.

It is possible to generalise and show that the result in *Lueth's case* is representative of the German practice. The reason is that case was not an exception; rather, it was the rule. Almost every leading decision of the German Federal Constitutional Court, when analysed, can be shown to be just as arbitrary and inconsistent. For example, in the *Elfes case*[67] the Court had used an inconsistent combination of theoretical concepts, mainly made up of the liberal model and the theory of human rights as democratic values. The same arbitrariness and inconsistency existed in the judgments of the famous cases, *Mephisto*[68] and *Lebach*.[69] In contrast, the *Spiegel case*,[70] although predominantly based on the democratic institutional theory, did not justify nor explain the use of that theory, thus further supporting the conclusion that the Court has tended to be arbitrary and inconsistent in its practice.

The Australian Capital Television case[71]

In the *Australian Capital Television case*, Australian Capital Television Pty Ltd, a licensed television broadcaster, brought an action against the Commonwealth of Australia and other defendants. The plaintiff sought a declaration that Part IIID of the 1942 Broadcasting Act (Cth) was invalid. Part IIID had been inserted as an amendment in the Act by the 1991 Political Broadcasts and Political Disclosures Act (Cth). The crucial part of the act under scrutiny was Part IIID Division 2 which restricted radio and television broadcasting during election periods in certain ways.

In its judgment, the High Court of Australia appears to have similarly used various theories and concepts when interpreting the right of communication in that case. And unfortunately, like the German Constitutional Court, the High Court gave no reason or justification for its inconsistent approach. This is well illustrated by Mason CJ's judgment.

[67] 6 BVerfG 55.
[68] 30 BVerfG 173.
[69] 35 BVerfG 202.
[70] 20 BVerfG 162.
[71] (1992) 108 Australian Law Reports 577.

Initially, Mason CJ's interpretation of the right of communication was primarily based on the liberal model. He held:

> Part IIID severely impairs the freedoms *previously enjoyed by citizens* to discuss public and political affairs and to criticise federal institutions. Part IIID impairs those freedoms by restricting the broadcaster's freedom to broadcast...[72]

Nevertheless, when referring to "public and political affairs", Mason CJ had alluded to a second theory, namely, the democratic functional theory of human rights. This was despite the fact that this theory and concept were fundamentally different to the liberal theory, as seen above. In a later part of the judgment, he had added:

> [F]reedom of communication [is] an indispensable element in representative government... Indispensable...is freedom of speech, at least in relation to public affairs and political discussion... Absent such a freedom of communication representative government would fail to achieve its purpose...[73]

It is therefore obvious that freedom of communication in this context is not interpreted as an individual's claim for liberty, but as an indispensable means in the political process of democracy. Hence, the focus is on society itself, and not on the individual as seen earlier.

As Mason CJ continued, he used a third theoretical model and a different concept which appeared to be based on the democratic institutional theory. He stated:

> In truth, in a representative democracy, public participation in political discussion is a *central element of the political process*.[74]

In other words, the public press was conceived as a principal and necessary institution in the democratic process. Also, it had become institutionalised as a so-called "objective-democratic institution" and as a consequence was seen as an indirect means for the realisation of the individual's freedom.

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72 Ibid per Mason CJ at 587.
73 Ibid.
74 Ibid at 595 (italics added).

In the same judgment, a fourth theory was used by Mason CJ, albeit for a brief period only. This was the democratic functional theory, which he referred to in the following terms:

> Freedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.[75]

Later, Mason CJ changed tack yet another time by switching from the democratic functional theory to the theory of human rights as democratic values, his fifth theory. This can be illustrated by the following quotation when he stressed:

> [I]t has been recognised that the freedom is but one element, though an essential element, in the constitution of "an ordered society" or a "society organised under and controlled by the law". Hence, the concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public.[76]

The position in the above quotation was based on the notion of human rights as an objective system of values. The right of communication was not seen as an individual's claim for liberty but represented only one of the essential elements. But all these "essential elements" collectively formed a society's ideological basis of values.

It is noteworthy that Mason CJ concluded his judgment with final resort to a sixth theory, the democratic functional theory. He held:

> The *raison d'etre* of freedom of communication in relation to public affairs and political disçussion is to enhance the political process..., thus making representative government efficacious.[77]

The above examples sufficiently illustrate that the High Court of Australia does not follow any consistent concept when applying the theory of human rights. In the *Australian Capital Television case*, it is possible to locate

75 Ibid at 596.
76 Ibid at 597.
77 Ibid at 599.

several other references which support this conclusion. A classic example is seen when within one sentence, Brennan J started with the democratic functional basis and ended with the theory of human rights as democratic values:[78]

> Though freedom of political communication is essential to the maintenance of a representative democracy[79]...it is not so transcendent a *value* as to override all interests which the law would otherwise protect.[80]

A plethora of other examples can be found in other cases as well. They include *Nationwide News Pty Ltd v Wills*,[81] *Dietrich v R*,[82] *Attorney-General (Victoria); Ex rel Black v Commonwealth)*[83] and *Theophanous v Herald and Weekly Times Ltd.*[84]

ANALYSIS

It may be argued that the lack of consistency in the application of the theories and their concepts point to one conclusion, namely, that the High Court of Australia almost exclusively concentrates on the development of and justification for the existence of human rights under the Australian Constitution. Like the German Federal Constitutional Court, the High Court is not interested in a general theory as a methodological basis for the interpretation of human rights.

However, in contrast to the German Federal Constitutional Court which, generally speaking, only ignores the theoretical concepts of human rights, the High Court of Australia goes one step further. It can be shown that the High Court had intentionally and expressively rejected a standard or general theory of human rights as unnecessary and superfluous. In

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78 Ibid.

79 Ibid per Brennan J at 610.

80 Italics added.

81 (1992) 108 Australian Law Reports 681.

82 (1992) 109 Australian Law Reports 385.

83 (1981) 146 Commonwealth Law Reports 559.

84 (1994) 182 Commonwealth Law Reports 104. (*Editor:* This case has since been reviewed in Lange v Australian Broadcasting Corporation (1997) 145 Australian Law Reports 96; also note Levy v State of Victoria and Others (1997) 146 Australian Law Reports 248.)

Attorney-General (Victoria); Ex rel Black v Commonwealth for example, the High Court explicitly stressed that the interpretation of a constitutional section should be based on the "actual language of the section itself",[85] not on general theories as to the general objectives of the section. Furthermore, in *Theophanous v Herald and Weekly Times Ltd*[86] the High Court held:

> The Court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its *text*...The Court has no jurisdiction to fill in what might be thought to be lacunae left by the Constitution.

Finally, it is interesting to note the uncertainly the Court recently showed concerning the theoretical basis of interpretation. In *Theophanous v Herald and Weekly Times Ltd*,[87] the following statement is found:

> But what the framers of the Constitution thought, but did not provide in the Constitution, 100 years ago, is hardly a sure guide in the very different circumstances which prevail today. If the purpose of the implied freedom were merely to safeguard the interests of the individual, there might be something to commend this approach.[88] But, when the purpose of the implication is to protect the efficacious working of the system of representative government by the Constitution, the freedom which is implied should be understood as being capable of extending to freedom from restraints imposed by law...[89]

THE AUSTRALIAN AND GERMAN RESULTS

From a theoretical and methodological perspective, the way in which Australian and German courts deal with the theory of human rights is not convincing. A general theory of human rights, as pointed out above, is the indispensable basis and a necessary starting point for any reasonable interpretation of human rights. Consequently, the interpretation of human

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85 See (1981) 146 Commonwealth Law Reports 559 per Gibbs J at 603; per Stephen J at 609.

86 (1994) 182 Commonwealth Law Reports 104 per Brennan J at 143 (italics added).

87 Ibid per Mason CJ, Toohey, Gaudron JJ at 128.

88 This viewpoint refers to the "standard liberal democracy" model.

89 This perspective refers to the "expansive democracy" model; also see note 86 per Brennan J at 148.

rights without the consistent application of theory would appear to be arbitrary and superficial. Instead of being integrated and anchored in the respective ideological systems of society, human rights thus become simple or mere terms, open to a number of interpretations and ideology. As a result, the rights lose much of their traditional thrust as the individual's claim for liberty against society.

Without a general and consistent ideological justification, fundamental rights are diluted and change from "equal and inalienable entitlements of all individuals"[90] to naked phrases. As such, they can no longer be absolute and powerful rights, but only potential possibilities. Their substantive enforcement, for better or for worse, becomes totally dependent on the personal ideology and arbitrariness of the body responsible for the interpretation of the law.

CONCLUSIONS

As stated above, human rights is much discussed in Australia as well as in Germany, albeit at different levels. Whereas the Australians mainly concentrate their discussion on the development of and justification for human rights as fundamental rights under the Australian Constitution, the Germans are more interested in finding the proper techniques for the interpretation of human rights. Be that as it may, both jurisdictions share a common and conspicuous lack of regard for an adequate theory of human rights when engaged in the interpretation of those rights.

To become clear and effective, human rights, which are generally speaking vague and abstract, need to be interpreted. Irrespective of which method or methods of interpretation prevail, they are still dependent on an underlying theory of human rights. In other words, the interpretation needs an ideological basis to become a sensible and convincing judicial exercise. Accordingly, the four main theories referred to above, alternatively or in combination, should form the ideological basis for the interpretation of human rights.

There are three submissions why there has been an inconsistent and arbitrary application of the theoretical concept. The first assumes that the interpreters of the law are sometimes unaware of the existence of the

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90 Howard note 3 at 810.

theoretical rules. The considerable practical consequences of this unawareness are profound. This may be a reason why in the judicial decisions referred to above, the comments on the general methodological concept for the interpretation were either rare or non existent. Secondly, judges may occasionally chose a certain theory of human rights intentionally, not as a generally valid theoretical basis for their interpretation, but as a simple argument to justify a desired result.[91] In doing so, the court can "pretend" that a judgment was founded on fair ideological ground, where in fact it is based on an unspoken and inconsistent basis.[92] Thirdly, as far as the High Court of Australia is concerned, a careful analysis of the cases shows that Australian judges every now and then explicitly reject the necessity for an ideological concept for the interpretation of human rights.

Finally, it should be mentioned that in spite of the appearance of arbitrariness and inconsistency by the courts in Australia and Germany, both are unified in a serious attempt to enforce and strengthen human rights in favour of the individual, as shown in the cases analysed above. On the other hand, if the courts decide to perform this task on a sounder theoretical and methodological basis, they will be accepting a great responsibility and embarking on a most challenging journey indeed.

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91 Boeckenfoerde note 2 at 1530.

92 Stern note 2 at 1693.