

A Model State
Individual Rights

Individual Rights for a Model State

Dossier on Principles of Government

Jurisprudence

Repurposed from Course Project

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Dossier

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SEC. 1 INTRODUCTION

The purpose of this paper is to convey the important legal and political philosophical perspectives that will most likely affect a small nation’s efforts to produce their desired beneficial outcomes through the meaningful written representation of the Individual Rights that the nation’s elders and leader want to inculcate within the spirit of their island nation as it moves toward statehood. More than any other mark of advancement or sophistication, the elders have developed an appreciation of the mechanisms and catalysts of legal evolution in modern societies which have drawn their power from the social awareness of the people who live in democracies along with noticing that these societies have become stronger through the development of national constitutions, and thereby, the elders have gleaned the importance of a Statement of Individual Rights —similar to the Bills of Rights in England and the United States.

Likewise, the national leadership has become aware of the necessary and desirable modification of posture from their legacy of hierarchical, authoritarian, and paternalistic leadership to a style that would accommodate pluralism and agility in keeping with the changing tides in the society. The elders, therefore, are seeking to develop a proactive “paradigm shift” that would avert the stresses of radical change that were experienced, internationally, as a result of political upheaval, resistance to wars and blatant inhumanity, and the natural (often subsequent) churn of emerging social trends. The dossier is divided into three parts that cover the five individual rights intended for an emerging Model State:

Part 1 consists of holistic analysis ... the story of individual rights from various perspectives and social contexts, using Yale University's Avalon Project as the source, taken from the following list:

Table 1- Historical References

Code of Hammurabi ca 1760 B.C.E. http://avalon.law.yale.edu/ancient/hamframe.asp
Magna Carta 1215 http://avalon.law.yale.edu/medieval/magframe.asp
English Bill of Rights 1689 http://avalon.law.yale.edu/17th_century/england.asp
Virginia Declaration of Rights 1776 http://avalon.law.yale.edu/18th_century/virginia.asp
U.S. Bill of Rights 1789 http://avalon.law.yale.edu/18th_century/rights1.asp
Declaration of the Rights of Man 1789 http://avalon.law.yale.edu/18th_century/rightsof.asp
Universal Declaration of Human Rights 1948 (United Nations) http://avalon.law.yale.edu/20th_century/unrights.asp

These are the legal assertions which will be reviewed in detail:

Part 2 will consider the historical context and impact as well as the philosophical foundation of the statement chosen for review. Likewise, there will be references to various other efforts to achieve individual rights as studied in previous coursework. For instance, the Mayflower Compact and the Declaration of Independence were both taken on as initiatives by a group of patriots to detail the framework of a new, centralized government. The Magna Carta, in comparison to these documents, has been viewed in the same way.

The paper moves toward citations and discussion topics taken from Learning about Law (Scaros), Principles of Constitutional Law (Nowak & Rotunda), Moral Issues in Business (Shaw & Barry) had two chapters covering topics related to individual rights (Normative Theories of Ethics, Chapter 2) and (Justice and Economic Distribution, Chapter 3), and Understanding Jurisprudence (Wacks) which analyzes the specific philosophies and documents that contributed to the formulation of significance concepts in modern law and legal systems, around the world.

Lastly, Part 3 offers the final list of proposed individual rights (*participation —such as voting, freedom of expression, privacy, protection of personal property, due process*) which would be used for a Model State moving into its future.

Audience: National Leadership Council

Content:

- 10 pages of Required Text
- 2 pages of Introduction (Abstract)
- 1 page Table of References
- 2 pages Front Matter

In consideration for the newly formed National Leadership Council, given their remote experience and scant knowledge of world events, it seemed appropriate to add numerous references for historical context which would facilitate their understanding.

SEC. 2 ANALYSIS (PART 1)

Our readings have focused on the historical factors that have led to influential documents, such as constitutions and landmark legal treatises: the Code of Hammurabi, the Magna Carta, and the Universal Declaration of Human Rights 1948 written by the United Nations.

CODE OF HAMMURABI CA 1760 BCE

The Code of Hammurabi, although it was written in ancient times and by a monarch to codify commonly understood laws into a text of legal knowledge, resulted from the historical conditions prevalent during the time in which it was written and shares similar contextual undertones—the relevance of which was that it addressed the broadening administrative stresses in an expanding territory and diversifying population which were contributing factors to the impetus to codification of the commonly held customs in Babylonian society. The Hammurabi, therefore, gave witness to the times and established an execution of law by the comprehensive enumeration of both the law and the precise punishment which (those with education—affording them with literacy), could appreciate and use to their advantage.

Nevertheless, the missing concern was a detailed legal system wherein a citizen would be able to contest or appeal a verdict. The law was flat and rigid—perhaps a function of the stage of development of the society. Moreover, accusations and verdicts were inexorable along with proof (evidence) and reasonable doubt not being genuine considerations. In the end, The Code of Hammurabi became a part of the Babylonian king's legacy, showing his initiative and leadership (which leveraged his right of office as interpreter and keeper of laws attributed to God), ultimately, for authority to govern the common people with them, largely at his sole discretion.

By comparison, Babylonia was a thriving community with a developed city life (far surpassing the island nation) that included commerce, trade, and property ownership. The laws of interest to constructing the nation's individual rights, therefore, could easily be drawn from the Hammurabi perspective on merchants, buying, selling, or owning property; and the rights that individuals have in trade relationships. The nation would benefit from cultivating its own agricultural crops to limit imports and transport costs for locally consumed food in addition to addressing rent or lease of property (to include fields used for agriculture) and inheritance as well as debt. Another practical and universal concern that the National Leadership Council shares with other countries would be the need to create legal tender or laws regarding acceptance in kind of some form of currency for trade.

[MAGNA CARTA 1215 - 1297AD](#)

Despite the historical influence of the documents known collectively as the Magna Carta (also referred to as the Magna Carta Liberatum or “Great Charter of Freedoms”), the actual implementation of the laws described was an ongoing process of legal definition that took close to 100 years to take effect. In fact, the 1215 version was unsigned. Essentially, the Magna Carta¹ sought to proclaim specific rights, legal procedures, and above all that, the notion that sovereign would be bound by the law. [King Henry I had (by choice), proclaimed that his powers as king were under the law in the 1100 Charter of Liberties. The notoriety of the Magna Carta was gained by the initiative coming from the people and claiming their right as the governed to have accountability from the sovereign.]

The Magna Carta also reformed the legal system regarding the purchase of freedom—paying fees to remove rulings from the royal court. This practice supported discriminatory punishment based on wealth and the privilege not to suffer through frequently unjust imprisonment if penalties could be paid off. A similar prohibition exists in the Eight Amendment of the U.S. Constitution that excessive bail will not be imposed. Ironically, we found in Principles of Constitutional Law that, “No specific case exists in which the Court has ruled that this provision is applicable to the states.”² State cases, however, have assumed frequently that the clause is applicable. These contradictory treatments from jurisdictions have led to increased dependence on the Constitution’s Fourteenth Amendment in this regard and the need for comparative analysis of provisions to gain a thorough and consistent sense for our Framers intentions which we have shared with the Leadership Council to demonstrate the importance of their continued work on their Constitution.

Lastly, the Magna Carta supported the concept that is known now as *habeas corpus*, the right to challenge unlawful imprisonment. *Habeas Corpus is a writ requiring a person to be brought before a judge or court, especially for investigation of a restraint of the person's liberty, which protects against illegal imprisonment.* The 1297 version of the Magna Carta continues on the statute books of England and Wales today.

[UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948 \(UNITED NATIONS\)](#)

The modern era has seen many new applications of law and efforts to imbue law with social values that would contribute to the improvement of societies facing radical, evolutionary development. Post-war efforts to ensure that the morally repugnant acts of torture and genocide would not be repeated (or, at least be acknowledged throughout the world as criminal acts against humanity) included the first (and subsequent) Universal Declaration of Human Rights 1948 written by the United Nations.

SEC. 3 UNDERPINNINGS (PART 2)

HISTORICAL BACKGROUND

The people of the island nation have had the unusual, perhaps fortunate, experience of evolving in an isolated socio-cultural and economic environment. Their lack of exposure to others can be viewed as a benefit or a disadvantage. The elders and leader must, with caution, proceed in their efforts to advance their society.

UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

The same is true of modern nations, working together, to find perspective on the great concerns and issues of the planet. International organizations, like the United Nations, have achieved many victories in common understanding, if not in actual cessation of hostilities around the world. Nevertheless, their deliberations while intended to be universally applicable, are non-binding and difficult to enforce as a body of law. The consequence is that reasonableness which has had beneficial impacts when used in judicial venues and applied at trial, even in international circles, requires the soundness of law along with the intentional subjugation of will (as stated in Wacks' Understanding Jurisprudence.³ on the many perspectives of the social contract which influenced jurisprudence) and applied to the state rather than the individual.

CODE OF HAMMURABI

The same had been true of the Hammurabi effect, a cyclical trend throughout history marked by power, and education, being held by royals and nobles that conversely saw those weakened through lack of power and knowledge having inadequate capability to acquire power (which was often viewed as a birthright), hence, having less than their empowered counterparts who ranked above them in society. The tragedy continued into the New World and (it would seem) into the 21st century. Observation of history established that patterns of economic exploitation cycle throughout history although the common saying has been that history repeats itself.

The breakthroughs of the international collective in the 20th century were the prerogative of the individual (perhaps small groups of like-minded individuals —some representing governments, or those of common circumstance) unlike the sovereign leading the effect to codify laws in the ancient times of the Hammurabi, as well as during the American colonial period that gave birth to national freedoms, as had the Magna Carta before them.

MAGNA CARTA

The early thirteen century in England had many political intricacies that caused wars in neighbouring regions. English King John used taxes, especially on the property of his barons, to finance his exploits. Yet, it is important to think beyond the practical need for money that the Kings used to finance their territory-motivated campaigns or the numerous crusades for moral

causes, such as spreading Christianity (much like the religious or patriotic undertones of the twentieth and early twenty-first century regarding the conflicts in the Middle East). As the Dark Ages gave way to the Enlightenment, scholars and philosophers sought to create understanding of the world, owing to the upsurge of independence from the former dominance of the Catholic Church into the splintered views of the Protestant reformation. For instance, we saw in our textbook that Wacks referred to Jeremy Bentham as “*the Luther of Jurisprudence*” for his copious writing which criticized the existing legal system and suggested wide sweeping reforms.

Furthermore, the Magna Carta was virtually resurrected and given new purpose when Sir Edward Coke used it to support his legal initiatives.⁴ Despite its historical significance and renown, Magna Carta may have remained legally inconsequential had it not been repurposed and reinterpreted by Sir Edward Coke in the early 17th century. His contributions in civil service and law made him a key contributor to legal reforms. For instance, Coke saw the acts of oppression that were used by the Stuart Kings as justification for the assertion that monarchs should abide by the common law. The Magna Carta was his weapon of precedence. Thus, in 1628, he made a proclamation to Parliament stating the universal application of common law. Hence, the 1689 English Bill of Rights fueled the stove of independence in the Colonies. Coke’s writings in the *Institutes of the Laws of England* influenced John Adams, Thomas Jefferson, and James Madison as law students.

In this regard, the Magna Carta’s insistence on accountability from the monarch was the manifestation of a trend during the period that saw more concentrated empowerment in the land-owners and the common people which represented a social evolution from the “great chain of being” that gave most of the power in a country to the sovereign, royals and military elite (like the Knights’ Templar). The trend toward accountability in government, initiated through the common voice of the people extends into our established, international organizations as well.

NATURAL LAW

The social contract which was contemplated by the great philosophers, for instance Jean-Jacques Rousseau (1712-78), of the Enlightenment carried high influence on early lawmakers around the world, especially in countries which sought to alleviate power centralized into institutions over elected bodies that were created and organized, thereby overshadowing natural law. Rousseau’s metaphysical outlook was evident and inspirational in the ideological fervour that served as a catalyst for the French Revolution, especially since he felt that the social contract represented an agreement between the individual and the community manifesting in “The General Will.” Rousseau said, “Each of us puts his person and all his power in common under the supreme

direction of the general will; and in a body we receive each member as an indivisible part of the whole.”

Thus Rousseau’s notorious proposition that man must ‘be forced to be free’ should be interpreted to mean that individuals surrender their free will to create popular sovereignty. Moreover, as the indivisible and inalienable ‘general will’ decides what is best for the community, should an individual descend into selfishness, he must be compelled to fall in line with the dictates of the community.”

which seems in line with the spirit of the preceding Mayflower Compact that placed community purpose over individual need, especially when matched with Rousseau’s commitment to *Participatory Democracy*, ironically, given his inclination to allow broad powers to the legislature if it acted to serve the ‘general will’ —this marked his democracy juxtaposed to a totalitarian inclination (Wacks, 2009, p. 24-25).

Evidently, others followed Hobbes’ darker view of the *state of nature* (a cold, lawless, and brutal existence) that required rigid laws to support a sense of order. This was true especially in his assumption that individual actions act ultimately self-serving (Wacks, 2009, p. 21). Documents like the Mayflower Compact written for the Plymouth Colony sought to align interests of individuals through agreement and commitment for the common good. His book *Leviathan* was burned at Oxford as seditious for pondering life in a state of nature without government. History moved forward from Hobbes into Rousseau’s metaphysical approach that saw the agreement between the individual and the community as the manifestation of “general will.” This shift in perception made the work on the Universal Declaration of Human Rights (1948) and its unanimous passage in the UN General Assembly possible.

LEGAL POSITIVISM

Taking another view, Finnis outlined some of the premises of the Mayflower Compact in his description of positivism citing the probable responses from Coleman and Leiter: self-interest frequently requiring “harmonization” of one’s behaviour with the official line, etc. although some of his thoughts were not shared or followed by Mandela (Wacks, 2009, p.52). History had seen misery, suffering, and despairs through many wars before the Universal Declaration of Human Rights and in the lives of the South Africans who suffered under to oppression of apartheid. This fact could be a sort of proof for the assertion by Auguste Comte and his Vienna Circle that we can know things only through observation coupled with observation requiring supplemental knowledge to be proven. In this manner, the logical positivists viewed metaphysics in a certain disdain, especially for their a priori propositions (Wacks, 2009, p.69-70). We must, therefore, find

credence in the legal positivist views from H.L.A. Hart's Positivism and the Separation of Law and Morals as quoted in Wacks: (1) *that laws are commands of human beings*, (2) *that there is no necessary connection between law and morals*, (3) *that analysis of legal concepts is worth pursuing (distinct from though not hostile to) sociological and historical enquiries and critical evaluation*, (4) *that a legal system is a 'closed logical system' in which correct decisions may be deduced from predetermined legal rules by logical means alone*, (5) *that moral judgments cannot be established, as statements of fact can, by rational argument, evidence, or proof (known as 'non-cognitivism') which describe the general leanings of Jeremy Bentham, John Austin, Hans Kelsen, and Hart without denoting full adherence or lack of discord.*

For instance, these prominent positivists did not consider it necessary to follow unjust or iniquitous laws only because they are laws. Kelsen went further as he thought that a legal 'ought' could not be directly considered with a moral 'ought' because the two had different areas of discourse. This thinking had obvious ramifications when the actions of states and governments, such as treatment of punishment for crime or human rights are considered. These quandaries on jurisprudence gave us the framework for working on individual rights for a Model State. Furthermore, the emergence of legal capitalism that coincided with 19th century capitalism (Wacks, 2009, p. 39). He noted that the rejection of "value-free" account of the law along with the idea that validity cannot be neutral and other concepts, such as authority and discretion. Finally, it was argued that rules, commands, or norms could not account for reality in its totality. These are the shortcomings that Fuller had outlined in his *Eight Desiderata* (kinds of legal excellence) toward which a system of rules might strive, and thereby, constituting an "inner morality of law" given as:

1. Generality
2. Promulgation
3. Non-retroactivity
4. Clarity
5. Non-contradiction
6. Possibility of compliance
7. Constancy
8. Congruence between declared rule and official action

These are the defining, moral hallmarks that we would offer the Model State to nurture their social and legal destiny.

INDIVIDUAL RIGHTS FOR THE ISLAND NATION (PART 3)

RECOMMENDATION 1: PARTICIPATION

Every citizen in a Model State would have the perpetual right to participate in the administration of the island via voting rights which would not be revoked for any reason.

RATIONALE: The only exception to **Participation** identified would involve elected positions in the Council or presidential office. Eligibility to serve in elected office is restricted to those who have had physical residency on the island within a period of five years preceding any election wherein candidacy is desired. Absences beyond sixty consecutive calendar days are disqualifying with the exception of prolonged illness of the person or a family member that required foreign medical care.

RECOMMENDATION 2: FREEDOM OF SELF-EXPRESSION

The people of the Model State would have the right to express their individual opinions, creativity, and interests without fear of prosecution or retribution from any government agency, institution, or corporate entity —public or private.

RATIONALE: The Model State will regard this **Right of Freedom of Expression** as comprising the rights covered within the U.S. Constitution First Amendment, called Freedom of Speech. We learned in Constitutional Law that the U.S. Supreme Court supported punishment of speech based on content if: (1) the speech incites imminent lawless action; (2) the speech sparks an automatic, violent response; (3) it represents true threats; (4) it contains obscenity, as defined by the Court; (5) child pornography; (6) it is considered as defamatory speech; and lastly, (7) speech in connection with commerce —such as false advertising, etc. (Nowak & Rotunda, 2007, p. 598); refer to excerpts in the article Instances of Freedom of Expression, excerpts from Guardian Timeline:

- *Magna Carta, viewed as the cornerstone of liberty in England. (1215)*
- *Bill of Rights grants ‘freedom of speech in Parliament’ after James II is overthrown and William and Mary installed as co-rulers. (1689)*
- *The Declaration of the Rights of Man, a fundamental document of the French Revolution, provides for freedom of speech. (1789)*
- *The First Amendment of the US Bill of Rights guarantees four freedoms: of religion, speech, the press, and the right to assemble. (1791)*
- *Justice Oliver Wendell Holmes outlined his belief in free speech: “The principle of free thought is not free thought for those who agree with us but freedom for the thought we hate.” (1929)*
- *The Universal Declaration of Human Rights is adopted virtually unanimously by the UN General Assembly. It urged member nations to promote human, civil, economic, and social rights, including freedom of expression and religion. (1948)*

RECOMMENDATION 3: PRIVACY

The new citizens would have the **Right To Privacy**, modeled after the hotly debated, implied right in the Fourteenth Amendment of the U.S. Constitution, will include a prohibition of acts

involving harm, pain, or duress taken against an individual's person (physical, mental or emotional) as a Malum in Se crime, therefore, making crimes of this sort immediately punishable by law and without categorical specification, i.e., not regarding privilege of rank, ageless and genderless.

RATIONALE: The constant challenge to clarify privacy laws in countries around the world, including the United States and Britain, has sparked intense debate among the Council members. The National Leadership Council want to the concept of privacy to be applied broadly as a right encompassing property (physical and intellectual), action, and thought to prevent incursion of individual right, especially from the government and social or religious institutions. **Malum in Se**, *a crime considered to be morally wrong*, designation represents the social code of the Model State and their ethical stance against government any form of intimidation or interpersonal strife in their society.

Furthermore, the Model State has had recommendations from their advisors of physical (surveillance suggested for new buildings under construction) and data security needs along with the proposed mass production of the crude oil. Additionally, surveillance security has been suggested for some of the new buildings under construction for government offices. Finally, the Model State would have universal Internet access for a population that has lived in remote isolation from more sophisticated and complex societies.

RECOMMENDATION 4: PERSONAL PROPERTY

Under the common law of the indigenous nation and therefore the future State, no one would take possession of another's property without that person's express consent.

RATIONALE: Under the law of the United States, larceny is defined as the act of intentionally taking and carrying away another's property, with the intent to deprive the rightful owner of possession permanently. Robbery is the same crime as larceny, however, force or threat of force is used to acquire the other's possessions. [We saw that robbery was treated sternly even in the days of Hammurabi.] The people of the small nation have been an open community of families that have co-existed for centuries. The nation's leaders, therefore, want to provide for the **Protection of Personal Property** based upon community principles and traditions which should to continue. Nonetheless, it will be important to document the common law, as was achieved with the Code of Hammurabi, to perpetuate common practice in society through legal documentation as well as communicate acceptable behaviour for any new or transient individuals in their society. Personal Property is a provision of the Fifth Amendment as well.

RECOMMENDATION 5: DUE PROCESS

Any citizen that is scrutinized or charged with a crime will have Due Process under the law in accordance with the Model State's legal system as well as access to legal counsel. This would include fair treatment such as a warrant provided to explain rights and requirements related to search and seizure in addition to standardized trial procedures to ensure uniform process and quality in execution of legal proceedings.

RATIONALE: The people have a tradition of fairness under tribal laws. As an extension of this tradition, the National Leadership Council appreciated the rights that are secured under the U.S. Bill of Rights which are found in the Fourth Amendment, Fifth Amendment, and Sixth Amendment of the U.S. Constitution which support Due Process under the law for the accused.

SEC. 4 CONCLUSION

The Model State embraced unanimously the desire to reflect the concept of the need for the *Rule of Law* within their society and constructed system of Jurisprudence. The importance is such that the Council would take measures to support the use of case law as precedence to bolster the codified common law over static legislation for their future legal system.

WHERE THE NATION IS NOW ...

The people are at a critical juncture in their history. It is incumbent upon the elders to review the trials that other countries have experienced before making their decision on the form of government, the rights of individuals, and the judicial system. This paper addressed the five primary rights and freedoms of individuals which are valued by Western societies.

WHERE THE NATION WANTS TO GO AS A SOCIETY AND STATE ...

English history was chronicled in the works of Shakespeare, especially in Richard II and Richard III. The idea of England was a composite from the conquered ancient societies of the British Isles. The challenge was to combine them and bring them together under a common flag with common purpose. The same is true of this small nation given the disparate cultures (despite common heritage and language among the islands) and insularity from the remoteness and separation by water.

HOW PROPOSED INDIVIDUAL RIGHTS WILL SUPPORT OBJECTIVES...

Ultimately, the National Leadership Council will have evaluated these individual rights and consider two others related to the need for **Equal Protection** (Nowak & Rotunda, 2007, p. 372-578). The exercise of finding, writing, and clarifying comprehensive, meaningful law suited to the dynamics of a growing society is unending endeavour.

¹ *Magna Carta*. (n.d.). *The Columbia Electronic Encyclopedia, Sixth Edition*. Retrieved March 08, 2010, from: <http://www.answers.com/topic/magna-carta>

² Nowak, John E. & Rotunda, Ronald D. (2007). *Principles of Constitutional Law*, 3rd ed. Saint Paul: West.

³ Wacks, Raymond. (2009). *Understanding Jurisprudence: An Introduction to Legal Theory*, 2nd ed. New York: Oxford University Press.

⁴ *Magna Carta* (n.d.). *National Archives and Records Administration*. Retrieved March 09, 2010 from: http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html