

State Immunity Versus Human Dignity: MK-Ultra Project— Was It an Implied Waiver of Human Dignity for the Benefit of State Immunity?

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ABSTRACT

While exploring the ethical and legal implications of state immunity in relation to the notorious MK-Ultra project conducted in Montreal, which involved unethical experiments on unwitting patients, this paper argues that the Canadian *State Immunity Act (SIA)* has obstructed justice, the grasp of human dignity and the hope for implementing historical responsibility for past wrongs. It explores a class action in Montreal and discusses how courts have interpreted the Canadian *SIA*, often prioritizing state immunity over victims' rights. It critiques this prioritization leads to a sacrifice of human dignity and accountability for state actions. While calling for a re-evaluation of the state immunity doctrine, this paper advocates for exceptions in cases of gross human rights abuses to uphold human dignity and justice. To encounter the past indignities of history, it inquires whether there would be a legal guarantee that a foreign state is unable to assert judicial immunity in instances of grave human rights abuses, thereby allowing domestic courts to exercise jurisdiction over such matters. This view concludes with a reflection on the need for historical and legal accountability for past indignities to prevent human rights abuses in future by ensuring that human dignity remains central in legal considerations.

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*"The best safeguard against abuses in the future is
a complete public accounting of the abuses of the past."*¹

INTRODUCTION

This paper will examine how the interpretation or adjudication of the Canadian *State Immunity Act* (SIA) in the recent judgment of the Supreme Court of Canada has affected the pursuit of justice for victims of the MK-Ultra project and in what ways the historical context of the MK-Ultra project challenges the efficacy and ethical implications of state immunity in Canada. In this introduction, I briefly explain the historical background of the MK-Ultra project, its funding, and the contribution of Dr. Donald Ewen Cameron. Afterwards, in Part I, I examine case studies as a class action in Quebec for affected victims. The concept of state immunity is also addressed in light of precedent cases in Part II. Finally, the last parts critically review the place and importance of human dignity in the MK-Ultra project.

¹ US, *Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Committee on Human Resources United States Senate*, 95th Cong, Stock No 052-070-04357-1 (Washington, DC: US Government Printing Office, 1977) at 3 [*MKULTRA Joint Hearing*].

A. *Brief Historical Overview of the MK-Ultra Project*

In the aftermath of World War II, the US Central Intelligence Agency (CIA) had been inquisitive about behavioural modification or mental manipulation methods in the interest of national security. The CIA was believed to be focused on pursuing and implementing these methods to counter Soviet espionage, specifically to extract confessions from spies or defectors.² At that time, the CIA assumed that the communist regime or Russian practices employed specific methods of behaviour manipulation or mind control techniques.³ Particularly, two incidents perplexed the US community: First, during the trial of Hungarian cardinal József Mindszenty, who was apprehended in 1948 and brought to trial in 1949, it was asserted that he seemed distracted, moved robotically, and confessed to crimes that had been alleged.⁴ Following the trial, Allen Dulles, then CIA Deputy Director for Plans, assembled a team of experts “[t]o apply special methods of interrogation for the purpose of evaluation of Russian practices” on 14 June 1949.⁵ Secondly, in 1950, US prisoners of war who were captured in Korea reported that “the [United States] had used biological weapons in Korea,” and this claim took the American public back

² Don Weitz, “A Psychiatric Holocaust: Canadian Government, CIA Supported Experimentation in Two Montreal institutions” (1986) 6:1 *Phoenix Rising* 8 at 9.

³ Torsten Passie & Udo Benzenhöfer, “MDA, MDMA, and the Other ‘Mescaline-Like’ Substances in the US Military’s Search for a Truth Drug (1940s to 1960s)” (2018) 10:1 *Drug Testing & Analysis* 72 at 74.

⁴ *Ibid.*

⁵ *Ibid.*

once again and triggered the conclusion that specific behaviour manipulation techniques had been implemented on them.⁶

Thus, the CIA established some clandestine programs under the tenure of directors Dulles and Richard Helms, including “BLUEBIRD,” which started in April 1950; “ARTICHOKE,” which began in August 1951; “MK-DELTA”; and “MK-ULTRA,” all of which dealt with brainwashing and mind control experiments.⁷ Subsequently, on 13 April 1953, the MK-Ultra project was authorized by the CIA with a diplomatic cover and encompassed all projects and additional research into “[r]adiation, electroshock, various fields of psychology, psychiatry, sociology, and anthropology, graphology and paramilitary devices and materials,” and the primary objective of MK-Ultra, according to Helms, was to “... investigate the development of a chemical material that causes a reversible non-toxic aberrant mental state ... This material could potentially aid in discrediting individuals, eliciting information, and implanting suggestions and other forms of mental control.”⁸ Additionally, the CIA decided to hire chemist Sidney Gottlieb from outside the agency to direct this project. Although Gottlieb was the child of a Jewish immigrant family, he carried out numerous inhumane experiments imitating the same psychological tactics and

⁶ *Ibid.*

⁷ Weitz, *supra* note 2 at 9.

⁸ Passie & Benzenhöfer, *supra* note 3 at 74.

mind-altering drugs of Nazi concentration camps.⁹ As the CIA not only relied on those same experiments applying mescaline (similar to the Dachau concentration camp) but also employed the vivisectionists and Nazi doctors who had worked in Japan and Nazi concentration camps to elucidate their findings, thereby enhancing the research. The MK-Ultra project was, therefore, essentially seen “[a]s a continuation of work that began in Japanese and Nazi concentration camps” and is known as the CIA project aimed at finding the secret of mind control to figure out how they could create “[a] truth serum, an amnesiac, a substance or portion that would make a person act after being programmed.”¹⁰ These experiments, as MK-Ultra subprojects, were carried out in prisons and involved the administration of LSD or other clandestine drugs. Experiments were conducted not only in the United States, but also in other countries such as Japan, Germany, and the Philippines. Subjects, more often than not, were African-American inmates at federal prisons or in juvenile detention centres.¹¹

⁹ Watson Institute for International and Public Affairs, “Stephen Kinzer — Poisoner in Chief: Sidney Gottlieb and the CIA Search for Mind Control” (2 October 2019), online (video): <[youtube.com/watch?v=uX4ksoSCoeE](https://www.youtube.com/watch?v=uX4ksoSCoeE)>. See also NPR, “The CIA’s Secret Quest For Mind Control: Torture, LSD and a ‘Poisoner In Chief’” (9 September 2019), online (podcast): <[npr.org/2019/09/09/758989641/the-cias-secret-quest-for-mind-control-torture-lsd-and-a-poisoner-in-chief](https://www.npr.org/2019/09/09/758989641/the-cias-secret-quest-for-mind-control-torture-lsd-and-a-poisoner-in-chief)>.

¹⁰ Watson Institute for International and Public Affairs, *supra* note 9.

¹¹ Stephen Kinzer, *Poisoner in Chief: Sidney Gottlieb and the CIA Search for Mind Control*, 1st ed (New York: Henry Holt and Company, 2019) at 94–97.

B. Montreal Experiments led by Dr. Donald Ewen Cameron

In 1943, Dr. Donald Ewen Cameron was appointed professor of psychiatry at McGill University and employed as director of the newly established Allan Memorial Institute until his retirement in 1964. He was one of the psychiatrists present at the Nuremberg trials, which were held in Germany from 1945 to 1946. During the Nuremberg trials, he assessed the mental capacity of the accused (especially Rudolf Hess) and determined that those experiments carried out in concentration camps were atrocious,¹² and the International Military Tribunal found former Nazi leaders guilty of war crimes. However, Dr. Cameron has also been alleged to have conducted extreme mind control or brainwashing experimentation on “unwitting” patients, also known as the “Montreal Experiments” or MK-Ultra project in Canada, carried out at the Allan Memorial Institute (as a psychiatric department of the Royal Victoria Hospital) in Montreal between the 1950s and 1960s. This historical contradiction raises some questions: “[H]ow could a psychiatrist present at the Nuremberg trials, who condemned the entire German people for allowing such experiments to happen, become involved in such experiments” and conduct those

¹² Jordan Torbay, “The Work of Donald Ewen Cameron: From Psychic Driving to MK Ultra” (2023) 34:3 History Psychiatry 320 at 321–22.

similar inhumane methods?¹³ How did a psychiatrist, on the one hand, attend the Nuremberg trials by concluding that those experiments were inhumane, yet on the other hand, within approximately a decade, carry out the same experiments in his country? Did each victimization engender its savagery, or was it simply a recurrence in history?

Unfortunately, Dr. Cameron's experiments bear numerous similarities to the World War II experiments that were prosecuted at the Nuremberg trials. For instance, the specific techniques alleged were the methods of depatterning and repatterning the brain, which included drug-induced sleep/coma, inclusive electroconvulsive therapy or massive electro-shocks, "psychic driving," sensory deprivation, the administration of barbiturates, the use of controversial chemicals such as LSD, and medications to suppress nerve functionality and activation, thus resulting in permanent injury.¹⁴ These experiments have been alleged to erase patients' memories and reduce them to childlike or unconcerned states.¹⁵ This kind of erasure has led them to be subjected to some sort of assimilation or made them lose their identity, which can even be considered modern-day torture techniques. Although it is claimed that Dr. Cameron commenced these experiments to treat

¹³ *Ibid* at 322.

¹⁴ Canada, Department of Justice, *Opinion of George Cooper, QC, Regarding Canadian Government Funding of the Allan Memorial Institute in the 1950s and 1960s*, by George Cooper, Catalogue No J2-63/1986 (Ottawa: DOJ, 1986) at 20.

¹⁵ *Ibid* at 16–17.

schizophrenia and there is no evidence demonstrating that he knew of the CIA's funding and interest in this project,¹⁶ it has been strongly argued that Gottlieb and Helms had already destroyed all records and files about the MK-Ultra project on purpose before they left the agency in 1973,¹⁷ thereby leading to nothing being revealed.

C. *Funding by the CIA*

Allegations have been made that the MK-Ultra project poses a risk of covert intelligence involvement in academic research, urging a historical blind spot regarding unethical and illegal human experiments on unwitting patients with the contribution of the CIA's extensive influence and controversial funding.¹⁸ It is argued that "MK-Ultra funds encouraged scholars to contribute to their study of brainwashing and coercive interrogation, supposedly benefiting military and intelligence branches by helping them to train spies and troops to better resist interrogation techniques."¹⁹ During the US Senate hearings in 1977, 149 MK-Ultra subprojects were revealed, with numerous of them seeming to be associated with

¹⁶ Torbay, *supra* note 12 at 329.

¹⁷ *MKULTRA Joint Hearing*, *supra* note 1 at 83–84. See also Kinzer, *supra* note 11 at 2.

¹⁸ David H Price, "Buying a Piece of Anthropology Part 1: Human Ecology and Unwitting Anthropological Research for the CIA" (2007) 23:3 *Anthropology Today* 8 at 8–9.

¹⁹ David H Price, "Buying a Piece of Anthropology Part 2: The CIA and Our Tortured Past" (2007) 23:5 *Anthropology Today* 17 at 18 [Price, "Our Tortured Past"].

research on behavioural modification and drug acquisition. These subprojects encompassed forty-four colleges and universities, fifteen research organizations and pharmaceutical companies, twelve hospitals, as well as three penal institutions.²⁰ It was revealed that the CIA established the Society for the Investigation of Human Ecology (HEC) as a means of concealing its funding sources, thereby facilitating greater academic autonomy and fostering relationships with scientists who lack confidential clearance.²¹ This allowed the execution of research while ensuring that neither individuals nor institutions were explicitly associated with the CIA, and financial resources were allocated to individuals and institutions via an impartial intermediary, enabling experiments that could be conducted and disseminated in a manner deemed appropriate while maintaining a separation from direct association with the CIA.²²

When it comes to the Montreal Experiments, a further question can be raised: Did the CIA lead, guide, or influence Dr. Cameron's research in a way that these treatments given to patients had an inner and hidden purpose to just conduct an experiment on unaware patients' bodies instead of treating them? To say the least, did these experiments induce any medical intention of treating

²⁰ *MKULTRA Joint Hearing*, *supra* note 1 at 5–7.

²¹ Tani M Linville, "Project MKULTRA and the Search for Mind Control: Clandestine Use of LSD Within the CIA" (2016) Cedarville University, History Capstone Research Paper No 6 at 7–8, online: <digitalcommons.cedarville.edu/history_capstones/6>.

²² *Ibid* at 7–8.

patients, or were they just conducted with the purpose of exploring behavioural and mental manipulation? What was clear is that the CIA was involved with Dr. Cameron's psychic-driving research at the Allan Memorial Institute, and he was funded by the CIA under the auspices of the HEC grant money to conduct this research as MK-Ultra Subproject 68.²³ However, no conclusion could have been drawn as to which roles or interferences the CIA played in these experiments by promoting or commanding treatments, as there was no permission to access the CIA file materials,²⁴ or "the CIA destroyed most of its MK-Ultra records in 1972."²⁵ Whereas the CIA conceded its participation in this grant or funding, they denied any kind of instigating or controlling of Dr. Cameron's research.²⁶ Additionally, it is unclear whether this sort of funding was intentional or by mistake, despite the fact that there was an unwritten agreement between the Defence Research Board of Canada and the US defence departments regarding classified defence-related research, and specifically, neither government would provide funding for research conducted in the other country.²⁷ Furthermore, it is asserted that there has not

²³ Although George Cooper only once indicated in his report that the Montreal Experiments were "MK Ultra Subproject 38" (see Department of Justice, *supra* note 14 at 101), according to the invoices, letters, certifications, or other official correspondence, mostly dated 1957, that bear the signature of Sidney Gottlieb and are available in the class action file, those experiments conducted by Dr. Cameron were designated as "MK-Ultra Subproject 68" instead of 38. See also Weitz, *supra* note 2 at 39.

²⁴ Department of Justice, *supra* note 14 at 95–96.

²⁵ Price, "Our Tortured Past", *supra* note 19 at 18.

²⁶ Department of Justice, *supra* note 14 at 103.

²⁷ *Ibid* at 97–98.

been certain knowledge or evidence proving whether Dr. Cameron or his staff were aware of the CIA's funding contribution to this project or whether they remained unaware of the US government's interest in it during the experiments²⁸.

Based on those questions, it is true to say that the CIA created the Human Ecology Fund to discreetly channel money to research institutions, bypassing ethical concerns and legal procedures for so-called protecting national interests, and the MK-Ultra project flagrantly violated numerous ethical concerns and legal codes, including the Hippocratic Oath, the US constitution, the Nuremberg Code, and the *United Nations Declaration of Human Rights*, as it was a lack of informed consent and regard for patient well-being.²⁹ This intentional ignorance was also blatantly disregarded in the Nuremberg Code, which emphasizes voluntary consent and the necessity of conducting beneficial experiments. It seems fair to say that Dr. Cameron, as a psychiatrist who attended the Nuremberg trials, should have known that carrying out such a massive electroshock conducted in the depatterning process could have resulted in severe brain damage, thus not treating or helping patients get well. However, the legal discourse that I will dwell on is not going to be the responsibility of Dr. Cameron's medical ethics and methods. Instead, I am seeking what sort of legal liability of governments is to be addressed to elucidate

²⁸ *Ibid* at 104–13. See also Torbay, *supra* note 12 at 329.

²⁹ Linville, *supra* note 21 at 14.

what legal framework provides patients with compensation for damages caused by this project. I will also investigate what kind of response was given by judicial authorities to discharge the legal and moral responsibility or whether the government omitted the duty of respecting human dignity when state immunity has taken precedence over it.

I. A CLASS ACTION FOR AFFECTED INDIVIDUALS

A. Tanny v. Royal Victoria Hospital

Due to Cameron's experiments on uninformed psychiatric patients, victims suffered from serious amnesia, permanent brain damage, retrograde amnesia, and so forth, thereby mostly lacking basic living skills. Therefore, in 2019, Julie Tanny, acting as an plaintiff and appellant, brought a class action on behalf of "[a]ll persons who underwent depatterning treatment at the Allan Memorial Institute in Montreal, Quebec, between 1948 and 1964 using Donald Ewen Cameron's methods (the 'Montreal Experiments') and their successors, assigns, family members, and dependents or any other group to be determined by the Court"³⁰ against the United States Attorney General, Royal Victoria Hospital, McGill University, and the Attorney General of Canada. She alleged that none of the patients gave informed consent, as

³⁰ *Tanny v Royal Victoria Hospital*, 2022 QCCS 3258 at para 3 [*Tanny* QCCS].

they assumed they were participating in medically sound therapy rather than being subjected to brainwashing or mind-control experimentation.³¹ The plaintiff asserted that the *SIA* codified restrictive immunity, not absolute,³² which should be applied retroactively.³³ Furthermore, she argued that the *SIA* is retrospective, meaning that it will apply now and in the future by imposing new consequences.³⁴ Therefore, according to the applicant, when examining the date, the time of bringing a class action should be considered, not the time of conducting those experiments.³⁵ She also argued that these experiments resulted in bodily injury, which is one of the exceptions to the *SIA*,³⁶ and they were a commercial activity inherently because of the confidential funding given by the HEC, which is the other exception of the *SIA* by involving illegal and classified activities.³⁷

However, the United States pleaded that the Montreal Experiments were part of the Cold War security interests conducted by the CIA and that the *SIA* provided immunity to a foreign state for these acts that occurred before 1982, when the *SIA* was enacted.³⁸ Accordingly, it was claimed that the *SIA* does not apply

³¹ *Ibid* at para 5.

³² *Ibid* at para 19.

³³ *Ibid* at para 19.

³⁴ *Ibid* at para 48.

³⁵ *Ibid* at para 50.

³⁶ *State Immunity Act*, RSC 1985, c S-18 [*SIA*]. Under the *SIA*, a foreign state is not immune from the jurisdiction of a country in any proceedings that relate to any death or personal or bodily injury or any damage to or loss of property that occurs in Canada (see *ibid*, s 6).

³⁷ *Tanny QCCS*, *supra* note 30 at para 19.

³⁸ *Ibid* at paras 15–17.

retroactively,³⁹ which allows the applicability of the act for only the date when the cause of action arose.⁴⁰ Given these claims, the Superior Court decided that there is no overarching retroactive provision or language in the *SIA* that would allow it to function backward from a previous date. When taken as a whole, its provisions do not suggest that the legislator intended for them to have a blanket retroactive effect.⁴¹ Following the Supreme Court's precedent case in 2012,⁴² the Superior Court was of the opinion that "[t]he retrospective application of statutory provisions is exceptional and that not all procedural provisions apply retrospectively,"⁴³ thereby the analysis should be based on determining whether the provisions affect substantive rights, rather than whether they are procedural or substantive.

While the effects of those experiments' harms have persisted, the Superior Court considered that damage allegations, no matter what physical, psychological, or behavioural they are, may be relevant to the other judicial debate, but not to the applicability of the *SIA*. The court also declared that common law immunity for foreign states remains applicable to cases arising before the enactment of the *SIA*.⁴⁴ Contrary to what the plaintiff claims, the Superior Court did not accept that the HEC

³⁹ *Ibid* at para 37.

⁴⁰ *Ibid* at para 38.

⁴¹ *Ibid* at para 45.

⁴² "Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately" (see *R v Dineley*, 2012 SCC 58 at para 11 [footnotes omitted]).

⁴³ *Tanny QCCS*, *supra* note 30 at para 54.

⁴⁴ *Ibid* at para 66.

was a third-party private research fund; instead, the CIA set up this fund in 1955 as a classified facade organization to fund the research.⁴⁵ As the nature of this funding was not commercial, section 5 of the *SIA*, as an exception for commercial activities, was not applicable in the present case. To conclude, the Superior Court rejected the appellant's claims about the illegal and classified character of those experiments as an exception to the immunity and concluded that the appellant's other questions or derivative issues about the rights of family members of victims of the Montreal Experiments will not be examined, as the United States benefited from immunity.⁴⁶ Finally, the Superior Court upheld the United States' immunity claims, preventing the class action from proceeding.

B. Tanny v. Procureur Général des États-Unis

The case was appealed to the Quebec Court of Appeal. Even though the applicant believed that the trial judge erred in granting the United States state immunity at an early stage, the Superior Court was of the opinion that foreign state immunity from jurisdiction is part of public order and that a decision needs to be made immediately or in the preliminary stage, not the later stage of proceedings.⁴⁷

⁴⁵ *Ibid* at para 77.

⁴⁶ *Ibid* at para 102.

⁴⁷ *Ibid* at para 30–32.

The appellant asserted that if the Superior Court had decided the immunity issue on the merits, she could have illustrated when “[t]he cause of action had crystalized for the class members in 2017–2018”;⁴⁸ however, the Court of Appeal believed that statutory immunity should be resolved before the parties proceed further, as this issue pertains to the jurisdiction and public order because the appellant’s claim about whether a commercial activity is an exception to the *SIA* inherently refers to the judge on the merits.⁴⁹ According to the appellant, class members’ right of action stemmed from after the *SIA* entered into force in 1982 because three different time frames need to be explained: the first period is when those experiments were conducted between 1957 and 1960, the second period is when the damages appeared as many patients suffered from long-standing brain damage over many years, and the third period is when class members discovered the facts and established the causal connection between those experiments and victims’ damages.⁵⁰ However, both the Court of Appeal and the respondent found this time difference unacceptable and believed that the appellant confused them with the prescription issue.⁵¹ As a result, the Court of Appeal found that section 6 of the *SIA*, which is an exception to state immunity by making the foreign state responsible,

⁴⁸ *Tanny v Procureur général des États-Unis*, 2023 QCCA 1234 at para 22 [*Tanny* QCCA].

⁴⁹ *Ibid* at paras 16, 20, 23.

⁵⁰ *Ibid* at para 31.

⁵¹ *Ibid* at paras 33–34.

was not applicable in the case at bar because those experiments were prior to the *SIA*'s enactment in 1982.

Considering the retroactive and retrospective effect of the *SIA* and whether it has an immediate effect, the appellant argues that the *SIA* is not retroactive, but “has retrospective effect, since it is of a procedural nature and jurisdiction-granting.”⁵² However, the respondent argues that “the *SIA* is not merely procedural, but also affects substantive rights”⁵³ and considers that if Parliament had intended that this immunity exception concerning personal and bodily injury can apply retroactively, they could have added a specific time limit or determined a retroactive frame about when this statute could be applied, as was done in the previous amendment for the exception of terrorism activity.⁵⁴ The Court of Appeal considered that there is no implicit or explicit intent about the retroactive or retrospective effect of the *SIA* providing the exception to a foreign state for the personnel or bodily injury,⁵⁵ and concluded that the *SIA* is not purely procedural, thus making this statute not immediately applicable.⁵⁶ According to the court,

⁵² *Ibid* at paras 35, 44.

⁵³ *Ibid* at para 36.

⁵⁴ *Ibid* at para 36. For the exception of terrorist activities, see *SIA*, *supra* note 36. Under the *SIA*, a foreign state is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985 (see *ibid*, s 6.1).

⁵⁵ *Tanny QCCA*, *supra* note 48 at para 45.

⁵⁶ *Ibid* at para 51. The Supreme Court seems to rely on this statement: “I will merely observe that the *SIA* is not solely procedural in nature” (see *Kuwait Airways Corp v Iraq*, 2010 SCC 40 at para 12 [*Kuwait Airways*]).

section 6 has already induced such nuance or instance regarding a retrospective effect of the provision for terrorism activities. This provision stemmed from the Air India bombing that occurred on 23 June 1985, thus leading to a legislative move through determining a time frame in the *SIA* explicitly (namely, for the terror crimes committed “on or after January 1985”) and bringing a retrospective scope into the terrorist activities; however, the court accepted that Parliament had not preferred to amend the exception of personnel and bodily injury in the *SIA* even though it could have carried the weight to do it.⁵⁷

Additionally, as for whether the funding of the CIA, namely the Human Ecology Fund, was a commercial activity or not, the Court of Appeal believed that those experiments conducted by the CIA relied on the Cold War national security concerns in the aftermath of World War II; thereby, this fund, no matter what tool was used, was not commercial in nature and purpose.⁵⁸ The court did not have a need for examining the characteristic feature of absolute or restrictive immunity itself.⁵⁹ As a result, the Court of Appeal concluded that the exception of the *SIA* for the personnel and bodily injury did not have a retroactive or retrospective effect since the facts occurred before the *SIA*’s enactment in 1982 and rejected the plaintiff’s arguments asserting that the *SIA* has a procedural and immediately

⁵⁷ *Tanny QCCA, supra* note 48 at para 48.

⁵⁸ *Ibid* at paras 59–61.

⁵⁹ *Ibid* at paras 59–61.

applicable feature. In the instant case, the Supreme Court of Canada also dismissed the applicant's claims on the 30 May 2024,⁶⁰ thus preventing the class action regarding the MK-Ultra project from proceeding.

II. STATE IMMUNITY

A. *The Concept of Absolute and Restrictive Immunity of the SIA*

Should a foreign state have an absolute right to immunity? The answer to this question was given by the US Supreme Court, asserting that “[F]oreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement.”⁶¹ The US Supreme Court decided that “[P]rior to 1976 foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts, ... but they had no ‘right’ to such immunity.”⁶² Thus, state immunity was interpreted as a diplomatic gesture instead of an obligation because it stemmed from the principles of comity and reciprocity.⁶³

⁶⁰ *Tanny v United States Attorney General*, 2024 SCC 48150.

⁶¹ *Austria v Altmann*, 541 US 677 at 696 (2004) [*Altmann*]. The applicant Altmann sued Austria in the United States to compensate or recover her uncle's painting that had been stolen by the Nazis and then confiscated by the Austrian government after World War II. Austria made a request to be granted an absolute immunity from this situation carried out in 1940s. However, the US Supreme Court applied the *Foreign Sovereign Immunities Act* (Pub L No 94-583, 90 Stat 2891 (codified in scattered sections of 28 USC) (1976) [*FSIA*]) and ruled to return the painting to the applicant.

⁶² *Altmann*, *supra* note 61 at 16. Note that the *FSIA* (*supra* note 61) came into force in the United States in 1976.

⁶³ *Re Canada Labour Code*, [1992] 2 SCR 50 at 99, 1992 CanLII 54 (SCC).

In the realm of interstate relations, recognizing the autonomy of states has been a cornerstone of public international law, and initially, this privilege was entirely a protective shield for a foreign state from the host state's judicial authority.⁶⁴

Sovereignty ensures a state's capacity to exert control over individuals and occurrences within its territory free from excessive external intrusion. Recognizing that no state is superior to any other in the international order is the essence of equality in international law.⁶⁵ Endorsement of state equality asserts that "to forestall factual inequities from leading to injustice, to ensure that one state should not be disadvantaged in relation to another state, and to preclude the possibility of powerful states dictating their will to weaker nations."⁶⁶ Even though state immunity fundamentally serves as a foundational principle governing relations among foreign states and ensures that sovereign states and the global order adhere to the principles of sovereignty and equality,⁶⁷ state sovereignty is not absolute; however, the only constraints on it are those that the state consents to or that are derived from customary or conventional international law. Some of these limitations have resulted from recent advancements in international criminal law,

⁶⁴ *Kuwait Airways*, *supra* note 56 at para 13.

⁶⁵ *Schreiber v Canada (AG)*, 2002 SCC 62 at para 13.

⁶⁶ Vratislav Pechota, "Equality: Political Justice in an Unequal World" in Ronald St J Macdonald & Douglas M Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, Developments in International Law, vol 6 (The Hague: Martinus Nijhoff, 1983) 453 at 454, cited in *R v Hape*, 2007 SCC 26 at para 44 [*Hape*].

⁶⁷ François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010) at 236.

international human rights law, and international humanitarian law, particularly in relation to crimes against humanity.⁶⁸

In the wake of World War II, the Nuremberg International Military Tribunal paved the way for a new approach to emerging state immunity's restriction in not only criminal proceedings, but also civil suits brought against states.⁶⁹ In this regard, the principle of absolute immunity has been decided to change and proceed to allow appeal in some cases regarding purely commercial activity or transaction⁷⁰. When it comes to resolving sovereign immunity claims, it has been crucial to make clear the rules that judges must follow and to do away with political participation. Nevertheless, because Canada followed the absolute immunity until the *SIA* was passed in 1982, "[l]ower courts were not insensitive to the rise of the restrictive doctrine in other jurisdictions."⁷¹ As sovereign immunity at common law was never literally absolute,⁷² there had been a shift from absolute immunity to restrictive immunity. Henceforth, notwithstanding the commitment to a stringent principle of immunity, domestic courts admitted specific exceptions wherein state immunity can be revoked, namely, "[i]n respect of (1) land situate in the host state, (2) trust funds or moneys lodged for the payment of creditors, (3) debts incurred for

⁶⁸ *Hape*, *supra* note 66 at para 43.

⁶⁹ *Kazemi Estate v Iran*, 2014 CanLII 62 at para 40 (SCC) [*Kazemi*].

⁷⁰ *Zodiak International Products Inc v Poland* (1977), 81 DLR (3d) 656 at 663, 1977 CanLII 1851 (QCCA).

⁷¹ *Larocque*, *supra* note 67 at 242.

⁷² *Ibid* at 240.

service of its property in the host state and (4) commercial transactions entered into with a trader in the host state.”⁷³ Considering those factors, it is fair to say that this gradual shift to restrictive immunity doctrine has relied on growing international trade and states’ functions regarding private interests. Therefore, it had been a gradual transformation into more restrictive immunity for shaping the common law in Canada by enacting the *SIA* as federal legislation.⁷⁴ The shift in public international law towards a more restrictive theory of state immunity reflects the increasing complexity of state functions and the challenges presented by relations with foreign states, international organizations, and private interests. The *SIA* embodies this much more restrictive theory of state immunity.⁷⁵

In the case at hand, the Court of Appeal decided that the common law in force prior to the enactment of the *SIA* was absolute immunity, not restrictive, and therefore the US government was immune. However, the court should have refrained from conducting this analysis and instead apply the *SIA* retrospectively. Although the United States’ participation in the Montreal Experiments occurred from 1957 to 1960, this period does not coincide with the crystallization of the

⁷³ *Jaffe v Miller*, [1993] OJ No 1377 at para 13, 1993 CanLII 8468 (ONCA) [*Jaffe v Miller*].

⁷⁴ There is a common time period between the enactment of state immunity legislation. For instance, the Canadian *SIA* (*supra* note 36) was enacted in 1982 and derived from similar legislation: the United States’ *FSIA* (*supra* note 61) that entered into force in 1976, and the United Kingdom’s *State Immunity Act 1978* (UK), which came into force two years after. See also *European Convention on State Immunity*, 16 May 1972, 1495 UNTS 1495 (entered into force 11 June 1976).

⁷⁵ *Kuwait Airways*, *supra* note 56 at para 13.

cause of action (as the cause of action did not arise until 2017–2018, at which point the injured parties recognized the fault, damages, and causal connection.)

Furthermore, in the *Venne v. Democratic Republic of the Congo* judgment, the Quebec Court of Appeal vehemently repudiated the doctrine of absolute immunity:

In my opinion it is time our Courts repudiated the theory of absolute sovereign immunity as outdated and inapplicable to today's conditions. This theory may have been workable in the past when Government acts were more limited in scope. It may have been an apt theory when foreign sovereigns were in many cases personal despots. However, today, instead of starting from the principle that every sovereign State enjoys jurisdictional immunity unless the other party can demonstrate some established exception to this rule, I believe we should reverse the process. Sovereign immunity is a derogation from the general rule of jurisdiction. Any attorney seeking immunity from jurisdiction on behalf of a sovereign State should be called upon to show, to the Court's satisfaction, that there is some valid basis for granting such immunity. Mere proof that the party seeking immunity is a sovereign State or any agency thereof and the invocation of the doctrine of absolute sovereign immunity is no longer sufficient.⁷⁶

⁷⁶ (1968), 5 DLR (3d) 128 at 138, 1968 CanLII 764 (QCCA) [*Venne* QCCA].

By the same token, the Supreme Court, in deciding *Gouvernement de la République Démocratique du Congo v. Venne*, commented on the legitimacy of absolute immunity:

[I]t is clear that the absolute doctrine is not today part of the domestic law “de tous les pays civilisés”. Second, neither the independence nor the dignity of States, nor international comity require vindication through a doctrine of absolute immunity. Independence as a support for absolute immunity is inconsistent with the absolute territorial jurisdiction of the host State.⁷⁷

As it is seen, although precedent cases deviated from absolute immunity in Canada, in the case at bar, the Court of Appeal decided that the US government benefits from absolute immunity. To my understanding, even with the application of the stare decisis principle to the current case, it is no longer feasible to assert that the doctrine of immunity derived from the sovereignty of a foreign state remains absolute in Canada or the province of Quebec.⁷⁸

B. Relevant Exception of the SIA: Death or Any Personal or Bodily Injury

In the present case, the Court of Appeal decided that the CIA funding, also known as the HEC, did not have any commercial activity in nature because of its

⁷⁷ [1971] SCR 997 at 1016, 1971 CanLII 145 (SCC).

⁷⁸ See *Venne QCCA*, *supra* note 76 at 142.

national security purpose. Then, it has been pointed out that there is no basis for restrictive immunity under the common law foreign state doctrine of immunity in Canada before the *SIA* was enacted, specifically in civil claims for death and personal or bodily injury. It resulted in the Supreme Court of Canada approving that the United States benefits from absolute immunity for those experiments. Although there is no evidence proving that the US government had been given any permission, either explicitly or implicitly, by the Canadian government to carry out those experiments in Allan Memorial Hospital at the time when the Montreal Experiments were conducted, and despite the evidence existing at that time before being destroyed by the CIA, the court deviated from established precedent by imposing the burden of proof on the appellant to demonstrate the presence of “exceptional circumstances” to defer the question of immunity to the merits. Instead of deciding the immunity issue at the preliminary stage, the court at least should have determined the timeframe of the events giving rise to a cause of action that requires civil responsibility and crystallized the cause of action for before or after the coming into force of the *SIA* by moving on the merits because this sort of determination could have made the *SIA* applicable for the territorial tort exception in section 6 (any death or personal or bodily injury). Instead, the court has failed to distinguish two different time frames for the cause of action: the first one was “facts giving rise to the cause of action,” and the second was “when the cause of action

arose”⁷⁹ and decided there is no restrictive nature relying on the exception of section 6 of the *SIA* for those facts that occurred prior to the coming into force of the act.

When examining section 6 of the *SIA*, it should be mentioned that the circumstances in *Jaffe v. Miller*, a case that the Superior Court cited as precedent,⁸⁰ has different conditions from the MK-Ultra class action. In *Jaffe v. Miller*, while the appellant contended the applicability of the personal injury exception under the *SIA*, the Ontario Court of Appeal determined that the personal injury or property damage exception outlined in section 6 of the *SIA* requires that the alleged personal injury “must occur in Canada after the passage of the Act”;⁸¹ otherwise, prior common law principles apply. The court concluded that the act did not apply, as the facts giving rise to the cause of action occurred prior to the *SIA* coming into force. However, in the present case, even though the cause of action occurred prior to the *SIA*, the effects of cause of action have emerged later, especially the psychological and actual inability to act. The appellant contends that although the “facts giving rise to the cause of action” occurred between 1957 and 1960, the cause of action

⁷⁹ *Tanny QCCS*, *supra* note 30 at paras 38, 41, 60, 62. The appellant contended that although the “facts giving rise to the cause of action” occurred between 1957 and 1960, the cause of action itself did not arise until 2017–2018, at which point the injured parties recognized the fault, damages, and causal connection—specifically, the psychological and actual inability to act.

⁸⁰ *Ibid* at paras 39–41.

⁸¹ *Supra* note 73 at para 53.

itself did not arise until 2017–2018, at which point the injured parties recognized the fault, damages, and causal connection—specifically, the psychological and actual inability to act. The appellant established a causal relation after realizing the detrimental effects of these experiments and bridging the gap between those experiments and the CIA's involvement in this project. Therefore, the cause of action itself arose after the *SIA* came into force. Additionally, these experiments had been conducted in Canada, not in other countries. In these respects, it is worth noting that the concrete case differs from the circumstances of the *Jaffe v. Miller* judgment and questioning whether this judgment is precedential.

C. Retroactive or Retrospective Effect of the SIA

In the case at hand, even though the appellant never claimed about the *SIA*'s retroactive effect and only argued that the *SIA* has a retrospective effect, the Superior Court decided that there is no implicit or explicit intent about the retroactive or retrospective effect of the *SIA* providing the exception to a foreign state for the personnel or bodily injury. The Court of Appeal also concluded that the exception of the *SIA* for the personnel and bodily injury did not have a retroactive or retrospective effect since the facts occurred before the *SIA*'s enactment. To elucidate the distinctions, a retroactive statute functions from a date preceding its enactment and functions in a backward manner. It alters the law as it existed.

However, a retrospective statute modifies the law as it would have applied to a prior event, thus leading it to apply solely to future events. It is prospective; however, it introduces new outcomes concerning a past event. It functions in a forward manner while simultaneously examining past events, as it imposes new future consequences on actions that occurred prior to the statute's enactment.⁸²

The evaluation of retroactivity differs from that of retrospectivity. The inquiry regarding retroactivity is whether the statute contains any indication that it should be considered law effective from a date preceding its enactment. The inquiry regarding retrospectivity is whether the statute contains any provisions that alter the consequences of a prior event, not for the period preceding its enactment, but rather from the time of enactment or, if applicable, from the time of its commencement.⁸³

One method for determining the intended temporal scope of legislation is the presumption. In the lack of evidence that Parliament has deliberated on retrospectivity and its potential for unfair consequences, it is presumed that Parliament did not intend such effects. The presumption is established to guarantee that laws are applied retrospectively only when Parliament has explicitly indicated that it has considered the advantages of retrospectivity alongside its

⁸² Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at ch 25.

⁸³ Elmer A Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56:2 Can Bar Rev 264 at 269.

possible injustice. Otherwise, it is reasonable to assume that Parliament did not intend for these consequences to occur.⁸⁴ It is observed that, in contrast to the presumption against retroactive application, which is applicable to all legislation irrespective of its purpose or effect, the presumption against retrospective application is more restricted. This does not pertain to legislation that provides benefits or is established for public protection rather than for the punishment of offenders. Hence, if the new prejudicial consequences are intended as punishment for a prior event, the presumption against retrospective application is applicable.⁸⁵ Although some Canadian courts incorporated Driedger's terminology and analysis, others did not. Consequently, ambiguity regarding the term "retrospective" within specific contexts remains a considerable issue in Canadian transitional law.⁸⁶ For instance, in the case of *The Ship Atra v. Lorac Transport*, the Federal Court of Appeal

⁸⁴ *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 48–49.

⁸⁵ As Driedger wrote:

To summarize:

1. A retroactive statute is one that changes the law as of a time prior to its enactment.
2. (1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
(2) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.
(3) A statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute.
3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
4. The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event (see *supra* note 83 at 276).

See also *Carrato v United States*, 1982 CanLII 2254 (ONSC).

⁸⁶ Sullivan, *supra* note 82 and accompanying text.

approaches the concept of state immunity with a distinct perspective, equating sovereignty to a status that can be altered retrospectively by legislative action, as exemplified in the *SIA*:

The statute contains no transitional provisions and appears, on its terms, to be applicable in respect of any claim of immunity made after it has come into force. I am, of course, well aware of the presumption against retrospective application of statutes; that presumption, however, normally applies only where a statute attaches new consequences to an event which happened prior to its enactment; it does not apply where the statute attaches consequences to a status or characteristic which may have existed prior to the enactment but which continues to exist afterwards.⁸⁷

According to the appellant's representative,⁸⁸ the *European Convention on State Immunity* was adopted a decade prior to the *SIA*, and it is apparent that the Canadian legislature considered it when enacting the *SIA*. If the Canadian legislature intended to restrict the application of the *SIA* to events occurring post-enactment, it could have easily replicated the language of article 35(3) of the convention, which explicitly states that nothing in this convention shall pertain to actions arising from, or decisions based on, acts, omissions, or facts that took place prior to the date of

⁸⁷ (1986), [1987] 1 FC 108 at 117, 1986 CanLII 3996 (FCA).

⁸⁸ *Tanny QCCA*, *supra* note 47 (Representative plaintiff's memorandum, Appellant at para 41 [*Tanny Memorandum*]).

the convention's opening for signature. There is no corresponding provision in the Canadian *SIA*. At that time, had the Canadian legislature intended to do so, it would have considered the convention provision and incorporated a similar clause in the *SIA*. It is also asserted that:

The principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships and aims to give foreign states and their instrumentalities some *present* "protection from the inconvenience of suit as a gesture of comity."⁸⁹

Therefore, the immunity of foreign sovereignty is not a constitutional requirement. Instead, it stems from a sense of grace and comity, or international courtesy based on the dignity of states. In case otherwise agreed, it can be presumed that the absence of retrospective effect for the *SIA* could foster reasonable expectations that the US government will possess immunity in instances of unlawful conduct.

D. Does the SIA Have an Immediately Applicable Nature?

⁸⁹ *Altmann, supra* note 61 at 696 [emphasis in original, footnotes omitted].

While substantive rules are typically not retrospectively implemented, procedural rules commonly has retrospective effect. Also, the presumption does not apply to procedural rules because they are assumed to function retrospectively. When it comes to the procedural powers versus substantive claims, the principle of state immunity has consistently taken into account the jurisdictional authority of Canadian courts in the event of a civil suit against a foreign state, rather than the admissibility of the underlying facts for initiating such a suit.⁹⁰ The primary question in this case is whether the US government committed a fault or crime between 1957 and 1960 in Canada. Therefore, the state immunity question determines the forum or the court that has jurisdiction over the case, not whether a plaintiff has the right to file a lawsuit. As the *SIA* is procedural in nature, jurisdictional immunity may prevent prosecution for a limited time or for specific offences, but it cannot exonerate the state of responsibility for wrongdoing. It is an immunity from judicial proceedings, not from a substantive, conduct-regulating rule.⁹¹

According to the *Kazemi Estate v. Iran* judgment:

State immunity is a procedural bar that blocks the exercise of jurisdiction before a hearing can even take place. Therefore, it is irrelevant that a person's substantive claim has not been extinguished. The existence of state

⁹⁰ *Tanny Memorandum*, *supra* note 88 at paras 37–38.

⁹¹ *Ibid* at para 39.

immunity means that regardless of an underlying substantive claim and of its merits, no jurisdiction exists in Canada to adjudicate that claim.⁹²

The case of *Jurisdictional Immunities of the State* also establishes that the *SIA* is procedural in nature.⁹³

The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943–1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility.

In the current case at bar, the Court of Appeal considered that the *SIA* is not solely procedural in nature and thereby does not apply retrospectively. As the procedural provisions affect the substantive rights, the court concluded that the *SIA* is not solely procedural. However, the principle of state immunity is not concerned with whether the facts that underlie the proceedings would allow for the filing of a civil action against a foreign state. Rather, it is concerned with determining whether the

⁹² *Kazemi*, *supra* note 69 at paras 34, 114.

⁹³ *Tanny Memorandum*, *supra* note 88 at para 36, citing *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, [2012] ICJ Rep 99 at para 93.

Canadian courts in which the action is brought have jurisdiction. The merits of the claim will not be affected significantly by the court's ability to exercise jurisdiction. In the event that a Canadian court lacks jurisdiction, the claim may still be brought in a different forum. This does not affect the substantive rights of the plaintiff or the foreign state; rather, it affects their capacity to progress through the legal process in Canada. The court initially was going to ascertain whether it has the authority to make such a determination in order to establish that the United States acted unlawfully with respect to these experiments. As per the case law, the court was required to make this determination within a specified time frame following the *SIA*'s implementation. Thus, the court's jurisdiction was not based on the date of the Montreal Experiments, but rather on the date of the court's examination of the present case. The date on which jurisdictional rights crystallize, or fail to crystallize, must have been the date on which the action was brought, as the *SIA* is only invoked when an action is brought against a foreign state. From my perspective, the *SIA* is either procedural, jurisdictional, or attributive of a status. It is intended to be retrospective and is not substantive. In the case at bar, it should have applied to past facts that have already happened, namely conducting those experiments before the *SIA*'s enactment, because it could have governed only the future effects of those experiments. It could not have modified legal effects that occurred before the *SIA* came into force. Instead, its effect is merely retrospective.

III. HUMAN DIGNITY

A. *The Value of Human Dignity in Adjudicating the SIA*

In the case at hand, there was a concise and sharp question to be asked regarding human dignity:

With respect to Class Members' rights, did [any] of the Defendants breach the *Civil Code of Québec*, ... the *Quebec Charter of Rights and Freedoms* ..., the *Canadian Charter of Rights and Freedoms* ..., *An Act Respecting Health Services and Social Services*, ... the *Universal Declaration of Human Rights*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ... the *Convention on the Prevention and Punishment of the Crime of Genocide*, ... and/or the Charter of the United Nations?⁹⁴

Furthermore, the representative of the appellant asked a more direct question in this regard: "Did the Canadian government expressly or impliedly waive its exclusive jurisdiction over the dominion of Canada and [c]ould the U.S. government have had any reasonable expectation that it would benefit from state immunity if its illicit conduct was exposed?"⁹⁵

⁹⁴ *Tanny QCCS*, *supra* note 30 (Re-amended application, Appellant at para 295(h) [emphasis omitted], online (pdf): <clg.org/pdf/5/3/7/1/Re-Amended-Application-for-Authorization.pdf>).

⁹⁵ *Tanny Memorandum*, *supra* note 88 at para 12(e).

Rather than clarifying or responding to those questions, domestic courts relying on state dignity never mentioned human dignity or humanity in their judgments by deciding that the US government benefited from state immunity, despite the rebuttable presumption that the Canadian government had no knowledge of the US government's activity being performed on Canadian soil (or having been kept deliberately hidden). Albeit the state dignity based on sovereignty of states asserting that they cannot be sued before foreign courts, this principle should not have been perceived as states not being responsible for their illicit and illegal acts violating human dignity because "[f]oreign State immunity should not be understood as providing a shield to States from their international legal responsibility to other States."⁹⁶

As human rights are fundamentally about human dignity, not human capabilities,⁹⁷ human dignity asserts that simply being human makes one worthy or deserving of respect; that we all have inherent worth that demands respect; thereby, the application of human rights offers a potent means of bringing about the realization of the dignity of the individual.⁹⁸ Further, "human rights represent a distinctive approach to the problems of human dignity which deserves to be fully

⁹⁶ Peter D Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, Recueil des cours, vol 200 (Leiden, The Netherlands: Martinus Nijhoff, 1986) at 254.

⁹⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed, Book Collection on Project MUSE (Ithaca, NY: Cornell University Press, 2013) at 14.

⁹⁸ *Ibid* at 29.

and fairly evaluated on its merits, not its parentage.”⁹⁹ Today, human rights continue to be the only means and method that has been demonstrated to be effective in ensuring human dignity in societies that are dominated by states. Despite being contingent and relative in history, this functional universality is entirely deserving of the term “universal”—for all individuals.

However, in the case of the MK-Ultra project, human dignity still remains orphaned and requires remedy. It was a plausible case that deserves fair protection and recognition of human dignity through internationalized human rights. Here, there could be an assumption made: If the western states that enthusiastically supported the Universal Declaration had been stripped of their state immunity, which prevented the prosecution of the crimes they had committed in the previous few decades, and a human rights scorecard had been compiled, we would have been able to observe more closely the roots of human dignity and the understanding of human rights in the Western states. This tremendous gap between some practices of Western states that deviate from human dignity and the vision of the Universal Declaration, and so to speak, the state of impunity supported by state immunity, renders many human rights violations, including the MK-Ultra project, unknown, unrevealed, and invisible. Nevertheless, I believe that

⁹⁹ Jack Donnelly, “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76:2 *American Political Science Rev* 303 at 303.

the responses or reflections to past human rights violations are still worth noting to preserve the claim and hope of deterring future violations of human dignity. By implementing historical responsibility for past wrongs, it would have provided the redress or healing sought by those who claimed to suffer a profound affront to their sense of dignity and inherent value.

B. What Is Being Overlooked Under the Auspices of State Immunity, or to What Extent Was Human Dignity Sacrificed for the Sake of State Immunity?

The concept of human dignity is inextricably woven with the idea of human beings as agents who are capable of making moral decisions, influencing our identity, resisting injustice, and contributing to the development of society.¹⁰⁰ In some cases, affronts to human dignity may also arise from unofficial, hidden, or clandestine origins, such as “[p]sychiatric treatment that involves coercive means to change beliefs or choices that are lawful.”¹⁰¹ In the case at bar, the reality that these experiments are executed under the pretence of scientific inquiry or, even more troubling, under the auspices of national security, results in the exclusion and disregard for the inherent dignity of the individuals affected. As it is well known, “[n]othing is more elastic than national security or gives a better cover to reason of

¹⁰⁰ Sandra Liebenberg, “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21:1 SAJHR 1 at 7.

¹⁰¹ Oscar Schachter, “Human Dignity as a Normative Concept” (1983) 77:4 AJIL 848 at 852.

state.”¹⁰² It is an indisputable reality that these experiments, which directly affront the individuality and dignity of the victims and inflict irreversible permanent harm by transgressing their bodily integrity, fundamentally undermining the intrinsic dignity and worth of human beings.

Here, in the intersection of state immunity and human dignity, we can ask a further question: Could human dignity have been salvaged even if the damage to victims was compensated at the expense of state immunity? In contemplating the circumstances surrounding the victims, who were confined to the hospital involuntarily for extended durations and exposed to an array of pharmaceuticals and electroconvulsive therapies, it becomes evident that their experience of being subjected to scientific experimentation, rather than being afforded genuine medical care, represents a profoundly distressing and stark aspect of the MK-Ultra project. The reality that these experiments catered to the paranoid implications of states during the Cold War, or that the verification of these concerns was carried out on the patients themselves, or more troublingly, that these experiments were shielded by the guise of national security, suggests a potential and urgent need to reevaluate or refine the concept of the human dignity. In this endeavour, it is imperative to

¹⁰² George Kateb, *Human Dignity* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011) at 31.

reflect upon a decision from the Constitutional Court of South Africa that intricately connects the concept of free will with the essence of human dignity:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their “humanness” to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.¹⁰³

On the basis of the close relevance between free will and human dignity, we can further expand the notion or essence of human dignity, encapsulating “[t]he fundamental moral advantage of rights is that they are supposed to reduce suffering by guarding against state oppression and wrongdoing.”¹⁰⁴ But in all honesty, there is no doubt that human dignity is the foundation of all human rights, and there is no conceptual ambiguity in the definition and comprehensiveness of

¹⁰³ *Ferreira v Levin*, [1995] ZACC 13 (SAFLII) at para 49.

¹⁰⁴ Kateb, *supra* note 102 at 22.

human dignity. Hence, as I shall further discuss below, I genuinely assert that we need to reevaluate the concept of state immunity rather than redefining or reinterpreting the exigencies of human dignity.

IN LIEU OF CONCLUSION:
WAS THE MK-ULTRA PROJECT AN IMPLIED WAIVER OF HUMAN DIGNITY
FOR THE BENEFIT OF STATE IMMUNITY OR STATE DIGNITY?

When it comes to encountering the past indignities of history, would it be possible to contend that a foreign state is unable to assert immunity in instances of grave human rights abuses, thereby allowing domestic courts to exercise jurisdiction over such matters? Would it be possible to establish a legal guarantee that judicial immunity or implied waiver of foreign courts will cease to exist in cases of gross human rights abuses and violations? In light of the supremacy of jus cogens norms over other international legal standards, is it feasible to eliminate impunity resulting from implied waiver or immunity from prosecution or exemption from punishment in cases of severe violations against human dignity? Taking into account the argument as to whether state immunity is in conflict with the rule of law, could we abolish state immunity for a few or limited exceptions?

With the guidance of these questions, it is reasonable to accept that should foreign state immunity be abolished, it might mostly assist individuals, particularly

those suffering from human rights abuses. For the time being, the tort exception to immunity is territorially restricted, making it exceedingly challenging to pursue legal action against a foreign state for actions carried out within its territory.¹⁰⁵ Although foreign state immunity was initially established for the benefit of state dignity and interdependence of foreign states against external interference, it has currently evolved into a muddled, complicated, and fragmented doctrine.¹⁰⁶ It requires being readjusted or reformed under those conditions in which lawsuits regarding gross human rights violations can be brought to courts to seek justice by making an exception for them or not allowing states to have absolute immunity in cases of human rights abuses. No state may invoke its immunity in a case of such severe crimes against humanity because all privileges and benefits granted by international law should be forfeited when fundamental human rights are violated.¹⁰⁷ This consequence is the result of the principle that no one can benefit from their unlawful conduct; thereby, immunity for a state in the case of international crimes committed by the state is in direct opposition to the fundamental principles of international law and undermines the most significant

¹⁰⁵ Richard Garnett, "Should Foreign State Immunity be Abolished?" (1999) 20 Austl YB Intl L 175 at 186.

¹⁰⁶ *Ibid* at 190.

¹⁰⁷ Roman Nowosielski, "State Immunity and the Right of Access to Court: The *Natoniewski* Case Before the Polish Courts" (2010) 30 Polish YB Intl L 263 at 269.

values of the international community.¹⁰⁸ Thus, regarding the current contentious debate of human dignity versus state immunity, it is fair to conclude that this sort of interpretation will be an implied waiver of the state's immunity rather than an implied waiver of human dignity.

In conclusion, considering the apparent frailty of humanity when confronted with state immunities, might we interpret this immunity as an unspoken or implicit concession to human dignity? Could we perhaps employ a metaphor to suggest whether the implied waiver serves as a key to the escape from the essence of human dignity? In order to address these inquiries with respect to state immunity and human dignity, it is essential to first examine the historical objectives and indicators that inform the implied waiver or immunity from prosecution for those human rights infringements. In instances where state immunity stands in opposition to international human rights law principles and norms, the prioritization of state immunity raises an avalanche of questions about whether this constitutes a subtle infringement on human dignity rather than a simple form of judicial immunity.

¹⁰⁸ *Ibid* at 269.

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