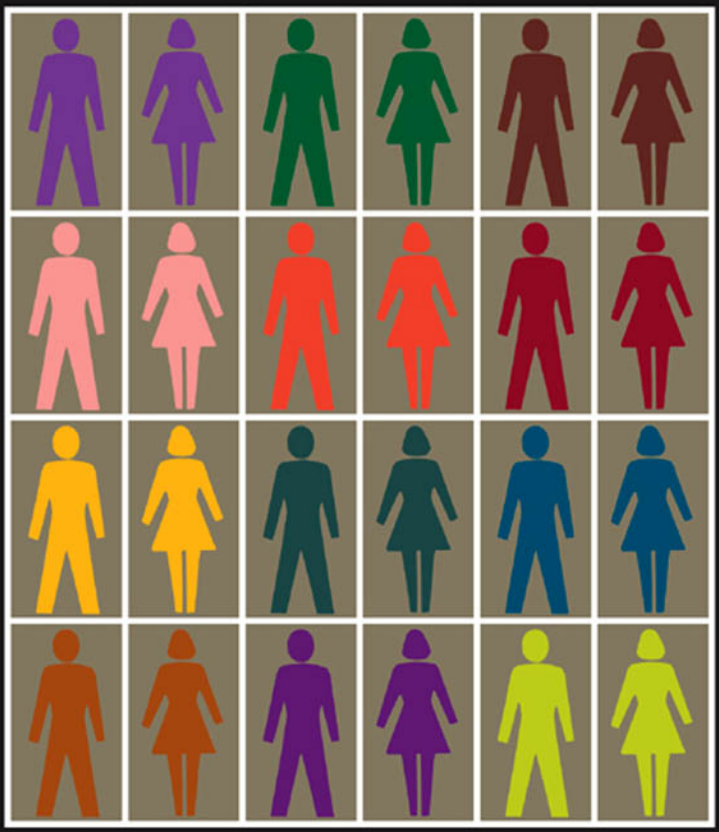

HUMAN RIGHTS AND DIVERSITY

Area Studies Revisited

EDITED BY DAVID P. FORSYTHE AND PATRICE C. MCMAHON

Human Rights and Diversity

HUMAN RIGHTS IN INTERNATIONAL PERSPECTIVE

Volume 7

Human Rights and Diversity

Area Studies Revisited

Edited by David P. Forsythe
and Patrice C. McMahon

UNIVERSITY OF NEBRASKA PRESS • LINCOLN AND LONDON

Publication of this volume
was made possible by a grant
from the University of Nebraska–Lincoln
Human Rights and Human Diversity Initiative.

Manufactured in the United States of America

Library of Congress Cataloging-in-Publication Data
Human rights and diversity : area studies revisited /
edited by David P. Forsythe and Patrice C. McMahon.
p. cm.—(Human rights in international perspective ;
v. 7) Includes bibliographical references (p.) and index.
ISBN 0-8032-2020-0 (cloth : alk. paper)
1. Human rights. 2. Human rights—Cross-cultural studies.
I. Forsythe, David P., 1941– . II. McMahon, Patrice C. III. Series.
JC571 .H76876 2003
323–dc21
2002156584

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Avant Propos

At the dawn of the twenty-first century, the issue of human rights grows in importance and complexity. The rhetoric and sometimes the reality of protecting human rights have become increasingly important in the world. The protection of human rights has a more important role in the foreign policy of many states than in years past. The United Nations has made the protection of human rights a central part of its mission. As many states become democratic, the protection of human rights seem to rise in importance, yet the idea of protecting human rights can sometimes be in tension with other goals, like the idea of respecting cultural diversity, maintaining a national identity, or protecting the security of citizens.

In response to the importance of human rights issues, the University of Nebraska–Lincoln established the Human Rights and Human Diversity Initiative in 1997. The Initiative's goal is to examine issues related to human rights in an international or comparative perspective. The Initiative has a particular interest in examining the relationship between cultural diversity and human rights. The Human Rights and Human Diversity Initiative is based in the College of Arts and Sciences, not in the law school, where most human rights programs are located, reflecting the interdisciplinary aspects of human rights issues. While international law is an important component to understanding human rights issues, a full understanding of human rights, and of the interaction between human rights and human diversity, moves beyond law. The Departments of Anthropology, English, History, Modern Languages, Philosophy, and Political Science and the College of Law are all involved and support the Human Rights and Human Diversity Initiative.

The Initiative has several programs, including a graduate specialization in Human Rights and Human Diversity that one can take in conjunction with a degree in one of the supporting departments. The Initiative gives funding to graduate students, sponsors workshops on human rights and human diversity for faculty, brings in speakers, and organizes conferences. This volume is the outcome of a conference held in Lincoln, Nebraska, sponsored by the Human Rights and Human Diversity Initiative and organized by David P. Forsythe.

Jeff Spinner, Director,
UNL Initiative on Human Rights and Human Diversity

Preface

In the late 1990s the College of Arts and Sciences at the University of Nebraska at Lincoln decided it would make sense to pool faculty resources across departmental boundaries so as to create interdepartmental programs of some significance. Rather than operate according to rather small departments of modest status in national and international evaluations, the decision was taken to build on existing but fragmented strength by creating interdisciplinary initiatives. This type of thinking led to the creation of the program in International Human Rights and Diversity.

Shortly thereafter the UNL Human Rights Initiative was granted some programming monies from the Ford Foundation to integrate human rights with areas studies. All areas of the world, no matter how defined, manifest human rights violations according to internationally recognized human rights. But the question naturally arises as to whether different areas manifest different patterns in accepting and implementing international standards on human rights. It was out of this intersection between universal human rights and the different areas of the world that a conference was held in Lincoln in October 2001. This book is the result of much of that conference.

On the basis of a call for papers and the resulting competition, we invited to Lincoln a dozen or so leading thinkers from the disciplines of law and political science to inquire into whether we could gain insights into human rights behavior through a focus on area studies. We made sure to include both quantitative and qualitative approaches to the subject. Our budget limited us to hosting scholars from North America and Western Europe. We tried to compensate for the limitations imposed by budgetary considerations by inviting a keynote speaker who was a national of the Sudan. Because we found our budget constraints forced a lack of coverage in important human rights matters, we added material in our concluding chapter. Thus although we were not able to bring in a scholar to cover China and East Asia, the editors paid special attention to that area in the concluding chapter.

The resulting conference papers, most of them now chapters in this volume, more than justified our original thinking. They provide a rich reflection on how geographical, cultural, and analytical areas can inform an understanding of human rights standards and practice. All authors graciously revised their original drafts several times in the light of conference discussion and editorial queries. Both the keynote speaker and the book editors spent considerable time after the conference seeking integrated and thematic reflections for the opening and closing chapters.

The details of the conference were handled with skill and grace by Ms. Barbara-Ann Rieffer. The details of the manuscript were handled in fine fashion by Mr. Jonathan Trexel. Ms. Helen Sexton was of great assistance concerning budgetary

matters. Ms. Kim Weide provided her usual expertise regarding other administrative concerns. Jeff Spinner, the director of the UNL Human Rights and Human Diversity Initiative, was supportive in every way.

David P. Forsythe,
Conference Organizer

Human Rights and Diversity

Introduction

"Area Expressions" and the Universality of Human Rights

MEDIATING A CONTINGENT RELATIONSHIP

Abdullahi A. An-Na'im

In this chapter I am concerned with mediating the clear tension between the reality of rigorous and permanent global cultural and contextual diversity on the one hand and the possibility of articulation and implementation of universal human rights standards on the other. Questions raised by this tension include whether the notion of universality of human rights is at all possible or viable. That will depend, it may be said, on what one means by this notion of the "universality" of these rights. To begin with, is it a normative claim notion, in the sense of rights that all human beings "ought to have" in accordance with some general justification or foundation, or is it an empirical assertion that a specific set of rights is in fact universally accepted everywhere? Whether it is the former or the latter sense of the term, does it mean that all human beings are entitled to the exact rights in precisely the same manner, or is there room for a degree of variation, and to what extent or on what grounds? What institutional and material resources does this claim or assertion require for its realization, and what allowances does it make for lack or deficiency of such resources?

For our purposes here in particular, are different geographical, cultural, political, and/or thematic "area expressions" of human rights inherently inconsistent with the universality of these rights, or are such expressions legitimate ways of "adapting" general definitions of universal human rights to various local settings for practical implementation? In other words, are the universality of these rights and the realities of different area expressions of human rights mutually exclusive, whereby one has to choose between the two approaches, or it is desirable and possible to see them in a dialectic relationship of mutual accommodation? If it is the latter, what are the appropriate limits of local variations for them to remain within the framework of universality? Assuming that differences in "area expressions" *can be* consistent with constructing a coherent and viable concept and normative content of the universality of human rights, is it not also reasonable to expect the opposite outcome when conditions are not favorable to a positive relationship between the two?

In my view the universality of human rights and their area expressions can be compatible and even mutually supportive, but this process should not be taken for granted or assumed to necessarily yield a predetermined or inevitable meaning and

content of universality of human rights. In other words, the synergy between the universality and culturally/contextually specific expressions of human rights can either be mutually supportive or not, depending on how various actors perceive the various elements of the process and how relevant factors and context affect its outcome. In either case, however, that conclusion would be the outcome of careful analysis of the two possibilities and assessment of available practical experience, rather than assertions of categorical, nonnegotiable positions.

Therefore, the premise of my analysis in this chapter is that the universality of human rights should be seen as a *product of a process* rather than as an established "given" concept and specific predetermined normative content to be discovered or proclaimed through international declarations and rendered legally binding through treaties. In fact, the idea of "discovery" or "proclamation" itself already implies a process, which requires certain actors, context, and other conditions that are conducive to its success. If this is true, understanding the meaning and implications of the universality of human rights calls for an examination of the nature of that process, the role of the actors and context, and other relevant conditions. Moreover, I suggest that this process should be seen as one of synergy between its actors, context, and other conditions, whereby each element can affect the others, as well as the dynamics of their interaction, either in favor or against the universality of human rights. The proponents of universality need to understand the nature and dynamics of this process in order to develop appropriate strategies for the achievement of their objectives, instead of expecting affirmation of universality to emerge as simply "self-evident" or the inevitable outcome of national politics and/or international relations.

In this light the starting point of my analysis here is that the opponents of universality of human rights, commonly known as cultural/contextual relativists, have a point that has to be taken seriously but not conceded or allowed to defeat the possibility of the universality of these rights. It seems clear to me that the relativists are right in observing that the notion of universally valid and applicable norms are problematic, but they are wrong in concluding that the effort to establish and implement universal human rights norms should be abandoned for that reason alone. To acknowledge the difficulty of realizing the universality of human rights in practice is to accept the possibility that this effort may fail in the end. But in view of the supreme importance of the universality of human rights, to take the relativists' challenge seriously is to emphasize the need to develop and implement effective strategies for overcoming that difficulty, rather than forfeit the possibility of success. In the first section of this chapter, I will elaborate on this proposition and in section two illustrate its application to different forms of "area expressions" discussed in some of the other chapters of this book. In the final section of this chapter, I will examine how the difficulties of universality of human rights might be overcome at various levels of theory and practice.

The Quandary of Universality and Relativity

While often used in popular discourse to refer to notions of freedom and social justice in general, the term *human rights* has come to signify a particular conception of those claims as rights due to all human beings, without distinction on such grounds as race, sex (gender), or religion. This modern conception of human rights, as proclaimed in the Universal Declaration of 1948 and developed in subsequent treaties and institutions, was no doubt Western in its initial formulation after the Second World War. But that does not necessarily mean that it is alien or irrelevant to non-Western societies.[1] As clearly reflected in the frequent endorsement of the Universal Declaration in national constitutions and regional treaties, like the African Charter of Peoples' and Human Rights of 1981, the present concept has already transcended—and needs to transcend further—the limitations of its initial Western formulations. Nevertheless, doubts persist about the universality of these rights.

This issue is often discussed in terms of a binary of universality and relativity, as if one has to either fully accept or completely reject the universality of certain rights for all human beings. On one end of this purported dichotomy are said to be countries that claim cultural/religious relativity or contextual specificity to justify rejecting or qualifying certain universal human rights norms, and on the other side are those that are supposed to fully accept the universality of all human rights. Whereas some Islamic and East Asian countries are commonly placed on the relativist side, Western countries are commonly assumed to be fully committed to the universality of these rights. Upon reflection, however, one can see that such a binary view of this issue is both misleading and difficult to substantiate or maintain in practice because, as elaborated later, no country either fully accepts or completely rejects the universality of human rights.

A binary view is misleading in assuming either that human rights can be culturally and contextually neutral or that a conception of human rights emerging within one culture or context can be accepted by other cultures for application in their context. To explain, I would first note that as a normative system that seeks to influence people's behavior and the political and social institutions that regulate their lives, human rights could only be the product of culture, to be interpreted for practical application in a specific context. The idea of human rights is founded on the belief in the possibility of universal rights due to all human beings everywhere to ensure equal respect for human dignity throughout the world. But such norms can neither be imagined nor understood in the abstract, without reference to the concrete daily experience of the people who are supposed to implement them. Since any conception of human rights as a normative system is the product of some culture(s), a given set of these rights can be perceived as alien or unacceptable to other cultures. Given the cultural foundation of all normative systems on the one hand and the permanent cultural diversity of the world on the other, how to determine universally valid human rights standards that are acceptable to all societies

regardless of cultural and contextual difference? This is what is I call the quandary of the universality and relativity of these rights.

The basic difficulty here is that any approach to locating the foundation or source of the universality of human rights simply begs the question.[2] For instance, one can say that all human rights emanate from a particular philosophical or religious premise about human nature, social life, and so forth. But this simply reframes the question in terms of which premise to select, why, and to what ends. To assert that these rights are necessary for protecting human dignity or satisfying certain basic needs presupposes a universally accepted or applied conception of human dignity and its implications or an agreement on basic needs and the manner of their satisfaction. For instance, all human beings need food and shelter, yet liberal relativists tend to assert that these needs should be realized through the political process in which certain liberties, like freedom of speech and association, are secured against the state, rather than by accepting them as human rights as such. Taking a positivist view of human rights, as those acknowledged by states through international treaties and national law, leaves the matter to the ideological, cultural, or political positions of the elite who control the state in each country.

The difficulty of finding a universally accepted foundation of universal rights was clear to some observers even before the United Nations' Human Rights Commission finished the draft of the Universal Declaration of Human Rights. In 1947 the commission received a long memorandum from the American Anthropological Association (AAA) cautioning against the dangers of ethnocentrism, the tendency to regard one's own culture as superior to those of other cultures.[3] Since standards and values are relative to the culture from which they derive, any attempt to formulate norms that are based on the beliefs or moral code of one culture to that extent detracts from the applicability of the declaration to humanity as a whole. The basic problem raised by that AAA statement, and also expressed by other scholars since then,[4] is that approaches to determining the content of human rights norms, or selecting the most effective ways of implementing them, necessarily reflect specific cultural, philosophical, or ideological perspectives. Even those who accept the idea of the universality of human rights as a legal entitlement of every human being will probably continue to have significant differences about the actual content and implementation of these rights. For instance, liberal supporters of the universality of human rights find it difficult to accept the possibility of collective human rights because they see them as undermining individual rights.[5] But if the sources or foundations of human rights are necessarily multiple and diverse, how can the rights so determined be universal in validity and/or application?

However, as stated in the declaration adopted by the AAA in June 1999, there is a problem "whenever human difference is made the basis for a denial of basic human rights, where 'human' is understood in its full range of cultural, social, linguistic, psychological, and biological senses."[6] In other words, cultural or other differences between human societies should not be used as a pretext for justifying human

rights violations. But the problem with this view is that it assumes or presupposes the existence of a clearly identified and accepted set of human rights in the first place. In an effort to anticipate objections to the circular logic of this view, the 1999 AAA declaration also cautions against equating or limiting human rights to "the abstract legal uniformity of Western tradition" and emphasizes the need to keep the concept open to additional and new perspectives by asserting: "The AAA definition thus reflects a commitment to human rights consistent with international principles but not limited by them. Human rights are not a static concept. Our understanding of human rights is constantly evolving as we come to know more about the human condition. It is therefore incumbent on anthropologists to be involved in the debate on enlarging our understanding of human rights on the basis of anthropological knowledge and research."[7]

While welcome for supporting an evolving view of human rights, this statement does not resolve the basic tension between ethnocentricity and universality of standards that are now proclaimed as universal human rights. One may still wonder whether the phrases "our understanding" and "we come to know" (in the above quote) are, or can be, inclusive of all peoples or perspectives. Since the "anthropologists to be involved in the debate" are the product of their own culture, too, how can the "anthropological knowledge and research" they produce escape that fact in a verifiable manner? That is, assuming that the training and professional orientation of anthropologists enable them to be sensitive to the risks of ethnocentricity, are American or any other group of anthropologists thereby "qualified" or "authorized" to speak for all views on human rights in their own culture, let alone in other cultures?

As implied in this last question, regard must be taken of the unavoidable diversity of views on human rights within each culture due to religious, ideological, class, or other differences. Since ethnocentrism means the tendency to assume that one's own views and experiences are necessarily shared or accepted by others, that can happen regarding specific views within, as well as among, cultures or societies. Moreover, to say that human rights should not be limited by existing international standards does not resolve the issue of how and by whom additional human rights can be identified and defined in practice. In other words, these concerns apply to the possibility of new rights in the future as well as to present international standards.

Another aspect of the universality issue can be appreciated in relation to what might be called the paradox of state self-regulation in the human rights field. Given the realities of national sovereignty and international relations, the charter of the United Nations and the Universal Declaration had to strike a balance between the need for international supervision and respect for the domestic jurisdiction of nation states. Thus in universalizing certain notions of fundamental rights, the international human rights system seeks to make these rights binding under international law while leaving application on the ground to the agency of the nation-state. Addressing the problem of state self-regulation of their own human rights

performance requires acting on a clear understanding of the role of local, national, and international actors and processes in influencing the actual conduct of states in this regard. In other words, redressing the underlying causes of violations, as well as providing effective remedy for individual violations, requires the mobilization of the maximum possible degree of political will at the local, national, and international level. However, the necessary degree of political will is unlikely to emerge in a sustainable manner if human rights are perceived to be lacking cultural legitimacy or contextual viability.

Moreover, it is counterproductive to assume that the universality of human rights is self-evident or has already been established, so all that remains is to pressure a few ruling elites in developing countries to abandon their opportunistic denial of the obvious. This view encourages hypocrisy among the governments of developing countries who have to pay lip service to human rights in exchange for favorable treatment by developed countries in aid and trade. At the same time, the nature of existing power relations enables the governments of developed countries to raise issues of compliance with human rights standards selectively, in service of their own foreign policy objectives, without regard to the integrity and credibility of the universality of these rights as a whole. This double standard in judging similar situations is possible because of the lack of an independent check on the presumed commitment of developed countries themselves to the universality of human rights. By dominating international relations today, developed countries are the primary judge of their own behavior, as well as that of developing countries, without being accountable to any other entity in a credible manner.

Western countries have not shown consistent acceptance of the universality of human rights in their own national policies, particularly in relation to economic, social, and cultural rights. These countries also find it difficult to accept the possibility of protecting any collective or group claim or entitlement as a *human right* within an existing state, although this is the basis of the right of self-determination that is affirmed in the first article of both of the 1966 covenants. It is not enough, in my view, to provide for the services and benefits covered by these sets of rights through the normal political and legal processes of each country because the essence of the universality of human rights is to safeguard such entitlements against the contingencies of these processes. That is, recognition of a specific entitlement as a human right is intended to enhance the prospects of its practical implementation more than can be expected from the normal political and legal processes of any country. To the extent that they do in fact respect and protect economic, social, and cultural rights or collective rights, Western countries have nothing to fear from accepting those rights as human rights. Conversely, such acceptance is necessary whenever those rights are not sufficiently respected in the manner and to the extent required by international human rights standards.

The main purported justification for refusing to acknowledge the human rights standing of economic, social, and cultural rights and collective rights is the present

difficulty of specifying and enforcing them in the same way civil and political rights are defined and protected. For example, since the right to work cannot practically mean an obligation on the state to actually provide work for every person, the questions are what should be the content of this right and how can it be implemented? Collective rights raise issues of human agency in determining membership and boundaries of groups or more generally the dangers of elite appropriation of the collective voice of groups and communities. However, such difficulties are only to be expected because formal recognition of these rights is much more recent, in comparison to civil and political rights. Moreover, these rights need not necessarily fit the model of civil and political rights to qualify as human rights, which is neither uniform nor always effective even for those long-established rights. The processes of concrete definition and implementation of economic, social, and cultural rights cannot even begin unless they are taken seriously as *human rights*, rather than simply objectives of public policy.

In my view the real reason for Western resistance to accepting these rights as human rights is ideological or cultural. As noted earlier, and subject to national and regional variations, the liberal ideology/culture of Western countries tends to hold that economic, social, and cultural benefits or services should be provided for through the normal political process. Because of its emphasis on individual autonomy and privacy, liberal ideology/culture finds it difficult to conceive of collective entities or groups as bearers of rights. Liberals may see their views as obviously valid to every reasonable person, but that is exactly how ideological or cultural conditioning of human behavior works everywhere. In other words, liberal societies tend to resist accepting economic, social, and cultural rights or collective/group rights as human rights for the same reason some Islamic and East Asian countries are resisting the universality of human rights in the name of their own ideology or culture. If ideology or culture can exempt Western countries from accepting these rights as human rights, non-Western countries can claim the same regarding such human rights norms as equality for women or protection of freedom of expression.

Moreover, the persistence of some Western governments in asserting chauvinistic notions of national sovereignty is in fact as relativistic as similar claims by non-Western countries like China or Iran. For example, the United States is notorious for seeking to fashion international human rights treaties to fit its own ideological views and social institutions during the drafting process, only to fail to ratify and incorporate those treaties into its domestic law for application within the country itself. This is true from the 1948 Genocide Convention, which took the United States more than forty years to ratify, and only subject to reservations, to the 1989 Convention on the Rights of the Child, which is now ratified by every country in the world except the United States and Somalia. Since Somalia has had no government since 1992, the government of the United States stands completely alone in refusing to ratify this convention. This position is particularly damaging for the universality of human rights because other relativists can cite it as justification for their own

positions at a time when the United States is dominating international relations and exercising excessive influence on the domestic policies of weaker and poorer countries.

It is therefore clear to me that full acceptance of the universality of human rights is difficult for all countries, including those that enjoy the most favorable conditions for the realization of these rights. In other words, all countries need to engage in constant negotiation about which claims to accept as human rights and how they can be implemented in practice. This negotiation should, by definition, include the widest possible range of perspectives and priorities of different human societies for the outcome to be accepted as truly universal. To avoid the appropriation of the collective voice of a culture by its political leaders or some other elite group, such negotiation must take place within each culture as well as between cultures. As I have discussed elsewhere, the object of this internal discourse within cultures, and cross-dialogue among them, is to promote an overlapping consensus over the meaning and implications of the universality of human rights.[8] While internal discourse seeks to promote consensus within a society or community over human rights norms and their underlying values within a particular society, cross-cultural dialogue attempts to achieve the same among different societies and communities. In other words, the concept and normative content of the universality of these rights is to be constructed over time, rather than proclaimed once and for all.

To suggest this apparently long-term approach does not mean that the articulation and implementation of all human rights should wait until consensus is achieved on any of them. In fact, the protection of certain rights, like freedom of speech and the right to education, is necessary for the proposed internal discourse and cross-cultural dialogue to be possible and effective. Rather, the point is to work with the existing human rights to expand and enhance consensus on their validity and practical application, in addition to focusing on similar concerns regarding any human rights that might be asserted in the future. This is already beginning to happen in the drafting and ratification of recent human rights treaties like the Convention on the Rights of the Child of 1990.

But since such discourse and dialogue does not happen in a vacuum, these processes must take into account contextual factors such as differentials in power relations between different participants in dialogue within, and discourse between, cultures. That is, to enhance the ability of cross-cultural dialogue to contribute to the acceptance of the universality of human rights, the impact of persistent and growing global differentials in power relation and material conditions between Western and non-Western societies and cultures must somehow be redressed. The context of discourse and dialogue also includes events and developments that affect the rule of law in international relations as the essential prerequest condition for any possibility of acceptance and protection of universal standards of human rights anywhere in the world today.

I will return to these issues in the last section of this chapter. For now the point to emphasize is that the quest for universality must continue because that is in the immediate self-interest of all human societies under present conditions of global interdependence as well as the moral imperative for the protection of universal standards of human rights everywhere. A compelling justification of the universality of human rights is that these rights are necessary for securing freedom and social justice for all individual persons and communities against the excess or abuse of power by the state. In other words, the universalization of the European model of the nation-state through colonialism requires the corresponding universalization of human rights standards and mechanisms for securing freedom and social justice in the context of the expansive powers of the nation-state. Since governments everywhere are exercising the extensive and prerogative powers of the state under this European model, they must also be accountable to the safeguards and rights that have evolved by the same model to protect individuals and groups against abuse or excess of those powers.

The conclusion I draw from the preceding discussion is the necessity of deliberate strategies to mediate the apparent conflict or tension between the cultural and contextual specificity of all norms, including those underpinning human rights standards, and claims that certain norms have universal validity regardless of culture or context. This mediation is critically important because universality of human rights is both imperative and difficult to achieve out of genuine consensus throughout the world. Since the inherent and permanent diversity of the world precludes founding the universality of human rights on the normative claims of any single tradition or context, it is necessary to explore which possible foundation or justification is more likely to work in different settings and under which circumstances. This strategic *construction* of the universality of human rights out of the realities of inherent and permanent diversity calls for acting on a clear understanding of the factors and processes that are conducive or counterproductive to its evolution.

Area Expressions and the Synergy of the Specific and Universal

For our purposes here, the dynamics of the relationship between "area expressions" of human rights on the one hand and the universality of these rights on the other can be illustrated by a brief discussion of some of the chapters included in this book. But the following brief review cannot be comprehensive, and comments on some of them are not criticism of the authors. Rather, the objective is to highlight both the difficulties and possibilities of the proposed process. In the next, final section, I will discuss how this contingency may be resolved in favor of the universality of these rights.

In "Does Region Matter in Provision of the Human Right to Physical Integrity?" Steven C. Poe investigates the impact of regional factors on countries' human rights practices, specifically those rights pertaining to integrity of the person. The findings of his study indicate that although general models have achieved substantial

explanatory power, this approach should be augmented by a search for regional variations to general patterns. He finds that regional variables retain a moderate amount of explanatory power once other factors included in our general models of human rights abuse are controlled. Further, when analyses are conducted on a region-by-region basis, evidence of interesting regional differences in casual patterns arises, though this general model fares better in some regions of the world than others. He concludes that a new look at the role of regional factors in determining human rights might prove helpful in our efforts to better understand the reasons why human rights abuses occur.

David L. Richards's "The Civilizational Geography of Government Respect for Human Rights" uses an original database of information about government respect for human rights to provide a cross-regional overview and analysis of government respect for a wide variety of human rights. While opting for the civilizational scheme of Samuel Huntington in his regional grouping of countries, he also discusses the importance of conceptual transparency when defining "region" for the purposes of a cross-regional study. The chapter also includes regional analyses of six factors that have been widely found to be reliable predictors of levels of government respect for human rights.

In "Promoting Women's Rights against Patriarchal Cultural Claims," Zehra F. Kabasakal Arat examines continued violation of the human rights of women in Islamic countries, which are usually justified on the grounds that the provisions of international conventions are not consistent with the tradition and culture of the country in question. She objects to invoking cultural heritage and its preservation as a way of resisting the promotion of women's rights and gender equality in Muslim communities. The author focuses on the states parties' reservations to the Convention on Elimination of All Forms of Discrimination against Women of 1979. She finds that Muslim states parties to the convention are more likely to place reservations that are broader in scope and to ground the reservations on some legal foundations that are absolute or difficult to change (mainly Islamic *Sharīʿa*). In this way, she argues, these states insist on keeping the reservations and hindering the progress toward the elimination of discrimination against women. She also challenges these reservations by arguing that the *Sharīʿa* and the *Sharīʿa*-based laws are all constructed and have been subject to interpretation, modification, and selective application in different Islamic societies. In other words, given the diversity in interpretation, why should only those understandings of *Sharīʿa* that violate the human rights of women be selected for application? Arat calls on states to express their political commitment not only to respect the rights of women, but also to promote and protect them by eliminating the obstacles, which may involve cultural norms and values.

In "The Status of Human Rightsin the Middle East," Emile Sahliyeh surveys his topic by employing the Political Terror Scale data set and the Freedom House Index on civil rights to measure the conditions of human rights in the region. He

suggests that the regional average of the violation of human rights for the Middle East states is high, at 2.9 out of 5, which gives the Middle East the worst human rights record in the world between 1978 and 1994. The author further shows that a similar tendency exists with regard to civil liberties. It indicates that the Middle East is slightly surpassed by Africa (5.4 to 5.3 out of 7) in having the most unfavorable record on civil liberties. This low record of human rights in the Middle East region has been widely debated in scholarly literature. The study outlines five competing explanations of this.

Some writers ascribe the violations of human rights in the Middle East to the feebleness of the democratic institutions and norms and the persistence of autocracies. Others attribute the lack of respect toward human rights and democracy to political economy and foreign and security policy considerations. A third trend attributes the weakness of the human rights and democratic movement in the Middle East to a moral and political clash between the West and the Middle East, which took an anticolonial, nationalist dimension. A fourth explanation refers to the Islamic opposition to Western human rights standards, which began to dominate the political scene in several Middle Eastern countries since the 1980s. Finally, the collapse of communism and thetriumph of liberal democracy and capitalism produced political, cultural, and civilizational arguments for the lack of respect to human rights in the Middle East. These arguments revolved around the controversy about whether Islam is fundamentally incompatible with the Western conceptualizations of human rights and democracy. The author concludes by outlining the arguments of those writers who disagree with the arguments upon which the case against Islam as being anti-Western, antidemocratic, and antihuman rights is made. Many of these writers do not believe that the differences between the West and Islam are great enough to inhibit the establishment of liberal democratic regimes that respect human rights. He also briefly surveys the views of the liberal Islamic thinkers who call for a reinterpretation of the Islamic *Sharī'a* and its reconciliation with the universal and emancipatory standards of modern human rights.

All these chapters confirm the reality of regional variations in compliance with international human rights standards as well as the difficulty of drawing reliable conclusions about the relationship between that and the universality of these standards. An obvious source of difficulty is that selections of regional groupings may not only be arbitrary but also reflect preconceived notions of the commitment of those countries to the universality of human rights or ability to live up to that commitment. Whether based on a combination of economic, sociological, geopolitical, and geographical factors, in the case of Poe, Arat, and Sahliyeh, or the "civilizational" model adopted by Richards and so forth, there is a serious risk of circular logic in the selection. That is, patterns of violation may in fact be due to other causes than those assumed or implicit in the selection criteria, such as colonial history or present conditions of economic underdevelopment and political instability. As noted earlier,

however, this is not a criticism of the approach adopted by these authors but simply an illustration of the difficulty of the project itself.

Another problem is the risk of distortion due to the choice of the rights to be compared or the time frame of comparison. For example, a civilizational regional classification is premised on a presumption of shared values in a fundamental and lasting manner, which is simply not true from a human rights point of view. If one takes the case of Western European countries, for instance, it is clear that their commitment to even the universality of civil and political rights was not true in relation to their colonies. That commitment was also lacking in Nazi Germany and fascist Italy before their defeat in the Second World War. The point here is that if it is a question of acceptance of the universality of human rights as a matter of distinctive and self-contained Western civilization, it should have been true long before the Universal Declaration of Human Rights was adopted in 1948. Again, my point here is not to blame Western European countries, which in fact have the best human rights record compared to all other regions, nor to criticize Richards for focusing on a limited set of rights, as that is unavoidable. Rather, the object is to highlight the difficulty of such comparisons.

The chapter by Patrice C. McMahon, "Between Delight and Despair: The Effects of Transnational Women's Networks in the Balkans," examines the work of international and regional organizations and international nongovernmental organizations on women's rights in the Balkans of the 1990s. The author finds that while the efforts of these transnational women's networks did help Balkan women, they have also fallen short of intended goals. This is largely due to misperceptions about the Balkans, Western bias, and inappropriate strategies. On obstacles to success, the author finds that despite good intentions and a great deal of money spent, democracy assistance, particularly programs that focused on civil society development, were created with little understanding of the region's history, let alone the particulars of any country. She also adds that the in their effort to "do something," donors have failed to listen to the needs and priorities of local groups, which reinforced the prevailing insensitivity to gender problems and unintentionally undermined their own efforts. McMahon observes that changing international priorities and interests put local women's NGOs in a difficult position of having to attract grassroots interest when domestic priorities do not match the priorities of their international donors, who fail to practice what they preach about gender equality and women's rights. In her conclusion, the author recommends that women's networks in such situations should promote domestic priorities, adopt a strategic approach, and provide a good role model if they are to succeed in advancing the rights of women.

Eva Brems's discussion, "The Margin of Appreciation Doctrine of the European Court of Human Rights," presents a clear and strong model of the relationship between an "area expressions" and the universality of human rights. The author does that by examining the jurisprudence of the European Court of Human Rights in managing the tension between uniform human rights standards and respect

for diversity through what is known as the doctrine of margin of appreciation. This doctrine relates to the willingness of the European Court to defer to national bodies in the examination of whether a restriction of an individual human right is acceptable or not. "The effect of a wide margin of appreciation is that the application of a common standard leads to different results in different member states: the same facts that constitute a violation of a fundamental right in one state may be considered as a legitimate restriction of that right in another." The court uses this notion to balance uniformity and diversity within the European system but does not always mention it or justify its choice for a broad or narrow margin. "To the extent that there is a 'doctrine' of the margin of appreciation, it has to be derived from the case law." The author examines the case law of the court on such issues as protection of morals, significance of religion in society, availability of resources, security situations, and political ideology in the socioeconomic field. Her analysis is concerned with answering the following questions: Which types of diversity does the court encounter and how does it deal with each of them? Which criteria affect the court's decision to grant a wide or narrow margin of appreciation and thus to accept or reject diversity in the interpretation and application of the European Convention on Human Rights? To what extent can the margin of appreciation be used as a tool to reconcile universality and diversity on the universal level? I will highlight some of her conclusions and evaluation of the doctrine in the next section of this chapter because of their particular relevance to my analysis.

Another type of area expressions and universality of rights is presented in Corinne Packer's chapter, "African Women, Traditions, and Human Rights." The author examines some of the challenges facing African women and states in redressing human rights violations due to such customary practices as female genital mutilation, early marriage, and discrepancies in land ownership and inheritance on the basis of gender. These challenges include some of the language and concepts of human rights discourse applied to these issues. The author also finds the way in which human rights advocates expect African women to evaluate and claim their human rights to be problematic, particularly in light of the strong structural, cultural, and psychological impediments women in the region face in their use of law. These include financial costs, delay, intimidating or discouraging language and attitudes of court personnel, and inaccessibility of the court system, as well as cultural inhibition for women to stand in public opposition to dominant values and lack of confidence in the efficacy of rights. She calls for adaptation of the way in which human rights advocates expect gender discrimination, and specifically harmful traditional practices, to be challenged within Africa by, for example, drawing more upon local and culturally relevant mechanisms such as customary law and leadership. That is, she calls for drawing on religious and customary institutions in the process of challenging harmful traditional practices rather than simply criticizing and attempting to exclude them. Still, she also notes the difficulties of following that strategy. Ultimately, the author argues for the need to recognize that

the discourse of human rights is less useful and practical in efforts to eradicate gender discrimination in the African region without strong adaptation to local conditions through multiple strategies.

A good example of contextual difficulties facing the universality of human rights is discussed by Mahmood Monshipouri in "Human Rights and Child Labor in South Asia." According to the author, adopting a human rights approach to the elimination of poverty is a desirable but difficult and paradoxical task, given that freedom from child labor and socioeconomic rights continue to be conflicting concerns in South Asia. The elimination of child labor is a difficult proposition that defies sweeping generalizations, quick judgments, and short-term solutions. Attempts to prevent child labor have been plagued by the complex, interlocking relationships among a multitude of variables such as economic deprivation, cultural traditions, the local economy and power structure, and the global economy. The question of how to enforce laws against child labor remains unanswered. The long-term solution lies in alleviating poverty, improving the quality of education, and expanding access to schooling for disadvantaged social groups. Protecting children in their workplaces and creating more alternatives for economic and social advancement are the key. An antipoverty development strategy will be effective if it targets equality and education opportunities for poor families, especially those with school-age children.

The chapters by Richard Burchill and Ilan Peleg, "The Role of Democracy in the Protection of Human Rights" and "Ethnic Constitutional Orders and Human Rights," examine the relationship between human rights and two related concepts, namely, democracy and constitutionalism, which provide good examples of the sort of mediation I am proposing here. In his chapter, Burchill explains how democracy and human rights are closely related concepts, as democracy involves inclusion, participation, openness, and accountability, which are also familiar concerns in the human rights field. This affinity does not mean that these two concepts are inherently one and the same and should not be treated as such, but they are still closely interdependent. Burchill demonstrates this proposition by examining how the Inter-American Court of Human Rights and the European Court of Human Rights view democracy in the protection of human rights. Each court places a great deal of importance on democracy for the protection of human rights; but the approach of each court has been influenced by the regional context within which they operate.

Ilan Peleg discusses the conceptual affinity of constitutionalism and human rights with reference to what he calls "ethnic constitutional orders" in terms of the relationships between nationalism and ethnicity on the one hand and the commitment to human rights on the other. Since an ethnic constitutional order is, in and of itself, a negation of some fundamental human rights, he proposes a model of radical democratization for transforming such orders and reflects on how this change might be achieved. In terms of the thesis I proposed at the beginning of this chapter, Peleg's analysis addresses the question of how to mediate between

the particularistic language of ethnic uniqueness and the universalistic principles of contemporary human rights, especially in multiethnic polities dominated by a single ethnic group. Following an analysis of the phenomenon of ethnic orders, he reviews the sort of human rights that are typically violated by ethnic orders and concludes with an examination of some possibilities of theoretical and empirical change.

Finally, Robert K. Hitchcock's "Human Rights and Indigenous Peoples in Africa and Asia" examines the human rights situation of indigenous peoples. Estimated to be more than 600 million living in some seventy-five countries, indigenous peoples, also known by other names such as aboriginal, native, or tribal people, have suffered acts of genocide, human rights abuses, discrimination, impoverishment, and lack of equal opportunity in employment and land access for centuries. The claims of indigenous peoples are relatively similar—as they all wish to have their human rights respected, to have ownership and control over their own land and natural resources, and want the right to participate through their own institutions in the political process at different levels. The author discusses the situations of indigenous peoples in Africa and Asia, focusing on such issues as the definition of, and diversity among, indigenous peoples, and issues of universality and relativity of the international human rights of these populations. The author concludes that most, if not all, indigenous peoples in Africa and Asia believe that universal human rights standards should prevail, and that the governments of the states in which they live should protect and promote their rights and treat them equitably.

Without in any way justifying violations of the human rights of indigenous peoples, one may also raise the question of the acceptance of the universality of these rights within these communities, as distinguished from their rights against the state and other external sources of violation. As can be seen from several case studies, the universality of human rights is problematic on both sides.[9] In the same way that some states tend to object to external efforts to monitor and protest against human rights violation within their own territories as encroachment on their national sovereignty and domestic jurisdiction, indigenous peoples raise similar objections regarding such violations within their own communities. In other words, to what extent should the communal integrity and autonomy of these communities be respected when they violate the rights of their own women or children? I recommend that the same mediation approach indicated earlier and further elaborated in the next section be used to promote the universality of human rights within communities of indigenous peoples as well as to promote their rights against violation by the state.

Mediating the Contingent Universality of Human Rights

To recall the main points I made in the first section of this chapter, critics of the notion of the universality of human rights have a point that must be taken seriously but not allowed to defeat the possibility of that universality. Their point should be

taken seriously because of the difficulty of realizing the universality of human rights when all such normative systems are deeply embedded in cultural and contextual specificity, in a world of profound and permanent cultural and contextual diversity. Yet this difficulty must be overcome because of universal need for human rights in a world of national governments that exercise so much power over the lives and well-being of persons and groups living under their jurisdiction. As suggested above, the way to mediate this quandary is to see the universality of human rights as the contingent outcome of a process of constructing an overlapping consensus through internal discourse within cultures and cross-cultural dialogue among them. Moreover, I have also emphasized the contingent nature of this process on a synergy of possibilities of multiple foundations for the universality of human rights, as accepted or contested by a wide variety of actors and factors interacting in different local, regional, and global levels and contexts. I will now attempt to focus that analysis and explain the suggested methodology of mediation in light of whatever insights one can draw from the sort of "area expressions" discussed in other chapters in this book at various levels.

To begin with, it is necessary to understand and act upon the profoundly political nature of the whole project. The normative formulation and practical application of the universality of human rights presupposes the political will to allocate the necessary resources and take appropriate administrative or judicial action, including making hard choices in cases of apparent conflict with other national priorities or concerns, and so forth. Therefore, the critical question is how to generate and sustain the necessary political will to respect and protect these rights in different societies over time. So far, it seems to me, too much emphasis has been placed on a narrow, state-centric, legalistic, and reactive approach to international human rights standards that also presupposes certain institutional and material capacities that many not, in fact, exist in many parts of the world. By state-centric and legalistic, I mean the tendency to perceive the legitimacy and authority of human rights standards as founded on the legal obligation of states under international law. Accordingly, advocates of these rights tend to focus on definitions of discrete or isolated rights and pursuit of specific remedies for individual violations in a reactive manner, instead of trying to be proactive in seeking to preempt violations by addressing their underlying structural and cultural/contextual causes of violations.

It also seems clear to me that there are two aspects to these two processes, one internal to the particular community and another external in its relationship with other communities or constituencies. On the internal front, advocates of universality must be able to use whatever arguments are likely to be persuasive to the specific community, or able to address their apprehensions and concerns, in relation to whatever frame of reference is accepted by that community as authoritative or applicable. For instance, they may find it necessary to address religious, cultural, political, and/or economic issues of concern to the community. In other words, the objective here is *persuasion*, by showing people how human rights norms "make

sense" in their own daily lives, without being too threatening for them to accept. Of course, some are bound to object to the human rights demands of others, whether they are oppressive political leaders, business entities violating workers' rights, officials who torture criminal suspects or political opponents, or men who abuse and harass women. The question is therefore whether the arguments human rights advocates can make are capable of overriding such objections by appealing to more fundamental or widely held values or capable of building alliances to overcome such objections rather than expecting it to be acceptable to all.

One should also take into account at this internal level whatever conditions or circumstances that are likely to influence the persuasiveness of the utility and relevance of human rights in any given context. This could relate to local history, ethnic relations, and so forth, as well as external threats that may cause the community or group to become defensive or conservative in an effort to protect its own sense of identify, or vital economic, social, moral, or political interests. It should be noted, however, that one is concerned here with strongly held perceptions of the issues, regardless of their so-called objective or verifiable bases in fact. For instance, a community may become more conservative in guarding some elements of its "tradition" against change when it believes itself to be the object of hegemonic designs of another, regardless of the independent validity of such a perception.

It is from this perspective that one can appreciate what is probably the most critical external factor in the persuasiveness of the universality of human rights, namely, a community's perception of how seriously others take the whole premise and specific implications of this claim. That is why perceptions of "double standards" in the domestic or foreign policies of other countries regarding human rights in general are so damaging to the universality of these rights. The point here is not that the failure of some countries to consistently respect human rights in their own policies somehow "justifies" disregard for those rights by other countries. Rather, it is that such failure undermines the credibility of the notion of universality itself from the perspective of other countries. This is particularly true when there is no generally acceptable reason for failure to accept the validity of certain rights, as in the case of the refusal of Western countries to acknowledge economic, social, and cultural rights as human rights, noted earlier, as perceived by poorer developing countries. Western rejection of the "human rights standing" of these rights is so damaging to the possibility of universality of human rights because it undermines that notion at the conceptual and legal level by legitimizing the rejection of some human rights on ideological or cultural reasons, as explained earlier. If Western countries, which played a founding role in the modern human rights movement, can object to some rights on such grounds, developing countries would feel justified in doing the same for their own ideological or cultural reasons.

Both the internal and external dimensions of the process outlined above can be illustrated with reference to the recent international terrorist attacks of September 11, 2001, on the United States and their aftermath. On the one hand these attacks

have clearly shown that even the most powerful and technologically developed country in the world is vulnerable to serious threats to the most basic security and economic well-being of its citizens. On the other hand the United States started to retaliate militarily on a global scale since October 7, 2001, and exclusively on its own perceptions of the immediate or anticipated danger to itself, without any assessment of those perceptions through accepted institutional arrangements and processes of international law. I am neither suggesting that the United States should passively submit to repeated atrocious attacks against its citizens and interests at home and abroad nor drawing any conclusions about possible legal justification(s) for its military campaign in Afghanistan. Rather, my position is simply that the actions of the United States since October 7 constitute a failure of international legality because they are neither authorized by the normative, institutional, and procedural requirements of international law nor subsequently held accountable to those requirements. Whatever legal justification(s) may be claimed for the actions of the United States, it cannot act as prosecutor, judge, jury, and executioner in its own cause and still claim the legitimacy of international legality. To simplify and illustrate in domestic law terms, it is as if someone's house was attacked and the aggressor was killed in the attack, but the victim took his gun and went into the town killing whoever he deemed to be responsible for or associated with that attack.

In my view the scholarly and highly focused study of area expressions of the universality of human rights, as reflected in various chapters in this book, provides deep and contextual knowledge of local conditions as a resource for strategies of overcoming objections to the universality of human rights. But to play this critical role, the limitations of studies of area expressions must be appreciated and redressed. For example, there is the conceptual problem of the two competing concerns reflected in the positions of the American Anthropological Association briefly discussed in the first section of this chapter. One concern is the risk of ethnocentricity, in "constructing" other people into one's own image, and the other is perceiving them as so different and alien that they cannot possibly subscribe to the same human rights values as one's own society. Both types of concerns can be seen in the analysis of some of the chapters reviewed in the preceding section, such as the criteria of regional classifications or selection of rights for comparative study in the chapters by Poe and Richards.

Another type of limitation of studies of area expressions is its emphasis on clear analysis of the nature and/or causes of the problem, coupled with an unwillingness to propose concrete solutions or engage in deliberate advocacy for change. This is of course due to deeply ingrained worry about compromising "the objectivity" of scholarship by inadvertently distorting the analysis in pursuit of explicit policy objectives. Reasons for this aversion, which can be seen in the chapters by McMahon, Sahliyeh and Hitchcock, include the double concern of assuming that other people are either exactly like us or too different to share the same values. Moreover, these scholars are probably carefully avoiding making promises they cannot keep in the

real world of violent conflicts and gross differentials in power relations. In order words, my remarks here are not intended as criticism of the authors of these studies because they have good reasons for stopping short of making categorical policy recommendations, let alone engaging in explicit advocacy for change. But the end result is that scholarly studies of area expressions need to be supplemented and operationalized in order to bridge the famous gap between theory and practice. Indeed, one can see that the above-mentioned authors are trying to take their analysis as far as they can go in that direction without compromising the integrity of their scholarship. Nevertheless, the gap remains and has to be bridged somehow if things are to change on the ground.

This problem is compounded by the fact that the opponents of the universality of human rights are not constrained by this primarily because their explicitly political project is to maintain the status quo rather than engage in advocacy for change. This crucial difference between the two types of approaches can be illustrated by comparing the work of Islamic groups and human rights organizations in the Middle East and South Asia. Whereas Islamic groups represent their role as the guardians of culture and tradition, including discrimination against women and religious minorities, human rights organizations are calling for transformation of culture and tradition in order to eliminate such practices. Taking advantage of access to traditional local funding, like the religious tax (*zakat*) and charitable endowments (*waqf*), Islamic groups provide services, like education and health care, to their communities. Being able to do that, and to operate in traditionally "secure" spaces, like mosques and local religious schools (*madrasa*), Islamic groups appear to be the "natural" expression of civil society activism.

In contrast, human rights advocates have to seek foreign funding to support their "monitoring and advocacy" activities that attract the hostility of government officials, without being able to show the community any immediate concrete results for their efforts. That is, human rights organizations in developing countries are neither accountable to their own local communities nor believed to be effective in what they do, at least in the short term. It is not surprising, therefore, that governments as well as Islamic groups cite the reliance of human rights organizations on foreign funding as conclusive proof that human rights advocates are "agents" of Western cultural imperialism. Yet the best scholarly studies of area expressions can do is to analysis and document the situation, while avoiding even the appearance of direct advocacy in support of human rights organizations for the good reasons indicated above.

Against this background, I suggest that the utility of academic study of area expressions can be improved in two ways. First, by being brutally honest about the limitations of a human rights approach and exploring radical alternative approaches to safeguarding human dignity, such studies can better define the challenge of constructing universality, instead of assuming its desirability and only lamenting failure to pursue it effectively. Good examples of that approach in this book are the chapters

by Corinne Packer and Mahmood Monshipouri, which take the universality project seriously enough to be willing to admit its limitations. To avoid confusion here, the point is *not* that African societies are not committed to the universality of human rights over harmful traditional practices, or that South Asian societies are not fully committed to eliminating child labor as a violation of some universal human rights standards. Rather, it is that the analysis presented in those two chapters demonstrates the inadequacy of rhetorical appeals to the universality of human rights without doing what it takes to realize it in practice. That is, if universality of these rights does not apply to harmful traditional practices in African and child labor in South Asia, then there is no universality of human rights anywhere. What other countries are doing may be good social policy or respect for domestic constitutional rights but is not observance of universality of human rights if it does not apply to every human being, wherever he or she may be, rather than as citizens of specific countries.

Second, scholarly studies of area expressions can help in better defining the scope of universality in ways that make its achievement more realistic. At the beginning of this chapter, I raised the question of whether universality means that all human beings are entitled to the exact rights in precisely the same manner or is there room for a degree of variation, and to what extent or on what grounds. Brems's analysis of the European doctrine of margin of appreciation, outlined in the previous section, clearly shows that it is probably necessary to mediate the poles of diversity and uniformity in the interpretation and application of legal human rights standards. In reflecting on the potential of this doctrine on the universal level toward the end of her chapter, she observes that international human rights discourse needs to come to terms with the tension between the universality of human rights rules and the diversity of contexts in which human beings live. Holding that the same standards should prevail everywhere in the world does not preclude accommodation of diversity in the way these standards are realized in specific situations through interpretation, balancing, and enforcement. As a legal approach, this doctrine has its limitations but also advantages in that it "can be used as a more objective, neutral tool, an instrument to work toward solutions rather than a forum for taking positions." But to serve this purpose, the doctrine needs to be more explicit. The judicial or juridical institution employing this approach, whether the European Court or an international treaty body such as the Human Rights Committee of the UN, should strive to provide clear reasons for widening or restricting the margin of appreciation.

As Brems also notes, the challenge of following a coherent approach to the limits to the accommodation of diversity at a global level are more difficult than the relation to relatively homogenous region like Europe. But even within such a region, with its particularly favorable conditions for the protection of human rights, universality cannot mean total uniformity. In that context, the doctrine of margin of appreciation can be used or abused, depending on the scope and context of its application. For instance, she argues that the European Court of Human Rights

should reduce the scope of the margin of appreciation when certain core aspects of a right are concerned. In her view, since all rights can be conceived as having a core and a periphery, the further an element is removed from the core, the more room for diversity. From this perspective, the universality of human rights is undermined by contextual diversity of interpretation regarding the core of a right, but not if they pertain only to peripheral elements of the right.

Notes

1. For more discussion of this point, see Abdullahi Ahmed An-Na'im, "Problems of Universal Cultural Legitimacy for Human Rights," *Human Rights in Africa: Cross-Cultural Perspectives*, eds. Abdullahi Ahmed An-Na'im and F. M. Deng (Washington DC: Brookings Institution Press, 1990), 331–67.
2. For a brief review of controversies over possible justifications for the foundational assertion of Article 1 of the Universal Declaration that all human beings are born free and equal in dignity and rights, and so on, see Tore Lindholm, "Article 1: A New Beginning," *The Universal Declaration of Human Rights, A Commentary*, eds. Asbjorn Eide et al. (Oslo: Scandinavian University Press, 1992), 31–55.
3. American Anthropological Association, "Statement on Human Rights," *American Anthropologist*, vol. 49, no. 4 (1947): 539–43.
4. See, for example, Adamantia Pollis and Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," *Human Rights: Cultural and Ideological Perspectives*, eds. Adamantia Pollis and Peter Schwab (New York: Praeger, 1980), 1.
5. Abdullahi A. An-Na'im, "Human Rights and the Challenge of Relevance: The Case of Collective Rights," *The Role of the Nation-State in the 21st Century: Human Rights, International Organizations, and Foreign Policy*, eds. Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (The Hague: Kluwer Law International, 1998), 3–16.
6. American Anthropological Association, *Declaration on Anthropology and Human Rights*, adopted by AAA membership June 1999. Retrieved 10 November 2001 from *www.aaanet.org/stmts/humanrts.htm* [12 October 2002].
7. American Anthropological Association, *Declaration on Anthropology and Human Rights*.
8. See Abdullahi An-Na'im, "Introduction," *Human Rights in Cross-Cultural Perspective: A Quest for Consensus*, ed. Abdullahi An-Na'im (Philadelphia: University of Pennsylvania Press, 1992).
9. An-Na'im, "Introduction." See, for example, the various case studies of these issues in different parts of the world.

Overviews

1 The Civilizational Geography of Government Respect for Human Rights, 1981–99

David L. Richards

Using a unique and original database of information about government respect for human rights, this chapter presents the results of a cross-regional overview and analysis of government respect for a wide variety of human rights (three rights categories, thirteen particular rights) over time (1981–99) and space (nine defined regions, 158 states). Included is a discussion about the importance of conceptual transparency when defining "region" for the purposes of a cross-regional study. Samuel Huntington's civilizational scheme is used in this study as the basis for making regional distinctions.[1] Also included is a regional maximum likelihood analysis of six factors—democracy, economic development, colonial heritage, population size, and internal and external war—that have been widely found by pooled regression analyses to be reliable predictors of levels of government respect for human rights.

The now-large body of empirical human rights literature consists mainly of single-region and pooled global analyses. Most of the large, pooled analyses test hypotheses that are generally supposed to relate to government respect for human rights in a universal manner. At the same time, others press claims that such practices are less than helpful because human rights performance by governments must be examined within particular cultural/regional perspectives. In addition, due mostly to problems in data availability, the majority of empirical human rights research has focused on one category of internationally recognized human rights—physical integrity rights. While it is true that the international dialogue on human rights originally centered on physical integrity rights, attention is, however, increasingly being paid in international forums to the wider range of internationally recognized human rights. In 2001 Amnesty International made headlines when it declared it was expanding its core mission to include economic, cultural, and social rights.

Thus a cross-regional analysis of many types of rights over time should interest academic scholars and foreign policy practitioners alike. First, such a cross-regional study would be a start in helping to reveal whether certain preconceptions about respect for human rights are actually true. For example, some would expect Islamic governments, because of their particular religious affiliation, and Latin American governments, because of their Roman Catholic Iberian cultural heritage, to manifest very low levels (relative to the other regions of the world) of respect for women's rights. Are these preconceptions true in practice? Whether they are true or not could affect what returns countries such as the United States might realistically

expect from governments in these regions when linking government respect for human rights to other foreign policy issues.

Second, knowing the relative level of respect for various rights in various regions over time is essential for developing a perspective from which new strategies for improvements in respect for human rights can be developed. A cross-regional analysis of many types of rights over time can help further illuminate our understanding of the associates of government respect for human rights important to foreign policy. For example, the closest thing to an axiom that has come from the empirical human rights literature is that democracy is reliably associated with increased governmental respect for physical integrity rights. The United States has linked the promotion of both democracy and respect for physical integrity rights abroad for some time. However, do we really know whether this relationship universally holds true? A pooled analysis can hide what holds true in some places but may not be true in others. As the range of rights-related dialogue expands, it is additionally important to know the answer to the question, "Is democracy associated with government respect for human rights other than physical integrity rights?" We may have strong preconceptions about the answer to this question, but until it is properly examined, we remain unsure.

Conducting a Cross-Regional Analysis

Defining Region

The first task when conducting a cross-regional analysis is to define one's regions with a great deal of transparency—if not, the results of an otherwise sound study may become less clear, less reproducible or comparable, or even less important. This is because *region* is a fuzzy word. One dictionary defines a region as "a specified district or territory," "an area of interest or activity," or any area whose boundaries are either naturally or arbitrarily defined.[2] Even geographers, who rely so heavily on this term, lend it a great deal of flexibility. Look at an introductory geography textbook, and one will likely see *region* generally defined as some area marked by its distinctive, common characteristics. Thus in some sense a region is what one makes of it. In this manner, a regional analysis is akin to a dimensional analysis, where dimensionality—a researcher's perception of the interesting sources of variation in a concept of interest—dictates the framework of the analysis.[3]

Typically, in studies of *government* respect for human rights that contain a regional element, sovereign states constitute the elemental components of the regions analyzed. That is, regions are aggregations of one or more states. To actually define these regions, however, a set of distinctive and common characteristics must be chosen by which the states of the world will select into regions. Right away, several choices avail themselves. First, one could consider regions as defined by continent. Such regions might include South America, Africa, or Oceania. Many organizations, including the United Nations Statistical Division, provide frameworks for identifying states with regions in this manner. Second, states may be divided into regions

according to levels of economic development. The World Bank defines regions such as "upper middle income" and "lower income" on this basis. The binary approach of labeling states as "developed" or "developing" is very popular. Those engaging in world systems analysis often classify states as "core," "semiperiphery," or "periphery" on the basis of a state's level of economic development and its role in the global economy. Third, regions could constitute states of similar political characteristics. The Freedom House organization provides an annual map of the world whereupon states are classified as "free," "partly free," or "not free." Fourth, countries could be grouped according to their dominant religion or cultural identity.

Previous Studies Incorporating Regional Analyses

Existing empirical human rights studies often "control" for some of the above factors, but these pooled results most often make it impossible to discuss the findings with regard to particular regions. Studies that do include distinct cross-regional analyses often combine several of the above possible organizing characteristics but then label regions with continental labels.[4] For instance, in their analyses of women's rights, Poe, Wendel-Blunt, and Ho create combinations such as "Europe and N. America" and "Middle East & N. Africa."[5] These are not natural continental pairings, but yet they are labeled with these terms, and no explanation of their combination is given other than that several countries from the Middle East and North Africa have large Muslim populations and "in practice, dominant interpretations of the Qur'an inhibit women's . . . equality."[6] Might it have been better to call "Middle East & N. Africa" by some different name that better suits the cultural basis for the pairing? Doing so might enhance our ability to interpret any findings. "Europe and N. America" might have been paired for commonality of economic development, political regime, and/or dominant culture. The authors, however, do not explain which, if any or all, of these factors underlies their pairing of these two places. Why is the Caribbean separated from the rest of Latin America? Much of Central America is more similar to the Caribbean in terms of economic development than in terms of ethnocultural identity. The lack of a table listing what states belong to what regions obfuscates certain information that might have been gleaned from the results. For instance, what countries comprise "Austrasia"? Is Mexico included in North America or Latin America?

All of the above is not to accuse Poe, Wendel-Blunt, and Ho of being ad hoc. It is clear that they took political, economic, and cultural factors into account when forming their regions. What is unclear is what countries belonged to which regions and more importantly, why different factors were taken into account to define various regions in the same analysis. Can we make cross-regional comparisons when we define one region by culture and another by level of economic development? Doing so is likely a threat to internal validity via instrumentation effects. Thus a lack of transparency and/or consistency regarding one's definition of region threatens the generalizability of one's findings.

Most certain of all is that Poe, Wendel-Blunt, and Ho are not alone in being less than perfectly transparent about their regions. Apodaca also examines women's rights by region, using such categories as West, Middle East, Asia, and Africa.[7] The same type of questions that applied to Poe, Wendel-Blunt, and Ho apply to her study as well. Which countries constitute the West? Are North African countries such as Egypt included in Africa or the Middle East? Is Iran included in the Middle East or Asia? What factors decided which countries selected into which regions? Cingranelli and Richards use regional categories almost identical to Apodaca's and commit identical offenses.[8] In a study focusing exclusively on economically developing countries, Richards and Gelleny do a little better by providing a table illustrating which countries selected into which regions.[9] Nonetheless, they too fail to reveal the real selection criteria for their regions.

Three Questions

Thus when conducting a study that employs cross-regional analyses, one must be able to answer three questions for the study to be fully transparent. By keeping these questions in mind, a researcher can take a large step toward maximizing the utility of any regionally based findings. First, are the common and distinct characteristics used to group states into regions clearly identified? Second, are these characteristics tied in any theoretical manner to the chief concept that the study addresses? Third, from the information provided, can a reader tell which countries have selected into which regions?

The Current Study: Civilizations as Regions

Given the previous caveats, a clearly defined regional scheme was sought with which states could be selected into various regions for the analyses in this study. In *The Clash of Civilizations and the Remaking of World Order*, Samuel Huntington provides a scheme for selecting all of the countries of the world into one of nine civilizations: Sinic, Japanese, Hindu, Islamic, Orthodox, Western, Latin American, Buddhist and African.[10] One of the characteristics of a civilization, according to Huntington, is that as an entity, it is long lived. Consequently, he asserts that since civilizations are long lived such that they "survive political, social, economic, even ideological upheavals," civilizations are not political but rather cultural entities."[11] Thus Huntington's civilizational scheme is based mostly on culture, for which he leans heavily on religion as a proxy. In addressing possible alternative proxies such as language, he explains: "To a very large degree, the major civilizations in human history have been closely identified with the world's great religions; and people who share ethnicity and language but differ in religion may slaughter each other, as happened in Lebanon, the former Yugoslavia, and the Subcontinent."[12]

Any arguments over his definition of civilization aside, Huntington's reliance on dominant religious culture is a perfectly suitable manner in which to divide countries into regions for a comparative empirical analysis of government respect for

human rights. First, the criterion for making regional distinctions is clearly defined and reproducible.[13] Second, culture is a theoretically rich concept relevant to respect for human rights. Moreover, as required for the present analysis, Huntington views the state as an elemental political component of civilizations. He notes that integration is important for states such that "[i]f the civilization is composed of states, these states will have more relation to one another than they do to states outside the civilization."[14] Thus the definition of a region as an area defined by distinct, common characteristics is well met by Huntington's civilizational distinctions. The list of which states fall into what civilizations can be found in appendix A.

Human Rights Data

The human rights data used in this study come from David L. Cingranelli and David L. Richards's database of information about the level of government respect for fourteen internationally recognized human rights.[15] These ordinal data exist for 158 states and span the years 1981 to 1999.[16] This country sample is representative of all continental regions of the world as well as representative of all political system types. The sources of information for the coding of the human rights indicators used in this study are the annual *United States Department of State Country Reports on Human Rights Practices* and Amnesty International's annual world reports.[17]

To increase the conceptual clarity of the analyses in this study, the thirteen particular rights from the data set were assigned into one of three general human rights categories: physical integrity rights, empowerment rights, and women's rights. The conceptual range of these three categories is meant to reflect only those rights included in the data set, not the full range of internationally recognized human rights. Both the coding schemes employed for the data used and a breakdown of particular rights by category can be viewed in appendix B.[18]

Physical Integrity Rights

Physical integrity rights refer to the entitlements individuals have to be free from arbitrary physical harm and coercion by their government. Four indicators of government respect for physical integrity rights are included in the indicator of the same used in this study. These indicators represent the rights not to be tortured, extrajudicially killed, disappeared, or politically imprisoned. When combined, they yield an ordinal scale ranging from zero (no respect whatsoever for any of these four rights) to eight (full respect for all four rights).

Empowerment Rights

Empowerment rights provide the individual with control over the course of his or her own life and, in particular, control over the state. Five indicators of government respect for empowerment rights are included in the indicator of the same used in this study. These indicators represent: the right to form trade unions and join union of choice; the right to freedom of expression, thought, and conscience; the right to

freedom of movement; the right to take part in public affairs, directly or through elected representatives; and the right to free choice and practice of religion. When combined they yield an ordinal scale ranging from zero (no respect whatsoever for any of these five rights) to ten (full respect for all five rights).

Women's Rights

Women's rights are those rights that entitle females to equality with males in the political, economic, and social/familial spheres of life. Three ordinal indicators of government respect for women's rights are used to construct an ordinal women's rights indicator ranging from zero (no respect whatsoever for any of these three rights) to ten (full respect for all three rights). These indicators, also used individually, represent respect for women's political rights, economic rights, and social rights. Women's political rights are fully respected by a government when women have the right to vote and participate in the political system equally with men. Women's economic rights are those that, when fully respected, ensure equal pay for equal work in law and practice and the ability to compete economically with men on an equal footing with men. Women's social rights are fully respected when the rights of women are the same before the law as those of men, particularly when women have the rights to equal inheritance, equal educational opportunities, equal power to enter into a relationship of choice with a partner and equal power within that relationship, and freedom from spousal abuse (among other rights).

The Civilizational Geography of Government Respect for Human Rights
An Overview across Rights Categories

Table 1.1 shows mean levels of government respect for three categories of human rights, by civilization, for the years 1981 to 1999. Within each category, the civilizations are listed according to their mean level of government respect throughout the 1981–99 period from most respectful (top) to least respectful (bottom).[19] It is important to remember when looking at table 1.1 that while the physical integrity rights scores range from zero to eight, the scores for the other two categories range from zero to ten. Thus in table 1.1, means are not directly comparable across all three categories.

Looking at physical integrity rights in table 1.1, we see that Japanese and Western civilization governments have, on the average, the highest mean levels of government respect, while Sinic culture governments have the lowest mean level of respect. It is important to remember that the Japanese civilization is comprised of Japan only. At the extremes, the civilization hierarchy that forms from the 1981–99 means remains steady throughout the period. That is, the Japanese and Western civilizations manifest the highest levels of respect throughout, with the Sinic culture holding the lowest rank of respect (except for 1993, in which the Hindu civilization had the lowest mean level of respect). Some of the states included in the Sinic and Hindu civilizations, such as China, India, and North Korea, make the low levels of respect

Table 1.1. Mean Levels of Government Respect for Three Categories of Human Rights, by Civilization, 1981–99

Physical Integrity Rights								
Civilization	1981	1984	1987	1990	1993	1996	1999	Mean
Japanese	8.00	7.00	8.00	8.00	7.00	7.00	7.00	7.53
Western	7.07	6.86	6.90	7.14	6.88	7.00	6.51	7.01
Orthodox	4.30	3.67	4.17	5.17	5.00	4.00	4.29	4.62
African	4.90	4.34	4.43	3.77	3.70	4.10	3.60	4.28
Latin American	4.04	3.61	3.91	3.26	3.96	4.52	4.96	4.23
Buddhist	4.50	4.88	4.13	3.13	3.50	4.50	4.13	4.14
Islamic	4.29	3.86	4.03	3.42	3.90	3.41	3.41	3.89
Hindu	4.50	3.50	4.00	3.50	3.00	3.00	3.50	3.85
Sinic	2.00	3.40	2.20	2.80	3.80	2.80	2.60	2.85
Empowerment Rights								
Civilization	1981	1984	1987	1990	1993	1996	1999	Mean
Japanese	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
Western	8.33	7.92	8.07	8.76	9.22	8.97	9.31	8.73
Latin American	6.04	6.65	6.52	7.04	7.61	8.04	7.91	7.55
Hindu	7.00	5.50	7.50	6.00	7.00	9.00	8.50	7.46
Orthodox	3.50	3.33	2.83	6.17	7.00	4.77	5.75	5.11
African	4.00	3.93	3.63	4.00	5.43	6.10	5.63	4.65
Buddhist	3.38	3.88	3.50	4.50	3.75	5.13	5.00	4.30
Islamic	3.97	3.89	3.43	3.61	3.88	3.51	4.10	3.74
Sinic	3.60	2.80	2.20	2.80	3.80	3.60	4.20	3.53
Women's Rights								
Civilization	1981	1984	1987	1990	1993	1996	1999	Mean
Western	6.04	5.69	5.72	6.11	6.44	6.63	6.47	6.26
Latin American	3.83	4.37	4.23	4.61	4.70	4.78	4.50	4.58
Orthodox	3.83	4.17	3.50	3.83	3.23	4.00	3.31	4.08
Hindu	3.50	4.50	4.50	4.00	4.00	4.00	4.50	3.92
Buddhist	3.29	3.00	3.14	3.50	3.88	3.88	5.63	3.71
Sinic	2.60	3.20	2.60	3.40	3.40	4.00	3.60	3.45
African	2.97	3.10	2.83	3.10	3.33	3.67	2.80	3.39
Japanese	3.00	3.00	3.00	3.00	4.00	4.00	4.00	3.23
Islamic	1.79	2.40	2.23	2.33	2.79	2.71	2.61	2.48

manifested by these civilizations not exactly surprising. No hierarchy of respect for physical integrity rights forms for those civilizations at mid levels of respect, as their ranks switch year in and year out. An interesting thing to note in table 1.1 is the steady rise in respect for these rights in Latin America in the post–cold war era. In addition, note the African civilization's erosion of respect over time.

Looking at empowerment rights in table 1.1, again, it is the Japanese and Western civilizations evidencing the highest mean levels of respect by their governments. The Sinic civilization once again manifests the lowest average level of respect, although this time it is joined in the bottom rank of respect by the Islamic civilization rather

than the Hindu civilization. The civilizations of Japan, the West, Latin America, and the Hindu civilization form the top ranks of respect throughout the period studied. This is qualified by the case of 1990, where the Orthodox civilization overtook the Hindu civilization for a year. Actually, the huge gain in the level of respect for these rights in the Orthodox civilization between 1987 and 1990 is one of the most interesting features of this section of table 1.1. A jump of almost three and one-half points on a ten-point scale is huge. Furthermore, this jump seemed to have established a new baseline mean level of respect for the Orthodox civilization. Even the conflicts in the lower Balkans, while decreasing the mean Orthodox level of respect, did not drop it to pre-1990 levels. Also worth pointing out is the increase in respect over time in the Buddhist civilization.

Table 1.1 demonstrates both a steady increase in respect for empowerment rights in Latin America throughout the period studied and an increase in respect in Africa for these rights in the post–cold war period. The Latin American trend makes sense, as many violent revolutions and other internal struggles were resolved in, if not perfectly democratic, increasingly democratic fashion. In Africa, toward the end of the cold war, client-state funds stopped coming in from the USSR and the USA, and new funding sources were needed. Many African states looked to international lending sources for funds. While some note that "the IMF and World Bank have seldom, if ever, pushed for political reforms to match the economic reforms that they have advocated," external pressure from international lending sources in the late 1980s and early 1990s clearly pushed some elites towards pluralism and multiparty systems. This was certainly the case in the Central African Republic, Malawi, and the Democratic Republic of the Congo.[20] Cingranelli and Richards describe this phenomenon and predict that respect for empowerment rights in Africa would peak and then decline as illiberal democracy, rather than fully consolidated democracy, took root in these states.[21] While it is limited evidence, the decrease in African civilization respect for these rights from 1996 to 1999 is consistent with their supposition.

Looking at women's rights in table 1.1, we see that Western civilization governments clearly manifest the highest mean level of respect for these rights. At the lowest rank of respect for women's rights is the Islamic civilization. Japanese civilization, after holding the top rank of respect for the previous two rights categories, finds itself in the second-lowest rank of respect for women's rights. Latin America generally holds the second-best rank of respect for women's rights throughout 1981–99, although it is dropped to third-best by a significant increase in respect within the Buddhist civilization. This may be somewhat surprising given the Roman Catholic Church's long-standing religious dominance in the region, as the Church has traditionally reinforced Iberian patriarchy. The time period of this study, however, may represent significant changes in, or a waning of, the influence of the mainstream Roman Catholic Church. First, the early portion of this study represents a time when "liberation theology," a Christian doctrine generally stressing the equality of

Table 1.2. Overall Ranking of Civilizations Based on Mean Levels of Government Respect for Three Categories of Human Rights, 1981–99

Rank	Civilization	Overall Average Level of Respect
01	Western	8.11
02	Japanese	7.66
03	Latin American	6.18
04	Hindu	5.74
05	Orthodox	4.69
06	African	4.42
07	Buddhist	4.24
08	Islamic	3.55
09	Sinic	3.25

Note: Physical integrity rights are originally on a 0–8 scale, while empowerment and women's rights are on 0–10 scales. To ensure that all three rights categories were weighted equally when calculating the overall average level of respect, physical integrity scores were multiplied by 1.25 before being averaged together with empowerment and women's rights scores. Thus the possible range of overall average scores is 0 to 10.

all believers, was a powerful force throughout the region.[22] Second, the later period of this study coincides with what is known as the "quiet revolution"—the trend of Catholic conversion to Protestantism.

Table 1.2 gives an overall ranking of Huntington's nine civilizations based on their mean level of government respect for three categories of human rights, 1981–99. It is important to note that table 1.2 represents a ranking based on three categories of human rights only, and these three categories are *not* intended to serve as a proxy for *all* internationally recognized human rights. For instance, due to lack of available data, the analyses in this study do not include either membership or subsistence rights. However, since indicators for three categories of rights are available, and these are important categories of rights, table 1.2 presents us with an opportunity to glean "the big picture" as far as these rights are concerned.

The overall means in table 1.2 reveal four tiers of respect for these three categories of rights. Included in the first tier of respect are the Western and Japanese civilizations. The second tier of respect is comprised of the Latin American and Hindu civilizations. Included in the third tier of respect are the Orthodox, African, and Buddhist civilizations. The fourth and lowest tier of respect is composed of the Islamic and Sinic civilizations. The tier rankings seem to have an association with democratization. It is interesting to note how closely the hierarchy of civilizations shown in table 1.2 corresponds with that of the empowerment rights hierarchy of civilizations in table 1.1. At first blush, it may appear looking at table 1.1 that this result is simply because average levels of respect for empowerment rights were higher than for the other two categories. However, when physical integrity rights scores are weighted by 1.25 to be made comparable for the purpose of overall ranking, the average level of respect per civilization is very similar to their level of respect

for empowerment rights, with respect for women's rights being significantly lower. The ranking of civilizations in table 1.2 is consistent with much empirical research demonstrating that more-democratic governments have greater respect for physical integrity rights: thus the similar means of these categories and their domination of the rankings in table 1.2.

Examining Particular Rights

PHYSICAL INTEGRITY RIGHTS

Table 1.3 shows mean levels of government respect for four physical integrity rights, by civilization. Looking down the columns we see that on average, the right against disappearance is the most respected right of these four. On average, all nine civilizations demonstrate at least a moderate amount of respect for this right. The right against extrajudicial killing is the second most respected right, followed by the right against political imprisonment. Almost every civilization demonstrates at least some respect, on average, for the right against extrajudicial killing. The Sinic civilization manifests the lowest average level of respect for extrajudicial killing and, in fact, the level of respect it affords citizens against political imprisonment is the lowest level of respect to be found for any right in this study by any of these nine civilizations. The Sinic civilization, on average, demonstrates nearly no respect whatsoever for the right against political imprisonment. Surprisingly, a closer look at the data shows this extremely low (0.13) average level of respect to actually be the result of an upward trend in respect for this right from 1990 to 1999. This trend toward increased respect resulted in a still-anemic 0.40 level of respect. Indeed, respect for the right against political imprisonment in the Sinic civilization was absolute zero in 1981, 1987, and 1990. Finally in table 1.3, we see that the least respected physical integrity right is the right against torture.

The overall pattern in respect (or hierarchy of respect) for the rights in table 1.3 corroborates the findings of Cingranelli and Richards, who found the same order using a smaller country sample and shorter time frame.[23] They noted that respect for the rights against torture and political imprisonment is generally similar, and any deviations from the general hierarchy will most likely involve these two rights. The general hierarchical pattern in table 1.3 holds across most of the individual civilizations, with a few such exceptions. Governments in the Buddhist and Islamic civilizations tend to exhibit less respect for the right against political imprisonment than the right against torture, but not significantly so. As previously discussed, the Sinic civilization displays a relatively greater level of respect for the right against torture than that against political imprisonment.

For most of the civilizations, the pattern of respect across these four rights holds over time. A few civilizations, however, have shown interesting deviations. For example, on average (as shown in table 1.3), the Latin American civilization manifests a much lower level of respect for the right against extrajudicial killing than for the right against political imprisonment. Looking at respect for these rights

Table 1.3. Mean Levels of Government Respect for Four Physical Integrity Rights, by Civilization, 1981–99

Civilization	Extrajudicial Killing	Disappearance	Torture	Political Imprisonment
African	1.12	1.64	0.70	0.78
Buddhist	1.10	1.41	0.81	0.75
Hindu	0.94	1.44	0.50	0.97
Islamic	1.18	1.49	0.61	0.58
Japanese	2.00	2.00	1.53	2.00
Latin American	1.02	1.35	0.62	1.21
Orthodox	1.49	1.63	0.73	0.76
Sinic	0.86	1.42	0.41	0.13
Western	1.89	1.95	1.47	1.69

Note: The range of government respect for each particular right is from 0 (no respect whatsoever for that particular right) to 2 (full respect for that particular right).

in this civilization over time, however, one can see a more engaging picture. Figure 1.1 shows that from 1981 to 1990 levels of respect in Latin America for the rights against extrajudicial killing and political imprisonment were actually very similar. However, the post-1990 period saw a sharp increase in respect for the right against political imprisonment. While torture occurred less frequently from 1993 on, it did not improve on the same scale as the increased restraint shown by governments against political imprisonment. Figure 1.1 also shows us that in Latin America the only physical integrity right not to see some boost in respect after 1990 is the right against torture, which has remained at a very low level of respect due mainly to continued frequent violations in Cuba, Haiti, Mexico, Colombia, Peru, and Brazil.

Figure 1.2 confirms the findings from table 1.3 that the right against disappearance is the most respected physical integrity right by African governments. However, we also see that the general pattern of respect in table 1.3 among these four rights only exists in 1990. In 1981, respect for the right against torture was actually much higher than for political imprisonment. Then, respect for the right against torture plummeted from 1981 to 1990, when it became the least respected physical integrity right in Africa—a position in which it remains. Figure 1.2 also shows a slide in respect for the right against extrajudicial killing in Africa from 1981 to 1999. While it did not affect their overall patterns of respect for physical integrity rights, the Buddhist, Orthodox, and Western civilizations also all saw deterioration in respect for the right against torture throughout the 1981–99 period. Cingranelli and Richards explain: "The prohibition against torture . . . is relatively weak, because, despite good intentions, many governments have been unable to eradicate the practice of torture by police and prison guards. . . . [G]overnments such as the United States, Switzerland, and Austria, with excellent records of respect for other physical integrity rights, have found it difficult to completely prevent these practices."[24]

Figure 1.1. Mean Levels of Government Respect for
Physical Integrity Rights in Latin American Civilization, 1981–99

Figure 1.2. Mean Levels of Government Respect for Physical Integrity Rights in African Civilization, 1981–99

Finally, figure 1.2 shows that respect for the right against political imprisonment in Africa rallied hopefully between 1990 and 1996, but a steep decline in respect occurred between 1996 and 1999. The greatest losses of respect for this right occurred in Cameroon and Namibia, but other governments, such as Kenya, Benin, Burkina Faso, and Gabon, among many others, also exhibited noticeable losses of respect for the right against political imprisonment.

EMPOWERMENT RIGHTS

Table 1.4 shows mean levels of government respect for five empowerment rights, by civilization. On average across the civilizations, two tiers of respect form. Rights to freedom of travel (movement) and religion are the two most respected rights. For each civilization, on average, respect for freedom of movement is the most respected empowerment right and respect for freedom of movement is greater than respect for freedom of religion. The freedoms of political participation, unionization, and freedom from censorship are the next most respected rights, respectively. We do see, however, that in the Western and Orthodox civilizations, more respect is shown for the right to unionize than for the right to freedom of religion. Western governments such as those in Austria, Hungary, Slovakia, and even Canada have at times shown relatively less tolerance for religious freedom than their Western counterparts. Finally, on average, freedom from censorship is the least respected right. The African and Islamic civilizations show more respect for the right to freedom from censorship than for the right to political participation. In addition, the Buddhist and Latin American civilizations manifest more respect for the right to freedom from censorship than for the right to unionize. The Sinic civilization manifests the lowest levels of respect for three (censorship, travel, and unionization) of the five categories. Islamic governments show the least respect, on average, for the right to political participation, and the Orthodox culture manifests the lowest average level of respect for freedom of religion. Many Orthodox governments, such as those in Greece, Bulgaria, Russia, Armenia, and Georgia, demonstrate no respect for freedom of religion—some throughout the entire period, others for large parts of it.

Table 1.4 paints an interesting "big picture" from which we may generalize the relative levels of respect afforded to these five empowerment rights by these civilizations. However, looking at some of these civilizations individually over time yields an interesting picture about the relationship among the individual rights themselves in different regions. Figure 1.3 shows the mean levels of government respect for empowerment rights over the years 1981 to 1999 in Africa. Notice the two clusters of rights across time. This illustrates the two tiers of respect discussed above with regard to table 1.4. In figure 1.3, it is interesting to note the volatility in respect for the freedoms of travel and religion, and that despite this volatility, these rights remain the most respected empowerment rights in Africa throughout the 1981–99 period. Africa manifested, on average, a steady decline in respect for

Table 1.4. Mean Levels of Government Respect for Five Empowerment Rights, by Civilization, 1981–99

Civilization	Freedom from Government Censorship	Religious Freedom	Travel	Political Participation	Freedom to Unionize
African	0.67	1.31	1.36	0.54	0.77
Buddhist	0.64	1.13	1.22	0.72	0.60
Hindu	1.00	1.77	1.92	1.42	1.35
Islamic	0.52	0.90	1.27	0.43	0.63
Japanese	2.00	2.00	2.00	2.00	2.00
Latin American	1.35	1.75	1.81	1.39	1.24
Orthodox	0.98	0.68	1.27	0.98	1.26
Sinic	0.46	0.92	0.98	0.71	0.46
Western	1.58	1.75	1.82	1.75	1.78

Note: The range of government respect for each particular right is from 0 (no respect whatsoever for that particular right) to 2 (full respect for that particular right).

religious freedom from 1981 to 1990, and then a sharp increase in respect from 1990 to 1996. Some countries, such as Malawi and Mozambique, experienced steadier high levels of respect throughout this period, while others, such as Burundi and Republic of the Congo, reached new levels of respect. Likewise, respect for the right to travel also saw a general upward trend to 1996, with countries like Mozambique, Zambia, and Namibia loosening travel restrictions somewhat. Then, respect for both of these rights dropped after 1996 with governments in Liberia, Ethiopia, and elsewhere dropping from full to no respect for both of these rights. In contrast, the other three rights show much less volatility and generally trend upward (more respect) together throughout the period of the analysis.

Pay particular note in figure 1.3 to the significant and steady increase in respect for the right to unionize in Africa. Gains in respect for this right in Burkina Faso, Mozambique, Ethiopia, Zambia, and South Africa are particularly responsible for this trend. Finally, looking at figure 1.3, one might get the feeling that in Africa, respect for the two groups of empowerment rights seems to be headed toward convergence.

Figure 1.4 shows mean levels of government respect for empowerment rights in Latin America. As in figure 1.3, two groups of rights cluster throughout the period of analysis, but for Latin America they do so at higher levels of respect and with the difference between the two groups much less pronounced. Respect for the freedoms of travel and religion is shown to be much less volatile in Latin America than in Africa, and the levels of respect for these two rights are much closer as well. As might be expected, we see a post—revolutionary period surge in respect for political participation from 1990 to 1996. However, we also see a dip in respect for this right after 1996. The governments of Haiti, Jamaica, Guatemala, Colombia, and Chile all manifested less respect for political participation in 1999 than in 1996.

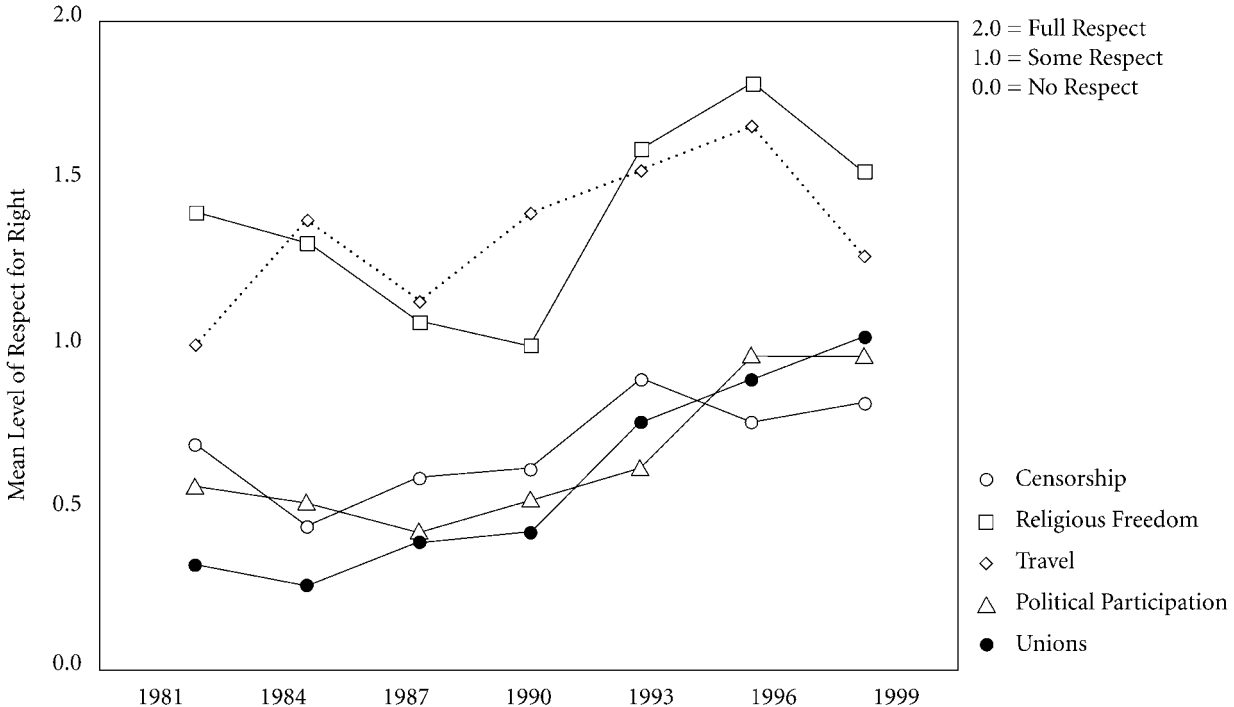

Figure 1.3. Mean Levels of Government Respect for Empowerment Rights in African Civilization, 1981–99

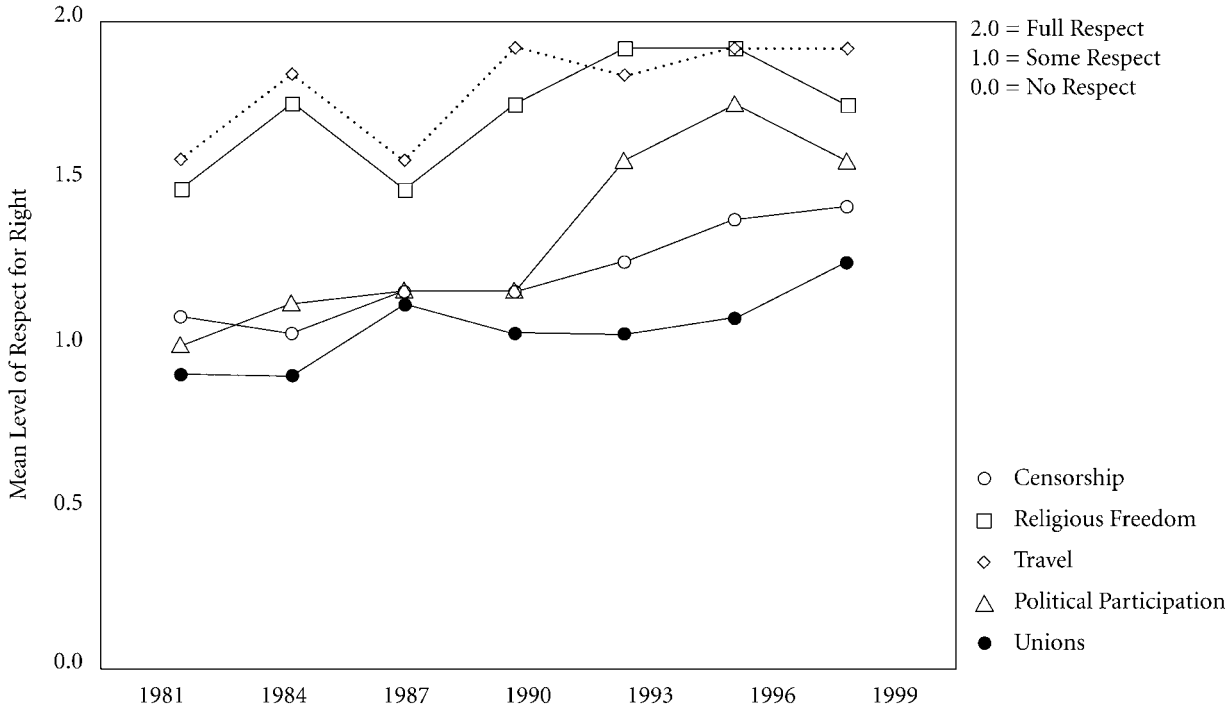

Figure 1.4. Mean Levels of Government Respect for Empowerment Rights in Latin American Civilization, 1981–99

Figure 1.5 shows mean levels of Orthodox government respect for empowerment rights. There are no discernibly different clusters of rights such as in figures 1.3 or 1.4, but rather one cluster containing all five empowerment rights that exhibits a very interesting rise and fall between 1987 and 1996. Between 1987 and 1990, respect for all five rights rises remarkably. This effect is due to short-lived increases in respect for these rights in Greece, Cyprus, and Romania in the mid- to late 1980s. The short life of these increases is partly responsible for the decline in respect from 1993 to 1996. There is also a post–cold war dynamic at work in figure 1.5. Many of the countries that comprise the Orthodox civilization were not in the data set until the fall of the Soviet Union, and the fall in respect was partly due to some of these countries entering the sample during this era. The general increase in respect for empowerment rights from 1996 to 1999 is due to some countries, such as Moldova, stabilizing, and others, such as Cyprus, rebounding after decline. Once again, we see an improvement over time in respect for the right to unionize. This gain is due to the newly independent countries (NICs) entering the sample, with their high levels of respect for the right to unionize counteracting the more restrictive policies of countries such as Bulgaria and Romania.

Figure 1.6 shows mean levels of Islamic government respect for empowerment rights. Notice that, except for 1981–84, significantly more respect is manifested for the freedom of travel, or movement, than for any other empowerment right. The reason for this is the second striking feature of figure 1.6, and that is the precipitous decline in respect for religious freedom from 1984 to 1987. This decline was evident in many countries, such as Mali, Algeria, Tunisia, Oman, Turkey, and Jordan, where respect for religious freedom fell to a score of zero (no respect) and stayed at that level throughout the period in the study.

Also noteworthy in figure 1.6 are the steady increases in respect for both the right against censorship and the right to unionize. Increased restraint regarding censorship has been shown in small but steady doses by the governments of Albania, Mali, Mauritania, Bangladesh, and some others. Interestingly, increased respect for the right against censorship within the Islamic civilization seems to have occurred primarily in Islamic countries on the continent of Africa but not on the Arabian Peninsula. Perhaps there is a difference among these countries that falls along continental borders rather than civilizational borders. The rise in the respect for unions comes from two sources. First, countries such as Albania, Guinea-Bissau, and Yemen saw increased respect for this right throughout the 1981–99 period. Second, NICs such as Tajikistan and Kyrgyzstan entered the sample in the mid- to late 1990s with high levels of respect for this right.

WOMEN'S RIGHTS

Table 1.5 shows mean levels of government respect for three women's rights. These means are expressed as percentages of their maximum values because all three indicators are not on the same scale. By expressing level of respect for these rights as

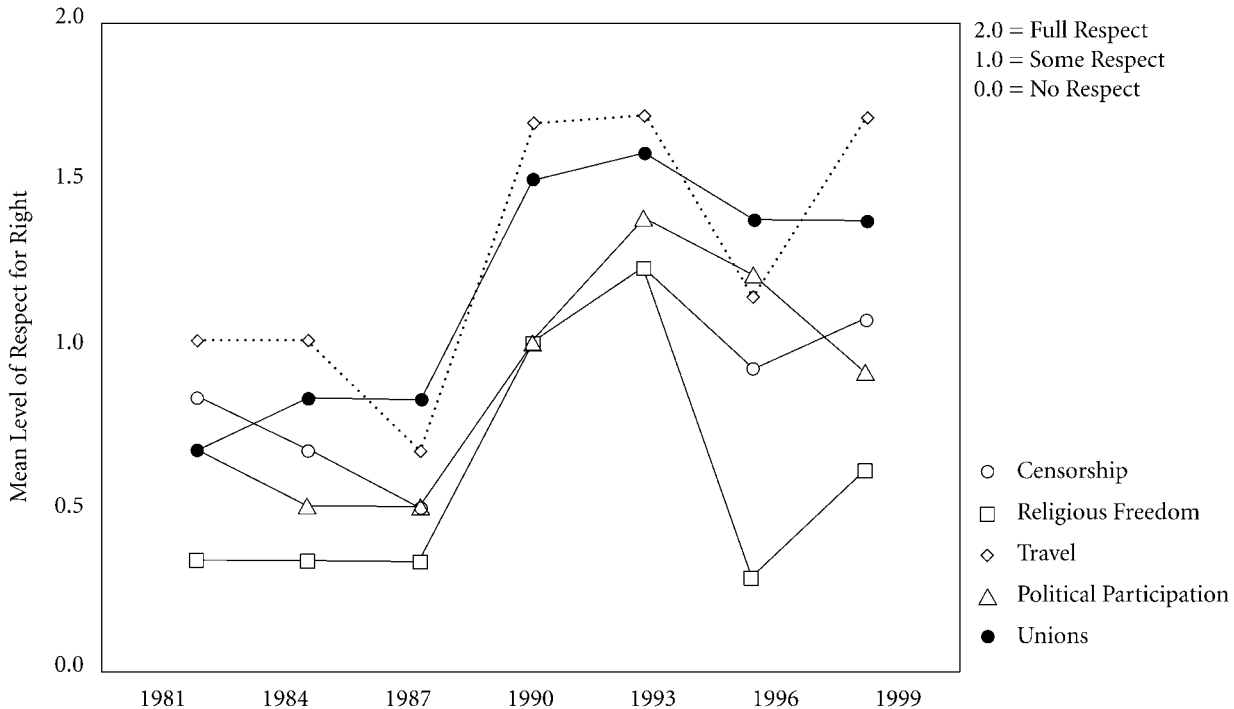

Figure 1.5. Mean Levels of Government Respect for Empowerment Rights in Orthodox Civilization, 1981–99

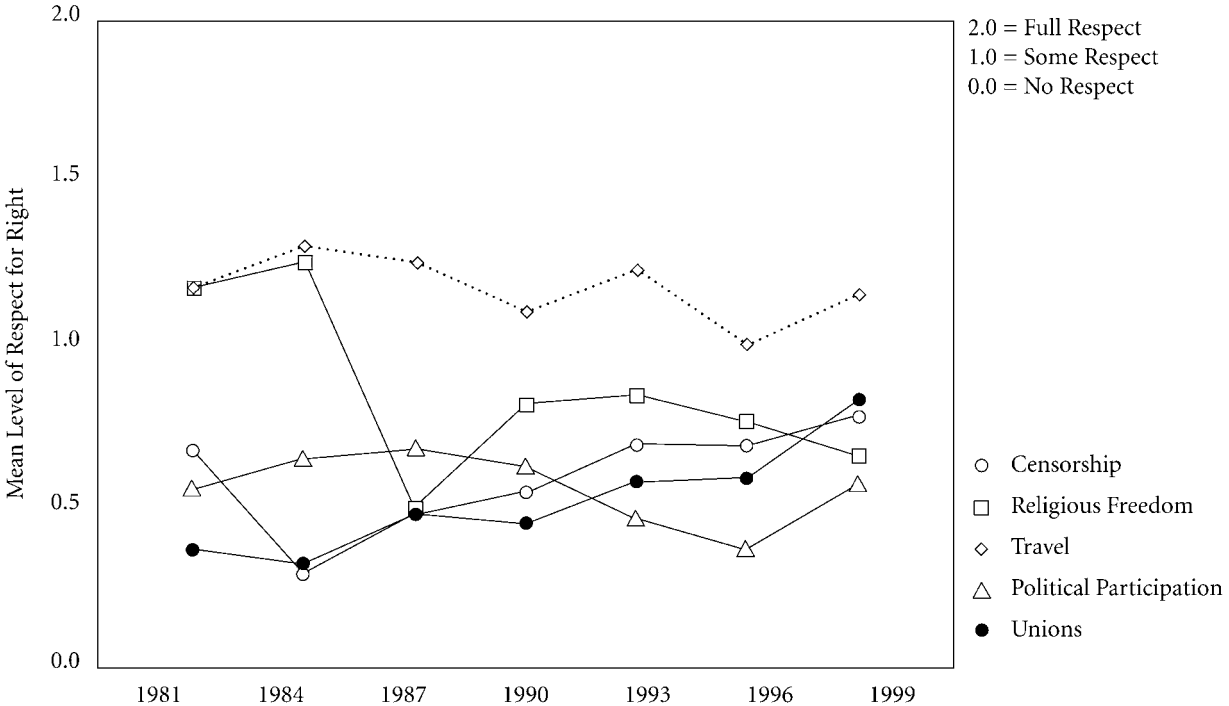

Figure 1.6. Mean Levels of Government Respect for Empowerment Rights in Islamic Civilization, 1981–99

Table 1.5. Mean Levels of Government Respect for Three Women's Rights Categories, Expressed as Percentages of Their Maximum Values, by Civilization, 1981–99

Civilization	Political Rights	Economic Rights	Social Rights
African	39	33	28
Buddhist	35	41	37
Hindu	53	36	24
Islamic	27	27	19
Japanese	31	33	33
Latin American	50	44	42
Orthodox	43	41	37
Sinic	38	36	29
Western	58	63	69

Note: The range of government respect for women's political rights is from 0 (no respect whatsoever for that particular right) to 4 (full respect for that particular right in law and practice), while the range of government respect for women's economic and social rights is from 0 (no respect whatsoever for that particular right) to 3 (full respect for that particular right in law and practice). Thus for purposes of comparison, respect for these rights is shown as a percentage of the maximum value of respect for each right.

a percentage of a maximum value, the values in table 1.5 become comparable across the three rights. While average levels of respect for these three women's rights are similar when averaged across the nine civilizations, we do see that political rights are respected slightly more than economic rights, and both of these are respected more than social rights. This general pattern holds in almost two-thirds of the individual civilizations, as well. The highest level of respect seen in table 1.5 is shown in the Western civilization for women's social rights. The lowest level of respect shown in table 1.5 is in the Islamic civilization for women's social rights. Only in the Western civilization do we see more respect for social rights than for political and economic rights. Only in the Western, Japanese, and Buddhist civilizations does respect for political rights not surpass respect for both social and economic rights.

Interestingly, only in the Western, Japanese, and Buddhist civilizations is more respect shown for women's economic rights than for their political rights. One cannot talk about sequence given this evidence alone, but this evidence might indirectly address the Asian-Western debate over which must take place first, economic development or political development. The Asian development argument is that economic development must precede political development. While the behavior shown by the Buddhist and Japanese civilizations in table 1.5 (more respect for economic than political rights) is not enough to confirm this (the difference between the two categories in Japanese civilization is negligible), it certainly does not contradict this thesis.

The pattern of respect shown in table 1.5 among the three women's rights, per civilization, is reasonably stable over time. Actually, respect for women's rights, per civilization, is the most stable over time of any of the three types of human rights

examined in this study. However, when one looks at each civilization's respect for these three women's rights over time, an interesting phenomenon emerges. In seven of the nine civilizations (Japanese and Hindu being the exceptions), there is a trend over time toward convergence in respect for these rights. This is especially true in the Buddhist civilization, where in the late 1990s government respect for woman's political rights caught up with respect for social and economic rights. Countries such as Bhutan, Cambodia, and Laos contributed to this trend by opening up new political avenues for women. In addition, in the late 1990s Sri Lanka reversed a trend toward deteriorated respect for women's political rights that had begun around the end of the cold war.

Civilizational Associates of Government Respect for Human Rights

A large body of empirical research has produced a list of factors that are widely found to be reliable associates of a government's level of respect for human rights. These commonly used factors are a country's level of democracy, its level of economic development, whether its colonial heritage (if any) was British, its population size, whether or not it is undergoing a civil war or other high-level domestic conflict, and whether or not it is involved in an interstate war.[25] Three of these factors—democracy, economic development, and British colonial heritage—have been found to have a *positive* relationship with government respect for human rights. That is, as these factors increase, or if they are present, respect for human rights improves. The other three factors—population size, internal war, and interstate (external) war—have been found to have a *negative* relationship with government respect for human rights. That is, as these factors increase, or if they are present, respect for human rights declines.

This study takes no issue with the veracity of the findings of any study declaring these six factors to be significant associates of government respect for human rights. Instead, it seeks to extend the examination of these associates of human rights beyond government respect for physical integrity rights by applying them to empowerment and women's rights as well. In addition, it seeks to examine the impact of these six factors on a civilization-by-civilization basis. Do these factors influence many different types of human rights? Is the influence of any of these factors culture-bound? Table 1.6 may help answer these questions.

Table 1.6 shows the results of ordered logit analyses of the above six factors on government respect for three categories of human rights, by civilization. The analyses are separated by which category of human rights is the dependent variable. The human rights data are the same used for other analyses in this study. The data for the six common associates of respect for human rights come from a set compiled by Poe, Tate, and Camp-Keith.[26] To estimate the models using the ordinal human rights indicators as dependent variables, I follow Richards, Gelleny, and Sacko and Richards and Gelleny in employing the technique of ordered logit with robust standard errors.[27]

Table 1.6. Substantive Ordered Logit Effects of Popular Human Rights Control Variables on Three Categories of Human Rights, by Civilization, 1981–93

	Democracy	Economic Development	British Influence	Population Size	Internal War	External War	(N)
Physical Integrity Rights							
African	P			N	N	N	310
Buddhist					N	*	74
Hindu	**	**	**	**	**	**	**
Islamic	P	n	P	N	N	N	346
Japanese	**	**	**	**	**	**	**
Latin American	P	P		N	N	*	239#
Orthodox					*	*	46
Sinic			*	N		*	30#
Western	P			N	*	N	264
Empowerment Rights							
African	+++	p	P		n	n	281
Buddhist	+++	P	P	p	N	*	66
Hindu	+++	**	**	**	**	**	**
Islamic	+++	N	P	n	N	N	303
Japanese	+++	**	**	**	**	**	**
Latin American	+++	P	P	P	N	N	218
Orthodox	+++				*	*	44
Sinic	+++	**	**	**	**	**	**
Western	+++	P			*		242
Women's Rights							
African			N			N	279
Buddhist			P	p		*	57
Hindu	**	**	**	**	**	**	**
Islamic	P	N		N			301
Japanese	**	**	**	**	**	**	**
Latin American	P	P		N			205#
Orthodox		p	N		*	*	44
Sinic	**	**	**	**	**	**	**
Western		P		n	*		238

P = Positive effect statistically significant at .05.
p = Positive effect statistically significant at .10.
N = Negative effect statistically significant at .05.
n = Negative effect statistically significant at .10.
* = Dropped from model due to collinearity.
** = Not enough observations for analysis.
# = Outlier(s) dropped from analysis.
+++ = Not included in models.

To increase accessibility, table 1.6 has been specially constructed so that those unfamiliar with regression analysis can still make use of the substantive findings relevant to this simple study.[28] All that is reported is whether a factor is reliably associated with government respect for a particular category of human rights for a particular civilization, and in what direction (positive or negative) a relationship is found. The legend at the bottom of table 1.6 details what the symbols found throughout the table stand for.

The most important thing in table 1.6 is whether a particular factor is found to have a statistically significant relationship with a category of human rights for a particular civilization. "Statistical significance" is a way to describe the level of trust one can have in a relationship between two (in this case) phenomena. That is, a statistically significant relationship is one where we can be confident that any association found is due to a meaningful relationship between two phenomena and not merely due to chance alone. In table 1.6, for example, both "P" and "p" indicate a positive (more respect) and statistically significant relationship, but we can be slightly more confident in a relationship marked by a "P" than a "p." Where no indicator is seen in table 1.6, no statistically significant relationship was found. In the empowerment rights section, democracy was not included in the analyses because of redundancy. The second most important thing in table 1.6 is in what direction a statistically significant relationship is found. Is the direction of the relationship positive (increases respect for human rights) or negative (decreases respect for human rights)?

The best way to start looking at table 1.6 is to see whether these six factors behave as previous research would lead us to believe. One of the dangers of breaking down regression analyses into regions is that the number of cases for analysis can become rather low. When this happens, one runs the risk of having an outlier (a country or country-year manifesting behavior that is very different from others in its region) dominate the findings for an entire region. Thus in this study if a factor was found to deviate from what previous research would expect, the first thing done was to check to see if this was the result of an outlying case or country. The data used in table 1.6 were analyzed thoroughly using both graphic and additional maximum likelihood analyses to find instances where an outlier was dominating the results for a given civilization. The number of cases for analysis (*N*) for a given civilization for a given category of human rights can be found in the last column to the right. When those numbers are accompanied by a pound sign it indicates that an outlying case or country was removed from that analysis.[29] The Hindu and Japanese civilizations were excluded from analysis due to a lack of sufficient cases. The Sinic civilization also had insufficient cases for analysis in two of the three human rights categories.

So how well do these factors actually fare when analyzed in terms of civilizations and with regard to several types of human rights? They fare very well. There are fifty-two statistically significant relationships represented in table 1.6. Of these, forty-four are in the direction (positive or negative effect) that previous research would lead us to expect. That is, even when analyses are broken down by civilization, these factors behaved as expected approximately 85 percent of the time. These factors do the best with regard to physical integrity rights (the school of research that spawned them), behaving as expected 95 percent of the time. They act as expected 84 percent of the time in the realm of empowerment rights and 71 percent of the time in the realm of women's rights. Looking at how many statistically significant relationships actually were demonstrated as a percentage of all possible significant relationships,

we see that a statistically significant relationship formed in 53 percent of these cases. All of these strong findings lend credibility to the power of these factors as general explanations for government respect for human rights across different regions, across time, and across various types of rights.

Still, some factors fare better than others. Looking down the democracy column in table 1.6, we see, as previous research would lead us to expect, only positive relationships—no matter the civilization involved. Looking down the internal and external war columns, we see, as previous research would lead us to expect, only negative relationships—again, no matter the civilization involved. However, while these factors are "perfect" in the sense that all reliable relationships are in the expected direction, there are some civilizations where no relationship is demonstrated. For example, in the Buddhist and Orthodox civilizations, there is no relationship between a country's level of democracy and its level of government respect for either physical integrity or women's rights.

Previous research would lead us to expect a positive relationship between a country's level of economic development and its respect for human rights. Column 2 shows that this is generally true, but not for the Islamic civilization. The Islamic civilization manifests a significant negative relationship between economic development and all three categories of human rights. A country's British cultural influence is positively associated with physical integrity and empowerment rights—as expected. However, both the African and Orthodox civilizations show a negative relationship between British colonial heritage and government respect for women's rights. While many African countries combine a British colonial heritage with low respect for women's rights, countries such as Lesotho, Zimbabwe, South Africa, and Nigeria typify this situation. Finally, we would expect increased population size to be associated with decreased respect for human rights, and table 1.6 shows that this is generally true across civilizations, but with some exceptions. The Latin American civilization shows a positive relationship between population size and respect for empowerment rights. This makes sense, as Latin American has combined post—cold war democratic reforms with a rate of population growth around 2 percent. The Buddhist civilization shows a positive relationship between population size and respect for both empowerment and women's rights. Changes in countries such as Mongolia and Cambodia factored into both of these relationships.

Summary and Discussion

First, this chapter briefly considered the basic components of a competent cross-regional analysis. It was offered that researchers who kept three particular questions in mind while conducting such a study could increase the validity and generalizability of any findings. These three questions are: Are the distinct and common and characteristics used to group states into regions clearly identified? Are these characteristics tied in any theoretical manner to the chief concept that the study

addresses? Finally, from the information provided (in a study), can a reader tell which countries have selected into which regions?

Second, keeping the above advice in mind, a cross-regional overview and analysis of government respect for a wide variety of human rights over time and space was conducted. Samuel Huntington's scheme for dividing the states of the world into nine civilizations was employed to make regional distinctions.[30] It was found that, across three categories of human rights—physical integrity, empowerment, and women's rights—the Western and Japanese civilizations manifested the greatest average amount of respect for these rights, while the Islamic and Sinic civilizations showed the least amount of respect.

Many interesting region-specific and time-specific behaviors were found. The lowest level of respect shown for any right, of any category, of any civilization, was the dim level of respect shown by governments within the Sinic civilization for the right not to be imprisoned for one's political or religious beliefs. The Orthodox civilization evidenced the least respect for freedom of religion. While there was a steady rise in respect for physical integrity rights in Latin America, respect for these rights steadily eroded in Africa. On the other hand, both of these regions showed gains in respect for empowerment rights. The gain in Africa came after the end of the cold war. One question raised by this finding is what happened in Africa between 1996 and 1999 that caused the sharp reversals away from the increased respect that was being seen throughout the early post—cold war period? Was it the fallout from the establishment of illiberal democracies in the early 1990s, as some suggest?

The regional and temporal variations in respect for categories of rights and particular rights raise questions about the relative roles of traditional culture and political liberalization in determining government respect for human rights. For instance, it was found that the increased respect for the right against government censorship seen within the Islamic civilization occurred primarily in Islamic countries on the continent of Africa, not in those on the Arabian Peninsula. This raises general questions: Can political development trump cultural association as a determinant of respect for human rights? If so, under what circumstances? Further, does this finding suggest that there may be something about continental regionality that affects government respect for human rights?

The findings also raise questions about policy substitution by repressive governments. For example, in Latin America, why did respect for the right not to be politically imprisoned improve so much more than respect for the right not to be politically murdered? Why was there a steep decline in respect for the rights against torture and political killings in Africa, but not for the other two physical integrity rights? We would do well to understand the choices governments make among these various tools of repression.

The end of the cold war loomed large in changes in rights-related behavior. For instance, Latin America experienced gains in respect for physical integrity rights and empowerment rights in the post—cold war period. The African and Orthodox

civilizations experienced increased respect for empowerment rights in this same period, especially regarding the right to unionize. The newly independent countries of eastern and southern Europe born after the dissolution of the USSR entered the data set after 1990 at reasonably high levels of respect for the right to unionize and were responsible for the respectable mean levels of respect seen in the Orthodox region. In Africa increases in empowerment rights might be either directly or indirectly attributed to posturing to receive international financial assistance—necessary because of the drying-up of cold war funding from the United States or the USSR. In Latin America, the end of the cold war had a certain effect on bringing various repressive regimes to a conclusion, particularly in Central America.

Furthermore, the findings in this chapter raise the possibility of rights convergence. For example, the analyses of empowerment rights in figures 1.3 and 1.4 suggest the possibility that in these civilizations the overall level of respect for empowerment rights will not significantly increase until there is a similar level of respect for all particular empowerment rights. That is, might it be that levels of respect for all the particular empowerment rights must be similar before a higher overall baseline of respect for this category of rights is established? If true, would we see this phenomenon across different categories of rights? Indeed, if one were to graph women's rights over time, by civilization, one would see that seven of the nine civilizations show convergence trends. The evidence necessary to confirm any convergence hypothesis would have to be done at the state, not regional, level of analysis, but the regional-level results are interesting enough to warrant further investigation.

Finally, this analysis was extended to an examination of how six factors, widely found by pooled research to be associated with levels of government respect for physical integrity rights, fared when analyses were region-distinct and included empowerment and women's rights. These factors performed well as general associates of government respect for human rights across time, region, and different categories of rights. Level of democracy, domestic conflict, and interstate war all performed as previous research would predict, without exception. Some unpredicted civilization-specific behavior was seen for the other factors, however. For instance, in the African and Orthodox civilizations, British colonial influence was associated with decreased respect for women's rights.

It is clearly impossible within the scope of a single chapter such as this to address every possible relationship that may exist in the extensive human rights data used or to raise every possible issue that may result from analysis of these data. This study attempted to use a regional framework to present a unique and structured overview of government respect for human rights over time and space. Indeed, some interesting regional and temporal variations were seen, and some of these resulted in interesting questions about government respect for human rights. Surely, many more questions worth pursuing could be raised from these findings. Hopefully, others will find the variations and patterns contained herein worth explaining.

Appendix A. Huntington's Nine Civilizations and Their 158 Associated States

African (31)

Angola
Benin
Botswana
Burkina Faso
Burundi
Cameroon
Central African Republic
Cote d'Ivoire
Democratic Republic of the Congo
Equatorial Guinea
Ethiopia
Gabon
Ghana
Kenya
Lesotho
Liberia
Madagascar
Malawi
Mozambique
Namibia
Nigeria
Republic of the Congo
Rwanda
Sierra Leone
South Africa
Swaziland
Tanzania
Togo
Uganda
Zambia
Zimbabwe

Buddhist (8)

Bhutan
Cambodia
Laos
Mongolia
Myanmar
Nepal
Sri Lanka
Thailand

Hindu (2)

Guyana
India

Islamic (42)

Afghanistan
Albania
Algeria
Azerbaijan
Bahrain
Bangladesh
Brunei
Chad
Djibouti
Egypt
Eritrea
Gambia
Mali
Mauritania
Malaysia
Morocco
Niger
Oman
Pakistan
Qatar
Senegal
Singapore
Somalia
Sudan

Guinea
Guinea-Bissau
Indonesia
Iran
Iraq
Jordan
Kuwait
Kyrgyzstan
Lebanon
Lybia
Syria
Tajikistan
Tunisia
Turkey
Turkmenistan
United Arab Emirates
Uzbekistan
Yemen
Yemen Arab Republic
(until 1990 merger)

Japanese (1)

Japan

Latin American (23)

Argentina
Belize
Bolivia
Brazil
Chile
Colombia
Costa Rica
Cuba
Dominican Republic
Ecuador
El Salvador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Nicaragua
Panama
Paraguay
Peru
Trinidad and Tobago
Uruguay
Venezuela

Orthodox (14)

Armenia
Belarus
Bosnia-Herzegovina
Bulgaria
Cyprus
Georgia
Greece
Kazakhstan
Macedonia
Moldova
Romania
Russia
Ukraine
Yugoslavia

Sinic (5)

China
Democratic People's Republic of Korea
Philippines
Republic of Korea
Vietnam

Western (32)

Australia	Lithuania
Austria	Luxembourg
Belgium	Netherlands
Canada	New Zealand
Croatia	Norway
Czechoslovakia/Czech Republic	Papua New Guinea
Denmark	Poland
Estonia	Portugal
Finland	Slovakia
France	Slovenia
Hungary	Spain
Iceland	Sweden
Ireland	Switzerland
Israel	United Kingdom
Italy	United States
Latvia	West Germany/Germany

Appendix B. Coding Schemes for Human Rights Data

Political or extrajudicial killings are:

(0) Practiced frequently
(1) Practiced occasionally
(2) Not practiced

Political or extrajudicial killings are:

(0) Practiced frequently
(1) Practiced occasionally
(2) Not practiced

Disappearances have:

(0) Occurred frequently
(1) Occurred occasionally
(2) Not occurred

Torture is:

(0) Practiced frequently
(1) Practiced occasionally
(2) Not practiced

Are there any people imprisoned because of their political, religious, or other beliefs?

(0) Yes, and many
(1) Yes, but few
(2) No

Is the judiciary an independent institution?

(0) No: judiciary under control of executive or legislature; judges can be dismissed at will or are subject to intimidation or undue influence
(1) Partially: judiciary separate but not completely independent; lack of protections or judges are subject to pressure, corruption, or manipulation, primarily in national security or public order cases
(2) Generally: judges free of manipulation and control except in extraordinary cases; professional judges

Government censorship and/or ownership of the media (including radio, TV, domestic news agencies) is:

(0) Complete
(1) Some
(2) None

There are restrictions on some religious practices by the government:

(0) Yes
(2) No

Domestic and foreign travel is:

(0) Restricted
(2) Generally unrestricted

Political participation is:

(0) Very limited
(1) Moderately free and open
(2) Very free and open

Union activities are:

(0) Severely restricted or controlled by the government
(1) Somewhat restricted
(2) Unrestricted

Concerning women's political rights there exists:

(0) Legal barriers preventing political equality
(1) Political equality guaranteed by law, but not in practice
(2) Political equality guaranteed by law; some representation in legislation; women in high-ranking government positions rare or nonexistent
(3) Political equality guaranteed by law; moderately to well-represented in legislature and high-ranking government positions, but in proportion to presence in population
(4) Political equality guaranteed by law and practice

Women's economic rights:

(0) No equal rights in workplace; no equal pay for equal work law; economic discrimination practiced and accepted

(1) Discrimination by sex prohibited by law; equal pay for equal work guaranteed by law; in practice, however, both discrimination and unequal pay are accepted realities; no attempt by government to change situation
(2) Discrimination by sex prohibited by law; equal pay guaranteed by law; some discrimination, but not accepted by population; serious government effort to halt inequality
(3) Prohibition of discrimination and guarantee of equal pay a reality in law and in practice

The social equality of women is:

(0) Not guaranteed by law; traditional practices based on custom or religion supersede national law
(1) Guaranteed by law; however, discrimination on the basis of sex is practiced, and it is tolerated by most of the population
(2) Guaranteed by law; there has been progress toward equality, and discrimination on the basis of sex is no longer accepted by most of the population
(3) Guaranteed by law; there has been significant progress toward equality, few segments of the population tolerate discrimination on the basis of sex

Notes

I extend thanks to (in alphabetical order): J. Clark Archer, David Forsythe, John Hibbing, and Steven Poe. Their thoughtful comments strengthened this work. I, of course, am solely at fault for any shortcomings.

1. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1996).
2. *The American Heritage Dictionary of the English Language*, 4th ed. (New York: Houghton Mifflin, 2000).
3. This view is best put forth by William Jacoby in *Data Theory and Dimensional Analysis* (Newbury Park: Sage, 1991).
4. Exceptions may be those studies that stratify states according to levels of economic or democratic development. Doing so is usually easily theoretically justifiable, but some of these studies create geographic regional subcategories. An example of this would be breaking down the list of economically developing countries into African, Asian, and eastern European developing countries, and so forth. If level of development is the interesting commonality about these countries used to create developed region and developing region categories, what do the geographic subdivisions add to our insight? Adding such subdivisions would assume, let us say, that there is something about the "Africa-ness" of African developing countries that justifies their separation from developing countries in Latin America. There well may be a reason for making such a distinction, but researchers must be transparent about their reasons for doing so. Otherwise, our inferences from any findings may be incomplete or incorrect.
5. Steven C. Poe, Dierdre Wendel-Blunt, and Karl Ho, "Global Patterns in the Achievement of Women's Human Rights to Equality," *Human Rights Quarterly* 19 (1997).

6. Poe, Wendel-Blunt, and Ho, "Global Patterns," 825.
7. Clair Apodaca, "Measuring Women's Economic and Social Rights Achievement," *Human Rights Quarterly* 20 (1998).
8. David L. Cingranelli and David L. Richards, "Respect for Human Rights after the End of the Cold War," *Journal of Peace Research* 36 (1999).
9. David L. Richards and Ronald D. Gelleny, "Is It a Small World World after All? Economic Globalization and Human Rights in Developing Countries," *Coping with Globalization*, eds. Steve Chan and James R. Scarritt (London: Frank Cass Press, 2002).
10. Huntington, *Clash of Civilizations*, vacillates about including Buddhism as a civilization, but for this study it is considered one.
11. Huntington, *Clash of Civilizations*, 43–44.
12. Huntington, *Clash of Civilizations*, 42.
13. There are a few states on which Huntington hedges and assigns dual civilizational status. However, for clarity (if for no other reason), the analyses in this study demand mutual exclusivity. Thus, following Huntington's reliance on dominant religion as a cultural proxy, these states were assigned to the civilization associated with their numerically dominant religion.
14. Huntington, *Clash of Civilizations*, 42.
15. For previous studies using these data, see David L. Cingranelli and David L. Richards, "Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights," *International Studies Quarterly* 43 (1999); Cingranelli and Richards, "Respect for Human Rights after the End of the Cold War"; David L. Richards, "Perilous Proxy: Human Rights and the Presence of National Elections," *Social Science Quarterly* 80 (1999); David L. Richards, Ronald D. Gelleny, and David H. Sacko, "Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries," *International Studies Quarterly* 45 (2001); and Richards and Gelleny, "Is It a Small World World after All?" Replication data for these studies can be retrieved at *www.mssc.edu/socsci/polisci/faculty/richards/htm*.
16. Originally coded in three-year intervals (1981, 1984, 1987, 1990, 1993, 1996, 1999), these data are currently being updated to annual status. Since the upgrade to annual status has not been completed for all rights, the three-year interval data will be used in this study. See Cingranelli and Richards, "Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights," for an explanation of both why ordinal categorization is employed and why these categories are interpersonally comparable.
17. It has become standard procedure to check the State Department and Amnesty International reports against each other. For an analysis on how the information in these two reports compares over time, see Steven C. Poe, Tanya C. Vasquez, and Sabine C. Zanger, "How Are These Pictures Different? A Quantitative Comparison of the U.S. State Department and Amnesty International Human Rights Reports, 1976–1995," *Human Rights Quarterly* 23 (2001).
18. Full explanations of these coding schemes are found in David L. Cingranelli and David L. Richards, "Coding Government Respect for Human Rights," (2001). Copies of this manuscript can be obtained from the author.
19. The *N*s for each year for any given civilization are not identical. Thus simply adding across from left to right and dividing by seven (the number of time points) will yield different means than the ones presented in table 1.1, which take the varied *N*s into account. As well, for physical integrity rights, the mean takes into account additional data for years other than those shown on table 1.1. Richards, Gelleny, and Sacko, "Money with a Mean Streak?" demonstrate that by doing so, there are no associated era-related effects in these data that may change substantive results.
20. Mahmood Monshipouri, *Democratization, Liberalization, and Human Rights in the Third World* (Boulder: Lynne Rienner, 1995), 55. For information about individual country experiences with democratic transition, see the "Government and Politics" section of any country entry in

Political Handbook of the World, 1999, eds. Arthur S. Banks and Thomas C. Mueller (Binghamton NY: CSA, 1999).

21. Cingranelli and Richards, "Respect for Human Rights after the End of the Cold War."
22. There continues to be controversy over the compatibility between liberation theology and feminism (both loosely defined). There exists enough support for women's rights by liberation theology, however, to be curious about its possible effects on respect for women's rights in Latin America.
23. Cingranelli and Richards, "Respect for Human Rights after the End of the Cold War."
24. Cingranelli and Richards, "Respect for Human Rights after the End of the Cold War," 416.
25. Four studies are primarily responsible for introducing this set of variables: Neil J. Mitchell and James M. McCormick, "Economic and Political Explanations of Human Rights Violations," *World Politics* 40 (1988); Conway Henderson, "Conditions Affecting the Use of Political Repression," *Journal of Conflict Resolution* 35 (1991); Conway Henderson, "Population Pressures and Political Repression," *Social Science Quarterly* 74 (1993); and Steven C. Poe and Neal Tate, "Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis," *American Political Science Review* 88 (1994).
26. Steven C. Poe, C. Neal Tate, and Linda Camp Keith, "Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993," *International Studies Quarterly* 43 (1999). These data may be retrieved at *www.psci.unt.edu/ihrsc/poetate.htm* [16 October 2002].
27. Richards, Gelleny and Sacko, "Money with a Mean Streak?"; and Richards and Gelleny, "Is It a Small World World after All?" Ordered logit analysis is used because using linear regression on ordinal data imposes an assumption of error linearity upon data with bow-shaped error-variance. This can result in incorrect standard errors. In addition, linear regression on ordinal data violates the OLS assumption of equal intervals, confounding interpretation of coefficients.
28. This is not to say, of course, that the size of standard errors and regression coefficients are not important. Rather, it is sufficient for the purposes of this analysis to simply know whether an indicator is statistically significant. For those interested, the detailed results of the ordered logit analyses are available from the author at richards-d@mail.mscc.edu.
29. In table 1.6 there were three instances in which outliers were dropped from an analysis. Cuba was dropped from Latin American physical integrity analysis, China (1987) was dropped from the Sinic physical integrity analysis, and El Salvador was dropped from the Latin American women's rights analysis.
30. Huntington, *Clash of Civilizations*.

2 Does Region Matter in Provision of the Human Right to Physical Integrity?

AN EMPIRICAL EXAMINATION

Steven C. Poe

In recent years we have witnessed a substantial growth in the body of scholarly work on human rights issues. Since the late seventies and early eighties political scientists have applied quantitative methods to answer empirical questions relating to human rights, and their studies have steadily grown in number and sophistication. The result is a vigorous and growing subfield dealing with human rights issues on the borders between comparative politics, international relations, and public law in the political science discipline.

Some research has focused on the question of whether human rights were a consideration in the allocation of foreign aid and other foreign policy outputs.[1] But perhaps the main concern of quantitative research, however, has been to identify the determinants of human rights abuses.[2] Though united by the humanitarian concerns that drew them to this subfield, these researchers differ on how they treat the issue of how to approach the study of human rights. One camp of researchers has adopted a *nomothetic* approach whereby their main emphasis has been on the attempt to explain human rights behaviors with general lawlike statements that apply to all countries, at all times, around the world.[3] Consistent with their aims, these researchers have built statistical models tested by using quantitative data for worldwide samples of countries.[4] In contrast, a second camp has tended instead to focus mainly on single countries or on countries within particular regions of the world.[5] These studies either argue explicitly or imply by their foci that such factors as culture, history, and the idiosyncrasies in the laws of particular countries or regions are primary factors in explanations of why human rights abuses occur.

In this study I seek in some sense to link what would at first seem to be two disparate lines of research. Specifically, using the nomothetic approach, I will investigate the degree to which region affects a subset of human rights relating to integrity of the person (or physical integrity): the right not to be imprisoned, tortured, executed, or disappeared, either arbitrarily or because of one's views. The results will show that while the models created by researchers with a general focus do succeed in providing relatively powerful general explanations of human rights abuse, regional characteristics can and do influence countries' human rights policies in important ways.

An Examination of Regional Patterns in Personal Integrity Abuse

In order to compare regional patterns of human rights abuses one first has to measure them. To accomplish this purpose I chose the Political Terror Scale, originally gathered by Michael Stohl and his colleagues at Purdue and added to by Mark Gibney and others.[6] Though not without difficulties, these data are the most common measure used in the field, probably mainly because of the extent of their coverage, which is annual and global.[7] The scale runs from one, which indicates the rule of law, to five, which indicates a human rights disaster where indiscriminate murder is a common part of life affecting all segments of society. Categories two through four represent gradations in between these two extremes.[8] Data were gathered through content analysis of the Amnesty International reports by teams of three coders. In order to solve a problem of sample bias that is present when Amnesty International reports are used as a data source, I supplemented these data by substituting the value for a similar U.S. State Department scale for any missing cases.[9] The resulting series of data runs throughout the twenty-year period from 1977 through 1996, for a nearly complete global set of countries and all country-years for which data were available.

The next important task in this research was how to categorize particular countries into regions.[10] Once that formidable hurdle was crossed, examination of the similarities and differences between regions of the world could begin. In table 2.1 I present the mean levels of physical integrity abuse, as measured by the Political Terror Scale, within six regions: longtime OECD countries, the Soviet and Eastern European region, sub-Saharan Africa, the Middle East and North Africa (minus Israel), Asia (excluding ex-Soviet countries), and finally, Latin American countries. (Where each country fits into this regional classification is shown in appendix A.) The global mean of 2.51 for the entire 2,678 nation-year sample is presented on the first line. Following that are the mean human rights score values of the various regions of the world, from best to worst.

Some might question my choice to place longtime economically developed OECD members in one group, in spite of the fact that they are spread around the world.[11] This group of countries, which in the strictest sense does not qualify as a region, is mostly European but also includes the United States, Canada, Japan, Iceland, New Zealand, and Australia. My reason for separating out these countries should be clear from an examination of table 2.1. Consistent with earlier work, it is shown that the chasm between developed and developing countries is a wide one as a result of the effects of economic development.[12] The mean physical integrity score among developed (OECD) countries in this twenty-year time period is 1.39, which is between the rule of law category, with no political prisoners, and a state with a few political prisoners, where torture and political murders are extremely rare if they exist at all. In contrast, once the OECD countries are taken from the sample, the mean score is 2.76. This is closest to the third category, in which political imprisonment is quite

Table 2.1. Regional Variations in the Abuse of Human Rights to Integrity of the Person

Region	Mean	Standard Deviation	*N*
All countries	2.51	1.13	2,678
Longtime OECD countries	1.39	0.71	475
Eastern Europe/ex-Soviet	2.35	0.84	225
Sub-Saharan Africa	2.58	0.93	714
Middle East/North Africa	2.95	1.07	333
Asia minus Eastern Europe/ex-Soviet	3.07	0.98	287
Latin America (Spanish, Portuguese heritage)	3.17	1.12	349

extensive, and unlimited detention for political views is a common part of life. On this basis I determined that these countries were best placed in a class by themselves, even if that class is not geographically based.

After the OECD countries, the ex-Soviet and Eastern European countries are least abusive of physical integrity rights. This is interesting in and of itself, since that area had generally been thought of as having been abusive of these rights before the breakup of the Soviet Union and since then has been the site of some horrible human rights disasters. Sub-Saharan Africa at 2.58 is just less than a tenth of a point above the mean for the world and well below the mean for all non-OECD, developing countries. Middle Eastern countries are more repressive than the mean, as one might expect, with a mean score of just below three. Some might be surprised that the Middle East was actually somewhat less abusive of physical integrity rights than Asia, which had a mean score of 3.07, and Latin America, the most repressive region, which had a mean score of 3.17 during this period (1977–96). That the Latin American region scored worst in the world where physical integrity violations are concerned is interesting given its move toward more democratic political institutions in recent years.

Empirical Examinations of Regional Differences: A First Look

Clearly, there are considerable regional differences in the propensity to violate human rights. Yet to be answered, however, is whether such regional breakdowns are capable of explaining a substantial proportion of the variance in human rights abuses and whether regional variables add to the explanation provided by other variables commonly associated with repression. It is possible, indeed probable, that some of the differences evident in table 2.1 can be explained by more general factors. For example, level of economic development has been shown to be a powerful determinant of human rights abuses. Regional differences in human rights abuse may arise due to diverging levels of economic development within the various regions of the world.[13] Similarly, some regions' proclivity toward more stable democratic institutions may lead them to be less repressive than others once other factors

are considered.[14] In order to tell whether the regional differences are important in determining human rights abuses or if the apparent effects are spurious, we must look at the problem more generally. If it is found that regional variables are statistically significant and substantively important explanations of human rights abuse, and that they explain variance above and beyond that explained by our more general model, then it will be clear that delving into a closer examination of particular regions is important to helping us to explain human rights abuse more generally. Conversely, if such variables add little or nothing to our explanation of human rights abuse, this might be interpreted as giving support to an argument that an examination of regional patterns would not be very helpful in the quest to understand physical integrity abuse.

A Multivariate Model

In order to construct a general, multivariate model, I will draw from my and my coauthors' previous research on the issue of why human rights are violated. I include in table 2.2 a description of eleven control variables that will be included in the model. Each of these is drawn from hypotheses that have received substantial support.[15] However, since they are not really the main focus of this research, I will not discuss the theoretical underpinnings or the operationalization of these particular variables in much depth except to present them in this table, leaving such discussions until later if they become relevant, or leaving the reader to consult our earlier research. These variables are: (1) a lagged dependent variable, meant to account for the incrementalism involved in repression, which is present in other government policies and to control the effects of autocorrelation, a statistical difficulty common to this kind of data set; (2) a variable tapping the level of democracy, hypothesized to have a negative impact on repression; (3) per capita GNP (in thousands of U.S. dollars), a measure of economic standing, to capture the strong negative relationship that has been found between economic development and various human rights practices; (4) Population (logged), to account for the effects of having to repress in order to control the actions of a larger population, while accounting for the disproportionate influence of a few outliers, such as China; (5) a variable identifying doctrinaire socialist (or leftist) regimes, which has yielded different findings in my past work; (6) a variable identifying governments controlled by military regimes, hypothesized to be more repressive than others; (7) a variable tapping whether or not a country had been a colony of Great Britain, a factor suggested to have a negative effect on human rights abuse in early research by Mitchell and McCormick;[16] (8) a measure that identifies whether or not a country participated in an international war during the year under question, which has been hypothesized to repress more; (9) a variable distinguishing cases where a civil war had occurred, because those wars have been found to lead to much greater human rights abuses;(10) a measure distinguishing cases where a nonviolent rebellion occurred during the year in question, hypothesized to relate positively to repression; and (11) a measure identifying

Table 2.2. A General Model of Human Rights Abuse

Variable and Expected Effect	Operationalization	Previous Findings
Lagged dependent variable (positive)	Political Terror Scale, ranging from 1 to 5 lagged one year	Strong determinant of repression
Democracy (negative)	Freedom House Political Rights 7-point scale, inverted (1=no democracy; 7=maximum democracy), and Polity 98 11-point democracy scale	Strong determinant of repression, statistically significant in all analyses, regardless of measure
Economic standing (negative)	Per capita gross national product	Substantively and statistically significant in all analyses
Population size (positive)	Logged population	Substantively and statistically significant in all analyses
Leftist regime (no expectation)	Dummy variable, with "1" indicating countries governed by leftist governments, with no nonleftist opposition	Contrary to hypothesis, negative coefficients were found, indicating leftist countries performed better, statistically significant (2-tailed test) in three of four analyses
Military regime (positive)	Dummy variable with "1" indicating regimes with a military person in power as the chief executive or a mixed regime with a military presence apparently controlling a civilian leader behind the scenes	Statistically significant, moderately important substantively
British cultural influence (negative)	Dummy variable, with "1" identifying countries that had been colonies of Great Britain	Statistically significant, moderately important substantively
International war (positive)	Total of 1,000 deaths. Participant countries had 1,000 personnel involved or suffered 100 fatalities.*	Statistically significant, substantively important
Civil war (positive)	*	Statistically significant, very important substantively
Nonviolent rebellion (positive)	Measure gained through content analysis of several sources with "1" indicating a rebellion and "0" indicating none	Statistically and substantively significant
Violent rebellion (positive)	Same as nonviolent rebellion	Statistically significant, stronger than nonviolent rebellion

Sources: Poe, Tate, and Keith, "Repression of the Human Right to Personal Integrity Revisited" for most, but see Steven C. Poe et al., "Domestic Threats: The Abuse of Personal Integrity," *Paths to State Repression: Human Rights Violations and Contentious Politics*, ed. Christian Davenport (Boulder: Rowman and Littlefield, 2000).

*Adapted from Melvin Small and J. David Singer, *Resort to Arms* (Beverly Hills: Sage, 1982).

Table 2.3. The Effect of Region on Human Rights Abuses: A Comparison of Four Models

Variable	Model 1: Incremental Model	Model 2: General Model	Model 3: Regions Only	Model 4: Integrated Model, General Model, Regions Added
Intercept	.446***	.039	.563***	-.100
	(.081)	(.121)	(.103)	(.148)
Repression $_{t-1}$	.823***	.637***	.759***	.592***
	(.032)	(.041)	(.039)	(.043)
Democracy	—	-.032**	—	-.026***
		(.006)		(.006)
Economic Standing GNP	—	-.012***	—	-.008***
		(.003)		(.002)
Population (logged)	—	.060***	—	.073***
		(.011)		(.011)
Leftist regime	—	-.119***	—	-.058
		(.047)		(.046
Military regime	—	.033	—	.041
		(.040)		(.035)
British Cultural influence	—	-.064***	—	-.074***
		(.027)		(.026)
International war	—	.093**	—	.077*
		(.048)		(.049)
Civil war	—	.461**	—	.464***
		(.067)		(.063)
Nonviolent rebellion	—	.124**	—	.126***
		(.042)		(.040)
Violent rebellion	—	.180***	—	.188***
		(.031)		(.030)
OECD	—	—	-.225***	-.191***
			(.061)	(.063)
Latin America	—	—	.197***	.203***
			(.055)	(.055)
Sub-Saharan Africa	—	—	.074*	-.014
			(.041)	(.043)
Middle East/North Africa	—	—	.170**	.155***
			(.063)	(.064)
Eastern Europe/ex-Soviet	—	—	-.050	-.116*
			(.074)	(.073)
Other Asia	—	—	.164***	.053
			(.067)	(.050)
Adjusted R^2	.686	.726	.698	.733
Wald Chi^2	653.43(1)	5349.98(11)	8924.00(7)	22,368.35(17)
Prob>Chi^2	.0000	.0000	.0000	.0000
Adjusted R^2 in a separate regression with Repression $_{t-1}$ excluded	—	.510	.266	.568

*$p < .10$, **$p < .05$, ***$p < .01$ (Two-tailed tests used for regions, intercept, and leftist regime variable; otherwise one-tailed tests were used.)

countries in which a violent rebellion occurred during that year, also hypothesized to have a positive impact on repression.[17]

Consistent with our previous research on human rights abuse, I will use OLS regression with Panel Robust Standard Errors to estimate the models.[18] This method allows us to control the effects of heteroskedasticity while dealing with the effects of autocorrelation by using a lagged dependent variable. The coefficients portrayed in the tables indicate the amount of change in the dependent variable for one unit change in the independent variable. Below these coefficients in parentheses are the standard errors. Based on a comparison of these two values, statistical significance is computed. A statistically significant coefficient is one that we know with a certain probability is different from 0 (in the case of a two-tail test) or in the expected direction (in the case of a one-tail test). Statistically significant coefficients are identified with asterisks following the coefficient, indicating which of the conventional significance levels have been met.[19] The first model that is portrayed in the table of results (table 2.3) is a simple one, including just the lagged dependent variable, which represents the value of the Political Terror Scale for the year immediately previous to the dependent variable. The coefficient is extremely strong, at .82, and the R-square of the model indicates that this variable accounts for about 69 percent of the variance by itself. Clearly then, there is a great degree of continuity to human rights abuse, and last year's abuses are an excellent predictor of this year's.

In model 2, I have added the variables included in the general model. Here these variables are vying with the very strong lagged dependent variable to explain the variance, providing a very rigorous test of these hypotheses. All of these variables perform as expected and are statistically significant at some level, with the exception of the military control variable. The coefficient of that variable is positive, indicating that military regimes are associated with greater human rights abuse, but it is statistically insignificant. This is interesting because that variable had been shown to have a statistically significant (though not particularly strong) positive coefficient in our latest study.[20] The additional years of data for the current study (Poe, Tate, and Keith only had data up to 1993) evidently made the difference.

Two things are of note about this model. First, the R-square is only very slightly larger than with the lagged dependent variable, at .726, indicating that just less than 73 percent of the variance is explained. This tells us that the explanatory power gained over the incremental model is only very slight. However, this is not too surprising given the power of the lagged dependent variable and the great continuity in repression. An indication of the explanatory import of the other nine variables general model is that the coefficient of the lagged dependent variable decreases substantially when they are added, from its previous .823 to .637. These variables are picking up much of the "shared variance" that had been explained by the lagged dependent variable.

Model 3 includes only the lagged dependent variable and a set of regional variables, each of which is a dummy (0, 1) variable, where a "1" indicates that a country is a member of a particular region. The only countries that were not included in regions were island countries such as Malta, Comoros, and Cyprus, Indonesia as well as some countries in the Caribbean that are sometimes considered Latin American (but are not, technically, American nor, in some cases, Latin) such as Cuba and Haiti, and finally, Israel, which was discarded from the Middle East region for reasons discussed in a note, and a few others that seemed not to fit in well into any regional grouping (for example, Afghanistan, Fiji). These countries had a mean human rights score of 2.47, just below the mean of 2.51 for the entire sample. With that number as a baseline, five of the six regional variables exhibit an effect or, that is to say, their scores were different from that reference group. Countries in the OECD had human rights abuse levels that were about .225 below those of other countries, once other regional variables were considered, while countries in sub-Saharan Africa had scores .074 greater than others. The Middle East and Asia achieved identical coefficients of .170 and .164 respectively, while the Latin American region appeared to have the greatest positive coefficient, with a coefficient of .197. The only regional variable not to reach statistical significance was that for Eastern European/ex–Soviet Union countries. That is not to say, however, that this region did not have an impact since such findings are highly dependent on the reference group that is chosen.

Of particular interest, though, are the R-squares and the coefficients of the lagged dependent variable, which give us some indication of whether the regional variables add to the power of the model. The R-square is about .70, below that of the general model, and adding only about 1 percent to the variance explained by the one-variable incremental model. But the coefficient of the lagged dependent variable decreases from .823 to .759 when the regional variables are added, indicating that a part of the variance that had been explained by this "historical" variable is now being picked up by the regional explanations.

Because the lagged dependent variable tends to complicate an assessment of the explanatory power added through considering additional variables, I ran a separate set of analyses discarding the lagged dependent variable. It is important to consider the lagged dependent variable when we interpret coefficients, not only because of its substantive importance but because it controls the effects of first order autocorrelation inherent in these data. Including this variable poses some difficulties when we try to evaluate the explanatory power added by regions, however. Examining the R-squares without the lagged dependent variable gives us a better idea of the power of the regional model as compared to that of the other nine variables in the general model. A more complete presentation of the findings is not offered because they are apt to be affected by autocorrelation.

Such a comparison shows that the general model explains about one-half (51 percent) of the variance without the "help" of the lagged dependent variable, while the regional variables explains only about one quarter (26.6 percent). From this we

can conclude that the strength of the explanatory effect of the variables included in the general model is substantially greater than that in which we merely considered regions.

In a final, integrated, model (number 4), I added the various regional variables to the general model, in essence pitting them against one another. Four of the six regional variables achieve statistically significant coefficients, indicating that regions are indeed important. Somewhat different from the results above, in this final model the variable for the Eastern Europe/ex-Soviet region has reached a relatively lenient statistical significance threshold (.10, two-tailed test) while the Asian region has lost statistical significance.

Now that other factors have been controlled, we might consider the magnitude of the coefficients in an effort to gauge the substantive importance of regions on human rights abuses. One way to do this is to simply interpret the coefficients, which represent the effect of a one-unit change in the independent variable, on the dependent variable. However, in the presence of a lagged dependent variable, looking at only the contemporaneous effect would understate the importance of region, since independent variables will exhibit lagged impacts through their effects on past repression. In this context, the effect of a change in an independent variable that is retained will be portrayed as being manifested over time, growing for several years, and then hitting a ceiling level where that effect becomes asymptotic. In the case of region, a variable that is essentially static, it makes sense to consider all of these lagged effects when we assess the magnitude of a coefficient.

Once these calculations are conducted, it is evident that the over-time effect of being in the OECD region is -.47, or a political terror scale that is about one-half a point lower, ceteris paribus, than what it would otherwise be. Location in Latin America is responsible for a half-point increase in this scale over the long haul, ceteris paribus. Location in the Middle East results in an increase of .38 in this scale, over what it would otherwise be. Finally, location in the Eastern Europe/ex-Soviet region results in a political terror score that is .28 less, once other factors are controlled.

The integrated model achieves the best R-square of all, adding about 1 percent to the percentage of variance explained by the general model but decreasing the coefficient of the lagged dependent variable from about .637 in the general model to about .592 in the integrated model. Finally, when the lagged dependent variable is discarded, the R-square of this model is .568, almost six points above that of the general model. From these findings I conclude that the general model is considerably more powerful than the regional one, but that being said, regions do hold the potential of adding somewhat to our quantitatively supported understanding of why countries abuse human rights. Though multicollinearity was fairly high in the regions-only model and in the integrated model, this didn't seem to pose much of a problem for interpretation of results.[21]

A discussion of the coefficients of some of the variables in model 4 is also in order. First, the leftist government variable, which identifies leftist regimes that do not have nonsocialist opposition, loses its statistical significance when regional effects are added. This is interesting because this variable has yielded contradictory results in earlier research. The findings of Poe and Tate appeared to indicate that a leftist regime led to greater human rights abuses when the human rights data were gained from the U.S. State Department Reports.[22] When Amnesty International data were used to tap this concept, however, the relationship disappeared, which led us to conclude that the findings might have been as a result of biases in the U.S. State Department reports. In a later study, contrary to our earlier hypothesis, this variable appeared to be connected to *better* human rights scores, just as in model 2. In this study, however, that effect disappears when regional variables are also considered. So perhaps there is a regional component to the effect of this variable (a proposition that will be addressed later).

The decrease of about one-third in the coefficient of the economic development variable indicates that part of the variance accounted for by that variable can also be attributed to regional variations. That region is related to variations in economic development is none too surprising, a relationship that may be due to such regional factors as the presence of minerals such as oil or whether the land and weather are suited for agriculture.

We have established that regions have some impact on human rights that is unaccounted for by general models. I next made an effort to find what factors might be behind the effects of region, undertaking an effort consistent with the implorations of Przeworski and Teune to attempt to substitute variable names for the effects of particular systems.[23] One variable that immediately suggested itself with regard to two of the regions was religion. Howard J. Wiarda and Harvey F. Kline have argued that Catholicism, which is common in Latin America, brings with it a hierarchical ordering of society that lends itself to instability, violence, and repression.[24] Similarly, there has been much argument and controversy regarding the place of human rights in Islam, with some scholars arguing that the two concepts do not fit with one another and others arguing that the two can be reconciled.[25] If the former group is correct, then it may be that Middle Eastern countries have more difficulty instituting human rights than others, and that therefore some of the variance explained by the Middle East regional variable might better be explained by those countries' Islamic religious heritage. In order to test these hypotheses, I gathered two variables that were coded "1" for countries where Islam (or Catholicism) was the largest religion, and zero for countries where they were not. When these variables were entered into the model, however, they were statistically insignificant and unimportant, indicating that religion was not an important factor in the explanation of these human rights violations. The region variables retained their statistical significance. Evidently, then, neither the repressive practices of the Middle

East nor those of Latin American countries are explained by the more general factor of religion.

A Second Look: Application of a General Model to Particular Regions

In the last section it was shown that region makes a difference, in the sense that it explains some of the variance in human rights abuse not currently accounted for by our general models. But it could also be that region matters in a different way that is more complicated to detect and to explain. Specifically, it could be that the region in which a country finds itself is so primary to the phenomenon of human rights abuse that actual patterns of causation differ. If variables such as location, culture, and religion, which tend to be associated with region, are vital to the causal process, then region could condition other relationships such that the impact of a particular variable matters in one region but not in another or, alternatively, such that a variable's impact flows in completely different directions depending on the region. This would result in what Most and Starr termed "a nice law"—a relationship that is not general but is specific to a particular domain, perhaps as a result of differing initial conditions.[26]

Admittedly, this search for domain specific laws is exploratory. If regional differences are found, my explanations will be post hoc and probably not very definitive. Indeed, the only instance in which I had any expectation of regional differences coming in to the study was with regard to democracy, where arguments have been made that the general relationship is actually curvilinear, whereby political murders are not very common where democracy is present or where it is not present at all, but it is most common "in the middle."[27] If that is the case, we might expect the relationship between democracy and human rights abuse to be positive in a region if countries varied from being nondemocratic to somewhat democratic. Conversely, it might appear to be negative relationship in a region where countries vary between those that are somewhat democratic to those that are quite democratic. In spite of the exploratory nature of this expedition, I believe it to be worthwhile since it can illustrate ways in which region is important that would be invisible to us if our focus were only on the general case.

The results of regression analyses with Panel Robust Standard Errors, conducted on each region, are presented in table 2.4. In some instances there was no variance for a particular independent variable in a region, and that variable was therefore necessarily discarded from the model, leaving a blank cell in the table.

There are some clear regional differences in the results. Trying to sort out which ones are important and interesting is somewhat tricky, though, since differences might also arise simply because there is not much variance in a particular independent variable in a particular region of the world. One first notices that there are some interesting variations in the magnitude of the effect of the lagged dependent variable. It is roughly of the same magnitude in three of the regions, hovering around .60, but is somewhat smaller in sub-Saharan Africa, at .51, and in the Eastern

Table 2.4. A Region-by Region Comparison of the Determinants of Human Rights Abuses

Variable	OECD	Latin America	Sub-Saharan Africa	Middle East/ North Africa	Eastern Europe/ ex-Soviet	Other Asia
Intercept	1.43***	-1.27***	-0.27	.549	.454	.092
	(.44)	(.54)	(.24)	(.478)	(.548)	(.477)
Repression $_{t-1}$	.575**	.595**	.513***	.594***	.339***	.610***
	(.06)	(.051)	(.05)	(.056)	(.101)	(.062)
Democracy	-.127***	-.029***	-.021**	-.018	-.056***	-.007
	(.041)	(.013)	(.009)	(.040)	(.016)	(.015)
Economic	-.002	-.056**	.011	-.019***	-.0001	-.024**
Standing	(.002)	(.038)	(.028)	(.006)	(.023)	(.011)
Population	.025***	.162***	.090***	.046*	.064***	.055**
(logged)	(.009)	(.036)	(.019)	(.031)	(.028)	(.026)
Leftist regime	—	-.833	-.077	-.051	.306**	.008
		(.554)	(.072)	(.085)	(.151)	(.101)
Military regime	.252*	.091	.065	-.081	—	.063
	(.173)	(.100)	(.055)	(.085)		(.102)
British Cultural	-.127***	—	-.059	-.131*	—	.213***
influence	(.04)		(.050)	(.083)		(.073)
International	-.053	.565	.054	.195**	-.114	.044
war	(.08)	(.747)	(.101)	(.095)	(.166)	(.122)
Civil war	.94***	.500***	.528***	.508***	.770***	.345***
	(.27)	(.114)	(.107)	(.131)	(.197)	(.135)
Nonviolent	.173	.072	.345***	.233**	-.006	.017
rebellion	(.15)	(.106)	(.085)	(.120)	(.115)	(.098)
Violent rebellion	.182***	.214***	.311***	.200***	.218***	-.035
	(.05)	(.071)	(.056)	(.065)	(.106)	(.089)
Wald Chi^2	543.51	720.39	1224.51	1115.62	743.36	349.42
Significance	.0000	.0000	.0000	.0000	.0000	.0000
Adjusted R^2	.77	.68	.55	.74	.57	.59
Adjusted R^2 in a separate regression with Repression $_{t-1}$ excluded	.65	.45	.37	.57	.50	.30
N	475	349	714	333	225	287

*$p < .10$, **$p < .05$, ***$p < .01$ (Two-tailed tests used for regions, intercept, and leftist regime variable; otherwise one-tailed tests were used.)

Europe/ex-Soviet region, where it was only about .34. The most continuity in human rights abuse is evident in the Asian sample, in which this variable has a coefficient of .61. As in the previous analyses, this variable is statistically significant at the .01 level in every analysis. Thus the continuity of repression is clear wherever one may investigate the issue, but there are important variations as to degree of stability in particular regions.

Also exhibiting results that were similar to those that have already been presented and that are consistent across all regions are the civil war and population variables.

The coefficient of the civil war variable is highest in the OECD sample at .94, but that is as a result of one civil war during the period, occurring in Turkey in the nineties. In the other regions the coefficients of this variable range from about .35 in Asia (where forty-three country-years were characterized by civil war) to .770 in the Eastern Europe/ex-Soviet states (where there were eleven country-years of civil war, in four different countries.

The violent rebellion exhibited a similar pattern, except that the coefficient failed to reach statistical significance in the Asian region. A look at the distribution for clues as to why turned up few clues. Violent rebellions are a fairly common occurrence in lesser-developed countries, occurring in 33.1 percent of the country-years included in the data set, and in 41 percent of the cases in Asia during this period.

In regard to the relationship between democracy and human rights, the findings are statistically insignificant in two regions not known for being democratic, the Middle East/North Africa and Asia. However, the coefficient of that variable is uniformly negative, indicating that the more democratic a government is, the less abusive of these human rights, regardless of region. It does appear that there is a difference in the strength of the relationship, whereby this variable has its greatest effect among OECD countries. These countries tend to be very democratic, with only slight variations in this variable on the upper end of the spectrum, and that is not the case in other regions.[28] Why might this occur? It could be that there is a threshold effect, whereby the effect of changes in the democracy at the upper end of the spectrum are magnified and whereby the effect of changes at the lower end of the spectrum (as in the Middle East) are muted, a curvilinear relationship different from that which Fein's argument would lead us to expect. Or it could be that there are in fact regional effects that magnify the effect of democracy in this region. Either way, this is an interesting matter that is worthy of further study.

Another regional difference relates to the per capita GNP variable. The coefficient is negative, except in sub-Saharan Africa, the poorest area of the world. This variable fails to reach statistical significance in that region, in the OECD, and in the Eastern European/ex-Soviet states. That the strong effect of this variable is not evident in all the regions is none too surprising, though, for when the OECD countries were all placed in a single "region," this substantially reduced the variance for this variable in the regions from which they were taken as well as created a rather more homogeneous group of developed countries. It also might be taken to suggest that at the very upper end of the economic development distribution (as in the OECD) and at the lower end (as in sub-Saharan Africa), small changes in economic development make little difference.

In the previous set of analyses, some interesting findings emerged regarding the leftist government variable. Here a possible "nice law" becomes evident when one examines the coefficient of the leftist government variable. This variable identifies doctrinaire leftist regimes that allow no nonsocialist competition. In our most recent research, Poe, Tate, and Keith found the coefficient of this variable, contrary

to our expectations, to be negative and statistically significant with a two-tailed test.[29] Here, also with a two-tailed test, this variable is found to be statistically significant and *positive* among Eastern European and ex-Soviet countries. In the rest of the regions this variable was found to have a statistically insignificant effect using the appropriate two-tailed test. This suggests that perhaps the nature of leftist regimes is different in this region of the world. One possible explanation is that under the domination of the Soviet Union, the purpose of such regimes was to keep the opposition to socialism in check and this was done through repression—a neighborhood effect peculiar to this area of the world. This argument, stated more generally to apply to all doctrinaire socialist regimes, was the reason we posed the hypothesis in our first article. What we failed to realize was that socialist regimes in other parts of the world would fail to exhibit a similar pattern.

A second possible nice law related to the organized nonviolent rebellion variable, which is only statistically significant in the expected direction in the context of Africa and in the Middle East/North Africa. This variable identifies cases in which a nonviolent opposition pushes for significant change in the constitution or other political institutions through unconventional means not involving organized violent activities. An examination of the distribution of this variable in those regions led me to no explanation on the basis of outliers. So these findings are currently lacking in theoretical explanation, even of the post hoc variety.

Perhaps most interesting, though, is that the explanatory power of the model differs substantially depending on region, indicating that the general model is more or less powerful depending on regional differences. The general model performs best among the most developed countries (of the OECD) and, interestingly, in the Middle East and North Africa, where the proportion of the variance explained (R-square) is roughly similar to that which was achieved in the global sample. The model performs least well in sub-Saharan Africa and in the Eastern European and ex-Soviet countries.

As before, much of the variance is explained by the lagged dependent variable, so the model is apt to perform well in regions where there is much continuity to human rights abuses, perhaps owing to that factor only. For that reason I also ran a set of models with the lagged dependent variable excluded. The coefficients and t-scores are not presented because the results are almost certainly affected by autocorrelation. However, the R-squares are still accurate and indicative of the power of the model. Here it is shown that the model performs least well in Asia, where the R-square shrinks from .59 to just .30, and in sub-Saharan Africa, where it decreases from .55 to .37 when the lagged dependent variable is discarded. Thus the general model does not seem to apply as well in these two regions of the world. In Latin America the R-square decreases from .68 to .45. Again, the model seems to perform relatively well in the Middle East and North Africa, while performance in Eastern European and ex-Soviet countries is "middling."

Summary and Conclusions

In this study I set out to investigate the effects of regional factors on countries' human rights practices. The findings clearly indicate that general models can achieve substantial power, but they also indicate that a focus on regional effects on human rights may be a useful avenue for future research. The findings indicate that regional variations in levels of personal integrity abuse, evident when one simply examines the mean levels of abuse on a regional basis, have a moderate amount of explanatory power even when other factors typically included in more general models are controlled. Perhaps even more importantly, when analyses were conducted on a region-by-region basis, though many of the findings yielded in earlier general tests held, there was also evidence of regional differences in causal patterns. And the explanatory power of the model was much stronger in some regions (OECD and the Middle East/North Africa) than in others (sub-Saharan Africa, Latin America, and Asia).

What does this imply for future research? First, it suggests that the more general, global research approach can and should be augmented by regional analyses. The advice of Przeworski and Teune was to use systemic names as explanations but then to attempt to identify a more general factor that can account for their effects, thus eliminating the need to include such variables in the analysis. Of course, in some instances it will not be possible to do so, and in those instances researchers will have identified what they call a "middle range theory" or what Most and Starr call a domain-specific or "nice law." An exclusive focus on general theory building has the effect of holding back the development of such theories, which are also useful to students of human rights.

Relatedly, my findings indicate that patterns of causation differ somewhat depending on region. That some variables in the general model did not fare so well in regional analyses suggests that there also may be a set of variables, as yet uninvestigated, that affects levels of human rights abuse only within certain regions but not within others, as a result of similarities in history, culture, geography, and other factors. Future research should be aimed at identifying such factors, which would result in richer mid-range theories and therefore a better understanding of why human rights abuses occur.

Appendix A

The regional breakdown is:

OECD: United States, Canada, United Kingdom, Ireland, Netherlands, Belgium, Luxembourg, France, Switzerland, Spain, Portugal, Germany (West), Austria, Italy, Greece, Finland, Sweden, Norway, Denmark, Iceland, Turkey, Japan, Australia, New Zealand

Latin America: Dominican Republic, Guatemala, Mexico, Honduras, Nicaragua, El Salvador, Costa Rica, Panama, Colombia, Venezuela, Ecuador, Peru, Brazil, Bolivia, Paraguay, Chile, Argentina, Uruguay

Sub-Saharan Africa: Guinea-Bissau, Equatorial Guinea, Gambia, Mali, Senegal, Benin, Mauritania, Niger, Ivory Coast, Guinea, Burkina Faso, Liberia, Sierra Leone, Ghana, Togo, Cameroon, Nigeria, Gabon, Central African Republic, Chad, Congo, Zaire, Uganda, Kenya, Tanzania, Burundi, Rwanda, Djibouti, Ethiopia, Angola, Mozambique, Zambia, Zimbabwe, Malawi, South Africa, Namibia, Lesotho, Botswana, Swaziland

Middle East/North Africa: Morocco, Algeria, Tunisia, Libya, Sudan, Iran, Iraq, Egypt, Syria, Lebanon, Jordan, Saudi Arabia, Yemen (South and North) Kuwait, Bahrain, Qatar, United Arab Emirates, Oman

Eastern Europe/ex-Soviet: Poland, Czechoslovakia and Czech Republic, Slovakia, Albania, Yugoslavia, Serbia, Croatia, Bosnia-Herzegovina, Macedonia, Bulgaria, Romania, Soviet Union/Russia, Estonia, Latvia, Lithuania, Belarus, Ukraine, Moldova, Georgia, Armenia, Azerbaijan, Kazakhstan, Turkmenistan, Uzbekistan, Tajikistan, Kyrgyzstan

Other Asia: China, Mongolia, Taiwan, South Korea, India, Bhutan, Pakistan, Bangladesh, Burma, Sri Lanka, Nepal, Thailand, Kampuchea, Laos, Vietnam, Philippines

Notes

I would like to thank John Hibbing, David Forsythe, John Books, David Richards, and other participants in the Global Human Rights and Diversity Conference for their helpful comments on this essay. Thanks are also due to Linda Camp Keith, who graciously shared her data with me. Most of the data used in this study were gathered with the support of the National Science Foundation through Grant SBR-9321741 of the Division of Social, Behavioral, and Economic Research. I thank NSF for its support. Any mistakes are my own.

1. See Clair Apodaca and Michael Stohl, "United States Human Rights Policy and Foreign Assistance," *International Studies Quarterly* 43 (1999): 185–98 and other studies cited therein.
2. As a sample, consider the following works: Conway W. Henderson, "Conditions Affecting the Use of Political Repression," *Journal of Conflict Resolution* 35 (1991): 120–42; Conway W. Henderson, "Population Pressures and Political Repression," *Social Science Quarterly* 74 (1993): 322–33; Steven C. Poe and C. Neal Tate, "Repression of Personal Integrity in the 1980s: A Global Analysis," *American Political Science Review* 88 (December 1994): 853–72; Helen Fein, "More Murder in the Middle: Life Integrity Violations and Democracy in the World, 1987," *Human Rights Quarterly* 17 (1995): 170–91; Scott Sigmund Gartner and Patrick M. Regan, "Threat and Repression: The Non-Linear Relationship between Government and Opposition Violence," *Journal of Peace Research* 33.3 (1996): 273–87; William Meyer, "Human Rights and MNCs: Theory versus Quantitative Analysis," *Human Rights Quarterly* 18 (1996): 368–97; David L. Cingranelli and David L. Richards, "Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights," *International Studies Quarterly* 43 (1999): 407–17; David L. Richards, Ronald D. Gelleny, and David H. Sacko, "Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries," *International Studies Quarterly* 45 (June 2001): 219–39.
3. See Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (Malabar FL: Robert E. Krieger, 1982).
4. See the works cited in note 2 above, which are examples of this approach.

5. See Sahliyeh's chapter 10 in this volume as one example. Also consider the following research as being examples of a much larger genre: Ernest A. Duff and John F. McCamant, with Waltraud Q. Morales, *Violence and Repression in Latin America: A Quantitative and Historical Analysis* (New York: Free Press, 1976); David Pion-Berlin and George Lopez, "Of Victims and Executioners: Argentine State Terror, 1975–1979," *International Studies Quarterly* 35 (1991): 63–86; Chris Maina Peter, "Incarcerating the Innocent: Preventive Detention in Tanzania," *Human Rights Quarterly* 19 (February 1997): 113–35; Abdullahi A. An-Na'im, "Human Rights in the Arab World: A Regional Perspective," *Human Rights Quarterly* 23.3 (August 2001): 701–32; and Said Adejumobi, "Citizenship, Rights, and the Problem of Conflicts and Civil Wars in Africa," *Human Rights Quarterly* 23.1 (February 2001): 148–70.
6. See Michael Stohl, David Carleton, and Steven E. Johnson, "Human Rights and U.S. Foreign Assistance: From Nixon to Carter," *Journal of Peace Research* 21 (1984): 215–26; Mark Gibney and Matthew Dalton, "The Political Terror Scale," in *Human Rights and Developing Countries*, ed. David L. Cingranelli (Greenwich CT: JAI Press, 1997); Steven C. Poe and Rangsima Sirirangsi, "Human Rights and U.S. Economic Aid during the Reagan Years," *Social Science Quarterly* 75 (1994): 494–509; Linda Camp Keith, "Constitutional Provisions for Individual Human Rights (1976–1996): Are They More than Mere 'Window Dressing?'" *Political Research Quarterly*, forthcoming.
7. See James M McCormick and Neil J. Mitchell, "Human Rights Violations, Umbrella Concepts, and Empirical Analysis," *World Politics* 49.4 (1997): 510–25; and Cingranelli and Richards, "Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights."
8. Stated more precisely, the scale runs as follows:
    1. "Countries . . . under a secure rule of law, people are not imprisoned for their views, and torture is rare or exceptional . . . political murders are extremely rare."
    2. "There is a limited amount of imprisonment for nonviolent political activity. However, few persons are affected, torture and beating are exceptional . . . political murder is rare."
    3. "There is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without trial, for political views is accepted."
    4. "The practices of (Level 3) are expanded to larger numbers. Murders, disappearances are a common part of life. . . . In spite of its generality, on this level terror affects primarily those who interest themselves in politics or ideas."
    5. "The terrors of (Level 4) have been expanded to the whole population. . . . The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals." See Raymond D. Gastil, *Freedom in the World: Political Rights and Civil Liberties, 1980* (New Brunswick, NJ: Transaction Books, 1980).
9. See Steven C. Poe, Neal Tate, and Linda Camp Keith, "Repression of the Human Right to Personal Integrity Revisited: A Global Crossnational Study Covering the Years 1976–1993," *International Studies Quarterly*43 (1999): 291–315. Essentially, Amnesty International tends not to cover the full range of cases that have less serious human rights difficulties, which biases the sample disproportionately toward countries with more serious human rights problems.
10. I experimented with several ways of breaking down the regions of the world, including drawing lines on the basis of geography and cultural heritage or geography and religion. I concluded (with thanks to a colleague who studies contextual factors, John Books) that though using a single variable (for example, religion) to supplement geography in order to draw lines between regions is intuitively appealing for the sake of simplicity, that simplicity in this case may be a downfall. This is because (in the terms of Przeworski and Teune) equivalence across systems

is an issue as a result of system interference. Or put another way, in different regions of the world variables will have different meanings, and thus it makes sense to use different variables to distinguish regional lines.

In the end I placed the northernmost African countries in the Middle Eastern region because of the shared cultural and religious (Islamic) influences. I decided to discard Israel from this region, under the assumption that culture was more important in determining human rights patterns than location. In regard to Latin America, I chose to group countries that were truly Latin (Spanish and Portuguese in their colonial heritage) and American in a region, consistent with the arguments of Wiarda that the distinctiveness of this heritage has ramifications for a number of variables, propensity toward repression being one. See Howard J. Wiarda and Harvey F. Kline, "Latin American Tradition and Process of Development," *Latin American Politics and Development*, eds. Howard J. Wiarda and Harvey F. Kline (Boulder: Westview Press, 1985). I distinguished ex-Soviet and Eastern European states from others on the basis of their shared recent experiments with socialism, and the importance of that to their current economic and human rights travails. The assumption here is that the experiment with communism may be important and still affects human rights situations in those countries today. I experimented with various conceptualizations of Asia (for example, Southeast Asian countries, Pacific Rim countries), and it did not seem to make much difference what I used. So I adopted the broadest conceptualization, including all countries in this region that are typically identified as belonging on that continent, with the exception of ex-Soviet Republics. Finally, I included all African countries not included in the North Africa/Middle East region into a single category, because I believed they shared difficult development problems and the problems inherent in transforming or adapting a tribal system into the form of a modern nation-state.

In the end several countries were left out of regions, as I felt that maintaining groups of countries that were at least somewhat similar was more important than being exhaustive. Further, this would provide us with a baseline group against which other regions could be compared in later multivariate analyses. I doubt very much whether a different conceptualization of region would have made much difference in my basic findings that region *does* help to explain human rights abuse and that some regional variations in patterns of causation do exist. Supplementary analyses using different conceptualizations of region lend some support to this claim.

11. The "longtime" criterion was chosen so as to exclude countries that only became OECD members very late in the period under study, such as Mexico (1994), the Czech Republic (1995), and Hungary, Poland, and South Korea (1996). It was decided that to include these countries in one region for the early part of the period and another region for the later part was an unnecessary complication, and that these countries fit better with the non-OECD regions of which they were a part for most of the years in the period under study. Prior to the accession of Mexico, New Zealand had been the last country to join, in 1973. See Arthur S. Banks and Thomas C. Muller, *Political Handbook of the World: 1998* (Binghamton NY: CSA, 1998).
12. See Wesley T. Milner, Steven C. Poe, and David Leblang, "Security Rights, Subsistence Rights, and Liberties: A Theoretical Survey of the Empirical Landscape," *Human Rights Quarterly*21 (1999): 403–43.
13. See Poe and Tate, "Repression of Personal Integrity in the 1980s"; and Richards, Gelleny, and Sacko, "Money with a Mean Streak?"
14. See Henderson, "Conditions Affecting the Use of Political Repression"; and Poe and Tate, "Repression of Personal Integrity in the 1980s."
15. Poe and Tate, "Repression of Personal Integrity in the 1980s"; Poe, Tate, and Keith, "Repression of the Human Right to Personal Integrity Revisited"; and Poe et al., "The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression" (manuscript, 2001).
16. Neil J. Mitchell and James M. McCormick, "Economic and Political Explanations of Human Rights Violations," *World Politics* 40 (1988): 476–98.

17. Poe et al., "The Decision to Repress"; and Poe, Tate, and Keith, "Repression of the Human Right to Personal Integrity Revisited." The nonviolent and violent rebellion variables have not yet been adequately described in print. The definitions are as follows: A threat that is characterized by "nonviolent rebellion"is one in which an unarmed opposition pushes for significant change in the constitution or other political institutions through unconventional means not involving organized violent activities. The massive student demonstrations in South Korea (over political reform and military power) during 1980 are an example of a threat due to nonviolent rebellion.

    A threat that can be called"violent rebellion" occurs when there is a substantial organized movement that seeks to alter the governmental system, bringing about a significant change in the constitution or other political institutions, through armed attacks, including terrorist activities, guerrilla movements, and most attempted coups, but not full-scale civil war. The terrorist activity of the Basque separatists in 1978 is an example of this type of threat. They were gathered through coders' inspection and application of these coding rules to a variety of sources that included reports on particular countries.
18. Nathaniel Beck and Jonathan N. Katz, "What to Do (and Not to Do) with Time-Series—Cross-Section Data in Comparative Politics," *American Political Science Review* 89 (1995): 634–47.
19. Two-tailed tests are used in the case of the region variables, the leftist regime variable, and the intercept. Otherwise, theory and previous findings persuasively indicated that the relationship would run in a particular direction and, therefore, the appropriate one-tail test was chosen.
20. Poe, Tate, and Keith, "Repression of the Human Right to Personal Integrity Revisited."
21. Bivariate correlations were run, as was a Klein test, whereby each independent variable is regressed on all others and the R-squares examined. The highest levels of multicollinearity were found in model 4, when OECD and per capita GNP were both included. The multicollinearity levels were high, clearly, as the bivariate correlation between these variables was .69, and the highest R-square achieved in the Klein test was when OECD was regressed on all the other variables, achieving an R-square of .71 (per capita GNP achieved a t-score of 33.2). However, an analysis conducted without OECD in the analysis resulted in trivial changes in the coefficients of the variables in the general model, except for that of per capita GNP, which increased substantially, as might be expected. The highest R-square achieved when the general model was tested was .48. The highest when the region-only model was tested was .67. Though these levels are high enough that caution is warranted, none of the common symptoms of multicollinearity (switched signs, difficulty in achieving statistical significance) are present, and removing variables that are relatively highly related doesn't seem to make a difference in the substantive findings, which were pretty stable. Finally, though caution should be exercised, the levels here are not nearly so high as to effectively preclude worthwhile analyses. See Michael Lewis-Beck, *Applied Regression: An Introduction*, Sage University Series on Quantitative Applications in the Social Sciences (Beverly Hills: Sage, 1983).
22. See Poe and Tate, "Repression of Personal Integrity in the 1980s."
23. Przeworski and Teune, *The Logic of Comparative Social Inquiry*.
24. Wiarda and Kline, "Latin American Tradition and Process of Development."
25. See chapter 10 by Sahliyeh in this volume and sources cited within.
26. Benjamin A. Most and Harvey Starr, *Inquiry, Logic, and International Politics* (Columbia: University of South Carolina Press, 1989). Przeworski and Teune (*The Logic of Comparative Social Inquiry*, 84) discuss this possibility and recommend the consideration of such differences across systems once efforts to find variables generally accounting for variation in the dependent variable are exhausted.
27. Fein, "More Murder in the Middle."
28. In the OECD the scores tended to vary between seven and ten on the high end of the ten-category democracy scale, with the vast majority of cases being tens. The only exceptions were three years in which Turkey, the poorest of longtime OECD countries, achieved a democracy score of only two. In contrast, in the Middle East the vast majority of country-years were on the low

end of the score, having been coded zero, with a few ones. The only exception was the three years during the mid to late eighties in which Sudan scored eight. In contrast, though zero was the most frequent democracy score in each of the other regions, scores were found across the spectrum of cases.

29. Poe, Tate, and Keith, "Repression of the Human Right to Personal Integrity Revisited."

Europe and the Americas

3 The Margin of Appreciation Doctrine of the European Court of Human Rights

ACCOMMODATING DIVERSITY WITHIN EUROPE

Eva Brems

Human Rights Protection in Europe by the European Court of Human Rights

With regard to human rights protection, the European Union and the European Court of Justice in Luxemburg play only a marginal role. The regional human rights protection system in Europe is based on another organization: the Council of Europe. Membership in the Council of Europe is conditioned upon ratification of the 1950 European Convention for the protection of human rights and fundamental freedoms (in what follows: European Convention). The European Convention and its additional protocols offer strong legal protection for civil and political rights. Enforcement is in the first place a task for the domestic judiciaries. In almost all European states the European Convention either has direct effect before the national courts or indirect effect through its incorporation in domestic legislation. After the exhaustion of domestic remedies, anyone who feels that his or her human rights have been violated can apply to the European Court of Human Rights (ECHR) in Strasbourg.[1]

In a comparative perspective, especially one that is concerned with human rights and diversity, the European human rights protection system has several interesting features. In the first place, it is the starting point for a *legal* approach to the issue. The European system is the most developed judicial international human rights protection system to date. With a body of case law encompassing over two thousand Court judgments as well as a large number of European Commission of Human Rights decisions and reports, the convention organs have been able to elaborate a sophisticated jurisprudence on a large number of different rights. In an international context where supranational judicial enforcement of human rights is relatively rare, this makes the ECHR case law a prime laboratory for the development of legal techniques, tests, and criteria within international human rights law.

Moreover, European human rights *conceptions* may offer an interesting contribution to the debate on human rights and diversity. This debate often opposes "Asian," "African," or "Islamic" human rights to "Western human rights," the latter being modeled on U.S. human rights conceptions. Yet European human rights offer better possibilities for rapprochement to non-Western human rights claims. One reason is the fact that they are less individualistic. Individual human rights in Europe

are not considered as absolute rights. They are balanced against communal interests. This balancing is a central part of the work of the ECHR, in particular in the context of limitation clauses (see later).

Finally, the European system has experience with the *management of diversity*. Since 1989 most states of Central and Eastern Europe have joined the Council of Europe and the European Convention. The system now encompasses forty-four states. Its eastern border reaches to Turkey, Russia, Ukraine, and Georgia. Within this region, states and societies differ with regard to their social and political history, religion, ideology, and cultural perceptions. Hence it seems that the experience of the European Court of Human Rights in managing the tension between uniformity and diversity in human rights standards may be useful on the universal level.

The Margin of Appreciation Doctrine

The ECHR's main instrument in performing this function is the so-called margin of appreciation doctrine.[2] The margin of appreciation is deference to national bodies in the examination of whether a restriction of a convention right is acceptable or not. In certain circumstances the Court grants a wider margin of appreciation than in others. The effect of a wide margin of appreciation is that the application of a common standard leads to different results in different member states: the same facts that constitute a violation of a fundamental right in one state may be considered as a legitimate restriction of that right in another.

The margin of appreciation doctrine performs a number of roles: it is an expression of judicial restraint, an interpretational aid, and a means of expressing the subsidiarity of the European Convention to the legislation of the member states and of demarcating the room left for national sovereignty vis-à-vis supranational control.

The specific focus of this chapter is on one particular role of the margin of appreciation doctrine: its function as a tool to balance uniformity and diversity within an international system of human rights protection. When the ECHR wants to impose uniformity, it either does not mention the margin of appreciation or restricts its scope. When it wants to leave room for diversity, it grants a wide margin of appreciation. Sometimes the Court justifies its choice for a broad or narrow margin, other times it does not. To the extent that there is a "doctrine" of the margin of appreciation, it has to be derived from the case law.[3]

The Margin of Appreciation as a Tool to Accommodate Diversity

The examination of the case law has been ordered according to the different types of diversity that are accommodated by the use of the margin of appreciation. Attention goes both to cases where the Court leaves room for diversity and to cases where it denies it.

The Protection of Morals
ROOM FOR DIVERSITY

The Articles 8 (private and family life), 9 (freedom of conscience and religion), 10 (freedom of expression), and 11 (freedom of assembly and association) of the European Convention, as well as Article 2 of the Fourth Additional Protocol (freedom of movement), all include similarly framed limitation clauses. Under such a clause, a measure restricting one of the rights concerned is legitimate if it is prescribed by law and if it is "necessary in a democratic society"—that is, proportionate—for the realization of a legitimate purpose from among those enumerated in the limitation clause. One of those legitimate purposes, which is common to all five limitation clauses, is "the protection of morals." In pluralist twenty-first-century societies, this is a common good that can have numerous and strongly diverging meanings. It generally refers to expressions and activities of a sexual nature. Opinions on what "morals" are in this field, and on what the state should do to protect them, vary widely even within a single society, let alone among the countries of Europe. It is common knowledge, for example, that what is considered indecent in Ireland may be perfectly acceptable in Denmark. Throughout its case law, the ECHR consistently promotes a democratic society that is characterized by "pluralism, tolerance and broadmindedness."[4] In that context, it would have been a valid option for the Court to put forward a narrow, bottom-line conception of the protection of morals so as to minimize its restrictive impact on individual rights. Yet it took another option, that of the margin of appreciation. The ECHR does not want to advance a uniform European conception of morals but rather wishes to leave room for state authorities to interpret this criterion in their own manner. In its *Handyside* judgment, the Court justified this approach as follows: "It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."[5] The 1976 *Handyside* judgment remains famous as one of the earliest ECHR judgments in which the margin of appreciation doctrine played a crucial part, and as one in which the national authorities are granted a particularly wide margin of appreciation.

Mr. Handyside was a left-wing publisher who prepared, in 1971, the UK edition of the *Little Red School Book*. This 208-page book, written by two Danish authors, was meant to be a reference book for children and adolescents. It took a liberal approach to sex. It had first been published in Denmark in 1969 and subsequently (sometimes in a slightly adapted version) in Belgium, Finland, France, Germany,

Greece, Iceland, Italy, the Netherlands, Norway, Sweden, and Switzerland as well as several non-European countries, where it had not encountered any problems. After the publication of accounts of the book's contents in British newspapers, however, complaints followed, which resulted in a case under the Obscene Publications Act. A London court ordered the book's forfeiture and imposed a fine. Under the Obscene Publications Act, an article is deemed obscene if its effect is "such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." The court referred to three passages as indications of what it considered to result in a tendency to deprave and corrupt. The first passage is headed "Be yourself": "Maybe you smoke pot or go to bed with your boyfriend or girlfriend—and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret. Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of.'"

The second is a two-page passage headed "Intercourse and petting" under the main heading "Sex." The third passage falls under the heading "Pornography": "Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed. But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before."

Even thirty years ago this was considered quite harmless in most European countries—yet not in Britain, and the ECHR respected the British position. The different European states "[h]ave each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, *inter alia*, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the London Quarter Sessions was a breach of Article 10."[6]

Of course, the margin of appreciation is not unlimited. The ECHR consistently holds that it "goes hand in hand with a European supervision," concerning both the purpose of the restrictive measure (under the limitation clause of Article 10, para. 2), in this case the protection of morals and the proportionality of measure and aim.[7] Without this supervision, states would be able to use the protection of morals as a pretext to curtail freedom of expression.

The measures in *Handyside* pass the marginal control of the Court because of the age of the intended readership of the *School Book*, which was between twelve and eighteen. The Court felt that the book contained "[s]entences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. In these circumstances, despite the variety and

the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it."[8]

In the 1988 *Müller* case the same reasoning was followed. At a 1981 exhibition of contemporary art in Fribourg, Switzerland, artists created works on the spot. Müller produced three large paintings. The day of the opening the public prosecutor had them removed. They were later confiscated and both the artist and the organizers of the event were fined. As in *Handyside*, the conviction was based on the prohibition of obscene publications. In the *Müller* case the qualification "obscene" appears more justified, as "the paintings in question depict in a crude manner sexual relations, particularly between men and animals."[9] Yet Müller is a recognized artist who has been able to exhibit similar work in other parts of Switzerland and abroad, both before and after the Fribourg exhibition.[10] He has been awarded several prizes and has sold works to museums.[11] As in *Handyside*, the ECHR shoves these elements aside: it does not follow "that the applicants' conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need."[12] The Court quoted the passage from *Handyside* on the lack of a uniform European conception of morals, and though it "[r]ecognizes . . . that conceptions of sexual morality have changed in recent years," the Court, "having inspected the original paintings . . . does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity.' "[13]

LIMITS TO DIVERSITY

Both *Handyside* and *Müller* were cases dealing with allegedly obscene expressions. Outside that sphere, the actual room for diversity among states with regard to rights restrictions for the protection of morals seems much more limited, despite the Court's doctrine about a wide margin of appreciation in the entire "sphere of morals."

In the context of freedom of expression, this is shown by an Irish case (*Dublin Well Woman*) dealing with freedom of information about abortion. The limits imposed by the Court on government assessments of the protection of morals as a justification for rights restrictions become even clearer in cases involving the protection of private life, in particular the homosexuality cases.

The Irish case concerned two health centers in Dublin that assisted pregnant Irish women to travel to Great Britain to obtain abortions, which are illegal in Ireland. At the request of a pro-life organization, an injunction was imposed upon them so as to restrain them from doing so. Before the ECHR, they confined their complaint to that part of the injunction that concerned the provision of information to pregnant women concerning abortion facilities abroad, as opposed to the making of travel arrangements or the referral to clinics.

The Court accepted the protection of morals as the legitimate aim of the restriction: "It is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum."[14]

It also acknowledged "that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life."[15] Quoting the passage from *Handyside* and *Müller* on the lack of a European conception of morals, the Court thus reaffirmed its doctrine on a broad domestic margin in matters of morals. Yet in its appreciation of the merits of the case, it did not restrict itself to a marginal appreciation and eventually found a violation of Article 10 of the European Convention. The main elements justifying this conclusion are the absolute and therefore overbroad nature of the injunction and the fact that the information given does not concern illegal activities, that it neither advocates nor encourages abortion, that it is not made available to the public at large, and that it was already available elsewhere.[16]

With regard to abortion, it should be noted that the European Court of Human Rights never had to give a judgment on state legislation regulating abortion. In 1992 the European Commission of Human Rights rejected the complaint of a man whose partner had undergone an abortion against his wish. Without explicit mention of the margin of appreciation doctrine, the commission applied margin-style reasoning, stating that "it is clear that national laws on abortion differ considerably. In these circumstances . . . the Commission finds that in such a delicate area the Contracting States must have a certain discretion."[17] Recognizing that there were different opinions as to whether the Norwegian law struck a fair balance between the need to protect the fetus and the interests of the woman, it found that the state had not gone beyond its discretion.[18] No conclusions with regard to the Court can be drawn from a commission decision. If there is one field in which it seems wise to leave room for diversity among the states parties to the European Convention, it is that of highly controversial and divisive ethical issues such as abortion. Hence if the Court is faced with this problem in the future, it would be advisable for it to follow the line of the commission's reasoning. This reasoning should preferably be reformulated in terms of the margin of appreciation doctrine, extending the *Handyside* approach beyond the obscenity sphere to controversial ethical issues.

Yet how is one to determine what are controversial ethical issues to which different societies may legitimately adopt different approaches? Societies and values change. What is one day a perfectly acceptable opinion on the conservative side of the ethical divide may one or two decades later become an untenable position that is incompatible with human rights. Somewhere in between, an international human rights court such as the ECHR must stop tolerating the latter position as an expression of legitimate ethical diversity among states and must bring recalcitrant

states in line with a pro–human rights position. That is what the ECHR did with regard to homosexuality.

The seminal ECHR case on homosexuality is *Dudgeon v. the UK*. Dudgeon challenged Northern Irish legislation, which prohibited most homosexual acts, even when committed in private by consenting adults. Anal intercourse was prohibited for both homosexuals and heterosexuals by an 1861 act, and most other male homosexual behavior fell under the prohibition of "gross indecency" between males, prohibited by an 1885 act. This legislation had been reformed in other parts of the United Kingdom, but the reform was not pursued in Northern Ireland because of opposition against it. Though the laws remained on the books, enforcement was limited in practice to cases involving males under twenty-one years old. The ECHR decided that this legislation violated Dudgeon's right to protection of his private life (Article 8, European Convention). The Court accepted that the general aim pursued by the legislation was "the protection of morals in the sense of moral standards obtaining in Northern Ireland."[19] The Court quoted *Handyside* on the need for a margin of appreciation in the sphere of morals.[20] It stated:

> The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland. . . . Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities. . . . it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society. . . . This opposition reflects . . . a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards. Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 § 2.[21]

However, the Court concluded that notwithstanding the margin of appreciation, this could not be decisive. It relied principally on two arguments. The first is a "core" argument. The legislation that was challenged touched upon the core of an individual right: the sexual life, "a most intimate aspect of private life."[22] It

is a recurrent pattern in the Court's case law that the margin of appreciation is narrowed when the core activities the right aims to protect are concerned.[23] The second argument is of another type that frequently occurs throughout the ECHR's margin of appreciation case law, namely a "consensus" argument. In this type of argument, the Court compares the national practice or regulation that is challenged to practices and regulations in the other states parties of the European Convention. If a state is found to be in an isolated position, the practice or regulation becomes suspect and the state's margin of appreciation is likely to be restricted. If on the contrary the same situation is found in many other states, this will strengthen the national government's case. In *Dudgeon*, the first hypothesis occurs: "As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member states of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States."[24] In the difficult business of drawing a boundary between those moral issues where divergence within Europe is justified and those where it isn't, the consensus criterion serves as a guideline for the Court.

The Dudgeon judgment was confirmed in *Norris*, concerning identical legislation in the republic of Ireland, and in *Modinos*, on similar legislation in Cyprus.[25] In a recent judgment the same conclusion was reached with regard to homosexual group sex, which had led to a violation for gross indecency in Britain.[26]

In another case the prohibition of sadomasochistic activities, on the contrary, was judged to be within the state's margin of appreciation. Remarkably, the Court chose to consider the prohibition as a measure for the protection of health, not for the protection of morals, adding that this "should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question."[27]

In the recent cases on dismissal of homosexuals from the British Army, the margin of appreciation was narrowed in line with *Dudgeon* and violations of Article 8 were found. The legitimate aim invoked by the British government in these cases, however, was not the protection of morals but the interests of national security and the prevention of disorder.[28]

The Significance of Religion in Society

ROOM FOR DIVERSITY

A rhetoric and reasoning that are very similar to those used in "morality cases" are found in cases touching upon the role and significance of religion in society. This ECHR doctrine is most explicit in the blasphemy cases (*Otto-Preminger* and *Wingrove*), but it extends beyond those.

The Otto-Preminger-Institute operates a cinema in Innsbruck, Austria. In 1985 it announced a series of six showings of the film *Das Liebeskonzil* by Werner Schroeter. The film is based on an 1894 play by Oskar Panizza, which led to that author's conviction for blasphemy. The film begins and ends with scenes from Panizza's trial and shows a performance of the play in between. It

> [p]ortrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil.[29]

At the request of the Roman Catholic diocese, the film was seized by the authorities and criminal proceedings were instituted on the charge of "disparaging religious doctrines," an act prohibited by the Austrian penal code. The film was found blasphemous and was forfeited. Before the ECHR the applicant claimed that this constituted a violation of his right to freedom of expression as guaranteed by Article 10 of the European Convention. The Court, however, concluded that the Austrian authorities had not overstepped their margin of appreciation.[30] The restriction of the applicant's freedom of expression was within the range of those permitted to serve a legitimate purpose under the second paragraph of Article 10, which in this case was the protection of the rights of others, in particular "the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons."[31] The Court drew the parallel with cases concerning restrictions for the purpose of the protection of morals: "As in the case of 'morals,' it is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . ; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference."[32]

The Court did not say that the margin of appreciation should be a broad one. To the contrary, it stated that its supervision should be strict in this case, as it involved an interference with a very important freedom.[33] Despite this rhetoric, the margin of appreciation seems to have been crucial in determining the outcome of the case. The Court was satisfied that the Austrian authorities had acted to "ensure religious

peace" in a region, Tyrol, where an overwhelming majority of the people are Roman Catholics, and to "prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."[34] As with morals, these kinds of feelings are better assessed by the national authorities than by the European Court: "It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time."[35]

Otto-Preminger has been very critically received. Nevertheless, its doctrine was confirmed three years later in another blasphemy case. Nigel Wingrove invoked the freedom of expression to contest the censorship of his video work *Visions of Ecstasy*. The British Board of Film Classification rejected his application for a classification certificate, which meant that the film could not be lawfully sold, hired out, or otherwise supplied to the public. The refusal was based on the criminal law of blasphemy. Wingrove's film is an evocation of the ecstatic visions of Jesus Christ experienced by St. Teresa of Avila. The film, which runs for approximately eighteen minutes, contains no dialogue, only music and moving images. It is of a soft erotic nature. The crucified body of Christ is shown as the focus of, and at certain moments as a participant in, the erotic desire of St. Teresa. As in *Otto-Preminger*, the ECHR judged that in censuring the film, the authorities did not overstep their margin of appreciation under Article 10 of the convention.[36] The Court has developed its doctrine since *Otto-Preminger* and now says that the margin of appreciation in this kind of cases is a wide one, despite the fact that freedom of speech is at stake: "Whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest . . . , a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion."[37]

The rest of the Court's reasoning about the margin of appreciation is also better structured than in *Otto-Preminger*:

> Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the right of others as well as on the "necessity" of a "restriction" intended to protect from such mate-

> rial those whose deepest feelings and convictions would be seriously offended.[38]

With a wide margin of appreciation for the British authorities, the Court's supervision becomes a marginal control. It is satisfied that the reasons given by the British to justify the censorship "can be considered as both relevant and sufficient for the purposes of Article 10 para. 2" and that their decision "cannot be said to be arbitrary or excessive."[39]

The ECHR's reluctance to condemn the way national authorities deal with the position of religions is not limited to the issue of blasphemy. The same attitude explains why no violation was found in a recent case dealing with ritual slaughter in France. The French authorities allow ritual slaughter to be performed only by slaughterers authorized for the purpose by religious bodies that have been approved by the minister of agriculture, on a proposal from the minister of the interior. Several organizations within the Islamic community have received this approval. Within the Jewish community however, only one organization has the requisite approval: the Joint Rabbinical Committee of the Jewish Consistorial Association of Paris, which is an offshoot of the Central Consistory, an umbrella organization representing the majority (around seven hundred thousand) of French Jews. The applicant in this case is the Jewish liturgical association Cha'are Shalom ve Tsedek, which came into being as a minority movement that split away from the Central Consistory. Its members practice their religion in the strictest orthodoxy. In particular they require that the meat they eat is not just kosher, but also *glatt*, which means that the slaughtered animal must not have any impurity, especially in the lungs. Meat that is ritually slaughtered under supervision of the Joint Rabbinical Committee is guaranteed kosher, but not guaranteed *glatt*, as no additional examination is performed. Hence one of the main activities of Cha'are Shalom ve Tsedek is the provision of *glatt* meat to its adherents, obtained from Belgium and from illegal slaughter in France. In 1987 the association asked the Ministry of the Interior to propose its approval with a view to practicing ritual slaughter. This was refused on the grounds that the association was not sufficiently representative within the French Jewish community and that it was not a religious body within the scope of French law.

Before the ECHR, the association claimed that this refusal violated its freedom of religion (Article 9) and constituted an unlawful discrimination (Article 14). The Court, however, found no violation. In a highly contestable reasoning, the Court absolved itself from the task of ruling on the compatibility of the restriction with the requirements laid down in the second paragraph of Article 9 of the convention by deciding that the contested measure did not constitute an infringement of the freedom of religion.[40] The Court accepted that ritual slaughter is protected by the right to manifest one's religion in observance, yet in its opinion this right had not been interfered with since ultra-orthodox Jews could easily obtain *glatt* meat from

Belgium.[41] Seemingly in a move to preempt the criticism of this approach, the ECHR added a paragraph to the effect that in any event it considered the restriction to be justified under the limitation clause (para. 2) of Article 9. The only argument it advanced to sustain the proportionality of the measure with the aim of the protection of public health and public order is the margin of appreciation of the member states, "particularly with regard to the establishment of the delicate relations between the State and religions."[42]

LIMITS TO DIVERSITY

The limits of the ECHR's tolerance in the field of state policies with regard to religions were experienced by the Greek government, which was reprimanded for its restrictive attitude toward the Jehovah's Witnesses. The Greek Constitution states that the dominant religion in Greece is that of the Christian Eastern Orthodox Church. Adherents of other religions, and in particular Jehovah's Witnesses, complain of discrimination and harassment. In a 1996 case (*Manoussakis*), four Jehovah's Witnesses living in Crete had been convicted for the criminal offence of operating a place of worship without the authorities' prior authorization. In this case the ECHR found a violation of Article 9 of the European Convention after a very critical analysis of the relevant legal provisions. In the eyes of the Court, the Greek state had tended to use those "to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses."[43] The Court stated that very strict scrutiny was needed in this case. It therefore curtailed the margin of appreciation of the state in the name of "the need to secure true religious pluralism, an inherent feature of the notion of a democratic society."[44]

Other Ethical Views

The margin of appreciation can also create room for diversity of ethical views outside the sphere of the protection of morals. Such views are often determined by culture and tradition. As with regard to the protection of morals, the Court tolerates diversity in this field, yet this tolerance is limited.

ROOM FOR DIVERSITY

In cases challenging the taking of children into care under Article 8 of the European Convention (protection of family life), the ECHR has long granted a margin of appreciation to the national authorities. These are considered to be better placed to assess the situation, as they have the benefit of direct contact with the parties concerned.[45] The "better placed" argument can justify a "pragmatic" margin of appreciation, granted in cases where factual assessments are crucial. Yet it occurs also in relation to the use of the margin of appreciation as a tool to accommodate diversity. If general ethical tendencies in a society are allowed to influence the appreciation of restrictive measures under the European Convention, it is logical to let the national authorities, rather than the ECHR, interpret these tendencies,

as they should have a better view of them. The appropriateness of a decision to take children into public care depends not only on factual elements but also on fundamental ethical conceptions about what it is in the best interests of children.

In two recent Finnish cases, the Court stated that it would "[h]ave regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area."[46] Hence "the Court recognizes that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care."[47] The margin is narrowed, however, when it comes to the scrutiny of "any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life."[48]

LIMITS TO DIVERSITY

A classic example of the kind of cultural diversity the Court will not tolerate is the 1978 *Tyrer* case. This case dealt with corporal judicial punishment, which at that time was still applied on the Isle of Man. Tyrer, a fifteen-year-old, had been caned with three strokes of the birch on his naked bottom as a sentence for assault on a senior pupil at his school who had reported on him and his friends for taking beer into the school. He claimed that this was an inhuman or degrading punishment prohibited by Article 3 of the European Convention. The ECHR concluded that it was indeed degrading. Before the Court, the attorney general for the Isle of Man argued "that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island."[49] The ECHR accepted that the assessment of the degrading character of a punishment is relative: "[I]t depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution."[50] Yet the Court was reluctant to take account of the cultural context in this respect. It found a way to avoid the issue by stating: "Even assuming that local opinion can have an incidence on the interpretation of the concept of 'degrading punishment' appearing in Article 3, the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favor its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves."[51]

The Court is justified in adopting a critical attitude to local opinion. It is self-evident that a human rights system's tolerance of cultural diversity must be limited. Some culturally determined traditions or views go against the core values of human rights. In that case the mission of human rights is to bring about cultural change. If the Manx population favors birching because they think a good punishment for

youngsters should be degrading, they cannot act upon that attitude since they are bound by a convention forbidding degrading punishment. Yet if they don't consider birching to be degrading, the situation becomes more complex. At that point the Court would have to decide whether to impose a uniform European definition of degrading punishment or to leave room for diverse national interpretations. In *Tyrer* it prefers to leave that issue open ("even assuming that . . ."). What is remarkable is that on the crucial question whether the Manx population considers corporal punishment degrading or not, the Court relied on its own appreciation rather than on the national authorities, even though a "better placed " argument would have been fully justified. It seems determined not to grant any margin of appreciation, not even for pragmatic reasons, in this area. Indeed the Court has never used margin of appreciation analysis in the context of Article 3. Physical integrity is a value the ECHR seems to want to uphold particularly firmly. The Court does seek support in a consensus argument, stating that it "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[52]

The Availability of Resources

In the above-cited passage from *K. and T. v. Finland* and *L. v. Finland*,[53] the ECHR stated that perceptions as to the appropriateness of intervention by public authorities in the care of children vary not only depending on culturally determined ethical views but also depending on the availability of resources. When it comes to contextual factors influencing human rights implementation in particular countries, the availability of resources is one of the main differentiating factors. Resource availability is crucial whenever the respect for human rights entails positive state obligations. The ECHR has long recognized that respect for the rights of the European Convention may sometimes entail positive obligations. At the same time it recognizes a margin of appreciation of states in the fulfillment of these obligations.[54] The positive obligations under the convention are obligations of result: states are free to choose the means by which they realize that result.

The Court does not generally mention resource constraints as factors that might influence a state's choice of means, let alone the eventual result. An obvious explanation is the fact that in none of the states parties to the convention are resource constraints so tight as to be acceptable as a legitimate obstacle to human rights implementation.

One recent exception is the *Özgür Gündem* judgment. The case concerned a pattern of attacks by unidentified persons on the offices of a newspaper and on persons associated with it. In its judgment, the ECHR affirmed for the first time the existence of a positive state obligation in the area of the protection of freedom of expression (Article 10). It added that "the scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and *the choices which must be*

made in terms of priorities and resources."[55] This may indicate a rising awareness in the ECHR of the resource implications of human rights implementation and of the diversity among the states parties with regard to the availability of resources.

Historical Background

History is an important factor determining a society's ethical and religious views and traditions. In that respect the impact of historical diversity among European states is already discounted in the diversity factors analyzed above. Yet beside that impact, historical circumstances may be responsible for other situations that may raise concerns under the European Convention. Both long-engrained practices and new political choices may sometimes be understood only in the light of a particular historical development.

ROOM FOR DIVERSITY

It was widely expected that the accession of the countries of Central and Eastern Europe to the convention would lead to increased use of the margin of appreciation doctrine in order to take account of these countries' difficulties of adjusting their laws and practice to the convention requirements, given their history of communism and authoritarianism. Yet so far the Court has been economical with its use of margin doctrine in this context. One clear case where it did use this argument is *Rekvényi v. Hungary*. Mr. Rekvényi was the secretary general of the Police Independent Trade Union. In that function he challenged the validity of a law prohibiting members of the armed forces, the police, and the security services from joining any political party and from engaging in political activities. The Court found that there was no violation of the European Convention, regard being had to the margin of appreciation left to the national authorities in this area, especially against the historical background of Hungary.[56] The Court considered that the protection of the police force from the direct influence of party politics is a legitimate concern, which "takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party."[57] It added: "In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate."[58]

Applying these principles to the particular Hungarian situation: "The Court observes that between 1949 and 1989 Hungary was ruled by one political party. Membership of that party was, in many social spheres, expected as a manifestation of the individual's commitment to the regime. This expectation was even more pronounced within the military and the police, where party membership on the part of the vast majority of serving staff guaranteed that the ruling party's political

will was directly implemented. This is precisely the vice that rules on the political neutrality of the police are designed to prevent."[59]

LIMITS TO DIVERSITY

An example of a case where an argument based on historical diversity did not convince the ECHR is *Buscarini v. San Marino*. The legislation of San Marino required members of parliament to take the oath on the Gospels. In a brief judgment, a unanimous Court held that this constituted a violation of Article 9 of the convention (freedom of religion). It disregarded the state's defense based on the margin of appreciation that it claimed it should have in order to do justice to its particular history. The government argued: "Regard being had to the special character of San Marino, deriving from its history, traditions and social fabric, the reaffirmation of traditional values represented by the taking of the oath was necessary in order to maintain public order. The history and traditions of San Marino were linked to Christianity, since the State had been founded by a saint; today, however, the oath's religious significance had been replaced by 'the need to preserve public order, in the form of social cohesion and the citizens' trust in their traditional institutions. "[60]

Security Situation

When governments worldwide are called to account for interferences with individual rights such as the right to privacy, the freedom of expression, the freedom of assembly and association, the right to a fair trial, and the prohibition of arbitrary detention, a frequently heard defense is the security argument. When they feel that the internal or external security of the state is threatened, governments like to have a broad margin to interpret human rights less strictly than in ordinary times. If the security threat is real—and not just constructed by an authoritarian government to strengthen its grip on society—it seems acceptable to broaden the authorities' margin of appreciation, it being understood that there always remains a measure of international control.

The ECHR takes the security situation into account in its appreciation of rights restrictions. The Court broadens the state's margin of discretion when it estimates that a legitimate security concern is at stake. Yet the fact that it nevertheless finds a violation of the convention in many of these cases (especially the Turkish cases) shows that it takes its supervising role seriously.

FREEDOM OF EXPRESSION

The Court accepted the conviction of a Greek officer for disclosing some technical knowledge he had acquired in his capacity of officer in charge of a project for the design and production of a guided missile to a private company. The Court judged that this information was "capable of causing considerable damage to national security" and that "the Greek military courts cannot be said to have overstepped the

limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security."[61]

The ECHR has dealt with numerous cases of people in Turkey convicted for expressing pro-Kurdish opinions, which are qualified as the crime of incitement to separatism. The Court generally refers to the margin of appreciation in these cases, affirming that where expressions "incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression."[62] This is an exception to the entrenched doctrine of the ECHR according to which states have very little room to restrict political speech, particularly when it criticizes the government. In some cases, the Court adds that it "acknowledges that in situations of conflict and tension particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions which advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence."[63] Despite this wide margin, the "Kurdish separatism" cases in which the Court concluded that there was no violation of the convention are exceptions.[64] In most of theses cases the Court decided after examination of the texts at issue that those did not incite to violence and that hence the government reaction had been disproportionate.

PRIVACY

The Court recognizes a wide margin of appreciation in the interest of security also with regard to restrictions of the protection of privacy. This was done implicitly in *Klass*, when the German authorities were granted a measure of discretion in fixing the conditions under which to operate a system of secret surveillance in the fight against terrorism:

> Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime. As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.[65]

Despite the absence of sufficient judicial control, the German wiretapping system passed the Court's (limited) scrutiny. The same reasoning was linked to the margin of appreciation doctrine in *Murray*, concerning the entry into and search of the home of a person suspected of being a terrorist in Northern Ireland.[66] In a recent case concerning a Turkish terrorism suspect detained in Germany, the same reasoning led the Court to accept control of the detainee's correspondence with his lawyers.[67]

Even outside the context of terrorism, the ECHR is rather tolerant vis-à-vis privacy restrictions justified by security concerns. A classic example is the *Leander* case, in which the Court decided that Article 8 had not been violated by the use of information from a secret police register to assess a person's suitability for employment in a post "of importance for national security." A wide margin of appreciation was granted in this case, despite the fact that the navy job concerned was one at a naval museum.[68]

EMERGENCY SITUATIONS

A very high security threat may sometimes be qualified as a "public emergency threatening the life of the nation." In that case, as in the case of a war, Article 15 of the European Convention allows states to derogate from many of their convention obligations "to the extent strictly required by the exigencies of the situation." The emergency has to be an official one: the secretary general of the Council of Europe must be kept fully informed of any derogating measures taken and of the reasons therefore (Article 15, para. 3).

The context of emergency situations is that where the margin of appreciation doctrine was first used, in the case law of the European Commission of Human Rights.[69] The Court followed the same line, granting a wide margin of appreciation in Article 15 cases. It justifies this with a "better placed" argument: "By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."[70] There have been only few Article 15 cases before the Court, yet commentators agree that this is an area where the margin of appreciation is probably at its widest.[71] Only once did the Court hold that a derogating measure was not strictly required by the exigencies of the situation. It concerned a measure of police detention for fourteen days without judicial intervention.[72]

The accommodation of "diversity with regard to security conditions" that justifies a wide margin of appreciation outside Article 15 need not necessarily entail a wide margin within Article 15, since the particular security problems of a state are already being accounted for when Article 15 is applied. As all emergency situations are different and as their assessment requires thorough knowledge of the local situation, a certain margin is definitely justified. Yet the Court's supervision of rights-restrictive measures should not be weaker than that in other security cases. It can be agreed with the critics of the use of the margin of appreciation in emergency

cases that "the Court must remain attuned to the danger of dilution and nullification of human rights in such circumstances and must ensure that 'emergency' and 'crisis' do not become expedient tools in the hands of governments to facilitate transgressions of individual rights."[73]

Political Ideology in the Socioeconomic Field

The types of diversity discussed above all share one characteristic, which is the fact that for the government of the country concerned, they are a "given," something that they have not chosen, even though they may try to change it (except, of course, the historical background). The ECHR is even more accommodating to some types of diversity that are the result of explicit policy choices by governments. The diversity that exists between the states of Europe is not only the result of political history, cultural tradition, and religion, but also of political ideologies. On issues such as economic freedom, redistribution, and environmental protection, different states within the continent follow different tracks. Politics are largely about common goods, and the realization of common goods often requires the subordination of individual interests. Hence the policy choices that are made in these fields often affect individual human rights.

THE RIGHT TO PROPERTY

The right that is most frequently affected is the right to property. The ideological connotation of this right is tellingly illustrated by its absence from the main United Nations human rights conventions.[74] The right to property is where the cold war collision between "capitalism" and "communism" became translated most clearly into human rights language. Today the opposition between free-market liberalism and social democracy can also be expressed in terms of interpretations and limitations of the right to property. At the conclusion of the European Convention on Human Rights (1950), no consensus was reached on the formulation of a right to property. This was postponed until the First Additional Protocol to the convention (1952). In Article 1 of that protocol, the right to property is framed as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This formulation was intended to leave room for state interventions in the right to property. States such as the United Kingdom and Sweden did not want the European Convention to sand in the way of political goals such as the nationalization

of industry. This explains, for instance, why the provision is silent on the issue of compensation for property deprivation.

Article 1 of the First Protocol contains three rules: on the peaceful enjoyment of property (first sentence of para. 1), on the deprivation of property (second sentence of para. 1), and on the control of the use of property (para. 2). In the evaluation of each of these, the Court takes into account the domestic margin of appreciation. When ideological policy choices are at stake, this margin is generally a wide one.

One area "which in our modern societies is a central concern of social and economic policies" is that of housing.[75] Housing being a basic need, social-democratic governments across Europe have taken measures to improve housing security. In the United Kingdom, the election of a Labour government in the 1960s led to leasehold reform. In England and Wales approximately 1,250,000 houses were held on "long leases." Under this system, tenants purchased a long lease of property for a capital sum and paid a small or even nominal rent for it thereafter. The Leasehold Reform Act of 1967 conferred on such tenants the right to become full owners of the property by purchasing compulsorily the "freehold" (the landlord's interest) on prescribed terms and subject to certain prescribed conditions. Landowners challenged this law in court up to the ECHR. The applicants in this case were the owners of a large estate comprising about 2,000 houses in one of the most desirable residential areas in London. Through the application of the Leasehold Reform Act they had been deprived of their ownership of 80 properties, and they expected hundreds of further enfranchisements on their estate, estimating their total loss at £1.5 million. Some of their ex-tenants, on the other hand, had made important profits. In at least twenty-five cases, they had sold the property within the year, making profits ranging between £32,000 and £182,000. The ECHR rejected the ex-owner's complaint under the expropriation rule of Article 1 of the First Protocol. It limited its own assessment of the case to a marginal supervision, considering: "The decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."[76]

The same reasoning was followed in an Austrian case concerning rent control legislation. The applicants were three families of house owners who as a result of the law had been confronted with important reductions of the proceeds from the letting of their houses. In two of the three cases, the rent was reduced to one-fifth of the contractually agreed amount. This case was examined under the second paragraph of Article 1, First Protocol. The Court referred to its justification of a wide margin of appreciation in *James* and concluded that the legislation remained within the bounds of that margin.[77]

A string of recent Italian cases shows that there are limits to the Court's acceptance of property right restrictions in the name of housing policy. In Italy the authorities have frequently intervened in residential tenancy legislation with the aim of controlling rents. This has been achieved not only by rent freezes and by the statutory extension of leases but also by the postponement, suspension, or staggering of the enforcement of orders for possession. In cases challenging the last category of measures, the Court adopted a nuanced position. It considered that the measures were in principle within the Italian state's margin of appreciation.[78] Yet in many cases the result in practice was an impossibility for the owners to recover possession of their house during many years, even after the expiration of the suspension period. In those cases, the Court judged that the owners had to bear a disproportionate burden and concluded that Article 1, First Protocol (para. 2) had been violated.[79]

One other policy field in which the European Court allows for a wide margin of appreciation to restrict property rights is that of town and country planning. The ECHR "finds it natural that, in an area as complex and difficult as that of the development of large cities, the Contracting States should enjoy a wide margin of appreciation in order to implement their town-planning policy."[80] Similarly wide margins are granted to states pursuing policies of environmental protection, fiscal policies, and many other social and economic policies.[81]

OTHER RIGHTS

Some of the same policy fields also lead to cases under Article 8 of the European Convention. Measures in the sphere of town and country planning may interfere with the right to private life and to a home—for instance, a gypsy's right to live in caravans on land that he or she owns. On that subject the ECHR remarked that "it is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases."[82] The wide margin of appreciation in such cases is moreover supported by a "better placed" argument.[83]

In the field of environmental protection, the Court examined a case in which aircraft noise from an airport was claimed to be a violation of the right to respect for the private life and the home. It found no violation, reasoning that "it is certainly not for . . . the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognized as enjoying a wide margin of appreciation."[84]

In freedom of expression cases the ECHR allows for a wider margin of appreciation in the economic sphere than with regard to political speech. This applies to restrictions on advertising as well as those based on unfair competition legislation.[85]

Under other convention articles, social and economic policies are rarely at stake, yet when they are a wide domestic margin of appreciation is likewise the result. For instance, in a case regarding freedom of association (Article 11), the Court said: "In

view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining . . . , the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed."[86]

Conclusion

One of the purposes for which the European Court of Human Rights uses its doctrine of the margin of appreciation is the accommodation of diversity among the states parties to the European Convention on Human Rights. By widening the domestic margin of discretion in a variety of situations, the Court takes into account different types of diversity found among European states. Yet the operation of the margin of appreciation doctrine does not always lead to a "no violation" verdict. In some cases the presence of a factor that usually widens the margin of appreciation is outweighed by the presence of another element restricting the margin. In other cases a violation of the convention is found despite the broad margin of appreciation. This margin is never so broad as to do away with the supervision of the European Court altogether. Even when this supervision is at its thinnest—a marginal control—the Court may find that state restrictions of individual rights go too far.

When will the operation of the margin of appreciation have the effect that a "diversity situation" justifies far-reaching restrictions of individual rights? And where does the Court draw the line between the tolerance of diversity and the enforcement of uniform human rights conceptions? The above analysis of case law allows for a partial and provisional answer to these questions.

With regard to restrictions of the freedom of expression, the Court explained its doctrine in *Wingrove* (see earlier): it restricts domestic discretion whenever debates of public interest are concerned, yet it grants a wide margin of appreciation when confronted with forms of expression that are liable to offend intimate personal convictions in the sphere of morals or religion. It is remarkable that in those situations the consensus argument carries no weight. If, after comparison with the other European states, the defendant state is shown to be in an isolated position that does not weaken its case, contrary to what happens in other types of cases.

The extra room for discretion with regard to the restriction of speech offending intimate personal convictions explains the difference between *Handyside* and *Müller* on the one hand and *Open Door and Dublin Well Woman* on the other. Although the restriction in the latter case is also based on the protection of morals, the expression concerned is not of a kind that offends intimate personal convictions. Despite that, the Court upholds the principle of a wide margin in the sphere of morals in that case as in others where it nevertheless finds a violation of the convention.

In the homosexuality cases, sexual activities rather than expressions are at stake. Here the morally controversial nature of these activities in some countries is outweighed by the fact that sexual activities are at the core of "private life" as protected

by the convention and by the broad consensus among the states parties to decriminalize this type of activities. That the "consensus" argument weighs more heavily than the "core" argument is illustrated (though implicitly) by the sadomasochism case (*Laskey, Jaggard, and Brown*), where *Dudgeon* was not followed despite the fact that it concerned sexual activities and thus the core of private life. Yet the European consensus to decriminalize homosexual behavior does not extend to sadomasochistic activities. When morally controversial behavior is concerned, the Court seems to use "consensus" argumentation as a means of weighing the controversy. When that is strong, such as on abortion, it will not enforce a uniform European rule. Yet when only a few states are found in an isolated position, as on consensual adult homosexual behavior, it will force them in line with the others. The same approach is found with regard to ethical conceptions outside the sphere of the protection of morals. The Court tolerates different approaches determined by cultural values, as on state intervention in families. Yet when confronted with an isolated position, as on judicial corporal punishment in *Tyrer*, it does not even consider resorting to the margin of appreciation. This approach must be linked to European conceptions about the appropriate role of the judiciary vis-à-vis Parliament. In many European countries, judicial activism is regarded with suspicion and the decision of controversial societal problems by judges rather than by elected representatives of the people is considered undesirable.

Cha'are Shalom ve Tsedek illustrates that the wide margin of appreciation in the religious sphere extends beyond free speech issues to the equally delicate area of the establishment of relations between the state and religions. *Manoussakis* shows that the Court's tolerance for diversity in this field ends and its scrutiny becomes very strict where it judges that state restrictions threaten religious pluralism, which is a core value to be protected under Article 9 of the convention.

On the basis of the few cases in which the Court has dealt with diversity arguments based on the historical background of a country, it seems that a distinction can be made between two types of situations. When the argument is based on recent political history, the effects of which characterize an entire society, it will be accommodated through a wide margin of appreciation (*Rekvényi*). Yet this will not be the case when it concerns a long-entrenched tradition of limited importance, with little relevance for contemporary society (*Buscarini*).

Diversity based on resource constraints has been rarely dealt with in the Court's case law. It may become more important in the future, as the poorer European states may experience difficulties in fulfilling all the positive obligations under the European Convention, or as these obligations are further developed. It will be interesting to see more case law in which the Court determines the acceptable variability in the scope of positive obligations as a result of choices made in terms of priorities and resources.

With regard to diversity in the field of security, the Court recognizes a wide margin of appreciation whenever there is a real threat. Its finding of a violation is gener-

ally determined by its appreciation of whether a security risk is present. Although it is clear that the Court today adopts a careful approach to this issue, there are some inconsistencies in its case law. In freedom of speech cases, it accepts that the communication of military secrets poses a threat to external security, without examining the nature of the particular information that was communicated (*Hadjianastassiou*). Yet before deciding whether certain "separatist" expressions constitute a threat to internal security in Turkey, it examines the texts concerned. Moreover, the Court easily accepts interferences with the right to privacy in the name of security. If this can be justified in a situation where a real threat of terrorism exists (*Klass*, *Murray*, *Erdem*), it is more contestable outside that context (*Leander*). Finally, although a margin of appreciation is justified in emergency situations under Article 15 of the convention, the Court seems to widen it too much in those cases. In general, the field of security is one where it would be useful for the Court to explicitly formulate its policy on the margin of appreciation. As the contestable cases are not the most recent ones, the Court should base its policy on the careful examination of the existence of a real threat, which it uses in its recent case law.

In the field of economic and social policy choices, the Court is similarly consistent in upholding the principle of a wide margin of appreciation. In its application of that principle, the Court shows a far-reaching tolerance of restrictions, in particular in the area of property rights. Yet, as in all fields, there are limits to this tolerance. These depend on the Court's appreciation of the facts of the case. In the field of housing, the Court seems more ready to accept restrictions that entail only financial losses, even if those are considerable, than restrictions of a different nature, such as the impossibility to recover possession of one's house.

Evaluation: Potential of the Margin of Appreciation Doctrine on the Universal Level

Legal Approach to Universality and Diversity

The tension between the universality of human rights rules and the diversity of contexts in which human beings live characterizes the entire human rights field. It is often expressed as a conflict, when Africans, Asians, or Muslims criticize the "Western bias" of international human rights and demand that their cultural values and their living circumstances be taken into account in formulating, interpreting, and applying human rights.[87] International human rights need to come to terms with this issue. The first step in this process is the admission that the needs, values, and experiences of nondominant groups (including non-Western societies, women, homosexuals, and many other groups) are underrepresented in current human rights standards. The second step is the understanding that this underinclusiveness can be cured without threatening to undermine what has already been acquired in terms of human rights. One approach to do this relies on the recognition of a margin of flexibility within international human rights standards. While universality requires that the same standards be upheld worldwide, it is possible to accommodate di-

versity in the way these standards are formalized in specific circumstances through interpretation, balancing, and enforcement. The above-discussed case law of the European Court of Human Rights shows how this can be done through the use of a domestic margin of appreciation.

This is a legal approach to the issue of universality and diversity. A legal approach has limitations because on the international level human rights enforcement is more political than legal. Yet at the same time its nonpolitical nature is its major trump. When the universality-diversity debate is framed in political terms, positions easily become radicalized and the slippery slope toward a clash of cultures is a real threat. A legal framework can be used as a more objective, neutral tool, an instrument to work toward solutions rather than a forum for taking positions.

Yet if the margin of appreciation is to be used as a neutral tool to reconcile universality and diversity on the universal level, its doctrine needs to be made more explicit. Although commentators are increasingly unraveling the way the margin of appreciation doctrine operates in the case law of the ECHR, the lack of explanation given by the Court itself continues to give an impression of arbitrariness. When the European Court uses margin of appreciation analysis, it should explain its reasons, the criteria widening or restricting the margin, and the weight of the margin of appreciation in the outcome of the case. If margin analysis is to be used on the universal level—for example, by supervising committees under UN human rights treaties—it should be similarly explained, not only when it is applied to a particular case but also in general, for example, in a General Comment.

Compared to the diversity that exists in the world—with regard to cultural and religious views, economic situation, security situation, political ideologies, and many other factors—Europe is relatively homogenous. Hence one of the most crucial challenges on the world level is the development of a coherent approach to the issue of the limits to the accommodation of diversity, which in the ECHR's case law is insufficiently addressed.

Criteria

What are the advantages and disadvantages of some of the criteria used by the ECHR when it applies a margin of appreciation?

The "better placed" argument justifies a wide margin of appreciation for the local authorities by the need to be familiar with local situations, sensitivities, and the like. This is acceptable when the outcome of a case is strongly determined by factual elements that the European Court, several years after the facts, has a difficulty in assessing correctly. Yet when the margin of appreciation is used to accommodate diversity, the local situations to be assessed are normally ethical values and views and culturally determined sensitivities. When these represent a general tendency within a society, reference to the government's assessment seems justified. Yet this becomes problematic when the issue concerned is a controversial one within the relevant society. Governments are not neutral. Their interpretation of local tendencies can

be colored by their own interests. This risk is more serious on the world level than in the European context, as more governments are found whose commitment to human rights can be doubted.

The "consensus" argument is not less ambiguous. If the comparative research underlying it is conducted thoroughly, it has the advantage of introducing an objective element in the generally very fluid margin analysis. Yet its application by the ECHR is generally rather superficial. Moreover, an approach based on a preexisting consensus of law and practice may retard the evolutive interpretation of the convention and lead to conservatism. On the world level, criticism of the consensus criterion is even more justified. The role of the comparative method in the ECHR case law can be explained by the fact that the European Convention on Human Rights is considered to be derived from the national systems of the European states. According to its preamble, it was created as an expression of the "common heritage of political traditions, ideals, freedom and the rule of law." All European states are supposed to be of good faith, pro–human rights. On the world level, where contextual differences are multiplied and gross human rights violations abound, there is no comparable common background of the states parties to a convention, and the assumption of good faith is in many cases not justified. The step from the empirical to the normative on which the comparative criterion relies is contestable where adherence to the goal of human rights protection cannot automatically be assumed. The comparison between the rules and practices of the states parties to a universal convention is not a useful criterion to determine the scope of the margin of appreciation. A minority position may in some situations be an indication of a human rights violation and in other situations it may point at relevant contextual factors legitimately influencing the interpretation or the implementation of a right. No conclusions should be drawn from the minority or majority position in itself.

More promising is the criterion based on the "*core*" *of a right*. The ECHR reduces the scope of the margin of appreciation when certain core aspects of a right are concerned (see *Dudgeon*). This is a useful approach. All rights can be conceived as having a core and a periphery. The further an element is removed from the core, the more room there is for diversity. Contextual diversity of interpretations cannot affect the core itself without undermining universality, yet in the periphery of a right it is perfectly acceptable. Diversity of interpretation is both unnecessary and undesirable when gross violations of human rights are concerned, which by definition touch upon the core of rights. For this criterion to work, the core of each right needs to be determined in an authoritative manner, so that it enjoys worldwide consensus and does not reflect any particular context. Again, general comments of the committees supervising UN treaties may be an appropriate instrument.[88]

Notes

1. Before November 1998 the procedure in Strasbourg consisted of two steps: a first one before the European Commission of Human Rights and for some cases a second one before the Court.

2. See, among the most recent doctrine: "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice," *Human Rights Law Journal* 19 (special issue, April 1998); Yutaka Arai, "The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights," *Netherlands Quarterly of Human Rights* 16 (1998), 41–61; Eyal Benvisti, "Margin of Appreciation, Consensus, and Universal Standards," *New York University Journal of International Law and Politics* 31 (1999), 843–54; Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000); Michael R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights," *International and Comparative Law Quarterly* 48 (July 1999), 638–50; Pierre Lambert, "Marge nationale d'appréciation et contrôle de proportionnalité," *L'interprétation de la Convention européenne des droits de l'homme,* ed. Frédéric Sudre (Brussels: Bruylant, 1998), 63–89; Nicholas Lavender, "The Problem of the Margin of Appreciation," *European Human Rights Law Review* (1997), 380–90; Lord Lester of Lerne Hill, "Universality versus Subsidiarity: A Reply," *European Human Rights Law Review* (1998), 73–81; Paul Mahoney, "Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments," *European Human Rights Law Review* (1997), 364–79; and Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer Law International, 1996).
3. The focus in this chapter is on the case law of the "new" Court (after 1 November 1998) in the light of the main cases of the "old" Court.
4. For example, ECHR, *Handyside v. the United Kingdom*, 12 December 1976, *Publications ECHR*, series A, vol. 24, 49.
5. *Handyside v. the United Kingdom*, 48.
6. *Handyside v. the United Kingdom*, 57.
7. *Handyside v. the United Kingdom*, 49.
8. *Handyside v. the United Kingdom*, 52.
9. ECHR, *Müller and others v. Switzerland*, 24 May 1988, *Publications ECHR*, series A, vol. 133, 36.
10. *Müller and others v. Switzerland*, 36.
11. *Müller and others v. Switzerland*, 9.
12. *Müller and others v. Switzerland*, 36.
13. *Müller and others v. Switzerland*, 35, 36.
14. ECHR, *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, *Publications ECHR*, series A, vol. 246-A, 63. Article 40.3.3ring of the Irish Constitution, guaranteeing respect for the right to life of the unborn, came into force in 1983 following a referendum.
15. *Open Door and Dublin Well Woman v. Ireland*, 68.
16. *Open Door and Dublin Well Woman v. Ireland*, 73–76.
17. *Eur. Com. H.R., R.H. v. Norway*, 19 May 1992, no. 17004/90, unreported.
18. *Eur. Com. H.R., R.H. v. Norway*.
19. ECHR, *Dudgeon v. the* UK, 22 October 1981, *Publications ECHR*, series A, vol. 45, 46.
20. *Dudgeon v. the UK*, 52.
21. *Dudgeon v. the UK*, 56–57.
22. *Dudgeon v. the UK*, 52.
23. Another example of core activities is political speech, which enjoys the highest degree of protection under Article 10 of the convention. The "core" criterion is sometimes expressed in the form of a prohibition to touch upon the "essence" or "substance" of a right. See Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff Publishers, 2001), 410–11.
24. *Dudgeon v. the UK*, 60.
25. ECHR, *Norris v. Ireland*, 26 October 1988, *Publications ECHR*, series A, vol. 142; ECHR, *Modinos v. Cyprus*, 22 April 1993, *Publications ECHR*, series A, vol. 259.

26. ECHR, *A.D.T. v. the UK*, 31 July 2000, not yet reported (see *www.echr.coe.int* [1 October 2002]), 37–38.
27. ECHR, *Laskey, Jaggard, and Brown v. the UK*, 20 January 1997, *Reports of Judgments and Decisions*, 1997-I, 51.
28. ECHR, *Lustig-Prean and Beckett v. the* UK, and *Smith and Grady v. the* UK, 27 September 1999, not yet reported (see *www.echr.coe.int*).
29. ECHR, *Otto-Preminger-Institute v. Austria*, 20 September 1994, *Publications ECHR*, series A, vol. 295-A, 22.
30. *Otto-Preminger-Institute v. Austria*, 56.
31. *Otto-Preminger-Institute v. Austria*, 48.
32. *Otto-Preminger-Institute v. Austria*, 50.
33. *Otto-Preminger-Institute v. Austria*, 50.
34. *Otto-Preminger-Institute v. Austria*, 56.
35. *Otto-Preminger-Institute v. Austria*, 56.
36. ECHR, *Wingrove v. the UK*, 25 November 1996, *Reports of Judgments and Decisions*, 1996-V, 64.
37. *Wingrove v. the UK*, 58.
38. *Wingrove v. the UK*, 58.
39. *Wingrove v. the UK*, 61.
40. ECHR, *Cha'are Shalom ve Tsedek v. France*, 27 June 2000, not yet reported (see *www.echr.coe.int*), 84.
41. *Cha'are Shalom ve Tsedek v. France*, 74, 80–81.
42. *Cha'are Shalom ve Tsedek v. France*, 84.
43. ECHR, *Manoussakis and others v. Greece*, 29 September 1996, *Reports of Judgments and Decisions*, 1996-IV, 48.
44. *Manoussakis and others v. Greece*, 44.
45. For example, ECHR, *Olsson (nr 2) v. Sweden*, 27 November 1992, *Publications ECHR*, series A, vol. 250, 90.
46. ECHR, *K. and T. v. Finland*, 27 April 2000, not yet reported (see *www.echr.coe.int*), 135; ECHR, *L. v. Finland*, 27 April 2000, not yet reported (see *www.echr.coe.int*), 118.
47. *K. and T. v. Finland*, 135, and *L. v. Finland*, 118. Again, it is to be noted that a wide margin does not preclude the finding of a violation of the European Convention. Whereas no violation of Article 8 was found in *L. v. Finland*, the Court concluded in *K. and T. v. Finland* that both the taking into public care and the refusal to terminate the care constituted violations of Article 8 of the convention.
48. *K. and T. v. Finland*, 135, and *L. v. Finland*, 118.
49. ECHR, *Tyrer v. the UK*, 25 April 1978, *Publications ECHR*, series A, vol. 26, 31.
50. *Tyrer v. the UK*, 30.
51. *Tyrer v. the UK*, 31.
52. *Tyrer v. the UK*, 31.
53. See text corresponding to note 46.
54. For example, ECHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28 May 1985, *Publications ECHR*, series A, vol. 94, 67.
55. ECHR, *Özgür Gündem v. Turkey*, 16 March 2000, not yet reported (see *www.echr.coe.int*), 43.
56. ECHR, *Rekvényi v. Hungary*, 20 May 1999, *Reports of Judgments and Decisions*, 1999-III, 48.
57. *Rekvényi v. Hungary*, 41.
58. *Rekvényi v. Hungary*, 46.
59. *Rekvényi v. Hungary*, 47.
60. ECHR, *Buscarini and others v. San Marino*, 18 February 1999, *Reports of Judgments and Decisions*, 1999-I, 36.
61. ECHR, *Hadjianastassiou v. Greece*, 16 December 1992, *Publications ECHR*, series A, vol. 252, 45, 47.
62. The most recent cases are: ECHR, cases against Turkey of 8 July 1999: *Ceylan*, 34; *Arslan*, 46;

Gerger, 48; *Polat*, 45; *Karatas*, 50; *Erdogdu and Ince*, 50; *Baskaya and Okçuoglu*, 62; Okçuoglu, 46; *Sürek and Özdemir*, 60; *Sürek 1*, 61; *Sürek 2*, 34; *Sürek 3*, 37; *Sürek 4*, 57; Reports ECHR, 1999-IV; ECHR, *Öztürk v. Turkey*, 28 September 1999, not yet reported (see *www.echr.coe.int*), 66. See ECHR, *Erdogdu v. Turkey*, 15 June 2000, not yet reported (see *www.echr.coe.int*), 53; ECHR, *Sener v. Turkey*, 18 July 2000, not yet reported (see *www.echr.coe.int*), 40.

63. *Erdogdu v. Turkey*, 62; see *Sürek and Özdemir v. Turkey*, 63.
64. ECHR, *Zana v. Turkey*, 25 November 1997, Reports ECHR, 1997-VII; *Sürek 1 v. Turkey*; and *Sürek 3 v. Turkey*.
65. ECHR, *Klass v. Germany*, 6 September 1978, *Publications ECHR*, series A, vol. 28, 48–49.
66. ECHR, *Murray v. United Kingdom*, 28 October 1994, *Publications ECHR*, series A, vol. 300-A, 90.
67. ECHR, *Erdem v. Germany*, 5 July 2001, not yet reported (see *www.echr.coe.int*), 69.
68. ECHR, *Leander v. Sweden*, 26 March 1987, *Publications ECHR*, series A, vol. 116, 59.
69. *Greek* case, 12 Yb. Eur. Conv. on Human Rights, 154: margin of appreciation is referred to as being "constant jurisprudence of the Commission," and in footnote 280, reference to *First Cyprus* case (p. 136: "discretion in appreciating the threat to the life of the nation"), and *Lawless* case (p. 90: "a certain discretion—a certain margin of appreciation—must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation").
70. ECHR, *Ireland v. United Kingdom*, 18 January 1978, *Publications ECHR*, series A, vol. 25, 207; ECHR, *Brannigan and McBride v. United Kingdom*, 25 May 1993, *Publications ECHR*, series A, vol. 258-B, 43.
71. See Michael O'Boyle, "The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?" *Human Rights Law Journal* 19 (April 1998), 25.
72. ECHR, *Aksoy v. Turkey*, 18 December 1996, Reports ECHR, 1996-VI.
73. Oren Gross and Fionnuala Ní Aoláin, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights," *Human Rights Quarterly* 23 (August 2001), 635.
74. The right to property is included in the Universal Declaration on Human Rights but not in the International Covenant on Civil and Political Rights nor in the International Covenant on Economic, Social, and Cultural Rights.
75. ECHR, *Mellacher and others v. Austria*, 19 December 1989, *Publications ECHR*, series A, vol. 169, 45.
76. ECHR, *James and others v. United Kingdom*, 22 January 1986, *Publications ECHR*, series A, vol. 98, 46.
77. ECHR, *Mellacher v. Austria*, 19 December 1989, *Publications ECHR*, series A, vol. 169, 45.
78. ECHR, *Spadea and Scalabrino v. Italy*, 28 September 1995, *Publications ECHR*, series A, vol. 315-B, 40.
79. ECHR, *Scollo v. Italy*, 28 September 1995, *Publications ECHR*, series A, vol. 315-C: 11 years; ECHR, *Immobiliare Saffi v. Italy*, 28 July 1999, not yet reported (see *www.echr.coe.int*): 13 years; ECHR, *A. O. v. Italy*, 30 May 2000, not yet reported (see *www.echr.coe.int*): 9 years; ECHR, *G. L. v. Italy*, 5 August 2000, not yet reported (see *www.echr.coe.int*): 9 years; ECHR, *Edoardo Palumbo v. Italy*, 30 November 2000, not yet reported (see *www.echr.coe.int*): 9 years; ECHR, *Lunari v. Italy*, 11 January 2001, not yet reported (see *www.echr.coe.int*): 6 years; ECHR, *P. M. v. Italy*, 11 January 2001, not yet reported (see *www.echr.coe.int*): 16 years; ECHR, *Tanganelli v. Italy*, 11 January 2001, not yet reported (see *www.echr.coe.int*): 12 years.
80. ECHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, *Publications ECHR*, series A, vol. 52, 69. Despite the wide margin of appreciation, a violation of Article 1, First Protocol was found in this case.
81. For environmental protection, see ECHR, *Fredin v. Sweden*, 18 February 1991, *Publications ECHR*, series A, vol. 192. Fiscal policy cases include ECHR, *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, *Publications ECHR*, series A, vol. 306-B, 60; ECHR, *National & Provincial Building Society, Leeds Permanent Building Society, and Yorkshire Building Society*

v. United Kingdom, 23 October 1997, Reports ECHR, 1997-VII, 80. Recent cases involving social and economic policies are ECHR, *Almeida Garret, Mascarenhas Falcao, and others v. Portugal*, 11 January 2000, not yet reported (see *www.echr.coe.int*), 52; ECHR, *The Former King of Greece v. Greece*, 23 November 2000, not yet reported (see *www.echr.coe.int*), 87; ECHR, *Malama v. Greece*, 1 March 2001, not yet reported (see *www.echr.coe.int*), 11.

82. ECHR, *Buckley v. United Kingdom*, 25 September 1996, Reports ECHR, 1996-IV, 75.
83. *Buckley v. United Kingdom*. ECHR, *Chapman v. United Kingdom*, 18 January 2001, not yet reported (see www.echr.coe.int), 92; ECHR, *Beard v. United Kingdom*, (see www.echr.coe.int), 103; ECHR, *Coster v. United Kingdom*, (see www.echr.coe.int), 106; ECHR, *Lee v. United Kingdom*, (see www.echr.coe.int), 94; ECHR, *Jane Smith v. United Kingdom*, (see www.echr.coe.int), 99.
84. ECHR, *Powell and Rayner v. United Kingdom*, 21 February 1990, *Publications ECHR*, series A, vol. 172, 44.
85. Advertising cases are ECHR, *Casado Coca v. Spain*, 24 February 1994, *Publications ECHR*, series A, vol. 285, 50; and ECHR, *Verein Gegen Tierfabriken v. Switzerland*, 28 June 2001, not yet reported (see *www.echr.coe.int*), 69. Cases involving claims of unfair competition are ECHR, *Markt Intern Verlag and Klaus Beerman v. Germany*, 20 November 1989, *Publications ECHR*, series A, vol. 165, 33; ECHR, *Jacubowski v. Germany*, 23 June 1994, *Publications ECHR*, series A, vol. 291-A, 6; ECHR, *Hertel v. Switzerland*, 25 August 1998, Reports ECHR, 1998-VI, 47.
86. ECHR, *Gustafsson v. Sweden*, 25 April 1996, Reports ECHR, 1996-II, 45.
87. Brems, *Human Rights*.
88. The Committee on Economic Social and Cultural Rights already promotes the "core" concept in its General Comment number 3.

4 Between Delight and Despair

THE EFFECTS OF TRANSNATIONAL WOMEN'S NETWORKS IN THE BALKANS

Patrice C. McMahon

The recent wars in the Balkans have, not surprisingly, made human rights a central concern for international actors involved in this region.[1] Given that the conflicts specifically targeted civilians and included mass rapes, Western governments, international organizations, and international nongovernmental organizations (NGOs) have paid special attention to the female population and women's rights.[2] The work of these actors has furthered and reinforced the objectives of the global women's movement or, in the jargon of political scientists, "transnational women's advocacy networks."[3] Transnational networks are international and national actors that target countries in an effort to bring new ideas, norms, and discourse into policy debates to promote change.[4] In formerly communist countries, transnational networks provide crucial material and ideational resources for domestic groups seeking to change government policy and social attitudes. Three ways women's networks have influenced the Balkans include strengthening international norms, providing humanitarian assistance, and promoting civil society development.[5] Helping the female population with the problems associated with war and transition and advancing women's rights have thus been intricately linked to the international community's mission in the Balkans.

Using insights gained from fieldwork in Bosnia in 2000 and 2001, from secondary sources, and from previous research, I argue that while the confluence of forces focused on gender has undeniably helped Balkan women, these efforts have fallen short of intended goals. This is due primarily, though not exclusively, to two factors. First, myths and misperceptions about the Balkans and communism continue to cloud the international community's activities, particularly when it comes to gender issues. Second, despite the significant investments made in civil society in the postcommunist world, too little time is spent on creating context-specific strategies.

Given the centrality of transnational advocacy networks to this chapter, the first part summarizes this concept and provides two ways to assess the effects of transnational advocacy networks. The second part explains the origins of the international community's interest in women's rights, discussing the challenges facing Balkan women in the last decade. Literature on transnational advocacy networks assumes the existence of international institutions that regulate human rights norms. The

third part identifies the specific international and transnational "norm promoting agents" and the mechanisms used by these actors to promote women's rights in the region. The rest of the chapter is devoted to a discussion of effects and impact. Using guidelines identified by Margaret Keck and Kathryn Sikkink and the spiral model developed by Thomas Risse and Sikkink, I discuss in the fourth part of the chapter how networks have shaped Balkan politics and positively affected the female position. Yet, the reality of international involvement is complex and multifaceted. The fifth part demonstrates how Western biases, ill-conceived strategies, and unintended consequences have together limited network effectiveness.

This chapter makes empirical and theoretical contributions to existing literature. It not only applies the idea of transnational advocacy networks to the case of women's rights in the Balkans but it also addresses a shortcoming of how transnational networks are currently evaluated. In brief, too little is known about why and when networks fail to produce desired outcomes. Moreover, the concept ignores the unintended consequences of network politics. Risse and Sikkink argue that "the success of transnational advocacy networks depends on the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes.[6] This essay concurs with such a hypothesis and proceeds to explain some of the problems associated with sustaining domestic-international networks. It specifically looks at how international actors promote change. It argues that Western biases and faulty assumptions, as well as unintended consequences, may paradoxically hinder domestic changes and undermine the development of indigenous social movements.

Transnational Advocacy Networks

The term *transnational advocacy network* was coined and defined by Keck and Sikkink in 1998; it "includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services."[7] This concept has attracted a good deal of attention among political scientists, in part because it has helped bridge the artificial divide between the subfields of international relations and comparative politics. Moreover, students of both subfields have found the concept useful for understanding how domestic and international forces work together and affect change.[8] It also allows the traditionally state-centered discipline to incorporate the powerful role of NGOs, as most of the existing literature on nonstate actors comes from development studies and not political science. Recently, scholars seeking to understand the effects of international NGOs have used this concept, arguing that Western efforts to promote democracy in postcommunist countries are part of a transnational activist network.[9] This section briefly develops this concept as well as ways for measuring the effects of these international-domestic actors.

Depending on the issue area, the relevant actors in transnational advocacy networks are a mixture of governmental, intergovernmental, or nongovernmen-

tal groups. Since human rights norms are well institutionalized in international regimes and organizations, it is not surprising that women's advocacy networks are composed of influential Western states, the largest intergovernmental actors, and numerous international NGOs. The United States and Western European states represent the influential national governments while the human rights bodies of the United Nations and the various human rights treaties that have been ratified under UN auspices are the most important of the intergovernmental norm-promoting agents. The efforts of these actors are supplemented and reinforced by regional organizations, such as the Council of Europe and the European Union. The "glue" holding transnational advocacy networks together are the officials working for these international bodies and for national governments who are loosely affiliated with representatives of private foundations, international NGOs, and domestic NGOs because they share similar beliefs and goals. In total, transnational networks include the activities of groups in international society and domestic society as well as the interactions between them.

At a minimum, transnational advocacy networks perform at least three roles in targeted states. They put certain states and issues on the international radar screen, they empower and legitimate the claims of domestic groups opposed to government policies or pushing for change, and they challenge governments, pressuring them "from above" and "from below." Put another way, transnational networks encourage states to adopt, internalize, and implement international norms by bringing new ideas, norms, and actors into policy debates. This explains why and how certain norms are adopted in different geographical regions. While numerous types of transnational networks exist, human rights networks are the strongest and most institutionalized. "Between 1973–1985 transnational human rights NGOs and advocacy networks expanded and states and networks built the international social structure of human rights norms and institutions."[10]

After focusing on development as a way to empower women around the world in the 1970s, the global women's movement shifted gears, targeting the international legal system, specifically laws governing access to social and economic resources. With every conference and meeting, women's groups from around the globe were realizing that they had a great deal in common and, despite their origins or culture, women faced surprisingly similar types of repression. The adoption of what is referred to as the "human rights methodology" during this period not only facilitated the redefinition of women's rights as human rights, but it also provided a clearer framework for grassroots organizations to hold their governments accountable. Local women's groups tried to take advantage of the international community's ability to set normative standards for gender equity, believing that international law would prove essential to the advancement of women's rights in different countries. Throughout the 1980s and 1990s states agreed, at least in principle, to take steps to prevent discrimination and offer redress for abuse "whether it occurs in public, in private, in wartime or in peacetime."[11] By the 1990s several events culminated in a

transnational campaign to push traditional women's issues onto the international human rights agenda and to persuade states to implement policies that would reverse gender discrimination in all forms.

Evaluating the effects of transnational advocacy networks is not an easy task. Impact can be conceived of in terms of tactics or stages of effectiveness. Networks engage in several tactics, such as gathering and providing information (information politics). They identify symbols or create catalysts to attract global attention (symbolic politics), target powerful international organizations to change policies (leverage politics), and convince governments to change their position (accountability politics). In carrying out these tactics, advocacy networks seek discursive and procedural changes but, most importantly, changes in policies—first in powerful international organizations and then within specific, targeted states. Since these transnational networks do not possess the same resources as states, they must "use the power of their information, ideas, and strategies to alter the information and value contexts within which states make policies."[12] These tactics may occur simultaneously or in a different order.

To illustrate the impact of advocacy networks on a particular state, Risse and Sikkink developed the "spiral model," which contains five phases and includes the activities of a targeted state, domestic society, and international/transnational actors. In general, events in the Balkans fit well with the model. The phases start with repression and denial and move to tactical concessions and prescriptive status (in this stage, state leaders refer to human rights norms to describe their behavior). Finally, in stage five, a state adopts rule-consistent behavior, indicating that the internalization of a human rights norm has taken place. After explaining why Balkan states were targeted by transnational women's networks, the rest of the chapter applies this concept and evaluates the impact of women's networks on Balkan societies.

The Origins of International Involvement

The international community's involvement in women's rights in the Balkans is the result of two different, albeit related, phenomena: the wars that took place starting in 1991 and the entire region's transition to democracy and a market economy. This section explains how these events, which started in the late 1980s, adversely impacted the female population, threatened women's rights, and thus sparked international concern for women in this region.

The Balkan wars started when the northern republic of Slovenia voted to secede from the Yugoslav federation. The conflict was short, but it intensified ethnic nationalism in the other republics, triggering violence in Croatia, Bosnia, Kosovo and, most recently, Macedonia. Of all the conflicts to date, the war in Bosnia-Herzegovina was the longest and resulted in the most blood shed. Of the 300,000 people who died between 1991 and 1995 in the former Yugoslavia, some 250,000 lost their lives in Bosnia. These conflicts, but particularly the war in Bosnia, galvanized world

attention to gender-based violence and drew attention to the unique problems encountered by women in conflict.

Human rights abuses had been committed elsewhere in the region, but Bosnia represented a profound shift in policy as well as results. The conflict explicitly targeted civilians, but in some respects human rights violations were gendered. During the conflict men and women were often separated; men were killed while women were raped and sexually abused. "Two interrelated atrocities that became the hallmarks of the conflicts in the Balkans were ethnic cleansing and the systematic rape of women."[13] A UN commission of experts that investigated the rapes in the former Yugoslavia concluded that rape was used as an instrument of ethnic cleansing, as a way to spread fear and induce flight.[14] Between 20,000 to 50,000 Bosnics,[15] Croat, and Serb women were raped in the Balkans between 1991 and 1993.[16] A recent Human Rights Watch report confirms that while not on the same scale, police, soldiers, and paramilitaries also used sexual violence against women as a weapon of war in Kosovo.[17]

While men and boys stay in conflict zones to fight—and die—women and children seek safety elsewhere. It is thus not surprising that the face of refugees in the Balkans, like elsewhere in the world, is more likely to be female. Reliable gender disaggregated data is not available, but some estimate that 80 percent of the refugees and internally displaced persons (IDPs) from the Balkan conflicts are women.[18] The United National High Commissioner for Refugees (UNHCR) concedes that at least the majority of refugees and IDPs from and in Bosnia are women.[19] Ethnic cleansing and atrocities in Kosovo forced at least 750,000 refugees to flee to neighboring countries and another 600,000 to 700,000 are internally displaced.[20] An estimated 80 percent of those uprooted are believed to be women and girls.[21]

Displacement is not easy for anyone, but it increases women's vulnerability to domestic violence, sexual abuse, and other forms of discrimination. In times of war women often suffer abuses and consequences different from those experienced by men. For example, there is evidence to suggest that female refugees and IDPs are less likely to receive education. In Bosnia a study of displaced persons found that girls are less likely to have finished primary school and much less likely to enroll in secondary schools.[22] Difficult financial times and the breakdown of public education means that families must pick and choose whom will become educated. Women are often disproportionately affected by violent conflict, and these conditions create new burdens for women as their traditional responsibilities are expanded. Even though the media, activists, and Western scholars have done a better job in exposing the problems women in conflict face, research indicates that in postconflict situations the needs and interests of women are often ignored.

The international community's interest in women's rights in the Balkans must also be seen in the larger context of the collapse of communism throughout the former Soviet bloc. Thus even before violence broke out in Yugoslavia, women's rights were threatened by political and economic change.[23] By the mid-1980s one

of the few commonalties among the different republics was a certain ideological shift in the official attitude toward the so-called "woman question" or the state's commitment to gender equality.[24] The promotion of greater equality between the sexes was an explicit part of the Communist Party of Yugoslavia's platform.[25] As in other socialist countries, liberal polices regarding divorce and abortion were adopted, and generous social welfare provisions were made available for women. Gender equality was not achieved anywhere in the socialist bloc, but certain gains in the status of women were undeniable.

As communism started to disintegrate, all the governments in Central and Eastern Europe openly declared that gender equality was of no interest or concern to them.[26] Throughout Yugoslavia republic leaders focused on trends in birth rates to foster nationalism and criticize the state's commitment to women's rights. In Serbia and Slovenia the high birth rates of Albanians prompted leaders in both republics to decry the "dying out of their nations."[27] In 1990, Serbia's Socialist Party created a law that provided rewards to Serbian families with more than two children while it cut social benefits to Albanian families with more than three children.[28] In Croatia and Bosnia similar developments occurred, with politicians calling for changes in abortion laws and for women to return to the home and their traditional responsibilities. Even in the absence of such demographic trends, "the traditionalization movement" or the return to traditional values, family, and region was evident in other Balkan countries, such as Romania and Bulgaria, and most postcommunist countries.[29] Yet in the Balkans discussions over national identity led to essentialist definitions of men and women as nationalist movements in Yugoslavia yearned for the mythic past of ethnic or religious homogeneity, and this inherently meant more control over the female population and an attack on gender equality.[30]

By the early 1990s, Balkan women were literally under siege by the consequences of war and the effects of political, economic, and social change, though reliable statistics are scant. While important differences among women in postcommunist countries exist, there are many similarities in the challenges they face. Whether from the Balkans, Central Europe, or the former Soviet Union, the forces of transition have had a disproportionate effect on women and negatively affected their status in society. According to the UN report, widening gender inequality has been one of the human costs of economic transition in the former Soviet bloc.[31] In all formerly communist countries, women are discriminated against in the workplace, their reproductive rights are threatened, and domestic violence is widespread. "In times of economic transition, when state-run businesses privatize and a market economy is ushered in, women and girls often pay the price, especially when services such as day care and health care are cut back."[32] Women's presence in public life also declined in the years immediately following the collapse of communism, as the number of women in national and local politics has decreased throughout the region.[33] Economic difficulties and more porous borders have led to a significant rise in the trafficking of women and forced prostitution.

This period of political and economic transition corresponds well to stages one and two of Risse and Sikkink's spiral model. During this period Balkan governments, like those throughout the former Soviet bloc, increasingly repressed women. Whether out of neglect or because leaders genuinely believed that feminist ideas were intrinsically foreign and undercut tradition, postcommunist leaders throughout the Balkans stated firmly and resolutely their lack of interest in women's rights or the need to reverse communism's influence on the position of women in society.

Promoting Women and Women's Rights

By the late 1980s women's and human rights organizations in the United States and Western Europe had successfully drawn attention to the challenges women faced in postcommunist countries. Given international involvement in the region and the problems facing the female population in these countries, it is not surprising that women's networks began to target these states in an effort to reverse negative trends, promote women's rights, and ultimately foster indigenous social movements. Working with local women's groups, transnational networks were able to mobilize influential states and international organizations to support their cause, ensuring that international assistance programs initiated at the decade's end considered women's needs and incorporated gender initiatives.[34] For example, in their assistance to transitional countries "U.S. democracy promoters often highlighted nongovernmental organizations involved in public interest advocacy, such as human rights or women's issues."[35] Throughout the region discussions about democracy and civil society development noticeably included the need for gender equity, the promotion of women's rights, and the importance of female participation in the democratization process. Members of women's networks used their resources and leverage power to exploit the transformative potential of events in the Balkans to advance women's rights. The following section discusses three tactics used in an attempt to help Balkan women and change government policies.

Strengthening International Norms and Laws

International human rights law, humanitarian law, and refugee law all acknowledge the problems of discrimination based on sex, but the Women's Convention adopted by the United Nations in 1979 is considered the main instrument addressing the human rights of women. Often referred to as the "International Bill of Rights" for women, the Convention requires that states "commit themselves to undertake a series of measures to end discrimination against women in all forms."[36] The Convention not only prohibits discrimination against women, but it forbids any practices, even those that occur in the private realm, that perpetuate women's inequality. "Perhaps more importantly, particularly in the latter period of global democratization trends (which includes Balkan countries), the Convention was to serve as the basis of constitutional development for all signatories."[37] By the mid-1980s, after world conferences in Mexico and Nairobi and with the help of legal

literacy campaigns, women's groups around the world were documenting abuses, holding their governments accountable, and relying on global pressure to heighten domestic awareness and push for national changes.

The 1990s exploited the momentum of the previous decade with two major international conferences that focused on women's rights. Events in Bosnia gave greater meaning and urgency to the violence against women campaign that had earlier gained attention only in the West. Explicitly targeted by women's networks, participants of the 1993 World Conference on Human Rights in Vienna successfully put violence against women on the global agenda. Vienna proved to be a platform and a symbol of the growing transnational women's movement, legitimizing the claim that women's rights are human rights.[38] As a result of this conference and the success of the women's networks, the UN, the OSCE, the EU, and other institutions adopted successive resolutions condemning war crimes, giving special attention to sexual violence and abuse of women and girls.[39] The 1995 Beijing Conference on Women, following on the heels of conferences in Cairo and Copenhagen, proved to be unprecedented in terms of scope, depth, and perhaps consequences. The thirty-five thousand attendees, representing 189 countries, made Beijing the largest international conference ever held. At the minimum the conference established shared priorities for the global women's movement, led to gender mainstreaming within international organizations and national governments, expanded the base of the movement, and created mechanisms for monitoring the commitments made by national governments.

European bodies have taken an even stronger position on gender equality, proving to be leading actors in women's advocacy networks. Given the Balkan states' present, as well as desired, relationship with Western European countries, the standards established by the Council of Europe are used by network activists engaged in leverage politics to get Balkan states to adopt and implement European laws. The Council is the oldest European intergovernmental organization; one of its main aims, as noted in Article 1 of the statute, is "maintenance and further realization of human rights and fundamental freedoms."[40] Since 1979 it has promoted European cooperation to achieve equality between men and women. The Council "carries out analyses, studies and evaluations, defines strategies and political measures, and, where necessary, frames the appropriate legal instruments."[41] In the Balkans the Council has undertaken many activities to help these countries meet West European standards, including sponsoring conferences, conducting training seminars, and establishing education programs.[42] Eager to join "the West" and particularly the European Union, Balkan countries have sought and become members of the Council, which is seen as a first step to EU membership. Albania, Bulgaria, Croatia, Macedonia, Romania, and Slovenia all became Council members in the mid-1990s, Bosnia became a member in 2002, and the Federal Republic of Yugoslavia has only special guest status as of October 2002. Membership in the Council and agreeing to its principles suggests merely that Balkan states are already starting to "talk the talk"

in terms of women's rights. In the Risse and Sikkink spiral model, Balkan states have entered stage three.

Civil Society Development

A second way transnational networks have targeted Balkan states is associated with democracy promotion efforts, in particular support for civil society development. With the collapse of communism and the revolutions of 1989, "civil society suddenly gained cachet in Eastern Europe as the key to democratization."[43] Despite different assumptions by Europeans and North Americans about the functions of civil society, they seemed to agree upon the need for emerging democracies to foster the development of grassroots NGOs. Documenting the declining status of women, activists in the region and abroad claimed that gender discrimination was symptomatic of the political ills that plagued the entire region and testimony to the weakness of civil society. Nationalism, democracy, civil society, and women's rights were thus all intimately related. The conclusion made, in the words of an OSCE representative, was that if these countries have any chance at becoming democracies, "they have to embrace at least half of the population."[44]

Kevin Quigley notes that "despite the high-flown rhetoric, the merest fraction of Western aid went to civil society."[45] Yet when international assistance did go to civil society, this translated strictly into support for the creation of local NGOs. Throughout the region two types of local NGOs have been supported, policy-oriented and service-delivery. While the former seeks to affect government policy through advocacy, service-delivery NGOs provide citizens with essential social services. In general, women's groups in the Balkans often did both and received financial and in-kind assistance from donors based in both Europe and the United States.[46] Most assistance to women's NGOs was financial support for institutional development, but it also included money for specific activities. Since Balkan women often lacked managerial skills or technical expertise, international groups also provided training and technical assistance, arranging workshops, overseas fellowships, or conferences for activists. At least initially international supporters funded consultants to visit the region to provide technical assistance, conduct research, or help establish a local presence. Given the inefficiency and backlash against this approach, assistance shifted to creating self-sustaining NGOs and investing in local people. Establishing national networks, promoting regional projects, and providing capacity-building training are thus the latest phase of civil society support.

Influential members of women's networks, such as the UN, the OSCE, and the European Union, have created their own gender departments throughout the region as a way of supporting grassroots women's groups. Among its numerous gender initiatives, the United Nations, with financial support from the governments of the United States, Denmark, and Japan, established the Bosnian Women's Initiative (BWI) and the Kosovar Women's Initiative (KWI). These umbrella agencies address the special needs of women, female refugees, and victims of rape and other gender-

based violence. Depending on the country these agencies support a variety of gender initiatives, including grants to local groups, psychosocial counseling, reemployment programs and training, and income-generation activities.[47]

The OSCE was the first regional organization to become directly involved in promoting women's rights in the Balkans. The Copenhagen Document, established in 1990, outlines the fifty-five-member organization's commitment to the protection and promotion of human rights. It has since established gender projects in Albania, Bosnia, and Macedonia as well as in numerous other postcommunist countries, fostering democracy through support for local women's NGOs. In addition to politically binding resolutions and support for local NGOs, the OSCE has established offices throughout the region to monitor human abuses and discrimination and advance women's rights. In 1998 the OSCE's Office for Democratic Institutions and Human Rights created a gender unit to implement specific gender projects and to ensure gender mainstreaming in other units.[48] Such projects include grants to local women's groups, leadership training for women, education programs on the human rights of women, free legal advice to women, and assistance to develop national laws to address discrimination.

Some claim that of all the foreign institutions involved in promoting democracy and human rights, the European Union has the most influence on formerly communist countries.[49] The EU attaches great importance to the advancement of women's rights. In fact, the European Commission has provided financial support to enhance the status of women and to protect women from discrimination throughout the world. Since 1996 the EU has developed a European-wide policy to fight trafficking in women, and women's human rights have been identified as the major priority for the EU in the twenty-first century. In the Balkans the EU exerts its influence directly through financial programs and assistance and indirectly by holding the keys for future membership in the most sought after institution in Europe. Starting with the Phare program, which was initiated in 1989 to support reform in Central Europe, the European Union provided approximately $6.5 million to Balkan countries from 1991 to 1999.[50] As part of its democracy assistance to the region, the EU has supported capacity building for women's NGOs and provided rape trauma counseling and therapy for female victims of war. It also provides training for lawyers, NGO representatives, and local government officials in the prevention of trafficking in women.

Private foundations, mostly from the United States and Western Europe, are key players in women's networks around the world but particularly in the Balkans and Central and Eastern Europe. Without a doubt, the most important private foundation involved in the democratic transition of the entire postcommunist region is the network of Soros foundations, established by Hungarian émigré financier George Soros.[51] In the past decade the Soros foundations have spent more than $1 billion trying to help transform the former Soviet bloc into capitalist democracies, or what are referred to in the Soros community as "open societies."[52] Three countries in

the region, Hungary, Yugoslavia, and Belarus, received more money from Soros than from the U.S. government.[53] The Soros network promotes women's rights in three separate ways: through national foundations, the Open Society Institute in Budapest, and the Open Society Institute in New York. National foundations and OSI–Budapest both provide financial support to women's NGOs and work together to foster regional women's networks. In 1997 OSI–New York initiated a women's program to encourage gender-inclusive projects within Soros national foundations as well as other foundations working in this region. The decentralized nature of this network means that gender initiatives differ from country to country, yet strengthening women's position in society and the economy run throughout their programs.

International NGOs, like the U.S.–based Delphi International, have also linked the region's democratic development to greater gender equality. After a meeting of women from the former Yugoslavia and the United States, Delphi established the STAR Project with major funding from the U.S. Agency for International Development. Believing that women in the former Yugoslavia provided new leadership in grassroots initiatives for peace, human rights, refugee assistance, democracy, and sustainable development, the STAR Project supports a network of independent women throughout the region. Creating partnerships with women's organizations in Croatia, Bosnia-Herzegovina, and Macedonia, the STAR Project provides technical assistance and training in four areas: conflict resolution, management, microenterprise development, and women's health.

Providing Humanitarian Assistance

Transnational women's advocacy networks have also targeted Balkan countries, specifically Bosnia and Kosovo, through the provision of humanitarian assistance. Initially humanitarian assistance was limited to emergency relief, such as providing food and water and protection. Later some organizations singled out the female population and explicitly responded to their needs. What this means is that organizations that once focused narrowly on humanitarian issues are now working side by side with other international groups on civil society projects to promote democracy but also gender equality. The United Nations, for example, is committed to gender equality in all its policies and programs. Defined in a 1997 report, gender mainstreaming is "the process of assessing the implications for women and men of any planned action, including legislation, politics or programs, in all areas and at all levels. . . . The ultimate goal is to achieve gender equality."[54] In Bosnia and Kosovo the United Nations and other humanitarian organizations have done a good deal to help women deal with the effects of war, and in Bosnia they have also encouraged the development of local women's groups.

These countries are good examples of the recent trend among both nongovernmental aid organizations and national governments, as they shift from the provision of humanitarian relief to broader concerns associated with reconstruction and development. USAID, for example, notes that in postconflict areas its assistance for

relief and reconstruction currently channels a tremendous amount of money to women's organizations to provide services to needy populations and to build up civil society as a counterweight to the state.[55] In Bosnia since most of the beneficiaries of assistance as well as service providers were women, aid organizations realized that women's needs were not being met adequately. In 1993 some organizations started to reassess their efforts and focused on the needs of Balkan women. Scores of psychosocial programs were supported to provide counseling for women and support to widows and unemployed women. With promoting and assistance from humanitarian organizations, many of the mental health projects that were created evolved into Bosnian women's NGOs. For example, Bospo and Bosfam were spin-off organizations from the Danish Refugee Council and Oxfam respectively.

In Kosovo the situation was a bit different, though humanitarian assistance also promoted women's interests and the advancement of their rights. Although attention was paid to the needs of women, relatively little assistance, according to Julie Mertus, has gone to local women's organizations.[56] This is somewhat surprising because, unlike in Bosnia, women's groups had existed in Kosovo for a quite a while and often had several years of experience. Nonetheless, even though many humanitarian organizations expressed a desire to work with local women's groups, they have instead established their own mechanisms and gender units for providing humanitarian relief that targets the female population.

The Good News

According to the International Helsinki Federation for Human Rights, international organizations, national governments, and nongovernmental organizations have been of great assistance in formerly socialist countries in promoting women's rights.[57] Put another way, as do Keck and Sikkink in their discussion of transnational advocacy networks, recent campaigns by women's networks have been principled and strategic.[58] Given the tactics and mechanisms explained in the previous section, it is evident that women's networks had penetrated international and regional organizations working in the Balkans, prompting discursive, procedural, and policy changes associated with women's issues. Even within Balkan states there is evidence that these networks have helped the female population and shaped postcommunist politics, producing just the type of outcomes predicted in stage three and possibly four of the Risse and Sikkink spiral model. As predicted, Balkan states are adopting international standards, and transnational influences are leading to the creation of domestic groups that seek to improve the position of women. Some Balkan states are also witnessing the institutionalization of international standards as well as changes in domestic discourse about women's rights. This section considers the positive changes wrought by transnational women's networks in the Balkans.

By the time conflict broke out in the Balkans, women's transnational networks had already successfully exposed the problem of violence against women. By documenting abuse and raising consciousness about its cause, activists in the United

States and Western Europe had made violence against women a priority issue by the mid-1970s. Yet these were dispersed groups working alone to raise awareness and promote change. The global attention given to rape in the Bosnian war, magnified by the media and catapulted into homes throughout the world, provided a political space upon which debates and activism around rape and all forms of violence again women could coalesce.[59] That is, the 1993 Vienna Conference on Human Rights proved to be the symbolic turning point necessary in the violence against women campaign and in attempts to reframe women's rights as human rights. Preparations leading up to the conference and the conference itself led directly to discursive changes by influential members of the international community. By this time the UN General Assembly had adopted a declaration on violence against women and the U.S. State Department had added the category of violence against women to its annual human rights reports.[60]

At the international level transnational networks influenced procedures and policies. International and regional organizations as well as Western governments incorporated gender initiatives into democratic assistance projects, including support for women's NGOs and the creation of international institutions that defended women's human rights and offered redress for victims of sexual abuse. The targeting of influential international and regional bodies resulted in the creation of a special rapporteur on violence again women and its causes. The Tribunal for Women's Human Rights was also established. For Balkan women perhaps the most important international accomplishment was the prominence given to rape when the International Criminal Tribunal for the former Yugoslavia (ICTY) was set up. From the beginning one of the main purposes of the ICTY was to prosecute rape as a crime against humanity and impose on states the duty to search for the alleged perpetrators. While a direct link to transnational women's networks has not been found, the court's decision to focus on gender-based violence was seen as a victory for women's groups seeking to raise international awareness to the problems of women in war.

In June 1996 the ICTY issued indictments against eight Bosnian Serb soldiers for the enslavement and rape of Muslim women in the town of Foca (southeastern Bosnia and Herzegovina) in 1992–93. Of the eight indicted, however, only one turned himself in to the tribunal. It was not until July 2000, however, that the ICTY upheld a ruling that established rape was a war crime. In this case the ICTY rejected the appeal of a Bosnian Croat officer, convicted in 1998 of allowing a subordinate to torture and rape a female prisoner. The conviction of this Bosnian officer set international legal precedent, admitting the testimony of the victim and extending the meaning of sexual assault to be punishable as an act of torture. Thus in strong contrast to other international courts and despite the failure to arrest war criminals, the ICTY has maintained credibility among women reporting conflict-related violations.

As Balkan states become institutionalized into the web of international and Western European institutions, women are increasingly looking outside their states

to external bodies to exert pressures on their states to prevent and address problems of discrimination based on sex. The complex web of institutions that exists in Europe today not only challenges states' power from above, but it also shapes individuals' identities from below, thus influencing how Balkan women respond to situations. As Thomas Risse-Kappen explains, "de-centralized structures of multilevel governance emerge in which actors are no longer motivated by their particular national loyalties and identities but by collective principled and causal beliefs as well as by the goals of the institutions."[61] Such a process was evident in June 1999, when female parliamentarians and representatives from more than 150 women's groups called on the European Union and other international organizations to help them fight discrimination by including gender initiatives in the Balkan Stability Pact. The creation of a gender unit within the Stability Pact was the by-product of these urgings, focused on revising legislation within Balkan states to meet European standards. More importantly, the gender unit implicitly relies on Western organizations' material and moral leverage power with Balkan states to monitor and genuinely implement such legislation.

Transnational women's networks have had a tangible effect on postcommunist societies, facilitating the creation of local women's groups that exist to raise domestic awareness and push for national change. Domestic groups and sustained links to transnational actors are key to the effectiveness of transnational advocacy networks. Major U.S. foundation grants for projects on women's rights and violence against women increased from eleven grants totaling $241,000 in 1988 to sixty-eight grants totaling $3,247,800 in 1993.[62] Exact amounts on the funding of European groups are not available, but by all accounts European semipublic and private foundations increased their funding on women's rights in the same period. Coincidentally, this was also the time when many of these same foundations become involved in democracy assistance to the postcommunist world. The confluence of democracy assistance and funding for women's projects has had a tremendous impact on Balkan societies, particularly in terms of the number and type of women's NGOs that currently exist in these countries.

During the communist period there were few independent women's groups, though women's organizations had started to form in the late 1980s. Some ten years later international support has contributed to an explosion of women's groups throughout the region and linked these local groups to Western women's groups. Numbers of NGOs are often inflated and a mere count certainly cannot be used to measure how influential the groups are in local or national politics. Nevertheless, thanks to external funding and support, every country in the Balkans has witnessed a substantial growth in the number of women's NGOs in a short period of time. According to the International Voluntary Agency, some one hundred local NGOs work on women's issues in Bosnia.[63] In Croatia the Women's Information and Documentation Center claims that its network includes some forty women's groups working together to support women.[64] The Association for the Education of Women in

Kosovo reports that there are at least thirty-three local NGOs and eight international NGOs working on women's issues in Kosovo.[65] Serbia has only recently started to receive support from the international community; feminist organizations started forming in the 1990s. However, because of events in the region and support from the international community, more than fifty women's groups or initiatives participate in the Women's Movement–Women's Network. Regional women's networks have also been created with the support from the UN, the OSCE, the Soros Network, the Network for East-West Women, and Delphi International.

While women's groups have had mixed success overall in terms of their ability to reverse negative trends or promote substantial changes in the status of women, countless women's NGOs have had discrete, positive effects on individual women and local community development. In a few other cases notable women's NGOs have become active in national politics. Global trends suggest that local groups are crucial to documenting discrimination, holding states accountable, and encouraging domestic change. The Serbian NGO Women in Black against War, for example, was a prominent critic of the Milosevic regime and the only organization that regularly demonstrated against the government. In Macedonia the Union of Women's Organizations of the Republic of Macedonia and the League of Albanian Women are among the few organizations that are working together to promote interethnic peace in the country. In Bosnia several women's groups stand out as genuine success stories, such as Medica Zenica, Women to Women, and Women for Women.[66] They have not only helped scores of individual women find jobs, open their own businesses, or cope with domestic violence, but they have genuine grassroots support. External evaluations of the Bosnian Women's Initiative (BWI) and the Kosovo Women's Initiative (KWI), supported by the UN indicate that these NGOs have had significant positive effects on women. The Open Society Institute's Forced Migration Monitor, for example, had a glowing evaluation of the Bosnian Women's Initiative; the report concludes that "with some additional refinement, the BWI may become a model for emulation." Since the formation of the Kosovo Women's Initiative, some two hundred local groups and NGOs have become involved in the program, with almost four thousand women directly involved in project activities.[67]

Transnational networks, with the help of regional organizations and local NGOs, have also contributed to policy changes within Balkan governments and genuine advances for women. For example, the OSCE adopted a new election law that mandates that at least three of each party's top ten candidates be female, in an effort to "combat the systematic discrimination again women within political parties." This law prompted the League of Women Voters, a NGO based in the United States and extensively involved in women's political participation in the region, to start working with local Bosnian women's groups to negotiate with the Provisional Election Commission to adopt OSCE rules and institute a quota system. Because of this law and the work of local NGOs, women's representation in Parliament went from a postwar low of 2 percent in 1990 to 26 percent today.[68] In Kosovo a similar process occurred,

whereby thirty women's groups pushed the Kosovar administration to adopt the OSCE law and institute quotas for women's representation. Serbian women's groups recently launched a campaign to push for adoption of a 30 percent system.[69]

Given that the status of women in Balkan countries continues to decline or has not improved greatly, one might conclude that the international community has not made much of a difference. While improvement is difficult to capture, particularly in terms of statistics, closer inspection suggests that international involvement has clearly helped individual women, particularly refugees and unemployed women. Internationally sponsored activities have also generated income for women, helping them to become economically self-reliant. Research has demonstrated that there is a strong relationship between economic independence and social empowerment. Third, international involvement—and this is demonstrated most clearly in Bosnia and Kosovo—has encouraged political participation and increased the number of female politicians. Finally, women's networks have raised gender awareness, particularly among women within these countries.

Obstacles to Success

To restate, transnational women's networks seeking to end discrimination and promote women's rights have had positive, tangible effects on Balkan women. Internationally supported programs have helped women in the short term, and financial support for women's groups may prove to be even more important in the long term, if these groups are genuinely able to influence policies and raise social awareness. Joining the Western community of states and seeking European Union membership means that while Balkan states may neglect gender issues at present, they cannot forever.

With this said, women's networks have not been entirely effective or wholly positive. This is where previous discussions of advocacy networks provide considerably less insight in explaining domestic outcomes or the failure of transnational networks. If, as Risse and Sikkink note, the success of transnational advocacy networks depends on the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes, why does this sometimes fail to happen? This section argues that in answering this question one must remember that transnational advocacy networks include a variety of organizations whose strategies and organizational strengths often differ a great deal. The section considers how Western biases, ill-conceived assistance projects, and other factors have hindered the effectiveness of women's networks and resulted in an unwillingness of Balkan states to engage in rule-consistent behavior. These factors help explain why these states have failed to internalize international norms regarding women's rights.

The international community, primarily from North American and Western Europe, descended on the Balkans, as they did on the rest of Central and Eastern Europe, to help but also to liberate. Democracy promotion in the postcommunist

world became a central component of U.S. foreign policy and, for some, a cottage industry. Despite good intentions and a great deal of money spent, research has demonstrated that democracy assistance, particularly programs that focused on civil society development, were created with little understanding of the region's history, let alone the particulars of any country.[70] "Although political and economic conditions were generally similar throughout the region, each country presented different opportunities and dilemmas for civil society and democratic development."[71] Historical ignorance often reinforced Western beliefs that what they could bring to the region was undoubtedly better than what had existed earlier or than what Eastern Europeans could create themselves. Case in point, the OSCE Democratization Branch notes that while "only the Bosnian people can create a civil society, it also believes that Bosnian people . . . are not confident enough, or skilled enough to initiate their own 'grassroots' projects."[72]

Historical innocence and Western arrogance were also evident in how some members of transnational women's networks approached gender issues in the Balkans. Emina Ganic, a Bosnian native working for the Council of Europe in Sarajevo, claims that although international organizations are eager to work with and help women's groups in Bosnia, they do not understand that Bosnian women do not need or want to be liberated.[73] In fact, as many women in the region proudly point out, the status of women in communist countries was, in many ways, better than the status of women in Western capitalist countries. What women in the Balkans hoped for was that, at long last, their interests and concerns would be heard. Yet throughout the region women have expressed their disappointment and frustration with members of the international community, pointing out the differences between feminist ideas in Western Europe and the United States and those in Central and Eastern Europe.[74] The problem in the Balkans is not that the international community has ignored women's issues or a lack of funding for gender initiatives. In fact, in some places and at certain times the problem was just the opposite. In an effort to "do something," donors have failed to listen to local women's groups about their needs and priorities, thus reinforcing the prevailing insensitivity to gender problems and unintentionally undermining their own efforts.[75] There is an abundance of gender task forces created by the international community and various international agencies and international NGOs that lack credibility with local women's groups.[76]

Transnational actors working in the Balkans often lacked a strong background in Balkan history or knew little about the status of women in communist countries. Consequently, the objectives touted and the strategies for activism encouraged by network activists fell flat in the Balkans and throughout Eastern Europe.[77] For example, women's networks have focused their attention on legal reform and the need for laws that protect women and promote gender equality. Balkan women, like women in other postcommunist countries, counter that their countries have, in fact, a long history of trying to legislate and dictate equality. For almost fifty years these societies were imbued with official rhetoric and attempts to legislate

gender equity. The problem lies not in the existence of such laws but in getting people to believe in them, which requires changes in national consciousness about gender equality. What Balkan women have indicated is that they want, first and foremost, organizations that can help them solve everyday problems and improve their socioeconomic status. The problem is that local women's groups that reject an emphasis on changing national legislation and instead focus on providing services are deemed "less developed" and thus given less external support.

The goal of liberating downtrodden Balkan women led some network activists, perhaps without realizing it, to advance women's rights and build civil society in their own image rather than rely on domestic groups to determine their future course of action. The tension between international and local actors has pushed the latter to focus on what can be considered Western or donor priorities rather than domestic needs. Among others, Janine Wedel argues that "the fall of the Berlin Wall energized American efforts to try to remake Central and Eastern Europe in our image by exporting the can-do mentality and the tradition of citizen's initiative and local governance.[78] For the U.S. government and the OSCE in particular, advocacy NGOs devoted to public interest causes, such as women's rights and the environment, were given priority. It was believed that advocacy NGOs represented interests and groups that political parties often ignored, helped to mitigate extreme positions, undermined ethnic nationalism, and ultimately created a culture of tolerance among the population.[79] For women's groups this inherently meant that they needed to focus on advocacy rather than service provision. Assistance was thus given mostly to women's groups that looked and acted like those in the West rather than those that were helping local women. The success of women's groups was not measured by their ability to help individual women or create, for example, a shelter for women but by their ability to create a program advocating on behalf of women. At least to the OSCE and the U.S. government, the success of women's NGOs was measured in terms of their public activism and political involvement in particular.

Yet most women's groups in the Balkans, and throughout the postcommunist world for that matter, do not seek to be politically active, at least for the time being. Moreover, the strategies and jargon used by members of transnational networks does not resonate with Balkan women's groups. Calls for women to become more politically active and fight for change understandably failed to attract Balkan women, many of whom remain revolted by politics after years of communism and want to retreat from public life. While some of the local women's NGOs developed gradually, others were essentially created by internationals, establishing many of the programs in their own "image," sometimes sensitive to local conditions but sometimes not. Case in point, in Kosovo Western groups tended to focus on sexual violence, calling on local organizations to submit grant applications for activities in this area. While not considered irrelevant, this is not a primary concern for women's groups in Kosovo. Instead, like women in Bosnia, Serbia, and elsewhere, Kosovar women are concerned with women's rights issues more generally and want to be

more involved in the reconstruction of their country. Without even realizing it, at least some members of women's networks were replacing the communist model of equality with an equally foreign Western model.

By trying to remake civil society and women's groups in their own image, women's networks, dominated by Western governments and women's groups from the United States and Western Europe, have not only affected the NGOs that have been created but in doing so have unintentionally discouraged grassroots interest in local NGOs. Balkans women's groups may be independent of their own states but they are quite, if not extremely, dependent on international support. Every major women's group in Bosnia and perhaps throughout the region relies on international sources for support, many on a single donor, and they risk being cut off at any moment. Changing international priorities and interests put local women's NGOs in a difficult position. How do they attract grassroots interest when domestic priorities do not match the priorities of their international donors? Since international priorities change at a whim, how can they sustain local interest if they are forced to change programs or activities midstream? A persistent problem for women's groups is that most grants are yearly and renewals less and less likely. This environment of uncertainty makes it difficult to engage in long-term planning or even implement programs. The reality of transnational advocacy networks is that the survival of local women's groups depends on their listening and responding to international rather than domestic constituents. Local NGOs must do whatever it takes to maintain support. In Macedonia, for example, local women's groups indicate that they engage in a broad variety of activities—this indicates that these NGOs basically take on any activities that funders are likely to support rather than focus on domestic priorities.[80] In sum, the control over resources by external agents undermines the capacity of local organizations.

It is not only Western biases and ill-conceived strategies that have limited the effectiveness of women's networks. Transnational women's networks have also been challenged by many of the same organizational problems experienced by other external actors seeking to promote change in other sectors.[81] In fact, the postcommunist world is replete with examples of transnational networks failing because of organizational challenges, strategic choices, and unintended consequences. Although many of the actors involved in women's rights in the Balkans share similar objectives, they know disappointingly little about each other. Donors from the United States and Western Europe want to end discrimination based on sex and improve the status of women, yet they rarely meet and talk about programs or the strategies they use. Lack of communication among donors has prevented them from cooperating and learning from each other. This has led to many inefficient and negative outcomes, such as excessive duplication of projects, inappropriate strategies that are, unfortunately, repeated, and local NGOs that lose international support because they have squandered funding. Scholars focusing on civil society development have argued that external support for local NGOs has not only proven

to be ineffective, but the unintended consequences are even more damaging. Lack of transparency has contributed to intense rivalry among local NGOs, which are forced to compete for the dwindling resources allocated for postcommunist countries. Moreover, such interventions in civil society have resulted in fragmentation and new hierarchies, with those supported by the international community on top and those that are not on the bottom. Indeed, larger, more well-established women's groups with members fluent in English or German tend to receive most of the support while smaller groups or ones with less cosmopolitan leaders lose out. By pushing Western priorities and encouraging certain strategies, women's networks have, in fact, undermined the ability of local women's groups to respond to local needs and attract a domestic following, thus hindering their ability to foster indigenous women's movements.

A final reason women's networks have failed to produce the outcome hoped for is that despite all the talk about gender equality and women's rights, many of the leading actors within women's networks fail to practice what they preach. Even the so-called norm-generating actors have often set a bad example of gender equality—specifically, though not exclusively, the UN, the OSCE, and many humanitarian organizations working in the Balkans. Some believed, for example, that the international community would use the lessons learned in Bosnia to do a better job helping women and incorporating them in the reconstruction of Kosovo. Yet a gender audit completed by Chris Corrin of the international community's involvement in Kosovo concludes that the potential contributions of women have been ignored and at times undermined.[82] In fact, she argues that throughout the administration of social, economic, and political change in Kosovo there has been discrimination against women.[83] Despite the fact that local women's groups often had many years of experience, members of the international community ignored their expertise, believing that the women in Kosovo are not "culturally attuned" to becoming partners in community politics.[84] Humanitarian organizations often subverted the plans of local women's groups and used local women only as cheap service providers rather than involve them in the decision-making process.[85]

The international community's actions in other areas also suggest that international actors are insensitive to gender equality. For example, the international community's lack of regard for mainstreaming issues of gender within their political and policy-making processes speaks volumes. The failure to appoint women to key decision-making positions and accord the same rights to war widows as male heads of households also says a great deal to women and men in these countries. For example, no women were appointed to the Kosovo Transitional Council and in March 2000, OSCE statistics showed that while 24 percent of the Kosovar police force was female, only 6 percent of the UN police force was female.[86] Together, the strategies used and the way women's network members behaved have, unintentionally, diminished international attempts to promote women's rights.

Conclusion

The international community's interest and involvement in promoting gender equality in the Balkans is inspiring. Nonetheless, the effects of transnational women's networks should be regarded as mixed, rather than merely successes or failures. To recap, I argue that women's advocacy networks have helped women in the Balkans and promoted women's rights. Yet even though transnational advocacy networks identify a common goal, members within this network represent different groups and employ different strategies. Moreover, transnational networks are unable to circumscribe their influence and unintended consequences result. The goals of women's networks are thus limited and in some cases undermined by their own members' behavior. Instead of hiding these realities, numerous evaluations of international assistance and gender programs are surfacing. The existence of gender audits suggests that the international community is likely, if slowly, to learn from its mistakes and improve strategies in the future. Given similar events in other postcommunist countries and the desire by Balkan states to become members of European institutions, the future for women's rights in this region looks good. The following section concludes by summarizing three changes in strategy that must be made by women's networks to further advance women's rights in the Balkans and facilitate the growth of indigenous women's movements.

Promoting Domestic Priorities

The Beijing Conference triggered a global campaign to promote women's rights in every corner of the world. At the same time Beijing revealed that despite the lip service given to a *global* woman's movement, there is an implicit hierarchy among women's organizations, and priorities adopted for the movement inherently represent certain agendas over others. There is a great need for international organizations and Western activists interested in helping women in the Balkans to listen rather than talk. Feminism in the Balkans is likely to look different from feminism in the United States and Western Europe. Responding to and funding locally generated women's initiatives may be problematic for international donors as they must reconcile grants with their own mission and limited resources, but their efforts will undoubtedly be more effective in encouraging and sustaining grassroots interest in women's NGOs. In short, their strategies must be more bottom-up rather than top-down.

Adopting a Strategic Approach

For women's network to be more effective in promoting change in this region there needs to be a better strategic framework created. Recently USAID noted that while the United States has designed and implemented a number of initiatives to promote women and gender equality, the U.S. government has no strategic framework to inform assistance programs.[87] For women's networks the purpose of creating a

comprehensive strategy associated with Balkan women is not merely to mitigate the harmful effects of conflict and transition on the female population but to genuinely transform gender relations. While the international community has done a good job enhancing the physical security for women, it needs to do a better job increasing women's access to resources and changing consciousness.

Providing a Good Role Model

There are certainly limits to what women's networks can do in these societies. The limits of external attempts to promote women's rights and changes in relations between men and women are symptomatic of broader problems associated with promoting democracy and civil society in this region. Women's networks must be universalistic in their support for women and gender equality but culturally informed and sensitive to how they achieve this goal. Sometimes the only way to promote change is to lead by example, providing good models to emulate rather than artificial standards that will not resonate with the local population. Setting standards and providing assistance to foster change must thus be accompanied by behavior that demonstrates a genuine commitment to gender equality.

It is quite evident that long-term peace and democracy in the Balkans depend on involving local groups and allowing them to take ownership in peacemaking, development, and in the organizations that represent civil society. In light of the numerous changes this region has experienced, ownership and domestic change, including the internalization of norms associated with women's rights, will take a long time. Nonetheless, these countries are particularly vulnerable to the material and moral leverage of the international community. Given that the global women's movement calls for nothing short of "revolutionary change in how societies should be organized," what is desperately needed, in addition to changes in strategy, are realistic expectations and patience as well as continued international involvement and support.

Notes

1. The Balkans can include up to ten countries. Given the disproportionate attention given to human rights in the former Yugoslavia, this research focuses primarily, though not exclusively, on Bosnia-Herzegovina, Croatia, Kosovo, Macedonia, Slovenia, and Serbia.
2. While debated elsewhere, I interchange the terms *international*, *transnational*, and *the international community*.
3. Sid Tarrow argues that there is a difference between global social movements and transnational advocacy networks. The distinction is small but nevertheless important, particularly for this chapter. As Tarrow notes, "advocacy networks are connective structures that cross national boundaries, whereas social networks or transnational social movements are the bases for contentious politics *within* domestic societies." The emphasis of the former is "sustained domestic roots," while the latter provides a mechanism for the diffusion of collective action frames that can help domestic groups construct their own social movements. See *Power in Movement* (Cambridge: Cambridge University Press, 1998), 176–89.

4. Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 6.
5. According to Keck and Sikkink, a transnational advocacy network includes international and domestic governments and advocacy organizations, local social movements, foundations, the media, churches, trade unions, consumer organizations, intellectuals, parts of regional and international intergovernmental organizations, and parts of the executive. Keck and Sikkink, *Activists beyond Borders*, 9.
6. Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," *The Power of Human Rights International Norms and Domestic Change*, eds. Thomas Risse, Stephen C. Ross, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 3.
7. Keck and Sikkink, *Activists beyond Borders*, 2.
8. Risse and Sikkink, "Socialization of International Human Rights Norms into Domestic Practices," 19.
9. See Sarah Mendelson, "Unfinished Business," *Problems of Post-Communism*, vol. 48, no. 3 (May–June 2001), 19–27.
10. Risse and Sikkink, "Socialization of International Human Rights Norms into Domestic Practices," 21.
11. Julie Mertus, *War's Offensive on Women* (Bloomfield CT: Kumarian Press, 2000), 21.
12. Keck and Sikkink, *Activists beyond Borders*, 16.
13. Martha Walsh, "Aftermath: The Role of Women's Organizations in Postconflict Bosnia and Herzegovina," Working Paper no. 308 (Washington DC: Center for Development Information and Evaluation, U.S. Agency for International Development, July 2000), 2.
14. Alexandra Stiglmayer, "The Rapes in Bosnia-Herzegovina," *Mass Rape: The War against Women in Bosnia-Herzegovina*, ed. Alexandra Stiglmayer (Lincoln: University of Nebraska Press, 1994), 85.
15. This is a term coined during the conflict. In the past the term *Muslim* was used. However, this term was not appropriate because most Bosniacs do not practice Islam but are Slavs who converted to Islam during the Ottoman period.
16. Stiglmayer, "The Rapes in Bosnia-Herzegovina," 85.
17. "Federal Republic of Yugoslavia: Kosovo: Rape as a Weapon of 'Ethnic Cleansing,'" *Human Rights Report*, March 2000, retrievable at *www.hrw.org./reports/2000/fry/index.htm* [17 September 2001].
18. This estimate came from a report by Jill Benderly, "World Learning–Star," retrievable at *www.worldlearning.org/pidt/star/about/#*.
19. Walsh, "Aftermath," 3.
20. "Women's Human Rights," *Human Rights Watch World Report*, 1999, retrievable at *www.hrw.org/worldreport99/women/index.html*.
21. Mertus, *War's Offensive on Women*, 39.
22. Martha Walsh, "Post Conflict Bosnia and Herzegovina: Integrating Women's Special Situation and Gender Perspectives in Skills Training and Employment Promotion Programmes," International Labour Office Report, Geneva, 1997, retrievable at *www.ilo.org/public/english/employment/ skills/training/publ/pub12.htm#c2*.
23. See *Gender Politics in the Western Balkans*, ed. Sabrina P. Ramet (University Park: University of Pennsylvania, 1999); *Assault on the Soul: Women in the Former Yugoslavia*, eds. Sara Sharratt and Ellyn Kaschak (New York: Haworth Press, 1999); and Stiglmayer, *Mass Rape*.
24. Vlasta Jalusic, "Women in Post-Socialist Slovenia: Socially Adapted, Politically Marginalized," *Gender Politics in the Western Balkans*, 117.
25. Sabrina P. Ramet, "In Tito's Time," *Gender Politics in the Western Balkans*, 89.
26. For more on women in the postcommunist region, see *Ana's Land*, ed. Tanya Renne (Boulder: Westview Press, 1997); Ellen Berry, *Postcommunism and the Body Politic* (New York: New York

University Press, 1995); Barbara Einhorn, *Cinderella Goes to Market* (London: Verso, 1993); and *Gender Politics and Post-Communism*, eds. Nannette Funk and Magda Mueller (New York: Routledge, 1993).

27. Jalusic, "Women in Post-Socialist Slovenia," 117.
28. Obrad Kesic, "Women and Gender Imagery in Bosnia: Amazons, Sluts, Victims, Witches, and Wombs," *Gender Politics in the Western Balkans*, 200.
29. Walter M. Bacon Jr. and Louis G. Pol, "The Economic Status of Women in Romania," *Gender Politics and Post-Communism*.
30. Meredith Tax, "Fundamentalist Social Movements Attack Feminism as Part of Their War on Modernity: The Left Ignores Cultural Movements at its Peril," *Nation*, 17 May 1999.
31. See Darko Silovic, "Regional Study on Human Development and Human Rights in Central and Eastern Europe," United Nations Human Development Report, 15 November 1999, retrievable at *www.undp.org/hdro/silovic.pdf*.
32. "International Status Report: Women's Share of Paid Employment Increases in Most Regions of the World," United Nations Development Fund for Women, press release, 1 June 2000, retrievable at *www.unifem.undp.org/progressww/pr_ progress1.html*.
33. "Women's Political Participation: The Missing Half of Democracy," USAID Bulletin no. 3, July 1999.
34. For a discussion of the role of the international community in other postcommunist countries, see Patrice McMahon, "International Actors and Women's NGOs in Poland and Hungary," *The Power and Limits of NGOs*, eds. Sarah Mendelson and John Glenn (New York: Columbia University Press, 2001).
35. Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington DC: Carnegie Endowment for International Peace, 1999), 87.
36. More on the Convention can be retrieved at *www.un.org/womenwatch/daw/cedaw/index.html*.
37. Ellen Dorsey, "The Global Women's Movement," *Global Governance*, ed. Paul F. Diehl (Boulder: Lynne Rienner, 2001), 441.
38. Dorsey, "The Global Women's Movement," 445.
39. Mertus, *War's Offensive on Women*, 24.
40. Silovic, "Regional Study on Human Development and Human Rights in Central and Eastern Europe," 23.
41. On the Council's work on this area, see "Council of Europe Action in the Field of Equality between Men and Women," Council of Europe Annual Report, 2000, prepared by the Directorate General for Human Rights.
42. Interview with Emina Ganic, Council of Europe representative, Sarajevo, Bosnia, September 2001.
43. Thomas Carothers and Marina Ottaway, "The Burgeoning World of Civil Society Aid," *Funding Virtue: Civil Society Aid and Democracy Promotion*, eds. Marina Ottaway and Thomas Carothers (Washington DC: Carnegie Endowment for International Peace, 2000), 7.
44. Alexandra Poolos, "Southeastern Europe: Women Demand a Role in Balkan Stability Pact," *Radio Free Europe/Radio Liberty*, 30 July 1999.
45. Kevin F. F. Quigley, "Lofty Goals, Modest Results: Assessing Civil Society in Eastern Europe," *Funding Virtue*, 192.
46. I note this because civil society and NGOs are viewed differently in the United States than in Europe. See Quigley for a discussion of the differences: "Assessing Civil Society in Eastern Europe,"194–207.
47. See "Women's Human Rights."
48. OSCE document, Gender Unit–OSCE ODIHR, retrievable at *www.osce.org/odihr/unit-gender.htm*.
49. Silovic, "Regional Study on Human Development and Human Rights in Central and Eastern Europe," 27.
50. This includes Albania, Bosnia, Croatia, and Macedonia and includes assistance for economic

programs, democracy, institution building, humanitarian aid, balance-of-payments support, and infrastructure. "Opinion of the Economic and Social Committee on Development of Human Resources in the Western Balkans," *Official Journal of the European Communities* (10 July 2001), 111, appendix 3.

51. For Romania see Dan Petrescu, "Civil Society in Romania: From Donor Supply to Citizen Demand," *Funding Virtue*; for Central Europe in general see Kevin F. F. Quigley, *For Democracy's Sake* (Washington DC: Woodrow Wilson Center, 1997).
52. Judith Miller, "A Giver's Agenda," *New York Times*, 17 December 1996.
53. See William Shawcross, "Turning Dollars into Change," *Time*, 1 September 1997.
54. Chris Corrin, "Gender Audit of Reconstruction Programmes in South Eastern Europe: Report Written for the Urgent Action Fund and the Women's Commission for Refugee Women and Children," June 2000, 5, retrievable at www.urgentactionfund.org.
55. See "Women's Political Participation."
56. Mertus, *War's Offensive on Women*, 50–51.
57. "Women 2000: An Investigation into the Status of Women's Rights in Central and South-Eastern Europe and the Newly Independent States," International Helsinki Federation Report, 19, retrievable at *www.ihf-hr.org/appeals/001109b.htm.*
58. Keck and Sikkink, *Activists beyond Borders*, 196.
59. Dorsey, "The Global Women's Movement," 445.
60. Keck and Sikkink, *Activists beyond Borders*, 187.
61. *Bringing Transnational Relations' Back In: Non-state Actors, Domestic Structures, and International Institutions*, ed. Thomas Risse-Kappen (Cambridge: Cambridge University Press, 1995), 486.
62. Keck and Sikkink, *Activists beyond Borders*, 182.
63. International Voluntary Agency statistics found in Walsh, "Aftermath," 11.
64. More on the women's movement in Croatia can be retrieved at *www.awin.org.yu/english/ewomnet2.htm*.
65. More on the women's movement in Kosovo can be retrieved at *www.motratqiriazi.org/network.htm*.
66. I have identified these three groups based on conversations and interviews in the United States and Bosnia. Vladimir Stanic, Office of the High Representative, also mentioned these organizations when I asked him about "successful" NGOs working in Bosnia. Interview, Sarajevo, Bosnia, September 2000.
67. "Women in War-torn Societies," *The State of the World Refugees*, retrievable at *www.unher.ch/refworld/pub/state/97/box4_3htm.*
68. "Women's Human Rights," 7.
69. See Ariane Brunet, "Field Report: Balkan Region," unpublished report submitted to the Urgent Action Fund, Boulder, Colo., 5–26 February, 2000.
70. For a discussion of this particular region, see Janine Wedel, *Collision and Collusion*, 2d ed. (New York: St. Martin's Press, 2001); and *The Power and Limits of NGOs.*
71. Quigley, "Lofty Goals, Modest Results," 192.
72. David Chandler, *Bosnia: Faking Democracy after Dayton* (London: Pluto Press, 2000), 137.
73. Interview, Emina Ganic, Sarajevo, Bosnia, July 2001.
74. Renne's *Ana's Land* and Berry's *Postcommunism and the Body Politic* both discuss the relationship and tensions between Western and Eastern European feminism.
75. Mertus, *War's Offensive on Women*, 24–25.
76. Brunet, "Field Report: Balkan Region," 14.
77. For more on this particular point, see *The Power and Limits of NGOs.*
78. Wedel, *Collision and Collusion*, 86.
79. For more on civil society development and its role in Yugoslavia, see David Chandler, "De-

mocratization in Bosnia: The Limits of Civil Society Building," *Democratization*, vol. 5, no. 4 (winter 1998), 78–102.

80. Brunet, "Field Report: Balkan Region," 6.
81. See Mendelson, "Unfinished Business."
82. Corrin, "Gender Audit of Reconstruction Programmes in South Eastern Europe."
83. Corrin, "Gender Audit of Reconstruction Programmes in South Eastern Europe," 14.
84. Corrin, "Gender Audit of Reconstruction Programmes in South Eastern Europe," 16.
85. Mertus, *War's Offensive on Women*, 50.
86. Corrin, "Gender Audit of Reconstruction Programmes in South Eastern Europe," 14.
87. USAID, Office of Women in Development, "Intrastate Conflict and Gender," Gender Matters Information Bulletin, no. 28, December 2000, retrievable at *www.genderreach.com/publs/ib9.htm*.

5 The Role of Democracy in the Protection of Human Rights

LESSONS FROM THE EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS

Richard Burchill

Democracy and human rights are closely related concepts. Democracy implies the existence of processes of inclusion, participation, openness, and accountability that is beneficial to all individuals and society. Human rights have the same purpose of acting as a tool of protection and empowerment for the benefit of the individual and groups. Since the early 1990s we have seen the growth of democracy as a topic of international law and relations, especially in the context of international human rights.[1] Concurrent with this development is the all too prevalent belief that democracy and human rights are inherently one and the same. While the two do share broad areas of overlap and a growing interdependence, democracy does not automatically include human rights and vice versa.[2] The greatest oversight in using the two terms as one is that adherence to human rights may exist where there is no democracy and violations of human rights continue in a democratic society. Human rights rely heavily upon the existence of democratic systems if they are to be effective. This is natural considering that human rights are about the individual's existence, and democracy entails individuals being able to be part of the processes impacting their lives. Equally so, democracy may exist in a society where violations of human rights continue. The existence of democracy in no way guarantees adherence to human rights standards. Democracy will allow for rights to be a larger part of society and allow for individuals to demand their rights and to seek recourse for violations, but it will not end violations of rights or ensure the effectiveness of rights.[3] Given the current emphasis on elections alone as marking the existence of democracy, a failure to take a substantive examination of the structures and processes of democracy, alongside issues of human rights protection, creates a number of problems. Relying on elections alone makes it easier to identify a democracy but, as explained by Zakaria, many of these fall into the category of "illiberal" democracies whereby the underlying goals and purposes of democracy and human rights are not realized.[4]

Democracy is a process by which individuals are part of the systems that impact their lives. Human rights are part of the process by providing some of the essential tools to allow democracy to be effective for all.[5] While the two are closely related and mutually supporting, they remain distinct entities whose relationship is not

self-evident and requires further exploration.[6] Since the advent of the current international system for the promotion and protection of human rights from 1948, the existence of democracy within states was sparse, but this did not prevent the gradual development of the UN human rights system and regional human rights systems.[7] Now that democracy is slowly emerging as an international legal principle, international systems for the protection of human rights are emphasizing the importance of democracy for the promotion and protection of human rights.[8]

The purpose of this chapter will be to examine and compare the role of democracy in the promotion and protection of human rights in the European Convention on Human Rights system and the Inter-American Convention on Human Rights system. The Organization of American States and the Council of Europe have, since their creation, held that democracy is the basic foundation for the society of member states and that the promotion and protection of human rights depends upon effective democracy. Each system has faced a variety of unique problems to ensure that these basic concepts are translated into practice. Both systems also face a continual struggle in ensuring the effective promotion and protection of human rights. This chapter will examine how the judicial human rights body in each system has approached democracy in their efforts toward the promotion and protection of human rights. It will outline the foundations established by each court with a view to looking to how future problems may be overcome. In each system a variety of institutions are involved in the promotion and protection of democracy and human rights, but this essay will focus only on the statements of the respective human rights courts as authoritative expressions that try to ensure there is no drift toward either illiberal democracies or liberal autocracies.[9]

Inter-American Court of Human Rights

Throughout Latin America and the Caribbean the presence of authoritarian regimes with dictators or military juntas was at one time an all too common occurrence. The recent advent of democratic governance throughout the region has by no means marked an end to human rights abuses and led to a better life for all individuals. The region continues to suffer from a number of factors that inhibit the protection and promotion of democracy and human rights. The protection and promotion of democracy and human rights has been a long-standing concern for the region but usually more in the form of rhetoric than substance.[10]

Today the Organization of American States (OAS) undertakes a wide range of efforts for the protection and promotion of democracy and human rights in the region through its institutional structure and specialized bodies, notably the Inter-American Court of Human Rights (hereinafter the Court), the Inter-American Commission on Human Rights and the Unit for the Promotion of Democracy (UPD). Based on the experiences of the past, the Court actively tries to counter any movement toward illiberal democracy or ensure there is no return to autocratic regimes, liberal or otherwise. The approach of the Court to democracy follows the

general position taken by the OAS, whereby democracy is viewed in holistic terms, recognizing the need to support democracy through political institutions but also ensuring that democracy goes beyond the political to include the necessity of the rule of law, effective protection of human rights, and addressing socioeconomic concerns.[11]

The Court came into existence in 1978 as "an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights."[12] The Court has defined its task as preserving the rights of victims of human rights abuses and preserving the integrity of the Inter-American system of protection.[13] In its first advisory opinion the Court stepped out if its original mandate as a product of the American Convention on Human Rights (ACHR) by declaring its ability to utilize any existing human rights instrument in undertaking its work "so long as it is directly related to the protection of human rights in a Member State of the inter-American System."[14] Through its advisory jurisdiction the Court has made substantial progress on establishing its role in the Inter-American system and in helping to develop an understanding of the importance of democracy for the promotion and protection of human rights.

The constituent documents in the Inter-American system clearly establish the importance of democracy in the promotion and protection of human rights. In the charter of the OAS, the preamble claims that "the historic mission of the Americas is to offer to man a land of liberty and a favorable environment for the development of his personality and the realization of his just aspirations."[15] This is to occur with representative democracy as "an indispensable condition for the stability, peace and development of the region." Further, "American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man."[16] Article 2 of the charter contains the purposes of the OAS, which include the promotion and consolidation of representative democracy; the promotion of economic, social, and cultural development; the eradication of extreme poverty, which is said to constitute an obstacle to full democratic development. Article 3 outlines the principles to which the OAS adheres, including the requirement that the political organization of member states is on the basis of the effective exercise of representative democracy and the recognition of the fundamental rights of the individual without distinction as to race, nationality, creed, or sex. Article 9 makes democracy a necessary element of membership and empowers the OAS to take action in member states where democracy comes under threat.[17]

When the OAS Charter was originally adopted in 1948, the American Declaration on the Rights and Duties of Man (the American Declaration) was included alongside in order to establish a "system of individual liberty and social justice based on respect for the essential rights of man." The American Declaration is based on the idea that the institutions of the state have as their principal aim the protection of the

rights of individuals. While the American Declaration was considered nonbinding at adoption, it has taken on the character of an authoritative interpretation of the charter in the field of human rights.[18] The Court places the American Declaration as part of the evolving inter-American law on human rights, making it an authoritative interpretation of the charter of the OAS, meaning states have obligations arising from it.[19] The Court's position is clear: "That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it."[20] The American Declaration has proven to be a useful tool for the Court in furthering democracy and human rights in the region, not only through its elaboration of certain human rights but also in its belief that the institutions of the state are not self-serving.

The American Convention on Human Rights came into force in 1978 with the purpose of giving clear legal effect to the rights originally laid down by the American Declaration. The rights in the ACHR contain greater detail as to the content of the right then the American Declaration. As with the American Declaration, the ACHR is clearly grounded in the context of a democratic society, as the states parties to the ACHR reaffirm "their intention to consolidate . . . , within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."[21] The place of the individual is paramount as there is recognition of the normative and legal importance of protecting human rights over states' rights.[22] The context of rights protection within a democratic society is expressed further in Article 29, which states that interpretation of the ACHR provisions shall not preclude "other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government."

It is also worth highlighting the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, the Protocol of San Salvador (the Protocol). The adoption of the Protocol signifies the importance given to economic and social rights as governments reaffirm "their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."[23] This reaffirmation is based upon the need for "full respect for the rights of the individual, the democratic representative form of government as well as the right of its people to development, self-determination, and the free disposal of their wealth and natural resources."[24] Within the Protocol, Article 13 guarantees the right to education "to enable everyone to participate effectively in a democratic and pluralistic society."

Through its interpretation of the above documents, the Court has taken the clear stance that democracy is the standard by which the actions of governments are to be judged on a continual basis. The Court has relied upon the rhetorical support of democracy that has marked the development of the Inter-American system as an expression as to how things should be in the region and from this has attempted to

articulate binding legal principles. The Court has not had to engage in any form of judicial activism concerning democracy and human rights, relying on the fact that the legal instruments of the Inter-American system continually refer to democracy, which in turn gives the Court a clear legal basis for its position.[25]

The Court has articulated the general character of a democratic society in the region as thus: "The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."[26]

The Court has expressed a more succinct position where "[o]bviously, representative democracy is based on the Rule of Law which presupposes that human rights are protected by law."[27] The Court's definition of a democratic society, not surprisingly given the history and context of the region, concentrates on the existence of legal procedures that provide for the legitimacy of government and the protection of human rights.

The approach of the Court in defining how democracy supports the protection of human rights has involved discussions of the structural necessities of democracy. In an opinion dealing with the meaning of the word *laws*, the Court has described the essential processes of a democratic system. The Court has stated that the only legitimate law is one that is duly "passed by the Legislature and promulgated by the Executive," stressing the necessity of some form of separation of powers so the government alone does not have sole discretion in restricting rights.[28] The Court also explained the importance of the existence of the rule of law so that there exists a "set of guarantees" to ensure state power does not violate the rights of individuals. The Court noted: "Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement . . . so as to prevent the majority from acting arbitrarily."[29]

The Court drew a necessary connection between the legality of rules and the legitimacy of the rule makers, giving rise to the requirement of the "effective exercise of representative democracy."[30]

The Court recognized that even the separation of powers and the rule of law cannot prevent the government from violating rights. Therefore it moved beyond procedural requirements to include substantive elements of democracy whereby laws can only "be enacted for reasons of general interest," meaning they must be "adopted for the 'general welfare,' a concept that must be interpreted as an integral element of public order [*ordre public*] in democratic states," which has the main purpose of protecting the individual and creating an environment for self-determination.[31] The Court draws a direct link between procedure and substance

on the belief that since the purpose of law is to serve the general interest or welfare of society, it requires a specific institutional form for its creation, as "[l]aw in a democratic state is not merely a mandate of authority cloaked with necessary formal elements."

The Court has made it clear that "[r]epresentative democracy is the determining factor throughout the system of which the [ACHR] is part."[32] In other advisory opinions the Court has extended this basic idea of democracy to situations where a state of emergency exists and where often various rights and democratic processes are suspended. Given the long history of internal strife in the region and the frequent presence of authoritarian leaders, the Court is making a substantial position on principle by ensuring that even in exceptional circumstances the effective exercise of democracy and human rights continues. In its consideration as to whether an emergency situation may justify the denial of habeas corpus, the Court admitted that states of emergency will occur and "[i]t cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society." It continued to explain that even though abuses may occur in the application of emergency measures, "the Court must emphasize that the suspension of guarantees cannot be disassociated from the "effective exercise of representative democracy" referred to in Article 3 of the OAS Charter.[33] In particular the Court highlighted the necessity of maintaining a clear separation of powers so that the judicial branch can carry out its duties, as there is a need for "an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."[34] This ensures that remedies will be effective and the rule of law maintained at times when it is most needed.[35]

Staying within the context of states of emergency, it is worth noting that Article 23 of the ACHR, "the right to participate in government," is included in Article 27 as a nonderogable right in times of emergency. The inclusion of Article 23 as a nonderogable right is unique in international human rights law and agrees with the Court's view of democracy being the norm, for even in times when democracy is usually put on hold there remains the right for individuals to be part of the decision-making process.

The Court has also provided substantial insight concerning two essential elements of a democratic society and the promotion and protection of human rights—the principles of nondiscrimination and freedom of expression. The question of nondiscrimination was raised concerning proposed changes to the nationality laws of Costa Rica.[36] The Court stated that equality is directly part of the essential dignity of the individual and cannot be reconciled with special treatment to different groups based on assumed superiority: "It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character."[37] However, it was expressed that starting at the point of universal human dignity, "it is possible to identify circumstances in which considerations of public

welfare may justify departures to a greater or lesser degree from the standards articulated above."[38] The Court took the position that differential treatment may exist in society, but that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things"—but without defining any of these elements.[39] In the Court's opinion not all differential treatment is discriminatory for it is not always offensive to human dignity.[40] In coming to this conclusion the Court referred to the *Belgian Linguistics* case before the European Court of Human Rights,[41] where it was established that in democratic states difference in treatment is discriminatory only when there is "no objective or reasonable justification."[42]

In dealing with freedom of expression, the laws of Costa Rica were once again in question as the Court examined the requirement under Costa Rican law that all journalists register with the national government and asked whether or not this violated freedom of thought and expression under Article 13 of the ACHR. The Court began by recognizing, according to its previous opinions, that not all rights are absolute and certain limits upon the exercise of a right are permissible. For determining the permissible limits the Court relied on Article 29 of the ACHR, which requires that restrictions on rights occur only within the guarantees provided by representative democracy as a form of government. The Court also expressed the necessity to take into account the preamble of the ACHR, as it places the document within a framework of democratic institutions.[43] It went on to say: "These articles define the context within which the restrictions permitted under Article 13(2) must be interpreted. It follows from the repeated reference to 'democratic institutions,' 'representative democracy' and 'democratic society' that the question whether a restriction on freedom of expression imposed by a state is [necessary] . . . must be judged by reference to the legitimate needs of democratic societies and institutions."[44]

The Court considered freedom of expression as a necessary element of a democratic society, feeling it "constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard." The Court went on to say that "[i]t is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected."[45] And finally: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public."[46]

Freedom of expression has been characterized as having two necessary dimensions, both essential to a democratic society.[47] The first dimension, as described above, involves a wide-ranging conception of expression involving various forms

of disseminating and receiving information. The Court has explained that the second element concerns "the social element" of freedom of expression. This involves "everyone's right to know opinions, reports and news. For the ordinary citizen, the right to know about other opinions and the information that others have is as important as the right to impart their own." The Court went on to say that both dimensions are of equal importance and need to be guaranteed simultaneously, which in turn give rise to an independent media so that society may enjoy the full benefits of freedom of expression, which "constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard."[48]

In contentious cases before the Court there has not been the opportunity to expand upon the various elements and limits to human rights in a democratic society in a way similar to the European Court of Human Rights, primarily due to the extreme nature of the violations involved. However, it is possible to observe the general position established by the Court as to the nature of a democratic society. In the *Velasquez Rodriguez* case the Court reinforced the belief that the state is based on the consent of society, declaring that "the power of the state is not unlimited, nor may the state resort to any means to attain its ends. The Court affirmed that the state is subject to law and morality."[49] In the *Godinez Cruz* case the Court repeated the claim that the state is subject to law and morality and that it does not exist as a self-serving institution, as it is "at the service of the community and not the reverse."[50] On the issue of access to courts, the Court has stated in a number of cases that the "right of everyone to a simple and prompt recourse or any other recourse to a competent judge or tribunal for protection against acts that violate his fundamental rights is one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention."[51] The Court has also emphasized the importance of limiting the extent of military judicial bodies in exercising penal jurisdiction over civilians, explaining that military courts should deal with military matters only as a necessary corollary of a democracy society, an attempt to break with practices of the past.[52]

The Court has clearly established that in the Inter-American system the only possible way of ordering society is through democracy, which in turn is an essential component in the promotion and protection of human rights in the region. The Court has not attempted to articulate any one specific model of a democratic society, recognizing that the states of the region have different societies and legal systems, which will influence the day-to-day practice of democracy accordingly.[53] But the Court has set out the basic foundations of a democratic society that must be adhered to. The Court has taken a clear stance that a weak procedural form of democracy, as envisaged by the illiberal democracy model, is not acceptable. The Court has laid out the basic democratic features that all societies in the region must possess as well as the underlying principles that must inform the day-to-day existence of a democratic society. Most important is that government must be based on the will of the people

and act only for the good of society. The Court does not accept strict majority rule, as the will of the majority cannot be supreme since a democratic society entails tolerance and accommodation of differences that exist. Governments exist only for serving and upholding the general welfare of society, strictly adhering to the rule of law and the effective protection of the rights of individuals and groups. The institutions of government are to be established and function based on the democratic requirements of the rule of law with the necessity of an independent judiciary. From this the Court has established that "[t]he just demands of democracy must consequently guide the interpretation of the [American] Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions."[54]

The Court is explicitly pursing a strong liberal form of democracy where the protection of human rights and the rule of law are at the core, alongside procedures and structures that ensure that the will of the people is effectively expressed and is the basis for the legitimacy of government. As the jurisprudence of the Court develops, more practical manifestations of the above ideas will be established. The definable limits of a democratic society are in a process of continual change, requiring the Court to remain proactive and sensitive to the conditions within the societies of the region. It will also be important for the Court to ensure that it maintains the holistic approach to democracy as advocated by the OAS and not limit itself to the basic political processes and issues of democracy. If the Court is to assist the long-term maintenance of the democratic societies of the region, it cannot ignore socioeconomic realities or the position of minority and indigenous groups. First and foremost, however, the Court needs to actively foster a culture of human rights in societies where it has not existed. This is essential not only for the preservation of democracy over the long term but for the immediate concerns facing the democratization process of many states in the region.

European Court of Human Rights

While the Inter-American Court has been more concerned with establishing the structural requirements of democracy in order to ensure the effective promotion and protection of human rights, the European system faces a different set of circumstances. For much of its history the majority of members of the Council of Europe (COE) have been established democracies with relatively long democratic traditions, even if in the weakest sense of the term. The existence of democratic processes and structures has been a basic assumption in the development of the system for the promotion and protection of human rights. However, this assumption is now being challenged in two respects. On the one hand there exist the states formerly under communist rule that do not necessarily have extensive experience with democracy and are struggling to develop effective systems of democracy and human rights protection.[55] On the other there are the established democracies that are facing low levels of participation, apathy, problems with minority groups, government

centralization, and other circumstances that have created the need for a resurgence of democracy and human rights within these societies.[56] Both factors will have a substantial influence in how democracy is approached in the promotion and protection of human rights in the region.

Since its creation in 1949 the COE has placed the protection and promotion of democracy and human rights as its primary task and as the key for building European unity. The organization serves three basic functions: to protect and reinforce democratic pluralism and human rights, to seek common solutions to major societal problems of the member states, and to encourage a heightened sense of Europe's multicultural identity.[57] In the charter of the COE the member states reaffirm their devotion to the spiritual and moral values that are the common heritage of their peoples and the true source of individual freedom, political liberty, and the rule of law, principles that form the basis of genuine democracy. Article 3 of the statute establishes the criteria for membership, based on the assumption that a democratic system is in place, stating that all members "must accept the principles of the rule of law and the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms."[58] Article 8 stipulates that any member that has seriously violated the terms of Article 3 may be suspended from the work of the organization until it complies with Article 3 or it may have its membership revoked.

In 1993 the heads of state and governments of the COE held their first-ever summit in Vienna, where they recognized the importance of democracy, human rights, and the rule of law for the security and stability of Europe.[59] The assembled leaders saw the end of the cold war as "a historic opportunity" for peace and stability on the continent due to the widespread existence of democracy, human rights, the rule of law, and a common cultural heritage.[60] The summit marked a new purpose for the COE, to create "a Europe of democracy security" through reforming the ECHR; establishing legal commitments for the protection of minorities; combating racism, xenophobia, anti-Semitism, and intolerance; and by improving local and regional representation. In 1997 the COE held its second summit in Strasbourg, adopting a Final Declaration and Action Plan targeting the strengthening of human rights and pluralist democracy, emphasizing social cohesion and the essential role of education and culture. They also agreed to develop a program on education for democratic citizenship "with a view to promoting citizens' awareness of their rights and responsibilities in a democratic society." These summit declarations mark recognition by the political bodies of the COE that an effective democracy in the member states can no longer be an automatic assumption.

The primary legal framework for the protection and promotion of democracy and human rights rests with the European Convention on Human Rights and its Court.[61] The ECHR was adopted with the purpose of protecting against the revival of aggressive and repressive dictatorships by ensuring the enforcement of rights contained in the Universal Declaration of Human Rights (UDHR).[62] In the preamble states reaffirm their belief in human rights, which are seen as a foundation for

peace and justice and "are best maintained . . . by an effective political democracy." The rights and freedoms contained in the ECHR and its protocols deal primarily with civil and political rights, with some social rights included. Interpretation of the ECHR takes into account the UDHR, the aims of the COE, the need for effective representative democracy, and the acknowledgment of a common heritage among members with respect for the rule of law.[63]

The ECHR framework assumes the existence of democracy in a signatory state through the membership criteria of the COE. The ECHR itself contains no provision directly dealing with democracy, with obligations regarding voting being a later inclusion in Protocol 1. During the drafting of the ECHR there was disagreement as to whether there should be explicit protection of democratic structures and processes.[64] Some states favored such an inclusion, while others felt that it would be "inappropriate" to include provisions concerned with democratic institutions.[65] The Consultative Assembly, which was charged with drafting the ECHR, felt strongly about including provisions on democracy as a necessary means to give practical effect to the protection of rights, in the belief that the only way to ensure that rights are truly protected is through a democratic regime and democratic institutions.[66] In the end the assembly's proposals were rejected by the Committee of Ministers.

In the absence of direct mentions of democracy in the relevant instruments for the promotion and protection of human rights, the position of democracy in the ECHR occurs along much more subtle lines as an implicit understanding. The preamble of the ECHR does include an affirmation that the promotion and protection of human rights are best maintained through "an effective political democracy." Within the ECHR the term *democratic society* is used in Articles 8–11 as a determining factor for assessing the acceptability of limitations upon the exercise of those rights. The practice of the Court has been to use the idea of a "democratic society," as established through the ECHR, for the basis upon which the actions of governments are judged.[67] The Court works on the assumption that a democratic system is in place, which means there has been little in the way of examining the structures and processes of democracy but instead a concentration on assessing whether or not restrictions upon rights in particular cases are acceptable. Since the Court has not fully elaborated upon the structures and processes of democracy in a way similar to the Inter-American Court, the concept of democracy society is, in the view of some commentators, "a phrase heavy with uncertainty."[68]

Therefore, in examining the Court's approach to democracy it is difficult to discern what exactly a democratic society is, but we are able to determine what sorts of actions are permissible within it. The Court's view of a democratic society is flexible, for it recognizes that democracy among the member states can vary.[69] To accommodate the essential differences of the democratic societies of the member states there has developed the concept of "margin of appreciation," used by the Court to acknowledge the variations in the implementation of rights.[70] The Court's use and development of the margin of appreciation has been inconsistent and vague,

leading to questions over its proper place within the ECHR framework.[71] One trend that has emerged is that in issues of public importance the margin of appreciation allowed by the Court will be lower as opposed to matters of a more private nature, where the Court will allow a wider margin to the government.[72]

To a certain extent the margin of appreciation is a necessary element of the ECHR framework due to the level of human rights protection it has developed and the context in which violations occur. With established democratic governments there is the assumption that human rights are generally adhered to and any action taken to limit rights, as with assembly, expression, and so on, is justified since the elected representatives imposing the limitations possess a legitimate mandate from society. The Court has established that this does not mean that the will of the majority must always prevail over the interests of minority groupings; a balance between interests must be struck.[73] The margin of appreciation provides the Court with a legal tool allowing it to agree that the limitations upon certain human rights as defined by the government are necessary. The margin of appreciation also allows governments to use acceptable legal language before the Court to say that restrictions upon rights are acceptable and not contrary to the democratic mandate they have been given. The margin of appreciation acts as a rhetorical tool for democratic governments to justify their behavior; it is left to the Court to determine whether the behavior in question is appropriate for a "democratic society."[74]

The Court has maintained that the ECHR is "an instrument designed to maintain and promote the ideals and values of a democratic society"[75] and that "[d]emocracy is without doubt a fundamental feature of the European public order."[76] The belief of democracy underwriting the entire ECHR system has been explained on the basis that "[a]ccording to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by 'an effective political democracy.' "[77] The Court's assumption of the existence of democracy appears to be based on a "European model" of democracy, which would be some form of representative system of government with regular elections combined with structures for the rule of law and the effective protection of human rights. However, this remains undefined in clear terms by the Court.

The Court has provided some discussion of one particular structural issue of democracy in its examinations of Article 3 of Protocol 1, which covers the obligation on states to hold free elections to "ensure the free expression of the opinion of the people in the choice of the legislature." These discussions demonstrate that overall the Court takes a fairly narrow view of democracy as limited to the political aspects, mainly voting.[78] The Court's view is that while the right to participate is fundamental, it is not absolute, allowing for a wide margin of appreciation that leaves much of the content of the right to be determined by the government.[79] The Court has stated that Article 3 of Protocol 1 does create an obligation "of adoption by the states of positive measures to 'hold' democratic elections."[80] However, the obligation of elections only applies to the national legislature of a state, with elections at lower

levels of government to be determined by the constitutional structure of the state. The application of Article 3 is to occur in "conditions which will ensure the free expression of opinion." The Court has declared this to include "the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election."[81] But this does not mean "that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory."[82]

Under Article 3 favorable legislation may be enacted that allows for minority groups to be represented in government.[83] The Court has made it clear that a democratic society does not mean that the will of the majority will automatically prevail over the minority.[84] The Court has expressed the need to take into account "pluralism, tolerance and broadmindedness without which there is no 'democratic society.' "[85] This was in the context of freedom of expression, with the same idea being applied to the freedoms of association and assembly and religious freedom.[86] The Court has continually referred to the belief that the "free expression of the people" remains the core concept of democracy as well as "one of the essential foundations" of a democratic society.[87]

The Court has described further aspects of a democratic society as consisting of the rule of law as a fundamental principle, the need for appropriate limits to be placed upon security and police forces, and the independence of the judiciary to allow an individual recourse in cases of a violation.[88] Furthermore, access to impartial courts is essential for a democratic society.[89] The press has a vital role to play in the democratic society as a "means of discovering and forming an opinion of the ideas and attitudes of political leaders."[90] And political parties constitute an "essential role in ensuring pluralism and the proper functioning of democracy" as they make "an irreplaceable contribution to political debate."[91] In these statements it clear the Court is working from the assumption that an effective democracy is in place, so there is no need to elaborate upon basic structures and processes.[92]

In the absence of direct protection for democracy the Court has made it clear in its case law that the actions of government are to be judged on the basis of the European model of a democratic society as it is determined by the Court. As stated above the Court views democracy as a fundamental feature of the European public order and the ECHR has the purpose of upholding democracy.[93] Therefore the Court has emphasized that the rights of the ECHR are not be "theoretical or illusory, but practical and effective."[94] It has gone on to say that the ECHR is a living instrument that must be interpreted in the light of present-day conditions recognizing the dynamic nature of democracy.[95] The Court has explained that "[d]emocracy . . . appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[96] But the Court has not ever given a full impression as to what this limited political model of democracy consists of. It is noticeable that the Court has not made any reference to the legitimacy of a democratic system and its grounding in popular sovereignty.[97]

The Court has perhaps not been as expressive as its Inter-American counterpart in defining and elaborating upon the basic structures and processes of a democracy, but nonetheless a number of fundamental characteristics emerge. Perhaps the main reason for the absence of detailed discussion of democracy has been the lack of a workable system of advisory opinions under the ECHR,which has allowed the Inter-American Court to express its views about democracy at length.[98] Given the fact that the European Court is going to be faced with more cases involving societies whose democratic credentials are weak, the Court will need to become more expressive about the basic structures and processes of democracy in the ECHR system.[99] A number of states in Eastern Europe have shown themselves to have illiberal forms of democracy, and other institutions of the COE are making efforts to address this.[100] The Court's lack of guidance on the basic structures and processes of democracy means that it will be able to have only limited input in addressing these situations.[101]

Concluding Views

Both the Inter-American and European Courts have made it clear that democracy is the only form of ordering society for the effective promotion and protection of human rights. They have also expressed the view that an effective democracy relies upon the protection of a variety of human rights, making a clear stand in favor of liberal models of democracy. Each court has come to this conclusion via a different means, given the context of the regions within which they exist. The approach of each court to democracy has been driven by the events in its respective region, and the future development of democracy and human rights by the courts will be in response to the issues faced in each region. The ability of either court to make a substantial difference is limited. The importance of their authoritative legal statements is that other bodies within their respective institutions that are also concerned with the promotion and protection of human rights and democracy are able to use the position of the respective courts in support of their work.[102] Together, the different institutions within each system are able to undertake significant measures for the promotion and protection of democracy and human rights in their regions.

A 1995 report by the COE stated that "[t]he upheavals in central and eastern Europe have triggered both political/military and economic/social reorganization which has not yet produced new, clearly defined structures."[103] To date the European Court has not explicitly dealt with the structures and processes of democracy in a fashion similar to the Inter-American Court. The recent expansion of membership of the COE has impacted the fundamental premises upon which the promotion and protection of human rights has been carried out. The European Court's assumption of democracy as a self-evident and preexisting feature of the member states, making it necessary only to determine to what extent the restrictions on rights are appropriate to a democratic society, is becoming difficult to maintain. This point has been confirmed by the secretary general of the COE in a speech wherein he stated that membership of the COE does not confirm the existence of democracy within a

state, only an intention and commitment to achieving democracy.[104] The decisions of the European Court as to how rights may be exercised in particular circumstances within the framework of a democratic society will be useful for many of the newer member states but will be ineffective in situations where the basic structures of a democratic society are not in place.[105] Even though regular elections may exist in the member states of the COE, this does not automatically mean other aspects of democracy are firmly in place, such as the rule of law or a separation of powers. Furthermore, many of the newer member states face widespread economic difficulties, which means that the benefits of COE membership and protection through the ECHR have not been fully realized by large sections of the population. The European Court will also need to address socioeconomic issues to a greater degree to ensure the existence of effective democracy in the region.[106]

For the Inter-American Court, establishing the fundamentals of democracy has been at the forefront of its efforts for the promotion and protection of human rights in the region. In this regard its task is far from finished, and it cannot afford the luxury previously held by the European Court in working from the assumption that a democratic society actually exists in a member state. Recent attempted coups in Haiti, Peru, Guatemala, and Paraguay and the general instability of a state like Columbia demonstrate just how fragile democracy is in the region. The political developments of the region continue to demonstrate a tendency for strong centralized authoritarian forms of rule that sometimes have the popular backing of society.[107] At present democratically elected governments exercise a great deal of personal control within a democratic framework, often without significant political impediments, checks and balances, or other regulatory supervision.[108] This instability is exacerbated because the judiciary does not remain wholly independent when the individual leaders attempt to ensure that judges follow their way of thinking. The consolidation of democracy along with the protection of human rights and social and economic development requires a strong, independent, reliable, and efficient judiciary—an area where much of the region is weak.[109] Presently the Inter-American Court faces a caseload which too often involves severe cases of widespread human rights abuses. In this context the ability of the Court to further elaborate upon the extent and limits of rights within a democratic society is going to be limited.

In Europe and the Americas it has been consistently held that the only acceptable form of government is a democracy, which includes effective protection for human rights. This belief is beginning to take hold at the international level, with UN human rights bodies starting to take a similar line. For many the conclusion that democracy is the best means of ensuring human rights is self-evident. However, considering that there is no one model of democracy for every society and that the appearance of democracy through elections does not translate into real democracy on the ground, there is a role for human rights protection bodies in addressing the structures and processes of a democratic system. From the beginning the Inter-American Court

has explained how these structures and processes are to work. The European Court has worked from the other direction by explaining how rights are to be exercised in a democracy and highlighting those rights that are very important to a democratic society. The work of both bodies demonstrates that this is not a clear-cut or self-evident area, but one that needs constant vigilance.

Notes

1. For example, see Thomas Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86 (1992): 46; Christina Cerna, "Universal Democracy: An International Legal Right or the Pipe Dream of the West?" *New York University Journal of International Law and Politics* 27 (1995): 290; Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84 (1990): 868; Anne-Marie Slaugther, "Toward an Age of Liberal Nations," *Harvard International Law Journal* 33 (1992): 394; Anne-Marie Slaugther, "International Law in a World of Liberal States," *European Journal of International Law* 6 (1995): 514.
2. See Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76 (1997): 22.
3. See Zakaria, " Rise of Illiberal Democracy," 28, for examples.
4. Zakaria, " Rise of Illiberal Democracy," 24. Larry Diamond describes it as "fat" and "thin" democracy in "Democracy, Fat and Thin," *Encyclopedia of Democratic Thought*, eds. Paul Barry Clarke and Joe Foweraker (New York: Routledge, 2001), 149. For a critique of international law's failure in general to look beyond elections, see Richard Burchill, "The Developing International Law of Democracy," *Modern Law Review* 64 (January 2001): 123–34.
5. Jorge Müller, "Fundamental Rights in Democracy," *Human Rights Law Journal* 4 (1983): 131–33.
6. Allan Rosas, "Epilogue," *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach,* eds. Theodore Orlin, Allan Rosas, and Martin Sheinin (Turku/Åbo: Åbo Akademi University Institute for Human Rights, 2000), 295.
7. It has been held that United Nations treaties on human rights are "ideologically neutral." See UN Committee on Economic, Social, and Cultural Rights, General Comment no. 3 (1990), UN doc. E/1991/23; Henry Steiner, "Political Participation as a Human Right," *Harvard Human Rights Yearbook* 1 (1988): 87–88. But see Manfred Nowak, CCPR *Commentary* (Kehl: N. P. Engel, 1993), at 441, who suggests that even though the ICCPR may be ideologically neutral, anything not based on democratic governance would be a violation of the treaty—a difficult point to support given the fact that the Human Rights Committee never made any declarations of this nature.
8. Democracy as an international legal principle is closely related to international human rights law but also extends to other areas of international law; see Burchill, "Developing International Law of Democracy." For the significance of democracy in supporting human rights, see, for example, "Concluding Observations of the Human Rights Committee: Bolivia" (1 April 1997), UN doc. CCPR/C/79 add.74, paras. 4–6; "Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Dominican Republic" (6 December 1996), UN doc. E/C.12/1 add.6, para. 9.
9. See Zakaria, "Rise of Illiberal Democracy," 28–29.
10. For a historical view of the Inter-American system, see J. B. Scott, *The International Conferences of American States, 1889–1928* (Washington DC: Inter-American Institute, 1933). For an examination of the more recent past, see *Beyond Sovereignty: Collectively Defending Democracy in the Americas*, ed. Tom Farer (Baltimore: Johns Hopkins University Press, 1996).
11. James Thérien, Michel Fortmann, and Guy Gosselin, "The Organization of American States: Restructuring Inter-American Multilateralism," *Global Governance* 2 (1996): 215, 219.
12. Article 1, *Statute of the Inter-American Court on Human Rights* (1980), reprinted in *Basic Docu-*

ments Pertaining to Human Rights in the Inter-American System, OEA/ser.L.V/II.82, doc. 6, rev. 1, at 133 (1992).

13. *Re Viviana Gallardo et al.,* ser. A, no. G 101/81 (1984), decision of 13 November 1981, para. 13. Decisions and opinions of the Inter-American Court can be retrieved at *www.corteidh.or.cr* [15 October 2002].
14. *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, advisory opinion, OC-1/82 (24 September 1982), Inter-Am.Ct.H.R., ser. A, no.1 (1982), para. 21.
15. OAS Charter, preamble, para. 1.
16. OAS Charter, preamble, paras. 3–4.
17. See Hugo Caminos, "The Role of the Organization of American States in the Promotion and Protection of Democratic Governance," *Collected Courses of The Hague Academy of International Law* 273 (1998): 103.
18. *Interpretation of the American Declaration of the Rights of Man within the Framework of Article 64 of the American Convention on Human Rights*, advisory opinion, OC-10/89 (14 July 1989), Inter-Am.Ct.H.R., ser. A, no. 10 (1989).
19. *Interpretation of the American Declaration of the Rights of Man*, paras. 37–38.
20. *Interpretation of the American Declaration of the Rights of Man*, para. 47.
21. ACHR Preamble, para. 1.
22. V. McComie, "Practical Considerations on Human Rights within the OAS Context," *American University Journal of International Law and Policy* 4 (1989): 276.
23. Protocol of San Salvador, preamble, para. 2.
24. Protocol of San Salvador, preamble, para. 7.
25. Scott Davidson, *The Inter-American Court of Human Rights* (Aldershot: Dartmouth, 1992), 184–85; *The Word "Laws" in Article 30 of the American Convention on Human Rights*, advisory opinion, OC-6/86 (9 May 1986), Inter-Am.Ct.H.R, ser. A, no. 6 (1986), para. 8.
26. *Habeas Corpus in Emergency Situations*, advisory opinion, OC-8/87 (30 January 1987), Inter-Am.Ct.H.R., ser. A, no. 8 (1987), para. 26.
27. *The Word "Laws,"* para. 8.
28. *The Word "Laws,"* para. 27.
29. *The Word "Laws,"* para. 22.
30. *The Word "Laws,"* para. 32.
31. *The Word "Laws,"* paras. 29–30.
32. *The Word "Laws,"* para. 34.
33. *Habeas Corpus in Emergency Situations*, para. 20.
34. *Habeas Corpus in Emergency Situations*, para. 30.
35. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights)*, advisory opinion, OC-9/87 (6 October 1987), Inter-Am.Ct.H.R., ser. A, no. 9 (1987), para. 24.
36. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, advisory opinion, OC-4/84 (19 January 1984), Inter-Am.Ct.H.R., ser. A, no. 4 (1984).
37. *Proposed Amendments*, para. 55.
38. *Proposed Amendments*, para. 58.
39. *Proposed Amendments*, para. 57.
40. *Proposed Amendments*, para. 56.
41. Ser. A, no. 6 (1968).
42. *Proposed Amendments,* para. 56. See also Judge Piza's dissenting opinion at para. 12.
43. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, advisory opinion, OC-5/85 (13 November 1985), Inter-Am.Ct.H.R., ser. A, no.5, para. 41.
44. *Compulsory Membership*, para. 42.
45. *Compulsory Membership*, para. 69.

46. *Compulsory Membership*, para. 70.
47. *Ivcher Brostein Case*, no. 74, judgment of 6 February 2001.
48. *Ivcher Brostein*, paras. 148–51. In *The Last Temptation of Christ Case*, no. 73, judgment of 5 February 2001, the Court has explained that freedom of expression also includes a right to be sufficiently informed, at para. 68.
49. *Velasquez Rodriguez Case* (Honduras) (29 July 1988), Inter-Am.Ct.H.R., ser. C, no. 4 (1988), para. 154.
50. *Godínez Cruz Case* (Honduras) (20 January 1989), Inter-Am.Ct.H.R., ser. C, no. 5 (1989), para. 150.
51. For a recent pronouncement see *Ivcher Brostein*, para. 135.
52. *Durand and Ugarte Case*, no. 68, judgment of 16 August 2000. In the *Castillo Petruzzi et al. Case*, no. 52, judgment of 30 May 1999, the concurring opinion of Judge de Rouxrenfigo discusses how the activities of military courts in society can seriously undermine the basis of democracy and the protection of human rights.
53. *The Word "Laws,"* para. 20.
54. *Compulsory Membership*, para. 44.
55. See Zakaria, "Rise of Illiberal Democracy," 35.
56. See Council of Europe, *Disillusionment with Democracy: Political Parties, Participation, and Non-Participation in Democratic Institutions of Europe* (Strasbourg: COE, 1994).
57. Council of Europe, *The Challenges of a Greater Europe: The Council of Europe and Democratic Security* (Strasbourg: COE, 1996), 29.
58. This has been interpreted to include elections at reasonable intervals with secret ballot and universal suffrage, sovereign parliaments, and free political parties. See Parliamentary Assembly Resolution (800), "Principles of Democracy" (1983).
59. *Vienna Declaration and Programme of Action* (1993).
60. *Vienna Declaration and Programme of Action*, para. 2.
61. The enforcement mechanism of the ECHR was substantially revised with the adoption of Protocol 11 to the ECHR (1999), which eliminated the Commission on Human Rights.
62. A. Robertson and J. Merrills, *Human Rights in the World*, 3d ed. (Manchester: Manchester University Press, 1989), 82.
63. *Kjeldsen, Bush Madsen, and Pedersen v. Denmark,* ser. A, no. 23 (1976), para. 53. The decisions of the European Court of Human Rights may be retrieved at *http://hudoc.echr.coe.int/* [15 October 2002].
64. Susan Marks, "The European Convention on Human Rights and Its 'Democratic Society,'" *British Yearbook of International Law* 66 (1996): 221–24.
65. Council of Europe, *Collected Edition of the "Travaux Preparatoires" of the European Convention on Human Rights*, vol. 5 (The Hague: Martinus Nijhoff, 1979), 60, 70.
66. Council of Europe, *Collected Edition of the "Travaux Preparatoires,"* 290.
67. P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d ed. (The Hague: Kluwer, 1998), 772–73.
68. David Harris, Michael O'Boyle, and Colin Warbrick, *The Law of the European Convention on Human Rights* (London: Sweet and Maxwell, 1995), 291. For a further discussion, see A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon, 1993).
69. The Court recognized this in *Mathieu-Mohin and Clerfayt v. Belgium,* ser. A, no. 113 (1987): "[A]ny electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another" (para. 54).
70. See "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice," *Human Rights Law Journal* 19 (1998).

71. See N. Lavender, "The Problem of the Margin of Appreciation," *European Human Rights Law Review* 2 (1997): 380.
72. *Handyside v. UK*, ser. A, no. 24 (1979–80), para. 48. Also P. Mahoney, "Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining some Recent Judgments," *European Human Rights Law Review* 2 (1997): 379; and P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism," *Human Rights Law Journal* 19 (1998): 3.
73. See the Court's opinion in *Young, James, and Webster*, ser. A, no. 44 (1981), para. 63. Also Marks, "European Convention," 218.
74. *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52. Also Harris, O'Boyle, and Warbrick, *Law of the European Convention*, 295–96.
75. *Kjeldsen, Busk Madsen, and Pedersen v. Denmark*, para. 53. The Court's translation of the original French text is found in *Soering v. UK*, ser. A, no. 161 (1989), para. 87.
76. *United Communist Party of Turkey and Others v. Turkey*, European Court Reports, 1998–1, para. 45.
77. *Mathieu-Mohin and Clerfayt v. Belgium*, para. 47.
78. In the view of some commentators, this has resulted in a rather thin and weak view of democracy within the ECHR system. See Marks, "European Convention," 237.
79. *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52. The European Commission on Human Rights expressed that voting is not the only means of political participation available to a society but did not elaborate further. See *Movement for Democratic Kingdom v. Bulgaria*, no. 27608/95 (1995).
80. *Mathieu-Mohin and Clerfayt v. Belgium*, para. 50.
81. See *Bowman v. UK*, European Court Reports, 1998–1, para. 42.
82. *Mathieu-Mohin and Clerfayt v. Belgium*, para. 54.
83. *Liberal Party v. UK*, European Commission, no. 8765/79 (1982); *Lindsay and Others v. UK*, European Commission, no. 8364/78.
84. See *Young, James, and Webster*; *Johnston and Others v. Ireland,* ser. A, no. 112 (1986). In the separate opinion of Judge De Meyer—"democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of the dominant position" (para. 5).
85. *Handyside v. UK*, para. 49; *Jersild v. Denmark*, ser. A, no. 298 (1994), para. 37.
86. For freedom of association and assembly see *Plattfrom "Arzte für das Leben,"* ser. A, no. 139 (1988), para. 32. For religious freedom see *Kokkinakis v. Greece,* ser. A, no. 260-A (1993), para. 31; and *Buscarini and Others v. San Marino*, no. 24645/94, judgment of 18 February 1999, para. 34.
87. See J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1993), 127–28, for the first two quotations; for the third see *Handyside v. UK*, para. 49.
88. *Klass and Others v. Germany*, ser. A, no. 28 (1978), paras. 42, 55.
89. *Castillo Algar v. Spain*, no. 28194/95, judgment of 28 October 1998, para. 45; and *Airey v. Ireland*, ser. A, no. 32 (1979), para. 24.
90. *Lingens v. Austria*, ser. A, no. 103 (1986), para. 42; and *Sunday Times v. UK*, ser. A, no. 30 (1979–80), para. 65.
91. The quotations are from *United Communist Party v. Turkey*, para. 43; and *Lingens v. Austria*, para. 42, respectively.
92. This is demonstrated in a number of cases concerning Turkey. See *Gunes v. Turkey*, no. 31893/96, judgment of 25 September 2001, paras. 44–45, which concerned martial law courts set up to deal with a declared state of emergency. The Court stated it was not its task to determine if the courts had been legitimately established or to review their practice; instead their task was limited to looking at fair trial rights in the particular situation.
93. *Kjeldsen, Busk Madsen, and Pedersen v. Denmark*, para. 53.

94. *United Communist Party v. Turkey*, para. 33.
95. *Loizidou v. Turkey*, ser. A, no. 310 (1995), para. 71.
96. *United Communist Party v. Turkey*, para. 45.
97. See the position of the Inter-American Court, note 31 above.
98. Article 47 of the ECHR provides that advisory opinions can only be requested by the Committee of Ministers of the COE and cannot deal with the main rights covered by the ECHR. On the deficiencies of a purely reactive and ex post facto approach of human rights courts, see Conor Gearty, "Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal," *Northern Ireland Legal Quarterly* 51 (2000): 383.
99. For a differing interpretation on the Court's treatment of democracy, see Alistair Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy," *Public Law* (1999): 703. For a critique of Mowbray's approach see Gearty, "Democracy and Human Rights."
100. See the work of the Parliamentary Assembly of the COE with regard to the honoring of obligations and commitments by member states, notably Russia, Ukraine, and Turkey, retrievable at *www.stars.coe.fr*.
101. Gearty, "Democracy and Human Rights," at 390, believes that the Court generally has been very wary of addressing issues of democratic structure and process in the member states.
102. This is perhaps more obvious in the Inter-American system. See, for example, *Annual Report of the Inter-American Commission on Human Rights 2000* (16 April 2001), OEA/ser./L/V/II.111, doc. 20 rev., para. 20; *Third Report on the Situation of Human Rights in Paraguay* (9 March 2001), OEA/ser./L/V/II.110, doc. 52. Gearty, at 382–85, (see "Democracy and Human Rights") notes that in the ECHR system states that are on the edges of acceptable liberal democracy, such as Turkey and Russia, demonstrate the ability of the European Court to make a difference, as in Turkey, but also the limitations of the Court, as in Russia.
103. Council of Europe, *Bridging the Gap: The Social Dimension of the New Democracies* (Strasbourg: COE, 1995), 9.
104. Statement in L. Leszczyski, "A General Look at the Redefinition of the Protection of Human Rights in Eastern and Central Europe," *East European Human Rights Review* 1 (1995): 6–7.
105. See Bill Bowring, "Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?" *European Human Rights Law Review* 2 (1997): 628.
106. Statements by A. Gusenbauer, member of the Council of Europe's Parliamentary Assembly, in Council of Europe, *The Social Charter for the 21st Century: Colloquy Organised by the Secretariat of the Council of Europe, 14–16 May 1997* (Strasbourg: COE, 1998), 15.
107. Carlos Nino, *The Ethics of Human Rights* (Oxford: Clarendon, 1993), 640–44; C. McClintoch, "Peru's Fujimori: A Caudillo Derails Democracy," *World Affairs* 92 (1993): 112–19.
108. See C. Larkins, "The Judiciary and Delegative Democracy in Argentina," *Comparative Politics* 30 (1998): 423–27.
109. See *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. I. Stotzky (Boulder: Westview, 1993).

Africa and Asia

6 African Women, Traditions, and Human Rights

A CRITICAL ANALYSIS OF CONTEMPORARY "UNIVERSAL" DISCOURSES AND APPROACHES

Corinne Packer

Harmful traditional practices performed on or expected of African women have received global attention because of highly publicized attempts by health and women's rights activists within and outside Africa to challenge these practices. The subject has since made it to the dining tables and living rooms of much of the Western and media-rich world. Over the span of just two weeks, media coverage of the International Conference on Population and Development, held in Cairo in 1994, made the practice of female genital mutilation known the world over. Viewers of CNN followed scenes of a young, happy, and flittering girl as she was led into a physician's office in Egypt without knowledge of what was to come. We then witnessed the girl being bound hand to foot, her squirming body held tightly by several adults against a wall, exposing her genitalia so that the physician could perform their excision. No anaesthetic had been given. Her primal screams of pain, interjected only with pleas to stop and shouts of "*Why?*" shot shivers down our spines. Most of us could not even bear to watch the entire footage. Indeed, we had been warned that what we were about to see "might be disturbing."

The well-documented HIV/AIDS pandemic in the African region has also raised our awareness of risky behaviors and practices condoned in the region, such as unprotected sex and the early marriage of girls. In both cases African women have been portrayed as slaves to their culture and subordinate to their men, unable to act contrary to traditional behaviors and practices.

Spurred by such coverage over the last two decades, Western women's rights activists have taken up the challenge with fervor, together with their African counterparts, to end harmful traditional practices in Africa. Global and regional fora have been held and instruments adopted on human rights and the status of women (in general) and harmful traditional practices (in particular). All conclude that the most effective and decisive way to modify or put an end to harmful traditional practices is to change the social, cultural, and religious attitudes, norms, and beliefs that fundamentally maintain them.[1] In short, the message is that African culture must change. One of the strategies used to promote and effectuate such a change has been a discourse promoting the protection and enjoyment of human rights for African women.

Although the campaign to end harmful traditional practices has been under way for over two decades, the number of successful challenges has been relatively scant

and weak. The story of the Sabini people of Uganda serves as a good wake-up call in this regard. After receiving extensive health and human rights education initiated by a Western-led NGO, the Sabini decided to replace the practice of female circumcision with an alternative ritual of gift-giving. Their success was heralded worldwide as a demonstration of what health and human rights discourses could achieve. A few short years thereafter, however, the practice came back into fashion. The NGO had left, the momentum had dissipated, and pressure to end the practice was no longer strong. Most of the girls who had been spared the operation during the period of alternative ritual were placed among the new initiates.[2]

Africans have become arguably more defensive of their traditions, both good and bad. This should not be too surprising considering the language and tone used in Western criticism of these and the negative press their traditions have received. The lead-up to the World Conference on Racism, Racial Discrimination, Xenophobia, and Other Related Intolerance, along with the small flurry of literature on postcolonial African identities, fueled a discourse and reaffirmation of all things Africana: African spiritualism, African values, and African traditions.[3] The formation of a "new and improved" organization for the region calling for the strengthening of African values has similarly contributed to this reaffirmation.[4]

The challenge of African traditions on the basis of universal human rights equates to a challenge of African culture. As such it a true test of the cross-cultural application of these rights to a specific, and often marginalized, environment (underdeveloped Africa), group (women), and subject (local customs). By focusing on this environment, group, and subject, it is my intention in this chapter to demonstrate that adaptations must be made in:

- some of the language and concepts of the human rights discourse;
- the way in which we expect African women to evaluate and claim their rights;
- the way in which we expect human rights to be promoted and protected within Africa.

Some of the problems with current strategies to eradicate harmful traditional practices through human rights are also considered and suggestions made for alternatives.

What Are Harmful Traditional Practices?

There is no official definition of a *harmful traditional practice*. It is therefore not surprising that different organizations and experts acknowledge different practices as falling under this term of reference.[5] Female genital mutilation has been consistently acknowledged as a harmful traditional practice and is also the most prevalent traditional practice throughout the African Continent.[6] Its practice has been reported in at least twenty-seven African countries, with the highest incidences occurring in Djibouti, Ethiopia, Sierra Leone, Somalia, and the Sudan.[7] The operation varies

from place to place, ranging from a clitoridectomy (partial or total removal of the clitoris) to an infibulation (where the clitoris, the labia minora, and the inner surface of the labia majora are completely removed). The reasons why it is performed are many but are principally based on arguments of health and hygiene, physical necessity, social necessity, and religious proscriptions.[8] Aside from questioning the need and reasons for this practice, critics also condemn the instruments used (razors, broken glass, and thorns) and manner in which it is commonly carried out (with little concern for hygiene, anesthetic, or consent) as being particularly violent and inhumane.

Other documented practices in the African region that I advance as qualifying as potentially harmful to health and traditional, but which I will not define or elaborate at length in this chapter, are:

- early pregnancy (related to early marriage);
- incisions in pregnant women;
- some traditional birthing practices;
- dietary taboos during pregnancy and lactation;
- some widowhood practices;
- religious bondage;
- abduction for purposes of rape, impregnation, and marriage.[9]

These practices are considered "traditional" because they are maintained from one generation to the next and because "tradition" or "custom" is often cited as a reason, usually together with others, why they must be upheld.

Problem Areas in the Language and Concepts Forming the Discourse

Human rights activists have established that harmful traditional practices are manifestations of gender discrimination and inequality and reinforce the poor status and health of women.[10] In 1992 the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) recognized gender-based violence as a form of discrimination within the meaning of Article 1 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (henceforth the "Women's Convention"). This form of discrimination was acknowledged in paragraph 7 to seriously inhibit, impair, or nullify a woman's ability to enjoy other rights and freedoms.[11] The 1993 UN Declaration on Violence against Women followed up on this reasoning and included harmful traditional practices within its definition of violence again women.[12] Since her preliminary report, the UN Special Rapporteur on Violence against Women has been singularly influential in solidifying our understanding of and approach to all harmful traditional practices as forms of gender-based violence.[13] A draft regional declaration maintains the focus on harmful traditional practices as forms of gender violence. Indeed, the 1997 Addis Ababa (African) Declaration on Violence against Women is deceptive in its title, given that it mostly emphasizes harmful traditional practices, female genital mutilation in

particular. The declaration was the result of a joint effort between the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (the largest and best-known NGO working on the subject across Africa) and various United Nations agencies.[14] It remains to be adopted by the African Union.

The direct and indirect claims conveyed by the dominant human rights discourse on harmful traditional practices have been that:

- harmful traditional practices only originate from and occur in non-Western (developing) countries, especially African and Asian;
- all harmful practices are principally traditional;
- all harmful traditional practices represent a form of violence;
- all harmful traditional practices are directed at women.

In the following sections I address some of the questionable elements of each of these claims.

Harmful Traditional Practices as Existing Only in Non-Western Countries

While not necessarily intending to do so, the international human rights campaign against female genital mutilation and other harmful practices has taken on a culturally imperialist tone simply by acknowledging all too infrequently that such practices can and do occur outside of Africa and Asia. To date all the harmful traditional practices formally recognized by independent experts and international fora—child marriages, bride burning, foot binding, severe widowhood practices, female infanticide, polygamy, harmful taboos in child delivery and nutrition during pregnancy—take place only in African and Asian societies. The facts that female genital mutilation (arguably among the most violent and harmful of traditional practices) is by far the most widely studied and criticized traditional practice and is most common in Africa further create the illusion that harmful traditional practices are peculiar to Africa and the African psyche.[15] Effectively, the image formed by such a message is one of Africa as a violent society where women are prey to traditions formulated by and in the interests of men.

As a means of lashing out against this tide of cultural criticism, African women (including, perhaps especially, those actively campaigning to eradicate harmful customs and practices in Africa) are now responding defensively. Increasingly, non-Africans working to end harmful traditional practices in Africa are challenged by Africans, even those sensitive to the issues and active in campaigns to end these practices, to explain their authority and motives.[16] "Who are you to say such practices are bad and that they should be banned?" "What do you know about the daily realities of African women?" These are valid questions that require honest answers.[17] Some Africans have further retorted that harmful practices are also widespread in Western societies. Presumably, they rightfully argue, neither the subjugation of women nor harmful traditional practices are phenomena particular to Africa or the developing world. Some have formed their own lists of harmful traditional practices particular

to Western societies. Examples include cosmetic surgeries (such as breast augmentations, face-lifts, and liposuction); eating disorders (such as anorexia nervosa and bulimia); tattooing, piercing, and even the wearing of high heels.[18] However, one may easily argue that girls and women in the West undergo these practices as a matter of free choice. The issue of consent within the discussion of harmful traditional practices indeed merits attention and is therefore addressed further below.

Tradition as the Culprit

Admittedly, the practices listed above as common in the West are not necessarily all "traditional," nor are they necessarily all "practices" for that matter. But this holds true for a number of well-documented harmful traditional practices. Female infanticide (cited in numerous human rights declarations as a harmful traditional practice), for instance, is the tragic and highly regrettable outcome of a societal norm that devalues the girl child. Those who commit infanticide do so with great shame and in secrecy. It is not a "tradition." A "tradition" connotes that such a practice is long-standing, habitual, repeated, and handed down from one generation to another. Referring to female infanticide as a "tradition" is a scathing condemnation of the population where it occurs.

It also appears that the term *traditional* has come to have a pejorative meaning when applied to cultural practices: "harmful *traditional* practices" suggests something worse than "harmful practices." Whether intended or not, the term is judgmental.[19] In attacking tradition we are, in effect, condemning the ceremonies, customs, and indeed the very cultural fabric of a community. As a result, Western condemnation of and calls for changes in these practices will always draw accusations of cultural piousness and interference. Bearing this in mind, we must take extra care to employ the term correctly and acknowledge that not *all* the recognized harmful traditional practices are truly *traditional* or, indeed, a *practice*.

Nondifferentiation between "Violence" and "Harm"

A good number of harmful traditional practices do consist of gender-based violence. But there are a number of others that cannot, and should not, be construed as violence against women. Let us take, for instance, the practice of early marriage.[20] This practice often seriously diminishes a young woman's full potential and development as a human being. It commonly results in a shortened period of education and an early initiation into the burdens of domestic life. In short, it is a clear manifestation of gender discrimination. One element of "harm" enters into the equation when early marriage results in early pregnancy and its attendant physical risks. There is also a potential of psychological harm arising from early marriage in that the young bride may find herself in a low bargaining position within the couple and her extended family. But violence does not have a direct correlation with early marriage, beyond the fact that some girls may suffer physical abuse by their older, dominant husbands and that such abuse is often socially condoned. With this understanding,

to say that early marriage in Africa equates to gender-based violence is a highly contentious statement.

Consider another example—the practice of dietary taboos (nutritional restrictions) in pregnancy.[21] Is this practice truly a form of *violence*? In fact, there is very little sociocultural research on why this practice has come to exist and become embedded into the traditions of a community. Yet when reasoned, it is more than likely that this practice—usually involving the restricted consumption of eggs, chicken, and other sources of essential protein and iron during pregnancy—arose from something other than an attempt to place women in submission or to cause them harm. More than likely, incidents of food poisoning from these foods caused a myth to be created around their consumption during pregnancy, where the life of a fetus was threatened by food poisoning. This belief may have eventually been transformed into a traditional practice.[22]

HARMFUL TRADITIONAL PRACTICES AS A UNIGENDER ISSUE

Another indirect claim conveyed in the human rights campaign against harmful traditional practices is that only women are the victims of such practices. Traditional practices harmful to men, such as circumcision[23] and scarification (usually performed as a boy's rite of passage at puberty) among some peoples, are very rarely acknowledged in human rights discussions on such practices. The question that should be asked is whether these practices also constitute forms of gender-based violence—this time the gender being male? In failing to formally recognize that men also undergo harmful traditional practices and suffer violence, we are in fact acting in the very manner we are criticizing: that is, we are discriminating. The response of many feminists to this argument is that if we place traditional practices harmful to women on a par with those harmful to men, we are minimizing the systemic and socialized discrimination against women in Africa and its serious effects on their lives. But the two need not be mutually exclusive in the discourse of human rights. The practice of male circumcision among the Xhosa can, and should be, framed as a violation of a man's human rights to health, freedom from torture and cruel and inhuman treatment, and freedom of belief. This does not diminish the severity and magnitude of the violations that women-specific harmful traditional practices, and the broader discrimination on which they are based, represent. As an alternative, the campaign against harmful traditions may be better approached from an "egalitarian" perspective in the context of sub-Saharan Africa.

Indeed, the egalitarian approach would better serve most human rights campaigns on most subjects.[24] There are reasons, however, why the egalitarian approach is particularly suited to the African context. These are cultural sensitivity and strategy. In addressing harmful traditional practices from a broad perspective of gender discrimination and violence, an entire social system is condemned with African men (including spiritual, community, and political leaders) marked as the oppressors of women and advocates of harmful traditional practices. Such an approach has nu-

merous fault lines starting with some incorrect premises. Aside from all harmful traditions being incorrectly thrown into the basket of violence, research has also shown that women are equally—and in some cases more forcefully—the defenders of these harmful traditions. The response by some feminists to this statement is that these women are unaware of the extent to which they have been socialized into accepting gender violence as the norm.[25] The proliferation of African feminist thought has responded in various ways to this counterstatement. Some accept the argument, but many others take offense at Western feminists and human rights campaigners, arguing that they do not need to be rescued by such feminists applying theoretical paradigms foreign to African society. As remarked by one such African feminist, "we are not collectively sitting about in bondage waiting for other people to lift our veils or keep the knives away from between our legs."[26]

In short, the approach that the current human rights campaign against traditional practices has embarked upon risks being construed as culturally paternalistic and strongly antagonistic, fueling a largely unsought and unsupported battle of the sexes in Africa. While this approach may work in some contexts, it has yet to prove successful in the African setting, where women often do not have access to traditional systems of power and thereby lack the force to push through change.

Problem Areas in the Application of the Universal to the Cultural

For the sake of brevity, let us accept and begin from the position that human rights, *in theory*, have a *universal validity* and *applicability* regardless of communalist sentiments in African society, gender roles in African families, African traditions, or any other religious, social, or cultural factors. Ultimately, the young Ghanaian girl handed into sexual bondage to the deity for the sins of her brother understands that her fate is unjust, even if she does not understand her fate in terms of violations of her "rights" to dignity and freedom. Similarly, the young Togolese woman who flees her country because she is vehemently opposed to being forcibly circumcised has an instinctive knowledge that such an act represents an affront to her basic dignity and constitutes reprehensible violence. Although both women have most likely never heard of the Universal Declaration of Human Rights, they have fundamental needs and desires for basic respect, safety, and personal security. As such, even if unknown to them, "human rights" remain a valid expression of their basic needs and desires.

In this section, however, I seek to establish how human rights, *in practice*, have considerably less *utility* in the contemporary African context as a means to challenge harmful traditional practices or, indeed, other forms of gender violence and discrimination. In other words, even if the Ghanaian and Togolese women did know of their human rights and how to seek their enforcement, this knowledge would be of limited use to them—certainly considerably less than to their Western counterparts.[27] The situation should therefore be tackled with the understanding that even women who may be aware of their rights and accept their theoretical validity remain unable—and/or unwilling—to exercise them. It is also posited that

the manners in which we expect and encourage African women to use human rights are largely untenable within the particular context of sub-Saharan Africa.

Critical Assessments of the Value of Law and Rights

Many Africans have negative attitudes toward the value of law and legal institutions (for example, courts, administration, and law enforcement agencies). Legal institutions, if not seen as corrupt, may be considered a culturally irrelevant relic of colonial times or a tool meaningful only to the elite. These negative views are reinforced by other structural, cultural, and psychological realities.

STRUCTURAL IMPEDIMENTS TO THE USE OF LAW

The most obvious structural obstacle to women's use of law is the fact that the judicial system in most of Africa is not easily accessible to women. The chief reasons are:

- the enormous costs involved;
- the length of time required to pursue a case to its end;
- the language of the court;
- the nonreceptive attitude of personnel and officers involved in the administration of justice;
- the fact that the courts are few and far between.[28]

Rural populations, and in particular women in these populations, have limited access to legal remedies under the formal legal system. The concentration of legal services and judicial facilities in urban centers reinforces many women's views that law is not tangible and not for them.[29]

While these structural obstacles are widely acknowledged, they are rarely given proper consideration when offering human rights education to African women, almost as though to say that they are trivial. This simply reinforces the views of some Africans that human rights law is alien to them and their environment, precisely because the solutions it offers are implausible within their realities.[30]

CULTURAL IMPEDIMENTS TO THE USE OF LAW

At the cultural level, obstacles manifest themselves in many different ways. A number of cultural constraints affect women in particular. Women, for instance, are often found to be reluctant to take public positions on issues that conflict with conservative social and religious values.[31] Those who do risk paying a high price. Socialization also leads to some passivity in confronting injustice in the family sphere. Many Third World feminists further note that when women do dare to confront injustice, they prefer to do so by lobbying or attempting to influence the decisions of their families in a nonadversarial manner. Recourse to law is seen as necessarily adversarial and therefore culturally inappropriate.[32]

Recourse to the police has commonly not served women well, either. One story illustrates some of the problems women have encountered. Female circumcision

is practiced by the Maasai people in a region of Tanzania. At the same time, the Tanzanian penal code prohibits female circumcision.[33] According to the Tanzanian Legal and Human Rights Centre, local government officials had issued statements against the practice but had done little to follow up. The local church sometimes intervened, but even in cases where children bled to death no one was charged. More striking is one particular case in the region where three girls had run away from their father in the summer of 1999 in a desperate effort to save themselves from being circumcised. The girls fled to a local church for protection, whereupon several pastors assisted them and took them to the nearest police station. Rather than protect the girls, the police arrested one of the pastors, as well as his wife, for having taken unlawful custody of minor children. The pastor was severely beaten and asked to confess that he had raped the girls. Fortunately the girls were taken to the hospital for an examination, whereupon it was confirmed that they had not been raped. The girls were then turned over by the police to their father, who had them circumcised the next day and married within a month, one as a third wife. The three girls were aged thirteen and fourteen at the time. One became pregnant a short time after. Although the Legal and Human Rights Centre had submitted its report of the incident to the authorities and was prepared to help the girls prosecute their father, all three said they did not want to pursue prosecution.[34]

Most women will not muster the courage to report against any member of their family to the police. Even if a woman manages to get to the police station, she is likely to be told that her complaint is a domestic affair in which the police cannot involve themselves. She will be advised to go back home and work it out with her family.[35] In short, the fact that law enforcement officers and other people who make up the structures of the legal system at this level are as steeped in custom as the women themselves further complicates matters.[36] Hence even if a young girl dares to report a complaint to the police, there is a real risk that the police will not even register it. The only safety net available to her will thus disappear. Even worse, she will have little choice but to return home and deal with the consequences of her escape to the police. Experience shows that she likely will be forced to submit more quickly to circumcision or marriage.

PSYCHOLOGICAL IMPEDIMENTS TO THE USE OF LAW

In order to seek fulfillment, an individual must first have faith that human rights are meaningful and demand respect. A woman must, as Bay suggests, "begin to trust the strength of her mind, built up through experience in discussion in dialogue . . . sufficiently to enable her to choose her own answers to all the searching questions, regardless of the pressures of conventional wisdom."[37] Human rights education ostensibly should create the conditions for critical awareness, wherein individuals feel strong or "empowered" enough to ask not only what the reasons behind traditional practices are but to challenge these reasons and thereby seek fulfillment of their human rights.

Yet very few African women and men seem to have passed this threshold where they begin to believe that human rights discourses and law can make a difference. Even fewer have passed the next threshold of actually putting the law into practice. The stretch between consciousness-raising and action is therefore enormous and slow going and is unlikely to improve if our own expectations of human rights as the solution do not change. An-Na'im correctly points out in this regard that "[t]here is a mistaken impression that all we need to have is a rights paradigm or a system of rights. The issue is not simply a question of rights; it is a question of ability to use rights, to the extent that rights can make any difference anyway. Beyond legal and rights paradigms, there is a whole world of women and men and social, cultural and religious activities, which are deeply rooted and very inaccessible."[38]

To these women and men, the human rights discourse brings little inspiration to challenge harmful traditional practices or any other human rights violations. The observation should also be made that in much of Africa there is a suspicion and hostility directed toward a struggle that is framed in terms of rights.[39] Law and rights are perceived as being a tool of the elite and of the West—not disadvantaged women and men in Africa. The initial task of educators, therefore, is to get rural women to appreciate a system they may not identify with.[40] Ilumoka appropriately notes that the assertion of rights presumes their existing and probable violation and a desire to remedy or prevent violation. Yet in the case of harmful traditional practices in Africa, both the presumption and the desire are often lacking. We should not be surprised, therefore, at stories of failure such as that of the Sabini experience recounted above.

The "Reality Check"

Numerous commentators have also stressed that for the large majority of women in Africa, the problems of poverty and underdevelopment are considered a priority over all others.[41] In stressing health, harmful traditional practices or, more significantly, gender-based violence as primary human rights issues within African communities, we may effectively be reinforcing their belief that the campaign projects the concerns of privileged (and often foreign) women who are able make their voices and interests heard. These interests, they claim, are out of touch with the more pressing problems of everyday survival for the average African woman. African women, therefore, must not only be encouraged to "speak the language of human rights in their own tongue"but also according to their own interests.[42]

Questioning Conventional Strategies of Promotion and Protection and Considering Others

Recognize the Limitations of Legislation

As already established, law is frequently underused by African women, even in places and situations where family and personal laws are favorable to them.[43] There are many occasions where laws prohibiting harmful practices exist but are not called

upon. For instance, the 1995 Constitution of Uganda guarantees equal protection of the law to all persons while prohibiting discrimination on any grounds.[44] Women and men are guaranteed the right to marry with their free and full consent as of the age of eighteen years.[45] It expressly prohibits all "laws, customs or traditions which are against the dignity, welfare, or interest of women, or which undermine their status."[46] While these provisions are straightforward, unbiased, and fair, practices are different. Few women will marry without the consent of their father, brother, or other paternal male relative. Indeed, their own consent is not important. Whether a girl is underage is largely irrelevant.[47]

The nonuse of legal recourse or opportunities guaranteed to women by law is not limited only to traditional practices. It is reflected in the very fact that in numerous African countries where women have the vote, less than 1 percent actually goes to the polls.[48] In other words, reasons for the underuse of law go deep into the cultural norms and traditional gender roles of African society.[49]

One must also bear in mind that although laws against harmful traditional practices exist, they may not be considered legitimate.[50] In the true Thomist tradition of Natural Law, it is generally understood that man-made laws that conflict with a community's perceived principles of morality and justice are not considered valid: *Lex iniusta non est lex*. Hence if Africans are to have a sense of moral obligation to uphold a law banning child marriages, they first must believe that a law is needed, for which they must first be convinced that the practice is "wrong." Even if it is agreed that the practice is "wrong," there may still be hesitation to remedy it or prevent its further practice. As Shils explains, "Human beings become attached to the given. It becomes to them the 'natural way' to do things. Being 'natural' is nearly the same as being normative and obligatory, once a pattern is accepted as 'natural.' Other ways might be rationally recommended or even coercively imposed on persons but attachment to the traditional patterns of acting and believing is not easily dissolved."[51]

In view of this, it is very important that neither the human rights community nor African states narrowly interpret or advance the state's obligation as to adopt legislation, inform individuals of its existence, or even punish those who break the law.[52] Rather, the obligation must absolutely be interpreted as including duties to explain to individuals why the law exists, why it is just, and why it should be respected. In this regard, the Women's Convention is appropriately holistic, defining the obligations as much more far-reaching. Not only must legislation be adopted to modify or abolish customs and practices that discriminate against women, but other measures as well (Article 2e). States must equally act to modify the social and cultural patterns of conduct of men and women in order to eliminate customary and all other practices that subjugate individuals (Article 5a). Harmful or negative stereotypes should be challenged in all forms of education (Article 10c). Access to information and education as well as health care to ensure the well-being of families and women's reproductive health must be made available (Article 10h and 14.2b).

The fact should also be considered that access to law may come too late for the young girl who learns that very morning that she will be circumcised or married off and is prevented in the meantime from fleeing. Given that circumcision is irreversible (unlike a marriage, which could be dissolved soon after), legal recourse is not a reasonable solution in the immediacy.

Admittedly, legislation against harmful traditional practices does serve a purpose, not the least of which is to acknowledge that a problem exists.[53] But while reliance on the law provides statutory/theoretical protection, it is not in itself sufficient to achieve the practical realization of women's rights.[54] The passing of legislation favorable to women has helped women to overcome some of the injustices they face, but it is clear that the real position of women will not be improved until traditional mores and customs are examined and replaced. Only then will women be able to appeal to the law to protect their rights.[55] Ultimately, a legal revolution (for example, through mass popular human rights awareness and legislative texts banning harmful practices) may improve the lives of some women, but if the power and attitudinal relationship between African men and women does not change, such a revolution will have a limited impact.[56] Even if a harmful practice is stopped, there is a real risk of it rearing its ugly head once again if the underlying norms and values that gave rise to it in the first place remain unchanged.

For all of these reasons and many more, it becomes obvious that under the current African environment legislation is hardly a priority and of little use to end harmful traditional practices. Indeed, few solutions to sociocultural problems are generated by law itself. Law must therefore not be seen as the means for social change but only as a part of the process toward change, to be introduced only after shifts in attitudes toward practices have begun to take shape.[57] Ultimately, programs and advocacy campaigns need to look beyond for the solution to the gender dilemma.[58] These conclusions are arguably even more appropriate to the African context.

Respect the Possible Interpretations of Freedoms and Rights

Some African women may find it hard to define certain needs as rights. This is particularly so with respect to matters of sexuality, which African norms tend to place beyond women's scope of decision making.[59] For instance, African wives see themselves as having no right to resist or refuse a sexual relationship—even with a partner infected with a sexually transmissible disease—because for a woman to say "no" is not a considered a "right" within their social context.[60] The family of reproductive rights (such as the right to decide the number and spacing of one's children or the right to seek and obtain the means to do so) may thus be considered of little relevance since women have little real power to demand their respect. For the same reason, the right of a woman to own her body (which is commonly argued in the West as a right issuing from the right to personal integrity) may be considered meaningless in this context. In light of this problem, it has been suggested that the discourse of rights, or more specifically the rights raised in order to address matters

pertaining to reproduction and sexuality, focus rather more broadly on the right to life, to dignity or personal integrity. Once these "fundamental" rights are seen to be violated, African women and men may be more inclined to see a human rights issue in circumcision, unprotected sex, or early pregnancy.[61]

It should also be recognized that in various contexts, some African women and men have taken the human rights narrative as a tool to transform their duties into rights. For instance, the practice of purdah (which requires, inter alia, that women be secluded in their homes) is also advanced by those upholding it to be a woman's expression of her right to liberty (free choice) and dignity. A woman, it is similarly argued, has the right to be veiled because human rights allow her to enjoy rights to freedom of belief, liberty, and dignity. More specific to the subject at hand, it is also argued on the basis of these rights that women have the "right" to be circumcised. These issues can therefore be framed in such a way that women find themselves defending their ability to stay inside the home, remain veiled, or be circumcised. It is important that the narrative recognize that human rights and freedoms may indeed be broadly interpreted to support both options. In this context it is imperative to stress that the options be truly realistic, that women are informed of them, and that they are able to freely consent to their practice.

THE THORNY ISSUE OF FREE AND INFORMED CONSENT

If we placed the concept of free and informed consent in a sterile social and cultural environment, it would be relatively easy to establish whether a woman has:

- been given all the necessary information concerning a practice (such as the reasons why it is considered important and the possible consequences of the practice on her health);
- been informed that she has the ability to choose whether she will undergo the practice or not;
- agreed or disagreed to undergo the practice;
- given her consent without undue influence or coercion.

Unfortunately for most African women, social prescriptions and cultural norms work against free and informed consent. Women often lack the necessary information to make an informed choice and the power to act outside of the tradition. Moreover, there is no social safety net on which to fall back should they choose to break with tradition. In such a sociocultural setting, it is possible that consent, even if it is given, is obtained under false conditions.[62]

In the case of female circumcision, most activists and scholars firmly assert that the "issue of consent" does not mask the element of violence. Where women submit to genital mutilation, they argue, the same human rights issues as those involved in domestic violence against women arise.[63] For instance, it is commonly argued and accepted that these women are dependent on their batterers and can therefore hardly be said to be able to act freely and according to their own wishes. The same

arguments of deep-rooted societal violence against women are given with respect to levirate marriage (and certain other widowhood practices), religious bondage, or early marriage. Others, particularly African women, believe such a conclusive statement to be unfounded. They posit that a good number of African women make an aware and independent decision, even as adults, to have themselves circumcised. While admitting that they do so because it is a tradition within their community, they scoff at any suggestion that they are being socially pressured and that there is any violation of their human rights.

Although the majority of women tacitly consent to these practices, the reality remains that their option *not* to consent is essentially nonexistent. This is particularly true in the case of female children. This leads us directly to the issue of the rights of parents and their ability to act on behalf of their daughters—so-called minors under the protection and welfare of their parents. Children-specific human rights instruments advance two conflicting concepts: the right of parents to act in the best interests of their child, and the child's right to decide matters independently according to his or her evolving capacities. The two are never easy to combine, but perhaps more so with regard to practices embedded in tradition. Most African parents believe that, in having their daughters marry early or circumcised according to tradition, they are acting in their daughter's best interests. The girl's ability to reflect on these interests, much less give consent, is rarely considered. Ironically, this results in a situation where a girl in considered mature enough to marry but not mature enough to formulate an opinion and act independently, including in a manner that carries less risk to her own health.[64] Even if given the opportunity to give her consent, her dependence on her family and her community place enormous constraints on her ability to act otherwise.

Regardless of the rights of parents to decide matters of their child's upbringing, human rights law clearly places a duty on the state to place the best interests and well-being of the child as a primary consideration. The 1990 African Charter on the Rights and Welfare of the Child is even more resolute, providing in its first article that "[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights . . . in the present Charter shall . . . be discouraged."[65] Hence regardless of parental wishes and rights, the well-being and rights of the child should prevail in the event of conflict. Bearing these provisions in mind, notions of a girl's maturely evolved capacities and her rights can be included in a campaign against harmful traditional practices. Insisting on the respect and superiority of *children's* rights in the current African environment, however, will likely further entrench them in the minds of Africans as culturally and economically irrelevant standards.

Drawing upon African Human Rights Instruments

As the primary human rights instrument in the region, the African Charter on Human and Peoples' Rights and its commission should be the first port of call for the protection and fulfillment of rights in the region. Logically speaking, a human

rights system applicable solely to Africa should be better equipped to deal with African challenges, including harmful traditional practices. Ostensibly, the African Charter should also have greater credibility within Africa as a uniquely African product created with an understanding of African concerns and priorities. For the average African woman, the fact that there exists a human rights instrument unique to Africa and binding specifically on African states may at least legitimize and validate "human rights speak" within her environment. The African Charter on the Rights and Welfare of the Child, as noted above, also legitimizes the argument that African *children*, as well, are endowed with rights.

Drawing upon Local and Culturally Relevant Mechanisms

Religious and customary law and institutions are usually among the first targets of review and condemnation by human rights advocates. Islam, in particular, has had to face the wrath of human rights activists. In fact, both *Shari'a* and customary law (or, more appropriately, interpretations thereof) in Africa have been shown to have difficulties reconciling human rights with religious prescriptions on the status and roles of women. Where Islam has roots, there often remain remnants of *Shari'a* implicitly and explicitly enforced in the daily workings of social institutions and family life. Customary law has evolved from tribal cultures, which are deeply embedded, are of long standing, and demand respect. While it would appear that adherence to traditional African religions is in demise, customary law remains strong throughout the region. Most tribal cultures and the customary laws they uphold prescribe traditional roles for men and women and place limitations on the freedoms of women.[66] Such laws, for instance, may disqualify a woman from standing before a court of law or holding a position in a public or private office. It may also refuse her ability to consent to her marriage, end it, or claim custody of her children.[67] More important to the subject at hand, domestic courts upholding customary law commonly have jurisdiction over cases regarding marriage, divorce, and family relationships—areas relevant to traditional norms and practices.[68]

What can be done in such cases? In my view, simply calling for the banning of customary or *Shari'a* law is not the answer—and is in any event impossible. More importantly, it is not customary or *Shari'a* law *as a whole* that is inherently discriminatory or contrary to the human rights of women, but *elements* of it within certain contexts. Doing entirely away with these systems of law would mean that their beneficial aspects would be thrown out along with the bad. One viable solution proposed by a group of activists is that women's rights advocates see religion and culture as a medium and vehicle for change rather than antagonistic to women's rights and the challenge of traditions.[69] Indeed, as noted earlier, in some African contexts religious and customary institutions are the *only* vehicles of law. Certainly, for women they are often the most accessible (in terms of cost, language, and physical proximity) and acceptable (according to their perceptions and evaluations of social, cultural, or religious proprieties). The only way we can make progress in this context

is to acknowledge that religion, like culture, is to a certain extent human-made or, as An-Na'im says, "secular." The amazing diversity of interpretations of one single religion, even among the smallest of populations, attests to this fact. The tactic suggested by some, therefore, is to actively engage individuals in discussions with a view to redefining for themselves what their religion and culture are.[70]

There are therefore a number of strong reasons why religious and customary institutions should be drawn into the process of challenge rather than criticized and excluded. First, it is precisely in those societies that adhere to Islam and traditional religions that norms maintaining harmful traditional practices remain highly influential in daily life. Many of the norms and traditions that still thrive today derive their source (or at least are believed by Africans to do so) from these religions. Even though many Africans no longer actively practice or adhere to a particular traditional African religion, they both consciously and unconsciously remain influenced by its precepts, if not by the mere fact that the community in which they live (and by whose societal rules they must abide) may still have remnants of religiously inspired codes of behavioral conduct. Second, most gender analysts would not hesitate to state that female submissiveness and patriarchy as expressed in all of its forms are strongly rooted in religious norms that have been maintained over centuries. In this light even the most educated or enlightened or informed women will have to contend with religion. Of course the difficulty, as Afshari explains, is to address these challenges without being "denounced as un-Islamic by the traditional custodians of *Shari'a*" or as un-African by local community and spiritual leaders, and immediately dismissed.[71] In any context this requires sensitivity, diplomacy, and in-depth knowledge of the culture and religion at hand. An-Na'im's suggestion of Islamic critique and revision is widely supported by feminist Islamic theologians who see a need to reveal how the texts can be open to interpretations and how dominant scholars may misrepresent traditions as required by the Quran. All, I believe, would agree that the critique is most likely to be successful if primarily internal—that is, advanced by those from within the culture.[72]

Indeed, the successful eradication of harmful traditional practices in other regions of the world strongly confirms the importance of local leadership and the support of key local opinion leaders. The eradication of foot binding in China and sati (widow burning) in India offer good illustrations of this.[73] The influences of Chou's (a native Chinese) appeal against foot binding and Roy's (an Indian) campaign against sati were truly catalytic. As natives of the affected cultures, Chou and Roy were able to frame the campaign within these cultural contexts. They were able to identify the factors blocking eradication and structure their messages in response to the circumstances. Their position was credible and enabled them to engage proponents of the practices in discussions and counter their arguments on the same basis of culture and religion. Both proceeded with intensive education programs at the community level to challenge public attitudes. Regardless of whether the

justifications for these practices were based on religion, tradition, marriageability or beauty, they proved to be not insurmountable.

Following from this, the successful challenge of foot binding and sati also demonstrated the unequivocal importance of directly addressing the practice on the terms of religion, *whether the harmful traditions were rooted in religion or not*. Hence while religious doctrine was not a justification for foot binding, opponents cited Confucian doctrine as supporting their call for its eradication. By drawing upon his scholarly knowledge of the Hindu texts, Roy countered religious justifications in favor of the practice with alternative scriptures and interpretations against it. His actions proved that the only way to fight religious justifications (which ultimately would end in indisputable "truisms") is with the same weapon, religion itself piercing its own armor. Along with the support of local religious leadership, the support of other key opinion leaders such as the Empress Dowager in China, politicians, or the elite was also highly significant. The same can and must be done throughout Africa with regard to harmful traditional practices. If eradication and human rights campaigns are to be successful, it is important to look at the community itself as a resource rather than draw from resources outside the affected culture. In any community, elements and individuals can be found and tapped. These will no doubt vary, with different elites, traditional leaders, village councils, and so on providing the resource.

Conclusions

The challenge of harmful traditional practices cannot take root without certain enabling changes in the basic norms and institutions of society. Yet program managers, NGO strategists, and women's rights activists alike tend to reject or ostracize those very actors who have the power to enable these changes, notably policy makers, police, judges, health care providers, and religious or traditional leaders.[74] Another dilemma is that human rights education has become concerned with merely conveying human rights principles, not about their feasibility. So much emphasis has been placed on entitlement that we have forgotten the intricacies of fulfillment in the process—intricacies that vary from culture to culture.[75]

Grassroots (bottom-up) strategies to end harmful traditional practices have received the greatest support and attention. This is not surprising since human rights activism has traditionally targeted the local. For most human rights activists and organizations, the grassroots level is where they work best, where their skills are most applicable, and where their ethos is most suited. But ending harmful traditional practices in Africa requires multiple strategies, not only empowering and educating women but also coordinating institutional responses, harmonizing media and communication strategies at the national level, and inviting leaders to challenge the norms at issue.

Despite this knowledge, our response has been overwhelmingly one-sided, focusing on helping African women empower themselves at the local level rather than

assisting the state to grapple with changing attitudes. It is not surprising, therefore, that while we may have convinced some women that they are sufficiently empowered to seek assistance and redress before the police and the courts, these institutions have not responded in an appropriate manner. This is principally owing to the fact that those opinion makers and leaders with the power to change attitudes (village elders, customary chiefs, religious leaders, and the like) have largely been excluded.

Ultimately, the complexities and peculiarities of applying human rights to the African context to resolve gender discrimination demonstrate that their application would best be done in a fashion and discourse suited to the region. Deciding precisely what fashion and discourse that may be requires a specialized and intimate knowledge of the African environment. Just as the sciences of feminism and anthropology have adjusted to accommodate specialized streams of *African* feminist studies and *African* anthropological studies, the protection of universal human rights may also be better served by its own area of specialized study.

Notes

1. See UN, Committee on the Elimination of All Forms of Violence against Women, General Recommendation no. 14 concerning Harmful Traditional Practices (1990). More generally: UN, *Report of the World Summit for Social Development, Copenhagen Declaration* (1995), Commitment 6; UN, *Report of the Fourth World Conference on Women, Beijing Declaration, and Platform for Action* (1995), UN doc. A/CONF/.177/20, paras. 39, 107, 108, 113, and 118; and UN, Committee on Economic, Social, and Cultural Rights, General Comment no. 14 on Health (2000), paras. 21 and 35.
2. As reported in the Center for Reproductive Law and Policy (CRLP), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (London: Zed Books, 2000), 41.
3. The conference was held in Durban, South Africa, in September 2001. Recent publications from Zed Books (London) alone demonstrate the popularity and demand for the subject of postcolonial Africa. See I. Amadiume, *Re-Inventing Africa* (1999); *Memory and the Postcolony*, ed. Richard Webner (2000); and *Postcolonial Identities in Africa*, eds. Richard Webner and Terence Ranger (1996).
4. The African Union entered into force in May 2001 and is to replace the Organization of African Unity.
5. For instance, the UN Special Rapporteur on Violence against Women, Its Causes and Consequences (Ms. Radhika Coomaraswamy); the UN Special Rapporteur on Traditional Practices Affecting the Health of Women and Children (Ms. Halima Embarek); CEDAW's General Recommendation no. 19 on Violence against Women (1992); the Beijing Declaration and Platform for Action issuing from the World Conference on Women (United Nations, 1995); and the pan-African nongovernmental group, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children each identify different practices as consisting of *harmful traditional practices*. For greater detail, see Corinne Packer, *Using Human Rights to Change Tradition* (Antwerp: Intersentia—Hart, 2002). Female circumcision, however, is commonly recognized as a harmful traditional practice by all of the above.
6. The practice is also referred to, inter alia, as female circumcision, female genital cuttings, or female genital surgeries. The fact that outside of Africa this practice is commonly called *female genital mutilation* further fuels African claims that the discussion outside of the region is led by non-Africans and is culturally insensitive.

7. It is estimated that 89–98 percent of the female population in these countries undergo female genital mutilation. For greater factual information, see Fran Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*, 4th ed. (Lexington MA: WIN NEWS, 1993); Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* (New York: Women Ink., 1993); and World Health Organisation, *Female Genital Mutilation: Information Kit* (Geneva: World Health Organisation, 1994).
8. For greater detail, see generally all literature cited in note 7.
9. For a summary of these practices and suggestions for further relevant literature, see Packer, *Using Human Rights*, chapter 1.
10. See UN, *Report of the World Conference to Review and Appraise the Achievements of the United Nations, Nairobi: Forward-Looking Strategies for the Advancement of Women, 1985*, UN doc. A/CONF.116/28/rev. 1, para. 48; UN, Committee on the Elimination of All Forms of Violence against Women (CEDAW), General Recommendation no. 19 on Violence against Women (1992), para. 11; UN, Declaration on the Elimination of Violence against Women (res. 48/104 of the United Nations General Assembly of 20 December 1993), Preamble and Article 2.
11. See UN, CEDAW, General Recommendation no. 19.
12. Articles 1 and 2 of the Declaration on the Elimination of Violence against Women and para. 113 of the Beijing Declaration and Platform for Action (BDPA) define violence against women as: "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women . . . whether occurring in public or in private life. . . . Violence against women . . . encompasses . . . physical, sexual and psychological violence occurring in the family, including . . . female genital mutilation and other traditional practices harmful to women."
13. UN, Economic and Social Council, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy*, 22 November 1994, E/CN.4/1995/42.
14. For greater detail regarding the symposium, see Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC), *Report of the Symposium for Legislation on the Drafting of an African Declaration on Violence against Women* (Addis Ababa: IAC, 1997).
15. The common reference to "female genital mutilation and other harmful traditional practices," combined with the failure to identify and locate these "other" practices geographically, prompts uninformed conclusions that they are all African phenomena.
16. For instance, despite being recognized as a leading activist and key source of information for the campaign against female circumcision for over twenty-five years, Fran Hosken still endures much questioning as to the legitimacy of her involvement in the campaign because she is a white American. One may refer to Hosken's celebrated work on female genital mutilation, *The Hosken Report*.
17. An entire stream of feminist theory questions precisely the standpoint, and hence objectivity/subjectivity, in the study of customs and practices. See, generally, *Fundamental Feminism*, ed. Judith Grant (New York: Routledge, 1993); or specifically, Donna Haraway, "Situated Knowledges in Feminism and the Privilege of the Partial Perspective," *Feminist Studies* 14 (1988): 575–99; and Sandra Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986). The issue of standpoint is significantly less commonly addressed within the study of international human rights law and, when it is usually by cultural relativists or proponents of critical legal studies. Universalists simply maintain that any evaluation of a custom or practice under the terms of international human rights law guarantees the greatest objectivity possible.
18. Examples cited in Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* (New York: RAINBO, 1995); and informal discussions at the Second Women of Africa and the African Diaspora (WAAD) meeting, University of Indianapolis, 22–27 October 1998.
19. Within the study of postcolonial theory it is acknowledged that binarisms exist that allow us to establish meaning by defining concepts in contradistinction to each other. If one looks

at Western rationalism (as a product of modernity and development) as socially significant, we begin to see how the notion of "traditional" society, in contradistinction, is embedded deeply within imperial culture and the colonial imagination. For more ample discussion, see Pal Ahluwalia, "Human Rights in Africa: A Post-Colonial Perspective," *Africa Quarterly* 38, no. 1 (1998): 21–37.

20. Recognized as a harmful traditional practice in the following: Declaration of Mexico on the Equality of Women (World Conference on the International Women's Year, 1975); Copenhagen Declaration (World Summit for Social Development, 1995); and the Beijing Declaration and Programme for Action (World Conference on Women, 1995).
21. Recognized as a gender-based form of violence (manifested in a traditional practice), in, inter alia, CEDAW's General Recommendation no. 19 on Violence against Women and the Special Rapporteur on Violence against Women's preliminary report (see note 13).
22. The example of the Sabini tooth-pulling practice, which evolved from a myth spawned for positive purposes but with negative implications in the longer term, supports this argument. Formerly the Sabini people of Uganda practiced a traditional custom that involved the removal of two incisor teeth of boys some time around the age of puberty. The ancient practice once served a purpose. In the time before antibiotics and immunization, tetanus and its resultant condition (lockjaw) were common. The Sabini discovered they could sometimes save a life by knocking out a few teeth and using the opening to force-feed the patient. Routine tooth pulling became a preventive measure and then another milestone on a young Sabini boy's road to adulthood. But with the advent of immunization and the spread of education, the practice has all but disappeared. As reported in (no author), "Examining a Tradition," *Populi* (March 1996): 16.
23. For instance, the ritual circumcision of all young men is a traditional rite of passage among the Xhosa-speaking people in South Africa. Young men are required to undergo this ritual before they are allowed to marry, have property rights, and attend and speak at gatherings. Much like female circumcision, the ritual is performed by persons without adequate medical knowledge using crude instruments and under unhygienic conditions. As reported by Graeme Meintjes, "Challenge to Tradition: Medical Complications of Traditional Xhosa Circumcision," *Indicator* 15, no. 13 (1998): 67–73.
24. For instance, the affirmative action schemes of the 1980s and 1990s that placed women above men in line for positions and promotions have fallen into disfavor as these institutionalized and simply reversed the very practice of discrimination that they sought to rectify. Firm nondiscrimination policies guaranteeing equal consideration at the risk of penalty are theoretically and practically preferable, as well as more loyal to the human rights principles of equality and nondiscrimination.
25. As noted by the Special Rapporteur (para. 98) on Violence against Women: "Violence against women is defined . . . as including, but not being limited to, physical, sexual and psychological violence that occurs in the family. . . . The definition . . . appears, therefore, to be a broad one whereby violence is not strictly construed as meaning only the actual use of physical force, but implies the right to inquire against all forms of action which disempower women because of the fear of violence, whether the fear is instilled by the state, actors in the community or member of the family." See note 13.
26. Abena P. A. Busia, "Foreword," *Gender Violence and Women's Human Rights in Africa* (New York: Center for Women's Global Leadership, 1994), iv.
27. The fact that many African women clearly accept harmful traditional practices means that they are ready to forgive or live with a certain amount of violence—not unlimited but to the limit of endurance. However, it may be deduced from the arguments of Seif El Dawla that most women in such situations would likely choose otherwise if given an alternative, although any alternative must be within their sociocultural context. See Aida Seif El Dawla, "Reproductive Rights of

Egyptian Women: Issues for Debate," *Reproductive Health Matters* 8, no. 16 (November 2000): 45–54 at 49.

28. As itemized by Esther Damalie Naggita, "Why Men Come Out Ahead: The Legal Regime and the Protection and Realization of Women's Rights in Uganda," *East African Journal of Peace and Human Rights* 6, no. 1 (2000): 34–65 at 59.
29. Celestine Itumbi Nyamu, "The International Human Rights Regime and Rural Women in Kenya," *East African Journal of Peace and Human Rights* 6, no. 1 (2000): 1–33 at 31.
30. See Itumbi Nyamu, "The International Human Rights Regime and Rural Women in Kenya"; and Adetoun O. Ilumoka, "African Women's Economic, Social, and Cultural Rights—Toward a Relevant Theory and Practice," *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 1994), 307–25.
31. Savitri Goonesekere, "Legal Status of Women," *Empowerment and the Law: Strategies of Third World Women*, ed. Margaret Schuler (Washington DC OEF International, 1986), 52–59 at 56.
32. See Radhika Coomaraswamy, "Ethnicity and Patriarchy in the Third World," *Empowerment and the Law*, 94–109; and Naggita, "Why Men Come Out Ahead."
33. Section 169A(1) of the Sexual Offences Special Provisions Act provides that anyone having custody, charge, or care of a girl under eighteen years of age who causes her to undergo circumcision commits the offence of cruelty to children. The penalty for this offence is a term of imprisonment from five to fifteen years, a fine of up to 300,000 shillings, or both imprisonment and the fine. The law also provides for the payment of compensation by the perpetrator to the person against whom the offence was committed.
34. As reported in *Equality Now Newsletter*, June 2001 (Women's Action 20.1).
35. Naggita, "Why Men Come Out Ahead," 50.
36. Florence Butegwa, "Challenges of Promoting Legal Literacy among Women in Uganda," *Legal Literacy: A Tool for Women's Empowerment*, eds. Margaret Schuler and Sakuntala Kadirgamar-Rajasingham (New York: UNIFEM/OEF International, 1992), 139–62 at 142.
37. Christian Bay, *Strategies of Political Emancipation* (South Bend IN: University of Notre Dame Press, 1981), 77.
38. Abdullahi An-Na'im, "Remarks" (Forum on Religious and Cultural Rights), *American University Law Review* 44, no. 4 (1995): 1383–84 at 1384.
39. See Naggita, "Why Men Come Out Ahead"; Nyamu, "The International Human Rights Regime and Rural Women in Kenya"; and Ilumoka, "African Women's Economic, Social, and Cultural Rights," 319–20.
40. Ilumoka, "African Women's Economic, Social, and Cultural Rights."
41. As suggested by, inter alia, Naggita, "Why Men Come Out Ahead"; Nyamu, "The International Human Rights Regime and Rural Women in Kenya"; and Ilumoka, "African Women's Economic, Social, and Cultural Rights."
42. R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), 38.
43. Asma A. El Dareer, "Sudan: Custom and Customary Laws," *Empowerment and the Law*, 135–39 at 137.
44. Constitution of Uganda, Article 21.
45. Constitution of Uganda, Article 26.
46. Constitution of Uganda, Article 33.
47. As reported by Naggita, "Why Men Come Out Ahead," 43.
48. As reported by Coomaraswamy, "Ethnicity and Patriarchy in the Third World," 107.
49. Unity Dow, Sheryl Stumbras, and Sue Tatten, "Women's Empowerment Initiatives from a Grassroots Level," *Human Rights Education for the Twenty-First Century*, eds. George J. Andreopoulus and Richard Pierre Claude (Philadelphia: University of Pennsylvania Press, 1997), 455–68.

50. Female circumcision alone is illegal in nine sub-Saharan African countries. As reported in CRLP, *A Guide to Laws and Policies*.
51. Edward Shils, *Tradition* (London: Faber and Faber, 1981), 200.
52. The Center for Reproductive Law and Policy appropriately warns states to reconsider any application of criminal sanctions for harmful traditional practices unless these are accompanied by sound and broad governmental initiatives to change individual behavior and social norms. See CRLP, *A Guide to Laws and Policies*, 28–29.
53. As suggested by Fitnat Naa-Adjeley Adjetey, "Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture," *American University Law Review* 44, no. 4 (1995): 1351–82 at 1371.
54. Naggita, "Why Men Come Out Ahead," 35.
55. El Dareer, "Sudan: Custom and Customary Laws," 139.
56. Magdala Velásquez Toro, "Legal Gains for Women," *Empowerment and the Law*, 71–76 at 76.
57. Bastiaan de Gaay Fortman, "The Dialectics of Western Law in a Non-Western World," *Human Rights in a Pluralist World: Individuals and Collectivities*, eds. Jan Berting et al. (Westport and London: Meckler, 1990), 237–50 at 237. In every instance of recorded challenges to traditional practices in various regions of the world, efforts to abolish the practices only became successful once the attitude of the general public changed against the practices. This is an explanation for the failure of legislative efforts to date in both Africa and Asia. Whenever the public was not convinced of the need to abandon a practice, legislation, punishment, or other alternatives were simply judged irrelevant and efforts for their eradication proved futile. For greater discussion, see Packer, *Using Human Rights*, chapter 7.
58. Dow, Stumbras, and Tatten, "Women's Empowerment Initiatives from a Grassroots Level."
59. For more detail, see Packer, *Using Human Rights*, chapter 2.
60. Nahid Toubia, "Women's Reproductive and Sexual Rights," *Gender Violence and Women's Human Rights in Africa* (New York: Center for Women's Global Leadership, 1994), 15–29 at 24.
61. Toubia, "Women's Reproductive and Sexual Rights."
62. In fact, no individual in any society is completely free in his or her consent since we all live within a social, cultural, religious, and economic environment that will influence our consent on different matters to some degree.
63. Joan Fitzpatrick, "International Norms and Violence against Women," *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 1994), 532–71.
64. For more discussion on the conflict between the two concepts with regard to adolescent pregnancy, see Corinne Packer, "Preventing Adolescent Pregnancy: The Protection Offered by International Human Rights Law," *International Journal of Children's Rights* 5, no. 1 (1997): 47–76.
65. Article 3 of the 1989 Convention on the Rights of the Child and Article 4 of the African Charter on the Rights and Welfare of the Child.
66. For an in-depth analysis, see CRLP, *A Guide on Laws and Policies*, 55.
67. Y. Mokgoro, "Customary Law, Human Rights, and the Position of Women in Africa," *Africa Legal Aid Quarterly* (January–March 1996): 14–16 at 15.
68. See further CRLP, *A Guide on Laws and Policies*, 55.
69. See An-Na'im, "Remarks."
70. See An-Na'im, "Remarks"; and Toubia, "Women's Reproductive and Sexual Rights," 24–26. An-Na'im has elaborated a methodological approach to Islamic reformation sensitive to the context of Africa in his book *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990).
71. Reza Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights," *Human Rights Quarterly* 16, no. 2 (1994): 235–76 at 263.

72. As suggested by Michael Perry, "Are Human Rights Universal? The Relativist Challenge and Related Matters," *Human Rights Quarterly* 19, no. 3 (1997): 461–509 at 493.
73. For a detailed description and analysis of these, see Packer, *Using Human Rights*, chapter 7.
74. As noted in Ushma D. Upadhyay and Bryant Robey, "Why Family Planning Matters," *Population Reports*, series J, no. 49 (July 1999): 3.
75. As generally argued by de Gaay Fortman, "The Dialectics of Western Law in a Non-Western World."

7 Human Rights and Child Labor in South Asia

Mahmood Monshipouri

Child labor is one of the most troublesome problems facing South Asia (Bangladesh, India, Nepal, Pakistan, and Sri Lanka), where it is widespread and where some of the most flagrant abuses occur. In recent years there has been tremendous growth in child servitude in the region's export-oriented industries.[1]1 Caught between crushing poverty and economic globalization, a large pool of young labor is employed largely in slavelike conditions. Many poor families feel they are without economic alternatives to "bonded labor," which is the region's most notorious form of child labor. Under these quasi-institutional forms of child labor, children, generally younger than ten years old, are pledged by their parents to factory owners or their agents in exchange for loans.[2] This often lifelong indentured servitude is passed on to the next generation, and bonded peasants can even be sold into marriage.[3]

All South Asian countries have low per capita incomes and high ethnic diversity. They have all undergone some degree of economic liberalization. In some parts of the region, wages have been set low in order to attract foreign investment. The moral dilemma here concerns how to free children from laboring under inhumane conditions given the abject poverty in which they live. Consumer boycotts, trade sanctions, and mandatory dismissals often bring about harsher conditions than working in sweatshop-like situations. To many children in South Asia who work under such abusive conditions, the alternative may be less appealing.

The campaign for children's rights is increasingly sidelined by the drive for profit and the hard realities of commercial pressures in a globalizing world, where it has become increasingly difficult to disregard the consequences of the global scramble for economic advantage.[4] In many respects global market forces have contributed to the problem of child labor by widening the gap between rich and poor, encouraging migration, destabilizing families, and dismantling support systems and safety nets.[5] This economic situation is exacerbated by the region's burgeoning militarization. South Asia—with 562 million in poverty—spent $14 billion on the military in 1994.[6]

It is necessary to ascertain the root causes of child labor in order to prevent or mitigate circumstances leading to further exploitation of child labor. But how to prevent child labor in the face of massive poverty remains a perplexing question. This chapter's basic contention is that prevention of child labor and the socioeconomic rights of children and families are competing claims in poor South Asian countries. Central to this claim is the argument that a total ban on child labor is neither feasible nor morally warranted in such countries, where unemployment can be a greater tragedy than child labor. Rather we should focus on the most

destructive forms of child labor, such as bondage, commercial sexual exploitation, and trafficking of children.

While debunking common myths regarding child labor, I shall address several nagging questions: (1) Is child labor a violation of human rights and/or a necessity for combating de facto poverty? (2) Is the abolishment of child labor a realistic prospect in poor countries? (3) Is ending hazardous and exploitative child labor contingent upon eradicating poverty in the first place? And finally (4), what is the most effective way to prevent this practice given the combination of factors—such as cultural traditions, local power structure, and globalization of trade, capital, and finance—that underlie the causes of child labor? The answers to these questions lie at the heart of the debate over regional diversity and the way it affects the practice of child labor in a globalizing world.

Defining and Measuring Child Labor

It is difficult to pin down exactly the number of working children around the world, in large part because of definitional problems regarding child labor, and partly because these children most often work in the informal sector, namely, on farms, in households, and on the streets. While employers are reluctant to admit that the work done by these children is a violation of local or national laws, parents often regard the work that their children do as essential to the survival of both the child and the family.

Child labor assumes several forms, some harmful and some not. Harsh conditions and other risks and abuses to which working children are exposed are physically and psychologically harmful and cause serious social adjustment problems.[7] Children are routinely sold into prostitution. In Sri Lanka, according to the U.S. Department of Justice's *Prostitution of Children and Child Sex Tourism* (1999), an estimated one hundred thousand minors age six to fourteen were engaged in prostitution in child brothels. Additionally, some five thousand children were selling sex favors in child sex tourism areas of the country.[8] More than 2 million Nepalese women, according to another source, are working as prostitutes in Indian brothels, where nearly 20 percent are girls below sixteen years of age.[9]

But not all child work is harmful. Many working children, who work in a stable and nurturing environment, can benefit from informal education and training as well as the socialization process that it entails.[10] In Nepal, one study stresses, "the capacity to work is not intrinsically linked to the move into the adult generation (as indicated by marriage and childbearing). Rather it is part of the maturation process in which children participate with peers and older relatives."[11] Unlike industrialized countries, where most workers are employed in the formal labor market, in developing countries, most child labor takes place outside the formal labor market.[12] Enforcement of child labor laws via national legislation often exempts agriculture and household employment. As such, World Bank experts argue, enforcement beyond the formal sector "is often impractical and is not a cost-effective means of protecting

working children most in need."[13] For this reason the World Bank's lending initiatives in urban development projects in India, for example, are directed at providing training to children in low-income families, many of whom seek employment in the informal sector.[14]

In this chapter, we define "child," as do most child labor surveys, as people aged five to fourteen who often—but not always—work against their will or under inhumane conditions. In most instances child labor is directly linked to economic deprivation for which these children and their families are not responsible and over which they have little or no control.[15] Often in such circumstances children's labor is exploited, and they are overworked or deprived of their right to health and education.[16]

The International Labor Organization (ILO) estimates that there are approximately 250 million children between the ages of five and fourteen who work full-time (120 million) or part-time (130 million). Some 61 percent of this total, or nearly 153 million, are found in Asia; 32 percent, or 80 million, are in Africa; and 7 percent, or 17.5 million, live in Latin America.[17] Between 50 and 60 million children aged five to eleven years work in hazardous conditions throughout the world.[18] The vast majority of these child laborers are unpaid family workers employed in small production units of the urban informal sector and the rural traditional sector.[19]

South Asia represents the most extensive use of child labor of any region in the world. Bangladesh accounts for between 5.7 and 15 million children, India for between 17.5 and 100 million, Nepal for 3 million, and Pakistan for between 2 and 19 million children. The South Asian Coalition on Child Servitude estimates that there are 80 million children under fourteen being forced to work (55 million in India, 10 million in Pakistan, 8 million in Nepal, and 7 million in Sri Lanka and Bangladesh).[20]

As a vast and complex problem, child labor may be defined by some universal standards, but its measurement with any precision is elusive at best. The ILO defines child labor as the type of work by children that "deprives children of their childhood and their dignity, which hampers their access to education and the acquisition of skills, and which is performed under deplorable conditions harmful to their health and their development."[21]

The International Labor Organization has consistently taken the view that all societies have a notion of "decent work." Yet the quality of employment can mean different things; it could relate to different forms of work or different conditions of work; it may also relate to feelings of value and satisfaction.[22] There seems to be little agreement, for instance, on what constitutes child labor and how the appropriate minimum age of working children should be determined. Basic minimum age for employment varies in South Asia. It is twelve years in Bangladesh, fourteen in Nepal, and fifteen in India, Pakistan, and Sri Lanka.[23] As noted earlier, most child workers are found on farms, in households, in informal workshops, in domestic service, and on the streets as self-employed traders, where they are usually beyond the reach of

protective labor legislation and inspection. Not surprisingly, it is in such relatively inaccessible sectors of the economy that children are likely to be exposed to the most egregious abuses and the greatest risks.[24]

Though the practice of bonded labor is explicitly prohibited by several human rights conventions and protocols and is illegal according to the laws of many of the countries in which it occurs, enforcement of such laws has proved exceedingly difficult.[25] Bonded child labor is most prevalent in South Asia. In India estimates suggest that as many as 15 million children are held as bonded laborers. These children may enter into debt bondage by inheriting a parent's debt, or they may simply be sold to an employer in exchange for a loan to the parent. Low-caste and indigenous children are particularly targeted for such form of slavery owing to their parents' poverty, lack of education, and low social status.[26] Given that families cannot subsist without the support of all their members, child labor issues are inseparable from the wider economic context involved.[27]

No South Asian country has ratified the ILO Minimum Age Convention (no. 138, 1973), which prohibits employment below the age of fifteen years.[28] Of the seven major labor rights conventions under the International Labor Organization, all but the convention on minimum age have been ratified by more than 125 countries.[29] Most developing countries view this minimum age convention as ethnocentric and are reluctant to exclude children from economic participation. All South Asian countries, in contrast, have ratified or approved the UN Convention on the Rights of the Child (CRC—1989).[30] Article 1 of the CRC reads: "For the purpose of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."[31]

Perhaps the most widely accepted convention of all, however, is the ILO's Worst Forms of Child Labor (Convention 182), which was approved in 1999. This convention commits, in a broad and democratic way, ratifying countries to prevent or remove children from engagement in the worst forms of child labor and to provide education, vocational training, or other viable alternatives to inappropriate work. By targeting the worst aspects of child labor, such as child pornography and prostitution, forced recruitment of children for use in armed conflict, slavery, and bonded child labor, to which all the essential actors can agree, this convention has become less prone to charges of cultural imperialism and/or cultural relativism. It is widely recognized that Convention 182 is "positioned to become one of the most basic of global human rights agreements and should encounter little trouble in being widely accepted as such."[32] These international standards, however, remain nonbinding, and individual countries define child-appropriate work differently, determine what is acceptable or objectionable child labor, and unevenly enforce laws pertaining to child labor.[33]

Three countries in the region have taken legal initiatives to tackle the problem of bonded labor. India has adopted two key legislative acts, known as the Bonded Labor System (Abolition) Act in February 1976 and the Child Labor (Prohibition

and Regulation) Act of 1986. The latter has provided further restrictions on and regulation of the hours and conditions of work for children under the age of fourteen years. In Pakistan the Employment of Children Act of 1991 prohibited the use of child labor in hazardous occupations and environments. Also, the Bonded Labor System (Abolition) Act was adopted by the federal legislative body in 1992. In July 2000 the government of Nepal declared the *kamaiya* system of bonded labor illegal. The *kamaiya* system comprises of a long-term rural labor relationship between the farm worker and landowner, which affects only the disadvantaged Tharu ethnic group in several districts of the Terai region of western Nepal.[34] These statutes notwithstanding, courts continue to confer legitimacy on the use of child labor in areas other than those specified as "hazardous" occupations under these acts.[35]

Contributing Factors to Child Labor: Regional Realities

The complex problem of child labor is fueled by numerous factors, including poverty, an inadequate educational system and high expenses of schooling, the local economy and power structures, cultural forces, and the global economy. The combination of these factors renders the protection of children working in conditions of bondage a daunting task, despite the fact that child slavery is banned by national law in all South Asian countries.[36] An analysis of factors contributing to the practice of child labor demonstrates the multidimensional nature of the problem.

Socioeconomic Dictates of Poverty

A brief look at some of the basic facts illustrates the poverty issue in South Asia. In 1998, Sri Lanka's GDP per capita of (1995 US$) $802 stood as the highest in the region, followed by Pakistan's $511, India's $444, Bangladesh's $348, and Nepal's $217.[37] During the same year, UN estimates showed that India's population was at 982.2 million, compared to Pakistan's 148.2 million, Bangladesh's 124.8 million, Nepal's 22.8 million, and Sri Lanka's 18.5 million.[38] From 70 to 75 percent of South Asia's total population is poor and live in rural areas. This segment of the population is highly susceptible to risks from natural disasters like flooding and crop failure.[39] For these people even marginal income fluctuations can have critical implications. Poverty is also widespread among the urban population and is the main cause of the prevalence of child labor in urban areas.[40] Almost half of India's population (44 percent) lives below the income poverty line, which is $1 a day. This rate is around one-third of the population for Nepal, Pakistan, and Bangladesh (see table 7.1).[41]

Approximately 400 million people in India alone cannot meet basic survival needs like food, clothing, and shelter, helping to illustrate the connection between child labor and poverty. Poor households are likely to have lower than average returns to education because of poor-quality schools and labor market discrimination, especially with consideration of gender differences.[42] Arguably, poor families may therefore be acting rationally in sending their children to work instead of to school.[43]

Table 7.1. Human Poverty in South Asia

	Population without Access			Population below Income Poverty Line (%)*
	To Safe Water (%) 1990–98	To Health Services (%) 1981–93	To Sanitation (%) 1990–98	1989–98
Bangladesh	5	26	57	29.1
India	19	25	71	44.2
Nepal	29	90	84	37.7
Pakistan	21	15	44	31
Sri Lanka	43	10	37	6.6

Source: UNDP, *Human Development Report 2000* (New York: Oxford University Press, 2000), pp. 169–71.

* $1 a day (1993 US $).

This poverty that sells children into bondage is not merely linked to the lack of money. Most importantly, perhaps, it results from the fact that "there simply is no reliable, legal system through which the poor can secure loans—especially without collateral."[44] Without adequate government social welfare programs, poor families often turn to local moneylenders who provide credit in exchange for child labor. These bonded child laborers are forced to work to pay off their parents' loans, known as *peshgi* in Pakistan, often for many years to come.[45]

Literacy rates are noticeably low in South Asia (with the exception of Sri Lanka). The region has registered the lowest rates in both of these categories (age group enrollment ratios and public education expenditure)of any region in the world. In 1998 an estimated 54.3 percent of people over age fifteen were literate in South Asia, as were 87.7 percent of the same age group in Latin America and the Caribbean, 83.4 percent in East Asia, 59.6 percent in sub-Saharan Africa, and 59.7 percent in Arab states (see table 7.2).[46] During 1990–95 the percentage of the children entering the first grade of primary school who eventually reached grade five was 47 in Bangladesh, 59 in India, 52 in Nepal, 48 in Pakistan, and 83 in Sri Lanka.[47] The public expenditure on education in South Asia, measured as a percentage of GNP, averaged 3.2 percent, which was lower than that of the average of all developing countries, which was 3.8 percent (see table 7.2).[48]

The caste system and other social influences, such as the enduring apathy with which Indian employers, parents, and even the Indian government and local humanitarian aid organizations regard bonded child labor as an inevitable outgrowth of India's poverty, have also contributed to the persistence of child labor.[49] Studies have shown that child labor in India's carpet industry largely comes from the lower castes and that severely impoverished districts provide a large share of the migrant and bonded child labor.[50] The lack of a compulsory education policy in India—the "non-compulsory and unequal" policy prevails—is another major contributing

Table 7.2. Education Profile

	Age Group Enrollment Ratios (adjusted)				Public Education Expenditure			
	Adult literacy Rate (%; age 15 and above, 1998)	Youth Literacy Rate (%; age 15–24, 1998)	Primary Age Group (% of relevant age group, 1997)	Secondary Age Group (% of relevant age group, 1997)	As % of GNP, 1995–97	As % of total Government Expenditure, 1995–97	Pre-primary, Primary, and Secondary (as % of all levels, 1994–97)	Tertiary (as % of all levels, 1994–97)
Bangladesh	40.1	49.6	75.1	21.6	2.2	—	88.6	7.9
India	55.7	70.9	77.2	59.7	3.2	11.6	66.0	13.7
Nepal	39.2	57.3	78.4	54.6	3.2	13.5	64.1	19.0
Pakistan	44.0	61.4	—	—	2.7	7.1	79.8	13.0
Sri Lanka	91.1	96.5	99.9	76.0	3.4	8.9	74.8	9.3
All developing countries	72.7	84.1	85.7	60.4	3.8	—	—	—
Arab states	59.7	77.0	86.4	61.7	5.4	—	—	—
East Asia	83.4	97.3	99.8	71.0	2.9	—	—	—
Latin America	87.7	93.7	93.3	65.3	4.5	—	—	—
South Asia	54.3	68.9	78.0	—	3.2	—	—	—
Sub-Saharan Africa	59.6	75.8	56.2	41.4	6.1	—	—	—

Source: UNDP, *Human Development Report 2000* (New York: Oxford University Press, 2000), pp. 194–97.

factor to child labor there.[51] Compulsory education in Sri Lanka, in contrast, has substantially reduced child labor (see table 7.2).[52]

Sociocultural Values

Because primary education is not compulsory in India, nearly half of India's children between the ages of six and fourteen (82.2 million) are not in school. They stay at home to care for cattle, tend younger children, collect firewood, or work in the fields.[53] Although poverty is the principal reason why children work, the importance of other factors cannot be underestimated. The extent of child labor in a region or country, according to UNICEF's report, is not directly proportional to the level of poverty there. In India, for instance, the state of Kerala has effectively eliminated full-time child labor through universal primary education, whereas the problem persists in other states with comparable or even higher income levels.[54] The arguments that compulsory primary education and high national income are causally linked or that the connection between literacy and per capita income is direct are unsubstantiated.[55]

The concept of "children's work" in South Asia is widely accepted as a skill development and educational experience necessary for children's welfare, the welfare of their family, and that of local and national economy. Myron Weiner examines its sociocultural roots: "Many members of the India's middle class conceptualize a distinction between the children of the poor and their own children, between children as 'hands' who must be taught to work and children as 'minds' who must be taught to learn."[56]

Weiner goes on to argue that in today's world education is not only a right but also a duty of the state. Without compulsory mass education, Weiner continues, governments are unable to enforce child labor laws. History bears this out: "[N]o country has successfully ended child labor without first making education compulsory."[57] Nevertheless, Weiner admits that few people in India believe that education should be regarded as a state obligation or parental duty.[58] There is, Weiner argues, an unspoken consensus among India's political leaders that education should not be made compulsory because parents should have the right to use or sell the labor of their children.[59] This prevailing attitude goes against the global trend: "Most countries promote the goal of universal education at the primary level and closing the gap between girls' and boys' educational levels."[60]

Ultimately, Weiner insists, school as an institution is linked to the emergence of modern civil society. Decisions made by the schools and the legitimacy conferred upon the teachers to do what is in the best interest of the children must be the overriding factor.[61] Some human rights experts point to the "best interests principle" of the Convention on the Rights of the Child (1989), arguing that "the right to be cared for by one's parents may come into conflict with the right to education."[62] In such circumstances, this standard might serve as a mediating principle that may

lead to the conclusion that "a degree of separation of the child from his or her parents is the best way of securing access to educational opportunities."[63]

The influence of sociocultural values is pervasive throughout the region. People send young members of their family to work at an early age in the hope that their apprenticeship will eventually make them good workers. Such traditions, without the benefit of schooling, might perpetuate a cycle of poverty and illiteracy, resulting in more negative consequences for girls than boys.[64] In Bangladesh, which is a traditional and conservative Muslim country, two-thirds of garment industry workers are women. This is because a factory job is one of the few socially acceptable ways for a woman to earn a living.[65]

Gender discrimination is also deeply entrenched in the social norms of these countries. Women in poor households in South Asia are particularly vulnerable, for they have little decision-making power.[66] In Pakistan, for example, "women raise smaller livestock like chicken and goats, while men usually raise cattle. During times of crisis, the smaller livestock get sold first."[67] The gender gap is blatantly manifest in all educational opportunities, as evidenced by the close relationship between poverty and gender discrimination.

When combined with the poverty trap, these gender-biased social norms underlie the violation of women's rights.[68] Although discrimination against girls and women is widespread throughout the world, the UNICEF report notes, "for the sheer scale of its population and the cultural strictures against gender and class, few regions compare with South Asia, where every year millions of girls are born into poverty, debt servitude and dehumanizing birth castes."[69] Female feticide has been reported in twenty-seven of India's thirty-two states.[70]

An estimated 40 million children—girls and boys—in South Asia are placed in debt servitude in exchange for a loan for seed or shelter.[71] To systematically tackle this issue, the 1999 Worst Forms of Child Labor Convention came into being. This convention, also known as ILO Convention 182, was adopted on 17 June 1999 and has since galvanized a worldwide commitment to children. As of 21 May 2001, seventy-four countries have ratified it. As noted above, although all five South Asian countries have ratified the UN Convention on the Rights of the Child (CRC), Bangladesh and Sri Lanka are the only two South Asian countries that have ratified the ILO Convention 182.[72]

In the cases of India, Pakistan, and Sri Lanka, debt bondage and the caste system have direct consequences for children toiling in factorylike conditions, weaving carpets, making matches, rolling cigarettes, and manufacturing other small consumer products. Some local NGOs, such as the Bal Mazdoor Union and Bhima Sangha, have been set up to provide a voice for working children and to improve their living conditions.[73] Almost all of the child workers in Nepal are members of low castes from poor rural areas. In most cases the workers receive no direct payment, since

Table 7.3. Women's Educational Status

	Adult Literacy Rate		Enrollment Ratio	Adult Literacy Rate			
	Females as a % of males, 1995		Females as a % of males 1990–97	1980		1995	
	Primary School		Secondary School	Male	Female	Male	Female
Bangladesh	53	86	50	41	17	49	26
India	55	82	66	55	26	64	35
Nepal	35	71	51	38	7	54	19
Pakistan	44	45	52	41	14	54	24
Sri Lanka	93	98	110	91	79	94	87

Source: UNICEF, *The State of the World's Children 2000* (New York: Oxford University Press, 2000), pp. 96–99, 108–11.

the wages for the bonded child workers are passed to their parents or brokers or retained by the factory owners.[74]

Local Economy and Power Structure

Another, more coercive, element involved in child labor is the degree to which the local economy depends on child labor and, more accurately, the employers' desire for cheap labor. Employers can extract the same work from children at lower wages while keeping down the overall wages for such jobs.[75] A prevailing view in India holds that child bondage is necessary not only for the children's own survival but also for the survival of local economies. Small-scale industries, it is argued, need low-wage labor to compete against large and more efficient firms. Government officials in India concede that child labor helps to maintain uneconomic small-scale industries and keeps costs down so that the carpet, gem, and brassware industries can expand their exports.[76] Similarly, Pakistan's economic viability, according to a World Bank economist, correlates with the number of children in its factories.[77] Cheap child labor has fueled Pakistan's economic growth, despite the fact that it has hindered the nation's industrial development, especially as it relates to the use of advanced technologies.[78]

Over one quarter of Pakistan's work force in factories, according to one estimate, consists of children under fourteen.[79] The carpet and brick industries of Pakistan would not survive without this pool of working children.[80] This widespread practice of child labor throughout the local economy in turn has depressing impacts on wages in general. Moneylenders are not willing to make loans at 10 or 20 percent interest when debt bondage will bring them over 1,000 percent interest.[81] This institution of bonded labor in turn deepens poverty itself. As part of local patron-client networks, moneylenders/employers (*mudalali*) are so powerful that they can either block child labor laws or render the public justice system simply ineffective. There is no political commitment or will to enforce laws against bonded child labor. Further, the poor,

especially those living in rural areas, are rarely cognizant of laws prohibiting bonded labor and surely lack the knowledge or means to request their enforcement.[82]

The Globalization Factor

In recent decades, however, the impact of trade liberalization and economic globalization on child labor has become dramatically visible. At stake is achieving competitiveness in the face of intensive global pressures. As firms—national as well as multinational—and countries attempt to reduce production costs in export industries, they turn to the employment of children to acquire or maintain a competitive advantage in world markets.[83] In relative terms, however, as one ILO report suggests, it is estimated that children employed in export industries represent only a small fraction of the larger problem of child labor in the world. Rather, the vast majority of children are employed in production for domestic consumption, not in the export sector.[84]

Nevertheless, trade liberalization aspects of globalization have increasingly complicated the child labor issue. Global market forces are likely to take advantages of such local traditions. Bangladesh's apparel industry is almost fifteen years old, but the business has grown so swiftly that it accounts for 76 percent of the nation's exports.[85] Bangladesh has experienced a great economic boost by offering the global economy some of the world's cheapest labor. "For a poor nation, rich only in cheap labor," Barry Bearak notes, "the garment industry is a well-trod pathway into the global market place."[86]

Opting for the gradual evolution of their economies, South Asian governments often refer to a familiar model: child labor was common in Europe and the United States, but as Europe and America prospered, people's perception evolved and children were sent to school rather than work. Developing countries, so runs the argument, have yet to reach that stage. Arguably, most of the jobs available in poor countries demand hard labor and are performed in conditions that would be considered unsafe in developed countries.

Globalization presents both opportunities and problems for various dimensions of human security. Achieving competitiveness in the face of intense global pressures has drawn attention to the issue of cheap labor costs throughout the developing world. Although the number of those who live in abject poverty has decreased since 1960 as a proportion of the world's population, their absolute number has increased. The World Bank has estimated that the number of people living on less than $1 per day rose from 1.2 billion in 1987 to 1.5 billion in 1997.[87] As of the mid-1990s, approximately 14 percent of the world's population (828 million people) was chronically malnourished.[88] More than 80 percent of this malnutrition was the result of long-term poverty rather than emergency situations.[89]

For those who live at subsistence level, globalization has meant further uncertainty and fear. Economic restructuring caused by globalization has more often than

not increased poverty, and many existing global trade regimes have had deleterious impacts on poor countries. The debt crisis of the developing world has severely compromised poverty alleviation efforts.[90] Developing countries are being forced into harsh compromises in order to extract the capital to cover their debt-servicing arrangements with international financial institutions. Although global companies have often improved terms of service for workers in the developing world, the globalization process has replaced the Fordist social contract with the flexibility of labor as commodity. So far, no sufficient guarantees of workers' rights under global capitalism have been developed.[91]

Stabilization and structural adjustment programs (SSAPS), imposed by the World Bank and other international financial institutions (IFIS) as conditions for development loans, demanded some form of reduction of budget deficits in recipient countries. SSAPS have resulted in increased poverty for many of the people in these countries, while bolstering demand for cheap child labor. The use of child labor in turn depresses wages across the board.[92] The ILO has identified a rising curve of child labor, with the worst exploitation and abuses occurring in small, undercapitalized firms at the margins of the market. These firms use the cheapest labor available in order to compete with larger and more efficient companies.[93]

During the 1980s, according to one study, thirty-seven of the world's poorest countries experienced cuts in health budgets.[94] The resultant cuts in social, welfare, and educational spending in these developing countries, combined with forced deregulation of national economies and labor markets, "have increased the pressure on employers and families to engage in flexible, marginal employment. Child labor has increased as a result."[95] This is especially true in Pakistan, where child labor is, to some degree, a function of a political economic system that combines aspects of feudalism and capitalism.[96]

Compulsory education and economic progress are by far the most effective empowering tools for the poor in the long run. For now, however, children's rights advocates must acknowledge the limits to the immediate abolition of all child labor. Given today's reality, some experts even point out that "in very poor countries, we should make it possible for children to combine school with work, instead of thinking of these as mutually exclusive activities."[97] The elimination of the most hazardous and exploitative child labor, however, is not contingent upon eradicating poverty altogether. The two are *not* inextricably intertwined, as it is often believed. The first priority should be to abolish the most abusive forms of child labor: forced and bonded labor, commercial sexual exploitation (child sex trade), and hazardous industrial and agricultural work.[98] Caught up in a stern and unrelenting battle, the poor of the South Asia have no choice but to follow the dictates of global capitalism and market forces on the one hand, yet they remain captives of their own poverty on the other—conditions over which they have little or no control.

While immediate action to eliminate child labor must be guided by the best interests of the child, as the Convention on the Rights of the Child enunciates,[99]

understanding the realities of these societies requires a holistic approach that examines poverty, economic exploitation, cultural traditions, and social values, as well as how the vested interests of local oligarchies and transnational corporations help foster the practice of child labor.

Rights Discourse: Contending Moral Perspectives

To determine whether or not child labor is unethical involves more complex judgments than it appears at first glance. The rich countries of the North and the poor countries of the South have diverse conceptions and models of childhood and ways of raising children. Northern societies tend to separate childhood from adulthood by discouraging children's participation in certain adult concerns, such as economic maintenance of the family. Many Southern societies, in contrast, emphasize family solidarity, equip their children to play mature roles by adolescence, and expect children to contribute to the family livelihood. For this reason, Southern societies often reject Northern-defined child labor standards because such standards do not fit the realities of their societies.[100]

Anthropologists argue that work is a central element of many developing-country childhoods, a position that is often unjustly neglected or condemned by Northern ethnocentric societies.[101] Given the variation in conceptions of childhood and children's social experiences, it might be argued that "childhood is always best understood in terms of its local, diverse context."[102] Childhood is thus socially constructed, politically contingent, and culturally diverse: "Children are competent social actors and people with informed and informing views of the social world."[103]

A recent ethnographic study of children engaged in carpet production in Nepal suggests that some consideration must be given to the relative risks of alternative livelihoods or to the potential benefits to children of a working role.[104] It also acknowledges the limitations of a purely legislative approach, under which local realities may not provide effective or reasonable application.[105] Human rights activists and practitioners, who proceed from the Western model of childhood, have increasingly encountered the reality that Western policy models to protect children's rights "do not accurately reflect children's competencies and the positive potential children see in a fulfilling working role."[106] If the effectiveness of children's rights regimes is to be improved, and if services of government, voluntary, private, and trade union organizations are to offer children opportunities to break the cycle of poverty, there needs to be a reassessment of how local sociocultural understanding, concerns, and priorities can be incorporated into such planning.[107]

Linked to these debates is a number of ethical claims. The first is an absolutist approach that insists on eliminating all forms of child labor by imposing universal labor standards across the globe. Consider, for example, the language embraced in the ILO in a paper drafted by the International Conference on Child Labor held in Oslo on 27–30 October 1997: "In the globalizing and competitive world economy,

prosperity depends critically on human skills and adaptability; to tolerate child labor is inconsistent with the massive investment in human resources which every society must make in order to secure its future."[108]

There are two problems with such an approach. First, this approach focuses on the consequences and symptoms of poverty instead of on the underlying causes of poverty itself. The absolutist approach avoids grounding the problem in emerging developments in the international political economy.[109] Second, this approach could actually aggravate child labor in the short run.

Many developing countries regard placing strict prohibitions on using child labor, including inserting "social clauses" in international or trade agreements, as the new, disguised "protectionism" practiced by the developed world. Textile and apparel industries have traditionally upheld the comparative advantage of developing countries, while their labor-intensive nature has defused the unemployment problem in developing regions. The widely shared view in the developing world is that the United States, Japan, and the European Union continue to place high tariffs on sugar, milk, meat, fruits, and vegetables as well as textiles and footwear—precisely those basic products in which developing countries enjoy a comparative advantage because of low labor costs. The advanced industrial nations, it is argued, are simply trying to end the use of child labor in the developing world in order to prevent them from translating their reservoir of low-cost labor into an increase in their market share. A related argument is that the best way to deal with problems such as poverty and immigration "is not to marginalize developing nations, but to give them a substantial stake in the global trading process."[110]

The proponents of an ethically relativistic view, in contrast, stress the hard realities facing these children and their families. Most families give the highest priority to subsistence rather than the education of their children. At sweatshops, it is argued, "the hours may be a strain and the wages a heartache. But almost anyone will say that even a dreadful job is better than none."[111] Under such circumstances, to argue that the only way to confront child labor is for consumers and governments to apply pressure through sanctions and boycotts is simplistic. In fact, in the International Conference on Child Labor, ILO officials argued: "Trade sanctions and threats of consumer boycotts may have done much to raise the awareness of the child labor issue, but they often have had unintended effects that were not always beneficial to children."[112]

Consider, for example, the introduction of the Child Labor Deterrence Act in 1992 by U.S. senator Tom Harkin, known as the "Harkin Bill." This bill led to the laying off of an estimated fifty thousand children, some 75 percent of all children in industry in Bangladesh. Several visits by UNICEF, local NGOs, and the ILO revealed that children went looking for new sources of income and found them in less- or nonregulated work such as stone-crushing, street hustling, and prostitution—pursuits far more detrimental and exploitative than garment production. In other

cases the mothers of laid-off children had to quit their jobs to look after their children, again resulting in less household income.[113]

Another relativistic view holds that workers in the South benefit from the opportunity to work in the "new sweatshops" of the transnational corporations because workers themselves often find this employment to be better than the available opportunities in their countries. Furthermore, it is argued, they should have the opportunity to secure low-waged industrial jobs rather than face the less desirable work in the informal sector. The relevant comparison is not between wages and working conditions in the North and in the South but between wages and working conditions of corporate facilities and other sectors in the South.[114]

Some analysts have emphasized the fact that the recent economic development of some Asian countries, such as Japan, South Korea, and Taiwan, is rooted in the kind of industrialization that extensively used cheap labor. These "corporate sweatshops" in developing countries are, in point of historical fact, the first stage of development and economic growth.[115] Some liberal economists, such as Jeffrey D. Sacks and Paul Krugman, have proposed a similar rationale. "Low-wage plants making clothing and shoes for foreign markets," Krugman notes, "are an essential first step toward modern prosperity in developing countries."[116] While questioning profit-driven decisions of callous multinational companies and greedy local entrepreneurs who take advantage of the availability of cheap labor, Krugman argues that even in corrupt nations such as Indonesia, industrialization has noticeably reduced the number of malnourished children.[117] "The overwhelming mainstream view among economists," Krugman insists, "is that the growth of this kind of employment is tremendous good news for the world's poor."[118]

Many local experts in South Asia, moreover, support Krugman's argument. Rita Afshar of the Bangladesh Institute for Development Studies points to the pay scale of Chowdhury Knitwear, an apparel industry in Bangladesh, where workers take home an average monthly wage of $35 for women and $40 for men. Those earnings are about 25 percent higher than the country's per capita income,[119] hence the rejection of the call for the harmonization of normative codes and their imposition on other countries. Poor standards of labor in low-income countries reflect "regrettable necessity" rather than distinct sets of cultural values or preferences. The solution lies in growth and development, which will result in an eventual increase in incomes and the demand for the higher standards that already exist in the industrial North.[120]

Increasingly, human rights observers question this approach, supporting a holistic perspective that links child labor not only to the manufacturers in South Asian countries and their governments but also to the role that corporations play in a structural rearrangement of the global economy. The conditions that foster such labor practices need to be examined from such a holistic perspective. Clearly, the ban on importation of goods produced by children will not end the conditions under which such practices are being held.

NGOs/Transnational Human Rights Groups

Since 1985, when the charter of the South Asian Association for Regional Cooperation (SAARC) was signed by the South Asian governments, no serious attempt has been made by SAARC member states to discuss human rights issues.[121] Because in South Asia, as elsewhere in the world, states lack the will and/or resources to eradicate child labor in the foreseeable future, the role of NGOs and private citizens is crucial. Several South Asian human rights NGOs have assumed the responsibility for improving human rights throughout the region. These include, among others, the Human Rights Organization of Nepal, the South Asian Human Rights Documentation Center in India, the Pakistan Human Rights Commission, the Bangladesh Human Rights Commission and, in Sri Lanka, the Asia Pacific Women, Law, and Development. In December 1990 at the Third World Congress on Human Rights in New Delhi, representatives from over fifty NGOs from the SAARC countries used this opportunity to create the South Asian Forum for Human Rights (SAFHR). This human rights NGOs' long-term goal is to establish a South Asian Charter of Human Rights.[122]

The Bonded Labor Liberation Front (BLLF) is probably the most successful human rights NGO in Pakistan. Founded in 1988, the BLLF has liberated thirty thousand adults and children from working in brick kilns, carpet factories, and farms, and has placed eleven thousand children in its own primary school system.[123] It has also won twenty-five thousand high-court cases against abusive and unscrupulous employers and helped to push labor legislation through the National Assembly.[124]

Since the 1980s NGOs and some governments (for example, Germany) have advocated market-based initiatives, including product labeling schemes, also known as social labeling, and corporate codes of conduct as a strategy to reduce child labor. These initiatives have had twofold objectives: (1) either total eradication of child labor or the amelioration of children's working and living conditions; and (2) improvements in the situation of child workers and their families and communities by setting up local aid, schooling, or rehabilitation projects financed through levies collected by the labeling initiatives.[125]

Corporations with social labeling programs include the Rugmark Foundation (Germany, India, Nepal, Canada, and the United States),[126] Care & Fair (Germany), STEP (Switzerland), the Double Income Project (DIP–Zurich), the Abrinq Child-Friendly Enterprise (Brazil), and Instituto Pro-Crianca (Brazil). None of these corporations, however, fully guarantee that their products are made without child labor because such a guarantee cannot reasonably be given.[127] Rather the emphasis is placed on the "socially just and ecologically sound" conditions under which carpets are produced and on paying producers a fair price as well as on fighting exploitative and abusive child labor.[128] The long-term effectiveness of social labeling rests on, among other things, monitoring and inspection, both of which are difficult to implement. Given the voluntary nature of codes of conduct and labeling, there is no

systematic way of controlling compliance. Yet NGOs' strategies and the media efforts in publicizing labels and codes have exerted enormous pressure on the producers.[129]

The development of Rugmark is a case in point. The carpet industry in India is one of the country's most lucrative export industries. As of 1997 unofficial statistics indicate that about three hundred thousand children continue to be employed in the carpet industry in India.[130] Transnational social activists from India and Germany made a concerted effort against the use of child labor in the carpet industry in South Asia.[131] This effort was initially launched in India by social activists such as Kailash Satyarthi and Swami Agnivesh, both of whom are involved with the Bonded Labor Liberation Front. But through an Indian-German coalition that later gained the support of a broader transnational coalition, such efforts ultimately led to the development of Rugmark, a label that identifies child-labor-free carpets; it also guarantees that adult carpet weavers are paid a minimum wage.[132] The Rugmark Foundation was incorporated in September 1994 as "a private, voluntary, non-profit entity" under section 25 of the Indian Companies Act of 1956. Currently there are Rugmark Foundations in the carpet-producing countries of India, Nepal, and Pakistan. Licensed Rugmark importers are now located in Germany, the Netherlands, Belgium, Luxembourg, Sweden, Switzerland, and the United States.[133] In India there are 218 licensed exporters registered with Rugmark.[134]

Conclusion

Adopting a human rights approach to the elimination of poverty is a desirable but all too often difficult and paradoxical task, given that freedom from child labor and socioeconomic rights continue to be conflicting concerns in South Asia. The chasm between an international normative consensus on human rights standards and the empirical context of local realities remains wide. Despite a broad consensus on the goal of eliminating the most abusive forms of child labor, the question of how to enforce laws against the variety of forms of child labor remains unanswered. Because of the tenacious obstacles to eliminating child labor—economic necessity and social legitimacy—laws against child labor have failed to forestall the practice.

Short-term solutions such as consumer boycotts, trade sanctions, and mandatory dismissal alone offer mixed results. Maintaining a balance between the *law enforcement* and *prevention* has proven immensely difficult and complicated.[135] Those initiatives that are designed to punish the manufacturers in South Asian countries fail to offer a way to "rehabilitate" the children and often lead to increased suffering rather than amelioration.

At the present time there is no policy guide, nor does any unique prescription exist regarding how to abolish or ban child labor altogether. What seems clear, however, is that the blanket eradication of child labor is unrealistic—perhaps even immoral—in the face of the region's massive poverty. Further attention must be accorded to improving the working conditions of child workers and combining

work with schooling and/or vocational training as well as to ensuring the payment of adequate wages to adults so that their children are not forced to work.

The long-term solution to the child labor problem lies in alleviating poverty, improving the quality of education, and expanding access to schooling for disadvantaged social groups.[136] Protecting children in their workplaces and creating more alternatives for economic and social advancement are the keys. An antipoverty development strategy will be effective if it targets gender equality and educational opportunities for poor families, especially those with school-age children.[137] How the globalization process affects the comparative advantage of South Asian countries demands further critical scrutiny, as does the way in which structural adjustment programs increase child labor rates. The complexity of the child labor issue illustrates the limitations of a purely legalistic approach, for local realities may not be effectively handled through universal legislation.

Passing laws, applying direct interventions, and promoting social labeling have all had tenuous impacts on the prevention of child labor in the absence of the favorable structural conditions and the political commitment of national leaders. Economic progress and desirable structural conditions are an integral part of any long-term solution to the child labor problem. Even so, South Asian governments themselves bear heavy responsibility in dealing with the issue. Addressing governance issues—such as the rule of law, accountability, transparency, democratization, and corruption—is crucial as these governments find it increasingly difficult to ignore the pressure that NGOs and civil society organizations apply toward preventing child labor. Only when there is a political will to socially empower people—through support for the welfare programs and universal primary education intent on closing the gender gap—can sustainable human development materialize, thereby breaking the cycle of bondage.

Notes

I gratefully acknowledge David P. Forsythe, Kavita Philip, Gustav Ranis, Mohammad Elahee, Sean Duffy, Amit Dar, and Ricardo Castro for their generous assistance with this project.

1. "The Tragedy of Child Labor: An Interview with Kailash Satyarthi." Kailash Satyarthi is the head of the South Asian Coalition on Child Servitude (SACCS), a coalition of fifty organizations working on child rights issues in Bangladesh, India, Pakistan, Nepal, and Sri Lanka. In the case of the carpet industry in India, for example, ten years ago, twenty-five thousand to one hundred thousand children were employed in the industry. Today, the industry has more than three hundred thousand child workers. Retrievable at *http://essential.org/monitor/hyper/issues/1994/10/mm1094_07.html* [15 June 2002]. See pp. 1–5, especially 2.
2. UNICEF, *The State of the World's Children* (New York: Oxford University Press, 1997), 35.
3. "The Flourishing Business of Slavery," *Economist*, 21 September 1996, 43.
4. UNICEF, *The State of the World's Children*, 17–28.
5. UNICEF, *The State of the World's Children*, 37.
6. UNICEF, *The State of the World's Children*, 28.
7. Peter Fallon and Zafiris Tzannatos, *Child Labor: Issues and Directions for the World Bank*, Social Protection, Human Development Network (Washington DC: International Bank for Reconstruction and Development, the World Bank, 1998), 1–22, see 4. See also Optional Protocol to

the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (adopted and opened for signature, ratification, and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000), retrievable at *www.unhchr.ch/html/menu2/dop child.htm*. Human Rights Watch/Asia in 1996 reported that three main types of child laborers worked in India's so-called carpet belt: migrant bonded labor, local bonded labor, and wage earners. The most severe bondage was inflicted on the migrant children, most of whom were trafficked to the carpet belt from the poor state of Bihar. For more information on how prevalent migrant child labor is in India, see Human Rights Watch/Asia, *The Small Hand of Slavery: Bonded Child Labor in India* (New York: Human Rights Watch, 1996); 104–5.

8. Cited in R. Barri Flowers, "The Sex Trade Industry's Worldwide Exploitation of Children," *Annals of the American Academy of Political and Social Science*, vol. 575 (May 2001): 147–57, see 149.
9. Madhavi Basnet, "South Asia's Regional Initiative on Human Rights," retrievable at *www.wcl.american.edu/pub/humright/brief/v4i2/saarc42.htm*.
10. Basnet, "South Asia's Regional Initiative on Human Rights," 5.
11. Rachel Baker and Rachel Hinton, "Approaches to Children's Work and Rights in Nepal," *Annals of the American Academy of Political and Social Science*, vol. 575 (May 2001): 176–93, see 190.
12. United Nations Development Programme (UNDP), *Human Development Report, 2000* (New York: Oxford University Press, 2000), 40.
13. Fallon and Tzannatos, *Child Labor*, 6.
14. Fallon and Tzannatos, *Child Labor*, 15.
15. Retrievable at *www.hindustantime...fram/101299/detnato8.htm* [15 June 2002]. See also *Hindustan Times* (New Delhi), 10 December 1999, 1.
16. International Programme on the Elimination of Child Labour: IPEC, "IPEC in Action: Asia," retrievable at *www.ilo.org/public/english/standards/ipec/index.htm*.
17. International Labor Organization, "Statistics: Revealing a Hidden Tragedy," retrievable at www.ilo.org/public/english/standards/ipec/simpoc/stats/4stt.htm. This brief child labor statistics is part of the International Programme on the Elimination of Child Labour: IPEC.
18. Carol Bellamy, *The State of the World's Children, 2000*, retrievable at *www.UNICEF.org*.
19. Mark Lansky, "Perspectives: Child Labour: How the Challenge Is Being Met?" *International Labour Review*, vol. 136, no. 2, (summer 1997): 233–57, see 243.
20. FOIL pamphlet 1 (fall 1996), "Those That Be in Bondage: Child Labor and IMF Strategy in India," retrievable at *www.proxsa.org/economy/labor/chldlbr.html*, see 1–11.
21. ILO, *Strategies for Eliminating Child Labour: Prevention, Removal, and Rehabilitation: Synthesis Document*, International Conference on Child Labor, Oslo, 27–30 October 1997, International Labor Office (Geneva: United Nations Children's Fund, New York, 1997), 1–19, see 2.
22. ILO, *Decent Work*, International Labor Conference, 87th Session (Geneva: International Labor Office, 1999), 4. The ILO has had as its primary goal securing "decent work" for people everywhere in conditions of freedom, equity, security, and human dignity. In this connection, it pursues four strategic objectives: the promotion of rights at work; employment; social protection; and social dialogue (p. 3).
23. See Anu Saksena, *Human Rights and Child Labour in Indian Industries* (Delhi: Shipra Publications, 1999), 34.
24. ILO, "Strategies for Eliminating Child Labour," 4.
25. Rebecca Sherman, "Bonded Labor," *Human Rights: The Essential Reference*, ed. Hilary Poole (Phoenix: Oryx Press, 1999), 235–36, especially 235.
26. Sherman, "Bonded Labor," 236.
27. See Ralph Wilde, "An Analysis of the Universal Declaration of Human Rights," *International Encyclopedia of Human Rights: Freedoms, Abuses, and Remedies*, ed. Robert L. Maddex (Washington DC: Congressional Quarterly, 2000), 73–116, especially 80.

28. "The Convention on the Rights of the Child," retrievable at *www.unicef.org/crc/convention.htm* [12 October 2002], see 3.
29. UNDP, *Human Development Report, 2000*, 40. Ratification of core International Labor conventions (as of 4 April 2000) shows that only eighty-eight countries ratified the Convention on Minimum Working Age, known as Convention 138 (1973).
30. One hundred and ninety-one countries (as of 16 February 2000) have ratified the CRC. Somalia has neither ratified nor signed and the U.S. signature has not been followed by ratification. For further details, see United Nations Development Programme, *Human Development Report, 2000*, 48–51. William E. Myers has argued that social conventions such as CRC, unlike security or trade conventions, are purely voluntary and have no enforcement mechanism to make countries fulfill their obligations. See Myers, "The Right Rights? Child Labor in a Globalizing World," *Annals of the American Academy of Political and Social Science*, vol. 575 (May 2001): 38–55, see 44.
31. Center for the Study of Human Rights, *Twenty-Four Human Rights Documents* (New York: Columbia University, 1992), 82.
32. Myers, "The Right Rights?" 52.
33. S. L. Bachman, "The Political Economy of Child Labor and Its Impacts on International Business," *Business Economics*, July 2000, 30–41, see 33.
34. See ILO, *Global Report 2001: Stopping Forced Labor*, retrievable at *www.ilo.org*. Further information can be retrieved at *www.ilo.org/public/english/standards/decl/publ/reports/report2.htm*, 34–35.
35. Savitri Goonesekere, "The Best Interests of the Child: A South Asian Perspective," *The Best Interests of the Child: Reconciling Culture and Human Rights*, ed. Philip Alston (Oxford: Clarendon Press, 1994), 117–49, see 141.
36. ILO, "Strategies for Eliminating Child Labour," 5.
37. See trends in human development and per capita income, UNDP, *Human Development Report, 2000*, 178–81.
38. See demographic trends in UNDP, *Human Development Report, 2000*, 223–26.
39. The World Bank, "Social Protection Sector Strategy: From Safety Net to Spring Board," Draft Final Report, Social Protection Sector, Washington DC, August 2000, 110.
40. The World Bank, "Social Protection Sector Strategy," 121.
41. See human poverty in developing countries for the period of 1989–98, in UNDP, *Human Development Report, 2000*, 169–71.
42. Richard Anker, "The Economics of Child Labour: A Framework for Measurement," *International Labour Review*, vol. 139, no. 3, (2000): 257–80, see 272.
43. Anker, "The Economics of Child Labour," 273.
44. International Justice Mission, "No Mercy: An Introduction to Bonded Child Labor and Forced Prostitution in India," Washington DC, 1998, 1–28, especially 4–5, retrievable at *www.ijm.org/India.htm*.
45. Jonathan Silvers, "Child Labor in Pakistan," *Atlantic Monthly* February 1996, 79–92, especially 81. Also see Rekha Chalsani, U.S. Agency for International Development Fact Sheet, 20 March 2000, USAID/India–Child Labor/Human Rights, retrievable at *www.usaid.gov/press/release/200/fs2000 0082.htm*.
46. UNDP, *Human Development Report, 2000*, 197.
47. UNICEF, *State of the World's Children, 2000* (New York: Oxford University Press, 2000), 96–99.
48. UNICEF, *State of the World's Children, 2000*, 96–99.
49. International Justice Mission, "No Mercy," 6.
50. See B. N. Juyal's work, *Child Labor in the Carpet Industry in Mirzapur-Bhadohi* (New Delhi: International Labor Organization, 1993), cited in Geeta Chowdhry and Mark Beeman, "Challenging Child Labor: Transnational Activism and India's Carpet Industry," *Annals of the American Academy of Political and Social Science*, vol. 575, (May 2001): 158–75, see 166.

51. International Justice Mission, "No Mercy," 6.
52. Myron Weiner, *The Child and the State in India: Child Labor and Education Policy in Comparative Perspective* (Princeton: Princeton University Press, 1991), 173–75.
53. Retrievable at *www.indev.nic.in/news/5july99.html* [June 2001], see p. 1.
54. Retrievable at *www. indev.nice.in/news/5july99.html*, 2.
55. Weiner, *Child and the State in India*, 77–108.
56. Weiner, "Children in Labor: How Sociocultural Values Support Child Labor," *World and I*, vol. 10, no. 2 (February 1995): 370–81, see 378–79.
57. Weiner, "Children in Labor," 381.
58. Weiner, *Child and the State in India*, 195. For more information on child labor and compulsory education policies, see chapter 5, pp. 77–108.
59. Weiner, "Children in Labor," 381.
60. Arlene Gelbard, Carl Haub, and Mary M. Kent, "World Population Beyond Six Billion," *Population Bulletin*, vol. 54, no. 1 (March 1999): 3–42, see 37.
61. Weiner, *Child and the State in India*, 153.
62. Philip Alston points to this social reality, albeit in a different context, to demonstrate how best culture can serve the purpose of promoting human rights. See Alston's "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," *The Best Interests of the Child: Reconciling Culture and Human Rights*, ed. Philip Alston (Oxford: Clarendon Press, 1994), 1–25, see 19–20.
63. Alston, *Best Interests of the Child*, 20.
64. Alston, *Best Interests of the Child*, 20.
65. See Barry Bearak, "Lives Held Cheap in Bangladesh Sweatshops," *New York Times*, 15 April 2001, 1 and 12, especially 12.
66. The World Bank, "Helping the Vulnerable Manage Risk," *Spectrum* (special issue, 2001): 36.
67. The World Bank, "Helping the Vulnerable Manage Risk," 36.
68. UNICEF, *State of the World's Children, 2000*, 19.
69. UNICEF, *State of the World's Children, 2000*, 19.
70. UNICEF, *State of the World's Children, 2000*, 19.
71. UNICEF, *State of the World's Children, 2000*, 20.
72. Retrievable at *www.indev.nic.in* or *www.indev.org*. See Ratification of ILO Convention 182, updated 21 May 2001. For updated version of ratification of the Convention 182, visit *www.globalmarch.org/worstformsreport/ratification/182.html*.
73. Sandy Hobbs, Tim McKechnie, and Michael Lavalette, *Child Labor: A World History Companion* (Santa Barbara CA: ABC-CLIO, 1999), 122–23.
74. Hobbs, McKechnie, and Lavalette, *Child Labor*, 172–73.
75. For a compelling analysis on this point, see Anu Saksena, *Human Rights and Child Labour in Indian Industries* (Delhi: Shipra Publications, 1999), 6.
76. Weiner, "Children in Labor," 375.
77. Silvers, "Child Labor in Pakistan," 81.
78. Silvers, "Child Labor in Pakistan," 84.
79. Retrievable at *www.angelfire.com/hi/katzmaru44/childlabor.html* [June 2001].
80. Retrievable at *www.angelfire.com/hi/katzmaru44/childlabor.html.*
81. International Justice Mission, "No Mercy," 5.
82. International Justice Mission, "No Mercy," 8.
83. ILO, "Strategies for Eliminating Child Labour," 3.
84. ILO, "Strategies for Eliminating Child Labour," 4.
85. Bearak, "Lives Held Cheap in Bangladesh Sweatshops."
86. Bearak, "Lives Held Cheap in Bangladesh Sweatshops."
87. Jan Aart Scholte, *Globalization: A Critical Introduction* (New York: St. Martin's Press, 2000), 214.

88. Scholte, *Globalization*, 214.
89. Scholte, *Globalization*, 214.
90. Scholte, *Globalization*, 232.
91. Scholte, *Globalization*, 233.
92. Saadia Toor, "Child Labor in Pakistan: Coming of Age in the New World Order," *Annals of the American Academy of Political and Social Science*, vol. 575 (May 2001): 194–224, see 204.
93. Hobbs, McKechnie, and Lavalette, *Child Labor*, 219.
94. Scholte, *Globalization*, 214.
95. Scholte, *Globalization*, 214.
96. Toor, "Child Labor in Pakistan," 205.
97. Kaushik Basu, "Child Labor: Cause, Consequence, and Cure, with Remarks on International Labor Standards," *Policy Research Working Papers*, no. 2027, World Bank (December 1998): 1–73, see 62.
98. UNICEF, *State of the World's Children* [1997], 35–45.
99. See "The Convention on the Rights of the Child," *Twenty-Four Human Rights Documents*, Center for the Study of Human Rights, Columbia University, 1992, 81–93; see especially Article 3, section 1: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (p. 82).
100. Myers, "The Right Rights?" 40.
101. Myers, "The Right Rights?" 41–42.
102. Allison James and Adrian L. James, "Childhood: Toward a Theory of Continuity and Change," *Annals of the American Academy of Political and Social Science*, vol. 575 (May 2001): 25–37, see 27.
103. James and James, "Childhood," 29.
104. Rachel Baker and Rachel Hinton, "Approaches to Children's Work and Rights in Nepal," *Annals of American Academy of political and Social Science*, vol. 575 (May 2001): 176–93, especially 182.
105. Baker and Hinton, "Approaches to Children's Work and Rights in Nepal," 182.
106. Baker and Hinton, "Approaches to Children's Work and Rights in Nepal," 190.
107. Baker and Hinton, "Approaches to Children's Work and Rights in Nepal," 192.
108. ILO, "Strategies for Eliminating Child Labour," 10.
109. FOIL pamphlet, 6.
110. William Drozdiak, "Protectionism in a Global Age," *Washington Post National Weekly Edition*, 21–27 May 2001, 17.
111. Investigating the deadly fire that claimed fifty-two lives at Chowdhury Knitwears, a Bangladesh garment industry, in November 2000, Barry Bearak reminds us of the difficulties inherent in perilous Bangladesh sweatshops. See Bearak, "Lives Held Cheap in Bangladesh Sweatshops," 12.
112. ILO, "Strategies for Eliminating Child Labor," 1–2.
113. UNICEF, *State of the World's Children* [1997], 23.
114. Defending the neoclassical vision of capital mobility, Paul Krugman has advocated a relativistic position in support of global competition. His views here are highly relevant to our discussion on child labor. He is cited in George F. DeMartino, *Global Economy, Global Justice: Theoretical Objections and Policy Alternatives to Neoliberalism* (New York: Routledge, 2000), 182. For a similar viewpoint, see Irwin M. Stelzer, "Efforts to Reduce the Use of Sweatshops Are Misguided," *Child Labor and Sweatshops*, Opposing Viewpoints Series, ed. Mary E. Willaims (San Diego: Greenhaven Press, 1999), 58–62. Stelzer writes that "now-prosperous Japan started as a low-wage producer" and that "the allegedly exploited workers are often better off than their countrymen who remain in primitive agriculture or handicraft industries" (p. 61).
115. Allen R. Myerson, "Sweatshops Often Benefit the Economies of Developing Nations," *Child Labor and Sweatshops*, ed. Mary E. Williams (San Diego: Greenhaven Press, 1999), 32–35, see 32.

116. Jeffrey D. Sacks and Paul Krugman are cited in Myerson, "Sweatshops Often Benefit the Economies of Developing Nations," 33.
117. Cited in Myerson, "Sweatshops Often Benefit the Economies of Developing Nations," 34.
118. Cited in Myerson, "Sweatshops Often Benefit the Economies of Developing Nations," 34.
119. Cited in Bearak, "Lives Held Cheap in Bangladesh Sweatshops," 12.
120. DeMartino, *Global Economy, Global Justice*, 202–3.
121. Basnet, "South Asia's Regional Initiative on Human Rights."
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133. Chowdhry and Beeman, "Challenging Child Labor," 169–70.
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135. Human Rights Watch/Asia, *The Small Hand of Slavery*, 148.
136. The World Bank, "The Global Fight against Child Labor," *Spectrum* (special issue, winter 2001): 15.
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8 Human Rights and Indigenous Peoples in Africa and Asia

Robert K. Hitchcock

Over the past three decades there has been a dramatic upsurge in international, regional, and local efforts to promote human rights for the cultures of the world that define themselves as indigenous peoples.[1] Variously called aboriginals, native peoples, tribal peoples, Fourth World peoples, or "first nations," these populations have suffered acts of physical and cultural genocide, human rights abuses, discrimination, impoverishment, and inequalities in access to land, capital, and employment for centuries.[2]

International meetings that include indigenous peoples have been held that focus on their plight.[3] Detailed investigations of human rights violations against indigenous peoples have been conducted, some of which have included forensic work on mass graves.[4] In some countries indigenous peoples have entered into direct negotiations with the state over land and other rights.[5] One of the ironies that exists in the arena of international human rights is that a number of governments of states that are home to indigenous peoples take the position that the world should recognize what can be referred to as regional values or norms (for example, "Asian values" or "African values"). They argue that human rights groups and intergovernmental organizations should be culturally relative in the ways in which they treat the actions of individual states.

Some governments and scholars maintain that the values of Africa and/or Asia include respect for the group and the community, communalism, social harmony, and the explicit recognition of the importance of custom and tradition.[6] Yet many of these same governments do not recognize the rights of indigenous peoples within their borders, many of whom possess belief systems, customs, and values that are said to be similar to those of Asians or Africans in general.

Cultural relativism as developed by anthropologists was aimed initially at bringing about respect for cultural difference and objectivity in the discussions of cultural diversity.[7] The concept has been employed more recently in international debates that seek to rationalize specific customs, some of which could be defined as discriminatory or prejudicial to the populations involved. Examples include the treatment of women in some states in Asia and the Middle East, bride burning and dowry death in South Asia, and female circumcision, also called female genital mutilation (FGM), which is practiced in a number of countries in Africa and the Middle East.

Spokespersons for various governments around the world (not just in Africa and Asia) have used the concept of cultural relativity in defense of their human

rights records, some of which are abysmal. A question asked by Asian and African indigenous peoples is whether or not human rights are universal or if they have to be subjected to rules that derive from particular cultural traditions that vary from place to place and that, in some cases, are not always positive for the societies or groups in question. It is important to note that, in general, the more repressive (or less democratic) the state, the more likely it is to make a culturally relativistic argument about how its actions should be perceived by outsiders.

This chapter addresses the issue of indigenousness among the world's peoples, with particular attention paid to those people in Africa and Asia who consider themselves or are considered by others to be indigenous. After a discussion of the meaning of the term *indigenous peoples*, I outline some of the ways in which African and Asian governments have approached the question of indigenousness. Drawing on examples from various Asian and African countries, I discuss issues relating to human rights, breaking down the rights into categories: (1) civil and political rights; (2) land rights; (3) economic rights; and (4) cultural rights. I pay particular attention to the variation in real expressions of indigenousness or lack of indigenousness. I conclude with a discussion of the importance of region in the approaches to indigenous peoples' rights.

The Meaning of the Term *Indigenous*

One of the areas of concern for indigenous peoples relates to just who these groups and individuals are. No single, agreed-upon definition of the term *indigenous peoples* exists. According to the Independent Commission on International Humanitarian Issues, four elements are included in the definition of indigenous peoples: (1) pre-existence; (2) nondominance; (3) cultural difference; and (4) self-identification as indigenous. The term *indigenous peoples* is usually used in reference to those individuals and groups who are descendants of the original populations residing in a country.[8] In the majority of cases they are numerical minorities, and as a group they do not control the governments of the countries where they live. Most, but not all, indigenous groups are ethnic minorities who tend to lack power, feel that they are marginalized from the political process, and are disenfranchised.

Indigenous peoples generally possess ethnic, religious, or linguistic characteristics that are different from the dominant or numerically superior groups in the societies of which they are a part. They also tend to have a sense of cultural identity or social solidarity that many members of indigenous groups attempt to maintain. In some cases members of indigenous communities attempt to hide their identity so as not to suffer racial prejudice or poor treatment at the hands of others. In a number of cases they proclaim their ethnic affiliation proudly and openly. Indeed, an important criterion for "indigenousness" is the identification by people themselves of their distinct cultural identity. Most indigenous people prefer to reserve for themselves the right to determine who is and is not a member of their group. As Nietschmann put it, "Like a nation, a people is self-defined."[9]

The term *indigenous peoples* is sometimes applied to non-European groups residing in regions that were colonized by Europeans. According to the United Nations special rapporteur on the problem of discrimination against indigenous populations, the term also applies to those people who are isolated or marginal groups that have managed to preserve their traditions in spite of being incorporated into state systems dominated by other peoples.[10]

There are several different approaches among analysts to the issue of defining indigenous peoples. The International Labor Organization and Survival International use the term "tribal and indigenous peoples" (and in the past also used "semi-tribal peoples"), while the World Bank and the United Nations prefer "indigenous peoples." The World Bank's 1991 operational directive on indigenous peoples notes that no single definition is appropriate to cover the diversity in indigenous peoples. It then goes on to point out that these peoples can be identified by the following characteristics: (1) close attachment to ancestral territories and natural resources; (2) self-identification and identification by others as members of a distinct cultural group; (3) possession of an indigenous language that is often distinct from the national language; (4) presence of customary social or political institutions; and (5) subsistence-oriented production systems.[11]

It is important to note that many indigenous peoples do not fit these criteria. Substantial numbers of indigenous peoples have been dispossessed so they no longer retain their traditional ancestral territories. The vast majority of African and Asian indigenous peoples have market-production systems. The hill tribes of Thailand, the Maori of New Zealand, and some Chinese national minorities are relatively heavily urbanized. There are also indigenous peoples who do not have what many anthropologists would define as tribal sociopolitical systems. Instead, groups such as the San of southern Africa, the Hadza of Tanzania, the Batwa (Pygmies) of central Africa, the Penan of Sarawak in Malaysia, the Agta of the Philippines, the peoples of the Andaman Islands in the Bay of Bengal, and the Birhor and some other former foragers in India have relatively egalitarian systems in which adults have a relatively equitable say in public policy making and tend to lack nonkin-based social units such as age-grades.

Even if some people claim to be indigenous, the countries where they live may not recognize them as being aboriginal. The government of India, for example, maintains that all people in the country are indigenous. At the same time, the government of India does designate tens of millions of its citizens as "tribals" (Adivasis, Dalits, "Scheduled Tribes"). There are also "Scheduled Castes" designated under the Indian Constitution.[12] Some African countries, such as the Republic of Botswana, use a bureaucratic definition to cover their indigenous peoples along with others who share similar characteristics of residing in remote areas and being marginal in a socioeconomic sense. Multiracial states like Botswana prefer not to differentiate specific populations that are targets of development programs, in part because they

do not wish to be seen as practicing a kind of apartheid or separation on the basis of ethnic identification.[13]

Particular problems arise in defining people as indigenous in Africa and Asia. In many areas, it is difficult to determine antecedence since a variety of populations have moved in and out of local areas over time. The majority of Africans would identify themselves as belonging to specific tribal or ethnic groups. Some African countries see themselves as ethnically homogenous (such as Somalia and Swaziland), but there are internal subdivisions that people pay heed to (for example, clan affiliation). If African countries employed the definition of tribal populations provided in the World Bank's *Operational Manual*, there would be little agreement on which groups fit the criteria of being ethnically distinct, isolated, unacculturated or only partially acculturated, and nonmonetized or only partially monetized. As a consequence, the World Bank is in the process of revising its indigenous peoples' policy. Social scientists and others in the Bank recognized that there was what they termed a "definitional problem" and they realized that some potentially relevant groups did not fit the criteria outlined in the 1991 operational directive. Currently a profiling exercise is on-going in Asia to obtain a more detailed understanding of cultural diversity there.

Indigenous peoples in Africa and Asia are highly diverse. They range from small communities of foragers (hunters and gatherers) in the savannas, tropical forests, and mountains of eastern and southern Africa and Southeast and South Asia to large-scale internally stratified groups engaged in struggles for autonomy and self-determination in such countries as Bangladesh, Burma (Myanmar), India, and Thailand. In most cases, indigenous peoples in Africa and Asia are at the bottom of the several-tiered socioeconomic systems of the countries in which they live. Sizable proportions of indigenous peoples are impoverished, they are marginalized both socially and politically, and they are all too often subjected to discriminatory treatment by governments and individuals in the states in which they reside.

The claims of indigenous peoples in both Africa and Asia are relatively similar: they wish to have their human rights respected, they want ownership and control over their own land and natural resources, and they want the right to be to participate through their own institutions in the political process at the nation-state, regional, and international levels.

Many indigenous peoples in Africa and Asia live not just in individual countries but rather are found in several states, often in border areas (for example, the peoples in the Chittagong Hills of Bangladesh and across the border in Burma or the Hill Tribes of Southeast Asia). The transboundary nature of many indigenous peoples puts them in special positions vis-à-vis nation-states, many of which are concerned about their sovereignty and security and are attempting to prevent movements of people, goods, drugs, and weapons across their borders, as is the case, for example, in the Golden Triangle of Southeast Asia, including parts of Burma, China,

Laos, Thailand, and Vietnam or the Golden Crescent of South Asia, which includes Afghanistan and Pakistan.

An examination of the sociopolitical status of indigenous groups in Africa and Asia reveals that very few of them are in control of the governments in the countries where they reside. The vast majority of indigenous peoples lack political power at the national or even at the local level. A major reason for this situation is that many of them were designated by colonial governments as "wards of the state," without legal rights to participate in political decision making or to control their own futures.

Africa and Indigenous Peoples

The African continent is vast, covering 30.2 million square kilometers (11.7 million square miles), an area slightly larger than the combined area of the United States and Latin America. As of 2000 the African continent was home to some 771 million people residing in fifty-four separate countries. Of the world's regions, Africa is by far the most diverse culturally. The people of Africa speak more than 2,011 (or some 30 percent) of the world's 6,703 distinct languages. Some African countries are especially diverse. Sudan, for example, contains over two hundred ethnic groups who speak some 134 languages, while Nigeria has some six hundred or more ethnic groups who speak as many as 505 different languages.

African countries tend to take two different positions on the issue of indigenous populations within their territories: (1) they claim that there are no indigenous peoples whatsoever; or (2) they state that *all* of the groups in the country are indigenous. Oral histories, data from the archaeological record, and sometimes ethnohistoric information can brought to bear on the question of "indigenousness." The problem is that even these data are open to interpretation.

In the past, the peoples of Africa who were most frequently identified as being indigenous in the countries in which they resided were hunter-gatherers (for example, the San of southern Africa or the Batwa of central Africa) or pastoralists (for example, the Maasai of Kenya and Tanzania or the Tuareg of the Sahara). Over the past two decades a number of different African groups have claimed to be indigenous, some of whom have attended the meetings of the Working Group on Indigenous Populations (WGIP) of the United Nations in Geneva. Those people who identify themselves as indigenous in Africa have sought to publicize the situations that they are facing. They have also taken part in a number of international forums on indigenous peoples held by academic institutions and indigenous peoples' human rights and advocacy organizations.[14]

In many ways the indigenous movement is still in its infancy in Africa, but steps are being taken toward establishing Africa-wide indigenous peoples' networks and promoting indigenous peoples' rights at the national and regional level (for example, through the Organization of African Unity, now the African Union, and through networks of African peoples' organizations). Regional meetings on African indige-

Table 8.1. Population Sizes of Indigenous African Peoples

Group	Location	Population Size
Amazighs (Berbers)	Algeria, Morocco, Libya, Tunisia, Egypt	16,000,000
San (!Xu, Kwadi, Kxoe)	Angola	1,200
Basarwa (San)	Botswana	47,675
Batwa (Pygmies)	Central Africa (7 countries)	200,000
Haddad (Kreda)	Chad	3,000
Boni (Aweer)	Kenya	2,000
Dahalo	Kenya	1,000
Okiek (Dorobo)	Kenya, Tanzania	42,000
Waata	Kenya	2,000
Maasai	Kenya, Tanzania	500,000
Mikea	Madagascar	1,000
Tuareg (Tamacheq, Tamajaq)	Mali, Niger, Libya, Algeria, Burkina Faso	1,200,000
San (Bushmen)	Namibia	32,000
Ovatjimba (Himba)	Namibia	500
Ogoni	Nigeria	500,000
Eyle	Somalia	450
Kilii	Somalia	1,500
San (Bushmen)	South Africa	4,350
Dinka	Sudan	1,030,000
Nuer	Sudan	740,000
Shilluk	Sudan	175,000
Hadza (Hadzabe)	Tanzania	1,000
San (Kxoe)	Zambia	300
Amasili (Tyua)	Zimbabwe	2,500
VaDema (Tavara)	Zimbabwe	500
Total	29 countries	20,487,975

Sources: Data obtained from researchers, development agencies, nongovernment organizations, indigenous rights groups, government archives, censuses, and reports.

nous peoples' rights have been held in recent years, one example being a meeting held in Arusha, Tanzania, in January 1999 that was organized by the International Work Group for Indigenous Affairs and the Pastoralist Indigenous Non-Government Organizations Forum. At many of these meetings the participants outline the issues that they feel are significant, examples being civil and political rights, including the right to life and the right to take part in decision making. There is also widespread concern in Africa among people who define themselves as indigenous regarding land rights, economic rights (including the right to development), and cultural rights.

Efforts to control the exploitation and trade of wild products have sometimes resulted in difficulties for local people in Africa. The placing of elephants on appendix 1 of the Convention on Trade in Endangered Species of Flora and Fauna (CITES) meant that the collection and sale of elephant ivory became less viable as a source

of income. While this action may have helped reduce pressure on elephants, it also caused frustration and a certain amount of economic hardship both at the national and local levels in eastern and southern Africa. Antipoaching efforts in Africa have also resulted in deaths, injuries, and arrests of local people, including indigenous women and children.

As some Africans have pointed out, the state's use of coercive conservation policies has caused social disruptions and has exacerbated tensions between local communities and their governments. A more appropriate strategy, in their opinion, is one that guarantees rights of access to and benefits from resources, as is found in some of the community-based natural resource management projects (CBNRMPS) or integrated conservation and development projects (ICDPS) in places such as Botswana, Cameroon, the Central African Republic, Malawi, Namibia, Uganda, Zambia, and Zimbabwe. Some of these programs have gone a long way toward assisting indigenous peoples in their efforts to increase their incomes and employment levels, but they have not had the hoped-for effects of ensuring greater security of land tenure.

In general, in Africa it has not been easy for indigenous peoples to get legally defined access to land. In central Africa, for example, Batwa (Pygmies) generally have had problems in gaining title over land, something that is also true of groups who have a history of hunting and gathering in eastern and southern Africa. Some positive steps have been taken in the quest for land rights in countries such as South Africa, where the /Khomani San were recently granted comanagement rights over the Kalahari Gemsbok Park. In other parts of southern Africa, however, the San have had difficulties in maintaining their hold on land, and they have been dispossessed both directly and indirectly by governments and by private companies and individuals who have been able to use government legislation to get freehold and leasehold rights over land that in the past supported sizable numbers of indigenous peoples.

Although many of the indigenous groups of Africa remain unrecognized in the nation-states where they reside, the indigenous peoples are seeking to organize themselves and to lobby in defense of their human rights at the national levels. In doing so they are employing a variety of innovative strategies that range from community mapping using remote sensing and Geographic Information Systems (GIS) to conflict resolution and negotiation techniques. To take a specific example, the eighty-eight thousand San (Bushmen) of southern Africa, who reside in six countries (Angola, Botswana, Namibia, South Africa, Zambia, and Zimbabwe), have been engaged in a several decades-long struggle for recognition of their rights. A major concern of San and other indigenous peoples in southern Africa is whether or not they will be able to maintain their land and resource rights in the context of major changes in the ways in which governments, nongovernment organizations, and international institutions (for example, the World Bank through the Global Environmental Facility) are dealing with environmental matters. There are three

major areas of concern: (1) subsistence hunting rights; (2) land rights; and (3) rights to benefits from tourism and from wildlife-related conservation and development projects.

There are few states in Africa that permit their citizens to engage in hunting for subsistence purposes. Until 2000 the only African country that had national-level legislation allowing subsistence hunting rights was the Republic of Botswana. Two other countries in Africa in the past allowed specific groups of people who traditionally were hunter-gatherers to hunt for subsistence: (1) Namibia, where one group, the Ju/'hoansi San, are allowed to hunt in what was Eastern Bushmanland (now Tsumkwe District East, Otjozondjupa Region); and (2) Tanzania, where the Hadza in the Lake Eyasi region were allowed to hunt without paying fees under the country's Wildlife Conservation Act of 1974. In the rest of Africa, those people defined as subsistence foragers generally risked arrest and imprisonment if they engaged in subsistence hunting.

Sizable portions of African countries were declared national parks and game reserves and were therefore, for all intents and purposes, off-limits to local people. Table 8.2 presents information on national parks, game reserves, and conservation areas in southern Africa whose creation resulted in the involuntary relocation of resident populations. It can be seen that local people lost their residence and subsistence rights in areas covering as much as fifty thousand square kilometers in some cases in several countries in southern Africa.

One of the few games reserves in Africa that until recently allowed residents to continue to reside in and to forage was the Central Kalahari Game Reserve (CKGR) in Botswana. In May 1997 the government of Botswana relocated a sizable proportion of the CKGR's population, over 1,100 people, to two sites outside of the reserve, one in the Ghanzi District to the west of the reserve (New !Xade), and the other in the northern Kweneng District south of the reserve, Kauduane, not far from Khutse Game Reserve. The populations of the new communities are so large, and the resources in the vicinity of the settlements so few, that the residents are unable to sustain themselves through foraging and must depend heavily on the government of Botswana for support.

San residing in these settlements have been arrested, jailed, fined, and deprived of their assets (such as horses, donkeys, weapons, bridles, saddles) for engaging in subsistence hunting. Such an event occurred in July 1999, when thirteen men from New !Xade, one of the resettlement locations, were arrested for allegedly engaging in illegal hunting. The men who were arrested had special game licenses, so the charge of hunting without a license was thrown out of court in October 2000. Eventually the entire case was dismissed, but not before another incident occurred in which over a dozen San were detained and allegedly tortured by wildlife department officials and police because they were suspected of being involved in a poaching ring.

A major focal point of discussion among San and the organizations with whom the San work in Botswana relates to security rights. *Security rights* include the

Table 8.2 National Parks, Game Reserves, and Conservation Areas in Southern Africa That Have Caused Resettlement of Local Populations

Park or Reserve Area, Establishment Date, Size	Country	Comments
Central Kalahari Game Reserve (1961), 52,730 sq km	Botswana	1,100 G/wi, G//ana, and Boolongwe Bakgalagadi were resettled outside the reserve in 1997 in nearby areas; another 450 are threatened with resettlement in 2002
Chobe National Park (1961), 9,980 sq km	Botswana	Hundreds of Subiya were resettled in the Chobe Enclave, where 5 villages are in a 3,060 sq km area
Etosha National Park (1907), 22,175 sq km	Namibia	Hai//om San were resettled outside of the park or sent to freehold farms
Gemsbok National Park (1931; made transfrontier park in April, 1999) 37,991 sq km	South Africa, Botswana	/Khomani and N/amani San were resettled out of the park in the 1930s
Hwange (Wankie) National Park (1927), 14,620 sq km (Declared a national park on 29 January 1950)	Zimbabwe	Tyua (Amasili) were rounded up and resettled south of Hwange Game Reserve in the late 1920s
Moremi Game Reserve (1964), 3,880 sq km	Botswana	Bugakwe (//Ani-kxoe) San were relocated out of the Moremi area in the 1960s
Nata Sanctuary (1989), 230 sq km	Botswana	Tyua and others lost access to the sanctuary and its resources
West Caprivi Game Park (1963), 5,715 sq km	Namibia	Kxoe and Mbukushu were resettled outside the game reserve in the early 1960s and some Kxoe and !Xuu San were resettled in South Africa in the 1980s

rights to be free from torture, execution, and imprisonment, or rights relating to the integrity of the person. This set of rights is especially important in light of the frequency of allegations of torture and mistreatment of suspected "poachers" by game scouts and other government officials in Botswana. Such an incident allegedly occurred as recently as early September 2000 in the Molapo area of the Central Kalahari Game Reserve. The claims about this case are still uncertain, and investigations into the matter are on-going.

Subsistence rights are those rights related to the fulfillment of basic human needs (water, food, shelter, and access to health assistance and medicines). The denial of the right to hunt and gather, according to some people, is an example of restrictions placed on subsistence rights. The San realize full well the need for conservation of wildlife, plants, and other resources. At the same time they feel that they should be able to exploit resources as long as they do so sustainably.

The question remains whether or not those people who in the past considered hunting and gathering to be part of their heritage will be able to obtain wild animals

and plants or whether they will have to turn instead to other ways of earning their subsistence and income. Those San who have opted to move into tourism operations, for example, have often found themselves at the bottom of the socioeconomic ladder, getting jobs as cleaners and waiters but not as company managers. It should come as no surprise, therefore, that the San have sought to organize themselves and to seek ways in which to ensure their subsistence and security rights.

One step that has been taken by the San is to engage legal advisors. Plans have been made for legal claims to be made to the Central Kalahari Game Reserve and other parts of the Republic of Botswana. The members of San and other rural Botswana communities would prefer to negotiate with the government and to obtain rights to land and resources through the normal land use planning process. The future of the San and other peoples in Botswana depends very much on their ability to convince the government, international agencies, and environmental groups of the importance of social, economic, and cultural rights, which they see as a matter of cultural as well as physical survival.

Innovative efforts were being made to address these problems in Africa in the late 1990s and into the new millennium. Community-based resource management programs in southern Africa are helping to reduce wildlife losses and to provide incomes to local communities. The Ju/'hoansi San of the Nyae Nyae region of northeastern Namibia now have their own conservancy, an area of land some 9,000 sq km in extent, that they oversee and that they manage on their own through a conservancy council, a statutory body recognized by the Namibian government. Ju/'hoansi environmental monitoring personnel, known as community rangers, have been hired to assess the resources in the Nyae Nyae region and to assist in land use and development planning. The conservancy council earned N$260,000 in 2000 in exchange for leasing the hunting rights in the area to an international safari company. The Ju/'hoansi in Nyae Nyae also received income from tourists and from film companies that visited the area. While these gains were substantial, the Ju/'hoansi San of northern Namibia and their neighbors in Tsumkwe District West were threatened with the possibility of the government of Namibia resettling over twenty-one thousand refugees in their area, a process that would undoubtedly lead to greater conflicts over natural resources, jobs, and income.[15]

The problem for many African indigenous peoples is that many of the continent's countries are in serious economic and political straits. A combination of war, economic depression, environmental degradation, and poorly framed development policies have left many people, especially the poor, worse off over the past two decades. Structural adjustment programs of the International Monetary Fund and the World Bank have led to cutbacks in spending on health, education, and welfare. Livelihood support systems have eroded along with the social and physical infrastructure in some African countries. Indigenous groups and their supporters have sought to reverse these trends at the local level by promoting full public participation in decision making, reducing structural inequities, and doing way with

discrimination. No longer satisfied with being at the bottom of the socioeconomic hierarchy, indigenous peoples in Africa are seeking to change the policies of their governments and are lobbying for more equitable and socially just policies at the international level, as they have done with the World Bank. The World Bank, for its part, has begun hosting international meetings of indigenous peoples in Africa and is seeking feedback on its new indigenous peoples' policy. The World Bank and the Global Environmental Facility (GEF) are also investing more heavily in environmentally and socially sustainable development projects and are engaged in capacity building at the local level in indigenous communities. In spite of these gains, African indigenous peoples continue to have to cope with the lack of compliance of nation-states, international institutions, and transnational corporations with human rights legislation and guidelines on indigenous peoples and development project implementation.

Asia and Indigenous Peoples

The largest proportion of peoples who define themselves as indigenous in the world reside in Asia (some two-thirds of the total world population of indigenous peoples) (see table 8.3). Some 193 million indigenous people reside in the countries that I take here to make up Asia. Numbering over 1,113 different ethnic groups, these peoples, like those in Africa, are highly diverse. They range from small groups of foragers in the hills and forests of Southeast Asia and the Philippines to large, internally stratified groups engaged in struggles for autonomy and self-determination (such as the Karen in Burma, the Nagas in India, and the tribal peoples of the Chittagong Hill Tracts in Bangladesh). Some of these groups are highly organized and engaged extensively in efforts to promote their civil, political, social, economic, and cultural rights.

As is the case in Africa, the term *indigenous* is considered problematic in Asia. A number of Asian governments have claimed that the term does not apply inside their borders. Some Asian countries, such as Indonesia, maintain that all of the residents of the country are indigenous. A number of Asian governments do, however, admit that their countries contain peoples who differ from the majority and who possess linguistic, cultural, and religious features that are distinct, and they do have categories into which they are placed (for census or social service provision purposes, for example).[16] China recognizes the existence of "national minorities" but does not accept the United Nations definition of indigenous peoples.[17] China, which is engaged in the rapid development of its land and resources, is reluctant to adhere to the guidelines of the World Bank on the treatment of indigenous peoples or the standards on how to address the needs of populations undergoing involuntary resettlement.[18]

In Indonesia there is no term for indigenous and tribal peoples (as defined by the ILO Convention 169); the government instead defines people on the basis of their marginality. Indonesia classifies 1 million people as "estranged and iso-

Table 8.3. Indigenous Peoples in Asian Countries

Country	Total (millions)	Percentage of Population	Groups of Indigenous Peoples
Bangladesh	0.6	1	13
Burma	11	30	60
Cambodia	0.1	1.1	N.A.
China	91	8	55
India	51.6	7.7	350
Indonesia	3	1.5	300
Japan	0.05	0.4	N.A.
Laos	0.8	23	71
Malaysia	2	11.1	67
Nepal	11.1	60	60
Pakistan	7.7	8	N.A.
Philippines	6.5	16	50
Sri Lanka	0.002	<1	1
Taiwan	0.4	2	10
Thailand	0.5	1	23
Vietnam	9	13	54
Totals: *N*=16	195,352 indigenous peoples	3,189,000 overall population in Asia	>1,114 groups

Sources: Data obtained from researchers, nongovernment organizations, and government reports and censuses.

lated" (*masyarakat terasing*) and says that they possess traditional values such as nomadism, egalitarianism, an emphasis on kinship and reciprocity, and ancient ties to the land. Other people in Indonesia's rural areas are classified as "village folk" (*orang kampong*). Both sets of groups have faced problems in terms of land and resource rights and have been involuntarily relocated by the Indonesian government or private sector interests.

In many cases the governments of Asian nation-states do not have guarantees in their national constitutions for the recognition of tribal territories. There are, however, governments that do recognize the land rights of indigenous peoples, a notable example being the Philippines. In the Philippines "indigenous cultural communities" (ICC), containing some 4.5–7.5 million people, roughly 15 percent of the total population, have been given rights to "ancestral territories."[19] In general, however, it can be said that in most of Asia the indigenous peoples, especially those living in forest areas, do not yet have their rights to land recognized, and as a result they all too frequently are subjected to dispossession, often at the hands of governments, elites, or private companies.[20]

A major problem affecting indigenous peoples in Asia has been the expansion of nation-states and private companies, sometimes in cooperation with each other. In Indonesia and Malaysia, for example, multinational corporations have cooperated

with the governments in their efforts to exploit local resources (such as mineral resources and timber). In some cases local people have been pressed into service, often at low wages. In Irian Jaya (West Papua), the mining company Freeport MacMoRan has been engaged in the exploitation of gold, and local indigenous groups who have opposed the mining operations have been oppressed, sometimes violently.[21]

Indigenous peoples are protesting mistreatment at the hands of governments and multinational corporations, and they are using the media to a positive effect. In some cases indigenous groups have sought legal redress through the courts. This was the case, for example, with a number of different peoples of Burma such as the Karen, who have gone to court against UNOCAL in Los Angeles for its alleged involvement in the use of slave labor in the construction of an oil pipeline in the country.[22]

Indigenous groups in Asia frequently have been denied fair compensation for their loss of access to land, assets, and natural resources. This is particularly true in the case of the construction of large hydroelectric dams, which have led to the dispossession of tens of millions of peoples in Asia.[23] There are literally millions of "development refugees" in Asia, people who have had to leave their home areas because of the expansion of economic development. In India, for example, it is estimated that between 21 and 33 million people, a sizable number of them members of tribal communities, have been displaced as a result of the construction of dams.[24] In few cases in Asia (or elsewhere in the world, for that matter) has adequate compensation been provided to the people affected by the construction of large dams. In most cases the livelihoods of those people who have been resettled have not been restored, and living standards have declined, in spite of the fact that World Bank guidelines stipulate that project-affected people are supposed to be no worse off after resettlement than they were originally.[25] Inadequate compensation, poor mitigation efforts, and lack of recourse was seen in the cases of those people affected by the Kao Laem Dam in Thailand and the Sri Sailam project in India, two of the case studies of the World Commission on Dams.[26]

In India there have been policies formulated that have been described as positive discrimination, some of which date back to the Indian Constitution of 1950. As noted previously, members of groups that the Indian government has designated as Scheduled Tribes have legal rights under the constitution to representation in Parliament and in state legislative assemblies and rights to education and employment opportunities. The constitutions of Vietnam and Laos also contain provisions that forbid discrimination against ethnic minorities. The Laotian constitution mandates the government to "carry out every measure necessary to continue to improve and raise the economic and social status of all ethnic groups." The problem is that many of these provisions in national-level legislation go unenforced.

As globalization proceeds, many Asian indigenous groups are finding themselves competing with other groups and institutions for land, resources, and services. This is true, for example, of the indigenous peoples of Malaysia and Indonesia, who

reside in remote tropical forest areas that are being exploited by large-scale timber companies. Some of these groups have resisted the onslaught, setting up blockades on logging roads, as was done by the Penan of Sarawak in Malaysia.[27] In 1987 the Penan of the Tutoh, Limbang, and Patah Rivers region of Malaysia issued a declaration stating: "Stop destroying the forest or we will be forced to protect it." This proclamation was ignored by the Malaysian government. The prime minister of Malaysia, Mahlathir Mohamed, invoked the Internal Security Act in October 1987. Critics of the government and leaders of the blockade and members of environmental nongovernment organizations were arrested and detained, including Penan and Kayan leaders. Penan and others have had to cope with harassment, arrests, jailings, torture, and abuse.[28] The struggles of the Penan and their neighbors helped spark a widespread movement among Southeast Asians against unfair legislation that favored state forestry institutions, multinational corporations, and international banks that fund environmentally destructive development projects.[29]

The expansion of tourism in Asia has had profound effects on some indigenous peoples, some of whom have witnessed the sad spectacle of indigenous women and children being exploited as sex workers. Not only have indigenous children and women had to cope with severe physical and mental abuse, they also are exposed to sexually transmitted diseases, and in some cases they exhibit high rates of HIV/AIDS.[30] There are numerous cases of extreme child labor in Asia where children are exposed to difficult and sometimes dangerous working conditions, as can be seen in cigarette and fireworks factories in South, Southeast, and East Asia and the carpet industry in India, Pakistan, and Afghanistan.[31]

The peoples of Asia, like those of Africa, have experienced a sizable number of human conflicts, particularly since the colonial expansion of European states from the fifteenth to the nineteenth centuries. Asian countries served as staging grounds for many conflicts, including the anticolonial resistance movements against the Americans in the Philippines in the early twentieth century and the anti-British campaigns of the Orang Asli and other Malaysians in the 1950s and 1960s.[32] In some cases indigenous peoples were co-opted by the combatants, as occurred, for example, in Thailand, Laos, and Vietnam in the 1960s and 1970s.[33]

In Asia indigenous peoples have suffered from physical integrity abuse, with acts of genocide and massive human rights violations being perpetrated by governments, a notable example being Cambodia under Pol Pot and the Khmer Rouge.[34] The cold war had a destabilizing and devastating effect on indigenous and other Asian peoples. In places such as Indochina (a region that includes Cambodia, Laos, and Vietnam), the impacts of generations of war can be seen in the forests destroyed by bombs and herbicides, the large numbers of people who are physically disabled as a result of land mines and leftover military ordinance (bombs and grenades), and a heavily traumatized population.[35]

The post–cold war period has seen an expansion in the numbers of conflicts in Asia, notable examples being the struggles between indigenous peoples and the

state in Burma (Myanmar), Indonesia, Bangladesh, and India. Sizable numbers of people, many of them civilians, have been killed, injured, and maimed. One of the consequences of these conflicts is the rise in the numbers of refugees and internally displaced persons (IDPs).[36] Today there are literally millions of Afghan refugees in Pakistan, Iran, and central Asian countries such as Uzbekistan and Tajikistan, and hundreds of thousands of Afghans are living in terrible conditions inside the country itself.[37] In some areas of Asia, as in Africa, refugee women and children in refugee camps have been raped and abused, a major problem with which international aid agencies and nongovernment organizations must contend.[38]

While countries such as Canada and Australia have had commissions of inquiry into the violations of indigenous peoples' rights, such investigations have been undertaken only to a limited extent in Asia. Some Asian countries, notably Japan, have categorically refused to apologize for actions that have affected indigenous and other peoples. Asian countries, like their Western counterparts, have refused to compensate people for human rights violations that occurred during the course of colonizing activities and state expansion.[39] Religious repression has been a major feature of the military government in Burma, where troops have entered monasteries and arrested Buddhist monks who spoke out in favor of human rights. Christian churches and mosques have been destroyed, and limitations have been placed on religious expression.[40]

In spite of the constraints that they face, some progress has been made by Asian indigenous peoples in getting at least some recognition of their rights. Civil, political, social, economic, and cultural rights have now been incorporated into national constitutions, as can be seen in the cases of Laos and Vietnam.[41] The Laotian Constitution, for example, explicitly disallows discrimination among ethnic groups. It also requires the state to raise living standards and improve the overall health and well-being of all ethnic groups in the country. There are, however, limitations in the implementation of this legislation, particularly in the areas of consultation with minorities, participation of indigenous peoples in decision making regarding development action, and promotion of culture and language policy.[42]

As is the case in Africa, there has been some progress made by indigenous peoples and their supporters in establishing comanagement rights over areas of land in national parks, game reserves, and conservation areas in Asia.[43] Nevertheless, indigenous peoples in many parks and forest reserve areas are restricted in their activities. In Indonesia, for example, indigenous peoples who exploit timber resources are arrested and jailed for their actions; the same is true in Bangladesh, India, Malaysia, Nepal, and Thailand.[44] Asian governments, like their African counterparts, sometimes take the position that human rights of indigenous peoples and others can be abrogated in the face of the need for overall economic development and the promotion of social and political stability. The prime minister of Singapore, Lee Kuan Yew, for example, argued that poverty alleviation in Asian countries was necessary at any cost.[45] If there were efforts on the part of groups or individuals to impede the

progress of development, then human rights can and should be suspended, according to some Asian government spokespersons. Promoting economic development while at the same time allowing for infringements on internationally recognized human rights is seen as a legitimate trade-off by some Asian governments.[46]

A number of Asian countries have suspended civil and political rights in the face of what they define as terrorism, as seen, for example, in the cases of Al-Arqam, an Islamic fundamentalist group in Malaysia and Abu Sayyaf, a militant Islamic group operating on Basilan Island near Mindanao in the Philippines that has taken tourists and missionaries prisoner and has attacked Filipino security forces.[47] The combination of a pro-development policy with restrictions on civil, political, social, economic, and cultural rights and the pursuit of state and societal protection against terrorism, insurrection and, in some cases, groups seeking self-determination, provide justifications for the "Asian values" and "Asian human rights" that are cited by Asian governments and some scholars as ways to promote communal well-being in Asia.[48] It is these "values" and perspectives on human rights that, according to Asian indigenous and human rights activists and indigenous spokespersons, are the reason that there are so many indigenous peoples and ethnic minorities who are at risk physically and culturally in Asia.[49]

Conclusion

It is apparent from this discussion that Asian and African indigenous peoples are alike in the sense that they generally are not recognized as indigenous or as having specific rights because of their sociopolitical status. In both Asia and Africa indigenous peoples have had difficulties in maintaining access to land and natural resources. Civil and political rights of indigenous peoples have been denied in both Asia and Africa, often on the basis of an argument that holds that specific groups should not have greater rights than other people. Asian and African governments have prevented citizens of their countries from attending international meetings on indigenous peoples' rights, and indigenous organizations have sometimes had trouble gaining official recognition.

It is clear that there are differences among regions of the world in the ways in which human rights have been approached. In North America, for example, Canadian First Nations and American Indians have generally been treated as "domestic dependent nations" with a limited degree of sovereignty. In Latin America, where indigenous groups are in some cases in control of the governments of the states in which they reside, gains have been made in recent decades in the recognition by governments of civil and political rights, land rights, economic rights, and cultural rights.[50] Asian and African indigenous peoples see themselves as being in regions that are behind other parts of the world, especially North and South America, Europe, and the Middle East. While there are numerous reasons for this situation, a major factor, in their estimation, is the willingness of Asian and African governments to use cultural relativist arguments to justify the denial of human

rights in order to promote economic development and maintain political stability. Indigenous peoples in Africa and Asia often reject the argument that cultural values of nations and peoples should override universal human rights standards.

There are only a few international human rights instruments that deal specifically with indigenous peoples. For decades the only international legal instruments that related directly to indigenous peoples' rights were Convention 107 and Recommendation 104 of the International Labor Organization. Many indigenous groups felt themselves to be essentially left out of the debate on promotion of indigenous rights, especially those in Asia and Africa.

In the 1960s and 1970s indigenous groups called for greater recognition of their social, economic, and cultural rights and the right to determine for themselves the kinds of policies that would affect them. It was not until 1982 that the United Nations established a Working Group on Indigenous Populations (WGIP) under the auspices of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the United Nations Human Rights Commission. In the International Labor Organization, which had campaigned for years on behalf of indigenous peoples and minorities, there were extensive debates over the revisions of Convention 107, some of which related to the issues of assimilation and integration of indigenous peoples in states. Convention 169's preamble recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages, and religions within the framework of the States in which they live."[51] The debates underscored the fact that indigenous peoples wanted a greater say in political decision making at the international level.

Some of the principles of Convention 169 were incorporated into the draft "Declaration on the Rights of Indigenous Peoples," which was drawn up by the various members of the working group in a series of annual meetings in Geneva in the 1980s and early 1990s. By 1994 the draft was available for consideration by the United Nations.[52] This document is a far-reaching statement of both the collective and individual rights of indigenous peoples. Self-determination is a key principle in the draft declaration, as is the right of indigenous peoples to full recognition of their own laws and customs, land tenure systems, and institutions for the management of land and natural resources. The Declaration on the Rights of Indigenous Peoples underscores the importance of environmental protection, something that is considered a human right in the current draft. The document also stresses the significance of indigenous peoples' land rights and ownership and control of natural resources.

The Declaration on the Rights of Indigenous Peoples is considered problematic by many governments, including those in the West (such as the United States and Canada) and those in Asia (Japan and China). One of the objections has to do with the rights to land that are outlined in the declaration. Another has to do with the rights of autonomy and self-determination, which many governments are reluctant to grant to groups inside their borders. A third issue relates to the

rights of indigenous peoples to compensation and reparations for losses that they suffered as a result of colonization and postcolonial policies. One of the biggest issues with which indigenous peoples are concerned is that of sovereignty or, as many indigenous leaders put it, "self-determination."

Asian and African indigenous communities and organizations have sought to get the governments of the states in which they reside to develop and enforce national legislation that is aimed at human rights promotion and protection. Indigenous groups and their supporters have banded together to protest human rights violations, and they have sought redress in international forums and courts for actions by states and companies that have put them at risk. They have called for support by states of the Universal Declaration on the Rights of Indigenous Peoples.

Most, if not all, indigenous groups have rejected the arguments for cultural relativity in the application of human rights standards by African and Asian governments. They have stressed the importance of being protected from governmental repression and the negative effects of globalization. They have noted that the arguments by Asian and African governments and by the companies working in Asia and Africa that endorse economic development at the expense of civil, political, social, economic, and cultural rights are lacking in rigor and are essentially trade-off positions that in fact violate international law, including the United Nations International Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights.[53] Indigenous groups have pointed to the need for ratification not only by their countries but also by the United States of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Rights of the Child. They have also sought to support regional human rights instruments such as the African Charter on Human and Peoples' Rights.[54]

The international indigenous rights movement has had significant impacts on the ways in which African and Asian peoples have attempted to establish their own identities and promote their rights. At the same time Asian and African governments have sometimes taken strong positions against indigenous peoples and their supporters who are seeking greater recognition of indigenous peoples' rights. Some Asian and African governments have arrested and detained indigenous leaders and have suspended the operations of nongovernment organizations that are seeking to promote indigenous rights and social and environmental justice.[55] Asian and African indigenous groups have mobilized in the face of this opposition, forming alliances and coalitions, lobbying for more comprehensive human rights legislation at the national and international levels, engaging in direct action to protest the behavior of governments and corporations, and establishing programs that promote sustainable social, economic, and political development at the grassroots level.

Some indigenous groups have actively resisted state efforts to promote development or bring about cultural assimilation, in some cases using nonviolent tactics and

in other cases seeking to bring about self-determination through military means. The risks facing some indigenous groups engaged in military operations in the new era of post–September 11, 2001, counterterrorism, is that they will be facing not only the military might of their own governments but also that of the United States, Great Britain, and other nation-states seeking to do away with groups and organizations that they define as terrorists. The vast majority of indigenous groups overtly reject terrorist tactics and instead seek to engage in actions that bring about social and political change through nonviolent action, drawing on the principles and tactics outlined by Mohandas K. Gandhi of India, Martin Luther King Jr. of the United States, and Archbishop Desmond Tutu and Nelson Mandela of South Africa. They have called for the establishment of truth and justice commissions and an international court of justice and have lobbied for the end of impunity for individuals, organizations, governments, and companies engaged in crimes against humanity.

It is hoped that all the efforts by indigenous peoples and their supporters in Africa and Asia will have positive effects in influencing international, national, and local policies and practices on indigenous rights. The crucial test will be whether or not nation-states, international agencies, nongovernment organizations, and local communities monitor and enforce both international and national human rights legislation and if these institutions attempt to better the lives of indigenous and other peoples.

Notes

1. See Jose R. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, vol. 5: *Conclusions, Proposals, and Recommendations* (New York: United Nations, 1985); *State of the Peoples: A Global Human Rights Report on Societies in Danger*, ed. Marc S. Miller (of Cultural Survival) (Boston: Beacon Press, 1993); David Maybury Lewis, *Indigenous Peoples, Ethnic Groups, and the State* (Boston: Allyn and Bacon, 1997); John H. Bodley, *Victims of Progress* (Mountain View CA: Mayfield, 1999); International Work Group for Indigenous Affairs, *The Indigenous World, 2000–2001* (Copenhagen: International Work Group for Indigenous Affairs, 2001).
2. These indigenous peoples' support organizations include the International Work Group for Indigenous Affairs (IWGIA), Survival International, Cultural Survival, the World Council of Indigenous Peoples (WCIP), the International Indigenous Women's Forum, the Asia Indigenous Peoples Pact (AIPP), the Indigenous Peoples of Africa Coordinating Committee (IPACC), and the Working Group of Indigenous Minorities in Southern Africa (WIMSA).
3. These include the "Conference on Indigenous Peoples in Africa" held in Tune, Denmark, 1–3 June 1993 (organized by the IWGIA and the Center for Development Research of the University of Copenhagen) and the "Conference on Indigenous Peoples in Asia," held in Chiang Mai, Thailand, 9–11 October 1995 (organized by the IWGIA, the AIPP, and the Inner Mountain Peoples Education and Culture in Thailand Association, IMPECT).
4. Some of these investigations have been carried out in Guatemala, Ethiopia, Indonesia, Mexico, Rwanda, and Zimbabwe. Physicians for Human Rights (PHR) and various forensic anthropology groups (for example, the Argentine Forensic Anthropology Team, EAAF) and individual medical and archaeological personnel have been involved in this work along with, in some cases, members of local communities, some of whom were affected by the human rights violations

that resulted in the disappearances of individuals. For further information, see H. Jack Geiger and Robert M. Cook-Degan, "The Role of Physicians in Conflicts and Humanitarian Crises: Case Studies from the Field Missions of Physicians for Human Rights, 1988 to 1993," *Journal of the American Medical Association* 270: 616–20 (1993).

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7. Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park CA: Sage Publications, 1990); Carole Nagengast, "Women, Minorities, and Indigenous Peoples: Universalism and Cultural Relativity," *Journal of Anthropological Research* 53(3): 349–69 (1997).
8. Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A Global Quest for Justice* (London: Zed Press, 1987), 6.
9. Bernard Neitschmann, "The Fourth World: Nations versus States," *Reordering the World: Geopolitical Perspectives on the 21st Century*, eds. George J. Demko and William B. Wood (Boulder: Westview Press, 1994), 227.
10. Martinez-Cobo, *Study of the Problem of Discrimination against Indigenous Populations*.
11. World Bank, "Indigenous Peoples," operational directive 4.20, *The World Bank Operational Manual* (Washington DC: World Bank, 1991).
12. Ratnaker Bhengra, "Indigenous Peoples' Juridical Rights and Their Relation to the State in India," *Vines That Won't Bind: Indigenous Peoples in Asia*, ed. Christian Erni (Copenhagen: International Work Group for Indigenous Affairs, 1996), 119–50; Ratnaker Bhengra, C. R. Bijoy, and Shimreichon Luithui,*The Adivasis of India* (London: Minority Rights Group International, 1998).
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14. For a discussion of African indigenous peoples and the issues surrounding identity, see Sidsel Saugestad, "Contested Images: Indigenous Peoples in Africa," *Indigenous Affairs* 2: 6–9 (1999); *Africa's Indigenous Peoples: "First Peoples" or "Marginalized Minorities?"* eds. Alan Barnard and Justin Kenrick (Edinburgh: Center of African Studies, University of Edinburgh, 2001).
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International, 1999); "The Applicability of the International Legal Concept of 'Indigenous Peoples' in Asia," *The East Asian Challenge*, 336–77.

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28. See, for example, reports by Survival International, such as "Malaysia: Sarawak Natives Arrested for Defending Their Forests," *Urgent Action Bulletin*, February 1989 (London: Survival International, 1989); and Survival International, "Malaysia: Crisis Deepens for Dayaks in Sarawak," *Urgent Action Bulletin*, April 1992 (London: Survival International, 1992); J. Peter Brosius, University of Georgia, personal communication, 1997.
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39. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W. W. Norton, 2000). One example of the international pressure brought to bear on an Asian nation to apologize for its actions is the case of Japan, whose troops engaged in massacres and rapes in Nanking (Nanjing), China, in World War II and in the exploitation of "comfort women," Asian women who were forced to engage in organized sexual slavery in China and Korea during the Japanese occupation up to 1945. In the latter case the Japanese did come up with a restitution program, but the plan did not satisfy the victims or their supporters. Some

of the victims of the sex slavery never recovered, and only a small number were willing to come forward with their stories about what they had suffered. See Barkan, *The Guilt of Nations*, 46–64; George Hicks, *The Comfort Women: Japan's Brutal Regime and Enforced Prostitution in the Second World War* (New York: W .W. Norton, 1995).

40. The Burma Project, *Burma: Country in Crisis* (New York: Open Society, 1998); Edith Bowles, "Burma: Human Rights, Forgotten Wars, and Survival," *Cultural Survival Quarterly* 24(3): 18–20 (2000).
41. Erni Bowles, "The Indigenous Peoples of Indochina," *Indigenous Affairs* 4: 2–5 (2000).
42. International Labor Office, *Policy Study on Ethnic Minority Issues in Rural Development: Project to Promote ILO Policy on Indigenous and Tribal Peoples* (Geneva: International Labor Office, 2000), especially 39–47.
43. *Indigenous Peoples and Protected Areas*.
44. Nancy Lee Peluso, *Rich Forests, Poor People: Resource Control and Resistance in Java* (Berkeley: University of California Press, 1992); Minority Rights Group, *Forests and Indigenous Peoples of Asia*.
45. Joanne R. Bauer and Daniel A. Bell, "Introduction," *The East Asian Challenge*, 7.
46. Jack Donnelly, "Human Rights and Asian Values: A Defense of 'Western' Universalism," *The East Asian Challenge*, 72–74.
47. Abdullani A. An-Na'im, "The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia," *The East Asian Challenge*, 147–68; Adam Brown, "U.S. Troops Offer Promise, Problems for Philippines, *Lincoln Journal Star*, 17 January 2002.
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49. *Indigenous Peoples of Asia*; *Vines That Won't Bind*; Minority Rights Group, *Forests and Indigenous Peoples of Asia*; International Work Group for Indigenous Affairs, *The Indigenous World, 2000–2001*. For an assessment of the numbers of indigenous and minority groups considered at risk in Asia, see Ted Robert Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington DC: United States Institute of Peace Press, 2000).
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52. Russel Barsh, "A 'New Partnership' for Indigenous Peoples: Can the United Nations Make a Difference?" *American Indian Culture and Research Journal* 17(1): 197–227 (1993); Russel Barsh, "Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force," *Human Rights Quarterly* 18(4): 782–813 (1996); *The Human Rights of Indigenous Peoples*, ed. Cynthia Price Cohen (Ardsley NY: Transnational Publishers, 1998).
53. Such arguments were made, for example, at meetings of indigenous peoples in Tune, Denmark, in June 1993, and one on Asian indigenous peoples, held in Chiang Mai, Thailand, in October 1995, at the meeting of the United Nations Human Rights Commission in March 1996, as well as at meetings of the Working Group on Indigenous Populations of the United Nations held in Geneva.
54. See Chidi Anselm Odinkalu, "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples'

Rights," *Human Rights Quarterly* 23(2): 327–69 (2001), for a discussion of the complexities facing Africans in implementing the African Charter.

55. See the *Urgent Action Bulletins* of Survival International, reports in *Cultural Survival Quarterly*, *Indigenous Affairs*, and those of the Minority Rights Group International. See also International Work Group for Indigenous Affairs, *The Indigenous World, 2000–2001*.

Islam and the Middle East

9 Promoting Women's Rights against Patriarchal Cultural Claims

THE WOMEN'S CONVENTION AND RESERVATIONS BY MUSLIM STATES

Zehra F. Kabasakal Arat

The United Nations and the International Bill of Rights created an international human rights regime that has been simultaneously undermined and embraced as the ultimate hope of humankind—albeit by different groups. The success of the regime in promoting and protecting human rights has also been assessed differently. The development of numerous instruments and the incorporation of human rights into international law constitute significant progress in terms of developing normative and legal frameworks, and the increasing references to human rights in international and national debates reflect the advancement of the concept as a diplomatic and political currency. Many advocates of human rights, however, are also often dismayed by the continuation of a wide range of violations all around the word.

The explanations for the ineffectiveness of the regime have been numerous, addressing various issues including the lack of commitment by states parties, the lack of enforcement mechanisms, challenges to the universalism of rights, a partial endorsement of rights with preferences assigned to different kinds, the persistent emphasis on state sovereignty, the prevalence of "realism" in international politics, and the resistance of the privileged and powerful groups. In this chapter I will address the contradictory goals and norms of the regime as they appear between some group and individual rights, with an emphasis on the principles of national self-determination and preservation of cultures.

Peoples' right to self-determination is one of the earliest group rights recognized in the International Bill of Rights. It has been explicitly stated in the first articles of both the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. However, the ambiguities around the peoples' right to self-determination raise several questions: What comprises people? How would the will of the people be determined? Who speaks on behalf of the people? The central question in this chapter is this: What would happen if this collective right is exercised by an exclusive group, especially if the exclusiveness is condoned by the culture? In other words, how can we resolve the conflict if the cultural rights and goals of a group are predisposed to violate some individual rights or other groups' rights? In addressing this question, I will focus on the practice of

invoking cultural heritage and its preservation as a way of resisting the promotion of women's rights and gender equality in Muslim communities. Moving beyond the issue of cultural relativism, the study focuses on the states parties' reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). By problematizing the "Muslim position," the chapter intends to show the diversity among the Muslim perspectives, the differences in the domestic laws and international positions of the Muslim states, the need to question the legitimacy of using the Islamic *Sharā'a* as a ground for placing reservations on CEDAW, and the hindering impact of such reservations on the promotion of women's rights.

CEDAW, the States Parties, and Reservations

The Convention on the Elimination of All Forms of Discrimination against Women was the culmination of a long process that included various declarations and conventions that addressed sex discrimination and women's rights, but it was given impetus in the early 1970s by the Commission of the Status of Women (CSW) of the United Nations Economic and Social Council. A working paper prepared by the CSW in 1973 stated that neither the 1967 Declaration on the Elimination of Discrimination against Women, a document that is not legally binding, nor the legally binding human rights treaties have been effective in advancing the status of women. The working paper argued for a single comprehensive convention that would legally bind states to eliminate de facto discrimination. In 1974 the CSW started the preparation of a draft that became an integral part of the activities sponsored by the United Nations during the United Nations Decade of Women (1976–85) and, following a long period of negotiations and revisions, the Convention was adopted by the United Nations in 1979.[1] Composed of thirty articles organized in six parts, the Convention provides a definition of "discrimination against women" in its first article: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The subsequent fifteen articles of the Convention (Articles 2–16) specify the areas of discrimination (for example, laws, legal structure, political and public life, education, employment, health care, rural environment, marriage, and family) in which the states parties should take measures to eliminate discrimination; the last two parts of the Convention (Articles 17–30) refer to the administration of the implementation of the Convention. "For the purpose of considering the progress made in the implementation," Article 17 of the Convention creates the Committee on the Elimination of Discrimination against Women. Functioning as an agency of monitoring and advising, the Committee evaluates the periodic reports submitted by the states parties, questions the government delegations that present the report,

guides and advises the states parties in meeting the objective of the Convention, and issues General Recommendations that help interpret the intention and scope of the Convention.[2]

The popularity and the ratification rate of CEDAW have been encouraging. It entered into force on 3 September 1981, soon after its adoption by the General Assembly of the Untied Nations, as Resolution 34/180 on 18 December 1979. As of 1 September 2001, 168 countries, more than four-fifths of the independent polities that participate in the international human rights regime (87 percent), were parties to the Convention. However, a good number of these states parties, 69 of them to be precise, adopted CEDAW with reservations.[3] Since more states have entered reservations to their ratification of this Convention than to any other human rights treaties,[4] CEDAW appears to be "the human rights instrument least respected by its states parties."[5] Although the reservations can be withdrawn later—and 14 of the states that had originally ratified the Convention with reservations have already withdrawn all of their reservations, and 15 of them have withdrawn or modified their reservations regarding some provisions—reservations that are supposedly grounded in culture and religion are less likely to be withdrawn in the near future. Such wide and vague reservations, which go "to the heart of both values of universality and integrity," constitute the primary concern of this chapter.[6]

Muslim States and Their Participation Rate

Assigning a religious identity to a state is a problematic task, both empirically and politically. Thus instead of insisting on an objective criterion of classification, I chose to employ the state's self-identification as "Islamic" and a guardian of the Islamic heritage as the definition of "Muslim state" and coded the countries that are members of the Organization of Islamic Conference (OIC) as such.[7]

Out of the fifty-six state members of the OIC, forty-six have ratified the convention.[8] A ratification rate that exceeds 82 percent leaves the Muslim states slightly below the world average but does not place them apart. Although the Muslim states are more likely to be latecomers in the ratification process and only three of them ratified the Optional Protocol of the Convention (Azerbaijan, Bangladesh, and Senegal), what distinguishes the Muslim states is their disposition toward placing reservations.[9] They are more likely: (1) to place reservations; (2) to have reservations that are broader in scope; (3) to ground the reservations on some legal foundations that are absolute or difficult to change (for example, God-given Islamic Law); and thus (4) to keep the reservations and hinder the progress toward the elimination of discrimination against women.

As seen in table 9.1, the rate of reservation placement is not much higher among Muslim states parties. Nearly 60 percent in both sets of countries, Muslim and non-Muslim, have imposed reservations at the time of accession. However, while 14 percent of non-Muslim states removed all of their reservations, none of the Muslim states did so for all of the reservations. Thus the recent tallying indicates that while

Table 9.1. The Disposition toward Entering Reservation on the CEDAW, by Religion

	Religious Identity of the State		
Reservation Status	**Non-Muslim**	**Muslim**	**Total**
No reservations placed	73	27	100
	(59.8%)	(58.7%)	(59.5%)
All reservations removed	14	0	14
	(11.5%)	(0%)	(8.3%)
Some reservations removed/modified	11	4	15
	(9.0%)	(8.7%)	(8.9%)
All reservations maintained	24	15	39
	(19.7%)	(32.6%)	(23.2%)
Total	122	46	168

71.3 percent of the non-Muslim states parties will implement the Convention without reservations, that position is taken by 58.7 percent of the Muslim states parties.

Moreover, only four Muslim states have modified their original reservations, and among them only Turkey's revisions amount to an actual removal of some reservations. A content analysis of the communiqués that the states parties presented to explain their reservations and changes to the reservations shows that the modifications by Bangladesh, Malaysia, and the Maldives are less clear in their intentions because their partial withdrawals and modifications of the original reservations are accompanied by the reassertion that the Convention would be implemented as long as its provisions do not contradict the Islamic *Sharā'a*.[10]

The tendency to enter "blanket reservations," that is, declaring that the provisions of the Convention will be implemented only if they are consistent with some other moral or legal sources to which the county adheres, is very high among the Muslim states parties. Bangladesh, Libya, Malaysia, and Saudi Arabia present consistency with the Islamic *Sharā'a* as the condition for the implementation of the provisions of the Convention. Pakistan and Tunisia set their constitutions as the legal and moral standard on which the applicability of the Convention would be determined. The Maldives and Mauritania cite both the constitution and the *Sharā'a*.

In addition to these countries that exempt themselves from the obligation of implementing any or every provision of the Convention that is contradictory to the *Sharā'a*, several other Muslim states invoke *Sharā'a* in justifying their reservations to some specific provisions of the Convention (see table 9.2).

It is important to examine the content of the articles that are considered as conflicting or inconsistent with the religious laws in general and the Islamic Law in particular. Articles 2 and 16 appear frequently on the reservation lists of the Muslim states parties as well as on the lists of non-Muslim states that have ever referred to religion as the reason for entering reservations (India, Israel, Lesotho, and Singapore; see table 9.2).

Table 9.2. The State Parties That Employ the Protection of Religion and Religious Freedom as the Justification for Placing Reservations on CEDAW, or Its Provisions

Country	Rationale	Provisions
Muslim		
Bangladesh	*Shari'a*	General
Libya	*Shari'a*	General, especially Articles 2 & 16
Malaysia	*Shari'a*	General, especially Articles 2 & 16
The Maldives	*Shari'a*/Constitution	General
Mauritania	*Shari'a*/Constitution	General
Saudi Arabia	*Shari'a*	General
Egypt	*Shari'a*	Articles 2 & 16
Iraq	*Shari'a*	Article 16
Kuwait	*Shari'a*	Article 16(1)(f)
Morocco	*Shari'a*	Articles 2 & 16
Non-Muslim		
India	Noninterference in the personal affairs of any community	Articles 5(a) and 16(1)
Israel	1. Women judges in religious courts are prohibited in some religions	Article 7(b)
	2. Laws on personal status that are binding religious communities	Article 16
Lesotho	Noninterference in the affairs of religious denominations	General, especially Article 2(e)
Singapore	Respecting the freedom of minorities to practice their religious and personal laws	Article 2 & 16

Article 2 declares that "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and to this end, undertake" and continues with six paragraphs that specify the measures to be taken. The subsequent paragraphs (a–g) of the article oblige the states to undertake legislative, legal, and executive reforms that are based on the principle of equality and geared toward eliminating discrimination in laws (both by changing discriminatory laws and by enacting laws that protect against discrimination), regulations, customs, and practices. Noting that the Convention imposes both "obligations of result" and "obligation of means," Rebecca Cook finds Article 2 crucial in outlining those obligations: "The thesis of this article is that the object and purpose of the Women's Convention are that states parties shall move progressively towards elimination of all forms of discrimination against women and ensure equality between men and women. Further, states parties have an obligation to provide the means to move progressively toward this result."[11]

Since this article defines the scope of the state's legislative, judiciary, and administrative obligations, by placing a reservation on its provisions—especially if the reservation is full-blown and applies to the entire article—the state defers its responsibility to undertake the administrative and legal measures that would enable or reinforce the measures taken in specific issue areas such as health, education, political participation, employment, and so on.

Another set of provisions that are subject to reservations is embodied in Article 16, which is concerned with marriage and family relations. The first paragraph of the article indicates that "State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations," and with provisions covered in eight subparagraphs, it obliges the state to ensure to men and women the same rights (a) to enter into marriage; (b) to freely choose a spouse; (c) and responsibilities during the marriage and its dissolution; (d) and responsibilities as parents; (e) and responsibilities to decide freely on the number and spacing of their children and have access to the information, education, and means to enable them to exercise these rights; (f) and responsibilities with regard to guardianship, wardship, trusteeship, and adoption of children; (g) to choose a family name, a profession, and an occupation, as husband and wife; and (h) for both spouses in respect to ownership, acquisition, management, administration, enjoyment, and disposition of property. The second paragraph of the article calls for outlawing betrothals and child marriages and requires the specification of a minimum age for marriage and the mandatory registration of marriages.

Article 16 applies to the most immediate and intimate aspects of women's lives. As it has been repeatedly addressed in feminist theory and movements, inequality and restrictions imposed upon women within the domestic sphere of life play an inhibiting effect on women's development and ability to use and enjoy any other rights they may have.[12] In 1997 the CEDAW committee discussed how inequalities in the private realm of life disadvantage women and prevent their full and effective participation in public and political life, in its General Recommendation 23. Moreover, customs that privilege men within marriage and family leave women not only dependent on men but also vulnerable, especially if the men of the household are likely to abuse their power. Domestic violence against women, an expression of abuse of power by men, has been prevalent in all countries, and honor killings, sanctioned by the culture, have been common in several Muslim states.[13]

Articles 2 and 16 are more likely to appear on the reservation statements of the Muslim states parties.[14] The cross-tabulations of the latest status of reservations and the religious identity of states parties show that in addition to the statistically significant differences between the Muslim and non-Muslim states in their tendencies to place indiscriminate reservations on all provisions of Articles 2 and 16, reservations on some specific paragraphs of Article 16 are also more common among the Muslim states. Table 9.3 provides a summary of the provisions that

Table 9.3. Provisions That Show Statistically Significant Differences on Reservations Rates by Muslim and Non-Muslim States Parties to the Convention*

Provisions	Reservation Rates by States** Non-Muslim	Muslim
Article 2, taking administrative and legal measures	1 (0.8%)	4 (8.7%)
Article 7(a), equal rights to vote and running for and holding public office	0 (0.0%)	2 (4.3%)
Article 9(2), equal rights in children's nationality	2 (1.6%)	9 (19.6%)
Article 15(4), freedom of movement, choosing of residence and domicile	0 (0.0%)	6 (13.0%)
Article 16, equality in marriage and family	4 (3.3%)	5 (10.9%)
Article 16(1)(c), same rights and responsibilities during and in ending marriages	0 (0.0%)	6 (13.0%)
Article 16(1)(d), equality in parental rights and responsibilities	2 (1.6%)	6 (13.0%)
Article 16(1)(f), equality in guardianship and adoption	2 (1.6%)	4 (8.7%)

*Chi-square test, significant at probability level at least <.05.
**Actual number followed by percentage of cases in parentheses.

reflect statistically significant differences between Muslim and non-Muslim states in regard to the placement of reservations.[15]

While reservations on Article 7, which requires the equality of men and women in the decision-making processes of the country as electorates and public officials, would sustain practices that restrict women's roles in the public domain, reservations placed on Article 9(2), which requires equality in handing down one's nationality to the children, and on Article 15(4), which stipulates women's freedom of movement and equal rights in choosing of residence and domicile, allow the states to excuse themselves from any obligation to remove certain patrilineal and patrilocal norms and practices that restrict women, both at home and outside the home.

Not surprisingly, the reservations entered by the Muslim states parties have received objections from several other states parties. The statements of objections include one or more of the following:

1. Entering general reservations is incompatible with the object and purpose of the Convention (Article 28, paragraph 2).
2. Reservations on provisions that cover fundamental rights of women and establish key elements for the elimination of discrimination against women are not in conformity with the object and purpose of the Convention.
3. A statement by which a state party limits its responsibilities under the Convention by invoking general principles of internal or religious law may create doubts about the commitment of the reserving state to the object and purpose of the Convention.

Nevertheless, despite their criticisms, these states refrained from a full rejection; they typically concluded their statement of objections with a sentence indicating that the objection "shall not preclude the entry into force of the Convention" between the objecting country and the reserving state.

What Is the Islamic *Sharīʿa*? The Diversity in Interpretation

The content analysis of the states parties' reservations show that the articles of the Convention that are typically subject to reservations by the Muslim states parties (Articles 2, 7, 9, 15, and 16) include provisions that are central to establishing gender equality and crucial to the enjoyment of the rights that are specified in other articles. These states parties tend to exempt themselves from any obligation to implement these provisions on the grounds that the provisions are incompatible with the Islamic *Sharīʿa* or with other laws of the state that are based on the Islamic Law (for example, the Personal Status Code and the Family Law in Tunisia and Algeria).

The *Sharīʿa* is invoked also in the Cairo Declaration of Human Rights, which was initiated by the Foreign Minister of Iran at the Tehran meeting of the OIC in 1989 as an expression of the Islamic understanding of human rights (if not as an alternative to the Universal Declaration of Human Rights) and endorsed by the Foreign Ministers of the other member countries at the Cairo meeting of the OIC held on 5 August 1990. As Ann Elizabeth Mayer's methodological study shows, the Cairo Declaration falls short of asserting equality, contains various discriminatory clauses, and displays substantial deficiencies in regard to women's rights.[16]

Article 6 of the Cairo Declaration starts with a promising statement: "Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform." However, in stipulating her rights, it only mentions that "she has her own civil entity and financial independence, and the right to retain her name and lineage." On the other hand, by specifying that "the husband is responsible for the support and welfare of the family," it rejects the principle of equality between husband and wife in the union of marriage. Some other articles of the Cairo Declaration also *explicitly* state that some rights and freedoms are recognized for men only. Article 12, for example, is clear in its wording that the freedoms of movement, selecting residence, and seeking asylum are reserved only for men.

Several articles of the Cairo Declaration also specify that the rights and freedoms covered by the article are recognized on the condition of their being "within the framework of," "in accordance with the norms of," or if "not contrary to the principles of" the *Sharīʿa*. The provisions of the other articles are brought under the same criterion in two separate articles that reiterate the foundational role of the *Sharīʿa*. Article 24 states briefly: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari'ah*." In an equally short reference, Article 25 reaffirms: "The Islamic *Shari'ah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration."

All of these references to the *Sharīʿa* raise some crucial questions: What is the *Sharīʿa*? What provisions does it embody in regard to women's rights, marriage rules, family life, gender roles, and equality? The *Sharīʿa*, literally meaning "the high path" in Arabic, is used interchangeably with the term *the Islamic Law*. Despite the customary reference to the Islamic Law in capitals and in the singular, there is no single coding of the law that Muslims believe as given by God, Allah. There is also no agreement about the sources of the divinely revealed law. Most Muslims agree upon the Qur'ān (the recitations of the word of Allah by Prophet Mohammad), the *Hadīth* (the sayings of the Prophet), and the *Sunna* (the tradition) as the sources of the Law, but—except for the Qur'ān, which is believed to have been written down by the first generation of Muslims upon the order of the third Caliph and maintained without alterations—the authenticity and the scope of the sources are questioned as well. There are several collections of the *Hadīth*, none of them were compiled less than a century and half after the death of the Prophet. The tradition, even if it is narrowly interpreted as the deeds of the Prophet (some Sunni Muslims expand it to include the decisions and practices attributed to the fist four Caliphs), is most problematic, being a set of orally transmitted stories that are full of contradictions.[17]

Thus Muslims have been debating the content of the *Sharīʿa*, and jurists have been devising various *qanuns* (laws) and fatwās (religious decrees) that are not only derived from the different collections of the *Hadīth* and *Sunna* but also based on different interpretations of them. Sheikh Rached Al-Ghannouchi makes a distinction between the *Sharīʿa* and jurisprudence:

> Islam is not a specific system, but Islam is a set of values that serve to establish or to search for a world in which humans cooperate in order to achieve justice and goodness.
>
> We should distinguish between *Shari'a* and *fiqh*. *Fiqh* is the word for jurisprudence. Islam can be understood to be synonym of the word *Shari'a*. However, *fiqh* or jurisprudence is the understanding of the people in society, and this may develop and change from time to time. It may also vary with the level of education and civilization.[18]

Even the Qur'ān, a written text the authenticity of which is not contested like the other sources, is open to interpretation, because what is offered by the Qur'ān is not a codified law but a comprehensive set of moral and spiritual guidelines and some provisions about social arrangements and community life that need to be decoded, interpreted, and adapted to the changing circumstances.

The processes of interpretation and adaptation have been going on since the birth of the religion, resulting in a diversity that reflects the amalgamation of cultures that interplayed with the religion as it became a world religion. In addition to the impact of the contact and interaction with other cultures, different interpretations became inevitable as the Muslim communities started to split into sects, and the sects have produced different schools of law and traditions.

The ambivalence about what is prescribed by the *Sharīʿa* is best illustrated by the diametrically opposing political structures of two self-proclaimed "Islamic" states. A republic, Iran's theocracy is based on a political philosophy of Islam that treats hereditary rule and monarchy as anti-Islamic and sinful.[19] The royal family of Saudi Arabia, on the other hand, justifies its monarchical rule by grounding it on Islamic authority. Similar to the differences in these two "Islamic" political theories, the construction of gender in Islam, or as attributed to Islam, has not been monolithic but varied, both historically and geographically.

A comparative study of the family or personal status laws of Muslim states, even if we narrow down the sample to include only those states that based their legislation on the *Sharīʿa*, would reveal no uniformity. In his classic study, *Women in Muslim Family Law*, John Esposito, for example, shows how "the Islamic family law" was fashioned differently by the founders of the four prominent law schools of the Sunni sect of Islam (the Hanafi, Maliki, Shafii, and Hanbali schools) in the medieval era, and he illustrates through his discussion of reform processes in modern Egypt and Pakistan how family laws in the two countries, which officially subscribe to the Hanafi school, both deviate from classical Hanafi law and differ from each other.[20] Similarly, Azizah al-Hibri's analysis reveals some profound differences in the Hanafi and Maliki approaches to the issues of (1) women's right to contact their own marriage; (2) wives' duty to obey their husbands; and (3) women's right to initiate divorce.[21] Pointing out that jurisprudence may develop and change over time, Sheikh Rached Al-Ghannouchi notes that "Al-Shafe'i [the founder of the Shafii school] moved from one geographical location to another, changed many of his ideas and opinions and only left 15 questions the way they were." Then he poses the question: "So what would happen if Al-Shafe'i came to this world today? What would happen to his ideas?"[22]

More current legal provisions and practices also reflect considerable variation in several areas, ranging from the minimum age of marriage to women's freedom of movement. For example, while Malaysia's *Sharīʿa*-based law sets sixteen as the minimum age of marriage for women, in Iran the *Sharīʿa* allows girls to be married at age nine.

Given the diversity of the sources, the multiplicity in the application of the *Sharīʿa* is inevitable. The problematic practice is the Muslim states' treatment of these elusive sources as if they constitute a concrete code, the revision of which is not permissible. Other states parties to the Convention rightfully object to the references to the *Sharīʿa* as a justification of reservations, arguing that the "unlimited and undefined character of the reservation" is inadmissible. For example, the statement of objections issued by the Norwegian government in response to the reservations entered by the Libyan government addresses the evasiveness of the reservations: "The Norwegian Government will stress that by acceding to the Convention, a state commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women. A reservation by which a State

Party limits its responsibilities under the Convention by invoking religious law (*Shariah*), which is subject to interpretation, modification and selective application in different states adhering to Islamic principles, may create doubts about the commitments of the reserving state to the object and purpose of the Convention."

Women's Rights in Islam: Conservative Definitions and Their Challengers

Despite the differences on a number of points, the treatment of women in the family laws of Muslim states has been generally unfavorable and based on the interpretations devised by medieval clergy and jurists. This "traditional" approach, which was influenced by cultural practices and many other factors as much as it was by the sources of the religion, was based on a very negative view of women (unintelligent, irrational, impure, seductive) and used that perception to bar women from public and political posts, to bring them under the tutelage of men, and to confine them to a secluded domestic life. The traditional jurists recognized man as the provider and head of the family, allowed him to inherit twice as much as a woman, and granted him several rights including polygyny, authority over the wife, unilateral and instant divorce, the guardianship of minors, and the custody of children beyond their infancy.

These traditional perceptions and their applications were questioned by some interpreters, but they remained a minority and were often silenced.[23] Nevertheless, the changing social and economic circumstances required reforms, and the family laws became subject to reform during the codification processes in the nineteenth and twentieth centuries. However, the emergence of "Islamism" as a conservative political ideology in the late 1960s and the political success of its conservative leaders and supporters, who either came to power (as in Iran, Sudan, and Afghanistan) or became a major political force that had to be appeased (as in Egypt and Pakistan) in a number of Muslim-populated countries, reversed the limited progress that had been made in the personal status or family laws during the reform era. The interpretations of the influential conservative clerics, some of whom flatly denied the existence of any basis for gender equality in Islam, were used in the formulation of the new legislation.[24]

However, the positions of the conservative jurists and the restrictive laws enacted in the name of Islam have been subject to criticisms, not only by secular opposition groups but also by reformist Muslim jurists and scholars, Muslim feminists, and "Islamist" women.[25] Referring to the several rights that Muslim women gained about a millennium before their counterparts in other parts of the world (for example, the right to inherit and hold property and the right to divorce) as well as numerous verses in the Qur'ān that endorse equality and justice, they argue that the Prophet Mohammad introduced a religion that intended to improve women's lives, treat them with dignity, and grant them equality.[26] Pointing out that Muslim women were active and involved in public life during the early days of pristine Islam under the rule of Prophet Muhammad, they attribute the prevailing conservative discourse

and restrictions imposed upon Muslim women to the degeneration of leadership, misinterpretation of religious texts by the late medieval and modern clergy, and the incorporation of the patriarchal norms and practices of non-Muslims into Islam. They emphasize that the Muslim women of *Asr al-Saada* (the period of the lifetime of Prophet Mohammad, literally, "the period of happiness/prosperity") could earn income through their own labor, pray in mosques along with men, participate in battles, enjoy freedom of movement without seeking the company of a male kin, and interact and have conversation with other men. Some exceptional women, such as the Prophet's youngest wife, Aishah, even led men in battle, prayers, or political discussion, and some such women continued to play significant roles and hold important positions even at later dates.[27]

They find the revival of the egalitarian Islam in the reinterpretation of the sources of the *Sharīʿa*, especially the Qur'ān.[28] Iranian women, both secular and "Islamists," have challenged the mullahs' interpretation and the legislation that denied women the right to education, work, and political participation by arguing that such judgments are contrary to the word and sprit of the Qur'ān.[29] They have been highly successful in reversing some of those restrictive government decisions and legislation, and they continue to pressure the regime to make changes in some other areas (such as marriage, child custody, and divorce).[30] In the secular state of Turkey, Islamist women not only criticize the state for violating the right to religious freedom, but they also criticize their male comrades and companions for subscribing to a "distorted" Islam that confines women to the domestic sphere and makes them subservient to men. Like their Iranian sisters, they, too, support their arguments for gender equality by citing verses from the Qur'ān and references to the egalitarian practices that were introduced or condoned by the Prophet himself and were prevalent during the early days of Islam.[31]

The variation in family laws among Muslim countries and the modifications made over time show that different stipulations can be claimed (1) as driven from the same sources; and (2) as upholding the *Sharīʿa*. The lack of uniformity reflects that the Islamic Law, like any law, is constructed and has been subject to interpretation, modification, and selective application. What has been consistent, throughout the history of the religion, is the predominance of the restrictive and discriminatory "male" interpretation, and what poses a problem for the promotion of women's rights today and for the implementation of the Women's Convention is the preeminence of the traditional male interpretation in the "reserving" states parties' view of the religious norms and rules.

It should be noted that insisting that the *Sharīʿa* is the divine Law, which is firm and cannot be modulated, has applied to only a few aspects of the community structure and life, and women's rights and affairs happen to be among them. Amira Shamma Abdin notes that all laws in all Islamic countries, with a few exceptions in Iran and Saudi Arabia, have been secularized by applying "foreign law," such as Swiss and French codes. She argues that "[t]he only laws that have never been

changed are family laws," which have remained essentially the same "for 1200 years," because changing them "will take away power from the male." Then she reminds us that "historically the only revolt that the Muslims mounted against the Prophet . . . was when the verses came down giving women the right to inheritance."[32] Similarly, Norani Othman's study of fatwās in Malaysia finds that "when it comes to economic issues of Islamic banking," the rulings show a "strong impetus to take into consideration contemporary contingencies" and concerns about economic development, but "all the underlying issues that feminists are very sensitive to are just glossed over by the various views provided by the religious authorities."[33] Thus it can be concluded that the resistance by Muslim states has not been to change in laws or to reinterpreting the *Sharīʿa* but to any *change in gender relations*.

In all communities gender roles and relations are formulated within the culture, which embodies religion as a significant part of it but intermingles with economic, scientific, technological, and political enterprises. Thus the rights and opportunities enjoyed by Muslim women vary from one country to another as well as within each country. The subjugation and secondary status of women cannot be reduced to religion. Similar to the situation in other countries, gender inequality in Muslim countries has strains in international economic and political inequalities, militarism, lack of development, authoritarian politics, inadequate legal structures, and weak states.[34] Women's struggles against all of these constraints and their demands for equality in Muslim countries, however, are branded as un-Islamic or anti-Islamic; they are resisted, discredited, and repressed by states or the defenders of the "Islamic culture" in the name of Islam and its preservation.

The International Human Rights Regime and Cultural Claims

The international human rights regime, which emerged after the Second World War as a response to the authoritarianism and discrimination that had led to massive human atrocities committed before and during the war, has evolved into a comprehensive framework of human rights. With its principles of universality, indivisibility and solidarity, it has established a normative architecture that contains the seeds of an *international culture* of human rights. This culture inevitably infiltrates the prevalent national, regional, or local cultures and attempts to curb their discriminatory practices and impacts.

It should be emphasized that the international human rights regime is an improvised and negotiated design that was developed as *a reaction* to the atrocities, and it maintains a reactive pattern. Its construction of rights is grounded not theoretically but empirically, a result of an awareness of the actual violations of human dignity.[35] Since the violation is allowed, if not sanctioned, by the prevailing culture, the recognition of each right emerges as a critique of certain aspects of the culture, at least implicitly. Values, norms, and practices that sanction or reinforce discrimination and violation of human dignity become targets of change. In other words, the advocacy of each right means demanding some cultural changes.

Thus human rights are closely linked to culture, and the expansion, full recognition, and protection of rights would demand the transformation of cultural norms and their material foundations. With its treaties and negotiation procedures, the international human rights regime may appear to be requiring only participation in a limited political or legal program, but the compliance with its norms and their articulation in treaty provisions demand a moral change and political commitment. That commitment, expressed through the ratification process, requires the states parties not only to respect the rights but also to promote and protect them by eliminating the obstacles, which may involve cultural norms and values.

Cultures, of course, are neither monolithic nor static, but within each culture there are people who benefit from making it monolithic and keeping it static. Karen Engle poses the question, "[W]hat happens when people within cultures disagree about the meaning of the culture?" as an ethical dilemma for anthropologists.[36] Moving the question to an empirical plane and trying to explain how differences are resolved, however, would bring up the issue of power. Cultures are not only based on power structures, but through their value systems they also maintain them. Culturally (and officially) promoted values privilege some members of the society and disadvantage others, and the privileged ones tend to use their power to perpetuate those values that justify and sustain their privileged positions. Thus it is not surprising that the male leadership, starting in the early days of Islam in Arabia, has taken a course that interprets the Qur'ān and the tradition, both of which contain contradictions themselves, in a way that has privileged men, excluded women, and eventually closed interpretation to the layperson. Their interpretations have created and sustained Islamic patriarchies, but how much of their formulations and teachings are based on Islam is questioned by modernist/reformist and feminist Muslim interpreters from within.

Conclusion and Suggestions

The governments of Muslim states try to dismiss criticisms directed at their human rights records and thwart objections to their wide and vague reservations placed on the provisions of the Women's Convention by resorting to the polemics of cultural imperialism and interfaith conflicts. In the light of the Western colonial history and its Oriental ideology, their claims may hold some validity. These states embrace the people's rights to self-determination as an anticolonial principle and as another assertion of the state sovereignty. Their authoritarian structures and monopoly over interpretation, however, prevent people from exercising sovereignty. Thus invocations of cultural relativism and the right to self-determination in contexts where people are not allowed to interpret the cultural sources and determine their own lives serve only as shields of protection for the privileged. Without any democratization of the interpretation and decision-making processes, people cannot exercise their right to self-determination.

The diversity reflected in the interpretations of the Qur'ān, for example, reveal not only that cultures have conflicting sources but that the sources themselves may embody self-contradictory tenets. A task for the advocate of human rights, then, should be the examination of cultures by focusing on the principle of universality and the identification of where and how cultures observe that principle. Since human rights are about human dignity, the principle of "universality" means establishing the dignity of all and inevitably calls for equal treatment. Thus cultures should be examined to identify their contradictions in regard to the principle of equality. Once revealed, the "egalitarian" aspects of cultures can be highlighted and linked to international human rights in terms of principles. Such a study of the Qur'ān, showing that Muslim women are granted equality with men at the spiritual level but denied equality at the social level, argues for the elevation of the spiritual equality recognized in the sacred text to become the standard that would be used in the reformulation of social roles.[37]

Critical assessment of cultures to identify their enabling and egalitarian components should apply to all societies, and as the references in this chapter indicate, the process has already started in Muslim communities. But these alternative voices tend to be repressed at home and ignored abroad. The international human rights community, especially the Western states and NGOs, has to break away from the habit of attributing violations to the culture, equating culture with religion, and treating Islam as a monolithic and rigid culture. What is needed on the latter point is the expansion of the attention given to interfaith and intercommunal conflicts and domination (for example, rights of religious and ethnic minorities) to address *the intracommunal differences and hegemonies*.[38] Such a change in the international forums and discourse would provide support to the alternative voices. Moreover, the recognition of multiple sources of knowledge about particular cultures, especially the incorporation of the nonelite and nontraditional sources of knowledge and multiple forms of discourse, are crucial to establishing cross-cultural dialogues on human rights.[39]

As for the implementation of the CEDAW in Muslim states, the monitoring Committee has already issued several recommendations to press the states parties to clarify their points of reservation.[40] "[A]t its 1987 meeting, the CEDAW Committee adopted a decision requesting that the United Nations and the specialized agencies promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in public life of the society, taking into consideration the principle of *El Ijtihad* [interpretation] in Islam."[41]

Although the representatives of Muslim states criticized this decision as a threat to their religious freedom, and the Committee's recommendation was ultimately rejected, the Committee has been persistent in pressing on this matter. In 1994 the Committee amended the Guidelines for the preparation of state reports to provide

additional guidelines for states parties that have entered substantial reservations. Connors writes:

> Such States should report specifically with regard to their reservations, why they consider them to be necessary, their precise effect on national law and policy and whether they have entered similar reservations to other human rights treaties which guarantee similar rights. Such States are also required to indicate plans they might have to limit the effect of the reservations or withdraw them and, where possible, specify a time-table for withdrawing them. The Committee made particular reference to those States who have entered general reservations, who would include countries such as the Maldives, or to Articles 2 and 3 [*sic*], for example, Egypt and the Libyan Arab Jamahiriya, indicating that the Committee considers such reservations to be incompatible with the object and purpose of the Convention and requiring a special effort from such countries who are directed to report on the effect and interpretation of their reservations.[42]

In its persistent effort, the Committee should also encourage shadow reports that include not only the assessments of what has, or has not, been done by the state to implement the Convention but also alternative interpretations of the *Sharīʿa*. Inviting such reports would provide the Committee with the information that it had originally asked the United Nations to gather, allow it to press states to explain and justify why the provisions would have been considered as contradicting the *Sharīʿa*, and support the modernist/feminist Muslims by validating their right to interpret their cultural sources.

Appendix A

The Organization of Islamic Conference Members and Their Dates of Accession to the Organization

Afghanistan, 1969
Republic of Albania, 1992
People's Democratic Republic of Algeria, 1969
Republic of Azerbaijan, 1991
State of Bahrain, 1970
People's Republic of Bangladesh, 1974
Republic of Benin, 1982
Sultanate of Brunei Dar-us-Salaam, 1984
Burkina Faso 1975
Republic of Cameroon, 1975
Republic of Chad, 1969
Federal Islamic Republic of Comoros, 1976
Republic of Cote d'Ivoire, 2001
Republic of Djibouti, 1978
Arab Republic of Egypt, 1969
Republic of Gabon, 1974
Republic of Gambia, 1974
Republic of Guinea, 1969
Republic of Guinea-Bissau, 1974

Republic of Guyana, 1998
Republic of Indonesia, 1969
Islamic Republic of Iran, 1969
Republic of Iraq, 1976
Hashemite Kingdom of Jordan, 1969
Republic of Kazakhstan, 1995
State of Kuwait, 1969
Republic of Kyrgyzstan, 1992
Republic of Lebanon, 1969
People's Socialist Libyan Arab Jamahiriya, 1969
Malaysia, 1969
Republic of Maldives, 1976
Republic of Mali, 1969
Islamic Republic of Mauritania, 1969
Kingdom of Morocco, 1969
Republic of Mozambique, 1994
Republic of Niger, 1969
Federal Republic of Nigeria, 1986
Sultanate of Oman, 1970
Islamic Republic of Pakistan, 1969
State of Palestine, 1969
State of Qatar, 1970
Kingdom of Saudi Arabia, 1969
Republic of Senegal, 1969
Republic of Sierra Leone, 1972
Democratic Republic of Somalia, 1969
Republic of Sudan, 1969
Republic of Suriname, 1996
Syrian Arab Republic, 1970
Republic of Tajikistan, 1992
Republic of Togo, 1997
Republic of Tunisia, 1969
Republic of Turkey, 1969
Republic of Turkmenistan, 1992
Republic of Uganda, 1974
State of United Arab Emirates, 1970
Republic of Uzbekistan, 1995
Republic of Yemen, 1969

Notes

I am grateful to the commentators at the Global Human Rights and Diversity: Area Expressions conference and to my assistant, Jose Alves, for his help in coding and constructing the data set.

1. Rebecca Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women," *Virginia Journal of International Law* 30:3 (spring 1990): 643–88, especially 663–73; Jane Connors, "The Women's Convention in the Muslim World," *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Convention*, ed. J. P. Gardner (London: British Institute of International and Comparative Law, 1997), 85–103.
2. CEDAW, *General Recommendations Made by the Committee on the Elimination of Discrimination against Women*, retrieved from *www.un.org/womenwatch/daw/cedaw/recomm.htm* [10 August 2001]. Some of the General Recommendations are particularly important because they elaborate on the provisions of the Convention by bringing up some gender-specific violations of human rights and the underestimation of the value of women. They stress issues such as gender-based violence, unequal pay for work of equal value, undervalued and unremunerated domestic activities of women, polygamy, and other marital practices that disadvantage women and violate their dignity. The following General Recommendations, all issued in 1994, have broadened the scope of the Convention: no. 12, Violence against Women; no. 13, Equal Remuneration of Work of Equal Value; no. 14, Female Circumcision; no. 16, Unpaid Women Workers in Rural and Urban Family Enterprises; no. 17, Measurement and Quantification of the Unremunerated Domestic Activities of Women and Their Recognition in the Gross National Product; and no. 21, Equality in Marriage and Family Relations.
3. Article 28 allows the ratification of the Convention with reservations, as long as they are compatible "with the object and purpose" of the Convention. Thus states may enter reservations or "interpretive declarations" when they sign or ratify the Convention. Although the text of

the Convention has no reference to "declarations," they tend to employ a language similar to the one used in reservations and play the same role in limiting state obligations. Thus for the purposes of this study, declarations are treated the same as reservations.

4. Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2d ed. (Oxford: Oxford University Press, 2000), 180.
5. Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on the Discrimination against Women," *American Journal of International Law* 85:2 (April 1991): 281–321, at 318.
6. Cook, "Reservations to the Convention," 644.
7. The Organization of the Islamic Conference was established in Rabat on 25 September 1969. Currently it has fifty-seven members and three observers. The members and date of their accession to the organization are shown in appendix A. The observer states are the Republic of Bosnia and Herzegovina, Central African Republic, and the Kingdom of Thailand. It should be noted that this self-proclaimed Islamic identity does not correspond to the size of the Muslim population in the country (for example, Tanzania, which is not a member, has Muslims constituting a larger percentage of its population [35 percent] than a member state, Suriname, which has only 19.6 percent of its population Muslims. Ethiopia, on the other hand, with nearly half of its population being Muslim [46.5 percent] is not a member). Most of the members also do not recognize Islam as the state religion, and some of them promote secularism as an official ideology and a part of their national identity (such as Turkey). Yet by joining the OIC, regardless of their demographics and religious policies, states assert their Islamic identity, commit themselves to safeguard the holy places of Islam and the dignity, independence, and national rights of Muslim people, and seek cooperation and solidarity on the basis of their reiterated Islamic identity.
8. Palestine, which has been a member and recognized by the other members as a state since the establishment of the OIC in 1969, is not included in the analyses.
9. The Optional Protocol was adopted by the United Nations General Assembly Resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999. It entered into force a year later, on 22 December 2000, upon its ratification by ten states parties. The Protocol allows "individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party" to submit a communication to the Committee on the Elimination of Discrimination against Women (Article 2). By October 2001, only 15 percent of the states parties had adopted the Protocol, but with a ratification rate of 6.5 percent (three out of forty-six), the Muslim states parties lag behind the non-Muslim ones, which have registered a ratification rate of 18 percent, nearly three times higher.
10. The Chi-square test for the cross-tabulation reported in table 9.1 indicates a statistically significant relationship between membership in the Organization of Islamic Conference and the prevalence and persistence of reservations at the probability level of $<.05$. When the three states with blanket reservations are assigned from the category of "reservations modified" to the "all reservations maintained" category, the probability level drops to $<.006$.
11. Cook, "Reservations to the Convention, 648.
12. Hilary Charlesworth, "Human Rights as Men's Rights," *Women's Rights, Human Rights: International Feminist Perspectives*, eds. Julie Peters and Andrea Wolper (New York: Routledge, 1995), 103–13; Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988); Zillah Eisenstein, *Capitalist Patriarchy and the Case of Socialist Feminism* (New York: Monthly Review Press, 1979).
13. Julie Peters and Andrea Wolper, eds., *Women's Rights, Human Rights*; Lama Abu-Odeh, "Crimes of Honor and the Construction of Gender in Arab Societies," *Feminism and Islam: Legal and Literary Perspectives,* ed. Mai Yamani (New York: New York University Press, 1996), 141–94;

Shahla Haeri, "The Politics of Dishonor: Rape and Power in Pakistan," *Faith and Freedom: Women's Human Rights in the Islamic World,* ed. Mahnaz Afkhami (London: Tauris, 1995), 161–74.

14. Christine Chinkin, "Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women," *Human Rights as General Norms and a State's Right to Opt Out*, 64–84; Michele Brandt and Jeffery A. Kaplan, "The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh, and Tunisia," *Journal of Law and Religion* 12:1 (1995–96): 105–42; Connors, "Women's Convention"; Clark, "Vienna Convention Reservations Regime"; Cook, "Reservations to the Convention."
15. Not all provisions of the Convention have been subject to reservations. Articles 3, 4, 6, 8, 10, 12, and 14 have been accepted at accession by all states parties without any reservations. They address taking measures for the development and advancement of women, not interpreting the corrective measures as discriminating, suppressing trafficking and exploitation of prostitution of women, increasing women's representation of government in international organizations, eliminating discrimination in education, eliminating discrimination in health care, and the need to pay special attention to rural women, respectively. Other provisions that have received reservations, but only by a few countries and without any significant differences between Muslim and non-Muslim states parties, include: Article 1; Article 2, paragraphs (a), (d), (f), and (g); Article 5, paragraphs (a) and (b); Article 7, paragraph (b); Article 9 and its paragraph 1; Article 11 and its paragraph 1 and paragraph 2 (b); Article 13; Article 15 and its paragraphs 2 and 3; Article 16, paragraph 1, subparagraphs (b), (e), (g), and (h); and Article 29, paragraph 1.
16. Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics,* 3d ed. (Boulder CO: Westview Press, 1999); Ann Elizabeth Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" *Michigan Journal of International Law* 15:2 (winter 1994): 307–429.
17. The tradition, *Sunna*, can also be defined to include the *Hadīth*. For a brief review of all conflicts and confusions about the content and authenticity of these sources, see Benjamin Walker, *Foundations of Islam: The Making of a World Faith* (London: Peter Owen, 1998), 146–78.
18. Lawyers Committee for Human Rights, *Islam and Justice: Debating the Future of Human Rights in the Middle East and North Africa*, (New York: 1997), 115.
19. Imam Khomeini, *Islam and Revolution*, trans. Hamid Algar (Berkeley CA: Mizan Press, 1981).
20. John Esposito, *Women in Muslim Family Law* (Syracuse NY: Syracuse University Press, 1982).
21. Azizah al-Hibri, "A Study of Islamic Herstory: Or How Did We Ever Get into this Mess?" *Women and Islam,* ed. Azizah al-Hibri (Oxford: Pergamon Press, 1982), 207–20. Also see Abdur Rahman I. Doi, *Women in Shari'a* (London: Ta-ha, 1989); Chibli Mallat and Jane Connors, eds., *Islamic Family Law,* Arab and Islamic Law Series (London: Graham and Trotman, 1990); Jamal Nasir, *Islamic Law and Personal Status*, 2d ed. (London: Graham and Trotman, 1990); Jamal Nasir, *The Status of Women in Islamic Law and under Modern Islamic Legislation* (London: Graham and Trotman, 1990).
22. Lawyers Committee for Human Rights, *Islam and Justice*.
23. Bouthaina Shaaban, "The Muted Voices of Women Interpreters," *Faith and Freedom*, 61–77; Fatima Mernissi, *The Forgotten Queens of Islam* (Minneapolis: University Press of Minnesota, 1993).
24. For a brief summary of the advocacy of gender inequality by Sultanhussein Tabadeh and Abu'l A'la Mawdudi, see Mayer, *Islam and Human Rights*, 102–5. For the views of Imam Khomeini and his followers, see Foreign Affairs Committee of the National Council of Resistance of Iran, *Women, Islam, and Equality*, (1995), 37–39. For a summary of the position taken by the Moslem Brotherhood in Egypt, see Lawyers Committee for Human Rights, Aicha Belarbi, "Islam, Women, and Politics," *Islam and Equality: Debating the Future of Women's and Minority Rights in the Middle East and North Africa* (New York: 1999), 185–205.
25. The latter group rejects feminism as a Western notion and embraces Islam not only as a

religion but also as the foundation of a political system. However, since these women also struggle against the subjugation of women and the elimination of the conditions that prevent women's advancement, albeit within an Islamic work, I consider their goals and approach as nothing but feminist.

26. For example, see Ali Asghar Engineer, *The Rights of Women in Islam* (New York: St. Martin's Press, 1992). The modernist scholar Mahmoud Mohamed Taha refers to the inequality between men and women, polygamy, the veil (*al-hijāb)*, segregation of men from women, and slavery as "not an original precept in Islam." See Mahmoud Mohamed Taha, *The Second Message of Islam* (Syracuse NY: Syracuse University Press, 1987), 137–45. Taha and his student Abdullahi Ahmed An-Na'im examine the historical development of the message of Islam by separating the revelations in the Qur'ān and the *Sunna* into two stages: the earlier Mecca period and the later Medina one. They argue that the current *Sharī'a* is based on revelations and *Sunna* of the Medina period, which abrogated the more egalitarian and humanistic message of the Mecca period because the social and political conditions—as well as the psychology and mental attitude of the early Muslims—could not allow the implementation of the radical message. Thus they propose "reversing the process of *naskh*, or abrogation, so that those texts which were abrogated in the past can be enacted into law now, with the consequent abrogation of texts that used to be enacted as *Sharī'a*." See Abdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse NY: Syracuse University Press, 1990), 56. For a brief review of other proposals for reviving the *original intentions* of Islam to emancipate women, see Anouar Majid, "The Politics of Feminism in Islam," *Signs* (winter 1998): 321–61, as well as the critical responses to his essay: Suad Joseph, "Comment on Majid's 'The Politics of Feminism in Islam': Critique of Politics and the Politics of Critique," *Signs* (winter 1998): 363–69; Ann Elizabeth Mayer, "Comment on Majid's 'The Politics of Feminism in Islam,'" *Signs* (winter 1998): 369–77.

27. Nabia Abbott, *Aishah, the Beloved of Mohammad* (Chicago: University of Chicago Press, 1942); Nawal El Saadawi, "Woman and Islam," *Women and Islam,* 193–206; Nawal El Saadawi, *The Hidden Face of Eve* (London: Zed Press, 1980); Leila Ahmad, *Women and Gender in Islam* (New Haven CT: Yale University Press, 1992), 41–78; Engineer, *Rights of Women*, 89–94; Fatima Mernissi, *Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (New York: Addison-Wesley, 1991); Fatima Mernissi, *Forgotten Queens*; Foreign Affairs Committee, *Women, Islam, and Equality*; Raga' El-Norm, "Women in Islamic Law," *Feminism and Islam*, 87–102; al-Hibri, "A Study of Islamic Herstory"; Nimat Hafez Barazangi, "Muslim Women's Islamic Higher Learning as a Human Right," *Muslim Women and the Politics of Participation: Implementing the Beijing Platform*, eds. Mahnaz Afkhami and Erika Friedle (Syracuse NY: Syracuse University Press, 1997), 43–57; Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (New York: Oxford University Press, 1999). For a brief review of various new interpretations, see Riffat Hassan, "Rights of Women within Islamic Countries," *Religious Human Rights in Global Perspective,* eds. John Witte Jr. and Johan D. Van der Vyver (London: Martinus Nijhoff, 1996), 361–86. For the positions taken by Islamist women in Turkey, see Aynur Ilyasoğlu, "Islamist Women in Turkey: Their Identity and Self Image," *Deconstructing Images of "The Turkish Woman"*, ed. Zehra F. Arat (New York: St. Martin's Press, 1998), 241–61. On Iran, see Haleh Afshar, *Islam and Feminisms: An Iranian Case Study* (London: MacMillan Press, 1998); Hisae Nakanishi, "Power, Ideology, and Women's Consciousness in Postrevolutionary Iran," *Women in Muslim Societies: Diversity within Unity,* eds. Herbert Bodman and Naryerh E. Tohidi (Boulder CO: Lynne Rienner, 1997), 83–100.

28. For various modernist/feminist exegeses, see Engineer, *Rights of Women*; Barazangi, "Muslim Women's Islamic Higher Learning"; Azizah al-Hibri, "Islam, Law, and Custom: Redefining Muslim Women's Rights," *American University Journal of Law and Policy* 12:1 (1997): 1–44; Wadud, *Qur'an and Woman*. For a brief review of the different interpretations, see Barbara Stowasser, "Gender Issues and Contemporary Quran Interpretation," *Islam, Gender, and Social*

Change, eds. Yvonne Yazbeck Haddad and John Esposito (Oxford: Oxford University Press, 1998), 30–44; Barbara Stowasser, *Women in the Qur'an, Traditions, and Interpretations* (New York: Oxford University Press, 1994). For women in mystical Islam, see Lynn Wilcox, *Women and the Holy Qur'an: A Sufi Perspective*, vol. 1 (Washington DC: M.T.O. Shahmaghsoudi, 1998); Annemarie Schimmel, *My Soul Is a Woman: The Feminine in Islam,* trans. Susan H. Ray (New York: Continuum, 1997).

29. Foreign Affairs Committee, *Women, Islam, and Equality*; Afshar, *Islam and Feminisms*; Nakanishi, "Power, Ideology, and Women's Consciousness."
30. Afshar, *Islam and Feminisms*.
31. Ilyasoğlu, "Islamist Women in Turkey."
32. Lawyers Committee for Human Rights, *Islam and Equality*, 59.
33. Lawyers Committee for Human Rights, *Islam and Equality*, 71.
34. There is now a considerable body of literature that explores and explains the historical, political, biological, and sociocultural genesis of the conditions of Muslim women and their struggle for equality. For cross-national examples, see *A Social History of Women and Gender in the Modern Middle East*, the Social History of the Modern Middle East Series, eds. Margaret L. Meriwether and Judith E. Tucker (Boulder CO: Westview Press, 1999); Lila Abu-Lughod, *Remaking Women: Feminism and Modernity in the Middle East* (Princeton NJ: Princeton University Press, 1998); *Islam, Gender, and Social Change*; Mahnaz Afkhami, "Promoting Women's Rights in the Muslim World," *Journal of Democracy* 8:1 (1997): 157–66; *Muslim Women and the Politics of Participation*; *Women in Muslim Societies*; *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender*, eds. Nikki Kiddie and Beth Baron (New Haven CT: Yale University Press, 1992); *Women, Islam, and the State,* ed. Deniz Kandiyoti (Philadelphia: Temple University Press, 1991); Fatima Mernissi, "Virginity and Patriarchy," *Women and Islam*, 183–92.
35. The international human rights regime is a product of political negotiations among states, whose representatives, of course, would be inspired or influenced by different theories and schools of thought.
36. Karen Engle, "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999," *Human Rights Quarterly* 23:3 (August 2001): 536–59.
37. Zehra Arat, "Women's Rights in Islam: Revisiting Qur'anic Rights," *Human Rights: New Perspectives, New Realities*, eds. Peter Schwab and Adamanta Pollis (Boulder CO: Lynne Rienner, 2000), 69–94.
38. Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton NJ: Princeton University Press, 1999). Ironically, a historical assessment of Islamic empires and Muslim states would show that these states have granted more religious freedom to their non-Muslim subjects and citizens than that they allowed to Muslims.
39. Brooke Ackerly, "Humans' Rights and Culture: A Comment on Daniel Bell's *East Meets West* and Theorists of Cross-Cultural Universal Human" (comments presented at the annual meeting of the American Political Science Association, San Francisco, 29 August–2 September 2001). I am grateful to the author for providing me with a written copy of her comments.
40. Brandt and Kaplan, "The Tension between Women's Rights and Religious Rights"; Connors, "Women's Convention"; Clark, "Vienna Convention."
41. UN, Doc. E/1987/SR 11.
42. Connors, "Women's Convention," 99–100.

10 The Status of Human Rights in the Middle East

PROSPECTS AND CHALLENGES

Emile Sahliyeh

The last two decades of the twentieth century witnessed a profusion of articles and books dealing with the status of human rights. The growing attention to human rights is part of larger changes in international relations. These changes include the end of the cold war, the collapse of communism in the Soviet Union and Eastern Europe, the spread of democratization and human rights in different parts of the world, and the globalization of information and market forces. In addition to reporting about the status of human rights, this vast body of literature investigated the conditions that lead governments to repress or respect the rights of their citizens.

The Middle East region has not been excluded from this trend, as the question of human rights has received considerable attention from both the academic community and political activists. In response to a mounting economic crisis and domestic public pressure in the second half of the 1980s, several Middle Eastern countries introduced democratic reforms. This limited democratic reform movement triggered an intense discussion among Middle East–area specialists concerning the prospects for democratization, the barriers to the advancement of human rights, and the persistence of authoritarianism.[1] In the late 1970s and the 1980s a number of human rights groups and movements began to appear in some Middle Eastern countries.[2] It was also during this period that international attention began to focus on the status of human rights in the Middle East.

In light of this growing academic and political interest in the question of human rights in the Middle East, the goals of this chapter are twofold. First, the chapter will describe the status of human rights and the variation in the conditions of these rights among the different countries of the Middle East region. It will try to determine if there is variation in the respect of human rights between monarchic and republican authoritarian regimes and discern if these governments have made any progress on the path toward respecting the human rights of their citizens. To accomplish this task, we will use data from Freedom House, Polity III, and the Political Terror Scale. The second task for this chapter is to examine the challenges and barriers to human rights in the Middle East. It will review four different perspectives that attempt to explain the violation of human rights among the countries of this region. In particular, the chapter will highlight the debate concerning the compatibility between Islam and human rights and the views of the Islamic conservative and liberal thinkers concerning the question of human rights.

It is commonly assumed that human rights consist of political rights, civil liberties, personal integrity rights, and subsistence rights. In our effort to discern the status of human rights in the Middle East, we employ the personal integrity rights and the civil liberties as indicators for human rights. The personal integrity rights index refers to the physical and personal security of the individual against state terrorism. We use the Poe-Tate Political Terror Scale data set, which focuses on the "integrity of the person" to measure the conditions of personal integrity rights in the Middle East. According to the Political Terror Scale, the violations of personal integrity rights of citizens may take the form of "state terrorism," including murder, torture, disappearance, and imprisonment of citizens for their political views.[3] The personal integrity rights index is based upon analyses of the contents of both the State Department and Amnesty International reports. In our study we employ only the Amnesty International data. According to Poe and Tate, the human rights abuse scale consists of five rankings, with 1 representing the most law abiding and the most respectful of human rights, and 5 the least respectful of those rights.[4]

The civil liberties index of human rights includes freedoms of religion and speech, the rule of law, economic freedoms, and the right to form political parties, associations, and interest groups. We use the Freedom House Rankings to measure the level of civil liberties in the Middle East.[5] In its ranking of states the Freedom House data set does not use constitutional guarantees of civil liberties but rather looks at those rights in practice. The survey rates civil liberties on a seven-category scale, 1 representing the most free and 7 the least free. A country is assigned to a particular numerical category based on responses to the checklist and the judgments of the survey team at Freedom House.

Personal Integrity Rights

Table 10.1 presents the status of human rights as measured by the personal integrity rights among the Middle Eastern countries and compares the Middle East with other regions of the world. The term *personal integrity* in table 10.1 refers to the physical security of the person and his or her rights against torture and imprisonment. A higher number indicates an undesirable condition of personal integrity, while a low score denotes respect for the personal integrity rights of citizens. The highest possible number a country may score is 5 and the lowest number is 1. This table covers twenty-four Middle Eastern and Arab countries between 1976 and 1993 and rank-orders the countries by the last year of data and the average of the state in all years.

Table 10.1 shows that out of the twenty-four countries, three countries (Cyprus, United Arab Emirates, and Oman) have good human rights records similar to Western countries, scoring on average less than 2. It also shows that out of the twelve Middle Eastern states, which have an average score between 2 and 3, five are monarchies and two—Israel and Lebanon—are democracies. Seven countries averaged between 3 and 4, and three countries scored on average more than 4. It is inter-

Table 10.1. Personal Integrity by Amnesty International, Rank Ordered by 1993 Score

	1976	1977	1978	1979	1980	1981	1982	1983
UAE	—	1	1	1	1	1	1	1
Cyprus (Greek)		2	1	1	1	1	1	1
Oman	1	1	2	2	2	2	2	2
Mauritania	—	1	3	2	3	2	2	3
Israel	4	2	3	2	2	2	2	2
Jordan	2	2	3	3	3	3	3	2
Bahrain	3	3	3	3	3	3	3	3
Kuwait	1	1	1	1	1	1	1	3
Saudi Arabia	3	2	1	2	3	2	2	3
Yemen, South (Peoples' Democratic Republic)	3	3	—	3	3	3	2	2
Yemen, North (Arab Republic)	2	2	2	3	3	3	3	3
Lebanon	—	2	2	2	—	—	—	—
Tunisia	2	3	3	3	3	3	3	3
Libya	3	3	3	3	4	3	3	3
Morocco	3	4	3	3	3	3	4	4
Syria	4	3	3	3	5	5	5	4
Iran	4	3	—	3	5	4	5	5
Algeria	2	2	—	4	2	2	2	2
Egypt	3	3	3	3	3	3	3	3
Somalia	2	3	3	3	3	3	3	3
Turkey	3	3	2	3	4	4	4	4
Sudan	4	3	3	3	3	3	3	3
Afghanistan	2	4	4	5	5	5	5	5
Iraq	4	4	4	4	4	4	4	4
North America, Western Europe	1.3	1.5	1.3	1.3	1.4	1.3	1.3	1.3
Africa	2.5	2.4	2.4	2.3	2.3	2.4	2.4	2.6
Asia & Pacific	3.1	3.1	2.9	2.7	2.6	2.7	2.5	2.5
Latin & Central America	2.9	3.1	3.2	2.8	2.9	2.8	2.8	2.8
Eastern Europe	3.4	2.9	2.8	2.9	2.8	2.9	2.9	2.8
Middle East	2.8	2.4	2.5	2.7	2.9	2.7	2.8	2.9

Source: Poe and Tate, "Repression of Human Rights to Personal Integrity in the 1980s."

esting to note that UAE (an oil-producing monarchy and an oligarchy) and Oman (another oil-producing monarchy and an autocracy) received the most favorable average rating of 1.3 and 1.6, respectively, and that Cyprus is the only democracy in this group. The table shows that Iran, Afghanistan, and Iraq have the worst human rights records during this period, as they scored more than 4 on average.

Though the table suggests that the majority, or 62 percent, of the Middle Eastern countries fall in the two first categories of respecting or moderately violating the personal integrity rights of their citizens, the regional average for the Middle East is higher than the other regions, at 2.9. This unfavorable rating gives the Middle East the worst human rights record in the world during this period. Central and Latin America and Eastern Europe have an average of 2.7 each, and Asia Pacific and Africa

1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	Low	High	Mean
1	1	1	2	2	2	2	2	1	1	1	2	1.3
2	1	1	1	1	1	2	2	2	2	1	2	1.4
2	2	2	2	1	2	1	1	—	1	1	2	1.6
3	2	2	2	3	3	4	4	3	2	1	4	2.6
3	3	3	3	3	3	2	2	2	2	2	4	2.6
2	3	3	3	3	3	3	3	2	2	2	3	2.7
3	3	3	3	3	3	3	3	2	2	2	3	2.9
2	3	2	2	1	2	5	4	3	3	1	5	2.1
3	3	3	3	3	3	3	3	2	3	1	3	2.6
2	3	4	3	3	3	—	—	—	—	2	4	2.8
3	2	4	3	3	3	2	2	3	3	2	4	2.7
—	—	—	—	—	3	4	3	4	3	2	4	2.9
3	3	3	3	2	2	3	4	3	3	2	4	2.9
3	3	3	4	3	3	3	3	3	3	3	4	3.1
4	4	3	3	3	3	3	3	3	3	3	4	3.3
4	3	5	5	4	4	4	4	3	3	3	5	3.9
5	5	4	5	5	4	4	4	4	3	3	5	4.2
2	2	2	2	4	2	2	3	4	4	2	4	2.5
3	3	3	3	3	4	3	4	3	4	3	4	3.2
3	3	4	4	5	5	5	5	5	4	2	5	3.7
3	4	4	4	4	4	4	4	5	4	2	5	3.7
3	3	3	4	5	4	4	4	5	5	3	5	3.6
4	5	5	4	4	4	4	4	4	4	2	5	4.3
5	5	4	5	5	4	5	5	5	5	4	5	4.4
1.5	1.4	1.5	1.5	1.5	1.3	1.3	1.3	1.4	1.3			1.4
2.5	2.5	2.5	2.4	2.5	2.4	2.6	2.7	3.8	2.8			2.5
2.4	2.4	2.6	2.5	2.5	2.5	2.7	2.6	2.6	2.3			2.6
2.8	2.5	2.8	2.7	2.7	2.5	2.7	2.5	2.6	2.4			2.7
2.7	2.8	2.9	2.9	2.4	2.6	2.3	2.3	2.4	2.0			2.7
2.9	2.9	3.0	3.0	3.0	3.0	3.1	3.2	3.2	3.0			2.9

have an average of 2.6 and 2.5, respectively. The most unfavorable human rights ratings for the Middle East are shown in the 1980s, when oil reached its lowest price. During the Gulf War (1990–91), the Middle East regional average reached a record high of 3.2. We would like to note that the violation of personal integrity rights in the Middle East reached a historical record low of 2.4 at the height of the oil boom in 1977.

Civil Liberties

Table 10.2 presents the state of human rights among the Middle Eastern countries as measured by the status of civil liberties. The table ranks these states along a scale ranging from 1 to 7. As in table 10.1, a lower number indicates a desirable condition, while a higher number denotes an undesirable state. Freedom House designates

Table 10.2. Freedom House Civil Liberties Indicators, Rank Ordered by Country Average

	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985
Cyprus (Greek)	3	3	4	4	4	4	4	4	3	2	2	2	2	2
Israel	3	3	3	3	3	3	2	2	2	2	2	2	2	2
Cyprus (Turkish)										3	3	3	3	3
Lebanon	2	2	2	4	4	4	4	4	4	4	4	4	4	4
Turkey	4	4	3	3	3	3	3	3	5	5	5	5	5	5
Kuwait	4	3	3	3	5	4	3	4	4	4	4	4	4	4
Morocco	4	5	5	5	5	3	4	4	4	5	5	5	5	5
Yemen, North	4	4	4	4	5	5	5	5	5	5	5	5	5	5
Tunisia	5	5	5	5	5	5	5	5	5	5	5	5	5	5
United Arab Emirates	5	5	5	5	5	5	5	5	5	5	5	5	5	5
Bahrain	5	5	4	4	4	4	4	4	4	5	5	5	5	5
Egypt	6	6	4	4	4	4	5	5	5	6	5	5	4	4
Jordan	6	6	6	6	6	6	6	6	6	6	6	6	5	5
Yemen														
Algeria	6	6	6	6	6	6	6	6	6	6	6	6	6	6
Mauritania	6	6	6	6	6	6	6	6	6	6	6	6	6	6
Iran	6	6	6	6	6	5	5	6	5	6	6	6	6	6
Oman	6	6	6	6	6	6	6	6	6	6	6	6	6	6
Sudan	6	6	6	6	6	5	5	5	5	6	5	5	6	6
Libya	6	7	7	6	6	6	6	6	6	7	6	6	6	6
Saudi Arabia	6	6	6	6	6	6	6	6	6	6	6	7	7	7
Afghanistan	5	6	6	6	6	6	7	7	7	7	7	7	7	7
Syria	7	7	7	7	6	6	6	6	6	6	7	7	7	7
Iraq	7	7	7	7	7	7	6	7	7	7	7	7	7	7
Somalia	6	6	6	6	7	7	7	7	7	7	7	7	7	7
Yemen South	7	7	7	7	7	7	7	7	7	7	7	7	7	7
North America; Western Europe	1.9	1.8	1.6	1.7	1.5	1.4	1.4	1.3	1.3	1.3	1.2	1.2	1.2	1.3
Latin & Central America	3.8	4.0	4.0	3.9	4.1	4.1	3.8	3.6	3.8	3.8	3.5	3.5	3.2	3.0
Asia & Pacific	4.2	4.3	4.3	4.5	4.6	4.5	4.4	4.3	4.2	4.2	4.2	4.3	4.3	4.2
Eastern Europe	6.6	6.6	6.6	6.6	6.6	6.4	6.3	6.4	6.4	6.4	6.6	6.6	6.4	6.3
Middle East	5.3	5.4	5.3	5.3	5.5	5.0	5.0	5.2	5.2	5.3	5.3	5.3	5.3	5.3
Africa	5.7	5.8	5.8	5.8	5.8	5.9	5.8	5.5	5.5	5.5	5.5	5.6	5.7	5.8

Source: Freedom House Country Ratings *www.freedomhouse.org/ratings/ratings.pdf*, [1 December 1999].

countries whose average for civil liberties is between 1.0 and 2.5 as "free," countries with an average between 2.6 and 5.5 as "partly free," and countries with an average between 5.5 and 7.0 as "not free."

In table 10.2 we rank Middle Eastern countries into four categories. The first group is free states, which have an average score below 2.5; these states are Israel

1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	Low	High	Mean
2	2	2	1	1	1	1	1	1	1	1	1	1	1	4	2.2
2	2	2	2	2	2	2	3	3	3	3	3	3	2	3	2.4
3	3	3	2	2	2	—	—	—	—	2	2	4	2	4	2.7
4	5	5	5	5	4	4	5	5	5	5	5	5	2	5	4.1
4	4	4	3	4	4	4	4	5	5	5	5	5	3	5	4.1
5	5	5	4	7	5	5	5	5	5	5	4	5	3	7	4.4
5	5	5	4	4	5	5	5	5	5	5	5	4	3	5	4.7
5	5	5	5										4	5	4.8
5	6	4	3	4	5	5	5	5	5	5	5	5	3	6	4.9
5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5.0
5	5	5	5	5	5	5	6	6	6	6	6	6	4	6	5.0
4	4	4	4	4	5	6	6	6	6	6	6	6	4	6	5.0
5	5	5	5	5	4	3	4	4	4	4	4	5	3	6	5.1
				5	5	4	5	6	6	6	6	6	4	6	5.4
6	6	6	4	4	4	6	6	7	6	6	6	5	4	7	5.8
6	6	6	6	6	6	6	6	7	6	6	6	5	5	7	6.0
6	6	6	5	5	5	6	7	7	7	7	7	6	5	7	6.0
6	6	6	6	6	6	5	6	6	6	6	6	6	5	6	6.0
5	5	5	7	7	7	7	7	7	7	7	7	7	5	7	6.0
6	6	6	7	7	7	7	7	7	7	7	7	7	6	7	6.5
7	7	7	6	6	6	7	7	7	7	7	7	7	6	7	6.5
7	7	6	7	7	7	6	7	7	7	7	7	7	5	7	6.7
7	7	7	7	7	7	7	7	7	7	7	7	7	6	7	6.8
7	7	7	6	7	7	7	7	7	7	7	7	7	6	7	6.9
7	7	7	7	7	7	7	7	7	7	7	7	7	6	7	6.9
7	7	7	7										7	7	7.0
1.3	1.2	1.2	1.2	1.2	1.2	1.1	1.1	1.1	1.1	1.1	1.1	1.1			1.3
2.9	2.8	2.8	2.7	2.5	2.4	2.6	2.6	2.6	2.6	2.4	2.4	2.4			3.1
4.1	4.1	4.0	4.1	4.2	4.2	4.2	4.3	4.3	4.3	4.2	4.2	4.2			4.3
6.3	6.1	6.0	5.6	3.6	3.3	3.4	3.3	3.3	3.2	3.1	3.0	2.9			4.7
5.3	5.3	5.2	4.9	5.1	5.0	5.3	5.6	5.8	5.7	5.5	5.5	5.5			5.3
5.8	5.7	5.7	5.8	5.5	5.1	4.8	4.8	4.7	4.6	4.6	4.7	4.6			5.4

and Cyprus, the two consolidated democracies in the region. The second group is "partly free," with an average score between 2.6 and 5.5. The partly free group consists of eleven countries: Lebanon, Turkey, Kuwait, Morocco, Tunisia, United Arab Emirates, Bahrain, Egypt, Jordan, N. Yemen (before 1989), and Yemen (after 1989). We notice that five out of the ten partly free countries are monarchies. The

third group is not free and is composed of five countries with an average between 5.5 and 6.0: Algeria, Mauritania, Iran, Oman, and Sudan. The last group of states is hardcore "not free," as they have the worst record, between 6.5 and 7.0, and consists of seven countries: S. Yemen (before 1989), Libya, Afghanistan, Saudi Arabia, Syria, Iraq, and Somalia. Table 10.2 further denotes that the condition of civil liberties in the Middle East has deteriorated since 1989. When compared to other regions of the world, the Middle East is slightly surpassed by Africa (5.4 to 5.3) in having the most unfavorable record on human rights as measured by civil liberties. If we exclude Israel and Cyprus from the calculation, the Middle East region reaches a higher average of 5.6 and even 6.0 in 1996 and 1997.

Debating the Low Record of Human Rights in the Middle East

This low record of human rights in the Middle East region has been widely debated in the scholarly literature. The debate is entangled in religious, cultural, and political issues. Some aspects of this literature revolve around the question of whether the Middle East should be judged by the same standards of human rights as the West, or if it should be treated differently when it comes to the question of human rights. In the next section, we will review four viewpoints that shed some light on this controversy and that try to account for the low record of respect toward human rights. The four explanatory variables include the weakness of democracy, the primacy of security and foreign policy calculation, the impact of nationalism and anticolonialism, and Islamic resurgence.

The qualitative nature of much of the Middle East–area studies literature makes the task of measuring and ranking the impact of the four variables upon the violation of human rights among the Middle Eastern countries rather difficult. Some of the findings of the general empirical research on human rights, however, suggest that a positive relationship exists between level of democracy and respect for human rights. The research by Poe and Tate, Henderson, and McKinlay and Cohan indicates among other findings that democracy reduces the level of repression of human rights and that democratic governments respect the personal integrity and the physical security of their citizens.[6] They further show that leftist governments, military regimes, and civil and international wars are more likely to lead to violation of human rights.

The Persistence of Authoritarianism

A primary reason for the low level of respect for the political rights, civil liberties, and the personal integrity rights of the citizens in the Middle East lies in the feebleness of the democratic institutions and norms and the persistence of autocracies. Indeed, with the exception of Cyprus and Israel, the two consolidated democracies in the region, the rest of the Middle Eastern countries are autocratic or oligarchic regimes. A few of them, like Lebanon, Turkey, Jordan, and Morocco, have introduced democratic reforms. Some writers, such as Abdalla, Crystal, Awad, and An-Na'im,

Table 10.3. Procedural Democracy: Mass Accommodation and Elite Accord The Middle East and Regional Comparisons

	Central and Latin America	Africa	Middle East (1)	Middle East (2)	Asia
High Elite Accord with High Mass Accommodation (Democracy)	53.6%	21.1%	16.9%	9.2%	31.5%
High Elite Accord with Low Mass Accommodation (Oligarchy)	25.6%	50.9%	60.2%	65.8%	60.0%
Low Elite Accord with Low Mass Accommodation (Autocracy)	20.9%	28.7%	22.9%	25.1%	8.6%
Low Elite Accord with High Mass Accommodation (Stratocracy)	0%	0%	0%	0%	0%
Tau-B	.55	.32	.25	.18	.21
Pearson X^2 at 1 df	174.9	97.2	35.8	18.4	24.7
N (Countries by Years (1970–94)	552	896	568	520	540

Source: Emile Sahliyeh, "Patterns of Distribution of Political Authority in the Middle East" (paper presented at the Middle East Studies Association annual convention, Chicago, 19 November 1999.

Notes: Middle East (1) includes Afghanistan, Algeria, Bahrain, Cyprus (Greek), Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, UAE, Yemen, North (Arab Republic), and Yemen, South (Peoples' Democratic Republic). Middle East (2) excludes Israel and Cyprus.

The Elite Accord Score is coded 1 if a state is above 5 (out of 10) of the summation of the "executive recruit regulation," "executive recruit competition," and "executive recruit openness," and 0 for a state below the 50 percentile.

The Mass Accommodation score is coded 1 if a state is above the score of 9 (out of 17) of the summation of the "participation regulation," "executive authority constraint," and "participation competition." Otherwise it is coded as 0.

attribute the excessive violations of human rights in the Middle East to the lack of democracy and the weakness of human rights organizations, leadership, and movements.[7] According to these writers, the failure of the independent human rights organizations to achieve any notable standing in the region (until recently) lies in the fact that their ability to work for independent human rights standards has been circumscribed by the political milieu. The conservative authoritarian rulers in the area sought to keep some form of direct control over the human rights organizations in their countries for fear that these groups presented a threat to their autonomies. The development of independent and relatively unrestricted human rights organizations in countries where none previously existed is a primary reason behind the global push for greater respect for human rights, where these organizations seek to operate outside the sphere of government control. In the Middle East, however, this independence has been difficult to achieve, as the human rights movement is still a new phenomenon in the region.

The findings of table 10.3 lend support to the proposition that ascribes the repression of human rights to the weakness of democracy. The table explores the regime types in the Middle East between 1970 and 1994 along four categories, autocracy (low elite–low mass participation and competition), oligarchy (high elite participation–low mass participation), stratocracy (low elite participation–high mass participation), and democracy (high elite–high mass participation and competition). The table, which is based upon the Polity III data set, has two columns for the Middle East, where column 1 consists of twenty-four Middle Eastern countries and column 2 excludes Israel and Cyprus from the list.[8] As already noted, both Israel and Cyprus are the only consolidated democracies in the region.

Table 10.3 indicates that 25 percent of the total 520 country-years between 1970 and 1994 (as in the Middle East 2 column), fall in the autocracy category, and 66 percent fall in the oligarchy category, while only 9 percent fall in the democracy category. The table also compares the distribution of political authority in the Middle East with Central and Latin America, Africa, and Asia along the democracy, oligarchy, and autocracy categories. It indicates that when we exclude Israel and Cypress, only 9 percent of all the country-years in the Middle East between 1970 and 1994 falls in the democracy category, and that the Middle East has the most cases of autocratic rule next to Africa (29 percent and 25 percent). This table shows the Middle East to be the least democratic, followed by Africa, Asia and Central and Latin America.

The Impact of Security and Political Economy Considerations

A second group of writers attributes the lack of respect toward human rights and democracy to political economy and foreign policy considerations. Writers like Murphy and Gause, Bahgat, and Anderson maintain that external rents in terms of oil revenue and foreign assistance, especially American and Western aid and assistance from the Arab oil-producing countries, have not been associated with pressures for democratization and the improvement in the conditions of human rights.[9] They note that American security interests in the Middle East have received priority over improvements in human rights conditions and democratic reforms and elections.

The Nationalist Argument

A third trend in the scholarly literature attributes the repression of human rights and the scarcity of democratic governments in the Middle East to a moral and political clash between the West and the Middle East. This moral and political discord has assumed an anticolonial nationalist dimension. The anti-Western nationalist leaders believe that the Western origin of human rights and democracy makes them unsuitable as a standard for the Middle East. These nationalist leaders criticize the West for colonizing the Middle East and creating artificial political boundaries among the

countries of the region. They also disapprove of Western countries' human rights policy records toward the Middle East, which are characterized by moral duplicity and support of both Israel and the "reactionary Arab regimes." They regard Western promotion of universal standards for human rights as imperialist and hypocritical. Many of the nationalists turned to anti-Western ideologies of Marxism and pan-Arabism as a way to attain state independence and national unity and place more emphasis on achieving their political goals than upholding universal human rights standards.[10]

A conglomeration of developments associated with colonialism also accounts for the negative stands that the nationalists adopted toward human rights in the Middle East. The struggle for independence from colonialism was associated with anticapitalist and communitarian values and the consolidation of political unity. These nationalist and collectivist sentiments came at the expense of human rights, democracy, and liberalism. The process of nation building and political independence was also accompanied by a widespread appreciation for the role of the army and its discipline. This antiliberal trend was further reinforced by the fact that the rise of the modern Middle Eastern state system was intertwined with the emergence of the Soviet Union, European fascism, and the outbreak of the Second World War.

John Strawson, in his work entitled " A Western Question to the Middle East: Is There a Human Rights Discourse in Islam?" ascertained that "Colonialism did not arrive with a Bill of Rights" to the Middle East.[11] Britain and France, the two colonial powers in the region, suppressed the liberal movements that were calling for independence in Egypt and Iraq, forcing these movements to form underground organizations. They also established a highly centralized quasi-democratic system of government and invested the executive branch with vast emergency powers and made it heavily dependent on the military. The formation of such pro-Western oligarchic and quasi-democratic regimes in countries like Egypt, Sudan, Tunisia, Morocco, Jordan, Syria, Iraq, and Lebanon and the close ties that these governments kept with the two colonial powers gave a negative connotation to democracy and freedoms.[12] The leaders of the nationalist movements at the time did not think of freedom and independence to mean freedoms and rights for the individual but rather political freedom from Western colonialism and tutelage.

The political development in the 1950s and the 1960s further reinforced this nationalist trend as several Middle Eastern countries adopted an anti-Western and antiliberal path. In particular, the advent of "revolutionary Arab nationalist" governments in Egypt, Syria, Algeria, Iraq, Yemen, and Libya introduced an authoritarian socialist-populist alternative to democracy, individual rights, and the free market. The leaders of these revolutionary governments wanted to attain political independence from the West rather than borrow Western democratic norms and human rights standards or model their political institutions after Western political parties and associations.[13]

Islam and Human Rights

The fourth major barrier to the advancement of human rights in the Middle East lies in the role of Islam in the politics of the Middle East. Many Islamic thinkers hold that Islamic moral norms are superior to Western standards of human rights and therefore refuse to apply those standards to the Muslim people. A group of Western scholars who belong to the political-cultural perspective disagrees with this positive assessment of Islam and attributes the low record for human rights in the Middle East to the fundamental incompatibility between Islam and individual rights and democracy. We will explore both points of view in the remaining pages of this chapter.

The Islamic Arguments

Since the 1980s an Islamic variant of opposition to Western human rights standards began to dominate the political scene in several Middle Eastern countries. This Islamic alternative took the form of several Islamic opposition movements in countries like Algeria, Tunisia, Egypt, Jordan, Saudi Arabia, Yemen, Afghanistan, Iran, and Sudan. These movements consider Western human rights materialistic, hypocritical, and insincere.[14] Over the centuries the West practiced massive human rights violations—such as racism, religious persecution, slavery, genocide, and exploitation of the Middle East. Like their nationalist counterparts, the Islamic activists consider human rights alien to Islam and a product of Christian culture and Western imperialism and hegemony. They advocate Muslims' struggle against global capitalism, Westernization, and secularism and call for the revitalization of Islamic norms and traditions.[15]

To many of these Islamic groups and conservative thinkers, nationalism, democracy, and human rights and individual freedoms are incompatible with Islamic political norms. The concept of nationalism and the current division of the Islamic world into separate nation-states are inconsistent with the universalism of Islam.[16] Classical Islam believes in the unity of mankind and recognizes only the division of the world into the communities of believers and nonbelievers. Within this community of believers, there is no place for distinction on the bases of color, race, national origin, or language. According to Aziz Ahmed, the Islamic *Umma* "constitutes a harmonious whole in which the claims of the family, community, parents, women, orphans, slaves and unbelievers are duly recognized."[17]

The United Nations' 1948 endorsement of the Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social, and Cultural Rights, and the 1966 International Covenant on Civil and Political Rights triggered a debate among these Islamic movements and thinkers concerning the place of human rights in Islam. In reaction to these documents and the increasing saliency of human rights, many of these Muslim thinkers and organizations published several documents articulating an Islamic variation of human rights norms. Among others, these

Islamic documents include Sultanhussain Tabandeh's "A Muslim Commentary on the Universal Declaration of Human Rights," Allamah Abu al'Ala Mawdudi's *Human Rights in Islam*, the Muslim Council's "The Universal Islamic Declaration of Human Rights," Al-Azhar's "Draft Islamic Constitution," and the Organization of the Islamic Conference's "The Cairo Declaration of Human Rights."[18]

Several themes figure prominently in the writings of these Islamic thinkers and movements. Thinkers like Mawdudi, Mohammad Aziz Ahmed, Tabandeh, Sayyid Qutb, Ayatollah Ruhollah Khomeini, Al-Ghanoushi, Al-Affendiand, and Al-Turabi invoked cultural relativism to challenge the universal standards of human rights. They rejected the universality of human rights and the dominant position that Western standards preoccupy in the human rights system and condemned those writings that depict Islam as stagnant and inferior. In this connection, Majid Anowar maintains "all major cultures are capable of articulating liberating possibilities without surrendering their memories and faiths."[19]

Another theme in the writings of the conservative thinkers pertains to the relationship between religion and politics.[20] They hold that the separation of religion from politics is the primary cause of all the social and political turmoil and confusion in modern societies. They insist that in their political vision there is no separation between religion and the state. The Islamic *Sharī'a* is the supreme ethical value for all Muslims, is the source of all human rights, and is based on divine revelations and not man-made law. The *Sharī'a* regulates the social, political, and cultural aspects of life and elevates mankind to a higher spiritual level. In this context Al-Turabi contends that an Islamic society governed by *Sharī'a* values is free from materialism and does not have any conflict between individual rights, freedom, or limits of state authority and obedience to God.[21]

Instead of emphasizing rights, these conservative Islamic thinkers stress the duties of the individual to his or her community, the promotion of its well-being, and the preservation of its unity.[22] In their view rights belong to God and individuals can enjoy these rights when they fulfill their duties toward God. The individual is instructed to develop a "virtuous character" in order to serve as a useful member of the Islamic *Umma*. In this regard Aziz Ahmed maintains: "A true believer is the product of a true environment . . . where the individual believer depends upon the Millah for the development of his personality as a virtuous character and the Millah acquires a unity of will and purpose through the collective organization of such individual believers."

These conservative thinkers are opposed to the adoption of modern standards of human rights and Western democratic political institutions and insist that Islam is a comprehensive, seamless, and absolute religion. In their formulation of the Islamic version of human rights documents, the conservative thinkers premise them on cultural, regional, and religious exclusivity. In this context Mawdudi places the Islamic version of human rights in a much superior position to the modern standards of human rights and laments the Western claim of an exclusive origin for

human rights. "Even in this modern age which makes such loud claims of progress and enlightenment, the world has not been able to produce more just and more equitable laws than those given 1400 years ago. It hurts one's feelings that Muslims are in possession of such a splendid and comprehensive system of law and yet they look forward for guidance to those leaders of the West who could not have dreamed of attaining those heights of truth and justice that were achieved a long time ago."[23]

In his book, *Human Rights in Islam*, Mawdudi redefines human rights and gives them an exclusively Islamic framework. He states that Islamic *Sharī'a* recognized the equality of all human beings and extended to them basic human rights without discrimination on the bases of race, color, language, or national origin. These rights include the right to life, the right to a basic standard of living, the right to property, the emancipation of slaves, the right to justice, and the right to cooperate or not to cooperate. Islam also affirmed the respect for the chastity of all women regardless of their religion. It also accorded religious tolerance to non-Muslim minorities and gave them self-rule and autonomy in managing their local affairs.

The conservative thinkers also state that Islam guarantees freedom of expression for Muslims and non-Muslims alike. In this regard, Section (a) of Article 22 of the Cairo Declaration of Human Rights in Islam stipulates: "Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the *Shari'a*."[24] In addition, the Islamic thinkers affirm that Islam goes beyond guaranteeing these basic freedoms to attend to the welfare of the individual—including food, health, child malnutrition, epidemics, and widespread illiteracy in the Third World. Moreover, Mawdudi points to a set of rules that govern the humane treatment of people during war. These rules differentiate between soldiers and civilians and provide certain protections and guarantees for each. Mawdudi suggests that the Prophet and his immediate successors initiated several rules to guide the behavior of the Muslim fighters during their conquest of the Middle East. These directives include the ban upon killing civilian populations, including women, children, the old, the sick, monks, and people in places of worship. Likewise, these orders provided some protection for the combatants, including the safety of the wounded and the ban on burning the enemy alive, killing prisoners of war, looting, and the destruction of property in the conquered territories.[25]

The Political-Cultural Arguments

While this moral and political clash between Islamic thinkers and activists and the West early on presented a formidable barrier to the endorsement of human rights in the region, the collapse of communism and the triumph of liberal democracy with capitalism produced political, cultural, and civilizational arguments for the lack of respect for human rights in the Middle East. These arguments revolved around the controversy that Islam is fundamentally incompatible with the Western conceptualizations of human rights and democracy. They are based upon the claim that, while other regions of the world (Latin America, East Asia, and Eastern Europe)

have experienced gains in respect for human rights that have gone hand in hand to some degree with increases in political rights, Middle Eastern countries have largely been excluded from these "waves" of democratization.

Writers such as Donnelly, Vincent, Arzt, Tibie, Huntington, and Mayer claim that in Islam there is a culture-based resistance to human rights.[26] They employ several arguments to justify their contention for the incompatibility between Islam and human rights. First, the Islamic Law lacks a positive and modernist legal system that is needed for human rights to flourish. This positivist quality cannot exist in Islam, as the *Sharī'a* has a divine nature and origin that makes Islamic Law immutable and unaccommodating to modern human rights.

Second, Islamic norms and values are different from human rights in that they do not provide for rights for the individuals but rather highlight the primacy of the community. Islam conceives of the individual as a member of the *Umma* or community of believers and underscores the individual's obligations and duties to the community. In this connection Bassem Tibie asserts: "Islam is a distinct cultural system in which the collective, not the individual, lies at the center of the respective world view."[27] In a similar vein Vincent and Donna Arzt ascertain that Islam favors the rights of the community at the expense of the rights of the individual.[28] Both Donnelly and Mayer also assert that in contrast to the Islamic conception of individual obligations, the modern concept of human rights emphasizes the rights of the individual against the state and society.[29]

Third, Huntington offers a civilizational explanation for the low record of human rights in the Middle East and contends that the strong opposition in the Middle East to human rights and democratization lies in the nature of Islam. He argues that there are concrete "civilizational" differences between the West and the Islamic world that militate against respect for individual rights. He suggests that Western political values and norms of liberal democracy—including constitutionalism, human rights, equality, freedom, the rule of law, free markets, and the separation of church and state—"often have little resonance in Islamic and Buddhist and Confucian cultures." According to his 1993 *Foreign Affairs* journal article, "a strong correlation exists between Christianity and democracy. Modern democracy developed first and most vigorously in Christian countries. Democracy was especially scarce among countries that were predominantly Muslim, Buddhist, or Confucian."[30] In another context Huntington stated that even in the most "European" of countries in the Islamic world, Turkey, revived fundamentalism is threatening individual political and basic human rights.[31]

Other writers ascribe the incompatibility between Islam and human rights to the time lag between the two normative systems. In his article, "Muslim Voices in the Human Rights Debate," Heiner Bielefeldt maintains that the proclamation of a "universal" and "emancipatory" standard for human rights in the twentieth century presents a challenge to the Islamic *Sharī'a*, which was articulated more than fourteen centuries ago. He calls attention to a number of major differences between

Islamic legal stands on human rights and the Universal Declaration of Human Rights.[32] While the *Sharīʿa* recognizes the equality of all human beings before God, it treats Muslims and non-Muslims differently. Despite the fact that the people of the Book—Christian and Jews—were given a considerable degree of self-autonomy over the administration of their religious and family law, the *Sharīʿa* bestowed different rights upon Muslims and non-Muslims, whereby only the Muslims enjoy full membership in the *Umma* or the community of believers. In order to preserve Islamic dominance, the *Sharīʿa* also forbids interreligious marriages between Muslim women and non-Muslim men. It also puts severe restrictions upon religious tolerance, such as apostasy or the conversion from Islam to another religion, which normally warrants the death penalty. *Sharīa* also treats men and women differently, whereby a women's share of inheritance is only one-half of that for a man and a man can marry up to four women—a privilege denied to women. In addition Bielefeldt underlines the severity and the cruelty of some of the *Sharīʿa* criminal punishments, such as amputating the hand for theft and flogging and stoning to death for committing adultery.

The Defenders of Islam

While the previous section outlined the two opposing perspectives on the role of Islam in the violation of human rights in the Middle East, in this section and the next we discuss the counterresponses to the arguments of Islamic conservative scholars and movements and the advocates of the Western political-cultural perspective. We will first examine the writings of those scholars who disagree with the arguments for the incompatibility of Islam and the Western-conceived notion of universal human rights. In the subsequent section we will discuss Islamic liberals' views on how to reconcile Islam with the modern standards of human rights.

The defenders of Islam produce several interrelated arguments to refute the grounds upon which the case against Islamic anti-Western, antidemocratic, and anti–human rights tendencies is made. First, these writers do not believe that the differences between the West and Islam are great enough to inhibit the establishment of liberal democratic regimes that respect human rights.[33] The position of early Islam concerning giving some equality of rights to women and non-Muslim minorities and Islamic norms like "Puritanism, egalitarianism, and aversion to mediation and hierarchy" would seem to facilitate Islamic accommodation of modernization, individual freedoms, religious tolerance, secularization, and liberalism.[34]

Second, the Islamic negative stand toward human rights and Western liberal ideas is a relatively new phenomenon that goes to the nineteenth-century intellectual debate between Muslim thinkers and European secularists over the role of religion.[35] Here some writers maintain that Muslim thinkers rejected the secularists' claim that religion is responsible for social and economic underdevelopment.[36] This intellectual conflict between Islam and Western secularism was further sharpened by the confrontation between the Middle Eastern people and the colonial powers

in the first half of the twentieth century. Muslim thinkers considered secularism a foreign doctrine, imposed by the West and its local collaborators, while they viewed "Islam as a timeless and absolute system, which covers all aspects of societal and personal morality."

In this connection Ansari observes that "[t]o be a secularist has meant to abandon Islam, to reject altogether not only the religious faith but also its attendant morality and the traditions and rules that operate within Muslim societies." He further argues that "the oppositions between local and intruder, between Muslim and European, between believer and secularist were, in one way or another, conflated." The resulting polarization came to dominate all attitudes and approaches to questions related to religion, politics, and the social order.[37]

A third argument questions the intellectual integrity of some of the Western writings on the Middle East. Several writers claim that Western scholarship on human rights and Islam is patronizing and colonial in nature, and that it is full of conceptual and ideological prejudices. In his book *Orientalism*, Edward Said asserts that much of Western scholarship on the Islamic Middle East is racist and lacks any scientific rigor, and that it assumes the superiority of the West and the inferiority of the East.[38] He further maintains that this approach dehumanizes Orientals in a way that serves the goals of Western imperialism. In a similar fashion Strawson maintains that the West has appropriated the human rights movement and given itself the right to evaluate other countries' compliance with its own version of human rights standards.[39] The West considers non-Western societies "backward, traditional, rural and static" and constructs a fixed image of Islam that is antidemocratic and anti–human rights.

A fourth related argument disputes the projection of the Middle East as a region dominated by an unbending Islamic fundamentalist value system that is inconsistent with the new standards of human rights. Numerous writers take issue with the preconception of Islam as a system of rules that regulates all facets of life. Hadar suggests that political Islam, which calls for the enforcement of the *Sharīʿa* rules and norms upon the society, is only one of many ideologies that compete for the attention of the Middle Eastern people—including secularism, capitalism, socialism, and liberalism.[40] Leonard Binder also maintains that this rigid concept of Islam "is a modern notion and reflects a particular attitude toward religion, not a particular feature of Islam."[41] Fazlur Rahman also dismisses this restricted notion of Islam and states that *Sharīʿa* was not intended to be a comprehensive legal code but rather a system of moral rules and prescriptions to guide the conduct of Muslims.[42]

The British scholar Fred Halliday also questions the contention of some Western scholars that Islam is rigid and monolithic. Far from Islam having a well identifiable and centralized political and religious authority, Halliday notes that there are more than fifty Muslim countries with diverse legal and political systems.[43] Similarly, Mohamed Charfi dismisses the argument of an inherent incompatibility between Islam and liberal ideologies and holds that the educational policies of the states

during the process of nation building edified Islam not as a religion but as an "identity and a legal and political system" that rendered Islam intolerant of liberal norms and human rights.[44]

Fifth, another group of writers question the wisdom of the arguments of exporting Western standards of human rights and democracy wholesale to Third World countries. Tibie observes that, in view of the fact that there are no cultural and legal norms in the region that emphasize the rights of individuals, and that the Qur'an does not mention universal rights, what needs to be done is, in part, to "make Muslims speak the language of human rights in their own tongue."[45] In a similar vein Niblock suggests that rather than converging our efforts on the transfer of macrolevel human rights and democratization schemes, the focus should be on the introduction of some useful, identifiable, and specific questions, such as rule of law, the independence of the judiciary, bureaucratic efficiency, fighting corruption, and respect for the rights of minorities.[46]

Sixth, still other scholars remark that the essence of the problem is not Islamic inflexibility or incompatibility with human rights but the attitudes of Middle Eastern governments and the West toward Islam, democracy, and human rights. Traditional rule in the Middle East is commonplace, as many of the governments and the political elite in the region approach politics from a traditional rather than from a modern outlook. Some of these traditional governments use *Sharīʿa* as a "battering ram," particularly when applied to women's groups, minority groups, and apostasy charges against intellectuals.[47] While these regimes may superficially profess agreement with universal concepts of human rights, they may diverge from these concepts sharply, particularly when it comes to the death penalty and certain personal rights.

These writers also suggest that the root of the problem of the Islamic movements' hostility toward human rights lies in hostile Western attitudes toward Islam. The United States and western Europe have opposed democratic elections if they run the risk of bringing fundamentalist Islamic parties to power. In this context Al-Sayyid suggested that if the West really wants to see regimes in the Middle East that respect human rights, then it will choose to align itself with more moderate groups within the Islamic world.[48] Hadar also stresses that it would be better to allow the Islamic parties to govern, as this would force them to deal with societal problems that potentially may force them towards moderation, democracy, and respect for the universal standards of human rights.[49]

The Liberal Islamic Response to Human Rights

Whereas conservative Islamic thinkers reject the secular standards of human rights and produce a narrow Islamic version of these rights, liberal Islamic scholars acknowledge the need to reconcile Islamic values with the universal and emancipatory standards of modern human rights.[50] Those writers do not share the belief of their conservative counterparts that Islam and the modern concept of human rights are

fundamentally incompatible or that the idea of human rights is simply a tool for spreading Western hegemony and colonialism. While acknowledging the differences between Islamic *Sharī'a* and modern human rights, the liberal thinkers call for a reinterpretation of the Islamic *Sharī'a* and its reconciliation with international human rights standards.

In his numerous works, the prominent scholar Abdullahi Ahmed Al-Na'im has taken the lead in scholarly efforts to find ways to reconcile Islam with universal human rights.[51] He introduced an alternative model to the Islamic conservatives' cultural relativist critique of human rights that would account for the viewpoint of the non-Western cultural and religious traditions. His model accepts the standards of the Universal Declaration of Human Rights and its subsequent documents as universally applicable to all human beings regardless of religion, gender, race, or national origin. The model calls for a reconciliation between religion and human rights through the reinterpretation of religion.[52] Three considerations make this reconciliation possible. First, the moral, philosophical, and political bases of the human rights documents are found in different religions. Second, finding a middle ground between religion and human rights is mandated by the contradictions between human rights principles and some religious norms, which resulted from the time lag between the two value systems. Third, reconciliation between religion and human rights is essential for the protection of human rights against abuse by the state.

In the process of reconciliation between human rights and religion, An-Na'im urges those concerned to study the impact of social, economic, and political forces at both the local and global levels. There is also the need to recognize not only the areas of convergence but also the points of divergence and conflict between religion and human rights.[53] The articulation of a human rights consensus must also show consideration for the integrity of other cultures, especially in view of the past history of colonialism. Moreover, different groups can validate their commitment to human rights by invoking religious, secular, or humanist arguments, provided that they concur on the same human rights norms. The general observance of the modern standards of human rights norms is likely to take place if the people concerned accept them.[54] In this connection An-Na'im states: "For such a local constituency to emerge and be effective in its advocacy of human rights, these rights must be seen by the general public as consistent with its own religious beliefs. In other words, international human rights norms are unlikely to be accepted by governments as legally binding, and respected in practice, without strong legitimation within national politics."[55]

This general concurrence on human rights can emerge as a result of a dialogue within and across cultures. The local aspect of this dialogue on human rights stems from the premise that cultures and societies are not static and homogeneous. Cultures are diverse and have a propensity to change and to influence each other. These three characteristics of culture can be used to create a normative consensus for

the crystallization of universal standards of human rights and the modification of religious traditions in such a way as to support the emergence of universal human rights standards. This normative consensus initially results from the dialogue among competing interests in the society over the importance of their cultural traditions and domestic institutions. The more a particular society internalizes and accepts human rights norms as an essential part of its indigenous culture, the more likely it will observe and implement those norms.

In addition to the internal cultural discourse, An-Naʿim's perspective incorporates a cross-cultural dialogue. The aim of this cross-cultural dialogue is to identify common moral and philosophical norms and values among human cultures that would provide the basis for a universal human rights system and that would allow the sharing of successful approaches and experiences. This cross-cultural interchange can influence the outcome of the internal cultural discourse and help to justify human rights from within diverse religions and cultural traditions. The credibility of external forces to promote and defend the universal acceptance of human rights in different cultural settings depends upon their ability to engage in internal dialogue over compliance with human rights within their own society.

In light of this general approach, An-Naʿim advocates a liberal reinterpretation of Islamic Law and its reconciliation with modern standards of human rights. In his opinion the *Sharīʿa* does not provide a comprehensive legal system to govern all aspects of modern life but embraces mainly religious and ethical tenets, such as prayer, fasting, charity, communal solidarity, and religious tolerance of non-Muslims. He urges his fellow Muslim thinkers not to disregard the differences between traditional *Sharīʿa* norms and modern standards of human rights and calls upon them to engage in cross-cultural dialogue on human rights.

Concluding Remarks

In this chapter we sought to describe the status of human rights in the Middle East. The study clearly shows that the Middle East ranks very low on the scale of respecting the human rights of the citizens. It also demonstrates that there is no consensus among the community of scholars concerning the reasons behind the high level of violation of human rights in the region. The study presented competing explanations, including the presence of autocratic governments, the incompatibility of Islam with the modern standards of human rights, Islamic resurgence, the opposition to the West and its values, Muslim apprehension about the Western origin of democracy and human rights, and the time lag between the two value systems. We would like to note, however, that the underlying arguments of some of these perspectives—such as the claims of the Islamic conservative activists who purport to speak in the name of the Islamic world and the equal claim by some Western scholars of the presence of an intransigent and monolithic Islamic world—understate the complex political realities of the Middle East.

Yet despite these barriers to human rights, several changes have taken place. An-Na'im reminds us that religious and cultural traditions are not fixed and undergo change in response to modernization and rising public demands. Moreover, though most of the Middle Eastern countries proclaim Islam to be the official religion of the state, the influence of traditional Islamic *Sharī'a* has been attenuated since the early decades of the twentieth century. As the Muslim scholar Ansari suggests: "In almost all countries with substantial communities of Muslims, positive law has replaced *Shari'a* (except with regard to matters of 'personal status,' and more specifically the status of women, where the traditional rules generally continue to be maintained). Similarly, prevailing conceptions and attitudes of everyday life are founded on modern rationality and on doctrines influenced by science and philosophy, rather than on traditional or premodern worldviews."[56]

Citizens, regardless of their religion, enjoy equal rights and religious liberties within the prescribed limits of the respective constitutions of the state. Several Middle Eastern countries, like Jordan, Pakistan between 1989 and 1999, the Islamic Republic of Iran, Lebanon, and Egypt, provided for proportional representation and reserved a number of parliamentary seats for religious minorities. Likewise, most of the Middle Eastern countries introduced numerous legal reforms, including the replacement of the traditional *Sharī'a* punishments with a criminal procedural legal code, and passed laws to improve the social and legal status of women.[57]

This process of political change may be sustained by the coming to power of younger reform-oriented rulers in several Middle Eastern countries like Morocco, Jordan, Tunisia, Qatar, Bahrain, Iran, Turkey, and Syria. These younger rulers have taken some steps toward democratization and liberal economic reforms. Moreover, the last decades of the twentieth century were marked by the emergence of a number of Arab nongovernmental organizations for human rights and a new leadership for these organizations. Many of these organizations and leaders espoused more liberal ideologies and were willing to reach out for support to international human rights organizations, which gave them greater access to resources and information. However, as our study clearly indicates, these changes and reforms have not been translated into a higher respect for the civil, political, and human rights of the citizens. Autocratic governments, Islamic revivalism, the patriarchal culture, interstate disputes, ethnic dissention in several Middle Eastern countries, and opposition to the West remain formidable barriers in the path of incorporating democracy and universal standards of human rights.

Notes

1. On this debate see, for instance, Samir Amin, "Observations on the Analytical Approach to the Crisis of Democracy in the Arab Homeland," *Democracy and Human Rights in the Arab Homeland*, ed. Hillal Ali Eddin (Beirut: Arab Unity Research Center, 1983); Michael Hudson, "Democratization and the Problem of Legitimacy in the Middle East," *Middle East Studies Association Bulletin* 22:3 (1988): 162; Michael Hudson, "After the Gulf War: Prospects for Democratization in the Middle East," *Middle East Journal* 45:3 (1991): 408; Pete Moore, "The

International Context of Liberalization and Democratization in the Middle East," *Arab Studies Quarterly* 16:3 (1994): 43–66; John Esposito and James P. Piscatori, "Democratization and Islam," *Middle East Journal* 45:3 (1991): 407–26; Larry P. Goodson and Saha Radwan, "Democratization in Egypt in the 1990's: Stagnant or Merely Stalled?" *Arab Studies Quarterly* 19:1 (1997): 1–21; Saad Eddin Ibrahim, "Crises, Elites, and Democratization in the Middle East," *Middle East Journal* 47:2 (1993): 292–305; Muhammad Muslih and Augustus Richard Norton, "The Need for Arab Democracy," *Foreign Policy* 83:2 (1991): 3–19; Augustus Richard Norton, "The Future of Civil Society in the Middle East," *Middle East Journal* 47:2 (1993): 205–16; Alan Richards, "Economic Imperatives and Political Systems," *Middle East Journal* 47:2 (1993): 217–27; Alan Richards, "Economic Roots of Instability in the Middle East," *Middle East Policy* 4 (1995): 175–87; Glen E. Robinson, "Can Islamists be Democrats?" *Middle East Journal* 51 (1997): 374–97; L. Sadiki, "Towards Arab Liberal Governance: From Democracy of Bread to Democracy of the Vote," *Third World Quarterly* 18:1 (1994): 127–48; Mary Tetreault, "Patterns of Culture and Democratization in Kuwait," *Studies in Comparative International Development* 30:2 (1995): 26–44.

2. For more information, see Ibrahim Awad, "The External Relations of the Arab Human Rights Movement," *Arab Studies Quarterly* 19:1 (1997): 59–75; Jill Crystal, "The Human Rights Movement in the Arab World," *Human Rights Quarterly* 16 (1994): 435–54.
3. Steven C. Poe and C. Neal Tate, "Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis," *American Political Science Review* 88 (1994): 853–72.
4. Poe and Tate, "Repression of Human Rights to Personal Integrity in the 1980s." According to the Political Terror Scale, the first ranking refers to countries under a secure rule of law, where "people are not imprisoned for their views, torture is rare or exceptional, and political murders are extremely rare." In the second ranking of states "there is a limited amount of imprisonment for nonviolent political activity. However, few persons are affected, torture and beating are exceptional, and political murder is rare." In the third category of states "there is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without trial, for political views is accepted." In the fourth ranking "the practices of [Level 3] are expanded to larger numbers. Murders and disappearances are a common part of life. In spite of its generality, on this level terror affects primarily those who interest themselves in politics or ideas." According to the fifth category "the terrors of [Level 4] have been expanded to the whole population. The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals."
5. The Freedom House civil liberties checklist consists of four broad categories. The first category refers to freedoms of expression and belief and includes free and independent media, free religious institutions and other forms of cultural expressions, and free private and public religious activities. The freedom to form associations and organizations, the second category, includes the freedom of assembly, demonstration, open public discussion, the freedom to form political or quasi-political organizations such as political parties, civic organizations, free professional organizations, trade unions, and peasant organizations. The significance of these freedoms lies in the fact that they allow for effective collective bargaining. The third category consists of the rule of law and human rights. These rights guarantee the presence of an independent judiciary, the prevalence of the rule of law in civil and criminal matters, and equality of the population under the law. They also place police under direct civilian control and protect citizens from political terror, unjustified imprisonment, exile, torture, and extreme governmental corruption. Personal autonomy and economic rights make up the fourth category of the civil liberties index. These rights comprise open and free private discussion, freedom of travel, choice of residence, choice of employment, freedom from indoctrination, gender equality, equality of opportunity, choice of marriage partners, and size of family. They also include the security of property rights and the right to establish private businesses.

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Nongeographical

11 Ethnic Constitutional Orders and Human Rights

HISTORICAL AND COMPARATIVE ANALYSIS

Ilan Peleg

This study is dedicated to the examination of the relationships between two powerful forces in the modern era. The first force is that of nationalism and ethnicity: the commitment of a group of people to what they perceive as their collective national, communal, or ethnic interest within the boundaries of a given polity. The second force, a newer one, is that of human rights: the belief that individuals and minorities (and sometimes even majorities) have fundamental, "inalienable" rights within the polity and possibly against the polity.

These two ideational and political forces, one using the particularistic language of ethnic uniqueness and the other the universalistic principles of human commonalities, are often in competition with each other within political systems. Nowhere is that struggle more severe than in a multiethnic polity dominated by a single ethnic group. In such circumstances, in fact, the determination of the collectivity to define its interests and promote them versus the right of the minority or of individuals to resist the collectivity becomes the main, if not the only political "game in town," a struggle with potentially enormous consequences for human rights.

This study will examine the tensions between "ethnicity" and "rights" within polities that have established ethnic constitutional orders. It will define *ethnicity* simply: as group identity that may be based on religious, cultural, linguistic, racial, or other real or imagined commonalities. The first part will describe and analyze ethnic constitutional orders, historically and comparatively: it will specifically identify their necessary components and offer a theoretical framework that might be useful for their analysis. The second part will focus on the human rights that are typically violated by "ethnic orders." The third section will attempt to identify changes that might respond to the inherent tensions between "ethnicity" and "rights." It will attempt to point out how ethnic orders could be transformed in a way that changes their human rights performance significantly.

Many states, in the past and at present, "embody the interests and political agenda of a dominant ethnopolitical group."[1] It is the hypothesis of this essay that whenever such hegemonic condition exists, the human rights of members of the minority group(s)—and, eventually, the human rights of all individuals—will seriously suffer. The goal of this essay is to make a theoretical argument for that position and support it empirically by concrete historical examples. At the same time and in a more normative vein, the chapter will explore possibilities for the

transformation of hegemonic ethnic states as a means of improving the human rights of their citizens.

Ethnic Orders: An Analytical Framework

The modern era is characterized above all by strong and persistent emphasis on nationalism and ethnicity on the part of so-called nation-states. Ever since the French Revolution, the most important basis for political organization has become that of loyalty to the "nation."[2] In establishing itself as a central player in people's communal affairs, the state has often been perceived and often has seen itself as a missionary on behalf of the nation. France during the nineteenth century converted peasants into "Frenchmen."[3] Hungary "Magyarized" its population, Poland and Serbia between the two world wars were decidedly ethnic polities, by most accounts even "liberal" Canada until the 1960s was an Anglo-Saxon entity,[4] and Spain until the death of Franco was described by some as embodying the "Castillian spirit."[5]

Needless to say, ethnic orders are still extremely prevalent today and are likely to remain so for the foreseeable future. One may find ethnic regimes in diverse places such as Sri Lanka and Turkey, Israel and Estonia, Serbia and Malaysia, and in milder form in numerous other countries.[6] Ethnic orders can even be found in what many observers would perceive as "model democracies." Moreover, if Kymlicka is right that "the process of nation-building inescapably privileges members of the majority culture," then the "ethnicization" of the polity is inherently linked to its very establishment and even existence.[7]

But the most interesting question, from the perspective of this essay, relates to the implications of an ethnic order for the human rights of those who live under such order, both members of the dominant ethnic group and, even more so, members of minorities residing within the polity. Since the vast majority of contemporary polities are, in fact, ethnically diverse, and in many cases deeply divided along ethnic (that is, religious, cultural, racial, and other) lines, this question is of enormous significance for the future of human rights in the world.[8]

Before we address directly the question of human rights (mostly in the next section), the essential characteristics of an ethnic order must be identified and such order defined in a way that facilitates analysis. There are several typical traits to an ethnic order:

1. It privileges one ethnic group—the "core nation"—over all other groups within the polity.[9]
2. While the ethnic dominance might be established by law, more often it is carried out more blatantly and aggressively through governmental policies, societal practices, and individual initiatives that are semilegal or even extralegal.[10]
3. The ethnic hierarchy is often so deeply internalized by all members of society—those who belong to the dominant ethnic group and

those who are members of the minority—that even the thought of challenging it is not entertained; Gramsci's notion of "hegemony" is useful in understanding the implications of this psychopolitical process.

4. In most ethnic orders, the state itself becomes the primary instrument for the establishment and the perpetuation of the ethnocentric regime. To understand this reality, we must bring the state back in.[11] In this essay it is argued that the specific role of the ethnicized state is to convert a multiethnic social setting into a uniethnic, political order.
5. Finally, an ethnic order in today's world, I would argue, is inherently unstable because it inevitably generates resistance and often violence; those reactions could exacerbate the human rights violations on the part of the regime by generating even more oppressive policies.[12]

An ethnic order could be defined, then, as a regime privileging one ethnic group over all others via law, policies, or practices carried out by the state or by agents, organizations, and individuals acting on its behalf.

My primary interest in this essay is in the relationships between ethnic groups in deeply divided societies and the implications of these relationships for human rights within those societies. I am particularly interested in exploring those rights that directly affect the quality of democracy and human rights in deeply divided societies: are all groups and individuals on equal footing in competing for elective positions or is membership in a minority group ipso facto a disqualifier for such positions? Are civil and political freedoms guaranteed so as to facilitate meaningful participation in the political process to all members of the polity? Is the political system inherently discriminatory against the minority, either by law or by practice?

In developing an analytical framework for dealing with these complex questions, I propose to introduce several important distinctions. First, there is a fundamental difference between deeply divided societies in which the dominant group and its leadership are committed to an exclusivist government, designed to maintain or even enhance its own dominance within the state, and an accommodationist government, designed to eliminate or reduce the legal and practical barriers to equality. While the existence of an exclusivist regime is, in and of itself, a gross violation of human rights, the establishment of an accommodationist order is, at the very least, the first step toward human rights improvement.

Each of those two diametrically opposed positions has several ideal type, Weberian variants. An accommodationist position could adopt a liberal model in the face of social division, a solution designed to improve the human rights condition of the population via civic equality of all individual citizens (regardless of ethnicity), protection of political rights via constitutional means (such as bills of rights), and institutionalized arrangements (for example, judicial review by powerful supreme

courts). It is my argument that in the face of long-term discriminatory practices in deeply divided societies, liberal solutions would be proven necessary but insufficient (see conclusions).

A second variant of accommodationism is a consociational model. While liberalism is Anglo-American in origin and its best-known "applicator" in our own time is Dahl, consociationalism is continental and its "inventor," as an analyst, is Arend Lijphart.[13] While they accept all the individual rights on which liberalism rests, consociationalists believe that in a deeply divided society ethnic groups—or at least the most important among them—ought to be recognized as major political players and, as such, negotiate a deal for the protection of their particularistic interests.[14] In terms of human rights (on which many consociationalists do not necessarily focus), consociationalism believes, in effect, that simple liberal, majoritarian government is insufficient for the protection of all freedoms and liberties on an equal footing.

Ethnic constitutional orders, I would argue, violate classical liberalism by giving preference to one group over others and to individuals belonging to this group over those who do not. Moreover, the liberal notion of the state as a neutral arena for the promotion of any group interests (rather than particular, ethnically defined group interests) is deserted in an ethnic order. But in a situation where there is clear demographic, economic, and political advantage to the dominant ethnic group, it can quite easily govern without violating directly the liberal credo (although in deeply divided societies the majority can rarely resist the temptation to further enhance its advantage over the minority).

The contrast between an ethnic order and a consociational one is even deeper than between ethnic order and a liberal one: (1) while in an ethnic order the state is typically identified with a single group (Slovaks in Meciar's Slovakia, Serbs in Milosovic's Yugoslavia, Jews in Israel, Singhalese in Sri Lanka, and so on), in a consociational regime the state is identified with several (often two) groups; (2) while in an ethnic order the state is committed to the promotion of one group's agenda, the key program of the state in a consociational order is the reconciliation of the major constituent ethnicities, often in the face of intense hatred;[15] and (3) while in an ethnic order the basic constitutional order is dictated single-handedly by the dominant group, in consociationalism the fundamental constitutional arrangement is the product of a power-sharing deal resulting from genuine negotiations between power elites representing the dominant groups within society.

In terms of human rights, both the liberal and the consociational models have inherent and significant advantages over an ethnic order. While an ethnic order violates a fundamental principle of human rights—equality—liberalism and consociationalism enhance it, albeit in rather different forms.

Just as the accommodationist position has two variants, so does the exclusivist position. An exclusivist regime is one that privileges one group over all others; an ethnic order is thus a particular form of exclusivity.

There are two variants to an exclusivist regime:(1) An apartheid model, in which one ethnic group, often the majority but (as in the case of South Africa in the past) sometimes the minority, appropriates the state for its own "use," negating even the most basic rights of other groups, including the right of participation in the political game;[16] and (2) a hegemonic model, in which an ethnocultural "core nation" uses the state for the establishment of exclusivist control over the public sphere.[17]

Most ethnic constitutional orders today are of the hegemonic type. These are states that have been transformed from serving as neutral arenas for the struggle between conflicting interests—an ideal that is rarely achieved in reality—to being, in effect, "expropriated ethnic arenas" to which entry is limited by ethnic considerations.

The problem with reforming hegemonic ethnicity is often psychological: it is often perceived as "natural," having been internalized by members of both the dominant and the dominated groups. What Aronoff calls "a relatively hegemonic situation in which a given cultural definition of reality dominates the society in large" is rather typical for ethnic orders.[18]

In analyzing ethnic orders, one must focus on the state as an organization.[19] States matter greatly because of their overall pattern of activity and their ability to encourage certain collective political behavior.[20] Today more than in any period in the past, states have centralized control over education, enormous economic and military sources, and newly acquired computer capabilities. If those resources are put in the hand on an ethnicized state, its rivals on the inside (namely, minority groups) are likely to find themselves at a huge political disadvantage.

Within the context of this analysis it is important to emphasize that hegemonic statehood in an ethnic order is bound to seriously damage the human rights of large number of individuals. Moreover, such a condition is likely to harm not merely its "natural" victims—members of ethnic minorities within the hegemonic state—but also its presumed beneficiaries, members of the ethnic majority.

Human rights in a hegemonic ethnic situation are likely to suffer, especially if the "core nation" in control of the state enjoys multidimensional superiority in important areas such as the level of education and income, technological know-how and control over the economy; if there is a bitter and violent historical conflict between the dominant and the dominated group; if the state lacks a tradition of respect for rights (via established constitutional order, a political culture of moderation and restraints, and the like); if the majority in control of the state tends to be intolerant;[21] and if there is no significant international pressure on the state to treat the minority in accordance with acceptable human rights tradition.

When such conditions exist, we may expect the development of a system where human rights are disrespected and violated in a rather systematic manner. Even if the system is democratic in certain respects (for example, the conduct of orderly, periodic elections), it might be more of an "illiberal democracy" than a liberal democracy, where respect for individual rights is central.[22]

The role of political elites in ethnic orders, even more than in politics in general, could be crucial. The elite of the ethnic majority, in particular, can try to lead that majority toward compromise and accommodation with the minority or toward greater control and dominance. Thus while Meciar's Slovakia was led toward intensification of the marginalization of the Hungarian minority, post-Meciar Slovakia moved clearly toward Slovak-Hungarian accommodation.[23] The same can be said about Franco's Spain versus contemporary Spain.

The treatment of the minority in an ethnic state is often the key to the country's overall human rights record. The temptation of majority politicians to generate political support via minority scapegoating is a powerful and often irresistible political reality. If the majority is led by its elite toward total domination, the results for human rights could be extremely negative.

One option that ethnic political elites have, in addition to options analyzed in this chapter, is that of peaceful separation. The number of cases in which there was such an outcome is, however, extremely small. It includes the separation of Norway from Sweden in the early twentieth century and the separation of the Czech Republic and Slovakia in the early 1990s.

Human Rights Violations in Ethnic Orders

In ethnic orders, which are typically established in deeply divided multiethnic societies, there is often fierce struggle between political forces promoting what they perceive to be the communal interests of the majority and groups that represent what one might want to call the "rights agenda," universally accepted human rights applied to groups or individuals. Among these who represent the agenda of human rights, one may naturally find significant elements within the ethnic minority, some groups within the ethnic majority, and international human rights activists. The human rights of the minority often become a central issue in a multidimensional political struggle.

Numerous countries have to deal with the tension generated by the divergent interests of their constituent ethnic groups. The interethnic struggle often determines the status of human rights within the polity and the potential for changing it in the direction of expansion or contraction (see next section).

The overall strategies of domination or accommodation adopted by the dominant group are likely to determine the status of human rights in multiethnic societies. Thus if the dominant group uses its power to enhance its relative position (economically, politically, and otherwise), the likely results for human rights will be negative, for at least two reasons: first, such an approach is incompatible with genuine commitment to human rights, which requires equal treatment of all individuals and groups within society, regardless of their ethnic background. Second, discriminatory ethnic policies could prove counterproductive, destabilizing, and damaging to the entire polity, including the ethnic majority, if they result in massive

violence (as they are likely to do). A "domination" approach is thus both unjust and unwise from the perspective of political stability and, eventually, human rights.

On the other hand, accommodationist policies in a deeply divided setting could improve the human rights situation in the polity, insofar as their explicit purpose is to restrain the majority and, in the case of consociationalism, eliminate the possibility of its tyranny altogether and create opportunities for equal participation of all citizens in society's activities.[24]

Efforts at genuine accommodation in deeply divided multiethnic societies are, obviously, very difficult and sometimes heroic. Their eventual success in conflictual ethnic situations is invariably in doubt, but without them violence and massive violations of human rights are virtually assured.

Two recent examples demonstrate the importance of improving human rights inherent in an accommodationist approach. The first is the political process in today's Macedonia. Since independence Macedonia has been led by its Slavic majority in cooperation with a major Albanian party, which joined the coalition in late 1998.[25] For a while this political mechanism functioned to convince the minority to pursue its interests for greater political rights via electoral and other political strategies. In 2001, however, an Albanian rebellion broke out and massive violence erupted.

In order to deal with the Albanian claims, a complicated deal was struck, focusing on reforming what might be called an "ethnic constitutional order." The agreement would give more power to regional governments, Albanian would become an official language in areas where Albanians account for more than 20 percent of the population, and more Albanians would receive positions in state bodies, especially in the police force.[26] Insofar as equality is a fundamental human right, this agreement is a step toward the enhancement of human rights in Macedonia.

Another recent example is the 1998 Good Friday Agreement over the future of Northern Ireland. Following almost thirty years of intense violence—evolving in what might be called the ethnic constitutional order of Northern Ireland—the parties struck a consociational deal based on the assumption that majority rule per se is insufficient for a stable political arrangement.[27] But, more important from the perspective of this essay, is the often implicit hope that the Good Friday Agreement would eventually result in the enhancement of human rights in Northern Ireland.

Brendan O'Leary, one of the most prominent scholars of contemporary Northern Irish affairs, wrote recently: "It is not disputed by anyone that better human rights protection was a central promise of the Agreement."[28] While O'Leary and others emphasize that more has to be done in regard to human rights, it is clear that without an accommodationist political approach, nothing could or would be done in that area.

In general, accommodationist policies within multiethnically divided societies require primarily the commitment and courage—as well as the imagination and creativity—of both those who lead the dominant ethnic group and those who lead the weaker ethnic groups. When these characteristics exist, improvements in the

condition of rights are possible, although they invariably require a new political framework. While ethnic orders are fundamentally incompatible with the promotion of human rights as this ever-expanding term is understood today, liberal or consociational orders are not.

It seems, however, that in a deeply divided society a transformation from an ethnic order to a consociational order is, on the whole, more promising than merely a change into a liberal order. Moreover, the deeper the internal divide, the stronger is the case for consociationalism. "Liberal democracy," with its unidimensional emphasis on individual equality and enshrined constitutionally protected rights and liberties, is a necessary precondition for comprehensive human rights, but in deeply divided societies, it seems, additional protections against tyrannical ethnic majorities are needed.

Consociationalism, while deviating theoretically from the principle of majority rule, might be a useful approach for dealing with the poor human rights conditions in historically based ethnic orders. The transfer of centralized power to regional and often ethnic centers of power as was done in Spain,[29] the recognition of language rights as was done in Finland for the Swedish minority and most recently for Macedonia's Albanians, special representation for a minority group as was given to Turkish Cypriots prior to 1974. These are but some techniques that are not merely constitutionally attractive and not only a way of enhancing stability but, above all, are positive contributions to human rights within multiethnic states.

While Arend Lijphart's effort to develop a consociational model for multiethnic societies—some with traditional ethnic orders—does not focus primarily on human rights, his theory of consociationalism is directly relevant for human rights concerns. In ethnically divided societies, I would argue, there must be a multidimensional effort designed to limit the power of the majority and, therefore, enhance almost automatically the rights of the minority. If such an effort is nonexistent, massive human rights violations are practically inevitable.

In a liberal democracy based on a relatively homogenous society, the attitude of the majority toward the minority is relatively unimportant, especially if ethnicity is privatized (formally or practically) and rights are individually based. In a consociational democracy with deeply divided society, however, the attitude of the majority toward the minority is overwhelmingly important, especially for the status of rights within the polity. In fact, if rights are massively violated—as they are in many multiethnic societies—we need to recognize the polity as an "ethnic constitutional order" and not as a consociational democracy.

In consociational democracy civil and human rights could flourish if and only if they are not merely recognized pro forma but are aggressively pursued via a whole gamut of accommodationist policies: (1) the initiation of proactive education for tolerance; (2) the establishment of human rights commissions for dealing with violations of minority rights; (3) the enactment of affirmative action programs

for dealing with historically based inequalities; and (4) the institutionalization of supreme courts committed to the aggressive protection of rights.

These are merely some techniques and policies that could enhance the protections of human rights in divided societies. While in majoritarian liberal democracies special attention to minority rights as group rights are deviations from the overall commitment to ethnic blindness (often called color blindness), such attention is the very soul of a consociational democracy.

The key difference between what I call "ethnic constitutional order" and what Lijphart and others call "consociational democracy" is that in the latter there is a conscious effort to go beyond individualistic liberalism and give the minority extra protection in a system that otherwise might endanger its long-term interests. Several examples for such a political order would suffice:

1. Canada has recognized Quebec for all intent and purposes as a distinct society, has accepted French as an official language; its federal structure, based on extensive power for the provinces, has protected the French-speaking minority's identity and interests.[30]
2. Spain has adopted a territorial autonomy scheme that protects the historical interests and identities of its constituent ethnic elements.[31]
3. Belgium adopted beginning in 1970 a series of constitutional amendments creating "cultural councils" dealing with the educational and cultural identities of its two major communities.[32]

While these examples reflect different approaches to the recognition of ethnic uniqueness—federalist, territorialist, educational, and so on—they can all be recognized as mechanisms for the enhancement of human rights.

On the other hand, what I call "ethnic constitutional orders" are polities that have not (yet?) come to terms with the implications of their ethnic diversity. In these societies, one of the ethnic groups has been successful in establishing exclusive political control, granted itself preferential status within the polity, and has done so clearly against the wishes or interests of the ethnic minority.

While a regime of that sort may maintain rudimentary democracy via periodic elections, a free press, and an independent judiciary, its genuine democratic nature may be flawed and, in terms of this essay, of limited positive implications for human rights.[33] Put differently, even a democratically elected government can be (and often is) in violation of human rights, particularly if it is unconstrained by a "liberal" constitution, a bill of rights with the traditional freedoms, a constitutional court that is truly committed to human rights, a political culture conducive for the promotion of rights, and so forth.

Therefore, what Sammy Smooha calls "ethnic democracy" is rarely a genuine solution to the violation of human rights on the part of ethnic constitutional orders.[34] While such regimes might indeed grant "political and civil rights to individuals and certain collective rights to minorities," their basis is the "institutionalized dominance

over the state by one of the ethnic groups."[35] In practically all situations known to us empirically, such "institutionalized dominance" is likely to result in serious human rights violations.

In ethnic orders, where the state is controlled by a dominant group, the access to the public sphere is likely to be effectively blocked via legal or other means; the "public good" is determined exclusively by the members of the majority alone.[36] In promoting its interest, the majority may use constitutional means to "appropriate" the state to itself, legitimizing supreme courts, educational, and linguistic means (as in the case of Meciar's Slovakia), immigration and citizenship laws, land purchasing laws, public employment, and even control over the national iconography, symbols, and collective memory.[37]

While the number of "ethnic constitutional orders" might depend on the precise definition of that term, there can be no question that numerous states are "owned" by prominent ethnic groups that view them as their exclusive (albeit collective) province and use them as instruments for the promotion of a single group's interests. Slovakia under Meciar, Yugoslavia under Milosovic, Croatia under Tudjman, Latvia's and Estonia's policy toward the Russian minority are but a few examples. Even presumably solid democracies are "ethnically biased": the policy of Germany toward the Turks is but one example.

In the Middle East, with its long history of the Millet System, the state has traditionally been associated with ethnicity (often defined in terms of religion). Discrimination on the basis of religion has been quite common. Even in Egypt, a relatively benign authoritarian state, the Copts (Egyptian Christians) have been discriminated against: they are still underrepresented in some institutions, their religious institutions receive a disproportionately small share of public funding, they are discriminated against in terms of certain educational opportunities, and they suffer cultural restrictions.[38]

Israel, for its part, has established an almost classic "ethnic order." While Israel is, in many ways, a most vibrant democracy, it is exclusively "the state of the Jews" and Arabs are discriminated against in numerous ways.[39]

There are numerous examples from Asia that indicate not only traditional ethnic discrimination by the "core nation" against minorities but a trend toward increasing discrimination. China's policy toward the Tibetans and other non-Han Chinese and Japanese attitudes toward the Korean minority are traditional cases of discrimination. More interesting to note, however, is that in previous British colonies there has been a trend toward the increasing "ethnicization" of the state: Sri Lanka has become more Singhalese, India has grown more Hindu, and Pakistan more Moslem.[40] The results have been, invariably, detrimental for human rights.

Transformations of Ethnic Orders: Human Rights Implications

The description given of ethnic constitutional orders (first section) and their implications for human rights (second section) suggest first, that it is extremely difficult

to change, let alone transform, those kind of regimes, and second, that in terms of human rights promotion it is desirable to do so. The status of human rights in today's world is so much more salient and important than in the past, and ethnicized polities are under enormous pressure to fit their behavior to increasingly accepted human rights norms.[41]

In this section I will identify some of the theoretical possibilities for bringing about change in ethnic order, discuss the factors that might bring such change about, and offer an analysis of some ethnically based regimes that have actually gone through historic transformation resulting in partial or complete regime change.

An ethnic constitutional order may evolve, I would argue, in five different directions:

1. Status Quo. Despite the tension between the commitment of the most prominent ethnic group to the perpetuation of its control over the state and the requirement of equality and human rights, the status quo might be maintained via the coercive power of the state, international acceptance of discriminatory policies, lack of consciousness and sense of discrimination on the part of the minority (that is, "hegemonic" condition), or any combination of these and other factors. After all, even apartheid in South Africa—an exceptional minority-based ethnic constitutional order—survived for almost fifty years.
2. Cosmetic Democratization. The dominant group in an ethnic constitutional order may decide that in order to sustain its overall control over society and state, it should dismantle the most flagrant violations of human rights but without erasing the fundamentally ethnic, discriminatory nature of the state. In the southern United States before the 1960s as well as in South Africa of the 1980s, "petty" discriminatory practices were deserted in order to maintain the overall ethnic order.
3. Radical Democratization. Under serious internal and international pressure—economic, military, moral, psychological, and above all political—the ethnic state and the ethnic majority on which it relies decide to transform themselves, introduce genuine democracy, and adopt comprehensive human rights as a basis for a newly designed constitutional order. Individual equality (that is, classical liberalism) and possibly a power-sharing consociational deal might be the basis for the "new order," and the mechanisms for change are many and varied. Over the last fifty years or so we have witnessed such dramatic transformations in the character of the regime in greatly diverse situations—Canada (1960s), Spain (1980s), Northern Ireland and

South Africa (1990s), and Macedonia (2001) are but some examples (others might include Slovakia and the Baltic states).

4. Mild Ethnicization. The prominent ethnic elite decides to strengthen its already ethnically hegemonic institutions. Thus over the last several years both India under the BJP and Russia under Putin (and even under Yeltsin) have gone down this route.
5. Radical Ethnicization. The ruling ethnic group and its leadership decide to transform the multiethnic state into a purely ethnic state (or at least an apartheid state) via harsh means such as mass expulsion or involuntary population "transfer," ethnic cleansing, or even full-fledged (or more limited) genocide. The recent Yugoslav policy in Kosovo and Bosnia or the Rwandan case (1994) are examples, as is the Pakistani action in Bangladesh in the early 1970s, the Nigerian policy toward the Ibo in the late 1960s, the situation in the Sudan, Chechnya, and so forth.

The linkage between any of these five policies and human rights within the ethnic polity is theoretically clear but in reality blurred. In principle, if we start with the assumption that an ethnic constitutional order is, in and of itself, a negation of some of the most fundamental principles of contemporary human rights (for example, equality before the law), then option 3 is preferable from the perspective of human rights, option 5 must be rejected as a massive violation of the contemporary human rights regime, and even option 1 (maintaining an ethnic order) is rather unattractive.

At the same time, the difficulty of actually achieving genuine transformation of an ethnic order is such that it could generate, at least in the short run, significant deterioration in the overall human rights situation within a polity trying to achieve such a transformation. Thus the Good Friday Agreement (1998) was a genuine attempt to bring about a "consociational democracy" to Northern Ireland in place of the Anglo, Protestant, majoritarian, Westminster model of the past. Moreover, the unspoken assumption was that the Good Friday Agreement would enhance the human rights of members of Northern Ireland's minority community. The difficulties in implementing the agreement suggest, however, that on the way toward a better future—a more "balanced" democracy and enhanced human rights—deterioration in the quality of democracy and human rights is possible.

The transformation of ethnic constitutional orders is invariably difficult because all such orders, with no exception, are based on passionate ethnicity, historical primordial loyalties, and quite often a majority (or a very large minority) determined to maintain the ethnic character of the state from which it benefits. Moreover, the likelihood of a dramatic change of the character of an ethnic order depends on factors such as the centrality of security concerns among the ethnic majority, the

prominence of religion in defining the nature of the polity, and even the length of the polity existence.

At the same time ethnic orders today are under enormous international pressure (and often domestic pressure as well) to change. The Baltic states, Bulgaria, Slovakia, Romania, and now even Serbia must abstain from powerful ethnic oppression or they will trigger the type of international pressure that they are unlikely to survive (as, in a different time and place, South Africa did). While some powerful countries such as China, India, and Russia may be able to "get away" with ethnically based human rights violations, normal-sized polities must conform to a newly emerging, often ill-defined international human rights order. If in the past aggressive ethnicization was often unsuccessful, today it is likely to be disastrous.

If and when the pressure for change in the ethnicized order is judged by the leading ethnic elite to be unbearable—in what direction can the state move? I would like to suggest that two different modes of change are possible:

1. Liberal mode of change, in which all citizens are recognized as equal but only as individuals and not as members of a group. South Africa as well as the United States (in the 1960s) have gone through that type of change. However, liberal democratization is often insufficient in erasing pervasive, historically based hegemonic control. I agree with Sisk that "the international community need not always advocate simple forms of majoritarian democracy" as a solution for ethnic conflict.[42]
2. Consociational mode of change, in which the most important groups within a traditionally ethnic order renegotiate a constitutional order based on comprehensive power sharing. While the liberal mode erases differences, the consociational one tries to better manage them.[43]

It is beyond the scope of this essay to explore in detail consociational solutions in ethnically divided societies. However, it might be useful to note that such solutions may include cantonization à la traditional Switzerland, federalization à la contemporary Spain, proportional or protected representation for minorities à la pre-1974 Cyprus, the establishment of constitutional courts, and other such means.

While my analysis so far has tended to be rather theoretical (despite some empirical examples), it is important to recognize that there are several historical examples of actual transformations of ethnic orders. While none will be explored here in detail, in their totality they strengthen the argument that an ethnic order does not necessarily have to remain as such forever. The ethnic character of a society and a polity is a variable, not a constant.

The following are interesting historical cases (in order of their evolvement). They are mentioned here for future inquiry into the possibility of transformation of ethnic orders:

1. Canada. A product of one settler society (the English) defeating another settler society (the French), Canada was traditionally considered by many "a dominant Anglo-Saxon culture" to which new immigrants were expected to quickly conform.[44] Only in the 1960s did we see a movement toward increasing recognition of Quebec's uniqueness. In the 1970s a policy of multiculturalism was adopted and today Canadian citizenship could be achieved by proving the knowledge of French only.
2. Spain. Until Franco's death, Spain was not only an authoritarian state but a centralized Castilian polity as well.[45] The ethnoterritorial "peculiarities" of the Iberian peninsula—that is, the identity of peoples such as the Basques or the Catalans—was not only ignored but energetically suppressed. Over the last twenty-five years, however, the country has gone through a process of "pluralization," erasing the previously enshrined "old and unpolluted Castillian spirit."[46] In the process not only were individual rights granted to all "Spaniards" but territorially based group rights were fully recognized.
3. South Africa. One of the clearest examples of a racially based ethnic order, South Africa has transformed its polity (if not yet its society and economy) and moved away from its old ethnic reality.[47]
4. Northern Ireland. Yet another example of a potential transformative political settlement, the 1998 Good Friday Agreement is, fundamentally, a consociational deal with enormous implications for human rights in the longtime troubled province.[48]
5. The Baltics, Bulgaria, Slovakia, and Macedonia, as well as several other Eastern European and Balkan states, also seem to be moving in the general direction of deethnicization.

As explained throughout this essay, in all of these cases the implications for human rights are enormous. In general, however, I would argue that a purely liberal solution that grants all individuals equality before and under the law is a necessary but frequently insufficient condition for both long-term stability and a comprehensive human rights regime in a society that is traditionally divided on the basis of ethnic relations. What is often required in deeply divided societies is a transformative constitutional settlement granting the major groups in society collective rights: language rights, a significant share in the polity's economic resources, and possibly even protected political representation. Such "deals"—difficult to defend in terms of traditional democratic thinking—might be necessary for genuine, comprehensive human rights.

Figure 1 identifies the four regimes analyzed in this paper—apartheid, hegemony, liberal democracy, and consociationalism—as well as the potential transformative processes available to them.

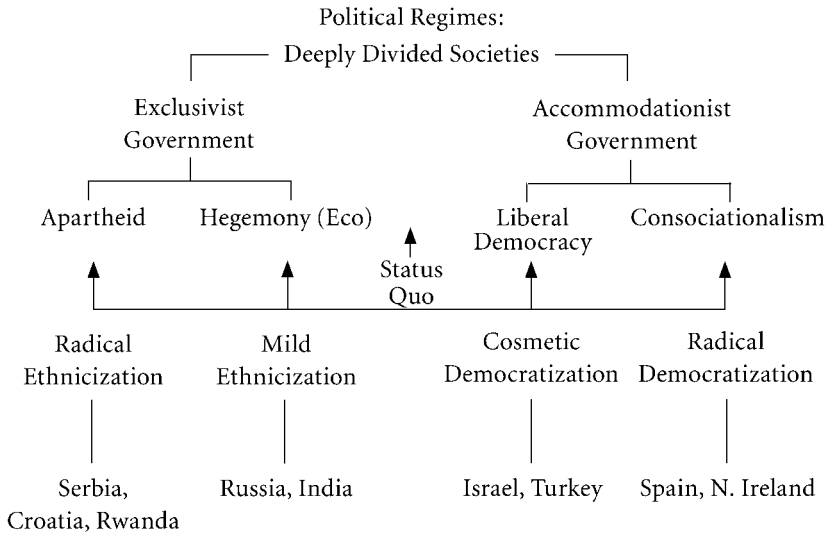

Figure 11.1.
Regime Types and Transformative Processes in Deeply Divided Societies

Notes

I would like to thank Professors David Forsythe and Jeff Spinner-Halev, both of the Department of Political Science at the University of Nebraska–Lincoln, for their useful comments on an earlier version of this chapter.

1. Ted Robert Gurr, *Peoples vs. States: Minorities at Risk in the New Century* (Washington DC: United States Institute of Peace, 2000), 66; see also *Ethnic Groups and the State*, ed. Paul Brass (London: Croom-Helm, 1985); Virginia Q. Tilley, "State Identity Politics and the Domestic Ethnic Arena" (paper presented at the annual meeting of the International Studies Association, April 1998).
2. See Hans Kohn, *The Idea of Nationalism: A Study of Its Origins and Background* (New York: Macmillan, 1949); Walker Connor, *Ethnonationalism: The Quest for Understanding* (Princeton: Princeton University Press, 1993); Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993).
3. Eugene Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914* (Stanford: Stanford University Press, 1976).
4. Gordon E. Cannon, "Consociationalism vs. Control: Canada as a Model," *Western Political Quarterly* 35 (1982): 50–64; William Sheridan, *Canadian Multiculturalism: Issues and Trends* (Ottawa: Library of Parliament, 1987), 17.
5. Luis Moreno, "Federalization and Ethnoterritorial Concurrence in Spain," *Publius* 27(4) (1997): 65–84.
6. Tamir, *Liberal Nationalism*; Oren Yiftachel, "Ethnocracy, Geography, and Democracy: Comments on the Politics of Judaization in Israel," *Alpaiim* 19 (2000): 78–105.

7. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 29.
8. See Gurr, *Peoples vs. States* as well as his *Minorities at Risk* (Washington DC: United States Institute of Peace, 1993); Christopher Hewitt and Tom Cheetham, *Encyclopedia of Modern Separatist Movements* (ABC-CLIO, 2000).
9. Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge: Cambridge University Press, 1996).
10. On the Israeli case, see David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder CO: Westview Press, 1990). On the politics of domination in general, see Ian Lustick, "Stability in Deeply Divided Societies: Consociationalism vs. Control," *World Politics* 31 (April 1979): 325–44.
11. See *Bringing the State Back In*, eds. Peter E. Evans, Dietrich Ruesschmeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985).
12. On the case of Sri Lanka, see, for example, Ketheshwaran Loganathan, *Sri Lanka: Lost Opportunities–Past Attempts at Resolving the Conflict* (Colombo: University of Colombo Press, 1996).
13. See, for example, Robert Dahl, *Polyarchy, Participation, and Observation* (New Haven: Yale University Press, 1971). Among Lijphart's most significant books are *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1968), *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977), *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press, 1984), and *Patterns of Democracy: Government Forms of Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999). See also Timothy Sisk, *Power Sharing and International Mediation in Ethnic Conflict* (Washington DC: United States Institute of Peace, 1996).
14. This is the position taken, for example, by Kymlicka, *Multicultural Citizenship*.
15. On the psychological aspects of ethnic rejection, see Ilan Peleg, "Otherness and Israel's Arab Dilemma," in *The Other in Jewish Thought and History*, eds. Laurence J. Silberstein and Robert L. Cohn (New York: New York University Press, 1994), 258–80.
16. On the case of South Africa, see Dunbar T. Moodie, *The Rise of Afrikanerdom* (Berkeley: University of California Press, 1975); Allister Sparks, *The Mind of South Africa: The Story of the Rise and Fall of Apartheid* (London: Heinemann, 1990).
17. On the application of the hegemonic model in an ethnic setting, see Brubaker, *Nationalism Reframed*; Asad Ghanem, "State and Minority: The Case of Ethnic State and the Predicament of the Minority," *Ethnic and Racial Studies* 21(3) (May 1998): 428–48; Peleg, "Ethnicity and Human Rights in Contemporary Democracies: The Case of Israel and Other Cases," in *Negotiating Culture and Human Rights*, eds. Lynda Bell, Andrew Nathan, and Peleg (New York: Columbia University Press, 2001), 303–33.
18. Myron Aronoff, *Israeli Visions and Divisions: Cultural Change and Political Conflict* (New Brunswick: Transaction Press, 1989), xiv.
19. See Evans, Rueschmeyer, and Skocpol, *Bringing the State Back In*.
20. Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research" in Evans, Rueschmeyer, and Skocpol, *Bringing the State Back In*, 3–43, especially 21–23.
21. On tolerance, see Michal Shamir, *Jews and Arabs in Israel: Everybody Hates Somebody, Sometimes* (Tel Aviv: Institute for Social and Labor Research, Tel Aviv University, 1983), and "Political Intolerance among Masses and Elites in Israel," *Journal of Politics* 53 (November 1991): 1018–43.
22. On this highly significant concept, especially for the current chapter, see Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76(2) (November–December 1997): 22–43.
23. Martin Butora and Zora Butorova, "Slovakia's Democratic Awakening," *Journal of Democracy* 10(1) (January 1999): 80–95.
24. See Lijphart's publications listed in note 13 above.
25. Gurr, *Peoples vs. States*, especially 47–48.

26. *New York Times*, 7 September 2001.
27. Geoffrey Evans and Brendan O'Leary, "Northern Irish Voters and the British-Irish Agreement: Foundations of a Stable Consociational Settlement?" *Political Quarterly* 71(1) (January–March 2000): 78–101; John McGarry and Brendan O'Leary, *The Politics of Ethnic Conflict Regulation* (London: Routledge, 1993); Andrew Reynolds, "A Constitutional Pied Piper: The Northern Irish Good Friday Agreement," *Political Science Quarterly* 114(4) (winter 1999–2000): 613–37.
28. Brendan O'Leary, "The Protection of Human Rights under the Belfast Agreement," *Political Quarterly* 72(3) (July–September 2001): 353–65.
29. Moreno, "Federalization and Ethnoterritorial Concurrence in Spain." Also: Luis Moreno, *The Federalization of Spain* (London: Cass, 2001).
30. Cannon, "Consociationalism vs. Control."
31. Moreno, "Federalization and Ethnoterritorial Concurrence in Spain."
32. On the transformation of Belgium, see Robert Senelle, *The Reform of the Belgian State* (Brussels: Ministry of Foreign Affairs, 1978).
33. See Charles Taylor, "Democratic Exclusion (and Its Remedies?)" in *Multiculturalism, Liberalism, and Democracy*, eds. Rajeev Bhargava, Amiya Kumar Bhgchi, and R. Sudarshan (New Delhi: Oxford University Press, 1999), 138–63.
34. See Sammy Smooha, "Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel," *Ethnic and Racial Studies* 13 (July 1990): 389–413, and "Ethnic Democracy: Israel as an Archtype," *Israel Studies* 2(2) (Fall 1997): 198–241; as well as Oren Yiftachel, "The Concept of 'Ethnic Democracy' and Its Applicability to the Case of Israel," *Ethnic and Racial Studies* 15 (January 1992): 125–36.
35. Smooha, "Minority Status in an Ethnic Democracy," 391.
36. On the issue of access to the public sphere, see Jurgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: MIT Press, 1992). On the exclusive determination of the "public good," see Yoav Peled, "Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State," *American Political Science Review* 86 (June 1996): 432–43.
37. For the majority's use of constitutional "appropriation," see Philippa Strum, "The Road Not Taken: Constitutional Non-Decision Making in 1948–1950 and Its Impact on Civil Liberties in the Israeli Political Culture," in *Israel: The First Decade of Independence*, eds. Ilan Troen and Noah Lucas (Albany: SUNY Press, 1995), 83–104; Ilan Peleg, "Israel's Constitutional Order and Kulturkampf: The Role of Ben-Gurion," *Israel Studies* 3(1) (1998): 237–61. Regarding supreme courts, see Gad Barzilai, "Political Institutions and Conflict Resolution: The Israeli Supreme Court and the Peace Process," in *The Middle East Peace Process: Interdisciplinary Perspectives*, ed. Ilan Peleg (Albany: SUNY Press, 1998), 87–106; Ran Hirschl, "Civil Society vs. the State of Israel: Two Perspectives in the Contemporary Discussion and Their Place in the Supreme Court's Rulings," in *Israel: From Mobilized to Civil Society?* eds. Yoav Peled and Adi Ophir (Jerusalem: Van Leer Jerusalem Institute and Hakibbutz Hameuchad Publishing House, 2001), 305–36. On issues of citizenship, see, for example, Yoav Peled and Gershon Shafir, "The Roots of Peacemaking: The Dynamics of Citizenship in Israel, 1948–93," *International Journal of Middle East Studies* 28 (August 1996): 391–413, and Gershon Shafir and Yoav Peled, "Citizenship and Stratification in an Ethnic Democracy," *Ethnic and Racial Studies* 21(3) (May 1998): 408–27. For land purchasing laws, see Alexandre Kedar, "A First Step in a Difficult and Sensitive Road: Preliminary Observations on Quaadan vs. Katzir," *Israel Studies Bulletin* 16(2) (fall 2000): 3–11; Gerald Steinberg, "The Poor in Your Own City Have Precedence: A Critique of Katzir-Quaadan Case and Opinion," *Israel Studies Bulletin* 16(2) (fall 2002): 12–18; Oren Yiftachel, "Democracy or Ethnocracy? Territory and Settler Politics in Israel/Palestine," *Middle East Report* (summer 1998): 8–13. About collective memory, see, for example, Meron Benvenisti, *Sacred Landscape: The Buried History of the Holy Land since 1948* (Berkeley: University of California Press, 2000); Brian Friel's *Translations* (a play); Yael Zerubavel, *Recovered Roots: Collective Memory and the Making of Israeli National Tradition* (Chicago: University of Chicago Press, 1995).

38. Gurr, *Peoples vs. States*, 138–42.
39. On discrimination against Arabs in Israel, see Ghanem, "State and Minority"; Kedar, "First Step in a Difficult and Sensitive Road"; Kretzmer, *Legal Status of the Arabs*; Nadim Rouhana, *Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict* (New Haven: Yale University Press, 1997); and numerous other sources.
40. On India see Paul Brass, *The Politics of India since Independence: The New Cambridge History of India IV* (Cambridge: Cambridge University Press, 1990); Christopher Jaffrelot, *The Hindu Nationalist Movement in India* (New York: Columbia University Press, 1996).
41. See David Forsythe, *The Internationalization of Human Rights* (Lexington MA: Lexington Books, 1991), and *Human Rights in the New Europe* (Lincoln: University of Nebraska Press, 1994).
42. Sisk, *Power Sharing*, 93.
43. McGarry and O'Leary, *The Politics of Ethnic Conflict Regulation*.
44. See Cannon, "Consociationalism vs. Control"; Sheridan, *Canadian Multiculturalism*, 2.
45. Moreno, "Federalization and Ethnoterritorial Concurrence in Spain," 67.
46. Moreno, "Federalization and Ethnoterritorial Concurrence in Spain," 67.
47. See Adrian Guelke, "Ethnic Rights and Minority Rule: The Case of South Africa," *International Political Science Review* 83(4) (1992): 415–32; Rupert Taylor, "South Africa: Consociation or Democracy?" *Telos* 85 (1990): 13–32.
48. Evans and O'Leary, "Northern Irish Voters and the British-Irish Agreement"; Reynolds, "A Constitutional Pied Piper"; O'Leary, "Protection of Human Rights under the Belfast Agreement."

Conclusion

Rights, Practices, and "Area Studies"

David P. Forsythe and Patrice C. McMahon

This project reflects two principal concerns: with internationally recognized human rights, presumably globally valid; and with whether one can group states in certain ways to increase our knowledge about the protection or violation of those rights. As such, it reflects precisely the two dominant intellectual currents affecting area studies at the start of the twenty-first century: nomothetic approaches, or the concern with general laws; and contextualization, or the effect of particular conditions.[1] These concerns are not merely academic but reflect what some argue is the central paradox of the world today: the world is becoming more homogenous and standardized while, at the very same moment, cultural differences and local context are both more obvious and more salient.[2]

Most chapters in this volume do not deal in any great depth with whether certain groups of states wish to reconstitute global human rights more to their liking. Instead, most deal with how different areas of the world are, or are not, balancing universal rights principles with contingent, particular realities. The volume as a whole addresses the norms and institutions that have been developed to mediate this predicament as well as the problems that still remain. Are universal human rights inappropriate for certain groups of states—perhaps non-Western, postcolonial, or poor? Are universal human rights, at least some of them (and which?) likely to be well protected by certain groups of states—democratic, rich, Western? Do particular rights meet with systematic violation in certain types of states, such as women's rights in Islamic countries or rights to equality in ethnic constitutional orders? Why might this be so? Do all states in a group "move" in the same direction regarding rights behavior, or do some states that otherwise "fit" with a group show "outlier" behavior; and if so, why? Does careful analysis confirm our intuitions and "common sense"? Such are the questions considered in this volume.

The first chapter, by Abdullahi A. An-Na'im, provides an overview of the tension between—or in his words, the quandary of—universality and relativity. He is one of the authors who raises the issue of the legitimacy of internationally recognized human rights as they now exist in international law. He argues that despite the difficulty of the enterprise, the notion of universal human rights should not be abandoned. Consistent with his well-known position that all human rights norms have to be fairly negotiated (renegotiated?) by all members of the contemporary international community, he notes the need to develop and implement strategies for acknowledging and truly incorporating diversity. More than anything else, uni-

versal human rights need to be seen as the product of a process rather than as an established, given concept proclaimed through international decisions. Human rights norms, An-Na'im argues, have to be put on the table for review since many non-Western parties did not participate in the construction of the international law of human rights between 1945 and 1966. But he does not specify what part of the 1948 Universal Declaration of Human Rights is morally invalid, and why. Others, like Adamantia Pollis and Peter Schwab, who question the universality of the current international law of human rights have also been vague about what specifically is inappropriate about the 1948 Universal Declaration.[3]

After all, even China, historically a communist totalitarian state, formally endorses the Universal Declaration of Human Rights, celebrates it with state-sponsored events, and allows it to be taught in Chinese universities—at least in an abstract way. China has signed and ratified the International Covenant on Economic, Social, and Cultural Rights. It has signed the International Covenant on Civil and Political Rights. All of this, of course, refers to formal endorsement rather than serious application.

Some authors in this volume are, however, quite specific in explaining how international laws and the practices of international actors discount local conditions and cultural values. Mahmood Monshipouri, for example, looks at the campaign for children's rights, explaining why certain international laws related to children's labor are inappropriate in the South Asian context, at least for the present time. Other chapters, such as those by Robert K. Hitchcock, Patrice C. McMahon, and Corinne Packer, also suggest that, in fact, some of the internationally recognized rights may be problematic. The sum total of this type of critique can equate with the belief held by some, particularly in places outside Europe and the Americas, that the current version of international human rights is not universal at all and that certain norms and structures are being imposed on them by people who are not members of their own community. In other words, for these critics human rights is just the most recent way for Western, rich countries to impose their will on the East and South. This perception of human rights as the cultural face of Western power is a challenging critique because it directs attention to the international power structure and the identities and interests involved in it.[4] Such resentment may result in a demand for a fourth generation of rights that would benefit poor and vulnerable groups.[5]

Relativist and particularist challenges to universalism have several sources. It is well known that certain East Asian states have championed "East Asian values," or a less individualistic and less democratic version of international human rights.[6] Malaysia and Singapore has been persistent leaders in this regard. Many Islamic states obviously would like a version of universal human rights that omits gender equality, as Zehra F. Kabasakal Arat's chapter demonstrates. There was even a "Declaration of Responsibilities" put forward at one point by certain individuals who had held governmental positions in states from around the world, which would seem

to lend support to the "East Asian" position articulated by leaders in Singapore and elsewhere that the current version of international human rights placed too much emphasis on individualistic rights.[7] From time to time there have been other unofficial, revisionist declarations of human rights offered. Yet none of these counterarguments has been acceptable to Western states, and there has been no formal attempt to revise the 1948 declaration and its progeny of two dozen human rights treaties to accord with revisionist views. In fact, the dominant trend at the start of the twenty-first century is that extant universal human rights are being repeatedly reaffirmed in many ways. More states are formally accepting those norms. New treaties are being negotiated—for example, the treaty on the rights of the child—consistent with the idea that there are indeed individual human rights that are universally valid. The abstract notion of universal human rights was reaffirmed by consensus by states at the 1993 Vienna Conference of Human Rights, sponsored by the United Nations, even if some other language in the final document seemed to allude to cultural relativism and national particularity. Indeed, Professor An-Na'im accepts the notion of universal human rights and believes it to be compatible with central principles found in Islam.[8]

Most authors of this project—admittedly Western or Westernized—accept the international law of human rights as a starting point for analysis and raise the question of whether—and if so, how—we should group states to further our knowledge of human rights practices. Traditionally, area studies research has been defined primarily, though not exclusively, in geographical terms.[9] Scholars studied one country or a region based on geographical proximity, common language, or assumed cultural ties, though the concept lacked clarity. Instead of making any assumptions about the scope of area studies, this volume problematizes the concept. In some chapters, particularly the one by David L. Richards, there is a careful discussion about the choice of "areas" and the relative merits of grouping states geographically, economically, or even culturally. Professor Arat, similarly to Richards, uses area in a cultural sense, looking at Islamic states, some of which—for example, Indonesia—do not lie in the Middle East or North Africa.

The chapter by Ilan Peleg utilizes the notion of area in a nongeographical sense. Peleg examines the fate of human rights in polities dominated by one people, nation, or ethnic group, such as Jews in Israel. In many ways, Peleg's grouping of states by ethnic composition and political practices is understandable given that nationalism and ethnicity remain powerful forces in international politics. Moreover, by grouping states in this way Peleg is able to make connections that are not possible with a geographical grouping. For example, he can explain why both Spain and Finland have been able to enhance human rights practices toward their minorities. Thus just as some scholarship in international relations argues that anarchy or the lack of central government is what you make of it, so it can be said that area study is what you make of it.[10]

In most chapters authors use area in the traditional geographical sense, to delimit the "dependent variable." That is, an author like Patrice C. McMahon takes general phenomena like universal human rights pertaining to women and women's networks and raises the question of what is happening in the Balkans. Similarly, Robert K. Hitchcock takes the general subject of human rights and indigenous peoples and limits his inquiry to Africa and Asia. In examining human rights and child labor in South Asia, Monshipouri's chapter justifies, at least implicitly, why states are most often grouped geographically—they face similar economic situations, political conditions, and often cultural ties.Traditional area studies, at least as seen from the view of political scientists, is on the defensive.[11] Under the impact of globalization broadly defined, one dimension of which pertains to universal human rights, there has been much emphasis on the search for global patterns and laws. This volume shows, however, that area studies—also broadly defined—can yield interesting and even significant results. The cumulative result of our efforts is precisely to add important insights about "general propositions that are properly contextualized."[12] Most of our authors come up with important, if limited, "generalizations . . . refined and refreshed by insights from particular political and cultural contexts, based on a variety of methodological approaches."[13] We now review and comment on those findings.

Human Rights and the Grouping of States

Despite the importance of other actors, the state—or a group of states—remains an appropriate focus of inquiry. Legally, it is states that are primarily obligated under international law. Politically or factually, it is states that frequently have the power to do something about human rights, and it is states that still receive much loyalty from persons. In much of the world, certain networks like Al Qaida notwithstanding, it is only for the state, or a would-be state, that persons are willing to pay taxes or die. Despite pressures from above (from international organizations) and below (from subnational politics) and the changing distribution of power vis-à-vis the state and nonstate actors, we still live in a modified Westphalian system in which the state is the most important legal and political unit.[14]

Richards declines to make his analysis about the protection of human rights around the world on the basis of traditional and unexamined geographical groups. Following the lead of Samuel Huntington, he tests the groupings of states on the basis of civilization or culture.[15] Using the nine civilizational groups identified by Huntington, Richards inquires into three basic types of rights, involving thirteen specific rights, linked to six variables (for example, level of economic development) over two decades. His categories of rights are not the ones most often investigated (civil-political, socioeconomic, and solidarity rights) but rather rights of physical integrity, empowerment, and women's rights. This approach allows him to both highlight the good record of Western civilization across the three categories of rights, (as well as the Japanese culture, even if the latter contains only one state) and to

point out the shortcomings of the Sinic and Islamic cultures. This cultural approach equally allows him to note that it is not only the Islamic but also the Orthodox Christian culture that manifest profound problems in dealing with freedom of religion.[16] By grouping states by culture, he is able to identify and discuss patterns of behavior pertaining to human rights practices not always obtained by traditional regional groupings.

In general the factors previously found to be positively associated with human rights protection (democracy, economic development, British colonization, small population size, absence of international and internal armed conflict) were able to explain about 85 percent of his findings. But that means that his cultural groupings might account for the remaining 15 percent of his results, which is no small accomplishment. It would follow from what we expect of his six variables that groups of rights "move" in tandem, in that rights of integrity, empowerment, and gender may improve together, depending on such factors as presence of democracy and so on. This would seem to be a finding unaffected by regional or area considerations. But note his conclusion, for example, that economic development does not lead to enhanced protection of women's rights in certain cultures, thus emphasizing the importance of the civilizational factor. Using culture as an explanatory variable in conjunction with other factors, as many have recommended and Richards does, allows it to become an important explanatory device in understanding human rights practices.[17]

Steven C. Poe also takes a global overview of human rights behavior, crosscut by some rather traditional groupings but limited to rights of physical or personal integrity. His groupings are geographical, with the exception of rich liberal democracies. The latter are grouped together as OECD countries regardless of geographical position. This is not symmetrical but it is logical. Putting Anglo, rich, democratic countries like Australia and New Zealand into the East Asian or Asian grouping would certainly alter the notion of "Asian," and alter the findings about Asia and human rights. Similarly, Emile Sahliyeh finds it useful to exclude democratic and non-Arab countries like Israel and Cyprus from some of his groupings and correlations about the Middle East.

Poe, like Richards, finds that the six usual variables previously used to explain human rights performance on a global basis remain useful in this analysis as well. Thus democracy, higher levels of economic development, British colonialism, small population size, and the absence of international and civil war still correlate positively with protection of integrity rights. But Poe, again like Richards, finds that an area studies approach does provide some new insights into human rights behavior. Unlike Richards, apparently, Poe believes that Catholicism and Islam do not account for increased violations of rights of personal integrity in areas like Latin America and the Middle East. Poe also questions whether economic development per se uniformly correlates positively with improved protection of integrity rights. Poe wonders if economic development might have a more complex relationship to

integrity rights. He is not sure, but it is his area studies approach that leads him to inquire further into this subject. Poe is open to the possibility that in addition to global "laws" of human behavior related to rights, there may also be some "nice laws" or "middle range theories" that apply on a more limited basis, perhaps on the basis of area studies.

The two studies by Richards and Poe comprise an excellent overview of the interplay of global and area approaches to summary knowledge about human rights behavior—at least for a certain range of rights. Of course there is always room for further development in studies of this kind. Neither deals with subsistence rights such as rights to adequate food, clothing, shelter, and health care. Neither deals with what might produce, or even correlate with, stable liberal democracy over time—one version of the recognized right to participation in public policy making. Relying on quantitative methods, both of these chapters show that approaches based on global patterns can be supplemented by area studies approaches and qualitative research that would stimulate the imagination—and the research agenda.

Europe and the Americas: The Power and Limits of Institutions

A common perspective, at least within American political science, is that the United States should be analyzed by itself rather than in comparative or international perspective. In fact, area studies approaches often simply omit the United States from any coverage. Some universities, as in Europe, contain American studies (referring to the United States only) and sometimes Canadian studies. But North American or Western Hemispheric studies rarely exist. In many ways—and not always in a positive sense—the United States really is an exceptional country. Its wealth, stable democracy, military power, and triumphal nationalism are not often replicated. One cannot logically assume that what has worked well for the United States is necessarily appropriate for smaller, poorer, weaker, more unstable countries. It would seem important to place the United States in broader perspective, for our purposes to inquire if the U.S. version of human rights resonates well with the rest of the international community.

One can do this by combining, as we have done in this project, Europe and the Americas. This is not a combination widely used by social scientists, although those like Richard Burchill, a law professor, who are interested in the regional protection of human rights through arrangements entailing international human rights courts have done so frequently. This grouping of states allows one to compare, as he does, the Council of Europe, with its European Court of Human Rights, with the Inter-American system with its Inter-American Court of Human Rights. His concern is with the notion of democracy, but one can address other human rights issues as well.

Burchill, of course, is not able to say very much about the United States in his chapter because the United States has never ratified the Inter-American Convention on Human Rights or accepted the jurisdiction and authority of the Inter-American

Court. American nationalism, with its core of American exceptionalism, has never been very supportive of international adjudication, rhetoric to the contrary notwithstanding.[18] The U.S. opposition to adjudication about internationally recognized human rights is especially strong. It is very clear in the U.S. case that regional adjudication on human rights has made almost no contribution to its democracy.

As for the countries subject to the two regional courts he reviews, Burchill concludes that judicial pronouncements have probably been marginal to the existence and functioning of democracy, in the sense of greatly affecting the right to participation in public policy making. But particularly the European Court has affected a number of civil rights that are essential to the workings of liberal democracy. He further observes that given the nature of some of the new members of the Council of Europe (for example, postcommunist countries from Central Europe), the European Court may become more like the Inter-American Court in having to deal with the fundamentals of democracy rather than just fine-tuning what is already firmly established.

It certainly bears stressing, as Burchill does, that the ideas of human rights and democracy, while overlapping, are not the same.[19] In fact, one of the reasons for having certain human rights is precisely to restrain majority (or plurality) rule. In liberal democracies, certain things are proscribed on the basis of human rights—such as torture or discrimination against minorities—even if the majority is in favor.

The analysis of democracy and human rights is complicated and merits sharp thinking. One has to see certain human rights respected to begin with in order to have liberal democracy: the right to participation, the right to freedom of belief, opinion, speech, publication, association, privacy. Only when this bundle of rights is accepted and operative can one then talk about the role of democracy in advancing—or impeding—other rights. More democracy may mean more discrimination of minorities, as in modern Yugoslavia or Sri Lanka. This point is relevant to Ilan Peleg's chapter about ethnic domination of constitutional democracies, discussed below. More democracy may mean less subsistence rights, as in contemporary Argentina. More democracy may bring lots of bad things, as in the German Weimar Republic. On the other hand, as Richards and Poe have confirmed, the presence of democracy is usually associated with protection of a wide range of human rights. One suspects they are speaking of liberal democracy and not democracy per se.

The grouping of states followed by Eva Brems and Patrice C. McMahon is more common, which is to consider Europe or one of its subdivisions—the Balkans in McMahon's case—as a distinct focus of inquiry. Brems's inquiry points us to an important subject, already recognized as such by Abdullahi A. An-Na'im in his introductory chapter. That is, the European Court of Human Rights has developed the doctrine of "margin of appreciation" as a way for the regional system of human rights protection to give due deference to human rights decisions taken by nation-

states or their subdivisions. Under this doctrine the Court tolerates considerable diversity within the larger European framework of common human rights principles. This approach would seem to suggest similar tolerance on a broader scale, when global norms encounter diverse national and subnational rules and practices. But Brems makes clear that there is much confusion in Europe about when the doctrine of "margin of appreciation" will be invoked. She also directs attention to emerging jurisprudence, suggesting that there may be core rights, or core meanings to fundamental rights, that should not escape international review. On the other hand, while all human rights by definition are said to be fundamental, some may be more fundamental than others. And thus there may be two tiers or classes of human rights, those appropriate for "margin of appreciation"—and hence national variation in meaning—and those not.

In some ways McMahon is also dealing with this same quandary in her chapter on women's networks and human rights issues in the Balkans. Ultimately she confronts the question of what to do when women in the Balkans are more interested in obtaining pragmatic services than in advancing internationally recognized human rights pertaining to women. What does a liberal transnational network do when its local interlocutors and supposed beneficiaries may either be illiberal or lack the same sense of priorities as the outsiders? More generally she considers the strategies members of the international community can adopt to promote changes in women's rights. This framing of the issue is similar to the subject of transnational networks and female genital mutilation in Africa as dealt with by Corinne Packer as discussed below and as already noted by An-Na'im in his chapter.

Whereas Brems the law professor is concerned with judicial matters in Europe, McMahon the political scientist is concerned with advocacy, international norms, and implementation in nonjudicial ways. Both are ultimately interested in European behavior consistent with internationally recognized human rights, whether in regional or global form. It is a very good question whether judicial or policy approaches can affect change more rapidly for a greater number of persons. More than anything else, research on Europe and the Americas demonstrates the prominence of formal and informal institutions involved in human rights practices. While none of the institutions discussed in these chapters have resolved the struggle between universal principles and local practices, whether through courts or through transnational organizations, it remains true that human rights principles are highly institutionalized in the American and European contexts.

Africa and Asia: The Need for Indigenous Strategies

Just as very few universities can afford a comprehensive approach to area studies, very few books can do likewise. Just as most universities have to content themselves with seeking excellence in one or two area studies, so this book must fold together some traditional areas to limit the project. We have done so by linking Europe and the Americas, and we do so again regarding Africa and Asia. Many African and

Asian states share certain attributes: former colonial status, under development, a history and political culture not known for commitment to human rights and liberal democracy. One can study human rights behavior in all these states under global norms, perhaps as linked to the six classic variables already discussed (democracy, development, colonial history, population, armed conflict in its two forms). One can also study these states and their human rights performance, as both Richards and Poe have done, via cultural or geographical groupings. In this section the authors take a more contextualized approach, and their work focuses on the disjuncture between international principles and local practices. More so than the others, these chapters highlight the impediments to universal human rights in practice, particularly the problems with international "norm-promoting agents."[20]

Corinne Packer presents a fresh approach to the increasingly well-known subject of female genital mutilation (FGM) in African states. She argues that internationally recognized human rights are not so important to concerned women in this area because of several factors, including the nature of the national and local legal systems, the prevailing political culture, and the reigning psychology of both men and women. She advocates a strategy of self-help for African women and girls, who are adversely affected by FGM in many ways. A self-help approach, rather than a top-down strategy that might focus on changing legislation, would entail the use of local norms and avenues which, given the heretofore paternal biases of such norms and procedures, would redefine and restructure the local to better fit with the global.

Packer's analysis, while seeking to move from current national legal impediments at the price of undertaking sizable political challenges, fits well with earlier observations by An-Na'im to the point that it is the concerned persons who must make the key decisions, not outsiders. If, in this case, someone is going to run the risk of being stigmatized by not conforming to prevailing practices of FGM, it should be the African females at risk—at risk of both threats to health and long-term happiness as well as more immediate threats of ostracism. This point would also seem relevant to McMahon's analysis of women's issues in the Balkans. Relatedly, Michael Ignatieff argues for a type of informed consent on these matters.[21] This notion, borrowed from medical ethics, he says, would guard against imperialism in human rights matters.

This entire line of thinking that emphasizes forms of self-determination, local decision making, and development can be contrasted with an emphasis on what might be called liberal imperialism, political development, and humanitarian intervention. The latter were discussed at length especially in 1999 in relation to Kosovo. When, if ever, is it permissible for outsiders to override national and subnational decisions that have led to human rights violations such as forced relocation in the name of ethnic cleansing?[22] Is there any gross violation of human rights besides genocide that merits such intervention? For Packer FGM not only does not meet the threshold for intervention, but also it does not merit heavy outside pressure for

change. International assistance is appropriate and might be helpful, but foreign pressure is likely to be counterproductive.

Some analysts have argued the same regarding China and civil-political rights. Given the long history of Western evolution concerning these matters, so the argument runs, the West should not overtly pressure China on such subjects but should allow the Chinese polity to evolve at its own pace. This approach might be persuasive if the Chinese elite showed a good-faith effort at progressive change; but where repression continues unabated, arguments about deference to local decision making seem less persuasive to many. If over decades the Chinese elite continues brutal and pervasive repression of advocates of liberal democracy or of spiritual movements like Falun Gong, for that matter, should outsiders turn a blind eye?

Assistance and pressure are also subjects for Monshipouri when he addresses the question of child labor in South Asia. In an analysis that picks up the support of An-Na'im, Monshipouri argues that negative pressure under human rights norms to end child labor in this area will not be successful as long as the region remains characterized by underdevelopment and inadequate educational opportunities. A discussion of the obstacles to economic development in Asia is particularly important, as only part of the "Asian values debate" is actually about culture. The other part of the debate is related to the perceived need to sacrifice human rights in favor of economic development.[23] Only through a more positive approach stressing economic growth, education, and improved workplace regulations can one hope for amelioration of the situation.

Monshipouri's chapter, perhaps more than others, demonstrates the limitations of a juridical approach to human rights. The human rights norms may be embedded in treaties and these treaties may be, at least theoretically or in principle, subject to adjudication in national tribunals. We have already noted that something like the European "margin of appreciation" doctrine has its contribution to make to the protection of human rights. But one will see progressive change concerning Asian child labor only through policies designed to affect family incomes, schools, and places of work. Judicial decrees will be relatively unimportant in this process. It is transnational policy—backed by resources—that may change behavior, not legal pronouncements.

Turning from child labor to indigenous peoples, Robert K. Hitchcock juxtaposes the cultural relativist arguments made by many African and Asian states with these states' treatment of indigenous peoples. Although the fate of indigenous peoples has attracted a great deal of attention of late, these peoples suffer greatly at the hands of the very governments that claim that universal human rights practices are intolerant or ignorant of what are referred to as African or Asian values. In both regions the concept of indigenousness is controversial, with many governments claiming either that no indigenous populations live within their territories or that all the groups in the country are indigenous. Regardless of what many governments plead, both Africa and Asia contain sizeable populations of what Hitchcock and

others define as indigenous. As a group indigenous populations are at the bottom of the socioeconomic ladder, marginalized socially and politically, and they are often the victim of human rights abuses. Like other authors in this volume, Hitchcock ultimately concludes that the success of the indigenous rights movement depends a great deal on the actions of the international community. Not only must powerful Western states and international organizations help monitor and enforce human rights legislation, but they must resist the relativist claims made by African and Asian governments.

Africa and Asia share not only certain attributes but also problems with human rights practices—as the chapters by Hitchcock, Poe, and Richards clearly demonstrate. International actors seeking to promote domestic change, particularly in the area of human rights, are often faced with monumental challenges. One of the difficult issues is how to empower local groups without imposing Western ideas or institutions. The burgeoning literature on international assistance, whether it focuses on democracy promotion in Central Europe, civil society building in the Middle East, or improving human rights in Africa, emphasizes the limitations and difficulties of Western attempts to "do good."[24] Research from various parts of the world and in other issue areas thus reinforces what Packer, Hitchcock, and Monshipouri have to say about the problems with universal human rights in Africa and Asia. Despite the obvious need for human rights principles and their international norm-producing agents to be inclusive and sensitive to local context, this happens rarely and only reluctantly.

A good argument can be made, nevertheless, that persons in these non-Western areas need human rights to protect them from repressive states and exploitative markets. How to bring about the needed protection of rights in these contexts remains the most important question to many, not whether the concept of universal human rights is valid in the abstract. It is likely, however, that some transnational influences in some situations will prove detrimental to some human rights. In China, for example, transnational actors in the form of multinational corporations (MNCs) have undeniably contributed to deterioration, rather than the improvement, of social and economic rights in the short run.[25] The same thing occurred in Eastern Europe after the fall of communism. On the other hand, some of those writing about East Asia, like Kevin Tan, who compares human rights in Singapore and Taiwan, argue that despite poor human rights policies today in the former, further economic development and greater integration with the world economy will lead to increasing globalization of national society. He believes that "these changes will usher in new approaches and great respect toward human rights in the region."[26] Regardless of the interplay of particular transnational forces in particular countries in particular time spans, a more general point remains valid. As Ignatieff and others have argued, an awareness of fundamental threats to human dignity across history leads to an emphasis on the utility of human rights in principle regardless of culture, region, or nation.

South Korea certainly manifests an authoritarian history over a very long period. But that has proven no barrier to the development of liberal democracy based on relatively serious respect for civil and political rights. The same might be said of Taiwan. One wonders if Indonesia in 2002 might be in the process of making the same, if difficult, transition. And one wonders if other East Asian authoritarian states like Malaysia and Singapore and maybe even China might be pushed or pulled in that direction in the future. Will not the benefits, but also the dangers, of capitalism (as discussed above) lead to that orientation? Will not the dangers of authoritarian rule eventually produce change—especially if human rights advocates continue to be active?

Islam and the Middle East: Elites Are Key

Since the fall of 2001 Western countries have suddenly shown increased interest in most things Islamic because of the terrorist attacks in New York and Washington, which were undertaken in the name of radical or fundamentalist Islam. Richards has already noted that Islamic states as a group present a very poor record with regard to implementing most categories of human rights, especially women's rights. The chapters in this section examine and differentiate among Islamic countries, seeking to elucidate the reasons for what the authors agree are poor human rights practices in Islamic countries.

Zehra F. Kabasakal Arat examines Islamic states' record of reservations to the Convention on the Elimination of All Forms of Discrimination against Women. After this careful and clear analysis, she proceeds to examine the cultural, religious, and legal arguments used by Islamic paternalistic parties to justify, in their view, inequality for women. She argues that many if not most Islamic religious and legal principles used to rationalize discrimination against women are subject to other interpretations. Indeed, she notes that not all states that are members of the Organization of Islamic States interpret the same provision in the same way. Tunisia, for example, presents a different record from Iran. Pakistan in any given year may manifest laws and practices quite different from Saudi Arabia.

She makes very clear that paternalistic and discriminatory elites have, in many Islamic countries at certain times, made rulings and decrees that discriminate against women but are by no means the only possible or reasonable understanding of the Islamic texts in question. These elites seek cover under notions of national self-determination and religious freedom. Under these ideas, as Arat observes, the illiberal Islamic elites resist pressure from the UN CEDAW Committee to move toward recognition of gender equality. Arat obviously wants that committee to continue its efforts to press Islamic paternalistic elites for progressive change. Similar to the chapters by McMahon, Monshipouri, and Packer, Arat believes that protection of human rights cannot rest with traditional elites; change in human rights practices depends on eliciting alternative voices and including nontraditional leaders.

The chapter by Emile Sahliyeh in effect continues this line of analysis. Looking at human rights broadly and not just with regard to women, he reinforces what Richards and Poe have said about the poor human rights record of the Islamic grouping of states. Paying passing attention to factors like persistent authoritarianism and nationalism after colonialism, Sahliyeh is primarily interested in the effect of Islam. He presents first the defense of conservative interpretations of Islam and why they should triumph over internationally recognized human rights. He then presents a critique of conservative Islam in the light of global human rights. His main conclusion is that "Islam" is not a value system set in stone but is subject to possible change out of the dialectic of interaction with other cultures.

Research on Islamic countries and the Middle East speaks to the importance of individuals in this particular context. Whether they focus on reform-minded elites or Islamic feminists, both Arat and Sahliyeh believe that progressive change is not only possible but already evident in certain countries. Like Arat, Sahliyeh notes that different Islamic states have made changes in interpreting the Koran and the *Sharī'a*. On a number of subjects, but not often including women's rights, Islamic states have undertaken changes compatible with international law or a Western approach to the same subject—for example, regarding a criminal code. Moreover, just as many have charged bin Laden and the terrorists responsible for September 11 with exploiting Islam for their own purposes, these authors, born in Turkey and Palestine, respectively, intimate that Islam is not a satisfying answer to explain the region's poor human rights record. Religion and culture per se are undeniably part of the equation, but more important is the interpretation of religion and culture by individuals in power.[27]

Nongeographical Regions: Institutions and Practices Endure

In encouraging a review of the status of area studies, the Ford Foundation encouraged American universities to rethink "area studies" to the point of possibly defining areas in ways other than geographical terms. Using cultural areas, such as the Islamic world, is one such possibility, and we have already referred to Richards's chapter in this regard. Poe's use of OECD states is another manifestation of a nongeographical area. Whether "OECD" is a cultural, economic, or political grouping or all three at the same time, is an interesting question. In the spirit of the Ford injunction, we include one study based on "ethnic orders." The states in such a grouping comprise analytical rather than geographical areas or regions but again represent logical groupings of states for understanding human rights practices.

Ilan Peleg looks at all states, regardless of geographical position, reflecting an ethnic constitutional order. It turns out he is wary of constitutional democracies in which one people, nation, or ethnic group has a preferred position. Understandably, looking at states like Israel, or even the United Kingdom dominated by the English, he anticipates discrimination against the minority—for example, Arabs, Scots. He then discusses safeguards against such violations of the right to equality, examin-

ing classic democracy with minority guarantees, and consociational democracy in which ethnic groups are afforded broad collective rights—following the examples of Belgium, Switzerland, and so on. Finally, Peleg looks at changes under way in contemporary international relations that touch upon his concerns, suggesting that different states adopt different strategies to deal with how to hold existing states together as a viable polity while dealing with ethnic discontents and protections.

Peleg's analysis shows how, in addition to regional and cultural groupings, one can utilize analytical areas to good advantage. Borrowing heavily from the study of comparative politics in political science, he shows how many human rights, especially involving minorities, can be addressed through a carefully considered constitutional law but also informal practices. He explicitly discusses the advantages of consociational democracies over liberal democracies and what states need to do to improve human rights practices.

Peleg is fundamentally interested in structures and institutions and how they directly or indirectly affect human rights practices. As in some of the "new" institutionalist literature in comparative politics, he suggests that even when institutions formally disappear, legacies remain that affect states' behavior and the fate of human rights.[28] While he is not that interested in understanding how particular institutions were created, as are many new institutionalists, Peleg looks at how constitutional structures and informal practices affect individual and group rights within the state. In a modified Westphalian system, in which states are constantly changing because of such things as the pressures of globalization and the growth of grassroots organizations, analytical groupings of states, whether they are ethnic orders or otherwise, lead to findings that are neither obvious nor possible with geographical groupings.

What We Have Learned

In and of themselves, the chapters in this volume tell us a great deal about what is happening on the ground in human rights practices. In this way they serve traditional area studies quite well, as they provide in-depth information about particular countries and regions. The chapters also demonstrate that an area studies approach certainly does not eschew scholarly rigor. In other words, these authors did not avoid generalizing but limited their conclusions to particular contexts. Yet none rejected outright the possibility that similar relationships and dilemmas might arise elsewhere. As others have noted, area studies is not fundamentally opposed to principles also valued by nomothetic approaches.[29] More generally, these chapters contribute to numerous ongoing debates in political science, in the subfields of both comparative politics and international relations. The rest of this chapter relates the findings in this volume to four specific debates.

Culture Matters

Cultural arguments were in vogue in the 1960s in North American social science and then declined precipitously. The revival of culture as an explanatory factor started

in the 1980s and remains, as these chapters demonstrate, quite important today. Most of the chapters implicitly or explicitly use culture as a partial explanation for human rights practices, or they invoke culture to account for the discord between universal principles and local behavior. Among the criticisms leveled against the use of cultural arguments is that this concept cannot account for change and is too deterministic. Some of the authors here resolved, or at least attenuated, this problem by explaining how culture has changed over time. Moreover, these authors did not just observe differences and conclude that culture captured the divergence. Rather there were specific discussions of the vehicles that create, transmit, and change cultural values.

Since human rights is fundamentally about ideas, it is not so surprising that culture is indeed relevant to human rights practices. But to understand why, one must look at how certain values are embedded in the nation-state, institutions that monitor rights practices, or the individuals empowered to oversee the implementation of rights practices. Samuel Huntington once lamented that a cultural explanation was tricky because it was simultaneously easy and unsatisfying to use because, in some sense, it was a residual category.[30] Few in this project would agree with such an assessment, believing that culture is not at all residual. In fact, used as it is here—in conjunction with other explanatory variables and with specific reference to historical events, institutions, religion, and leadership—cultural arguments go quite far in elucidating states' behavior.

The Neighborhood Effect

Some analysts have stipulated that the more a state associates with, or is tied to, other states that take human rights seriously, the more that first state will come to respect human rights as well.[31] A neighborhood—and the neighborhood effect—can be something geographical, as in the notion of Europe. Or it can be something nongeographical, as in the neighborhood or grouping produced by major trading partners.

In the first sense, for example, the neighborhood of liberal democratic Western Europe may exert influence on East Europeans or Central Europeans or those in the Balkans to be more rights protective. To the extent that one identifies as European, this implies taking human rights seriously. In the second sense, a South Korea or a Taiwan may evolve in a rights protective direction partly because of its economic and security ties to the United States and other liberal democratic states. In this sense the United States is really part of an economic and security community that involves certain East Asian states; there is a transnational neighborhood, and being a member of that community or neighborhood may generate pressures to conform to certain human rights principles.

It would seem that a neighborhood effect is sometimes in play in South America, as trends toward either democracy or authoritarianism sweep the area at times. Since the cold war there has been something of a trend toward liberal democracy in sub-

Saharan Africa, although much variation in types of polities remains. It is yet to be seen if in East Asia the movement toward liberal democracy by such as South Korea and Taiwan is eventually emulated by other states. Whether Indonesia might be the next to follow in that evolution remains to be seen. So far Singapore, for example, participates extensively in international capitalism but remains authoritarian rather than a genuinely liberal democracy.

On the other hand, in this volume Richards and also Arat have noted that not all states in an area or grouping "move" in the same direction at the same time regarding various rights protections. For example, some Islamic states may liberalize in certain areas of the law, whereas other members of the Islamic community do not. Women, for example, may achieve more equality in Iraq compared to Iran or Saudi Arabia, although all are in the same geographical and cultural area. It is interesting to speculate on the effect of a major Islamic state moving to a clear endorsement of gender equality. Would such a development be likely to set off a snowball or bandwagon or spillover effect within the Islamic "neighborhood"?

Despite a clear push or pull for human rights in Europe, where any number of states would like to join the European Union, and where these applicant states must demonstrate some significant commitment to at least civil and political rights to be so considered, much remains to be known about neighborhood effects and various human rights. The neighborhood effect has been institutionalized in Europe. States must become parties to the European Convention on Human Rights and accept the jurisdiction and authority of the supranational European Court on Human Rights before they can be considered for EU membership. Outside of Europe, however, the effect of a neighborhood or community is not entirely clear.

Practices Are Increasingly Institutionalized

Classical liberalism as a philosophy rather than political program is one widely accepted basis for human rights thinking. Liberalism has long presented a quandary in that liberals believe in both universal human rights and tolerance for diversity. But should one tolerate diversity that violates internationally recognized human rights? Hitchcock's work demonstrates the negative impact on indigenous peoples when pleas for diversity and relativist arguments are made by oppressive governments in Africa and Asia.

Since liberal thinkers have also theorized a great deal about the power of institutions—to mitigate anarchy in the international system, to reconcile individual desires with public needs—it is not surprising that formal organizations and informal institutions, or rules and norms of behavior that structure human interaction,[32] have featured so prominently in the study of human rights. From this perspective, one thing we have learned in this project is that rules related to human rights are increasingly institutionalized around the world. In some places, like North America and Europe, as the chapters by Brems, Burchill, and McMahon discuss, quite formal organizations have been created to protect and standardize human

rights practices discusses. What most seem to agree upon is that while diversity certainly exists among states in North American and Europe, most states at most times follow fundamental "rules of the game" and their behavior is constrained and shaped by human rights organizations and international law.

In other regions, such as Africa, Asia, or Islamic states, human rights practices may be less institutionalized but they are certainly not absent. For example, as Packer points out in Africa with regard to FGM, African states have, at certain points, conceded to international pressure and ended harmful practices against women. However, the change was for instrumental reasons and only because of international pressures; once the particularly Western NGO involved in this campaign departed, FGM practices returned. Similarly, as Arat notes, even though the Women's Convention has not been implemented by most Muslim states, this should not be construed to mean that it has not had any effect at all. In fact, this law and other aspects of the international human rights regime present many possibilities (some might argue the only possibility) for improving women's rights in these countries. In both cases, as in many regions, human rights practices may be adopted only for instrumental reasons or they may not be adopted at all.

Nonetheless, as Thomas Risse and Kathryn Sikkink explain in their model of human rights socialization, this does not mean that human rights practices do not affect states' behavior at all.[33] What their research has found is that over time, with pressure from above and below, states do follow the rules of the game, implement human rights laws, and eventually genuinely internalize human rights norms.

China, for example, may have—and probably has—accepted international human rights for strictly instrumental reasons—to ward off Western economic or other sanctions.[34] But China may yet become entangled in its own human rights discourse and the promises it has made. This was true of the Soviet Union and other European communist states, as Daniel Thomas has argued elsewhere.[35] But we have no theory that tells us the time line for such learning and change. Moreover, in some cases it is not elite learning in favor of serious attention to human rights that occurs. Repressive elites are replaced by more liberal elites. In that case, one might say that *national* learning rather than elite learning has occurred.

States and the Power Shift

The institutionalization of human rights practices and the organizations involved in this process speak directly to literature on the changing role of the state in domestic and international politics. While states remain the central analytical focus, nonstate actors, both intergovernmental actors and subnational grassroots organizations, are becoming more numerous and probably more influential. As we have seen in this volume, this seems to be true of every area examined in this project. Data from Europe and the Americas, for example, suggest that the changing role of the state vis-à-vis international organizations and transnational groups is quite a good thing for human rights practices. Not only are rights the most protected in these areas but

international organizations, such as the European Court, have done a reasonably good job at mediating the problems of uniformity and diversity—that is, via the margin of appreciation doctrine. Yet for weaker states, whether they are weakened by international or local groups, this new distribution of power does not necessarily spell improvements for human rights practices. In fact, very weak and poor states are rarely able to implement international human rights laws or are interested in doing so. Thus while academics may welcome a change in the state's status, the practice of human rights may not. Paradoxically, one seems to need both a strong state and a strong monitoring process made up of international and transnational organizations operating under international norms.

The Future of Research

Scholarship on human rights is, in many ways, in a fortunate position. First and foremost, many important policy makers care about human rights—at least to some extent. From Kosovo to Chechnya to Bangladesh to the United States, world politics prominently reflects claims by individuals and groups to certain conditions of existence. Even if politicians sometimes choose not to act on behalf of human rights violations, they cannot ignore this topic—or ignore the results of their decision not to act to protect human rights. The subject of Rwanda in 1994, and the resulting destabilization of adjacent areas through refugee flight, immediately comes to mind.

Second, because this field has grown so much, reflecting new political realities, both in terms of the issue areas it encompasses as well as the states adopting human rights practices, the subject encourages methodological pluralism. At least in the area of human rights, the search for general laws can work with research that focuses on particular regions and countries. To answer Sidney Verba's question—do we want specific information about particular places or generalizations about how politics work?—in the study of human rights we clearly want both.[36] Scholars working on human rights, as a result, appear to be less hampered by methodological quarrels than others, for example, studying institutions, ideas, or political culture.

Finally, as this project testifies, human rights research is fundamentally an interdisciplinary affair that fortunately includes more than one discipline. Bringing together anthropologists, law professors, and political scientists was, to say the least, a daunting proposition but ultimately a rewarding and enriching one. If resolving the quandary between universality and relativity depends on putting human rights norms on the table for debate and negotiation, academic research, as we have tried to do here, must continue to acknowledge and even embrace diverse disciplines, new concepts, and various methodologies.

Notes

1. Peter J. Katzenstein, "Area and Regional Studies in the United States," *PS: Political Science and Politics*, 34, 4 (December 2001): 789.

2. Although there are plenty of other examples, Benjamin R. Barber's book, *Jihad vs. McWorld* (New York: Ballantine, 1995), talks about this paradox explicitly. See also Thomas Friedman, *The Lexus and the Olive Tree* (London: Harper Collins, 1999).
3. *Human Rights: New Perspectives, New Realities*, eds. Adamantia Pollis and Peter Schwab (Boulder: Lynn Rienner, 2000).
4. Peter Bahrach and Morton S. Baratz, "Two Faces of Power," *American Political Science Review*, 56 (December 1962): 947–52. On the third face of power and arguments about structural power and identities, see Stephen Lukes, *Power: A Radical View* (London: MacMillan, 1974); and Stefano Guzzini, "Structural Power: The Limits of Neorealist Power Analysis," *International Organization*, 47, 3 (summer 1993): 443–78.
5. Seyom Brown, *Human Rights in World Politics* (New York: Longman, 2000), 164.
6. See further *The East Asian Challenge For Human Rights*, eds. Joanne R. Bauer and Daniel A. Bell (Cambridge: Cambridge University Press, 1999).
7. Reprinted in *Netherlands Quarterly of Human Rights*, 15 (December 1997): 546–50. Signers included Jimmy Carter of the United States and Helmut Schmidt of Germany.
8. See especially his *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990).
9. John W. Harbeson, Cynthia McClintock, and Rachel Dubin, "'Area Studies' and the Discipline: Towards New Interconnections," *PS: Political Science and Politics*, 34, 4 (December 2001): 787–88.
10. Alexander Wendt, *The Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), chapter 6.
11. Katzenstein, "Area and Regional Studies in the United States," 790.
12. Katzenstein, "Area and Regional Studies in the United States," 790.
13. Harbeson, McClintock, and Dubin, "'Area Studies' and the Discipline," 787.
14. See Jessica T. Mathews, "Power Shift," *Foreign Affairs*, 76, 1 (January–February 1997): 50–66.
15. Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Oxford University Press, 1997).
16. His general approach is supported by the in-depth analysis of Adamantia Pollis, who has shown why Greece, with its Orthodox Christian faith, does not respect freedom of religion. See *Human Rights Quarterly*, 9, 4 (November 1987): 587–14.
17. *New Directions in Comparative Politics*, ed. Howard Wiarda (Boulder: Westview Press, 1991), 236.
18. See further David P. Forsythe, "The United States and International Criminal Justice," *Human Rights Quarterly*, 24, 4 (November 2002).
19. In addition to the literature cited by Burchill, see Jack Donnelly, "Democracy and U.S. Foreign Policy: Concepts and Complexities," *The United States and Human Rights: Looking Inward and Outward*, ed. David P. Forsythe (Lincoln: University of Nebraska Press, 2000), 199–226.
20. Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," *The Power of Human Rights*, eds. Thomas Risse, Stephen Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 21.
21. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001).
22. For one of the newer treatments of a much-worked subject, see Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).
23. See Joanne R. Bauer and Daniel A. Bell, "Introduction," *The East Asian Challenge for Human Rights*, eds. Bauer and Bell, 7.
24. For democracy assistance, see Thomas Carothers, *Aiding Democracy Abroad* (Washington DC: Carnegie Endowment for International Peace, 1999). For civil society, see *Funding Virtue*, eds. Marina Ottaway and Thomas Carothers (Washington DC: Carnegie Endowment for Interna-

tional Peace, 2000). For human rights practices, see Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices."

25. See the arguments of Yash Ghai, "Rights, Social Justice, and Globalization in East Asia," *The East Asian Challenge for Human Rights* eds. Bauer and Bell, 241–63.
26. Kevin Y. L. Tan, "Economic Development, Legal Reform, and Rights in Singapore and Taiwan," *The East Asian Challenge for Human Rights* eds. Bauer and Bell, 284.
27. See further Ann Elizabeth Mayer, *Human Rights and Islam* (Boulder: Westview, 1999), who stresses the importance of power and politics in the various interpretations of Islamic principles and law. For Mayer traditional Islamic circles have a vested interest in making inegalitarian and sexist interpretations of Islam in order to further their status and control. For Mayer the issue is not Islam per se, but self-serving politics and power in the name of Islam.
28. Kathleen Thelen and Sven Steinmo, "Historical Institutionalism in Comparative Politics," *Structuring Politics: Historical Institutionalism in Comparative Analysis*, eds. Sven Steinmo, Kathleen Thelen, and Frank Longstreth (Cambridge: Cambridge University Press, 1992).
29. Jack Snyder, "Science and Sovietology: Bridging the Methods Gap in Soviet Foreign Policy Studies," *World Politics*, 40, 2 (January 1988): 169–93.
30. Samuel P. Huntington, "The Goals of Development," *Understanding Political Development*, eds. Myron Weiner and Samuel Huntington (Boston: Little and Brown, 1987), 22–23.
31. Thomas Carothers, "Democracy without Illusions," *Foreign Affairs*, 76 (January–February 1997): 85–99.
32. This definition of institutions is taken from Robert O. Keohane, "International Institutions: Two Approaches," *International Organization: A Reader*, eds. Friedrich Kratochwil and Edward D. Mansfield (New York: Longman, 1994), 48–49.
33. For more on their model of change, see Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices" 1–38.
34. See further Rosemary Foot, *Rights beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000); Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999); and Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending National Interests* (Philadelphia: University of Pennsylvania Press, 2001).
35. See Daniel Thomas, "The Helsinki Accords and Political Change in Eastern Europe," *The Power of Human Rights*, eds. Risse, Ropp, and Sikkink, 205–33.
36. Sidney Verba, "Comparative Politics: Where Have We Been, Where Are We Going?" *New Directions in Comparative Politics*, ed. Wiarda, 31–58.

Contributors

Abdullahi Ahmed An-Na'im is Charles Howard Candler Professor of Law at Emory University, Atlanta, Georgia. He is the author of *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*; editor of *Human Rights in Cross-Cultural Perspectives: Quest for Consensus*; *The Cultural Dimensions of Human Rights in the Arab World* (in Arabic); *Proselytization and Communal Self-Determination in Africa*; coeditor of *Human Rights and Religious Values: An Uneasy Relationship?*; and *Human Rights in Africa: Cross-Cultural Perspectives*. An-Na'im directed two major research projects at Emory Law School (funded by the Ford Foundation): "Women and Land in Africa" and "Islamic Family Law." He is currently the director of the new Fellowship in Islam and Human Rights, also funded by the Ford Foundation and implemented through Emory Law School.

Zehra F. Kabasakal Arat is a professor of political science and women's studies at Purchase College of the State University of New York. She also serves as the founding president of the human rights section of the American Political Science Association. Her research addresses issues pertaining to democracy, human rights, and women's rights. Her publications include numerous journal articles and book chapters on these topics as well as the books *Democracy and Human Rights in Developing Countries* and *Deconstructing Images of "The Turkish Woman."* Currently she is working on a project that explores human rights discourse and policies in the Turkish Republic since its establishment, which is expected to yield two volumes on the subject.

Eva Brems is a professor of human rights law at Ghent University, Belgium. Among her recent publications is *Human Rights: Universality and Diversity*. Her research interests include most areas of human rights law, in European and international law as well as in Belgian and comparative law.

Richard Burchill is a lecturer in law, McCourbrey Centre for International Law, Law School, University of Hull, United Kingdom. He is currently undertaking a research project examining the contribution of the regional organizations of Europe to the development of democracy in international law. Recent publications include "The Promotion and Protection of Democracy by the Regional Organizations of Europe: The Case of Austria,"*European Public Law*; and "The Developing International Law of Democracy," *Modern Law Review*.

David P. Forsythe is the Charles J. Mach Distinguished Professor of Political Science at the University of Nebraska–Lincoln. Among his recent publications, he is the

author of *Human Rights in International Relations* and the editor of *Human Rights and Comparative Foreign Policy* and *The United States and Human Rights*. His article "The United States and International Criminal Justice" has recently appeared in *Human Rights Quarterly*.

Robert K. Hitchcock is a professor of anthropology and geography and the coordinator of African studies at the University of Nebraska–Lincoln. He works on human rights among indigenous peoples, primarily in Africa. His recent publications include a book, *Kalahari Communities: Bushmen and the Politics of the Environment in Southern Africa* and two coedited volumes: *Hunter-Gatherers and the Modern State: Conflict, Resistance, and Self-Determination* and *Endangered Peoples of Africa and the Middle East: Struggles to Survive and Thrive*. He is working on a monograph, "Organizing to Survive: Indigenous Peoples' Political and Human Rights Struggles."

Patrice C. McMahon is an assistant professor of political science at the University of Nebraska–Lincoln. She works on international relations, ethnic conflict, democratization, and women's rights. She has published articles on international involvement in Bosnia, democracy promotion in postcommunist countries, and women's NGOs in Poland, Russia, and Hungary.

Mahmood Monshipouri is chair and professor of political science at Quinnipiac University. Among his recent publications is *Islamism, Secularism, and Human Rights in the Middle East*. His most recent articles have appeared in *Yale Human Rights and Development Law Journal*, *Human Rights Quarterly*, and *Journal of Church and State*. He also directs the International Studies Program at Quinnipiac University and is the executive director of the Center for Iranian Research and Analysis.

Corinne Packer is a researcher at the Netherlands Institute of Human Rights, University of Utrecht, the Netherlands. She is the author of *The Right to Reproductive Choice: A Study in International Law* and has published articles on, among other topics, rights relating to sex education and family planning for children and adolescents. Most recently she has written on the new African Union and its Constitutive Act (*American Journal of International Law*) and a book, *Using Human Rights to Change Tradition*.

Ilan Peleg is the Charles A. Dana Professor of Government and Law at Lafayette College in Easton, Pennsylvania. He is the author of *Human Rights in the West Bank and Gaza: Legacy and Politics*, which received the Choice Award for Outstanding Scholarly Book in 1996, and a coeditor of *Negotiating Culture and Human Rights*. He has also written two other books and over seventy scholarly essays. Dr. Peleg is the editor of *Israel Studies Forum: An Interdisciplinary Journal* and is a frequent lecturer on the Middle East and American foreign policy.

Steven C. Poe is currently a professor of political science and director of the Peace Studies Program at the University of North Texas. Previously he taught at William Penn College in Oskaloosa, Iowa. His research on human rights–related topics has been published in *American Journal of Political Science*, *International Studies Quarterly*, *Human Rights Quarterly*, *Journal of Peace Research*, *American Political Science Review*, and in other scholarly journals and edited volumes.

David L. Richards is an assistant professor of political science at Missouri Southern State College. His research on government respect for human rights, economic and information globalization, and comparative political institutions has appeared in such journals as *International Studies Quarterly*, *Journal of Peace Research*, and *Social Science Quarterly* as well as in several edited books.

Emile Sahliyeh is an associate professor of Middle East politics and international relations in the Department of Political Science at the University of North Texas. He is the director of the international studies major. In addition to more than thirty articles and book chapters, Dr. Sahliyeh is the author of *The PLO after the Lebanon War*, *In Search of Leadership: West Bank Politics since 1967*, and *Religious Resurgence and Politics in the Contemporary World*. He is presently completing a manuscript, "The Predicament of Democracy in the Arab World."

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