

NAM YEARBOOK ON HUMAN RIGHTS AND CULTURAL DIVERSITY

Volume 1 - 2012

CULTURES IN SUPPORT OF HUMANITY

Edited by:
Kamran Hashemi and Linda Briskman



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Hashemi, Kamran and Briskman, Linda (Editors)

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About The Non-aligned Movement Center for Human Rights and Cultural Diversity (NAMCHRCDD)

The Non-aligned Movement Center for Human Rights and Cultural Diversity (NAMCHRCDD) is an outcome of the Non-aligned Movement Ministerial Meeting on Human Rights and Cultural Diversity, held on September 3-4, 2007, in Tehran. In the final document of the meeting, entitled "the Tehran Declaration and Plan of Action", the Member States decided to establish the Center in Iran.

Taking into consideration the virtues of historical traditions and the values of all civilization and cultures around the world, the Center as an educational- research institution provides scientific analysis and promotes discourse in global human rights and cultural diversity issues. Under the heading "Unifying Diverse Cultures towards the Enrichment of the Universality of Human Rights", the main function of the Center is to prepare a platform for the exchange of knowledge, good practices, general reflections, and to have intensive debate in order to contribute to the advancement of human rights, with a special focus on the common human rights challenges that developing countries encounter.

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Introduction

Kamran Hashemi & Linda Briskman

The Non-Aligned Movement Center for Human Rights and Cultural Diversity (NAMCHRCDD) is an outcome of the Non-Aligned Movement (NAM) Ministerial Meeting on Human Rights and Cultural Diversity, held on September 3-4, 2007, in Tehran. In the final document of the meeting, entitled "the Tehran Declaration and Plan of Action", the Member States decided to establish the Center in Iran.

The relation between cultural diversity and human rights has been an issue of long-standing debate among human rights scholars, policy-makers and advocates. Human rights and cultural diversity are intertwined; full respect for human rights creates an enabling environment for guaranteeing cultural diversity. Cultural diversity can be guaranteed only if human rights and fundamental freedoms are protected. Conversely, an environment conducive to cultural diversity will contribute in a significant manner to the full respect of human rights and universal humanitarian values. Among many different related matters, the way cultures contribute to the enrichment of the concept of human rights in a normative and practical manner, in order to achieve wider enjoyment of human rights, requires further exploration.

Taking into consideration the virtues of historical traditions and the values of all civilizations and cultures around the world, the Center as an educational research institution provides scientific analysis and promotes discourse in global human rights and cultural diversity issues. Under the heading "Unifying Diverse Cultures towards the Enrichment of the Universality of Human Rights", the main function of the Center is to prepare a platform for the exchange of knowledge, good practices, general reflections, and to have intensive debate in order to contribute to the advancement of human rights, with a special focus on the common human rights challenges that developing countries encounter.

In line with its objectives, the Center during the year 2011 held three successful international academic events in cooperation with some prestigious academic institutions and with the participation of more than 600 attendees (more than 100 speakers and more than 500 participants) from more than 30 countries. The first event was a summer school on human rights and cultural diversity, held in June. Two other bigger events were held in November: a conference on International Humanitarian Law entitled "Protection of Civilians" and the first conference on human rights and cultures, entitled "Cultures in Support of Humanity".

We mention the three most impressive features of the events here. First, in organizing these programs the Center hugely benefited from the kind and generous cooperation and partnership of several organizations and institutions, as well as renowned figures and scholars who devoted their invaluable time and work for the success and enrichment of the events.

The second was the incredible diversity of opinions raised by the speakers as well as the challenging comments and questions raised by the participants during all of the sessions, which enlivened and enriched the events. Another beautiful feature of the events was the

consideration and voluntarily cooperation of friendly young participants, who were available everywhere for help. They have already established a network to keep in contact with and support the Center.

In September 2012 the NAM Summit will be held in Tehran and we do hope that the Center, as the only human rights body associated with the NAM, will contribute to the success of the Summit and in this line the Centre is honored to launch a digital volume of its first year book, entitled : " NAM Yearbook on Human Rights and Cultural Diversity". The volume contains 28 selected papers submitted to the three above mentioned academic events and is divided into the themes of: Cultural Diversity and Constructions of Human Rights; Islamic Culture and Human Rights; Responses to Conflict Situations; Traditional Knowledge and Human Rights; Contemporary issues; and Country Case Studies. However, one of the strengths of the collection is the interlocking of themes that is apparent in many of the papers. An overview of the contents follows.

Cultural Diversity and Constructions of Human Rights

In advancing theoretical understandings and debates on universalism and cultural relativism, Louis E. Wolcher refers to the UNESCO Universal Declaration on Cultural Diversity that implies that the 'universal' is more precious than the 'diverse'. He refers to the liberal preference for individual rights and asks how it can be reconciled with the 'illiberalism' that may be necessary for cultural self-preservation. Wolcher contends that to advance debates it is necessary to examine concrete cases that are likely to disrupt the unity of the normative field. If the international law of human rights counts the human family as one, then the notion of cultural differences reconstitutes this one into many.

Michele Brunelli provides a theoretical analysis of the question of universal and inalienable rights that rises above cultural traditions of groups. We are taken through the journey of the decrees of history that eventually resulted in the transition to transcultural precepts of rights that sanctioned the universality of rights in modern day declarations. He raises some problematic questions arising from this.

Next, Camilo Pérez-Bustillo turns to grassroots movements in Latin America that construct alternative counter-hegemonic paradigms of human rights as a way of addressing tensions. He discusses his ideas through the lens of people movements of groups excluded from full recognition of their rights, with particular attention to Indigenous peoples. He asserts that contemporary efforts to develop counter-hegemonic paradigms of global justice and human rights must include an examination of previous struggles and needs that remain unmet.

Despite the fact that the rights of minorities are generally more insecure than those of the majorities, Riaz Ahmad argues that global endeavors inspire some hope for a 'dignified human existence'. Taking us through theoretical discussion, international norms and the post-colonial case study of India, the author advocates the importance of the global movement for minority rights while recognizing the limitations relating to specific contexts.

Islamic Culture and Human Rights

Kamran Hashemi examines the extent to which Islam might contribute to the internal promotion and protection of human rights. He refers to the approach in the developing world of 'cultural-religious oriented approach' as a way towards human rights fulfillment. The paper surveys traditional Muslim law and its relevance to the concept of rights. The author points out that the both the OIC and the Arab League, the

largest intergovernmental organizations comprised of Muslim states, avoid referring to controversial or ambiguous areas between religious traditions and human rights.

Hajar Azari and Abdollah Bagheri refer to how in Islam, wisdom or intellect is one of the greatest gifts that humankind can enjoy although scholars have different views on its place in Islamic law. Particular attention is given to the question of protection of women victims' rights in the context of the Islamic legal system where, the authors assert, that applying the ability of intellect to protect the rights of women victims is an important method to guarantee their rights.

The paper by Morteza Yusefi Rad claims that International Humanitarian Law in Islam enjoys a strong basis and stability, arising from both theoretical and practical principles of Islam. In the chapter we are led through a series of theoretical and practical Islamic principles that reach the conclusion that the principles of humanitarian law in Islam, which are applied to all of humankind in wartime, not only enjoy an innate and conscience-based approval but are also supported religiously.

Mykhaylo Yakubovych explains how an exegetical tradition (*tafsir*) still plays an important role in Islamic religious outlook. Based on a study of Arabic texts, he points to the mutual influence of modernity and Islamic religious tradition. He shows how Islamic culture benefits through *tafsir* relations between modern law principles and Quranic teachings, as a way of enriching cultural experiences in order to serve humanity.

The topic of freedom of religion as a human right occurs in both the Western world and in Muslim communities. Jointly, Valeollah Ansari and Abdollah Bagheri conducted a comparison on freedom of religion between Islamic laws and international law. They concluded that after

studying Islamic principles that came centuries before the Universal Declaration of Human Rights, Islam explicitly addresses the principle of freedom of religion and prohibited every type of compulsion and coercion in religion.

Responses to Conflict Situations

A contribution by Michel Veuthey advocates the importance of International Humanitarian Law. He outlines the different ways in which humanitarian law can be expressed and argues that, by its very nature, humanitarian law aims through acts of humanity, to preserve the survival of humankind, to ensure that 'civilized' life is still possible and to maintain the conditions for a return to peace. He presents the role of humanitarian law in restoring peace as opening the possibility of dialogue and addressing specific humanitarian problems.

Issa Ahmadabadi states that as we got closer to the twentieth century the 'just war theory' became more diluted. With the realization that conflicts and wars have always been present, attempts have been made to regulate wars and armed conflicts through rules that order or avoid inhuman acts of hostility. Using an Islamic framework, areas of international documents are analyzed including children, women, the elderly, the infirm, and medical personnel, concluding that although war is permitted in some circumstances, targeting those who are not involved is against the Shariah and prohibited.

The field of transitional justice is interrogated by Thomas Obel Hansen, who asserts that there is a need to update aspects of transitional justice theory, a field that emerged around what is described as the third wave of democratization. In arguing for a more nuanced approach that goes beyond the sole normative framework of liberalization and democratization as the end product of transitional justice, the paper

argues for a differentiated normative framework. Illustrative examples are presented to distinguish between modes transitional justice in different contexts.

Traditional Knowledge and Human Rights

Using a starting point that traditional knowledge is the cornerstone of the cultures of Indigenous peoples and local communities, Hassan Soleimani explores the contemporary question of intellectual property protection, referring to instruments and forums that advance this discussion. In doing so, the paper suggests that current international arrangements on intellectual property do not provide sufficient protections for the traditional knowledge holder from abuse by others.

By exploring Vietnam's traditional values, Nghia Hoang Van demonstrates how ancient traditions can inform the development of human rights. She points out that traditional Vietnamese culture incorporated the ideas of human rights that are enshrined in international instruments. The arguments are advanced by tracing history and values from the 10th century onwards, differentiating between the traditions, and emphasizing the specific contribution of Confucianism to shaping modern Vietnam and the evolution of universal human rights.

Ways in which the rights of Indigenous peoples to their cultural heritage and practices have been denied, are outlined by Linda Briskman. She highlights the issue of the forcible removal of Indigenous children from their families and communities that occurred in Australia and other nations. To illustrate that practices aimed at removing the rights to culture are systemic, she examines themes apparent in two further examples of asylum seekers and Gypsies and Travelers.

From an anthropological perspective, Firouz Gaini explores the question of the cultural rights of children as part of a larger debate on the universality of human rights. By comparing empirical data from different parts of the world, the paper focuses on the consequences for children of human rights violations that impact on culture. The author posits that the best way to protect cultural diversity is by defending children with cultural rights as a shield against culturally homogenizing processes of globalization. Children's rights are about cultural emancipation and the elimination of ethnic discrimination that afflicts many children.

Contemporary Issues

The paper by Su-ming Khoo explores a capabilities approach and its potential contribution to the ground beyond the Universalism and Cultural Relativism debate, which has dominated the conversation about culture and human rights. Drawing on extensive literature sources, she examines the prospects and limits of the work of capability theorists in forging the connection between education and capability. She explores in depth the merging of the human rights and the capabilities approach.

Taking an innovative approach, Soumitra Subinaya uses her paper to provide a platform for people in India whose voices have been suppressed. Applying the concept of empowerment through legal literacy she presents three case studies from Orissa – tribal people, transgender people and women. She suggests that a more human rights friendly and humanitarian concept of justice is enabling people to realize their freedom through accountable and transparent modes of economic liberty delivery, with legal literacy as an enabler of justice and freedom.

Jakub Kryś draws on examples from a number of countries to explore the question of the meaning of multiculturalism and the challenges that confront the notion, with some voices proclaiming that multiculturalism cannot co-exist with fundamental individual human rights. Adopting John W. Berry's framework of intercultural relations, we are led through a range of differing approaches to multiculturalism.

Samireh Ahmadi and Faraz Firouzimandi use the case study of the right to social security as an Economic, Social and Cultural Right within a social market economy. Taking us through international legal protections and historical processes, the authors turn to the question of the social market economy and its approach to questions of social justice, rights and responsibilities, solidarity and social balance. They apply their analysis to the United Kingdom over a ten-year period.

In their joint paper, Mohammad-Javad Javid and Esmat Shahmoradi explore the question of the relationship between culture and nature that they contend has been an issue of extensive debate. They argue that the invariant core within humans is their very nature, and that cultures can be universal and philanthropic as long as they are established based on human's nature and essence.

Hosein Sartipi suggests in his paper that although there has been progress in promoting human rights since the adoption of the Universal Declaration of Human Rights, many challenges remain. His paper poses many questions and debates set within the context of human security, the economy, cultural diversity and peace.

Country Case Studies

In describing human rights violations against North Indian migrants, Dadarao C. Kirtiraj speaks of the insecurity and social exclusion of a

group of in-migrants from other states in India to Pune City who move to seek better opportunities. The paper is derived from an analysis of research collected from the marginalized people discussed. Although the Indian Constitution demands non-discrimination, the research reveals that discrimination has been commonplace among this migrant group.

Presenting a challenge to individualistic Western notions of human rights, Mohd Azizuddin Mohd Sani discusses the advancement of understandings that are collectivist and focus on duties and responsibilities. It is suggested that the concept of human dignity is more appropriate to Malaysia, as it is embedded in the local communitarian culture and values in Malaysia. The contribution of Islam to the debate on human dignity in Malaysia is traced as the sources of human dignity are rooted in religious perspectives. The author uses topical examples relating to freedom of religion, moral policing, including legal rulings, and free speech, to apply the understandings.

According to Abul Bashar Mohammad Abu Noman, the Bangladesh judiciary shies away from consideration of international law in domestic courts in order to ensure that the common law system remains loyal to traditions. In arguing for more incorporation of international human rights law domestically, the author points out that although Bangladesh is little different from other common law countries there are a number of contextual factors that inhibit the adoption of international norms. He proposes ways forward for the enforcement of international human rights law in Bangladesh.

From an Indian perspective of a country with a myriad of minorities, Dinesh Kumar describes the importance of the issue of cultural identities that have also been subject to controversy. Through a summary of

historical processes and legal findings and provisions, Kumar provides evidence of the safeguards in place to protect minority interests.

The paper by Nadaraja Kannan posits that Myanmar's human rights record has been deplorable, with large sections of the population subject to great sufferings including displacement and imprisonment. He traces the movement for democratic reforms before turning to questions of a 'roadmap' for change following the 2010 elections, as well as other human rights developments that have gone alongside the transition from half a century of military rule to civilian rule. He concludes optimistically that the current is now being steered in a reform direction of democratic rule.

The low social status of women in Tajikistan is discussed by Ozoda Nurmatova and Gulbahor Jumaboeva. They trace the developments for women from the Soviet era, when women's participation increased, to the Civil War that saw a return to traditional roles. Even now, rates of education of women in rural areas are low and the authors highlight the traditional barriers inhibiting the attainment of rural females from full school education. Through interviews conducted with four young females in the region of Garm, a sensitive area in terms of tradition, religion and security, the authors present information on the barriers to the enjoyment of the right to education and active citizen engagement. They conclude with suggesting cooperation with religious leaders in order to uproot social barriers.

Cultural Diversity and Construction of Human Rights

The Problem of Unity and Diversity in International Human Rights

Louis E. Wolcher*

Abstract

Although the UNESCO Universal Declaration on Cultural Diversity declares that the defense of cultural diversity is an “ethical imperative,” it also states that “no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.” The Declaration’s fulsome praise for “good” cultural diversity is therefore hedged by a prior commitment to upholding universal human rights. What is diverse is precious, it seems to be saying, but what is universal is even more precious. This essay attempts to unpack the meaning and significance of the distinction between these points of view for the discourse and practice of international human rights. It aspires to move the discussion of cultural diversity in the sphere of human rights to a level that is deeper than that which is allowed for by the usual (and ultimately sterile) verbal opposition between “universalism” and “cultural relativity.” The goal is to clarify as much as possible the relevant points of agreement and disagreement about the nature of the inherently limited ethical imperative to tolerate and protect cultural diversity. The essay does this by reflecting on the dialectically linked concepts of unity and diversity and by investigating what it really means to say that different groups of people have different “beliefs” about what is morally and legally permissible or mandatory. The international law norms that protect human rights are, like all normative systems, expressed in general (i.e. abstract) terms. The essay contends that if one wants to discover whether differently situated people agree or disagree about the significance of these norms the right place to look is not at the words expressing the norms themselves, but at how those words are actually applied to real, concrete cases, each one of which retains the inherent potential to disrupt if not explode the unity of the normative field.

* Louis E. Wolcher is Charles I. Stone Professor of Law, University of Washington School of Law, USA.

The same person has perceptions that, for all their differences, have the same object, which leads one to infer that there are different subjects contained within one and the same person.

— Franz Kafka¹

I

Let me begin by expressing my deep gratitude to the NAM Center for Human Rights and Cultural Diversity,² and especially its Acting Director, Dr. Kamran Hashemi, for giving me the opportunity to travel to Tehran and speak to you today. The difficult times in which we live call for clear thinking and moral courage, as opposed to the mindless bluster that all too often has characterized the tone of international relations in recent years. I therefore commend the cosponsors for lending their good names and giving their public support to this *First International Conference on Human Rights and Cultures*. I am referring, of course, to the International Committee of the Red Cross, the Irish Centre for Human Rights, Curtin University's Centre for Human Rights Education, Tehran's School of International Relations, and the Iranian National Committee of Humanitarian Law.

It seems to me that this conference is grounded in a very simple, very basic ethical principle. Together with the philosopher Emmanuel Levinas, I conceive of ethics as "first philosophy."³ This means that ethics is a task that ought to take priority over all other tasks in any serious effort to question and understand the world around us. Not one of the seven

¹ Franz Kafka, *The Zürau Aphorisms*, tr. Michael Hoffmann (New York: Schocken Books 2006), 71.

² The Non-Aligned Movement Center for Human Rights and Cultural Diversity (NAMCHRCD), headquartered in Tehran, Islamic Republic of Iran.

³ Emmanuel Levinas, "Ethics as First Philosophy," in Emmanuel Levinas, *The Levinas Reader*, ed. Séan Hand, tr. Séan Hand & Michael Temple (Oxford: Blackwell, 1989), 75-87.

billion human beings currently living on this earth has ever really inhabited an *individual* world. Each one of us is always surrounded by *our world* – a joint venture, so to speak, among morally equal individuals. At its most fundamental level ethics involves the ever-urgent problem of how the ethical subject, in every case a “me-myself”, will reconcile his or her right to exist with the equally valid and imperative right to exist of the Other. At bottom, ethics poses that most important of all moral questions. Surprisingly enough, that question is not *what should I do?* but rather: *Who am I in relation to the Other?* Understood properly, this reconciliation between self and Other is a mutual project and process: without sustained, open and respectful international dialogue about what unites us as individual human beings *and* about what separates us as unique products of our many different cultures there can be no hope for peace and justice in the world.

Personally I would go even further and say that there is no such thing as a just peace that does not emerge from the kind of dialogue that remains utterly peaceful from beginning to end. Any peace between peoples that is achieved on the basis of violence or the threat of violence, however remote the realization of that threat might be, is self-contradictory and *a priori* unjust. Like the deceptively named *Pax Romani* of the ancients, such a peace always reenacts yet another transitory moment in the seemingly endless dialectic of violence and counter-violence that has characterized all of recorded human history up to the present age.⁴ As Pascal said, the individualistic cry “this is my place in the sun,” however good and necessary it may be to sustain the existence and dignity of the individual, is at the same time also “the beginning and the image of the usurpation of all the earth.”⁵ If the hope for a just peace on the basis of the radically *peaceful* sort of justice I

⁴ Cf. Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz, tr. Edmund Jephcott (New York: Schocken Books, 1978), 300.

⁵ Blaise Pascal, “Pensées,” tr. W.F. Trotter, in Blaise Pascal, *Pensées and the Provincial Letters* (New York: Modern Library, 1941), 1-321, at 102 (No. 295).

have in mind (perhaps naively) were ever to die out completely, then I fear that Immanuel Kant's stern warning about what would happen if justice itself died will have been proven right after all: in that unhappy event there would no longer be any value in human beings living on the earth.⁶

II

In what follows I intend to think very carefully about the difficult and ambiguous relationship between the idea of cultural diversity and the idea of universal human rights. The official theme of this conference, "Cultures in Support of Humanity," contains within it three distinct terms: the plural noun *cultures*, the singular noun *humanity*, and the participial phrase *in support of*. The word "cultures" implies a *plurality* of different and diverse things; the word "humanity" indicates the *unity* of something that always remains the same as itself; and the words "in support of" imply that the one can or should help to advance the goals of the other. This arrangement of terms harmonizes with the spirit of UNESCO's *Universal Declaration on Cultural Diversity*, which is ten years old this month. The Declaration's official website summarizes that spirit well when it says that "cultural diversity is a 'common heritage of mankind' and ... its safeguarding [is] a concrete and ethical imperative, inseparable from respect for human dignity."⁷ Article 2 of the Declaration uses the term "cultural pluralism" to name this ethical imperative, and I take it that the organizers of this conference had something like this in mind when they came up with the title "Cultures in Support of Humanity."

⁶ Immanuel Kant, "The Metaphysics of Morals," in Immanuel Kant, *Practical Philosophy*, ed. and tr. Mary Gregor (Cambridge: Cambridge University Press, 1996), 353-603, at 473.

⁷http://portal.unesco.org/culture/en/ev.php-URL_ID=35232&URL_DO=DO_TOPIC&URL_SECTION=201.html

My remarks to you today will attempt to unpack the meaning and significance of the conference's organizing concepts for the discourse and practice of international human rights. I hope to move the discussion of cultural diversity in the sphere of human rights to a deeper level than that which is allowed for by the usual (and in my view sterile) verbal opposition between "universalism" and "cultural relativity." As I see it, the most fundamental question in this sphere is not how a liberal preference for individual human rights can be reconciled with the illiberalism that is often necessary to achieve cultural self-preservation. It is, rather, the problem of how the entities called "the individual" and "culture" are constituted (or co-constituted) in the form of *unities* that are worth protecting and preserving in the first place. What I hope to uncover is not particularly complicated. This does not make it easy to see or understand, however. Often the simplest insights are the hardest to achieve, owing to the extreme difficulty of thinking about what we usually take for granted, as well as to the fact that any language we might use to converse with one another contains within it many obscure sediments from the past that remain unacknowledged or unrecognized.

Take the origin of the word "diversity" itself. Article 1 of the UNESCO Declaration makes diversity sound like something noble and good, "as necessary for humankind as biodiversity is for nature." But in Old French the noun *diversité*, from which the English word is derived, also signified the quality of "oddness, wickedness, and perversity." The negative connotation of this medieval word for diversity existed in English from the late fifteenth century, when diversity began to mean "contrary to what is agreeable or right; perversity, evil." The archaic notion that diversity is something unpleasant (or worse) is fully in keeping with the concept's

Latin root, *diversitatem*, which signifies “contrariness, contradiction, [and] disagreement.”⁸

This brief etymological survey reinforces the need for us to be brutally honest with one another about the troubling ambiguities surrounding the project of respect for cultural diversity. Throughout most of human history readily noticeable physiological, linguistic and/or behavioral differences amongst members of the species *homo sapiens* have been interpreted in ways that are much less charitable towards diversity than UNESCO’s Declaration is. In fact, “diversity” has usually signified something good and fortunate for US (i.e. *our* group) and bad and unfortunate for THEM (i.e. *their* group). Normatively speaking, THEY were traditionally excluded from the concept of justice, that is, from the sphere of those beings whose treatment could rightly be called *either* just or unjust. At the same time, THEIR exclusion accomplished the inclusion of US as the only proper subjects of legal and moral rights. One of US might *choose* to treat one of THEM with respect, but as Aristotle put it, this would only be a sort of justice “by analogy”⁹ or “metaphorically”¹⁰ – a matter of OUR discretion rather than THEIR right. All too often THEY have appeared to US in the form of what the philosopher Giorgio Agamben calls “bare life” – living beings that WE can notice or ignore, kill or let live, without incurring culpability.¹¹

The 1948 *Universal Declaration of Human Rights* was supposed to put an end, at least in part, to this way of thinking and dealing with the THEM of the world. Now for the first time everyone on earth was supposed to be the subject of a limited kind of universal justice solely by virtue of the fact

⁸ See http://www.etymonline.com/index.php?allowed_in_frame=0&search=diversity&searchmode=none.

⁹ 1134^a (referring to relations between free and equal citizens of the *polis* and those who are not free and equal to them).

¹⁰ 1138^b (referring to relations between master and servant and husband and wife).

¹¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, tr. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), p. 83.

that he or she is a “member of the human family,” as the Declaration’s Preamble puts it. But human languages are like tar: their past usages persist in sticking to our fingers no matter how hard we try to shake them off. Thus, even the word “human” resonates with the sort of exclusivity that the U.N. Declaration and all subsequent human rights instruments have aspired to overcome. The point is not just that this word distinguishes human life from animal life in a way that might be (and has been) seriously questioned from an ethical standpoint.¹² I mean in addition that the word “human” has a dubious history even if the focus of one’s moral concern is limited to our own species.

As my friend and colleague Professor Costas Douzinas has observed, the word *humanitas* appeared for the first time in the Roman Republic as a translation of *paideia*, the Greek word for education and cultivation.¹³ But of course no one would say that the haughty Romans recognized all people on earth as equally educated and cultivated – far from it. The Latin word for human being is *homo*, not *humanus*. The concept of “humanity” in its original Roman form was based on the juridical and moral distinction, drawn by Stoic philosophy, between two different types of people: *homo humanus* and *homo barbarus* – the civilized, educated and fully human man of rights (US) as opposed to the uneducated, uncivilized, and therefore non-“human” barbarian (THEM).¹⁴ In their world the idea of US meant exclusively the educated and virtue-loving Roman citizen, a divisive usage that was resurrected in the fourteenth and fifteenth centuries during the Italian Renaissance. This so-called “rebirth” of knowledge and art called itself the *renascentia romanitatis*, and notwithstanding its undeniable excellence, renaissance

¹² See, e.g., Jacques Derrida, *The Animal That Therefore I Am*, ed. Marie-Louis Mallet, tr. David Wills (New York: Fordham University Press, 2008), 26-27.

¹³ Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), 186.

¹⁴ *Id.*

thought continued to draw a firm distinction between *homo romanus* and *homo barbarus*.¹⁵

This abbreviated history of the word “human” casts new light on some of the most important language used in the *Universal Declaration of Human Rights*. In particular, it shows that when the Declaration recognizes the “inherent dignity and ... the equal and inalienable rights of *all members of the human family*” (emphasis added), it does not make a moral and legal claim about a preexisting empirical entity called “all members of the human family.” Rather, it endeavors to officially *constitute* “all members of the human family” as a juridical entity for the first time since the eighteenth century, when the French *Déclaration des droits de l'Homme et du citoyen* had attempted (with little success, as Hannah Arendt reminds us)¹⁶ to elevate the “Rights of Man” to a level that was at least somewhat commensurate with the “Rights of the Citizen.”

III

If the international law of human rights counts the human family as one, then the notion of “cultural differences” reconstitutes this one into many. The Preamble of the UNESCO Declaration defines culture as “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and ... it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.” Seen from the inside by its individual members, such a distinct society or social group shows itself as an US whose existence is co-constituted by the recognition that it is different from other societies and

¹⁵ Martin Heidegger, “Letter on ‘Humanism’”, in Martin Heidegger, *Pathmarks*, ed. William McNeill, tr. Frank Capuzzi (Cambridge: Cambridge University Press, 1998), 239-76, at 244.

¹⁶ Hannah Arendt, *The Origins of Totalitarianism* (New ork: Schocken Books, 2004), 369-84.

groups considered not-US. There is an important sense in which a culture cannot be itself – that is, a distinct, self-aware human culture – unless and until it comes into decisive contact with other, different cultures. Consider an example drawn from the history of my own country. Until Europeans began to arrive *en masse* on the North American continent there were no “Indians,” no “Native Americans.” There were only people who thought of themselves as Mohawk, Arapaho, Lakota Sioux, Cheyenne, and so forth. The very idea of an indigenous “native people” (in the singular) in North America could only arise after white settlers began to intrude on local cultures (plural) that had always before thought of themselves as essentially different from their foes and neighbors in other tribes. Unity and diversity are not just logical correlates: they are also parasitic on one another at the level of their substantive content.

If we do not take too distant a view of day-to-day experience, the truth is that we drift through our lives most of the time without ever taking *explicit* notice of many (or even any) of the historically contingent features of our social environment that have gone into making it what it is. Martin Heidegger famously called this phenomenal oblivion to what counts as a state of normalcy in everyday life *Geworfenheit*, or “thrownness.”¹⁷ Within the comfort of our own social environments most of us are able to swim around thoughtlessly like fish, so to speak, inside the particular community aquarium that history and culture have constructed for us. If we *do* happen to notice a “unique” aspect of our own culture, this is usually because we have become consciously aware of something in it that contrasts with analogous features of other cultures, past or present. I will confess, for example, that I never really explicitly thought about the fact that I spoon sugar into my tea *before* drinking it until the first time I came to Iran and saw what was, for me, the

¹⁷ See Martin Heidegger, *Being and Time*, tr. John Macquarrie & Edward Robinson (New York: Harper & Row, 1962), 174.

remarkable sight of people drinking tea through lumps of sugar held between their teeth.

What is diverse must first see itself as unified, must first constitute itself as *itself*, before it can recognize itself as different from something else. But what is itself in this way can only be unified if it takes the form of what Hegel called “self-relating negativity”: that is, if it reflects itself back onto itself as a unity that stands opposed to something else that it is not.¹⁸ The idea of absolute unity, the ancient dream of Western philosophy since Parmenides,¹⁹ is no more intelligible than the idea of absolute difference. To be recognized and understood as something unique, every THIS requires a contrast: it needs to stand opposed to at least one THAT that it is not.²⁰ On the other hand, the idea of absolute diversity is equally unintelligible. When Heraclitus said, “The sun is not only new each day but forever continuously new,”²¹ he quite literally did not know what he was talking *about*. That is because nothing can be called *continuously* different from itself unless it is first of all called itself, however momentary and transient its self-identity might be. Unity and diversity are not like an apple and an orange – they do not offer two different material possibilities between which one could choose once and for all, thereafter discarding what remains as personally unpalatable. Unity and diversity are more like opposite ends of a single measuring stick: you can’t have one without the other.

¹⁸ G.W.F. Hegel, *Hegel’s Logic*, tr. William Wallace (Oxford: Clarendon Press, 1975), 168.

¹⁹ Parmenides of Elea, *Fragments*, tr. David Gallop (Toronto: University of Toronto Press, 1984), 55 (Fragment 2).

²⁰ Expressed in logical terms, a proposition that could not possibly be false is also not entitled to call itself true. This is the principle of bipolarity, according to which a propositional sign “only has a sense if it determines a possibility which the world either satisfies or not.” Hans-Johann Glock, *A Wittgenstein Dictionary* (Oxford: Blackwell, 1996), 64-65.

²¹ Heraclitus, *Fragments*, tr. T.M. Robinson (Toronto: University of Toronto Press, 1987), 13 (Fragment 6).

Ever since Hegel's day, the formal philosophical name for the strange (but I think ultimately emancipating) idea that a thing can be both itself and not itself at the very same time is "dialectics." Theodor Adorno described the essential insight of all dialectical thought, well enough for my purposes, as follows: "The name dialectics says no more ... than that objects do not go into their concepts without leaving a remainder [and] that they [eventually] come to contradict the traditional norm of adequacy."²² A simpler way to express this same point would be to say that a concept, just like every other abstraction, "does not exhaust the thing conceived."²³ It is of course true that the average person lives with a more or less automatic sense of worldly permanency, and that being in possession of this sort of automatic sensibility is probably indispensable to the conduct of ordinary life.²⁴ But a practical sensibility that allows us to navigate within reality should never be confused with reality itself, lest we come to have faith in the extremely dangerous proposition that believing a thing is so always makes it so. The real is no more identical to the conceptual than ambient noise is identical to the English words "ambient noise." The one keeps droning on and on in the background, whether or not we notice it, in a way that Levinas has called *il y a*, or "there is";²⁵ the other lingers in existence only in the highly abbreviated form of "that-which-is-recognized-as-X." The many different historical experiences of humankind converge on at least one enduring truth about social arrangements: *nothing lasts forever*. Like a liter of water poured slowly but inexorably over a little teacup, eventually the real will escape whatever conceptual container is placed beneath it.

²² Theodor Adorno, *Negative Dialectics*, tr. E.B. Ashton (London: Routledge, 1973), p. 5.

²³ *Id.* at 5.

²⁴ See Hannah Arendt, "The Aftermath of Nazi Rule: Report from Germany," in Hannah Arendt, *Essays in Understanding 1930-1954*, ed. Jerome Kohn (New York: Harcourt Brace, 1993), 248-69, at 259 ("The absence of such automatic reactions [to the social environment] is the chief element in the anxiety of maladjustment").

²⁵ Emmanuel Levinas, *On Escape*, tr. Bettina Bergo (Stanford: Stanford University Press, 2003), p. 11.

The implications of this insight for the conceptual unities that call themselves “culture,” “cultural diversity” and “the individual” are profound, as you might imagine. Take the idea that a given group of people have a culture (in the singular). It is convenient, perhaps even necessary, for cultural anthropologists to adopt this notion as a sort of Kantian regulative ideal²⁶ to govern their research. Science needs to make certain simplifying assumptions about reality in order to say anything coherent about it. But when an international human rights instrument such as the UNESCO Declaration calls for “genuine dialogue among cultures” (Article 7), the question of who *speaks* for each culture – i.e. who gets to *define* its traditions and set them in opposition to the traditions of other cultures – is left hanging in the air.

In chapter 27 of the *Essay Concerning Human Understanding*, John Locke suggests the following answer to the problem of unity and diversity: “an entity of any sort can remain the same throughout its changes provided that the changes that take place in it are characteristic of entities of that sort and are allowed for in their concept.”²⁷ Although exceedingly dry to read, Locke’s solution does offer the great advantage of bringing into the foreground the interesting notion of what a concept “allows.” It is a truism that a concept cannot allow or disallow anything unless someone first formulates it. Concepts are like the laws of the state in this respect: they cannot take effect, so to speak, until they are promulgated.²⁸ Yet everyone knows that those who

²⁶ “[T]he ideas of reason have an important function in the conduct of natural science if they are understood *regulatively*, that is, if they are taken to represent not metaphysical beings or entities whose reality is supposed to be demonstrable, but rather goals and directions of inquiry that mark out the ways in which our knowledge is to be sought for and organized.” Paul Guyer and Allen Wood, “Introduction,” in Immanuel Kant, *Critique of Pure Reason*, ed. & tr. Paul Guyer and Allen Wood (Cambridge: Cambridge University Press, 1998), pp. 1-80, at 18.

²⁷ Terence Penelhum, “Personal Identity,” in *The Encyclopedia of Philosophy*, ed. Paul Edwards (New York: Macmillan, 1967), vol. 6, 95-107, at 96.

²⁸ Cf. Martin Heidegger, *Being and Time*, tr. John Macquarrie & Edward Robinson (New York: Harper & Row, 1962), 269 (“Before Newton’s laws were discovered, they were not ‘true’; it does not follow that they were false ... To say that before Newton his laws

happen to be politically powerful within a particular social group tend to have a much louder voice than those who are not. Must we assume that the louder a voice is, the more clearly and correctly it articulates the truth to us about some monolithic unity that goes under the name "THEIR culture"? And must we also assume that the absence of any nuance or vocal dissent emanating from the politically powerless within a given group of people implies that THEIR culture really is what those who speak for it say it is?

I will return to the paradox of a culture's simultaneous unity and disunity in a little while. For now, however, permit me to give a small hint concerning what I eventually intend to make of this paradox: If cultural diversity is something precious, as I truly believe it is, then it is also the case that no human culture has ever really remained itself for very long.

IV

The process by which human beings distinguish US from THEM is not *just* a question of determining the objective facts of identity and difference, as if we were red balloons that knew we were colored red only because we had come into contact with otherwise identical balloons colored green and blue. There is also a certain degree of anthropological condescension in the process of group identification, no matter how personally free from contemptuousness a given observer may be. Judging from the historical evidence alone, any self-conscious human identity which insists on calling itself US also brings with it the *normatively* subordinated status of what it calls THEM. That this is true in the case of all

were neither true nor false, cannot signify that before him there were no such entities as have been uncovered and pointed out by those laws. Through Newton the laws became true, and with them, entities became accessible in themselves to Dasein.").

forms of racial, ethnic, national and religious chauvinism is obvious. But it also holds true even when members of a particular social group sincerely conceive of all human beings in universal terms. There are always limits to our toleration of the culturally specific behaviors of those who are not-US, no matter how widely we may throw our net of tolerance. However much it may praise cultural diversity, for example, the UNESCO Declaration shows plainly enough where it stands on the question of conflicts between cultural diversity and individual human rights: Article 4 states, unequivocally, that “[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.” It would seem that what someone takes to be a universal human right and what he or she takes to be tolerable (or even essential) under the heading “respect for cultural diversity” is necessarily conceived, in any given case, from the point of view of some “US” or other.

The explicit or implicit hierarchy established whenever WE speak about THEM (whether to praise or to reproach) can be found everywhere in the discourse of human rights. By way of illustration, consider the effort of philosopher John Rawls to distinguish between what he calls decent and indecent “hierarchical peoples.”²⁹ To illustrate the distinction, Rawls constructs (and I quote) “an imaginary decent hierarchical Muslim people” by the name of “Kazanistan.”³⁰ After describing its basic political structure (the details of which need not concern us here), he has this to say about his imaginary culture’s final normative status:

I do not hold that Kazanistan is perfectly just, but it does seem to me that such a society is decent. Moreover, even though it is only imagined, I do not think it is unreasonable that a society like Kazanistan might exist, especially since it is not without

²⁹ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 62.

³⁰ *Id.* at 64.

precedent in the real world. ... Readers might charge me with baseless utopianism, but I disagree. Rather, it seems to me that something like Kazanistan is the best we can realistically—and coherently—hope for.³¹

Who are the “we” in this last sentence? The question is not difficult to answer, for Rawls is not shy about saying why he drew the distinction in the first place. Although undoubtedly well-meaning, Rawls explicitly conceives of his distinction from the point of view of a proponent of Western liberalism for whom the most pressing political and moral task is, as he put it, “to specify how far liberal peoples are to tolerate nonliberal peoples.”³²

On the flip side of things, consider some of the distinctions contained in Dr. Saleh Hussain Al-Aayed's treatise on the rights of non-Muslims in the Islamic world.³³ Noting that Islam guarantees freedom of belief for non-Muslims, including the right to build and attend non-Muslim places of worship, Al-Aayed concedes that the case is otherwise in the special situation of the Arabian Peninsula. There *Shariah* law has been interpreted (rightly in his view) to forbid the public proclamation of any religion other than Islam.³⁴ Elsewhere Al-Aayed refers to the distinction between “People of the Book [i.e. Christians and Jews] and polytheists,”³⁵ and it seems quite clear that he does not mean that the Abrahamic religions differ from polytheistic religions in the same way that red balloons differ from blue ones. Like Rawls, he is speaking normatively in these cases about the outer limits of his respect for diversity, albeit in this case from a distinctly Islamic point of view.

³¹ *Id.* at 78.

³² *Id.* at 59.

³³ Saleh Hussain Al-Aayed, *The Rights of Non-Muslims in the Islamic World*, tr. Alexandra Alesh (Riyadh: Dar Eshbelia, 2002).

³⁴ *Id.* at 63-70.

³⁵ *Id.* at 9.

“Perspectivism” is the name for the idea, made famous by Nietzsche, that every human being’s epistemological and normative stance – whether it consists in a claim couched in terms of trans-cultural validity or a demand that cultural differences be respected – necessarily proceeds from someone’s particular point of view.³⁶ This is so even (or especially) when the claimant asserts that his or her point of view is not a point of view at all, but rather what Catherine MacKinnon has called “the standard for point-of-viewlessness.”³⁷ The great German sociologist Karl Mannheim transformed Nietzsche’s philosophical theory of perspectives into the scientific discipline that we know today under the name “sociology of knowledge.” In his seminal 1929 book *Ideology and Utopia*, Mannheim described the essential task, as well as the peculiar difficulty, of such a science as follows:

Once we recognize that all historical knowledge is relational knowledge, and can only be formulated with reference to the position of the observer, we are faced, once more, with the task of discriminating between what is true and what is false in such knowledge. The question then arises: which social standpoint *vis-à-vis* history offers the best chance for reaching an optimum of truth? In any case, at this stage the vain hope of discovering truth in a form which is independent of an historically and socially determined set of meanings will have to be given up. The problem is by no means solved when we have arrived at this conclusion, but we are, at least, in a better position to state the actual problems that arise in a more unrestricted manner.³⁸

³⁶ Friedrich Nietzsche, *The Will to Power*, ed. Walter Kaufmann, tr. Walter Kaufmann & R.J. Hollingdale (New York: Vintage Books, 1968), 149.

³⁷ Catherine MacKinnon, “Feminism, Marxism, Method, and State: Toward Feminist Jurisprudence,” *8 Signs: Women in Culture and Society* 635-38 (1983).

³⁸ Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge*, tr. Louis Wirth & Edward Shils (San Diego: Harcourt Brace Jovanovich, 1985), 79-80.

It is important to recognize that Mannheim was not the sort of crude cultural relativist who maintains that just because “everything goes” (or has gone on) in human history, therefore anything goes, morally speaking. His most important epistemological insight is far more subtle. It is just this: while knowledge seems relative because there are so many competing versions of it, each human perspective exhibits an *objective* relation between the social location of the knower and the object of knowledge.³⁹ Hence each perspective is indeed entitled to call itself “true,” or rather, to say that it provides the correct criterion for truth, albeit only from the perspective of the knower’s own particular social location.

It might seem strange that a factual truth about a simple custom such as the best way to drink tea with sugar can be both objective *and* relative at the same time – strange, I might add, without being particularly controversial. One can find the same sort of strangeness in the field of translation. In his well-known essay *The Task of the Translator*, Walter Benjamin gives the simple example of the difficulties presented in translating the German word *Brot* into French, or the French word *pain* into German. Drawing a formal distinction between the *intended object* of a word (in logical terms, the word’s “reference,” or in the case of a proper noun, its “bearer”) and the word’s *mode of intention*, Benjamin states:

The words *Brot* and *pain* ‘intend’ the same object, but the modes of this intention are not the same. It is owing to these modes that the word *Brot* means something different to a German than the word *pain* to a Frenchman, that these words are not interchangeable for them, that, in fact, they try

³⁹ *Id.* at 264-311.

to exclude each other. As to the intended object, however, the words mean the very same thing [namely, a piece of cooked dough].⁴⁰

Any sensitive observer who has ever spent more than a little time in France and Germany will be able to grasp Benjamin's point immediately. A Frenchman's total social relationship, so to speak, to bread is substantially different from a German's. To be sure, both the French and the Germans savor their bread, whereas we Americans tend merely to eat it. But they savor it in substantially different ways. Thus, to substitute *Brot* for *pain* in a German translation of, say, a French novel is to leave out the full significance and resonance that the French word for bread was meant to project to its originally intended audience. This suggests the truth of a fact that all good translators realize, namely, that the act of translation is more than a mechanical process of transliteration.⁴¹

With the possible exception of proper nouns, it is a grave philosophical mistake to think that every word must stand for what Wittgenstein called its *Bedeutungskörper*, or "meaning-body": that is, a context-transcendent, metaphysically unified entity for which different languages provide functionally equivalent linguistic signs.⁴² Properly understood, translation does not create a facsimile of the original in a different tongue – it creates a *new original* whose meaning bears a more-or-less strong relationship to what it translates without ever being wholly equivalent to it. This is because the use of language does not consist in a sort of arm's length manipulation of two external objects – linguistic signs and their meanings – but also includes or entails both what Benjamin

⁴⁰ Walter Benjamin, "The Task of the Translator," in *Illuminations: Essays and Reflections*, ed. Hannah Arendt, tr. Harry Zohn (New York: Schocken Books, 1968, 69-82, at 74.

⁴¹ See, e.g., Robert Pinsky, "Translator's Note," in *The Inferno of Dante*, tr. Robert Pinsky (New York: Farrar, Straus and Giroux, 1994), xxi-xxiv.

⁴² Wittgenstein first used the derogatory term *Bedeutungskörper* in a manuscript written in 1932-33. Ludwig Wittgenstein, *Philosophical Grammar*, ed. Rush Rhees, tr. Anthony Kenny (Oxford: Blackwell, 1974), 54.

called a “mode of intention” and what Wittgenstein called a *Lebensform*, or “form of life.”⁴³ The speaking and writing of language is in every case part of a historically contingent activity: a “Language-game” (*Sprachspiel*), as Wittgenstein so famously put it, which can be defined as *the whole* of language use in a given context, consisting of language and the actions into which it is woven.⁴⁴

V

Unfortunately, the noble idea that certain human rights are universal often brings with it the naïve belief that linguistic meaning is also universal – that the content of a right is indifferent to the language in which it is expressed. But it is one thing to say that no one on earth should be subjected to cruel, inhuman or degrading treatment or punishment, for example, and quite another thing to say that the English phrase “cruel, inhuman or degrading treatment or punishment,” like the English word “bread,” possesses the exact same mode of intention (to use Benjamin's term) as its translation into, or translation from, the words of some other language. To be sure, Article 7 of the *International Covenant on Civil and Political Rights* definitely forbids cruel, inhuman or degrading treatment or punishment; but it also states, in Article 53, that “the Chinese, English, French, Russian and Spanish texts are equally authentic” versions of its provisions. If a word like *Brot* can signify something culturally different to a German than the word *pain* signifies to a Frenchman, then it is not implausible to think that the phrases *traitements cruels inhumains ou dégradants* in French, *tratos crueles, inhumanos o degradantes* in Spanish, and *cruel, inhuman or degrading treatment* in English substantially overlap in their intended meaning

⁴³ Ludwig Wittgenstein, *Philosophical Investigations*, tr. G.E.M. Anscombe (New York: Macmillan, 1953), at 11e.

⁴⁴ *Id.* at 5e.

without being exactly equivalent in their culturally specific modes of intention.

More generally, to claim in English or in any other language that different cultures display something called “cultural diversity” does not go anywhere near deep enough. Such a claim does not penetrate to the inevitable anthropological substrate of all outward manifestations of cultural diversity, which is just this: any given observer always notices and expresses cultural differences in a culturally specific language that is *a fortiori* inadequate, at least partially, to capture what those differences actually mean to the various populations that live with them every day. *Pain* is not the exact equivalent of *Brot*; indeed, *pain* in France is probably not even the equivalent of *pain* in Haiti, just as *Brot* in Germany is probably not the equivalent of *Brot* in Austria.

Sensitivity to the ineluctable problem of translation shows that there are two kinds of cultural diversity when it comes to the creation and protection of individual human rights. The first is relatively straightforward: a nation's leaders may object to a particular human rights convention because they reject the universality of its rights as expressed in the leaders' *own language*, as the Reagan and Bush administrations did, for example, when they rejected the *International Covenant on Economic, Social and Cultural Rights* on the asserted ground that recognizing economic and social goals as rights would “lead governments to deny civil and political rights in the search for distributive justice.”⁴⁵ The second is less obvious but in many ways more important for understanding the phenomenon of cultural difference: different nations may agree with one another in good faith to adopt the linguistic signs contained in a human rights instrument, yet still proceed (again in good faith) to

⁴⁵ See David Weissbrodt, Fionnuala Ní Aoláin, Joan Fitzpatrick & Frank Newman, *International Human Rights: Law, Policy, and Process*, 4th ed. (San Francisco: LexisNexis, 2009), 158.

interpret and apply them differently owing to cultural differences contained in their hearts and reflected in their own languages.

The idea that language and truth can be both objectively correct and culturally relative at the very same time is easy to understand in the context of everyday activities like drinking tea and eating bread. As the case of the prohibition on cruel, inhuman or degrading treatment may suggest, however, this idea presents an altogether different aspect when viewed in the context of the deeply held moral values associated with the international protection of human rights. The point here is not that the concept of “truth or falsity” applies only to statements of fact, not to statements of value, or that the words “good,” “right” and “just” are indefinable.⁴⁶ The kind of cultural relativism which maintains that there is no single moral truth in the world but only different moral truths is not so much true or false as it is a category mistake. Its only claim to plausibility lies in the undeniable truth that differently situated people often really do in fact differ about the content and application of moral norms, and have done so throughout history. This implies that there is at least one limited kind of truth or falsity in the realm of what we call “moral action” that all reasonable people ought to be able to acknowledge: namely, sometimes moral differences between different groups of people exist, and sometimes they do not exist.

For example, it is surely a *fact* that very many people in the world today say and believe, with complete sincerity, that cutting off someone's hand as a punishment for theft is both morally wrong and a legal violation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁴⁷ But at the same time candor requires us also to admit that many *other* people in the world say and

⁴⁶ See G.E. Moore, *Principia Ethica*, rev. ed. (Cambridge: Cambridge University Press, 1993), 61-62 (discussing the “naturalistic fallacy” in ethics).

⁴⁷ See Human Rights Committee, Summary Record of the 1196th Meeting, U.N. Doc. CCPR/C/SR.1196 (1993), at 11-14.

believe, with equal sincerity, that this punishment is not only legally right⁴⁸ but also morally mandatory,⁴⁹ and furthermore, that its enforcement is not a violation of the Convention.⁵⁰ To say truthfully that different groups of people just happen to say and believe different things about morality and law is first and foremost to state a *fact*. This sort of fact belongs to the subject matter studied by descriptive ethics and comparative jurisprudence. But in itself this fact, just like any other fact, is neither right nor wrong, neither good nor bad. Rather, it expresses what Wittgenstein called the merely “trivial or relative sense” of our judgments about right and wrong,⁵¹ and not the deeper sense that is involved whenever we stop objectively reporting on other people’s beliefs and actions and begin to evaluate them for consistency with what we think they *ought* to be.

The deeper sense of morality to which I refer will have been experienced by anyone who has ever disapproved of what someone else did on the ground that they really ought not to have done it. Which is to say: it has been experienced by pretty much everyone who has ever lived. While perspectivism may be useful as a regulative ideal for sociological research, this idea completely fails to capture the virtually *universal* feeling of disapproval and even outrage that characterizes the concrete phenomenology of making negative moral judgments. The philosopher O.K. Bouwsma describes a conversation he had with Wittgenstein about

⁴⁸ Amputation is imposed for what Islamic law calls a *hudud* crime, or one for which the Quran itself specifies the penalty. See Nadar Entessar, “Criminal Law and the Legal System in the Revolutionary Iran,” 8 *Boston College Third World Law Journal* 91, 96-98 (1988).

⁴⁹ Cf. *Qur’ān* 24:2 (“As to the thief, Male or Female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is exalted in power.”).

⁵⁰ See Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Second Periodic Reports of States Parties Due in 1983. Addendum, Islamic Republic of Iran, U.N. Doc. CCPR/C/28/Add.15 (1992), at 1-2, 18-19.

⁵¹ Ludwig Wittgenstein, “A Lecture on Ethics,” in Ludwig Wittgenstein, *Philosophical Occasions 1912-1951*, ed. James Klagge & Alfred Nordmann (Indianapolis: Hackett Publishing, 1993), 36-44, at 38.

the translation of morally-charged language that illustrates this point rather well:

Imagine a [group of human beings] who when they viewed things that were horrible, loathsome to us, clapped their hands, their faces bright, and now they always uttered the word "doog." And now you are to translate the word "doog." How will you translate it? Will you hesitate about this? Wittgenstein was trying to bring out the unsatisfactory character of "I approve." [This group] apparently approves. Will "good" do? I suppose that this involves that the use of the word "good" is affected in some such way as this: That ... the use of the word 'good' comes to serve also in naming things that are good. One might be horrified not simply at people's regarding such things good but also at their calling them good. ... If we were to translate "doog" into "good," we should be suggesting not simply that they approve of certain things but also that these things are justified by our law. ... The use of the word "good" is too complicated. Definition is out of the question.⁵²

Notice what this passage does *not* say. It does not say that the definition of the word "good" is out of the question because there are many different conceptions of goodness and none of them can be shown to be absolutely correct (the claim of vulgar cultural relativism). It says, rather, that the word "good" brings with it *feelings* on the observer's part that make it morally unsuitable as a translation in this context.

Human rights norms purport to state what ought to be, not what is. They consist of general rules to be applied now and in the future, not

⁵² O.K. Bouwsma, *Ludwig Wittgenstein: Conversations 1949-1951*, ed. J.L. Craft & Ronald Hustwit (Indianapolis: Hackett, 1986), 42.

statements of fact about something empirical that has already occurred. It is a basic axiom of legal theory that a general rule as such should never be confused with its application to a particular case. The one is supposed to govern the other, not be it. As Hans Kelsen put it, "it is a function of the will to arrive at the individual norm in the process of applying a statute."⁵³ The will of the person who applies the norm in any given case creates a necessary ontological bridge between the expression of the norm and the facts, for as H.L.A. Hart said: "Particular fact-situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances."⁵⁴ The rules that express human rights norms are either applied by individual human beings to unique, unrepeatable situations, or else they are not applied at all.

The same holds true for interpretations. Interpretation is not, strictly speaking, an act of cognition but rather an act of creation, inasmuch as it adds words to a text that were not actually there before it added them. Nor is the interpretation of a norm the same kind of thing as its application to a particular case. The logical form of an interpretation is: "'X' means Y"; whereas that of an application is: "A's right to X was violated on such-and-such a date." The formal interpretation of a human rights norm can no more apply *itself* to future cases than can the expression of the original norm. "[A]ny interpretation still hangs in the air along with what it interprets," said Wittgenstein,⁵⁵ meaning quite simply that it always requires a concrete, historically tensed human action to bring the words of *any* legal or moral rule – or rule-interpretation – down to earth in the form of this or that particular application. To understand a rule is to know how to apply it, to be the master of a technique; and the

⁵³ Hans Kelsen, *Introduction to the Problems of Legal Theory*, tr. Bonnie Litschewski Paulson & Stanley Paulson (Oxford: Clarendon Press, 1992), 83.

⁵⁴ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 123.

⁵⁵ Wittgenstein, *supra* note 43, at 80e.

technique itself is not a function of some ephemeral metaphysical entity called “meaning,” but rather a function of particular human *customs*, as Wittgenstein puts it – particular historical “uses and institutions.”⁵⁶

The idea that the same human rights norm might be understood and applied differently by different cultures (i.e. in different language-games) was well understood by the framers of the *Universal Declaration of Human Rights*. As Professor Mary Ann Glendon notes, René Cassin, who was one of the Declaration’s principal architects, understood that “a ‘universal’ document would have to leave an ample degree of pluralism in the understanding an implementation of many of its rights”; hence, he stated, “it is not necessary for one conception to triumph over another conception” in framing every right.⁵⁷ Professor Glendon uses similar terms to describe the general intent of the members of the drafting committee in May of 1948, as they went about the task of putting the Universal Declaration into its final form:

They were striving now to make the document clear enough to be readily understandable by men and women everywhere, as well as to achieve a level of generality that would leave each country and culture an appropriate degree of flexibility in interpreting and implementing its provisions.⁵⁸

It would seem that the words of the *Universal Declaration of Human Rights* were not intended to be completely “universal” where it might matter the most to the real individuals whose rights were being specified: namely, at the level of how those words would actually be applied to them in the future. After all, the U.N. was not going to make the judges

⁵⁶ *Id.* at 81e.

⁵⁷ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 69.

⁵⁸ *Id.* at 111.

and politicians of the world's many states attend a single cram course where they would all be drilled for months or years in the one, monolithically correct method of applying the Declaration's many general terms – terms such as “cruel, inhuman or degrading treatment or punishment” (Article 5) and “freedom of opinion and expression” (Article 19). The U.N. did not embark on this sort of massive indoctrination project in 1948, nor has it done so since. The interesting question remains, however, whether it should have gone beyond obtaining universal agreement to the *linguistic signs* in the Declaration in order to accomplish something that would have been much more radical: universal consensus about their *methods of application*.

VI

What offers to connect linguistic signs to reality is our using them according to certain grammatical conventions, or “methods of projection,” as Wittgenstein puts it.⁵⁹ If two groups of people adopt a single rule-expression, such as “Always drink tea with sugar,” but then employ two different methods of applying the rule (for example, one group dissolves sugar in tea before drinking it and the other drinks tea through a cube of sugar held between the teeth) then clarity would be better served if we thought of them as following, not one rule, but two different rules. Yet, as Glendon says, “The problem of what universality might mean in a multicultural world haunted the United Nations human rights project from the beginning.”⁶⁰

And so it has. But I do not think that being haunted is necessarily a bad thing, for not all spirits are evil. In this particular case I think that it is

⁵⁹ Ludwig Wittgenstein, *The Blue and Brown Books*, 2d ed. (New York: Harper & Row, 1960), 53.

⁶⁰ *Id.* at 221.

actually good for human beings that the discourses of unity and diversity keep on haunting one another, so to speak, in the sphere of human rights. If “cultural diversity” purports to name the overarching unity of each different culture that is gathered together under its concept, then I would say that it is constantly being contradicted by the radical diversity that is displayed *within* each so-called culture. Individuals look to their culture to reassure themselves that their world is grounded in something solid and enduring. But at the same time, culture amounts to nothing at all unless some (or many) individuals, by choice or by habit, keep on reproducing it. To paraphrase Michel Foucault, the individual which culture has constituted is at the same time also its vehicle.⁶¹

Among other things, this implies that the constant unity of culture is logically and empirically dependent on the constant unity of the individuals that reproduce it. Listen to Nietzsche on the origin, the pragmatic utility, and the ultimate ontological insecurity of what human beings take to be unified in everyday life:

We need “unities” in order to be able to reckon: that does not mean we must suppose that such unities exist. We have borrowed the concept of unity from our “ego” concept – our oldest article of faith. If we did not hold ourselves to be unities, we would never have formed the concept “thing.”⁶²

If the unity of culture is a thing, then it must be counted as a particularly protean kind of thing. For when the individuals who sustain a given culture change, the culture itself changes. Who would deny the readily verifiable empirical proposition that individuals can and do change their behaviors and values in the course of history, including their own

⁶¹ Cf. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon, tr. Colin Gordon et al. (New York: Pantheon, 1980), 98 (“The individual which power has constituted is at the same time its vehicle.”).

⁶² Nietzsche, *supra* note 36, at 338.

personal histories? Clinging to the notion that the empirical self possesses a constant and consistent self-identity is a very dubious metaphysical position, to say the least, as thinkers as diverse as David Hume,⁶³ Nietzsche,⁶⁴ Freud⁶⁵ and William James⁶⁶ have demonstrated time and again.

History teaches us that the self is especially susceptible to change the more it comes into contact with people who are not like it. And the opportunity for US to come into contact with THEM has never been more extensive than it is today. According to a recent article, in 1950 the whole population of the earth (2.5 billion) could have stood, shoulder to shoulder, on the Isle of Wight (381 square kilometers); whereas quite soon the earth's more than seven billion people will require an island the size of Zanzibar (1,554 square kilometers) to stand on.⁶⁷ Contact with cultural diversity is no longer a choice, it is a necessity. I take it that the UNESCO Declaration on Cultural Diversity tries to make a virtue out of this necessity when it says: "Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence" (Article 3), and "Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures" (Article 7).

But at the same time the Declaration also demands that care be exercised so that "all cultures can express themselves and make themselves known" (Article 6). I agree with the sentiment behind this

⁶³ David Hume, *A Treatise on Human Nature*, vol. 1 (New York: Everyman's Library, 1977), 238-39.

⁶⁴ Nietzsche, *supra* note 36, at 149.

⁶⁵ See generally Sigmund Freud, *Civilization and Its Discontents*, ed. & tr. James Strachey (New York: W.W. Norton, 1962).

⁶⁶ William James, *The Principles of Psychology*, vol. 2 (New York: Henry Holt, 1904), 316-17.

⁶⁷ "A Tale of Three Islands," *The Economist*, 22 Oct. 2011, 27-30, at 27.

demand. However, the Declaration itself does not seem to be troubled by the apparent contradiction that it introduces into its project of *preserving* cultural diversity by extending the universal right of self-expression and self-publication to cultures themselves. The more frequently different cultures exercise their right to make themselves known to one another in this increasingly “globalized” world of the internet and the cell phone, the multinational corporation and an interconnected global economy, the less likely it is that the individuals which comprise a given culture will remain securely themselves. For in that case they will have been exposed to features in other cultures that can lead them to doubt the value of certain features in their own. Therefore the less likely it is that the culture itself will continue to have something unique to express.

The deepest antinomy contained within the human rights effort to harmonize respect for the dignity of the individual with respect for the cultural differences that he or she embodies is not, as is sometimes imagined, the conflict between the West's cultural commitment to the importance of individual rights and certain non-Western cultural conceptions that value the wellbeing of the group more highly than that of the individual. These are static and petrified characterizations of an antinomy that always shows itself as being fundamentally dynamic in nature. That is, the unity or diversity of the individual (whether in West or East, North or South) is dialectically inseparable from the unity or diversity of his or her culture: change or maintain one, and you change or maintain the other.

VII

The ancient Greek historian Herodotus gives an interesting account of how the great Persian King Xerxes reacted when a great storm blew up

and broke to pieces a bridge he was building between Asia and Europe. "So when Xerxes heard of it," writes Herodotus, "he was full of wrath, and straightaway gave orders that the Hellespont should receive three hundred lashes, and that a pair of fetters should be cast into it."⁶⁸ It strikes me that those who would force, by language or by arms, a permanent reconciliation between the value of respect for universal human rights and the value of respect for cultural diversity are very much like Xerxes. They would whip a sea consisting of billions of human beings embedded in thousands of different cultures until it promised to quiet its waters and submit to their abstractions.

But abstractions, like bridges, eventually fall down. To set too high a value on the *unity* of the individual person (I did not say "the individual"!) is to set too low a value on culture. Likewise, to set too high a value on the *unity* of culture (I did not say "culture"!) is to set too low a value on the individual. Either way, it is certain that the ceaseless historical dialectic between individuals and their culture will make sure to knock down whatever bridges our puny faculty of reason might venture to build.

⁶⁸ Herodotus, *The Histories*, tr. George Rawlinson (New York: Everyman's Library), 525 (Bk. 7, ch. 35)

The Man and the State. From the Status *subiectionis* to the Citizenship. The Parabola of the Human Rights Achievement

Michele Brunelli*

Abstract

Society is defined as modern and contemporary not for merely temporal reasons alone, but above all because it has a particular corpus that actually lists a series of rights/values that must unequivocally be universal, or rather, they must inevitably concern everyone, protect everyone and apply to everyone. These rights concern the right to/value of life, liberty, dignity, equality, health and welfare, private property, education and the protection of children. It is a group of universal and inalienable rights (and consequent prohibitions) that rise above the individual cultural traditions of any ethnic group or population. Out of such rights, in an almost natural and consequential way, emerge a series of prohibitions.

*Many of these rights, that were rediscovered and brought back into fashion in the XVIII century in the wake of American and French revolutionary forces, already existed in the great monotheistic religions, in what Muslims call *ahl al-Kitab*, the people of the Book and in the revealed Books (the Torah, Gospels, Quran, Avesta and Rigveda). Nevertheless, in order for these precepts, from religious beginnings (therefore potentially only acceptable and applicable to believers) to become trans-cultural and even laic, therefore universal, it was necessary to wait for them to undergo a particular historical political process. A process that lasted centuries and focused on the State and especially the evolution of the relationship between the State and Man, with the slow but inexorable transformation of 'Sovereign' into 'Servant of the State' and 'subject' into 'citizen'. These were transformations that led man to recapture his centrality, through the attribution to his singularity of*

* Michele Brunelli is Professor of Sociology of Development and of History and Institutions of Asian Countries at Bergamo State University – Italy (michele.brunelli@unibg.it).

certain rights that characterise him and simultaneously extol his privileges. Here a critical transition occurs, which historically saw the evolution of a state of classes, which had characterised Europe until the Middle Ages, into a State of society, or the Modern State/Absolute State, which had its premonitions in the XV century, but would be in development until the XVIII century. It was a transition that, by shaping the State, the conception of the State, its powers and its prerogatives, would shape a new conception of law, which would also make the transition from general to specific. This transition to the specific – paradoxical only in appearance – would sanction universality, the universality of the value of rights for every single Man.

Society is defined as modern and contemporary not for merely temporal reasons alone, but above all because it has a particular *corpus* that actually lists a series of rights/values that must unequivocally be universal, or rather, they must inevitably concern everyone, protect everyone and apply to everyone. These rights concern the right to/value of life, liberty, dignity, equality, health and welfare, private property, education and the protection of children.

It is a group of universal and inalienable rights (and consequent prohibitions) that rise above the individual cultural traditions of any ethnic group or population. Out of such rights, in an almost natural and consequential way, emerge a series of prohibitions, for example, protection of children is related to the prohibition on their being recruited for use in battle. The right to freedom is related to the prohibition on arbitrary detention, etc.

Many of these rights that were rediscovered and brought back into fashion in the XVIII century in the wake of American and French revolutionary forces already existed in the great monotheistic religions, in what Muslims call *ahl al-Kitab*, the people of the Book and in the revealed Books (the Torah, the Gospels, the Quran, the Avesta and the

Rigveda). Nevertheless, in order for these precepts, from religious beginnings – therefore potentially only acceptable and applicable to believers – to become trans-cultural and even laic, therefore universal, it was necessary to wait for them to undergo a particular historical political process. A process that lasted centuries and focused on the State and especially the evolution of the relationship between the State and Man, with the slow but inexorable transformation of 'Sovereign' into 'Servant of the State' and 'subject' into 'citizen'. These were transformations that led man to recapture his centrality, through the attribution to his singularity of certain rights that characterize him and simultaneously extol his privileges.

Here a critical transition occurs, which historically saw the evolution of a state of classes, which had characterized Europe until the Middle Ages, into a State of society, or the Modern State/Absolute State which had its premonitions in the XV century, but would be in development until the XVIII century. It was a transition that, by shaping the State, the conception of the State, its powers and its prerogatives, would shape a new conception of law which would also make the transition from general to specific. This transition to the specific – paradoxical only in appearance – would sanction universality, the universality of the value of rights for every single Man.

This transformation would gather momentum from the feudal state, or rather from some of its eminent exceptions, as for Great Britain and the concessions awarded with the *Magna Charta Libertatum* in 1215, only to then begin to assert itself in the absolute State, (especially with the introduction of the *Cameralist* – the science of administration – von Seckendorff and the resumption of the conception of *commune bonum* or *Gemeine Wohlfart*) and finally taking definite shape in the American

and French liberal-revolutionary States, and, subsequently in western democracies.

The modern State is a political-judicial system. It is not universal but particular, and the system is valid something within certain limits, but not others (just as democracy, or democracies). It is a State among States. It is an organization that derives from a sovereign power that ends with the limits of that specific sovereignty. While within its limits it is subject to no other, as the definition itself of sovereignty suggests: *nullius alterius potestatis*, beyond those limits it is confronted with other state entities. A given state can exist as long as it exerts – or is able to exert – the effectiveness of its system.

The modern State began to pave the way for a certain affirmation of what might have been the principles and guidelines of universal rights, through the progressive modification (we might even say 'dilution') of certain principles that are the basis of social inequality, and that dominated both Western political thought and the power structure of every European monarchy.

Among these in particular *Quod principis placuit legis habet vigorem* (*Institutiones* by Giustiniano), and *princeps legibus solutus* (*Corpus Iuris Civilis*; the prince is not subject to the law).

As long as the assumption remains in force that no law can be passed without the expression of the sovereign will of the prince and that the prince is not subject to the law, there can be no respect for the right of universal equality, that is, the right at the basis of the Universal Declaration of Human Rights.

These are doctrinal impediments obstructing the emergence of individual's rights, although, as noted, the trail set by the great monotheist religions and, based on this, also many religious orders and movements, was the principle of the equality of men before God (whichever God this may be) and among men.

Although the Modern State is founded on absolute monarchy and the interpretation of *power exercised by the monarchy without any limit* (Jean Bodin, *De Republica Libri sex*, 1586), 'fundamental laws' also existed in this system, which limited the sovereign's power, making him perhaps slightly less distinct from the others. These include the inalienability of the territory of the State and compliance with the laws of succession to the throne which flourish in France in particular, under Louis XV the Beloved.

Henri de Saint-Simon (1760-1825) the father of French socialism wrote, in *The King's State* that a king at the height of his power must not forget that:

- i) His crown is a *fideicommissum*.¹ He is in possession of a crown that does not belong to him and that he may not use, but that he received from his ancestors on a provisional basis and not in free heritage, therefore he cannot make use of it as he pleases.
- ii) The throne will never be vacant, since the right returns to the Nation, from which these kings received the Crown along with all the males in their family, as long as they live.

¹ It is the obligation imposed by the testator on their heir to conserve the goods inherited and upon their death to pass them on to another person.

It is a turning point even with regard to his predecessor, Louis XIV, the Sun King, to whom the affirmation "*L'Etat c'est moi!*" is attributed.

Over the course of the XVIII century the Modern State system introduced further evolution in the process of alignment between sovereign and people/citizen, a principle of legitimacy that we might call ideological. This principle is expressed in the idea that the supreme goal of the prince and the State is the 'common good', the 'happiness of his subjects.' It is true that seeing to good and happiness is the responsibility of the monarch, to whom you cannot make any claim of initiative and to whom you must pay total obedience. But the very notion of *commune bonum*, as the supreme goal, is the basis for an important change in the function of the sovereign.

If it is then the sovereign's aim to make himself the promoter and guarantor of public happiness, he becomes, to quote an expression of Frederick II of Prussia (*Friedrich der Große*, 1712- 1786), "the first servant of the State".

This principle implies:

- i) A process of personalization of the State as a judicial person (and not physical, as was the case for Louis XIV) and
- ii) The reduction of the monarchy itself to a State organ.

The roots of welfare begin to take shape then, welfare of the community which is closely linked to respect and therefore defense of internal peace and the law, that is, the safety of individuals, on the basis of previous illustrious intuitions and theories and developments of political doctrine (Marsilius of Padua, *Defensor Pacis*, 1324, Thomas Hobbes, *Leviathan*, 1651), according to which the task of the authorities is to defend internal peace and the law (= safety of individuals).

The definitive break from the past and consequent form of absolute prevalence of *commune bonum* is the United States Constitution of 1787, a union of other constitutional charters, of which the Virginia 1778 charter was perhaps the most important. With the American constitution a *eudemonist conception* (moral doctrine that identifies good with happiness) of the state begins to gain ground. A State of society. A liberal State.

With the first *Virginia Declaration of Rights* of 1778, which states that “*All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity*”, the rights of the individual citizen are compared to the rights of the collective. The individual gains a position of power both over the collective, from which he differs, and over the state, both having obligations that correspond to his rights. This is the innovation brought about by all the declarations of Rights of Man. In this moment a new (in the sense that it didn't exist before) form of “political regiment” was born, that was no longer the rule of the laws against the rule of men, already praised by Aristotle, but the rule of both men and laws, of men who make laws and laws that are limited by the pre-existing rights of individuals, which those same laws cannot cross. In a word, the liberal state that unfolds, uninterruptedly and through internal development, into the democratic state.

The awareness, experience and recognition that there exists a moral relationship between man and man, before the law, and that there exists first a right and then a duty, are the fruit of long and laborious study of human thought aimed at proposing functional tools for a peaceful coexistence. In these constitutional charters (Virginia and then United States) it is stated that:

1. The legal system is legitimate only if it is founded on the rights that each individual possesses as such, by nature (Samuel von Pufendorf, *De Iure et Naturae Gentium*, 1688,) these natural rights determine that all men are born free and independent.

2. Being the 'State of society' founded on the *imprescriptible* rights of individuals, it can only be proclaimed so by the collective body of individuals, who form the 'sovereign' (the sovereign being), from which all power derives. We find the concept of *popular sovereignty* which will shape a contractual conception: a *pactum societatis*, an agreement between all citizens on the foundations of civil society. Through contractualism, the theory of popular sovereignty leaves empty doctrinal digressions to find fulfilment in modern constitutionalism.

3. The *liberty* and *independence* of individuals can be assured only if the person exercising power in the name of the people does so with techniques protecting the people themselves from absolute authority. Hence a new control system is required.

4. The *control system*. During the feudal system, the work of the monarch had to conform to the dictates of the Catholic Church, under pain of excommunication and expulsion of the ruler and his people from society. During the era of absolute monarchies, the power of control had been mostly analysed in terms of doctrine, but pragmatically theorised in the principle of passive resistance until the need for regicide, and in the heroicness of the act, until the real *institutionalisation of the revolt* and the *right to revolution* with the Jacobean

Constitution of 1793. Now the situation goes further, thanks to the 'separation' or better the distinction of legislative, executive and judicial powers, which were wielded by the same person in the previous system. The separation of powers allows a balance between them, a balance that imposes that the exercise of power is different to that wielded by the legal system.

5. *The organs of the state are at the service of the people, the expression of political will which is itself the common good. The 'happiness' of the people is no longer the task of the monarch and his organs, but the task of the popular will.*

6. *Obedience is obedience to the law and not to the will of a monarch legislator. Members of the population, as components of the sovereignty, are no longer subjects, but molecules of the polis, therefore citizens. The political-judicial system is a system of organisation and freedom. It is a 'liberal' system. Under this system, the repositories of freedom are no longer those of the past, collective bodies such as classes, corporations etc., but individuals. Using both of these observations, it can be said that the category of the rights of man was established with strong particularistic connotations, which makes it difficult to use in a universal sense.*

The other great constitutional work, alongside that of America, upon which would be founded what has come to be called the liberal system, that is the system based on the sovereignty and freedom of the people, on the rights of the people, on the distribution of powers of the State, is the work of the French Revolution. This had a greater historical-universal value than the American events, as it put the liberal system and the

absolutist system head to head in the heart of absolutism and the most powerful state of continental Europe.

The Declaration of the Rights of Man and of the Citizen of 1789

The ideological foundation of the three constitutions born of the French revolution (1791, 1793 and 1795) is the *Declaration of the Rights of Man and the Citizen* adopted by the constituent assembly on the 26th of August 1789.

This established that:

- 1) The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation.
- 2) Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative (delegate to Member of Parliament), in its foundation.
- 3) All powers must be separate.
- 4) The aim, and therefore legitimate basis, of political association and the judicial system is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

The *Declaration of the Rights of Man and of the Citizen* of 1789, reversed the concept of political power, no long top-down but bottom-up, where the 'bottom' is the men that gather together to form a general will, ready to enforce their civil rights by guaranteeing the observance of their duties.

In the American Revolution, the category of rights of man was actually only used to claim the traditional rights of the English colonisers against

the motherland (so much so that the problem of slavery was not resolved), but in the French Revolution the same category was used to definitively affirm the idea of an individual-single man who must rely on himself, sanctioning with the solemnity of a Declaration a vision of a man “typical of the rationalism and individualism of the XVIII century”, a single individual, molecule of the *polis*. It is no coincidence that he proclaims himself, defines himself, identifies and is identified with the word ‘citizen’. So all obstacles to political theory, the rights of man and their universal conception (Universalism) failed over the XIX century, the Rights of Man were the object of debates between great thinkers and philosophers such as Thomas Paine, John Stuart Mill and G. W. Friedrich Hegel, who would pick up the concepts of universality of the rights of man and contribute further to them.

Colonialism and global conflict added further content to human thought in the search for the right tools to combat those forms of power that will result in forms of racism and abuse towards the weakest categories. The pact of the League of Nations in 1919 did not block the spread of racism in Europe, which found its full expression in the Thirties and Forties, with the outbreak of the Second World War.

The Second World War, the enormous number of civilian victims, the tragedy of the extermination camps and the two atomic explosions had a major impact on attempts to rebuild a humanity that found itself in a situation of moral disaster, perhaps worse than the material ruins. We found ourselves faced with demonstrations of an unprecedented destructive force in humanity. It was decided to start again, with a lapidary statement “Never again”.

The maximum guarantee that peace and the rights of the people would be respected from then on was sought through the United Nations. It was

in light of these reflections and moral imperatives that the Charter of the United Nations was drafted in 1945. In fact, in the preamble it is stated that the objective of the United Nations is “to save future generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind” and it reaffirms “faith in fundamental human rights, in the equal rights of men and women and of nations large and small”, by joining forces.

It made way then for the opinion that, to avoid a repetition of the disasters and sad events of the Forties, the partnership of peace and human rights should be made definitive. A concrete response, originating from the ‘decision’ for ‘joint effort’, came from the Universal Declaration of the Rights of Man, a non-binding declaration however, adopted by the UN General Assembly in 1948.

From here descended the Declaration, whose structure would be compared to the portico of a temple by René Cassin², the portico of a temple in which each part had its precise location. Each of these articles dealt with the determination of the various aspects of the human person and their protection, something that had been needed for centuries. These include the ‘rights of the person’, ‘rights of the individual in their social group’, ‘political rights’ and ‘economic or social rights, or rights in the field of work and production’.

From the first drafts of the Universal Charter of Rights came many others, work of the United Nations (*UN Convention on the Rights of the Child*, 20th November 1989), or other supranational organisations (Council of Europe³: *Convention for the Protection of Human Rights and*

² He was a French Magistrate, President of the European Court of Human Rights and winner of the Nobel Peace Prize in 1968.

³ The Council of Europe is an international organisation whose goal is to promote democracy, human rights, the European cultural identity and seek solutions to social

Fundamental Freedoms, signed in Rome, 4th November 1950)⁴, or groups of experts (Fribourg Declaration on Cultural Rights, 2006). All increasingly incisive, especially as in these cases they are Conventions (as opposed to Declarations) and therefore provide certain sanctions.

With the proliferation of increasingly specific conventions and declarations for the protection of rights but which concern the sphere of the person, it seems that instead of the equation 'many rights, greater respect for Man', it is 'many rights, many violations' that is being affirmed.

Such violations, even particularistic, such as the incorrect perception of rights and of their universality are current practice even today, and not exclusively in developing countries but also and especially in our society. To merit the title of 'citizens' once more, a title that was laboriously and painstakingly constructed over the centuries, we must come to a new collective commitment from below, to bring back respect for individual rights and the enhancement of Man himself from the academic environment it has been consigned to, be it man as an individual or as a fundamental part and essential component of the community.

problems in Europe. The Council of Europe was founded 5 May 1949 by the Treaty of London and today has 47 member states.

⁴ Unlike the UN Declaration, this is binding for the signatory states.

The Making and Remaking of Human Rights: Latin American Origins and Development, from Below

Camilo Pérez-Bustillo*

Abstract

This paper will explore potential lessons which might be drawn from the contributions of grassroots social movements in Latin America (and among Latino immigrants in the United States) to the construction of alternative, counterhegemonic paradigms of human rights and global justice, from a critical, interdisciplinary, and intercultural perspective. My approach in this paper differentiates between hegemonic paradigms of human rights and global justice which reflect, support, and serve to reproduce existing processes and structures of domination, exploitation, oppression and discrimination on a global, regional, and national scale, and counter-hegemonic alternatives which are aligned with processes of liberation, “from below”, which are anchored in the “Global South”. This approach builds upon theoretical frameworks suggested by thinkers such as Enrique Dussel, Boaventura Sousa Santos, and Balakrishnan Rajagopal. Two key examples of such movements are those of indigenous peoples (in contexts such as Mexico, Bolivia, Ecuador, and Colombia) and those of “peoples in movement” (migrants, refugees,

* Camilo Pérez-Bustillo is Research Professor, Graduate Program in Human Rights, Autonomous University of Mexico City.(cperezbustillo@gmail.com)

and the displaced), who are excluded from full recognition of their rights in the contemporary international system because of the combined effects of "state logic" and "market logic" (Falk, 2000).

Introduction

French writer Jean-Claude Carrière (2002) and Portuguese novelist and 1998 Nobel Literature laureate José Saramago (2002) provide potentially useful points of departure for an exploration of the limits of contemporary notions of human rights, and as to the configuration of counter-hegemonic alternatives, "from below" and from a specifically Latin American perspective, in the age of neoliberal capitalist globalization. Carrière, author of the script for the Western theatrical and film adaptations (1987) of the ancient Indian epic poem known as *The Mahabharata* (of which the Bhagavad Gita is part) tells the story of a small village that could be located almost anywhere, and in any historical period, where there was once a very, very rich man and a very, very poor man. Each had a son about to come of age, and each took their son one day to the highest mountaintop overlooking the village. As they looked out upon the vast landscape surrounding the village, the rich man spread his arms before him, and said: "Look, my son, someday all this will be yours." A few days later the poor man climbed up to the same mountaintop with his son to carry out the same ritual, spread his arms before him, and said: "Look."

José Saramago tells a parallel kind of story. We might even venture to assume for purposes of this paper, that his involves the same characters from the first, at some subsequent moment of their intertwined histories. Saramago's story takes place in fifteenth century rural Italy, in the hill country, and describes what happened when an old man ravaged by too much work climbs up to his village's solitary bell-tower and begins to ring the bells. Like in so many such villages throughout the world, the bells

in this village are only rung as a rule when routine demands for the purpose of marking time or for calling the villagers to worship, or at the other extreme when some dire calamity (flood, fire, famine, earthquake, or invasion) threatens the safety of the community, or when some rich, important person has passed away.

None of these things had occurred on the day the bells began to toll, and so, many astonished, skeptical villagers surrounded the old man as he came down from the bell tower and mocked or insulted him, wondering why he would have done such a thing in violation of all of the village's conventions. The old man's tired yet passionate response was that he had rung the bell as a sign of mourning by the whole village because of the death of justice.

It turns out as he told it that the old man had just lost the last appeal before the highest level of the most important court in the land, in a case brought to preserve his family's ancestral lands from their gradual theft by his neighbor, the village's most wealthy landowner, who had a predilection for moving the boundary-stones between them when no one was looking (there is a similar sequence in the Hollywood version of the story of Mexican revolutionary Emiliano Zapata in the film *Viva Zapata*, directed by Elias Kazan, starring Marlon Brando and Anthony Quinn). As Saramago tells it, the highest court had just upheld the legality of his neighbor's wanton actions, and the old man's ancestral, communally held lands would soon be lost forever. But the villagers who had gathered either scratched their heads or muttered darkly to themselves that the old man must be mad, that he was just making trouble for everybody. None of them stopped to heed the bells and their possible significance for each of them. Saramago's story was told as part of his special address, by videoconference, to the closing session of the World Social Forum in Porto Alegre, Brazil, in February 2002.

I would like to pose two questions for discussion in light of these stories: 1) do the poor and powerless, in the era of neoliberal capitalist globalization, have any rights that the rich and powerful are bound to respect? I am deliberately borrowing here the language employed in the notorious Dred Scott (fugitive slave) case before the United States Supreme Court in 1857, *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857), where the Court held, inter alia, that no blacks in the United States, whether free or slave, had any rights except “such as those who held power and the government might choose to grant them”; and (2) what is the historical origin of contemporary notions of human rights, and what does this history tell us about where we are in the struggle for the globalization of human rights; where we are headed, and where we need to be, in terms of the construction of alternative, counter-hegemonic (or anti-systemic) paradigms of global justice and human rights?

The overall landscape

My argument in essence here is that the contributions of Latin American experiences regarding such issues are central both to “making” and to “remaking” the history of human rights, by shaping the alternatives which may determine its liberatory potential, in a manner analogous to E.P Thompson’s epic history of the English working class (1963), which he summarized as “a study in an active process, which owes as much to agency as to conditioning” (Preface id.: 9), to W.E.B Du Bois’ (1935) classic *Black Reconstruction in America*, and CLR James’ *Black Jacobins* (1963) . Common features I seek to draw upon here include Thompson’s insistence on the creativity and resilience of resistance movements characterized by people who “were told that they had no rights” but who insisted “that they were born free” (id.: 831), Du Bois’ revolutionary affirmation of the centrality of African-American traditions and values of

democratic struggle to U.S history, civilization and democracy (see generally Levering Lewis, 2000: 350-378), and James' equally momentous recentering of the history of the French Revolution, and of the origins of contemporary notions of human rights, from the perspective of Haitian resistance and rebellion against slavery and colonialism (see also Nesbitt, 2008 and Dubois, 2004).

My intention here is to suggest the outlines of an equivalent re-reading of the history of human rights and of potential new directions in terms of its reconceptualization, from a Latin American perspective. This reconceptualization is centered around the contributions of counter-hegemonic thinkers and activists such as Bartolomé de Las Casas and the indigenous people's resistance movements to which he gave voice in the 16th century and their contemporary successors (for example Mexico's Zapatistas), and that of the Haitian Revolution between 1791 and 1804, as it was explored in CLR James' *Black Jacobins*; (today we should also reverse the hegemonic, ultimately Eurocentric terms in which the title of James' book is still trapped and describe the Parisian revolutionaries who finally abolished slavery in 1794 as "white rebel slaves", in the spirit of John Brown). Together the traditions of critical reflection and struggle founded by Las Casas and by the Haitian Revolution, and their contemporary equivalents (from the Zapatistas to Brazil's movement of the landless, the MST, plus the region's human rights movements for justice and against impunity), provide the basis for articulating and advancing alternative, counter-hegemonic paradigms of rights and governance from below with global implications.

This article seeks to explore some initial theoretical aspects of the evolving relationship between contemporary grassroots social movements in Latin America, and the emergence of alternative, counter-hegemonic paradigms of global justice and human rights

throughout the world (Sousa Santos, 2007, 2010; Dussel, 1998, 2006, 2007, 2009; Rajagopal, 2003; Zibechi, 2008). Latin American social movements of this kind have contributed to rethinking and reshaping key aspects of hegemonic paradigms of human rights characterized by largely unexamined assumptions as to the supposedly uniquely Western and specifically European character and origins of contemporary human rights and international law. They have also vigorously questioned and sought to undermine the primacy given in this context to nation-states as the most privileged subjects of rights and as "rights-givers" (as attributes of membership through citizenship in configurations of state power which trickle down from above), to structures of representative rather than participatory democracy, and to individual (rather than collective or group) rights of a civil or political character, particularly those associated with interests related to liberty and property within a market framework, rather than to those of an economic, social or cultural character, associated with imperatives of equality. These efforts have included their ongoing activism and advocacy as to such issues at the grassroots level through direct organizing and the construction of alternative spaces of power, and also in many instances as influential voices to varying degrees "inside" or at the gate of state structures of power and influence and their equivalents in transnational normative spaces such as the UN.

The counter-hegemonic paradigms of human rights and alternative governance which have emerged in Latin America throughout the last 20 years imply a challenge, "from below" (aligned with popular movements and struggles for liberation - both North and South - against contemporary forms of domination) to capitalist and liberal hegemonic notions of rights which assume them to be necessarily embedded in exploitative and ecocidal market economies, and in Westphalian nation-states and their dimensions of citizenship or membership. Popular

social movements play a key role in this context in the imagination and construction of alternatives to state-centered formulations which are focused instead upon “peoples”, communities, and “persons”, rather than “nation-states”, as the most privileged subjects. They also tend to be characterized by an insistence upon the equality, integrality, inter-relatedness and interdependence of all rights (civil, political, economic, social, environmental, etc.).

Significant components of the international and regional human rights agendas associated with such visions has been enacted into law and state policy in many key states to varying degrees at least in formalistic terms, with many inconsistencies and gaps as to actual implementation throughout the last 20 years. Much of this has been accomplished at least in part through processes of legal and constitutional transformation in the context of “transitions to democracy” (often including Truth Commissions and/or trials of key human rights violators, to varying degrees) in the aftermath of U.S-backed authoritarian régimes (see e.g. Roht-Arriaza, 2005, Eckstein and Wickham-Crowley, eds. 2003).

These processes have also highlighted the direct incorporation (“constitutionalization”) of international human rights standards into constitutional texts on a scale unprecedented elsewhere in the world, and made it possible to enforce these standards in domestic courts and where necessary through recourse to the Inter-American Human Rights Court of the OAS (which by contrast is of course not recognized as binding either by the U.S or Canada), and in some cases have succeeded in translating such achievements into broader instruments of international law or policy in key normative spaces with significant potential impact beyond their country of origin. A key example is how Mexico’s Zapatista rebellion in 1994 became the decisive spark not only for unprecedented efforts (only partially successful) to reform Mexico’s

own constitution, federal and state laws and overall state policy to finally recognize the cultural and linguistic dimensions of the existence and rights of the country's indigenous peoples, but also ultimately for the adoption of the UN's Declaration on the Rights of Indigenous Peoples by the General Assembly in September 2007, and for the intensification of an equivalent process within the OAS.

The critical, highly contradictory factor in this context was how the Zapatista uprising itself and its implications served to "name" and "shame" the Mexican state into becoming the leading rhetorical champion of the Declaration within the UN. Most of the heavy lifting in this complex process was ironically undertaken by leading Zapatista advisers from Mexico and indigenous advocates from elsewhere in Latin America. Here as with the Mexican state's similar rhetorical championing in the UN of the rights of migrants, and of its version of market-friendly environmentalism as host of COP 16 in December 2010, there is a vast, largely unnavigable gulf between its supposedly respectable standing as to such issues in the "international community" and its actual policies and practices on a daily basis with respect to its own people (which include the systematic violation of the rights of indigenous peoples and migrants, both Mexican and in transit through the country's territory from Central America and elsewhere, as especially notable patterns).

All of this coincided and contrasted dramatically for example with the Mexican state's continuing militarization of Chiapas and every other region characterized by indigenous unrest, and unleashing of a U.S.-backed counter-insurgency process which has included reliance upon paramilitary forces responsible for massacres such as that of Acteal (45 dead, 36 of them women and children) in December 1997 reminiscent of similar instances of state savagery in Guatemala, Perú, and Colombia. It was only relatively speaking a small step from this precipice to Mexico's

current free fall as the latest example of generalized state terror (or “Colombianization”) in the region (in the name of the “war against drugs”) with the encouragement of persistent mechanisms of U.S. domination such as the Security and Prosperity Accord of North America (the national security complement to NAFTA), the Mérida Initiative (Mexico’s version of Plan Colombia, explicitly modeled after its predecessor), and Mexico’s leading role with its Central American neighbors to the south in the Meso-American Project (formerly Plan Puebla Panamá) (see Carlsen, 2007).

Despite such dialectical complexities, it is nonetheless crucial to recognize that the advances in the UN recognition of indigenous rights symbolized by the adoption of the 2007 Declaration would not have been achieved without the impetus and leadership provided by the Zapatista rebellion and its effects. This case exemplifies the direct impact a counter-hegemonic movement can have “against the grain”, from the “outside” and “from below” as to hegemonic structures and processes from above and the transformation of their normative content. Given the highly contested character of issues regarding indigenous and minority rights to self-determination and autonomy in the contemporary international arena, my argument here is that the Zapatista rebellion’s contribution to reshaping the terrain as to such issues is equivalent to that of the Haitian Revolution and its impact leading to the abolition of slavery in Paris in 1794.

Similarly Latin American social movements elsewhere which were indispensable factors in shaping the conditions which made possible a shift away from the most rapacious variants of neoliberal policies in the region (such as indigenous movements in Ecuador and Bolivia, movements of the landless in Brazil, and urban popular movements in Venezuela and Argentina), have also made significant contributions to

the “refoundation” of several of these states through extensive constitutional reform processes (foreshadowed previously in Colombia in 1991 and Nicaragua in 1987). The two most far-reaching examples are the new constitutions of the “refounded states” of Bolivia (2009) and Ecuador (2008). Both of these include the redefinition and institutional restructuring of their respective states as “plurinational” and “pluricultural” in character, which thereby at least rhetorically go beyond the limits of liberal multiculturalism (see Van Cott, 2000 and contrast with Sousa Santos, 2010), which is generally associated with much more limited discursive affirmations of cultural diversity and pluralism (as in Mexico’s 1992 and 2001 constitutional reforms which fell well short of the demands of the Zapatista movement based upon the 1996 San Andrés Accords, a key part of the still stalled peace process between the Mexican state and the EZLN).

Enrique Dussel (2006)’s conceptualization of a Latin American “political Spring” stresses the relationship between advances of this kind at the level of state power in terms of electoral victories by center-left political forces (which he highlights to varying degrees in contexts such as Bolivia, Venezuela, Ecuador, Brazil, Argentina and Uruguay, between 1998 and 2006, joined later by El Salvador in 2009, off-set by notable defeats also for such forces in 2006 in Mexico and Perú, and a right-wing military coup in Honduras in 2009), and their origins in counter-hegemonic social movements, such as those led by indigenous sectors in Bolivia and Ecuador, by urban popular and human rights movements and other allies in the cases of Venezuela and Argentina, and by former left insurgent movements transformed into political parties or into significant sectors of governing center-left political parties or coalitions in Nicaragua, El Salvador, Uruguay, and Brazil, within the same period. The specific landscape varies greatly in each case, and is also highly contested in terms of the extent to which this overall trend has actually

contributed to the region's ultimate liberation from U.S domination and that of its domestic allies in each country (see e.g. Burnett, Chávez and Rodríguez Garavito, 2008 and Stahler-Sholk, Vanden, and Kuecker, 2008). The electoral advances cited are also key in terms of providing spaces and opportunities for formal political, constitutional and legal ruptures with the "internal colonialism" (see González Casanova, 1969, 1987, 2006 and Lander, 2006) or racist neocolonialism characteristic of Latin American states post-independence. Peruvian scholar Anibal Quijano (2000) is particularly persuasive regarding the deeply rooted structural dimensions of the colonialist paradigm in the region which he describes in terms of the "coloniality of power" in Latin American states and societies.

The Ecuadorian and Bolivian constitutions contributed to the emergence of counter-hegemonic paradigms of human rights and constitutional law by redefining and restructuring their states as "plurinational" and "pluricultural" and by directly incorporating international human rights standards into the constitutional text. But they also went further by recognizing the rights and legal standing of Pacha Mama (Mother Earth, according to the Andean indigenous cosmovision associated with Inca civilization and its environs, from Argentina to Colombia, and encompassing much of the Amazon Basin), and of the ethical system which mandates its protection (Sumak Kawsay or Suma Qamaña, the Andean indigenous paradigm of cosmic harmony and well-being, underpinning the possibility of a "decent life"). These measures in turn have led the Bolivian state to take a leading role in challenging hegemonic approaches to issues of climate change in the context of the UN summits held in Copenhagen in 2009 and Cancún in 2010, by convening an alternative Global People's Summit on Climate Change and the Rights of Mother Earth in Cochabamba in April 2010 and promoting the adoption of a resolution by the UN Human Rights Council

and the General Assembly recognizing the “rights of Mother Earth” (the Earth itself as a planetary organism which is a bearer of rights) as an alternative paradigm and landscape within which issues of climate change, global warming, sustainable development, and environmentalism must be situated.

All of this is significantly more complex and contradictory in actual practice both in Ecuador and Bolivia (although in both contexts, notwithstanding increasing divisions within the ruling sectors, Presidents Rafael Correa and Evo Morales have both been re-elected to second terms). In Ecuador, the initial alliance between the CONAIE (Coordinadora de Nacionalidades Indígenas del Ecuador) and Correa, the key force behind indigenous and popular uprisings in 2000 and 2005 which eventually made it possible for him to emerge as a candidate of a united center-left front of opposition forces, broke down during the Constituent Assembly process which drafted the new constitution, and has sharpened during the last two years because of increasingly polarized differences over environmentalism and development policy (particularly as to oil extraction policy and mega-developments). In Bolivia, serious divisions within the ruling circle and between competing sectors of popular movements aligned for or against Morales have also intensified recently.

In general my focus will be on describing some key elements of the theoretical approaches needed to assess the potential contributions of movements rooted in the Meso-American and Andean regions of Latin America to the “making” and “remaking” of human rights in the region and beyond. The focus on these regions arises from the centrality of movements of indigenous peoples in these contexts. The approach taken here to the overall exploration of these issues is ultimately situated in the evolving epistemology and landscape of the “Global South”, as

defined by Boaventura Sousa Santos, where the concept of the Global South is not limited to geography, but instead “*represents all the forms of subordination (economic exploitation; forms of oppression based upon ethnicity, race, gender and their like) associated with neoliberal globalization. The South, in sum, alludes to all the forms of suffering produced by global capitalism. In this sense, the South is to be found throughout the world, including the North and West*” (translated from Sousa Santos and Rodríguez Garavito, 2007: 19). (emphasis added).

Sousa Santos and Garavito’s reshaping of the more traditional geopolitical or geo-economic definition of the Global South draws in turn from Mexican/Argentine philosopher Enrique Dussel’s design for the architecture of a universalist “trans-modern” philosophy, theology, ethics, and politics of liberation with Latin American origins. Dussel’s approach and that of Sousa Santos and Garavito are grounded in a shared critique of the epistemological and political baggage of Eurocentrism and Occidentalism (Samir Amin suggests “Euro-Occidentalism” as a convergent framework along these same lines, see also Mignolo, 2000 and Jameson and Miyoshi, eds. 2001, and in general the contributions of the Latin American school of critical Cultural Studies and its affinities with the work of Edward Said and of the South Asian school of Subaltern Studies, among others), which is centered around and has its principal point of departure in approaching issues of global domination and liberation “from the perspective of the victims” of the global system. Rajagopal (2003) has stressed the need for reshaping international law from below, and Sousa Santos and Garavito (2007) have emphasized the need to take an equivalent approach as to law and globalization, which is closely related to Sousa Santos’ efforts to develop a new “critical legal sociology” and to ground it in a much more far-ranging “epistemology of the south” (echoed also by Dussel in his own way, and by Lander, ed. 2000); my emphasis here, drawing both upon their work

and that of Dussel, is to emphasize the need to make and remake “human rights from below” (Pérez Bustillo, 2007; see also Barreto, 2009 and Guardiola-Rivera, 2010).

My approach here converges with that of Raúl Zibechi (2008) of Uruguay, who has argued that despite the emergence of center-left governing forces like those concentrated around Correa in Ecuador, Morales in Bolivia, Chávez in Venezuela, the Frente Amplio in Uruguay, Rosseff in Brazil, the Kirchners in Argentina, Ortega in Nicaragua, and Funes in El Salvador (and Humala in Perú or López Obrador in Mexico, should they succeed in reversing their initial narrow defeats in 2006), the center of gravity as to the potential for fundamental transformations in Latin America remains with its most radical grassroots popular movements, and particularly with those most independent from state power and electoral machinations, and most committed to building alternatives to the state, from below and from spaces “outside” of its structures. From this perspective the inception of the Latin American Spring highlighted by Dussel is marked by the Zapatista rebellion of January 1994 (and perhaps by its most immediate predecessors, the indigenous national uprising of June 1990 in Ecuador led by the CONAIE, and the continental wave of indigenous mobilizations leading up to the various observances of the 500 years of the European conquest or invasion of the region in 1992), and not by Hugo Chávez’s first electoral victory in Venezuela in December 1998, which lay the basis for the transformations associated with its Bolivarian Revolution (including a new constitution in 1999 and a marked process of further radicalization and explicit embrace of “21st Century Socialism” after his brief overthrow as the result of a U.S-backed military coup in April 2002). In this sense it is the indigenous popular movements of Mexico and Ecuador and then Bolivia which have shaped this Spring and made its electoral expressions possible in these examples and their equivalents elsewhere. It is also the

Zapatista rebellion which for the first time framed these processes as challenges to neoliberalism as such.

Mexico's Zapatistas and their development of local and regional alternative governing structures of indigenous autonomy with independent health and educational systems in Chiapas (emulated to some degree in pockets elsewhere in regions such as Oaxaca and Guerrero, and among youth collectives and urban, suburban and rural popular movements which identify with their approach) are perhaps the clearest example illustrative of Zibechi's approach, given their fierce resistance to formal political participation within existing state structures and processes since 2001 (see generally Hayden, ed. 2002; Womack, ed. 1999; Khasnabish, 2010; Mentinis, 2006; Higgins, 2004; Pérez-Bustillo, 1997, 2000, 2001, 2003). More mixed examples include Brazil's Movement of Landless Workers (MST) and its continuing campaign for radical land reform way beyond that entertained so far by Lula or Rosseff, and current expressions of what began during the economic crash of 2001 as movements of the urban unemployed and marginalized known as the Piqueteros in Argentina, parts of which have gravitated near Brazil's ruling PT (Worker's Party) and the Kirchners in Argentina, respectively, but which continue to include much more independent sectors which take a stance closer to that of the Zapatistas which involved in organizing and sustaining autonomous agrarian and factory cooperatives independent of state support.

A key underlying assumption here is that social movements of this kind which are rooted in Latin America share important characteristics with their contemporary equivalents in the Arab world and Africa, which have emerged with great force in the ongoing "Arab Spring" (Tunisia, Egypt, Libya, Syria, Yemen, Bahrain, etc.). There are a series of arguable convergences at work in this context. These include the "bottom-up"

character of these movements in both regions as responses to the combined effects of neoliberalism, neocolonialism, and authoritarianism, and the historical analogies between the revolutionary processes currently underway in the Arab world and those which led to Latin American independence between 1810 and 1825, suggested by Perry Anderson in his overview in *New Left Review* (May 2011 issue). I would go further here and combine Anderson's insight as to the historical parallels with Hardt and Negri's (2011) recent argument that there are important analogies between the Arab and Latin American Springs as such. My argument here is that it is precisely the incomplete and distorted legacies of the Latin American independence processes highlighted by Anderson, in terms of liberalism and neoliberalism, neocolonialism or "coloniality" (Quijano, 2000) and racism, and their equivalents in the context of the Arab world (for example the exhaustion of statist projects of Pan-Arab and Pan-African integration and "socialism" that are reminiscent of similar discourses prevalent to varying degrees among ruling sectors in Venezuela, Ecuador, and Bolivia as to "21st Century Socialism" and the role of ALBA, in the face of alternative critiques grounded in popular movements "from below and to the left") that define the pending agendas for their contemporary processes of transformation.

Origins and prospects

The overall trend towards increasing inequities on a global scale, which has led Dussel to characterize this historical period as the age of "globalization and exclusion" (1998, 2007), and others such as Luigi Ferrajoli (2004, 2005) to define it as that of "global social apartheid", and its implications, can best be grasped "from the perspective of its victims" (Dussel, 1998). More specifically it is imperative to ground our critique as to the origins and possible trajectory of the global system among those groups most affected by its polarities. This insistence on approaching

issues of human rights “from below” is closely related to that suggested by Rajagopal (2003) as to international law, and by Sousa Santos and Rodríguez Garavito (2007) as to the overall relationship between law and processes of globalization. This perspective is rooted in the critical insight suggested by thinkers such as Amartya Sen, Thomas Pogge, and Pierre Sané, and by social movements such as Mexico’s Zapatistas, that the essence of poverty is in fact the absence of meaningful human rights (the Zapatistas similarly suggested for example that it is Mexico’s widespread poverty and inequality which makes its democracy dysfunctional).

This also necessarily implies that poverty can only be effectively addressed and overcome if it is approached from a perspective that understands it to be a violation of such rights. There is an increasingly significant trend in recent jurisprudence from the Inter-American and European human rights systems and from constitutional courts in South Africa and India, among others, which seeks to ground human rights claims closely connected to conditions of poverty, such as those regarding economic, social, and cultural rights, in an underlying right to a dignified life (which is in fact already suggested in Article 23 of the Universal Declaration of Human Rights).

Willem van Genugten and I have suggested elsewhere (2001, 2004) that the systematic denial of justiciable and enforceable rights to the poor - for example in terms of the economic, social and cultural rights that shape their conditions of life as to education, work, health, housing, land, participation, discrimination, etc. - should be understood as a “poverty of rights” (id.) and “inequality of rights” (Pérez-Bustillo, 2007) that is characteristic of excluded and marginalized sectors throughout the world, and which according to Hans Egil Offerdal (2005) results in the denial of their “right to be human” as such. This approach builds on

Hannah Arendt's insistence in her seminal critique (1951) of the limits of the Universal Declaration on Human Rights that the fundamental human right from which all others flow is the "right to have rights", which Arendt argued is disturbingly absent from the Declaration (and much of the contemporary normative machinery of international law and international human rights) because of its emphasis on the protection on the rights of those with recognized membership in national communities, and its concomitant failure to recognize the rights of the stateless.

This approach further assumes that contemporary human rights norms are the historical product of the struggles of social movements and their impact on evolving patterns of reflection and discourse, which include those against feudalism, colonialism, imperialism, slavery, racism and national oppression, the exploitation of workers, and the domination of women. The largely unwritten history of the "making" of international human rights (Thompson, 1963) is the history of the ebbs and flows in a non-linear trajectory as to the extent of recognition of the rights of those most marginalized and excluded in each historical period. Such an approach also involves a distinct rupture with epistemological assumptions of a positivist, functionalist, and determinist character that are still prevalent in many circles. It also includes an insistence upon a critical understanding of legal definitions of rights in any specific historical period as minimums, not maximums ("floors" and not "ceilings"), and thus as points of departure, not destinations in themselves.

All of this includes a recognition of how initially hesitant advances at one moment can be completed at a much higher level of complexity later, as the result of the pressure of vigorous social movements. A key example is the adoption of the Declaration of the Rights of Man and Citizen in 1789 in the context of the early stages of the French Revolution, which despite its classical liberal rhetoric of "liberty, equality, and

fraternity", denied all three of these dimensions of human freedom to millions of African slaves within the French colonial empire, to women, and to males who were not property-owners. The Declaration's failure to address the issue of slavery was not remedied until the rebellion of slaves in Haiti led by Toussaint Louverture in 1791 compelled the French National Assembly to finally abolish it in 1794 (James, 1963; Blackburn, 1988); and despite such initial advances in France and then in the United Kingdom (and only much later in the United States and Brazil) the first enforceable international convention against slavery and the slave trade was not adopted until 1926. Similarly the Nazi genocide was completely "legal" during the period it was carried out, and the first international convention against genocide was not adopted until 1948.

Debates in the international community as to the rights of indigenous peoples thus highlight the extent to which the world system and hegemonic versions of international law and human rights discourses and practices are characterized by inequalities of rights. This is particularly so given the fact that the history of efforts to secure international recognition of the rights of indigenous peoples is completely intertwined with the origins of international law (and what we have now come to understand as "human rights") as such. The recent adoption of the UN Declaration on the subject is in this sense simply the latest stage in a continuing and still incomplete process of recognition of such rights, which in fact have an existence prior to that of the so-called "international community" itself. These efforts began with early scholars such as Bartolomé de Las Casas, Francisco de Vitoria, Francisco Suárez, and Hugo Grotius in the 16th and 17th centuries who laid the foundations of what has come to be known as the "Salamanca School", which developed the first systematic approach to what we currently define as "international law", and thereby engendered its most precocious step-child, "international human rights" (Dussel, 2007). Their still widely

unacknowledged origins are in Las Casas' arduous efforts to explore, document, and ultimately critique the theological, legal, and ethical bases for the Spanish conquest of the New World (Gutiérrez, 1995).

Las Casas' work drew in large part upon the widespread resistance of indigenous peoples to this processes, and insisted upon the legality and legitimacy of their assertions of self-defense, sovereignty, and finally armed rebellion (id.). The echoes of their defiance continue to resonate today. The new UN Declaration would not exist if there had not been a notable resurgence in demands for the recognition of the rights of indigenous peoples as a result of widespread controversy regarding the implications of the observance of 500 years of the inception of the European conquest of the Americas in 1992, the awarding of that year's Nobel Peace Prize to Guatemalan human rights activist Rigoberta Menchú, Mexico's Zapatista rebellion in 1994, and analogous movements in countries such as Ecuador and Bolivia (culminating in the election in 2005 of its first indigenous President, Evo Morales). The significance and limits of the new UN Declaration can only be fully understood in this context.

Contemporary debates in the international community tend to reflect the imperatives of "state logic" and "market logic" (Falk, 2000) which continue to be dominant in such contexts. These logics are centered around the defense of the interests of existing nation-states as the most privileged subjects of international law, understood as the framework for governing relations among states, as distinct for example from an international system structured around the "rights of peoples" (Basso, 1976; see also the African Charter on Human and People's Rights, adopted in Banjul in 1981, which is the basis of the African regional human rights system). But according to Falk this dominant statist logic is in turn subordinated to the imperatives of transnational capital, as

reflected for example in neoliberal economic policies imposed through the IMF, the WTO, the World Bank, and free trade agreements.

Indigenous peoples fall somewhere along the edges of the traditional understanding of “self-determination” in hegemonic versions of international law. The prevailing, somewhat Orwellian understanding is that all peoples are theoretically equal, but not all have an equal right to self-determination. The new UN Declaration on the Rights of Indigenous Peoples (adopted finally by the UN General Assembly in September 2007) is the latest effort to somehow square this troublesome circle at least in the context of indigenous and tribal peoples. It specifically recognizes (in its Article 3) the right of indigenous peoples to self-determination, which has already been universally accorded to all “peoples” by Article 1 (2) of the UN Charter (1945) and Article 1 of each of the International Covenants as to Civil and Political and Economic, Social, and Cultural Rights (1966), respectively. Deep divisions regarding such issues and their implications were reflected in the complex, multi-layered process leading up to the approval of the UDHR, which included thirteen years of deliberation regarding its specific contents, and the failure to ultimately adopt it, as had been expected, after its initial approval in an earlier version by the new UN Human Rights Council in 2006.

The amendments that made the Declaration’s final approval possible in somewhat diluted form included most notably an insistence in language added to the initial draft of paragraph 1 of Article 46 disavowing any exercise of indigenous people’s right to self-determination under Article 3 “which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent states” (e.g. an implicit allusion to the implications in the indigenous rights context of cases such as Kosovo, Tibet, and the Basque region). The standard for assessing

whether military activities conducted on the lands or territories of indigenous peoples are justified was also diluted from a requirement that the state at issue demonstrate a “(significant threat to) relevant public interest”, by striking the first (bracketed) part of the phrase; now simply a showing of a “relevant public interest” is enough. And yet since the rest of this Article continues to insist on free agreement or a request by the indigenous peoples involved in such situations, a state such as Colombia where traditional indigenous authorities insist upon the right to bar all armed groups from operating on their territory felt obliged to abstain in the final vote.

Article 3 of the Declaration on the Rights of Indigenous Peoples specifically contributes to a much-needed bridge between civil and political rights on the one hand and economic, social, and cultural rights on the other by adding that “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural rights”. These words reaffirm in essence that the rights of self-determination held by indigenous peoples have both the civil and political dimensions traditionally associated with this concept, and equally important additional dimensions related to their full and equal enjoyment of economic, social, and cultural rights. This in turn means that violations of the economic, social, and cultural rights of indigenous peoples have both an intrinsic significance in and of themselves, in relation to each other - in terms of rights in specific dimensions such as education, work, health, housing, etc. and their interdependence - and an additional significance because they reflect, and serve as indicators, of the extent to which their underlying right to self-determination is being respected.

The Declaration is particularly notable from the perspective of poverty research because more than half of its Articles focus on the economic

and social dimensions of indigenous rights with a direct relationship to issues of poverty: these include Articles 1, 2, 7-8, 10, 17-24, 26-29, 31-32 and 38-44. These provisions must be understood as part of an overall shift in emphasis in UN policy towards building a bridge between issues of poverty and human rights, which is also reflected in the May 2001 Statement of the Economic, Social and Cultural Rights (ESCR) Committee and in the draft version of the proposed guidelines on human rights and poverty which have been approved by the Human Rights Council but are still awaiting final approval in the General Assembly, in a situation akin to the limbo to which the indigenous rights declaration was consigned between June 2006 and September 2007.

Such standards provide an emerging juridical basis for Amartya Sen's suggestion that poverty must be understood as a deprivation of an individual's ability to control his or her own circumstances (Sen, 1999), which translated into the language of rights would imply that poverty takes its most concrete form as the violation of an individual and/or collective right to self-determination in both a literal and metaphorical sense. Meanwhile the Declaration is still only a half-step towards the full recognition of indigenous rights under international law that only a binding convention would provide; in the interim most advocacy efforts will be concentrated at the state and regional level to insure that these are raised up to the new minimum standards contained in it. The issue in this context is not whether the new Declaration is itself enforceable, but rather the extent to which it incorporates and provides additional support for standards as to indigenous rights which may be enforced or are already enforceable in other settings (global, regional, and national).

This leads us then to a further understanding of poverty as a deprivation of rights of full and equal citizenship, which is drawn in part from, and

enriched by, Brazilian educator Paulo Freire's notion of an inextricable link between education and citizenship, with education itself reconceived as a vehicle for self-determination in the most intimate sense - that of making history your own, and that of your community, and ultimately that of giving history a human face, where the global poor would be finally recognized as equal subjects, with "the right to have rights".

Meanwhile, the bell from Saramago's story is beginning to toll again - somewhere, everywhere - but this time he enjoins us, "Please let us stop - and listen. It tolls for us."

Conclusion

Contemporary efforts to develop counter-hegemonic paradigms of global justice and human rights must include legacies, fruits, and lessons rooted in the contributions and limitations of previous struggles to dignify economic, social, and cultural rights overall, and to fashion a weave capable of drawing together the disparate strands of the still unmet demands for a non-colonialist international order since the Bandung Conference of 1955 (Nonaligned Movement, UNCTAD, G-77, etc.). These include the recognition of the "right to development", "sustainable development", and respect for the "rights of Mother Earth" as serious alternative paradigms rather than as panaceas, together with the construction of alternative institutional structures on a global scale equivalent to those being developed in the Latin American region within the context of ALBA, Mercosur, UNASUR, and the emerging Conference of Latin American and Caribbean States and initiatives such as the creation of a Bank of the South and of an alternative Latin American currency, the African-Latin American Summits, and the April 2010 Global People's Summit on Climate Change and the Rights of Mother Earth in Cochabamba convened by the Bolivian government. To varying

degrees all of these efforts are derived from the critiques of the depredations of neoliberalism first launched by the Zapatistas, and of the international financial institutions as such at Seattle, Porto Alegre, Genoa, Cancún and elsewhere, and lay the basis for the construction, from below, of a new global “social and international order in which the rights and freedoms” recognized by the international community “can be fully realized” (as articulated by Article 28 of the Universal Declaration).

But the ethical force - the “army of ideas” necessary to bring this about, as Puerto Rican revolutionary pro-independence activist, poet, and philosopher Clemente Soto Velez (1987) once characterized it - can only come from among the victims of the global system of domination themselves and those of us who cast our lot with them because, as Ernst Bloch argued, “liberation and dignity are not automatically born of the same act; rather they refer to each other reciprocally - with economic priority we find humanistic primacy. There can be no true installation of human rights without the end of exploitation, no true end of exploitation without the installation of human rights.”

Mexico’s Zapatistas have come to symbolize the essence of such an approach, both as a movement that prefigured the critique of neoliberal globalization that has since become generalized in the “global justice” movement and more particularly because of their rigorously ethical wedding of critical theory and humane praxis. Much of this is reflected in their approach (1997), for example, to issues regarding the relationship between “reason” and “force” in the context of globalized struggle that confronts such movements:

If you cannot have both reason and force, always choose reason, and let the enemy have force. In many battles force may obtain victory, but in the struggle as a whole only reason

will triumph in the end. Those who are powerful will never be able to wrest reason from their force, but we will always be capable of deriving force from our reason.

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Saramago's speech is available online in its Spanish version at <http://habitat.aq.upm.es/boletin/n20/ajsar.html>.

Minority Rights as an Instrument of a Dignified Human Existence: India's Response to Diversity

Riaz Ahmad*

Abstract

A dignified human life today looks possible only in the milieu of a peaceful and egalitarian society, characterized by the values of liberty, equality and justice. Human rights and minority rights are indispensable instruments of refashioning or fine-tuning societies in conformity with the stated pattern, with a view to making them more livable. However, in the context of rights, the contemporary global situation is suggestive of a paradox: an unprecedented interest in their promotion on one hand and their frequent violation on the other. Rights of the minorities are generally more insecure than those of the majorities. Further, some minorities have to negotiate more severe difficulties than the rest. For instance, misinterpretation of global terrorism, particularly after 9/11, has bred and reinforced Islamophobia, resulting in hostile attitude and behavior towards the rights of the Muslim minorities in various national and local settings. Nevertheless, the very recognition of rights as tools of corrective mechanism inspires hope even in such trying circumstances.

There is a strong case for constantly watching human and minority rights in the global, national and local settings, learning from such experience, updating theory in its light, and guiding practice in view of the enriched theory. Macro and micro studies on human and minority rights therefore have far reaching current and future socio-political consequences for the dignified human existence of individuals and minorities in societies across the globe.

India's experiment with its socio-cultural diversity teaches many lessons about the role and relevance of minority rights in the context of a dignified human existence. Independence from British colonialism was a defining moment that entrusted the newly independent state of India

* Dr. Riaz Ahmad is Associate Professor of Political Science at Satyawati College, University of Delhi, India (riazonline@hotmail.com).

with a major responsibility to confront a series of challenges, of which the issue of socio-cultural diversity was one. India began evolving a suitable response to diversity, locating it in the context of human dignity. In search of a political framework for a dignified human existence, India experimented, among other things, with granting its minorities certain rights. India has had minorities of various kinds, which can be placed in distinct categories. It therefore employed different measures directed at the dignified human existence of its minorities, these measures achieving different levels of success. An estimate of the minority situation in India brings out the success and failure stories of such measures, as it also captures the current debates about evolving newer measures for improving the minority situation in the face of globalization. The stock taking of India's experiment teaches useful lessons regarding the theory and practice of minority rights, both in times of peace and violence.

This paper grapples with serious theoretical issues such as the definitions of minority and minority rights, 'universalization' of minority rights and the limits thereof, etc. it also makes a constructive assessment of the UN minority rights' mechanisms and instruments.

Introduction

A dignified human life today looks possible only in the milieu of a peaceful and egalitarian society, characterized by the values of liberty, equality and justice. Human rights and minority rights are indispensable instruments of refashioning or fine-tuning societies in conformity with the stated pattern, with a view to making them more livable. However, in the context of rights, the contemporary global situation is suggestive of a paradox: an unprecedented interest in their promotion on one hand and their frequent violation on the other. Rights of the minorities are generally more insecure than those of the majorities. Further, some minorities have to negotiate more severe difficulties than the rest. For instance, misinterpretation of global terrorism, particularly after 9/11, has bred and reinforced Islamophobia, resulting in hostile attitude and behavior towards the rights of the Muslim minorities in various national and local settings. Nevertheless, the very recognition of

rights as tools of corrective mechanism inspires hope even in such trying circumstances.

There is a strong case for constantly watching human and minority rights in the global, national and local settings, learning from such experience, updating theory in its light, and guiding practice in view of the enriched theory. Macro and micro studies on human and minority rights therefore have far reaching current and future socio-political consequences for the dignified human existence of individuals and minorities in societies across the globe.

India's experiment with its socio-cultural diversity teaches many lessons about the role and relevance of minority rights in the context of a dignified human existence. Independence from British colonialism was a defining moment that entrusted the newly independent state of India with a major responsibility to confront a series of challenges, of which one was the issue of socio-cultural diversity. India began evolving a suitable response to diversity, locating it in the context of human dignity. In search of a political framework for a dignified human existence, India experimented, among other things, with granting its minorities certain rights. India has had minorities of various kinds, which can be placed in distinct categories. It therefore employed different measures directed at the dignified human existence of its minorities, these measures achieving different levels of success. An estimate of the minority situation in India brings out the success and failure stories of such measures, as it also captures the current debates about evolving newer measures for improving the minority situation in the face of globalization. The stock taking of India's experiment teaches useful lessons regarding the theory and practice of minority rights, both in times of peace and violence. However, before discussing the details of independent India's encounter

with post-colonial diversity, it is pertinent to unfold the conceptual framework within which the Indian experiment has to be located.

Concepts and Conceptual Framework

A Dignified Human Existence

Though the idea of a dignified human existence can be tracked down to the distant past in religions and the writings of philosophers and sages, it spread slowly and steadily throughout the world, with the last century being a high point in its upsurge and espousal. The Charter of the United Nations (1945)¹ and The Universal Declaration of Human Rights (1948)² are two documents of great magnitude that have brought human dignity to the center of human attention more than ever before, setting an agenda for human societies and states for taking cognizance of and promoting the idea as a valuable norm and cherished goal. If the preamble of the Charter articulates a determination of the peoples of the United Nations 'to reaffirm faith in the dignity ... of the human person',³ the Universal Declaration underscores in its preamble the 'inherent dignity ... of all members of the human family' as a foundation of worldwide freedom, justice and peace, and then in its very first Article goes on to affirm all human beings' innate equality in dignity.⁴ Constitutions of many countries also spell out a commitment to human dignity.⁵ A dignified human existence is therefore a desired goal across cultures. The concept, nevertheless, lacks clarity.

¹*Charter of the United Nations*. Available at <http://www.un.org/en/documents/charter/preamble.shtml>. Last accessed on 9 August 2011.

²*The Universal Declaration of Human Rights*. Available at <http://www.un.org/en/documents/udhr/>. Last accessed on 9 August 2011.

³Op.cit., n.2

⁴Op.cit., n.3

⁵ For example, see the *Constitution of India*, p. 1. Available at <http://lawmin.nic.in/coi/coiason29july08.pdf>. Last accessed on 9 August 2011. Also see the *Constitution of the Islamic Republic of Iran*, Preamble, available at http://www.servat.unibe.ch/icl/ir00000_.html. Last accessed on 12 August 2011; Art. 2 (6), 22 and 39, available at <http://www.iranonline.com/iran/iran-info/government/constitution.html>. Last accessed on 12 August 2011.

There is a need to pause and ponder over the concept and develop its working definition for the sake of carrying forward the discourse in this paper. It may be argued that a dignified human existence is a subjective feeling rooted in objective conditions. These objective conditions are the circumstances necessary for human liberation. Such liberation is possible only when human beings enjoy a certain level of self-determination, and are free from coercion of their fellows and circumstances. In the 21st century, therefore, a dignified human existence has a tangible correlation with socio-cultural, economic and political aspects of life. A human society committed to a dignified human existence is actually possible only when the following two essential conditions are fulfilled. The first such condition is availability of equality of freedom and opportunity of participation in the aforementioned three aspects of life. The second prerequisite is absence of disadvantage, coercion and discrimination and any fear thereof. Taken together, both conditions account for access to power. Therefore, those who have equal access to opportunities of participation in socio-cultural, economic and political arenas of life and are equally free from disadvantage, coercion, discrimination and its fear, enjoy a dignified human existence. Those who suffer disadvantage and discrimination in the above context are marginalized, and lack power and, therefore, a dignified human existence.

The nuances of a dignified human existence can be understood with reference to yet another fact of contemporary world. All states are characterized by diversity and inequality. Ethno-cultural diversity resulting from multiplicity of identities based on cultural, ethnic, linguistic, religious and other distinctions makes the challenge of sorting out the issue of inequality even more serious. For, in the absence of diversity, equal citizenship rights and human rights can be a model for dealing with

inequality; but, with diversity as a fact of life this model cannot be a perfect mode of solving the inequality problem. In diverse societies, groups often have different hierarchical locations in the structure of power, some having an advantage over others. Some of them are dominant; others are disadvantaged and marginalized. As a result, individual members of the disadvantaged groups suffer many disadvantages and/or discriminations which others do not. Their minority status sometimes imperils even their citizenship rights and human rights; they face frequent violation of rights. Therefore, in addition to the normal citizenship rights, they also need special group rights. Groups suffering from disadvantage and/or discrimination and having an unfavorable power equation need citizenship rights *plus* other special rights. These are known as minority rights.

Minorities and the Issue of Access to Power

The concept of minority rights, like that of minority, is a disputed one. Both are inter-related too. A theoretical engagement with both these concepts is therefore warranted by the framework of this paper. Let us first discuss the concept of minority. Championship of the cause of the minorities by it notwithstanding, even the United Nations has conceded the absence of a universally accepted definition of a minority.⁶ A minority is usually defined with regard to one or more of the following attributes: smaller numerical size, an aspiration to uphold its culture and traditions, social deprivation and disadvantage, and an adverse power equation.⁷ The lack of a precise, universally accepted definition has often prompted the detractors of the concept to suggest that it is theoretically unsound. They have also used this suggestion to strip off the

⁶ "There is no internationally agreed definition as to which groups constitute minorities." See United Nations, (2010), *Minority Rights: International Standards and Guidance for Implementation*, New York and Geneva: United Nations, p. 2.

⁷ Riaz Ahmad (2011), "Minorities: An Introduction", in Manoranjan Mohanty, K. B. Saxena, *et al* (eds.), *Weapon of the Oppressed: An Inventory of People's Rights in India*, Delhi: Daanish Books, p. 149.

acceptability and respectability of the concept of minority rights, as also to advocate its surrender, and substitution by the concept of human rights.

However, the deficiency of a universally agreed upon definition of minority can possibly be construed as a signal of two reassuring trends. Firstly, more and more groups of people are seeking recognition as minorities because they consider such recognition as a necessary step to realize their dream of molding their own lives and thus living a dignified human existence. This is keeping the situation in a constant flux and posing challenges for the concept's theorization. Secondly, theoretical churning is on and conceptualization of minority and minority rights is on course.⁸

In the present age of democracy and rights when the people are seen as their own masters, access to power is a major issue. It is more reasonable to define majorities and minorities with reference to access to power. The most important feature of a minority at this historical juncture is then poor access to power. A minority is typically in a state of marginalization, often caused by deprivation and/or discrimination. Marginalization of a minority restricts fullest realization of its creative potential; its restricted creative potential reproduces its marginalization. It is then a vicious circle; both marginalization and restricted creative potential of a minority keep reproducing each other. Marginalization and restricted creative potential are an obstruction to a dignified human existence. This situation therefore requires conscious intervention to break the cycle of cruel reproduction of marginalization and restricted creative potential. There is a strong case for minority rights.

⁸ *Ibid.*, pp. 149-150.

Minority Rights, Creative Potential, Dignified Human Existence

Minority rights are opportunities and resources necessary for the fullest development of the creative potential of a minority.⁹ They are therefore socially useful instruments. They enable full realization of the creative potential of the members of a minority group and thus create conditions for their dignified human existence. However, the utility of minority rights is not limited to the minorities alone; they benefit the whole society too. The creative potential of its minorities impacts the aggregate creative potential of a whole society. Both high and low levels of minorities' creative potential reflect in the collective creative potential of the whole society. Further, realization of the creative potential of the minorities, their liberation, their ability to access power, their enjoyment of a dignified human existence reduces social tensions, conflicts and violence too. For, much of the same is rooted in a feeling of being ignored socially and culturally and being left out economically and politically. Minority rights are therefore in the interest of minorities and their members on one hand, and the whole society on the other.

Universalization of Minority Rights and Its Limits

In view of the global coexistence of the phenomena of diversity and inequality, minority rights need to be recognized as instruments of a dignified human existence in all states. A process of according respectability and acceptability to minority rights is already on due to various initiatives taken by civil societies, states, scholars, and national and international organizations across the globe. Given the common identifiable problems of the minorities around the world, there are also attempts directed at universalization of minority rights.

⁹ Riaz Ahmad (2011), "Of Minorities and Social Development: The Case of India's 'Missing' Muslims", in Manoranjan Mohanty (ed.), *India: Social Development Report 2010*, New Delhi: Oxford University Press, p.121

United Nations, for example, has been playing a crucial role in this respect. Minority rights are an integral part of its rights regime. In 1992, its General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In 1995, it established the United Nations Working Group on Minorities, which was replaced in 2007 by the Forum on Minority Issues. In the light of Article 9 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which asks the United Nations' specialized agencies and other organizations to play a role in the fulfillment of the rights and principles set forth in the Declaration,¹⁰ an Inter-Agency Group on Minority Issues was formed in 2004. In 2005, the position of the Independent Expert on Minorities Issues was created. The Office of the United Nations High Commissioner for Human Rights has a separate Indigenous Peoples and Minorities Section devoted to the protection and promotion of the rights of the indigenous peoples and the minorities.

These and other initiatives by the United Nations may gradually succeed in setting some global standards and thus in universalizing minority rights. The United Nations has already worked out some international standards of minority rights, along with providing guidance for their implementation.¹¹ In this context, it has identified four major areas of concern: survival and existence, promotion and protection of identity, equality and non-discrimination, and effective and meaningful participation.¹²

¹⁰ United Nations (2010), *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, United Nations, p. 41. Available at http://www.ohchr.org/Documents/Issues/Minorities/Booklet_Minorities_English.pdf. Last accessed on 13 August 2011.

¹¹ For example, see United Nations (2010), *Minority Rights: International Standards and Guidance for Implementation*, New York and Geneva: United Nations.

¹² *Ibid.*, pp. 7-13.

These four broad areas of concern may provide states and societies, as well as their minorities themselves, with a frame of reference for evaluating the status of minorities and then developing a scheme of rights for them; the universalization project, however, has its limits. Minorities in different states may have certain common identifiable problems and consequently some common areas of concern, but each of them is also conditioned by its own specificities. Therefore, there cannot be a universally applicable list of minority rights valid across variations of time and space. Minority rights will change and grow in accordance with the circumstantial contexts of the minorities in issue. Various minorities, in the light of their specific conditions, will continue to update their demand for minority rights in the light of their urge for, and politics of, recognition and redistribution.¹³

This conceptual framework demonstrates the inter-connections of power equation, minority status, dignified human existence, and minority rights. The evaluation of India's response to its diversity within this framework is likely to make useful contribution to the theory and practice of minority rights with a view to creating conditions for a dignified human existence around the world.

¹³ For an understanding of the distinction between politics of recognition and politics of redistribution, see Nancy Fraser (1995), "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age", *New Left Review* 212, pp.68-93; Nancy Fraser (1998), "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation", in Grethe Peterson (ed.) *The Tanner Lectures on Human Values Volume 19*, Salt Lake City: University of Utah Press, pp. 1-67; Nancy Fraser (2000), "Rethinking Recognition", *New Left Review* 3, pp. 107-120.

Diversity and Minority Rights in Post-Colonial India

Mapping India's Social Diversity

In the ninth decade following the publication of John Stuart Mill's *Considerations on Representative Government* in 1861, India got independence from the British colonial rule and then chose to adopt a democratic constitution. Since then democracy has survived in India, though it has had its own share of criticism. Notwithstanding its weaknesses and challenges, the survival of Indian democracy by itself is a convincing rebuttal of what Mill wrote in his seminal work on democracy: that democracy is next to impossible in multi-ethnic societies, and completely impossible in linguistically divided countries.¹⁴ India is a multi-ethnic and multi-linguistic society where democracy is now well entrenched, has caught the imagination of masses, and therefore faces no threat to its continued survival in foreseeable future.

The level of its diversity makes India one of the most diverse societies in the world. It has many aspects. From the perspective of religion, most of the Indians are Hindus (80.5%). Muslims (13.4%) constitute the largest religious minority, who, in terms of their percentage, are followed by Christians (2.3%), Sikhs (1.9%), Buddhists (0.8%) and Jains (0.4%). There are other religions and persuasions (0.6%), including Zoroastrianism (the religion followed by the Parsis).¹⁵ Internal heterogeneity of each religious community adds to India's diversity quotient. Religious communities of India are internally diverse on grounds of castes, sub-castes, sects, sub-sects, etc.

¹⁴ John Stuart Mill (1958), *Considerations on Representative Government*, New York: Liberal Art Press.

¹⁵ The census data indicates that 0.1% of the respondents did not state their religion. See Government of India, *Census Data 2001: Religious Composition*. Available at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx. Last accessed on 14 August 2011.

Of the socially disadvantaged, those recognized and listed as the Scheduled Castes (SCs) have a population of 16.2%.¹⁶ The SCs are the lowest castes of the Hindus and their equivalents amongst Sikhs, Buddhists and Jains. Their equals amongst Muslims, Christians and Zoroastrians (Parsis) have not been included as the SCs. In common parlance, people belonging to these castes are also known as dalits.

Another aspect of India's diversity is the existence of a substantial adivasi population, its indigenous or tribal population, which also hints at India's multi-ethnic character. 8.2% of the Indians are the Scheduled Tribes (STs).¹⁷

India's linguistic diversity is extraordinary too. If the information supplied by the respondents at the time of 2001 census is any hint, there are 6661 mother tongues in India. However, after subjecting the respondents' claims regarding their mother tongue to linguistic scrutiny, the final report of the census makes a mention of 122 languages in India: 22 scheduled and 100 non-scheduled.¹⁸

For the sake of this paper, focus on the above stated dimensions of diversity is sufficient; its other aspects are superfluous here. What is clear so far is the fact of coexisting different communities in India; what is not clear from the above is the fact of their unequal access to power. Some of them suffer marginalization, developmental and democratic deficit, and discrimination, none of which is of recent origin. India has inherited them at the time of independence. After Independence, therefore, Indian state and society have been searching for options that can lead

¹⁶ Government of India, *Census Data 2001: Scheduled Castes and Scheduled Tribes Population*. Available at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx. Last accessed on 14 August 2011.

¹⁷ Ibid.

¹⁸ Government of India, *Census 2001 Data Online: Languages and Mother Tongues*. See General Note. Available at http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/Language/gen_note.htm. Last accessed at 14 August 2011.

to a dignified human existence for citizens belonging to all communities. Minority rights and the politics thereof have been an important measure in this respect.

Minorities in India

In this paper, a minority has been defined as a community having poor access to power because of its marginalization caused by deprivation, and discrimination. From this perspective, despite its remarkable success in the working of democracy and emergence as a future engine of economic growth in the world, India remains a country with numerous minorities that live a marginalized life and thus do not have a proper, dignified human existence. Though the political discourse in India is predominantly preoccupied with its religious minorities, there are many other marginalized communities having poor access to power. For example, dalits (the SCs), adivasis (India's tribal communities), Other Backward Classes (OBCs), linguistic and cultural minorities, women, etc. suffer some degree of marginalization and poor access to power and qualify for categorization as minorities. This paper however restricts the discussion to four distinct, select categories of such communities: linguistic minorities, adivasis, dalits, and religious minorities. Two general observations may help an initial understanding about these minorities. First, none of these categories is a monolith. Secondly, exceptions apart, placed in the context of the whole of India, the linguistic minorities and the adivasis are geographically clustered in specific areas; the dalits and the religious minorities are geographically dispersed.

Freedom Movement, Constitution and the Minorities

Though India's mainstream freedom movement was led by the Indian National Congress and is often seen to have culminated in India's independence under Gandhi's leadership, other struggles of various

ideological persuasions too carried on the anti-colonial offensive at the grassroots.¹⁹ However, on the whole, the freedom movement in its various phases succeeded in mobilizing people belonging to different castes, classes, religions, regions and genders, each phase witnessing more extensive and intensive mobilization. Independence from the British colonialism was thus a project in which broadly all sections of the Indians participated. In this background, the freedom movement left behind a legacy of sovereignty, equality and dignity of all people, a legacy that in due course got reflected in the framing of the Constitution of India.

Consequently, the Constitution of India itself recognizes the people of India as its own source, lays the foundation of a political system based on representative democracy, and declares justice, liberty, equality and fraternity as major objectives of the Indian political system. The Constitution is inspired by the vision of a dignified human existence of all people: majorities and minorities. It therefore promises to secure for all citizens social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and fraternity as a means to guarantee dignity of the individual and unity and integrity of the nation.²⁰

In the above context, the Constitution includes rights and special provisions for select categories of the minorities. The successive governments in independent India have had the empowerment of the minorities on their agenda, as they are expected to operate within the constitutional framework. The framing of relevant policies and their implementation by the government on one hand and the politics of minorities and minority rights on the other have continued to influence each other all these years. A brief account of the four case studies of the

¹⁹ Bidyut Chakrabarty (1998), "Nature of the National Movement", in Mahendra Prasad Singh and Himanshu Roy (eds.), *Indian Political System: Structure, Policies, Development*, New Delhi: Jnanada Prakashan (P&D), p.55.

²⁰ See Preamble of the *Constitution of India*, op. cit., n. 5.

select categories of minorities will illustrate the point. Of the four case studies, the categories of geographically clustered minorities will be taken up first, which will then be followed by the categories of geographically dispersed minorities.

Linguistic Minorities

The case of linguistic minorities in India is one of the best examples to show how politics of minority rights can open avenues of accessing power and thus contribute to dignified human existence. In this regards, it will be fruitful to revisit the first decade of the post-independence period. When the Constitution was adopted on 26 January 1950, it included in its chapter on Fundamental Rights certain provisions for the protection of linguistic minorities. These provisions continue even today, while another one has been added in course of time. All sections of citizens have a right to conserve their language, script or culture.²¹ Admission to any state-maintained or state-funded educational institution cannot be denied to any citizen on linguistic grounds.²² Linguistic minorities have a right to establish and administer educational institutions of their choice.²³ The acquisition of property of such institutions by the state is possible only if the state ensures that the amount fixed for the acquisition by law does not restrict the minorities' right to establish and administer their educational institutions.²⁴ Further, discrimination by the state is prohibited in granting aid to any educational institution administered by any linguistic minority.²⁵ These rights under the category of 'Cultural and Educational Rights' in the chapter on Fundamental Rights have played a significant role in protecting and promoting the

²¹ Constitution of India, *op. cit.*, n. 5. See Art. 29 (1), p. 14.

²² *Ibid.* See Art. 29 (2).

²³ *Ibid.* See Art. 30 (1).

²⁴ *Ibid.* See Art. 30 (1A) [This provision was inserted in the Constitution of India by the Constitution (Forty-fourth Amendment) Act, 1978 which was effective from 20 June 1979.], pp. 14-15.

²⁵ *Ibid.* See Art. 30 (2), p. 15.

identity of linguistic minorities in India. It is interesting to note that the essence of these provisions is in a way a fore-runner of some of the provisions of the United Nations' Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by its General Assembly on 18 December 1992.²⁶

Much more interesting is the trajectory of altering the face of India's federal structure in the very first decade of the implementation of the Constitution. The urge of the linguistic minorities to share power and their politics of linguistic assertion ultimately led the government of India to undertake a linguistic reorganization of the Indian State. It was an example that suggested possibilities of modifying federalism for the sake of accommodating geographically clustered minorities' claims to power.

Despite some history of protest in south India during the colonial period against perceived domination of Hindi language and the north Indian culture, the framers of the Indian Constitution decided to use this language as a tool of unifying different communities and regions of India. In the hope that a shared language can bring people closer, the framers of the Constitution made Hindi in Devanagari script India's official language, with the proviso that English would continue to be used for all such official purposes of the Union of India for which it was being used before the implementation of the Constitution.²⁷ While the motives of the framers of the Constitution might have been noble, the move of according Hindi in Devanagari script the status of India's official language privileged it over other languages as also the Hindi speaking communities over non Hindi speaking communities of India.

Within a couple of years of the commencement of the Constitution, there were protests by such communities which, in a comparative

²⁶ Op. cit., n.10.

²⁷ See Art. 343 (1) and (2) of the Constitution of India, op. cit., n.5, p. 212.

perspective, were linguistic minorities. First, in 1952, the Telugu speaking people of what was then known as the state of Madras demanded that a separate Andhra state be carved out for them. Initially reluctant to respond favorably to this demand for fear of a backlash in Madras, the government of India had to announce creation of a separate Andhra state after language riots started in the Telugu speaking areas.²⁸ This was however just a beginning of a trend. There were other demands for linguistic reorganization of states. Thus, a year after the creation of Andhra in 1952, the government of India had to appoint in 1953 a State Reorganization Commission. The report of this Commission, which was made public in 1955, recommended linguistic reorganization of states of Indian federal structure.²⁹ The recommendation was implemented next year. Thus, linguistic considerations became crucial in altering the boundaries of existing states. Linguistic minorities became linguistic majorities in certain newly carved states.

Linguistic reorganization of states has been an empowering experience for the concerned linguistic communities that have become new linguistic majorities in the changed set-up. The language of each such community has become an official language of a state, which has given it many advantages.³⁰ First, it now thrives as a medium of instruction, examination and communication. Second, the first advantage is accompanied by more job opportunities, more literature and more cultural activities for its users. Third, even the speakers of a language outside the state carved out in its name may now access information and literature in their own language. Fourth, passing on their cultural

²⁸ Neera Chandhoke (2005), "The Political Consequences of Ethnic Mapping", Discussion Paper no. 14, London: London School of Economics and Political Science, Crisis States Development Research Centre, p. 15.

²⁹ Government of India, *Report of the States Reorganization Commission*, Delhi: Government of India.

³⁰ Gurpreet Mahajan, "Negotiating Cultural Diversity and Minority Rights in India", *International IDEA*, p. 114. Available at http://www.idea.int/publications/dchs/upload/dchs_vol2_sec3_4.pdf. Last accessed on 17 August 2011.

capital to the next generation has become easier for the speakers of such languages. Fifth, the regional linguistic elites which might have remained marginalized otherwise, now have more opportunities of political participation due to linguistic reorganization of states. Sixth, in addition to the elites, a greater number of commoners speaking regional languages can now play a more meaningful role in the democratic process through debates and discussions.

Linguistic reorganization of states in India has surely been a method of accommodating diversity and opening avenues of power for larger number of people. The discussion on linguistic minorities indicates the following. The Cultural and Educational Rights enumerated in the Constitution of India attend to the concerns regarding equality and non-discrimination, as also about the protection and promotion of their identities. Further, linguistic reorganization of states looks now a tested mode of addressing the concerns regarding effective and meaningful participation of the linguistic minorities both in democratic and developmental processes.

However, people who do not speak the language of the dominant group in a state now face the problem of inadequate participation in the democratic and developmental processes. They seem to have lost out to the dominant group in this context. Linguistic reorganization of states has therefore made erstwhile linguistic minorities new linguistic majorities in states of the Union of India, simultaneously creating new linguistic minorities in the framework of the reorganized states. Wherever the new linguistic minorities in states are living in geographically contiguous areas, multi-level federalism may be a method of addressing the issue of their minority rights for participation in the democratic and developmental processes. Such linguistic minorities, however, continue to enjoy their Cultural and Educational Rights.

Adivasis

As described earlier, Adivasis are India's indigenous people, its tribal population, who are also known as STs. Broadly speaking, they provide yet another example of geographically concentrated communities. Settled largely in relatively distant hills and forest areas, the tribes have different cultural values and social systems which themselves are different from the cultural and social systems practiced by other communities in rest of India. These socio-cultural gaps make these tribes vulnerable in the face of majority driven politics and therefore justify their special treatment and rights. Protection of the cultural and social systems of the tribe is possible only through recognition of their right to self-governance. Even the British colonial administration in India had to concede the point and provide special protections to the tribal belts in hilly areas.³¹ Such belts were excluded from the jurisdiction of the provincial governments.

The scheme of the Constitution of India reflects that its framers also understood the import of granting special protections to the adivasis. Therefore, along with enjoying citizenship rights in common with other citizens of India, STs have special rights³² too. They are entitled to the benefits of reservations in education,³³ government employment³⁴ and representative bodies.³⁵ The Constitution also directs the state to strive to protect them from social injustice and exploitation as also to promote their educational and economic interests.³⁶ The adivasis also have the

³¹ KB Saxena (2011), "Adivasis (Scheduled Tribes)", in Manoranjan Mohanty, KB Saxena, *et al* (eds.), *Weapon of the oppressed: An Inventory of People's Rights in India*, op. cit., n. 7, p. 39.

³² *Constitution of India*, op. cit., n. 5. For example, see Art. 15 (4), p. 7.

³³ *Ibid.* For example, see Art. 15 (5), p.7.

³⁴ *Ibid.* For example, see Art. 16 (4), (4A) and (4B), p. 8.

³⁵ *Ibid.* For example, see Art. 330 (1b) and (1c), p. 200; Art. 332 (1), (2) and (3), p. 201.

³⁶ *Ibid.*, Art. 46, p. 23.

protective shield of the Protection of Civil Rights Act of 1976 and the SC and ST (Prevention of Atrocities) Act of 1989.

Reservation of seats in legislative bodies has created conditions for their voices being heard. This and other reservations in education and employment have also increased their visibility in the Indian polity on one hand and have pushed their integration with the system on the other. The process of integration respects STs' culture and social systems. With a view to protecting their cultural, religious and social practices, adivasis in identified areas have been given special rights to govern themselves according to their customary laws. In this sense, the Constitution presents a blueprint for their protective segregation.³⁷ Within a regional state, some regions with tribal communities have been identified as excluded or partially excluded areas, and have been given special status. There, movement of outsiders is restricted and regulated by law. This special status of the regions with tribal communities protects these vulnerable communities against any possible danger of the consequences of the large scale influx of the outsiders.³⁸

The Constitution and the laws of India thus create some conditions for the STs to participate in the democratic and developmental processes, as they also try to guard them against atrocities, discrimination and violation of rights. Special care is taken to protect their cultural distinctiveness. In this regard, experimentations have been done with federalism. For instance, Mizoram and Nagaland have special rights to govern according to their customary laws. This is a special status which is not enjoyed by all constituent units of the Indian federation. This is, therefore, an example of asymmetric federalism. In order to address the

³⁷ Ibid. See Sixth Schedule, pp.291-314.

³⁸ Sanjib Baruah (1989), "Minority Policy in the North East: Achievements and Dangers", *Economic and Political Weekly*, Vol. 24, No. 37, 17 September, pp. 2089-92.

concerns of tribal (or other) communities of a region, in some states, the Indian state has experimented with multi-level federalism.

However, tribal communities in some areas face dislocation and loss of means of livelihood, or risk thereof, due to a strategy of development which is often criticized by many for its obsession with the modernization project, more so in the era of globalization. The focus of the tribal communities and the civil society on such issues is generating new demands for new rights, and posing new challenges for the Indian state to come up with appropriate response to accommodate such concerns.

Dalits

Acquiring currency in political and academic discourse in the late 1980s, the term dalit has come to be associated mainly with the SCs, though some prefer to use it in a wider sense to cover all marginalized groups of India including the religious minorities and the STs. Each State Government identifies the SCs in its own state and then they are listed in the Constitution. Presently, 1,231 communities are categorized as the SCs in the whole country.³⁹ Dalits, who were once labeled 'untouchables', are victims of institutionalized discrimination which has taken deep roots in the Indian society. Such discrimination had its beginnings in the caste hierarchy of Hinduism, which has also infiltrated other religions in India, both of native and foreign origins. As a consequence of discrimination and oppression spread over centuries, dalits lack a dignified human existence. It is in this context that the Indian state has initiated measures designed to restore human dignity to dalits.

It is important to reiterate one point here. The category of the SCs includes the lowest castes of Hindus and their equals from amongst Sikhs,

³⁹ Sukhadeo Thorat (2009), *Dalits in India: Search for a Common Destiny*, New Delhi: Sage

Buddhists and Jains; it excludes their equivalents from amongst Muslims, Christians and Zoroastrians (Parsis). The constitutional provisions and institutional arrangements intended to benefit the SCs are therefore not meant for the dalits among religions of a foreign origin. In fact, if an SC converts, for example, to Islam or Christianity, he immediately loses the benefits he used to get before changing his religion. Secular opinion and progressive forces in India favor a correction of this anomaly, though communal and conservative forces belonging to the Sangh parivar⁴⁰ are firmly against changing the existing rules of the game.

Initially restricting itself to the lowest castes of the Hindus, but then expanding its frontiers to include similar castes of the Sikhs, Buddhists and jains, the official category of the SCs still remains narrowly defined and thus discriminatory to similar castes of the religions of foreign origin. Nevertheless, the constitutional provisions and other institutional arrangements worked out for this category are remarkable for pushing a social revolution of dignified human existence for the citizens who currently qualify as SCs.

In the backdrop of centuries-old discrimination and oppression leading to a degrading human existence of the great mass of Indian people, the abolition of untouchability itself can be interpreted as a revolutionary step taken by the Constitution of India. It abolishes untouchability and makes its practice in any form a punishable offence.⁴¹ It is an important measure to uphold the principle of equal dignity of all human beings. It further prohibits caste-based discrimination in matters of legal equality (equality before law and equal protection of law) in various matters, still granting the state power to make special provisions for their

⁴⁰ Sangh parivar is a term that refers to the units of the 'saffron' family: RSS (Rashtrya Swayamsevak Sangh), BJP (Bharatiya Janata Party), VHP (Vishwa Hindu Parishad), Bajrang Dal, etc. The saffron family is understood as an unabashed campaigner of 'Hindu' nationalism.

⁴¹ *Constitution of India*, op. cit., n. 5, see Art. 17, p. 8.

advancement.⁴² It asks the state to try, like it has directed it in case of the STs, and make policy to protect them from injustice and exploitation and promote their educational and economic interests.⁴³ In the same manner as in case of STs, it opens up for them legal possibilities of reservations in education,⁴⁴ government employment⁴⁵ and representative institutions.⁴⁶ These rights are simultaneously protective, enabling and empowering for them.

Additionally, the government has also been making from time to time various laws to counter injustice against dalits. Untouchability (Offences) Act of 1955, Protection of Civil Rights Act of 1976 that actually replaced the first Act mentioned here, SCs and STs Prevention of Atrocities Act of 1989, Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act of 1993, etc. are some glaring examples of the government's endeavor for a dignified human existence of dalits.

An administrative structure is already in place to watch over the functioning of the constitutional and legal safeguards available for both SCs and STs. The duties of the Commissioner for SCs and STs who had his origin in Art. 338 of the Indian Constitution were consolidated in 1978 and a National Commission for SCs and STs was appointed, which itself was split in 2004. Since then, India has had two National Commissions: one, National Commission for the SCs; two, National Commission for the STs.

Though the cumulative impact of all these measures has been positive for restoring the dignity of the dalits, the erosion of discrimination, oppression and injustice and the restoration of dignity is rather slow and patchy. Despite a ban on untouchability, it continues in practice, though

⁴² Ibid. See Art. 14, 15, 16; pp. 6-8.

⁴³ Ibid. See Art. 46, p. 23.

⁴⁴ Ibid. For example, see Art. 15 (5), p. 7.

⁴⁵ Ibid. For example, see Art. 16 (4), (4A) and (4B), p. 8.

⁴⁶ Ibid. For example see Art. 330, pp. 200-201

to a lesser degree; their marginalization in economic and social structure and atrocities against them go on; many of them are still abysmally poor and face deprivation.⁴⁷ These are future challenges for the minority rights movement and the state.

Religious Minorities

In a descending order of their percentage in India's total population, Muslims, Christians, Sikhs, Buddhists, Jains and Zoroastrians (Parsis) are the only six notable religious minorities in India; there are other religions too. The first two and the last of these minorities are of foreign origin and the remaining three have Indian origin. In the circumstances that led to the partition of the country and the carving out of Pakistan as a Muslim state, the issue of foreign origin of minorities acquired a little weight and some started suspecting the 'national' loyalty of such minorities. They went on to question the desirability of making India a secular state. Nevertheless, the framers of the Indian Constitution stuck to the values of India's freedom movement and, inspired by this legacy, chose to make India a secular state. This secularism, different as it was from its western brand that advocated separation of church and state, gave the individual and communities a freedom of faith, sanctioned a multi-religious society, and expected the state to simultaneously give equal respect to all religions and maintain equidistance from all of them. Secularism itself came as a respite for the religious minorities. For, with its own peculiarities, Indian secularism was the first condition of a dignified human existence of such minorities. In the atmosphere of bloody rioting that followed the partition of the country, secularism gave the hope for future.

The framers of the Constitution, through its provisions, gave the religious minorities certain useful rights. A policy or practice of segregation

⁴⁷ Surinder S. Jodhka (2011), "Dalits and Development", in Manoranjan Mohanty (ed.), *India: Social Development Report 2010*, New Delhi: Oxford University Press, pp. 55-56.

pursued by the state or society or both can be damaging for the dignified human existence of the communities facing it. Some provisions of the constitution look like guarantees against such policy and practice. All majorities and minorities in India have the protections of the Fundamental Rights. All have equality before the law and equal protection of laws. Discrimination is prohibited by law.⁴⁸ Avenues for public employment are open for everybody without discrimination.⁴⁹ All enjoy a host of freedoms: of speech and expression, peaceful assembly, formation of associations or unions, free movement, residence and settlement, and profession, occupation, trade or business.⁵⁰ Everybody has protection in respect of conviction of offences,⁵¹ protection of life and personal liberty,⁵² right to education,⁵³ and protection against arrest and detention.⁵⁴

The commitment of the Constitution to the idea of integration as against the idea of assimilation is also clear from some other Fundamental Rights. Freedom of Religion which gives freedom of conscience and free profession, practice and propagation of religion⁵⁵ on one hand and freedom to manage religious affairs⁵⁶ on the other; and Cultural and Educational Rights protecting interest of linguistic and cultural minorities⁵⁷ on one side and giving religious and linguistic minorities a right to establish and administer their own educational institutions⁵⁸ on the other provide guarantees against assimilation. With all these rights available to them, religious minorities look safe from segregation and assimilation, and appear set to protect and promote their religious, linguistic and

⁴⁸ *Constitution of India*, op cit., n. 5, see Art. 14 and 15, pp. 6-7.

⁴⁹ Ibid. See Art. 16, pp. 7-8.

⁵⁰ Ibid. See Art. 19, pp. 9-10.

⁵¹ Ibid. See Art. 20, p. 10

⁵² Ibid. See Art. 21, p. 10

⁵³ Ibid. See Art. 21A, p. 11.

⁵⁴ Ibid. See Art. 22, pp. 11-12.

⁵⁵ Ibid. See Art. 25, p. 13.

⁵⁶ Ibid. See Art. 26, pp. 13-14.

⁵⁷ Ibid. See Art. 29, p. 14.

⁵⁸ Ibid. See Art. 30, pp. 14-15.

cultural identities in a framework of cultural diversity and integration. They have the freedom to use their own personal laws in matters like marriage, inheritance, etc. However, the suggestion in the Constitution regarding the desirability of the Uniform Civil Code⁵⁹ and its political exploitation mainly by the Sangh Parivar sometimes makes the issue of personal laws a bone of contention, threatening the autonomy of the religious communities. For, the uniformity intended by the making of a Uniform Civil Code will certainly excise a community's freedom of using its personal laws in crucial matters.

There are some other measures too that have a bearing on the rights of the religious minorities. There is a National Commission of Minorities which is expected to act as a watchdog of minority rights. Further, the UPA government has created a separate Ministry of Minority Affairs, which is likely to have some positive implications for the religious minorities. The policies regarding naming of public places, declaration of public holidays, and permitting dresses in institutions for education and employment broadly indicate symbolic recognition of religious minorities.

The constitutional rights of the religious minorities and other institutional arrangements related with them are undoubtedly enabling; they enable them to protect and promote their identities. But then there is much more to the issue of dignified human existence. It is therefore worthwhile to evaluate the conditions of the religious minorities against hard facts. A discussion of all religious minorities would be too unwieldy. Therefore only Muslims are being focused here, with a couple of other necessary references.

All safeguards of religious identity notwithstanding, sometimes this identity appears under threat. Such matters are not frequent. Still, despite their

⁵⁹ Ibid. See Art. 44, p. 23.

rare occurrence, their importance for the religious minorities cannot be ignored because they always leave behind a psychological condition that can make the religious minorities uneasy. A dramatic example of such an occurrence is the demolition of Babri Masjid that was planned and executed by the forces of Sangh Parivar.⁶⁰ This goes to the credit of the secular spirit of the majority of Indians that the incident was very widely condemned. However, it left a scar on the memory of not merely Muslims but other religious minorities. It was interpreted as an intended de-recognition of a religious community.

Broadly speaking, physical survival and existence of the religious minorities are not under stress. However, during communal violence, it is mostly a minority which suffers greater loss of life and property. Very rarely, such violence takes the form of genocide. There are two examples to support this. The first illustration is about the mass killings of Sikhs in the aftermath of Mrs. Indira Gandhi's assassination. Some allege that this violence was sponsored by the government. This violence also heightened the anxiety for survival and existence of a religious minority.

The 2002 Gujarat pogrom⁶¹ which is alleged to have been scripted by the BJP government of Narendra Modi, and in which thousands of Muslims were killed also falls in the category of very rare illustrations that showcase threat to survival and existence. But it is also true that like the incident of the demolition of Babri Masjid, the secular majority of Indians condemned the anti-Sikh violence of 1984 as well as the anti-Muslim Gujarat pogrom of 2002. More particularly the major battles for justice for Muslims in the context of Gujarat violence were and are being fought by innumerable Hindus.

⁶⁰ For a brief account, see Riaz Ahmad (1993), "The Internal Enemy", *Mainstream*, 24 April.

⁶¹ For a discussion, see Riaz Ahmad (2002), "Gujarat Violence: Meaning and Implications", *Economic and Political Weekly*, Vol. 37 No. 20, 18 May.

These examples show that in exceptional circumstances the survival and existence as well as the identity of Muslims appear under serious threat. But that is not all. There are issues of equality and non-discrimination and effective and meaningful participation. Sachar Committee Report has conclusively shown that Muslims are victims of discrimination in many matters and that they lack meaningful participation in economy and politics.⁶² The social, economic and educational deficit of Muslims compels one to think and explore newer ways of ensuring them a dignified human existence. The Sachar Committee itself recommended Equal Opportunities Commission and a Diversity Index. The minority rights discourse is giving due attention to both.

Wrapping up the Discussion

The discussion in this section indicates that India has responded to its diversity in a number of ways, depending upon the peculiarities of the minority community. The linguistic minorities as well as the adivasis have been given cultural rights for the protection and promotion of their identity. At the same time, due to their geographical concentration, the federal structure has been used to make their participation in democracy and development more meaningful. The Indian state has shown remarkable flexibility and willingness to experiment with innovative modes of power-sharing within the federal framework. The federal state in India not only reorganized its constituent units on the basis of language, but also made federalism asymmetric and multi-level. Expansion of the principle of multi-level federalism can possibly respond to the genuine concerns of more minorities who are smaller in number but geographically clustered.

⁶² Prime Minister's High Level Committee (2006), *Social Economic and Educational Status of Muslim Community of India: A Report*, New Delhi: Cabinet Secretariat, Government of India

Dalits and the religious minorities in India are geographically dispersed. They cannot benefit from the reorganization of the federal system. Jammu and Kashmir is a Muslim majority state, but there is much more to Muslim than only Jammu and Kashmir. Further, this state has a special status and is covered under the principle of asymmetric federalism. Dalits and the religious minorities both have been given cultural rights, rights to protect and promote their cultures. Dalits have the benefit of reservation in education, employment and representative institutions. Sections (not whole) of religious minorities have now been given reservations. Dalit Sikhs and Buddhists enjoy all benefits enjoyed by the Hindu dalits. OBCs of these minorities as well as the Muslim OBCs now have access to the seats reserved for OBCs in education and employment. However, they do not have access to reservations in representative institutions. In view of their marginalization, all Muslims, not merely some of their sections, need reservation in education, employment and representative bodies. The churning process is on. Maintaining the diversity index in all institutions, organizations, etc. is yet another interesting option.

Globalization is creating new vulnerabilities for all Indian minorities. Modernization is threatening the basic identity and survival of the tribal people. Cultural invasion through cinema, television, and other communication media is a cause of concern for all those who want to preserve their culture in pure form. This purity is only a mirage now. Many economic enterprises are closing down in the face of tough competition from the global players. People are losing work, thus facing economic hardships. All these things make minority rights even more relevant. In the face of a state withdrawing from social sector and leaving most things to the forces of the market, minorities will have to wage joint battles to pressure the state to concede minority rights necessary in fresh situations. There is also a need to think how the market forces can be used to the advantage of the minorities.

Conclusion

This paper has interesting implications for the concept of minority rights and their global value. Minority rights have an instrumental value in all contemporary societies, because such societies are diverse and unequal. It follows that some are living a dignified life; others are not. The developments of the last and this century point to the desirability of a dignified human existence for all human beings. One cannot get a dignified existence in charity from someone or as a welfare measure from a benign body or person. Conceptually, a dignified human existence is logically impossible if one is getting charity or welfare assistance. A dignified human existence is to be treated as a matter of right.

This right itself depends on certain conditions connected with one's economic well-being and ability to decide for oneself in a range of cultural, social and political issues. A dignified life calls for fullest possible development of one's potential, which itself is possible only when one has access to certain opportunities. Opportunities are not equally available to all. Persons belonging to minorities need special rights to cope up with their difficulties emanating from the processes of marginalization, deprivation and discrimination. For them, minority rights are tools of their dignified human existence.

A global movement for minority rights has to be a conscious endeavor. Minorities have to be conscious of the need for universalization of minority rights, as also about the limits thereof. A certain level of universalization is necessary so that others and the minorities themselves can evaluate their positions within a global frame of reference. This universalization cannot be complete, covering each aspect of minority rights. There can be an agreement, and attempted universalization, in

matters of some broad principles. Situations of the minorities vary; therefore their specific rights will also vary. What is useful for one minority in one set up may be useless for another minority in another set up. If a minority is not geographically clustered, it cannot benefit from federalism of the multi-level, or asymmetric or any other type. Further, even the universalization about the broad principles may lose its relevance after some time. Changed time will have changed circumstances. Therefore, a new agreement about universalization of broad principles of minority rights will develop over time. At the present juncture, however, the theme of universalization of minority rights consists of four broad concerns of the minorities worldwide: survival and existence, protection and promotion of identities, equality and non-discrimination, and effective and meaning participation in crucial walks of life.

Minorities need to respect each other's concerns and help in each other's struggles. In the present set up, though the scope of state activity is shrinking, minorities still need the state for recognition of their rights. Hence, a democratic movement to pressure state is of great use. Such a movement will grow in strength if more and more minorities join it. This is an argument for more and more minorities coming together to help each other in the struggle.

With poverty, injustice, oppression, marginalization, deprivation, discrimination and inequality continuing as stark, ugly realities of life, minority rights give the hope of a world with dignified human existence.

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Islamic Culture and Human Rights

Islam and Intra-Muslim Regional Human Rights Mechanisms

*Kamran Hahsemi**

Abstract

The OIC and the Arab League are the largest intergovernmental organizations whose membership is comprised solely of Muslim states. In the early 1990s each organization adopted a human rights document: the Cairo Declaration on Human Rights in Islam (CDHR) and the Arab Charter on Human Rights (ACHR), respectively. These documents remained inactive for more than a decade until both organizations resumed their human rights activities in early 2000s, leading in March 2008 to the adoption of a new Charter for the OIC, with special emphasis on human rights, as well as the entering into force of a new version of the ACHR.

This paper will examine the extent to which Islam might contribute to the internal promotion and protection of human rights and the establishment of intra-Muslim regional human rights mechanisms. A special approach in the developing world towards human rights fulfillment is the "cultural-religious oriented approach". For Muslims this multifaceted approach is discussed in the "Islam and human rights" discourse. Islam is the central common element among all Muslim states for establishing a human rights system. In this regard, the paper provides a survey on traditional Muslim law and its relevance to the concept of rights. In order to provide a better understanding of the relevance of Islam to human rights, the study makes a distinction between the three Islamic concepts of Islamic core principles/values, Muslim legal traditions, and Shariah. In line with this distinction the CDHR, as the most well-known contemporary source of Islam and human rights, is discussed.

* Dr. Kamran Hashemi is a Human Rights and International Law Lecturer at Iranian universities and Director of the Non-Aligned Movement for Human Rights and Cultural Diversity (kamranhashemi1@yahoo.com).

The paper argues that after two decades since the adoption of the CDHR, and following a long running debate on Islam and human rights, the related human rights documents in the Arab League and the OIC in recent years tend to avoid referring to the controversial or ambiguous areas between religious legal traditions and human rights and leave them to be resolved in the process of time within more progressive endeavors of related states. Instead references to Islam in these documents have been limited to contributing areas of the religion to human rights, i.e. to "Islamic principles and values".

Introduction

The Organization of Islamic Cooperation (OIC) and the Arab League are the largest intergovernmental organizations whose membership is comprised solely of Muslim states. In the early 1990s each organization adopted a human rights document: the Cairo Declaration on Human Rights in Islam¹ (CDHR) and the Arab Charter on Human Rights² (ACHR), respectively. These documents remained inactive for more than a decade until both organizations resumed their human rights activities in early 2000s, leading in March 2008 to the adoption of a new Charter for the OIC³, with special emphasis on human rights, as well as the entering into force of a new version of the ACHR⁴. This paper will examine the extent to which Islam might contribute to the establishment of intra-Muslim regional human rights mechanisms.

A special approach in the developing world towards human rights fulfillment is the "cultural-religious oriented approach". For Muslims this multifaceted approach is discussed in the "Islam and human rights" discourse. Islam is the central common element among all Muslim states for establishing a human rights system. Islam, with an age of fourteen

¹ Adopted on 5 August 1990, U.N. GAOR, World Conference on Human Rights, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

² Reprinted in 18 Hum. Rights Law Journal, 151 (1997).

³ Adopted by the 11th OIC Summit on 14 March 2008 in Dakar.

⁴ Reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force, 15 March 2008.

centuries, and with more than one billion followers throughout the world, is, like all of the great religions, a diverse body of essential principles, moral values and worship, with spiritual, agnostic, ethical, theological and philosophical aspects running parallel to human elements, including history, civilization, culture, politics, law and related customs and traditions of different communities. In order to provide a better understanding of the relevance of Islam to human rights, the study makes a distinction between the three Islamic concepts of Islamic core principles/values, Muslim legal traditions, and *Shariah*.

Muslim States, the OIC and the Arab League

The term "Muslim states" in this study refers to the 57 member states of the OIC (the OIC members), with mostly predominant Muslim populations⁵. Spreading over four continents, the OIC is the second largest intergovernmental organization after the United Nations⁶. Intergovernmental organizations aim at cooperation in the different spheres of culture, economics, politics and security. The OIC, however, is formed mainly on the basis of religious identity, and given the vast areas of diversity among the OIC members, Islam is the only common element which binds them together. Khan indicates:

"After the UN, it is the OIC alone that has so much diversity within its fold. The single common dominator among the OIC

⁵ The list of members of the OIC is available at the website of the Organization at: <<http://www.oic-oci.org>>.

⁶ The Organization was established on 25 September 1969 when the first meeting of the leaders of the Muslim world was held in Rabat, Morocco, in the wake of the Israeli attempt to burn down the Al-Aqsa Mosque on 21 August 1969. This summit also resolved that Islamic nation states should foster close cooperation and mutual assistance in the economic, scientific, cultural and spiritual fields. As a first step toward facilitating such cooperation, the summit established the Islamic Conference of Foreign Ministers (ICFM), which eventually adopted the Charter of the Organization at its third meeting in March 1972. On emergence of the OIC see Saad S.Khan, *Reasserting International Islam: A Focus on the Organization of the Islamic Conference and Other Islamic Institutions*, (Oxford University Press, (2001), 11-18.

member states is Islam, otherwise there is not one thing, geography, language, culture, national priorities etc., that is common among, say, Bosnia, Senegal, Libya, Qatar, Tajikistan, and the Maldives."⁷

Syed argues that presently even Islam as "a semi-dormant ideology does not provide sufficient force to overcome political, ethnic, sectarian, and economic disputes existing within the countries of the OIC bloc⁸". An-Na'im has a similar view on the role of Islam in the Arab world:

"While Islam is often assumed to be a major factor in the presumed unity of 'Arab culture', there are some strong differences in the way it is understood and practiced in various parts of the region, especially in terms of its relationship to the state and public life, from Tunisia to Saudi Arabia, and from Somalia to Syria and Iraq."⁹

After the OIC, the Arab League is the second largest intra-Muslim regional organization. The Arab League was formed in Cairo on 22 March 1945 with six members: Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, and Syria; it currently has 22 members. The main goal of the League is to draw the relations between member states closer and to coordinate collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries¹⁰.

⁷ Khan (note 7), 181. For other critical discussions on the OIC see generally , *The Iranian Journal of International Affairs*, Special Volume on the OIC, Vol.9 , No.3 ,(Fall 1997).

⁸ Fasahat H.Syed, *Structural Reform in the OIC*, *The Iranian Journal of International Affairs*, *Ibid*, 399.

⁹ Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective* , 23 *Human Rights Quarterly* 3 (2001), 707.

¹⁰ See *Pact of the League of Arab States*, U.N. doc. A/C. 6/L.111 (also in U.N. Treaty Series, vol. LXX, pp. 237-263).

Muslim law (Muslim Legal Traditions) in its Historical Context, and the Concept of Rights

The Prophet Muhammad was born in Mecca in 570 A.D and in 610 received the first verses of the Holy Quran. After ten years in Mecca he migrated to Medina in 622, where he established the first Muslim community. The situation of Arabs before Islam is described by Mahmasani as follows: "The Arabs in *jahilyah* (the pre-Islamic era) lived a simple - almost primitive existence on their peninsula and the areas adjacent to it. Their society was a composite of disunited tribes with no central authority to bind them together in a coherent whole."¹¹ Considering the Arab law in *jahilyah*, Schacht states:

"The positive law of the ancient Arabs is decidedly profane, matter-of-fact, and informal; even their penal law is reduced to questions of compensation and payment. ...The law of personal status and family, of inheritance, and criminal law were dominated, both among the Bedouins and among the sedentary population, by the ancient Arabian tribal system. This system implied the absence of legal protection for the individuals outside his tribe, the absence of a developed concept of criminal justice and the reduction of crimes to torts, the responsibility of the tribal group for the acts of its members, and therefore blood feuds, mitigated by the institution of blood-money.... The relations of sexes in pre-Islamic Arabia were characterized not so much by polygamy, which certainly existed, as by the frequency of divorce, loose unions, and promiscuity, which sometimes make it difficult to draw a line between marriage and prostitution. Slavery and concubinage with slave women were taken for granted. The absence of an organized political authority in Arab society, both Bedouin and

¹¹ Subhi Mahmasani, *Falsafat Al-Tashri fi Al-Islam, the Philosophy of Jurisprudence in Islam* (trans. F. Ziadeh) (1961), 15.

sedentary, implied the absence of an organized judicial system¹².

The basic purpose of Islam and indeed of all religions according to the Holy Quran is humanistic, ethical, moral and spiritual¹³. Therefore, “[t]he primary reason for sending the prophets was to proclaim truths and lay down eternal values, not to make laws¹⁴”. Mohammad, however, in line with his mission, had to apply the eternal values in his message into the daily law and politics of Medina, where he, like Moses and unlike Jesus, faced new responsibilities as the ruler and legislator.

After the death of the Prophet, with the speedy expansion of Muslim territories, medieval scholars had to address the vast and variable legal requirements of the new Muslim territories. The development of Muslim law therefore was based on the endeavors of Muslim jurists through the exercise of legal reasoning (*ijtihad*) and using specific jurisdictional methods¹⁵.

Muslim law “was at the time of introduction no doubt a major step forwards¹⁶”. It entailed “a highly developed awareness of rights and obligations, a combination which enabled Islam to formulate a system that would seek to safeguard the rights of individuals to an extent which

¹² Joseph Schacht, *An Introduction to Islamic Law* (Oxford At the Clarendon Press, 1964), 6-7.

¹³ See the Holy Quran, for example verses, 2:151 and 62:2.

¹⁴ Mohammad Mojtahed Shabestari, Interview with: 42 *Howzeh* (1991), quoted in: Asghar Shirazi, ‘Criticism from Outside’ Chapter 16, in: *The Constitution of Iran*, available at the website of Dr. Abdolkarim Soroush at: <<http://www.seraj.org/schirazi.htm>>.

¹⁵ The two main jurisprudential methods according to *Sunni* branch of Islam are *ijmaa* and *qiyaas*. *Ijmaa* is consensus of opinions, and *qiyaas* means reasoning by juristic analogy. The science of law is called *fiqh* and the body of Muslim law is in fact a creation of *fiqh*.

¹⁶ Tore Lindholm, *Human Rights in Christianity and in Islam*, in: Silvennoinen Suvikki & Markku Suksi (eds.) *Human Rights and Religion: the Case of the Sudan* (1997), 82.

was not common in the legal thinking of many cultures and civilizations¹⁷". An-Na'im states:

"In my view, by securing a relatively advanced degree of protection for the rights of women and non-Muslims, historical formulations of *Shariah* did provide for better protection of human rights than other normative systems in [the] past. For example from the very beginning, *Shariah* was understood to require an independent legal personality for the women, and the protection of certain minimum rights for them in inheritance and family relations, beyond what was possible under other major normative systems until the nineteenth century. Similarly, *Shariah* guarantees specific rights for the so-called People of the Book (mainly Christians and Jews), more than what had been provided for under other major normative systems in the past¹⁸".

Similarly, Ostrog points out:

"Considered from the point of view of its logical structure, the system [Muslim law] is one of rare perfection. Those Eastern thinkers of the ninth century laid down on the basis of theology, the principle of the rights of Man, in those very terms, comprehending the rights of individual liberty, and inviolability of person and property, elaborated a law of war of which the humanist, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of

¹⁷ B. Breiner, 'A Christian View of Human Rights in Islam', quoted in: Mashood A Baderin, *Establishing Areas of Common Ground between Islamic Law and International Human Rights*, 5 *the International Journal of Human Right* 2 (2001), 85.

¹⁸ Abdullahi Ahmed An-Na'im, *Islam and Human Rights: Beyond the Universal Debate*, in: Asil, *Proceedings of the 94th Annual Meeting*, 5-8 April 2000, Washington, DC., 95-103.

toleration of non-Muslim creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted¹⁹".

On the historical treatment of religious minorities by Muslims, Mayer points out that "[i]n particular, the treatment of the Jewish minority in Muslim societies stands out as fair and enlightened when compared with the dismal record of Christian European persecution of Jews over the centuries²⁰". She also states: "The annals of history point out the fact that the same degree of religious freedom as granted by *Shariah* to the non-Muslims living in Islamic states were non-existent in the history of other religions²¹". Bielefeldt has a similar comparison as follows: "Historic evidence shows that some Christian minorities and dissidents preferred living under Islamic rule to being persecuted by their fellow Christians in the Byzantine and Habsburg empires. Thus, with regard to religious tolerance, Islam seems to have a better historical record than Christianity²²".

In fact, The *Dhimmah* (Muslim legal traditions on minorities), - although a part of its conditions with the standards of today is discriminatory against non-Muslims - has provided the widest and oldest system for recognition, protection and regulation of the status of religious minorities among majority Muslims; the system has survived for about fourteen centuries in an extended area from Spain in Western Europe to the Pacific Ocean in

¹⁹ C.L. Ostrong, *The Angora Reform*, three lectures delivered at the centenary celebrations of University College on 27-29 June (University of London Press, 1927), pp.30-31, cited in: Asef A. A. Fysee, *Outlines of Muhammadan Law*, Third Edition (Oxford University Press, 1964), 53-54, quoted in: Mashood A Baderin, *Establishing Areas of Common Ground between Islamic Law and International Human Rights*, *The International Journal of Human Rights* 2 (2001), 86.

²⁰ Anne Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics*, Third Edition (Westview Press 1999), 136.

²¹ Abdur Rahman I Doi, *Non-Muslims under Shariah (Islamic Law)*, Third Edition (Ta ha Publishers Ltd, 1983).

²² Heiner Bielefeldt, *Muslim Voice in the Human Rights Debate*, *17 Human Rights Quarterly* 4 (1995), 597-8.

East Asia. In recent centuries the *Dhimmah* system, by the name of *Millet*, governed the status of minorities in multi-religious areas under the Ottoman reign in parts of Eastern Europe and most areas of the Middle East and North Africa²³.

In the same vein, Van Bueren on children rights states that "the very concept that children possess rights has a far older tradition in Islamic law than in international law, where the notion did not emerge until the twentieth century²⁴". It has even been suggested that child-rearing practices in medieval Islamic societies revealed a greater concern for the child's needs than in recent European societies²⁵.

Finally for the purpose of this study, when a reference to early (classical, historical or traditional) Muslim law is made, the terms "Muslim law", "Islamic law" or "Muslim legal traditions" all have a similar meaning. "Legal traditions" or "religious legal traditions" are more familiar terms for non-Muslim readers, because other religions and civilizations have such traditions as well²⁶. Furthermore, by using the term 'traditions' it is easier to remember that, when comparing Muslim legal traditions with modern human rights norms, the former date from before the tenth century, while the latter are the achievement of the last six decades of modernity and post-modernity. As Bielefeldt states: "the emancipatory principle has been articulated only in the modern era. By comparison, the Islamic *Shariah*, the normative tradition commonly known as Islamic law, is much

²³ See Kamran Hashemi, *The Right of Minorities to Identity and the Challenge of Non-discrimination: Study on the Effects of Traditional Muslims' Dhimmah on Current States Practices*, 13 *Journal of Minorities and Group Rights* 1 (2006).

²⁴ Geraldine Van Bueren, *The Best Interests of the Child - International Cooperation on Child Abduction*, Program on the International Rights of the Child (QMWC, London, 1993), 51.

²⁵ See Anver Giladi, *Concept of Childhood and Attitudes towards Children in Mediaeval Islam*, 32 *Journal of the Social and Economic History of the Orient* (1989).

²⁶ For study of other legal traditions such as Chthonic, Talmudic, common law and Hindu, see generally, Patrick Glenn H, *Legal Traditions of the World, Sustainable Diversity in Law* (Oxford University Press, 2000).

older"; although, even according to contemporary standards, most Muslim legal traditions are either consistent with or contribute to the development of human rights²⁷.

Islamic Core Principles/Values, Muslim Legal Traditions (Muslim Law), and Shariah.

As mentioned earlier, a special approach to human rights in the developing world, which includes Muslim and Arab states, is the "cultural-religious oriented approach". In the "Islam and human rights discourse", different terms have been referred to as Islamic terms, such as *Shariah*, Muslim law, religious traditions, principles of *Shariah*, principles of Islam, Islamic criteria and Islamic values. For a better understanding of the relevance of Islam to human rights, a distinction should be made among the core principles/values of Islam, Muslim law and *Shariah*.

Shestack states: "[H]uman rights are a set of moral principles and their justification lies in the province of moral philosophy²⁸". Thus the principles of religion and of human rights could both be considered as eternal and in no need of reconciliation; they need only to be identified. The major common principle between human rights and Islam, as well as other monotheist religions, is human dignity. Shestack states:

If one accepts the premise of the Old Testament that Adam was created in the 'image of God', this implies that the divine stamp gives human beings a high value of worth²⁹. In a similar

²⁷ See generally Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law, and Muslim States*, (Martinus Nijhoff Publishers, 2008) and Mashood A Baderin, *Establishing Areas of Common Ground between Islamic Law and International Human Rights*, 5 the International Journal of Human Right 2 (2001).

²⁸ Jerome J Shestack, 'The Philosophic Foundations of Human Rights' 20 Human Rights Quarterly 2(1998) p.202.

²⁹ An appealing expression of this comes from the Talmud: "A man may coin several coins with the same matrix and all will be similar, but the King of Kings, the Almighty, has coined every man with the same matrix of Adam and no one is similar to the

vein the Quran says: 'Surely we have accorded dignity to the sons of man'.... In a religious context every human being is considered sacred. Accepting a universal common father gives rise to a common humanity, and from this flows a universality of certain rights. Because rights stem from a divine source, they are inalienable by mortal authority. This concept is found not only in the Judeo-Christian tradition, but also in Islam and other religions with a deistic base³⁰.

According to McDougal, Lasswell, and Chen:

The contemporary image of man as capable of respecting himself and others, and of constructively participating in the shaping and sharing of all human dignity values, is the culmination of many different trends in thought, secular as well as religious, with origins extending far back into antiquity and coming down through the centuries with vast cultural and geographic reach³¹.

By searching the Quran and *Sunnah* many scholars have tried to extract other divine principles of Islam relevant to human rights. According to Baderin:

Major moral principles that serve as basic postulates for the concept of human rights can be listed as "dignity (*karamah*), freedom (*hurriyah*), humaneness (*insaniyah*), equality

other. Therefore, every man ought to say the whole world has been created for me." See Sanhedrin 38:1 (Adin Steinsaltz ed., Random House 1989).

³⁰ Shestack, (note 29), p.205.

³¹ See Myres S. McDougal & Harold D. Lasswell, & Lung-Chu Chen, *Human Rights and the World Public Order* (New Haven, Yale University Press, 1980), pp 376-377, quoted in Baderin, (note18), p.90.

(*musawah*), beneficence (*ihsan*), responsibility (*masuliyyah*), co-operation (*ta'awun*) and justice (*adalah*). [They] evolved, and were embodied in the general doctrine of Islamic theology, law and governance³².

Bassiouni has also referred to some relevant Islamic principles for human rights including "brotherhood, mercy and compassion³³". In the same sense, Khadduri has listed the five principles of Islamic human rights as, "(1) dignity and brotherhood; (2) equality among members of the community, without distinction on the basis of race, colour or class; (3) respect for the honour, reputation and family of everyone; (4) the presumption of innocence; and (5) individual freedom³⁴".

For the purpose of this study, when a reference to early (classical, historical or traditional) Muslim law is made, the terms "Muslim law", "Islamic law" or "Muslim legal traditions" all have a similar meaning. "Legal traditions" or "religious legal traditions" are more familiar terms for non-Muslim readers, because other religions and civilizations have such traditions as well³⁵. Furthermore, by using the term 'traditions' it is easier to remember that, when comparing Muslim legal traditions with modern human rights norms, the former date from before the tenth century, while the latter are the achievement of the last six decades of modernity and post-modernity. As Bielefeldt states: "the emancipatory principle has been articulated only in the modern era. By comparison, the Islamic

³² Baderin, (note18), 86. There are some other principles mentioned by Baderin: cooperation for goodness and seek knowledge. *Ibid*, p.82. He also names the fundamental principles underlying the *Sharia* as: (i) the removal of difficulties (ii) the realization of welfare and (iii) the realization of universal justice, which are all relevant postulates of international human rights. See *Ibid*, p.100.

³³ M Cherif Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights In the Islamic Criminal Justice System' in , M Cherif Bassiouni (ed.) *The Islamic Criminal Justice System* (Oceana Publications, inc, London, Rome, New York, 1982), p.13.

³⁴ Majid Khadduri, *The Islamic Conception of Justice* (Johns Hopkins University Press. U. S. A, 1984), pp. 236-37.

³⁵ For study of other legal traditions such as Chthonic, Talmudic, common law and Hindu, see generally, Patrick Glenn H, *Legal Traditions of the World, Sustainable Diversity in Law* (Oxford University Press, 2000).

Shariah, the normative tradition commonly known as Islamic law, is much older"; although, even according to contemporary standards, most Muslim legal traditions are either consistent with or contribute to the development of human rights³⁶.

Considering the above, this study does introduce a new conception of *Shariah* in addition to what already has been comprehended as a legal system; this new conception is the one being understood by Muslim public opinion or ordinary Muslims. In the view of ordinary Muslims, *Shariah* constitutes a main part of their identity, is known as the whole religion or way of life, a combination of the Quran, their beliefs, their traditions of worship, their moral values, along with part of their customs concerning their personal status, as of inheritance and the family relations. Vessey-Fitzgerald has a similar reference to this broader conception of *Shariah*:

Law, then, in any sense in which a Western lawyer would recognize the term, is but a part of the whole Islamic system, or rather, it is not even a part but one of several inextricably combined elements thereof. '*Shariah*', the Islamic term which is commonly rendered in English by 'law', is rather, the 'Whole Duty of Man'. Moral and pastoral theology and ethics; high spiritual aspiration, and the detailed ritualistic and formal observance which to some minds is a vehicle for such aspiration and to others a substitute for it; all aspects of law; public and private hygiene, and even courtesy and good manners are all part and parcel of the *Shariah*, a system which sometimes appears to be rigid and inflexible; at others to be

³⁶ See generally Hashemi (note26) and Baderin (note18).

imbued with that dislike of extremes, that spirit of reasonable compromise, which was part of the Prophet's own character³⁷.

Likewise Baderin states: "*Shariah* broadly covers the moral, legal, social and spiritual aspects of the Muslims' life³⁸." In short, as Muslim public opinion does not make any distinction between the different aspects of the religion, for them '*Shariah*' means 'Islam'

The Cairo Declaration on Human Rights in Islam

Having the above mentioned distinctions among Islamic principles/values, law/traditions, and *Shariah* in mind the paper will conduct a short survey on the CDHR. The Declaration was adopted on 5 August 1990 by 45 foreign ministers of the OIC. It was indeed not a product of merely the OIC meetings but was based on previous documents and discussions on the issue within and outside the OIC, including "Dhaka Declaration on Human Rights in Islam³⁹" and several meetings of renowned Muslim religious scholars from different Muslim countries, the last of which was held on 26-28 December 1989 in Tehran.

The reason that CDHR has drawn more attention in the Islam and human rights discourse in comparison with other Islamic sources is that both its Arab and English versions were submitted to the UN by the OIC prior to the World Conference on Human Rights in Vienna in 1993⁴⁰. As will be discussed further, CDHR has also been recalled in consequent human rights documents, in the OIC and in the Arab League documents. Also according to a resolution which was adopted in June 2008, by OIC Thirty-

³⁷ S.G. Vessey-Fitzgerald, 'Nature and Sources of the *Sharia*' in Majid Khadduri. & Herbert J Liebesny (eds.) *Law in the Middle East, Volume I, Origin and Development of Islamic Law* (The Middle East Institute, Washington, D.C, 1995), p.85.

³⁸ Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press, U.S.A, New York, 2003), p.34.

³⁹ Adopted by the 14th ICFM in December 1983.

⁴⁰ CDHR, (note 2).

Fifth Session of the Council of Foreign Ministers, the 5th of August of every year, which is coincident with adoption of the CDHR, was designated the "Islamic Human Rights and Human Dignity Day⁴¹".

The CDHR declares its purpose to be "general guidance for member states [of the OIC] in the field of human rights" and is not a binding instrument. It starts in its preamble with some Islamic principles, considering freedoms and fundamental rights as integral part of Islamic belief:

"Believing that fundamental rights and freedoms according to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands.... and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedoms is an individual responsibility of every person and a collective responsibility of the entire *Ummah* (trans-national Muslim community) ⁴²."

Based on the Islamic principles provided in the preamble, the CDHR in its 23 following articles provides a long list of human rights principles and rules endorsed by "Islamic *Shariah*". Finally, Article 24 declares that "all the rights and freedoms stipulated in the Declaration are subject to the Islamic *Shariah*; and the concluding Article 25 reaffirms that: "The Islamic *Shariah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration."

⁴¹ OIC/CFM-35/2008/POL/RES/FINAL, The 35th Session of the Council of Foreign Ministers (Session of Prosperity and Development), held in Kampala, Uganda, 18-20 June 2008.

⁴² CDHR, (note 2).

The CDHR has met increasing criticism mainly by non-Muslim observers because it falls short of international human rights standards particularly by distinguishing different fundamental equalities on grounds of sex and religion, and for failing to guarantee freedom of religion and conditioning all the rights to the *Shariah*⁴³. CDHR, however, from a positive historical perspective, can be evaluated as an invaluable compromise of Muslim scholars from different Islamic sects on the minimum achievements of Muslim civilizations in the early centuries of Islam on the concept of rights. From this historical perspective Muslims can be proud of their progressive ancient law that for a long time provided grounds for equality and protection of fundamental rights. This Declaration can also be considered as clear evidence that, historically and culturally, human rights are a familiar concept for Muslims.

Considering the above, if the CDHR is counted as the minimum basis for further promotion of human rights in Muslim societies, it has a positive function. Yet, if it is considered as an "Islamic alternative to the UDHR⁴⁴" or as the final word of Muslims in response to the temporary human rights questions it is a restricting and even destructive document. As will be discussed further, the OIC and the Arab League in their further human rights documents stressed that the CDHR is a base that should be expanded and explored and is not the final word. The OIC Secretary General, Ihsanoglu, indicates:

"Human rights and man's dignity are an integral part of Islam and core components of Islamic culture and heritage...international interest in the issue of human rights has spawned exponentially over the past two decades, [and] the

⁴³ Also see generally Anne Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics*, Third Edition (Westview Press, London, 1999).

⁴⁴ See Mayer (note 43), p.23.

complexity of the fields of human rights inevitably call for the need to refine the 1990 Cairo Declaration on Human Rights in keeping with the current global human rights discourse. Such an approach would open up new horizons and avenues for human rights in the Muslim world⁴⁵."

The Arab League and the New Arab Charter on Human Rights (ACHR)

The history of human rights in the Arab League has had three peaking points. First, the Council of the League of Arab States (The Council) on the 20th anniversary of UDHR, on 3 September 1968, established its Permanent Arab Human Rights Commission. The Secretariat of the League also convened the first Arab human rights conference in Beirut on 2–10 December 1968. The conference called for Arab cooperation in the protection of human rights at the regional and international level, urged the implementation of the UDHR, and recommended the establishment of national human rights committees to cooperate with the League's Permanent Arab Commission for Human Rights⁴⁶. The Commission however remained fully inactive for most of its life. Second, the old ACHR was adopted by the Council on 15 September 1994⁴⁷. However, no single Arab state ratified the ACHR and the Charter remained silent for more than one decade. Third, as will be discussed in more detail in this part, the new ACHR was adopted in May 2004 and entered into force in March 2008⁴⁸.

In 2002 the Council adopted a resolution "encouraging the modernization of the ACHR to correspond with international human

⁴⁵ OIC discusses set-up of an independent and permanent human rights commission , 12 April 2009 , available at the website of Parliamentary Union of OIC Member States (PUIC): http://www.puic.org/english/index.php?option=com_content&task=view&id=320&Itemid=145.

⁴⁶ On the activities of the Commission and the related events see An-Na'im (note 10).

⁴⁷. (The old) ACHR, (note 3).

⁴⁸. (The new) ACHR, (note 5).

rights standards⁴⁹". "The revision of the ACHR was part of an overall modernization package suggested by the Secretary-General (SG) and the Council to reform existing institutions. These included an Arab Parliament, which would have competence to further human rights, as well as to review legislation in Arab countries; and a regional Security Council. The package also included the establishment of an Arab Court of Justice which will have competence on human rights issues as well as disputes related to principles of international law⁵⁰.

In April 2002, the Office of the High Commissioner for Human Rights officially approached the SG to form a working group of Arab independent experts working in the UN human rights bodies, with the aim of revising the ACHR in order to be consistent with international human rights standards. After about two years the new ACHR was adopted by the 16th Arab Summit, hosted in Tunis in May 2004.

The new ACHR entered into force on 16 March 2008, 60 days after ratification of the seventh member state of the League, including two African states: Algeria and Libya, and five Asian states: Bahrain, the United Arab Emirates, Jordan, Palestine and Syria. While the ratification of the ACHR should be easier for the African Arab States which already have experienced being parties to the African system of human rights, surprisingly the five Asian states have preceded the Africans in ratification of the ACHR.

The new ACHR consists of a long list of rights including civil, political, economic, social and cultural rights. Considering the human rights realities in many countries of the region some rights and principles of more importance have been included in the Charter, such as: non-discrimination on grounds of religion (Articles 1 and 34), non-

⁴⁹ Rishmawi (note 4), 362.

⁵⁰ See *Ibid.*

discrimination on grounds of sex and religion (Articles 3, 4 and 34), equality and non-discrimination between men and women (Articles 3 and 34(4)), rights to political participation (Article 24), prohibition of slavery and servitude under any circumstances (Article 10), freedom of religion (Article 30), protection of minorities (Article 25), prohibition of all forms of violence or abuse against women and children (Article 33), human rights in the educational programs (Article 41(4)) compensations for victims of torture (Article 8(2)), compensation for victims of arbitrary arrest or detention (Article 14(7)), and protection of privacy, family, home or correspondence (Article 21).

Article 45 of the new ACHR establishes the "Arab Human Rights Committee" (AHRC) which consists of seven members. In the old ACHR the Committee was called "Committee of Experts on Human Rights" and apparently replaced the "Permanent Arab Commission for Human Rights", mentioned above. The only duty of the Committees in the new and old ACHR is the consideration of the periodic reports of states parties. According to Article 48 of the new ACHR, each state party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee's reports, concluding observations and recommendations, shall be public documents which the Committee shall disseminate widely.

Interestingly while the new ACHR was adopted only four years after the adoption of the CDHR, it has no reference to *Shariah* or Muslim law as a pretext for limiting the rights. This means that the Arab states, who had a central role in the adoption of the CDHR, didn't consider it as a model for the consequent binding instruments. The old ACHR has just one reference to the Islamic principles in the preamble: "Pursuant to the eternal principles of brotherhood and equality among all human beings

which were firmly established by the Islamic *Shariah* and the other divinely-revealed religions". A similar reference exists in the new ACHR as well: "In furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions."

The preamble in the new ACHR affirms the preceding international human rights instruments. Yet, unlike the preamble in the old ACHR⁵¹, considers a lower level of regard for the CDHR:

"[R]eaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and having regard to the Cairo Declaration on Human Rights in Islam."

The new ACHR has also a reference to *Shariah* in its Article 3, which unlike usual references to *Shariah* does not imply a restrictive purpose on human rights but rather emphasizes a positive contributing role to developments of human rights. It considers a specific function for *Shariah* for the first time, i.e. positive discrimination in favor of women:

"Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favor of women by the Islamic *Shariah*, other divine laws and by applicable laws and legal instruments. Accordingly, each state party pledges to take all the requisite measures to guarantee equal opportunities and

⁵¹ It reads as follows: "Reaffirming the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam."

effective equality between men and women in the enjoyment of all the rights set out in this Charter."

The new version correctly avoids recourse to religion to justify the restricting purposes, yet, in some of its provisions, problematic traditions have restricting effects on related human rights. According to Article 7(1) "[s]entence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime." In the legislation of some Muslim states that penalize murder and sexual offences under traditional criminal codes, though no specific instances are reported, in theory their application can lead to the execution of children even under the age of fifteen⁵². Interestingly the equivalent Article 12 of the old ACHR was much more in conformity with international standards as it explicitly prohibited the death penalty under the age of 18: "The death penalty shall not be inflicted on a person under 18 years of age, on a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth."

There are also cases of punishment of offenders less than 18 years of age, in which the punishment is postponed until such time as the offender reaches the age of eighteen. This means it is possible that the crime took place before the child had reached the age of majority, but the trial and consequent punishment would be postponed until the age of majority. Instead, all regional and international instruments on punishment of juveniles should follow up the model of Article 37(a) of the Convention on the Rights of the Child⁵³ (CRC) which refers to the "age of committing the offence" and not the "age of imposing the punishment". The Article requires states parties to ensure that, "no child shall be

⁵² See Hashemi (note 46), 206.

⁵³ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force, 2 Sept. 1990.

subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age⁵⁴." Interestingly, not a single Muslim state has had a specific reservation to Article 37 of the CRC⁵⁵.

According to Article 8(1) of the new ACHR, "no one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment." Similar to the equivalent Article 13 (a) of the old ACHR, this article is not in line with international standards as stipulated in the aforementioned Article 37(a) of CRC, as they don't include cruel, degrading, humiliating or inhuman 'punishment' as well. This is because some traditional punishments such as flogging which are applied in some Muslim countries might be considered as torture based on international human rights standards⁵⁶.

Article 33 (1) of the new ACHR is the only Article whose provisions overlap with Muslim family law. The rights and duties of the man and woman as to marriage, during marriage and as to its dissolution are not conditioned to Muslim law or *Shariah*, but alternatively to national laws in force:

"The family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and

⁵⁴ CRC, (note 54, Art. 37(a). Also see William A Schabas & Helmut Sax, Article 37, Prohibition of Torture, Prohibition of Death Penalty and Life Imprisonment and the Deprivation of Liberty, in: André Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans & Mieke Verheyde (eds.), A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff Publishers, 2006).

⁵⁵ See Hashemi (note 46),198-199.

⁵⁶ See for example General Comment No. 20 of Human Rights Committee concerning prohibition of torture and cruel treatment or punishment (Art. 7) , Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution."

However, while most criticism against the current application of problematic Muslim legal traditions is for restrictions of the rights of women, children and minorities, the Charter in its Article 43 tries to close the door on any justification on this ground by resorting to national law:

"Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the states parties or those set force in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities."

The OIC's New Internal Approach towards Promotion and Protection of Human Rights

The establishment of the OIC is linked to the occupation of Palestine and violations of human rights of Palestinians by Israel. In the same vein the OIC's approach towards human rights has been mainly an external one, which is directed towards the human rights of Muslim minorities in other non-Muslim countries on issues such as defamation of religion and Islamophobia. The situation of human rights within the member states has not been on the agenda of OIC programs for long time. As a result Viljoen correctly argues that "As with the Arab League, membership of the OIC has not contributed in any significant sense to the improvement

of human rights in these countries⁵⁷". Unlike the Arab League which established a permanent human rights commission back in 1968, the history of the OIC's internal approach towards promotion and protection of human rights in Muslim countries started as recently as 2005.

In 2005, the OIC faced two new initiatives towards internal development of human rights inside the member states. First, the Covenant on the Rights of the Child in Islam⁵⁸ (The OIC Covenant on Children) was adopted in June 2005. Second, the OIC "Ten-Years Program of Action to meet the Challenges Facing the Muslim *Ummah* in the 21st Century⁵⁹" (The OIC Ten-Years Program), which was approved in December 2005, brought into focus for the first time in the history of the OIC the issue of human rights and good governance. The two initiatives however have had two different destinies. The OIC Covenant on Children failed because of its several omissions in meeting the minimum requirements of a binding treaty. Yet, the initiatives on human rights and good governance have continued to progress in the consequent activities of the Organization.

Covenant on the Rights of the Child in Islam

The Covenant consists of 26 articles with an insufficient list of children's rights. Furthermore, even the shortened list of rights enumerated has been limited by resorting to *Shariah* and domestic legislation. The Covenant in its preamble has not affirmed the principles stipulated in international human instruments but instead relied on the principles stipulated in OIC documents, i.e. Dhaka Declaration on Human Rights in

⁵⁷ Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press, 2007), 15.

⁵⁸ Adopted June 2005, OIC/9-IGGE/HRI/2004/Rep. Final, Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Yemen, in June 2005.

⁵⁹ Approved by the Third Extraordinary Session of the Islamic Summit, held in Mecca, 5-7 December 2005, available at the official website of the OIC : <<http://www.oic-oci.org/ex-summit/english/10-years-plan.htm>> .

Islam⁶⁰, the CDHR, and the Declaration on the Rights and Care of the Child in Islam⁶¹.

When the Covenant tries to ignore areas of inconsistency between problematic traditions and human rights standards it refers them to the domain of *Shariah* or national legislation. This approach can be seen in Article 1 on the definition of the child, Article 5 on equality, Article 9 on personal freedom, Article 12 on education and culture, Article 13 on rest and activity times, and Article 20 on parents' responsibilities and protection from detrimental practices. Also the scopes of some other child rights that do not necessarily overlap with problematic traditions, such as Article 14(1) on right to social security and Article 21 on the child refugee, have been left to the domain of national legislation.

Some provisions, however, are of a progressive nature in addressing the problems of children in developing countries. For example, Article 18 (2) on child labor considers sanctions against states that do not change their legislation: "Domestic regulations of every state shall fix a minimum working age as well as working conditions and hours. Sanctions shall be imposed against those who contravene these regulations" Also article 4(3) obliges states to "end action based on customs, traditions or practices that are in conflict with the rights and duties stipulated in this covenant."

As the first experience of the OIC in establishing a monitoring human rights body, the Covenant in its Article 25, though in a sketchy way, predicts the establishment of an "Islamic Committee on the Rights of the Child". According to this article "the Committee shall be composed of the representatives of all the states parties to the present Covenant and

⁶⁰ Dhaka Declaration, (note 47).

⁶¹ The Declaration on the Rights and Care of the Child in Islam, adopted by the Seventh Islamic Summit Conference under resolution No. 16/7-C (1994).

shall meet every two years, starting from the date of entry into force of this Covenant, to examine the progress made in the implementation of this Covenant."

Interestingly "the Rabat Declaration on Issues of Children in the Muslim World" (The Rabat Declaration), which was adopted in November 2005, a few months after the adoption of the OIC Covenant on Children, is a far more progressive and comprehensive document about children⁶². The Declaration expresses a shared sense of alarm over the dire situation for children in many Muslim countries and the need for an urgent collective response commensurate with the challenges. The reference of the Rabat Declaration to the relevance of Islam and human rights is in its consideration of Islamic values and principles and not to the controversial problematic traditions:

"To preserve and enhance our common Islamic heritage to increase the awareness of the Muslim Youth on the values of Islam, and instill into them a sense of pride in the achievements of the glorious Islamic civilization; and to contribute to more understanding and tolerance among peoples and religions".

Also, when the Declaration speaks about problematic traditions it denies the relation of those traditions to Islam and calls for "overcoming difficult challenges, including many of the harmful traditional practices that are often falsely associated with Islam, including child marriage, female genital mutilation/cutting and gender discrimination in education."

⁶² It was the outcome of the 1st Session of the Islamic Conference of Ministers in charge of Children's Affairs (ICMC), held in Rabat from 7 to 9 November 2005, which was co-organized by the Islamic Educational, Scientific and Cultural Organization (ISESCO), UNICEF and the OIC.

The OIC Covenant on Children is open to ratification and will enter into force upon 20 ratifications, though; no single state has ratified it as yet. In fact more than being complimentary to the CRC, the OIC Covenant on Children is restricting children's rights and its several failures have made it an impractical instrument.

On the other hand, the deficient Covenant reveals that a compromise on sensitive and controversial issues such as conflicting matters between problematic religious traditions and human rights within the OIC meetings is not an easy task. However, the compromise of the OIC members evident for the first time in agreeing to a binding human rights instrument and particularly a first human rights monitoring body within the Organization, can be evaluated as a step forward.

The New Vision of the OIC

The New Vision of the OIC (The New Vision)⁶³ is the new strategy of the OIC which came into life with the adoption of *Makkah-Al-Mukarramah* (The Holy Mecca) Declaration during the Third Extraordinary Session of the Islamic Summit Conference in December 2005⁶⁴ and is the result of a high-level advisory panel led by the OIC Secretary General. The Declaration reiterates the need for "a forward-looking vision that enables the Muslim world to tackle the challenges of the twenty-first century".

For the first time in the history of the OIC, the New Vision brings the issue of "human rights and good governance" as one of the main issues of focus by the Organization. The principal action areas of the New Vision are categorized into 12 thematic groups including among others, promoting good governance and human rights, empowerment of

⁶³ Available at the website of the Permanent Mission of the OIC to the UN : <<http://www.oicun.org/articles/37/1/New-Vision-of-the-OIC/1.html>>.

⁶⁴ Available at the OIC website :< <http://www.oic-oci.org/ex-summit/english/Makka-dec-en.htm>>.

women and children, education reform, and poverty alleviation in least developed countries. On the issue of promotion of good governance and human rights, the New Vision reiterates the particular challenges faced by the OIC member states in this regard, and places great emphasis on “broadening the scope of political participation, ensuring access to civil liberties and social justice, reducing socio-economic inequality, promoting transparency and accountability and reducing corruption.”

The New Vision also raises for the first time the issue of a regional human rights system within the OIC, when it mandates the ICFM to work towards the elaboration of an "OIC Charter on Human Rights" and the establishment of "the Permanent Commission on Human Rights"(OIC HRC). According to the New Vision, the ICFM will also work with member states to introduce changes to their national laws and regulations in order to guarantee respect for human rights. Additionally, member states will review their educational curriculum to include the subject of human rights with the purpose of emphasizing the cultural component of the issue. Apart from the "OIC Charter of Human Rights", the New Vision refers to drafting of two other new human rights treaties, namely "the OIC Covenant against Racial Discrimination" and "International Convention on Respect towards Religions".

The OIC Ten-Years Program of Action

Based on the New Vision, the OIC Ten-Years Program of Action was adopted by the Third Extraordinary Session of the Islamic Summit Conference mentioned above. In line with the New Vision, the Ten-Years Program has specific references to good governance, democracy and promotion and protection of human rights. In Part 7 of the Program, one of the ten issues of focus under the title of “intellectual and political issues” is "good governance and human rights". Also one of the six areas

of focus under the title of “development, socio-economic and scientific issues” is “rights of women, youth, children, and the family in the Muslim world.”

It is interesting that just a few months after the adoption of the OIC Covenant on Children, unlike the provisions of that convention, and in line with the Rabat Declaration, the Ten–Years Program has progressive references to controversial issues of women and children based on Islamic values of justice and equality, in areas such as education, discrimination, and violence. It links Islamic values to the provisions of CEDAW:

"Strengthen laws aimed at enhancing the advancement of women in Muslim societies in economic, cultural, social, and political fields, in accordance with Islamic values of justice and equality; and aimed also at protecting women from all forms of violence and discrimination and adhering to the provisions of the Convention on the Elimination of all Forms of Discrimination Against Women, in line with the Islamic values of justice and equality."

The Program also calls upon the OIC to contribute towards projecting Islam as a religion that guarantees full protection of women's rights and encourages their participation in all areas of public and private life. On the basis of Islamic values, it requires member states to “...exert all possible efforts, at all levels, to face up to the contemporary social challenges confronting the Muslim family and affecting its cohesion”.

Similar to the New Vision, the Program signals the development of “the Covenant on the Rights of Women in Islam”. It invites member states to join the Covenant on the Rights of the Child in Islam, the CRC and

CEDAW. Furthermore, it proposes establishing a division responsible for family affairs within the framework of the restructuring of the General Secretariat.

In its 8th chapter, under the title of "human rights and good governance", the Program affirms serious endeavor to enlarge the scope of political participation and ensure equality, civil liberties and social justice, and promote transparency and accountability through the elimination of corruption in the OIC member states. Similar to the New Vision, it asks the ICFM to consider the possibility of establishing an independent permanent body to promote human rights in the member states and the elaboration of an OIC Charter for Human Rights.

The New OIC Charter

The OIC, during its 11th Summit on 14 March 2008 in Dakar, adopted a new Charter aimed at reforming the Organization. The new Charter will replace the 1972 OIC Charter (the old Charter) upon ratification by member states. The New Charter has not yet come into force, although in new documentation of the OIC⁶⁵, it is referred to as the enforced Charter⁶⁶.

Continuing the provisions of the New Vision and the Ten-Years Program, the New Charter envisions greater respect of human rights as well as women's and children's rights. In comparison, the old Charter, besides referring to some principal objectives that can be linked to human rights such as the eradication of racial discrimination and colonialism, and the liberation of Palestine, had only one explicit reference to human rights in the preamble, in which member states reaffirmed "their commitment to the United Nations Charter and fundamental human rights, the purposes

⁶⁵ Already Senegal, Saudi Arabia, Malaysia and Bangladesh have ratified the Charter.

⁶⁶ See for example.

and principles of which provide the basis for fruitful cooperation among all people”.

Chapter 1 of the new Charter has listed 20 objectives for the OIC, one of which in Paragraph 14 is “to promote and to protect human rights and fundamental freedoms including the rights of women, children, youth, elderly and people with special needs as well as the preservation of Islamic family values”. Article 5 lists 11 main organs of the OIC, one of which is “the Independent Permanent Commission of Human Rights⁶⁷”. Article 15 describes the responsibilities of the Commission as “to promote the civil, political, social and economic rights enshrined in the Organization's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.”

Apart from the above mentioned reference to “Islamic values” in Article 15, the new Charter in three different paragraphs of the preamble lists Islamic values including, unity and fraternity, peace, compassion, tolerance, equality, justice, human dignity, and other Islamic values concerning moderation and respect for diversity. Also, in the chapter on objective and principles of the Charter, two similar references to “Islamic values and teachings” are made in Article 1(11) and in Article 2. In fact, only those Islamic terms that contribute to the concept of human rights are referred to in the Charter and no reference is made to multifaceted terms such as *Shariah* or Islamic law.

⁶⁷ The other ten OIC organs are as follows: Islamic Summit, Council of Foreign Ministers, Standing Committees, Executive Committee, International Islamic Court of Justice, Committee of Permanent Representatives, General Secretariat, Subsidiary Organs, Specialized Institutions, and Affiliated Institutions. Already the OIC is composed of three main bodies, namely, Islamic Summit, Council of Foreign Ministers, and General Secretariat, along with the following organs: Subsidiary Organs, Specialized Institutions and Organs, Affiliated Institutions and Standing Committees.

Initial Steps to Form the OIC Permanent Human Rights Commission

As mentioned above, under the Ten–Years Program, and Article 5 of the new OIC Charter, the ICFM is mandated to consider establishing the OICHRC and drafting its Statute. Since early 2009 different meetings have been held by the OIC on the issue. First, an Informal Consultative Meeting of an advisory panel was held at the headquarters of the OIC General Secretariat in Jeddah on 15 February 2009, under the chairmanship of the OIC Secretary-General, Ihsanoglu. Subsequently, the Official Expert Group for the drafting of the Statute of OICHRC met in Jeddah on 12-13 April 2009, and finally on 23-25 May 2009, the 36th meeting of ICFM in Damascus discussed the creation of the Commission and its draft Statute. Ihsanoglu, in a speech to the above mentioned Official Expert Group in Jeddah in April 2009, refers to the OICHRC as an idealistic institution within the Organization which addresses the particular human rights needs of Muslim states:

"establishing an OIC Human Rights Commission would pave the way to broad intellectual and political reform across the OIC member states and deeper cooperation that would contribute to a larger promotion of the values of tolerance and fundamental freedoms, good governance, the rule of law, accountability, openness, dialogue with other religions and civilizations, the rejection of extremism and fanaticism, and the strengthening of the sense of pride in the Islamic identity⁶⁸."

The draft Statute for the OICHRC tabled in the 36th meeting of ICFM in Damascus (the draft Statute)⁶⁹, consists of 33 articles which contain the components of the planned Commission, a description of the nature of its work, its appellation, principles, objectives and functions, members

⁶⁸ OIC discusses set-up of an independent and permanent human rights commission (note 46).

⁶⁹ OIC/IPCHR/2009/DR.STATUTE,ANNEX TO: OIC/IGGE-IPCHR/2009/REP.FINAL.

and experts, recommendations and quorum, and other aspects bearing on the activities and responsibilities to be entrusted to the Commission.

Under Article 2 of the draft Statute, the Commission consists of 19 members⁷⁰, of whom shall perform an advisory function under the aegis of the Council of Foreign Ministers. The first objective of the Commission, according to Article 10, is the promotion and protection of human rights in member states: "The Commission shall seek to ensure the promotion and protection of the civil, political, economic, social and cultural rights in the member states." Article 11 considers an unusual second objective for the Commission apart from the domain of protection and promotion, namely supporting "the OIC position on human rights at the international level". This objective, however, is not further elaborated in the following articles.

The instances of promoting function of OICHR are listed in Articles 12-17 of the draft Statute, which are similar to the promoting functions of the African Commission on Human and Peoples' Rights (ACHPR) as stipulated in Article 45(1) of the African [Banjul] Charter on Human and Peoples' Rights (the African Charter). In Comparison, the ACHR does not consider such functions for the AHRC. The promoting functions of the OICHR are as follow:

- Promoting the laws and policies aimed at promoting the status of women and vulnerable sections of society and in the member states in the economic, social, political and cultural fields in consistence with the provisions of the OIC Charter, and protecting them from all forms of discrimination and violence. (Article 12)

⁷⁰ The ACHR has seven members and the African Commission on Human and Peoples' rights 11 members.

- Promoting the role of the national human rights institutions and civil society organizations in the member states. (Article 13)

- Supporting capacities and providing technical cooperation in the field of human rights and raising awareness about these rights in the member states, and advising member states on human rights issues upon their request. (Article 14)

- Promoting cooperation with the national human rights institutions, non-governmental organizations and civil society to defend and protect human rights; also strengthening cooperation in the area of human rights between the OIC and the other international and regional human rights organizations. (Article 16)

- Conducting studies and research on important human rights issues and acting as information exchange channel on human rights issues.(Article 17)

- Overseeing the drafting of any instruments to promote human rights in the OIC member states, propose the revision and improvement of OIC declarations and covenants on human rights in harmony with international standards and Islamic values; and encouraging the member states to ratify human rights treaties and covenants. (Article 18)

Article 20, as the only principal provision on human rights protection of the draft Statute, outlines a monitoring function of the OICHRRC. The Article reads: "The Commission shall investigate any possible human rights violations by the OIC member states in accordance with its rules of procedure, and shall submit reports thereon to the Council of Foreign

Ministers for appropriate decision." While the OICHRC is not yet based on a Human Rights Charter or Covenant, the proposed Article 20 has been an issue of disagreement in related OIC meetings and it was decided to be put between brackets and referred to in further meetings. Apparently for the same reason, no function on considering states reports is predicted for the Commission in the draft Statute.

A similar article on the investigating function of the Commission is not included in the ACHR and, in comparison to the African Charter; the scope of the proposed Article 20 in the draft Statute is much more narrow. According to Article 46 of the African Charter, the Commission may resort to any appropriate method of investigation and it may hear from the Secretary General of the AU or any other person capable of enlightening it. Also, the Commission has the authority to examine states complaints against another state (Article 47) and individual complaints (Article 48). The ACHPR, similar to the AHRC, has the responsibility of considering the periodic reports of states parties. Furthermore it has some other responsibilities which are not taken into account in the subsequent similar Arab and OIC related human rights organs including interpretation of all the provisions of the African Charter, and any other tasks which may be entrusted to it by the Assembly of Heads of States and Governments.

The OIC has already signed a Memorandum of Understanding with the UN Office of the High Commissioner on Human Rights (OCHCR) in July 2006 and the two bodies are jointly working for an OIC draft Charter on Human Rights. Irrespective of questions of nomenclature, the proposed OICHRC, without the support of a binding instrument, will not be able to work effectively and its activities will be focused on non-binding promotion rather than binding protection of human rights.

Finally, there are two minor references to Islamic values in the draft Statute, the one in Article 18 quoted above, and the other in Article 4 which reads: "The Commission shall add value in serving the interests of the Muslim *Ummah* in the domain of human rights and encourage respect for languages, cultures and the tolerant Islamic values..." In these two articles, human rights and Islamic values are considered to be the same. Also similar to the recent OIC and the Arab League human rights documents, no reference is made to *Shariah*, Muslim law or other Islamic terms that might imply areas of inconsistency between problematic traditions and human rights.

Concluding Remarks

A special approach in the developing world towards human rights fulfillment is the "cultural-religious oriented approach". For Muslims this multifaceted approach is discussed in the "Islam and human rights" discourse. For a better understanding of the relevance of Islam to human rights this paper made a distinction among the core principles/values of Islam, Muslim law and *Shariah*.

Having this distinction in mind the paper argued that after two decades since the adoption of the CDHR, and following a long running debate on Islam and human rights, the related human rights documents in the Arab League and the OIC in recent years tend to avoid referring to the controversial or ambiguous areas between religious legal traditions and human rights and leave them to be resolved in the process of time within more progressive endeavors of related states. Instead references to Islam in these documents have been limited to contributing areas of the religion to human rights, i.e. to "Islamic principles and values". The related Muslim states, therefore, should ignore these controversial issues and leave it to be resolved in the process of time within more progressive interpretations of religion and state practices.

The Role of the “Intellect” as One of the Sources of Lawmaking in Updating Islamic Laws in Order to Protect Women’s Victims’ Rights

Hajar Azari* & Abdollah Bagheri**

Abstract

In Islam, "wisdom" or "intellect" is one the greatest gifts humankind can enjoy. With regard to Islamic law, intellect can be considered as an important source of Islamic jurisprudence principles in developing and up-to-dating the provisions of Islamic law. However, there have always been different ideas regarding this topic. Some scholars believe that intellect has no position in the sources of Islamic law and only the text of the Quran and the tradition of the Prophet should be followed. On the other hand, by referring to Islamic texts, it will be clear that the legislator (God) has always encouraged thinking and understanding. Therefore, intellect has acquired such a high position in Islamic teachings that it resulted in creation of one of the most basic principles in Islamic law, which means “All governed by the rule of reason and intellect will be ruled by Islamic law”. The main part of this paper will be dedicated to explaining the position of “intellect” in Islamic teaching and the credibility of “intellect” as an important source of Islamic jurisprudence. Secondly, it will be discussed that “wisdom” and “logic” themselves lead us to have the ability to discover and differentiate between good and bad actions. Finally, this paper will conclude that by applying the requirements and creative aspects of this important source of Islamic law, it will be possible to adopt Islamic regulation in accordance with new developments in the world and protect of women victims’ rights in context of Islamic legal system.

* Hajar Azari is a PhD Student at the Law Faculty, Antwerp University, Belgium (azari2002@gmail.com).

** Abdollah Bagheri is a Masters student in private law at the Law Faculty, Imam Sadiq University, Tehran (Iran) (abdollah.baghere@gmail.com).

Introduction

In Islam, "wisdom" or "intellect" is one the greatest gifts humankind can enjoy. With regard to Islamic law, intellect can be considered as an important source of Islamic jurisprudence principles in developing and up-to-dating the provisions of Islamic law. However, there have always been different ideas regarding this topic. Some scholars believe that intellect has no position in the sources of Islamic law and only the text of the Quran and the tradition of the Prophet should be followed. On the other hand, by referring to Islamic texts, it will be clear that the legislator (God) has always encouraged thinking and understanding. Therefore, intellect has acquired such a high position in Islamic teachings that it resulted in creation of one of the most basic principles in Islamic law, which means "all governed by the rule of reason and intellect will be ruled by Islamic law".

The main part of this paper will be dedicated to explaining the position of "intellect" in Islamic teaching and the credibility of "intellect" as an important source of Islamic jurisprudence. Secondly, it will be discussed that "wisdom" and "logic" themselves lead us to have the ability to discover and differentiate between good and bad actions. Finally, this paper will conclude that by applying the requirements and creative aspects of this important source of Islamic law, it will be possible to adopt Islamic regulation in accordance with new developments in the world and protect of women victims' rights in context of Islamic legal system.

Definition of "Intellect" and "Intellectual Argument"

Literal meaning

To inspect the meaning of "intellect" as one of the resources of the Islamic jurisprudence and a means of deriving Islamic rulings, the literal meaning of the term should be taken into account first. The Lexicologists

have suggested that "intellect" means: the power to distinguish, and ponder. In all the definitions offered for the term "intellect" there is one common point referred to by all of them, and that is the concept of "pause", "stop" or "preservation" which has been employed in all the definitions. The Persian equivalence for the term "intellect" is *khirad* which also entails the meaning of "reception", "perception", "contraption", "intelligence" and "knowledge".

The term "Intellect" in the Quran

By exploring the Holy Quran, we will find out that the term "'*aql*" meaning "intellect" has been mentioned 49 times in the Scripture. In all these cases the term refers to "understanding", "perception" and "cognition". In the Quran the term "'*aql*" is only used in its verb form, not noun form. We can find verb forms like "*aqalūh*", (they understood) "*ya'qilūn*", (they understand) "*ta'qilūn*" (you understand) and "*na'qilu*" (we understand) in different verses of Quran. For instance, we have this verse in the Quran: "And then They altered the Book Knowingly after *they perceived it*"¹. In this verse the phrase "knowingly" refers to alteration while "perceive" alludes to the understanding of the Divine Book. This is another verse: "and they shall say: had we listened to their admonitions and had we *used our reason* we would not have been among the inhabitants of the Hell."² Also we have this verse in the Quran: " ... but only the leaned men *understand* their deep meanings."³

In Islamic traditions "wisdom" or "intellect" has been highly revered. For instance we can find these two traditions in the corpus of Islamic transmissions: "the intellect is the power by which God is worshiped" and: "nothing has been created nobler than the intellect". In these traditions

¹Quran, 2:75

²Quran, 67:10

³Quran, 39:43

the term intellect probably refers to the power of perception and understanding granted to human beings.⁴ In the following parts, the proofs to establish the authenticity of intellect in the Islamic jurisprudence will be inclusively discussed.

Technical meaning

Since the formative era of Schism, the scholars advocating this sect have referred to "intellect" as one of the main sources of deriving religious precepts. It seems like the first scholar who offered a technical definition for intellect is Sheikh Tūsī who thought intellect was not an evident concept and as a result offered this definition: "intellect means having all the knowledge by which an individual becomes wise" ⁵

Mīrzāye Qumī, one of the pioneers in the field of *Usul* (principles) has expressed another definition for intellect as well. He says: "by intellectual reasoning we mean the verdict issued by intellect which will lead us to the religious ruling in that subject; the intellectual verdict transfers us to religious verdict."

Following Mirzāye Qumī, other *Usūli* scholars also offered various definitions to the term "intellect". For instance, this is a definition offered by Shahid Sadr: "intellectual reason is whatever perceived by the intellect and is likely to be used in the process of deducing the religious law". The important point which is mentioned in all the definitions is that "intellect", by its own, is capable of perceiving and discovering the facts which can be applied to reach religious rules. In other words, the intellect used by the Muslim jurists as one of the sources of *ijtihad* is exactly what is meant in general by other branches of science. The very intellect is used

⁴Qurashi Seyyed Ali Akbar, *Qāmūs al-Qur'ān* Dar al-Kotob al-Islāmiya, Tehran, 1412, Sixth Edition, Vol. 5, p. 28

⁵Sheikh Tūsī, *'Udda*, Setare Publication, Qum, 1417, Vol.1 p. 23

in the field of proving juridical dos and don'ts and not something totally different.

But let's go back to the question in detail, what is exactly meant by the intellect used in jurisprudence? Does it mean the same as in other fields or does it have a specific definition? Some Jurists believe that intellect only refers to the verdict of human intellect without implementing the Quran and tradition. Late Shahid Sadr has expressed his idea towards this question: "by intellectual verdict we do not mean the verdict of reasoning faculty in a philosophical sense, rather it refers to the verdict human intellect would conclude without applying Quran and Traditions"⁶ It is evident however, that there is no special technical meaning for the term "intellect" used by the jurists. Whenever they speak of intellect they mean the "Sacred Gem" and a component of soul faculties. Also, in traditions whenever the term intellect is used, it doesn't refer to any specific meaning, even in some traditions the duties that are attributed to intellect are exactly the ones considered in philosophy. So, whenever, we speak of "jurisprudential intellect" as one of the sources of religious law, we mean a kind of intellect that can be used besides the scripture and traditions and not the one dependent to them or just a tool to interpret them. Of course, here combining the two terms of "jurisprudential" and "intellect" doesn't indicate that a special concept different from the philosophical one is intended. This demonstrates the failure existing in Shahid Sadr's view. Based on what we said, and contrary to his idea, there is no difference between intellectual verdicts independent of Quran and Traditions and the intellectual verdicts in the philosophical sense. Therefore, the "jurisprudential intellect" is the well-known, common intellect used in philosophy and other fields and doesn't enjoy special meaning in jurisprudence and principles of jurisprudence.⁷

⁶Alidust Abulqasem, *Buhūth fi 'ilm al-Usūl*, Makta al-I'lām al-Islāmi, Vol. 4, p. 119

⁷Aliduūst Abo al-Qusim, *Fiqh va 'Aql* (Jurisprudence and Intellect), Ghabasat Quarterly, V 15,16

Position of Intellect among the Sources used in Jurisprudence and *Ijtihād*

Regarding whether or not the intellect is considered authoritative by different Islamic schools of jurisprudence, varied views have been offered about the sources of *ijtihād*. According to some Islamic sects, the sources are "scripture", "tradition", "consensuses" and "intellect". This is what most Imami Shiite jurists ⁸(also known as *J'afari*) advocate.⁹ Based on the views of Sunni jurists the intellect is authoritative but in forms of *Qiyās* (analogy), *istihsān* (judicial preference), *Masālih al-Mursale* (Conjectured Expediencies), *Fath al-Dharāy'e* and *Sadd al-Dharāy'e* (Doing something to achieve a benefit and avoiding something to prevent a harm), therefore they do not regard "intellect" as a distinct source.¹⁰ There are some other Sunni scholars, like al-Ghazālī, however, who regard "intellect" as the fourth source of the *ijtihād*, in al-*Mustafā* he says: "The fourth principle is intellect and *istishāb*"¹¹

By referring to jurisprudential books written by Shiite scholars, you can see that while mentioning the sources of *ijtihād* and *istinbād* (deriving rulings from the sources) they have also alluded to Intellect as one these sources besides scripture, tradition and consensus. Regarding the case of consensus, there is special consideration according to which it is

⁸Here we mention some scholars who included intellect in the official sources of making religious rules. Their views can be extracted from their works. For instance: 'Amelī Seyyed Javād ibn Muhammad Huseini, *Miftāh al-kirāma fi Sharh Qavā'id al-'Allāma*, Edited by Muhammad Bāqir Khālīsī, the office for Islamic Publication, Qum, 1419, First Edition, Vol. 12, p. 384; Najafī Kāshif al-Qitā', *Kashf al-Qitā' 'an Mubhamāt al-Shari'at al-Qharrā'*, Dar- al-Ahyā al-Turāth al-'Arabī, Beirut, First Edition, p.29; Māmaqānī Muhammad Husein Mullā 'Abdullā, *Ghāyat al-Āmāl Fī Sharh Kitāb al-Makāsib*, Majm'a al-Dhakhāir al-Islāmiyam Qum, 1316, Vol. 2, p. 293

⁹For further study see, Jannāfī Shāhrūdī, Muhammad Ibrāhīm, *The sources of Ijtihād in the views of Islamic Sects*, p. 3

¹⁰ Makārim Shīrāzī, Nāsir, *Encyclopedia of Comparative Jurisprudence*, Edited by Group of writers form Seminary, Imam Ali Ibn Abi Tālib School Publication, Qum, 1427, First Edition, p. 374.

¹¹Al-*Mustafā*, Vol,1 p. 217

included in scripture and tradition and cannot be an independent source.¹²

The first figure who added intellect with its specific concept to the sources of *ijtihād* was the Shiite jurist, Abū Aī Ibn Junayd (d. 1381)¹³. This innovation by Ibn Junayd caused his contemporary jurists to misinterpret his view and to severely criticize him.¹⁴

The Proofs indicating the Authority of Intellect in Islamic Jurisprudence

It is undoubtedly true that intellect is one the most authoritative sources of every kind of cognition or human learning and regarded as a means to gain knowledge concerning all corporeal or spiritual subjects. In fact sacred texts and divine traditions were revealed to human kind just to reinforce and cultivate the mere and pure thoughts he could come up with through his own wisdom, and to assist him in broader fields where his intellect is helpless. Thus, intellect has always been with human beings to prevent him from error, lapse and deviation. It should be noted that the legitimacy and truthfulness of all world religions is proved only by intellect and intellectual reasoning. So if intellect is not reliable, nothing in the world can be adopted as right. A doctrine is generally acceptable and reliable only when its bases are constructed on intellect and not on emotional imitation. Intellect is a human special feature which makes Man distinct from animals and is a scale of perfection.

In Islamic texts nothing has been praised and noticed as much as the intellect. The praise is given to the intellect on the basis that it is applied to help perceive the facts and objects and differentiate right from wrong

¹²Mutahari Murtazā, *Fiqh va Huqūq (jurisprudence and law)* Vol. 21, p. 484

¹³Maybe, there were other scholars who believed in intellect as a source before him, but they did not mention it in their books.

¹⁴Jannāfī Shāhrūdī, Muhammad Ibrāhīm, *The sources of Ijtihād in the views of Islamic Sects*, p. 225

in all theological, ritual, individual, social...aspects. Considering all these praises, one can conclude the significance, authority and substantial legitimacy of the intellect emphasized by divine sacred texts.

Here, we mention a few of Quranic verses which call human beings to take advantage of their intellect and mentality while facing the wonders of creation:

"For your benefit Allah has subjected by His command the night and the day. The sun and the moon and the stars: and in this there are signs of Allah's power for men of reason."¹⁵

"Therewith He brings forth for you plantations, olives, date-palms, grapes and all kinds of fruits and corns. Verily, in this there is a sign of Allah's power for men of thought."¹⁶

There are also other verses in which the people who do not resort to their intellect are criticized: "And indeed Satan led astray a great majority of you people, did you not then think about it?"¹⁷

"And it is not possible for any person to believe except by Allah's will: and Allah will place the filth of disbelief on those who do not use their reason."¹⁸

There are a great number of traditions concerning the validity of intellect. Here are some examples:

In Usūl Kāfi there is a tradition narrated from Imam Kāzīm who said to Hishām, one of his companions: O Hishām, God has appointed two guides for His servants: an outer one and an

¹⁵ Quran, 66:12

¹⁶ Quran, 66:10

¹⁷ Quran, 36:62

¹⁸ Quran, 10:100

inner one. The outer guide is the prophets and Imams and the inner one is intellect. ¹⁹

*In Bihār al-Anvār another tradition is narrated from Imam Bāqir who said: "God will interrogate the people based on the strength of their intellect."*²⁰

*In Usūl Kāfi, it has been narrated from Prophet who said: " Do not feel proud of someone who always says prayer and is fasting, rather examine how wise and intellectual he is."*²¹

*In another report from Seventh Imam, he says to Hishām: "Allah sent his messengers to people only to ponder and speculate on what has been revealed to them from Him... and His most knowledgeable Prophets are the ones who are the wisest and the wisest are the most exalted in this world and the next."*²²

There are a lot more traditions which all praise the exalted position of intellect that you can find in Hadith collections.

Intellect and its ability to discover the bases of religious law

The meaning of "base"

According to lexicologists²³ the term "base" can refer to "pillar" or "stand" or "foundation" of something. Thus, the word "base" can be defined as everything on which one can depend, and in legal issues, it is the pillar or foundation on which a verdict is set up and issued. So in Islamic law when we talk about the base of rulings we mean the expediency for

¹⁹Usūl Kāfi Vol. 1 p. 16

²⁰Bihār al-Anvār, Vol. 1, p. 106

²¹Usūl Kāfi Vol. 1 p. 2

²²Bihār al-Anvār, Vol. 1 p. 46

²³Ibn Manzūr Abu al-Fazl, Lisān al-'Arab, Ed. Ahmad FarisT Dar al-Fikr litiba'a va nashr va tuzii'T vol. 10, p494; Fayūmī ahmad ibn Muhammad Muqrī, al-Misbāh al-Munīr, Manshūrāt Dar al-Radī, First Edition, Vol. 2, p. 579; Rāqib Isfahānī Husein Ibn Muhammad, Mufradāt Alfaz al-Qurān, Ed. Safvan 'Adnān Davūdī, Dar al-'Ilm Lebanon 1412, First Edition, P. 776

which the Divine legislator has made certain rulings and the jurists attempt to discover it.

2. Intellect and its ability to discover the bases of religious law

Intellect has a lot of capacities. Here we mention one of them which is applied in Shiite jurisprudence and causes the Shiite system of law making to be so dynamic and powerful: "Ability to discover law bases". This ability of the intellect can be discussed in two different fields: The first one is the use of this ability in a general sense, regardless of any religious sources. That is, one independently, using his mere intellect, perceives the bases behind the laws without resorting to any religious texts or sources. The second field is the use of this ability by the help of religious sources. That means, intellect by searching in the sources of religious law discovers the bases and foundations of making those laws, while there is no explicit allusion to them. Of course, every perception and conclusion that is made from religious texts, is not considered valid in Islam, rather they should be done through specific methods and according to special conditions explained in *Usūl* science. In *Usūl*, this process is called *Tanqih al-Mināt*, meaning "identifying the base" and requires special conditions so that the intellect conclusion becomes legally authoritative.²⁴

On some occasions, a jurist probes deeply into religious texts including the religious rulings and precepts and considers the requirements of the social life of human beings in modern times and by using the general principles and regulations governing the process of deriving religious rulings in Islamic system of law, can discover the "base" which has caused a certain ruling to be established. For instance, having observed the problems of committing "ritual sacrifice" in *Minā* land during

²⁴For further study see Hakin Seyyed Muhammad Taqi, *al-Usūl al-Āme*, Vol. 1, al-Majma' al-Ālemi Li Ahl al-Beit, 1418, p. 301; *al-Favā'id al-Hā'eriye*, pp. 145 – 147, Muhaqiq Hilli, *Ma'ārij al-Usūl*, Vol. 1, Āl al-Beit Institute, 1403, p. 185

Pilgrimage, some of the cotemporary jurists have issued special different verdicts. In recent years, by increasing the number of pilgrims going to Mecca for performing the religious rituals which naturally led to the growth of doing ritual sacrifice as part of the practices, many of the sacrificed animals like sheep and cows were remained unused in the land and finally wasted. Considering this waste and the severe shortage of food in some areas leading to starvation and diseases of many people in those places caused the jurists to question the necessity of performing the sacrifice inside the Minā land and whether it is possible to do it in another place where the flesh of the sacrificed animal can be used. In this process they discussed the "base" or "wisdom" behind issuing this verdict by Divine Legislator; is *Irāqa al-Dam* (slaughtering an animal) the only base for the verdict or performing it in the specific place (Minā land) has a part in this ruling as well.

To answer this question, jurists by searching all the religious texts and sources describing this ruling and by noticing the requirements of deriving religious rulings, came to this conclusion that the cause of legislating on this issue and the base behind it is to donate and help the needy people. So, because at the present time, there are too many sacrifices and many of them are left unused, it is not necessary to perform the sacrifice in Minā land and can do it in a place where the meat can be granted to needy, hungry people.²⁵

There are no obstacles to the process of discovering and perceiving the "bases of laws" in the previously mentioned fields and no argumentations have been offered against the possibility of it except that some Shiite experts in *Usūl* say this cannot happen in practice, because it is usually difficult to discover these bases.²⁶ Some others even believe it can never

²⁵Makārim Shīrāzī, Nāsir, Buhūthn Fiqhīya Hāma, Al-Imām 'Alī Abī Tālin Shool, Qum, First Edition, 1422, pp 10 -

²⁶Sadr seyeyed Muhammad Bāqir, Drusun fī 'Ilm al-Usūl, Dar al-Muntazir, 1405, Vol. 2, p. 39

occur.²⁷Of course some of the scholars active in this field have mentioned that we cannot prevent independent intellect entirely from deriving and perceiving these bases.

A question might be raised regarding the views expressed here, and that is, intellect does not have a general and absolute role to understand the bases of all kinds of religious rulings, rather in order to apply the intellect in deriving the bases we should first consider the different divisions and categories of religious law made by the jurists and experts in *Usūl* science.

There are a number of classifications for religious law. For instance based on one of the classifications, the religious law is divided into two categories, namely "originated" and "confirmed" ones. The originated laws are divided into two sections: the mere intellectual rulings and the rulings made by rational people. By mere intellectual rulings we mean the verdicts and decisions made by human intellect which has roots in the instinctive power of Man. In this kind of verdict intellect is the cause to discover what really exists such as the virtue of justice and unrighteousness of the oppression. These sorts of intellectual rulings are also divided into two categories.

The first category includes the self-based verdicts or cognitions, which are not derived from anything or are not based on any sources, rather other verdicts and conclusions are made based on them. For instance, the propositions like "justice is virtuous" and "oppression is unrighteous" are two independently made intellectual verdicts which are sources for many other moral, political, economical and legal precepts. In other words these propositions do not need any bases to be true except human wisdom. Such verdicts are basically made to provide justice and

²⁷ Khui, Seyyed Abulqāsim, *Misbāh al-Usūl*, Davri Bookshop, 1417, Vol. 2, p. 25

equality for social relationships among people and for this reason are regarded as the bases for lawmaking and nature of religions. Many of the jurisprudential rulings made in the fields of civil and criminal laws are instances of these two human intellectual cognitions and as a result the bases of the religious rulings made in these fields are quite obvious for the human intellect. The second category contains the secondary or dependent verdicts and perceptions that are derived from other sources and are not based on themselves. For instance, the righteousness of punishing the criminals and the unrighteousness of punishing the innocents, the unfairness of punishing people without pre-warning, the unjustness of obligating the insane or immature people to perform religious rituals, the necessity to compensate for the imposed loss, the necessity of giving option of deception to buyer and... thus, the bases behind these kinds of religious rulings are obvious for the human intellect as well.

By the rulings made by rational people we mean the beliefs and conducts which are agreed upon by all rational people whose social needs and communication requirements caused them to make them legal. These subjective and unreal rulings (legalized by people) existed in human societies even before religious laws were revealed. People made those laws to regulate and organize their social and economic systems and later were verified by Divine law as well.²⁸ Some of these rulings are as follow: the legitimacy of practicing "*istishāb*" (principle of continuance), domination over property is a sign of possession, the possibility of resorting to the literal meaning of a text, finalizing some sorts of transactions, establishing different options of cancellation for transactions, the possibility to occupy a fenced land, the legitimacy of doing Bay' al-Mu'ātāt (a mutual delivery of the object of sale and the

²⁸Nāīnī, Muhammad Husin, Favāid al-Usūl, The Islamic Publishing Office, 1417, Vol. 4T pp. 384 - 386

sale price) and on the whole many of the rulings made for transactions. Such rulings are not objective and real precepts so the intellect cannot discover them, rather they are made by the people themselves to meet their requirements. Thus, these kinds of rulings are divided into two categories: one category includes the fixed and permanent rulings which relate to the constant needs of human beings such as resorting to the literal meaning of a text, and the other contains the temporary and changeable rulings which satisfy the temporary and epochal needs of Man during certain times like the laws which were made to regulate the slavery.

Since human intellect can clearly perceive both intellectual and rational bases behind laws and is able to easily distinguish the good and the bad, benefits and harms of rulings and many of these laws are among the non-dogmatic orders, some of the jurists²⁹ have come to this conclusion that all the divine ordinance issued for non-ritual subjects are just "leading" or "emphatic" commands³⁰ (the commands that are believed to be made by God just to lead human being towards his own understanding and to make him aware of his instinctive perception). Thus, it is possible for intellect to realize such bases without any explicit allusion from religion. And that's because Divine Legislator considered the very same bases while making the rulings by noticing the needs and requirements of social life of people and for this reason these rulings are

²⁹Montaziri Najaf Ābādī, Husein Ali, *Dirāsāt fi al-makāsib al-Muharramah* Vol. 3, Nashr Tafakur, Qum, 1415, First Edition, Vol. 2, p. 546, "The commands and injunctions issued by Divine Legislator in the fields of transactions, politics and criminal law are considered to be "leading" orders which can be understood by the intellect and instinct.

³⁰Leading ordinance is a kind of ruling which is recommended by both intellect and religion. Of course the order of religion is not considered as independent; rather it is a king of guideline for the intellect. Then if a person obeys such ruling will be rewarded for obeying the intellect order and in case he disobeys it will be punished for ignoring the intellect verdict and thus will not be given another reward or punishment for obeying or disobeying God's orders. Telling lie or truth is in this group of laws. So, intellect independently realizes that lie is bad and truth is good and if religion issues the same verdict, it is just to emphasize the intellect perception.

not regarded as original and new orders by some jurists³¹ and which are called "confirmed rulings"³² which means people made the rulings by themselves and God just confirmed them. Then there are two kinds of religious rulings: the defining laws³³ (which define rights, obligations and rituals) and declaratory laws³⁴ (which are related to the social relationship among people) Then, the bases behind defining laws are different from those of declaratory ones, that is the advantages and disadvantages which cause the rulings to be made are of different kinds. For the declaratory rulings the advantages are quite intellectual not religious or dogmatic although in certain instances Divine Legislator may interfere and make a different regulation. For example religion makes the sale with usury unlawful although people practice it.³⁵

The "originated" rulings are the laws innovated by the Divine Legislator and have no precedence in human societies. Most of the rulings regarding religious rituals or the ones related to what is lawful or unlawful are included in such category. For instance, there are some rulings in Islam about different kinds of meat, making eating some kind forbidden and the other permitted. Or there are some laws regulating what is permitted to drink and what is not. These rulings are all unprecedented. Of course, the rulings which used to be practiced in previous religions and then Islam adopted them by applying some changes, are also

³¹Mūsavi Bujnūrdī, Seyyed Muhammad ibn Hasan, Qavaid Fiqgiya, Urūj Institute, Tehran, 1401, Third Edition, Vol. 1, p. 62

³²Confirmed ruling is a kind of law which existed and was practiced by people before the advent of Islam and later was confirmed with or without changes by Islam. It is worth mentioning that in case of "confirming ruling" the Divine Legislator makes His own law by confirming the existing ruling and it is not true that religion does not have any laws in such cases as some great scholars have mentioned. (Musavi Khumeini Seyyed Ruhullah, Anvār al-Hidāya, The Institute for organizing and publishing the works of Imam Khumeini, 1415, vol. 1, p. 204)

³³Defining Ruling is a kind of ruling that is related to the duty of the people and indicates whether an action is obligatory or unlawful.

³⁴Declaratory ruling is a kind of ruling that causes a state which describes the result of an action. For instance the state of being married is a state of tying religious vow or being ritually pure or impure are the states which describe the quality of different objects.

³⁵Allah has permitted trading and forbidden usury (Quran, 2: 275)

referred to as "originated" rulings.³⁶ Regarding the "originated" rulings in Islam, it should be noticed that such rulings are not changed as time passes, rather they are fixed principles innovated by God to reform and regulate the human societies. Of course the tools by which these principles are applied and the methods by which different occasions are regulated by the principles may alter by passing time.³⁷ Thus, in the "originated" rulings which are mostly revealed regarding religious duties and rituals, the "bases" are sometimes expressed by the Divine Legislator and in some occasions are not.³⁸ The jurists³⁹ have mentioned that in such rulings the "bases" should be expressed by the Divine Legislator and the human intellect is not capable of discovering them.⁴⁰

Therefore, human intellect is capable of discovering only the "bases" in the rulings we just mentioned and cannot find out the real causes of the laws innovated by the Divine Legislator (known as originated rulings). The reason why human intellect is unable to perceive the bases of originated

³⁶Makārim Shīrāzī Nāsir, *Encyclopedia of Comparative Jurisprudence*, Researched by: Group of Professors of Islamic Seminary, Imam Ali School Publication, Qum, 1427, First edition, p. 561

³⁷Al-Madkhal al-Fiqhi al-Ām, Vol. 2, pp. 924 -925. (quoted from ³⁷Makārim Shīrāzī Nāsir, *Encyclopedia of Comparative Jurisprudence*, Researched by: Group of Professors of Islamic Seminary, Imam Ali School Publication, Qum, 1427, First edition, p. 273)

³⁸For instance, about the reason why drinking wine is forbidden, Almighty God says: "O you who believe! Intoxicants and gambling and sacrificing stones and dividing by arrows for seeking luck or decision are filthy and regarded some of Satan's acts. So keep away from them that you may receive salvation." (Quran, 5:90). There is also a tradition in *Vasā'il al-Shi'a*, Āl al-Beyt Institute, Vol. 14, p. 366 in this regard.

³⁹Mūsavi Khumeinī Seyyed Rūhullah, *Kitāb al-Bei'*, The Institute for Publishing the works of Imam Khumeini, First Edition, Vol. 4, p. 276 (Imam Khumeini says, even in cases the "base" and reason of a ruling is mentioned like " Wine is unlawful because it causes drunkenness" it does not show the real cause behind the ruling and as a result the ruling cannot be applied in the subjects the base exists." For further studies see, Gheravi Nāini Mirza Muhammad Husein, *al-Makasib va al-Bei'* Islamic Publication Office, Qum, 1413, First Edition, Vol. 2, pp. 452 and 420 and Hāiri Yazdāi Murtezā ibn 'Abdolkarim, *Kitāb al-Khums*, Islamic Publication Office, Qum, 1418, First Edition, pp. 378, 410 and 599

⁴⁰Maybe "intellect" manages to realize the very ruling, but it cannot perceive the "base" or cause behind it. For instance, when God says: " perform prayers" intellect realizes that saying prayer is obligatory but cannot understand the details related to it like how to perform it or how many Rak'ats it has or... but can realize that because prayer is obligatory all the introductory acts for prayer are also obligatory.

rulings is in the restriction of human ability to gain knowledge. In some occasions Man does not have comprehensive domination over a subject and for this reason cannot see all the aspects of it, then based on his incomplete view may see a benefit in a ruling regarding the subject but that benefit is not good enough to persuade him to issue his final, definitive verdict. Thus, unless a jurist is completely sure about all the aspects, benefits and harms of a ruling, he cannot claim to have discovered the "base" of religious originated rulings.⁴¹

3. The necessity and influence of discovering the "causes" of rulings

Considering the increasing trend of appearing newly arisen issues in modern time which invites jurists to issue appropriate verdicts about them, makes the necessity of discovering the causes of religious rulings quite clear. Because, by identifying the causes of some rulings in specific subjects, the jurist may be able to apply the same ruling in the subjects with similar cause. The newly arisen issues are mostly of non-ritual kind which makes the jurist free in his attempt to discover the bases of rulings and applying them in other subjects. This feature of *ijtihād* is what makes the Islamic jurisprudence a dynamic science. Sheikh Muhammad Hasan, a great Shiite scholar, who authored an important, massive book in jurisprudence called *Javāhir al-Kalām*, used this feature of *ijtihād* when he announced hoarding foodstuffs an unlawful act. In order to explain the source of this verdict, he said because hoarding the people's needs may cause people to be in trouble and putting people into trouble is a kind of oppression and oppressing is certainly unlawful, and then hoarding people's needs is unlawful as well. In Islamic tradition, hoarding just specific items is unlawful but Sheikh Hassan, using the intellectual perception of the cause behind this ruling, generalized the law expressed in the tradition and included all people' needs in it. Of course,

⁴¹Sadr Seyyed Muhammad Bāqir, *Drūsun fi 'Ilm Usūl*, Dār al-Muntazar, 1405, Vol. 1, pp. 420 – 426

he believes that hoarding is unlawful only in case the hoarded item is a necessary object without which people suffer. For this reason, if the hoarded item is not a necessity and people may survive without it, like barley, then it is not unlawful, Sheikh Hasan says. So, this great Shiite scholar used the principle of "justice is good" and "oppression is bad" which is quite intellectual, to announce the unlawfulness of hoarding necessary items.

Intellectual Good and Badness

To elaborate on "intellect" as one of the sources of Islamic law, it is essential to know the notion of "intellectual good and badness" or "substantial good and badness"⁴². First, by "good" we mean the "positive and virtuous aspects" intellect discovers in some acts and considers the doer of those acts admirable. By "badness" we mean the "negative and unrighteous aspects" intellect finds out in some acts and regards the doer of those acts as being reproachable⁴³.

The question in this subject is: Can human acts be endowed with being good or bad before religion judges about it? Or are they neither good nor bad by essence, and their values stem from religion? Some Muslims⁴⁴ believe that human deeds are endowed with either good or badness regardless of what religion proclaims. They say the status of the acts; being good or bad, depends on benefit and harm existing in the act in relation to social life. Then injustice and oppression, regardless of religion's view, are naturally bad, while justice and equity are considered good and God would never do or ask to perform bad actions. They believe, if substantial good and badness did not exist, there would be no way to

⁴²When we talk of Substantial Good and Badness, we mean a kind of immediate judgment that happens when one imagines an act. (for instance, human intellect immediately considers treason as bad and assisting others as good by imaging these acts)

⁴³Vilāiī 'Isā, Dictionary of Usūl Terminology, Tehran, Nei Publication, p. 167

⁴⁴Maktab Huquqi dar Islam (Legal school in Islam) p. 116

logically justify the Divine orders and injunctions, because by denying the existence of substantial good and badness, there is no reason to obey God's orders. Why should we obey God's orders? Is it because God has ordered us to obey Him? It is clear that following this second order also needs another order and so on, this will end up to endless continuity which is regarded impossible in logic. But if we adopt that there are some acts which are substantially good or bad, such problem would not occur, because when God orders human being to do certain acts, the intellect realizes that obeying God is good and virtuous and disobedience to God is a bad and improper action and then causes Man to obey Him. In addition, the religious law is based on an intellectual perception, so if this foundation is slackened or loosened the whole system of religious law becomes weak and unstable. In the next section more argumentations of this view will be presented.

The Proofs of the Possibility of Intellectual Good and Badness

Those who believe that all the human acts are independently endowed with being good or bad and intellect can judge whether an action is proper or improper regardless of what religions says, have resorted to some proofs to establish their view and reject the opponent idea. Here are a few of their proofs:⁴⁵

- It is quite evident that human acts themselves include good or badness and denying this fact would lead to the denial of a self-evident truth. One of the tools used by the intellect to identify and perceive the facts is its ability to realize what act is good and what is bad. There is no wise person in the world who doesn't regard acts like paying off debts, returning what is kept as safekeeping, saving a drowning person, supporting an oppressed one, appreciating

⁴⁵Jannāṭī Shāhrūdī, Muhammad Ibrāhīm, The sources of Ijtihād form the viewpoints of Islamic sects, p. 230

someone who grants blessing, and practicing justice and fairness, as good or does not count the deeds like violating others' rights, betrayal, oppression and ingratitude as improper acts.

- All people from various nations with different kinds of cultures, customs and beliefs have the same judgment about human acts. For instance all nations believe that saying the truth and following justice are good while, telling a lie and practicing injustice are bad. There are however a few 'spiritually sick' people deviated from the right path who ignore their instinctive perception and commonsense and admire lying or oppression. But such people are in minority. Most people all over the world easily perceive the beauty of proper acts and obscenity of improper deeds while do not base such evaluation on any religion or faith.
- There is a verse in the Quran which proves this theory: " And whenever they commit an act of indecency, they say: our fathers also did the same and Allah has enjoined us to it. Say O messenger verily Allah does not enjoin indecency. Do you say against Allah such things that you have no knowledge of?"⁴⁶ In this verse God expresses special boundary and limit for issuing His religious orders. Because He explicitly announces that His orders would never cover the indecent and improper actions. Thus, human acts can be proper or improper before God issues any verdict about them.

The necessity to know Allah and obey His order and injunctions can be understood and proved only through "intellect". The orders given by Allah such as: "Obey Allah and Obey the Messenger"⁴⁷ are counted as "leading" orders. Because unless human intellect does not know God and is not aware of the necessity to obey Him, it will not force Man to

⁴⁶Quran, 7: 28.

⁴⁷Quran, 4: 59.

obey God's order to follow Him. Since God's order to obey Him is just like his other orders then obedience to Him requires an intellectual stimulation other than His order. One of the most fundamental tools used to prove and then know God is intellect. So if it is believed that intellect can be used in the process of knowing God, why can it not be used to perceive the values of human acts? Intellect is the foundation of every logical argumentation and is used to prove such important notion as the existence of God.⁴⁸ There are numerous verses in the Quran which invite Man to use his wisdom and ponder. For instance here are few of them:

"Fie on you and what you worship! Do not you use your reason?"⁴⁹ Or "He said, Allah is the creator of the east and the west and all that is between them. If you but use your reason."⁵⁰ Or " And these parable we put forth for mankind in general, but only the learned men understand their deep meanings."⁵¹

In addition to intellectual and instinctive proofs we just mentioned, there are some traditions (sayings narrated from Imams) which emphasize the reliability of wisdom and introduce 'intellect' as one of the guides sent by God to human beings. These sayings can also be used as a proof to establish the validity of intellect's verdicts.

These proofs have caused some of the later jurists to announce that the "intellect verdicts" are as definite as intellectual concomitances, provided that the verdicts are merely intellectual and are devoid of delusions and prejudices. These three verdicts of the reason that is the

⁴⁸Muntazeri Najafābādī, Husein Ali, "The Bases of Islamic Government", Translated by Salavati Mahmud and Shakuri Abulfazl, Keihan Institute, Qum, 1409, First Edition, Vol. 3, p. 126

⁴⁹Quran, 21: 67

⁵⁰Quran, 26: 28

⁵¹Quran, 29: 43

intellectual good, the intellectual badness and the intellectual concomitance are the verdicts that all Muslim scholars whether Shiite or Sunni have agreed on their possibility. Of course there might be some rare utterances by few scholars who entirely question the reliability of the intellect as a whole, but these opinions are not generally welcomed. However, there are some scholars who go to extremes. While some of them regard the intellect as an invalid and unreliable source to understand the rulings of religion, there are some others who take the opposite direction and generally regard all the intellectual perceptions as authoritative even those made in the field of ritual precepts which we said intellect is not able to interfere. We believe the second group is also wrong because based on Shiite perspective, in order to derive religious rulings and Divine duties, a jurist must first refer to religious texts and by considering all the conditions and requirements such as the time and space of written material, issues his verdict and if he cannot find any text related to the subject then he should decide based on his intellect. The influence of intellect in Islamic sciences is not only through applying its role in theological, ethical, social and political subjects, but also it has a main part in making principles used in jurisprudence and during the process of *ijtihad*. As intellect is capable of perceiving good and bad aspects of some actions, some of the principles used in jurisprudence can be made by this feature of the intellect. That is, based on the intellect's judgment we originate some general bases by which minor rulings can be made. Here are some instances:

One of these intellectual principles is "qubh iqāb bilā bayān" which means it is improper for a ruler to punish people for performing an act that they haven't been informed of its illegality. This principle is applied in a case a jurist searches for the ruling of an act or an issue in all the authoritative sources of Divine Law but cannot find any ruling mentioned by the Divine

Legislator, he should refer to his intellect and follow its judgment. Intellect in such a situation would certainly decide that performing or quitting that act is permitted, because if that act were obligatory or forbidden God would definitely mention it in the sources. So, because He did not mention it, the act is neither obligatory nor forbidden and people are free to perform it or leave it. Now if that act were in fact obligatory, the jurist would not be held responsible, because he searched in the sources but could not find any rulings. Based on this principle, Muslims scholars believe that everything and every act in the world is lawful and permitted unless there is an explicit utterance from religion to limit it in a way. Another example, Intellect as an independent source of making law, regards the orderliness and discipline in society a necessary notion, so, the necessity of following order is a principle made by intellect. According to this principle following traffic regulation is obligatory for every Muslim, although it is not mentioned in religious texts. That's why Imam Khomeini made passing a red light religiously unlawful or in Islamic Republic of Iran a law was made to liberate the circulation of information because it will help prevent governmental corruption.

Thus, human intellect has undoubtedly a great role in clarifying the ambiguities, solving the difficulties of life, and realizing most of the necessary rulings in relation to different issues. Accordingly, intellect can also derive the Divine Rulings from the religious sources in addition to its independent role in lawmaking process.

It should be noted that this subject requires more research and study especially with regard to the conditions and the scope within which intellect is utilized.

To sum up, these are the points we may conclude:

1. There are some actions which are considered by the intellect as good or bad and accordingly the wise people are expected to either perform or avoid them.
2. Human intellect is capable of discovering the good or badness.
3. It is essential to discover good and badness of the actions.
4. Intellect is independent in discovering good and badness and its verdicts are usually confirmed by the religion.
5. And finally, the intellect's perception of good and badness will be applied in making laws. Intellect's judgment to either admire or reproach an action can be a cause or a base to make laws.

From all these points we can prove the authenticity of intellect's verdicts and intellectual concomitances.

The Principle Concerning the Concomitance between the Intellect and Divine Legislator's Verdicts

One of the issues arising out of the acceptance of the natural good and badness of the acts and the ability of the intellect to realize them is the belief in the agreement and concomitance between the verdicts made by the intellect and religion.

Some of the Muslim thinkers believe that whenever human intellect is purified and free from the non-intellectual motives and perceives the

good or badness of an act just through mere intellectual attempt, undoubtedly the intellect's conclusion will be the same as religious ordinance. This means that in such cases we can discover the verdict of Divine Legislator from the verdict of the intellect. Then in all cases that religion considers an act bad or good – if the bases of those verdicts are obvious to intellect – the intellect would issue the same verdicts as those of religion⁵². That is why some experts in *Usūl* say: "*Kulu mā hakam bihi al-aql hakama bihi al-shar' va kulu mā hakama bihi al-shar' hakama bihi al-aql*" which means whatever is decreed by the intellect is accepted by the religion and whatever is decreed by the religion is verified by the intellect. In other words whatever is regarded as acceptable by the intellect is counted as true by the religion too and whatever is improper in intellect view is regarded as improper by the religion as well. ⁵³Some have said: "Divine Law and Intellect are in agreement". Imam Ali has said: "Intellect is an internal Divine Law and Divine Law is an external Intellect".⁵⁴

It should be noted that all the above mentioned notions are possible for intellect and the verdicts issued by intellect are accepted by the religion only if intellect concludes in a certain, absolute way. So if the intellect reaches probable and conjectural verdicts, they are not valid and acceptable. So, the intellect by discovering the benefits behind some religious rulings manages to find out the rulings of other subjects and this is the meaning of the saying:⁵⁵ "whatever is decreed by the religion is

⁵² Jannati, Shahudi, Muhammad Ebrahim, *The bases of Ijtihād in the view of Jurists*, Tehran, Amir Kabir, p. 289

⁵³ Muzafar, Muhammad Reza, *Usūl al-Fiqh*, Esmailiyan Publication, Vol. 1, pp. 206 – 208; also see Ayatullah Qulpayegani, *Ifāzat al-'avā'id*, Dār al-Qūrān Harīm, 1410, Vol. 1, p. 11; Allame Tabātabā'i, *Hāshiyat al-Kifaya*, scientific and intellectual foundation of Allame Tabātabā'i, Vol. 2, p. 187; Khūlī, Seyyed Abulqāsim, *Dirāsāt fi 'Ilm al-Usūl*, the institute of encyclopedia of Islamic jurisprudence, 1419, Vol. 3, P. 32; Sheikh Ansārī, *Matār al-anzār*, Āl al-Beyt, Institute, p. 234; Khūlī, Seyyed Abulqāsim, *al-Hidāyah fi al-Usūl*, Sāhib al-Amr Institute, 1417, Vol. 2, p. 121.

⁵⁴ *Al-Aql Shar'n Min Dākhil va al-Shar'o Aqlon min Khārij*.

⁵⁵ Sheikh Ansārī, *Matār al-anzār*, Āl al-Beyt, Institute, pp. 240 - 241; Muzafar Muhammad Reza, *Usūl al-Fiqh*; Esmailiyan Publication, Vol. 1, p. 240.

accepted by the intellect."⁵⁶ Of course those who believe in the existence of such agreement between the religion and intellect have different opinions about whether or not the verdicts issued by the intellect are obligatory to be followed. There is a minority of Muslim scholars, however, who do not believe in the harmony between the religious and intellectual verdicts. Of course they agree that there are certain acts that intellect would consider as good or bad, but there is no necessary relationship between what intellect concludes and the real religious laws. They say it is all possible that something may be regarded by intellect as good but Divine Legislator, considering some reasons, does not order it and an act might be considered by intellect as improper but because of some consideration, is not forbidden by religion.

In Shi'ism, the authenticity of intellect means that if it issues a certain and absolute verdict, that verdict is true and valid, since intellect is not doubtful about it.⁵⁷ Such certain intellectual verdicts are undoubtedly authentic and must be accepted by everyone. Some of these verdicts are like: "punishment without informing the rules is improper" or "If someone is sure of being obliged to a task, he should do it until he becomes sure the task is fulfilled"⁵⁸ Because when we talk about

⁵⁶In this regard some scholars have said that it is great pride for Islam to propagate such notion as the existence of harmony between intellect and religion. Because it is possible that in some occasions when there is no religious proof to issue verdict, intellect acts and identifies the ruling. The existence and practice of this notion in Islam makes it a logical religion and has given Muslim scholars vast ability and scope to research about all subjects utilizing the intellect. This feature caused Islamic jurisprudence to get great achievements in the past. In many international scientific institutes, Islamic jurisprudence has been praised because of its flexibility. (Mutahari, Murtaza, *Jurisprudence and Law*, first edition, [1, pp. 484 – 485)

⁵⁷Mutahari, Murtaza, *Jurisprudence and law* (work collection), Vol. 20, p. 23. About the authenticity of the intellect he says that "authenticity of intellect" is proved by the intellect itself and the religion. The legitimacy of religion and religious doctrines are proved by the intellect, then religion would definitely regard intellect as authentic or its own legitimacy would be under question. Ibid, p. 52

⁵⁸Makārim Shīrāzī, Nāsīr, *The Encyclopedia of Comparative Jurisprudence*, Edited by, a group of authors from Islamic seminary, Imam Ali Publication, Qum, 1427, First Edition, p. 123.

"intellectual proof" we mean the certain intellectual propositions, then its authenticity is essential and does not need further proof. It is because we understand everything, including the Religious Doctrines, God, Prophet and other religious and non-religious concepts through certainty.⁵⁹ In other words, the authenticity of certainty is quite innate and exists in the certainty itself. Because if we were required to prove the authenticity of certainty by another certain proof, then we had to prove the authority of this second certainty first and it would lead to endless chain of proofs or vicious circle. But if by "intellectual proof" we mean conjectural, intellectual perceptions, their authenticity requires a certain proof. For instance to prove the authenticity of hypothetical analogy or "*istihsān*" one should resort to absolutely certain proofs. ⁶⁰

Therefore, the mere and purified intellect is one of the God's authorized proofs, like traditions and Quran with no difference.⁶¹ So, intellect is not apart or against religion, rather it is along with textual sources of religion. For this reason intellect has been described as Base or Scale and sometimes as Light and in some cases as Key to understand and analyze the laws and regulations.⁶²

To sum up, whenever intellect, following the proper and systematic procedure, comes to a conclusion, religion should have the same idea about that subject and this means the harmony between religion and intellect. Then in Islamic jurisprudence, the intellect's verdict about the good or badness of an act is used to issue religious rulings like legal or illegal, obligatory or unlawful. And for this reason "intellect" has been

⁵⁹It means that the legitimacy of religion and religious doctrines are proved by the intellect. So, religion needs intellect for its existence, and for this reason religion would definitely legalize intellect.

⁶⁰⁶⁰Makārim Shīrāzī, Nāsr, *The Encyclopedia of Comparative Jurisprudence*, Edited by, a group of authors from Islamic seminary, Imam Ali Publication, Qum, 1427, First Edition, p. 191.

⁶¹JavādĀmuī, 'Abdullah, *The Relation Between World and Religion*, Asrā' Publication, Qum, 1381, p. 81.

⁶²Ibid, pp. 199 – 208.

announced as one of the four sources of lawmaking in Shiite jurisprudence especially in dealing with newly arisen issues.⁶³

The Methods Used to Guarantee the Efficiency of Intellect's Role in Deriving Religious Laws from the Valid Sources.

In Holy Texts, there are some methods mentioned to increase the productivity of intellect in the process of extracting the laws for newly arisen issues from the religious sources. If these methods are closely followed, the jurist is able to respond to the problems and issues come up in modern life. These methods are as follows:

- A) A thorough investigation of the issue which has arisen.

- B) A thorough investigation of the verdict, by considering all its internal and external features which are affected by the variation of time and space. We mentioned before that time and space may affect the sort of verdict issued by the jurist. So if the case is of the kind where time and space are influential elements, the jurist should be careful to pay attention to these elements and place the case under another religious principle.

For instance, in the past, trading blood used to be forbidden in Islam, but is authorized now. This is because one of the conditions of the authorized transaction in Islam is that the good should be valuable, but in the past blood had no benefit or value. For this reason its selling was considered unlawful. But today as blood has great value and can save people's lives, it is authorized to buy or sell it. Or about donating body organs, because, intellect would consider saving people an essential task which

⁶³Some thinkers believe that Shiite jurisprudence cannot survive without this attitude towards Intellect. Mubalghi Ahmad, *Criticism of Imam Khumeini's Viewpoints*, Ahl Beyt Magazine, Encyclopedia of Islamic Jurisprudence, a group of authors, Qum, Vol. 19, p. 212.

is emphasized by the religion order as well, the Muslim jurists have expressed the permission of organ transplantation.

C) Thorough investigation of the "base" of the verdict. There is no doubt that, the change of time and its condition has influence on both "bases" of the verdicts and the "elements" making up the subject. So on some occasions, by changing time a verdict is totally evolved due to the changes of these two components. For instance, we have some traditions (Narrated Sayings of Imam) which say hoarding wheat, barley and dates are forbidden. These traditions do not mention other food items. When we investigate the "base" or cause of issuing this verdict we find out that at the time of issuing this verdict, the main food items which had great impact on the life of people were these three items mentioned. So hoarding those items caused real problems for people and for this reason they were mentioned by Imams. In fact, they were just instances for a general ruling: hoarding necessary items is unlawful. There are some signs confirming this conclusion, for instance, Imam Ali, in his letter to Mā'īl Ashtar, his appointed governor, wants him to fight against hoarding and says: "Hoarding leads to harm and loss for the society and indicates the weakness of the governments"⁶⁴ So, by investigating the base of this verdict, we can conclude that hoarding all food items even those which are not mentioned in traditions is unlawful.

D) Investigating the possible features of the subject which may have caused issuing the verdict. The jurists, who are well-informed of the principles of *ijtihād*, search about all the features that are likely to have caused the legislator to issue a

⁶⁴Ibn Abi al-Hadid, Commentary on Nahj al-Balagha, Vol. 17, p. 83.

specific ruling. By thoroughly searching for the possible causes, one can reach the real base behind the ruling and then he issues that verdict in other subjects with the same cause. Of course, this search is done under some conditions:

1. The jurist should think of all possible features that may have caused the verdict for the subject.
2. Then he should consider the features one by one, examining each of them carefully to see which one is capable of being the real cause behind the verdict. Through this process, the jurist manages to discover the "base" of the verdict and then he applies that verdict for every subject that has the same feature or base. In Islamic jurisprudence this process is called "*Tanqīh Mināt*" (discovering the base).

E) Investigating the relationship between the verdict and the subject. Some jurists try to discover the "base" of the verdicts by looking into the relationship between the subject and the verdict. By identifying the base, the jurist can apply the verdict in similar situations. For instance, one of the religious rulings is that, usury is unlawful in buying or selling wheat (it is unlawful to buy certain amounts of a kind of wheat for more or less amount of another kind of wheat). By investigating the relationship between the verdict (being unlawful) and the subject (wheat) we realize that, wheat is one of the items that are measured by special scale called *Keil*. So, wheat has that special ruling because of this feature. Therefore, a jurist may conclude that whatever is measured by that scale has the same ruling in Islam. This process in Islamic Jurisprudence is called "*Takhrij Manāt*" (extraction of the base) and is valid only when it is obtained in a definite way.

F) Investigating the advantages and disadvantages of the verdict and the needs of the society to it. It is sometimes possible to identify the cause of a religious ruling by investigating the advantages and disadvantages of a verdict and the way society needs it. If a jurist is sure the reason to issue a verdict is specially advantageous, then he can apply the verdict in similar subjects with the same advantage. This process is called "*Mustanbit al-'illa*".

Although Muslim thinkers have not accepted this process in an absolute way, they believe if a jurist is certain and completely sure about it, he is authorized to apply the verdict in other situations, because as we said before, certainty is authentic by itself and when someone is certain about something, he must act accordingly. Two points are worth mentioning here:

First Point: the process of issuing a verdict for the advantages or disadvantages found in it is a process common among Sunni scholars. The early Sunni scholars, even during the time of Prophet's companions and successors, whenever they found out an advantage in a subject made it obligatory and whenever identified a disadvantage, made it unlawful. They sometimes went to extremes and issued verdicts in opposition to Holy texts, just because of what their intellects perceived.

Second point: there is a difference between making a ruling just for its advantages and disadvantages and legislation which stems from the principle of concomitance and harmony between religion and intellect's verdicts. In the principle, the mere intellect without any other thing realizes the good or

badness of something and religion would definitely issue the same ruling. But to identify the advantages of an act, intellect with the help of other things like experience, knowledge and culture make such a conclusion.

G) Identifying the cause in different instances. The process of identifying the cause in different cases is called "*Tahqiq Manāt*" (looking for the base). This process occurs when the jurist reaches the cause of a religious verdict in a definite way like when it is mentioned in holy texts or there is a consensus over it, then he tries to identify that cause in different cases. At this level the jurist does not need to investigate features of the subject or relationship between the verdict and the subject, rather he only needs to identify the cases with that cause and apply the verdict.

H) Investigating the explicitly mentioned causes. When there is an explicit allusion to a cause of a verdict in an authentic source, the jurist can easily apply the verdict in similar situations. This process is called the argumentation of "*Mansus al-'illa*" (explicitly mentioned cause). There are however other viewpoints. Some scholars believe that applying the verdict in other cases with the same cause, is not included in intellectual reasoning, because generality is understood from the proof in which the cause is mentioned. In other words, the jurist resorts to the religious proof and its generality in order to generalize the verdict of a specific subject and apply it to all similar ones, in which case, he does not use intellectual process. Therefore, such argumentation in jurisprudence stems from texts and principles governing the text (generalization) not intellect. Some other scholars believe that generalizing the verdict from

the explicitly mentioned subject to other subjects is not legal, because it is exactly the same as analogy which has been reproached in Shiite jurisprudence.

- 1) Investigating and comparing the verdict of Direct concept (the direct notion understood from the wordings of the proof) and the verdict of the connotation (the indirect and correlative notion of a proof). When a jurist investigates the verdict of the direct notion mentioned in the holy texts and the verdict of the connotation of that proof and concludes that the cause behind the verdict of the connotation is stronger and has all necessary conditions, he can announce that verdict as a legal ruling, although it is not directly mentioned by Legislator in valid sources. This process is called: "*Qiyās Ulaviyat*" (the analogy of precedence). This process requires two conditions:

One: The verdict in the direct concept and connotation must be of one type. For instance, if the verdict in the direct concept is obligation (*Vujūb*), the verdict in the connotation should be obligation too.

Two: The base on which the verdict of the connotation is set up should be stronger and more important than the one of the direct concept. For instance, when adultery (having sex out of marriage) is illegal in Islamic jurisprudence, the rape (having sex with force) will be definitely illegal. Or when prostitution is a criminal action, forcing people to practice it will be certainly illegal too. This process and it includes both conditions:

Firstly: both verdicts in the direct concept and connotation are of one type: unlawfulness.

Secondly: The cause for the verdict of connotation; "Forcing" is stronger than the cause of the illegality of Rape or prostitution.⁶⁵

Conclusion

It should be noted that, jurisprudence is one of the Islamic sciences devoted to legislating on different issues and *ijtihād* is a tool which the jurist utilizes in the process of lawmaking especially when it comes to the modern subjects which have come up due to today's lifestyle. In fact, *ijtihād* is a secret cause behind the durability and dynamism of Islam. Furthermore, Islam has been based on intellectuality and most Muslim scholars believe that intellect is a Divine gift granted to Human beings as a medium by which good and bad, proper and improper are distinguished. They believe that human intellect is in total harmony with religion and religious ordinances, because, if there were inconsistency between intellect and religion, God's wisdom would go under question. It is impossible for God as the creator of wisdom to act improperly and grant human beings two different and opposite sources for guidance. Therefore, there is a complete agreement between the two sources. There are many verses in the Quran which confirm this claim such as "will you not use your reason?", "He shows you His miracles so that you may

⁶⁵ Another example, in the Quran there is verse in which God forbids Muslims from saying "fie" to parents. The unlawfulness of saying fie to parents is the verdict of the direct concept of the verse. The jurist perceives that when saying fie to parents is unlawful because it is kind of disrespect, then other forms of disrespect like swearing them or beating them are undoubtedly unlawful. Illegality of beating parents is a verdict issued by the jurist as a result of this process and it includes both conditions:

Firstly: both verdicts in the direct concept and connotation are of one type: unlawfulness.

Secondly: The cause for the verdict of connotation; swearing or beating is stronger than the cause of the illegality of saying fie to parents.

use your reason"," if you but use your reason" "Verily in these, there are signs of Allah for those who use their reason".

The rulings regulating an Islamic society are divided into two groups: fixed rulings and changeable ones. The fixed rulings are the regulations that are the same throughout the human history and Divine Legislator has announced them all.⁶⁶ The changeable rulings are the ones that might change as time passes and are dealt with by the sources and proofs used in Islamic lawmaking; the ones which have been emphasized by the Imams as the legitimate tools of legislation. These sources and foundations are the proper and efficient tools used by the jurists to respond to the issues coming up in modern world. They use these principles and intellectual reasoning to actively and dynamically solve all the problems of Muslim societies especially the newly arisen ones. In modern time, the Shiite jurists enjoy a privilege that early jurists were deprived of, and that is authority. In the past, the authority of the country was not in the hands of jurists and this would lead to certain problems and imperfection in lawmaking in the context of Islamic law in Muslims countries, but today the power is in the hands of the jurists and this has contributed to the jurist removing those problems. Of course, in order to solve all the problems of Muslim societies, the scholars and jurists should have a more active role in the process of identifying the expediencies and advantages of the society and by using intellect and wisdom, provide logical rulings for the Muslims.

Having this approach to intellect as one of the sources of jurisprudence and a tool used in the process of lawmaking, grants an important role to

⁶⁶Seyyed Razi, Muhammad ibn Hussein MusaviT Nahj al-Balagha, Researched by, 'Azizollah 'Atarodi, Najh al-Balagha Institute, Qum, 1414, First edition, p. 27, Sermon No. 18.

In this regard Imam Ali says: "Do you think Allah has revealed an imperfect religion and asked the idols to complete it? Or you think these are Allah; partners who have rights to make rulings and Allah would confirm them? Or you think Allah has sent a complete religion to Muhammad but he did not convey it to people completely?"

the intellect to solve the problems of human rights in Muslims countries. Codification of proper procedural rules, in order to protect the victims' rights is an area of rules that can be changed with regard to time, and human intellect has the ability to find God's specific order and determine the different aspects of fair trial not only by using the proofs of Islamic rules in the Quran and Sunnah, but also it can be used as an independent principle even in the issues that are not mentioned in main sources of Islamic law. Applying the ability of intellect in order to protect women's rights, particularly the rights of women victims, in the procedural stage, is an important method to guarantee the victims' rights. For example, recognizing the right to privacy, which can be derived from protective Islamic foundation of privacy, or codification of rules to guarantee comprehensive compensation for victims' losses or their safety are possible through these kinds of Islamic principles such as intellect.

In addition, complete understanding of the capabilities and competencies of intellect would contribute to solve other newly arisen issues in human societies. Claiming that God has the attribution of absolute justice and that He knows all requirements and needs of all human kind and thus makes laws accordingly, can be proven only when we recognize valuable identity for wisdom of humankind and allow it to make laws when it can understand and find the main causes of Islamic rules without being affected by any prejudice, love and hatred. The issue of protecting the victims has been mentioned in Quran and Sunnah in terms of general principles such as orders to protection of oppressed people or performing justice in the society or avoidance of inquiry. In order to protect the women victims, these general principles can be used as a license to issue verdicts in the protection of such women. Even in the cases that the Quran and Sunnah are silent and devoid of any verdicts, the intellect has the ability to make just procedural rules for them. The possibility of reforming the substantial laws and the rules

mentioned explicitly in the sources of Islamic rules, by using intellectual solutions, is a subject requiring more studies and research by jurists and Muslim scholars. Such studies should be concentrated on discovering the causes behind Islamic rules concerning special issues. However, achieving this goal is not impossible considering the tools such as intellectual principles, *ijtihad* and other elements existing in Islamic jurisprudence.

The Philosophical Principles of International Humanitarian Law in Islam

Morteza Yusefi Rad*

Abstract

The issue of International Humanitarian Law and its importance in various communities and nations implies that individuals, various societies, nations and races have a common understanding with regard to life; so that by means of these rules, they can differentiate themselves from other creatures; although the extent and limits of this differentiation may vary according to the temperament and the position defined by the philosophical and divine schools of thought for human beings. The author of the present article, following the same point of view, claims that International Humanitarian Law in Islam enjoys a strong basis and stability. The reason for such strength lies in the theoretical and practical principles of Islam. This paper studies the mentioned principles.

International Humanitarian Law refers to the rights considered by the international society for casualties, women, children and prisoners of war, who are not directly involved in the enmities and fights between countries or in civil wars. The origin of making such laws is the conscience of the human society supporting the people who are incapable of fighting in wars, however like soldiers they suffer from the injuries and damages of war. Such a judgment by human conscience has turned into a general and international requirement, so that, by these means civil and international wars could be restricted to the military people and centers which are actively involved in war. Therefore, humanitarian law is the law for supporting people at the wartime and its originator is human dignity, in which all human communities believe and it is expected that governments and authorities at wartime consider these laws and follow them. Such a consideration in Islam is stronger.

* Morteza Yusefi Rad is Assistant Professor of Research Center of Islamic Sciences and Culture

Introduction

The issue of International Humanitarian Law and its importance in various communities and nations implies that individuals, various societies, nations and races have a common understanding with regard to life; so that by means of these rules, they can differentiate themselves from other creatures; although the extent and limits of this differentiation may vary according to the temperament and the position defined by the philosophical and divine schools of thought for human beings. The author of the present article, following the same point of view, claims that International Humanitarian Law in Islam enjoys a strong basis and stability. The reason for such strength lies in the theoretical and practical principles of Islam. In the following, the mentioned principles are studied. International Humanitarian Law refers to the rights considered by the international society for casualties, women, children and prisoners of war, who are not directly involved in the enmities and fights between countries or in civil wars.¹ The origin of making such laws is the conscience of the human society supporting the people who are incapable of fighting in wars, however like soldiers they suffer from the injuries and damages of war. Such a judgment by human conscience has turned into a general and international requirement, so that, by this means civil and international wars could be restricted to military people and centers which are actively involved in war. The International Humanitarian Law, also known as laws of armed conflict (LOAC) or Law of War (LOW), refers to a collection of rules which at the wartime protects the people who take part in the war or the people who are unable to take part in the war; this law also limits the use of weaponry and war strategies.² Therefore, humanitarian law is the law for supporting

¹ Mohaqiq Damad, Seyed Mustafa. *International Humanitarian Law*. p. 66.

² *The International Red Cross Answers Your Questions*. p. 17.

people during wartime and its origin is human dignity, in which all human communities believe and it is expected that governments and authorities at wartime consider these laws and follow them.³

The message of International Humanitarian Law is that the parties involved in wars should not cause any damage to the people who are not involved in the war but can suffer from it.⁴ The weapons which are not capable of distinguishing militants from civil people as well as the weapons and strategies which cause unnecessary damages should be avoided.

Islam and the Necessity of International Humanitarian Law

In Islam, the necessity of the laws for avoidance from war and the laws which can protect people from uncommon war damages has been emphasized. These laws are necessary based on the innate dignity granted to man by God and the innate human insight and conscience in regard with following these laws; meanwhile this necessity is strengthened because of the noble status of man in religious and specifically Islamic thought, which provide more particular bindings for consideration of the humanitarian laws. Such bindings enjoy stronger supports among the ones who believe in them. In the following sections, the paper deals with the philosophical and ideological principles of humanitarian law in Islam.

The Principles of Humanitarian Law

The philosophical principles of humanitarian law in Islam can be classified into two groups including the theoretical principles and

³ *Consideration of the International Humanitarian Law* (2004). Translated by the Office of National Committee of Humanitarian Law, p. 43.

⁴ *International Humanitarian Law: An Islamic Approach*, p. 66.

practical principles. The first group deals with the nature and purpose of the existence and man:

Theoretical Principles:

The Principle of Unity and Purposefulness of Existence and Man

In the philosophical system of thought in Islam, God is the creator and destination of all the existence specifically of human beings. He is the beginning and the end of every truth and culmination and is attributed with all the goodness and probity. Therefore anything that hinders man from attaining goodness and virtue is illegitimate and is not favored by God. Following one's worldly desires, killing others and ignoring other people's rights (whether they are old or young, man or woman, Muslim or non-Muslim) are among the cases which take man away from God and are prohibited by Islam.

The Principle of Innate Dignity of the Man

In Islam, the people are respectful, whether they are healthy or disabled, mature or immature, wealthy or poor, born or not yet born. Therefore, causing any damage to them is prohibited and the committer has performed an illegal act and should be punished.

As one can find in the Quran: Surah 5. Al-Maidah, 32: ".....that whosoever killeth a human being for other than man slaughter or corruption in the earth, it shall be as if he had killed all mankind," . While human beings can be considered grouped among the animals, he is differentiated from them and stands out because of enjoying free will and wisdom; therefore God has put nature, which is lower in rank to man and animals, at his disposal and the man has utilized it in order to meet his material and spiritual needs. In Islam, the innate dignity of human beings is not restricted to the time of life in this world; rather it covers the time beyond

death, as well. Therefore, Islam prohibits mutilation of human corpus and approves human conscience according to which such an act is considered indecent.⁵ This kind of dignity gives rise to some rights for mankind, which in turn forms the basis of other fundamental principles for humanitarian law.

The Principle of Life

Life is considered as a divine gift and a noble and primal right in Islam and its necessity has been guaranteed for all humans and God prohibits depriving one from life without proper cause: Quran: Surah 6. Al-An'am, 151: "..... And that ye slay not the life which Allah hath made sacred, save in the course of justice. ...". In this case, prisoners of war cannot be deprived of life and its necessities such as clothing, food and a safe environment for physical and psychological wellbeing. Surah 4. An-Nisaa: 90: "... So, if they hold aloof from you and wage not war against you and offer you peace, Allah alloweth you no way against them."

To the same end in the *Fiqh* books, there are some regulations under the title of "misreckoned refuge", which refers to a situation in which a non-Muslim having conceived that s/he is under the protection of Muslims, arrives at their territory; while it is not factually so. In such a situation, s/he should not be killed; rather s/he should be returned to his or her earlier location.⁶

The Principle of Protecting the Lives of Enemies

Primarily, Islam intends to guide its opponents and enemies, except for the enemies who get involved in hypocrisy and hostility against Islam.

⁵ Shakuri, Abulfazl (1998). *The Political Fiqh of Islam*. Publication Center of the Office of Propagation of the Seminary School of Qom. p. 382.

⁶ Shahid Thani. *Sharh ol-Lom'at al-Dameshqiyah*. Maktabah Ayatollah al-'Ozma Mar'ash Najafi. Qom. Vol. 2. p. 397.

Although Islam favors a life accompanied by divine guidance and approval of God, based on the realities, it approves the right of life for the enemies who put their weapon down and leave enmity.

The Principle of the Equality of Humans

The principle of the equality of humans innately is among the other principles which result from approving the innate human dignity. According to this principle, all the people are equal before the rights of others and law, and nobody enjoys a privilege from which another one is deprived; as the belief in the unity of God and His being the Creator does not provide any advantage.⁷

The Principle of Decent Dignity

In Islam, the true value of mankind is not the same as the value of other natural creatures, each of which enjoys innate value; rather the status of man is based on his being the vicar of God on the earth,⁸ and to the extent that he practices this status of probity through achieving virtues, he enjoys decent dignity. Such a person places the foundation of his dignity on the right of decent and pure life and responsible freedom and self-esteem, rather than on the right to life and absolute freedom. The Holy Quran defines the resulted life from such a dignity as "good life": Surah 16. An-Nahl, 97: "Whosoever doeth right, whether male or female, and is a believer, him verily We shall quicken with good life, ... ". Such a man is elevated to a status beyond the position of things, plants, animals and angels⁹ and his freedom is realized through his free will and practicing his positive potencies and culminant tendencies, which is

⁷ Ja'fari, Mohammad Taqi (1998). *The Challenge of Thought*. The Office of Publication of Islamic Culture. p. 470-475.

⁸ The Holy Qur'n. Surah 2. Al-Baqara: 30: "... Lo! I am about to place a viceroy in the earth, ..."

⁹ Javadi Amoli, Abdullah (2009). *The Rightness and Duty in Islam*. Publication Center of Asra'. 3rd Edition. p. 105.

termed as "responsible freedom".¹⁰ Therefore, the religion exalts the value of mankind to the degree that any threat to an individual is considered as a threat to humanity and killing an individual means killing all the people, Quran: Surah 5. Al-Maidah, 32: "...that whosoever killeth a human being for other than man slaughter or corruption in the earth, it shall be as if he had killed all mankind,"

In this case, man finds himself responsible with regard to the life of all humanity and his social life is not a contrived communal coexistence, or at most a peaceful coexistence; rather he arrives at true unity with mankind. In the communal life for such a person, a war based on transgression, bloodshed, killing fellow men, massacre, plundering public property, killing women, children, old people, handicaps and prisoners is meaningless; rather meaningfulness of life lies in sympathy, empathy and altruism. The guarantee for such a performance is his grown characteristic in the religion which considers such a status and dignity for mankind.¹¹ A person trained in such a school of thought regardless of geographical boundaries shows empathy toward people whose shelters have been destroyed in war or whose country has been occupied. Such a person is eager to help them not just in terms of altruistic charities; rather he will go beyond geographical territories and do whatever he can with an intention of culmination and probity. In this case, the title of "humanitarian law" is not capable of communicating the rights considered and granted by God to such a person.

¹⁰ Ja'far, Mohammad, Taqi. *The Wisdom behind the Political Principles of Islam*. p. 331. & Ja'fari, Mohammad Taqi (1998). *The Challenge of Thought*. The Office of Publication of Islamic Culture. p. 295 and 502.

¹¹ Ja'far, Mohammad, Taqi (1994). *Translation and Interpretation of Nahj ol-Balaghah*. The Office of Publication of Islamic Culture. Vol. 10. p. 190.

Practical Principles:

The practical principles of humanitarian law refers to the principles which are based on revealed law or are innate in humankind and are affirmed by the religious and revelatory instructions and at the same time are intended to organize and regulate human behavior. Such principles include:

The Principle of Justice

The principle of justice here refers to justice in humanitarian behavior toward others and adapting it with the religious and divine rules. God set up divine religions in order to regulate human behavior and keep them away from injustice and transgression; so that people set their thoughts and beliefs in accordance with divine beliefs and also adjust their acts in accordance with the religion. The Holy Quran states: Surah 5. Al-Maidah: 8: "... Deal justly, that is nearer to your duty. ...". Surah 16. An-Nahl: 90: "Lo! Allah enjoineth justice ...". In these verses, just performance has been considered as a decent act and a sign of fear of God; and one of the good deeds is considering the rights of the ones who have got injured in the war, or the ones who have been captured as prisoners of war, or considering the rights of the women, children and prisoners.

In the Islamic thought, for a person who enjoys religious belief and views human beings at least as a creature of God and at most as the vicar of God, the major concerns are consideration of the rights of people, solidarity, unity and philanthropy. For such a person consideration of the people's religious and human rights is necessary both rationally and religiously, whether based on the fact that approval of other people's rights is appreciation of the rights of religious brothers or the fact that the others are fellow human beings and God creatures, whose rights have been agreed upon and recorded as humanitarian law. Imam Ali (peace be upon him) says that "there are two groups of people, the ones who

are your religious brothers and the ones who are like you in creation; therefore considering their rights is incumbent upon you."¹²

The Principle of Mercy

The principle of mercy is among the practical and fundamental principles for the manifestation of religious and humanitarian behavior. This principle is a humanitarian principle and at the same time it is the basis of religious good deeds to arrive at salvation; Muslims and religious society and political systems consider it as the basis of their conduct with prisoners, women, children and old people at wartime with the infidels who have no enmity with Islam. This principle is so highly valued that God calls his Prophet as "the Prophet of mercy": Surah 21. Al-Anbiyaa, 107: "We sent thee not save as a mercy for the peoples."

The religion expands the dominion of mercy beyond the human society to whatever exists on the earth and in the natural world including the animals, plants and non-living things, as it is stated in the following tradition: "Have mercy toward the creatures on the earth, so that the One who is in the Heavens has mercy upon you." Therefore, "mercy" as a decent human attribute, has a divine origin and its boundary is not limited to human beings; rather it goes beyond humans to all the creatures. Being merciful is considered as a good deed. In a tradition it is stated that "being kind and merciful is the characteristics of God's close friends." Faithful people do not limit their mercy to any specific group or to the people who believe in the same religion as they do; rather they generalize it to everybody including people who are not directly involved in wars such as the prisoners, injured, children women and people who are not involved in war, even to the animals, plants and trees. God says to the prophet (peace be upon him) that: Surah 8. Al-

¹² Nahj ol-Balaghah. Translated by Mohammad Dashti. Mashreqin Publications. Letter number 53.

Anfal: "O Prophet, Say unto those captives who are in your hands: If Allah knoweth any good in your hearts He will give you better than that which hath been taken from you, ...".¹³

The Principle of Responsibility and Keeping Promises

Keeping one's promise is a necessity which self-preservation and selfishness of soul seeks for its own maintenance and is considered as a natural principle and is affirmed by Islam, as well. The origin of such a principle is the human's innate insight about it and Islam considers it as the basis for social and religious life. The Holy Quran, Surah 17. Al-Israa, 34: "... and keep the covenant." According to such a principle, the Islamic government is responsible for the protection of security of the family, life and property of all the infidels and followers of other religions who have a bond of protection with the Islamic government.

The Principle of Affection and Decent Conduct

This is another principle which is of serious importance in practical knowledge of Islam and is the source of all the individual, social and political behavior at wartime and peacetime. Islam does not consider its addressees limited to a specific number of people; rather it emphasizes to its followers to consider the religious and humanistic principles for all Muslims and non-Muslims. Among such considerations, they are advised to act kindly towards prisoners. The Prophet of Islam said: "attract people towards yourself through affection, and act compassionately towards them and guide them to us through affectionate behavior before you decide to kill their men and bring their women and children to me."¹⁴

¹³ Ja'far, Mohammad, Taqi. *Translation and Interpretation of Nahj ol-Balaghah*. Vol. 9. p. 177.

¹⁴ Kanz ol-'A'mal, the Chapter on Jihad. Tradition number 1130.

The Principle of Benevolence and Altruism

The principle of benevolence and altruism is another principle encouraged by Islam and is the characteristic of a thought in which beside innate dignity, decent dignity, as it was described before, is granted to human beings, and of course, such a dignity is an outstanding characteristic of Islam. The Holy Quran fosters such an act to a degree that the interpreters believe the following verse of Quran was revealed to appreciate the benevolent act of Ali and his household (peace be upon them). While fasting for three days, they generously granted their food for three successive days and nights to the needy people, orphans and prisoners: Surah 76. Ad-Dahr: "And feed with food the needy wretch, the orphan and the prisoner, for love of Him."

Conclusion

Based on what was explained, it is clear that the principles of humanitarian law in Islam not only enjoy an innate and conscience-based approval but they are also supported religiously. In the Unitarian approach towards existence and the divine approach towards human beings, God is characterized with all the attributes of probity and is the origin and source of all decency and culminations in the world of being and also He grants innate dignity and decent dignity to man; so that, human beings recognize that their status and value culminates along with the approximation towards human and divine values in the realm of thought and action. The principle of unity of God is the basis of being and the basis of all the thoughts, beliefs and deeds of mankind. The principle of innate and decent dignity and the principle of equality of all humans and avoidance from discrimination among them necessitate that individuals, the religious community and the Islamic government follow them in dealing with all those people who are the subject of humanitarian law such as prisoners of war. They should act in accordance with both human principles and the ideological and

philosophical principles of Islam; as the objective of Islam in the realm of practical knowledge is the revival of all decent conduct which is innately considered as good by mankind and everybody favors to be treated in accordance with them. Meanwhile, Islam does not restrict decent acts just to Muslims; rather they are decreed to be practiced for everybody including prisoners, woman and children at wartime.

A Cultural Significance of the Modern Islamic Exegetics for the Theory of Religious Tolerance

Mykhaylo Yakubovych*

Abstract

An exegetical tradition (*tafsir*) played an important role in Islamic religious outlook since the times of the early Muslims. Despite the complex changes in social, political and, to some extent, religious life in the Muslim countries during the colonial and post-colonial era, *tafsir* still represents the main trends of how the Quran is reflecting in the cultural context. In our study, which is based on the Arabic texts of the commentaries of XX-century authors (Rashid Ridha, Mustafa al-Maraghi, Said Hawwa, Muhammad al-Ghazali, Ayatollah at-Tabatabai and others), we considered *tafsir* as a mirror, in which the modern Islamic culture shows its relation to the principles of Quran. A mutual influence of the modernity and Islamic religious tradition can be described as a complex system of values, which are rooted in both Western and Eastern cultures. Comparing the modern Western understanding of the freedom of religion with the statements of contemporary exegetes, our study showed the inner evolution of *tafsir* and its evaluation of the new issues of public and private law.

The research provides in-depth understanding of how the Islamic culture benefits through *tafsir* relations between modern law principles and Quranic teachings. We suppose that both traditional views as well as its modern interpretation support a wide understanding of religious freedom and propose new solutions for the widespread problems in this field. Finally, the critical analysis of the text of the contemporary *tafsirs* gives us a great chance to enrich our cultural experience in a way of serving the humanity.

* Dr. Mykhaylo Yakubovych is Assistant Professor and Researcher in Islamic Studies, National University of Ostroh Academy, Ostroh, Ukraine (nitishini@gmail.com).

The problem of religious freedom which, respectively, related to the complex issues of the freedom of consciousness, tolerance, speech and some others, constitutes one of the most crucial quests in contemporary social studies. Since “freedom” as a moral value became to serve as one of the makers of Western civilization *a priori* (i.e. even if we do not exactly know what freedom is we know that we need it), its various dimensions pretend to be the only true criteria of the real humanistic culture. Growing from the time of Renaissance, the idea of religious freedom came to us through very complicated political, social and cultural changes; in the West its inner sense evolved in the context of relation between the state and the church, the state and minorities, challenges of political radicalism (Nazism, Communism) and, nowadays, integration of the immigrants into what is called as “traditional European culture”.

Despite the huge amount of classical and recent studies on the religious freedom, still the problem of the features of its origin exists. Few scholars have sought to explain the rise of – or, more precisely – the change and fluctuations in – religious liberty in any theoretically systematic way, as Anthony Gill points out. As a result, the question about the origins of religious liberty was not seen as much of a question at all¹. However, two scientific approaches are corresponding to all the mentioned tries. The first, which applies to the intellectual roots of the idea of equality of religions (i.e. in the philosophy of Enlightenment), refers to tolerance as the result of growth in scientific progress and related social changes like secularization and so on². The second, which identifies itself as the political one, claiming for the role of the political interest, which come from both the side of religious actors and secular rulers³.

¹ Gill, Antony, *The Political Origins of Religious Liberty* (Cambridge: Cambridge University Press, 2008), p 6.

² Taylor, Charles, *A Secular Age* (New York: Harvard University Press, 2007), p. 4-26.

³ Gill, Antony, *Op. cit.*, p. 8.

However, new fundamental problems arise when we are talking about religious liberty from the non-Western or, what is more important, “non-Christian” and “non-secular” perspective. Anat Scolnicov rightly notices, that more than a subject of other human rights, such as “torture” or “slavery”, “religion” is a concept defined by the culture to which it belongs. This concept loses much of its meaning outside its cultural context. Therefore, more than other human rights, freedom of religion can be interpreted differently by different cultures⁴. The problem becomes more complicated if someone takes into account the position of Wilfred Smith, who argued in his well-known “The Meaning and End of Religion”: “Religion as a systematic entity, as it emerged in the seventeenth and eighteenth centuries, is a concept of polemics and apologetics”⁵. So, interpreted in this way, religious freedom can be understood only as one of the Western ideas, which seems to be projected onto the other parts of the world by means of colonialism and, in our days, globalization. But perhaps most important, globalization has created all kinds of identity dilemmas in which religion plays a complicated part. This raises rather more difficult questions: Is religion about belief? Is it about a way of life? Or is it a marker of identity? Or what combination of the three?⁶

Despite the obvious dependence of the concept of the freedom of religion (and, consequently, the idea of religious tolerance) from the Western thought, this doesn't mean that other cultures/civilizations possess similar ideas, widely discussed in various research books. Due to the goal of our study – which is the observation of this problem in the contemporary Islamic exegetics – we will try to show, how the

⁴ Scolnicov, Anat, *The Right to Religious Freedom in International Law Between group rights and individual rights* (New York: Routledge, 2011), p. 23

⁵ Smith, Wilfred Cantwell, *The Meaning and End of Religion* (New York: Fortress Press, 1991), p. 43.

⁶ Kwame, Anthony Appiah, *Causes of Quarrel: What's Special about Religious Disputes*, in *Religious Pluralism, Globalization, and World Politics Challenges* (Oxford: Oxford University Press, 2008), p. 66.

autochthonous culture reacts on the “Western” kind of tolerance, answering to the modern challenges from its own tradition. This will help us to define the real nature of the theory of “Islamic” religious tolerance, promoted not only by various Muslim groups around the world, but inclined to the politics of the governments of Muslim countries as well. Taking into consideration the difficulties with the term “Islamic”, our exploration will be restricted to the most traditional part of Islamic religious traditions – the Quranic exegetics, which, however, was the object of many changes during the 20th and the beginning of 21st centuries. Comparing the modern Western understanding of the freedom of religion with the statements of contemporary exegetes, our study will show the inner evolution of *tafsir* and its evaluation of the new issues of public and private law.

Notwithstanding the fact that modern trends of Islamic thought are well studied, a contemporary exegetics – in contrast to the traditional one – needs further research. J. Pink rightly notes, that the field of contemporary Qur’anic commentaries has by large been neglected by scholars. Several individual commentaries have received a certain amount of attention, while comparative studies or surveys that are at least remotely up-to-date are scarce⁷. By the “modern Islamic exegetics” we mean all the efforts in Islamic understanding of the Quran, which can be traced to the revival of the 19th century. Since the appearance of the “modernism” in Islam was the result of the familiarity with the West (and some authors like Albert Hourani determine it with a reference to French invasion into Egypt⁸ in 1798), the exegetic tradition came to reformulate itself in terms of new social circumstances. Taking into consideration the fact that modern Islamic exegetics represented by more than five

⁷ Pink, Johanna, Tradition and Ideology in Contemporary Sunnite Qur’anic Exegesis: Qur’anic Commentaries from the Arab World, Turkey and Indonesia and their Interpretation of Q 5:511, *Die Welt des Islams* 50 (2010), p. 4.

⁸ Hourani, Albert, *Arabic Thought in the Liberal Age: 1798-1939* (Cambridge: Cambridge University Press, 1982), p. 136.

generations of scholars, we may trace significant steps of development in this tradition. For instance, J. Pink takes a June war of 1967 as a starting point for the “nowadays Islamic exegetics”⁹. This, however, can only be partly justified, because, for instance, “The simplified Tafsir” (*at-Tafsir al-Muyassar*), first published in Saudi Arabia in 2003, is more conservative and restricted to tradition (*at-tafsir bi l-mathur*), than exegesis of Mustafa al-Maragi, appeared in 1947. Moreover, the ideas of both Muhammad ‘Abduh and Rashid Ridha, stated in the “The Beacon” (*Tafsir al-Manar*), which was published from the 1900 to 1927, influenced a number of other commentaries (even those famous like the tafsirs of al-Maragi and ibn Badis), which may be named as “al-Manar school”¹⁰. The impact of their exegetical ideas (some significant parts of which, according to the traditional classifications, can be determined as *tafsir bi r-ray*, i.e. “individual commentary”) is important even today, in the work of the later generations of scholars.

Ashgar Ali notes that with the advent of democracies, awareness of the Islamic world about democratic rights, human rights, and women's rights has been growing fast. However, although there was a great deal of secular theorizing on the issue, there was a lack of Islamic theorizing, and still less of activism¹¹. In a widespread literalist reading of Islam, there is a little room to negotiate human rights, as clear injunctions contravene the normative framework of the international human rights regime¹². On the other hand, as Saeed points out, there is nothing certain in the certainly claimed by the literalist readers of the text¹³.

⁹ Pink, Johanna, *Op. cit.*, p. 6.

¹⁰ Ennaifer H'mida, *Les commentaires coraniques contemporains: Analyse de leur méthodologie*, (Roma: Pontificio Istituto di Studi Arabi e d'Islamistica, 1998), p. 12.

¹¹ Asghar Ali Engineer, *Opening Remarks*, in *Interfaith Conference on the Culture of Peace* (Bangkok: AMAN, 1991), 6.

¹² *Islam and Human Rights in Practice. Perspectives across the Ummah*. Ed. by Shahram Akbarzadeh and Benjamin MacQueen (New York: Routledge, 2008), p. 1.

¹³ *Op. cit.*, p. 3.

Using the methodologies, provided by J. Pink, H. Ennaifer, H. Buss¹⁴, J. McAuliffe¹⁵ and other authors, in this study we will take some of the Quranic texts as a starting point to see, to which extent its modern interpretations include an answer to a problem of religious tolerance as a value. However, in the mentioned works only relations to Christianity was noted, without systematic analysis how the religious tolerance origins from the viewpoint of Islam. Referring to the previous outline of the problem of religious freedom, we should point out the three patterns of tolerance, which can be found in Islamic culture. That is, the level of individual choice to believe (*ikhhtiyar*), the level of relations between the groups of believers (*mu'ammalat*), and, finally, status of believers of other religions and disbelievers in Islamic community (traditionally *zimmi*). Since not every modern tafsir is systematic as the medieval one, we choose the following *ayats*, related by exegetes to the problem of religious tolerance: "There is no compulsion in religion: rectitude has become distinct from error" (Quran, 2:256)¹⁶, "O you who have faith! Do not take the Jews and the Christians for friends: they are friends of each other" (Quran, 5:51), "And say: [This is] the truth from your Lord. Let anyone who wishes believe it, and let anyone who wishes disbelieve it" (Quran, 18:29). Especially, we are conscious that the issue of religious tolerance in tafsir cannot be restricted to the commentaries on these *ayats*. Nonetheless, the most important trends are present here to great extent.

It seems that the first of the commentaries, that devotes much for the question of relation between Islam and other religions (and, consequently, status of these religions), is *Al-Manar* of Muhammad

¹⁴ Heribert Busse, *Jesu Errettung vom Kreuz in der islamischen Quranexegese von Sure 4:157*, *Oriens* 36 (2001), p. 160-195.

¹⁵ Jane Dammen McAuliffe, *Quranic Christians. An Analysis of Classical and Modern Exegesis*, (Cambridge: Cambridge University Press, 1991).

¹⁶ All the quotations are from the translation by Iranian scholar 'Ali Quli Qarai (*The Quran. With a Phrase-by-Phrase English Translation*. – London: ICAS Press, 2004).

'Abduh (1849 – 1905) and his student, Rashid Ridha (1865 – 1935). In the beginning of interpretation of the classical explanation of the reason of revelation (*sabab an-nuzul*) is mentioned, which shows how the Prophet Muhammad banned the forced conversion of children into Islam¹⁷. Beside these traditional statements, Rashid Ridha argues for the peaceful spread of Islam against the unnamed “enemies”, who insist that it was spread by the sword. Even more, the author states, that the time of 2:256 revelation is a Medinah period of Islam, when the Muslim community suffered from the aggression of Meccan polytheists and some Jewish tribes. However, writes he, even in these turbulent times Islam called for the grace and absence of any forced conversion. Rashid Ridha mentions the words of his teacher Muhammad 'Abduh, who understood the spread of some religion by force as a kind of politics which, in this case, has nothing to do with the real faith (*iman*). So, in contrast to other religions (the authors of *al-Manar* take Christianity as an example), Islam by no means uses force.

The same principle of peace is included in *al-Manar* commentary under the explanation of 5:51, recognizing *wilaya* (“friendship” in Ali Quli Qarai translation) with non-Muslims as a “mutual help” (*tanasur*) and “alliance” (*muhalifah*). Rashid Ridha explains, that *wilaya* is forbidden because of its real goals and not the differences in belief between Muslims and followers of other religions. Its real reason is hostility towards the followers of Islam. As a result, the real friendship and good relations with the followers of Judaism and Christianity are not banned here, in contrast to the classical explanations of az-Zamakhshari and al-Baydhawi. He uses as the argument the permission of marriage with Christian or Jewish women (Quran, 5:3) and, respectively, the *ayat* on relation between spouses: “He ordained affection and mercy between you” (Quran, 30:21). So, concludes Rashid Rida, obviously 5:51 is revealed against the

¹⁷ Tafsir al-Manar (Al-Qahirah: Dar al-Manar, 1366/1947), vol. 3, p. 37.

hypocrites among Muslims, who wished to destroy the order of Islam, and not the Jews and Christians as they are¹⁸.

The same explanations, borrowed from *al-Manar* and shortened, were proposed by Mustafa al-Maragi (1881 – 1945). Referring to the traditions from the tafsir of at-Tabari, al-Maragi tries to show, that even this highly authoritative tafsir explains *wilaya* from 5:51 as a “mutual help” and “alliance” between the hypocrites and Jewish tribes of Medina¹⁹. As for the 2:256, “there is no compulsion in religion” means only the ban of the forced conversion to Islam. Moreover, he adds to the ideas of his forerunners an important statement. Muslims, al-Maragi writes, recognize “no compulsion in religion” as the principle (*asas*) of their belief and the pillar (*rukun*) of its politics. So, nobody should be forced to embrace Islam, as nobody should be forced to leave it. Interestingly, he speaks about “the best kind of polemics” as the result of “freedom of call” (*hurriya ad-dawwa*), which Muslims should defend even by the means of *jihad*. We may conclude that for al-Maragi religious freedom is a freedom to invite people to Islam, without force conversion but, from the other side, without any barriers from unbelievers²⁰.

The next of important commentaries is the *Zahrat at-Tafsir* by Egyptian scholar Muhammad Abu Zahra (1898 – 1974). An expert in *Shariah*, he began to write his own commentary since the 1950s²¹. This exegete sees the mentioned verse from Surah “al-Baqarah” (2:256) from the two vistas.

The first is that from the epistemology. Abu Zahra writes, that *iman* and, relatively, acceptance of some religion is “the intellectual perception” (*al-idrak al-fikri*). As a result, it should be a voluntary action, based on a

¹⁸ Op. cit., vol. 6, p. 425-427.

¹⁹ Tafsir al-Maragi (Al-Qahirah: Matba'ah al-Babi al-Halabbi, 1365/1946), vol. 2, p. 135-136.

²⁰ Op. cit., vol. 2, p. 18.

²¹ Pink, Johanna, Op. cit., p. 10.

completely free choice. The author takes “compulsion” in the most literal way: for him, no religiosity is possible by any means of force.

The second is that from the perspective of Islamic call (*dawwah*). Its starting point is a “wisdom” and “good advice”, mentioned in other verse of the Quran (16:125). In general, Abu Zahra insists that only knowledge is a way to *iman*. Thus, the explanation of “what is correct” does not include any force. To my mind, there are some traces of Asha’ri theology, where rationality plays a role of some basis for the religion.

Abu Zahra gives detailed explanations of 5:51²². He tells us, that in relation to Muslims non-Muslims divided into the three groups: a group which live in peace with Muslims, a group which is hostile expressively, and a group, which hide its hate to Islam. There is no barrier in relation with the first group; however, any help for the second and third groups is an injustice (*zulm*) to other Muslims. In contrast to his forerunners, Abu Zahra does not mention here the issue of *jizyah*; this author tried to define possible relations with non-Muslims from the positions of modernity.

The next tafsir from the Egyptian school is the work of Muhammad ibn al-Khatib (1900 – 1981), first published in 1964. Explaining 2:256 in his “The most clear commentary” (*Awdhah at-tafsir*), ibn al-Khatib writes that this *ayat* is a point for the “freedom of religion” (*hurriyah al-’ittiqad*), so the “religiosity” must be like a kind of scientific research. For this exegete, verse 18:29 gives for humanity a chance to choose²³.

The same position is stated in the tafsir of famous Egyptian scholar Muhammad bin Mutawwali ash-Sha’arawi (1911–1998) who writes about freedom to choose between the faith and arrogance. However, on the

²² Zahrat at-Tafsir (Al-Qahirah: Dar al-Fikr al-’Arabi, 1987), p. 2241-2242.

²³ Muhammad al-Khatib, *Awdhah at-Tafasir* (Al-Qahira: al-Matba’ah al-Misriyah, 1383/1964), p. 255.

opinion of this scholar, *ayat* 2:256 cannot be used to avoid some prescriptions of Islam: if someone, by the free will, embraces Islam, he should follow all the prescriptions of faith, whether he wishes to do it or not²⁴. In the same way as Rashid Ridha and al-Maragi, ash-Sha'arawi uses this verse against those who argue for the spread of Islam by sword²⁵.

Similar ideas can be found in tafsir of Tunisian scholar Muhammad ibn 'Ashur (1879 – 1973), who was influenced by Muhammad Abduh. He sets a close link between 2:256 and previous *ayat al-kursi* (2:255), arguing, that truth became obvious and does not need any kind of force to accept it²⁶. By "religion" in 2:256 definitely Islam is meant, which should be accepted only by free choice. Ibn 'Ashur supposes that "no compulsion in religion" was revealed after the victory over Makkah. This *ayat* cannot be "abrogated" by another and, as a result, both Jews and Christians must be left in their beliefs and pay a *jizyah*²⁷. Obviously, ibn 'Ashur was less devoted to modernity in his tafsir than some of his contemporaries.

Interesting commentaries on the problem of religious tolerance are included in widespread tafsir of Sayyid Qutb (1906 – 1966), who is recognized as one of the forerunners of what is called "Islamism". He clearly notes that "freedom of religion" (*hurriyah al-ittiqad*) is a first of the basic rights of every human. Qutb writes that those, who reject this right, reject the idea of humanity as it is²⁸. However, "freedom of religion" should also be a freedom for Islamic call and a safety from temptations and offensives. For him, any other kind of freedom is not a real freedom at all. Mentioning the topic of relations with Jews and Christians, Sayyid

²⁴ Tafsir ash-Sha'arawi (Al-Qahirah: n.p., 1991), p. 1113.

²⁵ Op. cit., p. 1114.

²⁶ Ibn 'Ashur, Tafsir at-Tahrir wa t-Tanwir (Tunis: Dar at-Tunisiya li-Nashr, 1984), vol. 3, p. 25

²⁷ Op. cit., vol. 3, p. 28

²⁸ Sayyid Qutb, Fi Zilal Quran (Al-Qahirah: Dar Ash-Shuruq, n. d.), vol. 1, p. 561.

Qutb writes, that in reality Islam does not pressure them to leave their beliefs (because of God's order in 2:256). But even the good relations (*mu'ammala*) with the followers of Judaism and Christianity do not signify even partial recognition of their faith²⁹. Being influenced by the reformist views of Muhammad 'Abduh and his students, Sayyid Qutb tries to reformulate his ideas on the contexts of his own views of what is "true Islam" and, respectively, "true religion" as it is.

The same background is present in the books of Said Hawwa (1935 – 1989), a Muslim activist from Syria, who proposed a new way of reform, called *al-ihya ar-rabbaniya* ("God-given revival")³⁰. He divides between the fight with unbelievers, declared in the Quran, and the compulsion to Islam. Despite the declaration of fight against unbelievers, only Arabic polytheists are pressured to embrace Islam. In general, force to Islam is not from Islam at all, concludes Hawwa³¹. It seems to be that this exegete tries to preserve medieval interpretations of these verses as they are. However, like the previous commentators, he refuses to signify this ayat as the one of abrogated ones (*mansukha*).

The next Syrian exegete, Wahba az-Zuhayli (born 1932) in his "The Middle Commentary" is clearer in his views on religious tolerance. He argues against the idea of "orient lists" that Islam was spread by sword and states that all the wars Muslims fought were defensive. There are no barriers for the peaceful coexistence between Islam and other religions (*at-ta'aish ad-dini as-salami*)³².

One of the most precious commentaries, written to answer both the traditional and modern issues, is "The Criteria" (*Al-Mizan*) by *allama*

²⁹ Op. cit., vol. 2, p. 915.

³⁰ Weismann, Itzhak, Sa'id Hawwa and Islamic Revivalism in Ba'thist Syria, *Studia Islamica*, No. 85. (1997), pp. 131-154.

³¹ Sa'id Hawwa, *Al-Asas fi Tafsir* (Al-Qahirah: Dar as-Salam, 1986), vol. 2, p. 600.

³² Op. cit., vol. 1, p. 149.

Sayyid Muhammad at-Tabataba'i (1892–1981), a prolific Shia philosopher and exegete. In his contemplation on the 2:256, at-Tabataba'i proposes an explanation from the viewpoint of Islamic philosophy. Taking into consideration the problem of "internal" (*batin*) and "external" (*zahir*), which is classical for Muslim thought, the author of *al-Mizan* argues against "compulsion" (*ikrah*) in religion as follows. Since faith (*iman*) is an internal thing, any force can only be applied to the external part of human beings, i.e. some deeds of body. *Allamah* proves, that, since the second part of *ayat* is reality and cannot be cancelled (i.e. "rectitude has become distinct from error"), the first part of 2:256 cannot be nullified as well. After the victory of *tawhid*, the Jews and the Christians may practice their religion freely. The same is true about the issue of *wilayah*, which interpreted by at-Tabataba'i in its primary Quranic context, i.e. question of apostasy in Islam³³.

The next important tradition of tafsir, which continue its development today, is a Saudi school, usually associated with Salafi approach, reviled by the followers of Muhammad bin 'Abd al-Wahhab (1703 – 1791). To great extent devoted to the traditional Sunni exegetics, scholars of this school try to solve the issues of modernity from the classical viewpoint, declared as an accurate reception of Quran and Sunnah. Muhammad Amin Ash-Shanqiti (1905 – 1974) one of the most popular exegetes of Saudi school, writes in his explanation on the 18:26 ("Let anyone who wishes believe it, and let anyone who wishes disbelieve it"), that absence of compulsion here does not mean "the choice", but definitely "the treat" to unbelievers³⁴. The same position is stated in the tafsir of 'Umar al-Ashqar (born 1940), who links its meaning to the next part of *ayat*

³³ Al-'Allamah Sayyid Muhammad at-Tabataba'i. *Al-Mizan fi Tafsir al-Quran* (Tehran: Dar al-Kutub al-Islamiyah, 1397), vol. 2, p. 291-295.

³⁴ Muhammad Amin ash-Shanqiti. *Tafsir Adhwa al-Bayan* (Ar-Riyadh: Dar 'Alam al-Fawa'id, n. d.), vol. 4, p. 118-120.

("Indeed we have prepared for the wrongdoers a fire")³⁵. For these exegetes, this kind of "choice" is the only parable of the wrong way, which finishes in Hell. Similar ideas expressed by al-Ashqar in his commentary to 2:256, which, in his opinion, speaks only about those who pay *jizyah*. The same view is included in the recent "The Simplified Tafsir" (*At-Tafsir al-Muyassar*), prepared by a group of scholars from the King Fahd Glorious Quran Printing Complex (Medina, Saudi Arabia). Thus, the meaning of *ayat* restricted to those who pay *jizyah*³⁶. Abu Bakr al-Jaza'iri (born 1921) in his own tafsir notices, that this verse related to Jews, Christians, Sabians and Zoroastrians, who should pay *jizyah* and may embrace Islam voluntary³⁷. On the other hand, followers of Salafism completely recognize a possibility of cooperation with the believers of other religions, restricting it to the "earthly issues" (*dunyawi*)³⁸.

Conclusions

Notwithstanding the development of new trends in Quranic exegetics during the last half of 20th century, in general majority of tafsirs are rooted in the works of their forerunners, be it classical medieval commentaries (at-Tabari, al-Qurtubi, al-Baydhawi, and so on) or the masterpieces of reformers like *al-Manar*, Muhammad 'Abduh and Rashid Ridha. In general, the analyzed corpus of contemporary Islamic exegetics may be classified in accordance with the criteria of geography and local traditions (i.e. Egyptian school, Saudi school, Iranian school, Syrian school and so on) or the ideological components (Sunni-salafi, Sunni-ikhwani, Shia). Thus, in contemporary Islamic approach to the study of the Quran

³⁵ 'Uamr bin Sulayman al-Ashqar. *Zubda at-Tafsir bi-Hamish Mushaf al-Madina al-Munawwarah* (Dhuha: Wizarah al-Awqaf wa sh-Shuyun al-Islamiyah, 1428/2007), p. 297.

³⁶ *At-Tafsir al-Muyassar* (Al-Madinah al-Munawwarah: Mujamma' al-Malik Fahd li-t-Tiba'ah al-Mushaf ash-Sharif, 1427/2006), p. 42.

³⁷ Al-Jaza'iri, Abu Bakr. *Aysar at-Tafasir li-Kalam al-'Ali al-Kabir* (Al-Madinah al-Munawwarah: Maktabah al-'Ulum wa l-Hikam, 1424/2003), Vol. 1, p. 130.

³⁸ *Kitab Usul al-Iman fi d-Dhaw al-Kitab wa s-Sunnah* (Al-Madinah al-Munawwarah: Mujamma' al-Malik Fahd li-t-Tibaa al-Mushaf ash-Sharif. 1432/2011), p. 267.

we observe various positions which differ much on particular issues. One of these issues is the problem of human rights, which have been discussed much in both Islamic and non-Islamic academic circles in the second half of 20th century. Our study shows, that modern commentaries of the Quran were highly interested in the problem of inter-religious relations from the viewpoint of Islam and, as a result, the problem of religious tolerance.

What does religious tolerance mean from the vistas of Quran? The multiplicity of answers given leads to a few main positions, which may be summarized as follows.

The first is what may be called as "the limited tolerance", described in the works of Egyptian exegetes Rashid Ridha, Mustafa al-Maragi, Sayyid Qutb, Muhammad as-Sha'arawi and Muhammad ibn al-Khatib. Denouncing the classical type of relations with Jews and Christians as *dhimmi*s, this author argues for tolerant relations, which guarantees the absence of any threats to Islam. "Freedom of religion" here means also the freedom to practice someone's belief freely and the possibility to realize the call to Islam.

The second position, which is more theoretic, represented by the works of Sunni commentators Wahba Zuhayli, Muhammad Zahra and Shia thinker Muhammad at-Tabataba'i. These authors argue for the impossibility of the spread of any religion by sword and the great harm which such claims make for Islam. Speaking about the issue of free will and acceptance of religion as a conscious act, these scholars apply to the rationality of Islam. These commentaries give an in-depth view on the fundamental issues of Islam and modernity, founding a strike base of knowledge and, finally, *ijtihad*.

The third position is declared mainly in the commentaries of the followers of Salafi Islam. Claiming for the tolerant coexistence between religions, authors like 'Umar al-Ashqar insists on the strict traditional interpretations of verses like 2:256. According to the statements of the Salafi exegetes, Quranic tolerance is addressed to Jews and Christians as *dhimmies*, who must pay *jizyah* for the perseverance of their faith. However, this approach claims for the possibility of cooperation with the followers of other religions in the "earthly" (*dunyawi*) issues.

Finally, none of the mentioned commentaries recognize the tolerant verses of Quran as "the abrogated one" (*mansukh*), in contrast to significant part of medieval tafsirs. So, these statements are *actual* along with the other elements of Islamic creed. And, what even more important, majority of contemporary tafsirs presents the formulation of Quranic tolerance in a way, where traditional Muslim idea of peaceful coexistence and Western understanding of tolerance are combined. This is a kind of tolerance, which Europe, to some degree, has lost – freedom, which is *for* and not *against* religion; freedom, which helps us to enrich our spiritual experience for the religious, and not secularist and consumerist sense of life.

The Principle of Freedom of Religion (A Comparative Study between Islamic Laws and International Law)

Valeollah Ansari* & Abdollah Bagheri**

Abstract

One of the most important aspects of personal liberty is the freedom of an individual to declare his or her religion without any fear or compulsion. There is currently a lot of debate and discussion on freedom of religion as a human right not only in the Western world but also in Muslim communities. In international law, the International Covenant on Civil and Political Rights (ICCPR) protects the freedom of religion and belief. In addition, one of the indisputable and undeniable principles in the Universal Declaration of Human Rights is the principle of freedom of religion. Although freedom of religion is the most challengeable issue in Muslim and non-Muslim countries, after studying Islamic principles, we find that centuries before the Universal Declaration of Human Rights, Islam explicitly addressed the principle of freedom of religion and prohibited every type of compulsion and coercion in religion. However, apostasy is criticized, and most critics mention it as an important obstacle and problematic issue towards reaching the freedom of religion.

This paper will firstly study the freedom of faith and religion in international documents, in particular the Universal Declaration of Human Rights and then examine the Quranic texts and other sources in favor of freedom of religion. Finally, the apostasy, its rules and its real position will be examined. We will conclude that freedom of religion is considered as the main ascertained accepted principle in Islam, which means everybody is free to choose any religion without any coercion or compulsion.

* Valeollah Ansari is Senior Lecturer at the College of Law at Azad University.

** Abdollah Bagheri is a Masters student in Private Law at the Law Faculty, Imam Sadiq University, Tehran, Iran (abdollah.baghere@gmail.com).

Freedom of Religion in International Law

Public international law, never recognize any discrimination either because of differences in sex, age, race, color, language or religion. According to the Universal Declaration of Human Rights and other international conventions, all humankind have equal rights regardless of any religious or non-religious beliefs. Universal human rights charter, based on international human rights documents, emphasizes on freedom of choosing or converting to or from any religion. For example, article 18 of The Universal declaration of human rights states that “Everyone has the right of free thought, conscience and religion; this right includes freedom of changing his religion or belief, and - either alone, in the community with others, in public, or in privacy - manifestation of his religion or belief in teaching, practice, worship and observance.” The same concept is also indicated in the 2nd subsection of article 18 of International Covenant on Civil and Political Rights. It says, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Proclaimed by General Assembly Resolution 36/55 of 25 November 1981, considers that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed. Article 1 of this declaration mentions that “i) everyone shall have the right of free thought, conscience and religion. This right shall include freedom of having a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, of manifesting his religion or belief in worship, observance, practices and teaching; ii) no one shall be subject to coercion which would impair his freedom of having a religion or belief of his choice; iii) freedom of manifesting one's religion or belief may be subject only to such limitations as are prescribed by law and are

necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others". And article 2 states that "no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief".

It is worth noting that Robert Badinter, the president of Arbitration Commission of the Peace Conference on the former Yugoslavia, pronounced several advisory opinions in 1992 emphasizing that the protection of minorities falls within the peremptory norms of international law (*jus cogens*)¹. Article 27 says that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be deprived of their rights in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to speak their own language."

What is more, article 21 (section 3) of Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, mentions that "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender - as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinions, national, ethnic or social origin, wealth, birth or other status".

¹ Conference on Yugoslavia Arbitration Committee Opinion No13(1992), Arbitration Commission of the Peace Conference on the former Yugoslavia, The `Arbitration Commission of the Conference on Yugoslavia` (commonly known as `Badinter Arbitration Committee`) was a commission set up by the Council of Ministers of the European Economic Community on 27 August 1991 to provide the Conference on Yugoslavia with legal advice. Robert Badinter was appointed to President of the five-member Commission consisting of presidents of Constitutional Courts in the EEC. The Arbitration Commission has handed down fifteen opinions on "major legal questions" arisen by the split of the Socialist Federal Republic of Yugoslavia (SFRY), <http://www.enotes.com/genocide-encyclopedia/minorities>

International community did not confine itself to these declarations and created significant innovations to protect minorities' rights and issued a declaration in this regard in December of 1992². However, we must admit that, despite these efforts, there are fundamental problems in the implementation of minorities' rights. The first obstacle to protect minorities' rights is the fundamental rights of the governments and states³, which are sponsored by the Public International Law. Article 8 (section 4) of Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992 mentioned that, "in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States⁴". Bear in mind that creating an international protective system for minorities, is not feasible and conceivable without regard to certain benefits of the governments because states are the main parts of international law and preserving the rights of states is one of important objectives of international law. Therefore, section 2 of article 4 of this declaration articulated that "states shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards."

In conclusion, we can say that, based on universal human rights, the principle of equality of all people regardless of their religion has been recognized in public international law. Therefore, according to universal

² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Adopted by General Assembly Resolution 47/135 of 18 December 1992.

³ Seidean Mehdi. Shaban nea Ghasem, views of islam and west about Human right, Marefat Journal, V 93, p. 32.

⁴ Nader, Zoa'in, Protection of minorities' rights in international law, legal researches Journal, V 15, p. 456.

human rights, any religious discrimination is prohibited in the same way as prohibition of race discrimination.

Religion Freedom Principle in Islam

To study the subject of Religious Freedom in Islam, we should first investigate an acceptance of documents on this crucial principle in Islam, and then we go through the investigation of objections on apostasy ordinance.

Religious Freedom in the Glorious Quran

The most important proof on acceptance of freedom of religion is the virtuous verse wherein God says:

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ وَيُؤْمِن بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ
الْوُثْقَىٰ لَا انْفِصَامَ لَهَا وَاللَّهُ سَمِيعٌ عَلِيمٌ⁵

<<There's no compulsion in acceptance of religion; [for] certainly truth is distinguished from non-truth; thus anyone who contravenes fiends and believes in God has grasped a strong handle that may not [ever] detach; and God is informed and sagacious.>>

According to this virtuous verse of Quran, there's no compulsion in acceptance of religion; but to investigate more on the verse, we should inquire in what conditions this virtuous verse had been rained on the Prophet (praise be upon him and his followers).

There are different cases for the inspiration of this verse in exegeses. Some say that a man named Abu-Hasin from Medina had two sons. Some merchants who imported goods to Medina motivated the two

⁵. Al-baqarah, 256

sons to join Christianity; and they were highly swayed. Abu-Hasin got quite tense with the matter and informed the Prophet, requesting him to make them return to his faith; and asked if he could compel them to return. Thereupon the verse came down stating the gospel that "there's no compulsion and obligation in faith acceptance".

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Al-Menar exegesis remarks that Hasin tried to compel his two sons to return to Islam; and they went to visit the Prophet complaining. "How could I see my sons entering Hell?" Hasin cried to the Prophet. The aforementioned verse came down with regard to this⁷. There is another case for the fall of this verse as notes: when the wives of Ansars could not give birth, they vowed to make their children Jewish if they could have any. There were Ansars' children among Bani-Nazir tribe while they were crowded out of Medina. Then, Ansars claimed that they wouldn't withdraw from their children. The aforesaid verse was inspired at that time and deprecated compulsion for Ansars⁸. Now that we've understood in the condition in which the inspiration of the verse had happened, we should review analysts' viewpoints.

Ibn-Kasir suggests not to compel anyone to accept Islam, for Islamic justifications are so clear that there's no need for compulsion. "God

⁶ . Makarem Naser, *Nemouneh exegesis*, 2.3/1, 204.

⁷ Abdeh Mohammad, Rashid Reza, Almaraghi Ahmad Mostafa, *Al-menar exegesis*, 37/3.

⁸ Tabatabaie Mohammad Hosein, *Almizan exegesis*, 365/2.

logically justifies anyone who (God) reclaims to Islam" he states⁹. Some authorities have considered the verse a natural and formative premise. They suggest that the religion is belief in general, and have also referred actions and practices to belief; remarking that belief and commitment are cordial affairs and no compulsion and obligation are allowed therein¹⁰.

Ayat-o-llah Tayyeb interprets this verse stating that, indeed, there's no compulsion in religion; because religion consists of numinous faith and cordial conviction, and that's not 'obligeable'. God has not even obliged anyone to keep the façade of Islam, to admit verbally, and to follow the rules¹¹. Also some have pointed out that compulsory obedience will not be meritorious on Judgment Day; for, the all-knower God is consented only by sincerity¹². But we should consider that, in addition to the aforementioned verse, there are many other verses in the holy Quran that validate freedom of religion. Some are mentioned in the following. In the 99th verse of Younos sura, God calls the prophet:

وَلَوْ شَاءَ رَبُّكَ لَأَمَنَّ مِنَ فِي الْأَرْضِ كُلَّهُمْ جَمِيعًا أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّىٰ يَكُونُوا مُؤْمِنِينَ ﴿٩٩﴾

<<All the people of the world may gain faith if God determines to; could you compel them to?>>

The 3rd verse of Al-Dahr sura says:

إِنَّا هَدَيْنَاهُ السَّبِيلَ إِمَّا شَاكِرًا وَإِمَّا كَفُورًا ﴿٣﴾

<<We shepherded the man to the [right] path, and they may [freely] appreciate or profane.>>

And in 29th verse of Al-Kahf sura we have:

⁹ Abolfeda Emadodin, Al- quran -al-azim exegesis, 310/1, Maraqi exegesis, 16 and 15/3.

¹⁰ Qurashi Seyyed Ali Akbar, Qāmūs al-Qur'ān, 108/6.

¹¹ Tayyeb Abdol-hosein, Atib-ol-bayan exegesis, vol. 3, p. 19.

¹² Firozabadi Majdoddin Mohmmad ebne Yaghob, .Basa'er zo-l-tamyiz, 347/4.

وَقُلِ الْحَقُّ مِنْ رَبِّكُمْ فَمَنْ شَاءَ فَلْيُؤْمِنْ وَمَنْ شَاءَ فَلْيُكْفُرْ ﴿٢٩﴾

<<Say truth is God's; thus anyone may [want] to believe or deny.>>

In the following verses, God has commissioned the Prophet only as an evangelizer; and he may not motivate people to accept Islam in any way and there should be no compulsion. But He is to distinguish the right path from the wrong, and people may independently accept Islam logically. These verses include:

Al-Qashia sura, verses 21 and 22:

فَذَكِّرْ إِنَّمَا أَنْتَ مُذَكِّرٌ ﴿٢١﴾ لَسْتَ عَلَيْهِمْ بِمُصَيِّرٍ ﴿٢٢﴾

<<You admonish them and remind them the God's ordinance, for you are reminder. You don't dominate them and cannot compel them to join a faith.>>

Al-Zomar sura, verse 41:

إِنَّا أَنْزَلْنَا عَلَيْكَ الْكِتَابَ لِلنَّاسِ بِالْحَقِّ ۖ فَمَنْ اهْتَدَىٰ فَلِنَفْسِهِ ۖ وَمَنْ ضَلَّٰ فَإِنَّمَا يَضِلُّ عَلَيْهَا ۖ وَمَا أَنْتَ عَلَيْهِمْ بِوَكِيلٍ ﴿٤١﴾

<<We sent the scripture for people to convoke them to the truth; anyone may be reclaimed to his interest, or deviate and boomerang on themselves. And you don't depute them.>>

Younos sura, verse 108 as well:

قُلْ يَا أَيُّهَا النَّاسُ قَدْ جَاءَكُمْ الْحَقُّ مِنْ رَبِّكُمْ ۖ فَمَنْ اهْتَدَىٰ فَإِنَّمَا يَهْتَدِي لِنَفْسِهِ ۖ وَمَنْ ضَلَّٰ فَإِنَّمَا يَضِلُّ عَلَيْهَا ۖ وَمَا أَنَا عَلَيْكُمْ بِوَكِيلٍ ﴿١٠٨﴾

Also verses 91 and 92 of Al-Naml sura, indicate the same point:

إِنَّمَا أُمِرْتُ أَنْ أَعْبُدَ رَبَّ هَذِهِ الْبَلَدَةِ الَّذِي حَرَّمَهَا وَلَهُ كُلُّ شَيْءٍ ۖ وَأُمِرْتُ أَنْ أَكُونَ مِنَ الْمُسْلِمِينَ ﴿٩١﴾
 وَأَنْ أَتْلُو الْقُرْآنَ ۖ فَمَنْ اهْتَدَىٰ فَإِنَّمَا يَهْتَدِي لِنَفْسِهِ ۖ وَمَنْ ضَلَّ فَقُلْ إِنَّمَا أَنَا مِنَ الْمُنذِرِينَ ﴿٩٢﴾

And the 20th verse of Aale-Emran where it says:

وَقُلْ لِلَّذِينَ أُوتُوا الْكِتَابَ وَالْأُمِّيِّينَ أَاسَلَمْتُمْ ۚ فَإِنْ أَسَلَمُوا فَقَدِ اهْتَدَوْا ۖ وَإِنْ تَوَلَّوْا فَإِنَّمَا عَلَيْكَ الْبَلَاغُ ۖ
 وَاللَّهُ بَصِيرٌ بِالْعِبَادِ ﴿٢٠﴾

The Prophet was even commissioned to evangelize with logical proof and justification; such as:

Al-Nahl sura, verse 125:

ادْعُ إِلَى سَبِيلِ رَبِّكَ بِالْحُكْمَةِ وَالْمَوْعِظَةِ الْحَسَنَةِ ۖ وَجَادِلْهُمْ بَالَّتِي هِيَ أَحْسَنُ ۚ إِنَّ رَبَّكَ هُوَ أَعْلَمُ
 بِمَنْ ضَلَّ عَنْ سَبِيلِهِ ۖ وَهُوَ أَعْلَمُ بِالْمُهْتَدِينَ ﴿١٢٥﴾

<<Invite people to your God with wisdom and divine advice; and debate them in the best and perfect way. No doubt God is aware of those deviated or reclaimed.>>

In the 24th verse of Al-Anbia sura, it is said:

أَمْ اتَّخَذُوا مِنْ دُونِهِ آلِهَةً ۚ قُلْ هَاتُوا بُرْهَانَكُمْ ۖ هَذَا ذِكْرٌ مَنْ مَعِيَ وَذِكْرٌ مَنْ قَبْلِي ۚ بَلْ أَكْثَرُهُمْ لَا
 يَعْلَمُونَ الْحَقَّ ۖ فَهُمْ مُعْرِضُونَ ﴿٢٤﴾

<<Did they take any other gods except Him? Ask them to adduce [their gods]. This is my [the prophet] word, and the ones' who are with me, and

the previous prophets' and authorities'. But most of them are ignorant of the truth and shun.>>

When Moses and Aaron were sent to Pharaoh to introduce the truth, God so orders them:

﴿٤٣﴾ فَقُولَا لَهُ قَوْلًا لَّيِّنًا لَّعَلَّهُ يَتَذَكَّرُ أَوْ يَخْشَىٰ ﴿٤٤﴾^{١٣}

<<Go to Pharaoh who has revolted; talk to him tenderly, and he may admit or be warned.>>

As you see, the Prophets have never intended to impulse their beliefs and let people choose their religion freely. Heretofore we could validate the principle of religious freedom in the most important Islamic source, the Glorious Quran. So, with the documentation mentioned, no one can disclaim the principle of faith freedom in Islam. Now, we go through investigation of the matter in the second Islamic source, prophetic tradition.

Religious Freedom Principle in Prophetic Tradition and Impeccable Imams Lives

Whenever the Prophet and other Imams confronted critics and antagonists of Islam, they would hold free discussion and debate sessions. They would first listen to what the critics said and then answer. At last, some would accept and join Islam, and some would freely leave. The numbers of those sessions have been so much that late *Allameh Majlesi* has pointed some of them in 2 volumes of "*Behar-ol-anvaar*", more than 800 pages. These debates began since the time of the Prophet and Amir-al-Momenin (praise be upon Him), and flower at the time of Imam Sadegh and Imam Reza. Even, at the time of Imam Reza,

¹³.*Al-Taahaa*, 43, 44

an international debate session was held; and all the non-Islamic scholars gathered in Khorasan from all over the world to discuss with Imam [leader] of Muslims. History has recorded a part of their discussion and debate¹⁴.

The Prophet and Imams' fashion had also been to respect others' views, listening to their opinions, and giving them freedom of expression. Even Amir-al-Momenin Ali, as a Caliph and governor, encouraged people to give their opinions if they had any rightful speech. He pointed out that people may not think that the rightful requests would bother or annoy him. "As a human being, mistake is inevitable [even] for me, sometimes I make mistakes too, otherwise God upholds me" he cites to people.

"فلا تكنوا عن مقاله بحق او مشورة بعدل فاني لست بفوق ان اخطى و لا آمن ذلك من فعلى الا ان

يكفى الله من نفسى ما هوا ملك به منى فانما انا و اتم عبيد مملوكون لرب لا رب غيره..."¹⁵

The above phrase means: "Do not refrain uttering the right or equitable guidance; for I (being a human) don't consider myself superior and unmistakable, and I may make mistakes too; otherwise God saves me. Evidently, me and you are all vassals of God, and He is unique." Even, in some historical records, it is so said that some Christians, who had come to the Prophet to give reports and researches, were let to do their religious prayers in Prophet's Mosque in Medina¹⁶. The following narration from the Prophet is the best proof to validate our claim.

The Prophet says:

¹⁴ Tabresi has quoted many of discussions between the Prophet (and Imams) and opponents of Islam in his book, *Ehtajaj*, that is a good reference to study this subject.

¹⁵ Feiz-ol-islam, *Nahj-ol-balaghah*, p. 687.

¹⁶ Makarem Naser, *Nemoune exegesis*, vol. 2, p. 331. Under the 256th verse of *Al-baqarah*.

«من آذى ذميا فانا خصمه و من كنت خصمه خصمته يوم القيامة»¹⁷

meaning:

"one who troubles anyone (Jewish, Christian, Zoroastrian) who is under the protection of Islam, I would be his foe; and anyone to whom I be foe, I will express my grudge to him on the Judgment Day."

The treaty written between the Prophet and Najran Christians, clearly shows freedom of religion in Islam, and is a perfect validation upon it:

<<No priest or pious will be evicted from the church or its region. There will be no infliction and scorn; and their lands won't be invaded by our troops. Justice will be given to those who request.>>

It is said that when Najran Christians came to the Prophet, he spread his cloak for them to sit on. "Once, people were bypassing us carrying a corpse. The Prophet stood up as respect, and we also did so. Then we reminded the Prophet that he was a Jewish man! And he answered: 'aren't Jews humans? I stood up to respect humanity.'" Jaber-ibn-Abdollah narrates¹⁸.

At the end of this part, we're going to have an example of Imams' behaviors to religious minorities. In the following is one of them:

Once Imam Ali saw a weak and incapable old beggar. He asked [people] who that old man was. People answered that he was a Christian. "You labored him; and now that he is weak and can no longer do anything, his life and bread must be

¹⁷ Afif Abd-ol-fattah Tabarah, Ruh-od-din Al-eslami, Dar-ol-kotob, Lebanon, p. 274.

¹⁸ Qutb Sayyid, Islam and global peace, p. 250

supplied from the Muslims' vault." Ali ordered while being so indignant.¹⁹

Now that we have validated Religious Freedom Principle in two main Islamic resources, we should now answer the critics of Islamic injunctions about apostasy. To clarify the subject, first we may have a short description of apostasy.

Apostasy

Definition of Apostasy

Apostasy is conflict after confession and declination after admission of the religion. The one, who accepts the religion after verification and then declines it, is called apostate.

Types of Apostasy

Apostasy is of two types: national and visceral. Visceral apostasy means disavowal of religion after verified confession after maturity, while either or both of the parents are Muslim. National apostasy means disavowal of religion after verified confession after maturity, while neither of the parents is Muslim.

Three major factors are required in visceral apostasy:

1. At the time of embryo formation, either or both of the parents are Muslim.
2. The child be grown up in an Islamic family; i.e., he/she has perceived and understood Islamic issues closely before

¹⁹ Horre ameli Mohammad Hasan, Vasa'el-ol-shi'a, Al-jahad, chapter 19.

maturity, and has accepted and admitted the religion with verification and willingness.

3. After realization and acceptance of religion with verification, denies it after maturity.

The four kingpins of national apostasy are:

1. At the time of embryo formation, neither of the parents is Muslim.
2. The child has grown up in a non-Muslim family and has accepted heresy before maturity, as his/her parents did.
3. He/she has joined Islam by verification after heresy.
4. After acceptance of Islam, he/she disavows and regresses to heresy.

Distinction between Hostile Apostasy and Persuasive Apostasy

From this view, apostates are divided into two groups with regard to their intention:

- a) The hostile apostate, whose intention is obstinacy and hostility to Islam or the Prophet. Such an apostate deserves execution.
- b) The persuasive apostate, who's not intended to hostility; but his apostasy is a result of question, doubt, ignorance, and poor verification, i.e. wrong and surface knowledge. Such an apostate is not ordered to be executed.

It is so said that all or most of apostasies happening at the onset of Islam had been of the first group. They had no persuasive or thoughtful base and orientation; but meaning to hostile insistence, in order to aggrandize and keep interests. Some other apostasies of the time had been simply group obedience of patriarchs; such as Banu-Hanifah tribe's apostasy in response to Mosaylamah's invitation²⁰.

Distinction between Public and Personal Apostasy

This view refers to abdication of apostasy injunction with regard to personal persuasion of apostate person. Not until he/she publicizes his apostasy can apostasy injunctions be enforced for him; even though, we realize his/her inner mind in any other way. Abu-salah Halabi is one of the jurists from whose definition [of apostasy] we may perceive this view²¹.

Sahr Dashti, one of Sayyed Mortaza's disciples says:

«الارتداد هو ان يظهر الكفر بالله تعالى و برسوله و الجحد بما نعم به»²²

"Apostasy is declaration of paganism to God and His Prophet;
and denial of His given blessings and endowments."

As we said, apostasy injunction is not specified to faith and religion declaration; but Islam sentences this declaration when it surpasses simple religion conversion and turns to a psychological warfare against Muslims. The Holy Quran notes instances of these apostasies as tricks of enemies at the onset of Islam. They wanted their followers to declare Islam in the morning and deny in the evening, in order to provoke hesitation in other Muslims' hearts. The Quran says:

²⁰ Vaghedi Mohammad Omar, K etab Al- raddeh, p. 83 and 144

²¹ Halabi Abosalah Al-kaafi fe-l-feqh, p. 311

²² Morvarid Aliasghar, Yanabe-ol-feqh, vol. 9, p. 171

وَقَالَتْ طَائِفَةٌ مِّنْ أَهْلِ الْكِتَابِ آمَنُوا بِالَّذِي أُنزِلَ عَلَيَّ الَّذِينَ آمَنُوا وَجَّهَ النَّهَارَ وَآكُفُرُوا آخِرَهُ لَعَلَّهُمْ

يَرْجِعُونَ ﴿٧٢﴾^{٢٣}

<<A group of other divine religions told [their followers]: "go to the Prophet in the morning and declare to Islam, and forsake in the evening; in order that Muslims hesitate and backslide from the right faith.>>

Allamah Tabatabaie so interprets the verse:

"To justify their efforts, they said they thought that Islam had proofs to verify its truth; but after declaration to Islam, they observed its contrast and contradictions lit up for them. So they forsook Islam. And that was a conspiracy to make Muslims fall in doubt."²⁴

Repentance Compliance of Visceral and National Apostasy

Most of Jurists do not consider the repentance of visceral apostate as an exoneration of punishment. In other words, they believe although his/her repentance is complied in the heavens, it does not save him/her from punishment (unless national apostate whose punishment will cancel after repentance).contrary to Previous opinion, Ibn-jonaid and Shahid-e Saani²⁵ are those who believed apostate, visceral or national, would save from punishment after repentance.

Referring to the following considerations, compliance of repentance is verified for both national and visceral apostates. Considerations of compliance of repentance for apostate (national and visceral):

²³. Aale Emran sura, verse 72

²⁴ Tabatabae, Mohmmad Hosein, Almizan exegesis, vol. 3, p. 257

²⁵ Shahid-e Saani, Masalek-ol-fahaam, vol. 15, pp. 24-25.

1. Quran has never demarcated national and visceral apostates, and remarks:

إِنَّ اللَّهَ يَغْفِرُ الذُّنُوبَ جَمِيعًا ۖ إِنَّهُ هُوَ الْعَفُورُ الرَّحِيمُ²⁶

"God will not bless [polytheist] pagan, but may bless non-pagan."
Thus, any fault is forgivable except polytheism.

2. The narrations that remark the phrase "*la yastatab*"²⁷ with regard to visceral apostate, verify the point that it is not required to make the apostate repent; but does not clarify whether or not the apostate's repentance is complied if he repented himself/herself²⁸.
3. Imam's traditions during the history indicate compliance of visceral apostates' repentances. For instance, Imam Ali let those who took him as God repent²⁹.
4. It's not sensible to believe in compliance of visceral apostate's repentance and, on the other hand, sentence him/her to execution³⁰.

As validated, whereas Islam is the religion of mercy and love, and its ordinances and even punishments are based on bestowal of mercy on human beings; thus, God has let the very apostate one - who has

²⁶.Al-zumar sura, verse 53

²⁷ It means: don't make repent

²⁸ Asghar Tafazzoli harandi ,views of jurists about Apostasy, p133

²⁹ Muhammad-ibn-hasan, Vasa'el-o-shi'a, vol 7, p.p. 254-257, chapter 61

³⁰ Muhmmad-hasan Mar'ashi, "Apostasy and its injunctions from the approaches of juridical resources in Islam", Legal and Juridical Journal of Judicature, Winter 1372, vol. 9. Syyed Muhammad Mousavi Bojnourdi, Feq'he Tatbighi (juridical chapter), Tehran, Imam Khumaini and Islamic Revolution research center publication, first print 1382, p. 190.

declared publicly and hostilely and has caused turmoil in the society - to save himself/herself from punishment with repentance and expressing regret.

So, it can be inferred that apostasy retribution involves a few of apostates; because faith conversion does not require public declaration. Therefore, people may be apostate for years in an Islamic society, but never be sentenced; forasmuch their apostasy is not public or hostile. Even if anyone declared his/her apostasy hostilely and publicly; he/she may easily escape retribution with repentance and expressing regret.

Freedom of Express in Islamic Republic of Iran Regime

Having the following principles, Islamic Republic of Iran's constitution is a perfect instance of a regime based on freedom of religion and faith. It denotes: "other branches of Islam, such as *Hanafi*, *Shaafe'ie*, *Maaleki*, *Hanbali*, and *Zeydi* benefit a perfect respect; their followers are free to hold their own religious ceremonies; and their religious educations and personal statuses (marriage, divorce, legacy, testaments, and prayers) are licensed in courts.

In addition, it is so anticipated in the same principle that: "in any district with majority of any of Islamic creeds, regional bylaws would be in accordance with that creed under the authority of councils, providing that other religions' rights be preserved." This part of the 12th principle validates the right for Islamic creed minorities to tune regional bylaws according to their beliefs in districts wherein they comprise the majority population.

Then it talks about the other divine religions that live in Iran. "Zoroastrian, Jewish, and Christian Iranians are the only religious minorities who can freely hold their religious ceremonies in the frame of law; and who act

according to their faith with regard to personal statuses and education."
(13th principle)

The 14th principle, in compliance with divine verses, adverts non-Muslims generally, and advises to humanistic behavior and genteel manner towards non-Muslim minorities.

According to the holy verse:

لَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِّنْ دِيَارِكُمْ أَن تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ ۗ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ³¹

Islamic Republic of Iran government and Muslims must act mercifully and with Islamic justice and equity to non-Muslims; and must observe their humanistic rights. This principle embraces those who do not plot and act against Islam and the Islamic Republic.

The aforesaid principle is mostly focused on observation of humanistic rights of minorities by Islamic Republic of Iran Government and Muslims.

It is obvious that in Islamic Republic - which is based on justice and equity - cannot treat unequally between Muslims and non-Muslims. In this context, the 20th principle decrees equality of Muslims and non-Muslims with regard to all humanistic, political, economic, social and cultural rights:

³¹. Al-Mumtahana sura, verse 8

"All the members of the society, including men or women, are equally protected by law; and benefit all humanistic, political, economic, social and cultural rights in the frame of Islam."

The 19th principle focuses on any kind of racism and discrimination: "All the Iranians, no matter which race or tribe they are from, have equal rights; and skin color, race, language, and so on would not advantage anyone to the others."

The 8th clause of the 3rd principle emphasizes on "contribution of general public in their political, economic, social and cultural determination"; and, obviously, this generality includes non-Muslims as well. Accordingly, the 64th principle refers to minorities' contribution in legislation:

"Zoroastrians and Jewish, each elect one legislator; Ashouri and Kaldani Christians together have one legislator; and Armeni Christians of South and North, each choose one legislator."

So, as indicated, respect and freedom of religious minorities is an undeniable fact in the Islamic Republic of Iran.

But, while studying societies, we should always consider the fact that, what is stated in print is different from the realities in the society. Therefore, a real investigator should always chase society facts and study if the printed principles turn to action!

To examine this subject, i.e. degree of freedom for religious minorities in Islamic Republic of Iran, we should observe facilities and conveniences provided for them in the society.

Viewing the Status of Religious Minorities in Islamic Republic of Iran

A) Armeni nationals, who are mostly distributed in Tehran, Esfahan and Tabriz, and enjoy vast social, sports and cultural facilities shortly as follows:

Armenians now have a population of 150,000 that enjoy wide social and cultural facilities. According to the 19th principle of Islamic Republic of Iran's Constitution, i.e. " All Iranians, no matter which race or tribe they are from, have equal rights; and skin color, race, language, and so on would not advantage anyone to the others", beside worshiping facilities, Armenians benefit from national facilities as equal to other compatriots.

Anyway, the Iranian Armenian community have the following facilities in the current conditions:

1. Parliamentary rights: Armenians have got two legislators in the parliament.
2. Church facilities: from about 250 churches in Iran, 200 churches belong to the Iranian Armenian community. With a population of 120,000 in Tehran, they have got 50 churches only in this city.
3. Press: Iranian Armenians have always possessed journals, newspapers, and weekly, daily, monthly, and seasonal prints in the country. *Alik* magazine is now 67 years old; and is available not only in Iran, but it is also read in 40 other countries of the world. So far, 102 publications have been registered in the countries that are run by different Armenian groups.
4. Their other facilities include: 50 cultural, sports and charity institutes in the country such as *Ararat* club in Tehran which is one of the largest sports centers in Iran and belongs to the Armenian community. There are 50 specific schools specifically

for the Armenian community's use and Muslims are not allowed in; minorities, on the other hand, may be registered in Muslim schools. Armenian community have a lot of nursing homes, specific cemeteries, publications, and many national and cultural places such as *Qara-kelisa* church, *Vank* church, and their museums. *Vank* church which was established in 1606, with Iranian classical architecture, has housed 32 Armenian Caliphs so far.

B) Ashour or Asour was imputed to a branch of Semitic race that entered Iraq and Mesopotamia thousands of years BC. Facilities provided for this community in Iran include:

1. Parliamentary rights: They've got a legislator in the parliament.
2. Church facilities: Ashouries have got 59 churches only in Uroumia and 6 churches in Tehran. Thus, this 30,000 person community has got 65 churches in Iran and 6 of them go back to the Sassanian dynasty era.
3. Educational, recreational and cultural facilities: In addition to registration in national schools - which is any Iranian citizen's legitimate right, this community also have their own specific schools, the most important of which are *Hazrate Maryam* [saint Mary] and *Behnam*. This community also possess 27 journals, 20 cultural and social centers, and 12 famine and engineering committees. Their global leader lives one to two months among the community in Iran every year.

C) Russian Orthodox Church and Greek Orthodox Church are the two Orthodox churches that have been built because of Greek and Russian citizens' presence in the past. Saint Ticklas Russian church has got an expeditionary priest from Moscow Church. This priest is formally

running the church in Tehran and undertakes religious leading of thousands of Russian industrial and civil counselors and some Russian families in Iran. He also regulates other Russian Christian citizens in the Persian Gulf states from Iran.

1. Catholic Armenian community: This church goes back to four centuries ago, i.e. Safavia's era, that missionaries of religious Catholic communities began their evangelistic plans among Iranian Armenians. Followers of this church are 12,000 persons. Catholic Armenian community have got eight churches, four training and sports centers, six educational centers, and a private cemetery.
2. Catholic Ashouri-Kaldani community: Now, observing all Catholic faiths, this church differs in one aspect from the other Catholic churches with regard to their prayer ceremonies. Its followers do their prayers in Ashouri language. This community have got eight running churches in Iran with 13,000 followers.
3. Latin Catholic community: This church was allocated mostly to foreigners. It was built in 1630 AD by foreigners who were on mission.

Religious prayers are frequently held in these churches on Sundays with the attention of French, Italian, Dutch and Polish citizens. Based on statistics given by Catholic community in 1370, these churches have 2,000 to 2,500 members that generally use 9 churches.

D) Protestant churches: With the entrance of missionaries from Britain and the US in the 19th century, they established Protestantism Iran. The Biblical Church of Iran (Pearsbitry) is one of them built on the basis of Calvin faith principles. Its followers believe that, according to the ancient divinations, Jesus was born from the Virgin Mary and then

crucified and buried. Other Protestant churches and formal meetinghouses of other religions are run in perfect freedom and under the protection of the constitution in the Islamic Republic of Iran, a detailed description of which requires a broader opportunity.

Conclusion

As noted, freedom of faith and religion is received in Islam and international law as a definite principle. Basically, we can claim that Islam and the Prophetic tradition observed freedom of faith and religion centuries before composition of Human Rights; and we should never relate what the arbitrary rulers did to the Islamic approaches towards freedom of faith and religion. During the history, there have always been dictators who misused just religious approaches to outrage and suppress their protesters. About the apostasy injunction in Islam we should point out that this is limited to instances where religious expression surpasses simple faith declaration and is meant to plot against Islamic society. In this case, common sense sanctions punishment for such a person; or else, turmoil and ravage awaits Islamic society.

Also, people are free in the Islamic Republic regime. Anyone with non-Islamic faith is free to declare his thoughts (one may express anything he wishes; Islamic Republic will only not permit conspiracy and deception). The Constitution of the Islamic Republic of Iran has also recognized Faith and Religious Freedom principle. Basically, a government or society can't be Islamic and treat Muslims and non-Muslims unequally. The realities of Iranian Islamic society reflect the free living of religious minorities among Muslims, too.

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Responses to Conflict Situations

The Contribution of International Humanitarian Law to the Restoration and Maintenance of Peace

*Michel Veuthey**

Abstract

The aim of International Humanitarian Law is to maintain peace and security and to preserve human dignity during armed conflicts. Armed conflict and enmity between civilians on opposite sides of a conflict is a temporary exceptional situation in which international humanitarian law proves to be a permanent reminder that no enemy is an enemy forever. International Humanitarian Law is increasingly part of global thinking on security issues at the national, regional and international level. Throughout the history of humankind, civilizations and their religions and belief systems have developed rules to ensure their survival.

The paper traces the historical development of international human rights law through agreements, treaties and conventions, which are universal and timeless. By its very nature, humanitarian law aims, through acts of humanity, to preserve the survival of humankind, ensure that 'civilized' life is still possible and maintain the necessary conditions for a return of peace even during a conflict. The fundamentals of humanitarian law may be thought of as forming part of a wheel of co-operation, responsibility and accountability. The paper also highlights the role of humanitarian law in maintaining peace, which is clear from the fact that many conflicts, both internal and international, have been sparked by serious violations of humanitarian law. It also shows that application of human rights law shortens conflicts and restores peace.

* Professor Michel Veuthey is Vice-President of International Institute of Humanitarian Law in Nice and San Remo and Geneva, Switzerland.

Introduction

In today's unstable situation, the first purpose of international cooperation is, and should remain, the prevention of armed conflicts: as Article 1 of the United Nations Charter provides, "to maintain international peace and security"¹. The second is to preserve humanity in all circumstances, even during armed conflicts. This is the primary intention of International Humanitarian Law.

The contribution to peace made by International Humanitarian Law should not be overlooked. Humanitarian law is a permanent reminder that armed conflict, and enmity between civilians on opposite sides of a conflict, is a temporary, exceptional situation: no enemy is an enemy forever², since civilized life - both within and between communities - is founded on peaceful relations (peace being not the absence of conflict, but harmonious management of conflicts). Furthermore, the very nature of humanitarian law shatters the dangerous illusion of unlimited force³ or total war, creates areas of peace in the very midst of conflicts, imposes the principle of a common humanity, and calls for dialogue. International Humanitarian Law is increasingly becoming part

¹ The normal state of human relations, between communities and within a single community, is peace. Humanitarian law does not contradict this rule, but confirms it; this is borne out by the Preamble to Additional Protocol I of 1977, in particular the first, second and fourth preambular paragraphs thereof.

² William Broyles Jr., *Brothers in Arms: A Journey from War to Peace* (New York: Knopf, 1986): "To transform ordinary men into warriors requires that they give up a piece of their civilized selves, that they develop the ability to see other men and women as abstractions, as enemies to be killed. That powerful idea is easy to learn and hard to forget. But the idea of the enemy, so fundamental in the heat of war, is always temporary. Wars end. No enemy is an enemy forever. We have made our peace with the British, the Germans, the Japanese; we have brought the North and the South of our own Civil War together. We will be reconciled with the Vietnamese. As my former enemies said, the past is the past. We all did our duty, most of us honorably. Life goes on. The war is over."

³ The principle of the limitation of armed violence is reflected, in contemporary written law, in the Saint-Petersburg Declaration of 1868, as well as in Article 22 of the Hague Regulations of 1907, which stipulates that: "The right of belligerents to adopt means of injuring the enemy is not unlimited". This text is taken up again, slightly reworded, in paragraph 1 of Article 35 ("Basic rules") of Protocol I of 1977: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".

of global security issues, on the national, regional and international levels: security today⁴ also means human security, through solidarity in peace and restraints in conflict that safeguard the common humanity⁵. Bringing protection and relief to victims of conflicts can have a strategic value in preserving regional and global stability⁶. The implementation of humanitarian law should form part of a culture of conflict prevention in the twenty-first century⁷.

The Nature of Humanitarian Law

The simplest and most universal definition of humanitarian law is found in the Golden Rule, "Love thy neighbor as thyself." The great Rabbi Hillel's response to a question on the Torah was "Do not do unto others what you would not want to be done unto you. This is the essence and the rest

⁴ See Paul Kennedy, *Preparing for the Twenty-First Century*, New York: Random House, 1993, p. 130: "In this larger and more integrated sense, 'national' security becomes increasingly inseparable from "international" security, and both assume a much broader definition; in place of the narrower military concept there is emerging a larger definition which can encompass a whole spectrum of challenges, old and new. Indeed, we may eventually come to agree that a threat to national security means anything on the globe which challenges a people's health, economic well-being, social stability, and political peace."

⁵ The principle of humanity, the cornerstone of humanitarian law, has frequently been set against military necessity. Here we uncover two essential factors of humanitarian law, which are however not necessarily contradictory. Humanity and military effectiveness are often complementary; and the best approach is indeed to highlight the mutual military, political and economic benefit of recognizing the enemy - civil or combatant - as a human being with the same dignity as oneself.

⁶ Sadato Ogata, United Nations High Commissioner for Refugees, at the Conference "Internal Conflicts: the Role of Humanitarian Action", organized by Webster University, Geneva, 2 April, 1998.

⁷ Zbigniew Brzezinski, *Out of Control: Global Turmoil on the Eve of the Twenty-First Century* (New York: Scribners, 1993) p. xv. See also: *Preventing Deadly Conflict: The Final Report of the Carnegie Commission on Preventing Deadly Conflict*, New York: December 1997, p. 257, and Lown, Bernard, *Clearing the debris. (The Atomic Age at 50)*, *Technology Review*, 18 Aug 1995: "The bestialities unleashed in Bosnia, Rwanda, and Chechnya provide evidence, if such be needed, that barbarism is just below the integument in all human societies, whatever their purported moral values or avowed religious persuasions. In the words of an Auschwitz survivor, the psychotherapist Victor Frankl: 'Since Auschwitz we know what man is capable of. And since Hiroshima we know what is at stake.'

is commentary.⁸ Practically all traditions know this fundamental principle.⁹

The historical sources of humanitarian law are universal and timeless. Throughout the history of humankind, all civilizations have developed rules within the group, tribe, nation, or religion to ensure its survival - in Asia, Buddhism¹⁰, Hinduism¹¹, Taoism¹², and Bushido¹³; in the Middle East, Judaism¹⁴, Christianity¹⁵, and Islam¹⁶; in Africa¹⁷, a multitude of customs

⁸ Erich Fromm, *You Shall Be As Gods* (New York: Holt, Rinehart and Winston, 1966). Cf. also this statement by the American Rabbi, Marc Tannenbaum: "You must first learn to love yourself before you're able to love your neighbor. Frequently, hatred of the other emerges out of people who don't love themselves" (quoted by Christopher News Notes, New York, No. 267). Confucius writes in the *Analects* (15, 23): "If there is one maxim which ought to be acted upon throughout one's life, surely it is the maxim of loving kindness. Do not do unto others what you would not have them do unto you". Christ says, "In everything do to others as you would have them do to you" (Matthew 7:12). In Islam the Sunnah proclaims, "No one is a believer until he desires for his brother that which he desires for himself." These quotes and others in John Catoir, *World Religions: Belief Behind Today's Headlines* (New York: The Christophers, 1989).

⁹ See the excellent collection of essays, published in French and English by UNESCO, in collaboration with the ICRC and the Henry-Dunant Institute, under the title *International Dimensions of Humanitarian Law*, Paris 1986.

¹⁰ Buddhism contains two fundamental principles, *maitri* (friendliness, benevolence) and *karuna* (mercy, compassion) closely related to the principle of humanity.

¹¹ For Hinduism, numerous rules on the kind treatment to be granted to the vanquished are found in the *Mahabharata* (XII, 3487, 3488, 3489, 3782, 8235) which also prescribes loyalty in combat (XII, 3541 and 42, 3544 to 51, 57 to 60, 64, 3580, 3659, 3675, 3677). See also the famous *Laws of Manu*, VII, 90 to 93 (*The Laws of Manu*, Oxford 1886).

¹² On Taoism, see Lao Tseu: *Tao Te Ching*, and in particular No. 68 ("a good winner is not vengeful") and No. 38: "When Tao is lost, there is goodness; when goodness is lost, there is kindness; when kindness is lost, there is justice; when justice is lost, there is ritual" (Lao Tseu, *Tao Te Ching*. A new translation by Gia-Fu and Jane English, New York 1972).

¹³ On Bushido, see Sumio Adachi, "Traditional Asian approaches : A Japanese view", *Australian Yearbook of International Law*, Vol. 9, 1985, pp. 158 - 167, and, by the same author, "The Asian Concept", in: *International Dimensions of Humanitarian Law*, Paris, UNESCO, 1986, pp. 13-19, which also considers Buddhism.

¹⁴ On Judaism, see Erich Fromm's work quoted above in note 8, which contains a commentary, among other things, on the Book of Leviticus, revealing the restrictive interpretations confining the notion of neighbor solely to other members of the Jewish community, and the broader interpretations extending the definition to all human beings. Fromm also quotes other passages from the Old Testament on the injunctions handed down to the Israelites for humanitarian treatment of their vanquished enemies.

¹⁵ On Christianity, Max Huber, *The Good Samaritan: Reflections on the Gospel and Work in the Red Cross*, Neuchâtel 1943 (also translated into French; the German original was published under the title *Der barmherzige Samariter. Betrachtungen über Evangelium und Rotkreuzarbeit*, Zürich 1943). See also Joseph Joblin, *L'Eglise et la Guerre. Conscience, violence, pouvoir*, Paris 1988, and in particular, for *jus in bello*, pages 193

valid only within a given tribe; in Europe, the mutual restrictions imposed by chivalry, before the condottieri and lace-clad war generals were supplanted by the humanists (Grotius, Hobbes, Kant, Pufendorf, Rousseau, Vattel, Henry Dunant, and Francis Lieber)¹⁸ - all aiming to avoid excesses that would turn clashes into anarchy and hence make peace more difficult to achieve.

Thus, in article 6 of his *Perpetual Peace*, Immanuel Kant wrote: "No State at war with another must allow itself hostilities of a kind which would make reciprocal confidence impossible during future peace."¹⁹

Humanitarian law may be expressed in the provisions of bilateral agreements²⁰, concluded before hostilities begin (*cartels*), during

onwards; Alfred Vanderpol, *La doctrine scolastique du droit de la guerre*, Paris 1919; Francisco de Vitoria, *Leçons sur les Indiens et le droit de la guerre*, Geneva 1966; Ernest Nys (ed.), *De Indis et de jure belli relectiones*, Washington 1917.

¹⁶ On Islam, see among others Marcel Boisard, *L'Humanisme de l'Islam*, Paris 1979; Jean-Paul Charney, *'Islam et la guerre, De la guerre juste à la révolution sainte*, Paris 1986; the article published in the *International review of the Red Cross* by M.K. Ereksoussi, "Le Coran et les conventions humanitaires" (November 1960); Hamed Sultan, "La conception islamique du droit international humanitaire dans les conflits armés", *Revue Egyptienne de Droit International* Vol. 34, 1978 pp. 1-19; and Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic countries*, Geneva, HCR/International Institute of Humanitarian Law, 1986.

¹⁷ On African customs, see Emmanuel Bello, *African Customary Humanitarian Law*, Geneva: ICRC, 1980; the articles by Yolande Diallo published in February and August 1976 in the *International Review of the Red Cross* under the title "Humanitarian Law and African Traditional Law".

¹⁸ See Geoffrey Best, *Humanity in Warfare: the modern history of the international law of armed conflicts*, London, Weidenfeld and Nicholson, 1980, 400 p.

¹⁹ Another translation, available on the Website <<http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>> : "No State shall, during War, permit such Acts of Hostility which would make mutual Confidence in the subsequent Peace impossible: such are the employment of assassins ("percussores"), poisoners ("venefici"), breach of Capitulation, and Incitement to Treason ("perduellio") in the opposing State".

²⁰ For bilateral agreements, cf. Dieter Fleck, "Suspension of Hostilities", in: *Encyclopedia of Public International Law*, Vol. 4, 1982, pp. 239-240, who quotes S.D. Bailey, "Cease-fires, Truces and Armistices in the Practice of the U.N. Security Council", *American Journal of International Law*, Vol. 71, 1977, pp. 461-473. Bailey points out that the truces negotiated by the Security Council in 1948 between the Netherlands and Indonesia and in Kashmir between India and Pakistan included military, political and humanitarian clauses. See also Charles Rousseau, *Le droit des conflits armés*, Paris 1983, p. 103, who quotes a few examples of special agreements between

hostilities (truces, instruments of surrender), or at the end of a conflict (cease-fires, peace treaties), laying down the treatment to be given to civilians, prisoners, sick and wounded, and neutral intermediaries. Or it may take shape in multilateral agreements, frequently concluded in reaction to a bloody conflict.

For example, each of the stages of humanitarian law codified in Geneva from 1864 to 1977 followed a war that created a shock wave in public opinion and for governments: the battle of Solferino (1859)²¹ between Austrian and French armies was the impetus for the First Convention, in 1864; the naval battle of Tsushima (1905) between Japanese and Russian fleets prompted adjustment of the Convention on war at sea in 1907; World War I brought about the two 1929 Conventions, including a much broader protection for prisoners of war; World War II led to the four 1949 Conventions²² and an extensive regulation of the treatment of civilians in occupied territories and internment; and decolonization and the Vietnam War preceded the two 1977 Additional Protocols²³, which brought written rules for the protection of civilian persons and objects against hostilities.

belligerents, otherwise known as cartels, on the exchange of prisoners: Cartel of 12 May 1813 between Great Britain and the United States, and the Dix-Hill Cartel, named after its two signatories, Generals J.A. Dix and D.H. Hill, concluded on 22 July 1862 between the American Federal Government and the Southern Confederates, the texts of which may be found in Howard S. Levie (ed.), "Documents on prisoners of war" *International Law Studies* Vol. 60, Newport, R.I., U.S. Naval War College, 1979, pp. 18-22 and 34-36.

²¹ See: Henry Dunant: *A Memory of Solferino*, Geneva: ICRC. 1939.

²² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949.

²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The total ban on anti-personnel landmines²⁴ signed in Ottawa on 4 December 1997 was the result of a world-wide campaign by governments, U.N. agencies, the Red Cross and Red Crescent Movement and NGOs in a full partnership which stressed the human suffering and socio-economic costs caused by anti-personnel mines.

Similarly, most of "Hague Law" stems from the Peace Conferences of 1899 and 1907. World War II and regional conflicts prompted the drafting of the United Nations instruments on human rights, disarmament, the prohibition of terrorism and mercenaries, protection of the environment²⁵, and protection of the rights of children²⁶.

The terminology used to refer to these international treaties may vary (humanitarian law²⁷, International Humanitarian Law applicable in armed conflicts²⁸, laws of war²⁹, law of Geneva³⁰, Red Cross Conventions, law of The Hague³¹, human rights in armed conflicts³²), but

²⁴ Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, signed at Ottawa on 4 December 1997.

²⁵ The United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted on 10 December 1976 (ENMOD).

²⁶ Convention on the Rights of the Child, adopted by Resolution 44/25 of the United Nations General Assembly on 20 November 1989.

²⁷ See Jean Pictet, *Humanitarian law and the protection of war victims*, Leiden 1975.

²⁸ This was the term used by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH), which met at Geneva from 1974 to 1977 to adopt the two Additional Protocols to the Conventions of 1949.

²⁹ Law of war is the expression still most widely used today in military circles. Cf Frederic De Mulinen, *Handbook on the Law of War for Armed Forces*, Geneva, ICRC, 1987.

³⁰ Law of Geneva is sometimes used with the intention of stressing aspects relating to the protection of victims of war, as opposed to the regulation of conduct as regards methods and means of destruction between combatants, designated by the expression "Law of The Hague".

³¹ The Protocols of 1977 have to some extent merged the law of Geneva and the law of the Hague; this was merely the culmination of a trend which began when the rules of the Hague relating to the treatment of prisoners of war were incorporated and expanded upon in the Second Geneva Convention of 1929, and later the Third Convention of 1949; similarly, the Fourth Convention of 1949 incorporated most of the Hague Regulations of 1907 on military occupation. All this is of considerable significance: apart from the historical memory, it is the customary nature of the rules of the Hague (and hence of the provisions incorporated in 1949 and 1977) which should be emphasized.

all seek the same objective - namely, to limit the use of violence. Some of these instruments, like human rights treaties, are based on a peacetime approach, while others, such as humanitarian law, are normally applicable during armed conflicts. Yet their scope often overlaps, especially as regards the fundamental guarantees they embody.

The fundamental rules of humanitarian law³³ are closely linked to the survival of human beings, not only individuals but also entire populations, by: the safeguarding of cultural objects and places of worship³⁴, and objects indispensable to the survival of the civilian population³⁵; the protection of medical establishments and units (both civilian and military), public works, and installations containing dangerous forces (like dams, dikes, and nuclear power plants)³⁶; and the preservation of the

³² This was the term used by the United Nations for almost ten years after the International Conference on Human Rights held in Tehran (22 April - 13 May 1968). Numerous resolutions of the United Nations General Assembly, advocating further codification, and describing how this was to be done, were adopted under the heading of "Respect for human rights in armed conflicts", as well as reports by the Secretary-General of the United Nations (A/7720 in 1969, A/8052 in 1970, A/8370 in 1971, A/8781 in 1972, A/9123 in 1973, A/9669 in 1974, A/10195 in 1975).

³³ Humanitarian law may be defined as the principles and rules restricting the use of violence in armed conflicts in order to spare the persons who are not (or are no longer) directly engaged in the hostilities (civilians, wounded and sick, shipwrecked, prisoners of war), and to limit the use of methods and means of warfare of such a nature as to cause superfluous injury (or excessive suffering, as in the case of "dumdum bullets", or with gas warfare), or which could cause severe damage to the natural environment or betray an adversary's confidence in agreed-upon obligations ("perfidy").

³⁴ The protection of cultural objects, essentially set out in the Convention of the Hague of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, is reaffirmed in Article 53 ("Protection of cultural objects and places of worship") of Protocol I of 1977 and Article 16 of Protocol II. See Stanislaw Edward Nahlik, "Protection of Cultural Property in International Dimensions of Humanitarian Law, pp. 203-215.

³⁵ An article in each of the two Additional Protocols of 1977 is devoted to the protection of objects indispensable to the survival of the civilian population: Protocol I, Article 43; Protocol II, Article 14. The protection afforded to medical units, in particular civilian ones, was substantially extended by Protocol I (the main points being reaffirmed in Article 11 of Protocol II): - Article 8 ("Terminology"), sub-paragraph e), defines "medical units"; - Article 12, 13 and 14 describe the protection afforded, and its limits.

³⁶ The prohibition of attacks on works and installations containing dangerous forces (dykes, dams, nuclear electrical generating stations) is also set out in the two Protocols of 1977: Protocol I, Article 56; Protocol II, Article 15.

natural environment³⁷. Even beyond these objectives, the need to maintain a minimum of confidence between adversaries (in other words, the prohibition of perfidy) is one of the pillars of humanitarian law, both customary and written.

By its very nature, humanitarian law aims, through acts of humanity, to preserve the survival of humankind³⁸, to ensure that "civilized" life is still possible and to maintain the necessary conditions for a return of peace even during a conflict. As one well-known expert on international law, Denise Bindschedler-Robert, writes,

"The law of armed conflicts is certainly not a substitute for peace. Nevertheless, in the last analysis it preserves a certain sense of proportion and human solidarity as well as a sense of human values amid the outburst of unchained violence and passions which threaten these values."³⁹

As a psychologist expresses it: "It can save us from dehumanizing ourselves by dehumanizing our enemy".⁴⁰

³⁷ The causing of widespread, long-term and severe damage to the natural environment, thereby prejudicing the health or survival of the population, is outlawed in Article 55 of Protocol I and in the United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 10 December 1976. In this connection, see Geza Herczegh, "La protection de l'environnement naturel et le droit humanitaire", and Alexandre Kiss, "Les Protocoles additionnels aux Conventions de Genève de 1977 et la protection des biens de l'environnement", in Christophe Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles*, Geneva: The Hague, 1984.

³⁸ See Henri Meyrowitz, "Réflexions sur le fondement du droit de la guerre", in: Christophe Swinarski, *op. cit.*, pp. 419-431, and Michel Veuthey, "Le droit à la survie, fondement du droit international humanitaire", in: *Essais sur le concept de "Droit de Vivre" en mémoire de Yougindra Khushalani*, Brussels 1988, pp. 233-249.

³⁹ Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*. Report to the Conference on the law of armed conflict (Carnegie Endowment, Geneva, 15-20 September 1969), p. 61 (Conclusion).

⁴⁰ Sam Keen, *Faces of the Enemy. Reflections on the Hostile Imagination. The Psychology of Enmity*, San Francisco: Harper & Row, 1986, p. 181.

The Universal Applicability of Humanitarian Rules

It is important for the sake of peace that humanitarian rules and principles be respected in all circumstances. The International Court of Justice, in the Nicaragua case, considered Article 3 as "elementary considerations of humanity", binding all individuals⁴¹. In the case of "collapsed States",⁴² "postmodern wars",⁴³ anarchic conflicts,⁴⁴ the international community of States Party to the 1949 Geneva Conventions should reaffirm their collective responsibility according to Article 1, common to the four Conventions and to Protocol I. According to this provision, "The High Contracting Parties undertake to respect and to ensure respect for this Convention in all circumstances". Should measures be limited to diplomatic démarches, adoption of resolutions or rather the use of sanctions and peace-enforcement operations in order to stop genocide and arrest war criminals? A number of Security Council resolutions, including those on anarchic conflicts, call upon all parties to respect International Humanitarian Law and reaffirm that those responsible for breaches thereof should be held individually accountable⁴⁵.

The commencement of the applicability of humanitarian rules is sometimes deferred. Perpetuating the illusion of peace, refusing to recognize the state of conflict, and ignoring or concealing victims may

⁴¹ International Court of Justice, Nicaragua Case, 27 June 1986, Vol.114, Para. 218. On this case, see: Rosemary Abi-Saab, "The 'General Principles' of humanitarian law according to the International Court of Justice", *International Review of the Red Cross*, July-August 1987, pp. 367-375.

⁴² See I. William Zartman (Ed.), *Collapsed States. The Disintegration and Restoration of Legitimate Authority*, Boulder: Lynne Rienner, 1995, p. 301.

⁴³ See Robert Fox, "On the Age of Postmodern War. Beyond Clausewitz: the long and ragged conflicts of the coming millennium", *The Times Literary Supplement*, 15 May 1998.

⁴⁴ As Martin van Crefeld puts it in *The Transformation of War*, New York, Free Press, 1991, "Once the legal monopoly of armed force, long claimed by the State, is wrestled out of its hands, existing distinctions between war and crime will break down."

⁴⁵ Preparatory document drafted by the ICRC for the first periodical meeting on international humanitarian law, Geneva, 19-23 January 1998, *Armed conflicts linked to the disintegration of State structures*, mentioning Resolution 814, para. 13 (Somalia), Res. 788, para. 5 (Liberia).

jeopardize the application of the law or, indeed, the restoration of peace. As the number of victims grows - individuals are taken prisoner, are tortured and executed, or disappear - and methods and means of warfare degenerate on both sides, it becomes extremely difficult to revert to the legal path. Examples of this are the Algerian War thirty years ago, as well as more recent, even ongoing conflicts. While large-scale military operations are characterized for too long as "operations for the maintenance of order" or even "fraternal assistance," hatred accumulates, and sincere but belated efforts to set reciprocal limits run into enormous problems, with an adverse impact on civilians and prisoners. The pacifying value of humanitarian restrictions thus emerges late in the day, accompanied by the bitterness caused by too many violations. The revolting policy of "ethnic cleansing" is a confirmation of grave breaches of humanitarian law, the very embodiment of hatred and rejection⁴⁶. As for genocide, it should be considered as a threat to international peace and security⁴⁷, as we do not need another century of megadeath⁴⁸.

The period of applicability of humanitarian rules is also subject to change. Often the actual hostilities are brief, and a lightning war gives way to a long period that belongs no longer to war but not yet to

⁴⁶ Cornelio Sommaruga, "Humanitarian Challenges on the threshold of the twenty-first century": Keynote address, 26th International Conference of the Red Cross and Red Crescent. See also: Elie Wiesel, quoted in Robert Jay Lifton and Eric Markusen: *The Genocidal Mentality. Nazi Holocaust and Nuclear Threat*, New York: Basic Books, 1990, p.1: "Once upon a time it happened to my people, and now it happens to all people. And suddenly I said to myself, maybe the whole world, strangely, has turned Jewish. Everybody lives now facing the unknown. We are all, in a way, helpless".

⁴⁷ United Nations Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Thirty-eighth session. Item 7 of the provisional agenda "Gross Violations of Human Rights and International Peace" E/CN.4/Sub.2/1985/11, 25 June 1985) para. 18: "Genocide, the most extreme form of discrimination and massive disregard of the right to life, recognized as a crime against humanity, was considered as a major threat to international peace and security."

⁴⁸ Zbigniew Brzezinski, *Out of Control. Global Turmoil on the Eve of the Twenty-First Century*, New York: Charles Scribner's Sons, Chapter One ("The Century of Megadeath").

peace. During this period, which may last several years, victims remain: thousands of prisoners remain in detention years after the cessation of hostilities (as was the case in the western Sahara, in the Iraq-Iran conflict, even in the conflict between Iraq and Kuwait), and civilian populations come under attack or are continually under military occupation.

At the end of hostilities, the accumulation of unsolved humanitarian questions often constitutes an additional obstacle to successful peace negotiations. Humanitarian questions are mentioned more and more frequently in Security Council resolutions. Such was the case in the Arab-Israeli conflicts, in Lebanon, in Yugoslavia, and in Somalia. The question of the repatriation of prisoners of war between Iran and Iraq was referred to on two occasions in Security Council resolutions:

*In paragraph 4 of resolution 582 (1986), which, after an appeal for an immediate cease-fire, reads:

"Urges that a comprehensive exchange of prisoners of war be completed within a short period after the cessation of hostilities in co-operation with the International Committee of the Red Cross".

* In paragraph 3 of resolution 598 (1987), which, after paragraphs demanding that a cease-fire be observed and requesting the Secretary-General of the United Nations to dispatch a team of observers, reads:

"Urges that prisoners of war be released and repatriated without delay after the cessation of active hostilities in accordance with the Third Geneva Convention of 12 August 1949".

Many of those prisoners had not been registered, and the International Committee of the Red Cross (ICRC) was unable to visit them under the arrangements provided for by the Third Convention; a persistent obstacle to their repatriation was the insistence of certain parties on prior settlement of other (military and political) points in the negotiations. ICRC nevertheless considered that the conditions for complete repatriation of all these prisoners were fulfilled, pursuant to article 118 of the Third Convention, the first paragraph of which clearly stipulates:

"Prisoners of war shall be repatriated without delay after the cessation of active hostilities."

Pending a full-scale repatriation, humanitarian measures also incumbent on the parties in accordance with their obligations under the Third Geneva Convention - such as the obligation to release the names of prisoners, to authorize ICRC to visit them, to organize the repatriation of wounded and sick prisoners, or even to take voluntary humanitarian measures in favor of prisoners of war who are minors or who have been imprisoned for a long time - are gestures of goodwill that can only serve to promote further gestures of the same kind.

Humanitarian law lies at the heart of peace, focusing as much on maintaining peace as on restoring it. Breaches of humanitarian law aggravate and prolong conflicts; on the other side of the coin, application of the law mitigates and shortens conflicts. Let us consider these two observations.

The Contribution of Humanitarian Law to the Maintenance of Peace

The role of humanitarian law in maintaining peace is clear from the fact that many conflicts, both internal and international, have been sparked

by serious violations of humanitarian law. Massacres of civilian populations in the Middle East, Latin America, Indochina, and Europe inflamed hatred and passion rather than imposing fear and submission⁴⁹. Furthermore, breaches of humanitarian law have accounted for the spreading of conflicts. For example, refugees, victims of persecution in their homeland, often bring to neighboring or more distant countries the violence to which they were subjected.

Even during internal armed conflicts, population displacements are strictly prohibited. Article 3 common to the 1949 Geneva Conventions and their Additional Protocol II of 1977 contain rules which, if respected, would have the direct effect of significantly reducing the number of refugees and internally displaced persons, and victims in general⁵⁰. Respect for International Humanitarian Law would also imply the separation of combatants from civilians, disarming camps, careful siting of refugees, preventing combatants from using refugees for cover or aid supplies⁵¹.

International Humanitarian Law is applicable no matter how righteous the causes are for which the two sides are fighting. Violations of humanitarian law were at the root of Security Council resolutions asking for international armed interventions in Somalia in 1992, and in Bosnia the

⁴⁹ During the Spanish Civil War, the bombings of Madrid aimed at the civilian population from October to December 1936 were abandoned because they failed to have the expected effect of terror, thereby confirming what had already been observed during the Sino-Japanese war: far from weakening a people's morale, such operations, which are condemned by international law, inspire fierce hatred, bringing the will to resist to a climax (cf. E. Warty, *L'Art de la guerre*, Verviers 1967, Vol. II, p.279). Similar conclusions have been drawn in official American reports as regards the bombing of Germany (The United States Strategic Bombing Survey, Overall Report - European War) and by the former German Minister of War, A. Speer, in his memoirs (*Au coeur du Troisième Reich*, Paris, 1971, p. 394 for the allied bombings on German towns and p. 399 for Germany's misguided policy of launching raids on British towns rather than concentrating on military objectives).

⁵⁰ Article 17 Protocol II ("Prohibition of forced movement of civilians").

⁵¹ Ben Barber, "Feeding Refugees, or War? The Dilemma of Humanitarian Aid", *Foreign Affairs*, Vol. 76/No 4 (Jul/Aug 1997).

attacks against the "safe areas" and the shelling of Sarajevo led to the NATO "Operation Deliberate Force" in 1995⁵².

Breaches of Humanitarian Law Leading to Conflicts

"Pacification" as an euphemism for genocide is the most extreme example of a breach of humanitarian law that leads to conflict, and is not only a question of terminology. History has demonstrated the illusory nature of the idea that a conflict may be shortened by resorting to torture or massacres, bombardments of civilian populations, or terrorist attacks against civilians. From World War II to this day, violations of humanitarian law have served merely to strengthen the adversary's determination to resist. They also have severely undermined the legitimacy of that party to a conflict which condones inhumane practices. As Albert Camus wrote during the Algerian War, one should be watchful "to fight for a truth without destroying it by the very means used to defend it."⁵³

Using the fate of prisoners of war as a pawn in peace negotiations, as was done at the end of the October 1973 war between Israel and Syria (the October/Yom Kippur War), is a serious abuse that has proved to be counter-productive in both the short and the long term. As ICRC stated in December 1973:

⁵² Adam Roberts, *Humanitarian Action in War. Aid, protection and impartiality in a policy vacuum*. Oxford, Oxford University Press, 1996, 96 p. (Adelphi Paper 305). As for Somalia, see the Security Council Resolution S/RES/794 (1992) of 3 December 1992, and especially paragraphs 4 and 5 and this preambular paragraph: "Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security". The report of the Secretary-General of the UN on "The causes of conflict and the promotion of durable peace and sustainable development in Africa" (S/1998/318), of 13 April 1998, highlights the importance of abiding by international humanitarian law in paragraphs 49 to 54.

⁵³ "Se battre pour une vérité en veillant à ne pas la tuer des armes mêmes dont on la défend": (Actuelles, III, Chroniques algériennes [1939-1958], Paris, 1958, p.24.

"The commitments arising out of the Geneva Conventions are of a binding and absolute nature. Under those commitments, each State unilaterally undertakes, vis-à-vis all other States, without any reciprocal return, to respect in all circumstances the rules and principles they have recognized as vital. These do not involve an interchange of benefits but constitute a fundamental charter that proclaims to the world the essential guarantees to which every human being is entitled.⁵⁴"

Breaches of humanitarian law leave lasting and often serious after-effects, which hinder the return to civil and international peace, a fact witnessed during the American Civil War⁵⁵, on the Eastern Front in World War II, in the Pacific between American and British on one side and Japanese on the other, between Japanese and Chinese, and in the Middle East.

Humanitarian issues that are not resolved during the conflict often handicap the restoration of peace between former adversaries; only when they are settled can normal political and economic relations be resumed, sometimes many years after the cessation of hostilities. The

⁵⁴ See the International Review of the Red Cross, December 1973, p. 641 ("The International Committee's Action in the Middle East").

⁵⁵ James Reston Jr., *Sherman's March and Vietnam*, New York 1984, evokes "General William Tecumseh Sherman's "March to the Sea" when civilians and their communities were ravaged and, in the Civil War's aftermath, the festering bitterness of Reconstruction", adding that still today "in the south, the mere mention of Sherman elicits an instant emotional response" ... On the same conflict, the war of annihilation against the South, see also James M. McPherson, *Battle Cry of Freedom*, Oxford 1988. Very relevant, even today, here is the statement by the Chairman of the Security Council on 11 November 1976 to the 1969th meeting (S/INF/32, p.5), in which paragraph 3 reads: "3. To reaffirm that the Geneva Convention relative to the Protection of Civilian Persons in Time of War is applicable to the Arab territories occupied by Israel since 1967. Therefore, the occupying Power is called upon once again to comply strictly with the provisions of that Convention and to refrain from any measure that violates them. In this regard, the measures taken by Israel in the occupied Arab territories which alter their demographic composition or geographical character, and in particular the establishment of settlements, are strongly deplored. Such measures, which have no legal validity and cannot, prejudice the outcome of the efforts to achieve peace, constitute an obstacle to peace..."

issues of mistreatment of POWs, MIAs, and several thousand Eurasian children, and the case of former "reeducation camp detainees," paralyzed the relations between the United States and Vietnam for some twenty years after the end of the war.

The Contribution of Humanitarian Law to the Restoration of Peace

The role of humanitarian law in restoring peace is twofold. It leaves open the possibility of dialogue, thus averting degradation by excessive violence both between international adversaries and among one's own population. And it aims to solve humanitarian problems (refugees, prisoners, disappeared, missing in action, and so forth) that can become serious political issues.

Application of Humanitarian Law to Shorten Conflicts

Well before the first signs of political negotiation, humanitarian gestures help, informally, to institute a minimum of dialogue between adversaries. Such dialogue may result in cease-fires, often tacit, between enemy positions, to evacuate the dead and wounded; truces to let civilians out or supply them with food and medicines; or contacts to exchange news of the latest captures or even to exchange prisoners. A humanitarian truce may lead to a complete halt in the fighting. In Santo Domingo in 1965, for instance, the joint efforts of the ICRC delegate, the president of the local Red Cross, and representatives of the United Nations and of the Organization of American States succeeded in halting the fighting for twenty-four hours in order to collect the wounded; during that time negotiations were held that put a final end to the armed clashes.

In the case of the Nigerian civil war, a historian points out:

"For the Federal Government, relief per se was not the issue. Shortly after the war broke out the International Committee of the Red Cross asked for permission to penetrate the federal blockade and fly a plane load of medical supplies into Port Harcourt. General Gowon immediately approved the request and throughout the war remained committed to the principle of allowing food and medical supplies to reach the civilians in Biafra, he supported these endeavors in order to alleviate the human suffering, to promote international good will, and to facilitate what he always believed would be the inevitable transfer of popular allegiance from Biafra to Nigeria once peace was restored⁵⁶".

Humanitarian clauses are the first ones adversaries wish to negotiate. For example, the provisional government of Algeria sought first of all to negotiate a "special agreement" with the French government, under Article 3 common to the 1949 Geneva Conventions, and then, after Paris refused, initiated the procedure for accession to the Four 1949 Geneva Conventions⁵⁷. In 1984, in La Palma, El Salvador, the first item in the negotiations between the government and the guerrillas was "to humanize the war"⁵⁸. The first contacts between Soviet representatives and mujahideens in Afghanistan dealt with the plight of prisoners of war.

⁵⁶ J.J. Stremlau, *The International Politics of the Nigerian Civil War, 1967 - 1970*, Princeton: Princeton University Press, 1977, p. 205.

⁵⁷ See Mohamed Bedjaoui, *La Révolution algérienne et le droit*, Brussels 1961.

⁵⁸ These efforts still continue and are also receiving the support of outside governments. Also relevant here is Resolution 43/145 adopted by the United Nations General Assembly ("Situation of human rights and fundamental freedoms in El Salvador"), which contains a preambular paragraph recalling the applicability of Article 3 common to the Conventions of 1949 and Protocol II of 1977, and an operative paragraph 11 with the following wording "Requests the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional - Frente Democrático Revolucionario, with a view to humanizing the conflict, to continue ensuring that the agreements for the evacuation of the war-wounded and war-injured for medical attention will not be made contingent on further prisoner exchanges and negotiations".

The first talks between various warring factions in former Yugoslavia, held in Geneva in 1991 under the auspices of ICRC, focused on humanitarian issues (exchanges of prisoners and relief supplies to civilians). More recently, the release of Nelson Mandela from prison in 1990 paved the way for the negotiation of a peaceful settlement of political issues in South Africa.

The treatment of prisoners plays an important role in the return to peace, as does the treatment of civilian populations. Repatriation of refugees is an essential component in the restoration of peace, but is exceedingly difficult if villages have been razed, and roads and fields strewn with mines. The question is highly relevant today for hundreds of thousands of Afghan, Angolan, Burundian, Cambodian, Mozambican and Rwandan civilians.

The scourge of anti-personnel mines continues to kill and to maim indiscriminately thousands of innocent civilians every year, and especially refugees and internally displaced persons. Mines are not only a cause of displacement, they also constitute one of the chief obstacles to the return of entire populations once the fighting is over.

Physical suffering is very often accompanied by mental trauma due largely to the separation imposed by captivity. Similarly, the virtual absence of any system of notifying deaths could leave countless families in a state of uncertainty concerning the fate of their relatives. Restoring family ties, providing family messages and reuniting families, according to the provisions of humanitarian law, are an important factor in healing war sufferings⁵⁹.

⁵⁹ Article 123 of the Third Geneva Convention and Article 140 of the Fourth Geneva Convention create the obligation, in times of armed conflict, to set up an agency to collect all the information it may obtain through official or private channels on prisoners of war and all other persons protected under international humanitarian law,

In non-international conflicts, amnesty in fact corresponds to an essential feature of prisoner-of-war status - namely, impunity for participation in the hostilities. It may also be a powerful means of relieving antagonism; a measure of national reconciliation following a crisis; or a political solution to a crisis, to encourage partisans of armed struggle to turn (or return) to democratic forms of political struggle⁶⁰. It is, indeed, with this in mind that article 6, paragraph 5, of Protocol II of 1977 invites governments "to grant the broadest possible amnesty to persons who have participated in the armed conflict." The object of this provision, according to the ICRC commentary on Protocol II, "is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided."⁶¹ The same question also arises at the international level: should one prolong hatred and punish criminals (on the losing side), or wipe the slate clean and decree, as in the Treaty of Nimeguen of 1678, an official "act of forgetting"⁶²?

Today, the question of whether priority should be given to pardon or to criminal prosecution is still a subject of negotiations. When Bangladesh was created after a war between India and Pakistan, criminal proceedings against 195 Pakistani prisoners of war and civilian detainees held for violations of humanitarian law (accusations of genocide) were curtailed: Pakistan made full repatriation of all prisoners, without

particularly the civilian population. See G. Djurovic, *The Central Agency of the International Committee of the Red Cross*, Geneva: ICRC, 1986.

⁶⁰ Louis Joinet, Special Rapporteur to the Human Rights Commission, "Study on Amnesty Laws and their role in the safeguard and promotion of human rights" (E/CN.4/Sub.2/1984/15, para. 30).

⁶¹ Sylvie-Stoyanka Junod, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva: ICRC, 1987, p. 1402, para. 4618.

⁶² Alfred M. de Zayas, who gives this example in his article "Amnesty Clause", in: *Encyclopedia of Public International Law*, Vol. 3, 1982, p. 15, also quotes Article 2 of the Treaty of Utrecht of 1713, Article 2 of the Treaty of Aix-la-Chapelle of 1748, Article 2 of the Treaty of Paris of 1763, Article 2 of the Treaty of Westphalia of 1648, Article 16 of the Treaty of Paris of 30 May 1814, and the mutual amnesties concluded between France and Algeria in the Evian Agreement of 19 March 1962.

exception, a condition for peace negotiations. The matter was brought before the International Court of Justice by Pakistan, and later, with the agreement of the parties involved, was struck from the register⁶³.

The provisions of the 1949 Geneva Conventions - reaffirmed in 1977 - would no doubt be sufficient to punish the violations that still occur in many conflicts. Actual prosecutions have been rare and unilateral events. Nevertheless, governments party to the 1949 Conventions (practically all members of the United Nations) should not too easily escape their responsibility to prosecute violators of humanitarian law: the preventive role of the effective use of the universal jurisdiction provided for in the 1949 Geneva Conventions for all States Party could contribute not only to justice but also to peace. The experiences of the International Criminal Tribunals for the former Yugoslavia and for Rwanda have proved constructive in many respects, despite the difficulties encountered⁶⁴ and will undoubtedly be of valuable assistance in the discussions now under way with a view to setting up a permanent international criminal court with universal jurisdiction⁶⁵.

Conclusion

Humanitarian Law: A Sum of Experiences

Humanitarian law, both customary and treaty law, is a sum of real-life experiences. It is based on warnings against the destructions of war, and advice on how to overcome difficult choices and avoid tragedies that

⁶³ Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973, p. 347.

⁶⁴ See: Paul Tavernier: "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda" in the International Review of the Red Cross, 1 November 1997, and Gerhard Erasmus and Nadine Fourie: "The International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?" in the International Review of the Red Cross no 321, p. 705-715.

⁶⁵ See the website of the NGO Coalition for an International Criminal Court: <http://www.igc.apc.org/tribunal/>.

have become increasingly deadly as modern means of destruction have become more powerful and the number of protagonists involved has grown.

One should use the dynamic role of humanitarian action to disarm the adversary, or, in the words of Sun Tzu, "build a golden bridge to the retreating enemy."⁶⁶ The military, political, and economic effectiveness of humanitarian behavior - on top of the fact that such behavior is consistent with ethical requirements - should be constantly emphasized, in the hope that we may finally move on from chaos to peace, from internecine strife to dialogue. Octavio Paz writes:

Hölderlin sees history as a dialogue. Yet that dialogue has always been interrupted by the sound of violence or the monologue of chiefs. Violence exacerbates differences and prevents us from talking and listening. Monologue is the negation of others; dialogue does of course maintain differences, but it provides an area within which alterities coexist and become interleaved. To establish such a dialogue, we have to affirm what we are while at the same time recognizing others and their inherent differences. Dialogue prevents us from denying ourselves and from denying the humanity of our adversaries⁶⁷.

This perspective has much in common with the Dalai Lama's declarations and writings on the vital necessity of compassion in order to cope with today's difficult challenges:

⁶⁶ See Samuel Griffith, in his excellent translation of Sun Tzu, *The Art of War*, Oxford, Oxford University Press, 1980: II.19. Treat the captives well, and care for them. III.1. Generally in war the best policy is to take a state intact; to ruin it is inferior to this. III.2. To capture the enemy's army is better than to destroy it; to take intact a battalion, a company or a five-man squad is better than to destroy them.

⁶⁷ Octavio Paz: *Tiempo Nublado, One Earth, Four or Five Worlds: Reflections on Contemporary History*. San Diego, Calif.: Harcourt Brace Jovanovich, 1985.

A leitmotiv: compassion, compassion, compassion, which enables peace to be achieved, both individual, and collective. Altruism is the key to universal peace. It is the only option in today's planetary debacle. It is a matter of life and death for humanity⁶⁸.

The problems we face today - violent conflicts, destruction of nature, poverty, hunger, and so on are mainly problems created by humans. They can be resolved - but only through human effort, understanding and the development of a sense of brotherhood and sisterhood. To do this, we need to cultivate a universal responsibility for one another and for the planet we share, based on good heart and awareness⁶⁹.

The Letter and the Spirit

The letter of humanitarian law is essential. It must, however, be applied in the proper spirit: for the benefit of victims, rather than to serve transient interests. It is not only legal experts who can understand humanitarian law; every human being is capable of grasping its fundamental principles. Pierre Boissier, founder of the Henry-Dunant Institute, used the following method in training new ICRC delegates in the Geneva Conventions: he gave his students a blank page and asked them to re-write in their own words the essence of the Four Conventions, placing themselves, in turn, in the position of the wounded (First Convention), the shipwrecked (Second Convention), prisoners of war (Third Convention), civilians in an occupied territory (Fourth Convention), and enemy forces. This powerful maieutic ploy brought out the essential provisions of

⁶⁸ "La compassion, pilier de la paix mondiale": Lecture at the University of Geneva, 31 August 1983.

⁶⁹ Freedom in Exile. The Autobiography of the Dalai Lama. Calcutta: 1992.

instruments that seem at first sight extremely complex and difficult, but then, as individuals respond to vital requirements, are easily understood.

Towards a Global Concept of Humanitarian Action

Humanitarian law has evolved from a law protecting only certain categories of individuals (from the medieval knights to today's prisoners of war), to a set of provisions ensuring fundamental human rights guaranteeing the survival of civilian populations in wartime.

Humanitarian instruments in force form part of international law and are interlinked with the system of international security, whether for arms control or for peaceful settlement of conflicts. They have still to be replaced in the general context of the development of co-operative relations at the political and economic levels.

Humanitarian action cannot be confined to exceptional or emergency situations. Different actors (individuals, organizations, and governments) will be involved in different situations, each most effective in one particular sphere of activity. According to International Humanitarian Law, ICRC plays the unique role of neutral intermediary between parties to the conflict: "through humanity to peace" could be the motto of ICRC in many operations today.

Nevertheless, no one should lose sight of the problem as a whole and, in particular, of how their actions are inter-related with those of others⁷⁰. At the same time, implementing humanitarian law facilitates a return to peace and the reconstruction of a country, and emergency relief organizations (like ICRC) will give way to development organizations (such as the United Nations Development Program, the World Bank, the

⁷⁰ For instance, decisions by the International Monetary Fund, a typical "peace" organization, may have caused riots or even civil war in some Third World countries.

WHO, the FAO, and others, including the other components of the International Red Cross and Red Crescent Movement⁷¹ and the increasing role of non-governmental organizations, on the national and international level).

The fundamentals of humanitarian law may be thought of as forming part of a wheel of co-operation⁷², responsibility⁷³ and accountability⁷⁴. The initial stage is the emergency situation, in which survival is paramount; reconstruction and development follow, and then, the building and maintaining of a balanced, sustainable economy; the next stage is the pursuit of peace, with efforts such as those of the United Nations and regional and sub-regional organizations; legal mechanisms follow for the settlement of conflicts, in the form of international treaties and national constitutions; the final stage is the attainment of the ideals of humankind⁷⁵. The fundamental principles of the Red Cross, namely,

⁷¹ See Resolution 8 ("Peace, International Humanitarian Law and Human Rights") of the Council of Delegates (Sevilla, 25-27 November 1997).

⁷² François Grünewald: "From prevention to rehabilitation: action before, during and after the crisis: the experience of the ICRC in retrospect": Article based on a study presented to the Colloquium: "Emergency - Rehabilitation - Development". Arche de la Fraternité, Paris, 17 November 1994 in the International Review of the Red Cross no. 306, p. 263-281.

⁷³ Peter Fuchs: "Conflict and the global economy: towards a new sharing of responsibility": Address by Dr Peter Fuchs, Director General, International Committee of the Red Cross (ICRC) at the Hôtel Baur en Ville, Zurich, 29 February 1996.

⁷⁴ See Article 1, Common to the four 1949 Geneva Conventions: "the High Contracting Parties undertake to respect and to ensure respect for this Convention in all circumstances".

⁷⁵ These ideals could be social, political and/or spiritual and should not divide but unite. As Bede Griffiths writes in *Return to the Center*, Springfield, Illinois, Tempelgate 1977, p. 71: "I have to be a Hindu, a Buddhist, a Jain, a Parsee, a Sikh, a Muslim, and a Jew, as well as a Christian, if I am to know the Truth and to find the point of reconciliation in all religion". Hans Küng also considers that international peace presupposes peace between religions. See: Hans Küng, *Projekt Weltethos München*, Piper, 1990, 191 p. and Hans Küng (ed.) *Ja zum Weltethos. Perspektiven für den Such nach Orientierung. (Global Responsibility. In Search of a New World Ethic)* München, Piper: 1995, and his statement on the "Declaration Towards a Global Ethic" on http://kvc.kit.nl/kvc/ukverslag_kung.html as "a minimal basis consensus relating to binding values, irrevocable standards and moral attitudes, which can be affirmed by all religions despite their 'dogmatic' differences and can also be supported by non-believers". "A better world order will ultimately only be created on the basis of:

- common visions, ideals, values, aims and criteria;
- heightened global responsibility on the part of peoples and their leaders;

humanity, universality, neutrality, independence, service, unity and impartiality could provide useful guidelines for organizations engaged in humanitarian action, not only for the Red Cross and Red Crescent Movement.

Humanitarian law and its principles thus form part of a chain of solidarity: at the height of a conflict, with the necessary support of other political and economic measures (military peacekeeping and peacemaking measures should normally be kept separate from humanitarian activities - at least humanitarian activities by non-UN organizations, especially from ICRC) and efforts to mobilize public awareness, they often constitute a vital link contributing to the restoration of peace. As President Abraham Lincoln said, "Do I not destroy my enemies when I make them my friends?"⁷⁶

Guinea-Bissau: ICRC Acts as Neutral Intermediary

16 October 1998. ICRC News Release 98/41

The members of the delegation representing the opposition forces at peace talks on Guinea-Bissau that took place in Abidjan in mid-September were stranded for three weeks in Banjul, Gambia, after problems arose in obtaining safety guarantees for their return by air over the zone held by Guinea-Bissau government troops. The Guinea-Bissau

- a new binding and uniting ethic for all humankind, including states and those in power, which embraces cultures and religions. No new world order without a new world ethic, a global ethic".

⁷⁶ Quoted in Martin Luther King, Jr., *Strength to Love* (Cleveland: North Light Books, 1963), p.53. See also this quote by Martin Luther King: "The chain reaction of evil - hate begetting hate, wars producing more wars - must be broken, or we shall be plunged into the dark abyss of annihilation. Far from being the pious injunction of an utopian dreamer, the command to love one's enemy is an absolute necessity for our survival...".

authorities therefore asked the ICRC, which has been present in the country since the rebellion began, to arrange for the delegation to travel between the capital Bissau a seaport and therefore accessible from international airspace and the rebel-held area. Acting as a neutral intermediary, the ICRC obtained the consent of both parties for its plan to provide safe passage.

The operation took place on 8 October with the cooperation of diplomats from the countries that had taken part in the talks. The opposition representatives arrived by helicopter at the national stadium in Bissau, under government control, then travelled the dozen kilometers to the front lines in a convoy of several vehicles displaying the protective red cross emblem, before proceeding to an air force base under opposition control.

Protection of Civilians in Armed Conflicts

*Issa Ahmadabadi**

Abstract

In the past, wars and armed conflicts were not considered as taboo, but as accepted methods and tools for settling disputes and differences among states. Previously it was believed that legality of wars and conflicts lied in their justice-based reasons and roots. Therefore even the most violent conflicts were always justified as acceptable, proper and even sacred incidents. But as we got closer to the twentieth century, the just war theory became more diluted.

According to the contemporary thinking, armed conflicts and wars were evident from the very beginning of human creation. This is an undeniable reality; all religions, schools of thought and philosophies and all legal experts in the course of history, accept this unpleasant reality, and have always tried to regulate wars and armed conflicts by preparing a set of rules in order to avoid or limit inhuman acts of hostility.

International Humanitarian Law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons and properties that are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Through the international conventions and the law governing armed conflicts and existing related Islamic law we can see clearly that most roots of rules of war in general and other humanitarian laws as well as the rights of individuals have already been stressed upon in the Islamic commandments and teachings to the extent that a number of thinkers today believe that international rules have been extracted from the same Islamic resources.

* Issa Ahmadabadi is a PhD student at Azad University, Iran (issa.ahmadabadi@gmail.com).

Introduction

Since “being a civilian is the major factor in the authentication of occurrence of war crimes, crimes against humanity or mass destruction”¹, there is a need for careful study of this expression. In Islam, civilians are those who do not play any active roles in a conflict and as they do not take part in the war, they are counted as non-fighters and their rights are respected. As it is stated in the explanation Al-Sear; a fighter is the one with the potency of fighting”². This definition is different from what has been stated in the International laws, as in the International laws “a civilian is the one who’s not a member of the armed forces on the flanks of a conflict.”³ However, for a better understanding of the definition of “people” or “the civilian population”, one should refer to the first additional protocol 1977⁴, as it was through this protocol that a definition of “members” and “the civilian population” was obtained and vivid legal commitments were provided concerning compliance with differentiation principles and banning attacks on the civilian. Article 50 of the protocol, in the definition of “the civilian” provides that “those people are counted as civilians who do not belong to any of the classifications of the people mentioned in the clauses 1, 2, 3 and 6 of Article 4 of the third convention (related to the prisoners of war)⁵ and Article 43 of the present protocol.” Due to this definition of the civilian population, it can be said that the civilian population includes all

¹ Dyhayen, Alireza, A Review on the International Criminal Law, first edition, Tehran, Ministry of Foreign Affairs, 1380, p. 60

² Sarakhsi, Ahmad-Ibne-Mohamad, Seyr-Alkabir Explana on, Volume 4, first edition on, Beirut, Dar-Alkotob-Alelmieh, 1417, p.78

³ Antony. P. and Rogers Paul Malreb, Applicable Rules of International Humanitarian Law, translation: National Committee of Humanitarian Law, first edition, Tehran, Amir Kabir, 1382, p.53

⁴ Protocol additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of International Armed Conflicts, (protocol1), 1125, UNTS3. For Farsi text, refer to: National Committee of Humanitarian Law, Introduction on International Humanitarian Law, Tehran, Red Crescent Society of Islamic Republic of Iran, first edition, 1381, p.215, also refer to: <http://www.nokhbeh.ir>

⁵ Convention (III) relevant to “The Treatment of Prisoners of War”, Geneva, 12 August 1949. For the Farsi text, refer to: National Committee of humanitarian law, Introduction on International Humanitarian Law, previous, p. 79, also refer to: <http://www.nokhbeh.ir>

the people who are civilian and a civilian is the person who does not belong to any of the different types of fighters and the inherently civilian population is the population that never participates in armed conflicts⁶.

Support for civilian populations have been considered in many of the International Humanitarian Laws, in conventions and international documents, and many of the resolutions of the Security Council and the General Assembly, and in the international judicial procedure; such as the verdicts of the Nuremberg court⁷, the votes of the international court of justice⁸, special courts for the former Yugoslavia and Rwanda⁹ and the statute of the international criminal courts. They all emphasize the point that supporting the civilian population is one of the basic principles that form the International Humanitarian Laws and banning attacks on the civilian people or populace is one of the fundamental and civil rules of these laws and is necessary to be obeyed in all conflicts. It must also be noted that supporting civilians is given considerable importance in Islam. This is evident when we take a glance at the historical documents and the wars that took place at the time of Islam's rise (the 7th century AD). It is very obvious that people in those days were passing their bitterest and most depressing days specifically at the time of armed conflicts and with

⁶ Katy Sheeyesri, Keriang Sak, *International Criminal Law*, translator: Behnam Yoosefian and Mohamd Esmā'ili, first edition, Tehran, Reading and Editing Organization of Humanity Science Book of Universities. 1383. p. 295

⁷ This court was held by four winner governments of England, France, USSR, and the US, to which Germany had surrendered with no conditions, in order to judge the criminal military leaders of Nazi after the second world war, after the occupation of Germany by Allies, based on the agreement of the 8th of August 1945 London. It was held on behalf of all countries and sixteen other countries announce their support afterwards.

⁸ International Court of Justice (ICJ).

⁹ Following the assassination attempts against the president of Rwanda (Juvénal Habyarimana) and him getting killed in an airplane crash, two tribes of "Hutu" and "Tutsi" in this country, in 1994, had a conflict and hundred thousands were killed during four months. This event resulted in the Security Council holding a special court to judge those guilty of massacre or severe attack to humanitarian law in Rwanda- due to the declaration on 955 dating back to 8 November 1994- and also judging citizens of Rwanda who were guilty of committing such crimes or attacking the neighboring countries from the first of June to the 30th of December 1994.

the war being acceptable as a tool for dominating others, the only domineering logic in countries' relations, was the logic of "might is right" and there were no humanitarian laws to dominate the armed conflicts; vandalism, violence, and slaughtering the dead bodies were not out of ordinary; there were no differences between the armed and the civilian, and while the fire of war started there would be no differences between properties and armed people and the civilian and no delimitation for damage and destruction. In such days, Islam rose to pass the message of friendship and peace to man's thirsty spirit and to fill the moral and legal vacuum of man in those days.

In Islamic humanitarian education, the first principle is that while conflicts are taking place, as far as possible, the approaches which prevent war and killing people, must be adopted; as Great God in inspiring and encouraging Muslims towards peace says: "in case they (the enemies) are willing to keep the peace, you make peace either and trust God.¹⁰" And in another verse, while emphasizing on this basic principle says: "if they remained aloof from you and did not battle against you and offered peace, in this case God does not allow you to fight against them¹¹." Due to the general principles of the humanitarian laws in Islam, the foes are counted as people with the potential of being guided and directed towards the truth and fact and during armed conflicts in any nature or form, it is a duty to differentiate between two groups of people; that is the armed and the civilian and conflict is only allowed among the armed forces and in Quran it has been explicitly announced that: "in God's path, battle against those who battle against you and do not violate this since God does not like violators¹²." And "...anyone who attacked you, you attack him the same way as he did; and fear God

¹⁰ Enfal Sura, verse 61

¹¹ Nesa Sura, Verse 90

¹² Baghareh Sura, Verse 190

and know that God is with the abstinent¹³". This verse and other verses are clear denotations for the fact that one must differentiate between the two groups of the armed and the civilian.

It is in this divine religion that for the first time, the children, women, the elderly and the people who need support are given a shelter and centuries later, in international conventions, under the support of the humanitarian laws, these provisions have been taken into consideration.

Therefore, civilian people and population are granted public protection against the danger of the conflicts and military operations; generally supporting the civilian means that any type of blind and aimless attack with the purpose of making the civilian population vanish or spreading fear and terror among them, is strictly forbidden; as historical evidence shows, Imam Ali in wars, would strictly prevent attacks on children and families that are true examples of the civilian¹⁴. And in numerous cases, too, in His instructions to Islam's commanders, He would strongly prohibit committing such acts.

So the protection of those people who do not participate in armed conflicts directly is of fundamental importance and there are binding rules in the Islamic legal system. This has also been recommended by the Prophet and his other Caliphs; as Amir-al-Momenin, Ali in his instructions to one of his commanders; while being dispatched to the front lines, states: "except for those who fight a battle against you, do not step into a battle against anybody."¹⁵

¹³ Previous, Verse 194

¹⁴ Ibn Shahr Ashoob, *Managheb-Al-Abi-Taleb*, volume 2, Almatba'elHeydariéh, 1376, p. 363.

¹⁵ Seyed Razi, *Nahjol-Balaghe*, Shareh-Mohamad-Abdeh, volume1, Beirut, Dar-alma'refah- Leltaba'e-Va-Nashr, p. 36

Supporting Specific Strata in Islamic and International Humanitarian Laws

In Islam's point of view, man possesses inherent dignity and this is based on the fact that since the beginning of creation, the Great God has granted reverence to man and by giving him the land and the sea, He has provided clean food and in this way He has granted excellence to man rather than other creatures¹⁶. And the philosophy of this reverence is because of man owning a divine spirit and thereby angels prostrating themselves before him¹⁷.

Of the social consequences of man's inherent dignity is his right to live among the fauna and his peers. All the people of the human dignity equally share this right. This right, as a universal concept, has been taken into consideration and the Universal Declaration of Human Rights¹⁸ has emphasized on it¹⁹. The pure essence of dignity is an integrity whose protection depends upon human actions and behavior and it is respected until no crimes have been committed and no mischief made²⁰.

In Islamic humanitarian laws, beside this general support that is due to all human individuals, specific support has also been provided for some civilian strata; such as children, women, the elderly and the monks. All the orders of God's prophet vividly denote that no conflicts with such people should arise. In Islam, the Prophet's way of living and his Caliphs, commitment to these principles is counted as a part of the divine duty; as it has been mentioned in Ibn Hisham's ways of living: "...then the prophet ordered Bilal to pass the flag to Abdurrahman Oaf and he did

¹⁶ Asra Sura, Verse 7

¹⁷ Hajar Sura, Verse 30.

¹⁸ Universal Declaration of Human Rights

¹⁹ Article 1 of the international declaration of human rights: "all men are born free and are equal in rights and status; all possess mind and conscious and must treat each other brotherly."

²⁰ Hashemi, Seyed Mohamad, Fundamental Rights of Islamic Republic of Iran, volume 1, Tehran, Shahid Behesh University, first edition, 1374, p. 72

so, then the Prophet praised and thanked the essence of God and requested blessings for himself and said: "Hey, Oaf's son, take the flag. All of you fight in God's path, and struggle with those who've got no faith in God; do not undermine integrity or commit treason against any one and do not murder children or women, this Godlike covenant and his Prophet's lifestyle is for your guidance."²¹

After the Prophet, the rest of his Caliphs would also respect this lifestyle; as Hazard Ali in one of his letters in Nahjolbalaghe, while focusing on the ethical conduct during the war; states: "do not harm him, who is not capable of defending himself."²² Ibn Hanbal states: "Also Abu-Bakr behaved in the same way as the Prophet in war and after him Omar became the Caliph and behaved in the same way as both of them."²³

Paying attention to teachings of this divine religion explicitly denotes this fact that it is impossible not to notice the influences of these divine rulers on the provisions of the International Humanitarian Laws. In the coming discussions this point will be expanded further.

First Topic: Children

International documents have paid significant attention to the issue of supporting children; since they can be recognized as the most vulnerable stratum of innocent people who are seriously harmed during armed conflicts.

According to a report by the United Nations Children's Fund (UNICEF), during the last decade, more than two million infants have died or been

²¹ Ibn-Hisham, Sireh-Nabi, volume 3, Maktabat Mohamad Ali SabihVaOladeh, 1383, p. 922.

²² Nahj-Albalagheh, letter14, translator: Mohamad Dash, Qom, Cultural Research Institute of Amir-Almomenin, second edition, 1380, p. 494.

²³ Ibn-Habal, Ahamd, Mosnad, Beirut, Almaktabel-eslami, 1055.

murdered under the direct influence of war²⁴. Every year almost six thousand children are killed or disabled from explosion of landmines. According to another report of the UNICEF, considering the existing estimations, eighty to ninety percent of the people killed or injured because of armed conflicts have been civilians and mostly women and children²⁵.

Children have been kidnapped during conflicts and like slaves they suffer from violent sexual, physical and mental exploitation²⁶. Nowadays, one hundred thousand infants in more than forty-one countries around the world, particularly in Asia and Africa, are engaged in armed conflicts. Most of these children, from the age of ten or sometimes even at a lower age, have been recruited by the armed forces. In many of these countries, girls are being utilized as soldiers just like boys and are often subjected to sexual assault and violation²⁷. Such phenomenon has been lucidly rampant in Uganda and Sudan. In these regions, girls aged twelve are given to commanders as mates. Reports from Uganda indicate that eighty five percent of the girls in the North of Uganda, who have been enslaved by rebel forces, have contracted different types of sexually transmitted diseases and AIDS.

It is here that the dire need of peace treaties and agreements for identifying the infant soldiers and providing the essential facilities for discharging them is felt²⁸. For the first time, in the sixteenth declaration of the society of nations in September 1924, supporting children was

²⁴ www.unicef.org/publications/index_4291.html

²⁵ www.unicef.org/sowc01.

²⁶ International Bureau for Children's Rights (1999), "international Dimensions of the Sexual Exploitation of the Children", The Global Report, IBCR, Canada, p. 18

²⁷ Lindsey, Ch. (2001), "Women and War: The Detention of Women in the Wartime", International Review of the Red Cross, No 842, pp 505-520.

²⁸ O'Connell Davidson, Julia (2001), "The Sex Exploiter", available at: www.focalpointngo.org/yokohama/themepapers/theme4.htm, p.15, 29 XLVII.

earnestly proposed. As this declaration, known as “Geneva Declaration”, was ratified; in the introduction and its five provisions, it has paid particular attention to the physical and mental support of children. After the Geneva Convention in 1949 and its additional protocols in 1977, on 20th of November 1989, the UN declaration on children’s right was ratified and it emphasized on the Geneva Declaration.

In the resolutions 2444 (23) December nineteenth 1968, 2597 (24) December sixteenth 1969, 2674 (25) and 2675 (25) December ninth 1970, the issue of supporting human rights and the fundamental principles with regard to supporting civilians during armed conflicts has been mentioned. In the resolution 1515²⁹ of the Economic and Social Council, which dates back to the 28th May 1970, the UN General Assembly was requested to compile a declaration with regard to supporting women and children at the time of crises or war and as an answer, the General Assembly, on the 14th of December 1974, ratified the declaration of supporting women and children at the time of crises and armed conflicts. According to the 77th provision of the first protocol added to Geneva Convention 1977, infants must be especially respected and must be defended against any “disrespectful”³⁰ offence and in case they need assistance for any reason, either age or any other reason, the flanks of the conflict must supply them with facilities for the demanded care and attention.

In the teachings of Islamic humanitarian rights also, killing children has been strictly forbidden. This prohibition can be clearly seen in the Prophet’s orders and his Caliphs’ to the commanders of Islam’s corps that were setting off for a fight³¹; for instance, in an oration of Imam

²⁹O’Connell Davidson, Julia (2001), “The Sex Exploiter”, available at: www.focalpointngo.org/Yokohama/themepapers/theme4.htm, p.15, XLVII.

³⁰Independent Assault

³¹ Allameh-Helli, Vasa’el-Alshia, volume 11, Beirut, Dar AlehyaAltrathAlarabi, Bab 15, p. 43.

Sadegh he quotes from the Prophet that he said: "Battle against the polytheists; but do not harass their elderly and children."³²

While reasoning out this order of the Prophet in which he said: "do not murder any woman or child"³³, Sarakhsi says: "here, the word 'born' has been used and it is obvious that any man is counted as 'born'; however, the purpose here is the child that's close to time of birth and of course the child who does not rise to fight."³⁴

In another occurrence, while sending forces to the Khyber to fight against the Jews as the Prophet was informed of the death of some children, he asked: " what forces you to murder children?"; they replied: "aren't the children born as polytheists?"; he said: "weren't your fathers born as polytheists?"³⁵

About not utilizing children in wars, there are various examples in the history of Islam that sending children of lower than 15 years of age was forbidden. In Ahad war, the Prophet allowed Samr-Ibn-Jandab and Rafe-Ibn-Khadij that were both 15 years old to be positioned among the shooters; and didn't permit people like Osama Ibn-Zeid and Abd-Allah-Ibn Omar who had not reached this age yet, to be involved in the war. However, in Khandagh War when the same people had reached the age of fifteen, they were allowed to participate in the war.³⁶

Years later, international laws emphasized on this point, too, that both of the flanks of an international armed conflict, should take all of the

³² Allameh-Helli, Vasa'el-Alshia, previous, Bab 18, p. 48.

³³ Alkashani, Abu-Bakr, Beda'e-Alsanaye, volume7, first edi on, Pakistan, Maktab-Alhabibeh, 1409, p. 10.

³⁴ Sarakhsi, Ahmad-Ibn-Mohamad, Seyr-Alkabir explana on, volume1, first edition, Beirut, Dar-Almaktab-alelmiyeh, 1417, p. 127

³⁵ Saghani, Abd-Alrazagh-Ibn-Hemam, Almonsef, volume5, Almajles-Ala'la publication

³⁶ Ibn-Hesham, Sireh Alnabi, volume 3, previous, p. 586

possible solutions into account so that the children of the age of lower than fifteen do not take part in the conflicts directly and especially to avoid recruiting and utilizing them as soldiers among their own armed forces. In this case, the second clause of Article 77 of the first additional protocol, ordains that: "the parties to the conflict, take all the possible measures so that those children who have not reached the age of fifteen yet, are not directly engaged in the conflicts and specifically to avoid conscripting them into the armed forces."

The prohibition ordained in part C of clause 3 of Article 4 of the second protocol, is even more precise; since it announces that: "children who are not 15 yet, are neither allowed to be recruited by the armed forces or groups nor to be involved in the conflicts."

Also in the 26th clause of Article 8³⁷ of the statute of the international court, mobilizing the children of under 15, forcefully or voluntarily, in the national armed forces or utilizing them in national armed forces for active cooperation in war work has been counted as war crimes. However, both protocols emphasize on the point that in case children participate in armed conflicts and become slaves, those countries that have enslaved these children should take all their rights and needed support into account. What needs to be noted here is that the lowest age for being involved in a war according to International Humanitarian Law has been chosen as 15, while this exact range of age had been chosen in Islam more than a thousand years ago and this denotes two noticeable facts: first of all, this range of age was picked by Islam in the situation where before the rise of Islam, the atheists would, in some cases, murder their children before their Idols and would merely count sons as their children who could be more influential in the battlefield and

³⁷ International Criminal Court (ICC)

hearing that a girl was born, they would feel incandescent with rage, although Islam has, in various cases, emphasized on letting children maintain their dignity besides providing them with specific support. The second point is that opting for the same age range in both international and Islamic humanitarian law and the more than a thousand years of age of Islam's teachings, cannot be far from the fact that the compilers of the new humanitarian law, directly or not, have been under the influence of these divine teachings.

Second Topic: Women

Women's vulnerability in armed conflicts dates back to man's life history. Enslaving, forceful loveless marriages to the kings and commanders of the opposite flank of the conflict, and the commanders to the girls of the opposite flank with the justification of sustaining the kingdom, widespread harassment and a diverse range of violence towards women, make up a part of the history of war.

Although women and children are not the causes of the outbreak of war, with history as evidence, they have constantly suffered much harm in different manners. The statistics related to the women and men who have been hurt and have lost life during armed conflicts, have been different³⁸. Women and infants have majorly been the main target of violence in battles, and make the majority of victims, refugees and displaced people³⁹.

Women and girls are harmed in many different ways in wars and specifically the violence related to gender including torturing, molesting,

³⁸ UN Document, S/2002/1145, 16 Oct 2002.

³⁹ Mosafa, Nasrin, *Women and Armed Conflicts (proceedings)*, Tehran, Sarsam, 1381, first edition, p.67

forceful pregnancy, bondage sex, in different manners and with different purposes, is carried out on them⁴⁰.

If we take a glance at the events of the 20th century, Nazi's crimes during the Second World War, Japanese actions towards women, American soldiers' brutality against Vietnam women, events in Kashmir, Israeli soldier's crimes against Palestinian women and the agony of women in Somalia, Rwanda, Bosnia, Kazoo, Sierra Leone, the Congo and many other examples, indicate that because for their gender, they have been the victims of ferocious attacks, have been abused as excuses for ethnic cleansing and ethnic humiliation, and in the worst possible way, their personal dignity have been harmed⁴¹.

Considering the historical background, Convention 1907 in Article 46, turns attention to the necessity of respecting family dignity and rights, individuals' lives and properties, beliefs and fulfilling their religious obligations and supporting women can be counted as part of respecting family status and rights and individuals' lives⁴². Forty-two articles out of a total of 506 articles of Geneva quartet conventions and two additional protocols notably focus on the issue of supporting women in different manners and propose a number of problems related to brutality against women.

Article 27 of the 4th Geneva Convention ordains that: "people given support, anyway, deserve respect for themselves, family rights, religious beliefs and their own customs and mannerism. At any time they will be treated with humanity and for instance they will be given support against

⁴⁰ ICRC (2003), "Violence against Women", statement by the International Committee of the Red Cross, 59th Annual Session of the United Nations Commission on Human Rights, Agenda Item 12-11 April 2003. Available at: www.icrc.org/web/eng/siteeng0.nsf/html/5LHHWP

⁴¹ Mosafa, Nasrin, previous

⁴² Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct 18, 1907. Available at: www.yale.edu/lawweb/avalon/lawofwar/hague04.htm

any violent or degrading actions, abuse and idle curiosity. Women, specially, against any harm to their status including sexual abuse and molesting, and any type of sexual harassment, will be supported.⁴³

In addition, the 47th Article of the same convention states that intentional murder, torturing or behavior against humanity, besides biological experience, spreading pain massively, bodily harm and harm to health, illegal banning and transferring, etc. are prohibited. Therefore, committing rape which is, in some ways, counted as a type of torturing and is among non-humanitarian behavior, is included in the list of major crimes and is obviously banned.

Also the 76th Article of the second chapter of the first additional protocol 1977 focuses on the point that women must be highly respected and must be given special support against rape, molesting and any type of sexual abuse.

Clause 4 of Article 5 of the same protocol denotes that any non-humanitarian actions and those degrading to personal dignity are prohibited. Also Part 3 of clause 2 of the second additional protocol 1977 is although related to non-international armed conflicts, obviously because of the considerable importance of the issue, includes international conflicts too, which ordains that: "any violation, disrespect, attack, forced prostitution and threat against those individuals who do not directly participate in war or have quit their participation are forbidden".

The cases above are apart from those cases that point at women alongside children and their maternal role; for instance, clause 4 of

⁴³ National Committee of Humanitarian Law, Introduction on International Humanitarian Law, including Geneva Quartet Declarations 1949 and additional protocols 1977, The Red Crescent Society of the Islamic Republic of Iran, Tehran, 1381.

Article 6 of the second protocol, represents the prohibition of executing pregnant women or mothers who own young children. With regard to this article which elaborates on the issue of criminal prosecution in the matter of violation of these laws, the government of the Islamic Republic of Iran, in the bill of inserting this government into the first and second protocol 1977, announces that: "regarding the provisions of Article 6 of the second protocol, the government of the Islamic Republic of Iran declares that the civil rights of Iran about these issues include much more detailed provisions which will give more guarantee to the rights of the individuals mentioned above and will be applied if needed." This seems out of place, considering that nowadays, countries consider international provisions prior to their own civil rights⁴⁴.

Moreover, Article 6 of Nuremberg's court statute and Article 3 of Rwanda's court statute, have assigned ravishment to the category of crimes against humanity. Inhuman acts carried out in Bosnia and Herzegovina, specifically against women who were, because of their gender, harassed to a great extent in a violent battle, brought more attention from the international community to their situation; in a way that in Article 5 of the statute of the international criminal court, held by the security council in order to take care of the crimes done in Former Yugoslavia, crimes committed against women in different ways, specifically organized sex assault, were recognized as crimes against humanity.

⁴⁴ Determining the place of the International law is among very important issues, which has obsessed the International law scientists for a long time. The advocates of the school of validity of will believe that International law and civil law are two distinctive systems of law and each has got a specific nature and territory; this theory is called "dualism". On the other side, the advocate of the school of Authenticity of Lords, consider the International law and Civil law inseparable and believe in the principle of the unity of law; this theory is known as the theory of Monism. The noticeable point is that although the international procedure, obviously, has not accepted one of the previously-mentioned theories, on the whole, the preference of the International law to civil law has been well recognized. For further explanation, refer to: Sharol Roso, *General International Law*, translation: Mohamad-Ali Hekmat, Tehran University, 1347, volume1, pp. 1-26; Ziayi Bigdeli, Mohamad-Reza, *General International Law*, Tehran, Ganj Danesh, 1376, 11th edition, pp. 83-102.

Also in Article 3 of the statute of Sierra Leone court, ravishment, sexual capacity, forced prostitution, forced pregnancy and other types of sexual violence have been counted as crimes against humanity and this court has been authorized to take care of them. In Article 7 of the statute of the International Criminal Court, this issue has been taken into consideration to a greater extent and committing crimes such as ravishment, sexual captivity, forced prostitution, forced pregnancy, forced castrating or any form of different types of similar sexual violations are categorized as crimes against humanity that can be addressed and reprimanded.

The forbiddance of these acts has also been paid attention in the resolutions and final documents of the women conferences of the United Nations. One of the important resolutions is the declaration of "supporting women and children in armed conflicts" that was approved by the UN General Assembly on 15th December 1975, in whose 5th clause all the types of inhuman treatment against women and infants, including degrading treatment, imprisoning and torturing, have been banned⁴⁵.

For the first time, by taking a historical step in October 2000, the Security Council discussed the issue of women, peace and international security which resulted in a comprehensive resolution⁴⁶. In clause 11 of this resolution, every government's responsibility has been pointed out with regard to finishing wars and imposing penalty for those who ordered and committed crimes against humanity and war crimes including violation against women and children and it emphasizes that those who ordered and committed these crimes should not be granted amnesty and should face the penalty.

⁴⁵ UN General Assembly, 30th session, Resolution 3519, 15 December 1975, available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NRO/002/32/IMG/NR000232.pdf?OpenElement>

⁴⁶ UN Document, S/RES/130/20. October 2000.

Also in Islamic humanitarian rights, various cases can be observed with regard to supporting women during armed conflicts. Amir-alMomenin - Ali after generally expressing the emphasis on the essence of supporting all the defenseless individuals during the war, specifically about supporting women during the war, states: "do not annoy women by hurting them, even if they damage your prestige or hurl abuse at your Emirs.⁴⁷"

In The History of Tabari it is said that: "a group of Ansars from Khazraj, asked for the permission of the prophet to murder Ibne Abi Alhaghigh in Khyber; the Prophet allowed them and chose Abd-Allah Ibne Atik as their commander and prohibited him from murdering women and children.⁴⁸"

In Ibn-e-Hesham lifestyle, it is also mentioned that: in one of the battles, the Prophet passed by a woman that was killed by Khalid Ibn-Valid and people had gathered about her; he asked: "who is she?" they replied: "the woman murdered by Khalid Ibn-Valid."; the Prophet said to his company: "reach Khalid and tell him: Prophet forbids you to murder infants, women and workers.⁴⁹"

For many of the Holy Quran's expounders, killing women and children are examples of "aggression" which have been forbidden in the Holy Quran due to this noble verse: "... but transgress not the limits. Truly, Allah likes not the transgressors."⁵⁰ Allameh Tabatabaei in "Almizan Interpretation" declares: "by aggression we mean any action about

⁴⁷ Nahj-Albalagheh, translator: MohamadDash . Previous, letter14, page 494.

⁴⁸ Tabari, Tarikh-Alrosol-Va-Almolook. Beirut, Mo'aseseh-Ale'mali, volume2, p. 496

⁴⁹ Ibn-Hisham, Alsira-Alhabavi, volume 2, p. 457, Ahmad Ibn-Sha'ib Alsenae'ee, Alsonan-Alkobra, Beirut, Dar-Alkotob-Aleslami, 1401, first edition, volume5, p. 187 and Ibn-Kasir, Albedayat-Va-Nahayat, Beirut, Dar Ehya-alatorath-alarabi, 1408, first edition volume 4, p. 385.

⁵⁰ Baghareh Sura, Verse 190.

which 'assault' is true such as starting the war before inviting to the right, being the starter in a war and killing women and children.⁵¹"

The noticeable point here is that supporting women and children during armed conflicts is when they do not directly and actively participate in the war and if this is not the case, then killing them is allowed from the point of view of most of the Muslim jurists and international rights provisions. This will be discussed in detail in the following issues.

Finally, in the comparison between international and Islamic humanitarian rights, the importance of Islam taking a humanitarian glance at women is in the fact that Islam has paid special attention to the case of women's dignity and their character at the time when the Western World, which consists of the origins of the new international humanitarian rights, for a long time used to believe that not only in armed conflicts, but also in usual social events, woman cannot be counted as a complete person and not even a hundred years has passed since in some of these countries when women have been provided with ownership rights. It is obvious that in such societies wherein usual social relations, they choose such behavior towards women, of course it cannot be expected to see the individuals of the society being provided with any respect or credit during armed conflicts, when applying rule and provisions loses its color; while some centuries ago, Islam has noticeably noted respecting women rights and has expressed vivid and clear orders with regard to supporting and defending women even during armed conflicts.

⁵¹ Mohsen, Alsafi, Tehran, Maktabat-Alsadr, 1416, second edition, volume 1, p. 288 and Tabataba'ee, Seyed Mohamad Hossein, Alimizan, Moasesat-Alnashr-Aleslami, Qom, volume 2, p. 61.

Third Topic: The Elderly

In the provisions of the International humanitarian rights, no specific case has been taken into account about the elderly among those who are given support and in these provisions such individuals have not been mentioned separately⁵². However, in Islamic humanitarian rights, these people have been given special support and Islam has paid special and humanitarian attention. There are various sayings and narratives in Islam's in the Prophet's way of life, which are the examples of individuals and the elderly being supported during a battle. This approach can also be noticed in his Caliphs' behavior, since Abu-Bakr, in his recommendations to one of his commander who was heading to Sham, had emphasized that murdering the aged and the elderly during the battle must be avoided⁵³.

In the account of "Seyr-Alkabir", Sarakhsi says: "of course, it means the old man does not fight or hold no views on it; however, if he fights or consults in this case, he will get killed, since the Prophet ordered to murder Darid-Ibne-Osamah as he was a consultant in the war and had told the individuals to take women to the elevated regions so that they will be protected and can make the foe vanish fighting on their horses with their sabers. However, people did not accept his opinion and fought alongside their families and that was why they lost the battle. With regard to this, Darid has stated: "on that hill, I ordered them, though the next dawn they faced reality', so he was a war consultant, hence killed by the Prophet's order"⁵⁴.

⁵² Not mentioning these individuals' names doesn't mean not supporting them, but that general law, obviously, grant them support and even it can be said that all the supports represented to women and children include them too, since considering the provided support for women and children, it seems as if the criteria for supporting these individuals is their inability with regard to facing the dangers of armed conflicts.

⁵³ Beyhaghi Costumes, volume 9, p. 85.

⁵⁴ Sarakhsi, Ahmad-Ibn-Mohamad, explanation of Seyr-Alkabir, volume 4, previous, p. 197.

Kasani believes: “the point is that all those who have got the potential of fighting, might get killed and in this case it does not really matter whether they truly fight or not; however, those who do not possess the potential of fighting a battle must not get killed; unless they rise to fight, through their beliefs, power, bringing about fracas and similar actions⁵⁵.

Allameh-Helli of the jurists of *Imamiat* divides the elderly into four groups:

- 1: those who have been consultants and participants in the war
- 2: those who are not the consultants, but have fought against Islam's corps
- 3: those who are the war consultant but not willing to fight
- 4: those who are neither war consultants nor participants⁵⁶

With regard to the above categories, Allameh, explains that: “murdering the elderly, who have been battling against Islam or have given advice helping the enemy, is allowed and in the fourth case not”⁵⁷. He refers to the Prophet's order in Khyber War as evidence. As denoted before, in the so-mentioned war, Islamic soldiers murdered Darid-Ibne-Lasmeh, who was an old man of the age of one hundred and fifty and brought by the polytheists to benefit from his opinions on military methods and the Prophet of Islam did not reprimand them⁵⁸. What's more, as evidence for his view on the fourth case, Allameh mentions the narratives that have been told in different ways that the Prophet, besides

⁵⁵ Alkashani. Abu-Bakr, previous, p. 101

⁵⁶ Helli, Alameh, Alhasan-Ibn-Yoosef-Almotahar-Alasadi, Tazkarat-Alfoghaha, volume1, p. 412.

⁵⁷ Previous

⁵⁸ Previous

his orders, to his troops who were heading for the war has said: "do not kill the elderly."⁵⁹

Sahib-Javaher, while confirming Allameh's point of view, believes that Imam jurists share a consensus on this case⁶⁰. In addition to the narratives above, the elderly of the fourth category are examples of non-fighters and due to the verdict reached by the opposite concept of another verse: "And fight in the Way of Allah those who fight you, but transgress not the limits. Truly, Allah likes not the transgressors."⁶¹, killing them is forbidden.

Some of the jurists, considering some teachings by God's Prophet, with the concept of " Kill seniors of enemy non-believers "⁶² hold the view that murdering them is permitted; however, those against this point of view, firstly, have considered the origins of this narrative faulty and secondly have interpreted 'sheikhs' as the leading individuals of the tribe and not necessarily the elderly, since the word sheikh in Arabic has been widely used with the meaning of tribal elders and heads⁶³. Therefore, it can be generally said that due to the content of various narratives and the jurists' opinions, the elderly are among those whose murder has been prohibited; however, their immunity can be granted only in case they do not intervene in the war; so if they take part in battles against Muslims as fighting forces or military consultants in designing the maps of war or by

⁵⁹ Hor-Ameli, *Vasa'el-Alshia*, volume 15, Beirut, Dar AlehyaAltorathAlarabi, page 58, and Mohamd-Ibn-Alhasan-Ibn-Ali (Sheikh Toosi), *Tazhib-Alahkam*, volume 6, 4th edition, Qom, Dar-Alkotob-Aleslami, 1365, p. 138.

⁶⁰ Najafi, Mohamad Hasan, *Javahe rKalam*, volume 21, 3rd edition, Tehran, Dar-Alkotob-Aleslami, 1367, p. 75 .

⁶¹ Baghareh Sura, Verse 190.

⁶² Jame'-termezi. volume 2, p. 391, reported from Vahbe-Alzahili, 3rd edition, Dameshgh, Dar-Alfekar, 1998, p. 499.

⁶³ Ziya'eeBigdeli, Mohamad Reza, *War Law*, first edition, Tehran, Allameh-Tabataba'i University, 1373, p. 155.

providing any military guidance, they won't benefit from any of the supports provided⁶⁴.

Fourth Topic: The Unwell

Taking care of the wounded and the sick in armed conflicts before 1859, would be done because of the treaties that would be ratified during every war by the commanders of both flanks⁶⁵. Until 1859, Henry Donan (1828-1910) attracted the world's attention towards the situation of the wounded during the conflicts, after many attempts and writing a book called "The Memories of Solphorino War" (1862). The first international documents in the area of supporting the wounded and sick of the war, respectively, include Geneva Convention dating back to the 22nd of August 1864, the Convention of the 27th of June 1929 (in 39 articles), Geneva Quartet Convention 1949 and additional protocols 1977.

Article 8 of the first protocol, in the definition of "wounded" and "sick" provides: "wounded" and "sick" mean armed and civilian people who need help and care, because of injury, sickness or other physical and mental disorders or disabilities and who avoid any type of hostile action. These expressions, also, include the issues related to delivery, babies and other individuals who might need urgent help and care; such as mothers in pain or waiting for delivery who avoid any hostile actions; therefore, the wounded and the patients who are provided with support do not only include those injured in battle field, but also anyone who needs medical treatment, such as women at the verge of delivery, babies and other individuals such as disabled ones or pregnant women who require urgent care.

⁶⁴ Amid Zanjani, Abas Ali, Political Jurist, volume 5, first edition, Tehran, Amir Kabir, 1383, p. 176

⁶⁵ Ziya'ee Bigdeli, Mohamad Reza, War Law, first edition, Tehran, Allameh-Tabataba'i University, 1373, p. 155

Articles 12 and 15 of the first convention also emphasize on the point that the wounded and patients are granted support and cannot be aimed at as targets of attacks; they must be treated with humanity; acting violently against them or doing biological experiments on them are forbidden. Women due to their gender must be highly respected; in a way that this behavior is not inferior to the behavior towards men. Moreover, the flanks of the conflict must provide them with medical treatments. They should not be deliberately deprived of medical help and should not be put at the danger of infectious or communicable diseases. Also the priority of treatment will be based on medical considerations. The noticeable point here is that "the important condition for the wounded and patients to be provided with these supports is that they should avoid any hostile actions and in case they intended to do this, they will not be granted any support."⁶⁶

Also in the Islamic humanitarian rights teachings, patients are in the category of those who are granted support because of their special status. "This group, in many Muslim jurists' point of view, are provided with special help, because first of all, they are not in the category of fighters and the armed for their inabilities and are included in the general verdict of not murdering those who are not participants in battle and secondly, there have specific teachings with regard to them; including Imam Sadegh in a story, has added the physically disabled and the blind individuals to women and children and paying ransom is not necessary for them; since if it was and they would avoid paying it, still killing them would not be allowed, therefore they are granted amnesty on paying ransom⁶⁷. Due to this saying, murdering them is not allowed."⁶⁸

⁶⁶ Antony P. V. Rogers Paul Malreb, previous, p. 117

⁶⁷ Zein-Aldin-Ibn-Ali-Jabali-Amoli (alshahid-Alsani), , volume2, research: Seyed Mohamad Kalantar, Qom, Davari, First edition, 1410, p. 115

⁶⁸ Mohaghegh Damad, Seyed Mostafa, International humanitarian law, Islamic Approach, previous, p. 116

In a story, in Asad-Alghabeh, it has been reported that the Prophet would prohibit killing the maimed and the fallen⁶⁹. Apart from all these, it seems as if the order given by the Prophet and his Caliphs regarding the necessity of supporting children, women and the elderly, because of its common criteria, would obviously include these individuals who do not possess the necessary physical abilities.

Fifth Topic: The Foreigners

About the foreigners who live in the land of one of the hostile countries during armed conflicts, Article 35 of the fourth convention provides that: "any supported individual who wants to leave the foreign country either at the beginning of the war or during the war, will have the right to leave; unless his leave is against the government's interests (for instance he's got confidential information), and in this matter, his leave will be taken care of in an organized order." With regard to Article 36 of this convention, at the time of their departure, they should be in a good state of security, hygiene, health and nutrition. The situation of the foreigners, who are not willing to leave or cannot benefit from the departure facilities, will remain under the control of the provisions related to foreigners at the time of peace.

Anyway, a number of basic rights; including receiving individual or group help, hospital and medical treatments, doing religious acts, benefiting from some provided guarantee by the government in some strata's interests; in Article 38 of the fourth convention, for these people, it's been provided and guaranteed that: "apart from some specific measures that might be taken due to this convention, especially with regard to articles 27 and 41, the status of supported individuals will be taken into account,

⁶⁹ Ibn-Asir, Asad-Alghabe, volume 5, Tehran, Esmā'ilian, p. 335.

considering the provision made at the time of peace and anyway, they will be offered the following rights:

- 1: they can accept any type of individual or group help that is offered to them,
- 2: in case their health conditions suggest, they can benefit from any medical and hospital treatments that is provided for the nationals of that country,
- 3: they will be allowed to act due to their own beliefs and religion and receive any spiritual help from their religious clergies,
- 4: if they had settled in the regions at the danger of War, they can move like the nationals of that country,
- 5: children of less than 15, pregnant women, and mothers owning infants of less than 7 can benefit from all the privileges that have been considered for the nationals of that country with the characteristics mentioned above.

Articles 39 and 40 of the fourth convention, ordains that for the foreigners only if we consider the same conditions as the conditions for the nationals, then the foreigner can be forced to work; it is not possible to force such individuals to work when that job includes military objectives. If the security section of the resident country counts it as necessary, it can arrest them or force them to settle in a specific place; however, the characteristic of being the national of the enemy, alone, is not a valid reason for justifying such acts and any individual in this situation must be able to complain about the decision of the arresting country to a court or a competent administrative authority. (Articles 41-43 of the 4th convention).

Considering the Islamic humanitarian rights, those who are not the nationals of the Islamic Government, can be granted security by the Islamic government, under some conditions. As Holy Quran emphasizes on this point and says: "if one of the polytheists sought your protection, grant him your support and take him under your wings.⁷⁰" Due to the commentators' opinions, this verse guarantees establishing "immunity" institution. Although there are divergences of opinions among the jurists and the commentators, but generally this verse is the most important religious evidence of immunity.

With regard to Islamic resources, not all of the citizens of an Islamic country are Muslims, and in addition to Muslims, there are two other groups settling in the Islamic land and are not counted as enemies: a group of lessees and the other group of the vituperative. The lessees are those who by ratifying a safety declaration, temporarily live in the Islamic land and of course, are not counted as the nationals of the Islamic Government; however, the vituperative include people with book who live permanently by paying ransom and signing contracts and are counted as the citizens and nationals of the Islamic Government; so although these individuals are supported by the Islamic Government, they are not out of context; since they are the non-Muslim nationals of the Islamic Government and "due to Islam jurists' ideas, if these individuals obey the rules and pay ransom, they'll be provided with the freedom of settlement and religion and their life, properties and dignity will remain safe."

In Islamic rights terminology, "lessee" means a person who settles in a foreign country temporarily and with permission and so it seems as if this word includes all the foreigners with different names of stranger and

⁷⁰ Tobe Sura, Verse 6

asylum-seeker. In Arabic, there are no expressions to differentiate between Muslims who enter a non-Islamic land and non-Muslims who enter Islamic lands; but a foreign country's national with whom they have signed a peace treaty or a temporary truce is called "عادوم", in order to be different from a fighting enemy who asks for safety and enter an Islamic territory to do something specific such as visiting a friend, business deal and else. All these people are all called lessee that linguistically means safety and support seeker.

Foreigners who settle in Islamic lands like this are still safe even if war rises between their government and the Islamic Government and under the conditions of their passport, they can get back to their own home whenever they want and can even take their properties with themselves; however, trafficking has been specifically banned; but with all these any foreigner can take back whatever he has brought with himself and must sell anti-military contrabands that has been bought recently or must in any other way take it into his stride.

A foreign resident, according to principles, can go anywhere they wish, but such individuals are not permitted to go to a state that is in state of war with Islamic government; because there is the fear that they will unite with foreign forces and fight against Islamic forces; despite this, they are able to return to their country without any disturbance; even when Islamic government is at war with it; because preventing exodus is considered a violation of the treaty. Despite this, if a moustaman spies or "if an individual who has been granted moustaman status, who is from a fighting government, immediately after leaving the Islamic territory turns into a real enemy⁷¹" they will lose their immunity.

⁷¹ Mohammad Hamid-Allah, *Solouk e Doulate Eslaami*, previous, p.229

Therefore it can be generally said that if with respect to regulations of *jihad* all enemy nationals in Islamic territory are counted as *moustaman* or *zemmi*, they can be under the Islamic government's protection as long as they respect the conditions. This protection includes their belongings and other political and civil rights; unless under this protection, they use their facilities and belongings in favor of the enemy⁷².

Sixth Topic: Medical Workers

In Islamic concept medical services are deemed only humanitarian; because of this doctors and nurses, on condition that they do not rebel, will never be disturbed, although it is possible that they will be taken captives. Many instances of transportation of the sick and the injured during the Prophet's life have been documented. About the battle of Ohod, Kheibar and other battles, detailed descriptions of hospitals, nurses and the order of transportation of the injured have been recorded.

In international human rights medical workers, because of the crucial role they perform, enjoy very strong safeguards. The point of these safeguards is that it contains some privileges to provide them with freedom of maneuver. As a result they cannot waive it because such privileges come with responsibilities. Medical workers perform under the banner of Red Cross or Red Crescent, which are known as symbols of peace during battles.

Seventh Topic: Individuals in Charge of Religious Affairs

According to clause 4 of Article 8 in the first additional protocol of 1977, "the personnel in charge of religious affairs" refers to individuals, armed or

⁷² Amid Zanjaani, Abbas Ali Faqih ,*Fiqh e Siasee (political jurisprudence)* , previous , p 180

civilian, such as priests and mullahs who have performed their religious duties and are affiliated with one of these institutions:

- 1-armed forces of one the parties involved in conflict.
- 2-medical units of one of the parties involved in conflict.
- 3-medical units or medical transportation units mentioned in clause 2 of article 9(first protocol).
- 4-civilian defense organizations of one of the parties involved in conflict.

In the following part of this article it is established that these regulations protect employees irrespective of the fact that they are employed permanently or temporarily. In clause 5 of Article 15 in this protocol it is emphasized that any protection that is recognized for medical workers in conventions and first protocol of Geneva must be recognized for people in charge of religious affairs. This clause notes: "civilian religious personnel must be respected and protected. Regulation of conventions and this protocol about protection and identification of medical workers must be enforced identically regarding these individuals."

So civilian personnel too, while taking measures that the related party in conflict considers it necessary regarding supervision and safety, must have access to wherever their service is needed and according to the previously mentioned regulations all the necessary help must be provided to these individuals so that they can carry out their humanitarian duties to the extent they can.

Before discussing protection for these people in Islamic human rights it must be made clear that to whom the title "individuals in charge of

religious affairs" refers. In Islamic jurisprudence (i.e. *fiqh*) the above title refers to as *rejaal al-din* (men of religion)⁷³ from the view point of Islamic scholars, generally three groups have been counted as followers of religion: Christians, Jews and Zoroastrians and any other religion does not qualify to be accepted⁷⁴. These three groups are also called people of the book. From the public perspective, a religious leader is an individual who is known as the person in charge of religious ceremonies and formalities and religious rituals. However in Quran⁷⁵ Christian leaders are referred to as monks and priests⁷⁶.

About immunity of individuals in charge of religious affairs, different opinions have been expressed by Muslim scholars, both Shi'a and Sunni. Some are of the opinion that because of the special influence they can have, they do not enjoy any immunity at all and must be killed without any exception. Among these people is Sheybaani who in "al-Seyr al-Kabir" says: "it is alright to kill priests and servants of the church and tourists who are in contact with people because they are among the people who with their spiritual influence and if possible personally are among fighters"⁷⁷.

AllameHelli too, in "Qavaa'ed al-Ahkaam" considers monks deserving of death in battlefield. According Saaheb Jawaaher (the author of Jawaaher al-Kalaam) the reason people who believe in permission of killing monks have is insufficiency of quotations on this subject and in case of insufficiency of evidence, there is no way but to take refuge in

⁷³ Mohaghegh Daamaad, Seyyed Mostafaa ,Hoghoughhe Bashar Doustaane ye Bein al-melali (international human rights) , Rahyaa eeslaami , previous , p.119

⁷⁴ Khooyee, Abulghaasem, Menhaaj al-Saadegheen, Qom, Madina al-elm, 1410, 28th publica on, vol.1, p.361

⁷⁵ Chapter Al-Maa'edah , verse 85:"and you will find that closest to the believers in friendship are those who say: "we are Nasaaraa." This is because among them are learned priests and devoted monks and they are not arrogant".

⁷⁶ Mohaghegh Daamaad, Seyyed Mostafaa ,Hoghoughhe Bashar Doustaane ye Bein al-Melali

⁷⁷ Sarahsee, Ahmad Ibn-Mohammad, Sharh Al-seyr Al-Kabir, previous, vol. 4, p.196

pieces of general evidence that order the killing of disbelievers indiscriminately⁷⁸.

From the quotations which are used as a reason for protection of monks sanctity is a quotation told by Mas'ade Ibn-Sadaghe who quotes Imam Sadegh saying: whenever the Prophet assigned someone as a commander in a district, first he advised him about piety and then would tell all soldiers: "fight in the name of God and kill whoever does not believe in God..... and do not kill children and hermits in abbeys⁷⁹". Sheikh Tousi, quoting Saheb Jawaaher⁸⁰, had said that because of Mas'ade's lack of credit in the quotation, the probable option is to act according to this verse's general message:" kill polytheists wherever you found them.⁸¹"

Another group of Muslim scholars are of the opinion that monks enjoy immunity at the time of war and their reason is the Prophet's quotation to the soldiers who were departing for war that: "do not kill the people who live in monasteries and convents⁸²". Doctor Sobhee Mahmasaani considers monks to include residents of abbeys and other religious leaders who have detached themselves from people and have prayed, who are immune from any kind of disturbance. He has deemed this manner of behavior as a testimony to Islam's religious tolerance and says:" this is a clear proof for the fact that Islam has never been harsh on followers of other religions. Quite the contrary, it had respected religious place and religious figures of other religions.⁸³"

⁷⁸ Najafi, Mohammadhasan, Jawaaher Al-Kalaam, previous, vol. 21, p.76.

⁷⁹ Allameh Helli, Vasa'el Al-Shi'a, vol. 11, same, chapter 15 of chapter of jihad al-adow (jihad against enemy) , quota on 3 , p.43

⁸⁰ Jawaaher Al-Kalaam, previous.

⁸¹ Chapter Towba, verse 5: "so kill the mushreks (polytheists) wherever you found them".

⁸² Ahmad Ibn-Hambal, Mosnad, same vol.1, p. 300.

⁸³ Sobhi Mahmasaani , Al-Ghaanoonwa Al-Alaaghat Al-Dowaliah fi Al-Islam (law and governmental affairs in Islam), p.240.

The juridical reason for this is the action of Abu Bakr, who when sending the army to Shamaat, addressing the commander of the army, Yazeed Ibn Abu Sofyaan, said: "you will encounter a group who think that they have made themselves pure from anything for God in abbeys; leave them and let them believe what they believe⁸⁴."

In this order, not only had he prohibited the killing of the clergy, but also pointed to protection for them and their immunity from any kind of disturbance and disrespect; solely because they worship God. The first caliphate's action was later taken on by most of the caliphates.

Paying attention to these cases denotes the fact that protection for hermits, just like other civilians, is conditional on their not being involved in military affairs. Some others believe that: "what can be understood from pieces of evidence and Islamic texts is that monks and hermits who have detached from people, do not make contact with people and are solely occupied with their rituals, in time of war are immune; however this immunity is not because Islam pays respect to religious figures and leaders of other religions, rather it is because they are not considered fighters and do not fight with Muslims as a result of isolation and not participating in social and political affairs and total freedom from fighting and military armed combat.⁸⁵"

By studying opinions of Islamic scholars and international law, this point is revealed that there is a difference between Islamic human rights and international human rights and it is the fact that in Islam immunity for people in charge of religious affairs only exists when they are in their own religious places. And are engaged in; but when with direct interference they can be influential in any manner, this immunity is divested. As

⁸⁴ Beihaghi, Ahmad Ibn-Hosseini-Ibn-Ali, Al-Sonan Al-Kobraa, Beirut, Daar Al-Fekr, bita, vol.

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⁸⁵ Mohaghegh Daamaad ,SeyyedMostafa , previous , p.123.

Allame Helli has said in Tazkera al-Foqahaa⁸⁶: "monks and hermits, if they possess mental ability (so that they in a way help the enemy), are killed". Shaheed e Aval and Shaheed e Dovom too, share this opinion with Allame and believe hermits' immunity is not unconditioned; rather it is conditional on their not participating in war⁸⁷. Whereas in international law this immunity is not limited and is not limited to the state of being isolated in certain religious places and engagement in religious practices. Even if they are present at the battlefield, on condition that they do not participate directly in military operation, they are immune from any disturbance.

In other words, "immunity for the clergy and religious leaders with respect to Islamic jurisprudence is more limited than what has been mentioned in four Geneva agreements and the additional protocol; because in Islamic law the assumption is that religious leaders live in abbeys away from people, while the related clauses in conventions and protocols are more encompassing and include the member of the clergy who officially teach religious teachings and educate members of army and soldiers about religion and perform ceremonies for them⁸⁸".

Eighth Topic: Reporters

In today's world covering news of war is not only an important task, but it is also considered as a perilous activity. With a statistical look at the behavior of the two parties involved in conflict, it can be said that the numerous reports by World Federation of Journalists, such as the report of the year 1999, are indicative of the fact that many of the victims and casualties in the battlefield are journalists; for instance just in the year

⁸⁶ HelliAllameh , Al-HasanIbn-Yousof Al-Motahar Al-Asadi , Tazkirat Al- Foqahaa , vol.1 , same , p.412 : "monks and hermits if they possess mental ability , are killed".

⁸⁷ Zeyn Al-AbedinIbn-Ali JabalAmeli (Al-Sahid Al-Saani) , Al-Rawza Al-Bahiya fi SharheLom'a Al-Dameshqiya , same , p.393.

⁸⁸ Mohaghegh Daamaad, Seyyed Mostafaa, Hoghoughhe Bashar Doustaane ye Bein al-melali (international human rights) , Rahyaa eeslaami , previous , p.124.

1999 (which was a year filled with chaos on the international scene) roughly eighty journalists lost their lives⁸⁹. Therefore, the topic of protection for journalists has always been seriously discussed in international human rights and as a result, clause 13 of the fourth Hague Convention has predicted a special status for press journalists and has established that: "they can have the right of treatment as war prisoners; on condition that they have permission from the army they are accompanying". The major reason behind this special protection for individuals of this type is their excessive proximity to armed forces engaged in conflict. Although this proximity provides many benefits for others such as easy access to information inside the battle, it has dangerous consequences such as being taken captive by enemy⁹⁰. During WWI, the role of reporters had been limited and they were not allowed to follow military operation in all its aspect and could only see and report what military officials wanted to be shown.

Geneva's third convention, with respecting the right of war correspondents who have the status of war prisoners, has mentioned this topic and has established: "individuals who are with armed forces, without being directly among their ranks, such as civilian personnel of military airplanes, war journalists, providers of goods, members of units in charge of armed forces comfort, on condition that they are permitted by the armed forces they are accompanying, to this aim, armed forces are obliged to hand over identity cards alike in form with the sample in enclosure, to these individuals."

It is since the twenty-fifth United Nation's General Assembly that the international community took notice of circumstances of journalists on

⁸⁹ Momtaaz, Jamsheed, protection for journalists in time of war by international human rights, the research of law and politics magazine, the special issue (collection of articles of "duty of public media." conference, fall of 1384, p.11.

⁹⁰ Rudolf Bernhardt, Encyclopedia Public International Law, North-Holland Publishing Company, 1982, Vol IV, pp 293-294

dangerous missions. In 1970 the scheme for a treaty for assurance that they will be protected was developed whose initiator was France. The Assembly in its 1973 resolution, asked the Secretary General to present the scheme to the diplomatic conference for verification and development of human rights. This conference during its second assembly discussed the subject which led to writing of a text that composes clause 97 of the first protocol". Clause 97 in its first paragraph clearly explains the journalist's civilian nature. According to the content of this article, their immunity against any disturbance and their rights in case of arrest by one of the parties involved in the conflict and also enjoyment from Geneva's fourth convention, have been emphasized again. Due to paragraph 3 of the mentioned clause, the ID card which is issued for the journalist, by the government of whom the journalist is a national, or the government in whose territory the journalist resides, or the government in whose territory the news media which has hired the journalist is located, results in the journalist's enjoyment from the protections contained in the protocol and four conventions.

Regarding these individuals, although there is no explicit order in Islamic human rights' teachings, which is due to the fact that this topic was not relevant at that time, using the general principles extracted from quotations and words of scholars, it can be said that the generality of the criterion, sentences like "do not kill anyone except the person who fights⁹¹" and "do not fight with anyone save for the person who fights you⁹²", is clearly indicative of this basic principle that except for the ones who have participated in the war, no one is killed; therefore, a journalist, as long as they are not considered among the fighting forces, are included under this principle's generality.

⁹¹ Al-Kaashaani, Abu-Bakr, *Badaa'e Al-Sanaa'e* , same , vol. 7 , p.101.

⁹² *Nahj Al-Balaaghe*, letter 12.

In addition to protected individuals above, other individuals too, are like refugees and individuals without citizenship who are protected by Islamic and international human rights at the time of war, which should be discussed in an opportunity vaster than this article⁹³.

Conclusion

Although war is sometimes under certain circumstances allowed and fighting with people involved in it is legitimate and sometimes obligatory, fighting with those who are not involved is against the Shariah and prohibited.

Study and research into regulations and rights related to war, from Paris's declaration on 16th of April 1856, which is about naval war, to the latest regulation about this which are the four Geneva conventions and the additional protocol and finally the United Nation's 1981 convention, and comparison between them and existing principles in Islamic law about war and armed conflicts, illustrates this fact well; that the roots of rules and regulations of war generally, and particularly human rights and rights of protection of individuals and protected places, exist entirely in Islamic teachings and commands, and even in the opinion of some experts that consider these regulations to be adopted from Islamic law, does not seem exaggerated; because according to judge Christopher G. Viearamontarry's opinion, the former Vice President of International Court of Justice, it is not possible to believe the West as the only origin of development of international law and not consider any role for Islam;

⁹³ Ahmadaabaadi, Esa, protection for civilian individuals and properties in armed conflicts from the view point of international law and Islam . A Razavi University of Islamic studies' thesis, the major of international law.

because the Islamic world has influenced western civilization and culture directly and indirectly⁹⁴.

This fact is proved when Islamic references and the method of categorizing scholars of early centuries of international and non-international wars and systems and regulations of each and also duties of Islamic soldiers in confronting the enemy are studied separately. The established enforcement about soldiers' violation of these rules which has been studied in Islamic law, reminds us of another fact and that is the mentioned commands are not only ethical suggestions; but also rights and rules that must be respected and followed, whose violators are held accountable for their actions, regarding both civil and criminal aspects.

There is no doubt that Muslims, since the seventh century AD have established and exercised such strong regulations for issues of peace and war that still to this day they have a certain place in international law and affairs and this was centuries before the West was aware of such a system⁹⁵. Of course, mentioning this point is essential that we should not consider Islamic human rights a comprehensive innovation in the field of legal studies and international affairs; however, it can be said that in comparison to international legal system which is developed by the Greeks and Romans, this Islamic field has enjoyed a more noticeable advancement; because the law of the Greeks and Romans have given more importance to ethical values and on the whole have been

⁹⁴ Mousa Zaade , Reza , *Islam and international criminal law , key concepts of international law (collection of articles) , first publication , Mahdi Zaakerian , Tehran, Mizan , 1383 , p 57.*

⁹⁵ Mohamad Ibn-Hasan Al-Sheybaani , the Hanafee scholar, can be considered as the forerunner of this field, who by writing the book "Al-Seyr Al-Kabir" and "Al-Seyr Al-Sagheer" in eighth century , founded this field and just as West has benefited from the knowledge of various Islamic scholars in different fields, undoubtedly in this field as well it has been influenced by the ideas of such Muslim scholars. For more explanation, see: *human rights from the perspective of Islam (opinions of Iranian scholars), the cast of authors, Al-Hoda international publication, first publication, 1380, p. 315.*

followers of purely religious concepts, while Islamic international law, for the first time, innovates evolved concepts such as acknowledged rights for enemy in time of war and peace⁹⁶.

⁹⁶ Zakerian, Mahdi, *Key Concepts of International Human Rights*, Tehran, Mizan , first publication , 1383, p. 56.

Establishing a Normative Framework for Evaluating Diverse Cases of Transitional Justice

Thomas Obel Hansen*

Abstract

Based on an assessment of contemporary practices of dealing juridically with large-scale human rights violations, this paper argues that there is a need for updating important aspects of transitional justice theory. The field of transitional justice emerged around the so-called third wave of democratization, most notably the transitions from military rule in Latin America in the 1980s and the transitions in Central and Eastern Europe following the fall of communist governments. However, though institutionalized responses to mass violence and state-sponsored repression now take place in highly diverse cases, transitional justice theory remains dominated by the claim that law and justice should primarily promote liberal democratic values.

This paper argues that it is useful to operate with a differentiated normative framework, thereby endorsing a more nuanced understanding of the interests that transitional justice in fact serves as well as the legitimacy of these. In doing so, this paper distinguishes between transitional justice in cases of liberal transitions, non-liberal transitions, deeply conflicted societies that have not seen a fundamental regime change, and consolidated democracies. Though rejecting one consistent normative framework, which prioritizes liberalization and democratization as the end product of transitional justice, the present paper concludes that it is possible to establish some overall positive goals of transitional justice, namely attending to the needs of victims, preventing the recurrence of large-scale violence and, finally, creating a more just society.

* Dr. Thomas Obel Hansen is Associate Professor of International Law, United States International University, Nairobi, Kenya (obelhansen@gmail.com).

Introduction

Based on an assessment of contemporary practices of dealing juridically with large-scale human rights violations, this paper argues that there is a need for updating important aspects of transitional justice theory. The field of transitional justice emerged around the so-called third wave of democratization, most notably the transitions from military rule in Latin America in the 1980s and the transitions in Central and Eastern Europe following the fall of communist governments. However, though institutionalized responses to mass violence and state-sponsored repression now take place in highly diverse cases, transitional justice theory remains dominated by the claim that law and justice should primarily promote liberal democratic values. This paper argues that it is useful to operate with a differentiated normative framework, thereby endorsing a more nuanced understanding of the interests that transitional justice in fact serves as well as the legitimacy of these. In doing so, this paper distinguishes between transitional justice in cases of liberal transitions, non-liberal transitions, deeply conflicted societies that have not seen a fundamental regime change, and consolidated democracies. Though rejecting one consistent normative framework, which prioritizes liberalization and democratization as the end product of transitional justice, the present paper concludes that it is possible to establish some overall positive goals of transitional justice, namely attending to the needs of victims, preventing the recurrence of large-scale violence and, finally, creating a more just society.

Thinking about the Practices of Transitional Justice

Transitional justice is usually said to refer to the kinds of justice which occur in the *aftermath* of gross human rights violations, and – in one way or another – attempts to *address* these violations. As will follow from discussions below, the ‘transitional’ in transitional justice can have various meanings. Most theory, however, takes it as referring to conditions of

fundamental political change, rather than referring to the nature of justice itself.¹ These fundamental political changes are usually understood as making reference to *liberal change*, thus entailing a clear normative dimension. This clarification could lead to the presumption that the institutions and practices of transitional justice are identical to those in other contexts. That, however, is not necessarily the case.

The origin of transitional justice as a field of scholarly inquiry is closely linked to the Latin American transitions from military rule to democracy and the democratization processes in Central and Eastern Europe following the Soviet collapse.² 'Transitional justice' as a notion was constructed in the late 1980s or early 1990s, when some lawyers suggested an idiosyncratic conception of justice in periods of fundamental (and liberalizing) political change. According to Ruti Teitel, she coined the expression in 1991.³ However, as some commentators have pointed out, the first involvement with issues of transitional justice can be traced to the 1988 Aspen Institute conference, 'State Crimes: Punishment or Pardon?'⁴ Since then, the field has developed and expanded significantly. However, a generally accepted definition of transitional justice is yet to emerge, and different definitions put forward in the literature are often at odds with the nature and scope of transitional justice discourses.⁵

Several scholars have defined transitional justice by making reference to those *practices* that can be put in place to address past wrongdoing.

¹ It has therefore been observed that "the term itself is misleading, as it more commonly refers to 'justice during transitions' than to any form of modified or altered justice". See Bickford, "Transitional Justice", 2004, p. 1045.

² See for example the essays in Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies*, 1995.

³ Teitel, "Editorial Note – Transitional Justice Globalized", 2008, pp. 1-4.

⁴ Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice", 2009, pp. 321-367. See also Hesse and Post, "Introduction", 1999, p. 15 with note 16.

⁵ I return to some of these definitions and the problems that surround them later in this chapter.

Jon Elster, for example, observes that transitional justice can be understood as “the processes of trials, purges, and reparations that take place after the transition from one political regime to another”.⁶ Most observers add to Elster’s list a widely utilized institution: the truth commission.⁷ In other words: transitional justice discourses have tended to approach its practices primarily as a matter of criminal trials, vetting processes, reparations to victims, and truth commissions.⁸ In a sense, this understanding of what measures make up transitional justice reflects that these institutions and processes were, from time to time, employed in transitions in Latin American, Central and Eastern Europe, Southern Europe, and the post-World War II context. The question whether amnesties should be perceived as a mechanism of transitional justice is more controversial. Some observers see the granting of amnesties as the anti-thesis to transitional justice, but others suggest that amnesties may also represent a form of accountability and should be considered within a transitional justice framework.⁹ Moreover, some commentators have suggested that forward-looking processes, such as legal and institutional reform, ought to be considered within a transitional justice framework.¹⁰ This perception, however, remains marginalized in the scholarship. Transitional justice has most commonly been associated with a *specific set of institutions or processes that deal with the past*. As Mark Freeman and Jaspreet Saini note: “transitional justice tends to be implemented by

⁶ Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 1.

⁷ See for example Freeman, *Truth Commissions and Procedural Fairness*, 2006, pp. 5-6; Villa-Vicencio, “Truth Commissions”, 2004, pp. 89-95; Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001; Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998; and Teitel, *Transitional Justice*, 2000.

⁸ See for example Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations*, 1995; and Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies*, 1995.

⁹ On this debate, see Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, 2008. See also further below in section 2.2.6.

¹⁰ See for example Bell et al., “Justice Discourses in Transition”, 2004, pp. 305-328.

means of four main mechanisms: criminal prosecutions, truth commissions, victim reparation programs, and vetting procedures".¹¹

In the following, I dwell on these four mechanisms of transitional justice. Section 2 examines transitional criminal trials; section 3 examines vetting processes; section 4 examines reparations; and in section 5 truth commissions are examined. Section 6 concludes these deliberations on the mechanisms of transitional justice by briefly discussing amnesties and the 'doing nothing' option.¹²

Transitional Criminal Trials

Criminal trials are at the forefront of understandings of the mechanisms of transitional justice. As Ruti Teitel notes, "in the public imagination, transitional justice is commonly linked with punishment and the trials of ancient regimes".¹³ Transitional criminal trials can take place at different levels, including the local, the national, the international, and the supranational. The scholarship of transitional justice has paid extensive attention to criminal justice at all of these levels. Sometimes criminal accountability is pursued in a combination of two or more levels. For example are perpetrators of the Rwandan genocide prosecuted at the supranational level (ICTR), the international level (primarily European courts exercising universal jurisdiction), the national level (domestic courts), and at the local level (Gacaca Courts).¹⁴ In other recent instances, a merger of accountability levels forms new institutions. Acknowledging the limited resources available in post-civil war Sierra

¹¹ Freeman and Saini, "Transitional Justice and Civil Society", 2007, p. 64.

¹² The fact that this chapter refrains from discussing legal and institutional reform in detail should by no means be seen as reflecting a perception that such processes are not crucial for doing justice in contexts of repression and mass violence. On the contrary, the marginalization of such measures in debates on transitional justice remains one of my key concerns with the field. See further Chapter V.

¹³ Teitel, *Transitional Justice*, 2000, p. 27.

¹⁴ Des Forges and Longman, "Legal Responses to Genocide in Rwanda", 2004, pp. 49-68.

Leone, its president's request for UN assistance led to the creation of a so-called 'hybrid tribunal'. The 'Special Court for Sierra Leone' is a treaty-based tribunal located in Freetown, Sierra Leone. It holds jurisdiction over international crimes as well as domestic crimes, and it relies on international personnel as well as the assistance of Sierra Leonean authorities.¹⁵

Criminal justice following gross human rights violations may in some aspects resemble and in other aspects differ from criminal justice in other contexts. A different, or unique, nature of transitional criminal trials has been said to follow from the creation of special tribunals, a move towards collective guilt, presumption of guilt rather than innocence, lack of adversarial procedures, lack of appeal provisions, extension of statutes of limitations, and the use of retroactive legislation.¹⁶ When due process guarantees, such as the right to legal defence, are restricted, critique tends to be based on the premise that human rights standards should be fully applicable to processes of transitional justice.¹⁷ On the other hand, some point to the impossibility of respecting all international standards in these contexts and therefore suggest a more nuanced approach to human rights in processes of transitional justice.¹⁸

A central debate in the field concerns the political nature of transitional criminal justice. Politics is said to contravene with notions of judicial impartiality and, more broadly, the rule of law when political leaders put

¹⁵ Horowitz, "Transitional Criminal Justice in Sierra Leone", 2006, pp. 43-69.

¹⁶ Elster, "Introduction", 2006, p. 8.

¹⁷ The Rwandan genocide trials, for example, have been severely criticized for failing to respect due process guarantees such as the right to legal defence. See for example Amnesty International, *Gacaca: A Question of Justice*, 2002.

¹⁸ Most clearly William Schabas has argued that there can be tensions between international standards, in some instances making the full respect for all rights impossible. See Schabas, "Balancing the Rights of the Accused with the Imperatives of Accountability", 2004, pp. 154-168; and Schabas, "The Rwanda Case: Sometimes It's Impossible", 2002, pp. 499-520.

pressure on judges or intervene in the functioning of tribunals,¹⁹ when only a certain group of perpetrators are put on trial,²⁰ or when the crimes prosecuted are punishable only according to rules established by the new regime.²¹ While warning against a “remarkably thin line between the fulfilment of the potential for a renewed adherence to the rule of law and the risk of perpetuating political justice”, observers such as Ruti Teitel suggest that the political nature of criminal trials in these contexts is not necessarily an obstacle to liberal political transformation.²² Others maintain that also in periods of fundamental transition law must be sharply separated from politics. Commenting on the Eichmann trial, Hannah Arendt concludes that “the question of individual guilt or innocence, the act of meting out justice to both the defendant and the victim, are the only things at stake in a criminal court”.²³

Some of the more well-known cases of transitional criminal trials at the supranational and international level include the Allies’ trials of top Nazi leaders in Nuremberg (IMT); its Asian counterpart (IMTFE); subsequent prosecutions of German war criminals under Control Council Law No. 10; prosecutions of war crimes, crimes against humanity, and genocide before the two ad hoc UN tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR); and more recently, prosecutions before the

¹⁹ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 30-31. Political interference can take place at all levels. In his account of the ICTY, former Chief Prosecutor Richard Goldstone provides interesting perspectives on how politicians and diplomats, including former UN Secretary-General Boutros-Ghali, attempted to interfere in his work. See Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, 2000, in particular pp. 100-104.

²⁰ Such selectivity can take two forms. Firstly, the political nature of prosecutions can be evident when only a small proportion of alleged perpetrators are put on trials (‘scapegoats’). Secondly, concerns over selectivity arise when only one side to a conflict is held accountable (victors’ justice). On the ‘scapegoat’ challenge, see for example Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 40-45. On the ‘victors’ justice’ challenge, see for example Shklar, *Legalism: Law, Morals, and Political Trials*, 1986, pp. 161-164.

²¹ For a thoughtful analysis of the political purposes served by retroactive legislation in transitions, see Nino, *Radical Evil on Trial*, 1996, in particular pp. 127-135.

²² Teitel, *Transitional Justice*, 2000, p. 30.

²³ Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 1963, p. 298.

permanent International Criminal Court (ICC). Prosecutions in countries not directly affected by violence (universal jurisdiction) are also considered in the transitional justice scholarship. The (attempted) prosecution of Augusto Pinochet in European courts, for example, has been debated in a number of studies.²⁴

The importance of supranational and international transitional criminal trials lies more with the political importance of the persons prosecuted than in the sheer numbers. By October 2009, the ICTR – after 15 years of existence, around 1,000 staff members, and a total budget of more than one billion US Dollars – has completed 37 cases while 38 cases await trial, are still pending, or are awaiting appeal.²⁵ Likewise, the emergence of a permanent body to hold accountable the masterminds of crimes against humanity, after seven years of existence (October 2009), has only led to one case reaching its trial hearings (*prosecutor vs. Thomas Lubanga Dyilo*).²⁶ Such circumstances, along with the claimed inability of international tribunals to address root causes of human rights abuses and international tribunals' remoteness from victims, make some commentators question the legitimacy of international justice and its institutions.²⁷ On the other hand, some credit these bodies for advancing

²⁴ See for example Sriram, "Exercising Universal Jurisdiction: Contemporary Disparate Practice", 2002, pp. 51-57.

²⁵ ICTR website at <http://69.94.11.53/default.htm> (accessed October 7, 2009); Hironelle News Agency, *Cost of the ICTR to Reach \$ 1 Billion by the End of 2007*, May 12, 2006; and Møse, "The ICTR's Completion Strategy – Challenges and Possible Solutions", 2008, pp. 667-679.

²⁶ In other cases, however, arrest warrants have been issued, or cases are in their pre-trial stage. Investigations against the Lord's Resistance Army in Uganda have resulted in the ICC issuing altogether five arrest warrants (but proceedings against one have been terminated due to his decease); besides the case against Dyilo, two cases (involving three persons) related to crimes committed in the DRC have reached their pre-trial stage; one case concerning a citizen of the Central African Republic is at its pre-trial stage; and finally due to a UN Security Council referral, arrest warrants have been issued against three Sudanese citizens (including President Bashir) who are all still at large, and an additional case is pending against a Sudanese rebel leader who has appeared voluntarily before the Court. See ICC website at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/> (accessed October 4, 2009).

²⁷ See for example Drumbl, *Atrocity, Punishment, and International Law*, 2007.

a move “from a culture of impunity to a culture of accountability”,²⁸ and some international lawyers have celebrated the tribunals’ contribution to the development of international human rights law.²⁹

At the national level, most will recall the trials of collaborators in post-World War II European countries, such as France, the Netherlands, and Denmark; the trials of the colonels in Greece following the fall of the military regime; the trials of former junta leaders in Argentina; the Ethiopian ‘Red Terror Trials’ following the 1991 overthrow of the Mengistu regime; the ‘Border Guards Trials’ ensuing the German reunification; and more recently, the trial of Saddam Hussein in US occupied Iraq.

Sometimes criminal trials at the national level have focused on bringing to account only the *leaders* of prior repressive regimes. In Argentina, for example, Raúl Alfonsín’s administration designed prosecution strategies that left behind many actual perpetrators and instead focused on bringing to account the main architects of the military regime. In 1985, after the parliament had nullified a ‘self-amnesty law’, nine commanders in chief of the armed forces who had all been members of the junta were brought to trial. In a tense climate (but generally deemed fair), five received long prison sentences while four were acquitted. Prosecutions of other perpetrators did in fact commence, but were eventually – after intense pressure from fractions within the armed forces – cut short with the passing of a ‘due obedience law’ and other legislative measures.³⁰ While the attempt to expand prosecutions, with mid-level army personnel

²⁸ Lauren, “From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights Context”, 2004, pp. 15-41.

²⁹ Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2001, p. 204. See also Christine Chinkin’s discussion of how international tribunals have contributed to the development of standards on gender-related crimes in Chinkin, “Gender-related Crimes: A Feminist Perspective”, 2004, pp. 116-134.

³⁰ On the junta trial, see Nino, *Radical Evil on Trial*, 1996, pp. 60-104. In 2005, the Argentine Supreme Court declared the ‘due obedience law’ unconstitutional, and prosecutions have re-emerged in recent years. See Sikkink and Walling, “Argentina’s Contribution to Global Trends in Transitional Justice”, 2006, pp. 301-324.

facing court proceedings, has been attributed to the dynamics of an independent judiciary, the executive's strategy of curtailing the judicial activity is usually observed as a trade-off with the Argentine army,³¹ or (more positively) as a necessary measure to ensure stability and the consolidation of democracy.³² Also beyond the Argentine case, tensions between 'peace and justice' are profound for discussions of transitional criminal trials.³³ The Argentine judiciary's attempt to circumvent political strategies also raises questions that relate to a more theoretical debate on the role of legal professionals in transitions.³⁴ Moreover, the nullification of the Argentine self-amnesty law and the challenge of due obedience defences highlight rule of law concerns that have unfolded in many other contexts.³⁵

In other instances of selective prosecutions, the focus has been on former *leaders as well as low-key perpetrators*. Following the German reunification, more than 22,000 investigations of crimes in the former GDR commenced. However, only about 500 of these led to court hearings – and of these, only 20 resulted in prison sentence.³⁶ Although prominent officials, such as the former head of state, Erich Honecker, were prosecuted, only few GDR leaders were actually sentenced to imprisonment.³⁷ Most of the low-key perpetrators, who were convicted, including the border guards who had implemented the shoot-to-kill

³¹ Acuña and Smulovitz, "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts", 1997, pp. 93-122.

³² Nino, *Radical Evil on Trial*, 1996, pp. 100-101.

³³ See for example Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints", 1995, pp. 3-31.

³⁴ See for example McEvoy and Rebouche, "Mobilizing the Professions: Lawyers, Politics, and the Collective Legal Conscience", 2007, pp. 275-314.

³⁵ Nino, *Radical Evil on Trial*, 1996, pp. 62-72 and 149-185; and Teitel, *Transitional Justice*, 2000, pp. 27-67.

³⁶ Offe and Poppe, "Transitional Justice in the German Democratic Republic and in Unified Germany", 2006, p. 265.

³⁷ McAdams, "Communism on Trial: The East German Past and the German Future", 1997, pp. 249-255.

policy, received lenient or suspended sentences.³⁸ Some argue that this limited scope of criminal accountability was (partly) the result of lacking public and political interest in the trials in unified Germany.³⁹ The question of which factors in society drive the pursuit of transitional criminal trials and which factors can be obstacles to that has been subjected to rigorous analysis in the field.⁴⁰ In the German case, one cause of the limited outcome of pursuing criminal accountability for GDR crimes relates to difficulties in proving individual responsibility. Firstly, a strict application of the principle of non-retroactivity – so that the act must be criminalized under both GDR and FRG law – precluded prosecution for a wide range of human rights abuses.⁴¹ Secondly, a general fear of politicizing the process – reflected in Chancellor Helmut Kohl's infamous “we do not hold political trials” announcement⁴² – may have led judges to be extra cautious of not letting trial become an “end in itself”.⁴³ Moreover, concerns over individual accountability for GDR oppression reflect a theoretical debate of whether responsibility should be individualized when the crimes in question were sponsored or ordered by the state.⁴⁴ In the GDR case, it has been suggested that many of the “moral wrongs” did not constitute unlawful acts, and “how is it possible to come to terms with these ‘faceless’ arrangements in terms of personal guilt and culpability?”.⁴⁵

³⁸ Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, p. 265.

³⁹ Ibid.

⁴⁰ See for example Nino, *Radical Evil on Trial*, 1996, pp. 118-127; and Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, in particular pp. 79-135 and 188-271.

⁴¹ Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, pp. 255-256 and 262-263.

⁴² As quoted in McAdams, “Communism on Trial: The East German Past and the German Future”, 1997, p. 244.

⁴³ A Judge in Honecker's trial, as quoted in McAdams, “Communism on Trial: The East German Past and the German Future”, 1997, p. 252.

⁴⁴ See just beneath on general justifications for transitional criminal trials.

⁴⁵ Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, p. 246.

Examples of widespread criminal accountability are fewer. In Ethiopia, however, criminal accountability was based on an approach where decision-makers, officials who passed on orders, as well as those responsible for carrying out the orders were all liable to prosecution. More than five thousand individuals have been indicted, and as of 2007, more than one thousand have been convicted, including (in absentia) former head of state Haile Mengistu.⁴⁶ Yet, Mengistu has avoided accountability and lives comfortably in Zimbabwe.⁴⁷ Obtaining custody over high-profile defendants is a common challenge to transitional criminal trials. Despite the ICC's arrest warrant, for example, it is unlikely that Sudanese President Bashir will face trial in The Hague in the near future.⁴⁸ Prosecuting a large number of individuals involved in past repression also raises difficult questions of how far criminal accountability can, and should, be stretched.⁴⁹

Discussions of advantages and disadvantages of conducting transitional trials at the national level vis-à-vis the supranational level are central to transitional justice discourses. Many observers suggest that in those instances where national authorities are capable of conducting fair trials, criminal justice at the national level poses "a significant potential advantage over international tribunals" because the judicial process is "more deeply connected with the society" in which the crimes took place.⁵⁰

The pursuit of criminal accountability at the local-level is of more recent nature than the above models. Perpetrators of the Rwandan genocide have been prosecuted in so-called 'Gacaca Courts', which purportedly

⁴⁶ Tiba, "The Mengistu Genocide Trial in Ethiopia", 2007, pp. 513-528.

⁴⁷ BBC News, *Mengistu 'To Remain in Zimbabwe'*, December 13, 2006.

⁴⁸ See also Clark, "If Ocampo Indicts Bashir, Nothing May Happen", 2008.

⁴⁹ See for example Drumbl, "Sclerosis: Retributive Justice and the Rwandan Genocide", 2000, pp. 287-307.

⁵⁰ Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2001, pp. 182-183.

combine a traditional reconciliatory community process with formal justice and criminal accountability. Genocide criminals are sentenced in accordance with provisions in written law, but the process relies on extensive community participation and thousands of Gacaca Courts have been set up countrywide.⁵¹ The field is divided on the merits of local-level prosecutions. Advocates for such forums have noted their potential for engaging ordinary citizens in the conduct of justice, thus reinstating “a collective social and judicial voice in communities deeply divided and traumatized by the atrocities of the past”.⁵² Critics, on the other hand, argue that such forums provide inadequate human rights protection for the defendant and raise a number of other concerns relating to the fairness of the process.⁵³

In other instances, community processes of transitional justice have functioned in *conjunction* with criminal justice institutions. In East Timor, the Commission for Reception, Truth and Reconciliation has sought to mediate between victims and low-key perpetrators at the community level, while the gravest crimes are prosecuted in the UN sponsored ‘Special Panels for Serious Crimes’.⁵⁴

As such, transitional criminal trials are usually said to build “upon the complex legacies of the Nuremberg and Tokyo trials conducted after World War II”.⁵⁵ The post-World War II trials’ contribution to the establishment of rules in international law (‘The Nuremberg Legacy’) has

⁵¹ Clark, “Hybridity, Holism, and ‘Traditional’ Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda”, 2007, pp. 765-837.

⁵² Wells, “Gender, Violence and Prospects for Justice at the Gacaca Courts in Rwanda”, 2005, p. 177.

⁵³ See for example Sarkin, “The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Genocide”, 2001, pp. 143-172.

⁵⁴ Reiger, “Hybrid attempts at accountability for serious crimes in Timor Leste”, 2006, pp. 143-170.

⁵⁵ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 26-27.

often been celebrated.⁵⁶ However, we must recall that even if criminal justice provides “the dominant language of successor justice”,⁵⁷ the majority of war criminals around the world do not end up facing criminal trial. Moreover, the preference for criminal justice in international law is not followed by consensus on the *appropriateness* of trial and punishment. The question of whether and why societies emerging from repressive rule and violent conflict should pursue criminal accountability has received considerable attention in the field.

In part, justifications for criminal trials rely on arguments resembling those put forward in general penal theory.

The IMT, it has been noted, “in the first instance [...] aimed at punishment and retribution”,⁵⁸ and Mark Drumbl, in looking into the sentencing practice of the ad hoc international tribunals, observes “a preference for retributive motivations”.⁵⁹ More generally, Drumbl concludes that “retribution remains a consistent goal, although national and local punishing institutions experience considerable difficulty in operationalizing enhanced retribution to accord atrocity perpetrators their comeuppance”.⁶⁰ Rather than formulated as ‘the perpetrator should be punished because he deserves it’, retributive arguments for transitional criminal justice often use a ‘softer’ language where “crimes [...] deserve punishment as a matter of morality and fundamental considerations of justice”;⁶¹ crimes should be met with punishment as a matter of expressing “condemnation and outrage of the international

⁵⁶ On the UN General Assembly’s adoption of the ‘Nuremberg Principles’, see Teitel, *Transitional Justice*, 2000, pp. 34-36.

⁵⁷ *Ibid.*, p. 38.

⁵⁸ Cohen, “Transitional Justice in Divided Germany after 1945”, 2006, p. 61.

⁵⁹ Drumbl, *Atrocity, Punishment, and International Law*, 2007, p. 61.

⁶⁰ *Ibid.*, p. 121.

⁶¹ UN Secretary-General, *Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms in Cambodia*, March 16, 1999, para. 99.

community”;⁶² or, reversed (and victim-centric), “impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflict to whom we owe a duty of justice”.⁶³

Perhaps even more enthusiastically, advocates for individual criminal accountability following large-scale abuses dwell on trials’ ability to deter other individuals from instigating or carrying out atrocities. The Nuremberg trials, as Robert Jackson noted, were desired “to make war less attractive to those who have the governments and the destinies of people in their power”.⁶⁴ Similarly, the existence of the ICC, “it is hoped [...] will end forever the culture of impunity, thereby deterring the commission of gross human rights violations in the future”.⁶⁵ When societies commence prosecution at the national level, Diane Orentlicher asserts that “by laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence”.⁶⁶ However, the deterrent argument often takes a reversed form in transitional justice theory. Orentlicher argues: “above all, however, the case for prosecutions turns on the consequences of *failing* to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lessons can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct”.⁶⁷

⁶² ICTY Trial Chamber, *Prosecutor v. Momir Nikolic*, December 2, 2003, para. 86.

⁶³ Bassiouni, “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights”, 2002, p. 54.

⁶⁴ As quoted in Taylor, *The Autonomy of the Nuremberg Trials*, 1992, p. 55.

⁶⁵ Flinterman, “The International Criminal Court: Obstacle or Contribution to an Effective System of Human Rights Protection”, 2004, p. 266.

⁶⁶ Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, 1991, p. 2542.

⁶⁷ *Ibid.*

Only to a more limited extent have advocates for transitional criminal trials attended to other justifications familiar from general penal theory.⁶⁸

It is important to note that a number of influential studies have questioned the applicability of retributive and deterrent theory to the sphere of transitional justice. These studies tend to argue that the nature of mass violence differs so radically from 'ordinary crime' that the premises of general penal theory are unfitted for such contexts; that justice in societies emerging from large-scale violence is a world apart from justice in stable democracies.

Critics of a retributive justification for transitional criminal trials sometimes dwell on the retributivist's premise of proportionality between crime and punishment. Carlos Nino argues: "our vocabulary for moral blame soon runs out when we want to condemn the genocide of six million persons or the torture of children. To say that these acts were wrong sounds like a kind of irony. Our level of emotion may be raised, but our terms for describing moral heinousness have a limit".⁶⁹ Martha Minow, in a similar vein, suggests that mass violence calls "for more severe responses than would any ordinary criminal conduct, even the murder of an individual. And yet, there is no punishment that could express the proper scale of outrage".⁷⁰ From a practice perspective, Mark Drumbl points to inconsistencies between the severity of crimes and the sentencing practice of international and national tribunals.⁷¹

Retributivism's precondition of blameworthiness, which is thought to rest on an evaluation of characters, is also questioned. Hannah Arendt's

⁶⁸ Justifications relating to rehabilitation, special deterrence, and incapacitation have only played a marginal role in justifications for transitional trials. See, however, Elster, "Retribution", 2006, pp. 52-53.

⁶⁹ Nino, *Radical Evil on Trial*, 1996, p. 141.

⁷⁰ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, p. 121.

⁷¹ Drumbl, *Atrocity, Punishment, and International Law*, 2007, pp. 154-163.

observation that organizers of the Holocaust, such as Eichmann, were opportunists who acted to benefit their career makes Nino question whether we are “prepared to blame a character which we evaluate as banal rather than full of burning hatred, sadistic inclinations, and cruelty?”.⁷² Other critics have as well questioned whether individual culpability is the right paradigm for collective or state-sponsored violence. Drumbl concludes: “whereas for the most part individual participation in ordinary crime deviates from generally accepted social norms in the place and time where the crime is committed, extraordinary crime has an organic and group component that makes individual participation therein not so self-evidently deviant. Participation is often a matter of obeying official authority, not transgressing it”.⁷³ Though more sympathetic to retributive theory, Jon Elster also notes that its premises face greater obstacles in transitional justice than otherwise. Counterfactuals, such as committing crimes to prevent worse crimes being committed, can complicate blame; perpetrators of gross human rights violations may have different motives (political, opportunistic, or pleasure), and it is difficult to determine which is the most blameworthy; and the time span between the point where a crime is committed and the point where trial takes place may challenge the assumption that the perpetrator (still) deserves to be punished.⁷⁴

Moreover, scholars such as Miriam Aukerman assert that the selective nature of prosecution in transitional settings poses an unsolvable challenge to the requirement of just desert for every criminal, as endorsed by retributive theory.⁷⁵

⁷² Nino, *Radical Evil on Trial*, 1996, p. 142.

⁷³ Drumbl, *Atrocity, Punishment, and International Law*, 2007, p. 24.

⁷⁴ Elster, “Retribution”, 2006, pp. 41-48.

⁷⁵ Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice”, 2002, p. 61.

Deterrence theory has not fared better with these critics. Scholars who are sceptical to deterrence theory point out that given massive participation in atrocities, perpetrators stand little chance of being indicted – and face an even smaller risk of being sentenced. Therefore, it is argued, the threat of punishment is unlikely to influence decisions in these contexts.⁷⁶ For some observers, the counter-argument – that deterrence would be strengthened if more judicial institutions are created – is based on a failed premise. Jamie Malamud-Goti, in looking into the Argentine case, suggests that deterrence is implausible in situations where military personnel are responsible for human rights abuses. Malamud-Goti argues that the “immediate and certain approval from comrades overrides any reason for complying with legal standards or any fear of the consequences of engaging in criminal behaviour”.⁷⁷ Because many perpetrators believe they are serving a greater cause, and therefore “want to belong to violent groups”, and because belonging to such groups is perceived as “the only viable survival strategy”, Drumbl concludes that “deterrence’s assumption of a certain degree of perpetrator rationality, which is grounded on liberalism’s treatment of the ordinary common criminal, seems particularly ill fitting for those who perpetrate atrocity”.⁷⁸ Such considerations allow Aukerman to conclude: “if deterrence is our goal, our underlying concern will be the prevention of future crimes. It is by no means clear that prosecution is the most effective mechanism for preventing atrocities”.⁷⁹

Some commentators reverse the deterrence argument. Rather than deterring others, adopting a prosecutorial strategy in one country may lead authoritarian regimes in other countries to insist on maintaining their

⁷⁶ Drumbl, *Atrocity, Punishment, and International Law*, 2007, pp. 169-170.

⁷⁷ Malamud-Goti, “Transitional Governments in the Breach: Why Punish State Criminals?”, 1990, p. 9.

⁷⁸ Drumbl, *Atrocity, Punishment, and International Law*, 2007, pp. 171-173.

⁷⁹ Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice”, 2002, p. 70.

grip on power because they fear the consequences of democratization. Samuel Huntington notes how in the short-term, Alfonsín's decision to prosecute junta leaders in Argentina "stimulated some Uruguayan military to back away from their commitment to relinquish power".⁸⁰ Malamud-Goti makes the same argument, but with the perspective of special deterrence. Should the ousted leaders regain power, lessons from the court room, he argues, will "discourage them from surrendering their power to a democratic successor".⁸¹

Because of these, and a number of other theoretical problems of general penal theory,⁸² critics argue that transitional criminal trials must either find support in other justifications or be abandoned as an appropriate response to atrocities.

Alternative justifications for transitional criminal trials have tended to dwell on consequentialist goals of establishing a liberal democracy that is respectful to the rule of law. In drawing on Judith Shklar's work, Nino argues that trying perpetrators of the past repressive regime will "counter those cultural patterns and the social trends that provide fertile ground for radical evil". This potential, Nino suggests, is a consequence of trials' ability to 1) highlight "the scope and nature of the atrocities", thereby causing that the general public acknowledges the brutal nature of authoritarian regimes; 2) reinforce the rule of law by juxtaposing "the lawless conduct of the defendants" with the new regime's commitment to due process; 3) reinforce the rule of law by lessening the "impulse toward private vengeance"; 4) enable victims to regain "self-respect as holders of legal rights" by providing them with a forum for acknowledgement of suffering and official sanction of the perpetrators;

⁸⁰ Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 1991, p. 103.

⁸¹ Malamud-Goti, "Punishment and a Rights-Based Democracy", 1991, p. 7.

⁸² This chapter's outline does not claim to present a full account of the arguments put forward in debates on whether general penal theory is fitting for transitional justice.

and 5) counter authoritarian tendencies by enhancing public deliberation, resulting in “collective appreciation of the rule of law”.⁸³ Similarly, Juan Méndez notes how “the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person”.⁸⁴ The presumption that transitional criminal trials will further democracy and the rule of law remains among the most frequently articulated justifications for adopting a prosecutorial strategy in dealing with repression and mass violence.⁸⁵

Beyond these utilitarian goals of punishment, specific justifications for transitional criminal trials have focused extensively on victims’ rights. The victim-centric approach suggests that “punishment ought to be directed at redressing the valued sentiments of those who were wronged”, thereby making up with “the victim’s loss of purpose and sense of worth”.⁸⁶ The argument that transitional criminal trials can be justified with reference to victims’ needs has not only gained support in the scholarship, but now also finds expression in the language of law.⁸⁷ Early advocates of a legal duty to prosecute human rights perpetrators mainly made reference to obligations in treaty law to prevent violations of the rights laid down – and therefore focused on deterrence theory.⁸⁸ More recent accounts of international law articulate that victims’ right to a

⁸³ Nino, *Radical Evil on Trial*, 1996, pp. 146-147.

⁸⁴ Méndez, “In Defense of Transitional Justice”, 1997, p. 1.

⁸⁵ Beside Nino’s and Méndez’ studies, this argument has been most central in for example Malamud-Goti, “Punishment and a Rights-Based Democracy”, 1991, pp. 3-13; Osiel, “Human Rights as Social Ideals”, 1999, pp. 217-262; and Teitel, *Transitional Justice*, 2000, pp. 27-68. For an interesting account of the arguments in the early scholarship for and against prosecution, see Huyse, “Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past”, 1995, pp. 337-349.

⁸⁶ Malamud-Goti, “Punishment and a Rights-Based Democracy”, 1991, p. 9.

⁸⁷ See the analysis of international law’s protection of victims’ rights in Aldana-Pindell, “An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes”, 2004, pp. 605-686.

⁸⁸ Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, 1991, pp. 2541-2544.

remedy entails a right to equal and effective access to justice. If the state in question does not ensure that human rights violations are investigated, prosecuted, and punished, the victim's right to access to justice is said to be violated.⁸⁹ Nonetheless, developments in international law on victims' rights to prosecution are not followed by consensus in the scholarship that prosecution and punishment are in fact what victims are looking for.⁹⁰

Vetting

Vetting – also known as 'purges', 'lustration', and a number of other names – has received considerably less attention in the scholarship than transitional criminal trials.⁹¹ Vetting has been defined as "processes for assessing the integrity of individuals to determine their suitability for continued or prospective public employment".⁹² Integrity, in this connection, is said to refer "to a person's adherence to relevant standards of human rights and professional conduct, including her or his financial propriety".⁹³ Vetting is thought to distinguish itself from mass removal through its focus on *individual assessment*.⁹⁴ Although vetting processes may relate to various forms of past misconduct, from a transitional justice perspective, human rights abuses are said to be most central.⁹⁵ According to these definitions, vetting only disqualifies public officials, and the concept does therefore not concern the removal from

⁸⁹ Bassiouni, "International Recognition of Victims' Rights", 2006, pp. 260-263.

⁹⁰ See for example, Cobban, *Amnesty after Atrocity: Healing Nations after Genocide and War Crimes*, 2007, for example pp. 209 and 217.

⁹¹ Before the launch of a 2007 publication "no comprehensive, comparative, and thematic study" on vetting existed. See Duthie, "Introduction", 2007, p. 19. That being said, a considerable amount of case studies and general studies of transitional justice have looked into processes of vetting. See for example the collection of essays in Elster (ed.), *Retribution and Reparations in the Transition to Democracy*, 2006. See also the general discussions in Teitel, *Transitional Justice*, 2000, pp. 149-189; and Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, for example pp. 35-36, 68-69, 124-127 and 257-260.

⁹² Duthie, "Introduction", 2007, pp. 17-18.

⁹³ International Center for Transitional Justice, "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines", 2007, p. 548.

⁹⁴ de Greiff, "Vetting and Transitional Justice", 2007, p. 524.

⁹⁵ Duthie, "Introduction", 2007, p. 17.

private or semi-private institutions.⁹⁶ Even if definitions of vetting only concern the screening process itself, the subsequent process of removing responsible agents from office is inherent to the usual understanding (and practice) of vetting.⁹⁷ Vetting may be relevant to persons already employed in the public sector as well as prospective employees, thus adding to the notion a positive dimension (ensuring that human rights abusers are removed from office) and a negative dimension (ensuring that human rights abusers are not being employed).⁹⁸ Besides this distinction, vetting is often divided into processes of review where the state official remains in office unless the (individual) review concludes that he should not, and, on the other hand, processes of reappointment where all employees in a certain state institution are removed from office, and can then reapply for their positions.⁹⁹

Vetting processes have been utilized in a variety of post-conflict and post-authoritarian contexts. The most widely discussed instances of screening and removal of human rights offenders include the purges of Nazi collaborators in the former occupied European countries;¹⁰⁰ the de-nazification programs initiated by the Allies in post-World War II occupied Germany;¹⁰¹ lustration laws in Central and Eastern Europe after the fall of communist rule, including the Czech Republic, Poland, Hungary, and

⁹⁶ However, the fact remains that private or semi-private entities, such as the media and learning institutions, on several occasions have been subjected to screening. See for example Czarnota, "The Politics of the Lustration Law in Poland, 1989-2006", 2007, pp. 222-258.

⁹⁷ See for example UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para. 52.

⁹⁸ Duthie, "Introduction", 2007, p. 17.

⁹⁹ *Ibid.*, pp. 25-27.

¹⁰⁰ Rousso, "The Purge in France: An Incomplete Story", 2006, pp. 89-123; Deak, "Political Justice in Austria and Hungary after World War II", 2006, pp. 124-146; Dahl, "Dealing with the Past in Scandinavia", 2006, pp. 147-163; and Huyse, "Belgian and Dutch Purges after World War II Compared", 2006, pp. 164-178.

¹⁰¹ For a discussion of differences between American, British, French, and Soviet practices, see Cohen, "Transitional Justice in Divided Germany after 1945", 2006, pp. 68-82.

others;¹⁰² and, more recently, US attempts to rid the Iraqi administration of human rights offenders (or Saddam Hussein loyalists?) through a de-Ba'athification program.¹⁰³

Although there are significant differences between these cases, they share the feature that screening and removing public officials associated with a past regime take place according to a legal mandate. However, it is worth noting that the insistence on individual assessment in theory is not necessarily reflective of how such practices are in fact carried out. Besides some historical examples of collective dismissals,¹⁰⁴ some have argued that the post-World War II purges in occupied Germany concerned groups rather than individuals.¹⁰⁵ As a security measure, individuals belonging to Gestapo, SD, SA, and SS were automatically arrested and interned without trial by the Allied forces.¹⁰⁶ Moreover, more than 100,000 Germans were removed from public office after the introduction of the so-called 'Fragebogen' system.¹⁰⁷ Finally, some argue that the trials of persons belonging to those organizations deemed criminal by the IMT (and subsequently by Control Council Law No. 10) had "in actuality lost any practical significance as an independent category of criminality and was simply subsumed within the general purge of de-nazification that would have, in any event, taken the

¹⁰² Czarnota, "The Politics of the Lustration Law in Poland, 1989-2006", 2007, pp. 222-258; Barret et al., "Lustration as Competition: Vetting in Hungary", 2007, pp. 260-307; Wilke, "The Shield, the Sword, and the Party: Vetting the East German Public Sector", 2007, pp. 348-400; and Priban, "Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law", 2007, pp. 308-346.

¹⁰³ Stover et al., "Bremer's 'Gordian Knot': Transitional Justice and the US Occupation of Iraq", 2006, pp. 229-254.

¹⁰⁴ See for example Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004 (discussing French purges after 1848).

¹⁰⁵ Cohen, "Transitional Justice in Divided Germany after 1945", 2006, pp. 59-88.

¹⁰⁶ *Ibid.*, pp. 68-71.

¹⁰⁷ The idea behind the Fragebogen system was that all Germans should complete a questionnaire that could reveal how closely they were connected to the Nazi regime. The system met a number of obstacles, and the de-nazification process was eventually handed over to the Germans (who were much more lenient in their practice). See Cohen, "Transitional Justice in Divided Germany after 1945", 2006, pp. 73-76.

significance of such membership into account".¹⁰⁸ More generally, some suggest that the distinction between criminal and administrative justice tends to blur in transitional settings.¹⁰⁹

Of the many vetting processes carried out in post-communist Central and Eastern Europe, the Czech practice of 'lustration' is probably the one surrounded by most controversy in the scholarship. In Czechoslovakia, the lustration law concerned political organs – such as parliament and the cabinet – as well as administrative organs, and a range of other institutions, including media posts, academic posts, and the judiciary. According to a draft law, only officials involved in human rights violations that could be proved by the state were to be removed. The law finally adopted, however, simply banned individuals according to their membership in institutions and agencies associated with the prior regime's repression. Moreover, the law only provided for limited access to judicial review.¹¹⁰ While the stated purposes of the Czech lustration was to exclude persons from the administration who were thought to endanger the process of democratization and to restore trust in government,¹¹¹ some observers imply that such arguments simply functioned as a smokescreen for retribution.¹¹² The law has also been severely criticized for failing to respect due process guarantees.¹¹³ On the other hand, some have argued that access to judicial review reduced the effect of lustration – combined with other factors – rendering it without "any considerable effect on the end result of the Czech [...]"

¹⁰⁸ Ibid., p. 72.

¹⁰⁹ Teitel, *Transitional Justice*, 2000, pp. 149-190.

¹¹⁰ Only judicial review of the decision to terminate employment (and not the content of the certificate determining whether the official in question belonged to any of the mentioned groups) was granted. See Boed, "An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice", 1999, pp. 357-402.

¹¹¹ Ibid.

¹¹² Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 126.

¹¹³ See Boed, "An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice", 1999, pp. 385-398.

transition".¹¹⁴ The question of whether vetting processes should comply with those due process guarantees that are typically recognized criminal justice has received considerable attention in the scholarship, also beyond the Czech case.¹¹⁵

Although the international community has been involved in a number of national vetting processes, such involvement is far less institutionalized compared to processes of criminal justice – and it is perceived far less controversial in the scholarship.¹¹⁶ External involvement also occurs when occupation forces impose transitional justice. In Iraq, the US launched a 'de-Ba'athification program', where top Ba'ath party officials were removed and banned from future employment in the administration, and all other Ba'ath party members were prohibited from holding key positions in government institutions. In total, around 30,000 individuals were removed from public office.¹¹⁷ Some commentators question the legitimacy of this process because it is argued that the Iraqis were not sufficiently consulted and because support for this move is lacking in the Iraqi population.¹¹⁸ Since the vetting process in Iraq ended up excluding large parts of the educated elite from public office, some conclude that "the process of de-Ba'athification had become a model of how not to do it".¹¹⁹

The general importance of vetting has been stressed by Jens Meierhenrich: "although lustration is just one of the many institutions of *jus*

¹¹⁴ Tucker, "Paranooids may be Persecuted: Post-totalitarian Transitional Justice", 2006, p. 202.

¹¹⁵ See for example Andreu-Guzmán, "Due Process and Vetting", 2007, pp. 448-481.

¹¹⁶ The scholarly debate on international involvement in national vetting processes has been limited. Nonetheless, the UN has been involved in vetting processes on an ad hoc basis in Bosnia and Herzegovina, Kosovo, East Timor, Liberia and Haiti. See UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para. 17-18.

¹¹⁷ Stover et al., "Bremer's 'Gordian Knot': Transitional Justice and the US Occupation of Iraq", 2006, pp. 229-254.

¹¹⁸ Ibid.

¹¹⁹ Ibid., p. 243.

post bellum, it is arguably one of the most important. The pursuit of administrative justice affects the reconstitution of the public sphere – literally and figuratively – in more fundamental ways, and thus more far-reaching ways, than most other institutions of transitional justice”.¹²⁰ However, Pablo de Greiff warns: “the idea of ridding institutions of abusers and collaborators in the aftermath of conflict or authoritarianism, as is well known, has a long (but not necessarily distinguished) history. At the most general level this is an expression of the desire for a new beginning, or at least a renewal, which is perfectly understandable under such circumstances. However, there is no such thing as a ‘new beginning’ and the idea of renewal is nothing more than shorthand for something that requires articulation”.¹²¹

There are several justifications for vetting public officials responsible for past human rights abuses. Some claim that vetting can serve as a measure to prevent the recurrence of abuses because such processes remove individuals who are likely to become abusers once again from the public sphere.¹²² Others contend that vetting leads to institutional reform, thus (re)establishing public confidence in state institutions – which, in turn, may help to “safeguard the democratic transition”.¹²³ Some link vetting specifically to the rule of law. Former UN Secretary-General, Kofi Annan notes: “vetting processes help to facilitate a stable rule of law in post-conflict countries”.¹²⁴ Others again imply that vetting can serve retributive or deterrence purposes. They argue that vetting may provide accountability where trials are not feasible. The OHCHR, for example, notes how “under circumstances of limited or delayed criminal prosecutions, the exclusion from public service of human rights abusers

¹²⁰ Meierhenrich, “The Ethics of Lustration”, 2006, p. 102.

¹²¹ de Greiff, “Vetting and Transitional Justice”, 2007, p. 524.

¹²² Elster, “Retribution”, 2006, pp. 52-53.

¹²³ Duthie, “Introduction”, 2007, p. 30.

¹²⁴ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para. 52.

may help to fill the impunity gap by providing a partial measure of non-criminal accountability".¹²⁵

Although human rights bodies have indicated that the state has a duty to remove human rights perpetrators of a prior regime,¹²⁶ the legal advocacy for 'state duties' that underpins transitional criminal trials is hardly visible in vetting discourses.¹²⁷ Legal standards and legal discourse in the context of vetting predominantly concern due process questions.¹²⁸ It is noteworthy that although international law *might* facilitate a claim that victims of gross human rights violations are entitled to see their perpetrator removed from office, the debate on vetting has – unlike transitional criminal trials – not (yet) been framed in a victim-centric manner.¹²⁹

Reparations

Reparatory justice has received a great deal of attention in transitional justice scholarship. The *prevalence* of reparations as a measure of

¹²⁵ UN Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Framework*, 2006, p. 5. Many scholars, however, are opposed to retributive justifications. See for example Schwartz, "Lustration in Eastern Europe", 1995, pp. 461-483.

¹²⁶ See for example UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Brazil*, December 1, 2005, para. 18.

¹²⁷ In Hansen, "Transitional Societies and International Law: An Obligation to Remove Human Rights Perpetrators from Office?", 2008, I make the argument that under certain circumstances, the obligation to prevent violations as recognized in a number of international standards, including the ICCPR, cannot be fulfilled without removing known human rights abusers from public office. Perhaps surprisingly, the question of whether a state duty exists is otherwise only discussed sporadically.

¹²⁸ In a number of decisions, the European Court of Human Rights has considered questions relating to due process in vetting procedures. See for example European Court of Human Rights, *Turek v. Slovakia*, Judgment of February 14, 2006, para. 115; and European Court of Human Rights, *Matyjek v. Poland*, Judgment of April 24, 2007, para. 62. As for the scholarship, see for example Andreu-Guzmán, "Due Process and Vetting", 2007, pp. 449-452.

¹²⁹ Although international law provides victims with a right to 'guarantees of non-repetition' (as part of the broader right to reparation), in my view, the nature of vetting (a structured process that targets *institutions*) means that a possible 'right to vetting' rests with society as such, rather than with the individual victim. The argument is made in Hansen, "Transitional Societies and International Law: An Obligation to Remove Human Rights Perpetrators from Office?", 2008.

transitional justice, however, remains disputed. Naomi Roht-Arriaza asks: “if reparations are so universally accepted as part of a state’s human rights obligations, why have so few states emerging from periods of armed conflict or mass violence put viable programs into place?”¹³⁰ Ruti Teitel, on the other hand, observes that “in contemporary times, most transitional regimes – whether following war, military dictatorship, or communism – have undertaken some form of reparatory justice”.¹³¹ This disagreement may follow from different understanding of ‘reparations’. Although financial compensation – as discussed by Roht-Arriaza¹³² – is central to transitional justice discourses, other forms of reparations have played out, in practice as well as in theory. Some of these are restitution of land or assets;¹³³ symbolic reparation, such as apologies or the building of memorials;¹³⁴ and collective reparations, such as community development or affirmative action programs.¹³⁵ The notion of ‘reparation’, however, has also been used to cover a range of other practices. In contemporary UN terminology measures of “medical and psychological care”; “public disclosure of the truth”; “assistance in the recovery, identification and reburial of victims”; “effective civilian control of military and security forces”; “strengthening the independence of the judiciary”; providing “human rights and International Humanitarian Law education to all sectors of society”; and many more initiatives and processes are dealt with as matters of reparatory justice.¹³⁶

¹³⁰ Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 121-122.

¹³¹ Teitel, *Transitional Justice*, 2000, p. 119.

¹³² Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 121-161 (quote at 121).

¹³³ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 107-112; and Teitel, *Transitional Justice*, 2000, pp. 129-131.

¹³⁴ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 112-117 and 138-142.

¹³⁵ Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 129-136.

¹³⁶ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation...*, 2006, principle 15-23.

Despite these variations, Teitel observes some common features of reparatory measures in transitions. Reparations, she suggests, transgresses distinctions between criminal and civil justice because they “express responsibility of past wrongdoing” and “challenge the understanding that the distinguishing feature of criminal justice (as opposed to civil justice) is the dominant role of the state”.¹³⁷

Examples of reparations include financial compensation from the German state (and companies) to victims of the Holocaust; (limited) financial compensation, official acknowledgement, and creation of public memorials in Argentina and Chile following the military dictatorships; financial compensation and restitution of confiscated property in some Central and Eastern European countries following communist rule; restitution of land and property in Bosnia and Herzegovina in accordance with the Dayton Peace Agreement; various reparation programs in post-Apartheid South Africa, including restitution of land and (limited) compensation; and compensation by a UN trust fund for (certain) victims of the Iraqi invasion of Kuwait.¹³⁸ Studies of transitional justice have also looked into reparations in a more distant past. Jon Elster, for example, discusses compensation for loss of property and loss of career opportunities offered to supporters of the restored French monarchy (1814) in a transitional justice framework,¹³⁹ and Teitel debates the imposed reparations on the German state after World War I.¹⁴⁰

The field has also (but more marginally) dealt with reparations for past wrongs in Western democracies. Martha Minow, for example, pays attention to US reparations for injustices committed against Japanese

¹³⁷ Teitel, *Transitional Justice*, 2000, p. 128.

¹³⁸ On all of these examples, see Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 121-161.

¹³⁹ Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, pp. 36-46.

¹⁴⁰ Teitel, *Transitional Justice*, 2000, pp. 121-122.

Americans during World War II.¹⁴¹ Already during the War, (unsuccessful) attempts were made to challenge the legality of convictions when Japanese Americans were interned for violating curfews. Following decades of silence, in 1978 the 'Japanese American Citizens' League' requested the US Congress to facilitate an apology and financial compensation for internments during the War. The 1983 congressional commission report 'Personal Justice Denied' recognized the humiliating conditions of internment and explained the policy behind as a consequence of racism, war hysteria, and failed political leadership. The commission was forthcoming to the claims for financial compensation. Finally, in 1988 – after heated debates in the Senate – a 'Civil Liberties Act' was passed, granting each surviving victim a sum of 20,000 US Dollars and an official apology for the internment. Moreover, a 1983 lawsuit (once again) challenged the legality of convictions for surpassing curfews. This time, a district court judge, following a detailed examination of wartime evidence, ruled in favour of the plaintiffs and removed their labelling as criminals.¹⁴² According to Minow, both of these reparatory measures created increased recognition of the suffering of Japanese Americans, and may have motivated Afro-Americans and others to file cases against the US government for past wrongdoing.¹⁴³ The argument that "the struggle for reparations represented the search for public acknowledgement of the wrongs done" raises more general questions of what ends financial compensation in fact serves as well as the importance of symbolic reparation.¹⁴⁴ Reparations to Japanese Americans concern events that took place four decades earlier. Deliberations on 'how far back should we go' – and whether

¹⁴¹ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 94-101.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, pp. 101-102.

¹⁴⁴ *Ibid.*, p. 99.

descendants of victims should be compensated – have also received attention beyond this case.¹⁴⁵

In other cases, reparations concern more recent events. During the decade-long civil war in Guatemala, “systematic reallocation of property became a tactic to prevent the return of the displaced”.¹⁴⁶ The peace accords entail provisions for land restitution, but the remedies are unclear and were “only partially implemented”.¹⁴⁷ Rhodri Williams explains that the government showed little interest in effecting land restitution, and that land disputes continue to have a destabilizing effect in Guatemala.¹⁴⁸ In Guatemala, measures of transitional justice also include a UN sponsored ‘Commission for Historical Clarification’. This commission recommended measures of reparations. Although much delayed, in 2004, a ‘National Reparations Program’, with a 10-year mandate and a budget of almost 40 million US Dollars, was launched.¹⁴⁹ As the compensation program entitles victims of summary executions, disappearances, and torture a right to compensation as well as it lays down a collective right for victims to seek compensation for forced displacement and massacres, the program is more inclusive than counterparts in for example Chile, Argentina, and South Africa, at least on paper.¹⁵⁰ Yet, the Guatemalan case reveals how tensions between

¹⁴⁵ Tyler Cowen argues that we should be cautious in accommodating quests for cross-generation reparations. See Cowen, “How Far Back Should We Go? Why Restitution Should Be Small”, 2006, pp. 17-32. Teitel examines a “dilemma of the passage of time” in Teitel, *Transitional Justice*, 2000, pp. 138-141.

¹⁴⁶ Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice”, 2007, p. 42.

¹⁴⁷ *Ibid.*, pp. 43-47.

¹⁴⁸ *Ibid.*

¹⁴⁹ Arriaza and Roht-Arriaza, “Social Repair at the Local Level: The Case of Guatemala”, 2008, p. 155.

¹⁵⁰ In Chile, only the families of those killed or disappeared were entitled to compensation. In addition, the process in Argentina provided compensation to political prisoners. In South Africa, victims of killing, torture, and abduction received monetary compensation. See Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 124-126. On the details of the Guatemalan reparations program, see Arriaza and Roht-Arriaza, “Social Repair at the Local Level: The Case of Guatemala”, 2008, p. 155.

groups can arise when distribution of compensations takes place.¹⁵¹ Transitional justice theory, also beyond the Guatemalan case, has dealt with questions of how to define 'victims' and who to compensate.¹⁵²

Several justifications for reparations have been put forward in transitional justice theory. According to UN guidelines, "adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of International Humanitarian Law".¹⁵³ Statements like this, however, leave us with little clarification on whose justice should be promoted, what kind of justice should be promoted, what is meant by 'promote', and how reparations are thought to promote the kinds of justice in question.

Many transitional justice scholars argue that it is problematic to assume that 'standard legal justification' for reparation, such as 'making the victim whole again', can be exported to the transitional context.¹⁵⁴ Erik Doxtader, for example, notes: "reparations are never enough. The past cannot be undone, lost potential can never be fully recovered and the reparative gesture is inevitably partial".¹⁵⁵ Roht-Arriaza also emphasizes that reparations are "intended to return victims to the state they would have been in had the violations not occurred – something that is impossible to do" after mass violence.¹⁵⁶ Roht-Arriaza continues: "what could replace lost health and serenity, the loss of a loved one or of a whole extended family, a generation of friends, the destruction of culture

¹⁵¹ Arriaza and Roht-Arriaza point to tensions between Mayans and non-Mayans in the distribution of compensation. *Ibid.*

¹⁵² See for example Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, 2002, pp. 119-123.

¹⁵³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation...*, 2006, principle 15.

¹⁵⁴ Cowen notes that "the original goal of restitution was to 'make the victim whole again'", while arguing that there are problems in utilizing such justifications in contexts of 'past wrongs'. See Cowen, "How Far Back Should We Go? Why Restitution Should Be Small", 2006, p. 29.

¹⁵⁵ Doxtader, "Reparation", 2004, p. 25.

¹⁵⁶ Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence", 2004, p. 122.

or an entire community?".¹⁵⁷ Other general justifications for reparations, such as "the correction of unjust enrichment", for observers such as Aviezer Tucker, are subject to the objection that perpetrators of mass violence do not necessarily benefit economically from their crimes. Tucker therefore concludes that "we deal here with a negative-sum game".¹⁵⁸ What is more, according to Minow, "putting value on losses from mass atrocity" can be an inappropriate way of attending to victims' needs.¹⁵⁹ Minow exemplifies: of the 500 so-called comfort women survivors, only six accepted the Japanese government's offer of monetary compensation. Accordingly, Minow questions the concept of translating human losses into material goods. She points to the general inadequacy of compensation after mass violence when noting that "no market measures exist for the value of living an ordinary life, without nightmares or survivor guilt".¹⁶⁰

Despite these reservations, for most observers, the primary justification for reparations after repression and atrocity remains victim-centric. Laura Arriaza and Naomi Roht-Arriaza, for example, note that "reparations can provide one of the most tangible manifestations of a government's recognition of victims' dignity and rights, and of its commitment not to repeat past wrongs".¹⁶¹ However, like criminal trials and vetting processes, reparation as a mechanism of transitional justice also finds justification in the idea of liberal democratic change. Teitel notes how

¹⁵⁷ Ibid.

¹⁵⁸ Tucker, "Rough Justice: Rectification in Post-authoritarian and Post-totalitarian Regimes", 2006, p. 276.

¹⁵⁹ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 104-105.

¹⁶⁰ However, Minow also mentions that the reluctance to accept compensation was partly due to the fact that the compensation would be paid by private entities, rather than the government itself. 'Comfort women' refers to women from East Asian countries, captured and abused by Japanese soldiers during World War II. See Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 104-105.

¹⁶¹ Arriaza and Roht-Arriaza, "Social Repair at the Local Level: The Case of Guatemala", 2008, p. 154. See also Bassiouni, "International Recognition of Victims' Rights", 2006, pp. 203-279.

“the paradigm of transitional reparatory justice is a complex conception, as it does work advancing multiple purposes mediating and constructing the transition”.¹⁶² Teitel finds reason to distinguish reparations in political transitions from other instances of reparations because “moral reparations transcend redress to the affected individuals and their survivors for injury, reaching the public eye”, thereby serving “the societal interest in the political transition”.¹⁶³ Teitel illustrates by arguing that in post-communist Central and Eastern Europe, reparations were framed in “juridical terms, as legal entitlements and ‘rights’” only to the extent that they were “compatible with the goals of the economic transition”.¹⁶⁴ Consequently, Teitel argues that “transitional reparatory justice is not justified primarily by conventional corrective concerns, but, rather by external political values related to the political exigencies of the time”, where “redress constitutes a primary symbol of discontinuity with the past, exercising the new regime’s critical transformative potential”.¹⁶⁵

Another dimension of reparatory justice’s transformative potential concerns a suggested link between reparations and restorative justice. With this nexus, a profound question concerns “how material and symbolic compensation can work to acknowledge the wounds of the past, restore human dignity and create platforms for collective (re)integration and nation-building”, and a key objective of reparations becomes the transformation of “a divided society into one that has a sense of common good and collective unity”.¹⁶⁶ Reparations, therefore, may be observed as part of a broader project of reconciliation.¹⁶⁷

¹⁶² Teitel, *Transitional Justice*, 2000, p. 146.

¹⁶³ *Ibid.*, p. 127.

¹⁶⁴ *Ibid.*, p. 131.

¹⁶⁵ *Ibid.*, p. 147.

¹⁶⁶ Doxtader, “Reparation”, 2004, p. 27.

¹⁶⁷ See also Philpott, “Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?”, 2006, pp. 23-24.

Finally, reparatory justice in transitions – unlike reparations in other contexts, it is argued – connects to punishment. Elster concludes: “in modern legal systems [...] reparation for victims is uncoupled from punishment of the wrongdoer”, but in transitional settings, “the process of compensation may nevertheless be wholly or partly shaped by punitive intentions”.¹⁶⁸ However, as some observers imply, corrective purposes of reparatory justice frequently end up targeting the wrong entities. This can lead to dilemmas, including the paradoxical situation where a new democratic regime (whose leaders may have been subjected to repression) ends up ‘being punished’ for the ancient regime’s crimes.¹⁶⁹

Examining these justifications gives rise to the question of “whether past *suffering* or present and future *need* is the most relevant ground for compensation”.¹⁷⁰ Most observers agree that reparation is in fact both backward-looking and forward-looking. While reparations inherently relate to the past, its consequences may provide “a basis for building a future”,¹⁷¹ or “reintegrate the marginalized and isolated into society so they can contribute to the future rebuilding of the country”.¹⁷² Some scholars distinguish between restitution, which they see as backward-looking, and compensation, which they see as “forward looking and utilitarian”.¹⁷³

Developments in international law have proved crucial for the scholarship’s understandings of when and why victims should be redressed. International Humanitarian Law has for long required that states which breach the rules of war pay compensation to the violated

¹⁶⁸ Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 166. See also Teitel, *Transitional Justice*, 2000, p. 121.

¹⁶⁹ On these problems, see for example Teitel, *Transitional Justice*, 2000, pp. 138-140.

¹⁷⁰ Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 177.

¹⁷¹ Doxtader, “Reparation”, 2004, p. 25.

¹⁷² Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, p. 122.

¹⁷³ Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 174.

state.¹⁷⁴ Moreover, as early as in 1928, the Permanent Court of International Justice (the predecessor to the International Court of Justice) held that reparations are integral to international law.¹⁷⁵ However, it was only with the coming of international human rights law (and further developments of humanitarian law) that individual victims of abuses obtained rights to monetary compensation.¹⁷⁶ Contemporary debates on reparatory justice as a measure of transitional justice tend to draw significantly on these legal standards (and may have contributed to their development).¹⁷⁷ Not all celebrate these developments in international law. Doxtader, for example, argues that “international law tends only to recognize the need for reparative measures in response to specific gross violations of human rights. This focus leaves to the side the question of how to understand and redress the wounds inflicted by structural forms of violence such as South African Apartheid – a system that subjugated and exploited millions in a manner that does not always translate into actionable legal claims that can be adjudicated in courts”.¹⁷⁸ What is more, Doxtader suggests that the formal courts’ inaccessibility can be an obstacle to approaching the question of reparations primarily as a matter of legal rights that are assumed enforceable.¹⁷⁹

¹⁷⁴ See Article 3, the Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (the 1907 Hague Convention).

¹⁷⁵ Permanent Court of International Justice, *Chorzow Factory Case*, September 13, 1928 (noting at 47 that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”).

¹⁷⁶ See generally Teitel, *Transitional Justice*, 2000, pp. 122-124.

¹⁷⁷ See Bassiouni’s discussion of the UN principles (which he took part in developing) in Bassiouni, “International Recognition of Victims’ Rights”, 2006, pp. 203-279. See the wide range of victims’ rights (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition) recognized in UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation...*, 2006.

¹⁷⁸ Doxtader, “Reparation”, 2004, p. 27.

¹⁷⁹ *Ibid.*

Truth Commissions

Besides transitional criminal trials, purges, and reparations, the truth commission is usually considered “one of the standard options on the palette of transitional justice alternatives”.¹⁸⁰ Priscilla Hayner, a leading expert on these commissions, defines the “generic name of truth commissions” as bodies that 1) focus on the past; 2) investigate a pattern of abuses over a period of time (rather than a specific event); 3) are of temporary nature (typically between 6 months and 2 years), and complete their work with the submission of a report; and 4) are officially sanctioned, authorized, or empowered by the state.¹⁸¹

Truth commissions have gained importance as a mode of dealing with past abuses. In 2001, Hayner (according to the above definition) identified “at least twenty-one official truth commissions established around the world since 1974”.¹⁸² Among the most well-known of these are the Argentine ‘National Commission on the Disappeared’, established in 1983 when Raúl Alfonsín took office after the military junta had consented to democratic elections;¹⁸³ the Chilean ‘National Commission on Truth and Reconciliation’, established by President Patricio Aylwin immediately after his taking office in 1990;¹⁸⁴ and the South African ‘Truth and Reconciliation Commission’, established in connection with the negotiated transition from Apartheid to democratic rule in 1994.¹⁸⁵ But truth commissions have played important roles elsewhere.¹⁸⁶ The prevalence of truth commissions is followed by

¹⁸⁰ Schabas, “The Sierra Leone Truth and Reconciliation Commission”, 2006, p. 21.

¹⁸¹ Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 14. For a slightly different definition, see Mattarollo, “Truth Commissions”, 2002, pp. 295-324.

¹⁸² Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15.

¹⁸³ *Ibid.*, pp. 33-34.

¹⁸⁴ *Ibid.*, pp. 35-38.

¹⁸⁵ *Ibid.*, pp. 40-45.

¹⁸⁶ For a comprehensive list of truth commissions following gross human rights violations, see Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15, Appendix 1, Chart 1, pp. 305-311.

increased academic interest as well as extensive practical involvement by international organizations, the donor community, and civil society organizations.¹⁸⁷

There may be several reasons for the prevalence of truth commissions. As Hayner notes, the most straightforward of these concerns the needs “to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history”.¹⁸⁸ These needs are said to materialize because authoritarian regimes commonly carry out (the worst acts of) repression and human rights violations in secret. An officially sanctioned version of past repression, therefore, has been said to eliminate continued denial among parts of the population.¹⁸⁹ Aryeh Neier notes: “where deception is so central to the abuses, then truth takes on a greatly added significance”.¹⁹⁰ Compared to criminal trials, some scholars argue that the truth revealed by these commissions is more nuanced, more comprehensive, and easier to assess.¹⁹¹ For others, truth commissions “will be a second-best solution because the public inquiry into the truth is much more precise and much more dramatic when done through a trial,

¹⁸⁷ The scholarship on truth commissions has become considerable. Besides a large number of case studies, notable studies of more general nature include: Freeman, *Truth Commissions and Procedural Fairness*, 2006; and Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15. On the practical side, the UN has (in different ways, and to different extents) been involved in the creation and running of several truth commissions, such as the El Salvadorian ‘Comisión de la Verdad para El Salvador’ (1992-1993); the Burundian ‘International Commission of Inquiry’ (1995-1996); the Guatemalan ‘Comisión para el Esclarecimiento Histórico’ (1997-1999); and, more recently, the Sierra Leonean ‘Truth and Reconciliation Commission’ (2000-2001). The ‘donor community’ and (international and local) civil society organizations are also involved in the set-up and funding of truth commissions. Not least, the emergence of international and regional ‘transitional justice institutes’, such as the New York-based ‘International Center for Transitional Justice’ and the Cape Town-based ‘Institute for Justice and Reconciliation’, has led to advocacy for, and practical involvement in, truth commissions.

¹⁸⁸ Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15, pp. 24-25.

¹⁸⁹ *Ibid.*

¹⁹⁰ Aryeh Neier as quoted in Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 25 with note 6.

¹⁹¹ Abrams and Hayner, “Documenting, Acknowledging and Publicizing the Truth”, 2002, p. 291.

with the accused contributing to the development of the story".¹⁹² Another merit of truth commissions is said to involve victims' redress because they receive acknowledgement of their suffering and increased recognition of their needs.¹⁹³ What is more, because victims are treated "as persons to be believed, rather than troublemakers or even people with a burden to prove their story", many scholars insist that the procedures under a truth commission are more victim-friendly than criminal proceedings.¹⁹⁴ Although truth commissions are backward-looking by nature, they may also contribute to forward-looking objectives such as prevention. The commissions, Ruti Teitel suggests, sometimes by their very names ('Nunca Más'),¹⁹⁵ "offer the promise of deterrence of future criminal wrongdoing".¹⁹⁶ The commissions are also merited for outlining institutional responsibility and forwarding recommendations for reform.¹⁹⁷ In addition, truth commissions are often associated with reconciliation. This may not be surprising since commissions such as the Chilean and the South African made explicit reference to this concept already qua their names. However, the question of how these commissions actually contribute to reconciliation remains a controversial issue in the literature.¹⁹⁸ Finally, truth commissions can be linked to the pursuit of accountability. Some see the procedures before truth commissions as entailing a form of accountability in their own right.¹⁹⁹ However, the work of truth commissions, it has been noted, can also

¹⁹² Nino, *Radical Evil on Trial*, 1996, p. 146.

¹⁹³ Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 28.

¹⁹⁴ Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, p. 72.

¹⁹⁵ The final report of the Argentine commission as well as the commission in Uruguay were entitled "Nunca Más" (Never Again).

¹⁹⁶ Teitel, *Transitional Justice*, 2000, p. 81.

¹⁹⁷ Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 29-30.

¹⁹⁸ See for example Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 30; Villa-Vicencio, "Reconciliation", 2004, pp. 3-9; and Daly, "Truth Scepticism: An Inquiry into the Value of Truth in Times of Transition", 2008, pp. 23-41.

¹⁹⁹ See for example Bassiouni, "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights", 2002, p. 32.

increase the probability of criminal accountability by making recommendations for criminal investigations, or by forwarding files to the prosecutor's office.²⁰⁰

Despite these merits, decision-makers' opt for a truth commission is not necessarily the result of an ideal choice. Truth commissions have often been perceived as a 'second-best option' when prosecutions are not feasible. Benjamin Schiff, in comparing truth commissions with trials, notes that "pardons, amnesties, and truth commissions depart from important standards of accountability and thus fail clearly to counter impunity", and therefore recommends that truth commissions are only established when trials cannot take place.²⁰¹ In practice, truth commissions have sometimes (but in different ways) been connected to amnesty provisions. According to many observers, the creation of the Chilean commission should be viewed as a feasible alternative to prosecutions – an option made difficult with Augusto Pinochet's passing of a general amnesty law before his leaving office and the military's continued influence under the new democracy.²⁰²

In one case – that of the South African Truth and Reconciliation Commission – did the commission itself hold the powers to grant amnesties for human rights violations committed in context of past political repression and struggle. The granting of amnesty was, however, conditional. Amnesties were granted only on an individual basis after application; the applicant was to make a full disclosure of the human rights violations committed; and only abuses committed between 1960

²⁰⁰ In Argentina, the truth commission played an important role for the subsequent trials, and also in Uganda and Haiti, files were forwarded to the prosecutors' office (but with less success in facilitating trials). See Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 29 and 90-102.

²⁰¹ Schiff, "Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission", 2002, p. 327. See also Cassel, "International Truth Commissions and Justice", 1995, pp. 326-333.

²⁰² Acuña, "Transitional Justice in Argentina and Chile: A Never-Ending Story", 2006, p. 225.

and 1994, with a *political objective* (and proportional to that objective), were eligible to amnesty.²⁰³ Many have argued that the South African model of 'trading truth for amnesty, and amnesty for truth' was a prerequisite for the Apartheid regime to agree to the holding of democratic elections, and thus a necessary compromise for ensuring a peaceful transition. Former South African President Thabo Mbeki has put it simple: "within the ANC the cry was to 'catch the bastards and hang them' – but we realised you could not simultaneously prepare for a peaceful transition while saying we want to catch and hang people, so we paid a price for the peaceful transition. If we had not taken this route I don't know where the country would be today. Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment, we would never have undergone peaceful change".²⁰⁴

Following the establishment of the South African Truth and Reconciliation Commission, some scholars started to argue that truth commissions should generally (or in most instances) be preferred to criminal trials.²⁰⁵ Others maintain that the use of truth commissions (at the cost of criminal trials) fails to conform to international law standards and insist that retribution is necessary to achieve "just reconciliation".²⁰⁶

Advocacy for truth-seeking efforts has frequently made reference to 'state duties' to utilize such measures. Already at the 1988 Aspen Institute conference, 'State Crimes: Punishment or Pardon?' there "was common agreement that the successor government has an obligation to investigate and establish the facts so that the truth be known and be

²⁰³ See for example Boraine, "Truth and Reconciliation Commission in South Africa", 2006, pp. 305-307.

²⁰⁴ Thabo Mbeki as quoted in Villa-Vicencio, "Restorative Justice in Social Context: The South African Truth and Reconciliation Commission", 2003, p. 236.

²⁰⁵ See for example Amstutz, "Restorative Justice, Political Forgiveness, and the Possibility of Political Reconciliation", 2006, pp. 151-188; and Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 118-147.

²⁰⁶ See Dugard, "Retrospective Justice: International Law and the South African Model", 1997, p 287.

made part of the nation's history. Even in situations where pardon or clemency might be appropriate there should be no compromising of the obligation to discover and acknowledge the truth".²⁰⁷

Closing the Books

In instances of 'negotiated transitions' – such as those in Chile and South Africa – amnesties are said to make up "an important bargaining chip" in ensuring a peaceful transition.²⁰⁸ Both Chile and South Africa opted for combining amnesties with other measures of transitional justice, but this is not always the case. As if reflecting a decision to 'close the books' and not look back, blanket amnesties are sometimes granted and no other measure of transitional justice is put in place.²⁰⁹

With the passing of a general amnesty law in October 1977, the Spanish Parliament endorsed the new democratic administration's plea to halt prosecutions of any member of the outgoing regime (or for any other political crime). The amnesty was part of "a broader transitional pact", according to which political prisoners were released, the archives of the secret police were sealed, most civil servants could maintain their jobs and pensions, the communist party was legalized, and a new constitution was adopted with consensus.²¹⁰ Some commentators have emphasized how the 'Spanish model' lays the foundation for a successful transition and democratic consolidation. Samuel Huntington notes that "to reject amnesty in these cases is to exclude the most prevalent form of democratization".²¹¹ Scholars such as Paloma Aguilar, however, argue that the 'doing nothing path' should not necessarily be understood as a

²⁰⁷ Henkin, "State Crimes: Punishment or Pardon (Conference Report)", 1995, pp. 184-188.

²⁰⁸ Teitel, *Transitional Justice*, 2000, p. 53.

²⁰⁹ Here simply understood as the mechanisms of transitional justice which have been discussed in preceding sections.

²¹⁰ Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, pp. 61-62.

²¹¹ Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 1991, p. 217.

broad consensus decision where the actors had preferences for 'looking forward'. Aguilar argues that "it is fear of conflict that allows one to understand the attitude of the main actors involved in the transition process and the institutional framework established during the [transition] period".²¹²

There are other examples of consensus (at the level of the political leadership) to refrain from adopting any mechanisms of transitional justice. When in Mozambique, the long-lasting civil war between the leftish Frelimo government and the South African sponsored insurgents, Renamo, was negotiated to an end in the early 1990s, it was agreed that "no one should be prosecuted for what had been done during the war".²¹³ The rationale was seemingly that "we needed to forget those things" in order to advance peace and reconstruction.²¹⁴ The subsequent democratic elections rested on a peace agreement, in which a blanket amnesty was laid down. No other officially sanctioned processes of truth seeking, reparations, or vetting were initiated. Nonetheless, a UN sponsored process of disarmament, demobilization, and reintegration was implemented. Moreover, the lack of state sponsored (or internationally enforced) mechanisms of transitional justice does not mean that Mozambicans have 'done nothing'. Processes of community-based healing have been used in villages, reintegrating (and perhaps reconciling) perpetrators and victims.²¹⁵

But if the Mozambican case is said to highlight a transition where actors *refrain* from adopting measures of transitional justice, how then can these community-based processes be approached? Parts of the scholarship have answered this question by utilizing a broader understanding of the

²¹² Aguilar, "Justice, Politics, and Memory in the Spanish Transition", 2001, p. 94.

²¹³ A Renamo delegate in interview with Helena Cobban. See Cobban, *Amnesty after Atrocity: Healing Nations after Genocide and War Crimes*, 2007, pp. 140-141.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, pp. 136-182.

mechanisms of transitional justice.²¹⁶ Likewise, there are problems related to perceiving the Spanish case as an example of 'closing the books'; as an example of doing nothing. More recently, legislation has been passed which addresses repression during the Franco years as well as the preceding civil war through a variety of measures, including financial compensation, reversal of 'political convictions', preferential access to public services, and the granting of citizenship to persons who have been exiled in this period.²¹⁷ In part, these challenges to the field seem to derive from the understanding that transitional justice is something that is embarked on in the interval between two regimes.

²¹⁶ See further section 2.4.

²¹⁷ See the so-called 'Law of Historical Memory' (Act No. 52/2007), December 26, 2007. For an analysis of how the law came about, and its place in broader transitional justice discourse, see Golob, "Volver: The Return of/to Transitional Justice in Spain", 2008, pp. 127-141.

Traditional Knowledge and Human Rights

Traditional Knowledge (TK) and Human Rights

Hassan Soleimani*

Abstract

Traditional knowledge is the cornerstone of the culture, source of revenue and human rights of indigenous peoples and local communities. It is embedded in the culture of local community. Traditional knowledge is not restricted to any specific field; it may belong to traditional medicine, handicraft, art, agricultural, environmental and knowledge associated with genetic resources. It has been estimated that in the year 1995, the market value of pharmaceutical derivatives from traditional knowledge amounted to U.S. \$43 billion. Accordingly, Traditional Knowledge which crop up from different cultures make huge contributions to the humanity and its existence.

In this context, Traditional Knowledge has been receiving increasing attention during last decade in relation to intellectual property protection. The different aspect of Traditional Knowledge including its protection has been under discussion at several international bodies since the beginning of the last decade. Some of these international forums where the discussions are presently on-going are: the Convention on Biological Diversity (CBD), the World Intellectual Property Organization (WIPO), World Trade Organization (WTO) and International Treaty on Plant Genetic Resources for Food and Agriculture 2001 under the UN Food and Agriculture Organization (FAO).

The rights which are expressed in the Human Rights documents especially Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in relation to Traditional Knowledge are important to review. Accordingly, in order to reach this aim, the Article will discuss the relation between Traditional Knowledge and Culture, the importance of Traditional Knowledge and its relations with Human Rights. The article then follows and analyzes the on-going discussions in a number of international arrangements dealing with the subject.

* Dr. Hassan Soleimani is Assistant Professor of International Law at the Iran's Islamic Azad University, Damghan Branch and Deputy Secretary General of the Asian-African Legal Consultative Organization (AALCO) (hsoliemani@hotmail.com).

Introduction

Traditional knowledge is the cornerstone of the culture, source of revenue and human rights of indigenous peoples and local communities. It is embedded in the culture of local community. Traditional knowledge is not restricted to any specific field; it is the creative production of human thought and craftsmanship, language, cultural expressions which are created, acquired and inspired, such as songs, dances, stories, ceremonies, symbols and designs, poetry, artworks; scientific, agricultural, technical, and ecological knowledge and the skills required to implement this knowledge and technologies.

Traditional knowledge cannot be alienated from the community by transferring ownership to another person or corporation because that knowledge is part of the distinct and collective identity and has meaning in the context of that community, not outside it. Consent to use, display, depict or exercise, is therefore temporary, and given only on the basis of trust that recipients respect and uphold the conditions and customary laws that are attached to particular aspects of the heritage. Traditional knowledge is to be kept in perpetuity to be safeguarded, developed and passed from one generation to the next. The transfer of this knowledge is a collective responsibility and in most cases it is transmitted orally. In some cases these are codified in texts.

It has been estimated that in the year 1995, the market value of pharmaceutical derivatives from traditional knowledge amounted to U.S. \$43 billion.¹ Accordingly, Traditional knowledge which crop up from different cultures make huge contributions to the humanity and its existence. In this context, Traditional Knowledge has been receiving

¹ Michael Blakeney, "What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?; Understanding the Value Chain," paper written from the Roundtable on Intellectual Property and Traditional Knowledge, World Intellectual Property Organization, Geneva, November 1 and 2, 1999, WIPO/IPTK/RT/99/3, p.9.

increasing attention during last decade in relation to intellectual property protection. The different aspects of Traditional Knowledge including its protection have been under discussion in several international bodies since the beginning of the last decade. However, so far, there is no international convention regarding protection of traditional knowledge. However, the negotiations which are undergoing in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF) in the World Intellectual Property Organization (WIPO) might be lead to the creation of such an international instrument. In parallel to WIPO, there are also some other international forums where the discussions regarding protection of traditional knowledge are presently ongoing, including: the Convention on Biological Diversity (CBD),² World Trade Organization (WTO) and International Treaty on Plant Genetic Resources for Food and Agriculture 2001 under the UN Food and Agriculture Organization (FAO).

The rights which are expressed in the Human Rights documents especially Article 27 of the Universal Declaration on Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) and Article 15.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in relation to Traditional Knowledge are important to analyze.

The present article will highlight importance of Traditional Knowledge, relations between Traditional Knowledge and Culture, Traditional

² The Convention on Biological Diversity 1992 concluded at the United Nations Conference on the Environment and Development "Earth Summit" which was held in Rio De Janeiro, 3-14 June 1992 under the auspices of the United Nations of Environment Program. This requests the CBD to promote the conservation of biological diversity and traditional knowledge, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of genetic resources and related Traditional Knowledge. At the present time, 188 countries are members of the convention. The text of the Convention and the list of its members are available at: <http://www.cbd.int/convention/text/> (last visited October 25, 2011).

Knowledge protection and international responses and the relationship between Traditional Knowledge and Human Rights.

The Importance of Traditional Knowledge and its Input to the Human Societies

Taken into account that, Traditional Knowledge, genetic resources, and folklore are intertwined, it is very difficult to discuss the importance of Traditional Knowledge without referring to the development in field of genetic resources and folklore. In this regard, it is important to mention that as a result of the development of biotechnology, the economic and commercial value of the biological resources has been increased substantially. Inventions³ in this field of technology have a significant effect on food and medicine⁴ and may have a crucial impact on energy and the protection of the environment and all aspects of the human life.⁵ In this relation, pharmaceutical industries have turned their focus from synthetic chemistry, which was the main resource of medicines in the nineteenth century, to plants⁶ and some other biological resources. On the other hand, with growth of world population and increase of demand for agriculture GM products, the activity of

³ Previously, inventions were limited to the areas of physics and chemistry and living organisms were considered discoveries not inventions. But with the possibility of controlling the processes of biotechnology, the concept of invention has been changed. However, many still believe that biotechnology is not a invention: rather most of the issues in this field are discoveries. They are therefore rejecting patents in biotechnology under Article 27.3(b). See, Ho, M. & Traavik, T., "Why we should Reject Biotech Patent from TRIPS: Scientific Briefing on the TRIPS Article 27.3 (b)", available at: <http://www.i-sis.org.uk/trips99.php> (last visited October 16, 2011).

⁴ The modification of micro-organisms by way of genetic engineering processes is one of the important ways for producing new medicines. The role of biotechnology is expected to develop, especially for producing new medicines for cancer and AIDS. See World Intellectual Property Organization, "Technology and legal Development in Intellectual Property", available at: <http://www.wipo.int/about-ip/en/iprm/pdf/ch7.pdf> (last visited October 29, 2011).

⁵ World Intellectual Property Organization, *Intellectual property Reading Material*, (2nd edn; Geneva: WIPO Publication No.476 (E), 1998), p. 430.

⁶ Aylward, B., 'The Role of the Plant Screening and Plant Supply in Biodiversity Conservation, Drug Development and Health Care', in Swanson, T. M., (ed) *Intellectual Property Rights and Biodiversity Conservation: An Interdisciplinary Analysis of the Values of Medicinal Plants*, (Cambridge: Cambridge University Press, 1995), p. 191.

seed companies developed. So, one observes an increase in the demand for genetic resources by the pharmaceutical and seed companies. Thus, biological resources and biodiversity and related traditional knowledge became part of the international trade negotiation battleground due to their enormous financial benefits.⁷

So the question which is important now is, what is the role of the traditional knowledge in this context? Traditional knowledge is often linked with genetic material and traditional cultural expressions; it is usually the main gate for research and relating to genetic resources.⁸ Accordingly, in addition to the role of traditional knowledge in traditional medicine, traditional way of human and animal treatment, producing and preserving food, seed, environment and so many other subjects, it has an important role in speedy research especially in biotechnology. Using of traditional knowledge for selecting plants for laboratory and analysis extremely reduce the research cost.⁹ According to one study, traditional knowledge can increase the success of share of the trials from one in 10,000 samples to one in two.¹⁰ So, traditional knowledge has enormous economic and social value.

⁷ Genetic resources are making a huge contribution to developed countries' economies; and numbers of cases which at the present time are under discussion illustrate the importance of the issue for developing countries. In this regard, see Odek, J. O., 'Bio-Piracy: Creating Proprietary Rights in Plant Genetic Resources', *Journal of Intellectual Property Law* 2 (1994), p.141.

⁸ Kremers, N. "Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?," *Fordham Intellectual Property, Media and Entertainment Law Journal* 15(2004), P. 1

⁹ Hannig, M., "an Examination of the Possibility to Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of the NAFTA States: Domestic Legislation Under the International Convention of New Plant Varieties", *Arizona Journal of International and Comparative Law*, 13 (1996), P. 175.

¹⁰ Jain, M. "Global Trade and the New Millennium: Defining the Scope of Intellectual Property Protection of Plant Genetic Resources and Traditional Knowledge in India" *Hastings International and Comparative Law Review* 22 (1999), P. 777, quoted from Anuradha, R.V. "In Search of Knowledge and Resources: Who Sows? Who Reaps?" *Euro. Community & Int'l Env'tl* 6 (1997), PP. 263, 263.

Traditional Knowledge and Culture

Before reviewing the relationship between Traditional Knowledge and Culture, it is important to define what is Traditional Knowledge and culture. The expression of Culture has different interconnected meanings. One of the UNESCO's publications suggested three different meanings for culture:

- (1) Culture as the 'process of artistic and scientific creation',
- (2) Culture as the 'accumulated material heritage of humankind', and
- (3) Culture as the 'sum total of the material and spiritual activities and products of a given social group which distinguishes it from similar groups'.¹¹

According to above definitions, Traditional Knowledge is a part of culture which is embedded in a community. This knowledge constitutes crucial elements of both the natural and man-made livelihood of that community.

There is no single accepted definition worldwide for traditional knowledge, because it covers an enormous diversity of information. Some scholars defined "traditional knowledge" as those systems of tradition-based knowledge developed over time by indigenous peoples or local communities in any area of scientific or artistic application, regardless of whether such knowledge is collected and conveyed through written, oral, or other forms.¹² It can belong either to one person,

¹¹ United Nation Educational, Scientific and Cultural Organization, "Cultural Rights and Wrongs", Stavenhagen, (1998), pp. 4–5

¹² Kremers, N. "Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: are U.S. Intellectual Property Law and Policy

a group of people or the local community. Traditional knowledge may have scientific or practical application, such as knowledge about the healing properties of medicinal plants or the growth and reproductive habit of food plants.

The concept of traditional knowledge is also reflected in the Article 8(j) of CBD in connection to conservation of biological diversity where it requires parties to “respect, preserve, and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity, “promote the wider application” of traditional knowledge “with the approval and involvement of its holders” and to “encourage the equitable sharing of the benefits” of the use of such knowledge.¹³

Traditional knowledge is also sometimes linked with spiritual or sacred concepts and it is regularly expressed and preserved via ritualistic or artistic traditions; it may be executed and passed down through generations only within firmly fixed parameters of expression.¹⁴

Really Aimed at Meaningful Protection for Native American Cultures?,” *Fordham Intellectual Property, Media and Entertainment Law Journal* 15(2004), p. 1

¹³ Downes, D. R. “New Diplomacy for the Biodiversity Trade: Biodiversity, Biotechnology, and Intellectual Property in the Convention on Biological Diversity”, *Touro Journal of Transnational Law*, 4(1993), p.1

¹⁴ Kremers, N. “Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?,” *Fordham Intellectual Property, Media and Entertainment Law Journal* 15(2004), P. 1, In this regard the article 3 of the Portugal, Decree-Law No. 118/2002, of April 20, 2002 Define Traditional knowledge as “all the intangible elements associated to the commercial or industrial use of local varieties and other endogenous material developed by local communities, collectively or individually, in a non-systematic manner and that are inserted in the cultural and spiritual traditions of those communities, including, but not limited to, knowledge relating to methods, processes, products and denominations that are applicable in agriculture, food and industrial activities in general, including handicrafts, trade and services, informally associated to the use and preservation of local varieties and other endogenous and spontaneous material that is covered by the present law”. See, Symposium on the Traditional Knowledge, Intellectual Property, and Indigenous Culture Articles Intellectual Property, Genetic Resources and

These definitions highlight the relation between the Traditional Knowledge and Culture and the position of traditional knowledge in the general framework of culture. Consequently, many of the arguments which have been presented by scholars regarding the necessity of protection of culture and its relationship with human rights are also relevant regarding the protection of traditional knowledge.

Protection of Traditional Knowledge and International Responses

The areas of the protection of genetic resources, traditional knowledge and folklore have attracted attention internationally during recent decades in the context of food, agriculture, biodiversity, desertification, environment, and trade and economic development. Certain kinds of traditional knowledge¹⁵ have a close relationship with plants and other biological resources, such as medicinal plants, traditional agricultural crops and animal breeds. Traditional knowledge is also often closely linked to the protection of biodiversity, in particular under the CBD. Accordingly, the subject of genetic resources and traditional knowledge has become one of the key subjects of international IPR related issues. It has raised some important questions regarding the comprehensiveness of many subjects of international IPR systems.

In response to these challenges, the World Intellectual Property Organization (WIPO) started discussions on genetic resources and

Traditional Knowledge Protection: Thinking Globally, Acting Locally 11(2003) Cardozo Journal of International and Comparative Law, p. 581

¹⁵ In this regard, there are several instances of the use of traditional knowledge in agriculture. One example would be the case of the Bela community in Mali regarding the resistance of one sort of rice, with the name of *oryza longistaminata*, to diseases this guided researchers to subsequently isolate and clone a gene named Xa21, which confirmed this resistance in rice plants. See World Intellectual Property Organization., 'Intellectual Property and Traditional Knowledge', Geneva: WIPO Publication No. 920(E), Available at: http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf (last visited October 23, 2011).

traditional knowledge way back in 1998.¹⁶ It conducted several studies in order to identify the expectations of the genetic resources and traditional knowledge holders and their relation to IPRS. Following these movements, the WIPO IGC¹⁷ was established by the approval of the General Assembly of WIPO in October 2000.¹⁸ The Committee has the responsibility to discuss and provide proper international regulations for these subjects. It has established very close cooperation with other international forums, such as CBD, UNEP and FAO.¹⁹

After twelve years work and Nineteen Sessions in Geneva,²⁰ IGC have made considerable progress in highlighting the majority of subject and gathering materials regarding the relations between the IP system and genetic resources, traditional knowledge and folklore. However, due to difference in approach between developed and developing countries regarding the subject, there was a lack of progress in the work of IGC in the codification and there is no clear vision for its work for the near future.

¹⁶ Ibid.

¹⁷ Some other actions, including an Intergovernmental Meeting on Genetic Resources and Disclosure Requirements in 2005, have also been taken by WIPO. The meeting discussed a revised version of the draft examination of issues relating to the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications. The subjects of genetic resource and disclosure requirements of the patent applications which relate to these materials were also discussed in the Working Group on Reform of the Patent Cooperation Treaty (PCT). Switzerland has suggested to the meeting of the Working Group in February 2005 that the amendment of the PCT by reference to the Patent Law Treaty must be conducted in a manner in which domestic law requests inventors to disclose the source of their genetic resources and traditional knowledge of the materials which are used in the invention. See World Trade Organization, Further Observation by Switzerland on its Proposals Regarding the Declaration of the Source of Genetic Resource and Traditional Knowledge in Patent Applications, (IP/C/W/433, Geneva, 2004). The WIPO IGC consists of member states' delegations of the WIPO and some other intergovernmental and non-governmental Organizations.

¹⁸ See World Intellectual Property Organisation, *WIPO General Assembly Twenty-Sixth (12th Extraordinary) Session*, (WO/GA/26/10, Geneva, 2000).

¹⁹ World Intellectual Property Organization, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, (WIPO/GTRKF/IC/8/9, Geneva, 2005).

²⁰ For more information in this regard, see <http://www.wipo.int/tk/en/> (last visited October 29, 2011).

The other international forums to some extent also have a similar situation. In this relation, the Convention on Biological Diversity 1992 (CBD) is the main international convention concerning the management and conservation of biological resources and related traditional knowledge. Although CBD is an environmental protection convention, it also deals with the economic valuation of biological resources, traditional knowledge and intellectual property rights in biodiversity management.²¹

The CBD²² emphasizes the principle of fair and equitable sharing of benefits derived from the use of genetic resources and related traditional knowledge, and requested the member countries to provide national legislation to facilitate benefit sharing.²³ In this regard, after almost eighteen years on the conclusion of CBD and also more than five years of work and several meetings²⁴, the Working Group on CBD, finally, reached a conclusion on 16 October 2010 and adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from utilization of genetic resource and traditional knowledge, in its ninth meeting which was held in Nagoya, Japan.²⁵

Conclusion of the Nagoya Protocol on ABS is a crucial development in regulating the subject of access to genetic resources and traditional

²¹ Ibid.

²² Ibid., Articles 1, 8j, 15.7 and 19.2.

²³ Ibid., Article 15.7.

²⁴ The seventh meeting of the Working Group on Access and Benefit-sharing was held in Paris from 2 to 9 April 2009, its eighth meeting was held in Montreal from 9 to 15 November 2009 and the first part of the ninth meeting of the Working Group was held in Cali, Colombia, from 22 to 28 March 2010. On 28 March, the Working Group decided to suspend the meeting and to resume its ninth meeting at a later date. The resumed ninth meeting of the Working Group was held in Montreal, from 10 to 16 July 2010.

²⁵ For more information in this regard, see <http://www.cbd.int/convention/wgabs.shtml> (last visited October 8, 2011).

knowledge and the fair and equitable sharing of benefits. However, despite all these development, it appears that the Nagoya Protocol on ABS does not address the developing countries' concerns. Furthermore, although traditional knowledge and the rights of indigenous and local communities have been given stronger recognition in the Protocol compared to the CBD provisions, it does not cover all kinds of traditional knowledge. In this regard, while the vast parts of the traditional knowledge are publicly available and belong to the State, the Nagoya Protocol does not provide protection for this knowledge and also has not responded to the developing countries' concerns as regards to benefit sharing from the use of this traditional knowledge.

During the negotiations on the TRIPs Agreement's the subject of protection of traditional knowledge was not discussed. However, the question in this regard has been raised in the TRIPs Council later on, in the context of the revision of the Article 27.3(b) of the Agreement. After the enforcement of the TRIPs Agreement, the subject of revision of Article 27.3(b) was put on the agenda of the TRIPs Council in 1999. In this regard, the Doha Declaration which was a result of the WTO Ministerial Conference held in Doha, Qatar, in November 2001 requested that the TRIPs Council should examine the relationship between the TRIPs Agreement and the CBD,²⁶ traditional knowledge and folklore.²⁷ At present, the subject of relationship between the TRIPs Agreement and the CBD and the protection of genetic resources and traditional knowledge are some of the crucial issues in ongoing negotiation in the TRIPs Council in the context of reviewing the provisions of Articles 27.3(b) and 29 of the TRIPs Agreement.²⁸

²⁶ McManis, C. R., 'Intellectual property, genetic resource and traditional knowledge protection: thinking globally acting locally', *Cardozo Journal of International and Comparative Law* 11 (2) (2003), p.547.

²⁷ See, WTO at: www.wto.org. (Last visited October 20, 2011).

²⁸ See Article 71.1 of the TRIPs Agreement and see the TRIPs Council at: <http://www.wto.org/>(Last visited October 20, 2011).

However, until now the revision negotiations are still under process in the TRIPs Council. Taken into account, the wide gap between the demands of developed and developing countries in this regard,²⁹ it is not expected that the TRIPs Council can reach a proper decision for protection of Traditional Knowledge in the near future. Furthermore, the TRIPs Agreement did not provide any protection for moral rights which seems particularly relevant for protecting traditional knowledge.³⁰

From the above discussion, it is very clear that the current international regulations, especially the international IP system does not provide sufficient opportunity for the traditional knowledge holder to protect their traditional knowledge from misuse by others at the international level.³¹

Traditional Knowledge and Human Rights

Article 27(2) of the Universal Declaration of Human Rights of 1948 (UDHR)³² states that: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.. Nevertheless, the provisions of this section are balanced by the provisions of another subparagraph of this article which says, "Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

²⁹ For more information, see WTO at: www.wto.org. (Last visited October 26, 2011).

³⁰ Hans Morten Haugen, Traditional Knowledge and Human Rights, *Journal of World Intellectual Property*, Vol. 8, 2005, No. 5, pp.663-77

³¹ Economic and Social Council of the United Nation, Committee on Economic, Social and Cultural Rights, Twenty-fourth session, E/C.12/2000/12, 3 October 2000.

³² Despite the Universal Declaration of Human Rights (1948) is not a legally binding instrument, but many of its provisions have attained the status of international customary law.

One of the important articles in the human right documents which can build the bridge between traditional knowledge and human rights protection is Article 27 of the International Covenant on Civil and Political Rights (ICCPR), 1966, which says:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

It is obvious that the idiom of “enjoy their own culture” in the Article 27 of the ICCPR refer to the culture of specific communities. As it was explained before, traditional knowledge is a part of the culture and has an important role in the life of the many communities. In this connection, traditional knowledge and the skill which are related to some plants are important; because many communities may depend on this knowledge and their natural environment. Accordingly, if we read the provision of Article 27 of the ICCPR in the context of provision of its article 1.2, it says:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...”

Furthermore, a similar or may be broader language also exists in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UN General Assembly in 1966. In this regard, Article 15.1(c) of the ICESCR provides that:

“the right of everyone ... [to] benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

It is obvious that this paragraph recognizes cultural rights and should be read in the context of the other ICESCR regulations. Despite the fact that the article is written in a singular way, it is obvious that it is not limited to individuals. Therefore, there is possibility for the article to provide protection for moral and material interests of individuals as well as the community. It does not, however, provide an adequate basis to oblige the ICESCR member states to provide intellectual property legislation in their national law for the protection of traditional knowledge.³³ This does not prevent the States from a higher protection for the traditional knowledge and its holders.

The relevant human rights provisions from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights can be read as providing a human rights basis for the protection of traditional knowledge. This applies both in the context of 'defensive protection', aiming at preventing third parties from claiming rights, and in the context of 'positive protection' aiming at excluding others from making commercial use of the protected material. The latter form of protection must, however, take into account what the local and indigenous peoples who have developed this knowledge believe is appropriate in order to ensure their human rights.³⁴

It is also worth mentioning that the United Nations Declaration on the Rights of Indigenous Peoples is the latest and the most relevant instrument that recognized the rights of indigenous peoples

³³ Hans Morten Haugen, above, no 31.

³⁴ Ibid.

(2006). Traditional knowledge, traditional cultural expression, cultural heritage genetic resources and medicines are explicitly mentioned in Article 31(1): "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

Conclusion

With this discussion, it has become clear that, despite the existence of the above mentioned regulations in the human rights documents, very little attention has been paid by human rights scholars to the interpretation of intellectual property as human rights. Accordingly, there are a few academic works in this regard which discuss the scope of Article 27 of the ICCPR and the UDHR and Article 15 of the ICESCR and its Members States' obligations. On the other hand, intellectual property rights scholars also neglect the human rights aspects of intellectual property rights. Their attention is mostly on the commercial aspects of the intellectual property rights issues and hardly addresses the ethical and human rights dimensions of intellectual property systems.

Accordingly, attention to traditional knowledge in the context of intellectual property rights and human rights should be improved. As it is described above, currently, the international IP system does not provide proper protection for traditional knowledge, and human rights documents also do not properly addresses the protection of traditional knowledge. Traditional knowledge is the result of human effort though

generations; international community should protect and recognize the fundamental rights of traditional knowledge holder to define and control this knowledge. This will enable them to offer this knowledge to all humanity.

Therefore, international actions are needed to ensure that the international human rights documents have to be revised if the current international standards cannot adequately cover traditional knowledge.

The human rights standards no longer remain Eurocentric. Protection of traditional knowledge as human rights is a favorable option for the Asian-African people. Legally binding human rights treaties in the field of traditional knowledge could go a long way in the protection of traditional knowledge which is very dear to the Asian-African people. The standard of protection could be higher than the proposed International Convention on Protection of Traditional Knowledge which include, right to the full ownership, control and protection of their traditional knowledge; mechanism of benefit sharing; adequate monitoring mechanisms; collective status of their knowledge; and multi-generational coverage span.

Reinterpreting East-Asian Culture and Human Rights: The Case of Traditional Vietnamese Legal Culture

Nghia Hoang Van *

"What you do not want others to do to you, do not do to others"
-Confucius (551-479 BC), Analects-

*'Winning brutality by doing humanity and righteousness,
Replace cruelty by intelligence and humanity'*

-Nguyen Trai (1427), *The Great Declaration to the Enemy's Defeat-*

Abstract

This paper's overall goal is to search for human dignity and tolerance, as cross-cultural values of human rights and a contribution of East Asian Culture to the Evolution of Universal Human Rights through examining the traditional Vietnamese legal culture and its influences on modern Vietnam. The paper explores Vietnam's traditional values of humanism, humanitarianism and human rights which were exposed through the lenses of Feudalism and flowered from the presence of Buddhism, Confucianism, Taoism and Vietnamese belief (animism) from 10th century onwards, until 1858 at which time Vietnam began to fall into French rule while still remaining semi-feudalistic. By looking at the Vietnamese Imperial dynasties, especially from the Ly, Tran, Le and Nguyen, the paper seeks for solid proof demonstrating that in traditional Vietnamese legal culture did exist the ideas of human rights as enshrined in international human rights treaties and that the East Asian Culture, embraced by Confucianism, by which Vietnamese legal culture had received, significantly contributed to the evolution of universal human rights. The paper is also based on the argument that Vietnamese traditional culture, as well as the East Asian Culture, is embraced by both negative and positive elements that affect, either side, the evolution of human rights in Vietnam and East Asia, as well as to the emergence of universal human rights. The transcendent values constituting that culture

* Dr. Nghia Hoang Van is Senior Lecturer and Head of Department of General Theory, Vietnamese Institute of Human Rights, Ho Chi Minh National Academy of Politics and Public Administration.

are human dignity, tolerance and endless compassion; they were rich in Vietnamese traditional legal culture and Vietnamese traditional society still significantly influence on present-day Vietnam. The arguments brought to some key conclusions that as part of East Asian Culture, regardless of containing some conservative viewpoints negatively affecting the ways in which the individuals' human rights have been respected, protected and fulfilled, such as women's rights, Vietnamese culture embraces a lot of values supportive for humanity and humanitarianism and entirely compatible with universal human rights.

Introduction

This paper's overall goal is to search for human dignity and tolerance, as cross-cultural values of human rights and a contribution of East Asian Culture to the Evolution of Universal Human Rights through examining the traditional Vietnamese legal culture and its influences on modern Vietnam. The paper explores Vietnam's traditional values of humanism, humanitarianism and human rights which were exposed through the lenses of Feudalism and flowered from the presence of Buddhism, Confucianism, Taoism and Vietnamese belief (animism) from 10th century onwards, until 1858 at which Vietnam began to fall into French rule while still remaining semi-feudalistic. By looking at the Vietnamese Imperial dynasties, especially from the Ly, Tran, Le and Nguyen, the paper seeks for solid proof demonstrating that in traditional Vietnamese legal culture there existed ideas of human rights as enshrined in international human rights treaties and that the East Asian Culture, embraced by Confucianism, by which Vietnamese legal culture had received significantly, contributed to the evolution of universal human rights. The paper is also based on the argument that Vietnamese traditional culture, as well as the East Asian Culture, is embraced by both negative and positive elements that affect, either side, the evolution of human rights in Vietnam and East Asia, as well as to the emergence of universal human rights.

The Socialist Republic of Vietnam (SRV) is located in the heart of South-East Asia. It lies between the People's Republic of China in the North and the Gulf of Thailand in the South. Vietnam is bordered by China in the North, the Pacific Ocean and the South China Sea in the East, the People's Democratic Republic of Laos and the Kingdom of Cambodia in the West and Southwest. Vietnam's mainland territory roughly resembles the shape of the letter "S". Its land area is 331,689 square kilometers and it has territorial waters with an area approximately three times larger than its mainland territory. The recent census, in 2009, indicated that the population of the country is ranked the 2nd in Southeast Asia and the 13th in the world with approximately 86 million people¹.

What is now modern Vietnam is traced back to the very early ages of the first Vietnamese people who settled in this land thousands of years ago; and to the Vietnamese first kingdoms of several thousands of years. The nation was first occupied by the Chinese many times in the periods of 111BC and 938 AD, got its independence from 938 to 1858 before it fell into French colonization. Vietnam regained its independence from French domination in 1945. Just less than 10 years later, Vietnam was again invaded by the Americans and in 1954 it was divided into North Vietnam (Democratic Republic of Vietnam) and South Vietnam (the Republic of Vietnam) under the Geneva Arrangement. The fight for the unification and independence of the nation had also been the fight for the entire Vietnamese people's human rights. Of the most important rights is the right to freedom from foreign suppression and repression, or the right to life in human dignity and freedom. Vietnamese people have paid with their lives to gain independence, freedom and happiness. Unsurprisingly, it is said that there might be no country in the world which had suffered so many wars against foreign invaders as the Vietnamese.

¹ See Vietnam General Statistics Office (2009) *Gross Survey of Population and Houses in 2009 (Tong Dieu Tra Dan so va Nha o nam 2009)*: at <http://www.gso.gov.vn/default.aspx?tabid=512&idmid=5&ItemID=10798>.

Throughout several thousands of years, the Vietnamese people have developed a heritage of solidarity, humanity and perseverance that has formed the unique Vietnamese culture during their regular struggles for the establishment and prosperity of their country.

The Ly dynasty (1009-1225)

As early as 11th century, the Ly dynasty (1009-1225) of traditional Vietnam is characterized as a period of national development where Buddhism challenged rigid Confucian hierarchical structures². On the contrary to the Chinese counterparts, the Ly dynasty applied Buddhist ideology onto the entire socio-political, legal and cultural life, rather than Confucianism³, and took it as an official and national religion of the Great Viet⁴. Obviously, humanitarianism of Buddhism had remarkably influenced the legal system and culture of human rights of Great Viet at that time. For example, in 1042, Emperor Ly Thai Tong promulgated the *Hinh Thu* (Book of Punishments), which was praised by the historian of the later Le Dynasty in *The Complete Book of Historical Records of The Great Viet*: 'Up to that time, lawsuits in the country were very complicated. The judges stuck to the letter of the law to the extent of being harsh and condemning against the innocent. The emperor, having sympathy for them, thereupon ordered that the laws be edited to bring them up to

² See Cuong Tu Nguyen, 'Rethinking Vietnamese Buddhist History: Is the Thien Uyen Tap Anh a "Transmission of the Lamp"' in Taylor and Whitmore (eds), *Essays Into Vietnamese Pasts* (1995), 113-115; Also see Ha Van Tan, 'Buddhism from the Ngo to the Tran Dynasties' in Nguyen Tai Thu (ed), *History of Buddhism in Vietnam* (1992) 100-103, 117-125; Ngo Ba Thanh, 'Influence of Buddhism on Ancient Vietnamese Law and Role of Comparative Law in Contemporary Juridical Science' (1996) 2 *Vietnam Law and Legal Forum* 24, 27-28.

³ Buddhism was still so popular among the people that later on, under the Tran dynasty (1225-1400), the Confucian Le Quat, a doctoral degree holder, complained in a stele set up in Thieu Phuc Temple at the time "*Buddhist temples exist in all villages but nowhere does one find the worship of Confucius.*" See Hoang Xuan Han, *supra* note..., p.402.

⁴ See Ta Van Tai, Buddhism and human rights in Traditional Vietnam. Review of Vietnamese Studies 2004-5, presented at Harvard Law School. At www.vstudies.org (accessed 10.06.2006).

date, to classify them and reduce them to articles in the Book of Punishments, so that people could easily understand them.'⁵

Due to this humanitarianism of Buddhism, the Vietnamese following scholars strongly criticized the Ly dynasties' humane legal system as well as their human rights policy. For instance, the well-known fifteenth-century Confucian historian Ngo Si Lien was also critical of Emperor Ly Nhan Tong's decision to impose only exile on Le Van Thinh, who was charged with the most serious offence of attempt to murder the Emperor, in 1096, 'To exempt from death a subject who attempted to kill the emperor and seize the throne was a mistake in criminal policy. This was due to the emperor's faith in Buddhism'⁶. He also added that, 'The emperor, deluded with the Buddhist doctrine of love and humanitarianism, pardoned a traitor. Therefore, his benevolence became marred. That was his defect'⁷.

As a central feudal society, however, the Ly dynasty's legislation could not avoid being severe, even savage as the history still records. Of the very severe and strict means used to punish the criminal offenders is "Thuong moc ma"⁸ which is used to nail the offender on a board, hanging in the market, cutting parts of him off in the execution ground. For those that were charged with the offence of burglary and robbery shall be punished by cutting off fingers and toes"⁹. Such cruel and inhumane punishments reflected the negative points of the Ly Code.

⁵ *Dai Viet Su Ky Toan Thu* (The Complete Book of the Historical Records of Dai Viet), official history of the Lê Dynasty. Translation into Vietnamese by Cao Huy Giu, Hanoi, 1967, I : 219.

⁶ *Ibid*, I:242

⁷ *Ibid*, I:228

⁸ This is an instrument used for torturing offenders, which is made of wood with nails on it to hang the offender. This is a very cruel punishment that could make the offender severely hurt and painful physically.

⁹ See Le Van Huu, Ngo Si Lien (eds) (1697) *Dai Viet Su Ky Toan Thu* (The Complete Book of the Historical Records of Great Viet). Translated and Reprinted by the Social Sciences Publishing. Hanoi: Social Sciences Publishing 1993.

Under the Ly dynasty, there was also a tradition of burying or burning alive for those who were charged with several special criminal offences. For example, in 1117, the Emperor made a decision of burying alive 3 imperial maids together with the burnt body of Empress Y Lan. In 1128 The King ordered a lot of imperial maids to be buried with the body of Emperor Ly Nhan Tong¹⁰. In relation to the right to freedom of marriage and form a family, the Ly's legislation also contained some historical deficits as it restricted women's rights and interests. In 1129 the Emperor gave an imperial order: "Daughters of Mandarins are not allowed to get married before having made in a maid selection for the Emperor. Only after the selection, those who failed to be the palace maids can get married"¹¹.

The Tran Dynasty (1225-1400)

Unlike Ly who placed Buddhism as the national legal-political ideology, its successive dynasties, including the Tran (1225-1400), the Ho (1400-1407), the Le (1418-1788), the Nguyen (1802-1945), the role of Confucianism was highly appreciated and placed the most important as the nation's official ideology. These dynasties' legal-political ideology was strongly influenced by neo-Confucianism. The longer Vietnamese Feudal dynasties existed, the greater the influence of neo-Confucianism they have. For instance, the Lê and especially Nguyen dynasties were extensively influenced by Tang and Ch'ing Dynasty laws and bureaucratic processes. Influences eventually produced an elite

¹⁰ Ibid. Also see Cao Duc Thai (2003) *Vietnam's traditional values of human rights* in Human Rights-Theory and Practice in Vietnam and Australia. Hanoi: Political Theory Publishing. Pp.

¹¹ Cited in the History of state and law in Vietnam. Vol. 1. Hanoi: Social Sciences Publisher. P. 128.

political-legal culture more in line with Chinese than earlier Ly and Tran dynastic practices¹².

Of Vietnam's distinctive most important cultural characteristics was the unification of the three major religions (or the 'reduction of religions into the same source' (tam giao dong nguyen), which syncretically blended Confucianism, Mahayana Buddhism and Taoism¹³. By this time, the traditional Vietnamese society coexisted with Confucianism, Buddhism, Taoism that was the school that united these three religions.

Until the Tran Dynasty, Buddhism still had strong influence on the political-legal ideology of Vietnam, though neo-Confucianism was embedded in the nation's socio-political, cultural, family structures. At least two codes that were promulgated are Quoc trieu Thong Che (General Statutes of the Dynasty) in 1230 and Hinh thu (Book of Punishments) in 1341.¹⁴ During the Tran dynasty, Vietnamese society became a complete aristocracy-based political institution in which the empire was governed by the Tran family's aristocrats. The Nation's governance was under the royal family-based hierarchical system. This characteristic led to the very typical hierarchy of society and the legal system; which mirrored the absolute protection of this system and the aristocrats' interests. The legal system was very strict and reflected the influence of Confucianism. For instance, the punishment of the unfaithful husband or wife who had illegal sexual relationship with others, who was charged with this offence, was either executed or forced to become his or her own family's

¹² John Gillespie (2001) *Globalisation and Legal Transplantation: Lessons from the Past*, Deakin Law Review 5. <http://www.austlii.edu.au/au/journals/DeakinLRev/2001/5.html#fn54> (accessed 03.08.06).

¹³ See Minh Chi, 'Buddhism's Entry into Vietnam and Its Practice During Chinese Control' in Nguyen Tai Thu (ed), *History of Buddhism in Vietnam* (1992) 1-15.

¹⁴ Ta Van Tai (1988), *The Vietnamese Tradition of Human Rights*. Institute of East Asian Institute, University of California at Berkeley, Berkeley: University of California Press, at 39.

servant¹⁵. Furthermore, the law also recognized the legitimacy of trading slaves, servants or giving away wives and children to be servants in lieu of paying debts to the aristocracy¹⁶. The provisions indicate that the Feudal society under the Tran dynasty contained the inequality between classes of people and between men and women. However, the Imperial Penal Code (Quoc Trieu Hinh Luat) of the Tran contained many humanitarian elements and humanity¹⁷. For example, the law protecting property rights, especially the right to ownership of land. Additionally, in order to protect the rights and interests of the whole people, the emperor put in places laws to ensure that innocent people were not wrongly charged and allowed the accused the right to the 'the big bell' hanging in the front of mandarin offices which they could ring to ensure their case were heard.¹⁸ The Tran dynasty also respected people by actively hearing their voices, placing them as the foundation of their dynasty. As the Tran's most prominent General, Tran Quoc Tuan¹⁹, recommended the emperor and mandarins, as well as the Tran's government, that 'respect for the people, as well as delivery of a well-treatment policy to them, is the best solution of governance' (*khoan thu sức dân để làm kế sâu rễ bền gốc*).²⁰

For most Vietnamese Confucian-scholars, Vietnam had its own culture, civilization and ideology that shaped the nation distinct from China

¹⁵ See Dai Cuong Lich Su Viet Nam (General History of Vietnam), Vol. 1. Cited at <http://www.cpv.org.vn/details.asp?topic=32&subtopic=227&id=BT2130659666> (accessed 10.08.06)

¹⁶ Ibid.

¹⁷ See Dai Cuong Lich Su Viet Nam (General History of Vietnam), Vol. 1. The Education Publishing, 1997. Also see Le Van Huu, Ngo Si Lien (eds) (1697) *Dai Viet Su Ky Toan Thu* (The Complete Book of the Historical Records of Great Viet). Translated and Reprinted by the Social Sciences Publishing. Hanoi: Social Sciences Publishing 1993.

¹⁸ Ibid,

¹⁹ who led the nation's army to the three-time victory against the world's most powerful army at that time, the Mongols, when they attempted to invade the nation in three times. See supra 29.

²⁰ See Phan Huy Le, *Van de Dan chu trong truyen thong Vietnam* ('The Problem of Democracy in Vietnam's Traditions', http://www.bbc.co.uk/vietnamese/vietnam/story/2006/03/060328_phanhuyle_danchu.shtml (accessed 28.03.06)

since the dawn of the nation's foundation. Vietnam's famous fifteenth Century- Confucian and Great Poet, the World's Cultural Personality and National Hero Nguyen Trai (1380-1442) once asserted in his outstanding essay, *Dai Cao Binh Ngo (Great Declaration to the enemy's defeat)*, that the Great Viet had its own culture and civilization,

*'...Insofar as our Great Viet has existed,
So long had Its Culture and Civilization,
Had its own separate mountains and rivers,
Had distinctive Customs between North (China), South (Great Viet),
Throughout Trieu, Dinh, Ly, Tran Dynasties,
Along with Han, Tang, Sung, Yuan Dynasties.
Each built its own independence and ruled its own land.
Though strong or weak, depends upon time.
But heroes never disappear...'²¹*

The Le (1418-1788)

The Le dynasty (1418-1788) legal-political ideology reached a new height of humanitarianism in traditional Vietnamese society. In his *Great Declaration to the Enemy's Defeat*²², Nguyen Trai asserted the values of humanity, humanism and humanitarianism that were well embedded in the Vietnamese tradition. As he wrote,

"The work of humanity and righteousness is to stabilize the life of people"

²¹ Nguyen Trai (1427), *Binh Ngo Dai Cao (The Great Declaration to the Enemy's Defeat)*. Ngo Tat To (Trans.) <http://vnthuquan.net/truyen/truyen.aspx?tid=2qtqv3m3237n2n4nnn31n343tq83a3q3m3237nvn&cochu=> (accessed 10.10.05)

²² The Chinese Ming's army invaded Vietnam and then was defeated by the Le in 1427, by which Nguyen Trai wrote this *Great Declaration* that proclaimed the Great Viet's long civilisation, culture, and independence and asserted the Vietnamese values of humanism and humanitarianism.

“The most important thing in military is first to abolish violent disturbances”....

“Thus, wining brutality by doing humanity and righteousness,

Replace cruelty by intelligence and humanity”²³

Humanity, humanism, and humanitarianism have always been Vietnamese traditional values. However, these values were expressed remarkably and profoundly in the Le dynasty through Nguyen Trai's political and military ideology. For Nguyen Trai, as a Vietnamese scholar commented, humanitarianism is not only the policy at peacetime but also the ideology of military strategy and at wartime. That is not only the right policy for the state to treat its own people, but also the forgiveness policy for the defeated enemies. That is not only the policy of short- but also the long-term, for the independence and sovereignty of the state, peace and friendship with other countries. Those ideas still have the same values at present day²⁴.

A Vietnamese born American scholar, Dr Ta Van Tai, in his book *The Vietnamese Tradition of Human Rights*, asserted that Vietnam has had a very long tradition of human rights, at least a thousand years old. As he emphasized,

‘The legal norms and practices of traditional Vietnam adhered to many of today’s international standards and even exceeded them in the area of many economic and social rights (made them enforceable). The reader who is interested

²³ Nguyen Trai (1427), *Binh Ngo Dai Cao (The Great Declaration to the Enemy Defeat)*. Ngo Tat To (Translated from the Nom (Old Vietnamese-Chinese characters into modern Vietnamese language). <http://vnthuquan.net/truyen/truyen.aspx?tid=2qtqv3m3237n2n4nnn31n343tq83a3q3m3237nvn&cochu=> (accessed 10.10.05)

²⁴ See Cao Duc Thai, *supra* note....

in the total subject may read this general treatise of the thousand-year history of human rights in Vietnam'.²⁵

According to Ta, it is Buddhism, rather than Confucianism, that plays a vital pillar and stood as a first and foremost foundation of Vietnamese tradition of human rights. Throughout Feudal dynasties in Vietnam, Buddhism, with plenty of ideas on humanity and human rights, penetrated the laws, government policies and practices. Ta regarded Buddhist influence on human rights policies as remarkable²⁶. Ta also claimed that Buddhism contributed a lot to constituting human rights ideas and policies in Confucianism-based Feudal dynasties in Vietnam. Traditional Vietnamese emperors or Confucian-scholars applied the Buddhist ideology of humanity and human rights into lawmaking and governing society. He asserted, 'the influence of the Vietnamese Buddhists on the human rights policy of the governments in traditional Vietnam is clear. This is not to say, as we have alerted the reader at the beginning of this paper, that the Confucians in the government were the big bad boys. Endangering human rights, because our broader study, i.e. the book *The Vietnamese Tradition of Human Rights*, gives ample evidence that the Confucians, whether emperors or scholar-officials, did respect human rights standards to a great extent'²⁷.

In terms of the legal development of traditional Vietnam, the Le Dynasty contributed so much to the extent that it produced a very advanced and well-known Code called Hong Duc Code (1483)²⁸, which is

²⁵ Ta Van Tai (1988), *The Vietnamese Tradition of Human Rights*. Institute of East Asian Institute, University of California at Berkeley, Berkeley: University of California Press

²⁶ Ta Van Tai, Buddhism and human rights in Traditional Vietnam. Review of Vietnamese Studies 2004-5, presented at Harvard Law School. At www.vstudies.org (accessed 10.06.2006)

²⁷ Hoang Xuan Han (1949), *Ly Thuong Kiet*. Hanoi. p: 402

²⁸ This name was given after the Great Emperor Le Thanh Tong (1460-1497) and under his reign the nation achieved huge and significant developments, notably in terms of legal system. It is also known as Quoc Trieu Hinh Luat (*The Nation's Penal Code*). See Le Van HUU, Ngo Si Lien (eds) (1697) *Dai Viet Su Ky Toan Thu* (*The Complete Book of*

regarded as one of the best ever codes in East Asia and the best ever code in Imperial Vietnamese dynasties. Significantly, though influenced by neo-Confucianism, this Code is remarkably distinctive from the Chinese contemporary code (such as the Tang's Code and the Ming's Code) and contained a lot of advances. Of the Code's seven hundred and twenty two articles, only two hundred were substantially influenced by the Tang Code and seventeen were similar to those of the Ming Code.²⁹

The Hong Duc code was also influenced by the principles of neo-Confucianism, such as the ideas of 'Heavenly Mandate' (*Thien Menh*), virtue-based rules (*Duc Tri*), and moral indoctrination³⁰. Despite these influences, the Hong Duc Code marked remarkable progress in the respect for and protection of human rights in general and women's rights in particular. For example, under this Code, the status of women was especially highlighted. The code protected women's rights and interest. By implementing many reforms, the Code ensured that women were entitled to the same rights as men. Bearing in mind that this was done in the 15th century, this was, by all accounts, a remarkable and rare achievement in the whole world's legal system. The advanced ideas enshrined in Hong Duc Code have become standards and good practices for Vietnam's later feudal dynasties; it has become the focal point of the modern ideology of human rights.

the Historical Records of Dai Viet). Translated and Reprinted by the Social Sciences Publishing. Hanoi: Social Sciences Publishing 1993. Also see Ta Van Tai & Nguyen Ngoc Huy (1987), *The Lê Code: Law In Traditional Vietnam*. Volume 2. Athens: Ohio University Press.

²⁹ See Ta Van Tai, 'Vietnam's Code of the Lê Dynasty (1428-1788)' (1982) 30 *American Journal of Comparative Law* 523, 525.

³⁰ See Vu Van Vinh, 'Development of Confucianism in the Tran Dynasty and the Struggle of Confucian Scholars against Buddhism at the End of the XIV Century' (1999) 2 *Vietnam Social Sciences* 55, 57-60; John K Whitmore, 'Foreign Influences and the Vietnamese Cultural Core: A Discussion of the Pre-modern Period' in Truong Buu Lam (ed), *Borrowings and Adaptations in Vietnamese Culture, Southeast Asia Paper No. 25* (1987) 1, 8-10; R B Smith, 'The Cycle of Confucianization in Vietnam' in W F Vella (ed), *Aspects of Vietnamese History* (1973) 6-24.

In this regard, it is the East tradition that pioneered progressive ideas of human rights, and not the West. The Western ideas of human rights for all only came not sooner than the end of the 17th century and gained momentum from the American Declaration of Independence in 1776 with the claim that every man is born free and equal. As one Western scholar commented, the Hong Duc Code, similar to other mandarin law, contained the elements of natural law which is the law for all people³¹. Many scholars have mentioned that human rights for women were first mentioned under this Code. For example, a woman's right to inherit the family's ancestral lands provided that she had no living male relatives³². The Code covered many areas of women's human rights, notably economic, social and cultural rights. A wife who brought her own property when she married, had a say in its disposal; furthermore, she had equal share in the joint property of marriage from the time of the marriage to when she left (widowhood or divorce); she was entitled to legally administer part of her deceased husband's share; the sale of family property required wife's signature; she enjoyed equal inheritance and great freedom of movement.³³

The Lê Dynasty's Hong Duc Code was a brilliant achievement of the Vietnamese legal tradition. During the Lê Dynasty, law had recognized and respected role in governance and significantly became an effective tool of human rights protection. Soon after ascending the throne, Emperor Lê Thai To proclaimed to the people that "[f]rom the

³¹Haines, David W. (1984) *Reflections of Kinship and Society under Vietnam's Le Dynasty*. *Journal of Southeast Asian Studies* Vol XV No. 2 (September), 307-314. Haines states that the Mandarin Law became "natural Law" for all people. at 309.

³² See Ta Van Tai (1981) *The Status of Women in Traditional Vietnam: A Comparison of the Code of the Le Dynasty (1428-1788) with the Chinese Codes*. *Journal of Asian History* 15, 2 (1981) 97-145

³³ Ibid. Also see John Whitmore (1984) *Social Organization and Confucian Thought in Vietnam*. *Journal of Southeast Asian Studies* Vol XV No. 2 (September), 296-306. Here John Whitmore commented that the role of women and her freedom was dependent upon a given ruler's wish to maintain the "flexibility" thought of as "Southeast Asian" or reduce it, in favor of "neo-confucian" morality" and "proper" kin relations. See John Whitmore (1984), *supra*. At 300

beginning of time, to govern the country, there must be law. Without law, there will be chaos. Therefore, our forefathers have made laws to teach people what is good, what is evil; to do good, to avoid harm; and not to break the laws"³⁴.

Brilliantly, Hong Duc Code reached its highest development of humanism and humanitarianism within the period of Oriental Feudalism. Of the 722 articles, there were many specific provisions for the protection of human rights of a number of groups: women, children, the elderly and the disabled, and the people who are in special circumstances. For example, Article 322 stipulates that, "a girl who has been engaged in marriage with (but not married to) a boy who is disadvantaged or has committed crime or wasted his whole estate shall have the right to complain for annulment of the engagement". Under this Code, the right to freedom of marriage and family was also highlighted. Article 308 recognized a woman's right to divorce if betrayed by her husband, "a husband who abandons his wife for more than 5 months (the wife's claim is witnessed by a village's mandarin) shall lose his wife. One who has already divorced but prevents his former wife from re-marrying shall be punished by reducing rank"³⁵. Additionally, Articles of 376 and 391 provides for women's inheritance rights.³⁶ Article 680 protects women's rights to freedom from inhumane or degrading, cruel treatment and punishment in case they have committed criminal offences. For example, if a woman who committed an offence and sentenced to be beaten

³⁴ See Lan Quoc Nguyen (1989), *Traditional Vietnamese Law - The Lê Code - and Modern United States Law: A Comparative Analysis*. *Hastings International and Comparative Law Review* (13), pp 141-144.

³⁵ Cited in Ta Van Tai (1988), *ibid*.

³⁶ However, these rights were only granted to women in special circumstances, for instance, in case the family from which she was born has no sons. Obviously, this is a historical limitation as the dominance of Confucianism affected to traditional Vietnamese legal-political, cultural ideology where men always became first and women the second. Thus, even during this very progressive period, women's rights were also not fully recognized.

by canes or imprisonment, but is pregnant is exempted from receiving such punishments within that period. They had the right to have a reduction or exemption from punishment and punishment of death penalty. As it stipulates, "the execution of a death penalty for a woman who is pregnant shall be delayed until 100 days after the birth [of the baby]. Officials who have executed those sentences against women before birth or within 100 days from birth shall be reduced in rank or punished''.

The Code protected children's human rights, especially those of females. Article 404 provides the death sentence for those who violate or abuse female children. It prohibits sexual intercourse with an under-age girl. The article states one that had sex with a girl under the age of 12, even with her consent, shall be punished as if he had committed the offence of rape (and shall be sent to a remote area or sentenced to death)''.

The Code was also very strict towards those who apply torture to prisoners. Article 622 states, "anyone who commits misconducts or an injustice against a prisoner imprisonment or application of cangue and stocks towards prisoners shall be beaten by cane for 70 times", and article 422, "robbing a person at a sensitive place, and committing arson causing a person to die shall be treated as manslaughter".

Notably, the Le dynasty's Hong Duc Code contains many advanced provisions which still remain worth today. It is not only a great achievement of the Great Viet's history or Vietnamese Feudal regimes, but also of the East Asian Civilization. Since the Western civilizations have been officially thought to have contributed to the birth and development of the concept, and theories, of human

rights, the recent discoveries of Eastern ideologies and thoughts have brought a re-thinking of the Western origin of human rights ideas. Unarguably, Phan Huy Chu, a famous historian, commented in his well-known *Lich Trieu Hien chuong Loai Chi* (Historical Notes of Imperial Bibliography) that "the Code was a standard ruler for country management, a frame for ruling people".³⁷ Unsurprisingly, many modern scholars and historians have especially emphasized the advanced values of Hong Duc Code as a great development of East Asian legal-political ideology. In his forewords for *the Le Code* (by Nguyen Ngoc Huy and Ta Van Tai, eds., 1987), an American scholar, Professor Oliver Oldman, director of the East Asian Law Centre of Harvard Law School (USA) commented: "The Le Code of Vietnam is a truly immortal work of the rich-in-tradition Great East Asia. ... During this special period of development, Vietnam had put great efforts to build a strong state that protected individual rights of citizens through an advanced legal system which, in some functions, could be equal to modern western legal thoughts"³⁸

The Nguyen (1802-1945)

Following the Le, the Nguyen Dynasty also applied neo-Confucianism into the nation's primarily socio-political, legal, cultural ideology. More than the Lê dynasty, however, the Nguyen emperors especially emphasized on this neo-Confucian ideology and mirrored the socio-political institutions of China's Ching dynasty³⁹. As a result, the Nguyen's Code, well-known as Gia Long Code,⁴⁰ which is also regarded as one of

³⁷ Phan Huy Chu, *Lich Trieu Hien chuong loai Chi* (Historical Notes of Imperial Bibliography), Volume II. Hanoi: Social Sciences Publishing House, 1992, at 287.

³⁸ Nguyen Ngoc Huy & Ta Van Tai (eds) (1987) *The Le Code*. Athens-Ohio- London: Ohio University Press, at VIII, volume I.

³⁹ See Alexander Woodside (1988) *A Comparative Study of Nguyen and Ch'ing Civil Government in the First Half of the Nineteenth Century* (1971), pp 60-110. Harvard: Harvard University Press.

⁴⁰ This name was given after the Nguyen dynasty's founding Emperor Gia Long (1780-1820) (real name was Nguyen Phuc Anh) who made a great contribution to expand

the best Codes of traditional Vietnam, was remarkably influenced by the Ching's Code.

Unlike the Lê's Hong Duc Code, which mainly mirrored Vietnamese traditions and customs, The Nguyen's Gia Long Code (adopted in 1813 by Emperor Gia Long) was lavishly copied from the Ching's Code⁴¹. There is no doubt about this huge influence of the Chinese Ching Code in the Nguyen Code. Of its three hundred and ninety eight articles all but one are either identical to or closely based on Ching Code articles. It strengthened the existing criminalization of neo-Confucian morality, removing most indigenous provisions found in the Lê Code. Also contrasting with the Lê Code, provisions showing the social reality of everyday commerce, land dealings and women's rights were stripped away⁴².

The Nguyen Code established a legal architecture enmeshing village leaders and family heads into Imperial-Confucianism. Consequently, the most substantial criminal penalties (five-relationships (*ngu luan*)) reached into village and family life. Crimes by wives against husbands and especially by children against parents (filial piety (*hieu*)) were considered more heinous than offences against social inferiors⁴³. The meaning of filial piety is nothing but a strict principle imposed upon the people and society based on the nature of inequality. The disrespect of filial piety

and unify Vietnam as it is now today. This Code is also known as Hoang Viet Luat Le (Laws and Decrees of Imperial Viet).

⁴¹ The Hoang Trieu Luat Le, also widely known as the Gia Long Code, contained 398 articles arranged in 22 volumes that precisely followed the structure, legal categories and provisions of the Ching dynasty legal code. See Tran Thi Tuyet (1997) *The Nguyen Dynasty and its Legislation in the First Half of the 19th Century*, 3(32) *Vietnam Law and Legal Forum* 24, pp 24-25. Also see supra note 37.

⁴² See Gillespie (2001) *Globalisation and Legal Transplantation: Lessons from the Past*. *Deakin Law Review*, Vol. 6 (2), pp. 286–310. Also see Lan Quoc Nguyen, supra note 37.

⁴³ See Pham Diem (1999) *Criminal Offences Under Ancient Laws of Vietnam*, 5(58) *Vietnam Law and Legal Forum* 27, at 27-29; Also Pham Diem (1999), *Relationships Between Parents and Children under Vietnam's Ancient Laws*, 6(63) *Vietnam Law and Legal Forum* 29, 29-30.

could break the whole society, which was based on this solid family-based relationship.⁴⁴

Influenced by the Chinese legal tradition, the Nguyen's Gia Long Code (or the Vietnamese Imperial Penal Laws and Orders, *Hoang Viet Luat Le*) was none other than the code of the Ch'ing dynasty, itself largely a copy of the Ming Code of 1397. The Nguyen rejected the Le Code as a model because the Ching statutes were presented more thoroughly and consistently⁴⁵. The Gia Long Code only inherited one article of the Le Code (article 164). Nevertheless, the Gia Long Code did not inherit thirty-nine articles of the Ching Code on the ground that the Ching Code represented the apex of Confucian thinking about punishment and as such commanded respect⁴⁶. Thus, under the Nguyen, the traditional Vietnamese village customs (customary laws), which were once dominant during the Le dynasty and embedded in the people's consciousness, were abandoned. As a result, the Nguyen's Gia Long Code seemed to be in existence at central feudalism's governmental institutions and urban areas, rather than did it adjust the people's village life; and there existed a big gap between villages' customs and imperial orders. Initially many advanced provisions of this Code were missing on laws and orders of the later dynasties, of other countries at the time and modern time. Though they were missing to be included in formal and written legal system of post-Le dynasty's successors, villagers continued to live according to the rules of the Le Code as enforced by village

⁴⁴ For example, Article 2 of Hong Duc Code indicated the ten heinous crimes were plotting high treason (an attempt on the emperor's life), plotting grave insubordination (desecrating imperial ancestral temples and palaces), plotting treason (working for an enemy state), wicked insubordination (attempts to kill grandparents, parents or actually killing senior male relatives), inhumanity (killing three people in one family), stealing articles from the emperor, lack of filial piety, discord (*bat muc*) (plotting to kill or sell relatives), disloyalty (killing an active official) and incest.

⁴⁵ Stephen B. Young & Nguyen Ngoc Huy (1990) *The Tradition of Human Rights in China and Vietnam*. Council on Southeast Asia Studies, Yale Centre for International and AREA Studies. The Lac Viet Series No.10. Pp353-4.

⁴⁶ *Ibid*, at 354.

councils⁴⁷. This was because Vietnam's dynasties after the Le did not inherit the Code, instead they tried to create for themselves their own legal system by borrowing that of the Chinese counterparts. For example, the Mac, Trinh-Nguyen's Dynasties had borrowed many provisions and laws of the Ching Dynasty of China. Traditionally, the new dynasty's elite and scholars did not want to apply their predecessors' legal and political ideology just because of political reason and East Asian culture. Thus, many good practices and advanced legal provisions on human rights were not promoted continually throughout Vietnamese imperial dynasties.

Under Gia Long Code, the right to freedom of private property was also somewhat respected and ensured, though on the ground of a person's hierarchical status in society recognized by the government⁴⁸. For example, the right to ownership of land were first stipulated in a law of 1804 which regulated that every three years land was re-divided amongst claimants. People who were as first-ranking civil officials could claim fifteen parts. A tax-paying adult male could claim six and a half parts while the elderly, orphans, widows and disabled could each receive from five and a half to three parts⁴⁹.

In 1840 the proportions of allocation were revised on the ground of giving more equality towards people. For instance, land given to active duty soldiers was replaced in a separate category and the remainder was allotted to officials, soldiers and commoners equally with each other receiving one part, the old and infirm one half of a part and orphans and widows one third of a part. Public land used for special purposes such as supporting teachers and students or the poor was also classified

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ See Nguyen The Anh (1971 *Kinh te Xa Hoi Viet Nam duoi Cac Vua Trieu Nguyen (Vietnamese society and economy under the Nguyen Emperors)*, Saigon: Lua Thieng. Pp 96-97.

separately⁵⁰. When public land in a village was built upon by the central government, the village was paid compensation for the loss of productive land⁵¹. Furthermore, uncultivated land could become privately owned through exploitation and payments of taxes to the state⁵².

It is worth noting that at the time of feudal regimes, for example the Le and Tran dynasties, land and land use were only granted to mandarins and high-ranking warriors while ordinary people did not have the right to use land nor did they claim to that right. Additionally, since land was regarded one of the emperor's most valuable property, that it was granted and divided to ordinary people and the poor was a great recognition of economic rights of people. Thus, the Nguyen's provisions on land use indicate that its law ensured somewhat people's rights in terms of socio-economic field.

However, as the seniority in society as well as in the village council was based on the people's official hierarchy⁵³, the human rights given to people were still limited and on the grounds of discrimination and inequality. Though there were a lot of achievements providing certain human rights for all people, the Nguyen's Code was, after all, made to protect the privileges of royal family and mandarins based on their hierarchically social status and rewards, rather than to protect the whole people regardless of any distinctions. For example, reflecting the legalist belief in the power of rewards, this judgment of the Nguyen's Emperor Minh Mang also evinced a reliance on the framework of official sanctions to set effective incentives for village leaders.⁵⁴ Compared with the Le dynasty's Code, as well as with that of the Tran and Ly, the

⁵⁰ Stephen B.Young & Nguyen Ngoc Huy, *Ibid.*

⁵¹ Nguyen The Anh, *ibid.*, at 88-89.

⁵² *Ibid.*, at 100.

⁵³ Stephen B.Young & Nguyen Ngoc Huy, *Ibid.*

⁵⁴ *Ibid.*, at 335.

Nguyen Code became not only more strict and systematic towards people and the village life that made people less freedom and equality, but it was also aimed at enhancing neo-Confucianism's conservative ideology and at building up a strong totalitarian feudal state. In addition to the French invasion and dominance upon the entire country, the Nguyen's legal and political ideology became strict and defensive towards Vietnamese peoples' life and culture during mid-19th and early 20th centuries.

Of these very strict provisions which are discriminatory against and intolerant towards people include several provisions related to restrict the right to freedom of religion of non-Confucianism followers⁵⁵ (other than Confucianism), such as Buddhists, Taoists, Catholics and Protestants. It is worth to note that the Nguyen's laws and orders were discriminatory against those people. It was the Nguyen who carried out the bloody repression of Vietnamese Catholics, which began only with the Minh Mang Edict of 1833 and ended in 1862 under Emperor Tu-Duc⁵⁶. There was a provision stipulating that the clergy had to be under the emperor's control and 'any attempt to obtain private ordainment certificates or to enter monkhood or priesthood without a certificate would lead to the punishment of the stick penalty'⁵⁷.

The Nguyen Government also carried out the policy of control over temple building and statue casting. For instance, it regulated that there could be no new monasteries or convents built without any approval of

⁵⁵ As the Nguyen Emperors really wanted to impose Confucianism as the official and dominant ideology upon the entire society, as well as a result of the misunderstanding of Christianity as a supporting force for the European invasion upon Vietnam, the Nguyen Government imposed the very strict laws towards religions other than Confucianism.

⁵⁶ See Ta Van Tai, Buddhism and human rights in Traditional Vietnam. Review of Vietnamese Studies 2004-5, presented at Harvard Law School. At www.vstudies.org (accessed 10.06.2006)

⁵⁷ Ta Van Tai, Buddhism and human rights in Traditional Vietnam. Review of Vietnamese Studies 2004-5, presented at Harvard Law School. At www.vstudies.org (accessed 10.06.2006)

the Imperial authorities; anyone who might breach this regulation would be punished and sentenced to exile⁵⁸. The Imperial authorities also took control over printing of religious books and the popular cults. The Nguyen's Code stipulated some provisions that gave the Imperial authorities powers to take control over the religious practices and restrict the people's right to freedom of religion and beliefs. In the nature of religious oppression, the Nguyen's imposed death penalty on those who attempted to follow or practiced the so-called "perverse religions"⁵⁹. Article 75 of the Nguyen's Code, as well as the Decree 3 following that Code, stipulating that if there is no limit imposed on the number of Buddhist monks and Taoist priests, who were not listed in their family households and were thus exempted from corvee, the population would be decreased; also, since the clergy did not till land or exercise any trade and depended on the people for their food and clothing, national resources would be wasted. Therefore any attempt to put young men sixteen years old or older outside the family (i.e., into the clergy) would lead to punishment⁶⁰.

The Nguyen Code also adopted several other strict provisions that aimed at punishing those who might not follow them, and to strangulate those who were religious masters or "sorcerers" who evoked "diabolical spirits", "saints, and all other "fake religious doctrines", or who formed unauthorized religious societies, thereby "sowing confusion among the people". Neighbours who did not denounce and officials who failed to suppress these offenders would be themselves punished⁶¹.

⁵⁸ Article 75 of Hoang Viet Luat Le (Vietnam's Imperial Laws and Orders). See *Hoang Viet Luat Le or The Nguyen Dynasty Code*, translated by Philastre as *Le Code Annamite*, 1909. Cited in Ta Van Tai, *ibid.*

⁵⁹ Ta Van Tai, *supra* note 69.

⁶⁰ Philastre, *Le Code Annamite*, 1:336. Cited in Ta Van Tai, Buddhism and human rights in Traditional Vietnam. Review of Vietnamese Studies 2004-5, presented at Harvard Law School. At www.vstudies.org (accessed 10.06.2006)

⁶¹ *The Nguyen Dynasty Code in Dai Viet Su Ky Toan Thu* (The Complete Book of the Historical Records of Dai Viet), hereinafter *TT.*, official history of the Lê Dynasty.

As the Nguyen imposed the entire Confucian ideology on the society, the more this ideology entered socio-political, legal, cultural institutions, the more strict and conservative policies it had against reformed elites, scholars and ordinary people. Additionally, as an absolutely authoritarian feudal regime, more than any other dynasties prior to them, the Nguyen dynasty borrowed and applied the Ching's neo-Confucianism based Code which was extremely strict and discriminatory against non-Confucians. Additionally, since the Nguyen took neo-Confucianism as its official legal and political ideology, Confucianism's conservative ideas were again multiplied. The idea of superiority of man over woman ('man first, woman second'), scholars over businessmen ('scholar first, businessman last'), and many other forms of the hierarchical order of people in society, made discriminations to the recognition of rights and affected the way in which people enjoyed their rights. Most notably, the role of women and their rights became less respected and protected.

As the Nation's greatest poet Nguyen Du (1765-1820)⁶², In his famous work *The Tales of Kieu*⁶³, drew this situation of society through the destiny of women and concluded that her destiny was also common to everyone and the whole feudal society that gave them nothing but unhappiness, suppression and inequality. As Nguyen Du sympathetically uttered this word,

Translation into Vietnamese by Cao Huy Giu, Hanoi, 1967, Volume III, p. 144. Cited in Ta Van Tai, supra note 69.

⁶² One of the World's 18th century greatest poets and of the only three Vietnamese scholars who were awarded the World's Cultural Personality. The other two are Nguyen Trai and Ho Chi Minh. Nguyen Du used to hold as a high-ranking official of the Nguyen dynasty of Empire then resigned after serving within many years to become a poet and writer.

⁶³ The tale consists of 3,254 verses (sentences), written in *lục bát* (6/8) meter, the poem recounts the life, trials and tribulations of Thúy Kiều, a beautiful and talented young woman, who had to sacrifice herself to save her family. She unwittingly sold herself as a prostitute to save her father and younger brother from jail. The earliest edition only found was published in 1866.

*'How painful the destiny of woman is
That her unhappy destiny is also of all human beings'*

Or,

*'Having gone through a play of ebb and flow,
The things that have been seen make one painful and hurt'⁶⁴*

Nguyen Du's Tale of Kieu was inspired by a Chinese classic literature work, the Tale of Kim-Van-Kieu, written by a Chinese writer⁶⁵ in Ming dynasty. The story was about a Wang family who lived under the reign of Gia Tinh (1522-1566) of the Ming dynasty. The historical, socio-economic context was in Chinese feudal society in the 16th century; however it was so much similar to that of Vietnamese feudal society under the Nguyen at which Nguyen Du lived. The story, written by the Chinese writer, itself was forgotten, as was its author. However, it was so inspired by Nguyen Du that made him re-create it and write it in verses of a poem, and make it one of mankind's greatest works of literature. Thus, the socio-economic context of Nguyen Du's character Kieu lived was exactly of Vietnamese feudal society in early and mid-19th century, at which Nguyen Du lived.

Nguyen Du's Tale of Kieu is a poet story describing a most beautiful and talented, but unhappy woman. Through his creation of character Kieu, her family and society, Nguyen Du made his great contribution to draw up the whole picture of East Asian Imperial societies, such as China and Vietnam, in relation to the respect for and implementation of human rights. That is also a complete picture of Vietnamese feudal society in which human rights was realized. For Nguyen Du, the destiny of

⁶⁴ Nguyen Du, *The Tale of Kieu*, (by Vietnamese Literature). The verses of 3-4. <http://vhvn.com/Kieu/1-38.html>. (accessed 10.10.05). Also see Nguyen Du *Selected Writings*. Hanoi: Literature Publishing, 1996. This means that throughout experiencing a life of successfulness and failure, whatsoever one have seen is unhappiness, pain and sorrow. Here Nguyen Du wanted to send a message of the common fate of people, who lived under the central Feudal regimes, to his future generations.

⁶⁵ His pen name is Thanh Tam Tai Nhan.

Vietnamese women is also that of the whole people who live under traditional Vietnamese societies. That is also a shared voice of the destiny of the whole of mankind living under Feudal regimes. The socio-political context in which Nguyen Du lived was also typical for the traditional Vietnamese society and its legal-political ideology was constituted by neo-Confucianism.

Influenced by Confucianism, Nguyen Du also thought that what made human beings have a good or bad destiny, happy or unhappy, successful or unsuccessful, etc., are caused by the Heaven. Thus, the human being's destiny in general and that of woman in particular are arranged by the Heaven, and they could not change it or improve it. As read in his poems,

*'Think it over; everything is caused by the Heaven,
The Heaven made man had his destiny!
If being doomed to roll in dust, one must roll in dust;
If being granted to be noble, one will live in a noble life!'*⁶⁶

Nguyen Du's viewpoints of the world, human society, and human beings mainly mirrored neo-Confucian ideology, which was more conservative than that of orthodox Confucianism. However, Nguyen Du was a radical neo-Confucian though this character did not help him split away from some conservative ideas of Confucianism⁶⁷. The question why Nguyen Du was unable to escape himself, therefore he could advocate the way to help the whole society to escape from such the Heaven's arranged destiny is explainable.

⁶⁶ Nguyen Du (1765-1820), *Truyen Kieu* (The Tale of Kieu). The verses are from 3241 to 3244. http://www.informatik.uni-leipzig.de/~duc/sach/kieu/call_2973_3254.html (accessed 10.10.05). Also see Vietnamese Literature, The Tale of Kieu. At <http://vhvn.com/Kieu/kieu.html> (accessed 24.01.06)

⁶⁷ Of which is his ideas on Heaven and Destiny, or the recognition of social hierarchy.

This is because Nguyen Du used to be a high-ranking mandarin, who was educated in Confucianism and lived in a central authoritarian Feudal society where he did not feel that he was free. As a brilliant Confucian scholar and a high-ranking mandarin, what Nguyen Du had gone through and experienced was the real life of traditional Vietnamese society and people. The image of Miss Kieu in his work was exactly the image of traditional Vietnamese women who did not find out the way to freedom and who were suffering from the repression and suppression of Feudalism in general and Confucianism in particular, as a conservative ideology. That was also the image of the Vietnamese people under Vietnamese feudal regimes.

Since relying upon Confucius' thoughts on Heaven and Destiny, Nguyen Du explained that woman's unhappy destiny was caused by an established order of Heaven and that was unchangeable. This made him not go further on Confucian conservative ideology that shaped Oriental totalitarian feudal regimes. As a Confucius' faithful follower, Nguyen Du relied on the Heaven's mandates and placed human beings' destiny in the Heaven and the existing society's order which was a hierarchical society. Since the Emperors are sons of the Heaven and are given powers to exercise the Heaven's mandates of ruling the people, the Emperor's laws imposed onto the society and people are also the Heaven's laws. Thus, it obviously indicates that people could not act against the laws, which were normally against them.

The Nguyen Emperors copied to the Ching counterparts even the life style as a superior emperor and son of the Heaven⁶⁸. Thus, most of the

⁶⁸ Basically, the political institution under the Vietnamese Imperial regimes was an absolute monarchy where the emperor had unlimited power and ruled by a mandate from Heaven. The emperor, however, was held accountable to the will of Heaven. This will, according was reflected in the will of the people. In short, to serve the will of the people was to serve the mandate of Heaven. Thus, the Nguyen emperors remained no exceptions. Furthermore, unlike their predecessors who took not only Confucianism, but also Buddhism and Taoism as the nation's official legal-

Nguyen emperors had dozens of wives and imperial maids. Remarkably it was Emperor Minh Mang who had 142 children in total, of whom 78 princes and 64 princesses⁶⁹. This was probably rooted from the Confucian culture of disrespect against women and of the patriarchal system⁷⁰. During the Nguyen emperors' reign, the strict principles of neo-Confucianism and those of the Chinese Ching Dynasty were heavily embedded in the rulers and their ruling machines, and took over the indigenous legal-political ideology, which was more open and radical than the Nguyen's Dynasty as being combined with Buddhism, Taoism and animism.

In the Confucian world view, emperors were said to have the "mandate of heaven" to rule their people, who, in turn, owed the emperor total allegiance. Although his power was absolute, an emperor was responsible for the prosperity of his subjects (people) and the maintenance of justice and order. An emperor who did not fulfill his Confucian responsibilities could, in theory, lose his mandate. In practice, the Vietnamese people endured many poor emperors, weak and strong. Counterbalancing the power of the emperor was the power of the village, illustrated by the Vietnamese proverb, "The laws of the emperor yield to the customs of the village."⁷¹

In brief, the traditional Vietnamese legal culture, during the periods of early history to French colonization (mid-19th Century), was constituted by

political ideology, the Nguyen's emperors so much relied upon and overemphasized on Confucianism.

⁶⁹ Open Wikipedia, *The Nguyen Dynasty and Emperor Ming Mang*. http://vi.wikipedia.org/wiki/Minh_M%E1%BA%A1ng (accessed 10.08.06)

⁷⁰ In the legal sense, the traditional Vietnamese family was a monogamy in which there was only one legal wife, the principle one; other women were not recognized as the legal wives, but as either secondary wives or sefts(slaves). Therefore, that fact that a man might have many wives constituted a de facto polygamy. This obviously affected to the recognition and protection of women's rights. See Ta Van Tai (1988), at. 111, *ibid*.

⁷¹ See Vietnam - A Country Study. <http://www.country-data.com/frd/cs/vntoc.html#vn0023> (accessed 10.08.06)

a combination between an indigenous culture and foreign legal-political ideology. For instance, the traditions such as caring for children and the elderly; children are required to care for their parents in old age, reflecting Confucianism based legal culture. While marriage is set forth as a partnership of equals, reflecting socialist law; and much of the family code also is drawn from the French civil code⁷².

Some Remarks

Due to the autonomy of the villages, it created the weakness of the Vietnamese political system. Under the Vietnamese feudal society, the villages almost existed as a close institution separate from the central government. This explains why the imperial codes had sometimes not reached the villages and realistically regulated upon people. Rather, the villages', as well as communes', customs were more prevalent than the law and even took over the law. This is particularly true in traditional Vietnamese society in which the people are accustomed to the maxim *Phep Vua thua le lang* (Village customs take precedence to the King's orders, or in other words, the emperor's law). As a result, the villages' customs and traditions had prevented the laws from coming into effect entirely within the society. Thus, these customs and traditions had significantly weakened the laws and produced many negative points for the execution of laws as well as the protection of human rights for all people, especially those of women.

Such customs created a lot of difficulties in protecting the substantial human rights for people, especially those of women. This has caused violations of women's rights, which were stipulated, respected and protected by specific provisions enshrined in the imperial Codes, such as those of Hong Duc Code. Despite the contemporary shortcomings of

⁷² Carol V Rose (1998) "new" Law Development Movement in the post-Cold War era: A Vietnam case study. *Law and Society Review*, 32 (93).

Confucian ideology and the 15th Century Le dynasty's socio-economic development, Hong Duc Code contributed a great viewpoint of the liberation of women and human rights ideas.

In general, the imperial law had imposed strongly upon social, family relationships that were based on both orthodox and neo-Confucian moral, legal and political thoughts. Confucian ideology consists of the following components: the *Tam Cuong* (Three vital relationships: king and mandarins (and his subjects—people); father and child (son)⁷³; husband and wife; elder brother and younger brother; and friend and friend) and *Ngu Thuong* (five cardinal virtues: humanity or humaneness (Nhan); righteousness (Nghia); rite (Le); wisdom or rationale (Tri) and trustfulness (Tin)).

These components are regarded as the foundation of Confucian humanitarianism. At the same time, they also constitute the society's moral-based rules upon which legal and political institutions are established and social relations are adjusted.

Confucianism advocates the social hierarchy and classifies people on their virtues; people who have different social status because they have different virtues. On the one hand, Confucians assumed that these virtues can be obtained through the people's process of life and self-cultivation. On the other hand, they thought that the people's social status is established by Heaven and unchangeable. Therefore, social relations of men to men are hierarchal and this is self-evident. This idea is obviously incompatible with modern ideas of human rights which advocate all people are born equal in dignity and rights. Confucian

⁷³ In Vietnamese, the word 'Tu' means children. However, it was commonly used as the son only since daughter was not much regarded as important as son. As the role of girl, when young, and of woman when married, was absent in the family, society's hierarchical system. Thus, the relationship between father and child was actually that of father and son.

thought of social hierarchy has created in Asian societies, including Vietnam and China, a lot of obstacles in the realization of human rights for all people.

The most vulnerable people who have been suffering Confucianism' restrictions are women. Confucianism advocates disrespect towards women and gender by tying them into very strict moral rules. For example, alongside with *The Three Relationships and Five Virtues*, which require all people must respect and follow, are the separate virtues for women. Those are *Tam Tong* (Three Bonds or Three Things Must be Followed) and *Tu Duc* (Four Virtues). *Tam Tong* are: 1. *Tai gia tông phụ* (a woman was supposed to be submissive to her father when young), 2. *Xuất giá tông phu* (a woman was supposed to be submissive to her husband when married), 3. *Phu tử tông tử* (a woman was supposed to be submissive to her oldest when widowed). *Tu Duc* are: 1. *Công* (skillfulness), 2. *Dung* (sophistication), 3. *Ngon* (good communication), 4. *Hanh* (good heartedness). These virtues are needed by every woman and they must be seriously followed. Whenever a woman breaches one or more than one of those virtues, she is regarded as the bad woman; she shall be subsequently punished morally or mentally by her family and community. Apparently, this violates the dignity and human rights of women. These very strict rules of Confucianism had tied woman within the solid walls of obedience that deserve her nothing but unrest acceptance and endless sacrifice. Under these rules, women lived an unequal, repressive life and they were treated as the family's servants.

As Confucianism advocated the ideology of superiority of man⁷⁴, women were excluded from both her status in family and society. Women were not allowed to study and to be a Mandarin. In the modern language of human rights, they were not entitled equal rights as men,

⁷⁴ 'man first, woman second', or 'the works of scholarship and governance lied in male characters'

such as the right to education and the right to participation in public life. Neither did they get equal education nor general education. Thus, there were no female scholars or female Mandarins until mid-20th century. In the lenses of Confucian ideology, it was very hard to accept any woman to be a mandarin or scholar because such jobs were only dedicated to men, and that woman's primary and only jobs were domestic work. Additionally, women must be always in piety and obedience towards her parents, husband, and always self-cultivate Confucianism's major virtues. Such rules of moral gave the woman no rights, but only duties instead. Obviously, Confucianism and Confucianism-based society that treated people on the ground of virtues is the discrimination and inequality between man and man, and especially between men and women.

Traditionally, Vietnamese society was based mainly on Confucianism that classified the classes of people according to their virtues; people who had different social statuses were entitled different privileges. For example, people were classified into two main types. The first type are those who are well educated and self-cultivated to understand and practice fully Confucian moral rules; they are called '*nguai quan tu*' (the gentlemen), or *tairan* (great men). They were much more respected than others. The second type are those who are uneducated, less educated or ordinary people as a whole; they are called '*ke tieu nhan*' (the small men), or *xiaoren*.

Another characteristic is that since traditional Vietnamese society was based on patriarchy, where members of society were ranked on their order as they are in a family, the relationships amongst them and between man and woman were unequal and hierarchical. The relationship between the State (King, Mandarins) and the citizen (subjects) was as parents and children. This was a one-way upward

relationship, which means the people must always respect their king and mandarins regardless of their characters and professional quality. This is also an unequal relationship. Thus, the people who lived under such regimes were unable to claim their rights and interests whenever they were denied or violated.

The family-based hierarchical relationships between father-child (*Phu Tu*), brothers (*Huynh De*, and husband-wife (*Phu The*) are the foundation of the social relationships and the model for societal roles. First and foremost, children were taught filial piety (*Hieu*), to obey and respect and honor their parents. The parent-child was at the very core of Confucianism, and therefore of Vietnamese culture, dominating everything else⁷⁵. The second important relationship of the family, and therefore of the society, is the relationship between brothers. Along with the *Phu-Tu* (father-child), the *Huynh-De* relationship is a paradigmatic example for extending this basic family model to society. One was supposed to behave towards those senior to one, or of higher rank, or older, as if they were older brothers. Unlike most Western cultures where children learned independence and equality, children growing up in traditional Vietnamese families learned dependence and nurturance, the importance of hierarchy, not equality, the rewards to submission to those of senior status, not assertiveness⁷⁶. This is an ideal role model that constitutes a social hierarchy: child towards parents, younger brother towards older brother, and wife towards husband⁷⁷. The third important relationship is the *Phu The* (*husband-wife*). This is also an equal super-ordinate relationship. Since women were regarded as subordinate to men in the nature of things, like children and younger brothers, they were supposed to be submissive, supportive, and compliant toward their husbands. Husbands were supposed to teach and exercise control over

⁷⁵ See Neil L. Jamieson (1995) *Understanding Vietnam*. Berkeley-Los Angeles- London: University of California Press. Pp. 16-17

⁷⁶ Neil L. Jamieson, *supra* note. 92, p. 17

⁷⁷ Neil L. Jamieson, *supra* note 92, p.18

their wives as they did their younger brothers and their children⁷⁸. This is absolutely a patriarchal, hierarchical relationship which tied women as if they were just servants.

Additionally, a woman when young is a subordinate to her brothers as girls are not regarded as the equals of boys, but they are also disrespected due to the Confucian culture of 'one boy, that is something; ten girls, that's nothing'⁷⁹, and 'a hundred girls aren't worth a single testicle'⁸⁰. After marriage, a woman soon fell into her husband's control and under the order of husband's family that again multiplied her submission towards her parents-in-law, her husband, and her brothers or/and sisters-in-law. This is inevitably discriminatory against women's rights and interests.

Since marriage was arranged between two families and two parents, so spouses were chosen not by themselves but by parents instead⁸¹, they did not have the right to choose their marriage partner, or decide their own marriage, and therefore their future. Such arranged marriages that were not based on love and on a voluntary basis between the two persons are inevitably not free. Thus, the right to freedom of marriage affected the right to freedom to decide one's own life. Historically, there were many arranged marriages that made both persons unhappy and unpleasant. The person who was suffering most had been always woman.

As Confucianism especially emphasizes on the values of family as a key role and foundation of the society, the relationships between the

⁷⁸ Ibid.

⁷⁹ Le Thi Que (1976) *Changing Structure of the Vietnamese Family from 1925 to 1975*. Unpublished manuscript. Honolulu: Population Institute, East-West Center, at 115. Cited in Neil L. Jamieson, see above.

⁸⁰ Gerard Chaliand (1969) *The Peasants of North Vietnam*. Baltimore: Penguin, at 60.

⁸¹ Ta Van Tai (1988) 1988. *The Vietnamese Tradition of Human Rights*. Berkeley: Institute of East Asian Studies, University of California. pp 214-215.

emperor and mandarins and his subjects are based on the family-style, between father and son. The Emperor and mandarins as the people's parents, therefore they are those whom the people must always respect. Obviously these relations are unequal. As Confucian doctrine pointed out 'Mandarins and people must be always loyal to the emperor'.

Neo-Confucians reformed orthodox Confucianism based on the contemporary socio-economic, political context so that it could be kept as the dominant ideology of Vietnamese imperial regimes. In relation to the ideas of moral, legal and political rules, neo-Confucian thoughts become more conservative than ever before so was orthodox Confucianism. However, neo-Confucians, like Nguyen Trai⁸² and Nguyen Du, among many other Vietnamese neo-Confucians, changed themselves to become radical Confucian. Their thoughts had significantly contributed to forming traditional Vietnam's legal culture that provided greater freedom to all people. These neo-Confucians advocated that the society's elite and mandarins, along with their loyalty to the Emperor, had to respect people and treat them in humanity, equality and dignity⁸³. Thus, for Vietnamese neo-Confucians, the role of people in the lenses of neo-Confucians was remarkably improved and highlighted. They especially emphasized and practiced the 'people are as the root' principle of governance (*Dan la goc*). Nguyen Trai contended that '[p]eople are as water. Water rows the boat, but also turns it over'. The Vietnamese radical Confucians also advocated a feudalism democracy in the context of Occidental monarchy. Indeed, this type had existed in traditional Vietnamese

⁸² A Vietnamese well-known neo-Confucian of 15th Century, a great poet and cultural personality, a high-ranking official, and senior advisor to the Le's Emperors.

⁸³ As it is said Mandarins must give *Trung voi Vua* (loyalty to the Emperor) and *Hieu voi dan* (must do filial piety to the people).

society, which is regarded a commune-village democracy, or communal democracy.⁸⁴

Since the traditional Vietnamese society was based on a wet-rice political economy, its villages and communes appeared to be a relatively closed, separate entity from one another and from urban and central areas. As a result, neo-Confucian values, which were so much conservative to the emperors and mandarins, and against the people's rights and interests, were not infused deeply in villagers and uneducated people, but the elite and educated people instead⁸⁵. As John Gillespie pointed out,

'Ultimately, neo-Confucian orthodoxy in villages was never considered as vital as official compliance, because hierarchical distinctions between the morally perfected elite and uneducated villagers formed a central organizing premise of Confucian/legalist culture'⁸⁶

This characteristic shaped the vital space for the people to maintain the Vietnamese indigenous identity and culture though being dominated under the Chinese occupation for thousands of years. Surprisingly, this created a considerably village autonomy in which ordinary people still felt their rights and equality assured under the commune-village

⁸⁴ Many Vietnamese present day historians insisted that in the Vietnamese Feudal society there once existed a democracy, which is mainly based on Confucianism-based ideology. See Phan Huy Le, 'The Problem of Democracy in Vietnam's Traditions' (1994) 4 *Vietnam Social Sciences* 3, 4-10. What Prof Le called a commune democracy is based on the recognition of democracy and equality of people who existed as members of a certain commune or community, rather than those existed as individuals. This is obviously doubtful and arguable as democracy is always understood as a equal right entitled to everyone. See also Phan Huy Le, 'The Problem of Democracy in Vietnam's Traditions', http://www.bbc.co.uk/vietnamese/vietnam/story/2006/03/060328_phanhuy_le_danchu.shtml (accessed 28.03.06)

⁸⁵ See Gillespie (2001) *Globalisation and Legal Transplantation: Lessons from the Past*. *Deakin Law Review*, Vol. 6 (2), pp. 286-310.

⁸⁶ *Ibid*

democracy⁸⁷ whilst the Feudalist authoritarian monarchy dominated the whole society and at the central levels. It is worth to note that the level of Chinese and Confucian influences to Vietnamese feudal societies' elite, mandarins and ordinary villagers were considerably different, and it was reduced at the society's grassroots. Confucian legal-political ideology deeply embedded on traditional Vietnam's later imperial dynasties, especially the Le and the Nguyen. Because the level of influences was different, Vietnam's indigenous culture has been still alive and flowered. It was the villagers who preserved traditional values and good practices of rules of conduct between men to men and men to the society. Also it was the villagers who relied and obeyed little to the emperor's laws and orders if they were incompatible with the villagers' customs and traditions.

By this time, traditional Vietnamese legal culture was mixed by the Chinese and indigenous characteristics, which appeared to be the contradictions between the imperial Codes and the villages' customs. Consequently, law in traditional Vietnam never decoupled from morality and there was no clear division between legality and morality, and moral consciousness, rather than legal rules, formed the central organizing principle⁸⁸ As analyzed above, the principle of Confucianism-based rule is nothing but virtue-rule instead. As John Gillespie commented, the Vietnamese legal-political ideology was based on the characteristics of *Imperial paramouncy, Virtue-rule, and Hierarchical state administration*, meanwhile its legal culture was obviously influenced by the Chinese⁸⁹.

⁸⁷ See Phan Huy Le, *supra* note,...

⁸⁸ John Gillespie also emphasized that as such the characteristics the traditional Vietnamese legal culture mirrored the hierarchically moral principles and social norms applied to the people. As he pointed out that 'Confucian/legalist jurisprudence endeavoured to make the punishment fit the crime, and social status fused individual legal identities with families and ensured that law preserved Confucian social hierarchies'. See Gillespie, *supra* note...

⁸⁹ *Ibid*,

Given the legal culture of traditional Vietnam, there are some conclusions that can be withdrawn as follows:

Firstly, traditional Vietnamese laws, especially the Le dynasty's Hong Duc Code, contained many advanced ideas of human rights which are completely compatible to the present-day universal and international human rights standards. Notably, the human rights of women, children, the elderly and the disabled were emphasized and respected. The Le Code protected women's rights and equality, at least in some extent. Both the Le's Code and Nguyen's Code protect the right to freedom from death penalty against a pregnant woman. Such a woman would not have to undergo her penalty until a hundred days after childbirth. Judicial officers who imposed such a penalty to a pregnant woman shall be punished⁹⁰. The Code also protected juvenile defendants. A juvenile under ten years of age who committed an offence could apply for a special petition for clemency addressed to the emperor, who would ultimately make the decision on his care; or a juvenile under seven years were exempted from the penalty.⁹¹ These provisions are absolutely compatible with the modern standards of 'the right to life' and 'the right not to be subjected to being tortured or arbitrarily deprived of one's right to life' set forth in international human rights law.

The aforementioned evidences demonstrate that traditional Vietnam's legal culture, as well as its norms and practices, contained many positive elements which are absolutely adherent to modern international human rights standards. However, it still contained certain elements or negative effects that are incompatible to modern ideas of human rights. For example, apart from such very humane provisions, there were a number

⁹⁰ Article 680 of the Le Code and 385 of the Nguyen Code, in *Dai Viet Su Ky Toan Thu* (The Complete Book of the Historical Records of Dai Viet), *ibid.*

⁹¹ Article 16 of the Le Code and article 21 of the Nguyen Code, *ibid.*

of inhumane and cruel punishments still applied. Consequently, there were a mixture of cruelty and humanity enshrined in traditional Vietnamese imperial legislation⁹². For instance, those punishments were applied against women who committed breaching *Tam tong* (Three Bonds) and *Tu duc* (Four Virtues). Most Vietnamese imperial laws strictly applied the death penalty not only to the individual who committed an offence of attempt, or conspire, to murder an Emperor, but also to his three-generation family⁹³. In the light of modern human rights standards, the Hong Duc Code, as well as other Vietnamese imperial laws, contain several historical shortcomings. For example, the individual's rights to have a lawyer could not be feasible at the time; or the right to have a public hearing; or to have substantive and procedural guarantees of due process.⁹⁴

Secondly, the human rights that women were entitled to enjoy equally to men basically belong to economic area, for instance, the right to have inheritance. As women had unequal status compared to that of men in the family and in the society, political, social and cultural rights were less likely recognized. As a result of Confucian culture, women were kept in the principles of rites that just asked for their sake, sacrifice, duties and morals, rather than enjoyment and rights; it also made them enjoy nothing but inequality and no freedom. As clearly taught in the Confucius's *Book of Rites*, the wife not only always obeys the husband during his lifetime, but also remain faithful to him after his death, whereas the husband had no such obligations⁹⁵. In family, she depends upon her

⁹² As Ta Van Tai concluded that 'Ly, Tran, Le, and Nguyen criminal punishments—consisting of the classic five penalties (the light stick or rod, the heavy stick, penal servitude, exile, or death), along with some other supplementary penalties and the principles for their application—were a mixture of cruelty and humanity', see Ta Van Tai (1988), at 72, *ibid.*

⁹³ This was the most restrict, cruel, inhumane punishment. In Vietnamese history, many innocent great scholars and mandarins, as well as their families, were victims and cleansed by this punishment. Of those was Nguyen Trai himself and his family.

⁹⁴ See Ta Van Tai (1988), at 97, *ibid.*

⁹⁵ Ta Van Tai (1988), at 115, *ibid.*

husband and had no voice in her family's major activities. In society, she was also seen only as a house worker and had no voice; therefore she had no right to education and participation in public life.

Thirdly, traditional Vietnam's legal culture mainly rested upon Confucian moral rules that regulated social relations and governance. This is a culture of duties, rather than that of rights. This is a culture formed designed on the ground of obedience and over-emphasis on one's duties towards another and the society. Under this culture, instead of claiming for one's rights, one is required to demand his duties towards others as a primary resource of enjoying rights. Thus, the human rights implications enshrined in Vietnamese imperial laws were either the privileges granted to the society's most powerful people (King, Mandarins, scholars) or the duties and obedience given to the powerless people (the ordinary and the poor) and the society's most vulnerable people (women, children and the disabled)⁹⁶.

In general, the legal culture in the traditional Vietnamese society was heavily influenced by Confucianism, which is a legal-political ideology that takes moral values as its foundation. Unsurprisingly, the influence of Confucianism in the present-day Vietnamese legal system and culture is evident and Confucianism produced a legal culture of "rule by moral" (righteous rulers), rather than the "rule of law"⁹⁷. That culture relies so

⁹⁶ This is the duties-based relationship in hierarchal society: duties of subjects toward the King, of mandarins towards King, of son toward father, of children toward parent, of younger brother toward elderly brother, of wife toward husband, of junior toward senior. For instance, art 308 of the Le Dynasty's Hong Duc Code pointed out that, 'a husband who neglects his principal wife and dose not personally visit her for five months shall be deprived of his rights over his wife'. Cited in Ta Van Tai (1988), at 116, *ibid*.

⁹⁷ See also Hoang Phuoc Hiep et al. (1996) *The Vietnamese Legal System*. Joint paper by Vietnamese Ministry of Justice and Swedish Embassy officials, at 42. Cited in Carol Rose (1998), *ibid*.

much on "morality, custom, kinship or politics, rather than formal legality"⁹⁸.

Though the traditional Vietnamese legal-political ideology was constituted by both the indigenous and alien characteristics, it is eventually shaped by Confucianism. Buddhism once played a key role in Vietnamese ideology and initially dominated its legal culture in the early dynasties of Vietnam. However it was Confucianism that rooted so long in traditional Vietnam's legal and political ideology, and it had shaped Vietnamese feudalism's superstructure of society. Surprisingly, at the heart of traditional Vietnamese society is a combined culture of indigenous belief, Buddhism and Taoism had still flourished and embedded in the people's daily life. Consequently, the traditional Vietnamese legal culture was mixed by the formally Confucianism-based system and the informally Buddhism, Taoism, and indigenous system⁹⁹, which mainly existed in villages and villagers' customs and behaviors.

Undoubtedly, the traditional Vietnamese society contained many elements compatible with and equivalent to modern ideas of human rights. Traditionally, Vietnamese laws enshrined a lot of human rights, advanced ideas that were only given to birth in Western thoughts of 18th century. Amongst those advanced legal provisions and laws on human rights are those enshrined in the Le Dynasty's Hong Duc Code of early 15th century. In the light of modern and universal thoughts of human rights, Hong Duc Code's provisions on women's rights are being sparkling

⁹⁸ Alford, William P. (1995) *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 *China Quarterly* 22-37 (March), at 22.

⁹⁹ Over many centuries, Taoism, Buddhism, and Confucianism had become intertwined, simplified, and Vietnamized to constitute—along with vestiges of earlier animistic beliefs—a Vietnamese folk religion shared to some extent by all Vietnamese. See Ho Tai Hue Tam. 1985. "Religion in Vietnam: A World of Gods and Spirits." In *Vietnam: Essays on History, Culture, and Society*. New York: Asia Society, at 25-26; Nguyen Ngoc Bich, ed. 1975. *A Thousand Years of Vietnamese Poetry*. New York: Alfred A. Knopf, at 24.

as East Asia's great values that are the foundation of humanism, humanitarianism and modern human rights law.

However, these elements were unable to spread to all of Vietnamese feudal dynasties and they died out during the emergence of modern Vietnam's socialist ideology. The decline of traditional Vietnam's advanced legal culture and system, which once played a genesis of human rights ideas in East Asia, was because of the clearance of feudal ideology happened in mid-20th century. Additionally, due to lack of correct understanding of genuinely traditional values, jurists, scholars and elites have abandoned them until the fall of the Soviet Union's and East European's communist ideology in late 20th century.

From culture-based approach, it is worthy to conclude that East Asian values consist of Confucianism's theory of humanity (*ren*); Buddhism's theory of transcendent morality, compassion and tolerance; and advanced thoughts on human rights enshrined in East Asian nations' legal system and ideology, such as those of Vietnam's Hong Duc Code of 15th century. These are universal human rights and enshrined in various international human rights treaties.

In essence, East Asia's Confucianism-based culture contains communitarianism; emphasis on family values; overemphasis on economic, social and cultural rights; invisibility of human rights and human dignity, rights and duties; and national sovereignty over individuals' rights. Traditional Vietnamese society remains the case as it has been strongly influenced by these characteristics. Human rights were not seen as rights of individuals, but rather as of persons who are not separate from their family, community, and society; and whose rights are indivisible with their duties. Thus, the traditional Vietnamese legal culture is focused on the rights of people as members of community, rights of

community, rather than as individuals; and on people's duties rather than their rights. Until the French imposed their rule upon this land, as an East Asian culture, Vietnam's legal culture was mainly based on Confucianism, which was typical to traditional Vietnamese society. In the field of the society's governance, Confucian moral rules were especially emphasized and they replaced legal rules. Moral rules-based culture has been the basis of traditional Vietnamese legal-political institutions. Additionally, traditional Vietnamese culture mirrored the central feudalism's ideology, of its characteristics, for example, patriarchy, hierarchy and exclusion (as women were most likely not respected), that could not avoid its shortcomings that made a lot of difficulties in relation to human rights realization and protection practice.

It is worth noting that traditional Vietnam's legal culture has been mainly formed by Buddhism and Confucianism. There are considerable differences between Confucian tradition of human rights protection and that of Buddhism. While Buddhism extremely advocates a transcendent morality, compassion and tolerance, Confucianism advocates humanity and self-cultivation. Consequently, these traditions entered traditional Vietnamese societies differently and influenced the ways in which the individual's rights were protected. Since Buddhism legal culture prioritizes tolerance, during it was the Ly Dynasty's formal legal and political ideology there were very few people sentenced to death or suffered a very serious punishments. By contrast, Confucian legal culture prioritizes the very strict moral standards, such as Three Bonds and Five Virtues that imposed on the most vulnerable people in society including women, children and those who might break such Three Bonds or violate such Virtues. Buddhism-based legal culture produces open and humane legal provisions that are more supportive for protecting the individual's rights. On the contrary, Confucianism-based legal culture produces strict and punishable legal provisions to adjust social relations and the individual's

behaviors. Thus, Confucian legal culture has marginalized certain groups of people in society, such as women, as it overemphasizes men to women. However, both these traditions share several key points in relation to the protection of human rights. First, both Confucianism and Buddhism emphasize human dignity, humanity and morality that are the foundation of human rights. Second, they became less conservative and more radical when they entered commune-village life of people. Third, these traditions became dominant in central and urban areas, whereas less likely influential to ordinary people as to elite and mandarins. Fourth, they were both applied into the society's practices of governance and became a component, or an entity, of the national culture in traditional Vietnam. Fifth, both Confucianism and Buddhism have shaped a legal culture of traditional Vietnam as well as they have been still influencing to modern Vietnamese legal and political ideology and the way in which the individual's rights has been respected and protected.

The Vietnamese traditional culture has been remarkably influencing to modern Vietnam, so as has East Asia, embracing both negative and positive factors to the realization of human rights for all. Nevertheless, given the aforementioned proofs it is fair to conclude that East Asia culture, through the lenses of Vietnam's traditional legal culture, has somewhat made significant contributions to the evolution of universal human rights.

Cultural Identity and Marginalized Groups

Linda Briskman*

Abstract

Attempts to erode the cultural identity of particular groups occur in a number of contexts. These attempts violate a number of human rights norms and have resulted in critiques by academics, lawyers and those affected by the practices. Three examples are provided in the paper: Indigenous peoples, asylum seekers and Gypsies and Travelers.

Introduction

The question of rights to cultural identity is a contested domain in a number of countries, particularly in their endeavors to present an image of 'unified nation'. In presenting this paper I come from the position that cultural identity is of profound importance for the diverse groups that inhabit the planet particularly when they are not the dominant group in the society or when they migrate and become vulnerable minorities. It also applies in settler societies such as Australia, Canada and the United States where the colonization process dislodged Indigenous peoples from their position as the rightful owners of the land.

Cultural background is one of the primary sources of identity. It is a source for a great deal of self-definition, expression, and sense of group belonging. As cultures interact and intermix, cultural identities change.

* Linda Briskman is Professor of Human Rights at Swinburne University, Australia.

This process can be both enriching and disorienting (Ayton-Schenker 1995).

Abdullahi Ahmed An-Na'im (1992, p. 23), raises some interesting points. He says that culture is the source of the individual and communal world-view. It provides both the individual and the community with the values and interests to be pursued in life as well as the legitimate means for pursuing them. And, he continues, culture stipulates the norms and values that contribute to people's perceptions of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies. As such, culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community. The impact of culture on human behavior is often underestimated because it is so powerful and deeply embedded in our self-identity and consciousness.

On a global scale, there are settings where there are endeavors to minimize cultural pluralism, reinforce assimilation and suppress cultural identity, often driven by community attitudes based on ignorance and prejudice. There is little recognition in these settings about how cultural identity is dynamic, not fixed in time and gradually evolves according to context and generation. The result of lack of affirmation of cultural identities can result in the privileging of the rights of dominant groups in societies.

Dominant groups or classes within a society normally maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture. Dominated groups or classes may hold, or at least be open to, different perceptions and interpretations that are helpful to their struggle to achieve justice for themselves (An-Na'im 1992, p. 20).

I draw on three examples to illustrate the arguments points in my paper. The points I raise not only have common threads between all three but hopefully offer up a way of looking at issues of cultural diversity in other contexts.

1. Indigenous (Aboriginal) peoples
2. Asylum seekers
3. Gypsies and Travelers

I begin by briefly examining whether United Nations instruments offer substantial leads by providing an overview of some relevant provisions.

United Nations

Historically there has been some resistance towards the development of cultural rights. International law has long been the tool to impose western ideas and colonize other cultures. The modern nation state ideal in the west was based on the notion of people as culturally homogenous. The view was that people who did not share a common culture should be assimilated with the dominant society (Smith and van den Anker 2005, p. 77).

Contemporary international law as I understand it however is based on the principle of equality between all cultures. When the Universal Declaration of Human Rights (UDHR) was drafted, cultural rights were added to the list of recognized universal human rights. The 1948 UDHR contains a number of articles related to socio-economic and cultural rights although limited to mainly scientific and artistic matters. As with the International Covenant on Economic, Social and Cultural Rights there is little focus on cultural differences and redress for colonized people.

The International Covenant on Civil and Political Rights has more substance as the right to enjoy one's own culture appears under the banner of non-discrimination, through rights such as freedom of expression and religion and also under the banner of minority rights. Cultural rights are also part of several other international instruments. For example the Convention on the Prevention and Punishment of the Crime of Genocide prohibits the deliberate destruction of a people's culture (Smith and van den Anker 2005, pp. 77-78).

United Nations bodies also offers critiques. The UN High Commissioner for Human Rights, Navi Pillay, when visiting Australia in 2011, pointed to the underlying racism in the way in which two of the groups I will be discussing are treated – Indigenous peoples and asylum seekers.

My approach to human rights and cultural diversity is not legal but more discursive, drawn from social science disciplines such as sociology, anthropology, media studies, political science and from my own background as a social worker. As a social worker with concern about human rights and social justice I have witnessed first-hand the struggle of some groups to maintain their cultural identities.

Indigenous (Aboriginal) Peoples

The attempt to erode the cultural identity of Indigenous peoples in Australia is similar to that which occurred in other colonized nations. When the British colonized Australia a little over two hundred years ago, the aspiration was to utilize the country for exploitative purposes. As time went on various policies and practices came into place in order to achieve this goal, which placed little value on the rights of Indigenous peoples to their own cultural identity and cultural practices.

A statement made by an early Governor, demonstrates the paradigm that the colonizers adopted. In 1838 South Australian Governor Gawler addressed a group of Aboriginal people. He said:

Black men, we wish to make you happy. But you cannot be happy unless you imitate good white men. Build huts, wear clothes, work and be useful. Above all things you cannot be happy unless you love God who made heaven and earth and men and all things.

One of the most harmful practices occurred in the previous century when many Indigenous children were separated from their families and communities. These were children of mixed race – of both Indigenous and European descent. As the children had lighter skin, it was believed it was best to assimilate them into white society and for this purpose they were removed to missions and children's homes. They were not allowed to speak their own languages, they could not visit their families, and were subject to Western style education although not to a high standard, in preparation for lowly work as farming assistants or domestic servants. Their spiritual beliefs were expected to disappear and Christianity was foisted upon them. The practices of that time no longer occur but the legacy remains, with Indigenous children still disproportionately in out-of-home care and Aboriginal peoples experiencing extreme levels of disadvantage.

The policy of removing children has been referred to as genocide in keeping with the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide which states in Article 2 that genocide includes:

e) Forcibly transferring children of the group to another group.

The dominant ideology that resulted in cultural exclusion, stemmed from a 'clash of civilizations' approach and even today Indigenous people are often seen as inferior and on the lowest rung of the scale of human development. This occurs through:

- Denigration of cultures and spirituality. Indigenous people's ancient cultures are not valued by mainstream populations. Indigenous spiritual beliefs are seen as incompatible with modern day religious practice. Although Australia has legislation that bans racial discrimination, some of this 'race thinking' still prevails.
- Fear is a significant factor. In an era of dominance of a neo-liberal discourse, the anti-capitalist stance of Indigenous peoples does not fit with the materialist quest. The struggle of Indigenous peoples for land rights and land justice – to have their traditional lands returned so they can practice their cultural traditions – have often been usurped by the purveyors of Western style development particularly mining interests.
- Results of colonization processes have resulted in Indigenous people being located at the bottom of the rung on every socio-economic indicator. In Australia Indigenous people have the worst health, lowest levels of educational attainment, highest unemployment levels and highest rates of imprisonment.
- When Indigenous children who had been removed from their cultures grew up they struggled with their identity and many ended up becoming addicted to alcohol and other harmful substances. This problem passes from one generation to another. The prisons have become full of people who were

moved from their families as children and turned to crime, largely as a result of non-acceptance in the white community and identity confusion.

- Even today the media focuses on dysfunction rather than strengths. There are often reports of the most negative aspects such as crimes committed by Indigenous peoples and the prevalence of sexual abuse and domestic violence in some communities.
- There is an inter-connection of rights. Civil and political rights were denied to Indigenous peoples in past times such as the right to vote or the constitutional right to be counted in the referendum. Social and economic rights are still highly problematic and the granting of first generation rights has not addressed the extreme socio-economic disadvantage. Collective rights which are dear to Indigenous people, such as the right to self-determination and land rights, are hard to attain when the dominant society adheres more to a neo-liberal individualistic approach.

On September 13, 2007 the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples. This followed around twenty years of discussion within the UN system and resistance from a number of Western countries. Indigenous representatives played a key role in the development of this Declaration. The Declaration contains a range of rights and is also of great symbolic importance in the recognition it provides to Indigenous peoples worldwide.

I finish this section on a positive note. Indigenous peoples are conveying their cultures through popular media such as music, theatre and film. They speak of resilience and survival to avoid being seen merely as

victims. There are endeavors to revive Indigenous languages. And non-Indigenous people are becoming better informed about Indigenous cultures including within education systems.

Asylum Seekers

Indigenous elder Lowitja O'Donohue in 2003 raised the conundrum: How is it that Australia's first peoples (Indigenous) and its last peoples (asylum seekers) should suffer similar indignity.

In Australia people seeking asylum are mandatorily detained and in many ways stripped of their identity, labeled in popular discourse as 'queue jumper', 'illegals', 'criminals', 'potential terrorists'. The term Middle Eastern Muslim asylum seeker is an imposed and constructed identity that has come to denote someone the West does not desire and whose identity is seen to interfere and destroy the Western way of life.

Since the attacks in the United States on September 11th 2001, asylum seekers have been perceived as a threat, and evoke fear in the Australian nation. Whether Muslim or not the perception is that most are to be feared. Letters to newspapers are filled with negative perceptions about an increase in mosques, about Islamic dress and even halal food.

But how is identity seen? There is some evidence that when living in the Australian community when accepted as refugees, people do not see refugee as a cultural label to be maintained. Instead as with many other migrants they see themselves as Afghan Australians, Iraqi Australians, Somali Australians, for example. The endeavors to banish people from their self-identity is evident in subtle rather than overt assimilation endeavors that are shrouded by a singular notion of national identity (Stratton 1999).

The term Middle Eastern Muslim asylum seeker has irrationally entered the national lexicon. I say irrational for a number of reasons but basically it amounts to decrying Islam as being incompatible with modern Australia. In its denunciation of Islam, Australia is polarized between two competing hegemonies – the importance of maintaining Christian dominance and the vision of a secular society (Briskman and Dimasi under review). Even though Muslims represent a small percentage of the Australian population and come from diverse countries and cultural backgrounds, they are seen as being a singular category (Poynting and Noble 2004). According to a Pakistani Muslim woman, Hanifa Deen (2010), Australian Muslims feel constantly under siege and forever obliged to explain the criminal actions of others to defend Islam while assuring their interrogators of their loyalty to Australia. The unfounded fears in the community are often so irrational that one commentator (Manne 2005, p. 390) asked the question on how Australians would react if those coming to Australia were white Zimbabwean farmers. Very differently he suspects.

Because asylum seekers in Australia are usually detained in camps far from metropolitan areas people do not have a chance to see their humanity. Sara Ahmed (2000) has stretched the phenomena of 'Stranger Danger' to speak of immigrants as outsiders in the nation space and where cultural difference becomes the text upon which fear of crime is written.

The plight of asylum seekers, particularly those held in detention can be further analyzed in terms of how policies and practices may violate UN conventions including the 1951 Refugee Convention. It can also be argued that holding children in detention is against the provisions of the Convention on the Rights of the Child. Some of the ways in which asylum

seekers are treated worldwide may breach the Convention against Torture particularly relating to inhumane treatment and punishment.

The Roma, Gypsies and Travelers

I became interested in the question of Gypsies and Travelers in England just over a decade ago when I observed, despite vast cultural differences, similarities between what Indigenous peoples in Australia experienced and the plight of Gypsies and Travelers in the UK. I have less knowledge here than the other two examples, so I will give just a brief overview. I draw on the work of UK social worker Sarah Cemlyn.

Broadly speaking in the UK context, Gypsies are ethnic groups formed by a diaspora of nomadic groups from India from the tenth century, subsequently mixing with European and other groups. The term Roma refers to European Romani speaking groups. Another group in England are Irish Traveler groups.

Historically throughout Europe Gypsy Travelers have experienced waves of persecution and, similar to Indigenous people, attempts at aggressive assimilation. Episodes of sometimes systematic child abduction have contributed to a form of cultural genocide aimed at removing children from the Gypsy way of life (Cemlyn and Briskman 2002). The family and extended family are extremely important in Gypsy culture so this was a terrible imposition.

The examples I provide below reveal current concerns, which, despite their differences, show similar patterns to those apparent in the way the identities of Indigenous peoples have been denied.

- Negative stereotypes presenting Gypsy Travelers as criminal or backward.

- Ways of life are seen as a threat to dominant economic and political interests.
- Hostility is fuelled by a hostile media which reinforces prejudice in the wider community.
- Accommodation is a problem with the erosion of stopping places. Many are homeless as they have nowhere to stop. Lacking somewhere to live undermines other rights and can result in racist harassment, vigilante attacks and repeated evictions, lack of access to schools, health and other services. Children are often not welcomed in schools. (Cemlyn 2008).

Cultural practices rather than being values as important are seen as out of step with the dominant society, Cemlyn (2008) explains. For example children often learn skills at home and take on adult economic and social responsibilities earlier than other children, creating alarm among mainstream bodies that see these as endangered children rather than children being nurtured in their own cultural context.

There have been instances where cases have been taken to the European Court of Human Rights or using domestic law under race-relations provisions in the UK (Cemlyn 2008).

Cultural Identity and Human Rights

The question of universal human rights and cultural relativism emerges in debates. Ayton-Schenker (1995) suggests that universal human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity. The Vienna Declaration provides explicit consideration for culture in human rights promotion and protection, stating that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.

Ayton-Schenker (1995) further argues that there are legitimate limitations on cultural practices even in well-entrenched traditions. For example, no culture today can legitimately claim a right to practice slavery. Similarly she says cultural rights do not justify torture, murder and genocide. There exist however, strident debates such as in the Indigenous example, as to whether punishments in traditional communities can be performed in accordance with traditional law.

A useful pathway is presented by Ayton-Schenker suggesting that rather than limiting human rights to suit a given culture, why not draw on traditional cultural values to reinforce the application and relevance of universal human rights? There is an increased need to emphasize the common core values shared by all cultures. Traditional cultures should be approached and recognized as partners to promote greater respect for and observance of human rights.

Deconstructing dominant worldviews is another way of approaching the tensions. The theoretical construct of 'the social construction of whiteness' opens up prospects, in line with what Australian Indigenous writer Aileen Moreton-Robinson (2000) says is the omnipresent invisible norm. This construct refers to how 'whiteness' or the dominant culture is created and unquestioned in the way The Other is positioned, and how the ensuing practices which follow become normalized.

People can be stripped of their cultural identity through a criminalizing discourse or a discourse that denigrates. For example the media in Australia often identifies people convicted of crimes by their race. When asylum seekers protest their detention they are depicted as violent and criminal rather than people in despair. And Gypsies are seen in populist

discourse as thieves and cheats. In past times Indigenous people, especially those with fairer skin, tried to hide their identity.

Human rights are not a panacea and can be a struggle to enact. But the concept and application of human rights is the best we have. We need a combination of human rights law and other approaches, such as sociological, policy oriented and media analysis to overcome the problems experienced by oppressed minorities who are in danger of having their cultural rights eroded. When we look at the exclusion of rights from all groups we need to look at all levels of rights.

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Quest for a Better Understanding of Children and Cultures: Twenty-First Century Children's Cultures, Rights and Education from an Anthropological Perspective

Firouz Gaini*

Abstract

This paper examines and analyses fundamental arguments regarding the credibility and valuation of the cultural rights of children, as part of a larger debate on the universality of human rights, and the framework of my approach is delimited by the following questions: (I) How do we research and illustrate the complex relation between children's cultural rights and the cultural diversity of the world today? (II) What position and function do the – formal and informal – education of children have regarding the knowledge on and respect of cultures and humanity in the world today? And finally, (III) what can be done – at local, national and international levels – in order to improve the general understanding of children and human right issues across ethnic, religious and national borders?

The main aim of the paper is, through an ethnographic lens, and with the children's 'own viewpoints' in focus, to outline children's core position in any reasoning about the value of humanity. The paper's imperative is the potential dangers of e.g. cultural commercialization, cultural 'racism' and 'ethnocide' in a globalized world characterized by economic and political competition, as well as xenophobia. Using empirical data from different parts of the world, the paper presents cases of violations of human rights – e.g. to use own language and rights to a (home) land – with focus on the negative consequences it has on children, hence also on their culture's viability and future; this discussion leads to the domain of human rights ethics that is connected to the question of education and pedagogy. What to teach the children – and in which way? The paper, in summary, concludes that culture is a capital that empowers people so that they protect and support humanity.

* Dr Firouz Gaini is Associate Professor in Social Anthropology at the Department of Education, University of the Faroe Islands (Northern Europe) (firouz@flsk.fo).

Ideals and Realities in Children's Lives

Children have, until quite recently, commonly been considered unfinished and unformed as human beings in most societies and cultures of the world, even if distinct local definitions of 'children' naturally can be relatively dissimilar with fundamental contrasts as regards to children's general societal role and status, as well as cultural identity¹. The concept of the 'child' is itself questionable and controversial, because no positive unambiguous understanding of the concept's cultural connotations exists at a contemporary international level; however the United Nations' (UN) Convention on the Rights of the Child (CRC) from November 1989 pursues an universal framework with impartial principles for the project of, as Article 2 in the Convention states, respecting and ensuring the rights of the child "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."² The Convention on the Rights of the Child, ratified by all but two UN member states (not ratified by USA and Somalia), is ambitious and necessary, but the international academic discourse on human rights during the last decades has also revealed CRC's shortcomings and problems that partly stem from the Convention's strong foundation in modern Western world-views and ethics that, according to some influential post-colonial critics, risks to undermine cultural and ethnic liberty and diversity in its general focus on formal abstract rights for 'individuals' without noticeable interest in customary law, cultural practices etc.³. Local indigenous cultural models, for instance regarding

¹ Ariès, P. 1962. *Centuries of Childhood*. New York: Vintage Books

² Convention on the Rights of the Child (1989) (www.unicef.org/crc/)

³ Children's Rights in Cultural Contexts. Una Working Paper 8. Prepared by the Una Children's Rights learning Group (2011) (www.jliced.org/en/page/reports)

interpretations of childhoods and welfare, critics say, are often ignored and discarded by `universal` rational models that CRC and other human right charters embody, because serious attempts to adapt new external models to traditional models, that are part of the cultural heritage of the children in question, are regrettably missing.

Children, a vulnerable societal group without formal political power and economic resources, do usually not – even if CRC has been signed and ratified yet not implemented by most nation-states of the world – enjoy full explicit recognition as a creative and cultured category of people with peculiar values and identities that reflect currents and flows of their time⁴. In order to get a better understanding of the daily realities of children in the North and South, centre and periphery, we have to upgrade and enhance our information and evaluation, not limiting our perspective to standard universal human rights schemes, as people are connected to and influenced by networks of rights that embrace family and local community, peers and school, etc. Interestingly, the African Charter on the Rights and Welfare of the Child (ACRWC) from 1990, which is unique as judicially approved regional charter on children's rights, reflects essential African social and cultural conditions that affect the lives of the continent's youngest generation, e.g. poverty and HIV/AIDS, more than global human rights law⁵. Welfare represents, in most African contexts, a higher concern than rights per se. ACRWC exemplifies the urgent need for a more visible and powerful local and regional dimension in the complex debate on children's rights in different parts of the world in order to fill the gap that CRC leaves, especially in relation to welfare and cultural diversity questions⁶. What is most

⁴ Alston, P. & Gilmour-Walsh, B. 1996. *The Best Interests of the Child. Towards a synthesis of children's rights and cultural values* (Innocenti Studies) Paris: UNESCO

⁵ *Children's Rights in Cultural Contexts*. Una Working Paper 8. Prepared by the Una Children's Rights learning Group (2011) (www.jliced.org/en/page/reports)

⁶ Freeman, M. 2000. *The Future of Children's Rights*. In *Children & Society* vol. 14 (pp 277-293). London: John Wiley & Sons, Ltd.

important to remember, when the cultural freedom of children and young people is critically reviewed from an anthropological angle, is to take children's 'own point of view' sincerely without intolerant prejudiced comprehension. Furthermore, children should by and large be respected and valued as active participators and contributors to society, not just passive immature beneficiaries under the control of parents and other authorities; albeit, this thesis does not suggest that children are entitled to unlimited liberties, or that they necessarily should be stimulated to choose modern 'hedonist' lifestyles, but rather that children, ethically, possess cultural rights to learn, to participate and to communicate, as well as to protection against cultural imperialism and acculturation that in worst case can lead to ethnocide.

Cultural Rights for All

The best way to protect the cultural diversity – hence also 'humanity' as value and ideal – of the world today is by defending children with 'cultural rights' as one of the main shields against threatening aggression from culturally homogenizing and standardizing processes of the global capitalist market economy misleadingly branded a progressive 'globalization' in popular public discourse. Children in the South, especially those belonging to ethnic minority groups, are at risk as double victims – as non-adult and as non-Western – often deprived of basic formal education, social welfare and cultural recognition, as well as true judicial protection⁷. The subject of cultural rights is, in contemporary theoretical and philosophical debate, usually linked to (cultural) relativism in opposition to universalism, therefore also often a part of provocative critique of universal definitions of human rights mainly focusing on the needs of the individual⁸. Cultural rights, nevertheless, can

⁷ Ennew, J. 2000. The History of Children's Rights: Whose Story? In *Cultural Survival* 24.2. Cambridge (MA) (www.culturalsurvival.org/ourpublications/csq/article/the-history-childrens-rights-whose-story).

⁸ Thorndal, M.H. & Tefre, G.L. 2005. *Menneskerettigheder*. Copenhagen: Columbus.

never be totally disregarded when human rights are presented, because every individual is influenced by cultural customs and values that give life integrity and `meaning`.

Cultural capital is, for many children of the world, the core ballast giving hope for a brighter future, because human rights, as defined in modern political juridical terminology, are rather abstract and difficult to attach to their everyday life experiences and practices. Unfortunately, prominent children's rights specialists often shut their eyes to the importance of cultural sensitivity in international comparative analyses of human rights issues with the unfortunate result of relatively naïve and speculative conclusions⁹. The vision of cultural rights, easily misinterpreted as commercial usage of `exotic` vanishing traditions and cultures in a fast changing world community, is to promote and protect cultures at local, national and international level, and, according to Ms Farida Shaheed, the new `Independent Expert in the field of cultural rights` at the Office of the UN High Commissioner for Human Rights (OHCHR), to secure cultural rights within the educational system, the freedom of scientific research and creative activity, the right to benefit from scientific progress, the right to access cultural heritage, cultural rights of persons with disabilities etc.¹⁰.

The symbolic and qualitative nature of the concept of culture makes it quite challenging to frame and define it in rational conclusive fashion, a fact that also makes it relatively easy to manipulate and misuse other people's `cultures` without the burdens of legal consequences. Children from ethnic minority groups, including disabled people, are especially defenceless in this respect, and these lost victims are ironically also often

⁹ Children's Rights in Cultural Contexts. Una Working Paper 8. Prepared by the Una Children's Rights learning Group (2011) (www.jliced.org/en/page/reports).

¹⁰ Shaheed, F. 2010. Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council (www.2ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.36_en.pdf).

described as criminals and troublemakers by the dominant groups in the countries. Their culture is often considered illegitimate and impure, even destructive, with the common consequence of deep social marginalization and cultural degradation of the children that get stigmatized by peers in school and local society.

The cultural rights vision, in defence of human dignity, is to disseminate the idea that, basically, all cultures have equal value and the right to flourish on own premises. This thesis in harmony with customary cultural relativism points out that cultural chauvinism and ethnic discrimination are based on the lack of cultural knowledge and experience that to a great extent stems from educational systems underestimating the value of cultural (and multicultural) information and communication¹¹. Appointing (for 3 years) an 'Independent Expert in the field of cultural rights' through resolution 10/23 of 26 March 2009 is a step in the right direction by the UN system thus demonstrating its concern for cultural rights that is "about empowering individuals and communities to create culture as continuously evolving ways of life, each culture being equally valued"¹².

Cultural rights, Pakistani sociologist Farida Shaheed stresses with reference to the dimension of cultural freedom, is also the right "to question existing parameters of 'culture' [...] and to continuously create new culture."¹³ The Universal Declaration on Cultural Diversity represents an excellent document clarifying the link between culture and (human) rights as expressed in article 5:

¹¹ Cultural Rights. Fribourg Declaration (2007) (www.unifr.ch/iiedh/assets/files/eng-declaration3.pdf).

¹² Shaheed, F. 2010. Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council (www.2ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.36_en.pdf).

¹³ Shaheed, F. 2010. Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council (www.2ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.36_en.pdf).

“The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Article 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.”¹⁴

These ambitious and respectable goals are, as mentioned earlier, especially far from everyday life realities when children belonging to weak and marginal ethnic groups are at the centre of attention, but they are also contested by diverse obscure opponents of cultural ‘diversity’ that often represent ethnocentric attitudes and morals of influential societal groups.

In recent debates on human rights and cultural values there has been an interesting political philosophical frontier between intellectuals from Europe and Asia arising from the general disagreement on culture’s and society’s status in the context of universal human rights as manifested in this warning by Singapore’s Foreign Minister, personifying so-called ‘Asian Values’ at an international conference in Vienna in 1993: “Universal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity.”¹⁵ The process of

¹⁴ UNESCO Universal Declaration on Cultural Diversity (2002) (www.unesco.org/images/0012/001271/127160m.pdf).

¹⁵ Thorndal, M.H. & Tefre, G.L. 2005. *Menneskerettigheder*. Copenhagen: Columbus.

globalization – a complex web of interconnectedness that means that our lives are increasingly shaped by events that occur at a great distance from us – implies that we more and more frequently face fundamental questions about our rights and our cultural identities forcing us to take a stance.

Children´s Educational Rights

Education is the most important intellectual and cultural capital for children in underprivileged positions in society in their lifelong struggle for respect and dignity, as well as the main institutionalized societal platform for dissemination of the vision of a nation that united gratifies elementary principles of cultural diversity and cultural freedom in harmony with basic human rights. The formal education of children should fully respect their cultural identities, as enshrined in the UNESCO Universal Declaration on Cultural Diversity from November 2001.

Education should not alienate children from their families and cultural heritage, as commonly observed when school curricula and pedagogical methods exclusively reflect the customs and lifestyles of the privileged classes and dominant ethnic groups of society, but also be relevant and appropriate in relation to the identities of the relatively weak group of children¹⁶. Education is not only a question of protecting and empowering the subordinated and exposed part by introducing his culture to distinguished academic arenas, but indeed also instruction that should give young citizens, no matter what is their ethnic or cultural background, unbiased knowledge on cultures and humanity in a globalized world full of incomprehensible contrasts.

¹⁶ UNESCO Universal Declaration on Cultural Diversity (2002) (www.unesco.org/images/0012/001271/127160m.pdf).

According to CRC as well as the Declaration of the Rights of Indigenous People, children belonging to ethnic, religious or linguistic minority groups have rights to education and to practice their own culture, but this should not force children out of mainstream education and into specialized education schemes for minorities. In many countries, including most European countries, main-stream education does “not provide cultural and linguistic inclusiveness to minorities’ children.”¹⁷ In many cases general minority rights are championed without sensitivity to the troubled children and youth that needs high quality education in order to establish and reproduce cultural identities as well as to get access to documented knowledge associated to other cultures and languages, regions and countries.

We should, however, not forget that children’s cultural rights is about cultural emancipation and elimination of ethnic discrimination that the lives of so many children is severely afflicted by, as noticed by Eglantyne Jebb, the Founder of Save the Children, in 1923 when he advanced this radical and that time very provocative claim: “I believe we should claim rights for children and labour for their universal recognition.”¹⁸ One of the sources of deep frustration among children, in 1923 yet still today, is the direct and indirect educational discrimination that segregates children and replicates social and cultural stratification in society.

Minority children, The International Save the Children Alliance says in a report on children’s rights (2000),

“face substantial difficulties in trying to reconcile living between two cultures. Their experience of discrimination and consequent low social status invariably places them at high risk

¹⁷ Children’s Rights in Cultural Contexts. Una Working Paper 8. Prepared by the Una Children’s Rights learning Group (2011) (www.jliced.org/en/page/reports).

¹⁸ Children’s Rights: Equal Rights? Diversity, difference and the issue of discrimination. 2000. London: The International Save the Children Alliance.

of poorer educational outcomes, ethnic violence, health problems, higher mortality rates and criminal activity.”¹⁹

The widespread problem of discrimination and racism within education makes life miserable for a growing number of children and young people from many old and new marginalized groups that the states fail to support and honour. In Israel, for instance, there have been two educational strategies – integration for Jewish children and segregation for Arab children; the result is expressive inequality for the Arab community²⁰. Education, respecting the cultural rights of all children, should not contain derogatory representations of minority children, but rather present positive images of all cultures and ethnic groups. Teacher training should also, according to recommendations by The International Save the Children Alliance, be reformed in order to pedagogically reduce prejudice towards minority cultures²¹. And, not to disremember, children themselves, as free independent members of society with personal priorities and preferences, should always be encouraged to participate in decision-making at school and elsewhere in society. The promotion of cultural/human rights in school can only succeed if the children in question have the freedom to interpret and express own culture on own premises, otherwise the experiences and realities of the child will stay invisible and old ethnic stereotypes and injustices will continue to flourish.

Change must start in primary school where many children get their first experience of severe racial discrimination and blatant lack of respect for their human rights, and the first step to take is to identify and register

¹⁹ Children’s Rights: Equal Rights? Diversity, difference and the issue of discrimination. 2000. London: The International Save the Children Alliance.

²⁰ Children’s Rights: Equal Rights? Diversity, difference and the issue of discrimination. 2000. London: The International Save the Children Alliance.

²¹ Children’s Rights: Equal Rights? Diversity, difference and the issue of discrimination. 2000. London: The International Save the Children Alliance.

existing discrimination of children by sensitive teachers with expertise in human rights. The best way to exhibit respect of children and their culture is to also demonstrate courtesy and estimation towards the child's parents, kin, ethnic community and wider social network. Children are parts of complex webs of relations that involve different roles and statuses that define their opportunities and obstacles, hence also often their future prospects.

Children and Cultural Diversity

Cultural rights, often considered an underestimated and undeclared part of the UN Universal Declaration of Human Rights (1948), the CRC (1989) and other universal declarations, growing in relevancy in the globalized post-industrial world that symbolizes a serious threat to small and peripheral cultures and languages around the world, but especially in the South, are put on the agenda through the Fribourg Declaration of Cultural Rights (DCR) launched, in cooperation with UNESCO and numerous NGO's, in Switzerland in May 2007²². Many actual and potential conflicts and wars, often involving children as main victims, have been triggered by violations of cultural rights that the international community often fails to comprehend because of the general marginalization of cultural rights in human rights debate. Article 3 (b and c) in DCR, discussing cultural identity and heritage, states that everyone – alone or in community with others – has the right

“To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage.

²² Cultural Rights. Fribourg Declaration (2007) (www.unifr.ch/iiedh/assets/files/eng-declaration3.pdf).

To access, notably through the enjoyment of the rights to education and information, cultural heritages that constitutes the expression of different cultures as well as resources for both present and future generations”²³

Children’s education is obviously a core part of DCR that emphasizes, beside the need to get precise information on human rights, children’s freedom to receive teaching of and in their own language, as well as knowledge related to their own culture (Art. 6). Also, in the same DCR article, the parents’ right to ensure the religious and moral education of their children, while respecting the child’s freedom of thought and conscience, is curiously affirmed. Cultural diversity, DCR notes, cannot be effectively protected without the implementation of cultural rights.

Cultural diversity, seen as the common heritage of ‘humanity’, is, says Mr Matsuura, Director-General of UNESCO, “as necessary for humankind as biodiversity is for nature.”²⁴ It should, according to the first article of the UNESCO Universal Declaration on Cultural Diversity (2002), “be recognized and affirmed for the benefit of present and future generations.”²⁵ The fact is that the future generations are, at the same time as pompous declarations are formulated and signed by political leaders, strongly menaced by new intricate forms of unethical cultural imperialism and economic exploitation that defraud children of cultural rights and force them to leave their home and family without any protection against downfall and poverty. Children not belonging to the dominant ‘normal’ group of citizens – nomads, refugees, displaced, homeless, orphans, disabled, etc. – are often systematically

²³ Cultural Rights. Fribourg Declaration (2007) (www.unifr.ch/iiedh/assets/files/eng-declaration3.pdf).

²⁴ UNESCO Universal Declaration on Cultural Diversity (2002) (www.unesco.org/images/0012/001271/127160m.pdf).

²⁵ UNESCO Universal Declaration on Cultural Diversity (2002) (www.unesco.org/images/0012/001271/127160m.pdf).

discriminated at school and other public and private institutions, as well as in the media and public discourse, in ways that unmask society's structure of inequality and corruption incarnated in the formal educational curricula and methodology.

Conclusion

Culture – values, beliefs, convictions, language, traditions, etc. – is a symbolic capital that defines the social person as individual and member of a group and that empowers the individual to protect herself/himself in the uneven walk of life. Culture is a heritage that connects the person to his past and future through systems of knowledge and tradition passed from generation to generation.

Culture is also an intangible heritage that includes language, belief systems, rituals, legends and other non-physical aspects of cultural life. Culture is also the right to inherited land. The huge contemporary problems of 'land grab' – a concrete and unmistakable offense against the poor peasant victims of the plunder – manifests violations against the cultural rights of people that leave nonaligned children dispossessed and 'homeless'. This problem can only be tackled by respect of cultural diversity and realization of the irreplaceable value of cultures (on equal terms) for children's identities and social welfare²⁶. And these values must be carefully implemented in the public and private institutions of education and in the ethics of teaching in order to bolster a humane ethical awareness of the creative and innovative, stimulating and thought-provoking aspects of cultural knowledge and communication.

²⁶ Van Bueren, G. 2009. Children's Rights – Moving Forward (www.gardencourtchambers.co.uk).

Contemporary Issues

Educating within Culture and Human Rights: What can a Capabilities Approach add?

Su-ming Khoo*

Abstract

Human rights and capabilities approaches have moved closer together in recent years, with human rights approaches highlighting the importance of values, while capability emphasizes the 'substantive freedoms and opportunities' of individuals and groups¹. Education is a core socio-economic and cultural right, and is regarded as one of three 'immediate action areas' for realizing the Right to Development - in turn the integrating vector for interdependent and indivisible rights². Yet, until recently, there have been relatively few studies applying human rights and capability approaches in the field of education³. Recent clarifications of the content of the right to education have taken a comprehensive approach to human rights education that moves beyond education about human rights, to encompass education for and through human rights. Indeed, it has been argued that human rights in education are an essential prerequisite for human rights education⁴. The UN's adoption of a World Program for Human Rights Education⁵ and UN Declaration on Human Rights Education and Training⁶ represent further milestones embedding a wide and deep understanding of human rights education as the crucial vehicle for the development, promotion and realization of a universal culture of human rights.

* Dr. Su-ming Khoo is Senior Lecturer, School of Political Science and Sociology, National University of Ireland, Galway (s.khoo@nuigalway.ie).

¹ Vizard, Fukuda-Parr & Elson, 2011.

² Sengupta 2002; see also UN 1986.

³ Saito, 2003.

⁴ Tomasevski, 2004.

⁵ United Nations 2005.

⁶ United Nations 2011.

The capability perspective is a problematic liberal theory as it only weakly addresses entrenched conditions of power and domination. Enhancing peoples capabilities involves not only providing education, decent living standards and political participation, but also opportunities, skills and self-confidence that empower people to stand up to arbitrarily dominating conditions and discriminating practices. Alexander argues that capability theory needs to be strengthened and developed to provide effective antidotes to 'liberal hegemony'⁷. This can be achieved by increasing the robustness of the condition of freedom, combined with a vision of individual freedom as tied to the common good. Melanie Walker suggests that capability theory currently provides only a thin account of education, and fails to fully take into account how power and lack of freedoms work through education⁸. She suggests that neither Sen's reluctance to specify valuable capabilities, nor Nussbaum's canonical list of 10 'central capabilities' is sufficient – this must be supplemented by focus on power, values and education as a public good. A pedagogical perspective also requires us to address the special position of children and future-oriented processes of being and becoming.

Human rights are sometimes perceived to be illegitimate from a cultural perspective, while others point out that such cultural objections tend to come from dominant rulers, not those who need their rights protected⁹. Drydyk's discussion of capabilities and 'responsible pluralism' suggests a way to address these cultural dilemmas¹⁰, as does Nussbaum's ten 'central capabilities'. Drydyk suggests that the capability approach provides an important enhancement to human rights since the formulation of 'valuable functionings and capabilities' helps to draw in pluralistic justifications. However, Drydyk ventures beyond the liberal pluralism of capability theory, to suggest a substantive anchoring in public knowledge about care and neglect. He argues that culture cannot be regarded as merely a 'background' view or relegated to the private realm, but can contribute to a variety of 'reliable moral discourses' that can be mobilized in support of equal dignity.

⁷ Alexander 2010.

⁸ Walker 2008.

⁹ Chanock 2000.

¹⁰ Drydyk 2011.

Introduction

This paper explores a capabilities approach to education and its potential contribution to shifting the ground beyond the ‘Universalism versus Cultural Relativism’ debate which has dominated the conversation about culture and human rights for at least two decades. It does so by drawing upon the capabilities approach, which originates within development theory and policy. This approach can enrich the debates on human rights, culture and freedom, enabling a substantive treatment that takes the debates beyond the impasse of the ‘universalism versus cultural relativism’ dichotomy. ‘Education’ is the central concern of this paper. Although education has been regarded by capability theorists as a fundamental capability from the very outset, the connection between education and capability has only recently begun to be examined in more detail¹¹. So far, capability theorists have formulated in very general terms how education plays a role in fostering *cultural freedom*, in contradistinction to *cultural captivity*¹².

Until the 1990s, ‘human rights’ and ‘development’ appeared as two distinct islands with little significance accorded to culture on either island. Social and economic issues comprised ‘a vast channel that put great distance between human rights and development’¹³. In the field of human rights, cultural rights remained the ‘Cinderella’¹⁴, while within development, culture was largely consigned to the sphere of private and subjective concerns¹⁵. This situation began to change in the 1990s. Development studies began to take on human rights concepts,¹⁶ and the centrality of culture and cultural diversity in development was

¹¹ Hinchcliffe & Terzi 2009, 387.

¹² Sen 2006.

¹³ Jones and Stokke 2005, 1.

¹⁴ Donders 2002, 65.

¹⁵ Eade 2002, x.

¹⁶ e.g. UNDP 2000; Alston and Robinson 2005; Gready and Ensor 2005; Khoo, 2005.

increasingly noted¹⁷. At the same time, human rights advocates began to address socio-economic rights more seriously¹⁸. A great deal of exchange and cross-fertilisation has begun to take place between the disciplinary islands of human rights and development and culture has become a centre ground of concern. Development theory, policy and practice have embraced rights-based approaches, while human rights theory and practice have begun to interact with development theory. Notable contributions from development theory include the concepts of basic needs and human development, especially the latter's foundational ideas about human capabilities and freedoms.

Human rights and capabilities approaches have thus moved closer together and found common ground in recent years. Human rights approaches highlight the importance of values and the legal framework, while capabilities and the human development paradigm emphasise the 'substantive freedoms and opportunities' of individuals and groups¹⁹. Concepts that development and rights hold in common such as justice and freedom are enriched by capabilities theory, because this development approach brings into the frame considerations of social choice, agency, well-being, and the understanding of 'functionings' and 'capabilities'. Furthermore, the capabilities approach clusters common philosophical and political concerns in a distinctive manner. A survey of the capabilities approach reveals three such clusters as major themes: i) liberty and justice; ii) freedom, violence and well-being; and iii) justice, democracy and participation²⁰. The capabilities approach is a substantive approach because it looks closely at both processes and outcomes, while questioning dominant assumptions about what is valued, say for example in education. It asks questions about the nature

¹⁷ Tucker 1997; Eade 2002; UNDP 2004.

¹⁸ e.g. Amnesty, 2005.

¹⁹ Vizard, Fukuda-Parr & Elson 2011.

²⁰ Qizilbash 2007.

of people's participation, and their agency, while being concerned about freedom, equity and social justice.

The theme motivating this conference: "*Unifying Diverse Cultures towards the Enrichment of the Universality of Human Rights*" speaks to the desire for genuinely cross-cultural approaches to human rights which challenge false universalism and problematic liberalism, but do not give up on the idea of shared humanity, hence the conference title "*Cultures in Support of Humanity*". This paper therefore begins with a brief survey of the debates about culture and human rights and the problems of false universalism and 'liberal hegemony', before examining the contribution of the capabilities approach to substantive freedom and human rights. It examines the key questions of cultural adaptation and problems of arbitrary domination, and turns to Nussbaum's 'central capabilities' approach to shared humanity. The discussion thinks through the role and problem of education within the capabilities approach before coming to a concluding section about capabilities, solidarity and humanity.

Culture, Human Rights and 'Freedom'

Cowan, Dembour and Wilson helpfully categorize the complicated connections between culture and rights into three main types of arguments: rights versus culture; rights to culture; and rights as culture:

- i) 'Rights versus culture' arguments see the two categories as mutually exclusive and oppositional. Recognition of one category entails subordinating the other.

- ii) 'Rights to culture' arguments represent culturalist arguments for group rights. Culture, tradition, language, religion, ethnicity, locality, tribe or race are group identities that can be used to

justify exceptional treatment, special protection, exemption from wider norms or support demands for non-interference.

iii)'Rights as culture' proposes that rights talk, rights thinking and rights practices represent a distinct culture in themselves, entailing certain constructions of self and sociality, and specific modes of agency²¹.

Donders refers to cultural rights as 'the Cinderella of the human rights family'²². She suggests that the inherent vagueness of the term 'culture' may be a reason why cultural rights lag behind the other members of the human rights 'family' of civil, political, economic and social rights. 'Culture' may refer to human culture in a very general sense or denote the culture of a specific society or period. It may even refer to the culture of an individual person. It denotes cultural products such as the arts or literature, and also cultural processes of change. It may encompass an entire '...way of life including knowledge processes, intellectual and material'. 'Culture' also involves the arrangements and institutions that transmit and develop culture such as educational institutions, museums and the media. Culture can be broadly defined as 'everything enabling persons to operate and be active in their world'. It includes forms of expression and communication that are central to human beings' ability to maintain and perpetuate life. These forms of communication and education provide the 'freedom to know', which allows individuals to develop themselves and form their identities.

The breadth of culture's definition does not indicate a shallowness of content. Culture is deeply linked to almost every human right. The term 'cultural rights', broadly defined, includes the rights to self-determination, freedom of religion, freedom of expression, freedom of association and

²¹ Cowan, Dembour and Wilson 2001, 6-9

²² Donders 2002, 65.

the right to education²³. Donders survey describes various attempts to specify and the content and scope of cultural rights, including the right to cultural identity. She seeks to clarify whether cultural rights are collective or individual rights, and examines the possible tensions between collective rights to cultural identity and individual human rights.

Two new texts appeared in 2005, setting more definitive parameters for the debate - General Comment 17 and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Substantial advancements have occurred with respect to indigenous and minority rights. However, the relationship to other human rights standards, notably regarding culture and gender equality, is less than clear, while matters of family law have not received sufficient attention. Recognition for cultural plurality gives rise to many conceptual and policy dilemmas and the potential fragmentation of human rights and gender-blindness are two major problems that have been identified²⁴. Claims may be based on a variety of religious, minority ethnic or indigenous identities, each of which have distinct socio-historical and legal origins. The ICHRP notes that such claims are “ontologically different” – their justifications are not automatically interchangeable. The referent object of ‘cultural difference’ may be a ‘thing’, a claim, a process, an institution or a combination of these²⁵. Human rights are an incomplete project in that standards and their content are continuously evolving, as actors in the global South and North and activists at all levels contribute to their development. The content of culture, custom, tradition and religion changes over time and space. ‘Culture’ is varied and contested both internally and with respect to other cultures. Being

²³ Donders 2002, 3.

²⁴ ICHRP 2010, v-vi.

²⁵ ICHRP 2010, viii.

contested, culture, custom, tradition and religion relate to structures of power and are undeniably political²⁶.

Donders' analysis of cultural rights focuses on Article 15 of ICESCR, which refers to the right of everyone to participate in cultural life, enjoy the benefits of scientific progress and benefit from the protection of scientific, literary or artistic works. Stavenhagen, on the other hand, bases his discussion on Article 13 on the right to education, and its relevance to cultural rights. Article 13 specifies that education 'should be directed to the full development of the human personality and the sense of its dignity'. Stavenhagen's discussion of cultural rights mentions the importance of education is mentioned alongside many other related rights and freedoms relating to expression, religion and belief and association. His discussion raises a clear tension between an individual's right to culture and the way that 'culture' is dealt with as a concept in many international documents and instruments such as the Algiers Declaration on the Rights of Peoples (1976), or the African Charter on Human and Peoples Rights (1981)²⁷.

Several main critiques have emerged since the 1990s, challenging the universalism of human rights: the 'Asian Values' discourse²⁸, Islamic human rights discourse²⁹, and the discourse of African tradition³⁰. Overall, the universality of human rights has been seriously challenged by the post-structuralist, feminist³¹ and post-colonial critiques of 'false universalism', 'liberal hegemony' and 'cultural imperialism'. There are significant demands for cultural relativity and sensitivity, advocacy for

²⁶ ICHRP 2010, 1-2.

²⁷ Stavenhagen 2001, 85.

²⁸ Bauer and Bell, 1995; Kingsbury and Avonius 2008.

²⁹ Afshari 1994; 2001.

³⁰ Mutua 2002.

³¹ Bunch 1990; Charlesworth 1994, Reilly 2009.

cross-cultural perspectives on rights³², and calls for multiculturalism and minority rights³³, all leading to a difficult quest for consensus³⁴. The critiques against the universalism of human rights are simultaneously political and cultural, pointing to the impossibility of separating out these two grounds of objection. Of course, it is not only non-Western cultures that challenge the universality of human rights. Finnegan and others describe the United States as having a 'dualistic culture of human rights'. Rhetorical championing and leadership in the field of human rights have been accompanied by refusal to sign or ratify instruments, while co-opting the language of human rights for ulterior ends. Their research on US human rights activists shows that activists are embedded within deep-seated cultural identities of liberalism, meritocracy and exceptionalism, all of which may have to be changed before a human rights framework can take root domestically³⁵.

According to An-Naim competing cultural perspectives tend to undermine each other's priorities and, in the process, to diminish the prospects of developing truly universal standards of human rights and more effective mechanisms for achieving them. He advocates a cross-cultural approach, which seeks to increase the legitimacy of human rights standards in the widest range of cultural traditions³⁶. Similarly, writing on Chinese thought and human rights, Angle urges us to 'allow a continuum of conceptual differences, for dynamic and interactive moral traditions, for values and standards that push us towards a wider consensus, and for an understanding of 'us' that acknowledges internal differences'³⁷.

³² Eg. An-Naim 1992; Angle 2002.

³³ Kymlicka 1996.

³⁴ An-Naim 1992; Howard, 1992.

³⁵ Finnegan et al 2010.

³⁶ An-Naim 1992, 1, 20.

³⁷ Angle 2002, 8.

Demands for cultural diversity may imply intolerance towards other differences and pluralities (notably of women, sexual and religious minorities or non-religious persons). The formalisation of custom or tradition may serve to “block the dynamic evolution of customary laws and the internal political contestation that drives it” and indeed strongly push for more dynamic evolution towards cultural hegemony, intolerance and repression (ICHPR 2010, viii). Hence, the ICHPR report suggests that recognition of cultural difference requires an initial assessment of human rights in the context of inter and intragroup *equality*. It advocates that there should be some assessment of the proportionality of restrictive effects of such recognition; and whether the cumulative effect of recognition would create a qualitatively new level of discrimination (ix-x). The report suggests that a functional rather than a categorical approach is more likely to produce positive results, following a four point approach: avoid a single all-purpose definition of ‘customary laws and practices’; aim to secure all basic human rights for every member of the community; deal with internal stresses and difficulties within the community that are due to external forces; and avoid establishing distinct and possibly conflicting systems of law that will generate inequities and inefficiencies.

The *When Legal Worlds Overlap* report rejects the view that there is a simple choice between universalism and cultural relativism, choosing instead to set human rights within a broader search for justice. Legal pluralism recognises that

...not all justice claims can be resolved through law and many languages of justice are available to people. It needs therefore to be understood at the start that human rights lie within, rather than outside, the universe of normative systems and culture.

People are bearers of both culture and rights, and recognition of rights does not imply rejection of culture³⁸.

Following the reasoning adopted by the 'vernacularization' and 'translation' approach to human rights³⁹, the ICHRP report on legal pluralism suggests that we should try to learn how local struggles for justice have appropriated universal general principles of human rights in their own contexts. Reilly is critical of versions of 'vernacularization' which perpetuate false universalization from dominant positions, as this is oppressive and to be resisted. She advocates a more genuinely cross-cultural approach oriented around emancipatory dialogic practices and intersectionality, around which new solidarities are negotiated⁴⁰. She gives the example of the Musawah project, a feminist adaptation of the 'cultural legitimacy thesis' that achieves a balance between validating a multiplicity of cultural expressions and realizing a global commitment to protect the rights of women⁴¹. The 'Musawah' campaign is led by a Malaysian NGO, Sisters-in-Islam and it is cited as an example of a 'praxis-oriented critical reading' of women's human rights that unsettles dominant conceptions and re-interprets human rights not only locally, but for the global human rights community overall. An-Naim supports a consensus around international human rights standards, but attributes many violations to a 'lack or insufficiency of cultural legitimacy' for such standards. In his view, cultural legitimacy should be approached starting with the construction of adequate cultural legitimacy within a local context through internal dialogue, developing local interpretations of human rights in light of local norms and values. From this pre-condition, it becomes possible to build cross-cultural legitimacy and agreement on the meaning, scope and method of implementing human rights⁴².

³⁸ ICHRP 2010, v.

³⁹ Merry 2006.

⁴⁰ Reilly 2011, 15

⁴¹ Reilly 2011, 10, citing Obiora 1997, 32.

⁴² An-Naim 1992, 19, 21.

Capabilities, Education and Cultural Freedom

This paper therefore addresses the central, but under-specified role of education and its relationship to capabilities, culture and human rights. Capability theory is probably the most influential and important alternative paradigm in development theory and most of the applications of the theory have been in the development field. The paper discusses and interrogates the promise as well as limitations of a capabilities approach to education and clarifies its relevance to thinking about culture and human rights. Two specific problems within educational capability, and their implications for cultural freedom, are examined in this section – the problem of ‘adapted’ preferences and the fundamentally prospective and unfinished nature of education, especially in relation to children and decisions that are taken on their behalf. The argument is that these two issues must be connected. Following Teschl and Comim’s arguments, this paper contends that a solution to the problem of adaptive preferences (or cultural domination) lies in a dynamic and developmental vision of individuals and societies, viewed through the lens of functionings and capabilities⁴³.

The concept of capability is attributed to the philosopher and economist Amartya Sen, and his interlocutor, Martha Nussbaum, who developed the idea in order to counter utilitarian conceptions of social choice; as applied to concepts of collective good and in the evaluation of public policy. ‘Capability’ refers to ‘the various combinations of functionings (beings and doings) that the person can achieve...[It] is, thus, a set of vectors of functionings, reflecting the person’s freedom to lead one type of life or another...to choose from possible livings’⁴⁴. Rejecting the limitations of utilitarian moral philosophy, Sen opts for well-being as the

⁴³ Teschl and Comim 2005, 231.

⁴⁴ Sen 1992.

central concept in his theory. Well-being calls for a 'dual accounting' of freedom and achievements, considering all the possible combinations within a person's reach. A 'capability set' reflects a person's freedom to lead one way of life or another, each way of life being one option among diverse options in the set. Choosing has both an instrumental and an intrinsic value i.e. the freedom to choose contributes to well-being because it is valued in itself. Well-being depends on being and doing well (achieving a high level of functioning), but also on being free to choose the life one values. Hence, in Sen's famous illustration, a person who chooses to fast has a greater capability set than one who is forced by poverty to starve⁴⁵.

Basic education and literacy are repeatedly referred to as a fundamental means through which an individual can overcome deprivation and poverty, and improve their capabilities⁴⁶. Alkire, for example, has focused her analysis on 'basic learning outcomes' which refer to learning that is essential to an individual's basic need for nutrition, shelter, education and clothes⁴⁷. But valued learning also encompasses non-basic as well as basic outcomes or achieved functionings, with 'freedom to choose' and 'ability to choose' being a critical indicator, and involving material and non-material dimensions⁴⁸.

Article 26 of the UDHR provides for education as a basic human right. Elementary and fundamental education is mandated to be free and compulsory. It specifies at Article 26 (2) that education shall be directed at 'the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'. Yet how can this focus on human personality and freedom fit with situations where choices are shaped by culture so as to artificially

⁴⁵ Sen 1985, 200-201, 203.

⁴⁶ Sen 1999, 90-92; Young 2009.

⁴⁷ Alkire 2002, 160.

⁴⁸ Young, 2009, 262.

narrow, indoctrinate or reproduce dominant views, and when such views foreclose or compromise the well-being (capability achievements and freedom to choose) of the learner?

In an address to students at the Irish Centre for Human Rights in 2009, Justice Albie Sachs, formerly of the South African Constitutional Court, drew attention to the enduring problem of human rights – that it is not often the case that one has to judge between a right and a wrong; it is more common to have to adjudicate between two competing rights. Two well-known educational cases in US law are often used to think through the problem of the rights of minorities to culture (and particularly their rights to religious freedom) in relation to the right of the child to education. The first example is the *Wisconsin v. Yoder* case⁴⁹. This ruling granted Old Order Amish parents an exemption from the state requirement to send their children to school beyond the eighth grade, following the parents' claim that this violated their fundamental right to religious freedom. Modern compulsory secondary education was seen to be in sharp conflict with the Amish way of life. The court's decision vindicated the Amish parents' right to defend their rights to religion and the reproduction of Amish culture, seeking to prepare their children exclusively for life in their separate culture. For the Amish claimant, the very presence of the child in school beyond the eighth grade would threaten the very existence of the Amish culture and their way of life with extinction. Justice Douglas' partially dissenting opinion held that the wishes of the child should also be heard when granting a parental exemption. The *Wisconsin v. Yoder* ruling is often contrasted against the dissimilar outcome of *Mozert v. Hawkins County School Board* case⁵⁰. *Mozert* was amongst a number of 'born-again' Christian parents who objected to the use of a series of basic reading textbooks in public primary school (the 'Holt series'), as they found some of the material

⁴⁹ *Wisconsin v. Yoder* case (1972)

⁵⁰ *Mozert v. Hawkins County School Board* (1987)

contained within them offensive to their orthodox interpretation of religion. On appeal, the court denied these parents an exemption and damages, agreeing with the school board that the 'critical reading' approach fostered by the school, using the textbooks, helped to bring together 'diverse and conflicting elements' in the society '...on a broad but common ground.'. The ruling held that the requirement to study the textbook did not impose an undue burden on the parents' freedom of religion. While one of the plaintiffs specifically stated that she could not tolerate other religions on the basis of equality, the ruling judge noted that only civil tolerance and equality were required, not religious tolerance. Reich's discussion of these two cases argues that these two cases are similarly flawed, despite the very different rulings, because they reflect only the parents' interest in protecting their freedom of religion and fail to take into account the independent interests of the children. Like Justice Douglas in the Yoder case, Reich thought that the voices and interests of the children must be included in legal proceedings that concern their educational futures. He argues that children have an independent interest in becoming autonomous adults and that developing autonomy requires an education that engages a person with value diversity.⁵¹ The approach defended by the school board in the Mozart case highlighted that rationale that the capability of the children to read was fundamentally tied to the development of critical skills and tolerance of value diversity.

The capability approach offers an important tool for understanding dignity and humanizing human rights, it has sought to unite the two concepts of human freedom and human 'functionings' (defined as valuable beings and doings). This bridging of freedom and functionings is considered to be Sen's most significant contribution⁵². Sen understands freedom as having real opportunities to accomplish what we value. A

⁵¹ Reich 2002, 454.

⁵² Alkire 2008.

'good life' results from genuine choice and authentic self-direction, having the ability to shape one's own destiny as a person and a part of various communities. Sen's conception of freedom does not only refer to an individual's direct control of their choices. Collectivities such as community groups and state government can increase freedoms through public action and investment, or they can decrease them through domination and discrimination. Sen's capability approach is a moral framework that is pluralist, non-relativist and non-essentialist. It is used to evaluate 'social arrangements' according to the extent of freedom people have to promote or achieve functionings they value. Capability theory has informed the development of the human development approach, and represents a practical and policy-centred effort to redirect development in a holistic and humanistic direction.

Capability theory attempts to capture both how individuals function and should be developed and the more structural aspects such as institutional, social and economic arrangements which may enable or limit individual freedoms and choices (Sen usually refers to these as 'social arrangements'). The capability approach is a humanistic and pluralistic approach which provides a framework for reconsidering what might be considered to be a good life and human well-being. Capability approaches challenge our understanding of education and lead us to consider different theoretical and practical angles. It accords a way to think about both freedom and values at the same time, referencing them to the consideration of well-being.

The debates and different positions within capability theory highlight a number of important points relevant to the question of universalism versus cultural relativism, highlighting the importance of substantive freedom, well-being and the problem of evaluating individual freedoms within a social context. As Robeyns argues, capabilities are ethically

individualistic since they focus on individual well-being; however, they are not ontologically individualistic since they allow for the importance of social relations, care, interdependence and cultural norms⁵³. There is room to understand the 'quintessentially social nature' of individual freedom and agency⁵⁴. Smith and Seward argue that Sen's conception of capabilities and freedoms 'implies an ontology of a relational society'⁵⁵. A person's position vis-a-vis relations of unequal power and oppression is part of their capability set: 'one cannot entertain a notion of enhancing capabilities without addressing the social structures that constrain (oppress) and enable the realization of a flourishing life'⁵⁶.

Capability theory has also notably addressed the problem of individual freedom within a cultural or social context through its discussion of 'adaptive preferences', where people adapt their preferences to fit in with unfavourable circumstances. The capabilities approach tries to respond, in part, to this problem of distorted subjective preferences and how these are treated as 'cheerful choices' within utilitarian conceptions of freedom and choice. Hence, Sen notes that:

The most blatant forms of inequalities and exploitations survive in the world through making allies out of the deprived and exploited. The underdog learns to bear the burden so well that he or she overlooks the burden itself. Discontent is replaced by acceptance, hopeless rebellion by conformist quiet, and – most relevantly in the present context – suffering and anger by cheerful endurance. As people learn to survive to adjust to the existing horrors by sheer necessity of uneventful survival, the horrors look less terrible in the metric of utilities.⁵⁷

⁵³ Robeyns 2002,5, cited in de Jong 2006, 1168.

⁵⁴ Herdt and Deneulin 2007; Smith and Seward 2009.

⁵⁵ Smith and Seward 2009, 214.

⁵⁶ Houston 2001, cited in Smith and Seward 2009, 231.

⁵⁷ Sen 1984, cited in Teschl and Comim, 2005, 230.

Nussbaum examines in some depth the problem of adaptive preferences in relation to gender in the developing world. In discussing how 'culture can blunt' and affect the structure of human personality, Nussbaum refers the impact of gender norms and custom on women's poverty because it decrees who gets to eat scarce food, who gets medical attention, who is allowed to be employed and therefore earn income (and enjoy the status it confers within the family and community), who gets access to education (and the labour and political participation education guarantees), who can protest against ill-treatment, inside and outside the family, and whose voices of protest are likely to be heard⁵⁸. Conversely, culture can be an ally to women, where women's productivity and autonomy are relatively well-respected and correlated with high levels of human development⁵⁹. In her defence of capabilities, Nussbaum is scathing about culturally relativist or essentialist arguments that support educational and other forms of deprivation for women.

Education clearly has a central role in the capabilities approach because of its prospective character and its transformative potential⁶⁰. It can empower the individual, providing him or her with opportunities to reflect and develop ways of thinking that are able to challenge insidious adaptive preferences. Even if the person lacks the power to change the actual circumstances constraining her well-being, she can resist and not acquiesce to the circumstances mentally, recognising the potential for a better life. Education is thus seen as an inoculation against ignorance which gives the individual a degree of autonomy and control, enabling

⁵⁸ Nussbaum 1995, 3; 2000.

⁵⁹ Nussbaum 1995, see especially the contribution by Nziru Nzegwu, which argues that traditional Ibo values originally accorded women considerable power in familial and personal relations as well as the management of economic relations. These traditions were eroded by colonial norms, substantially reducing women's social power and legal autonomy.

⁶⁰ Watts, 2009, 426.

her to 'form a conception of the good and engage in critical reflection about the planning of [her] life'⁶¹. It is this reflexive, counterfactually questioning, and 'actively involved in planning' character that lead Sen and Nussbaum to consider education as a 'basic capability'⁶².

Sen demurs from identifying a comprehensive list of basic capabilities as he is committed to pluralism and worried about paternalism. However, Nussbaum feels that it is impossible to carry out evaluations and deal with the problem of adapted preferences without defining a broad capability set defining well-being. She proposes a list of 10 universal values or 'central capabilities', which help us to think about the universally 'human' subject of human rights, and the 'human personality' that is to be developed through the mandated provision of education. This list of central capabilities is provisional, not absolute, but each capability is strongly justified by Nussbaum in universalist terms:

I believe, however that the human personality has a structure that is at least to some extent independent of culture, powerfully though culture shapes it at every stage. (...) Desires for food, mobility, for security, for health, and for the use of reason – these seem to be relatively permanent features of our makeup as human, which culture can blunt, but cannot altogether remove.⁶³

⁶¹ Nussbaum 2000, 97

⁶² Compare Watts, 426, for a different interpretation.

⁶³ Nussbaum 2000, 155

Box 1: Nussbaum's 'ten central capabilities'⁶⁴

- Being able to live a life of normal length.
- Being able to have good health, be adequately nourished, have adequate shelter, have opportunities for sexual satisfaction, choice in reproductive matters, being able to move from place to place.
- Being able to avoid unnecessary pain and have pleasurable experiences.
- Being able to use the senses. Being able to imagine, to think, to reason – in a way informed and cultivated by an adequate education, including (but not limited to) literacy and basic mathematical and scientific training. Being able to use imagination and thought. This connects education with guarantees for freedom of expression (in artistic and political terms), and freedom of religion.
- Being able to have attachments to things and persons; to associate with others and be able to love, grieve and experience longing and gratitude.
- Being able to form a conception of the good and engage in critical reflection about planning one's own life.
- Being able to recognize and show concern for others, engage in social interaction.
- Being able to live with concern for and relation to animals, plants and the world of nature.
- Being able to laugh, play and enjoy recreational activities.
- Being able to live one's own life, without interference with choices that are especially personal and definitive of selfhood such as marriage, childbearing, sexual expression, speech and employment.

Walker suggests that capability theory at present provides only a thin account of education, and fails to fully take into account how power

⁶⁴ Source: slightly abridged from Nussbaum 1995, 83-4.

and lack of freedoms work through education⁶⁵. She questions Sen's reluctance to specify valuable capabilities, while finding Nussbaum's canonical list of 10 'central capabilities' insufficient, as in her view, this must be supplemented by focus on power, values and education as a public good. A pedagogical perspective also requires us to address the special position of children and future-oriented processes of being and becoming.

Lessman agrees that capability approaches highlight the role of education in the function of choosing, yet find that existing studies have under-theorized this dimension and could benefit from more theorization about learning and how human beings learn to choose over time. She brings in Dewey's theories and concepts of experience, freedom of the learner and situatedness in a learning context. This theory is potentially fruitful for a more complex and nuanced understanding of how people choose from different functionings that they have reason to value⁶⁶.

Lessman contends that educational theory, or more precisely a theory of learning, is missing from the capability approach. A central goal of education is learning to choose. Dewey's educational theory on experience is suggested as a starting point that provides a good fit with the capabilities approach, since his theory links conceptions of experience, the freedom of the learner, and conditions of experience and education. Lessman points to the good fit between Deweyan educational theory and capability theory: the central importance of human freedom, the role of participation and the need to consider internal and external factors as well as their interaction in assessing choice situations.

⁶⁵ Walker 2008.

⁶⁶ Lessman 2009.

Conclusion

The formulation of capabilities and well-being is reflected in Sen's argument for *cultural freedom over cultural captivity*. In his book *Identity and Violence*, Sen explores the issue of identity, criticising the demerits of multiculturalism in relation to the problems of sectarianism and violence⁶⁷. Sen strongly opposes the tendency to reduce cultural identities to singular, exclusive cultural attachments, expressing instead his commitment to the irreducible plurality of human attachments and concerns. Sen links the condition of cultural captivity to what he terms the 'solitarist fallacy' of singular sexual, racial, religious, or other identity. Such an anti-pluralist approach bears the danger of becoming belligerent and violent, when it is imposed on gullible people and used to mobilize people to fight and persecute other identities. This violence of identity is something that Sen admits he finds perplexing, bewildering and terrifying. His book is, in part, a response to the crisis faced by 'multicultural Britain' in the wake of the London '7/7' bombings of 2005. Sen contrasts multiculturalism's promotion of diversity as a value in itself; against the capabilities approach, focused on the social arrangements that enable individuals to enjoy freedom of reasoning and decision-making in a broad context of social choice. The latter supports cultural freedom because it celebrates cultural diversity to the extent that it is freely chosen by individual persons involved. He is critical of the assumption that inherited and unchosen identity should be given automatic priority over multiple human affiliations involving, *inter alia*, 'politics, profession, class, gender, language literature, social involvements, and many other connections'⁶⁸. Sen is concerned to avoid the 'conceptual disarray' around identity that allows, or even encourages the purposeful exploitation of divisiveness⁶⁹. Multiculturalism, in effect, encourages a vision of 'plural monoculturalism', which rejects

⁶⁷ Sen 2006.

⁶⁸ Sen 2006, 150-151.

⁶⁹ Sen 2006, 165.

multiple cultural identities and discourages inter-cultural practices as separate identitarian communities strive to maintain their boundaries. This represents identity as 'fragmentary logic', promoting singular and exclusive affiliations, ignoring the relevance of other social connections. Sen calls for a 'multiculturalization of education on all sides' as the answer to cultural belligerence and the 'solitarist belittling of human identity'.⁷⁰

Sen is a liberal philosopher working largely within a western canon and some critics have characterized his work as Eurocentric⁷¹. However, this is inaccurate since he draws upon a brilliantly erudite range of classical and contemporary Western and Indian sources of thinking and argumentation to explain the nature and role of critical reasoning. He has explored the themes of justice and public reasoning in a thoroughly cosmopolitan way, drawing upon classical Indian thought in *The Idea of Justice*⁷² and in more delightful detail in *The Argumentative Indian*⁷³. Sen is one of a very few authors who can demonstrate that critical theorizing about justice is not specifically 'Western', Eurocentric, or irrelevant to the majority world of the South. He reminds us that a rich intellectual legacy reposes in the South, for example invoking the Mughal emperor Akbar's admonition to pursue reason and avoid getting stuck in 'the marshy land of tradition'. Sen is thus a key author who helps us to recognise the non-Western roots of what we consider to be 'Western' culture today, reflecting a robustly interactive and cross-cultural past. *The Argumentative Indian* explores the cross-cultural roots of reason, drawing on a number of different faiths for examples of public reasoning, including Akbar's liberal teachings and Hindu principles of ethical reasoning. What is challenging, however, is such an engagement with rich and diverse cultures makes for complex arguments.

⁷⁰ Sen 2006, 176, 178.

⁷¹ Eg. O'Hearn 2009.

⁷² Sen 2009.

⁷³ Sen 2005.

Alexander continues to critique the capability perspective as a problematic liberal theory in terms of the limited extent to which it addresses entrenched conditions of power and domination. Enhancing peoples capabilities involves not only providing education, decent living standards and political participation, but also opportunities, skills and self-confidence that empower people to stand up to arbitrarily dominating conditions and discriminating practices. He contends that Sen's approach lacks radicalism, and argues that capability theory needs to be strengthened and developed to provide effective antidotes to 'liberal hegemony'⁷⁴. Alexander notes the absence of any explicit critique of dependency and domination, as Sen leaves things open and hesitates to take a stand on which capabilities should be considered the greatest priorities for protection and promotion. He suggests that more strongly republican approaches would increase the robustness of the condition of freedom, tying the vision of individual freedom as to the 'common good' and 'common avowable interests' of citizens, tracked and justified by public judgements and debates rather than private or parochial reasoning⁷⁵. This approach points back to Sen's statement that 'freedom is one of the greatest social ideas'⁷⁶ and his emphases on the social and the institutional, democracy and public reasoning.

Several years ago, one commentator suggested that Sen's capability theory had to move towards a theory of justice based on democracy⁷⁷. *The Idea of Justice*, published two years later, attempts to do this. The penultimate section of the book, 'Forms of Reasoning', addresses the question of rationality under conditions of pluralism, while the final part commends 'Public Reasoning and Democracy' as the means to address questions of human rights and justice on the global scale. The tensions

⁷⁴ Alexander 2010.

⁷⁵ Alexander 2010, 18.

⁷⁶ Sen 1992, 69.

⁷⁷ Srinivasan 2007.

between liberal and egalitarian perspectives on society are getting more obvious as globalization pushes world inequality towards increasing polarization⁷⁸.

Sen's attempts to reconcile liberalism and egalitarianism push capability approaches beyond the safe liberal ground of civil and political liberties and towards substantive demands for justice, but still fall short of explicitly naming and prioritising 'manifest' economic, social and cultural injustices and demanding their removal. This silence on the specifics means that many of capability theory's detractors will remain dissatisfied by his unwillingness to specify the exact content of justice or decry specific structural injustices⁷⁹. It could be observed that Sen is genuinely torn between his concerns for agency, choice and pluralism⁸⁰. This causes the capabilities approach to be under-specific about capabilities, while the criticisms of substantive or 'manifest' injustice remain somewhat rarefied and abstract.

Sen identifies the correspondence between well-being and agency freedoms and straightforward notions of rights⁸¹. During the early years of capability theory, the focus was on 'basic capabilities – a person being able to do certain basic things'⁸², however the idea of 'basic capabilities' became expressed in later works such as *Development as Freedom*⁸³ as 'substantive freedoms'. Education is both a substantive freedom in itself, and an enabler of other substantive freedoms. Nussbaum sees education as a central capability and suggests that a capabilities approach seeks to educate for both cultural knowledge and cultural freedom, equipping persons with the reflexive ability to shape

⁷⁸ Mullard 2002.

⁷⁹ E.g. O'Hearn 2009

⁸⁰ Srinivasan 2007.

⁸¹ Sen, 1985, 217

⁸² Sen 1982, cited in Teschl and Comim 2005, 235.

⁸³ Sen, 1999.

their own destiny, choosing and shaping their own belonging as a member of various communities. The capabilities approach seeks to understand the self-limiting problem of adaptive preferences, while appreciating the importance of social connection to each and every individual.

A recent special issue on the topic of 'Capabilities and Education' in the journal, *Studies in Philosophy of Education*, notes that 'the time has come' for capability theory to be applied more extensively in the field of educational studies⁸⁴. It is likely, following Lessman's insights that we will rediscover the similarities and connections with educational theory, specifically Deweyan ideas about learning.

Education is a core socio-economic and cultural right, and is regarded as one of three 'immediate action areas' for realizing the Right to Development - in turn the integrating vector for interdependent and indivisible rights⁸⁵. Yet, until recently, there have been relatively few studies applying human rights and capability approaches in the field of education⁸⁶. Recent clarifications of the content of the right to education have taken a comprehensive approach to human rights education that moves beyond education about human rights, to encompass education for and through human rights. Indeed, it has been argued that human rights *in* education is an essential prerequisite for human rights education⁸⁷. The UN's adoption in 2005 of a World Program for Human Rights Education and subsequent UN Declaration on Human Rights Education and Training in 2011 represent further milestones embedding a wide and deep understanding of human rights education as the crucial vehicle for the development, promotion and realization of a universal culture of human rights.

⁸⁴ Hinchcliffe & Terzi, 2009, 387.

⁸⁵ Sengupta 2002; UN 1986.

⁸⁶ Saito, 2003.

⁸⁷ Tomasevski, 2004, emphasis this author's.

Capability theory stands at the centre of the human development paradigm and it has had significant influence on the field of human rights in practice, for example in the extensive work done by Sabina Alkire⁸⁸. The capabilities approach contributes key materials and perspectives that enable us to ground our claims for human rights, culture and education in a substantive theory of justice and the good through assessments of wellbeing, capabilities and freedoms. The capabilities approach addresses itself to questions about what priorities and resources are required to achieve human well-being and happiness⁸⁹. The principal means of achieving this justice is democracy based on agency, participation and public reasoning. In considering these elements, the capability approach understands 'culture as praxis'⁹⁰, but also enriches our toolkit for conceptualizing the dynamic and unfinished projects of cultural change and human rights in relation to substantive demands for justice.

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⁸⁸ E.g. Alkire 2002; 2008.

⁸⁹ Sen 2009.

⁹⁰ Bauman 1998.

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Conceptualizing a Human-Rights-Friendly and More Humanitarian “Freedom” and “Justice” from a Woman, Tribal and Transgender Perspective: Empowering the Marginalized through Legal Literacy

Soumitra Subinaya*

Abstract

It is more often than not that we accord immense significance to objective region-wide universalizable conclusions collected from field research or otherwise, but discard accounts of subjective individual experiences, which normally bedeck the library-shelves accommodating anything but not the place designated for accepted academic research literature. This paper seeks to be an unconventional endeavor at understanding fresher interpretations of the terms “justice” and “freedom” through a 60:40 mixture of moving accounts of subjective experiences and existent crystallized generalizations in the sociological, economical, psychoanalytical, legal, feminist, transgender and policy study discourses so that these terms can be made “Human-Rights-Friendly” and more humanitarian. Through this paper, I make a humble attempt at providing a platform to a few unsung marginalized women, “Others” and men from India whose voices have always been marred, suppressed and completely ignored. My paper titled “Conceptualizing A Human-Rights-Friendly and more Humanitarian “Freedom” and “Justice” from a Woman, Tribal and Transgender Perspective: Empowering the Marginalized through Legal Literacy” is largely an experiential essay supported by three real-life subjective experiences of the poorest COMMON “others”, women and men of India personally collected by the researcher in the poorest state, Orissa (exclusively for the sake of this forum). These persons voices, their personal, political and economic ordeal with the subjectively available concept of freedom and justice to

* Soumitra Subinaya is a youth activist, and CEO of an NGO called GLADJ and is also currently a Law and Sociology student at National Law University, Orissa, India, and a Psychology student at IGNOU (soumitrasubinaya@gmail.com).

each one of them. In the process, they aspire to spatialize a new conceptual landscape of “freedom” and “justice” and enable us to be critically conscious of the societal semiotics that defines our environment. I, the researcher here, have showcased how imparting “human-rights-and-humanitarian-Legal-Literacy-Education” can empower these marginalized groups to enter the mainstream developmental and income-generation activities in a nation.

This paper also depicts how a lack of legal literacy amongst the general public in general and amongst these marginalized groups in particular creates a disproportionate burden on and victimizes women, tribal-people and transgendered people enormously both during peace and during disasters. This paper will be a novel and most likely the only one importing a gender-mainstreamed, tribal and transgendered perspective. It is highly important at this time when thousands of tribal people are facing displacement in Orissa to accommodate the whims of the government which is hell bent on infringing private property rights. Further, the transgendered people are now being increasingly subjected to humiliation and being used for sexual gratification thereby dehumanizing their dignity. Women, as usual, continue to be the lesser mortals sometimes because of non-friendly laws and at other times due to prevalent social codes. This paper suggests how legal literacy can empower such people to enjoy their human rights and be well protected during disasters and during peace.

Introduction

By virtue of being humans, we possess certain inalienable fundamental apriori rights of which the “Right to Freedom” is supreme. I believe this Freedom is only achievable by a quantified human being. This is because a man with huge tracts of land is as poor as a beggar in front of a food shop, if both do not have capital. Both remain poverty stricken and as Mahatma Gandhi puts it, “poverty is the worst form of violence”. In the KBK (Kalahandi, Bolangir and Koraput) districts of Orissa, India, people own land but have low access to finance. This poverty amongst plenty has precipitated many farmer suicides. Thus, it is important to realize that time is ripe to spatialize fresher conceptual landscapes for freedom and justice. A democracy

which witnesses farmer suicides should be ashamed of breaching a constitutional guarantee to the right to life for all its citizens.

This paper thus provides that a more human-rights-friendly freedom would be to create enabling conditions in a society susceptible for an individual to fulfill her/his Maslow's hierarchy of needs (see Diagram 1). This is highly humanitarian as well because such a right to freedom would be concomitant with the three tenets on which humanitarianism hinges. This freedom, which is conventionally called economic freedom, encompasses The Principle of Impartiality because it acts as a self-aid during disasters irrespective of one's sex, caste, creed and color. Thus, a woman who has economic freedom will recover easily from climate calamities than her un-free counterparts. This freedom respects The Principle of Universality because it is intertwined with the fundamental human aspiration for Liberty, a commonality for which every individual must be treated with dignity immaterial of whether the person is a transgender. Thirdly, this econo-freedom believes in The Principle of Humanity because when powerful human instrumentalities such as the governments allow such freedom to prevail, they are in essence helping fellow human beings to survive. A more humanitarian and human-rights-friendly conceptualization of Justice on the other hand would mean creating transparent and perfect mechanisms of "Freedom" delivery so that each individual gets her/his due. This paper will not only kaleidoscope the concept of freedom, present the newer aspirations, the finer mechanisms of achieving both justice and freedom but also explore the subjective individual experiences of a transgender individual, a tribal and a rural woman. This research paper will most importantly show how LEGAL LITERACY can be a sustainable justice delivery magnet and a promoter of a more human-rights-friendly and more humanitarian Freedom and Justice. For this demi-academic research paper, I, the researcher take India, as my case study.

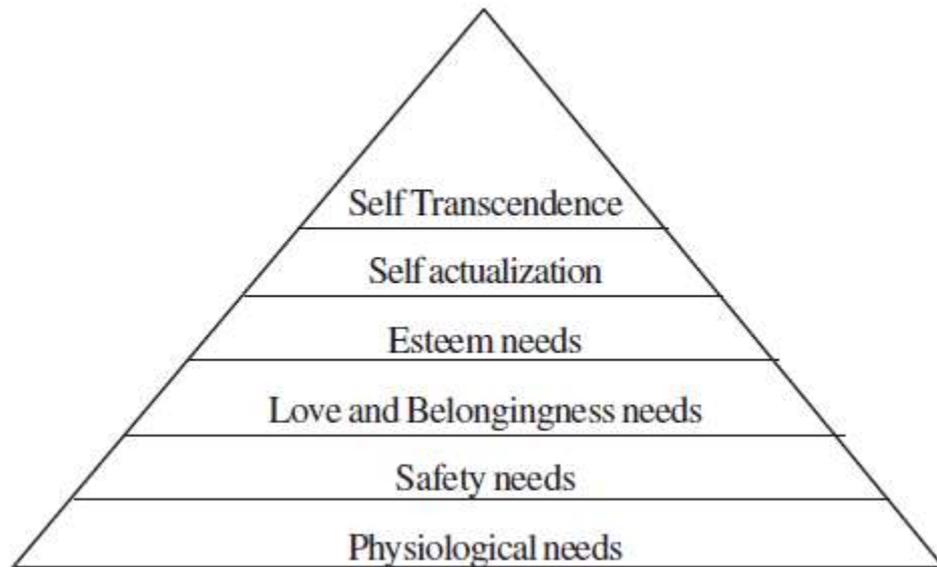


Diagram 1: Maslow's Hierarchy of Needs

Spatializing Fresher Concepts: Freedom And Justice, A New Look: Engaging with Freedom through a Transgendered Lens.

Experiencing Sonali

“Freedom is acceptance, accommodation and inclusion of human diversity. It is the absence of barriers for self-actualization for a human being irrespective of the identity whether sexual or otherwise the person holds. This freedom is an offshoot of economic freedom that I seek to achieve through entrepreneurship”: Sonali, Bolangir, Orissa.

Sonali is a transgendered individual residing in Bolangir, Orissa, India. She lives with fellow individuals in an exclusive commune in a rural agglomeration. She consented to interact with the researcher on being approached by the manager of a marriage-baaraat (procession) organizer in which Sonali was frequently hired to dance (transgender persons being considered auspicious in marriage-baaraats in Orissa). I asked Sonali what freedom meant to her. Sonali presented her idea with

personal experiences substantiating her words, though I learnt later from her that she held a BA in Oriya from the local college. She said, "Freedom is acceptance, accommodation and inclusion of human diversity. It is the absence of barriers for self-actualization for a human being irrespective of the identity whether sexual or otherwise the person holds. I have no access to temples and other public places of worship, hotels, restaurants, teashops, drinking water resources, hospitals in the village. We are not allowed into disaster-shelters during extreme weather events. We are commoditized as sex objects. Most importantly, we are a love-dwarfed lot who die and rot silently in a cold and torturing world." I questioned her, "What is the greatest impediment for your achieving freedom?" Sonali answered, "I feel the greatest problem that we people have is our identity. We are forced to assume a gender which we do not fit into. This increasingly discourages us to engage with the mainstream India. We too want to participate in nation-building but the government neither provides us with any push-or-pull factors. Now, we beg to eke out a living for ourselves." I intervene, "Can you suggest any solutions for providing you with the freedom you aspire to gain?" She elaborates, "This freedom that we aspire to gain is an offshoot of economic freedom that I seek to achieve through entrepreneurship. I believe that entrepreneurship is a vital tool towards enabling us to be truly free. This is because once our instinctual needs for food, clothing and shelter are fulfilled, we can then participate in social activism to gain wider acceptance in the society. Further, financial independence makes human lives more dignified. I had attended a Woman Entrepreneurship Development Camp organized in 2005. I wanted to start "Service-Entrepreneurship" amongst the transgender guild by organizing fellow sisters into a partnership that would provide dance services for parties and watchman services for lady's hostels during nights. I needed seed investment to get a telephone. My idea was appreciated by the EDC

facilitator but when he realized that I was a transgender, he was unsure if any NBF I will help us secure seed money.”

Engaging with Freedom through a Tribal Man's Eyes:

Experiencing Mala Sabara

“A livelihood that sustains me and my family comfortably is real freedom for me because then I will be able to fulfill my dreams. I will be able to feed my family daily and adequately”: Mala Sabara

Mala Sabara is amongst the tribal people who could lose their land to the government in the land acquisition drive for Vedanta, which was recently halted. He is skeptic about allowing strangers to interact with him. The researcher met him in the market where he sells Sal-leaf plates. I asked him what freedom meant and he replied, “Freedom means unhindered access to the land and resources which provide us livelihood”. I diagnosed, as a doctor does: The goal was “adequate nutrition for the body” and the mother's complain was “How can I get my daughter to eat eggs?” which in-fact, when incisively analyzed translated into, “How can I get my daughter to consume more proteins?” Similarly when I reasoned with Mala, I asked, “You want access and use of forest resources for livelihood, right? So what if you got an alternative livelihood, that does not depend on forest produce but pays you much more? Will you leave the forests then?” He contemplated and answered, “Is that possible? A livelihood that sustains me and my family comfortably is real freedom for me because then I will be able to fulfill my dreams. I will be able to feed my family daily and adequately.” I questioned further, “So can you sell your land for a better livelihood and sufficient payment?” Mala answered, “How can I sir? The land belongs to us all, not only to me. We have a pond in our area where

we rear fishes. I do much of the labor to collect the fishes and feed them. But when it comes to distribution, everyone gets equal share. So, I do not get commensurate share and am prevented from argument. Only if I had a pond that belonged exclusively to me, but that is not possible. Similarly, if I had land that belonged to me, I could sell it to you in exchange for a better livelihood”.

Engaging with Freedom through a Rural-Woman’s Eyes.

Experiencing Roma

“Freedom to me is sharing of proportionate powers and responsibilities between the husband and the wife in a family. It is the absence of gender inequality and equal availability of opportunities for both woman and man.”: Roma Begum, Kakatpur, Orissa.

Roma is a Muslim woman in Kakatpur village, Orissa. She says, “Freedom to me is sharing of proportionate powers and responsibilities between the husband and the wife in a family. It is the absence of gender inequality and equal availability of opportunities for both woman and man.” I ask her, “Have you realized the “Freedom” you speak of?” She answers, “Yes, the 1999 super cyclone made my husband realize that.” I was interested and inquired further, “How?” She answered, “The Climatic variations that we are experiencing nowadays put a disproportionate burden on women. Women are the primary caregivers of the family and have to collect water and fetch fodder for the livestock at home. When floods and storms occur, not enough resources are available at hand for poor families such as mine to be able to feed and run a family. To prevent bankruptcy during such exigencies, if the woman worked and added to the family’s income plus the husband too involved himself in jointly assisting a woman in whatever way she required him in the care

industry at home, then the woman could achieve autonomy and agency at par with the man. The super cyclone made us face untold hardships but at the same time made my husband realize the need to liberate me most importantly, economically. Today, I run a tailoring shop but I find there is a lot to be achieved to allow women to realize freedom. Women should have equal access to property as men have.”

Analysis

An analysis of Mala Sabara’s situation yields that the government’s land acquisition drive is compelling rather than reasoning with him. When I reasoned with him, he provided three interesting observations:

- A willingness to sell his land for a better livelihood and payment.
- A pressing need to own land and resources as his private property.
- An increasing disgust with being forced to produce agreement on everything because of a collective socialistic arrangement in his community that promotes sacrifice of individual autonomy and agency over collective interests.

Like John Mills in his essay, “On Liberty” clearly and cogently argues that no one must be compelled to do or forebear anything (even if it were for her/his good or happiness) except when the act or omission would do harm to others. He, however, concedes that the person’s good or happiness could be valid reasons for “remonstrating with him, or reasoning with him, or persuading him or entreating him, but not for compelling him, or visiting him with any evil, in case he does otherwise.”¹ Mill argues that any external interference is unwarranted “when the thing to be done is likely to be better done by individuals than by the

¹ Mill, John Stuart. 1963. *The Collected Works of John Stuart Mill, Volume XVIII - Essays on Politics and Society Part I*, ed. John M. Robson, Introduction by Alexander Brady (Toronto: University of Toronto Press, London: Routledge and Kegan Paul, 1977). Chapter: ON LIBERTY [1859].

government. Speaking generally, there is no one so fit to conduct any business, or to determine how or by whom it shall be conducted, as those who are personally interested in it.”² In the present situation in Orissa, people such as Mala Sabara can very well voluntarily bargain with the Company the price they need for their land and government interference which not only snatches their freedom of speech and expression including bargaining power, but compels them without consulting or reasoning with them to sacrifice their land is not only unjustified but unconstitutional. Further, the government, instead of providing legal-aid to the tribal people to enable them acquire valid titles over their property, is looting them of it. Mala when he wants to sell his property is legally debarred to do so because he has no title over it, leave aside a good title. Hayek in his essay “The Road to Serfdom” convincingly presses for the paramount importance of private property rights. He reasons, “It is only because the control of the means of production is divided among many people acting independently that we as individuals can decide what to do with ourselves. When all the means of production are vested in a single hand, whether it be nominally that of ‘society’ as a whole or that of a dictator, whoever exercises this control has complete power over us”³ and thus can use it coercively against individual agency. This is what pinched Mala Sabara who wanted to pursue his individual dreams but was laid down by a socialistic communal arrangement.

Let us now move on to the case of Sonali. Sonali talks about achieving freedom by entrepreneurship. She believes that dismantling the stereotypes and disaffection associated with her identity can be made possible through economic independence. This is because changing mindsets is a long term goal which can only proceed after economic

² Ibid.

³ Hayek, Friedrich. 2001. *The Road to Serfdom* (condensed version, Reader’s Digest, 1945). London: Institute of Economic Affairs.

independence satiates their basic human needs. For this, government must make policies that are in tandem with the informal institutions within the transgender communities so that they can follow them. This is a reiteration of the Frederic Sautet's idea that "whether individuals follow the formal rules legislated by governments will depend to a large extent on the alignment between formal rules and informal norms of conduct"⁴. See Figure.1.

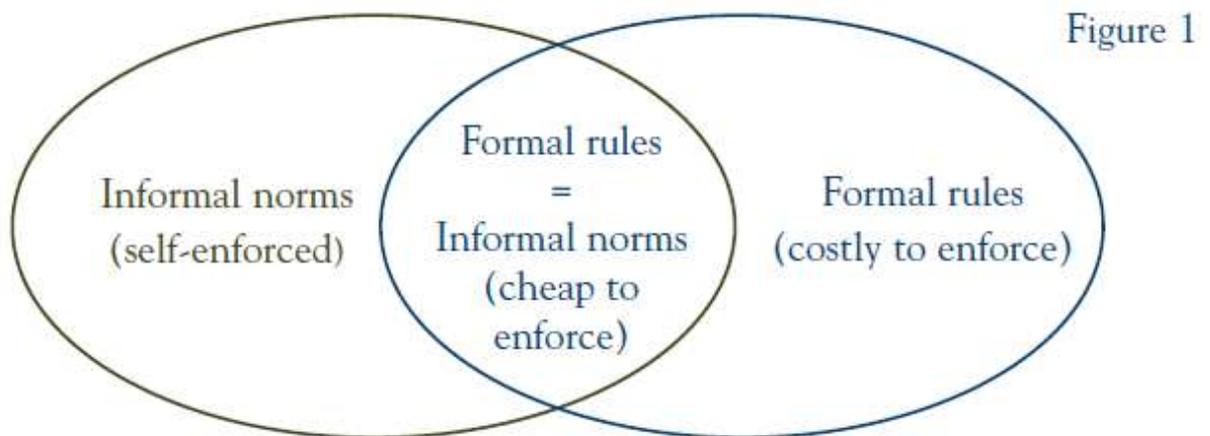


Figure.1⁵

The policy maker has to identify this overlap. He/She has to remember the 4th principle discovered by Lawrence W. Reeds: "If you encourage something you get more of it; if you discourage something you get less of it."⁶ Further, the policy maker must understand that "productivity increases are increases in the amount of socially useful knowledge. In other words, the source of changes in productivity lies in the increase in knowledge that entrepreneurial activity generates: the tyranny of diminishing returns is overcome by human ingenuity displayed in

⁴ Sautet, Frederic. 2005. The Role of Institutions in Entrepreneurship Implications for Development Policy. *Mercatus Policy Series Policy Primer No. 1*. Arlington, VA: Mercatus Center, George Mason University.

⁵ Id.

⁶ Reed, Lawrence. 2009. The Seven Principles of Sound Public Policy. Midland, Michigan: Mackinac Center for Public Policy.

entrepreneurship."⁷ Thus entrepreneurship is a vital engine for economic growth but "different institutional frameworks offer different incentives for entrepreneurs"⁸. Thus, in Sonali's case, the policy-maker can incentivize the transgender community by understanding that informal institutions within the transgender people accord utmost significance to their identity and that if Sonali wants to become an entrepreneur, her access to micro-credit must not be impeded because she has to align herself to a fixed sex category, that is, either male or female. This discourages them. Hence, formal institutions must begin importing the third-sex in the documents that accord individual an identity such as voters' id, ration cards, passports and so on. This mechanism will enable them to embrace formal institutions and become entrepreneurs plus, this will also make the policy enforcement costs cheaper. Thus, in this process the law will usher in social change. The transgender people will thereafter become economically free and concentrate on effecting social change to gain wider acceptability in the mainstream society.

Let us now move on to the case of Roma. Roma believes true freedom lies in providing her an enabling environment that allows her unhindered access to the market like her male counterparts. She advocates for pure libertarianism that, as Roy A. Childs, Jr., writes, "begins with inviolable individualism, with the view that human beings are the sole legitimate owners of their lives, free to do whatever they wish, so long as they do not use force, violence, aggression or fraud against the person or justly held property of another."⁹ He adds, "Libertarians stand opposed to power in lauding the natural rights of all human beings to choose the course of their lives....Any attempt to impose conformity on human beings is an attempt to destroy what

⁷ Supra note 4.

⁸ Id.

⁹ Childs, Roy A. 1994. *Liberty Against Power*. In *Liberty Against Power: Essays by Roy A. Childs, Jr.* Edited by Joan Kennedy Taylor. San Francisco: Fox & Wilkes. 1-14.,

makes them essentially and gloriously human.”¹⁰ Thus, libertarianism, by recognizing “human worth” aims at dismantling both formal and informal institutions of power, in our case gender-inequality perpetrating customary laws, both recognized and unrecognized by the state, that prevent any human being from self-actualization, that includes access to the market and ownership of property. Further, as Angelina Grimke puts it, “Now if rights are founded in the nature of our moral being, then the mere circumstance of sex does not give to man higher rights and responsibilities, than to woman. To suppose that it does, would be to deny the self-evident truth, that the “physical constitution is the mere instrument of the moral nature.”¹¹

Thus, in all, we learn that all the three of our interviewees wanted ECONOMIC FREEDOM DIRECTLY OR INDIRECTLY to realize their fundamental human right to a life with dignity whether in peace or in disasters (as Roma points out). So, ECONOMIC FREEDOM is the essence of all other freedoms whether political or personal. It is a more human-rights-friendly and more humanitarian concept of freedom that is often not accessible to people in many places worldwide. As Michael Walker (L), Executive Director of the Canada-based public policy research organization, Fraser Institute, puts it, “Without economic freedom you can't exercise the other freedoms that we all cherish.”

Now let us understand how we ensure this freedom becomes available to all. In other words, let us understand how we can give every individual his due, that is, a more human-rights-friendly and humanitarian JUSTICE through legal literacy.

¹⁰ Supra note 9.

¹¹ Gremké, Angelina. 1982. Human Rights Not Founded on Sex. [1837]. In *Freedom, Feminism and the State*, edited by Wendy McElroy. Chapter 1. Washington, DC: Cato Institute.

Enter “Legal Literacy”:

The Government of the Indian democracy runs on three wings: The Legislature, The Executive and The Judiciary. However, in India, the doctrine of separation of powers is not followed with absolute rigidity, rather the Constitution of India provides for an independent judiciary with extensive jurisdiction over the acts of the legislature and the executive¹². There exist inherent checks and balances to keep every organ within the limits of constitutional power. The Supreme Court of India in *Indira Gandhi v. Raj Narain*¹³, observed, thus: “... the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances”. It is in this context that the role of legal literacy becomes highly significant and necessary. It is the citizens who have to ensure that these three organs of the government run properly. It is they who have to ensure that their views are properly and adequately reflected in the legislations of the country. In this regard the women, the transgendered and the tribal have been a neglected lot. Further, citizens are to ensure that the executive implements the laws properly and the judiciary adjudicates disputes impartially. However, the researcher opines that this can be effectively done if people are sufficiently aware of their rights and duties. As we learnt above, for economic freedom, policies to the effect the freedom must not only be enforced but JUSTICE has to see to it that the benefits of those policies reach its targeted beneficiaries. Thus, a right to food policy that stands to provide food to the below poverty line people cannot succeed if a just mechanism is not ensured. Thus, now the government in India is contemplating shifting from a Public Distribution System (PDS) model to a Food Stamp Model which is more just and seeks to make people

¹² *Chandra Mohan v State of U.P*, AIR 1967 SC1987, at 1993

¹³ AIR 1975 SC 2299

economically free in tandem with human rights jurisprudence and humanitarianism. Legal Literacy can enable a person to get justice by ensuring that he gets economic freedom in the following ways:

The Right to Know

The Supreme Court of India in *Secretary Ministry of Information and Broadcasting Government of India and Others v. Cricket Association of Bengal and Others*¹⁴ observed: "True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views.... This is particularly so in a country like ours where about 65 percent of the population is illiterate and hardly 1 percent of the population has an access to the print media which is not subject to pre-censorship." The Court also observed – "a successful democracy posits an 'aware' citizenry"¹⁵. The Court had reiterated its views expressed in *Secretary Ministry of Information and Broadcasting Government of India and Others v. Cricket Association of Bengal and Others* in *Union of India v Association for Democratic Reforms*¹⁶: "One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce." In *Dinesh Trivedi. M.P. and Others v. Union of India and Others*¹⁷, The Court observed that: "In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society...".

¹⁴(1995) 2 SCC 161

¹⁵ Ibid.

¹⁶ India, SC, 2001

¹⁷ (1997) 4 SCC 306

Thus, for the people in general and the marginalized in particular awareness of their legal rights and most importantly, Use of 'The Right to Information Acts' (RTIs) of their countries is highly necessary because corruption renders most economic welfare policies unsuccessful. During an internship that I undertook as a law student in the State Information Commission, I met an impoverished daily wage earner woman who had applied for a grant under a government scheme which provided \$650 to a poor person to build a house. However, she waited over four years watching wealthier neighbors getting grants and building brick-and-mortar structures while she languished in her mud-and-stick hut. With my help, she filed a Right to Information request at the local government office to find out who had benefited from the scheme while she waited, and why. Within few days, her grant was approved and a check sent to her along with an inquiry commission being established to investigate corruption. I learnt from this experience the power of using "The Right to Information Act" to provide the marginalized with JUSTICE that furthers their human rights by economically freeing them.

The Supreme Court of India (as observed in *State of Uttar Pradesh v. Raj Narain and others*)¹⁸ the Court states that: "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.* They are entitled to know the particulars of every public transaction in all its bearing...".The people of this country or any developing country for that matter fail to exercise this very effective Accountability legislation called "The Right to Information Act". Through this act the citizens can compel the relevant authorities to answer adequately for any action they undertake that

¹⁸ (1975) 4 SCC 428

affects public or private interest. They can compel contestants in elections to disclose their antecedents such as assets, educational qualifications, criminal records, so on to enable them to make a more informed choice. Through this act, people in authority who intend action that would affect the public or private interests can be made to disclose the outcomes they intend to bring about, for whom, and why they think the outcomes they intend are desirable and fair. They can also be made to answer their own performance standards and the standards for those whom they direct, which clarify their outcome intentions. Through this act, the authorities can be made to disclose their achievements or lack of achievement given by those responsible for the achievement objectives, performance standards and actual performance.

In democracies worldwide today, which are increasingly embracing a CENTRIST approach to their economies, social justice policies and legislation are co-existing with capitalist aspirations, which is good for the marginalized as such an economic system will provide them with fillips to become economically free. Hence, transfer payments by the government to its people can be used as seed capital for businesses by the beneficiaries themselves. Further, ensuring that the tribal person gets the ownership of her/his land, the woman gets her widow's pension and the transgendered individual gets an answer to why he cannot get micro-credit. This is possible from the "RIGHT TO INFORMATION ACT". Thus, this would mean enabling people to climb up the Maslow's hierarchy of needs, thereby enabling them to realize their human rights and be able to sustain themselves post humanitarian-crises. JUSTICE here, would thus mean ensuring accountability of the government goods-delivering mechanism at each step, wherein good can be "the cash" transferred by government as well. So information about the inner processes in the black-box bureaucratic government instrument is vital for a more human-rights-friendly and more humanitarian freedom and justice.

This information so acquired by the citizens can then be evaluated for intentions and reasoning, and for results and learning, validated by knowledgeable public interest organizations or professional practitioners, or both and then the citizens can take resort to the second legal weapon: "Public Interest Litigation."

The Right to Be Heard

*"No one is born a good citizen; no nation is born a democracy.
Rather, both are processes that continue to evolve over a lifetime"*
- Former UN Secretary-General, Kofi Annan.

The women, the tribal and the transgendered often disengage themselves from the political process and do not get suitable platforms to air their views regarding governmental actions. As a result of which, the disgruntled often take resort to violent means to assert themselves when they feel that any governmental action is unjust. To control this unrest, the marginalized must realize that taking resort to strike or protest must be the last option as the citizen must remember that he/she still has the second legal weapon: "Public Interest Litigation (PIL)". Through Public Interest Litigation or a simple case, any citizen, the young and the old alike, or organization can invoke the court's power of judicial review.

Public Interest Litigation is the name given to the right of any member of the public, having sufficient interest to maintain an action for judicial redress of public injury arising from breach of public duty or violation of some provision of the constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provisions.¹⁹ It is the essence of this rule of law, which constitutes the core of our constitution, that exercise of the power by the State, whether it be

¹⁹ S.R.Gupta v. President of India, AIR 1982 SC149

the legislature or the executive or any other authority, should be within the constitutional limitations and if any practice is adopted by anyone of them which is in flagrant and systematic violation of its constitutional limitations, the petitioner as a member of public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of the court to entertain the writ petition and adjudicate upon the validity of such practice.²⁰ The citizen can thus contest any legislative action, judicial decision or executive action in the court of law and prove that the said action or decision is unjust or unreasonable.

In *U.O.I. v International Trading Co*²¹ the Supreme Court observed: “Article 14 of the Constitution²² applies also to matters of government policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. While the discretion to change the policy in exercise of the executive power, when not trammled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any other ulterior criteria. The wide sweep of Article 14 and the requirement of every state action qualifying for its validity on this touchstone, irrespective of the field of activity of the state, is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heartbeat of fair play. Every state action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary”. Moreover, through PIL, any active citizen can compel the authorities to discharge their public functions properly or stop any act contrary to law.

²⁰ Dr. D.C. Wadhawa v. State of Bihar, AIRSC 579, para 3

²¹ (2003) 5 SCC 437

²² ‘Right to equality’: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India, from The Constitution of India, 2007 Govt. of India Publications, downloaded from www.scribd.com.

In *Shiram Food & Fertilizer case*²³ through Public Interest Litigation, the Supreme Court directed the company manufacturing hazardous & lethal chemical and gases posing danger to life and health of workmen to take all necessary safety measures before re-opening the plant. In *Parmanand Katara V. Union of India*²⁴ the Supreme Court of India held in the Public Interest Litigation filed by a human rights activist fighting for general public interest that it is a paramount obligation of every member of medical profession to give medical aid to every injured citizen as soon as possible without waiting for any procedural formalities. In *Kapila Hingorani v. State of Bihar*²⁵, the Supreme Court noted the plight of the employees of public sector undertakings or the statutory authorities in the State of Bihar. In a letter to the Supreme Court, an Advocate of the Supreme Court, Kapila Hingorani brought to its notice many incidents of death owing to starvation or malnutrition due to non-payment of salaries of the workers working in these corporations. The court pierced the corporate veil in this case and also held the State of Bihar liable. Recent examples of successful PILs include "Stopping of felling of trees by authorities on the Bopal-Ghuma road after an order of the Gujarat High Court. The PIL was filed by a local resident, one Shivlal Purohit, who could prove that the felling of trees by the authorities was not in public interest as it upset the ecology and was contrary to the Felling of Trees Act."²⁶ Another recent example is a public interest litigation (PIL) initiated through the petition on September 26 by A. Narayanan of Chennai in the Madras High Court to highlight the miseries of the sewer workers who indulge in manual scavenging (which is illegal according to the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993) and get into manholes and sewer drainage

²³ AIR (1986) 2 SCC 176 SC

²⁴ AIR 1989, SC 2039

²⁵ 2003 (6) SCC 1

²⁶ "HC stops felling of trees", India Times Newsletter, 20 Jan 2009, 0000 hrs, IST, Times News Network

system to remove blocks, etc.²⁷. Hearing the public interest petition, the court ordered that the “entry of sanitary workers into the sewerage system under the guise of removing the blocks should be prohibited, except under exceptional circumstances”. The court also directed the Chennai Metro Water Supply and Sewerage Board (CMWSSB) and the Tamil Nadu Municipal Administration and Water Supply Department to initiate steps to prevent the entry of solid waste into the sewage line, plug unauthorized sewerage connections, launch a public awareness campaign against the throwing of solid waste into sewers and ensure that manual scavenging is not undertaken. Thus, we observed that with proper legal literacy PIL in the hands of the citizens can become a very effective weapon of ensuring that human rights and humanitarian freedom and justice prevail in most democracies of the world today.

The Other Legal Weapons:

The Prevention of Corruption Acts

Attaining Freedom and Justice cannot end with the RTIs and PILs, but continue with citizens-vigilance to continue ensuring a corruption-free transparent government in their home countries. This means weeding out the different manifestations of corruption such as bribery, extortion, embezzlement, favoritism, and so on, that a citizen encounters in his/her life. Corruption may not be confined to the high and mighty only such as to the politicians, bureaucrats, businesses, and industrial houses but it could start from the grassroots level. Legislation such as the Prevention of Corruption Act aim to contain corruption in public life of one's nation. However, amongst other reasons, poor legal literacy is a primary cause of its minimal use. The Act in India, for instance, deals with containing acts of corruption done by 'public servants'. The term 'public servant' in the Act encompasses various persons such as civil servants, judges, the

²⁷ S. Doiraj, “Clean-up order”, *Frontline*, Vol.26, Issue 1, Jan 3-16, 2009

Prime Minister, the Chief Minister, the MPs, the MLAs, so on. The Act also declares the acts of bribery, misappropriation, abuse of official position, possession of assets disproportionate to income, so on, as offence and punishable under law.

As discussed earlier, access to capital is vital to attaining economic freedom which in turn helps an individual to realize human rights and self-aid during humanitarian crisis. However, it is impossible to provide channels of finance without ensuring a JUST system where every individual get her/his due. Such a possibility can only be realized if we eliminate the malaise of corruption and effect good governance in the nation.

The Consumer Protection Acts

A human-rights-friendly and humanitarian concept of freedom and justice apart from continuing to ensure transparency and accountability in the government bodies must also ensure that the rights of consumers in democracies are exercised aptly in this era of globalization. Whether it be a government undertaking or its employee or a private enterprise, its employee or a professional such as a solicitor, doctor or an architect, the citizens must be aware that they have the right to safety, the right to be informed, the right to choose, the right to be heard and the right to seek redress for any product or service provided by these enterprises, their employees and the professionals.

In India the Consumer Protection Act 1986 provides for the establishment of Consumer Disputes Redressal Agencies at District, State and National levels for the protection and promotion of consumer interests and to redress their grievances in a speedy, simple and inexpensive manner. There are no legal formalities for filing the complaint. Suppose, one finds himself/herself cheated by any trader or manufacturer and wishes to

lodge a complaint to a consumer court, here in India, he/she can write the details on a plain paper, attach supporting documents such as guarantee or warrantee card and cash memo with the complaint and submit it in the district consumer court without going to any lawyer or professional for legal assistance. S/he can also plead her/his own case in the consumer court. Thus, the consumer protection laws can be effective instruments of social change if used properly by the citizens.

Conclusion

We thus conclude that economic freedom must be incorporated sufficiently and succinctly into our lexicon meaning of freedom because it is vital towards realizing other freedoms whether personal or political. The three subjective experiences of a tribal, a transgender and a woman very aptly displayed the necessity to spatialize a fresher concept of more human-rights-friendly and more humanitarian freedom by giving economic liberty its due. Secondly, we realized that it is impossible to gain such a freedom when it's just distribution is not possible. Hence, entered "LEGAL LITERACY". We observed that a more human-rights-friendly and humanitarian concept of justice is enabling people to realize their freedom through accountable and transparent modes of economic liberty delivery whether in terms of cash or other forms. Legal literacy as proved can enable citizens ensure both this justice and freedom by the use of some legal mechanisms as discussed in the paper. Thus, I, the researcher hope that this demi-academic research paper enables its readers to theorize freedom and justice from a fresher perspective as well as realize them in praxis through legal instruments and through legal literacy as discussed in this paper.

Index of Authorities Used (from India):

1. Chandra Mohan v State of U.P, AIR 1967 SC1987, at 1993
2. Indira Gandhi v. Raj Narain, AIR 1975 SC 2299

3. Secretary Ministry of Information and Broadcasting Government of India and Others v. Cricket Association of Bengal and Others(1995)2 SCC 161
4. Dinesh Trivedi. M.P. and Others v. Union of India and Others(1997)4 SCC 306
5. State of Uttar Pradesh v. Raj Narain and others(1975)4 SCC 428
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8. Dr. D.C. Wadhawa v. State of Bihar, AIRSC 579,
9. U.O.I. v International Trading Co, (2003), 5 SCC, 437
10. Shiram Food & Fertilizer case, AIR (1986) 2 SCC 176 SC
11. Parmanand Katara V. Union of India, AIR 1989 SC 2039
12. Kapila Hingorani v. State of Bihar 2003 (6) SCC 1
13. The Prevention of Corruption Act, 1988
14. The Consumer Protection Act, 1986
15. The Right to Information Act,2005

List of Abbreviations:

1. AIR : All India Reporter
2. SC : Supreme Court of India
3. SCC : Supreme Court Cases

Various Approaches to Multiculturalism and the Individual Human Rights

Jakub Kryś*

Abstract

Last decades brought previously unknown scale of migrations and growing multicultural environments in many cities and countries. This process in turn creates new problems and previously unknown phenomena with which societies need to deal. Ideas about the nature of plural societies differ between countries and the question arises how to organize societies in this new reality.

Is the word multiculturalism always understood in the same way? According to multicultural psychologist John W. Berry's model (2011, 2007) plural societies may implement at least four intercultural strategies of absorbing ethnocultural groups: integration, assimilation, separation, and marginalization. Do all the countries name the same phenomena under the word multiculturalism? Another problem is that there is more and more voices that multiculturalism cannot co-exist with fundamental individual human rights.

All this leads to the question what exactly multiculturalism means and what different solutions may be hidden under this word and how do they relate to human rights respect or violations. The aim of my presentation is to compare different multiculturalism solutions and plural societies basing on the examples of various countries and to refer this comparison to different practices of human rights respect.

* Jakub Kryś is a Ph.D. student at the Institute of Psychology of the Polish Academy of Sciences and Warsaw School of Social Sciences and Humanities (kuba@krys.pl). Manuscript prepared and written in Lodz (Poland), Ohrid (Macedonia), and Pogradec (Albania) in August 2011.

Introduction

Traditional multicultural view is that cultural pluralism is a resource, and inclusiveness should be nurtured with supportive policies and programs. In recent discourse however the anti-multicultural option becomes stronger which states that cultural pluralism is a problem and should be reduced or even eliminated. The first part of this paper lays out some ideas of the Berry's theoretical model of interculturalism to allow in the second part the analysis of differences in the multicultural policies of a set of countries.

As the voices become stronger that multiculturalism is contradictory to the idea of individual human rights, the presented Berry's model helps to show that multiculturalism is independent on human rights and those two phenomena may easily coexist in one society.

Plural Societies – Intensifying Process

The worldwide existence of culturally plural societies is a fact. Most societies of the world become more and more plural. It is a product of historical international phenomena such as colonization, slavery and refugee or more recent processes such as immigration movements (some of which has been supported by inviting countries - i.e. Turkish and Kurdish *Gastarbeiters* in Germany. Culturally plural societies are those in which a number of different cultural or ethnic groups reside together within a shared political and social framework (Brooks, 2002). All contemporary societies are now culturally plural; no society is made up of people having one culture, one language, and one identity (Sam & Berry, 2006). Plural societies have been known to exist for ages – no empire or big country has ever been based on exclusively one culture.

The process in which societies become more and more pluralistic is intensifying. Table 1 presents migration indicators.

Table 1. Population and Migration Indicators for the Continents in Thousands and Percentage of Population (source: Zick, Pettigrew, & Wagner, 2008).

	Population		Migration stock		Net migration ^a	
	1990	2000	1990	2000	1990–1995	1995–2000
Europe	721,981	727,304	48,437 6.7%	56,100 7.7%	1,120	769
Eastern Europe	310,770	304,172	23,017 7.4%	24,812 8.2%	274	124
Northern Europe	92,478	95,076	6,774 7.3%	7,453 7.8%	92	134
Southern Europe	142,643	144,935	3,418 2.4%	4,999 3.4%	–6	229
Western Europe	176,091	183,121	15,229 8.6	18,836 10.3%	760	282
Latin America & Caribbean	440,354	518,809	7,014 1.6	5,944 1.1	–580	–494
Northern America	282,598	314,113	27,597 9.8	40,844 13.0	1,189	1,394
Asia	3,164,081	3,672,342	49,986 1.6%	49,948 1.4%	–1,460	–1,311
Africa	619,477	793,627	16,221 2.6%	16,277 2.1%	–372	–447
Oceania	26,330	30,521	4,751 18.0%	5,835 19.1%	103	90

However not all countries dealt or deal with plural society phenomena in the same way. In the richest countries for the last couple of decades functioned term *Multiculturalism* which has been used by many politicians and researchers to describe their ways of dealing with plural societies. In most of those countries term *Multiculturalism* has been used to describe favorable approach to incoming cultural groups. Yet in the latest political discourse appeared voices that questioned the idea of multiculturalism. German Chancellor Angela Merkel, Australia's former prime minister John Howard, former Spanish prime minister Jose Maria Aznar, French president Nicolas Sarkozy and British prime minister David Cameron have in recent months said multicultural policies have not successfully integrated immigrants.

According to Merkel "attempts to build a multicultural society in Germany have utterly failed". She said the so-called "multikulti" concept - where people would "live side-by-side" happily - did not work, and immigrants needed to do more to integrate - including learning German. David Cameron talking on multiculturalism stated that "Europe needs to wake up to what is happening in our own countries". And Nicolas Sarkozy claimed "we have been too concerned about the identity of the person who was arriving and not enough about the identity of the country that was receiving him". Most European media summarized that Sarkozy, Merkel and Cameron – leaders of the three most important and strongest countries of European Union - have declared multiculturalism a failure.

Furthermore, there are many voices that suggest the idea that Multiculturalism is in contradiction to individual Human Rights. To some politicians and philosophers it is impossible to associate human rights and multiculturalism. The most explicit examples of this problem are Islamic traditions and customs (i.e. wearing *burqas*), some of which in France or Switzerland has been forbidden. Is it possible to respect individual human rights in the plural societies? Maybe human rights are 'invented by' and 'fit' only western individualistic cultures and it is impossible to respect them in multicultural societies if those societies are going to remain multicultural? Does multiculturalism exclude respect to individual human rights? In this paper I would like to discuss the above problems.

At the beginning I would like to clearly explain the term *Multiculturalism*. This term is used by many politicians, however very often in different meanings and contexts. That is why this term requires diligent understanding and explaining in a scientific manner. Clear explanation of the term Multiculturalism, in my opinion, shall help resolve most of the potential problems with multiculturalism and human rights respect.

Intercultural Strategies – Outline of John Berry's Model

The core of Berry's idea leading to clarifying the term *Multiculturalism* is that groups and individuals (both dominant and non-dominant) living in plural societies engage each other in a number of different ways (Berry, 1974, 1980). No matter what kind of history lies behind the plural history (colonization or immigration processes) individuals and whole groups hold preferences with respect to the particular ways in which they wish to engage their own and other groups.

Preferences of non-dominant ethnocultural groups living in contact with bigger dominant group have become known as *acculturation strategies*. On the other hand, when preferences are examined among the dominant group about how non-dominant groups should acculturate, they have been called *acculturation expectations* (Berry, 2003). Finally to explain what most politicians refer to when speaking about multiculturalism we shall mention about *multicultural ideology* – those are views of a dominant group, of how they themselves should change to accommodate the other groups in their society (Berry, Kalin & Taylor, 1977).

The above three sets of preferences and views are based on the same two underlying issues:

1. the degree to which there is a desire to maintain the group's culture and identity; and
2. the degree to which there is a desire to engage in daily interactions with other ethnocultural groups in the larger society, including the dominant one.

It is clear that the above two issues are implicitly based on the assumption that not all groups and individuals seek to engage in

intercultural relations in the same way (Berry, 1980, 1984). Furthermore it is more than obvious that people differ in how they seek to relate to each other, including their different preferences and alternative ways of eventual assimilation. Two of the above-mentioned issues form four basic strategies of acculturation and expectations and also form basics for multicultural ideologies. Four strategies based on two issues are presented in Figure 1. Issues are claimed to be independent of (ie. orthogonal to) each other¹.

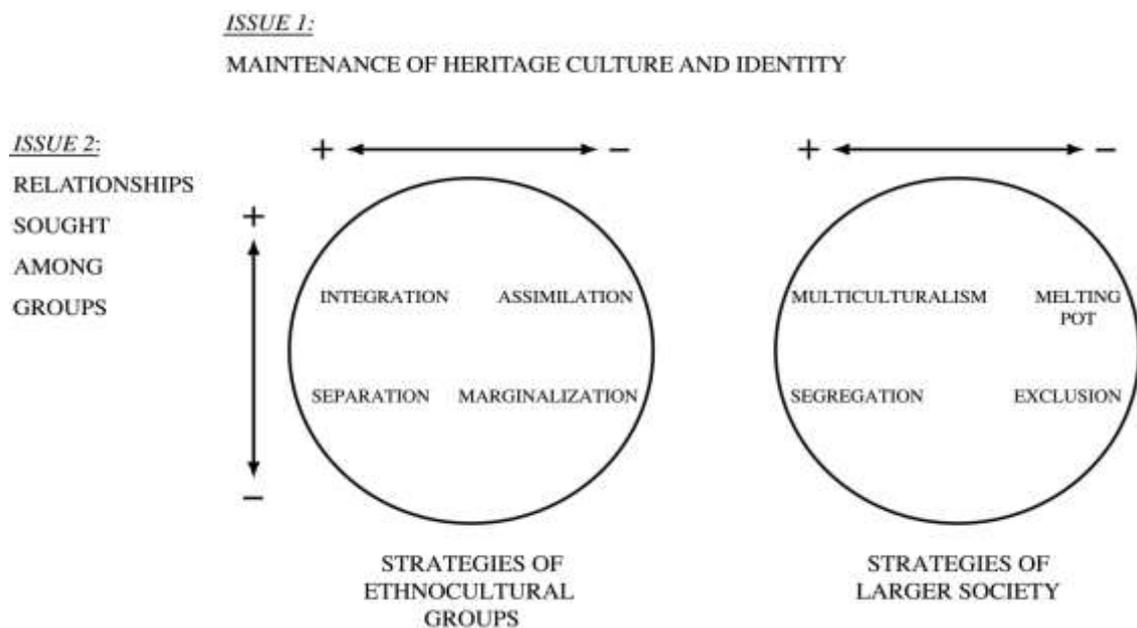


Figure 1. Intercultural Strategies of Ethnocultural Groups and the Larger Society.
(Source: Berry, 2011).

Four strategies carry different names, depending on which ethnocultural groups (the dominant or non-dominant) is being considered. First let us discuss the point of view of non-dominant groups – illustrated on the left of Figure 1. When individuals do not wish to utterly keep on their cultural identity and they search for daily interaction with other cultures, then such strategy is called the Assimilation. In contrast, if individuals place a value on maintaining their original culture, and at the same time they

¹ Their independence has been empirically demonstrated in a number of studies (e.g., Ben-Shalom & Horenczyk, 2003; Ryder, Alden & Paulhus, 2000).

wish to keep away from others' customs, then the strategy is defined as Separation.

On the other hand, there are two strategies based on pros or cons. When someone reveals an interest in both maintaining one's original culture and in daily interactions shows interest and respect to the rights and customs of other groups, such a strategy is called an Integration. It is important to explicitly explain that in this case, there is some degree of cultural integrity maintained, while at the same time seeking, as a member of an ethnocultural group, to participate as an integral part of the larger society.

Finally, when someone has small possibilities or interest in cultural maintenance (often for reasons of enforced cultural loss), and on the other hand reveals little interest in having relations with others (often for reasons of exclusion or discrimination) then such strategy is called Marginalization.

The above distinction was based on the assumption that non-dominant groups and individuals belonging to them have freedom and may choose how they prefer to acculturate. However this is not always the case. Sometimes the dominant group enforces certain forms of acculturation, or limits the choices of minority groups or their members. In such situations the power of the dominant group to influence the acculturation strategies available to, and used by, the non-dominant groups shall be additionally considered. The above presented model is some kind of simplification and it is obvious that acculturation strategy is a mutual and reciprocal process through which both groups (dominant and non-dominant) go through.

Arriving at strategies that will work in a particular society and in a particular setting is a task for all groups of plural society. To give an example, Integration can only be chosen and fruitfully pursued by non-dominant groups if the dominant culture is open and inclusive in its orientation towards cultural diversity. Hence it is clear that mutual accommodation is required for Integration to be successful and the acceptance of both groups of the right of all groups to live as culturally different peoples is a must. From the practical point of view this strategy requires non-dominant groups to adopt and respect the values and customs of the larger society, while simultaneously the dominant group shall be prepared to adapt national institutions (e.g., education, health, labor) to better meet the needs of all groups living together in the plural society. Especially because the lack of such adaptation leads to exclusion which may threaten all the multicultural processes.

The above analysis has been prepared from the point of view of non-dominant ethnocultural group and has been described by the left part of Figure 1. Let's have a look now at the strategies for dominant group portrayed at the right side of Figure 1. The outcomes of the analysis are similar and analogous to the previous one. Assimilation strategy of non-dominant groups, when sought by the dominant group is called the 'Melting Pot'. This strategy means that dominant group highly respects incomers and do not influence their way of life and at the same time do not strongly stresses and values its own dominant culture. Further going through the analysis: when the dominant group forces Separation or individuals of non-dominant group prefer such strategy then such solution from dominant's cultural point of view may be called Segregation. Marginalization imposed by the dominant group or chosen by members of non-dominant group shall be called Exclusion. Finally when cultural diversity is a feature of the society as a whole, including all

the various ethnocultural groups and maintaining own values and customs of dominant group, Berry calls this strategy Multiculturalism.

With the use of Berry's framework, comparisons can be made between individuals and their ethnocultural groups, and between non-dominant peoples and the larger society within which they are acculturating. Numerous studies with immigrant, indigenous and ethnocultural populations have shown these four orientations to be present in individuals engaged in intercultural relations (Sam & Berry, 2006; Berry, Phinney, Sam & Vedder, 2006; Berry, Kalin & Taylor, 1977; Berry & Kalin, 1995).

Different Approaches to Multiculturalism

Berry's model delivers the framework to prepare a comparison of different political and ideological approaches. Although, as it has been stated above, many countries and politicians called their policies and practices 'Multicultural promoting', the apparent and important differences between them exist. According to Berry's model not all of the policies shall be called 'Multicultural'; some may be named as 'Melting Pot' and others as 'Segregation' strategy. Of course not every policy may clearly and without failure be classified as one of the four strategies indicated by Berry. Nonetheless some clear differences may be indicated and that is what I would like to do now.

In the latest western discourse most doubtful opinions about multiculturalism appear in France, UK and Germany. However, multicultural issues appear regularly also in Canada, Australia, Scandinavia, USA, Spain or Balkan countries where pluralism is sometimes viewed as a resource and sometimes as a threat. Obviously, post-colonial countries, whose borders have been painted on the maps dividing traditional tribal areas into two separate countries also

experience some problems rooted in multiculturalism. The list of countries which deal with the multiculturalism phenomena is very long and there is no point in mentioning all of them here.

It is very important to note that the multicultural policy of dominant group consists not only of the official political instruments used by local official administration but is also strongly influenced and created by societal approach. As it has been mentioned before this what non-dominant groups experience is not only the effect of political instruments of the host country but also, and sometimes even stronger, is influenced by more soft in nature approach of dominant cultural group. Even most complex and best organizational solutions will not be fully efficient if the dominant society is skeptical about non-dominant ethnogroups.

Having in mind the above remark I would like to start considering French, English and German multicultural policy. German immigrants are mostly economical immigrants and people invited by German government in '60 and '70 of XX century (*Gastarbeiters*). The idea was to invite guest workers to do the most simple or dangerous jobs and those workers were expected to come back to their home-countries. German government did not prepare any wide-spread and solid language, culture or customs teaching, nor any other form of special education aimed at newcomers. In effect this policy caused huge immigration of people who were not trained at welcoming culture. In effect immigrants created their own ghettos. Newcomers mostly lived and live in separate places to 'natural' Germans. Although this policy has been called multiculturalism, according to Berry's model it shall be called Segregation. Very important part of this analysis is previous remark: attitude of welcoming society toward incomers was not hospitable. Germans assumed that Turkish, Kurdish and other individuals will come to their country only for the period of their work and after that they shall come back to their homelands.

New-comers were unwanted neighbors and non-full-members of German society.

Similarly France and UK are the final destination of many economic immigrants especially from former colonies. And similarly to German solutions, French and UK administration was rather not willing to support new-comers with language or culture training or such trainings were mostly ineffective. Effects are similar to German effects: separation of newcomers and numerous cultural misunderstandings, disputes and stereotypes. Again those two countries, whose politicians now announce retreat from multiculturalism, are another examples of societies rather culturally segregated than multicultural. Spanish culture with its Moroccan minorities could be analyzed in similar way. All those countries were previously quite homogenous and in the last century they were destination of many immigrants whose assimilation failed and those societies' policies are much closer to segregation strategy (including official administrative tools as well as more soft societal approach) than it seems to their politicians and dominant society members.

On the other hand we have societies who were not created as homogenous but were destinations of diverse migrations: Canada, USA and Australia. Although they seem to have the same history it turns out that different migration policies as well as 'multicultural' approaches created different plural societies. American society with its 'racial' problems and strong cultural problems shall be called rather 'Melting pot' society than typical 'Multicultural' society. On the other hand in Canada and Australia new-comers are encouraged to maintain their homeland identity however it is also required that they respect local customs and culture. This policy results in relatively low cultural tensions and high levels of openness of society to diversities and pluralism. This

makes Canadian and Australian societies close to the Berry's Multiculturalism ideas.

Maybe this is the way to multicultural societies? Maybe this idea may work only if the society is created from different and equally important cultures and groups? The example of Scandinavian countries reveals that equality of various groups is not a must to create multicultural society. Scandinavian cultures, previously highly homogenous (no important colonization experiences, no empire aspirations) are now one of the best examples of relatively successful multicultural societies. Level of cultural diversity in Scandinavia is one of the highest in Europe and on the other hand the cultural tensions in those countries are one of the lowest. What is the key factor leading to such result? Very often it is stressed that Scandinavian immigration regulations were based on efficient teaching of Scandinavian languages (reducing one of the biggest barriers for new-comers) as well as efficient teaching of Scandinavian culture, customs and tradition. Furthermore, a very important part of migration approach was supporting new-comers in such a way that they had equal chances to the original Scandinavians. New-comers had equal social support as well as young new-comers have equal education chances to their Scandinavian peers. The third crucial part of successful multicultural society is openness to newcomers. Figure 2 illustrates approach to immigrants among European societies. Finland, Denmark, Norway and Sweden (Iceland is not included in this research) are among those societies who are most open to immigrants. This means that not only administration tools helped new-comers but also soft societal approach was/is supportive to the idea of real multiculturalism.

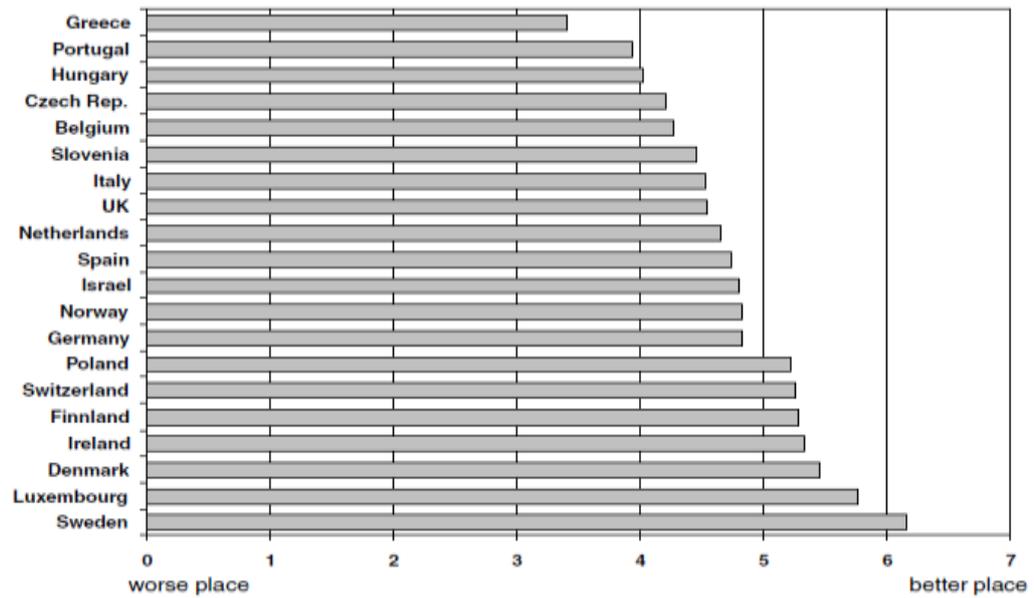


Figure 2. Mean (dis)agreement with the item "Immigrants make (country of respondents) a worse or better place" in the European Social Survey 2002 (0 = worse place, 10 = better place) (Source: Zick, Pettigrew, & Wagner, 2008)

To summarize the above: taking into consideration actual and real actions of administration as well as actual and real societal attitudes allows to distinguish between real Multicultural approach (respect to dominant culture as well as to non-dominant groups and cultures of new-comers) and approaches that are called Multiculturalism but shall be classified rather as Segregation. Table2 summarizes the above outline of analysis.

Table 2. Actual approaches to cultural pluralism in different countries

Multiculturalism	Melting Pot	Segregation
Canada	USA	Germany
Australia	Yugoslavia (before war)	France
Norway	Albania	UK
Sweden	Macedonia	Spain
Denmark		
Finland		

The problem with Multiculturalism is based on the problem of correct naming of some phenomena. Segregation policies are inefficient and in the long-term they lead to civil problems and tensions. To solve the problem with Multiculturalism we shall accurately name the policies and distinguish which policies are productive (Multiculturalism) and which are counterproductive (Segregation). This task has been done above.

Individual Human Rights and Multiculturalism

As has been mentioned earlier, more and more voices and opinions appear that the idea of multiculturalism is contradictory to the idea of individual human rights. Most arguments are raised on the examples of Islamic culture whose customs are different to western cultures (yet western cultures also differ among themselves). However none of those arguments seem to be reasonable.

Europe in recent centuries has experienced a couple of religious and cultural tensions or even wars. From the historical distance none of the reasons of those tensions was significant. Religious or cultural reasons from historical perspective appear to be only pretexts or excuses to tensions or wars. There is no reasonable evidence that people from different cultures may not live together in the same society. The only case is to respect all cultures living in plural society: both dominant and non-dominant cultures.

Of course extreme individuals live in each society. Finding scapegoats (for the sake of one's failures) in the groups of 'others' is one of the best described primitive psychological mechanisms of enhancing self-esteem. However, if there are no 'other' cultures around, then the role of scapegoats will be given to another out-group (women, blonde, with moustache, without beard, freckled). This means that multiculturalism is

not a problem but the real problem is extremism and people with unstable self-esteem. Such people are responsible for social tensions and most real acts of aggression (for analysis of real acts of aggression see: Baumeister 1997).

Multiculturalism is respecting each other (no matter what is the culture of origin) and giving equal chances to new-comers. The best example of this phenomenon is the above mentioned case of Scandinavia. Real chances mean not only administrative tools but also real societal favorable approach. Individual Human Rights in societies who introduce real idea of Multiculturalism (according to Berry's model) may be fully respected and fruitfully developed. There is no reasonable threat to human rights in multicultural societies.

Threats to Human Rights appear in plural societies who have problem with their plurality: in segregating or excluding societies. Those concepts are a real threat to what we understand under the term of Human Rights and this is what we should be afraid of. Furthermore, ideas that Multiculturalism is a threat to Human Rights are typical for segregation solutions... which in turn lead to threat to Human Rights.

To summarize: taking into consideration Berry's model of intercultural relations, it becomes easy to analyze different solutions and policies and to assess which policies are successful and which are threatening to modern plural society. Taking into consideration Multicultural society - described as respecting customs and tradition of dominant culture as well as supporting minority cultures - there is neither clash with, nor threat to individual Human Rights. On the other hand, policies which are sometimes wrongly called multicultural, but are in their essence closer to Segregation policies, are a real threat to basic individual Human Rights.

That is why we need to better understand what real Multiculturalism is and what are the ways that lead to it. We should just learn from those who have managed to build successful Multicultural societies.

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Realization of Economic, Social and Cultural Rights in the light of a Social Market Economy: The Case of the Right to Social Security

Samireh Ahmadi* & Faraz Firouzimandi**

Abstract

In 1966, considering the ideological atmosphere that existed between the East and the West, and the paradoxical differences in the definition of Human Rights by these two ideologies, the United Nations set up an "International Covenant on Civil and Political Rights". But we cannot care much about our political rights if we do not have enough to eat. Obviously, economic and educational inequalities hinder the use of our political rights. There is much more to human life than 'just' politics. Hence the United Nations compiled a second set of human rights, "The International Covenant on Economic, Social and Cultural Rights".

Unlike civil and political rights, economic, social and cultural rights need state intervention for full realization. According to the requirements of Economic, Social and Cultural Rights, the state has to provide basic infrastructure, for example the provision of health services, free education for all, social security and welfare services. Furthermore, the state has to also care about the people who are unable to participate in the market process because they are sick or cannot find a job or are too old. For these people, the state should offer some basic security system in the form of insurance or compensation systems.

On the other hand, according to the principles of social market economy which this paper tries to unpack, the state bears the role of the provider of order. It has to create a framework of governance, a system of preconditions which enables the economic players to act with as much freedom as possible and as much solidarity as necessary. The state

* Samireh Ahmadi has an MA in British Studies, Faculty of World Studies, Tehran University, Iran.

** Faraz Firouzimandi is Head of Department of Law, Payame-Noor University, Sanandaj.

is a firm referee who supervises the compliance with the rules, but who is not a player in the game itself. This study seeks to examine the relationship between the realization of Economic, Social and Cultural Rights: The Right to Social Security with the existence of a social market economy.

Introduction

From 1948, after the adoption of Universal Declaration of Human Rights (UDHR), it has been always a universal concern of the world community how to crystallize the norms embodied in UDHR into legally binding human rights instruments. However, due to the ideological division of the time between the East and the West, the efforts led to two distinct categories of rights, the Covenant on Civil and Political Rights as well as the Covenant on Economic, Social and Cultural Rights in 1966.

One of the striking differences between the Civil and Political Covenant and the Economic, Social and Cultural Covenant is the assigned role to the states in realization of these rights. The Civil and Political Rights, known as Negative Rights, require non-interference by the states whereas the Economic, Social and Cultural Rights, known as Positive Rights, require actions by the states for their full realization and relate to the obligations necessary to ensure the enjoyment of these rights.

Economic, Social and Cultural rights (ESC rights or ESCR) in international law include a variety of rights, such as: (i) the right to work and to just and favorable conditions of work; to rest and leisure; to form and join trade unions and to strike; (ii) the right to social security; to protection of the family, mothers and children; (iii) the right to an adequate standard of living, including adequate food, clothing and housing; (iv) the right to the highest attainable standard of physical and mental health; (v) the

right to education; and (vi) the right to participate in cultural life and enjoy the benefits of scientific progress.

As it can be seen from the above, one of the most important rights mentioned in this Covenant is the right to social security. The Committee of Economic, Social and Cultural Rights acknowledges that the fundamental importance of social security for human dignity and the legal recognition of this right by State parties mean that the right should be given appropriate priority in law and policy.

According to the Article 2 (1) of the ICESCR (the International Covenant on Economic, Social and Cultural Rights), the State parties to the Covenant must take 'effective measures', and periodically revise them when necessary, within their maximum 'available resources', to fully realize the right of all persons. Also, the State parties are required to utilize all the appropriate means, including the adoption of 'legislative measures'.

The authors of the paper believe that the adoption of legislative measures, which need the assignment of an effective role to the state, require the utilization of an efficient social and economic order. Thus, the state should bear the role of the provider of order and it has to create a framework of governance, a system of preconditions which enables the economic players to act with as much freedom as possible and as much solidarity as necessary. The state is a firm referee who supervises compliance with the rules, but who is not a player in the game itself. These are the frameworks for a 'Social Market Economy', a socio-economic model which the authors try to unpack.

Therefore, the main idea is to illustrate how effectively the right to social security would be realized in the case of a social market economy. In

doing so, the successful experience of UK in implementing a policy (from 1997 to 2007) of social market economy principles and the promotion of the enjoyment of the right to social security would be discussed in brief.

The International Legal Protection of Economic, Social and Cultural Rights (ESCR)

Economic, Social and Cultural Rights (ESCR) are protected in several international human rights treaties, the most comprehensive of which is the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹. ESC rights include the rights to work and to just and favorable conditions of work; to rest and leisure; to form and join trade unions and to strike; to social security; to protection of the family, mothers and children; to an adequate standard of living, including adequate food, clothing and housing; to the highest attainable standard of physical and mental health; to education and to participate in cultural life and enjoy the benefits of scientific progress (Articles 6–15 ICESCR).

The effective respect, protection, and fulfillment of these rights are an important – and under-explored – component of international human rights. This is despite the fact that the Universal Declaration of Human Rights (UDHR, 1948) recognized two sets of human rights: civil and political rights, as well as ESC rights. In transforming the provisions of the UDHR into legally binding obligations, the UN adopted two separate but interdependent covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two covenants, along with the UDHR, constitute the core of the international human rights law.

¹ M. Senyonjo, *Economic, Social and Cultural Rights: An Examination of State Obligations*, In S. Joseph, & A. Mcbeth (eds), *Research Handbook on International Human Rights Law*, 2010, Edward Elgar Publishing, p. 36.

Overview of the ICESCR

The ICESCR is divided into five parts. Part I (Article 1) recognizes the right of all peoples to self-determination. Part II (Articles 2–5) contains general provisions that apply to all substantive rights under the Covenant which is going to be further illustrated below. This includes Article 2(1) that defines the general nature of state parties' obligations, Article 2(2) dealing with non-discrimination, Article 3 on equal rights for men and women, and Articles 4 and 5 focusing on general limitations. Part III (Articles 6–15) deals with the specific substantive rights such as the right to work, to health and education. Part IV (Articles 16–25) focuses on international implementation and the system of supervision. Part V (Articles 26–31) centers on the ordinary provisions of a human rights treaty relating to the ratification, entry into force and process of amendment of the Covenant.

State Obligations under the ICESCR

Article 2(1) of the ICESCR is fundamental to the understanding of state obligations with respect to ESC rights since it is the general legal obligation provision. Under Article 2(1):

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

As it is observed, the language of the Article is weak and vague on the process of implementation and assessment as to whether a state has complied or infringed its general obligation to protect rights under the

Covenant of a particular individual². The obligation of state parties under Article 2(1) is subject to the availability of resources and is to be realized progressively. In the context of individual and collective communications, how would the CESCR apply the obligation under Article 2(1) 'to take steps . . . to the maximum of its available resources' to achieve progressively the full realization of the rights recognized in the Covenant? ³. More particularly, how would the CESCR decide whether a state should have spent more on education relative to social security, health, housing, water or food? Thus, it was necessary for this article to be interpreted in light of its object and purpose.

However, the nature and scope of the State parties' obligations under the Covenant, including the provisions of Article 2(1) ICESCR above, and the nature and scope of violations of ESC rights and appropriate responses and remedies have been examined by groups of experts in international law who adopted the "Limburg Principles on the Implementation of the ICESCR" in 1986, and the "Maastricht Guidelines on Violations of Economic Social and Cultural Rights" in 1997⁴. Although the Limburg Principles and Maastricht Guidelines are not legally binding per se, they may arguably provide 'a subsidiary means' for the interpretation of the Covenant.

² F. Coomans, and F. Van Hoof, *The Right to Complain about Economic, Social and Cultural Rights*, 1995, Utrecht: SIM Special No .18, 1995, pp.103–6.

³ M. Craven, *The Justiciability of Economic, Social and Cultural Rights*, Quoted in R. Burchill, D. Harris and A. Owers (eds), *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law*, 1999, University of Nottingham Human Rights Law Centre, pp 1–12 at 5 (footnotes omitted).

Craven has expressed the position as follows:

"Article 2(1) itself is somewhat confused and unsatisfactory provision. The combination of convoluted phraseology and numerous qualifying sub-clauses seems to defy any real sense of obligation. Indeed it has been read by some as giving States an almost total freedom of choice and action as to how the rights should be implemented".

⁴ E. Dankwa, C. Flinterman, & S. Leckie, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", *Human Rights Quarterly*, 1998, vol. 20, pp.705-30.

Moreover, the CESCR has also in numerous general comments spelt out the content of the obligations and rights under the Covenant, to which no state has ever raised any formal objections. More specifically, the scope of this obligation was clarified by the CESCR in 1990 in General Comment 3 on the nature of states parties' obligations. An interpretation which was offered for the Article 2 (1) of the Covenant according to the Limburg Principles was as follows:

Article 2(1): "to take steps . . . by all appropriate means, including particularly the adoption of legislation".

At the national level State parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfill their obligations under the Covenant⁵. Also, the Committee of ESCR in its General Comment 3 has specified that: "The Committee notes that the undertaking "to take steps . . . by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach...".

As it can be observed, neither the Covenant, nor the Limburg Principles and the General Comment offer straight forward socio-economic

⁵ These Principles have been issued as an official United Nations document (UN Doc E/CN.4/1987/17); they have also been published in (1987) 9 *Human Rights Quarterly* 122–35 and in the [1986] *Review of the International Commission of Jurists* No 37, December, 43–55., Para. 17.

models on how the ESC Rights should be fulfilled by the states. This can be justified as they are international documents which aim to avoid any bias to a special model either socialist or capitalist. In the present paper, acknowledging the obligations of states to provide propitious conditions for the realization of ESC Rights, the authors seek to find out the most efficient socio-economic model according to which all the ESC Rights, in particular the fundamental right to social security can be realized.

The Human Right to Social Security

In the traditional societies, there had been many different roles for the institution of family. In the agrarian societies, despite either having the ownership of land and water or working on the landlords' or governments' lands, the family had different patterns of production - consumption and production almost corresponded with consumption. In urban societies, there was no such correspondence between production and consumption. The male was the bread-winner of the family and the role of women and children were fundamentally distinct from that of the agrarian society.

The industrialization process in the 18th century had some major effects on the functions of family. The formation of industrial factories and mechanized ways of farming made the peasants migrate to urban societies. These migrations along with the formation of new urban conglomerations adjacent to the industrial factories introduced new kinds of social relations to which the traditional family and traditional ways of protection were not efficient to respond positively.

The metamorphosis following the industrial revolution such as the substitution of manual labor with mechanical labor, created new economic, social, cultural, political and even educational patterns fundamentally distinct from those of the past. As a result, the efficiency in

the process of production increased tremendously which benefited the mechanical labor more. In this condition, two major classes sprang up, the poor and the rich. The former owned the manual labor while the latter was the owner of mechanical labor. This was the time when the worker class was born as an offspring of the industrial revolution. So far, this class has attempted much in gaining more benefits from these industrial achievements. Day by day, the socio-economic gap between the workers and employers increased which led the workers to be interested in Marxist discussions favoring the working class.

This increasing tendency among the working class toward Marxism paved the way for some resilient actions by the employers and made them provide arrangements which according to their liberal ideas were impossible at that time. In doing so, Otto Van Bismark alerted the capitalists and passed the first principles on social insurance in Germany. Thus, the capitalist system of the time commenced a departure from its traditional beliefs toward adopting some Marxist principles and "social security" was the rightful offspring of this liberalism shift. Generally, social security is defined as the protection a society provides to individuals and households to ensure access to health care and to guarantee income security⁶.

Social Security as a Fundamental Right

Several international instruments affirm that every human being has the right to social security. They were all adopted between the end of World War II and the mid-1960s. The Declaration of Philadelphia, adopted in 1944 by the International Labor Conference, recognized ILO's obligation "to further among nations of the world programs which will achieve ...

⁶ E. Reynaud, *The Right to Social Security- Current Challenges*, In E. Riedel, *Social Security as A Human Right: Drafting a General Comment on Article 9 ICESCR- Some Challenges*, Berlin, 2007, Heidelberg: Springer, pp.5-7.

the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care" (para. III (f)).

The Universal Declaration of Human Rights, adopted in 1948, states that "everyone, as a member of society, has the right to social security ..." (Article 22) and refers explicitly to several specific rights (Article 25). The International Covenant on Economic, Social and Cultural Rights, in 1966, recognizes "the right of everyone to social security, including social insurance" (Article 9).

In 2001, the International Labor Conference composed of representatives of States, employers, and workers, affirmed that social security "is a basic human right and a fundamental means for creating social cohesion"⁷. However, the most broad and comprehensive approach regarding the right to social security has been provided under Article 9 of CESCR. According to this Article, "The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance".

The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights. Despite the significant importance of Article 9 of the Covenant which had focused on the right to social security, it was provided in its shortest form which was attracting less than its fair share of attention in scholarly literature. But experience has shown how the quality of state commitments in reporting to the Committees would improve after the adoption of a General Comment. Thus, the ESCR Committee adopted the General Comment No. 19 "The Right to Social Security" on Article 9 of

⁷ International Labor Conference, 89th session, Report of the Committee on Social Security.

the Covenant in order to provide a tool for normative development or standards setting, although not formally binding.

General Comment No. 19 stresses that, "State parties are obliged to adopt all appropriate measures such as legislation, strategies, policies and programs to ensure that the specific obligations with regard to the right to social security will be implemented...". However, it should be noted that due to the silence of the Covenant and the following General Comments regarding the most suitable socio-economic model which can be practical in fulfilling ESC Rights, the authors of the paper seek to introduce a socio-economic model which theoretically has proved to be an efficient model in realizing ESC Rights and in particular the right to social security. In doing so, the "Social Market Economy" would be introduced as the most suitable socio-economic model. Also, the experience of UK in following such a model which led to an increase in UK social security efficiency would be discussed.

Social Market Economy as the most Efficient Socio-Economic Model in Realization of the Right to Social Security

A functioning, reliable and democratically legitimate legal system is the basis for efficient and sustainable economic activity. It creates the preconditions for a strong economy, an efficient and citizen-friendly state administration, and compliance with the principles of good governance. Regulating elements and consistent supervision ensure that rules are adhered to and violations penalized. This is not an end in itself. Regulation is the appropriate and correct approach to shape incentives in a competitive economy in such a way that decentralized competitive activity benefits society⁸.

⁸ Konrad-Adenauer-Stiftung, *Freedom and Order for more Justice*, Amman, Jordan. Available at: www.kas.de. Konrad-Adenauer-Stiftung. 20 August 2009

On the other hand, according to the CESCR, states agreed to guarantee the following:

- The right of social and economic equality
- The right to work and to right to earn a decent wage
- The right of social security and freedom from hunger
- The right to access to basic common goods (e.g. education, health, etc.)
- The protection of human dignity at the workplace
- The protection of labor rights and trade unionism

According to this document, the significant obligation of states to providing efficient social security services is evident. In this section, the authors try to show a direct and positive relationship between the elements of a social market economy and the efficient realization of the right to social security. Thus, first the concept of the social market economy would be unpacked and then its constituent elements would be discussed.

The Concept of Social Market Economy

The model of a Social Market Economy (SME) defines a policy concept of economic order which is based on free markets but, at the same time, includes elements of social balancing. To understand the Social Market Economy, it is important to take into account the historical situation of its genesis. Social Market Economy means a mixture between a classical liberal way of thinking and social, state-managed elements.

The social market's origins reside in post-war Germany and charts the story of the reconstruction of postwar Germany, the revision of moderate

social democracy in Britain in the 1980s, the renewal of social democracy and acceptance of market economics in the 1990s and the contemporary acceptance, though not in name, of social market orthodoxies by the 'New' Conservatives, the New Labor and the Liberal Democrats in UK⁹.

The intellectual theory behind this concept resides in a German school of thought called "Ordo-liberalism"¹⁰. Since the adherents to social market economy claim that "social market includes 'social' component because the 'economy' affects the 'social': 'it was the best means of delivering higher living standards for all, including the poor'"¹¹. 'Ordoliberalism' as a liberal economic theory was first developed in the Nazi-period. Ordo-liberals were also called as German Neo-Liberals and their activities first intensified in 1920's mainly as a response to the political and economic crisis situation in Germany¹². Ordo-liberal thinkers believed that neither the centrally managed economy on the one hand, nor laissez-faire liberalism offered adequate and sustainable resolutions for the problem of post war economic reconstruction of Germany; instead, a Third Way was required and it was here that the conception of a 'Social Market Economy' took root¹³. In the chaotic situation of post-war Germany, the solution which was given by Ordoliberal thinkers consisted in writing an economic constitution which completes the political constitution. It lays the principles for the efficient functioning of markets

⁹ M. Lakin, David Owen, *New Labour and the Social Market Economy: The Renewal of Social Democratic Politics*, 2009, Social Market Foundation , p. 15.

¹⁰ Alfred Muller Armack, *The Meaning Of Social Market Economy*, In A. Peacock and H. Willgerodt, *Germany's Social Market Economy: Origins and Evolution*, 1989, Macmillan Press Ltd., p. xxi.

¹¹ N. Lamont, *Keith Joseph- A Real Compassionate Conservative, Though How He Would Have Hated the Label*, 2007, London: Center for Policy Studies, p. 17.

¹² Umut D. Ozbideciler, " Social Market Economy: An Inquiry into the Theoretical Bases of German Model of Capitalism", A thesis submitted to The Graduate School of Social Sciences of Middle East Technical University, Department of European Studies, Sep. 2003, p. 15.

¹³ Ibid, p. 11.

according to the values protected by society, by means of common determination and control¹⁴.

This economic constitution must realize a competition order that conforms to the principle of 'rule of law' and emphasizes in this way the regulation of public and private economic powers. Thus, it can be inferred that the Social Market Economy seeks a market economic system, rejecting both, on the one hand socialism and centrally planned economy as well as laissez-faire capitalism on the other hand. In contrast to these approaches, it is combining private enterprise with measures of the state to establish fair competition, low inflation, and social welfare. This is also called the "ordo-liberal" approach. Ordo-liberalism is a school of liberalism that emphasizes the need for the state to ensure that the free market produces results close to its theoretical potential¹⁵.

According to Armack, there are four principles of the social market. The first is a refined definition of competition¹⁶. Armack's 'principle of individuality' justifies the competitive market economy to secure the liberal ideal of individual freedom. The freedom to compete and to create wealth achieves prosperity for a society; anything that restricts freedom is detrimental. However, an 'appropriate role for state intervention', harnesses the excesses of the first. Government intervention is viewed as a necessity in the social market in order to extirpate the excesses of big business and the effects of market monopolization¹⁷.

¹⁴ W. Eucken, *The Foundations Of Economics, History And Theory Of Economic Reality*, 1950, London: Hodge, p. 83.

¹⁵ For further study: A. Nicholls, *Freedom with Responsibility: Social Market Economy in Germany 1918-1963*, 1994, Clarendon Press Ltd.; G. Hallet, *Social Economy of West Germany*, 1973, Mcmillan; James C. Van Hook, *Rebuilding Germany: The Creation of the Social Market Economy 1945-1957*, 2004, Cambridge University Press.

¹⁶ For further study: E. O. Smith, *The German Economy*, Routledge Ltd, 1994, A. M. Armack, *The Meaning of the Social Market Economy*, In A. Peacock and H. Willgerodt, *Germany's Social Market Economy: Origins and Evolution*, 1989, Macmillan Press Ltd.

¹⁷ M. Lakin, op. cit., p. 10.

Armack's 'principle of solidarity' refers to the idea that the individual is more than an isolated consumer but part of a gestalt. The second principle reasserts Armack's commitment to a system of social security, which legitimizes income redistribution. This principle can be seen as the 'social' component. It entailed panoply of social policies: assistance for the old and the ill, the handicapped, disabled and the unemployed¹⁸. The third principle details the commitment of the social market to a strict control of the money supply. The theory is that a stable monetary order would help inform investors of an efficient price mechanism. Armack's final principle outlines the ethical and political aspects of neo-classical liberalism¹⁹.

This principle states the necessity of social security. The social security system was to be shaped according to the 'principle of subsidiary', 'which meant that the state would only assist those citizens who could not help themselves'²⁰. This enshrines a commitment to free market values but remains committed to balancing this with a moral and ethical compass. Unlike free markets, the social market ethos rejects the restoration of laissez-faire capitalism, but argues instead for a 'new kind of synthesis'²¹. Armack protested that the social market should not be seen as classical liberalism or Marxism, but produce 'greater personal responsibility and individual freedom' under the rule of law²². Thus, Armack believed that there should be a deliberate attempt to affect the market processes in such a way that it will bring socially positive results and complement it with necessary social policies²³.

¹⁸ G. Hallett, *Social Economy of West Germany*, 1973, London: Macmillan, p. 22.

¹⁹ E. O. Smith, *The German Economy*, 1994, Routledge Ltd., p. 17.

²⁰ H. J. Braun, *The German Economy in the Twentieth Century*, 1990, Rouledge Ltd, p. 177.

²¹ A. Peacock & H. Willgerodt, *Germany's Social Market Economy: Origins and Evolution*. London: Macmillan Press Ltd, 1989, p. 83.

²² Smith, op. cit., p. 18.

²³ K. Zweig, *Origins of the German Social Market Economy: Leading Ideas and Their Intellectual Roots*, 1980, London: ASI, p. 36.

So it can be inferred that Armack tried to establish a totality of social and economic order in which social security is essential and in conformity with the functioning of market economy. The theory of Social Market Economy puts emphasis on the necessity to socially counterbalance or equilibrate the negative market processes by creating 'an institutional framework for 'social equilibration of capitalism' without breaking with the general idea of capitalist order but by defining it new in the light of social interpretations²⁴.

The Elements of a Social Market Economy in Improving the Realization of the Right to Social Security

According to the General Comment no. 19, The Right to Social Security, the social security system should provide for the coverage of the following nine principal branches of social security (para 12): (a) Health care, (b) Sickness, (c) Old age, (d) Unemployment, (e) Employment Injury, (f) Family and child support, (g) Maternity, (h) Disability and (i) Survivors and orphans. Here, the most efficient socio-economic model which can best guarantee the effective realization of these services, i.e. the social market economy which the authors tried to unpack the concept in the previous section, would be discussed. Following, is an elaboration on the elements of a social market economy which can promote the better realization of the right to social security.

Economic activity, according to the rules of social market economy, has to be value-driven. Economic players always have to be viewed as part of a society. The individual takes on responsibility for her/himself and the community. On the other hand, the community has to take responsibility for the individual, should s/he be in need. In this contrasting context,

²⁴ P. Koslowski, *The Social Market Economy: Social Equilibration of Capitalism and Consideration of the Totality of the Economic Order*. In P. Koslowski (Ed.), *The Social Market Economy: Theory and Ethics of the Economic Order*, Berlin: Springer, 1998, p. 82.

social market economy seeks a balance between freedom and responsibility, individual gain and public welfare²⁵.

According to a social market economy, the state bears the role of the provider of order. It has to create a framework of governance, a system of preconditions which enables the economic players to act with as much freedom as possible and as much solidarity as necessary. The state is a firm referee who supervises the compliance with the rules, but who is not a player in the game itself. Generally, it can be held that in a social market economy the state has a much greater role than in a liberal market economy.

According to Armack and Eucken, the founding fathers of social market economy, the following is an outline of social market economy principles²⁶. These elements would be investigated, one by one, to indicate how they would correspond with the prerequisites of the social security and can in fact improve the right to social security.

I. Social Justice

One of the elements of a social market economy is justice. Justice in conformity with social market economy signifies the balance of different types of justice. They may be summed up as a concept seeking to achieve justice, equality, or fairness in every aspect of society. Justice is a very complex matter, so much more difficult to grasp because some aspects of justice have conflicting targets.

²⁵ Konrad-Adenauer-Stiftung, "Guidelines for Prosperity, Social Justice and Sustainable Economic Activity", Available at: www.kas.de/soziale-marktwirtschaft

²⁶ For further study: N. Goldschmidt & M. Wohlgemuth, "Social Market Economy: Origins, Meanings and Interpretations", Springer Science Business Media, published online: 24 June 2008; A. Peacock & H. Willgerodt (Eds.), *Germany's Social Market Economy: Origins and Evolution*, 1989, London: Macmillan, pp. 46-67; L. Andrews, *Liberalism Versus the Social Market Economy*, 1985, Hebden Royd, Hebsen Bridge

The aim of social justice is to develop a peaceful way of living together, to minimize the differences to the greatest possible extent without leveling out the results of different performances, though. Social justice is a relative concept which is really difficult to define. However, it can be understood resorting to some measures.

According to Goodin et al, social justice can best be defined as equal opportunities and equal life chances for all. In a social security system based on social justice, everybody should be equally safe-guarded against the risks of life, for example, illness, accidents, homelessness, unemployment, etc. Equal opportunities mean employment opportunity for all and lifeline educational opportunity for all²⁷. Under the commitment of opportunity for all, women's employment rate would increase. Also, maternity leave provisions and certain assistance and support to child care would be provided²⁸. According to Blair, social justice must be founded on the equal worth of each individual, whatever their background, capability, creed or race. Governments must act decisively to end discrimination and prejudice²⁹.

Another measurement of social justice in a society is efficient income redistribution which would guarantee effective right to social security. Redistribution is based on the ability-to-pay, which can be most effectively accounted for in the tax-transfer-system. The latter includes all sources of income in the tax base without contribution assessment ceiling³⁰. The income distribution which is generated by the market

²⁷ R. E. Goodin, B. Headey, R. Muffels, & H. J. Driven, *The Real Worlds of Welfare Capitalism*. Cambridge University Press, 1999.

²⁸ Jill Rubery, "The UK as a Third Way: The US Model with a Human Face?", Annual Conference, May 1-2, 2008, Boston, MA, p. 9. Available at: <http://ssrn.com/abstract=1134962>

²⁹ Will Leggett, *After New labor: Social Theory and Center-Left Politics*, 2005, Palgrave Macmillan, p. 36.

³⁰ For further study: J. Griggs and F. Bennett, "Rights and Responsibilities in the Social Security System", Oxford: Social Security Advisory Committee Occasional Paper No.6, 2009; Ch. Wolfgramm & I. Laufer, *Social Security Systems in the Social Market*

process may have a higher degree of fairness than other possible distribution schemes but it still does not take care of the social needs of a society. It is the task of the state to redistribute income in a way that takes account of the social needs. Eucken recommends a progressive income tax. A progressive income tax would benefit the less-well-off relative to the better-off. A social security system based on a progressive income tax would help the effective and fair realization of the right to social security³¹.

Opportunity for all has often been neglected or distorted by both the right, who have focused too narrowly on freeing individuals from coercive forms of state intervention, and the left, who have too readily downplayed the state's duty to promote a wide range of responsibilities for individuals to advance themselves and their families. It is a third way between the right and the left, the principles of a social market economy, which can help to fulfill the realization of social justice in a society.

II. Rights & Responsibilities

According to a social market economy, Responsibility is a social value which is essential for a healthy community. In an open society, freedom and responsibility are two inseparable terms. Without responsibility, freedom will degenerate to a state of non-commitment and undermine its own fundamentals. Rights can be seen as both positive; such as the right to legal counsel, or to health care and negative; such as the right to freedom from interference with one's own property³².

Economy, Available at: http://www.kas.de/upload/dokumente/2010/06/60_Years_SME/wlofgramm/laeufer.pdf

³¹ J. Griggs and F. Bennett, "Rights and Responsibilities in the Social Security System", Oxford: Social Security Advisory Committee Occasional Paper, No. 6, 2009, pp. 77-79.

³² E. Brems, *Human Rights: Universality and Diversity*, 2001, Leiden: Martinus Nijhof Publishers, p.446.

Human rights and rights of social citizenship represent two of the various ways of thinking about entitlements. Both these approaches have been used as arguments for economic rights; such as the right to a minimum income, or enough to lead a dignified life and social rights, e.g. to healthcare, education etc., as well as cultural rights³³.

Whereas rights are often enshrined in international treaties and instruments such as the Universal Declaration of Human Rights, this is not usually the case for any responsibilities which rights holders might be thought to have. In fact, as noted above, human rights are often seen as unconditional, and much of the language of human rights implies a rights holder on the one hand and a different 'duty bearer', with responsibilities towards that rights holder, on the other. Rights holders are usually thought of as individuals or families, whilst those with responsibilities for granting these rights are usually seen as institutions; often nation states, which are assumed intrinsically to be in a more powerful position³⁴.

To claim a benefit – whether contributory or non-contributory, non-means-tested or means-tested - implies the existence of a right; and all benefits have some kind of eligibility conditions. All claimants have responsibilities to report their situation accurately, to notify the authorities of any relevant changes in circumstances, not to commit fraud, and so on. Some also have to meet other conditions attached to benefit receipt such as, for example, giving proof of incapacity for work or availability for work. Moreover, contemporary activation policies, which often link rights and responsibilities most explicitly, are the latest in a long history of endeavors to link welfare to work. In this regard, the successful experience of UK in basing its unemployment benefits upon defined rights and responsibilities for the authorities and the claimants can be mentioned. The social market economy seeks to reconnect rights with

³³ Ibid, pp.401-446.

³⁴ Ibid.

responsibilities. The rights we enjoy reflect the duties we owe: rights and opportunity without responsibility are engines of selfishness and greed³⁵.

III. Solidarity

Solidarity which is the fundamental requirement of social market economy is based on human communion. It is the ethical precondition required for the pursuit of common welfare. Putting a common interest before one's personal interest is motivated by the knowledge that common challenges can only be mastered through common effort. A society which has integrated the principle of solidarity into its ethics system can give its members social peace and consequently enjoy stability and long-term success.

The principle of solidarity is not a one-way street. It relies on a system of mutuality in which people contribute as much as they can, because otherwise they would lose their moral right to claim solidarity from others. In this regard, redistributive benefits can be used to see whether or not there has been social solidarity and fair income redistribution to the whole population³⁶.

The overview of fundamental principles of the Social Market Economy has shown that a liberal order does not preclude solidarity that is, helping people in need. On the contrary: guaranteeing a minimum income is essential for the functioning of a liberal society. The liberal order however does not guarantee absolute security. The freedom to choose one's activity and to reap the fruits of one's labor always goes along with the risk to fail. The society cannot avert all individual risks: individual losses

³⁵ Leggett, op. cit., p. 40.

³⁶ For further study: K. Vasak, "The Third Generation of Human Rights: the Rights of Solidarity", *Tenth Study Session of the International Institute of Human Rights*, Stratsburg, 1979; E. Brems, *Human Rights: Universality and Diversity*, 2001, Leiden: Martinus Nijhof Publishers.

have to be answered individually and are not to be socialized. Otherwise there would be no incentive to assume responsibility for one's actions³⁷. Guaranteeing social status for some would go at the expense of others: If, for example, certain jobs are preserved by subsidies the latter have to be financed by taxes. Thus, citizens are forced to pay for the preservation of a company for the products of which they did not have enough willingness to pay in the first place. Likewise, the tax burden leads to job cuts in other companies and/or hinders the creation of new jobs.

Justice can only be understood as justice of rules and procedures if all individuals should be treated equally and if their liberties should be respected. If these general rules are accepted, the only important action is to guarantee a minimum standard of living for the needy. This minimum living standard is financed by taxes which are paid in accordance to the respective individual's ability-to-pay. Further redistribution would create privileges for some groups of society at the expense of others without justification³⁸.

There are good reasons for supplying the needy not only with subsistence aids but also with access to medical treatment. Both have to be financed by society. It is however important to bear in mind that this can only mean equal access to a minimum health benefits basket defined by society. Equalizing all health status is neither possible nor desirable in a world of scarce resources. Solidarity with the needy should however not imply governmental intervention in the health care sector at the expense of market forces. On the contrary, relying on market forces with the resulting improvement in efficiency can lead to more justice in the health sector.

³⁷ For further study: A. J. Nicholls, *freedom With Responsibility: The Social Market Economy 1918-1963*. New York: Clarendon Press, 1994.

³⁸ W. Brown, "The Process of Fixing the British National Minimum Wage", *The British Journal of Industrial Relations*, 2009.

IV. Compulsory Insurance

A compulsory insurance benefit is one of the most important pillars of a social market economy³⁹. Following the principle of consumer sovereignty, citizens should principally be free to choose which risks to insure and in which way. However one can find reasons for compulsory insurance in the health care sector. Compulsory insurance is a means against unjustified utilization of minimum benefits. Otherwise citizens could have the incentive not to provide for illness, despite having sufficient financial means for insurance. They count on help from society in case of emergency.

Compulsory insurance requires no government intervention in the form of a statutory insurance. It can be left to the individuals which insurance to choose. Governmental action is only needed for the definition of the minimum health basket which has to be insured to prevent underinsurance. Citizens who are not able to pay their insurance premium receive financial support. Thereby they are able to act independently in the market. Renouncing totally to individual freedom to choose or to a market solution is therefore not necessary. Within this order, citizens can still choose the insurance which best fits their needs. The National Health Service (NHS) in Britain is a remarkable example of this kind of provision⁴⁰.

V. Social Balance

Social market economy is a market economy combining competition with social balance. Social balance is to a large extent reached by a

³⁹ For further study: S. Sperling, "Easy Guide to Social Market Economy", Friedrich Ebert Stiftung, 2003; Ch. Wolfgramm & I. Laufer, "Social Security Systems in the Social Market Economy", Available at: http://www.kas.de/upload/dokumente/2010/06/60_Years_SME/wlofgramm/laeufer.pdf.

⁴⁰ S. Driver, *New Labour and Social Policy*, In M. Beech, & S. Lee, *Ten Years of New Labour*, London: Palgrave Macmillan, 2008, p. 55.

government policy of re-distribution financed by public revenue. That in turn, consists largely of taxes and other charges levied on the performers of a society. For this purpose the government has to set up an income policy which is structured along social aspects.

One of the means used in social market economy is a progressive income tax supplemented by a system of compensation for loss of income due to illness, unemployment, or old age. This compensation is based on collective social security. The thin line separating the social state from the welfare state is crossed when the individual is relieved from the worry of securing his existence and future. In this case, the principle of subsidiarity is disrespected and the principle of solidarity overly stretched which furthers the spread of an attitude of claiming rights and possessions. National and international performance of an economy would be seriously endangered by the excessive tax burden on citizens⁴¹.

In social market economy, taxes and other levies are essential to the financing of public services such as infrastructure, promotion of the economy, or social benefits. Through the structure of taxes and benefits, the government narrows the range of incomes that would otherwise result from the market. The progressivity of the tax system and the level of social security benefits and tax credits in relation to other incomes are central to this, and to the levels of inequality within social groups of the kind that we have observed throughout our work⁴².

According to the principles of social market economy, all members of a society shall in principle get the same opportunity to develop individually

⁴¹ Ibid.

⁴² For further study: J. Griggs and F. Bennett, *Rights and Responsibilities in the Social Security System*, Oxford: Social Security Advisory Committee Occasional Paper No.6, 2009; J. Griggs and F. McAllister & R. Walker, *The New Tax Credits System: Knowledge and Awareness among recipients*, London: One Parent Families, 2005.

beyond any barriers of class. The result will be prosperity or welfare for everyone which means more than opportunities for consumption but a distribution of wealth within a society by the rule-based market order.

Case Study: The Successful Experience of UK in Implementing the Principles of a Social Market Economy, 1997-2007

In 1997, the Labor Party was elected in the UK with few explicit and specific ideas about welfare reforms. Since 1997, the largest set of changes to the social security system has been carried out in Britain⁴³. Blair's self-described 'New Labor' government is openly committed to a radical and modernizing reform of the British state apparatus and its economic and social policies.

The 1997 Labor election manifesto stated that "We will be the party of welfare reform". Blair's introduction to the manifesto claimed that: "in each area of policy a new and distinctive approach has been mapped out, one that differs from the old left and the Conservative right". Labor made large claims about welfare reform⁴⁴. Also, the main aims of the 2001 manifesto⁴⁵ were: prosperity for all, world-class public services, a modern welfare state and strong and safe communities. Investment and reform in public services were at the heart of the manifesto.

Blair's modernization and revision of policies was promoted under the aegis of the 'Third Way'⁴⁶. The third way doctrine was most commonly articulated by New Labor between 1998 and 2000. The third way can be summarized by accepting "traditional social democratic objectives but

⁴³ P. Kemp, Social Security and Welfare Reform Under New Labour, In M. Powell, L. Bauld, & K. Clarke, *Social Policy Review 17: Analysis and Debate in Social Policy*, Bristol: The Policy Press, 2005, pp. 15-32.

⁴⁴ M. Powell, *New Labour, New Welfare State? The Third Way in British Social Policy*. Bristol: The Policy Press, 1999, pp. 281-2.

⁴⁵ Labour Party Manifesto, *New Ambitions for our Country*, London: Labour Party, 2001.

⁴⁶ Lakin, *op. cit.*, p. 33.

seeks to think afresh about the policies used to realize them"⁴⁷. According to Fielding however, the third way was a 'pragmatic shift' to 'take account of change' in a long line of developmental social democratic revisionism⁴⁸. The third way therefore conceives that socialism, like capitalism, is subject to change. However, many believe that the third way is much the same as the social market in the determination to renew and update social democratic thought in an age of markets and globalization. Both concepts should be seen as tool concepts, to allow center-left parties and politicians to accept and update elements of neo-liberalism without necessarily succumbing to it⁴⁹.

In Britain, Blair looked to establish a hybrid version of the social market through a mixture of rights and responsibilities for trade unions and employees, underpinned by a commitment to employment opportunities for all⁵⁰. Therefore, Blair's vision of a social market was conceptually synonymous with third way thinking. The articulation of social market economy principles can be traced from Third Way policies of the New Labor in which social security had a great role. The New Labor government in Britain proved that efficient reforms in its social security system did improve the right of British citizens to social security services. The New Labor, by increasing means-tested benefits rates raised income support rates for families with children and for pensioners, and support for low-paid families with children since 1997⁵¹.

During the New Labor in government, an increase is evident in social security spending as a positive endorsement of the system and part of a

⁴⁷ Ibid.

⁴⁸ S. Fielding, *The Labour Party: Continuity and Change in the Making of New Labour*. London: Palgrave Macmillan, 2003, p. 84.

⁴⁹ Lakin, *op. cit.*, p. 34.

⁵⁰ V. Bogdanor, *Social Democracy*, In A. Seldon, *Blair's Britain*, 2007, Cambridge University Press, p 224.

⁵¹ M. Brewer, T. Clark, & M. Wakefield, "Social Security under the New Labour: What did the Third Way Mean for Welfare Reform?" London: Institute for Fiscal Studies, 2002, pp 9-10.

poverty reduction agenda⁵². Spending on social security benefits rose from 1996/97 to 2005/06 by over 50% in cash terms, and by nearly one quarter (22.5%) after adjusting for inflation. As it was mentioned before, the commitment to equal opportunity for all is one of the significant indicators of social justice. The New Labor commitment to equality of opportunity came early in their first administration⁵³. The need for positive discrimination for minority ethnic communities underlined this commitment. The objective was not to challenge the basis of merit by reversing patterns of discrimination; the government's goal was to open up opportunity for all.

One of the elements to understand the criterion for "Opportunity of All" is to look at women's employment rate. UK has moved towards providing support for equal opportunities for women by considerably improving maternity leave provisions and assistance with childcare, both through the provision of tax credits and through the national childcare strategy to increase the supply of childcare places⁵⁴. These improvements in leave and childcare have been complemented also by improvements in paid holiday entitlements, linked to the working time directive; when initially implemented in 1998 it provided for a minimum of 20 days paid holiday for everybody, but the minimum is in the process of being increased to 28 days to include public holidays⁵⁵.

Another right recently introduced is that of requesting to work flexible or reduced hours when one has a child under six or is responsible for a sick

⁵² M. Powell, *Modernizing the Welfare State; The Blair Legacy*, Bristol: The Policy Press, 2008, p. 54.

⁵³ For further study: M. Powell, *Evaluating New Labour's Welfare Reforms*, 2002, The Policy Press.

⁵⁴ K. Clarke, *New Labour: Family Policy and Gender*. In C. Annesley, F. Gains, & K. Rummery, *Women and New Labour: Engendering Politics and Policy?*, 2007, Bristol: The Policy Press.

⁵⁵ D. Smeaton, & A. Marsh, publications, Retrieved Dec. 22, 2010, from UK Department for Business, Innovation and Skills: <http://www.dti.gov.uk/files/file27446.pdf?pubpdfload=0.6%2F836>, 2005.

or elderly adult. Employers have a duty to take the request seriously and provide reasons for refusing any such request⁵⁶. The figure (Figure 1) below shows the trend toward more female employment under the New Labor.

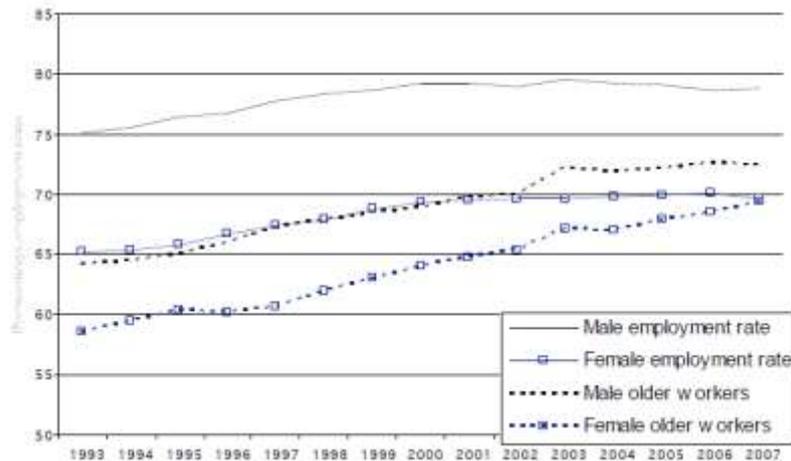


Figure 1: Trends in Employment Rate
Source: Department of Work and Pensions, 2008

Another important measurement of social justice which is poverty reduction is evident in the era of the New Labor. The Labor government that came to power in 1997 inherited levels of poverty and inequality unprecedented in post-war history. More than one in four UK children lived in relative poverty, compared with one in eight when Labor had left office in 1979⁵⁷. Poverty among pensioners stood at 21%. Income inequality had widened sharply: in 1979 the net incomes of the top tenth of the income distribution were about five times that of the bottom tenth; by the mid-1990s, that ratio had roughly doubled⁵⁸.

Although New Labor has rarely emphasized the redistributive impact of its tax-benefit policies, these have always been a vital component of its

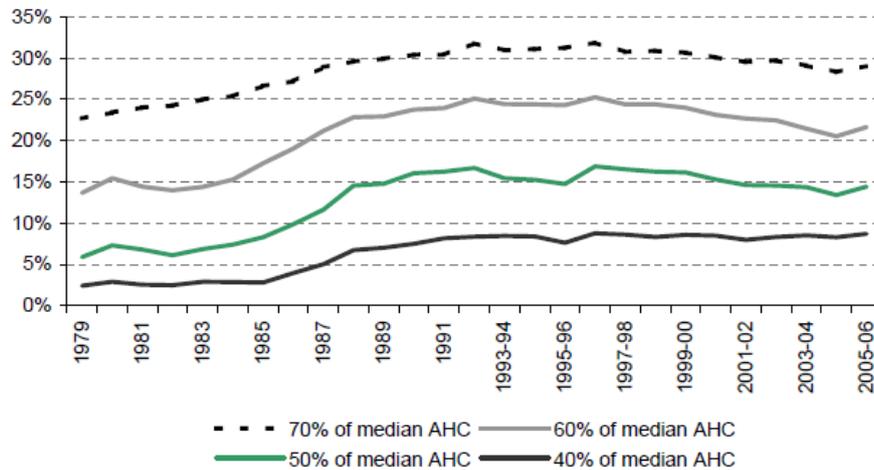
⁵⁶ J. Rubery, *Industry Studies 2008*. Retrieved Dec. 20, 2010, from Alfred P. Sloan Foundation: <http://web.mit.edu/is08/program>

⁵⁷ Department of Work and Pensions (DWP), At: <http://www.dwp.gov.uk/>

⁵⁸ J. Hills, T. Sefton & K. Stewart, *Towards a More Equal Society: Poverty, Inequality and Policy since 1979*, 2009, The Policy Press, p. 347.

anti-poverty strategy in combination with a range of other policies designed to improve the life chances of the poorest, including the early years agenda, targeted measures to raise educational standards in the most deprived neighborhoods, and welfare to work programs⁵⁹.

As a result of combating poverty, the levels of pensioner poverty have been significantly reduced. The proportion of pensioners living in low-income households has been falling throughout the last decade, from 29% of all pensioners in 1996/97 to 17% in 2005/06. Pensioners are now less likely to be living in low-income households than non-pensioners.



Note: Figures are presented for GB up until 2001-02 and then for the whole of the UK from 2002-03 onwards.

Source: Authors' calculations based on Family Expenditure Survey and Family Resources Survey, various years.

Figure 2: Relative poverty for the population with incomes below the median income

The following figure depicts income growth through different quintile groups, before and after New Labor in power.

⁵⁹ Ibid.

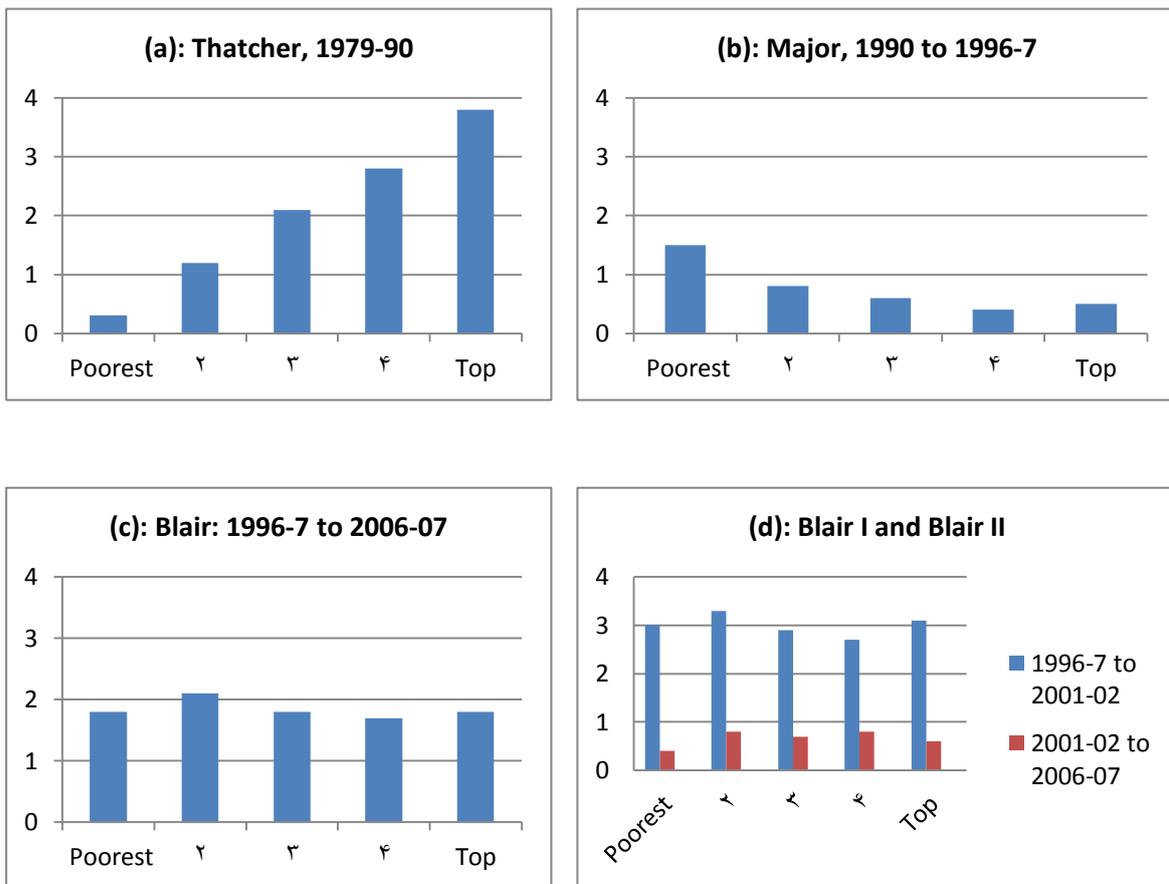


Figure 3: Real Income Growth by income quintile group
(Average annual income gain (%))

Sources: Brewer et al (2004, figure 2.3 for 1979 to 1996-97); DWP (2008b, table 2.1 ts) for 1996-97 to 2006-07

As a result of combating poverty, the levels of pensioner poverty have been significantly reduced. The proportion of pensioners living in low-income households has been falling throughout the last decade, from 29% of all pensioners in 1996/97 to 17% in 2005/06. Pensioners are now less likely to be living in low-income households than non-pensioners⁶⁰. Also, introducing national minimum wage in the UK in 1999 at a rate of £3.00 per hour for those aged 18-21 years and at the higher rate of £3.60 per hour for those aged 22 years and over was one of the reforms based on the principles of a social market economy⁶¹.

⁶⁰ Ibid.

⁶¹ Powell, op. cit., pp. 192-205.

New Labor's overall approach to social policy was based upon the principle that if poverty was to be reduced it was especially important to create more job opportunities and to encourage otherwise unemployed workers to take them. In this category, active labor market policies, tax credits, savings for retirement, child support reform and disability benefits can be mentioned. The introduction of Job Seekers Allowances by the New Labor enshrined new rights and responsibilities for the authorities as well as the claimants which could really enhance the employment rate in UK from 1997 to 2007⁶².

Blair achieved a 'paradigm shift' by putting 'poverty' back on the policy agenda. His pledge to eradicate child poverty was a major turning point in welfare reform, although the failure to achieve even the interim targets in poverty reduction may come back to haunt his successors. The emphasis on poverty was a radical departure from the previous governments but the focus on children and pensioners draws on traditional views about the 'deserving poor'.

A key indicator of whether or not the UK is charting the Third Way is if it is succeeding in combining a high employment rate with better wage protection for the most vulnerable employees. The employment rate in UK is shown in the following table (Table 1) in 2007.

Country	Percentage
UK	45.0

Table 1: Employment Rate in UK, 2007
Source: Low Pay Commission 2007

⁶² For further study: R. F. Drake, "Disabled People, New Labor, Benefits and Work", *Critical Social Policy*, 2000 20: 421, Sage Publications, Available at: <http://csp.sagepub.com/content/20/4/421>

As it can be seen, the UK does enjoy an increasingly high employment rate. This high employment rate reflects some important institutional characteristics of the UK economy that can be considered to contribute to both labor market efficiency and indeed some elements of social policy. This relatively strong employment performance in the UK over the past decade, which is also matched by a low unemployment rate, has coincided with the introduction of a national minimum wage. When the national minimum wage was first introduced it was considered to be fixed at a low level, but this was by European not US standards. Moreover, since its introduction the minimum wage has been steadily up-rated relative to median earnings as a deliberate policy particularly over the period 2003-2006 so that by 2006 it accounted for 45% of full-time median earnings⁶³.

New Labor's greatest achievement since coming to power in 1997 has been to articulate a set of strategic objectives within which it has begun to formulate a reasoned strategy of reform across much of welfare provision. They include macroeconomic stability and growth; labor market flexibility; investment in skills; higher in-work incomes and better incentives; and modernized government built on rights and responsibilities to foster inclusion, eradicate child poverty and enable society to be more adaptable in the event of inevitable structural change.

According to the results demonstrated in opportunity for all, employment and social security benefits, there are clear grounds on which one can make the case that the UK has developed a model with a more human face. This characteristic applies over the long-term but has also been reinforced over the past decade. There is no doubt that the UK has a

⁶³ For further study: M. Powell, *Modernizing the Welfare State: The Blair Legacy*, 2008, Bristol: The Policy Press; M. Powell, *Evaluating New Labour's Welfare Reforms*, 2002, The Policy Press.

relatively successful record over the last decade in promoting both economic growth and some improvements to social cohesion.

Conclusion

Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights. States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant in which the right to social security is the focus of this paper. According to Article 2 (1) of the Covenant on Economic, Social and Cultural Rights, State parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfill their obligations under the Covenant. On the other hand, the achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures. What the authors of this paper have tried to show, has been the introduction of a socio-economic model upon which the right to social security can be realized efficiently. This model is the social market economy.

According to the principles of a social market economy, states offer social protection against risks that endanger or violate citizen's basic rights and adversely affect their life chances. Some major risks are accidents at work, sickness, poverty in old age, unemployment or financial risks associated with raising kids, or generally what is known as social security services. For these cases, the state provides a social safety net. Many states set up a regulatory framework of social insurance systems. For example for health care and pension, or they use tax money

to pay direct contributions such as child benefits. The question arises regarding the extent of state provision and intervention.

Liberals that accept a basic level of social security argue that there should be a very low standard amount paid to all unemployed in order to keep their motivation high to search and accept a new job. On the other hand, social democratic welfare regimes, allow the recipients of unemployment benefits not only to survive but also to maintain their previous standards of living. The price of providing public goods and social insurances for certain contingencies can best be financed through compulsory contributions of both employers and employees. Increasingly, states adopt a dual system: the state as well as the private insurance. The state's main source of income is taxes and most importantly direct taxes on citizens' income and firms' profits. Usually these taxes are progressive, which means that the more you earn, the greater the share of your income that you have to transfer to the state. Thus, the state redistributes wealth and closes the gap between poor and rich.

Thus, the social market economy is a model providing an appropriate framework of orientation towards combining the principles of a competitive market economy with more elements of social justice and social protection with an efficient social security system as an indispensable part. Its value in the national context has been proven as with the successful experiences of post-war Germany and the New Labor government in Britain from 1997 to 2007. Now those principles need to be placed on an international footing.

A Social Market Economy needs compatible social security systems. That means that governmental actions have to be complementary to the market systems. The fundamental principles of a market economy do not

only separate governmental actions from the market sphere, that is the market for health insurance, but they simultaneously legitimate publicly supplied and accurate support of the needy.

The demand for security rises in times of crisis. Above a given point, however, this security can only be publicly guaranteed at the expense of the citizens' freedom. Justice of rules and procedures cannot guarantee comprehensive economic security, but the certainty to be treated equally and to be able to act under non-arbitrary conditions. A social security system based on the principles of social market economy can only function if its citizens assume responsibility for their own lives and request aid of the community only to the extent that his or her own efforts to earn a living have not met with success. The state has to set the frame and hold it all together.

We expect the acceptance of the Social Market Economy to rise when its fundamental principles are not only adhered to in theoretical discourses, but applied in the everyday political process.

Natural Challenges of Cultures in Support of Humanity: A Theoretical Assessment on the Basis of legal Sociology and Legal Anthropology

Mohammad-Javad Javid* & Esmat Shahmoradi**

Abstract

The relation between culture and nature has been an issue of long-standing debate. Total dominance of one over the other would mean ignorance of human identity in some respect. There is no discussion in the approval/rejection of one or the other; rather, the basic argument is the priority of one over the other, with an aim to support humanity, as a human obligation.

Given the above, the present article seeks to prove the hypothesis that the invariant core within human beings is their very nature, and that cultures, serving as some software to program human life, can be universal and philanthropic provided only that they are established based upon human's nature and essence. Such an essence is the very element which is occasionally referred to, in religious terminology, as fitrah.

With this in mind, authors of this article are of the view that contemporary cultures, alone, fall short of fulfilling the above obligation; and that mere emphasis on cultures cannot form a reliable standing point for human rights or a global culture, since they are primarily time - and place - bound. For this purpose, the suggestion is dividing culture into variable and invariable elements.

* Dr Mohammad-Javad Javid is Associate Professor, Faculty of Law and Political Sciences, University of Tehran, Iran (univiran@yahoo.com).

** Esmat Shahmoradi is an International Law Researcher (eshahmoradi@gmail.com).

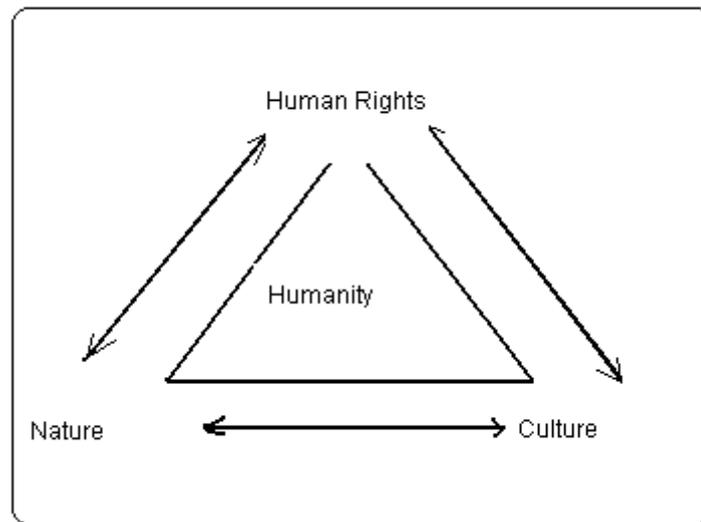
Introduction

The anthropological concept of “culture” reflects in part a reaction against earlier discourses based on an opposition between “culture” and “nature”¹. By culture it is meant the collective aspect of human life manifested in the form of urban and civil societies. Human nature, however, is that part of human beings which is formed within each individual and is not necessarily changed by the collective dimension, since it is basically established upon the human essence. Such a nature should be called the core of human being, and is not suppressed in collective and through the society but can, on the contrary, organize certain aspects of his collective life. Given the above, nature and culture can be considered as two aspects of human existence, one as the base and the other as the superstructure. Such a distinction does not indicate significance of one and/or insignificance of the other; rather, similar to the core and the shell of fruits, they are both favorable and of course necessary. The question, however, is for the strength of humanity and for it to be able to protect human rights, which one should be given priority?

In terms of their nature, all people are equal and there is no discrimination among them. When it comes to cultures, however, there are significant differences. Perhaps, for humanity to sustain, protection of human rights should be established both on culture and nature, as a unified reality. Our hypothesis in this article, therefore, is that to achieve effective philanthropy, beyond mere expression of sympathy and affection, the basic foundations should rely on two constituents, one as the invariant core, and the other as the changing and variable shell, both of which constitute a unity named humanity. For this purpose, the

¹ Social Anthropology: Culture; See: www.lycos.com/info/social-anthropology--culture.html

following three-fold aspects are proposed for analysis, which can better shed light on the logic of our discussion:



Humanity and its building blocks

As can be seen above, for the strength of humanity beyond mere temporary expression of feelings and affection, the above three pillars will help. Naturally, all these constituents are in dynamic interaction with one another. On this basis, nature and culture form the underlying foundations of human rights. Given the above, the competing theories that seek humanity in one of the two (either nature or culture), are insufficient. Accordingly, we consider any separation of the natural and cultural aspects of human beings as a natural challenge to the protection of humanity, and with an analysis on the sociological features of human beings, we seek support for human philanthropy and human rights through invariance as well as development of this logic.

Legal Anthropology prior to Cultural Anthropology

Human beings can be studied under the discipline of anthropology, which by itself is of a variety of sub-disciplines. For instance, if man is viewed with a focus on cultural issues, the purpose of the study is primarily to respond to his cultural needs, a set of needs some of which

arise from human nature and others which appear in the course of his collective life. From this perspective, cultural anthropology deals with two groups of human needs: group one; i.e. the common needs of human beings arising from the common nature of all humans, and group two, or the collective requirements which arise within the civil society; needs which are not necessarily equal, identical, or uniform, and which may vary from one society to another. The reason is clear; individual requirements differ from collective requirements, yet, the very existence of such needs is permanent in all human beings.

The contemporary cultural anthropology² focuses on the study of human societies and deals with the cultural acts and behaviors of human beings together with their influences. It addresses large and small, as well past and present human societies, and illustrates, reconstructs, or restates different interpretations of cultural differences within every human society. Thus, in cultural anthropology, investigation is made into the cultural and social differences and similarities between different societies. Here, the major issues are interaction, observation, symbols and values, language and linguistics, speech, customs and traditions, education and training, kinship, family and gender relations, customs and formalities relating to birth, marriage, divorce, death and the like. Such an analysis reveals that very few homogeneous or similar cultural societies can be found. The focus, therefore, should be mostly to identify the common needs of human beings rather than the common cultural responses to such needs. This is because culture is an issue of taste and

² Cultural anthropology: One of the four fields of anthropology, focusing on the description and analysis of the forms and styles of social life of past and present human societies. Its sub-discipline, ethnography, systematically describes contemporary societies and cultures. Oxford Dictionary of Archaeology: *The Concise Oxford Dictionary of Archaeology*, by Timothy Darvill, published by Oxford University Press

interest and there is no possibility of homogenizing all human beings in this respect. From this perspective, one may conclude that cultural anthropology addresses secondary issues which occur to human nature, issues mostly concerned with lifestyle and temperament and interaction of human beings within groups or in relation to one another.

Hence, the relation between legal anthropology and cultural anthropology is that of natural sciences and positivist sciences, in which legal anthropology refers to the study of human rights rooting in the human nature, which by itself is a study comprising the school of natural law. Of course it is in some other level of legal anthropology that natural rights are observed in the society. On the other hand, legal anthropology deals with the study of legal interactions between human beings in their interpersonal relations, mostly when it comes to the fundamentals of human rights. That is why such a discipline can be categorized under the status of individual to individual relationship, not individual to society relationship. However, when dealing with the rights of individuals within a group, 'judicial anthropology' is the issue at point which focuses on the interactions between social members with each other studied in the framework of cultural phenomena.³ Thus, law is also viewed from the perspective of cultures and in line with globalization.⁴ Today, anthropology is generally applicable in conventional and devised areas of study (as opposed to the fundamentals) and what we call legal anthropology can only be investigated in the realm of human rights. However, if cultural anthropology is viewed as a function of legal, and not judicial anthropology, it can survive and the humanity which is established upon it can endure. Otherwise, a natural challenge to humanity will be the gap between the two types of anthropology, i.e. legal and cultural. See the following table:

³ See: Bonte P., Izard M., « *Juridique (anthropologie)* » in Dictionnaire de l'ethnologie et de l'anthropologie, PUF, Quaridge, 1991.

⁴ See: Eberhard Christoph, *Le Droit au miroir des cultures. Pour une autre mondialisation*, Paris, LGDJ, Col. Droit et Société, 2006, p.199

Discipline	Legal anthropology	Cultural anthropology
Mode of realization	Invariable-unique	Variable-diverse
Level of analysis	Nature	Culture
Unit of analysis	Individual-to-individual	Individual-within-collective

Cultural anthropology also endeavors to legitimize any human cultural interaction, a fact which is in contradiction with legal anthropology especially human rights in which human beings and their fundamental rights are regarded as one and equal and in which non-plurality is taken for granted. It is worth noting, however, that taking post-modern approaches, anthropology is nowadays involved in pluralism and in line with positivist legal interpretations and hence with cultural anthropology. Among the basics of the post-modern legal anthropology are validation of all cultures and legal systems irrespective of any meta-narrative. A further natural challenge observed in this respect is the short life of philanthropy mostly because of the simple fact that it is not established upon an invariant and common essence. In this type of culture and anthropology, one should speak of a variety of cultures and of differing human rights; that is to say, humanity is no more based on an invariant core and all humans are accepted as they are; here, even the individuals with anti-human behaviors should receive unconditional mercy and philanthropy. This is contrary to the kind of humanity which is established on the human nature, as the core, and which conditions philanthropy on reciprocal philanthropy, in which case there would be no room for disgust, violence and crime of an individual against another. Accordingly, superhuman is one who serves others most and is most righteous to others.

Legal Sociology prior to Political Sociology

Two major challenges to humanity were discussed above on anthropology, which focused on the status of the individual, one with regard to non-compliance of the chain of culture with nature and the other with respect to an interpretation of philanthropy as compassion to anti-human individuals. This section will cover other challenges to humanity with respect to the collective status of human beings. Here again, the very logic of core and shell applies by which we mean that in the strengthening of humanity, attention to the real constituents of the society is more important than the formalities. In other words, beyond the individual boundaries of human beings, once they are situated within the society, the questions posed would be:

- What constitutes the building blocks of the human society? and
- Where does the strength of the human society lie?

Simply put, the society may subsist where protection of the fundamental human rights is central to formation of the society and of any social contract. Naturally, social values cannot be different from human values. Such values serve as the basis for the rights within the society; that is to say, "ought" is inevitably extracted and interpreted from "is". This relation can be justified by the very core-shell relation in legal anthropology. From this perspective, we should add a further demand; i.e. for humanity to be firmly established, legal demands should be given priority to political issues. Indeed, giving priority to a political analysis of humanity is like a poison for its foundation, since the logic of politics is the logic of dominance while the logic of humanity is convergence and equality.

Meanwhile, legal sociology focuses, similar to legal anthropology, on the study of legal structures and phenomena, both judicial and criminal, to describe causes, processes and consequences of legal acts in the

society.⁵ The area of study under legal sociology deals, contrary to anthropology, with the collective status of the individual and the type of disputes, the dispute resolution methods, or their legal and judicial consequences.⁶ If anthropology is to deal with the individual status of human beings in the society, sociology deals with the collective status of the individual in the society. Here again, two types of studies can be conducted on citizens, which can be the subject of two different areas of sociology, one of which should be considered as the core and the other as the shell. Legal sociology should be given priority as a result of the fact that it is concerned with the rights of the citizens and pursues such concerns in the collective and civil status of the individual, while political sociology studies individuals in terms of their competition for power.⁷ On the other hand, it is legal sociology which formulates the rules and regulations for the games of politics in the society and which can warn any violations in this regard.

Humanity is not very stable in political sociology as friendship is basically meaningless in politics, and a kind of partnership is the criterion for philanthropy and benevolence. In contrast, in legal sociology any concern for legal phenomena is primarily established upon benevolence and humanity. In this type of study, the goal is to explain the causes, analyses, results and eventually consequences of the legal phenomena, and meanwhile caution the violations by the state and the judges, or deficiencies of the rules and regulations in law enforcement mechanisms and guarantees.

In all of these studies, human being and his rights are central. Law, here, is like medical studies, and politics like military studies. Naturally, in military studies humanity is degraded to the possible minimum degree, and the

⁵ See Évelyne Serverin, *Sociologie du droit*, Paris : La Découverte, Repères, 2000. p.119

⁶ Jean Carbonnier, *Sociologie juridique*, Paris : PUF, collection Quadrige, 1994

⁷ Jean-Louis Cot, Jean Pierre Mounier, *Pour une sociologie politique*, Point Seuil, 1974, T. 1.

care for children, women, the wounded and the homeless is possible only through humanitarian protections by individuals, institutions, or a third government not directly involved in the warfare. An example could be that the parties to an armed conflict take glory in the injuries of the other, and they hardly tolerate any support for and treatment of their enemies. Similarly, political rivals can hardly show humanity to their competitors and support them; a third entity such as some lawyers or supervisors should be there to save the failed party from being crushed by the teeth of the powerful political gearwheels.

Political sociology, in contrast, focuses on political conflicts and the competition on and effects of such conflicts and at most introduces the survivors, losers, winners and the fierce forces in the political power relations. The basis and criterion in this type of study are the different styles followed in micro and macro level political competitions, contrary to legal sociology in which the basis is the degree that individuals enjoy human and citizen rights under the protection of law. After all, subject of political sociology is the interactions among citizens on power or interactions among political actors with each other, or the interactions between the state and the citizens in the games of power as well as the study of political behaviors resulting from such interactions. As we can see, here too, central is the power, while subject of legal sociology is to investigate and describe interactions between social groups, their interactions with legal and judicial institutions, and also with the government and state, while giving priority to law enforcement. As can be seen, such studies focus on justice as the center and the objective of the study. By a simple comparison of the subject and the objective of the study in the two disciplines, one can easily judge which one is prior in humanity and philanthropy, and which one provides no services in the support for humanity, not to speak of any betrayal to this aim.

Conclusion

Under certain circumstances and in certain approaches, humanity can receive substantial support; in certain others, however, it remains underprivileged. Authors of the present article are of the belief that the invariable core within human beings are their very nature and that cultures, serving as some software to program human life, can be universal and philanthropic provided only that they are established based upon human's nature and essence. To prove this contention, legal anthropology and legal sociology were given priority to cultural anthropology and political sociology to demonstrate how sustainable humanity can be secured from a single path, when an invariant core is specified for legal anthropology/sociology, and a variant shell for cultural anthropology and political sociology. Such a variant/invariant order can sufficiently establish humanity beyond the moral boundaries of mercy and affection on upright principles founded on human nature. Here, it is naturally possible, as a flaw, for humanity to rely on social contracts which are nourished from diverse and changing features of culture and not from the permanent nature of human beings.

Surprisingly, humanity is seen as variable or invariable! It is variable when it is established on the contracts among individuals or the will of the governments. Such humanity will be of a short life, as short as the life of a government or a group of people or some individuals. Once they are gone, this kind of humanity also vanishes. To achieve sustainable humanity, as a long term human plan, certain invariable principles have to be sought. As an indicator of a healthy culture, humanity should be established upon rights and justice. These rights and such a justice can be deemed universal when not simply established on contract but on the common essence and nature of human beings. Rights, in this sense, refer to the natural rights granted by the Creator to all human beings, and by justice we mean natural justice and the real response to the

natural needs of human beings. In this type of reading and interpretation, the goal of anthropology is primarily to consider these aspects of human life, and legal sociology is supposed to continue this goal within the society; therefore, social anthropology should naturally be given priority to cultural anthropology and political sociology each of which pursue human identity in the society after a kind of social/civil contract. Indeed, the nature-driven challenges to humanity lie in the ignorance of such priorities and in all-and-only reliance of humanity on cultures; cultures, which, are by themselves founded on a state of imbalance and instability and cannot contribute to the establishment of sustainable universal humanity.

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Human Security, Economic Aspects & Cultural Diversity for Universal Peace

*Hosein Sartipi**

Abstract

Human beings have become mute spectators of violence in various parts of the world. Wars, terrorism, genocides, as some of the world violence features, are terrible realities of today. It is clear that it cannot be denied conflicts between human beings can no longer be settled by breach of human rights principles. End of the Cold War has created a series of tentative attempts to define "a new world order". Since then, the international community has entered a period of tremendous global transition. Undoubtedly, this transition has established social and human security problems more than solutions. End of super-power rivalry, the growing North/South disparity in wealth and access to resources, coincides with an alarming increase in violence, poverty and disintegration.

The world has also witnessed one of the most severe global economic recessions since the Great Depression of the 1930s. At the same time, previously isolated peoples are being brought together voluntarily and involuntarily by the increasing integration of markets, the emergence of new regional political alliances and remarkable advances in telecommunications, biotechnology and transportation. Such problems have prompted unprecedented demographic shifts. In addition, the resulting confluence of cultures of peoples and trend to be secure is an increasingly global and multicultural world that has been seen with tension, confusion and conflict in the process of its adjustment to pluralism. There is an understandable urge to return to old conventions,

* Hossein Sartipi is a PhD student in E-commerce Law at UKM and in International Law at PNU and Lecturer at the School of Law and Media and Legal Officer at the Iranian Ministry of Foreign Affairs (irandiplomat@yahoo.com).

traditional cultures, fundamental values, and the familiar, seemingly secure, sense of one's identity.

Over five decades, adoption of the Universal Declaration of Human Rights granted great progress in promoting an understanding and respect for its principles. But creating a world which embraces the principles of non-violence, respect for human rights, sustainable development and cultural diversity still faces many challenges. Current global trends threaten entire segments of societies with social, economic and cultural marginalization and have been raised as human security. Culture of Peace has changed some definition in international community. It is a set of values, attitudes, modes of behavior and ways of life that reject violence and prevent conflicts by tackling their root causes. Regarding this issue, the year 2000, designated by the UN as the International Year for a Culture of Peace, was an inception for a global movement to expand the culture.

This situation sharpens a long-standing dilemma: How can universal human rights exist in a culturally diverse world? As the international community becomes increasingly integrated, how would comprehensive universal peace be achieved with cultural diversity? Is a global culture inevitable? If so, is the world ready for it? How could a global culture emerge based on and guided by human security? These are some of the issues, concerns and questions underlying the debate over universal human rights and cultural relativism. This paper attempts to prepare a logical and practical answer to the above mentioned questions.

Introduction

Human beings have become mute spectators of violence in various parts of the world. Wars, terrorism, genocides, poverty as some of the world violence features, are terrible realities of today. It is clear that it cannot be denied conflicts between human beings can no longer be settled by breach of human rights principles. End of the cold war has created a series of tentative attempts to define "a new world order". Since then, the international community has entered a period of tremendous global transition. Undoubtedly, this transition has established more social and human security problems than solutions. End of super-power rivalry, the growing North/South disparity in

wealth and access to resources, coincides with an alarming increase in violence, poverty and disintegration.

The world has also witnessed one of the most severe global economic recessions since the Great Depression of the 1930s. At the same time, previously isolated peoples are being brought together voluntarily and involuntarily by the increasing integration of markets, the emergence of new regional political alliances and remarkable advances in telecommunications, biotechnology and transportation. Such problems have prompted unprecedented demographic shifts. In addition, the resulting confluence of cultures of peoples and trend to be secure in an increasingly global and multicultural world that has been fraught with tension, confusion and conflict in the process of its adjustment to pluralism. There is an understandable urge to return to old conventions, traditional cultures, fundamental values, and the familiar, seemingly secure, sense of one's identity.

Over five decades, adoption of the Universal Declaration of Human Rights granted great progress in promoting an understanding and respect for its principles. But creating a world which embraces the principles of non-violence, respect for human rights, sustainable development and cultural diversity still faces many challenges. Current global trends threaten entire segments of societies with social, economic and cultural marginalization and have been raised as human security. Culture of Peace has changed some definition in international community. It is a set of values, attitudes, modes of behavior and ways of life that reject violence and prevent conflicts by tackling their root causes. Regarding this issue, the year 2000, designated by the UN as the International Year for a Culture of Peace, was an inception for a global movement to expand the culture.

At the heart of the United Nations, new guidelines for action opened with the *Human Development Report 1994* of the United Nations Development Program (UNDP), which focused on human security. These include the actions taken by UNESCO within the framework of its Interdisciplinary Project for the Promotion of a Culture of Peace, which became especially important in Latin America and the Caribbean, in Central America in particular, with the participation of governments, armed and security forces, non-governmental organizations and ombudsmen, among others. In other countries, such as Brazil, emphasis has been placed on mobilizing young people in favor of non-violence while also seeking the contribution of research agencies, thus giving a sound basis to the actions undertaken. Peace would never happen without concern to economic aspects of human security. The role of political, economic aspects of international assistance elements of globalization has been increasing at all levels of human life style. Universal peace and comprehensive secure model would not be achieved without attention to economic views of human security.

Besides, this is a study about the theoretical implications of the concepts of economic security and human security. This paper argues that the concepts of economic security and human security can well capture the various aspects of the threats faced by humankind and contribute to raising awareness of root causes of social disturbances and armed conflicts. They can also help elevate the priority order of developmental issues. Policy recommendations for dealing with economic security and human security may overlap and lead to inefficient use of scarce resources. However, if they are implemented in an efficient and integrated manner, they might further promote the policies to adapt to economic change and to ensure human security. In addition, the concept of human security may help to generate various military and non-military security as well as non-state security studies, although these

concepts themselves may hardly generate systematic and empirical study. This situation sharpens a long-standing dilemma: How can universal economic human rights exist in a culturally diverse world? If so, is the world ready for it? How could the roots of a global culture and economy emerge based on and guided by human security? These are some of the issues, concerns and questions underlying the debate over universal human rights, economic security and cultural relativism. This paper attempts to prepare a logical and practical answer to the above mentioned questions.

Human Security, Nature and Necessities

Since the early 1990s, the concept of human security has been the focus of many debates in the United Nations system, in international organizations and governments of different regions, as well as in the academic and intellectual fields. Indeed, with the end of the Cold War, the world became aware of the multiplication of non-violent threats to security at the international, regional, national and local levels. A great deal of theoretical and practical effort has been made to identify the most suitable modalities to deal with these threats. The combined impact of using force within states, degradation of the environment, worsening of extreme poverty, spreading of pandemics, and exploitation of cultural and ethnic differences, promotes various types of conflict affecting a great number of people, generally the most vulnerable and unprotected sectors of the population. At the beginning of the twenty-first century, some countries show significant weaknesses in coping with the consequences of the process of globalization.¹ Instability in the region has increased, and that has a significant effect on most of the population. Even though the main classical security issues have been overcome in the region, it has not made any substantial

¹ Translator: Mahmud Salimi G. B. Medilson "Globalization, the challenges and opportunities" *Rahbord Journal* Vol. 22 Winter 1380, p.53.

contribution to global instability², some countries are far from having policies that promote people's security, human security. Moreover, the intra-national nature of conflicts increases the vulnerabilities of millions of people around the world. For instance in Latin America, the search for a common security concept in the world is a basic challenge for the Rio Group, for the Organization of American States (OAS) and its Committee on Hemispheric Security and for all the region's states in the twenty-first century. Civil society organizations and academic institutions, such as FLACSO, can play an important role in this task. The twenty-first century is witnessing the emergence of new transnational actors and of non-state actors with large capacities for global action. This is an important change in international relations and in the primacy of the interaction between the various actors.³ The twenty-first century also shows more strongly than in previous eras the need to solve the problems of millions of human beings who are being adversely affected by enormous, growing insecurities in political, economic, social, health, personal and cultural fields. A significant part of the world population experiences tremendous vulnerability in an unfair system with increasing regional and global interdependence. The consequences are that (in)security is global, even though its manifestations may differ from region to region and country to country.⁴

A core concern is to progress towards the construction of a new global order capable of placing humanity at the center of the planetary system, and for states, which continue to be the actors with the greatest relative power, to be able to efficiently guarantee their security and contribute to overcoming the vulnerabilities and difficulties of hundreds

² " *The Right To Social Security Addressing Women's Poverty and Disadvantage* " (South African Journal on Human Rights) 25 (2009), p. 34.

³ Hiroshi Ohta, " *The Interlinkage of Climate Security and Human Security: The Convergence on Policy Requirements* " (Waseda University) 9 March 2009, p 5.

⁴ *Human Development Report 1999: Globalization with a Human Face*, New York, United Nations Development Program, 1999.

of millions of people in acceding to progress and development. The end of the Cold War and the process of globalization have led to increased opportunities for cooperation in the international system and in various regions.⁵ The revolution of communications, the new wave of democracies around the world and globalization have contributed to universalizing values and principles stipulated in the Human Rights Charter. Promotion of, and respect for, this Charter requires increased association and more cooperation.⁶

An approach to *global politics* from a perspective of human interest, as developed by Mel Gurtov, allows one to compare value matrices. This value distinction originates from different theoretical points of view.⁷ The realist theory looks at international problems and stresses conflict, which means that cooperation between the different actors is not properly gauged. Transnational 'corporate-globalist' views stress economic aspects and the hegemony of a capitalist model of production and division of labor. Even though these 'rules of the game' establish overall preservation, they are seen to be a zero-sum game compared with other values. In both cases, in the absence of any shared values, both realism and the corporate-globalist approach stress competitiveness as the basis for constant conflict and rivalry. When one looks at the world from a new perspective with a global humanist projection, the values stressed are different. The need for a more holistic approach means asking the core question: Who speaks for the planet? Based on this question, one looks for other angles in international relations, which

⁵ - Shahroz Ebrahimi "Globalization and Security of IRI" *Defense and Security Studies Journal* (Vol. 33, Winter 1381), p. 44.

⁶ On globalization, see Ulrich Beck *Qué es la globalización?* Buenos Aires, Editorial Paidós, 1998; Clóvis Brigagão and Gilberto Rodrigues, *Globalização a olho N.U. o mundo conectado*, São Paulo, Editora Moderna, 1998; Robert O. Keohane and Joseph S. Nye Jr, 'Power and interdependence in the information age', *Foreign Affairs*, Vol. 77, No. 5, 1998, pp. 81-94; Francisco Rojas Aravena (ed.), *Globalización, América Latina y la diplomacia de cumbres*, Santiago, FLACSO-Chile, 1998.

⁷ Mel Gurtov, *Global Politics in the Human Interest*, Boulder, Colo., Lynne Rienner Introduction. *Human Security: Emerging...* Francisco Rojas Aravena

means thinking about relations in the international system as a people-related issue. This approach means that one can relate different problems to new priorities. The main priority is necessarily peace. This is directly associated with social aspects and economic justice, political justice, human governance and common responsibility for a balanced environment. Recently, evidence suggests that the nature, domain and context of sovereignty have been changed recently.⁸ It goes without saying that the responsibility of government has been raised rather than their immunity. So international atmosphere has been affected by international security regimes and this is going to be redefined by the criteria of human rights, human security and other elements of their relationship. As a result of this situation, every day people observe the vast changes in human rights regulations and administrative tools.⁹ Crossing of the first and second generations of human rights and entering into the last innovations of human rights levels such as development right or collective right would approve that any countries or other legal or illegal obstacles would not be able to deny or stop development movement to universal human rights.

Human security is an emerging paradigm for understanding global vulnerabilities whose proponents challenge the traditional notion of national security by arguing that the proper referent for security should be the individual rather than the state. Human security holds that a people-centered view of security is necessary for national, regional and global stability. It has been definitely one of the most crucial reasons to create or continue bilateral, regional and world wars in the history of mankind. The concept emerged from a post-Cold War, multi-disciplinary understanding of security involving a number of research fields, including development studies, international relations, strategic studies,

⁸ 'A monstrous failure of justice'? Guantanamo Bay and national security challenges to fundamental human rights " *International Politics* 47 (2010), p23.

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and human rights. The United Nations Development Program's 1994 Human Development Report¹⁰ considered a milestone publication in the field of human security, with its argument that ensuring "freedom from want" and "freedom from fear" for all persons is the best path to tackle the problem of global insecurity. Frequently referred to in a wide variety of global policy discussions¹¹ and scholarly journals,¹² human security is often taught in universities as part of international relations, globalization, or human rights studies.¹³ Critics of the concept argue that its vagueness undermines its effectiveness;¹⁴ that it has become little more than a vehicle for activists wishing to promote certain causes; and that it does not help the research community understand what security means or help decision makers to formulate good policies.¹⁵

For many years, the subject and concept of security has comprehended as military concept. In places where military conflict has never been seen, everybody imagines what security is. The traditional notion of security has continued until the time of development of the doctrine of human security by the United Nations Development Program (UNDP). This subject has been raised as well as Good Governance Doctrine by World Bank in 1989. But, some believe that human security notion for the first time had been declared in the Palme Commission Report on Disarmament and Security former in 1982. After nearly a decade of presenting this report, UNDP in its 1993 report, presented the above ideas which were seriously considered. As result of that, new concept of

¹⁰ United Nations Development Program (1994): Human Development Report.

¹¹ For numerous examples of this, see the Human Security Gateway, <http://www.humansecuritygateway.com>

¹² Human Security Journal / Revue de la Sécurité Humaine - Center for Peace and Human Security - FNSP/IEP Paris.

¹³ Translator: Saber Shakiba Siz G Link " Ambiguous meaning of globalization " Journal of Strategic Studies ,Vol. 3 ,Autumn 1380, p.38.

¹⁴ Paris, Roland, Human Security - Paradigm Shift or Hot Air? In: *International Security*, 2001, Vol. 26, No. 2.

¹⁵ For a comprehensive analysis of all definitions, critiques and counter-critiques, see Tadjbakhsh, Shahrbanou & Chenoy, Anuradha M. *Human Security: Concepts and Implications* , London: Routledge, 2006.

security as titled Human Security, and its various aspects were paid attention.¹⁶ Somebody believes in idea that this new approach (the concept of human security), the problem only is of bureaucracy in the current system of human rights.¹⁷They believe. This subject could not raise any new approach. On the other hand, some people assist on the human security approach would represent real and objective situation in order to be benefited practically by human rights. Also, it would show new special function of human rights notion. The first group often considers what to be considered under the security titles by the reports of United Nations Development Program is only reflection of the rights to be written in UDHR (1948) and the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). Some rights and freedoms such as freedom of poverty, free of fear are traditional rule contained in the Atlantic Charter (1941). As a result, it is not necessary to rebuild such concepts and what is important and necessary is logical relationship between activities of international organizations such as United Nations Development Program and what has been never considered in many treaties in the past decades. What happened in international situation about human rights is based on this subject. In front of this idea, some lawyers believe in the idea that the concept of human security highlights on the function and special action that international institutes must to play in order to strength and to protect human rights. Also it explains the real conditions of practical benefits possible of human rights. It represents effective factors to perform these rights in real life. So what the human security concept merely do not refer to a legal status, but it has the exact consideration to role and function observer on the public interest. The doctrine of human security considers the security not only as mere current situation, but as a goal to achieve to webmaster

¹⁶ See: Claude , Bruderlein, peoples security as a New Measure of Global stability, vol.83,NO.842,IRRC,2001,P.353, Available at:www.icrc.org.

¹⁷ Tamoshat Cristian, Human Rights, Theoretical Roots, Translator: Hosein Sharifi Tarazkohi, Tehran, Mizan, 1386, pp.150-151.

needs. Such an approach transforms the concept that perfect benefits of human rights would be institutionalized, if the future problems would be considered as a general and complicated package. And possibility of achieving such rights should not be ignored. For instance, it pays attention to this point that achieving many rights without eliminating of poverty (especially extreme poverty) is not possible. So elimination of poverty has been raised as a new aspect.¹⁸

The principle of human security and human rights is seriously related to consideration of some social conditions prevailing in the international arena. Power structure at national, international and global conditions and other economic, social, etc. problems have been effective on raising subjects such as humanitarian intervention, problems related to migrant workers, terrorism, environmental issues, etc. In such situations, human security seriously has been endangered and its rights have been attacked widely.¹⁹ As a result, representation of human security again assists on consideration of human rights as a fundamental subject. States historically tended to be more concerned with national security as compared with individual security and human rights. International human rights system has attempted to focus on humanity as necessary target in every security system. As a result, human security doctrine has wanted to encourage human rights regulations at national and international levels so as to interpret and perform for most protection of human dignity.

Traditional Security, Human Developing and Economic Aspects

In recent years, human security emerged as a challenge to ideas of traditional security, but human and traditional or national security is not

¹⁸ See: GA Res.55/2, 8September 2000, section III.

¹⁹ See: Truong Thanh -Dam, Human Security and Human Rights ,in: The Essentials of Human Rights , Ed. by Rhona k.m. smith and Christien Van den Anker , Hodder Arnold, Newyork ,2005,pp.172-173.

mutually exclusive concepts. Without human security, traditional state security cannot be attained and vice-versa.²⁰ Traditional security is about a state's ability to defend itself against external threats. Traditional security (often referred to as national security or state security) describes the philosophy of international security predominance since the Peace of Westphalia in 1648 and the rise of the nation-states. While international relations theory includes many variants of traditional security, from realism to idealism, the fundamental trait that these schools share is their focus on the primacy of the nation-state. Economic, social and cultural rights are recognized and protected in international and regional human rights instruments. Member states have a legal obligation to respect, protect and fulfill economic, social and cultural rights and are expected to take "progressive action" towards their fulfillment.²¹

Human insecurity is the product of diverse and complex factors. In one form or another, it has always formed part of the human condition, and can never be eliminated altogether. Nor is it clear that total security would be a desirable state of living. Nevertheless, human beings have sought through the ages to reduce insecurity to tolerable levels. Although insecurities in different domains are interrelated and feed on each other, the primary focus of this paper is on economic insecurity. It is undeniable that economic insecurity has worsened in most parts of the world in recent years compared with the early post-war decades. As argued above, this insecurity derives from high levels of unemployment, precarious job conditions, deepening poverty and diminishing state support.²²

²⁰ Human Security Centre. "What is Human Security." <http://www.humansecurityreport.info/index.php>

²¹ Henry J. Steiner " *International Human Rights In Context* " Newyork: Oxford 2007, p 264.

²² Dharam Ghai," *Economic Globalization, Institutional Change and Human Security* ", United Nations Research Institute For Social Development, November 1997, p 15.

Some differences would be shown between traditional security and human security. Traditional security policies are designed to promote demands ascribed to the state. Other interests are subordinated to those of the state. Traditional security protects a state's boundaries, people, institutions and values. But, human security is based on people-centered policies. Its focus shifts to protecting individuals. The important dimensions are to entail the well-being of individuals and respond to ordinary people's needs in dealing with sources of threats.

Traditional security seeks to defend states from external aggression. *Walter Lippmann* explained that state security is about a state's ability to deter or defeat an attack.²³ It makes use of deterrence strategies to maintain the integrity of the state and protect the territory from external threats. While, in addition to protecting the state from external aggression, human security would expand the scope of protection to include a broader range of threats, including environmental pollution, infectious diseases, and economic deprivation. In traditional security, the state is the sole actor, to ensure its own survival. Decision making power is centralized in the government, and the execution of strategies rarely involves the public. Traditional security assumes that a sovereign state is operating in an anarchical international environment, in which there is no world governing body to enforce international rules of conduct. But, in human security, the realization of human security involves not only governments, but a broader participation of different actors²⁴, regional and international organizations, non-governmental organizations and local communities. In addition, traditional security relies upon building up national power and military defense. The common forms it takes are armament races, alliances, strategic boundaries, etc. while, human security not only protects, but also empowers people and societies as a

²³ Walter Lippmann, *U.S. Foreign Policy*, Boston, 1943, p.51.

²⁴ Caroline Thomas, "Global Governance, Development and Human Security: Exploring the Links", *Third World Quarterly*, Vol. 22, No. 2, pp 167-168, 2001.

means of security. People contribute by identifying and implementing solutions to insecurity.

Human security also challenged and drew from the practice of international development. Traditionally, embracing liberal market economics was considered to be the universal path for economic growth, and thus development for all humanity.²⁵ Yet, continuing conflict and human rights abuses following the end of the Cold War and the fact that two-thirds of the global population seemed to have gained little from the economic gains of globalization,²⁶ led to fundamental questions about the way development was practiced. Accordingly, human development has emerged in 1990s to challenge the dominant paradigm of liberal economy in the development community. Human development proponents argue that economic growth is insufficient to expand people's choice or capabilities, areas such as health, education, technology, the environment, and employment should not be neglected.

Human security could be said to further enlarge the scope for examining the causes and consequences of underdevelopment, by seeking to bridge the divide between development and security. Too often, militaries did not address or factor in the underlying causes of violence and insecurity while development workers often underplayed the vulnerability of development models to violent conflict. Human security springs from a growing consensus that these two fields need to be more fully integrated in order to enhance security for all. As a result, as shown below, security and development are deeply interconnected:²⁷

²⁵ Caroline Thomas, "Global Governance, Development and Human Security: Exploring the Links", *Third World Quarterly*, Vol. 22, No. 2, pp 167-168, 2001.

²⁶ See *Financial Times*, 24 December 1994 and *New York Times*, 15 July 1996: 55.

²⁷ Frances Stewart, "Development and Security", Centre for Research on Inequality, Human Security, and Ethnicity (CRISE), Working Paper 3, London: University of Oxford, 2004.

- 1- Human security forms an important part of people's well-being, and is therefore an objective of development.²⁸
- 2- Lack of human security has adverse consequences on economic growth, and therefore development.²⁹
- 3- Imbalanced development that involves horizontal inequalities is an important source of conflict.

Therefore, vicious cycles of lack of development which leads to conflict, then to lack of development, can readily emerge. Likewise, virtuous cycles are possible, with high levels of security leading to development, which further promotes security in return. Further, it could also be said that the practice of human development and human security share three fundamental elements:³⁰

First, human security and human development are both people-centered. They challenge the orthodox approach to security and development i.e. state security and liberal economic growth respectively. Both emphasize people are the ultimate ends but not means. Both treat humans as agents and should be empowered to participate in the course.

Second, both perspectives are multidimensional. Both address people's dignity as well as their material and physical concerns.

²⁸ An objective of development is "the enlargement of human choices". Insecurity cuts life short and thwarts the use of human potential, thereby affecting the reaching of this objective.

²⁹ Some development costs are obvious. For example, in wars, people who join the army or flee can no longer work productively. Also, destroying infrastructure reduces the productive capacity of the economy.

³⁰ Sabina Alkire, "A conceptual Framework for Human Security", Centre for Research on inequality, Human Security and Ethnicity (CRSE), Working Paper 2, London: University of Oxford, 2003.

Third, both schools of thought consider poverty and inequality as the root causes of individual vulnerability.

Despite these similarities, the relationship with development is one of the most contested areas of human security. "Freedom from fear" advocates, such as Andrew Mack, argue that human security should focus on the achievable goals of decreasing individual vulnerability to violent conflict, rather than broadly defined goals of economic and social development. Others, such as Tadjbakhsh and Chenoy, argue that human development and human security are inextricably linked since progress in one enhances the chances of progress in another while failure in one increases risk of failure of another.³¹ To help clarify the relationship between these two concepts³² attention should be given to *values, orientation, time frame, General objectives and Policy goals*. Values in human development attends to well-being, while in human security, the emphasis has been on security, stability and sustainability of development gains. Human development is considered to move forward, is progressive and aggregate, "Together we rise in orientation part. But, looks at who was left behind at the individual level, "Divided we fall" goes up in human security. Human development is long-term, while human security combines short-term measures to deal with risks with long-term prevention efforts growth with equity. Expanding the choices and opportunities of people to lead lives they value is the general objective in human development. But "Insuring" downturns with security is shown for human security. In addition, identification of risks, prevention to avoid them through dealing with root causes, preparation to mitigate them, and cushioning when disaster strikes are raised in this part. And finally, Empowerment, sustainability, equity and productivity

³¹ Tadjbakhsh & Chenoy, *Human Security: Concepts and implications*, London: Routledge, 2006.

³² S Tadjbakhsh, "Human Security", 'Human Development Insights Issue 17, New York: UNDP HDR Networks.

have been recognized as *Policy goals in human development*. About human security, Protection and promotion of human survival (freedom from fear), daily life (freedom from want), and the avoidance of indignities (life of dignity) have been introduced as policy goals.

Human Rights, Human Security and Cultural Diversity

Relationship between human rights and cultural diversity has been one of the important discussions in human sciences scope at the scientific and political situations, especially during the current decades. Many various notions have been raised mentioned below:

1. The first idea about human rights says it is universal. Cultural diversity would never to have impact on the norms of human rights. The proponents of this idea define human rights as a universal subject by the Universal Declaration of Human Rights and other international treaties.
2. Others, who are titled as Relativists, believe in the idea that human rights are relative. As a result, its norms are defined by cultural and geographic regional characteristics. They do not believe in a universal definition of human rights. Each government is allowed to especially define its cultural characteristics by human rights criteria and to perform its regulations.
3. Third group believe universal human rights is substantial, but the definitions of human rights norms are not necessarily universal. Various legal systems have declared different definitions of human rights, but intercultural communications about human rights would assist in order to come up with

common comprehensions to understand universal human rights.

The ideas mentioned above have led to different formulations by some groups in international politics. As a result, many states (often western countries) effort to promote Western definition of human rights by Universal Declaration of Human Rights, both Covenant on Civil and Political Rights and Covenant Economic Social and Cultural Rights and other international instruments such as Convention Against Torture, the Convention on the Rights of Women and the Convention on the Rights of the Child as universal criteria for human rights.³³ On the other hand, some states have rejected any international criteria for human rights by belief to cultural diversity.³⁴ They have attempted to justify their weak functions by their national definition of human rights. What is seen in the international community has been actually political and intellectual conflict between both of these groups.³⁵ Unfortunately, because of the so called conflict in the intellectual debates about human rights, non-scientific and non-political notions have been raised. This causes the image presented to the human rights and cultural diversity sounds single-dimensional and unbalanced. A result of such popularity in the media and university scopes, cultural diversity has been represented as a justification for the breach of human rights by developing countries.³⁶

In addition, the relation between human rights and cultural diversity is never shown well and it weakens the credit of cultural law in both

³³ Javid Rehman " *International Human Rights Law* " London Longman, 2009, p 243.

³⁴ Asadolah Asadi " *Respect the presumption of innocence in the quasi-judicial proceedings in France in the light of the European Convention on Human Rights* " *Journal of Legal Studies*, 49, 1389, p.44.

³⁵ Mahmud Reza Golshan Pazoh " *Human Rights in the World: Processes, Cases and Reactions* " Tehran: Azad Islamic University, Mordad 1388, p 23 and " *Universal Human Rights in a Culturally Diversified World*", *Criminal Defense Lawyers*, <http://www.racialjusticecollaborative.org/universal-human-rights-in-a-culturally-diversified-world.htm>

³⁶ Brandi Nikole Andrews " *Cosmopolitanism and Human Rights: Creating a Global Consciousness* " *European University for Peace Studies*, January, 2008, p24.

international literature and implementation. Because of that, the necessity to recognize exact relations between human rights and cultural diversity and to identify collective and individual rights is unavoidable. Regarding this necessity, Islamic Republic of Iran proposed a plan of a resolution as titled "Human Rights and Cultural Diversity" to General Assembly of United Nations in 1999.³⁷ This proposal was approved by consensus of states. The idea of cultural diversity approved by the above resolution seriously consider the basic concepts such as self-determination, respect for all, tolerance, intercultural dialogue, and the universality of human rights.

Socio-cultural Diversity and Human Security

The issue of international terrorism has highlighted the potential human conflict inherent in the existence of marked socio-cultural, religious, linguistic, political or any other type of differences between large groups of people throughout the world and within specific nations or regions. These differences are evident and coexist between different sectors and are marked by various degrees of cooperation and/or conflict. Recognition of the potential for conflict and insecurity inherent in this coexistence, together with recognition of the legitimacy of the existence of these differences and their peaceful expression, are a condition for bringing human security to fruition. Modernization and modernity bring with them the homogenization of patterns of life, values and behavior. This is stated as an empirical fact, but it is sometimes used as a governing criterion against which sizeable communities, defending their right to be different and live in a world in which their security is associated with the permanence of guidelines and values that are known to, but not necessarily shared by, all sectors that make up a nation, can rebel by different means. Peace and prevention of conflict

³⁷ <http://humansecurityconf.polsci.chula.ac.th/Documents/Presentations/Shanawez.pdf>

require proper understanding of diversity, sincere acceptance of its legitimacy and the design of institutional mechanisms to process tensions, which may arise naturally from the existence of marked diversity in society.

The Linkage between Cultural Diversity, Peace and Economic Security

Living in an environment of peace and security is fundamental to human dignity and development. Given that sustainable development is pertinent to every aspect of human life, teaching and learning for sustainable development must have social, economic, environmental and cultural perspectives. Peace and human security are among the 27 principles of sustainable development, Principle 25 reads: "Peace, development and environmental protection are interdependent and indivisible." Economic is vital to the task of acquiring the capacity to live together peacefully. It can help to prevent insecurity and conflicts from thwarting progress towards sustainable development. Economic can also be called upon to rebuild a more sustainable society after violent conflict. There are clear linkages between education, poverty reduction, human security and sustainability. For instance, the poor and marginalized are disproportionately more affected by poor environmental and socio-economic conditions.³⁸ Some international organizations such as ESD contribute to sustainable environmental management to improve livelihoods, increase economic security and income opportunities for the poor. In addition, educational responses to poverty need to address the fact that many of the world's poor do not participate in the formal market economy but in non-formal economies, and many are self-employed entrepreneurs. In the other hands

³⁸ Dharam Ghai, " *Economic Globalization, Institutional Change And Human Security* " , United Nations Research Institute For Social Development ,November 1997,p.171.

education that is relevant and purposeful has the power to transform people's lives.³⁹

The *Universal Declaration of UNESCO on Cultural Diversity* established the link between diversity and cultural rights⁴⁰ and defined the principle of mutual protection between cultural diversity and human rights, which impedes relativist drifts and community's self-exclusion⁴¹. The major impediment to granting respect for cultural diversity is that all cultural diversity is not, *per se*, good. It is through respect for indivisible and interrelated human rights that all richness and interpretations of universality contained in the diversity of cultural milieu can gain all their worth. Promoting respect for cultural diversity without insuring respect for all human right is opening the door to relativism. Of all human rights, cultural rights are the ones in the best position to insure this mutual protection of both universal human rights and diversity. While in the past culture has frequently been perceived as an impediment to progress and to universality, the international community has become aware that cultural diversity constitutes an invaluable resource for:

- The effective and universal implementation of all human rights;
- Respect for identities and cultural rights endangered by the homogeneity linked to globalization;
- Conflict prevention and the restoration of peace;

³⁹ Ehsan Javid "United Nation Human Rights Council and Its Mechanism for Military Conflicts" *International Law Journal* 40 (1388) p.22.

⁴⁰ Art. 5, and § 4 of the Plan of action : « Making further headway in understanding and clarifying the content of cultural rights as an integral part of human rights»

⁴¹ First principle of Art. 2. Resolution 60/167, adopted by the UN General Assembly on March 7th 2006, considers the link of mutual strengthening « between respect for cultural diversity and the cultural rights of all ».

The instruments and dispositions concerning the rights of persons belonging to minorities recall and make more precise the universal character of these rights, in particular in Art. 27 of the International Covenant on Civil and Political Rights, Convention 169 of the ILO on indigenous people, Article 19 of the International Covenant on Civil and Political Rights, the UN convention on the rights of persons belonging to national or ethnic, religious and linguistic minorities and the UN empowerment of actors involved in fair and sustainable development.⁴²

The cultural dimension of human security has been largely overlooked while injuries to identities, collective humiliations and the general suspicion with which cultures are viewed are determining factors in the spread of violence, conflicts, terrorism and extreme poverty. During the period, in which acts of terrorism have become widespread, it is vital that we address those violations of identities that lead to humiliations, reductionism, mutual incomprehension and hatred. Diversity and cultural rights are essential to guaranty human security. Cultural rights are rights to *diversity*, a diversity that brings peace by allowing differences to be considered as normal and rich contributions to social environment, instead of as threats. Welcoming these different possibilities brings out the value of this cultural richness, necessary to build long lasting peace.⁴³

Human Security, Development Right and Economic Subjects

When Dr. Mahbub ul Haq first drew global attention to the concept of human security in the United Nations Development Program's 1994 *Human Development Report* and sought to influence the UN's 1995

⁴² This right includes the right to benefit from scientific progress, protection of the essential freedoms needed to pursue scientific research and artistic creation, protection of intellectual property rights and rights of authors and also includes implicitly the right to access cultural heritage.

⁴³ Voir sur notre site le DS 15, le Document de Nouakchott: *Droits culturels et traitement des violences. Aux sources de la sécurité humaine.*

World Summit on Social Development in Copenhagen, importance of economic aspects of human security has been raised in the international community. The UNDP's 1994 Human Development Report's definition of human security argues that the scope of global security should be expanded to include *threats in seven areas*. One of them that would be attended in this article is related economic fields in human security context. The global financial crisis of 2008 sharpened debate on the nature of global economic security. Like the Asian Crisis of 1997-98, what began as a single-country, single-sector crisis spread to other countries and other sectors, demonstrating how intimately interconnected the global age has become.⁴⁴

Economic security, in the context of politics and international relations, is the ability of a nation-state to follow its choice of policies to develop the national economy in the manner desired. Historically, conquest of nations have made conquerors rich through plunder, access to new resources and enlarged trade through controlling of the conquered nation's economy. In today's complex system of international trade, characterized by multi-national agreements, mutual inter-dependence and availability of natural resources etc., economic security today forms, arguably, as important a part of national security as military policy. On the other hand, economic security requires an assured basic income for individuals, usually from productive and remunerative work or, as a last resort, from a publicly financed safety net. In this sense, only about a quarter of the world's people are presently economically secure. While the economic security problem may be more serious in developing countries, concern also arises in developed countries as well. Unemployment problems constitute an important factor underlying political tensions and ethnic violence.

⁴⁴ Rosita Dellios "Mandalic Regionalism in Asia: Exploring the Relationship between Regional Governance and Economic Security ", Culture Mandala 'Vol. 8, No. 1 ' October-December 2008, p1.

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Human Security, Economic, Political and International Approaches for Peace

Conditions currently exist to form an international coalition of states and civil society organizations to support and promote projects aimed at establishing greater security for people and their performance as the core of international security. The United Nations is encouraging this point of view, basically by improving new international law that seeks to guarantee peace and governance and foster positive incentives. In this regard, I would like to stress the point of view set forth at the Lysøen meeting of the Human Security Network: 'An innovative international approach will be needed to address the source of insecurity, remedy the symptoms and prevent the recurrence of threats which affect the

daily lives of millions of people.’⁴⁵ The goal set by the UN in terms of security is a “world free from fear”. Achieving this entails recognizing a new set of international circumstances typified by less weight given to inter-state conflicts and more weight to intra-state conflicts. The Millennium Report of the General Assembly, drawn up by former Secretary-General, Kofi Annan, “*We the Peoples*”,⁴⁶ stresses that more than 5 million people died in this type of internal war in the 1990s. There were also mass migrations, refugees, destruction of infrastructure and alterations to the environment. All this violates the basic human rights of millions of people and makes it hard to create conditions for peace – as a primary right – as the foundation for building a better world. UN analyses indicate that conflicts are more frequent in regions with poor countries, so the challenge of protecting more vulnerable populations is even greater. The above poses a global, and also regional, dilemma regarding the most suitable mechanisms for achieving stability and peace and fostering cooperation. Even though one cannot completely disallow intervention, it has shown that, in most cases, it is not the best option for settling conflicts. The same is true of the system of sanctions. In this framework, operations for maintaining and imposing peace must be reviewed. In the type of conflict that emerges as the most relevant at the start of the twenty-first century, control of small arms becomes just as important as control of nuclear weapons. All this marks a change in the perspective of the main international actors regarding situations of tension and conflict and, on a more general level, security concepts.

The international system has been changed dramatically in less than a decade. Not only did the disappearance of the Soviet Union definitively mark this change, but there were also substantial changes that accumulated over time and are expressed with particular strength in the

⁴⁵ Chairman’s Summary, ‘A Perspective on Human Security’, Lysøen, Norway, 20 May 1999.

⁴⁶ Millennium Report by the Secretary-General of the United Nations, *We the Peoples: The Role of the United Nations in the 21st Century* (www.un.org/).

post-Cold War context. The number of state actors participating in the institutionalized international system has multiplied by at least a factor of four since the United Nations was set up in 1945. Other actors with increasingly more influence on international relations, not just international agencies capable of changing their surroundings, but a series of transnational forces expressed with particular strength in transnational companies and non-government organizations (NGOs), began to emerge. Communications improvements, technological revolution, economical changes and globalization speeded up these changes. This is mainly expressed in the state – the main actor – having less power. States ceased to enjoy monopolistic control or have the capacity to establish and promote actions in six basic areas:

1. *Communications*. The Internet is the best example of world linkage without state control. Radio and television are also good examples.
2. *Technological development*. This depends more on companies than on the state and affects investment capabilities, from genetic techniques and cloning to technological developments designed for war.
3. *Finances*. Financial transactions flow around the world and generate regional and global crises with little capacity for intervention by the state.
4. *Investments*. Even though states generate reinsurance for investments, their ability to control decisions about where to invest and where to obtain the investments is minimal.
5. International migrations and the ability to control movement of people have also diminished in all states.
6. *Trade* has opened up more and more, and states have evident problems in setting up controls and restrictions.

At the beginning of the twenty-first century, the countries of the region are immersed in a process of debating and reformulating concepts of security. A conceptual transition is taking place from a Cold War perspective that visualized an enemy expressed in strongly military actions carried out by a state, to a post-Cold War perspective in which threats are diffuse, the weight of military factors has diminished and many of the threats appear not to be linked to state actors, and even not to be linked to any particular territory. We can say in general, however, that the end of the Cold War has led to a reappraisal of the main theoretical matrices used to evaluate international problems.⁴⁷ This will allow progress to be made towards a new paradigm which, while recognizing conflict and confrontation, places greater emphasis on cooperation and association. This change requires tremendous political will on the part of core actors and specific forms of coordination. Development of theories about international regimes⁴⁸ and about forming global public goods⁴⁹ has acquired greater significance and importance, as have contributions to theories of negotiation⁵⁰ and practical instruments to relieve tension.⁵¹ Theoretical exploration of this

⁴⁷ Michael P. Snnar and D. Neil Snarr (eds.), *Global Issues*, Boulder, Colo., Lynne Rienner Publishers, 1998; Barry Buzan, Ole Waever and Jaap de Wilde, *Security. A New Framework for Analysis*, Boulder, Colo., Lynne Rienner Publishers, 1998; Robert O. Keohane and Joseph S. Nye Jr, 'Power and interdependence in the information age', *Foreign Affairs*, Vol. 77, No. 5, 1998. pp. 81–94; Mel Gurtov, *Global Politics in the Human Interest*, op. cit.

⁴⁸ Stephen D. Krasner, *International Regimes*, Cornell University Press, 1983, 6th ed., 1991; Roberto Keohane, *Instituciones internacionales y poder estatal*, Buenos Aires, Editorial GEL, 1993.

⁴⁹ Inge Kaul, Isabelle Grunberg and Marc A. Stern, *Global Public Goods*, New York, UNDP/Oxford University Press, 1999.

⁵⁰ J. William Breslin and Jeffrey Z. Rubin, *Negotiation Theory and Practice. Program on Negotiation Books*. Cambridge, Mass., Harvard Law School, 1995. Roger Fisher, Andrea Kupfer Schneider, Elizabeth Borgmardt and Brian Ganson, *Beyond Machiavelli. Tools for Coping with Conflict*, Harvard University Press, 1994. Roger Fisher, Elizabeth Kopelman and Andrea Kupfer Schneider, *Más allá de Maquiavelo. Herramientas para afrontar conflictos*, Buenos Aires, Editorial Granica, 1996 (original version in English, 1994).

⁵¹ Michael Krepon, Michael Newbill, Khurshid Khoja and Jenny S. Drezin, *Global Confidence Building, New Tools for Troubled Regions*, New York, St Martin's Press, 1999.

field will generate suitable knowledge to improve multilateral relations and the results arising from them, especially those results capable of changing relations in the international system⁵², beginning with cooperative multilateralism.

Nowadays, the world has more information. Links are better. Political, economic and social events in a country or region do not leave indifferent those who perceive them on the other side of the world.⁵³ Economic decisions made in one part of the world have direct consequences on economic growth and sustainability in other areas. All the above bears out the existence of substantial changes in the basic concept of sovereignty and demonstrates the reduced capabilities of nations to cope with their main problems.⁵⁴ Hence, coordinating policies, establishing regulations and generating international regimes, based on shared values, are essential points in designing a new international system for the twenty first century. Only the ability to act jointly will allow states to recover their abilities to generate, together with other actors, a legitimate order capable of meeting the demands made, including the issue of security worldwide: building a world free from threats and fear. The basic concept that allows security to be understood in the post-Cold War period is that of cooperation. This concept emerges in all reports systematizing progress and interpreting the changes in the world. It also plays an important role in different views, both for preventing and for promoting peace and international security. The series of views indicate that new problems that must be incorporated into the concept go beyond military aspects; hence, elements of cooperation are an essential point.

⁵² Stanley Hoffmann, *World Disorders. Troubled Peace in the Post-Cold War Era*, Boston, Mass., Rowman and Littlefield Publishers, 1998.

⁵³ This trend has increased with the impact of global terrorism and the fight to eliminate it. *UNESCO/FLACSO-Chile* 16

⁵⁴ Roberto Bergalli and Eligio Resta (comp.), *Soberanía: un principio que se derrumba*, Buenos Aires, Editorial Paidós, 1996.

National Security and Economic Security

Countries all develop their global objectives and strategies. They all develop sophisticated scanning processes to understand the political, economic, sociological and technological variables which have an impact on them. In some countries such as USA, the federal government does not manage the country as a "system". They need interagency cooperation, which is an essential element of what needs to change in the future, in addition to other forms of cooperation between the government and its members. By industry, all industry - not just that portion of the industrial base which supports the military, directly government corporations increasingly act as large social systems with a global focus. But, if were asked the CEOs of the Fortune to describe the issues which are on their minds on any given day, "National Security" would not be among them. Many global corporations do not believe that they owe allegiance to any stakeholder except their stockholders, and sometimes, their customers. This attitude has changed profoundly since the end of the Cold War. Does this have an impact on the national security of governments? Certainly, in the post-Cold War environment, economic security is national security, but the national security community does very little about it. A new vision of national security is needed. It needs to encompass cooperation between government and all its stakeholders, including, but not limited to, industry.

Lacking economic security or a viable market based economy, the USSR disintegrated. It disintegrated rapidly, broadly, and precipitously. That disintegration created a new world order in which concern about regional challenges to national security replaced the global threats and counterbalances of the Cold War. Clearly, the reduced tensions of this new world have helped new democracies advance. Traditional democracies, such as the United States have also benefited. These

developed nations have had economic security due to their market based economies, and can now devote more resources than during the Cold War period, to addressing such global problems as the environment, overpopulation, technology transfer, and infrastructure development. They also have the resources to cooperate in peacekeeping operations around the world to create new alliances like the Partnership for Peace, and to move ahead in planning for enlarging other alliances such as NATO and the United Nations.

Most critical for the economy, both government and industry are failing to cooperate as completely as they could in crucial areas to advance national security, such as leveraging the national laboratories, and providing the environment to encourage increased research and development on many fronts. Industry doesn't really understand government's red tape. They are frustrated by government's lack of appreciation of the powerful role that Wall Street plays in the life of industry. With industry moving so rapidly and irretrievably into global markets and agreements -- which ought to be a great boost for the economy and therefore national security -- government has grown uneasy, sensing a steady loss of control. And industry, for its part, frequently turns a deaf ear to government's often rightful effort to regulate.

The relationship between industry and the military -- especially between the long-range planners on both sides -- now suffers from a growing lack of understanding. There is ignorance on both sides due to poor communication and lack of true "partnership." If this ignorance continues, the country could lose its leadership role in the world. Could be outpaced by European or Asian consortia in which military and government in general, work closely with industry for the long term. Thus, in effect, the United States could decline in whatever the post-Cold War

period would be called in decades hence. And no one today is predicting it. Ironically, the nation that made possible the end of the Cold War, that by its willingness to stand as the countervailing power against the Soviet Union for forty years, made possible the great economic booms in Asia, the rise of democracies in Europe and Latin America, and even, indirectly, eased the path for the emergence of China, that nation could decline by allowing itself to deteriorate from within while much of the world enjoys the fruits of a victory earned largely by the United States. There can and should be a peace divided, but only if increased communication takes place between government agencies and government and its stakeholders, including industry.

There are many kinds of "war" against corporations and countries. It may be difficult to guard against some of these "little Wars" for these are not considered "war" in the traditional sense. For example, act of terrorism when an executive is kidnapped and held for ransom in a foreign country. Is this single act of terrorism an act of "Economic War" when the executive's knowledge gives his company a competitive advantage on a global basis, and thus helps his country's economy to be stronger? If the executive is killed, is this an act of war? Is that the difference between real war and economic war? In a real war people's lives are at risk. In an economic war, a nation's economy and their citizen's livelihoods and way of life are at risk? Either way, national security is at risk. Having been known from history, though, that when nations' economies are at risk of failure, the way Japan's and Germany's were before World War II, their penchant for going to war is high. Economic wars can lead to the economic chaos which can lead to real wars. They can be very dangerous. In a globally competitive economy, how do national economies compete? Is there such a thing as economic war? When does natural competition end and economic war begin? Who is

the enemy in an economic war? A company? A country? How can the government defend itself against economic war, if there is such a thing?

Understanding the ramifications of the global economy and its relationship to countries' economies and their ability to compete, this is at the core of what national security is in a Post-Cold War world because economic security is national security. Without economic security, there can be no national security in a military or any other sense. So isn't an attack aimed at the economic security of the country, in a sense an act of war? Threats to national security are defined according to the context of the age. For instance, many U.S. industries have seen for decades that some foreign country's policies can have a profoundly negative effect on the ability of any country to export or sell their products and services competitively. This can lead to the loss of whole industries in a country. When a country's government deliberately encourages its industry and governmental officials to harm another country's economy or its industry through industrial and other policies, then an economic war is being waged.

Economic security is national security in its broadest sense. Government and industry sometimes are failing to consolidate the gains that should have been theirs following victory in the cold war because they are not cooperating, and, in fact, continue to have an adversarial relationship. The division between government and industry is largely one of misunderstanding, and, yet, bridging that gap is crucial to the national security. Understanding the "systems" nature of national security is at the very heart of why it is crucial for government and industry to work together to maintain the leadership position of the States in the 21st century. In a system, every element is interconnected with every other element and all elements are interdependent. For that reason, systems are only as strong as their weakest links. However, in some countries, the

links between government and industry are weak. Government and industry have been adversaries for so many generations that they do not know each other well enough to even recognize each other strengths and weaknesses. They are failing to capitalize on what could be a powerful and inexpensive force multiplier. The most recent reasons for this misunderstanding have their roots in cultural differences that began during the Vietnam War period, for example. Unfortunately for the nation, this has continued into the post-Cold War period because the two sides are approaching the new world order along separate paths. In addition, for most of this century, the two sides have viewed each other with suspicion and distrust. To survive in the 21st century, the United States will need to learn the true meaning of national security, and its concomitant requirements for cooperation between government, industry, and others. Each side has a great deal to learn from the other though neither has made a serious effort to do so. The irony of all this is that the U.S., in the absence, now, of a major global threat, could fritter away a significant portion of its strength by a self-inflicted wound. There is a brighter prospect however, and that lies in the possibility of a government and industry cooperative partnership which builds upon the strengths of both, and finds ways to augment weaknesses to enable a secure future for the country. Where there have been efforts to cooperate, they have frequently produced positive results, such as USCAR. Unfortunately, the number of cooperative efforts is far short of what is needed for the nation to remain a global leader in the long term. The executive branch of the federal government and the corporate officers of government need to begin a dialogue to learn from one another and work together in the national interest. Other nations have done superb jobs of such cooperation, such as Japan. Using systems thinking, the nation will benefit from seeing how powerful and productive common sense cooperation could be for 21st century America. Indeed, without such cooperation, the chances that the

United States will retain its global leadership position are questionable. There are other cooperative relationships that government and industry should be developing; relationships which will enable the infrastructure of the nation to be strong, such as the educational system, technology, research and development, as well. It is important to explain the systems nature of national security and its component parts which provides a context.

Now is an especially interesting time to study the global community while the world is in between the end of the Cold War and what will come next. A system in the real world can be described as any entity with an open boundary that contains interdependent elements. A system must be able to adapt to its environment. Systems can be small or large. They can be physical, such as the human body or the solar system. They can be social, such as the family, the church, or a company. Whole societies are systems, too. The "global village" may be, perhaps, the largest social system. Global systems are both physical and/or social. Satellite dishes providing television around the world, telecommunications networks or the Global Positioning System Satellite to determine latitude and longitude anywhere on the planet are examples of global physical systems. The United Nations, the World Bank, and the International Monetary Fund could be viewed as amongst the largest of economic and/or political systems. In a global economy, they need to understand global systemic behavior is essential. This gets especially complex, when individual nation's currencies compete with one another. There will truly be a global village and economy when, one day, there is only one global currency.

It is most helpful to discuss economic security as national security in a system's context. With the fall of the Berlin Wall, the crumbling infrastructure of the former Soviet Union, with the increasing pace of

change and technology which are leading the planet beyond Alvin Toffler's "third wave," and the globalization of the world economy, the stable bipolar world of the cold war has changed forever. Instead of a global "peace dividend," which raised the standard of living around the world, the people of the world have inherited an increasingly complex and unstable, even chaotic, place to live. After World War II, General George C. Marshall said, "We are now concerned with the peace of the entire world. And the peace can only be maintained by the strong." If we take General Marshall's comments as a premise, what does it mean to be strong? Why must national security be thought of in a "systems" perspective in order to enable the United States, for example, to be strong, and thus, to support commerce and peace initiatives around the world. A part of being strong includes the strength of our nation's infrastructure; the foundation upon which the continuous growth of our society depends. This includes its strong societal and moral codes, the rule of law, stable governmental and political institutions, schools and educational programs to ensure a knowledgeable citizenry and life-long learning. Infrastructure also includes power plants, roads, sewers, ports, banks, telecommunications, housing, hospitals and health-care, a powerful military, environmental Most important, to support all of this infrastructure, it is essential to have a healthy market based economy, with a strong industrial base of globally competitive industries which continuously improve their quality and productivity, and produce jobs and more jobs. All of these elements of infrastructure are critical to national security. They must be sound for a nation to be strong.

National security cannot be viewed any other way but in a societal systems context. And, within that context, it must be defined. This may have occurred in Dr. Deming's earliest thinking about social systems, since he told the Japanese to view their entire country as a system in 1950. Dr. Deming would say, "A system must have an aim" to be a

system. What is the aim of the United States? Perhaps, we could say, "life, liberty, and the pursuit of happiness," within the system framework of maintaining the Constitution, the Bill of Rights, and providing for a common defense. Of course, another system constraint includes a finite amount of tax dollars and globally competitive capital for free market growth, with which to build the infrastructure and, in addition, the knowledgeable people essential for a society to be effective. A major part of the infrastructure of a nation is a sound economy. It, therefore, follows that one important way to secure peace around the world is to ensure prosperity and a high quality of life on a global basis. Economic stability, however, is not necessarily considered an element of national security. But, it is. Too frequently, national security is mainly viewed within a military framework, but that is much too narrow a context for the 21st century. But, in a broad definition of national security, the military may need to play a role to help integrate, though not control, the many "voices" that come together to define our nation's security.

The Importance of the Cultural Dimension and Human Rights

Globalization has universalized such values as human rights, democracy and the market. This globalization has a strongly Western flavor. Basic technological and economic processes associated with globalization have generated greater global interdependence with positive and negative aspects, such as more trade, more dissemination of scientific knowledge and more global information. There is also greater danger to the environment; terrorism has acquired a global dimension; organized crime is worldwide and financial crises know no borders. Generating stability and global governance without proper institutions is difficult. Significant deficiencies can be observed in this area. In turn, there is increasing differentiation and multiplication of international actors in the context of globalization and this has a bearing on the degree of importance and power resources with which one deals with the

processes and seeks to influence future courses of action. A vision of the future is essential. In this framework and within the current period of the international system, various global concepts in specific areas such as security have not been honed.

Human security visualizes a *new global order*, one world, founded on global humanism. The core issue is to solve the population's basic needs in the context of globalization and interdependence. This presupposes, on the one hand, a tendency to unify behavior, consumption and values centered on universal values, and, on the other, the requirement to recognize and respect diversity and particular identities and cultures. We have seen, however, that in addition to the above; globalization also increases differences and does not in itself solve any needs. Globalization also has an adverse effect on cultural practices and national and local identities. All this is taking place in a context of economic and social polarization in various areas of the world. The result is local ungovernability, which transfers instability to the global system and regional subsystems. Classic security asserts that there is no absolute security and that a greater security of one actor can mean a greater degree of insecurity of another actor. In the case of human security, we can assert that the vulnerabilities of one are manifested as the vulnerabilities of all, a mutual vulnerability. In the Latin American region, this requires that we pay greater attention to, and seek more alternatives for, the Colombian conflict. Defining cultural rights also enables us to better identify the cultural components of other human rights, not in order to relativize these, but rather to supplement their interpretation, their appropriation by all actors involved and, thereby, their implementation. For example, the right to food cannot be correctly implemented without proper consideration for the right's cultural dimension. The same logic can be applied to most human rights. Overlooking the cultural dimension of rights is a factor of particularly

importance in the persistence of poverty. Capacity building and empowerment of persons in situation of extreme poverty and of social stakeholders involved in development are greatly conditioned by the exercise of their cultural rights (respect for their know-how, their values and identities, access to education, information and cultural heritage). Capitalizing on these resources and capacities is the best way to improve each person's possibility of choice.

Economic Human Security, Globalization and Cultural Impacts

Recent years have witnessed a marked acceleration in the tempo of globalization. Its scope has also widened beyond the realm of economy to embrace the domains of social, cultural and political norms and practices. This powerful thrust has been associated with far-reaching consequences for economic well-being, social structures and political processes in countries around the world. The different parts of the world have become so interdependent in so many ways that it is no longer possible to understand their socio-economic problems, much less to do something about them, without taking into account the play of global forces. The process of globalization has been accompanied by major changes in the role and responsibilities of a wide range of institutions - families, communities, civil society institutions, business corporations, states and supranational organizations. One of the important consequences of the changes associated with globalization has been increased insecurity at the level of the individual and the family. This, in turn, not only affects individual welfare, but has broader economic, social and political impacts as well.⁵⁵ In recent years there has been a good deal of discussion in academic circles, especially among sociologists, on the concept and defining characteristics of

⁵⁵ Dharam Ghai, "Economic Globalization, Institutional Change And Human Security", United Nations Research Institute For Social Development (November 1997), p 3.

globalization.⁵⁶ In a fuller treatment of the subject, it would be important to review the variety of conceptualizations of and approaches to globalization put forward in the literature. In common parlance, globalization is often equated with growing integration of national economies. But as employed here, the concept also refers to the rapid spread, worldwide, of some dominant social, cultural and political norms and practices. The pattern of global economic integration also displays some sharp inequalities. Whether measured in terms of trade, capital flows, foreign investment, technology transfers or activities of transnational enterprises, most transactions take place among developed countries. Linkages with developing countries have expanded significantly in recent years, but there is a marked concentration of direction: a handful of countries account for the majority of flows. The fact that this group includes some large Asian and Latin American countries means that in terms of population, the pattern of flows is distinctly less uneven. Nevertheless, most of the poorest and least developed countries are largely bypassed by the intensified circuits of trade, capital and investment.

The processes of globalization have been associated with wide-ranging socio-economic consequences. Globalization has been associated with a number of other changes, such as technological progress, liberalization and deregulation. It is quite impossible to separate out the economic impacts of globalization, however defined, from those of the preceding factors. There is the further difficulty arising from the time period over which the analysis is carried out. The immediate and short-term impacts may turn out to be very different from those of the medium

⁵⁶See, for instance, Roland Robertson, *Social Theory and Global Culture* (Sage Publications, London, 1992); Anthony G. McGrew et al., *Global Politics: Globalization and the Nation-State* (Polity Press, Cambridge, 1992); Mike Featherstone (ed.), *Global Culture: Nationalism, Globalization and Modernity* (Sage Publications, London, 1990); Peter Beyer, *Religion and Globalization* (Sage Publications, London, 1994); Malcolm Waters, *Globalization* (Routledge, London, 1995).

and long term. Despite these qualifications, it is important to stress that the processes of globalization tend to produce certain socio-economic effects. In the short run, most of the changes associated with globalization are likely to deepen income inequalities.⁵⁷The greater role of market forces in the labor and capital markets can be expected, in most countries, to raise interest rates and lower wages, especially those of unskilled workers. This is so because governmental regulation of these markets was designed to control interest rates and ensure minimum wages. The effect is likely to be reinforced by changes in taxes and public expenditure, such as moves towards indirect taxes, lower marginal rates of individual and corporate taxes, and reduction of subsidies, social security and welfare expenditure. The deflationary effects on economic activities may put further pressure on employment and wages, which may be reinforced by labor-saving technological progress.

Besides, cultural factors alone do not explain all of the cross-national variations in economic growth rates. Every economy experiences significant fluctuations in growth rates from year to year as a result of short-term factors such as technological shocks or unforeseen circumstances that effect output. These could not be attributed to cultural factors, which change gradually. A society's economy and political institutions also make a difference. For example, prior to 1945, North Korea and South Korea had a common culture, but South Korea's economic performance has been far superior. On the other hand, the evidence suggests that cultural diversity and differences are an important part of the story. Over the past five decades, the Confucian-influenced economies of East Asia outperformed the rest of the world by a wide margin. This holds true despite the fact that they are shaped by a

⁵⁷ Dharam Ghai, *Structural Adjustment, Global Integration and Social Democracy*, Discussion Paper No. 37, UNRISD, Geneva, 1992); Al Berry and Frances Stewart, *Changes in World Income Distribution* (North-South Institute, Ottawa, mimeo).

wide variety of economic and political institutions. Conversely, during the same period most African economies experienced low growth rates. Both societal-level and individual-level evidence suggests that a society's economic and political institutions are not the only factors determining economic development; cultural factors are also important.⁵⁸

When discussing the issue of programs of readjustment and redefinition of models of economic development, one cannot avoid the issue of poverty in the Latin American region and the Andean region in particular. This issue has probably received the most attention and research, and there are a number of accumulated studies and empirical evidences regarding the difficulty – or impossibility, as the case may be – of acceding to human security when minimum conditions of participation in collective well-being do not exist. Thus, just to emphasize once again, proper treatment of the problem of overcoming poverty is a necessary condition for achieving individual, national and international human security.⁵⁹

The social and cultural impact of globalization has also been widespread. It is manifested most clearly in the worldwide presence of certain patterns of consumption and lifestyles. These include cars, television, videos, fashions and designer clothing, popular music, films, television and video shows, dance, beverages and fast foods, just to mention a few of the more prominent symbols of world culture. The social and cultural impact is especially noticeable on two sections of the population — affluent minorities and youth. While many consumption

⁵⁸ Rosita Dellios, "Mandalic Regionalism in Asia: Exploring the Relationship between Regional Governance and Economic Security ", *Culture Mandala* (Vol. 8, No. 1, October-December 2008, p 2.

⁵⁹ Ralf Dahrendorf, "Economic opportunity, civil society and political liberty" in Cynthia Hewitt de Alcántara (ed.), *Social Futures, Global Visions* (UNRISD, Geneva and Blackwell, Oxford, 1996).

goods and services are available only to affluent minorities in developing and former communist countries, others - such as television programs, videos and fast food - reach much larger proportions of the population in these countries. Another important consequence of globalization is that it creates or strengthens groups throughout the world that are linked by common interests or lifestyles. Affluent minorities in poor countries can thus relate to middle classes in the industrialized world. A common culture binds together youth from different parts of the world.⁶⁰ These cultural and social links strengthen those already created by the web of international commerce, production, finance and investment. All these provide points of common interest going beyond state borders, thus further loosening national ties. A fundamental aspect of social and cultural globalization is that vast multitudes of people in poor countries - but increasingly in the rich countries as well - are left outside these circuits of consumption and leisure activities. The sense of frustration engendered by deprivation is fuelled by relentless exposure, through the media, to the temptations and seductions of "the good life" enjoyed by the fortunate few. It is hardly surprising that this sometimes leads to get-rich-quick activities, which are typically associated with illegal acts such as crime, trade in arms, prostitution, pornography, and production and sale of drugs.

One of the main consequences of accelerated globalization and the changes associated with it has been an intensification of human insecurity.⁶¹ This appears to have occurred across a wide spectrum of countries with varied socio-economic systems and levels of development. The sources of this insecurity can be traced to changes in

⁶⁰ UNRISD, *States of Disarray*, op. cit.; Marshall Wolfe, *Social Integration: Institutions and Actors* (Occasional Paper No. 4, UNRISD, Geneva, November 1994).

⁶¹ International Labor Office, *World Employment 1995* (ILO, Geneva, 1995); A.R. Khan, *Overcoming Unemployment* (ILO, Geneva, 1994); World Bank, *Workers in an Integrating World* (Oxford University Press, New York, 1995).

the domains of economy, society, politics and culture.⁶² Any dynamic system generates human insecurity — but when changes occur with startling rapidity, the cumulative impact can be quite frightening. And when the institutions and mechanisms in place to cushion insecurity begin to crumble under the impact of the same forces, the effect is intensified. Enhanced economic insecurity is at the center of the rising spiral of human insecurity. The key contributory factors are intensified competition, internationalization of production, changes in methods of production, surges of financial speculation and the rapidity of technological innovations. These dynamic forces have generated unprecedented pressures on livelihood security, which are expressed in different ways for different groups in different countries. In most countries, a central element in economic insecurity is an intensification of the unemployment problem. These sources of economic insecurity have been reinforced by changes in state policies in the field of income redistribution and social security. Influenced by new ideologies and buffeted by the factors noted above, most states have been cutting down on subsidies on items of mass consumption, increasing charges for social services and reducing the level and range of benefits under social security and welfare programs. Thus unemployment benefits, health coverage and old-age pensions are being adversely affected for most citizens.⁶³ Family and community structures are also undergoing important changes under the influence of globalization and the changes associated with it, and are thus less effective in cushioning the impact of adverse economic changes. Some existing and new institutions, such as religious bodies and citizens' organizations, are trying to fill in the void, but their efforts have had limited impacts at best.

⁶² United Nations Development Program, *Human Development Report 1994* (Oxford University Press, New York, 1994); Barry Buzan, *People, States and Fear* (Harvester Wheatsheaf, Hemel Hempstead, 1991).

⁶³ Gøsta Esping-Andersen, *Welfare States in Transition: National Adaptations in Economies* (UNRISD, Geneva and Sage Publications, London, 1996); Jessica Vivian, *Adjustment and Social Sector Restructuring* (UNRISD and Frank Cass, London, 1995).

Sources of insecurity are also located in other domains of human activity. In the sphere of politics, the close bonds between political parties and their supporters have loosened in recent years. Workers, the unemployed and other categories of low-income groups lack confidence in the traditional parties to defend their interests. It is not surprising that there is a growing disenchantment and lack of interest in the political process. In the social domain, the weakening of community and family structures exacerbates a sense of personal insecurity. Changes in the established patterns of relations between generations, sexes and peer groups add a potent new source of anxiety for many.⁶⁴ In the sphere of culture, the clash between traditional values and those propagated by the media and the consumer society contributes to conflicts and uncertainty.

Economic security cannot be enhanced simply by reverting to the conditions and policies of earlier years. The forces of globalization cannot be rolled back. Technology alone has forever changed the world we live in. Nor does it make sense to reverse the reliance on free markets and private enterprise as the primary mechanisms for promoting economic progress. The great challenge for analysts, reformers and leaders alike is to devise policies and institutions to ensure greater security in the new situation created by accelerated globalization and technological advance. It must be admitted that this is a daunting task — and little progress has been made so far in this respect, either at the level of thought or action. This section can do no more than sketch the broad directions for policy and institutional reform for enhanced human security. Even so, more questions are raised than answers provided. The problems of human security differ in industrialized, transition and

⁶⁴ Anthony Giddens, "Affluence, poverty and the idea of a post-scarcity society", in Cynthia Hewitt de Alcántara (ed.), *Social Futures, Global Visions* (UNRISD, Geneva and Blackwell, Oxford, 1996).

developing countries, and so must the policies to deal with them. A case in point concerns the prescription of higher growth rates to combat unemployment and poverty. Most developed countries were able to achieve near full employment in the first three decades of the post-war period, in large part due to historically unprecedented rates of economic growth. It is unrealistic to assume that this experience can be repeated in the future. It is more probable that the growth rates of the past two decades, more in line with historical experience, will prevail in the future. In any case, both environmental considerations and the nature of technological progress raise serious doubts about whether higher growth is the best route to handling unemployment problems in rich countries. Reforms in labor markets, and in educational and training systems, could help in enhancing employment possibilities. But significant progress towards full employment would call for more imaginative policy and institutional reforms in such areas as technological progress; new combinations of work, learning and leisure; work sharing; and novel arrangements for financing socially and economically useful work.

The idea that economic growth is partly shaped by cultural factors has encountered considerable resistance. One reason for this resistance is because cultural values have been widely perceived as diffuse as permanent features of given societies: if cultural values determine economic growth, then the outlook for economic development seems hopeless, because culture cannot be changed. Another reason for opposition is that standard economic arguments supposedly suffice for international differences in savings and growth rates.⁶⁵ For example, the standard life cycle model and not cultural arguments explains the difference in savings rates and growth rates between, say, Germany, Japan, and United States.

⁶⁵Rosita Dellios, "Mandalic Regionalism in Asia: Exploring the Relationship between Regional Governance and Economic Security " *Culture Mandala* ,Vol. 8, No. 1, October-December 2008, p 19.

Conclusion

As the reader will understand, the concept of human security is still under construction, considering the number of priorities and dimensions to be taken into account in order to achieve integrated action able to respond to urgent and wide-ranging needs, particularly on behalf of the most unprotected sectors of the population. The specific links between the promotion of human security, the prevention of conflict and action in favor of human rights and democracy should also be clearly established. Courses of action in these different fields often follow a very different political, economic and social logic, and perhaps the time has come to create a forum for more effective interaction among them, especially in the area of preparing coherent policies, the implementation of which requires the cooperation of all social actors without exception. Another essential aspect is the need for a long-term perspective on the processes that may lead to the emergence of new non-violent threats to peace and security. This perspective would require a more active and joint contribution from the social and human sciences and the natural sciences, particularly regarding the interactions between environmental degradation and worsening poverty and destitution (economic aspects).

There are problems which can be read as human security, but which more properly perhaps belong to the spheres of international and state security. Having made this first distinction, another must be made. Even at a human security level *per se*, one must distinguish between issues affecting 'freedom from want' and issues affecting 'freedom from danger'. The former cover such a wide-ranging field that they become mixed up with politics, economics, social policies, etc. Precisely for this reason, warnings have been given about the danger of excessive 'securitization' of problems that can normally be read as belonging to

other disciplines (as above). The fields of human security and development are obviously interconnected. Not enough attention can be called, however, to the centrality to human security of the problems inherent in these fields. So much more so if one considers the perverse force resulting from globalization and the competitiveness/inclusion antinomy referred to above. Everything done in this field will be too little during our lifetime. All minimally reasonable ideas must be encouraged in order to close the gap between economy and society. The actions of NGOs and other non-state institutions, such as foundations, neighborhood organizations, etc., must be supported. Similarly, the highest possible level of state concern must be demanded. Besides making demands on and controlling state institutions responsible for tackling the increase in common crime and insecurity in towns, the development of civil society agencies or institutions, which can play an important role in improving the situation, must be encouraged.

In addition, this paper has been concerned with the economic, political, social, cultural diversity and institutional consequences of accelerated globalization over the past two decades. It has focused particularly on heightened human insecurity resulting from the processes of globalization. Apart from being a source of much human suffering and hardship, intensification of economic insecurity is associated with social problems, ethnic conflicts and political instability. The systems of social support for disadvantaged groups built up in the post-war period are under severe strain and are increasingly ineffective in coping with these problems. Policy and institutional reforms to provide a modicum of social and economic security must reflect the reality of open markets, fierce competition and rapid technological change. In the long run, the globalization of the economy must be matched by a globalization of social policy.

Above all, the concepts of economic security, human security and cultural diversity have great potential to raise the priority of policies that address threats to people, their communities and built- and economic and cultural environment by identifying the issues of daily life and environmental degradation as issues of "security." In fact, one of the findings of this study is that there is a clear convergence on policy requirements between economic security and human security with concerning diversity of culture in the four corners of our globe. The policy linkages of these security concerns are the policies for adaptation to economic change and those for ensuring human security. If these policies were fully implemented, they could lay the foundation for building sustainable society and, at the same time, help eradicate the root cause of social disorder and armed conflicts in many less/least developing countries. Besides, cultural factors alone do not explain all of the cross- national variation in economic growth rates. Every economy experiences significant fluctuations in growth rates from year to year as a result of short-term factors such as technological shocks or unforeseen circumstances that effect output. These could not be attributed to cultural factors, which change gradually.

In conclusion, attending to regional cooperation could be assessed as a useful mechanism in order to promote economic security at regional and international levels. The preparation of a regional framework for the promotion of human security in order to incorporate a number of factors, such as the ethical foundations of human security, human rights, cultural diversity and the different perceptions of security at the regional, national and, especially, local levels, in order to move towards the protection of the most vulnerable sectors of the population. One of the most important considered points is to promote regional approaches in order to define the most suitable needs and modalities of action, and to jointly promote human security and conflict prevention in each specific

regional and cultural context. Finally, it is crystal clear that human security would never be achieved without promotion of economic security and to be successful in order to eliminate economic insecure space, the regional and international economic rates and criteria should be developed in all aspects to remove roots causes of wars and conflicts. In such situation, national security and then international security would appear suitable to the lifestyle of the people.

Country Case Studies

Plight of North Indian Migrants: A Case of Human Rights Violation in Pune City in Maharashtra

Dadarao C Kirtiraj *

Abstract

The concept of migration even if old it has added different dimensions to it due to the changing socio-economic and political situations more popularly called as neo liberal era or globalization. Globalization created the situation of marginalization, exclusion and social disintegration. (Sinha Manoj, 2004) Because of urban centric model of developments, many rural people are forced to migrate to cities in search of employment and better living. According to the Census 2001, among the population of 9.69 crore of Maharashtra, 32.32 lakh persons (3.34 per cent) were in-migrants from other states in India, out of which more than 40 percent were north Indian, particularly from UP and Bihar. These migrants are the most exploited people; they suffer from insecurity and social exclusion leading to the gross violation of their fundamental and Human rights.

City of Pune being an Industrial hub and its connectivity to all parts of the country attracts people from all over India. But the treatments offered to the north Indians from UP and Bihar is discriminatory owing to the sons of soil politics being practiced by the regional political parties like MNS (Maharashtra Navnirman Sena) and Shiv Sena. This has occasionally resulted in violence against the north Indian labor force employed in Pune city and suburbs areas. Many times they had to run away in overnight so as to save their lives. These people despite of being citizens of India could not enjoy their basic fundamental rights and are constantly subjected to discrimination, conflicts and violence as a part of vote bank politics. The present paper is an attempt to throw new lights on the issues of migrants and human rights violation in India. The paper will be based on the analysis of primary data (personnel

* Dr. Dadarao C Kirtiraj is Associate Professor at Social Sciences Centre, Bharti Vidhyapeeth Deemed University, Pune (kirtiraj88@yahoo.com).

interviews, and discussions) collected from north Indians living in Pune City either singly or with families.

Introduction

Migrants are one of the most vulnerable sections in India whose human rights are always at stakes. The wide economic, social, cultural and regional disparities forces the people to move away from their home land to the other state for want of employment - using migration as a survival strategy. Internal migration of poor laborers is rising in India. 14.4 million people migrated within the country for work purposes either to cities or to areas with higher expected economic gains, during the 2001 census period. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ have guaranteed the rights to sustainable livelihood, social, political and economic development for all specially the disadvantaged sections. International Covenant on Economic, Social and Cultural rights in its preamble states that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights.² Many countries have ratified these covenants. In 1979, Government of India acceded to the International covenants on economic, social and cultural rights.³ In India, there are many vulnerable groups like Scheduled Caste, Scheduled tribes⁴ and other backward classes who are victims of the Hindu social structure. Plight of these

¹ Fact Sheet No.2 (Rev. 1), The International Bill on Human Rights, United Nations, Geneva, June, 1996 available at: <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

² Ibid.

³ Chandrima Chatterjee and Gunjan Sheoran (2007), A Report on "Vulnerable Groups in India," published by Centre for Enquiry into Health and Allied Themes, Mumbai.

⁴ SC/ST are the Constitutional Terminologies use to denote Scheduled Caste and Scheduled Tribes, the two socially, educationally and economically disadvantaged groups in India.

weaker sections is quite noticeable when we visit villages in rural India and slums in urban areas.

Internal Migration in India

In 2001, 309 million persons were migrants based on place of last residence, which constitute about 30 percent of the total population of the country. This figure indicates an increase of around 37 percent from census 1991 which recorded 226 million migrants. Out of the total migrants 91 million are males and the rest 218 are females. Thus migrants constitute around 30 percent of the total population, male and female migrants constituting 18 percent and 45 percent of their population respectively. Of the total migrants, 87 percent were migrants within the state of enumeration while 13 percent were interstate migrants.⁵ From the largest three or four magnitudes of out-migration proportions of each state, it is clear that majority of the migrants have moved to neighboring states only. However there are exceptions for this. For Uttar Pradesh, which constitutes 41 percent of all our migrants, migration to Maharashtra accounts for 32 percent even though Maharashtra is not a border state. Likewise, out-migrants from Orissa preferred Gujarat and Maharashtra as the destination even when these states are not Border States. Out-migration to these states made up to 34 percent of total out-migrants from Orissa. A close look at the pattern of each state's out-migration is as follows. 56 percent of out-migrants from Uttar Pradesh have gone to Maharashtra, Haryana and Madhya Pradesh. In the case of Bihar, nearly 50 percent out-migrants have moved to Jharkhand, West Bengal, Maharashtra and Uttar Pradesh. Out-migrants from these two states made up to 70 percent of total out-migrants. More than one-third of Tamil Nadu migrants moved to Karnataka. The rest of the out-migrants have chosen mainly Kerala, Maharashtra and Uttar Pradesh. More than three-fourth of out-migrants from Andhra Pradesh have moved to the border states namely, Karnataka, Maharashtra and Tamil Nadu. For the

⁵ Census of India, 2001, Reports on Migration.

out-migrants from Rajasthan, destinations are Maharashtra, Haryana, Gujarat and Madhya Pradesh. Turning to Kerala, about 48 percent have moved to the neighboring states, Karnataka and Tamil Nadu. However, a slightly more than one-fourth of the out-migrants from Kerala have moved to Maharashtra, which is not a bordering state. Overall it is observed that majority of the out-migrants have moved to the bordering states. Nevertheless, it is observed that migration to non-bordering states has also been significant.⁶

Migrants in Maharashtra

According to the Population Census 2001, among the population of 9.69 crore of Maharashtra, 32.32 lakh persons (3.34 percent) were in-migrants from other states in India and in addition, 0.48 lakh persons (0.05 percent) were in-migrants from other countries during 1991-2001 decade. Out of the 32.32 lakh in-migrants from other states, large number of in-migrants were from Uttar Pradesh (28.5 percent), followed by Karnataka (14.7 percent), Madhya Pradesh (8.5 percent), Gujarat (7.6 percent), Bihar (7.1 percent) and Andhra Pradesh (6.0 percent).

After 1991, the net addition in the population up to 2001 was 1.80 crore, out of which 32.80 lakh (18.2 percent) persons were in-migrants. In other words, for every 5 persons added in the population of Maharashtra during the decade 1991-2001, one person was in-migrant.⁷

Human Rights and the Indian Constitution

The preamble of the Indian Constitution sets the aims to secure for all its citizens justice - social, economic and political, liberty - of thoughts, of expressions, belief, faith and worship, equality - of status and opportunity

⁶ Ibid.

⁷ Ibid.

and promote among them all fraternity assuring dignity of individual and unity of nation. The Indian Constitution has a full-fledged chapter (Part III) on fundamental rights which ranges from Article 12 to Article 36. The fundamental rights is drafted and incorporated into the Indian Constitution on the pattern of US Constitution (American Bill of Rights) and Switzerland⁸. These fundamental rights are made sacrosanct and mandatory, part of Basic Structure of the Constitution which cannot be altered or changed or withdrawn at the instance of the government enjoying power at the Centre.

It is further extended to the Article 37 to 51 in the form of Directive Principle of State Policy. According to the Directive Principles of State Policy of the Indian Constitution, the State is required to secure for its citizens both men and women - right to an adequate means of livelihood, equal pay for equal work for both men and women, protection against abuse and exploitation of worker's economic necessity, protection of their health and strength, to secure for children opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and protect children and a youth against exploitation and moral and material abandonment. The state is also required to secure equal justice and free legal aid, to make effective provisions for right to work, to public assistance in cases where the undeserved want to ensure just and human conditions of work and maternity relief, to secure work, a living wage and a decent standard of life to participation of workers in the management of industries⁹. Unfortunately, these are not mandatory due to paucity of resources at the disposal, but just the directions and guideline to the State in its governance.

⁸ Varandani Gurusharan(1995), "Human Rights: Constitutional Mandate and the Worker," in Human Rights In India, Ed. by B. P. Singh Sehgal, Deep and Deep Publication New Delhi.

⁹ Constitution of India, Part IV, Chapter on Directive Principle of State Policy.

Against this backdrop, when we look at our journey towards realization of a free world based on equality, liberty and freedom, we find that we have still long way to go. Great majorities of the people in the developing nations are living in poverty and are denied basic needs of life such as health, education, housing, food, security and equity. Issues of sustainable livelihood, social and political participation have remained a major problem in the developing countries. The governments have failed to guarantee the people their inherent human right at the implementing level (Ghai, 2001).¹⁰

Review of Literature

In India as in any other developing nation there are two contradictions with regards to process of migration. In the first case there are migrations of highly educated and skillful people to the developed countries (International Migrations by the Indians) who enjoy better pays and better work culture and send huge remittances to home country. In the second case there are migrations within country (Intra State and Inter State Migrations) wherein we find that the poor and unskilled people adapt migration as a survival strategy. A search through published and grey literature on migration shows that there are a large number of studies which portray a very different picture of migrants. They show that circular migration is the main form of mobility for work and that such migration is higher among the poor and especially SCs and STs¹¹. They also show higher rates of migration among women and children. All three sectors of the Indian economy namely agriculture, industry and services employ very large numbers of migrant workers. Field evidence

¹⁰ Ghai Yash (2001) working paper on Human Rights and Social Development towards Democratization of Social Justice available on <http://www.pogar.org/publications/other/unrisd/hr-social-dev-01e.pdf>

¹¹ UNDP Human Development Report (April, 2009) working paper by Priya Deshingkar and Shaheen Akter on "Migration and Human Development in India," p.2.

shows that the major sub sectors using migrant labors are textiles, construction, stone quarries and mines, brick-kilns, small scale industry (diamond cutting, leather accessories etc.), crop transplanting and harvesting, sugarcane cutting, plantations, rickshaw pulling, food processing including fish and prawn processing, salt panning, domestic work, security services, sex work, small hotels and roadside restaurants/tea shops and street vending¹². All these migrants make a substantial contribution to the Indian economy and play a major role in the development of place of their destination. But migrants remain on the periphery of society, with few citizen rights and no political voice in shaping decisions that impact their lives (Kabeer 2005). Unlike countries in Southeast Asia and East Asia, the bulk of the migrant workforce in India has little or no education (Srivastava 2003). In fact migrants are poorly endowed all-round: they come from poor families where access to physical, financial and human capital is limited and where prospects for improving living standards are constrained by their inferior social and political status. Historically disadvantaged communities such as the Scheduled Castes, Scheduled Tribes and Other Backward Castes are heavily represented in migration.¹³

There are several studies that indicates that determinants of migration varies from country to country, and even within country, it varies depending on socioeconomic, demographic and cultural factors, high unemployment rate, low income, unequal distribution of land, population growth, demand for higher schooling, etc., have been identified as some of the prominent determinants of rural out-migration. (Nabi, 1992; Kadioglu, 1994; Sekhar, 1993). Afsar (1995)¹⁴ argued that migrants often benefited more than non-migrants because of their innovation, risk taking and desperate nature. According to him benefits

¹² Ibid.

¹³ Ibid .

¹⁴ Cited by Misra Hrudanand (2009), in 'Rural Urban Migration in India: A Micro Level Study,' Indian Journal of Social Work, Vol. 70, Issue - 1, TISS, Mumai.

includes higher or regular income, gain in wealth, better access to public services and education. Misra H. (2009) found that educational attainment is associated with permanent or temporary types of migration. The illiterates' migrants are less likely to be permanent migrants whereas higher educated migrants migrate for permanent period. He also observed that in more than 65 percent of cases 'push' factors were the main reason and 35 percent cases 'pull' factor were the main reasons for their migrations¹⁵. Tripathy, N. and Dash, C. R. in their study on impact of migration on migrants and non-migrants at place of destination and origin in two India states, Gujarat and Orissa respectively, observed that the socio-economic conditions of migrants were better than the non-migrants living at the place of origin, the migrants had better access to the basic amenities as compare to non-migrants and food consumption was also improved¹⁶.

There are few studies conducted on the human rights aspects of the migrants. Yash Ghai (2001)¹⁷ working paper on, 'Human Rights and Social Development: Towards Democratization of Social Justice,' assesses the progress made towards achieving the Objectives of Copenhagen Declaration. The author concludes that although human rights provides suitable framework for goals of the declaration but little progress has been made by the respective governments in the realization of the rights that are central to the agenda of declaration. Stefanie Grant and Harrison Grant Solicitors (2005)¹⁸ in their study on policy analysis entitled 'International Migration and Human Rights,' observed that many human rights problems affecting migrants arise from discrimination, racism, integration and cultural identity. According to them migrant workers are frequently subjected to unequal treatment

¹⁵ Ibid.

¹⁶ Tripathy S. N, Dash C. R (1997).

¹⁷ Ghai Yash (2001), opcit.

¹⁸ Stefanie Grant, Harrison Grant Solicitors (2005), International Migration and Human Rights, available on <http://www.gcim.org/attachements/TP7.pdf>

and unequal opportunities, as well as discriminatory behavior. Surabhi K.S. And N. Ajith Kumar(2007)¹⁹ in their study on “Labor Migration to Kerala: A Study of Tamil Migrant Laborers in Kochi found that the migrant laborers get much higher monetary wages than in their native places but, they live in shanty houses/rooms in slum like localities often on a sharing basis. They have little access to public services like health, education safe water and sanitation. They also face problems of social integration in with local people and many a times becomes victims of violence due their quarrels with the locals leading to the gross violation of their human rights. In yet another study conducted by Alexander Libman Carsten Herrmann Pillath, Gaurav Yadav (2011)²⁰with an objective to examine the relationships between the demand for human rights and economic wellbeing it was observed that human rights violation at the poor states works as push factors. High income at the place of destinations works as a fine substitute for the human rights in the eyes of the migrants. The study concluded that human rights matters if they cannot be overcompensated by income.

Significance of the Study

Apart from the general protection from international human rights law and covenants, the migrants and their families enjoys specific protections under the International Conventions on the protection of rights of all migrant workers and members of their families (ICRMW, 2003). However, migrants all over the world more particularly those living in developing countries like India face gross violations of their human rights and dignity. The religious, linguistic and cultural alienation of the

¹⁹ Surabhi K. S. and N Ajith Kumar (2007), Labor Migration to Kerala: “A Study of Tamil Migrant Laborers in Kochi,” Working Paper No.16, Centre For Socio-Economic and Environmental Studies, Kochi, India.

²⁰Alexander Libman Carsten Herrmann Pillath, Gaurav Yadav.(2011). Frankfurt Working paper No. 163, “Are Human Right and Economic wellbeing substitutes? Evidences from Migration across Indian States. Available on www.frankfurt-school.de/dms/Arbeitsberichte/Arbeits163.pdf

migrants make them the victims of discrimination and are treated as second class citizens.

The present study is a field based inquiry into the situations of the North Indian migrants living in Pune City with regards to Socio-economic Status and the degree of freedom they enjoy at the place of destinations in the light of human rights discourse in India. The study aims at identifying the hurdles in cultural convergence and integration of the migrant workers with the natives and their culture.

Methodology

Statement of the Problem

Pune is one of the fast growing metropolitan cities in India and western Maharashtra to be specific. Apart from being an IT hub it has been a major manufacturing center for several MNCs and Indian companies. Pune is well connected to the different parts of India. During the last decade many developmental projects have created ample job opportunities for the laborers working at different levels. This has attracted the labor force from different parts of the country. The presence of North Indians is quite visible in different parts of the city and in suburban areas. Majority of the migrants live in slums and are engaged in construction sector, hawkers and vendors, salesmen, couriers and in transportation. The question of their livelihood remains unsolved since most of them do not have any job security and jobs are of temporary and casual in nature.

The study tries to find answers to some of the questions like - What is the socio-economic status of the migrants? How do they face the problem of alienation with the locals? To what extent are their human rights protected at the place of destinations? What are the factors that inhibit

the integration of the migrants with the natives? Do the migrants enjoy their basic human rights?

Objectives of the Study

- 1) To study and understand the socio-economic conditions of the migrants.
- 2) To investigate the causes and factors leading to migration of the people.
- 3) To study and identify the factors inhibiting the social and cultural convergence of the migrants with native people
- 4) To study and find out the changes in the life conditions of the out-migrants from a human rights perspective.

Universe of the Study

The study was conducted in Pune city. The city was divided location wise into main city and suburbs areas. The respondents were mainly from Tadiwala Road near Pune station, Hadapsar Vaiduwadi, Konddhava (Bk) and Warje Malwadi.

Sampling Procedure

The multi-stage stratified random sampling method was used. In the first stage entire universe was divided into two-Main city area and suburbs areas. In the second stage the suburbs areas where the north Indian migrants are living in large numbers were identified. In the third stage 20 (30 percent) of the total respondents were selected from main city areas and remaining 58 (70 percent) of the respondents were selected from three different suburbs areas likewise total 78 respondents were selected by applying purposive sampling technique. The primary data was

collected with the help of interviews, formal and informal discussions and objective observations. The census reports and the studies conducted earlier were the main sources of secondary data.

Data Processing and Analysis

The data thus collected was edited, scrutinized and processed with the help of SPSS. The simple descriptive statistics like mean, mode, median, standard deviations and variance was used. The data output of SPSS was presented in a tabular form the same was interpreted and analyzed.

Results and Discussions

States of Origin of the Respondents

It is evident from Table 1 that the majority of the respondents (38.5 percent) were from Uttar Pradesh whereas 23.1 percent of them were migrants from Rajasthan. The migrants from Bihar are comparatively lesser (14.1 percent). In all, 19 respondents were from other North Indian States like Jharkhand, Punjab, Haryana and Delhi.

Table 1
Respondents according to their state of origin

State of Origin	Distribution of Respondents	
	Frequency	Percentage
Uttar Pradesh	30	38.5
Rajasthan	18	23.1
Bihar	11	14.1
Others	19	24.4
Total	78	100.0

The large numbers of respondents are from Uttar Pradesh and Rajasthan. It is an indication that both the States are industrially, economically and

socially backward and lacks developmental opportunities which compel the people to move out of the state for better way of living. The respondents from Bihar are lesser because of recent anti-North Indian agitations of SS and MNS was targeted against Biharis forcing many of them to leave the city.

Age

It is evident from Table 2 that the large numbers of respondents are from 27 to 35 years of age; about one third of the respondents were from the age groups 18 to 26 and 36 to 45 respectively. The respondents above 46 years of age were minimal. The descriptive statistics show the standard deviation of about 9 years with mean age 34 years, minimum age 18 years and maximum age was 60 years.

Table 2
Age of the respondents

Age in Years	Distribution of Respondents	
	Frequency	Percentages
18-26	20	25.6
27-35	33	42.3
36-45	17	21.8
46-60	08	10.3
Total	78	100.00

The large numbers of respondents (42 percent) are from the reproductive age group (27 to 35). This is probably the age group when respondents start family life and share household responsibilities. They find it difficult to feed their family due lack of regular employment and less wages. They finally adapt migration as a survival strategy.

Gender

Gender is an important variable in a given Indian social situation which is variably affected by any social or economic phenomenon and migration is not an exception to it. Hence the variable, gender, was investigated for in this study. Data related to gender of the respondents is presented in Table 3.

Table 3
Gender of the respondents

Gender	Distribution of Respondents	
	Frequency	Percent
Male	69	88.5
Female	09	11.5
Total	78	100.0

It is quite clear that out of the total respondents investigated for this study, overwhelming majority (88.5 percent) of them were males whereas about 12 percent were females. The overwhelming majority of respondents are males by gender in this study because many respondents migrated without their family and few of them were not yet married. Similarly, women were not approachable and willing to talk about issues related to migration and about their personal life. We faced lots of difficulties in collecting the data from female respondents.

Caste

The Castes in India is a base of social and economic structure. The social system which is based on caste based occupations and its inbuilt hierarchies have undergone certain changes over the period of time. Many of the traditional castes are finding it difficult to continue with their traditional occupations because of mechanizations brought by the industrialization and urbanization. It was therefore felt necessary to

investigate the caste background of the respondents and hence the variable caste was investigated and the details are presented in Table 4.

Table 4
Number of households with caste

Caste/Category	Distribution of Respondents	
	Frequencies	Percentages
Scheduled Castes	13	16.16
Muslim Minority	06	07.69
Other Backward	37	47.43
Open Castes	22	28.20
Total	78	100.0

The Table above shows that almost half the respondents are from other backward category and more than one third of the respondents are from forward caste category. 16 percent and 8 percent of the respondents are from scheduled castes and Muslim minority respectively. The less number of SC and Muslims indicates their overall proportion in Indian population and same is reflected in this sample.

Education

Table 5
Level of education of the respondents

Level of Education	Distribution of Respondent	
	Frequency	Percentage
Illiterates	25	32.1
Primary	22	28.2
Secondary	26	33.3
Higher Secondary	3	3.8
Graduates	2	2.6
Total	78	100.0

Table 5 shows that more than a quarter of the respondents were illiterates and another quarter of them were educated only up to

primary level which means they are functionally literate and an equal number of them were educated up to secondary level. The number of respondents attaining higher education was very few, almost negligible. The Table above makes it clear that majority of the respondents are not well educated. In an interstate migration, the people who migrate for earning their livelihoods are educationally backward and did not find the jobs in organized sector and at the same time informal sector is not developed to absorb them in employment; neither do they have any skills and resources to start self-employment at the place of origin.

Occupations

Person's occupations do have a bearing on his or her personality and so also the ways of looking at the problem before him. The quality of life is also determined by an individual's occupation and the incomes he derives from it. Occupation of an individual also socialized him or her in a particular fashion which in turn reflects his or her pattern of behaviors and his/her level of understanding of particular phenomenon. In other words, the person's response to a problem is possibly determined by the type of occupation he is engaged in and hence the variable, occupation, was investigated by the researcher and data pertaining to occupation is presented in Table 6

Table 6
Occupation of the respondents

Occupation	No of Respondents	Occupation	No of Respondents
Grocery Shops (small)	8	Saloon workers	3
Security(Watchman)	9	Drivers	4
Construction Worker	7	Carpenter	3
Salesman	11	Juice Centre	4
Floor Mill operators	8	Railway Cant.	3
Chikan Centre	4	Boot Polish	4
Cooks	6	Poster Selling	4
Total	53		78

It is evident from Table 6 that the majority of the respondents are working in informal sector and a good number of them are having some kind of skills which made it possible for them to find some honorable employment. Quite few of them have continued their traditional occupations even after migration this may be because of the higher wages at the place of destination.

Income

Income of a person plays an important role in shaping the economic conditions of an individual which in turn is likely to have bearing on the responses about a problem posed to him. The researcher, therefore in this study attempted to investigate the income as variable and the data related to income of the respondents is presented in Table. 7

Table 7
Income of the respondents before and after migration

Income	Distribution of Respondent			
	Before Migration		After Migration	
1000 to 3000	45	57.7%	15	19.2%
3001 to 5000	18	23.1%	28	35.9%
5001 to 8000	1	1.3 %	15	19.2 %
8001 to 15000	1	1.3 %	20	25.6 %
Not Applicable	13	16.7 %	00	00 %
Total	78	100.0	78	100.0

It is evident from Table 7 that there are remarkable changes in the earnings of the respondents, before and after the migration. More than half of the respondents were earning Rs.1,000 to 3,000 per month before migration. The number of respondents in this cohort decreased to less than a quarter of respondents after the migration. There were only two

respondents who were earning Rs. 5,000 to 1,500 before migration, their number increased to 35 (44.8 percent) The 13 respondents who were not earning anything at the place of origin started earning after migration. This shows that the economic conditions of the respondents had improved after migration.

Marital Status

Marriage and migration are two very closely related phenomena. The marital status of the respondents gives an indication of using migration as a well thought out strategy of overcoming poverty and aspiring to live a better life. Keeping this in mind, the marital status of the respondents was investigated, and the details presented in Table 8.

Table 8
Marital status of the respondents

Marital Status	Distribution of Respondent	
	Frequency	Percentage
Married	70	89.7
Unmarried	08	10.3
Total	78	100.0

Table 8 shows that an overwhelming number of the respondents (89.7 percent) were married and very few of them (10.3 percent) were unmarried. Since the average respondents were from late adolescent age group, this is the age at which, normally, a person gets married and shoulders the household responsibility. The family responsibility and commitments force the respondents to look for better employment opportunities which are not available at the place of origin. In such a situation they become out-migrants. The respondents under the

category separated, widows or widower were not reported in the given sample.

Type of Houses

It is obvious from Table 9 that the majority (41 percent) of the respondents were residing in houses made up of Patras and little less than equal number of them were residing in Cement Pakka houses. The number of respondents living in 'Kachha' houses made up of cloths and mud and bricks were 9 percent and 11 percent respectively.

Table 9
House type of the respondents

House Type	Distribution Of Respondent	
	Frequency	Percentage
Patras/ Tins	32	41.0
Cloths	07	9.0
Mud and Bricks	09	11.5
Cement Slap	30	38.5
Total	78	100.0

House Ownership

The possession of a house is a status symbol in our society. House ownership is likely to boost the confidence of a person in understanding and handling of any situation or a problem. House ownership is therefore likely to have an impact on the type of response given by the respondents and therefore the variable 'house ownership' was considered an important variable and the same was investigated and data is presented in Table 10

Table 10
House ownership of the respondents

House Ownership	Distribution of Respondents	
	Frequency	Percentage
Owned	16	20.5
Rented	56	71.8
Illegal hut	05	6.4
With Relatives	01	1.3
Total	78	100.0

The Table above shows that a large majority of respondents (71.8 percent) were living in rented houses and a quarter of them were having their own houses. Five of the respondents were living in huts constructed illegally by them. It can therefore be concluded that housing as a basic need of a human being has not been met in case of most of the respondents in the study area.

Ration Cards

Table 11
Respondents possessing ration cards

Response	Distribution of Respondents	
	Frequency	Percentage
Yes	33	42.3
No	45	57.7
Total	78	100.0

Possessing a Ration card has many advantages for any Indian Citizen. It gives them the rights to access the basic amenities and they can become entitled for benefits of many governments schemes. One cannot enjoy any democratic rights unless he/she has a ration card. The above Table makes it clear that little less than 60 per cent of the respondents do not have the basic document like a Ration card. This

has a long term impact on their developmental prospectus. Their right to development and other civil and political rights get restricted despite them being a citizen of India.

Electricity

Table 12
Member of household with electricity

Response	Distribution of Respondents	
	Frequencies	Percentages
Yes	62	79.5
No	16	20.5
Total	78	100.0

Electricity is one of basic necessity of any citizen. It is also an indicator of quality of life. The Table above shows that more than one third of the total respondents are living in houses without electricity. A household without electricity shows precarious conditions of migrants at the place of destinations.

Drinking Water Facilities

Table 13
Number of household with source of drinking water

Source of Water	Distribution of Respondents	
	Frequencies	Percentages
Private Tap	20	35.9
Public Tap	37	47.4
Hand-Pump	07	9.0
Others	06	7.7
Total	78	100.0

Water and health are closely associated with each other. Safe drinking water is a right of every individual so that he can live a healthy life. It is

evident from the Table above that almost half of the respondents are dependent on public taps for drinking water whereas only 36 percent of the respondents have private connections. It can be concluded that the respondents are denied of their right to health.

Table 14
Number of household with toilet facilities

Toilet	Distribution of Respondents	
	Frequencies	Percentages
Private	29	37.2
Public	33	42.3
Open	16	20.5
Total	78	100.0

The Table above shows that little less than half of the total respondents are using public toilets and 37 percent of them were having private toilets attached to their home. What is more surprising is that one third of the respondents did not have either private or public toilets; they were defecating in open space.

Reasons for Migration

Table 15
Reasons for migration

Reasons for Migration	Distribution of Respondents	
	Frequency	Percentage
Employment	74	94.8
Family Crisis	02	2.6
City Attraction	02	2.6
Total	78	100.0

It is evident from Table 15 that the overwhelming majority of the respondents (94.8 percent) migrated for reasons of employment in urban areas. Migration due to other reasons was negligible. It can therefore be concluded that migration occurs because of loss of job or unavailability of jobs in the rural areas, ultimately leading to migration from rural to urban areas.

Table 16
Perceptions about present conditions

Level of Improvement	Distribution of Respondents	
	Frequencies	Percentages
Well Improved	24	30.8
Slightly Improved	44	56.4
As it is	10	12.8
Total	78	100.0

The Table above shows that more than half of the respondent's life conditions are stated to be slightly improved after the migration and 13 percent of respondents have said that their situation is same as before and there is no improvement in it even after the migration. Little more than one third of them had stated that there is an improvement in their life conditions after the migration. The respondents find their life somewhat easier compared to life at place of origin. That makes them continue to stay as migrants.

Social Relations with the Locals

Table 17
Respondent's relations with locals

Relations	Distribution of Respondents	
	Frequency	Percentage
Extremely	05	6.4
Good	06	7.7
Average	66	85.7
Total	78	100.0

An overwhelming majority of the respondents do not have healthy relationships with the local people. This was the most difficult question to answer for the respondents and many of them tried to keep silent out of fear. Most of the respondents were staying in a rented houses owned by the Maharashtra local people. The interviews were conducted almost three months after the sporadic violence against the north Indians by the so called "sons of soil". But most of them gave a very balanced answer saying that their relation with the locals are not so good but not bad also.

Table 18
Respondent's perceptions about hurdles in convergence with locals

Relations	Distribution of Respondents	
	Frequency	Percentage
language	11	14.10
Regionalism	06	7.69
Vote Bank Politics	53	67.94
Cultural Differences	08	10.25
Total	78	100.0

It is obvious from Table 18 that there were problems with integration and cultural convergence of the migrant with the locals because of the hurdles as mentioned above. North India speaks a 'typical Hindi' language mixed with Bhojpuri. That makes them identified as "different" by the locals. A large majority of the respondents perceived Vote Bank Politics as main hurdles in problems of their unification and integration with the native Maharashtra people. The politician exploits cultural and geographical differences of respondents for their vested interests.

Table 19
Respondents facing discrimination in day to day life

Response	Distribution of Respondents	
	Frequency	Percentage
Always	18	23.07
Some times	37	47.43
Rarely	14	17.94
Never	09	11.53
Total	78	100.0

The Table above shows the level and intensity of discrimination experienced by the respondents in their day to day life. Nearly half of the respondents had experienced some kind of discrimination at some time or other in their stay in Pune city. Nearly 25 percent of the respondents experienced discrimination in their day to day life. This makes a strong case for human rights violation.

Major Findings and Conclusions

- The study reveals that majority of the respondents are from the three north Indian states namely UP, Rajasthan and Bihar; which economists call as the group of sick states. It can therefore be inferred that regional disparities in development have forced the people of these states to move out of their native states to the state which is economically and industrially developed wherein they can have better prospects for their development.
- The study shows that most of the respondents are either illiterate or they are functionally literate up to primary or secondary level. The respondents educated up to higher secondary level and above are negligible. It can be concluded that the migrants are educationally backward.

- Want of employment is found to be the main cause of migration. (94 percent). Their right to livelihood is violated first at the State of origin and then at the place of destination. The present study confirms findings of the many earlier studies with respect to the reason for migration.
- The overwhelming majority of the respondents are living in rented homes in which 20 percent of the homes do not have electricity, more than 60 percent of houses are made of patras, cloths and mud and bricks. It shows that they are living in poor housing conditions. Only 37 percent of them have private toilets, almost equal numbers of them have public taps as source of drinking water. This shows gross violation of their basic rights to live a dignified life.
- While looking at their occupational patterns we found that they are involved in running small grocery shops, doing watchman ships under security agencies; many of them were working as salesman, flour mill operators and construction workers.
- The economic conditions of the respondents were reported to be improved after the migration but when we looked at their overall perspective towards living conditions, more than 50 percent of them felt that there were only slight improvements, and about 13 percent of them reported that their living conditions are as it was before. More than one third of them said that their living conditions are well improved after the migration.
- The study found that the most of the migrants have average social relations with the locals. The quality of their social relations is neither good nor bad. But their body language was very indicative of fears and submissiveness about the locals.

- While probing the problems in convergence and integration of the respondents with the locals a large majority of the respondents (68 percent) perceived petty politics as main hurdles followed by language, regionalism and cultural differences as hurdles in their unification and integration with the locals.

The philosophy of human rights discourse and the Indian Constitution demands non-discrimination in any form. In this study, it was found that a quarter of the respondents had often experienced discrimination in some form or other in their day to day life. Whereas, about half the number of respondents had experienced discrimination at some time or other during their stay in Pune city.

Human Dignity as an Alternative to Human Rights?: Malaysia's Argument to Protect Communitarianism and Islam

Mohd Azizuddin Mohd Sani*

Abstract

This paper tries to find a better understanding of the theory and debate of human dignity in the Malaysian perspective. This is because many scholars and activists are confused in dealing with the theoretical debates and issues of human rights. Human rights from the West tend to be very individualistic which is incompatible with the Malaysian (or Asian) understanding of rights which are collectivistic and stress more on duties and responsibilities. Therefore, the language of human dignity is suited more to Malaysians than human rights. This is because when arguing about duties and responsibilities, it is actually about human dignity, not human rights. In tradition, Asian and Western alike, human dignity is more important in order to not only protect people's rights but people have to also perform his or her duty to self and the society. At the same time, they must be responsible for any action taken by them. This paper also discusses the concept of human dignity in Malaysia which is unique because Islam and the Malay (the majority population in Malaysia) custom merged harmoniously. The ingredient of human dignity is strongly embedded in local communitarian culture and values which make it relevant to the current political, social and cultural scenario in Malaysia. Thus this paper will trace the current debate of human dignity in Malaysia especially when Islam is strongly involved in the debate such as in the case of religious freedom, policing moral behaviour and free speech. Although it is controversial, it makes Malaysia unique and different from other countries in the world.

* Dr. Mohd Azizuddin Mohd Sani is Dean of the School of International Studies, Universiti Utara Malaysia. He is a Senior Lecturer in Politics and International Relations. (azizuddin@uum.edu.my). Special thanks to Dian Diana Abdul Hamed Shah and Dr. K. Nadaraja for their comments and assistances in completing this paper.

Introduction

There is constant debate between the concept of human rights or human liberties with human dignity. However, 'human rights' as a concept is dubious or rather confused. As we observe a debate between liberal universalists and relativists, there are disagreements especially on the issues involving culture and religion. Basically, there are two theories of human rights i.e. universalism and relativism. The idea of universalism is 'Human Rights, because they rest on nothing more than being human, are universal, equal, and inalienable. They are held by all human beings, universally...Human rights, being held by every person against the state and society, provide a framework for political organization and a standard of political legitimacy'.¹ Meanwhile relativism focuses on the cultural perspective. 'Relativism (or cultural relativism) is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal'.² Shad Saleem Faruqi explains that there is a sort of 'human rights epidemic' that is sweeping many lands, meaning that:

The human rights argument is so much in vogue that a lot of causes, though highly contentious in nature and not central to the dignity of human beings, are brought under the umbrella of a human rights claim. Homosexuality, pornography,

¹ See Donnelly, J. (2001) What are Human Rights? in G. Clack (ed.) *Introduction to Human Rights*, Washington: International Information Programs, U.S. Department of State. Available at: <http://usinfo.state.gov/products/pubs/hrintro/donelly.htm>

² See Ayton-Shenker, D. (1995) 'The Challenge of Human Rights and Cultural Diversity', *United Nations Background Note*, New York: United Nations Department of Public Information. Available at: <http://www.un.org/rights/dpi1627e.htm>

blasphemy, abortion on demand and same sex marriages are all being treated as human rights issues. Homosexual couples are seeking to adopt children in the same manner as their heterosexual counterparts. Children are seeking a right to divorce their parents. A publication from the Law School in Exeter lists the right to outdoor recreation, the rights of the unborn and freedom from unwanted publicity as fundamental liberties. Clearly there is an over-zealousness in some human rights claims and a failure to distinguish ordinary civil claims from fundamental human rights.³

When arguing about freedom of speech, it is always in conflict with some other rights such as the right to privacy; right to sing loudly in a home can disturb the right to privacy of a neighbour. Sometimes, the amorality of the human rights concept makes others feel uncomfortable particularly regarding the issues of hate speech and pornography. That is why in searching for a better concept to protect the people and common good, human dignity is a choice that can resolve the confusion in the concept of human rights. That is also the reason why European and African states particularly like Germany and South Africa embed the concept of human dignity in their constitution.

The purpose of this paper is to discuss the sources of human dignity which is rooted from the theologian or religious perspective. This paper will also trace the root and defend the communitarianism idea of human dignity from the Asian perspective as the better concept to be referred in studying the debate of human dignity in Malaysia. Next, this paper will discuss the concept of human dignity in Islam from Malaysian perspectives of freedom of religion, moral policing and free speech. This further helps us to understand the Islamic concept of human dignity in

³ See Faruqi, S.S. (2004). Human Rights: Now and the Future. *Journal of the Kuala Lumpur Royal Malaysia Police College*, 3: 4.

Malaysia. Besides, this paper will also explore the Malay-Muslim idea of human dignity.

Communitarianism and the Malaysian Concept of Human Dignity

Communitarians, in general, argue that our good as individuals is to be found primarily in our relationships to particular people (e.g. in friendship or family), in our various social roles (e.g. as farmer or doctor), in our membership in certain voluntary associations (e.g. tribe or religious institution such as mosque and church), and in the community which contains all these partial bonds, namely, our political community or society.⁴ This argument has affinities with the 'Asian values' perspective that sees the individual not as an isolated being, but as a member of a nuclear and extended family, clan, neighbourhood, community, nation and state. Malaysians generally believe, in accordance with the teaching of traditional customs and cultures, that whatever they do or say, they must keep in mind the interests of others and that the individual should try to balance his interests with those of his family and society.

There are five essential arguments of social responsibility for communitarianism. Firstly, individuals belonging to a community must have solid common objectives that are conceived of and very widely valued as common ends, not just similar individual aspirations. For each individual, their sense of belonging to the group is a significant constituent of their identity. Secondly, the protection of its citizens from coercion and the provision of proper channels for its citizens to participate in the political process should ideally be the role of the state. The social responsibility approach holds that the government has a positive duty to protect its citizen's right to freedom of political speech

⁴ See Badhwar, N.K. (1996) Moral Agency, Commitment, and Impartiality. In E.F. Paul, F.D. Miller Jr., and J. Paul (eds.) *The Communitarian Challenge to Liberalism*. Cambridge: Cambridge University Press. 3.

and to punish those who abuse the freedom to the detriment of the society – unlike the liberal view which tends to focus on the government primarily as a potential violator of freedom of political speech. Thirdly, truth is an important object of freedom of political speech, but it is not the result of an intellectual free-for-all, and its dissemination may need to be controlled and managed. In seeking the truth, a set of practices, procedures and regulations must be in place before the truth can be discovered. These should include processes of self-evaluation and reasonable criticism, and the argument be guided by the aspirations of objectivity, civility and mutual respect. How to handle the truth can be a very sensitive issue, especially when it involves such matters as national security, race relations and personal privacy. On the issue of national security, unless it is crucially necessary to keep certain matters secret, the government should permit the disclosure of information, allowing for the release of information when it is due. Public inquiries or independent commissions should be established to discover the truth and resolve misunderstandings especially as regards issues related to race relations. Fourthly, society enables men to create and share common material goods, common values and common experiences. A valid particular (personal or individual) good may conflict with the common good, though the common good should generally be prioritised over particular goods. Communitarians are united by their apprehension that our sense of community – the recognition that we are a people bound by shared values, meanings, traditions, purposes, and obligations – is undermined by an individualistic liberalism that prioritises the 'rights' of the individual at the expense of social cohesion, fellowship, and the pursuit of the common good. A society must be able to determine and prioritise the particular values that can best maintain its common good. Instead of following the concept of unlimited freedom of political speech claimed by liberals as universal values, people, especially in a multicultural society and linked by their distinct culture and tradition, can choose

responsible political speech as an essential element of common good for their particular society. Fifthly, in identifying the common good of the society, the process of public deliberation or deliberative democracy must be implemented. Through this process, civil society has a strong role to contribute views, debate and deliberate in the decision-making process. A public policy is the outcome from a consensus politics between the government and civil society. The strong civil society can also be able to check and balance the power of the state. This process would definitely produce the common good wanted by the people and freedom of political speech with social responsibility could be practised effectively in the society. In conclusion, it can be convincingly argued that social responsibility theory if properly applied can bring about positive results in Malaysia – in the form of a responsible and well-ordered society where human rights and human dignity are respected and safeguarded – for their own benefit and for the good of the society.

Asia is no doubt home to the world's many communitarian societies – or those with communitarian characters. The underlying consensus in these societies is often one of emphasising relation rather than individuality, duties as much as rights.⁵ While this is not equivalent to saying individuals are trivial, the prevalent belief is that they should not trump communal values like social harmony, family cohesiveness and respect for authority and the elders that are embedded in their communities for generations.⁶ Thus, the vision to build a society where collective interests thrive prompted many states to realise those values through public policies.⁷ This may result in government reining in excessive graphic depictions of sex or violence to protect public morals in defiance of absolute freedom of speech, or forcing adult children to financially support their elderly

⁵ See Barr, M.D. (2002) *Cultural Politics and Asian Values: The tepid war*. London: Routledge. 189.

⁶ See Parekh, B. (2006) *Rethinking Multiculturalism: Cultural Diversity and Political Theory*. 2d ed. Hampshire: Palgrave MacMillan. 139.

⁷ See Barr. *Cultural Politics and Asian Values: The tepid war*. 32.

parents should they shun this pious family duty. While such moves may be seen as an Asian backlash against the West's ruthless force of individualistic liberalism⁸; at a deeper level, they represent a cultural belief that humans are social beings who cannot live without communal support.⁹

Malaysians typically believe that the community should take priority over individuals. The importance of the community in Asian culture and society is incompatible with the primacy of the individual in Western society, which is the basis of Western notions of human rights. Modern Asian orientalism was based around the proposition that 'Asian' culture, with its priority on the group rather than the individual, was ideally suited to modern, industrial society. Western liberalism, with its emphasis on the rights and freedoms of the individual is, in contrast, portrayed by Asian thinkers as producing crime-ridden societies in moral decay and with little social discipline or concern for the broader interests of community.¹⁰ In Mahathir Mohamad's (former Prime Minister of Malaysia) words, 'Democracies are only beginning to learn that too much freedom is dangerous'.¹¹ Mahathir urges the need to limit freedom of speech for the sake of political stability and economic prosperity:

'For Asians, the community, the majority comes first. The individual and minority must have their rights but not at the unreasonable expense of the majority. The individuals and the majority must conform to the mores of society. A little deviation may be allowed but unrestrained exhibition of personal

⁸ See Peerenboom, R. (2003) Beyond Universalism and Relativism: The Evolving Debates about 'Values in Asia'. *Indiana International Law & Comparative Law Review* 14: 50-51.

⁹ See Barr. *Cultural Politics and Asian Values: The tepid war*. 25-26 and Lee, M.Y.K.. (2008) Universal Human Dignity: Some Reflections in the Asian Context. *Asian Journal of Comparative Law* 3(1): 14.

¹⁰ See Robison, R. (1996). The Politics of 'Asian values'. *The Pacific Review* 9(3): 310.

¹¹ See Mahathir Mohamad. (1995a). *The Malaysian System of Government*. Kuala Lumpur: Prime Minister's Department. 16.

freedom which disturbs the peace or threatens to undermine society is not what Asians expect from democracy.'¹²

Freedom, liberties and rights, in Mahathir's view, can only be exercised or enjoyed if restrained by a sense of personal responsibility, an individual deference to communal considerations, and a respect for stability, law and order. Curbs on individual freedom and liberties are 'checks and balances...maintained as between individual rights and public good' with 'the government of the moment determining what constitutes public good'.¹³ Thus, 'while a citizen is free...the society must have the right to object to individuals who offend the sensitivities of the society'.¹⁴ Freedom of speech is protected but its exercise should not be manifest in an unregulated and irresponsible press beholden only to 'media tycoons...who want to control the media worldwide',¹⁵ or 'the editor and sub-editor, or the reporters or sometimes the big advertisers, having their own political views and agenda'.¹⁶ It is the function of the press to report, to inform, even to criticise, but it is essential to realise that the 'democratic principle about the need to know', 'the need for transparency' and the 'right to information' could just as well be the 'invention of those who want to make money for the information industry'.¹⁷ Freedom of speech and assembly are respected, but they should not extend to racial provocation, incitements to violence, the use of the industrial strike 'as a political weapon, quite unconnected with the rights and welfare of workers in order to gain power',¹⁸ or moves

¹² See World Youth Foundation. (1999) *Human Rights: Views of Dr. Mahathir Mohamad*. Melaka: World Youth Foundation. 105.

¹³ See Mahathir. *The Malaysian System of Government*. 47.

¹⁴ *Ibid.* 92.

¹⁵ *Ibid.* 95.

¹⁶ *Ibid.* 94.

¹⁷ See Mahathir Mohamad. (1993). Speech at the 48th United Nations General Assembly, 1 October 1993, reprinted as 'UN Veto Power Most Undemocratic'. *New Straits Times*. 6 October: 1-2

¹⁸ See Mahathir. *The Malaysian System of Government*. 61.

'especially by foreigners and non-governmental organisations' to 'agitate and threaten the government with censure'.¹⁹

Furthermore, communitarianism – the idea that responsibilities to the family and the community have priority over the rights of the individual – is widely embraced not just in Confucian East Asia and Singapore, but also in Islamic Indonesia, Brunei, and Malaysia and Buddhist Thailand.²⁰ Joseph Chan has suggested that, while Asian cultures do not deny the value of personal autonomy, they do not value it as highly as do Western liberals.²¹ The value of individual autonomy, however, does not justify the right of individuals to disregard the interests of society.²² The Asian concept of the individual differs from that of the West. The extension of the relationships learned in the extended family setting gives East Asians a much more sophisticated ability to relate to others. For instance, the Confucian ethic:

...seems to have centred in an efficacious location much more generative and dynamic than the lonely self: the self that is not an island but an ever-expanding stream of interconnectedness...The Confucian conception that the self is a centre of relationships and that, as a dynamic centre, it constantly revolves around an ever-expanding network of human-relatedness seems to have helped East Asians to develop a form of modernization significantly different from

¹⁹ Ibid. 93 and Khoo B.T. (2002). Nationalism, Capitalism and 'Asian Values'. In Francis Loh and Khoo Boo Teik (eds.) *Democracy in Malaysia: Discourses and Practices*. Surrey: Curzon. 51-73.

²⁰ See Chandra Muzaffar. (1995) Keynote Speech. *Symposium on Human Rights in the Asia Pacific Region 'Toward partnership for the promotion and protection of human rights'*. 20-21 July. Tokyo and Fukuyama, F. (1995) Confucianism and Democracy. *Journal of Democracy* 6(2): 20-33.

²¹ See Chan, J. (1995). The Asian Challenge to Universal Human Rights: A Philosophical Appraisal. In T.H. Tang (ed.) *Human Rights and International Relations in the Asia-Pacific Region*. London: Pinter. 30 & 35.

²² See Fareed Zakaria. (1994) Culture is destiny: Interview with Lee Kuan Yew. *Foreign Affairs* 73(2): 111.

that achieved by Western individualism...The ability of East Asian entrepreneurs to take full advantage of the human capital, be it family loyalty; a disciplined work force, or supportive staff is not an accident. They are the beneficiaries of the Confucian way of life.²³

Mahathir holds that there should be no freedom without responsibility.²⁴ Hence, it should come as no surprise to learn that close to the heart of Mahathir's hostility to 'Western values' is his concern for family, which, he believes, provides stability and security for the individual. Mahathir criticises the concept of family in the West. He argues that:

I believe that a lifestyle rooted in family and friends is the key. I have had occasion to discuss the family at length with Westerners. Many say two men living together is a family, two women living together is a family, an unmarried woman and her child are a family. To Asians those are not families. A family exists when a man and a woman are joined in marriage and have children. The Western redefinition of the family is totally unacceptable.²⁵

There is strong consensus amongst Malaysians whether they are Malays (or other indigenous tribes), Chinese, or Indians, which rejects materials of a pornographic or sexual nature as immoral and obscene. Pornography is seen as a kind of exploitation as it degrades, endangers, and harms the lives of women. Although many in the business argue that the women's involvement in pornography is voluntary, many Malaysians

²³ See Tu W. (1989) *The Confucian Dimension in the East Asian Development Model*. Taiwan: Chung-Hua Institution for Economic Research. 74-75.

²⁴ See Mahathir Mohamad. (1995b). No freedom without responsibility. *New Straits Times*. 20 May: 1-2.

²⁵ See Mahathir Mahathir and Ishihara S. (1995). *The Voice of Asia: Two Leaders Discuss the Coming Century*. Tokyo: Kodansha International. 85.

believe that there is an element of exploitation by the pornographic industry. Mahathir argues in this context:

...there are limits to freedom, and I believe it is important for every member of a society to know these limits. One good example is pornography. You can have computer animation, which may be ever so creative – and thus should be freely available – but if this ‘freedom’ is used to produce pornographic films that are purveyed to the impressionable young, then the fruits of the freedom should not be accepted and allowed by society. In Malaysia, it is not my impression that business ingenuity or creativity has been stifled by our Malaysian value system which sets clear limits to individual freedom and generally emphasises the community over the individual. To the contrary, I believe that our value system has been the foundation for our society’s stability and prosperity, at least until the economic crisis struck.²⁶

On this matter, the government takes the initiative to protect public morality and the traditional way of life from pornography and sexual exploitation. For instance, in February 2002, the government banned a rerun of the controversial feminist play *The Vagina Monologues*. The play, presented by local performers, and according to the producer of the show, the play contained adult material but was neither vulgar nor obscene. The play was banned because of alleged complaints by members of the public on the vulgar content and title of the play.

In the next sections, this paper will discuss cases involving the issue of human dignity and how the authority and people deal with those cases.

²⁶ See Mahathir Mohamad. (1999). *A New Deal For Asia*. Selangor: Pelanduk Publications. 73-74.

Protecting Muslim Dignity I: Religious Freedom

Historically and contemporarily, the term human dignity has theological origins that may affect its interpretation and understanding. The concept of human dignity has deep roots in many religions, as well as in moral and political philosophy.²⁷ Human dignity played a historical part in the development of religious and philosophical approaches to human rights.²⁸ Human dignity is foundational for the tradition's understanding of such as distributive justice, the common good, and the right to life. Other perspectives, both religious and secular, may conceive of human dignity in similar terms with a similar sense of its inherent worth or value and other implications, but may posit different sources for that dignity.²⁹ Human dignity is one of most emphasized themes in the Holy Quran.³⁰ For example: 'We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things, good and pure; and conferred on them special favours, above a great part of Our creation' (17:70). And: 'Proclaim! (Or read!) In the name of Thy Lord and Cherisher, who created - Created man, out of a (mere) clot of congealed Blood - Proclaim! And Thy Lord is Most Bountiful - He who taught (the use of) the pen - Taught man that which He knew not.' (96:1-5). According to teachings of the Holy Quran, God (Allah) gave human beings the best shape and form: 'O Iblis! What prevents thee from prostrating thyself to one whom I have created with my hands? Art thou haughty? Or art thou one of the high (and mighty) ones?' (95:4) Not only that He created human being by His hands and gave humans the best form, but He called the spirit of human being His spirit to give honour and

²⁷ See Clifford, M.O. and Huff, T.P. (2000) Some Thoughts on the Meaning and Scope of the Montana Constitution's 'Dignity' Clause with Possible Applications. *Montreal Law Review* 61: 334.

²⁸ See Kretzmer, D. and Klein, E. (2002). Forward. In David Kretzmer and Eckart Klein (eds.) *The Concept of Human Dignity in Human Rights Discourse*. The Netherlands: Martinus Nijhoff Publishers.

²⁹ See Kamali M.H. (2002) The Dignity of Man: An Islamic perspective (Fundamental Rights and Liberties in Islam). *Islamic Texts Society* 2002: 56-67.

³⁰ See Aramesh, K. (2007) Human Dignity in Islamic Bioethics, *Iran Journal of Allergy Asthma Immunol*, 6 (Suppl. 5): 25-28.

dignity to human beings: 'I breathed into him my spirit.' (15:29; 38:72) He taught him all the names. 'And He taught Adam the names of all things; then He placed them before the angels, and said: 'Tell Me the names of these if ye are right.' (2:31) 'And behold, we said to the angels: 'Bow down to Adam:' and they bowed down: not so Iblis: he refused and was haughty: he was of those who reject Faith. (2:34) He gave human beings intellect and freedom of the will. (16:78; 23:78; 32; 9; 46:26; 67:23) And He made human being His Khalifah (Representative) on the earth. (2:30; 33:72).³¹

Malaysia has always had the intention to protect Islam. Therefore, when arguing about human dignity, the concept is always interpreted from an Islamic perspective. However, to conceptualize freedom of religion in Malaysia, it is important to understand several provisions of the Constitution. First, although the Malaysian legal system models the Westminster system, it is often taken for granted that there is a written constitution in place. The Constitution, according to Article 4, is the supreme law of the land. It is at the apex of the legal hierarchy, so any acts of parliament to the contrary may be deemed unconstitutional. Former Federal Judge Raja Azlan Shah's account on constitutional supremacy is particularly telling:

[T]he Constitution . . . is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach . . . no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of the government.³²

³¹ Ibid.

³² See *Malaysia Law Journal*. (1997) Loh Kooi Choon v. Government of Malaysia, 2: 187-188.

Article 3(1) states that Islam shall be the religion of the Federation, but other religions may be practiced in peace and harmony in the Federation. This provision is a product of inter-communal compromises reached in a pre-independence memorandum (hereinafter 'Alliance memorandum') constructed by the three main political parties in 1956 to safeguard the rights and interests of all communities.³³

Scholars have advanced various interpretations on Article 3, primarily connected to its ceremonial, historical and traditional significance.³⁴ For instance, L.A. Sheridan and Harry E. Groves argue that Article 3 entails the use of Muslim rites in religious parts of federal ceremonies.³⁵ Therefore, the intention in making Islam the official religion of the Federation was primarily for ceremonial purposes. Thomas suggests that Article 3 gives due regard to the elements and traditions of the Malay states long before the colonial period, i.e., the Sultanate, Islamic religion, Malay language, and Malay privilege.³⁶ The constitutional ideas of the Malay states stem from the Melaka Sultanate in the fifteenth century, where Buddhist, Hindu and Islamic influences permeated through the systems of law and governance.³⁷ Shad Saleem Faruqi stressed that 'the implication of adopting Islam as the religion of the Federation is that Islamic education and way of life can be promoted for Muslims.³⁸ Islamic institutions can be established. Islamic courts can be set up. Muslims can be subjected to *Shariah* laws in certain areas provided by the Constitution.'

³³ See Thomas, T. (2006) *Is Malaysia an Islamic State?* *Malaysian Law Journal*, 4: 17.

³⁴ See Fernando, J.M., (2006) *The Position of Islam in the Constitution of Malaysia.* *Journal of Southeast Asian Studies*, 37: 249.

³⁵ See Sheridan, L.A. and Groves, H.E. (1987) *The Constitution of Malaysia.* 4th Edition. Singapore: Malayan Law Journal. 31.

³⁶ See Thomas. *Is Malaysia an Islamic State?*. 31.

³⁷ See Harding, A.J. (1996) *Law, Government and the Constitution in Malaysia.* Kuala Lumpur: Malayan Law Journal Sdn. Bhd. 5-6.

³⁸ See Faruqi, S.S. (2006). *Freedom of Religion under the Constitution.* *The Sun*. 18 May. Available at: <http://www.sun2surf.com/article.cfm?id=14147>

Historical evidence suggests that although the Alliance memorandum discussed Islam as a religion for Malaysia, it emphasized that this should not affect non-Muslims' right to profess and practice their religion, and there is no implication that the State is not a secular State.³⁹ Although Article 3 names Islam as the religion of the Federation, it has until recently always been agreed that this provision does not in any sense establish an Islamic state, but merely provides for the religious nature of state ceremony.⁴⁰ Chief Justice Abdul Hamid, the Reid Commission member from Pakistan, opined that the provision on Islam as the religion of the State is innocuous.⁴¹ However, 'secular,' as intended by the founding fathers, does not connote an anti-religious or anti-Islamic state of governance.⁴² The Constitution envisages that *Shariah* laws would govern the personal law requirements of Muslims, but it recognizes that the *Shariah* would not be made the supreme law.

These views were espoused by the Supreme Court in the landmark case of *Che Omar bin Che Soh v. Public Prosecutor*, 2 M. L.J. 55, 55-56 (1988). In this case, the accused was faced with a mandatory death sentence for drug trafficking. He challenged the sentence on the basis that the imposition of death penalty for the offence is contrary to Islamic injunction and therefore, unconstitutional and void. The Court reiterated the secular character of the law and governance system, which resulted from colonial Anglo/Malay treaties. It also emphasized that the British establishment of secular institutions separated Islam into the public and private aspect. Islamic law 'was rendered isolated in a narrow confinement to the law of marriage, divorce, and inheritance only'.

³⁹ See Thomas. *Is Malaysia an Islamic State?*. 18-19.

⁴⁰ See Harding, A.J. (2010) *Sharia and National Law in Malaysia*. In: Jan Michiel Otto (ed.) *Sharia incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*. Leiden: Leiden University Press. 506.

⁴¹ See Thomas. *Is Malaysia an Islamic State?*. 19.

⁴² See Sarwar, M.I. (2007) *Latifah Mat Zin: Reaffirming the Supremacy of the Constitution*. *Blogger*. 29 July. Available at: <http://malikimtiazb.blogspot.com/2007/07/latifah-mat-zin-reaffirming-supremacy.html>

Despite the foregoing arguments, it is notable that the establishment of a particular religion over the State is not unique to Malaysia. In Norway, for instance, primacy on Christianity means that the king and a majority of the cabinet are required to be members of the state church.⁴³ In England, the Anglican Church remains at the centre of public policy and has substantial support from the state.⁴⁴

Article 11 guarantees freedom of religion, which – on its literal wording – seems comprehensive enough to safeguard this fundamental right for Malaysia's plural society. A citizen has the right to profess, practice and – subject to Article 11(4) – to propagate his religion. Religious groups have the right to manage their own religious affairs or any matters relating to the properties and the establishment of religious institutions. On its face, Article 11 does not expressly prohibit the conversion of a Muslim, though at the same time it does not explicitly include the right to change one's religion. However, it is suggested that Article 11 can be construed broadly to include one's freedom to relinquish or change a religious belief (albeit with limitations for Muslims under specific religious laws), and even to not be religious.⁴⁵

The religious freedom clause is reinforced by other constitutional provisions.⁴⁶ First, to combat subversion Article 149 permits the enactment of laws which would otherwise be inconsistent with certain fundamental rights such as freedom of speech or personal liberty, but it prohibits any encroachments on religious freedom. Second, under Article 150 (6A), even in a state of emergency, any emergency laws enacted thereafter cannot curtail freedom of religion. Third, Article 8

⁴³ See Shelton, D. and Kiss, A. (2007) A Draft Model Law on Freedom of Religion. In: Henry J. Steiner et al. (eds) *International Human Rights in Context: Law, Politics, Morals*. 3rd Edition. Oxford: Oxford University Press. 575.

⁴⁴ Ibid. 576.

⁴⁵ See Thomas. *Is Malaysia an Islamic State?* 34.

⁴⁶ Ibid.

prohibits discrimination on the grounds of religion against public sector employees, in the acquisition or holding of property, and in any trade, business or profession. It is also important to note that freedom of religion is not affected by Article 3's establishment of Islam as religion of the Federation. Article 3(4) clearly states that nothing in Article 3 derogates from any other provision in the Constitution.

Even so, there are several restraints against freedom of religion. Article 11(5) limits this freedom on grounds of public order, public health or morality. Thus, any religious act deemed contrary to general laws relating to these grounds is unsustainable under Article 11. In the case of Muslim citizens, there may be additional restraints to religious freedom by virtue of Schedule 9, List II, Item I of the Constitution. This grants power to State Assemblies to enact laws to punish Muslims for offences against the precepts of Islam and human dignity, such as *khalwat*, adultery, apostasy, gambling, drinking and deviationist activities.⁴⁷

A more controversial provision is subsection 4's limitation on the propagation of religion among Muslims. At first glance, it appears that this contradicts the idea of religious freedom especially for those religions that regard proselytising as a crucial part of worship.⁴⁸ There are some important arguments against this view. First, laws controlling propagation are meant 'to prevent Muslims from being exposed to heretical religious doctrines, be they of Islamic or non-Islamic origin, and irrespective of whether the propagators are Muslims or non-Muslims'.⁴⁹ Shad Faruqi adds that such restrictions are meant to protect Muslims against organised international missionary activities and to preserve social harmony, rather than prioritising any particular religion.⁵⁰ Second,

⁴⁷ See Masum, A. (2009). Freedom of Religion under the Malaysian Federal Constitution. *Commonwealth Law Journal*, 2: iii.

⁴⁸ See Sheridan and Groves. *The Constitution of Malaysia*. 31.

⁴⁹ See Masum. Freedom of Religion under the Malaysian Federal Constitution. iii-iv.

⁵⁰ See Faruqi, S.S. (2001) Support for Religious Liberty. *Sunday Star*. 25 February.

subsection 4 does not, in and of itself, restrict propagation. Sheridan and Groves argue that it merely renders it constitutional for state law (or federal law in the case of the Federal Territories) to control or restrict propagation.⁵¹

Despite the constitutional grounding of religious freedom, the exercise of this right remains complicated in practice. The parameters of freedom of religion are not always clear, and it is often obscured by political, social and racial elements. The problem not only affects relations between Muslim and non-Muslim citizens; it raises many issues within the Muslim community itself. This strikes a chord between those intent upon a modern liberal interpretation of universal human rights principles, and those insistent on communally-based, constitutional-contract politics in Malaysia.⁵²

In Malaysia, religious conversion cases raise multifaceted constitutional questions and human dignity and rights issues, primarily on the extent of a citizen's assertion of the right to religious freedom. These cases also involve questions on the role and dignity of Islam as religion of the Federation, specific Islamic rules on apostasy and the role of *Shariah* courts, as well as one's ethnic status. The most pertinent issue is whether the exercise of this freedom includes the freedom of Muslims to renounce the Islamic faith. The Malaysian courts have dealt with conversions and apostasy many times over the years, and the results are quite varied. For one, there is the notable case of *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia & Another*, 1 M. L.J. 489-502 (1999). Soon Singh was brought up as a Sikh but converted to Islam. He later renounced Islam and sought a declaration that he was no longer a Muslim in the Kuala Lumpur High Court. The court dismissed his

⁵¹ See Sheridan and Groves. *The Constitution of Malaysia*. 76.

⁵² See Mohamad, M. (2008) Religion, Human Rights and Constitutional-Contract Politics in Malaysia. *Intellectual Discourse* 16(2): 155.

application on the grounds that the subject matter in the application fell within the jurisdiction of the *Shariah* Courts. In *Kamariah bte Ali v. Kelantan Government*, 3 M. L.J. 657, 657 (2002), a cult member was sentenced to two years in jail for apostasy. There is also the case of *Siti Fatimah Tan Abdullah v. Majlis Agama Islam Pulau Pinang*, (2006) Cas. 07100-043-0191-2006 (Shariah High Court of Pulau Pinang) which saw the courts exercising some degree of leniency in allowing the appellant, who converted to Islam to marry an Iranian, to later renounce the religion.

However, it was *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Another*, 4 M. L.J. 585-626 (2007), that has gained international attention and widespread local debate.⁵³ Joy argued that the National Registry Department's (NRD's) requirement of a *Shariah* court's confirmation of her conversion violated her constitutional right to freedom of religion. The Federal Court, however, upheld the NRD's requirement before Joy could officially change her religious status on her identity card. The majority opinion also held that one can renounce Islam but still must follow Islam's procedure to do so, and agreed with submissions of various Muslim Non-Governmental Organizations (NGOs) that wilful and whimsical conversions could cause chaos to Islam and its adherents.⁵⁴ Although this case was largely an administrative law matter, it became rife with important constitutional and human rights questions.

First, if rights provisions are indeed a mechanism for preventing State interference with a citizen's fundamental liberties, Joy's argument is plausible. Civil and political rights, such as religious freedom, are of a negative nature, that is, the State simply must not encroach upon a citizen's exercise of those rights. Second, the fact that the majority

⁵³ See Evans, C. (2009) Constitutional Narratives: Constitutional Adjudication on Religious Clauses in Australia and Malaysia. *Emory International Law Review*, 23: 460.

⁵⁴ *Ibid.* 463-464.

required adherence to particular procedures for renouncing Islam (namely, a *Shariah* court confirmation), suggests that Article 11 is read in light of Article 3.⁵⁵ Harding argues that the ruling is that Joy could only convert with an order of the *Shariah* court 'elevated article 3 to a higher status than article 11.'⁵⁶ One could possibly entertain the idea that Islam as the religion of the Federation means that it should be given precedence, and that any exercise of religious freedom by Muslims is conditional on Article 3. However, this approach is sorely lacking of any constitutional basis because Article 3(4) clearly states that the establishment of Islam does not affect other provisions of the Constitution. The majority holding in *Lina Joy* also appears to betray the constitutional guarantee of equality regardless of race or religion.

Perhaps the most problematic aspect of the decision is the apparent side-stepping of constitutional issues and deference to the *Shariah* court in matters implicating freedom of religion. It reveals a lacuna in the legal system due to overlapping of civil and *Shariah* jurisdictions. On the one hand, constitutional rights and interpretation fall squarely within the purview of the civil courts. Harding argues that matters within the Islamic jurisdiction are personal rather than constitutional, and that the 'constitutional law requires that jurisdiction of the ordinary courts to rule finally on matters of legality should be preserved'.⁵⁷ On the other hand, conversions out of Islam are perceived as a matter for the *Shariah* courts due to the separation of the civil-*Shariah* jurisdiction in 1988. The problem is that state-enacted Islamic laws regulating conversions are not always consistent with religious freedom. Moreover, barring a few states, there is no clear legislative enactment on how to deal with apostates or those

⁵⁵ Ibid.

⁵⁶ See Harding. *Sharia and National Law in Malaysia*. 511.

⁵⁷ See Harding. *Law, Government and the Constitution in Malaysia*. 138.

who seek to convert.⁵⁸ In *Kamariah bte Ali*, 3 M. L.J. 660 (2002), the court discussed on how sustained applications to the *Shariah* courts were rejected. The Court of Appeal however, held that the legislation in question - the state of Kelantan's section 102 of Enactment 4/1994 - does not prevent a Muslim from renouncing Islam. But this cannot be done unilaterally and a declaration must be sought from the *Shariah* court. In *Daud bin Mamat & Others v Majlis Agama Islam & Another*, 2 M. L.J. 390, 402 (2001), the right to exit a religion is not within the scope of Article 11 and the fact that the plaintiffs are Muslims ousted the court's subject matter jurisdiction. It is also unlikely that individuals would voluntarily go to the *Shariah* courts to convert because these efforts may either be futile, or they will be subjected to punishment or counselling sessions. For instance, Articles 119(1) and 119(8) of the Administration of Islam Enactment (Negeri Sembilan) 2003 require an individual who seeks to convert first to apply to a *Shariah* court for a declaration that he or she is no longer a Muslim; requiring counselling for a year, and if his or her position does not change, the court may grant the application.⁵⁹ Constitutional arguments aside, it is worth mentioning that from an Islamic perspective, apostasy (for instance by pronouncing oneself to have or intend to renounce Islam) is considered valid regardless of its official endorsement by any particular authority.⁶⁰

The outcome of *Lina Joy* restricts freedom of religion and, to a certain extent, puts it in a state of flux even though it can be seen as to protect human dignity for the Malay-Muslim. There is no clear answer to whether the Federal Court would be willing to fight tooth and nail to uphold Article 11 and permit conversions among Muslims. The trend of side-

⁵⁸ See Hasan, Z. (2008) *Islamic Criminal Offenses in Malaysia and the Extent of its Application*. 9 June. Available at: <http://zulkiflihasan.files.wordpress.com/2008/06/isu-undg-jnyh-msia.pdf>

⁵⁹ See *Refugee Review Tribunal*. (2008) RRT Research Response. 27 March. Australia. Available at: http://www.ecoi.net/file_upload/1997_1293698291_mys33057.pdf

⁶⁰ See Abidin, M.A.Z., (2007) *Apostasy: Between Emotions and Reality*. 22 July. Available at: http://drmaza.com/english_section/?p=17

stepping issues of constitutional importance and obscuring the boundaries of religious freedom in Malaysia continued in a recent child conversion case, *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Another*, 2 M. L. J. 648-658 (2004). The ruling is that the consent of a single parent is enough to validate the conversion of a child. There, a Hindu woman appealed against a High Court decision affirming the validity of her children's conversion to Islam without her consent. Shamala and her husband were both Hindus at the time of their marriage and her husband later converted to Islam and also converted both their minor children. The High Court also ruled that Shamala's application to invalidate the conversion is not within its jurisdiction because the children are now Muslims and as such, they are subject to the *Shariah* jurisdiction. The High Court accepted that Shamala, being a non-Muslim, was without recourse as she is not within the *Shariah* jurisdiction. The Court only suggested that Shamala seek assistance from the Islamic Council of the Federal Territories.

One of the crucial questions on appeal is whether the *Shariah* court has exclusive jurisdiction to determine the validity of minors' conversion to Islam once they have been registered as Muslims.⁶¹ The Federal Court was also called upon to determine the appropriate forum for a non-Muslim parent to assert his or her rights and remedies in cases of unilateral conversion of children. In November 2010, the Federal Court rejected Shamala's referral application on the basis that Shamala was in contempt of a High Court order requiring her to bring her children to Malaysia. Shamala had apparently left the country with her children in 2004.⁶² Commentators criticized the Federal Court's apparent 'hands-

⁶¹ See Harun, A. (2010) Shamala and the Skirt of Technicalities. *The Malaysian Insider*. 24 November. Available at: <http://www.themalaysianinsider.com/breakingviews/article/shamala-and-the-skirt-of-technicalities-art-harun/>

⁶² See *The Star*. (2010) Federal Court Rejects Shamala's Referral Application (Updated). 12 November. Available at: <http://thestar.com.my/news/story.asp?file=/2010/11/12/nation/20101112141055&sec=nation>

off' approach as a mere 'skirting of technicalities'.⁶³ It appears that the Court had failed to appreciate the gravity of the constitutional issues presented before it, and that it missed the opportunity to clarify those issues, especially as there are other similar cases pending.⁶⁴

Protecting Muslim Dignity II: Moral Policing

In January 2005, the Federal Territories Religious Department (JAWI) enforcement officers raided Singapore-owned Zouk night club in Kuala Lumpur and arrested 100 Muslims who were patrons of the club. The religious officers claimed that those arrested were dressed indecently or had consumed alcohol. This event had triggered a protest by a group of anti-moral policing campaigners, who called themselves Malaysians Against Moral Policing, not simply protested the arrest but also questioned the state's role in defining the morality of its citizens and the use of punitive religious and municipal laws to curb immorality and indecency.⁶⁵ Their campaign called for the repeal of provisions in religious and municipal laws that deny citizens their fundamental right to privacy, freedom of speech and expression, and those that overlap with the federal penal code.⁶⁶ It also called for the appointment of a committee to monitor the process of repealing these laws, including representation from women's groups, human rights groups, civil society organisations, progressive religious scholars and constitutional experts; and the strengthening of pluralism through community dialogue on the

⁶³ Harun, A. Shamala and the Skirt of Technicalities.

⁶⁴ See Tan, R. (2010) Time to Break the Impasse. *The Star*. 21 November. Available at: <http://thestar.com.my/news/story.asp?sec=focus&file=/2010/11/21/focus/7471860>

⁶⁵ See Mohamad. Religion, Human Rights and Constitutional-Contract Politics in Malaysia. 155-186.

⁶⁶ These included Section 29 of the Sharia Criminal Offences (Federal Territories) Act 1997 and Section 31 of the Sharia Criminal Offences (Selangor) Enactment 1995 which makes it an offence for a Muslim who, contrary to Islamic law, acts or behaves in an indecent manner in any public place; Section 9 of the Sharia Criminal Offences (Federal Territories) Act/ Section 12c of the Sharia Criminal Offences (Selangor) Enactment which make it an offence for a Muslim to defy the *fatwas* (religious edicts) of a Mufti.

issue of morals in the society. The campaign was endorsed by about 50 NGOs and more than 200 individuals including prominent government and opposition politicians such as from the Democratic Action Party (DAP), Parti Keadilan Nasional (KeADILan, National Justice Party).⁶⁷ As a result of the various protests, none of those arrested were charged in the *Shariah* court because, according to Abdullah Mat Zin, the Minister in the Prime Minister's Department (the *de facto* Islamic Affairs Minister), of the 'lack of evidence which warrants prosecution'.⁶⁸

In response to the Anti-Moral Policing Campaign, a coalition of mainstream Islamic organisations launched a counter-campaign to defend the enforcement of Islamic moral laws. About 50 Islamic organisations including ABIM, JIM, PKPIM, Malaysian Ulama' Association (PUM), Malaysian Chinese Muslim Association (MACMA) and Indian Muslim Youth Movement of Malaysia (GEPIMA) issued a joint statement claiming that the campaign 'has caused confusion and ambiguities about the concepts of prevention of sin and the limits of individual freedom in Islam'.⁶⁹ The organisations maintained that prevention of sin, especially by the government, is a manifestation of the principles of *hisbah* and *al-amr bi al-ma'ruf wa al-nahy 'an al-munkar* (enjoining good and forbidding evil) which are central to the teachings of Islam. Sharing the same sentiment was the National Fatwa Council, which consists of state muffis and religious scholars who urged the government in its April meeting to uphold the Islamic concept of 'enjoining good and

⁶⁷ See Mohamad. Religion, Human Rights and Constitutional-Contract Politics in Malaysia. 155-186 and Joint Statement, 'State Has No Role in Policing Morality' [online] available at <http://www.sistersinislam.org.my/mamp/endorsees.htm>, accessed on June 17, 2007. The NGOs include Sisters in Islam (SIS), *Suara Rakyat Malaysia* (SUARAM, Voice of Malaysian People), National Human Rights Society (HAKAM), *Aliran Kesedaran Negara* (ALIRAN, Movement for National Consciousness), All Women's Action Society (AWAM), International Movement for a Just World (JUST), Malaysian Youth and Student Democratic Movement (DEMA), Malaysian Trade Union Congress (MTUC), *Pusat Komunikasi Masyarakat* (KOMAS, Centre for Community Communication) and *Universiti Bangsar Utama* (UBU).

⁶⁸ See *Malaysiakini*. (2005). 14 April. <http://www.malaysiakini.com>

⁶⁹ See Mohamad. Religion, Human Rights and Constitutional-Contract Politics in Malaysia. 160.

forbidding evil' by enforcing those laws more responsibly. The government, responding to the protests from the Muslim majority, shot down the initiative and promised to retain all laws on morality including the Shariah laws in order to safeguard the moral of Malaysians.⁷⁰

Meanwhile in other related issue, fifty-two unmarried Muslim couples face charges of sexual misconduct and possible jail terms after being caught alone in hotel rooms by Malaysia's Islamic morality police.⁷¹ Scores of officers fanned out across budget hotels in central Selangor state before dawn on 1 January 2010, knocking on doors and detaining unmarried Muslim couples who were sharing rooms. The detained, mostly students and young factory workers, are expected to be charged with '*khalwat*,' or '*close proximity*'. Several unmarried Muslim couples in Malaysia were charged for being in '*close proximity*'. Malaysian *Shariah* law does not allow couples to be along together before marriage. Under Malaysia's Islamic *Shariah* law is described as couples not married to each other being alone together in a private place. The spokesman of JAIS Hidayat Abdul Rani explained that 'We chose to have this large-scale operation on New Year's Day because many people are known to commit this offense while celebrating such a major holiday'.⁷² In Selangor, *khalwat* carries a maximum penalty of two years in prison and a fine. The *Shariah* laws apply only to Malaysia's Muslims, who make up nearly two-thirds of the population, and not to the Christian, Buddhist and Hindu minorities. Mohd Asri Zainal Abidin, former Mufti of the state of Perlis, conceded that it was the right of the religious authorities to conduct *khalwat* raids but it must be done in a

⁷⁰ Ibid.

⁷¹ See Daily Mail. (2010) Mail Online: Malaysian police arrest 52 unmarried Muslim couples for being alone together in hotel rooms. 5 January. Available at: <http://www.dailymail.co.uk/news/article-1240510/Malaysian-police-arrest-52-unmarried-Muslim-couples-hotel-rooms.html?printingPage=true>

⁷² Ibid. 1.

reasonable and rational manner.⁷³ While the actions of *khalwat* among unmarried Muslim couples are sinful, the approaches to prevent such sins from being perpetrated should be modified to educate Muslims on their rights and wrongs. He suggested that state governments have special guidelines for religious departments on the proper way of conducting *khalwat* raids.

In separate issue in 2009, a Muslim model was sentenced to be caned by authorities after being caught drinking beer at a nightclub. Kartika Sari Dewi Shukarno was sentenced to six lashes by an Islamic court after she was caught with alcohol in a raid on a hotel nightclub in eastern Pahang state. Amnesty International had urged authorities to 'immediately revoke the sentence to cane her and abolish the practice of caning altogether'. But Miss Shukarno accepted her punishment and even asked for the caning to be carried out in public to send a clear message to Muslims that they should shun alcohol.⁷⁴ The nation's strict *Shariah* laws have been the focus of world attention. In some cases, such as with *khalwat*, academics and authorities have discussed imposing the code on non-Muslims in the country as well.

Protecting Muslim Dignity III: Freedom of Speech

One issue that has raised concerns over the exercise of free speech in multiracial Malaysia is the controversy on the use of the word 'Allah' by Catholics. In January 2008, the Malaysian cabinet banned a Catholic newspaper, *The Herald*, from using the word 'Allah' in their publications. The Malaysian government justified the restrictions on the basis that the word 'Allah' refers to God according to the Muslim faith, and as such its use by non-Muslims may arouse sensitivity and create confusion among

⁷³ See *The Star*. (2006) Mufti: See the bigger picture. 17 December. Available at: <http://thestar.com.my/news/story.asp?file=/2006/12/17/nation/16349115&sec=nation>

⁷⁴ See Daily Mail. Mail Online: Malaysian police arrest 52 unmarried Muslim couples for being alone together in hotel rooms.

Muslims in the country.⁷⁵ It is considered an insult against Muslim's dignity if the word 'Allah' is being used by the non-Muslims in referring to their god.

The debate on this issue remains unresolved. Although the High Court held in favour of *The Herald*, the Malaysian government obtained a stay order pending an appeal. It has been strongly contended that the government's censure against *The Herald* violates the freedom of religion under article 11, freedom of speech and expression under article 10, as well as article 8's guarantee of equality. Proponents of the Government suggest that 'Allah' is exclusive for Muslims, and giving Catholics the right to use 'Allah' disregards article 3 because such use will somehow erode the position of Islam in the country and cause confusion among Muslims. It is difficult however, to see the wisdom of this argument especially since article 3 does not affect the exercise of other rights espoused in the Constitution. Furthermore, in other Muslim countries, even in the Middle East, where the Muslim and Christian communities together use the word 'Allah', one hardly hears of any confusion arising.⁷⁶

For those who support *The Herald's* position, they claim a violation of article 11's right to religious freedom, in that the use of Allah is central to the practice and profess of their religion. But the widespread concern among the Muslims is that such use would strike the prohibition against propagation of other religions to Muslims. It is believed that the Catholic Church would use it as a tool for proselytism among the Muslim majority, against article 11(4) of the Constitution. However, a non-Muslim would only commit an offence if he uses the word 'Allah' to a Muslim but there would be no offence if it was used to a non-Muslim. The High Court

⁷⁵ See *The Sun*. (2008) Cabinet: Allah for Muslims only. 4 January. 1.

⁷⁶ See *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor*. [2010] 2 CLJ 208, 214; High Court Malaya, Kuala Lumpur, Judicial Review No. R1-25-28-2009, 31 December 2009

opined that the use of the word 'Allah' is an essential part of the worship and instruction in the faith of the Bahasa Malaysia-speaking community of the Catholic Church in Malaysia, and is integral to the practice and propagation of their faith.

The other side of the argument suggests that this controversy be looked at through the 'non-mandatory practices' lens. This restraint has been invoked by courts to allow only religious practices that are deemed 'essential and mandatory.' One could make out an argument that other than using the word 'Allah', the Catholics could instead use the Bahasa Malaysia equivalent of 'God' – which is *Tuhan* – in their publications. Hence, the use of 'Allah' is neither mandatory nor essential to practice the religion. But it is this very line of reasoning that has drawn concerns from those who believe that it may create problems in areas where some practices, though not mandatory, is however part and parcel of certain religions.⁷⁷ Another potential danger of invoking the 'essential and mandatory' reasoning lies in the fact that religious practices often vary not only from one place to another, but also from one community to another. So who is to decide what is 'essential and mandatory'? If this reasoning is used to sustain a uniform, blanket rule on 'necessary' practices, then we have no business in claiming cultural (or religious) relativism because to impose what is necessary or not contradicts the very heart of the relativist argument. As such, it is clear that arguments from both sides of the divide have some flaws which need to be addressed urgently.

With regard to the freedom of speech, it is contended by the applicants and subsequently affirmed by the High Court that the imposition of the prohibition amounted to an unreasonable restriction on the freedom of

⁷⁷ See Masum. Freedom of Religion under the Malaysian Federal Constitution. 4.

speech and expression under article 10(1)(c) of the Constitution.⁷⁸ It is also deemed an unreasonable administrative act which impinged on the first limb of article 8(1) of the Constitution, which demands fairness in any forms of State action.

In the international human rights regime, the freedom to 'manifest one's religion or belief in teaching, practice, worship and observance either in public or in private' is clearly recognised. Broadly speaking, we can conclude that this includes the use of a particular word or reference in publications distributed to adherents of a particular faith. The Human Rights Commission's General Comments to article 18 of the International Covenant on Civil and Political Rights (ICCPR) sheds some light in understanding what is contemplated by the human rights regime. It is recognised that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, as well as customs like the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.⁷⁹ In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, one of which is the freedom to prepare and distribute religious texts or publications. Given these, the position taken by the Malaysian government is inconsistent with international conceptions of human rights even though the decision is such a way is to protect of the dignity of Muslim and the exclusivity of the word 'Allah' to Muslim in Malaysia. It is also worth mentioning that international scholars such as Tariq

⁷⁸ See Adil, M.A.M. (2007) Restrictions in Freedom of Religion in Malaysia: A Conceptual Analysis with Special Reference to the Law of Apostasy. *Muslim World Journal of Human Rights* 4(2): 10-11.

⁷⁹ See Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), at para. 4. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument)

Ramadan seemingly share the sentiments against the prohibition to use 'Allah' in Malaysia. Ramadan suggests that for centuries Christian Arabs have been using 'Allah' to refer to God, and likewise Muslims have used different words when speaking of God in different languages.⁸⁰

Closely related to the 'Allah' issue, the Malaysian government detained 35,100 Bibles at conditions it has imposed for their release. The Home Ministry stamped the words, 'This Good News [Malay] Bible is for use by Christians only', which the covers must carry a serial number, on 5,100 Bibles without consulting the importer, the Bible Society of Malaysia (BSM), which initially refused to collect them as it had neither accepted nor agreed to the conditions. The Home Ministry applied the stamp a day after the government on 15 March 2011 issued a release order for the Bibles, which had been detained in Port Klang. Another 30,000 Bibles detained in a port in Kuching after the Sarawak state Home Ministry told the local chapter of Gideons International that it could collect them if the organization would put the stamp on them. Gideons has thus far declined to do so, and a spokesman said on 5 April 2011 that officials had already defaced the books with the stamp. Home Minister Hishammuddin Hussein has said the act of stamping and serialization was standard protocol.⁸¹ In the weeks following the 15 March 2011 release order, the government made several attempts to try to appease the Christian community through Idris Jala, a Christian from Sarawak state and a minister in the Prime Minister's Department. Idris issued the government's first statement on 22 March 2011, explaining that officials had reduced earlier conditions imposed by the Home Ministry to require only the words, 'For Christianity' to be stamped on the covers of the Bible in font type Arial, size 16, in bold. On 2 April 2011, Idris issued a 10-

⁸⁰ See Koya, Z. (2010) On Respect, Thinking, and Dialogue. *The Sun*. 14 January. <http://sun2surf.com/article.cfm?id=42327>

⁸¹ See Kay, J. (2011). Malaysian Christians Seek to End Restrictions on Malay Bibles. *Compass Direct News*. 8 April. <http://www.crosswalk.com/news/religion-today/malaysian-christians-seek-to-end-restrictions-on-malay-bibles.html>

point statement to try to resolve the impasse.⁸² Significantly among others, this latest overture by the government included the lifting of present restrictions to allow for the local printing and importation of Malay and other indigenous-language Bibles into the country.⁸³

Most Christians responded to this latest overture with caution. Many remained sceptical, seeing it as a politically motivated move in view of Sarawak state elections on 16 April 2011. Nearly half of Sarawak's population is Christian. However, the 10-point proposal has also drawn the ire of Muslim groups, who view it as the government caving in to

⁸² The solution is as follows:

1. Bibles in all languages can be imported into the country, including Bahasa Malaysia/Indonesia.
2. These Bibles can also be printed locally in Peninsula Malaysia, Sabah and Sarawak. This is a new development which should be welcome by the Christian groups.
3. Bibles in indigenous languages of Sabah and Sarawak such as Iban, Kadazan-Dusun and Lun Bawang can also be printed locally and imported.
4. For Sabah and Sarawak, in recognition of the large Christian community in these states, there are no conditions attached to the importation and local printing of the Bibles in all languages, including Bahasa Malaysia/Indonesia and indigenous languages. There is no requirement for any stamp or serial number.
5. Taking into account the interest of the larger Muslim community, for Peninsular Malaysia, Bibles in Bahasa Malaysia/Indonesia, imported or printed, must have the words 'Christian Publication' and the cross sign printed on the front covers.
6. In the spirit of 1Malaysia and recognising that many people travel between Sabah and Sarawak and Peninsular Malaysia, there should be no prohibitions and restrictions for people who bring along their bibles and Christian materials on such travel.
7. A directive on the Bible has been issued by the Secretary General (KSU) of the Home Ministry to ensure proper implementation of this cabinet decision. Failure to comply will subject the officers to disciplinary action under the General Orders. A comprehensive briefing by top officials, including the Attorney General (AG), will be given to all relevant civil servants to ensure good understanding and proper implementation of the directive.
8. For the impounded Bibles in Kuching, Gideon, the importer can collect all the 30,000 Bibles free of charge. We undertake to ensure the parties involved are reimbursed. The same offer remains available for the importer of the 5,100 Bibles in Port Klang, which have already been collected by the Bible Society Malaysia (BSM).
9. Beyond the Bible issue, the Government wishes to reiterate its commitment to work with the Christian groups and all the different religious groups in order to address inter religious issues and work towards the fulfillment of all religious aspirations in accordance with the constitution, taking into account the other relevant laws of the country. In order to bring urgency to this work, the Prime Minister will meet the representatives of the Christian Federation of Malaysia (CFM) soon to discuss the way forward.
10. The Christian Ministers in the cabinet will meet on a regular basis with representatives of the various Christian groups in order to discuss their issues and work with the relevant Ministries and Prime Minister in order to resolve them.

⁸³ See Kay. Malaysian Christians Seek to End Restrictions on Malay Bibles.

Christian pressure. Perak Mufti Harussani Zakaria and the Muslim Organizations in Defense of Islam (Pembela) expressed his disappointment challenge the 10-point proposal in court if it was not reviewed in consultation with Muslim representatives especially the issue of Malay Bibles. The issue with the Malay Bibles is closely tied to the dispute over use of the word 'Allah' by non-Muslims. In a controversial court ruling on 31 December 2009, judge Lau Bee Lan had allowed *The Herald*, a Catholic newspaper, to use 'Allah' for God in the Malay section of its multilingual newspaper. The Home Ministry filed an appeal against this decision on 4 January 2010 in which to date, there is no indication as to when the case will be heard.⁸⁴

Understanding the Malay-Muslim Concept of Human Dignity

Within the community and in tradition, the Malays have applied human dignity strongly in the society where the Malay customs (*adat*) co-exist together with Islam comfortably. Malay culture has been described by Western observers as valuing 'refined restraint', cordiality, and sensitivity and Malays themselves as courteous and charming (and less positively, as fatalistic, and easy to take offence). In comparison with other cultures and peoples such as the Chinese and European, the Malay's proper conduct of speech generally tend to be regarded by themselves as *halus* (soft) and others as *kasar* (rough).⁸⁵ This is to stress that *halus* behaviour applies also to a range of non-verbal behaviour such as removing the shoes before entering a home, consuming some of whatever refreshment is offered, adopting a specific posture when passing between people who are seated, using only the right hand in eating or in passing things, avoiding physical contact with the opposite sex, beckoning in a certain way.⁸⁶ Malay culture is richly verbal, with a

⁸⁴ Ibid.

⁸⁵ See Wilson, P.J. (1967) *A Malay village in Malaysia*. New Haven, CT: Hraf Press. 132.

⁸⁶ See Goddard, C. (1997) Cultural values and 'cultural scripts' of Malay (Bahasa Melayu). *Journal of Pragmatics* 27: 183-201.

large stock of sayings (*peribahasa*), short evocative verses (*pantun*), and narrative poems (*syair*). The importance of speech (*percakapan*) to proper conduct is because it has a secondary meaning of 'courtesy, manners'. For instance, the collocation *tahu bahasa* (know speech) is explained by Hussain Abdullah as *sopan santun* 'well mannered'.⁸⁷ Other similar expressions are *melanggar bahasa* (attack speech) 'breach etiquette' and *kurang bahasa* (less/under-speech) 'ill-mannered'.⁸⁸ Malays believe that proper speech will affect manner, and manner will definitely affect the dignity of one person.

One important concept in Malays' psyche and interaction is the social emotion of *malu* 'shame, propriety'. It is usually glossed in bilingual dictionaries as 'ashamed', 'shy', or 'embarrassed'. However, these translations do not convey the fact that Malays regard a sense of *malu* as a social good, somewhat akin to a 'sense of propriety'.⁸⁹ Michael G. Swift equals *malu* with 'hypersensitiveness to what other people are thinking about one'.⁹⁰ As identified by some anthropologists that the need to avoid *malu* has been the primary force for social cohesion – not to say conformism – in the Malay village. *Malu* is largely a negative reaction to the idea that other people could think something (anything) bad about one, a prospect which is powerfully unpleasant to Malay sensibilities.⁹¹

What is interesting to the Malays is that *malu* is also related to the social concept of a person's dignity or *maruah*. Other meanings of *maruah* are 'self-respect', 'pride', and the like. *Maruah* involves both what others think about one and what one thinks about oneself. It is a notion

⁸⁷ See Hussain Abdullah (1990) *Kamus simpulan Bahasa*. 2nd ed. Kuala Lumpur: Dewan Bahasa dan Pustaka. 26f.

⁸⁸ Goddard, C. Cultural values and 'cultural scripts' of Malay (Bahasa Melayu). 183-201.

⁸⁹ Ibid.

⁹⁰ See Swift, M.G. (1965) *Malay peasant society in Jelebu*. London: Athlone Press. 110.

⁹¹ See Goddard. Cultural values and 'cultural scripts' of Malay (Bahasa Melayu). 183-201.

resonant with moral implications in which a person with *maruah* would not lower him or herself to knowingly do something wrong. This portrays *maruah* as a kind of whole-some confidence in one's moral standing in the eyes of others. Other closely related concepts are *harga diri* 'self-esteem' (*harga* 'value', *diri* 'self') and *nama baik* '(one's) good name'. This cluster of concepts is of primary concern to Malay social ideology. As Nen Vreeland et. al. remarks: 'an individual's *amour propre* [is] in many respects his most treasured and jealously defended possession'.⁹² *Maruah* and a concern for one's *harga diri* bear a clear relationship to the emotion of *malu*. Feeling *malu* 'shame' implies a threat to one's *maruah* 'dignity', because *malu* is induced by the prospect that other people are thinking things about one; conversely, maintaining one's *maruah* will largely pre-empt any unpleasant sense of *malu*. The relationship is similar to that remarked upon by Mario Jacoby in a discussion of the psychology of shame, 'shame-anxiety', and dignity in the European context: '... one could regard shame as a 'guardian' of dignity. Shame-anxiety puts us on guard against 'undignified' behaviour, sensitising us to whether or not a given event will be experienced as 'degrading'.⁹³

What do such concepts have to do with characteristic Malay speech patterns? These concepts of shame and dignity are clearly explained in the Malays tradition as among the most essential values embedded in the Malay psyche. For instance, the relations between the ruler and the ruled were based on an idea of social contract that emerged from the concepts of 'sovereign' (*daulat*) and 'disloyal' (*derhaka*).⁹⁴ The social

⁹² See Vreeland, N., Dana, G.B., Hurwitz, G.B., Just, P., Moeller, P.W. and Shinn, R.S. (1977) *Area handbook for Malaysia*. 3rd ed. Glen Rock, NJ: Microfilming Corporation of America. 113.

⁹³ See Jacoby, M. (1991) *Shame and the origins of self-esteem: A Jungian approach*. Trans. in collaboration with the author by Douglas Witcher. London and New York: Routledge. 24.

⁹⁴ See Zainal A.A.W. (1970) Glimpses of the Malaccan Empire - I. In Zainal A.A.W. (ed.) *Glimpses of Malaysian History*. Kuala Lumpur: Dewan Bahasa dan Pustaka. 20.

contract was believed to be existed from a myth or dialogue between Sang Sapurba representing the ruler and Demang Lebar Daun representing the ruled in a classical literature called *Sejarah Melayu* (The Malay Annal) written by Tun Sri Lanang. In the dialogue as discussed by C.C. Brown, the concepts of shame and dignity are so crucial in guiding the relation between the ruler and the ruled. The Malay political system can collapse if both sides disobey the rule as agreed in the dialogue below:

Sri Tri Buana said; 'What is it that you wish me?' And Demang Lebar Daun replied: 'All my descendants shall be your highness' subjects and they must be properly treated by your highness' descendants. If they do wrong, however greatly, let them not be disgraced or insulted with evil words: if their offence is grave, let them be put to death, if that is in accordance with Muhammadan (Islamic) law.' And the King replied, 'I will give an undertaking as you wish but in return I desire an undertaking from you...that to the end of time your descendants shall never be disloyal to my descendants, even if my descendants are unjust to them and behave evilly'. And Demang Lebar Daun replied, 'So be it, your highness'. And that is why it has been granted by Almighty God to all Malay rulers that they shall never put their subjects to shame: however greatly they offend, they shall never be bound or hanged or insulted with the evil word. If any ruler puts his subjects to shame, it is a sign that his kingdom will be destroyed by Almighty God. Similarly it has been granted by Almighty God to Malay subjects that they shall never be

disloyal or treacherous to their rulers, even if their rulers should behave evilly or inflict injustice.⁹⁵

This is to suggest as observed by Vreeland et. al. that 'The social value system is predicated on the dignity of the individual and ideally all social behaviour is regulated in such a way as to preserve one's own *amour propre* and to avoid disturbing the same feelings of dignity and self-esteem in others.'⁹⁶ That is to say, in ordinary conversation Malays cooperate to assist the safeguarding of each other's *maruah* 'dignity' and to steer away from the possibility of incurring or inducing *malu* 'shame'.⁹⁷ Therefore, the concept of human dignity is not something new in the Malay tradition. It however needs to be further strengthened and developed in order to make it relevant to the Malaysia's current context and practice for the common good.

It has been argued that although the Malays face rapid development and modernization, they still embrace and prioritize certain values linked closely with human dignity. The Malay values of patience, respect and togetherness are applied through people's tactful actions in everyday social interactions, but more importantly, they are also achieved through linguistic indirectness, hedges and other 'positive politeness strategies'. According to Lim Beng Soon, by avoiding disagreements, criticisms, complaints and any other face-threatening acts (FTAs) that might reduce the desirability of the addressee and using hedges or even white lies to avoid conflicts, one shows forbearance, achieves harmony and demonstrates togetherness, thus meeting the essential requirement

⁹⁵ See Brown, C.C. (1970). *Sejarah Melayu 'Malay Annals'*. Kuala Lumpur: Oxford University Press. 16.

⁹⁶ See Vreeland et al. *Area handbook for Malaysia*. 117.

⁹⁷ See Goddard. Cultural values and 'cultural scripts' of Malay (Bahasa Melayu). 183-201.

of Malay etiquette.⁹⁸ For example, people are warned to guard against speaking in a direct manner as it may lead to serious consequences: '*berapa tajam pisau parang, tajam lagi lidah manusia*' – 'knives and machetes are not as sharp as tongues'. Malay culture has significant implications for negotiation processes and outcomes. In negotiation, the Malays' compromising and obliging conflict-handling styles are probably manifestations of their collective nature, which prioritises group over personal interests. In compromising and obliging styles, negotiators are more concerned with maintaining relationship and safeguarding their partner's feeling, hence the seemingly perceived 'weak-styles' in goal-oriented negotiation. To the Malays, even though achieving their goals in a negotiation is important, their values in preserving harmony and respect for elders take precedence in the negotiation process.⁹⁹ This for the Malays will preserve their integrity and dignity in human relations.

Conclusion

What is the future of human dignity? Asian countries should have a strong argument on human dignity and place it in the national constitution and legislation. This is because the protection of human dignity will make the people better off for the common good. I agree with Guy E. Carmi that, despite several possible understandings of human dignity, this understanding is most common among legal systems that utilise human dignity as a central constitutional tool, and serves as the basis for my model.¹⁰⁰ Under this understanding, the regulation of speech to promote social norms is warranted. In particular, the regulation of speech that is perceived as infringing upon dignity is

⁹⁸ See Yuan Y. (2003) Lim Beng Soon: Malay Saying as Politeness Strategies. *Review: Report on SAAL Talk*. Singapore: SAAL (The Singapore Association for Applied Linguistics). Available at: <http://www.saal.org.sg/sq63.html>

⁹⁹ See Lailawati M.S. (2005) High/Low Context Communication: The Malaysian Malay Style. *Proceeding of the 2005 Association for Business Communication Annual Convention*. Kuala Lumpur: Association for Business Communication. 8.

¹⁰⁰ See Carmi, G.E. (2008). Dignity versus Liberty: The Two Western Cultures of Free Speech. *Boston University International Law Journal*, 26: 277-374.

advanced. Thus, the ban on hate speech is perceived as advancing the human dignity and equality of minorities, and the regulation of pornography is often perceived as promoting the same values for women. But this conception of dignity also comes into expression in maintaining the dignity and honour of individuals via defamation laws and, in some cases, via criminal insult laws. These characteristics of human dignity explain the ideology and motivation of virtually all Western democracies, with the exception of the United States, to regulate hate speech and libel, and, in some cases, to restrict pornography and promote civility.¹⁰¹

In Malaysia, the concept of human dignity becomes so important to the Malay-Muslim. Human rights influenced by the Western views are unsuitable to be applied to the local who believe on religion such as Islam. However, the argument of human dignity is more acceptable to the Malay-Muslim culturally and religiously. In a community-based society like in Malaysia, protecting the community is valued and prioritised higher particularly when it involves religion. Islam is protected and special as the religion of federation. The concept of human rights is contradictory to the practice of Islam in Malaysia. Three cases of freedom of religion, moral policing and freedom of speech as shown in this paper were definitely proved that the practice of Islam is protected for the purpose of protecting the dignity of the Muslims in the country. Further, the Malay-Muslims have incorporated the teaching of Islam in their way of life. Although there are such precedent cases where the argument of human dignity was used to explain the case, the term is not vastly used and explained in the Court and by any legislation because of dual court and legal systems applied in Malaysia; conventional and *Shariah* court and laws. The concept is also not widely used even though it is embedded in local culture. Therefore, there should be an

¹⁰¹ Ibid.

attempt by the authority and political and legal scholars to analyse this concept further in order to have it successfully implemented for the common good.

Enforcement of International Human Rights Law by Domestic Court: Bangladesh Perspective

*Abul Bashar Mohammad Abu Noman**

Abstract

There is a substantial body of norms of international human rights law, both in international conventions and customs. However, the international mechanism to enforce human rights world wide is rather weak. On the other hand, domestic courts have remained largely unutilized as concerns enforcing international human rights law. This is primarily owing to different state perceptions concerning the interrelation between international law and municipal law, and the resultant diverging views they take to implement norms of international law in the state territories. This tends to weaken the international human rights enforcement regime. There is a need to emphasize the legal and binding nature of international obligations and to involve domestic courts to ensure compliance. The importance of and contemporary movement for the protection and promotion of human rights has further underlined this need. The increasing recognition of individuals as subjects of international law, especially international human rights law, has added new dimension. Invoking international human rights law in domestic courts, therefore, merits special consideration. The issue of invoking international human rights law in domestic courts would invariably bring to focus the relationship between international law and domestic law and the status of international law in domestic legal system as well as the role of domestic courts in relation to the application of international law.

Bangladesh as a member of the common law community is no different from other common law countries where incorporation of the international law into the domestic law and application of international instruments are becoming increasingly frequent. However, Bangladesh

* Abul Bashar Mohammad Abu Noman is Associate Professor of Law, University of Chittagong, Bangladesh (abu_noman1974@yahoo.com).

position in relation to domestic application of international law is characterized by paucity of case laws, ambiguity of constitutional and statutory provisions, and reluctance of the judges as well as the lawyers to refer to international instruments. These characteristics are largely the functions of traditional and stereotyped thinking of our legal community, lack of willingness to know more about international legal development, lack of sufficient emphasis on international law in our law school curriculum, and finally rigid adherence to common law principles with little or no interest to take anything from civil law system, or even with little interest to have a look at other common law jurisdictions which are now devoting more time and toil to accommodate international law within domestic jurisdiction. The aims of this paper are to examine how the problem of domestic implementation of international norms is addressed in Bangladesh and to search for the way forward for ensuring effective enforcement of international human rights law in Bangladesh.

Introduction

There is an entrenched and reigning belief in Bangladesh that as long as it belongs to common law system, it must remain firmly loyal to its traditions, and its lawyers and judges take every care not to be heretical in their approach and attitude. This pious attitude seems to have dictated Bangladesh judiciary to shy away from any consideration of international law in domestic courts.

However, there is remarkable variation in views and practices amongst common law countries themselves regarding application of international law within domestic jurisdiction. At least theoretically this variation is most prominently manifested in the questions of implementation of treaties in the U.S.A. and U.K. While international treaties duly signed by the U.S.A. are part of law of the land and hence are to be regarded and applied as such by US courts of all instances (Art. 6/2 of the US Constitution), treaties in U.K. can only be applied by enabling or implementing legislation of the Parliament. However, in *Foster v. Neilson* (1829) the US Supreme Court came up with the famous

thesis of dividing treaties into self-executing and non-self-executing.¹ Since then treaties for the purpose of Art. 6/2 of the constitution have been interpreted to mean only self-executing treaties. However, borderline between self-executing and non-self-executing has never been very clear. Judiciary, legislature as well as executive have always taken a conservative view in dividing the line between self-executing and non-self-executing, putting most of the treaties into the category of non-self-executing. This has substantially humbled the effect of Art. 6/2 of the US Constitution.

This dualistic approach characteristic of common law countries has mainly predetermined the application of international human rights law in the domestic courts. On the other hand, civil law countries in Europe and Latin America, with some exceptions, are inclined towards monism which is becoming more manifestly characteristic of these countries. This is evident from the provisions of direct application of international law especially human rights law in the domestic jurisdiction as entrenched in the Constitutions of many of these countries.² However, in a great many of these countries direct application of international law is preconditioned by other factors including legislative approval of international treaties.

On the other hand, in common law countries where in the case of treaties' application of international law by implementing legislation is the usual practice, reference to international instruments for reading into domestic laws, or where there is no domestic law or the law is not clear,

¹ *Foster v. Neilson*, 27 U.S. (2 Pct) 253, 314 (1829); for details see, Jordan Paust, "Self-Executing Treaties", 82 *American Journal of International Law*, 760 (1988); Calos Manuel Vazquez, "The Four Doctrine of Self-Executing Treaties", 89 *American Journal of International Law*, 695 (1995).

² Argentina, Peru, Costa Rica, Japan, Lebanon, South Africa, Belgium, Switzerland, Netherlands and many newly emerging democracies of East Europe including Russia present good example of countries of direct application of international human rights law.

deciding cases in the light of international law is becoming increasingly frequent.³ Indian Supreme Court by its judicial activism has decided in recent times many cases referring to and basing its decisions on international human rights instruments.⁴

It is assumed Bangladesh as a member of the common law community is no different from other common law countries. However, Bangladesh position in relation to domestic application of international law is characterized by paucity of case laws, ambiguity of constitutional and statutory provisions, and reluctance of the judges as well as the lawyers to refer to international instruments. These characteristics are largely the functions of traditional and stereotyped thinking of our legal community, lack of willingness to know more of international legal development, lack of sufficient emphasis on international law in our law school curriculum, and finally rigid adherence to common law principles with little or no interest to take anything from civil law system, or even with little interest to have a look at other common law jurisdictions which are now devoting more time and toil to accommodate international law within domestic jurisdiction.⁵

A look at those few cases where Bangladesh's higher judiciary has based its decisions on international customs or treaties as source of law, or has referred to them as to strengthen its stand on specific domestic law or to illuminate the domestic law, would shed light on its position.

³ M.D. Kibry CMG, "The Role of the Judge in Advancing Human Rights by Reference to International Human rights Norms" *The Australian Law Journal*, vol. 62, July 1988, p. 515.

⁴ See generally, Vijayashri Sripati, "Freedom from Torture and Cruel, Inhuman and Degrading treatment of Punishment: The Role of the Supreme Court of India", in *Judicial Protection of Human Rights. Myth or Reality?* ed. Mark Gibney and Stanislaw Frankowski, Praeger, Westport, 1999, pp.107-122.

⁵ See generally, M.D. Kibry CMG, *op cit.* pp. 514-532.

Bangladesh Judiciary on International Customary and Treaty Laws vis-a-vis Domestic Law

*Bangladesh V. Unimarine S.A. Panama*⁶ relates to the Bangladesh position on international customs. The court in this case declared that customary international law is binding on the states, and states generally give effect to rules and norms of customary international law. The court cited the rule of immunity of foreign missions, envoys, etc. as good examples of customary international law that would be binding on states. The question arose in this case whether private foreign companies enjoy immunity from arrest and seizures. The court denied such immunity to be accorded to private foreign companies and declined to protect them from arrest and seizures. The court observed, “immunity is available under public international law to persons and properties of classified persons mentioned in the list which is usually filed by foreign missions and international agencies”.⁷

However, where there is clear domestic legislation on the disputed issue, the court gives effect to the domestic law, not to customary norms of international law. This particular aspect of domestic law vis-a-vis international custom was raised in *Bangladesh and others V. Sombon Asavhan*⁸. Bangladesh Navy captured three Thai fishing trawlers for illegal entrance and fishing in the territorial waters of Bangladesh. The question was whether the trawlers were within the territorial waters or the exclusive economic zone of Bangladesh. Instead of applying existing international law regarding territorial waters, the Supreme Court settled the issue on the basis of Bangladesh Territorial Waters and Maritime Zones Act, 1974, which lays down specific provisions for maritime boundaries for Bangladesh. The Appellate Division of the Supreme Court observed, “it is well settled that where there is municipal law on an

⁶ 29 DLR (1977) 252.

⁷ *Ibid.*, p. 259.

⁸ 32 DLR (1980) 198.

international subject the national court's function is to enforce the municipal law within the plain meaning of the statute".⁹ The court further held:

..... the point touches international law, since three fishing trawlers are involved and they have been captured from a place over which Bangladesh claims sovereignty. We are relieved from entering into long discussion of diverse laws, conventions, rules and practices of international law since there is complete code provided by our municipal law¹⁰

According to the court, Article 143(I)(B) of our Constitution confers upon Parliament full competence to legislate on the boundaries of territorial and maritime zones which it did by adopting the above Act of 1974. It appears that in case of conflict between statute and customary international law, the court will give effect to the statute. The court observed:

The trend of Bangladesh court practice is to follow the municipal law when such law on a given subject exists. This strictness in following the state law imposes a certain amount of responsibility on the law makers not to make laws as would encroach upon the accepted boundaries of the international community.¹¹

It may be noted here that at the time when the above case was being considered by the Supreme Court it was a time of great transition of international sea law. New principles and concepts of the law of the sea including extension of customary 3-mile limit of territorial waters to 12-

⁹ *Ibid.*, p. 201.

¹⁰ *Ibid.*, p. 202.

¹¹ Hussain S.M. and Haque, M.M. "Status of International Law in Bangladesh Courts", 7:2 (1984) *Law and International Affairs*, Dhaka, p. 71.

mile and new concept of 200-mile exclusive economic zone were emerging, which ultimately were entrenched in the 1982 Convention on the Law of the Sea.¹² Bangladesh Territorial Water and Maritime Zones Act, 1974, was in fact the result of those extra-ordinary developments in the law of the sea. Many other countries enacted similar laws. Customary norms relating to coastal jurisdiction in the sea have been overshadowed by the treaty norms of 1982, giving more powers and jurisdiction to the coastal states over vast areas of territorial sea, contiguous zone, exclusive economic zone and continental shelf. It is time Bangladesh as a signatory to 1982 convention more comprehensively incorporates these provisions in its domestic legislation.

Another issue of considerable interest is that Bangladesh court above has definitely reflected the traditional common law principle that while customary law is to be considered part of the law of the land, but in case of conflict with statutory law, statute has to prevail over customary norms. However, in the USA, a common law jurisdiction, in case of conflict between customary law and statute, customary law prevails. It is undoubtedly puzzling to find statute and customary law in conflict, for custom is the product of universal state practice. It explains why one of the canons of interpretation suggests domestic law is presumed not to conflict with the principles of international law. Existence of domestic law in conflict with international law is, therefore, unique. Either it has to be interpreted as not to be in conflict with international law, or the domestic law has to be amended to make it consistent with international law, or international law has to prevail over domestic law.

¹² Under growing state practice of unilaterally extending coastal jurisdiction and movement of the developing countries or review existing law of the sea, United Nations convened 3rd Conference of the Law of the Sea which worked for long ten years during 1973-82 to adopt 1982 United Nations Convention on the Law of the Sea to provide for new norms and principles.

In *Saiful Islam Dider v. Govt. of Bangladesh and others*¹³ The High Court Division considered the issue of customary international law regarding right to self-determination vis-a-vis the provision of Bangladesh Constitution on this. In the impugned case, government readiness to extradite Anup Chetia, leader of United Liberation Front of Assam (ULFA) allegedly fighting for national liberation, to India was challenged. The petitioner argued that Anup Chetia was fighting for right of self-determination of his people which is a preemptory norm *jus cogens* of international law, and, therefore, he could never be extradited to Indian authorities. The petitioner further argued that right to self-determination as *jus cogens* of international law has not only been incorporated in the major international human rights instruments and the UN Charter, but has also become universally acceptable customary norm. This principle is binding upon all nations, and hence was obligatory for Bangladesh to accord refugee status to Anup Chetia. The petitioner also contended that Anup Chetia's extradition would violate Article 25 of our Constitution which incorporates the fundamental principles of international law and the UN Charter including right to self-determination. He further argued that there was no extradition treaty between Bangladesh and India, without which Anup Chetia could never be extradited.

Rejecting the petitioner's contention the court observed:

Rather, the Government may take help of Art. 25 for the purpose of extradition of Anup Chetia to Indian authority in order to base its international relations on the principles of 'respect for national sovereignty and equality, non-interference in the international affairs of other countries'..... Article 25(1)(c) enjoins upon state to support throughout the

¹³ 50 DLR (1998) 318.

world waging a just war against imperialism, colonialism or racialism. We are afraid to accept the contention that as because Anup Chetia is struggling for “self-determination” for the people of Assam handing over him to India would be violative of Article 25 of our Constitution. The struggle in which ULFA and its Secretary-General Anup Chetia is involved is not in our opinion “waging a just struggle against imperialism, colonialism or racialism”. Nor can it be said that the right to “self-determination” as canvassed in this petition falls within any of the three expressions viz. “imperialism”, “colonialism” or racialism as used in Article 25(1)(c) of the Constitution.¹⁴

In fact, Art. 25(1) incorporates *jus cogens* of international law. The court relied on these constitutional provisions to refute petitioner’s contention.

In *M. Saleem Ullah v. Bangladesh*¹⁵ also the petitioner relied on Art. 25(1) and *jus cogens* to argue that the Bangladesh government’s decision to participate in the UN sponsored multinational force to Haiti was illegal, for the petitioner contended that operation of multinational forces in Haiti was in fact a US led aggression and war. The petitioner further argued that the government decision was violative of Art. 63, which empowers the President to declare war with the assent of the Parliament. In this case, it was argued, the government ignored this provision of the constitution.

The Court observed:

The decision of the Government to participate in the UN sponsored multinational force to Haiti to help restoration of the legitimately elected government was taken pursuant to the

¹⁴ *Ibid.*, pp. 322-323.

¹⁵ 47 DLR (1995) 219.

UN Resolution No. 940 and Bangladesh being a member state, has taken the decision on the authority of the constitutional framework and international commitment. The decision is not derogatory to any provision of the Constitution including Art.7.¹⁶

The Court further observed:

Our reading of this sub-article 25(1)(b) vis-a-vis chapter VII of the UN Charter and the Resolution No. 940 does not impress us to hold that there is any infringement of sub-art. (1)(b) of Art 25 in taking decision to participate in UN sponsored multinational force in Haiti and to send troops. Sub-Articles (1)(c) and (2) have no relevancy for our purpose. Rather the decision, in our view, has been taken on the principles enunciated in the UN Charter which is in no way against the Fundamental Principles of State Policy and in accordance with Chap. VII of the Charter of the UN.¹⁷

It is significant that the court mentioned in its observation the UN decision and international commitment which Bangladesh ought to fulfill. Art. 25 incorporates fundamental principles of international law. International commitment mentioned in the decision merits to be interpreted not only as commitment arising out of the obligations under UN Charter but also all commitments and obligations under customary international law and treaties which Bangladesh is party to.

In *Hussain Muhammad Ershed v. Bangladesh and others*¹⁸, Justice Bimalendu Bikash Roy Chowdhury made some interesting but careful

¹⁶ *Ibid.*, p. 219.

¹⁷ *Ibid.*, p. 224.

¹⁸ 21 BLD (AD) (2001) 69.

observations about the applicability of international human rights law by domestic courts. While he attaches utmost importance to international obligations arising out of treaties, or otherwise, J. Chowdhury, true to his common law convictions, rules out any possibility of application of international law by domestic courts if it conflicts with domestic norms. However, that the Honorable Justice of the Appellate Division of the Supreme Court has urged to draw upon the principles of international law in case of absence or ambiguity of relevant domestic law is very significant. Justice Chowdhury observed:

1. I have had the advantage of reading the judgment in the draft of my learned brother A.M. Mahmudur Rahman, J. I agree with his conclusion but I like to add a few words as to the applicability of Article 13 of the Universal Declaration of Human Rights to the right of an individual to travel beyond the border of his state.
2. True it is that the Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated into the domestic law, they are enforceable in national courts. The local laws, both constitutional and statutory, are not always in consonance with the norms contained in international human rights instruments. The national court should not, I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of

the state concerned, courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies.

3. In the instant case the universal norms of freedom respecting rights of leaving the country and returning have been recognized in Article 36 of our constitution. Therefore there is full application of Article 13 of the Universal Declaration of Human Rights to the facts of this case.¹⁹

In the above case Art. 36 of our Constitution guaranteeing the right of the citizens to leave the country and to return has been the source of law. There are many other instances of international human rights norms which have been enshrined in our constitution as fundamental rights, and in other relevant laws. However, there are norms which have not been reflected in our domestic legislation, but which are our international obligations all the same. It is very rarely that our judges mention norms of international law in their judgments or observations.

Novelty and nobility of Justice Chowdhury's observation is that while reminding the principle of priority of domestic law in case of conflict, he has raised the issue of application of international law by a domestic court where there is no domestic law on the issue or the domestic is ambiguous. This has at least drawn the attention of our otherwise reluctant judges to vast source of international law which would merit consideration for application in case our own law fails to deliver justice.

Even subscribing to the principle of primacy of domestic law vis-à-vis international law, it is possible to resort to vast potentials of international law by reading these norms into domestic laws, or illuminating domestic

¹⁹ *Ibid.*

law by international law or where domestic laws are not clear by interpreting them in the light of international law, or where there is no relevant domestic law, by applying international law, if available. Given judges' motivation, willingness and knowledge of international law, recourse to international law can grow to become one of the elements of judicial activism, considered a very progressive development in the contemporary jurisprudence and justice delivery system.

In *Kazi Mukhlesur Rahman v. Bangladesh*²⁰ where the petitioner challenged the constitutionality of the agreement between Bangladesh and India on the transfer of Berubari enclave to India in exchange of Angorpota and Dahgra, although the court dismissed the petition on the ground of prematurity, it raised some issues of immense constitutional importance and instructed the state to act accordingly. The court held:

Ours is a written constitution. We have already seen that the head of the Executive, namely, the Prime Minister cannot unilaterally determine the boundaries of Bangladesh which has to be done by a law of Parliament under Art. 143(2) of the constitution. It cannot but be more so when cession of the territory is involved. This limitation on the part of the head of the Executive of Bangladesh is on the face of it such a "manifest and notorious" restriction on his treaty-making power that any such treaty entered into by a foreign state with Bangladesh without the sanction of Parliament of Bangladesh will be ultra vires and cannot pass title.²¹

²⁰ 26 DLR (1974) 44.

²¹ *Ibid.*, p. 57.

The territory in question formed an integral part of Bangladesh in view of Art. 26(a) of the constitution which defined the territory of Bangladesh. The Apex court observed:

There can thus be no escape from the position that though treaty-making falls within that ambit of the executive power under Art. 55(2) of the Constitution, a treaty involving determination of boundary, and more so involving cession of territory can only be concluded with the concurrence of Parliament by necessary enactment under Art. 143(2) and in case of cession of territory by amending Art. 2(a) of the Constitution by taking recourse to Art. 142.²²

The Court made it clear that implementing legislation was mandatory to give effect to the treaty making adjustments to boundaries, and in case of cession of territories in the form of exchange or otherwise, amendment to Art. 2(a) of the constitution would be necessary. Treaties signed and ratified by Bangladesh government would require implementing legislation to apply them within its domestic jurisdiction if “(i) it involves alteration of the existing laws; (ii) confers new powers on the executive; (iii) imposes financial obligation upon the citizens; (iv) affects the rights of the citizens; and (v) involves alienation or cession of any part of the territory of Bangladesh.”²³

Judiciary’s Reluctance to Base Decisions on International Law

Observers have rightly pointed out that in many cases our judiciary has referred to international law, both customary and treaty, but failed to base their decisions on international law, although they had immense

²² *Ibid.*, p. 58.

²³ Sheikh Hafizur Rahman Karzon and Abdullah Al Faruque, ‘Status of International Law under the Constitution of Bangladesh: An Appraisal’, 3:1 (1999) *Bangladesh Journal of Law*, BILIA, Dhaka, p. 45.

opportunities to do so.²⁴ *Hussain Mohammad Ershad v. Bangladesh* cited above is one of them. In *State v. Deputy Commissioner, Sathkhira*,²⁵ the High Court Division referred to Universal Declaration of Human Rights (UDHR) and Convention on the Rights of the Children (CRC) not as a source of law but as to illuminate constitutional and statutory rights to free a minor boy from custody and torture. Similarly, in *Salma Sobhan v. Government of Bangladesh*²⁶ the High Court Division referred to the Convention Against Torture (CAT) to underline practice of chaining prisoners with bar-fetter (*danda berry*) as cruel and inhuman, and hence violation of fundamental rights. In *Massamat Renu v. Bangladesh*²⁷ the Court's issuance of *rule nisi* on the Government was apparently motivated by Art. 25(1) of UDHR on right to adequate housing which also means right to be protected from forced eviction, which the petitioner as a slum dweller in Dhaka sought to stop. In *Professor Nurul Islam v. Government of Bangladesh*²⁸ while the High Court Division banned advertisement of cigarettes and cigarette related products by illuminated interpretation of constitutional right to life considering the health hazards of the consumption of tobacco, the Court heavily relied on the resolution of the World Health Organization (WHO) on the issue. Encouragingly, the High Court Division also reminded the Government of its constitutional obligation under Art. 25 to respect principles and norms of international law contained in the United Nations Charter and in the instruments of its allied organizations like WHO. In *Bangladesh v. Professor Golam Azam*²⁹ also, Appellate Division got inspiration from the 1961 Convention on Reduction of Statelessness while deciding the case of citizenship in favor of the petitioner on constitutional principle.

²⁴ Ridwanul Hoque and Mostafa Mahmud Naser, "The Judicial invocation of International Human rights Law in Bangladesh: Questing a Better Approach", *Indian Journal of International Law*, vol. 40, No. 2, 2006, pp.162-170.

²⁵ 45 DLR (HCD) (1993) 643.

²⁶ Unreported case as cited in Ridwanul Hoque, *op.cit.*, p.163.

²⁷ Unreported case as cited in *Ibid*, p.164.

²⁸ 52 DLR (HCD) (2000) 413.

²⁹ 46 DLR (AD) (1994) 194.

In two women's rights related case *Dalia Parvin v. Bangladesh Biman Corporation*³⁰ and *Shamima Sultana Seema v. Government of Bangladesh*³¹, the High Court Division in upholding women's rights that their rights be not undermined in public and professional activities based its decisions solely on constitutional provisions while it had great opportunity to base its decision, besides the Constitution, on the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) as well, which was strongly argued by rights group interveners, because the Convention was ratified by Bangladesh. With more attention and weight given to international women's human rights instruments by the judiciary, constitutional provisions of non-discrimination of women can be further strengthened and decisions made more effective.³² It can make great precedential value and impact on any case where the Constitution would fail to provide remedy.

It appears the courts in Bangladesh where references were made to international human rights law did not take any serious, substantive and doctrinal view of the domestic relevance of these laws to render international human rights as basis for decision.³³ "Thus, despite the agreed status of customary international human rights law as directly applicable, there is no instance where this actually happened."³⁴ As for ratified but unincorporated treaty the Appellate Division (speaking through Justice Fazlul Karim) could only go as far as observing that an unimplemented international convention "could be recognized upon ratification", but without elaborating on how it could be so done.³⁵

³⁰ 48 DLR (HCD) (1996) 132.

³¹ 57 DLR(HCD) (2005) 201.

³²Ridwanul Hoque, *op.cit.*, p.169.

³³ *Ibid.*, p. 180.

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 181.

“Nevertheless, this observation is supposed to be casting considerable impacts on the jurisprudence of domestic use of international human rights law at least because, the court’s reference to the English judicial practice as to the applicability of an unincorporated international convention can reasonably be inferred as its implicit approval of the contemporary English judicial trend of using of unincorporated conventions for a plurality of purposes.”³⁶

Although there are very few cases where Bangladesh judiciary experienced occasions to relate international law to its decisions, and there is little judicial mention of constitutional provisions of international norms, in principle customary international norms are considered part of the law of the land, if they are not contrary to statutes, and on the other hand, treaty laws would require implementing legislation to apply them within domestic jurisdiction. However, paucity of cases dealt with by Bangladesh judiciary and very limited number of facts and circumstances of international import which came for consideration before the judiciary and also ambiguous statutory provisions regarding domestic application of international law, both customs and treaties, leave many questions on the problem unanswered. There is no constitutional or statutory provision on the status of customary or treaty law in our legal system, nor is there any statutory rule as to how the existence of customary norms would be determined and by whom, or how the treaties would be implemented within our domestic jurisdiction. These questions merit searching enquiry into the issues involved.

It ought to be emphasized even at the risk of repetition that our national life is being tangibly and increasingly influenced by international transactions and international legal development to which we are a party. How smoothly international norms, customary and treaty, would

³⁶ *Ibid.*

be applied within our legal system is a question of utmost national interest. These issues not only demand greater elucidation and transparency, but also understanding and motivation of the legal and political community of the nation.

It needs to be realized that our state, institutions and individuals have both rights and obligations under international law which is presumably becoming a necessary fact of our life. However, by the peculiarity of the nature of the family of sovereign nations, most of the rights and obligations require to be implemented through state organs – legislature, judiciary and executive. This necessitates drawing a clear picture of how it has to be done.

Modern and broader concept of human rights and emergence of a great volume of the norms of human rights law, both customary and treaty, have heavily shaken the traditional methods of implementation of international law within domestic jurisdiction. Some of the human rights treaties are so fundamentally universal that provisions contained therein have seemingly attained the character of customary or self-executing norm. This allows speaking of a legal concept of 'common law of human rights'. ³⁷Many of the modern developments and achievements of the states and progress of human civilization are judged in terms of progress of human rights that individual states and the world community at large have made. This brings to forefront the issues of implementation of international human rights law by domestic courts.

³⁷ *Ibid.*, p. 156.

Identification of the Issues of Domestic Implementation of International Norms of Human Rights in Bangladesh

For further investigation of the problem the main issues can be identified and concretized as below.

1. Customary norms of international law are part of the law of the land, if they are not contrary to domestic statutes. In some countries, prominently in the USA, they are so part if they are not contrary to statutes enacted subsequently, meaning that customary norms will prevail over statutes enacted earlier. However, in some countries e.g. UK, statutes enacted both earlier and later than customs, would prevail. How is the problem addressed in Bangladesh? There is no case law, nor statute to clarify. However, rejection of customary law on the pretext of prior existence of conflicting statutes would pose the important question whether impugned custom at all became law, for if the state in question acquiesced in the emergence of any customary norms it entailed the repeal of relevant statute by implication, for any law recognized as law on any particular issue would exclude the law on the same issue made earlier. Therefore, it would fall upon the judiciary to determine whether the state concerned was a party to customary law. Acceptance of custom by judiciary as law would override earlier statute. On the other hand, conflict between international customary norm and subsequent domestic statute on the same issue would mean violation of international obligations by the state, and must be pointed out by the judiciary, while remaining loyal to the statute. Details of customary international law ought to be made out by the judiciary.

2. There are universally recognized customs which have been incorporated in Constitution of Bangladesh and in the statutes. Art 25 of Part-II of the Constitution on fundamental principles of state policy incorporates many fundamental principles of international law. Other provisions of this part also indicate certain basic rights especially of the

marginalized sections of the people including women's rights and empowerment. Although provisions in this part are not justiciable in conventional sense, judiciary can take a strong stand on these issues based on constitutional provisions. Moreover fundamental principles of international law *jus cogens* which are also fundamental customary norms besides being treaty norms can in combination with constitutional provisions become very effective devices of judicial activism to deliver justice. On the other hand, fundamental rights in part-III of the Constitution reflect the contemporary international human rights law, both customary and treaty. However, volume of rights provided in the international human rights instruments including Universal Declaration of Human Rights (UDHR) and two 1966 international covenants on political and civil rights, and on economic, social and cultural rights e.g. ICCPR and ICESCR is more extensive than the rights guaranteed in part-III of the Constitution and other relevant laws of Bangladesh. Judiciary has opportunities to illuminate existing domestic human rights law by international human rights law to extend its scope and area of application.

3. Art. 145A of the Constitution of Bangladesh states that "All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before the Parliament". This seems to be an incomplete provision of the Constitution raising more issues and creating more problems than it solves. It keeps any reader of constitutional jurisprudence guessing on its effects and impacts. Its ambiguous provisions had led constitutional writers to interpret them in their own ways with divergent results. Contrary to what some authors have taken liberty to interpret, treaties in Art. 145A actually mean any bilateral or multilateral treaty or convention under the meaning of the 1969 Vienna

Convention on the Law of Treaties. This convention includes treaties only amongst states.³⁸

One interpretation of laying before the Parliament by the President may be to let the Parliament know and endorse the treaty, or to be aware of the anomaly, if any, with domestic law, and to resolve such anomaly. Unbelievably, after this provision was inserted in the Constitution in 1979 under 5th Amendment, only one treaty was so laid before the Parliament for discussion, after the treaty had entered into force.³⁹ It has been a systematic and regular violation of Art. 145A of the Constitution. Besides, it is not clear whether, as the Constitution so requires, treaties are at all submitted to the President.

Negotiation and conclusion of treaties is an executive prerogative. It is the same everywhere. However, ratification and entering of a treaty into force may not be an all executive affair everywhere. In fact, ratification which precedes entering of a treaty into force is often a legislative function in many jurisdictions. More variations are observed in respect of implementation of treaties in state territories in distinction from ratification of treaties. These issues are often addressed by statutory or constitutional provisions.

In Bangladesh, there is neither constitutional nor statutory provision as regards ratification of treaties, nor, as has been earlier mentioned, there is any clear provision for treaty implementation. As practiced in Bangladesh, ratification of treaties is done by the Cabinet with the Prime Minister signing and presumably President giving formal assent.

³⁸ See for some other aspects of Article 145A, Liaquat Ali Siddiqui, "Parliamentary participation in Treaty Making Process: Implications for Bangladesh:", *BISS Journal*, vol. 20, No. 1, Dhaka, pp. 58-59.

³⁹ The Ganges Water Sharing Treaty, 1996, between Bangladesh and India was placed before the parliament on January 20, 1997. Discussions and debates on the treaty took place on March 13, 1997.

Parliamentary participation in the process is totally excluded with the exception that treaties are constitutionally required to be placed before the Parliament through the President with no clarification as to what purpose.⁴⁰ Method of implementation or application of treaty within domestic jurisdiction is a totally different matter which presumably would depend on individual states holding dualistic or monistic views to decide whether primacy lies with international law or domestic law, whether are not international law would be directly applied in the state territories without the need of implementing legislation.

4. Most of the fundamental norms of customary international law are also entrenched in various international and regional treaties and conventions which Bangladesh is also party to. Many of these norms have found abode in the Constitution and statutory laws. This is in particular true of human rights law. In case of ambiguity of any provision in the national legislation the same can be illuminated by the light of international treaties. In fact, the judges have great opportunities to do this.

5. All treaties are not of equal importance. There are subject-based bilateral, regional or universal treaties of political, economic or military character – the so called law-making treaties which would presumably require several procedures to be fulfilled before they could be operational within domestic jurisdiction. However, there are innumerable transactional agreements so called treaty-contracts or executive or administrative agreements which need to be implemented by mere executive or administrative order.⁴¹ However, the borderline between these two categories of treaties would not be always easy to determine, although in most cases it may be so determinable.

⁴⁰ See for details Liaquat Ali Siddiqui, *op. cit.*, pp. 62-67.

⁴¹ Justice Naimuddin Ahmed, "Law Reforms in the Light of Human Rights Norms", *The Daily Star*, July 4, 1997, Law and Our Rights, p. 4.

6. Various state organs and agencies including judiciary have to engage themselves on regular basis in interpretation and application of treaties. While foreign ministry has to do it on daily basis, other ministries and state functionaries do so on occasions to deal with problems with foreign elements. Unfortunately in Bangladesh there is no clear constitutional directive nor statutory regulation nor specific administrative guideline to address these issues.

7. In the age of globalization and rapidly increasing inter-state and inter-people transactions accompanied by inevitable rise of international norms in various fields where Bangladesh cannot but remain actively involved, and her development in many ways contingent upon these interactions and transactions, Bangladesh ought to clearly address the issue how best she would derive rights and benefits from international norms, and fulfill her obligations. In view of the ever increasing importance of international law for national life, it is imperative to state by law how we would respond to the call of customary international law and fulfill the obligations under treaties. Envisioned constitutional or statutory provisions ought to explicitly decide on the status of international customs within domestic jurisdiction and on the question who would determine the contents and extent of customary norms, and once determined how they would be implemented in the state territories. Legal provisions ought also to decide the issues of implementation of treaty norms within domestic jurisdiction. These issues need to be addressed without being much fettered by theoretically tussling propositions of monism and dualism, and also without being over influenced or biased by traditional tendencies to see things only through the prism of domestic law. The core issue is fulfillment of international obligations under international law. Our traditional approach may not suffice to live up to fulfilling these

obligations. World has gone far adapting, innovating and rationalizing the methods which best suit the objectives of fulfillment of international obligations to derive maximum benefits. We need to catch up.

8. Most spectacular development in international law in the last few decades has been accomplished in the field of human rights, both in terms of creating legal norms and, in a sense, creating international mechanism to implement those norms. Yet, state jurisdiction remains the most effective method of implementing international human rights norms. Unless theoretical nuances between international and municipal law are resolved to put things on clear perspective by deciding how definitely international norms are going to be implemented within domestic jurisdiction protection, promotion and development of human rights in individual states would remain elusive.

Internationalist and Statist Approach Towards domestic Implementation

Under the impact of various concepts and approaches as to the relationship between international law and domestic law and implementation of the former in state territories, methods of implementation greatly vary from country to country further complicating the very notion of this relationship and implementation issue. But the problem actually is simpler than such theoretical nuances and variations in approach suggest. No state has to date denied the existence and applicability of international norms. Every state vows to abide by universally recognized norms and principles of international law and fulfill international obligations under treaties. International norms are, subject to necessary interpretation and clarification by competent organs, recognizable and applicable by state parties, and they are binding norms, and the states have to apply them in their own territories. As to the method of application, it can be more internationalists, or

more statist in approach.⁴² In fact, these are mere procedural issues, not to shadow the more important substantive issue that international law is to be applied as domestic law is so applied.

The problem of conflict between international and domestic law, and which law ought to have primacy in such conflict is more a product of imagination resulting from overemphasizing state sovereignty and of attempt to artificially create distance between these two systems of law. Unless a state subscribes to customary international law and voluntarily commits itself to treaty obligations, it is never bound by these norms. Conversely, once it does so subscribe and commit, borderline between international norms and domestic norms becomes blurred, making laws of both systems equally applicable within the state. True, there can be conflict of laws of the two systems. These conflicts would be resolved as the conflicts of different laws within one domestic jurisdiction are settled, e.g. laws enacted subsequently would prevail over laws enacted earlier; special law would prevail over general law etc.

The above approach seems to be one of so called internationalist erasing the boundary between international and domestic law, once international law has been accepted by state. There are both advantages and disadvantages of this approach.

Application of international law in state territories by implementing legislation lengthens and may complicate the process of such application. The state-parties are bound by the wordings of the text which have been agreed upon while they concluded treaties. There always remains possibility of deviation from the original text while enacting implementing legislation to apply treaty. Besides, as modern parliaments are generally burdened with their activities, the process of

⁴² Antonio Cassese, *International Law*, Oxford University Press, 2001, pp.179-181.

adopting implementing legislation lingers to uncertain period. This holds true even when parliament merely resolves to apply treaty without transforming it into domestic law, and instead, by appending the text of the treaty to the resolution in its entirety, or with specific reservations.

Internationalist approach has a special meaning and value for a country like Bangladesh which constantly struggles to cope with the issues of rule of law and protection of human rights. As mentioned earlier, international human rights law amongst the branches of international law had made appreciable progress. Contemporary norms of international human rights law are the products of the noblest values of human civilization acquiring concrete legal norms and imperatives by the efforts made by the best legal minds of different legal systems and countries, which are becoming more and more revealed by the practices of the states. Bangladesh legal system and her judiciary can draw on the vast pool of resources of international human rights norms to protect and promote human rights within.

Statist Approach and Common Law Judges

Countries with common law background have generally been thought to be more of statist approach emphasizing the need for implementing legislation to apply international law. On the other hand, common law judges have more opportunities to be creative; they have more law-making potentials; and their decisions make sources of law. This power of the judges specially holds good for interpretation and application of human rights law. Human rights law may not be seen in isolation of one another i.e. international human rights law from domestic human rights law.

Law reform in any country is characteristically a slow process, as adaptation of domestic law to international law is slow. It is explained

more by in-built legislative procedures than by legislators' unwillingness to adapt. Here the judiciary can act as a more dynamic organ working constantly, and more vigilant to take into instant consideration ever growing complexities of human and human rights issues. It is not to bypass law, but to complement it, and where there is a lacuna, to create law without waiting for legislation to take place. Here, especially in human rights issues, national judges have ample opportunities to add collective wisdom of the world community to their own to settle human rights issues. There are great instances, e.g. US Supreme Court has handed down landmark judgments on human rights issues like civil liberties and segregation without waiting for slow-moving Congress. And the Supreme Court has done so on rational interpretation of the US Constitution.⁴³

Judges in any society are expected to be duly qualified, and are appointed and meant to be the most enlightened, conscientious and intellectually sound professional groups. If they are recognized to be guardians of constitution and rule of law, human rights are safer in their hands than in the hands of executive and legislature. In the issues of protection and promotion of human rights and in interpretation and application of human rights law, the judges have the potentials to raise themselves to the positions of teachers of the community. There are instances that they have done so in the past.⁴⁴

That the judges could perform their functions with justice and human progress in view, what is needed in the first instance is the independence of judiciary. Independence of judiciary does not only

⁴³ *Strauder v. West Virginia* (1880) 100 U.S. 303, *Yick Wo v. Hopkins* (1886) 18 U.S. 356 and *Brown v. Board of Education* (1954) 347 U.S. 483 are three of the famous cases considered landmark for their judgment for equal protection of law, civil liberties and non-segregation; for more details see, *The Supreme Court and Human Rights*, ed. By Burke Marshall, Forum Series, VIA, 1982, p. 281.

⁴⁴ M.D. Kibry CMG, *op cit.* pp. 526.

mean that judges can perform their functions independent of executive and legislature, without being under pressure from these two organs, but also that rules and procedures, terms and conditions of their appointment are appropriate to appoint genuinely competent persons as judges.⁴⁵

Conflict of International law and Domestic law and Stake of State Sovereignty

Main stake in the direct application of international law in state territories by domestic courts, or interpretation of international law by domestic court to apply them within domestic jurisdiction is allegedly that in case of conflict between international law and domestic law the court would be violating domestic law to apply international law. As discussed earlier, the issue of conflict is debatable, if not controversial.

In principle, customary international law is not to be contrary to domestic law, for the state in question is supposedly party to the creation of international law. As for treaty laws, state presumably shall not undertake obligations in violation of its domestic law. Yet, conflict between international law and domestic law does take place. Judges ought to point out these lapses or anomalies and draw the attention of the legislature and executive, and correct the situation. Traditional view is that judiciary must go by domestic laws. However, as mentioned earlier, there is no reason why judges cannot act by later-in-time principle to directly apply international law, if the state concerned is party to any particular norm of international law. This would greatly serve the cause of promotion especially of human rights law, for collective wisdom epitomized in international human rights law is supposedly better than individual state stand on human rights.

⁴⁵ For a comprehensive study of the problem, see Sarkar Ali Akkas, *Independence and Accountability of Judiciary*, CRIG Publication, Dhaka, 2004.

State sovereignty seems to come in the way of direct application of international law and according too much power to the courts to apply international law. However, it ought to be kept in mind that globalization has considerably changed the traditional notion of sovereignty. Interdependence of states, cross-border movement of labor and capital and multiplication of common problems of mankind, have greatly conditioned this change.

Amongst the globalized issues human rights stand unique. World-wide movement for human rights and world community's collective efforts to create and implement human rights law is the single most important phenomenon in the world in the last few decades. All states are now subscribing to these efforts. A state cannot now commit genocide or other forms of gross violations of human rights and then take the plea of non-interference in its internal affairs by other states on the pretext of state sovereignty. International Criminal Court (ICC) is the product of changed notion of sovereignty.⁴⁶ Likewise, domestic courts ought to play a definitive role in applying international human rights law within state jurisdiction. It must be remembered that judiciary is also a state organ bearing equal responsibility along with legislature and executive to uphold state sovereignty. It is assumed judiciary would not exercise its power to apply international human rights law in a way violative of its state sovereignty.

It must be admitted that conflict between international law and domestic law is not desirable, and it is more convenient for the judges to apply domestic law. Often conflicting situations arise temporarily during adjustments and readjustments of the anomalies between international

⁴⁶ ICC has jurisdiction to prosecute crime of genocide, crime against humanity and war crimes. Besides, municipal tribunal under universal jurisdiction is entitled to prosecute any individual of any nationality for specific crimes of gross violations of human rights committed anywhere in the world.

law and domestic law, which are bound to occur either because treaties have been concluded with an understanding that it would require amendment of domestic law which could be delayed due to legislative procedure, or because domestic legislation has been enacted in violation of relevant norms of international law with or without the knowledge of that particular international norm. In both cases, state concerned would bear international responsibility. These issues need to be addressed.

Treaty Making and Ministerial Responsibility to Parliament

Although treaty-making is an executive prerogative, it is not that legislature has no relation to it. In parliamentary democracy, ministers – the chief departmental executives – are the members of the parliament. Under the concept and law of ministerial responsibility to the parliament, the executives in principle conclude treaties which would not be contrary to the laws made by parliament. In practice, however, only the diplomats, officials of the foreign ministry or any other concerned ministry take part in the negotiations and conclusion of the treaties which are then, if necessary, signed by ministers. In fact, nature and contents of the treaties are determined by the officials of the ministries, not by parliament, although minister as a member of the parliament is accountable to the parliament for his activities including treaty-making.

While treaties are ratified by the cabinet – the collective executive – and they are also collectively responsible to parliament for all activities including treaty ratification, parliamentary participation in treaty-making and ratification is virtually absent.⁴⁷ This tends to make the treaties vulnerable to anomalies with domestic legislation. More direct involvement of legislature in the treaty-making including ratification of

⁴⁷ Erik Jurgens, "Parliament and Treaty Making", *Journal of Legislative Series*, 1995, 1(2), pp. 182-183.

treaties would make ministerial responsibility to the parliament more real and the issue of conflict between international law and domestic law less relevant.⁴⁸ Parliamentary involvement in treaty-making would make the judges more comfortable to apply treaty norms in case of their conflict, if any, with domestic law by using later-in-time principle.

There may be numerous suggestions as how to involve parliament more actively in the process of treaty-making, which would in many ways simplify the resolution of the problem of treaty implementation. One suggestion is to form special parliamentary monitoring group which would oversee the process of treaty-making either in the form of receiving reports from relevant officials on any particular treaty making process or in any other form.⁴⁹ Another form of parliamentary involvement can be prior legislative approval of any treaty before ratification, or ratification itself can be done by the parliament. Legislative approval can acquire both passive and active forms. Active involvement entails positive act of the parliament endorsing the treaty, while passive involvement may be by simply laying the text of the treaty before the parliament for a certain period of time after the lapse of which text of the treaty would be presumed to be approved, if the parliament moves neither to endorse nor to reject.

One problem the observers point out is that there is no scope for bringing about any amendment to the text of the treaty placed before the parliament for approval. Either it has to be approved in full, or rejected.⁵⁰ However, the legislature can always indicate the reasons for rejection in which case the treaty can be renegotiated, or the treaty-making executive can resort to law of reservations specially indicating

⁴⁸ *Ibid.*

⁴⁹ See for more Jonna Harrington, ' Security and Approval: The Role of Westminster Style parliament in treaty Making', *international and Comparative Law Quarterly*, vol. 55, part 1, January 2006, pp. 157-159; Liaquat Ali Siddiqui, *op. cit.*, pp. 62-64.

⁵⁰ Erik Jurgens, *op. cit.*, p. 179.

which provisions of the treaty it considers not to be binding on itself, if of course it does not defeat the purpose of the treaty, or it is not otherwise inconsistent with the content of the treaty. Reservation can also be done at ratification stage. What is important to note is that if treaty-making involves parliamentary participation in one form or the other, arduous process of implementing legislation can be avoided.

Legislative approval of treaties followed by ratification by executives or ratification of treaty by the parliament itself should in principle exclude the need for implementing legislation and make way for direct application of treaty norms by judiciary, for such approval or ratification would essentially rule out any possibility of conflict between international law and domestic law.

Issues of Direct Application Made Easy

Issues of direct application of treaties by domestic courts may be addressed in simpler and easier way. Even if there is no legislative approval or ratification by parliament, and the treaty making is purely an executive matter as is the case now in Bangladesh, there is no reason why Bangladesh judiciary could not apply international law directly within domestic jurisdiction, if it does not collide with domestic law, or no domestic law is available on the issue making the question of any collision irrelevant. There appears to be no legal barrier in the matter. If international law is considered law, and there is no domestic law contradicting any particular norm of international law, direct application of that norm by judiciary would seem rather logical and natural.

There are so many norms of international law, both customary and treaty, all of which may not find concrete habitat within domestic legal system, nor it is necessary that they should be part of domestic law. We are living in a fast growing interdependent and globalized world

community. It is only natural that all global interactions and mutual obligations would not be instantly reflected in domestic legal matrix. It does not, of course, relieve the states or international institutions, or individuals of the obligations under international law.

Therefore, in case international law and domestic law are not conflicting, judiciary has both right and obligation to apply international law without looking for any implementing legislation. Such application should be considered particularly positive and progressive in case of international human rights norms. If the judges feel reluctant or constrained to apply international law, it can be explained more by their traditional habit and notions rather than by legal compulsion.

Conclusion and Recommendation

Be that as it may, addressing the issues of correlation between international law and domestic law, and application of the former within latter's domain could be facilitated by the existence of relevant constitutional or statutory provisions. Bangladesh has neither. Art. 25 and whole of part III of the Constitution solemnly declare certain principles and rights to incorporate many of the provisions of international law especially of international human rights law. And Art. 145A simply mentions international treaties to be placed before the President and through him the Parliament. However, these provisions do not indicate anything relating to mechanism of international law being implemented within domestic jurisdiction. Other than the conservative judicial practice of non-application of international law, there is no statutory provision to this effect either.

In view of the importance and growing vastness of international law, concrete suggestion on the method of its application within domestic jurisdiction merits constitutional attention. Customary norms of

international law, after their contents have been determined by the judiciary, need to be constitutionally declared to be part of the law of the land. On the other hand, all treaty norms which Bangladesh is a party to also need to be declared part of the law of the land to the extent that they are not contrary to domestic law, and to be applied directly by domestic courts.

Legislative approval of treaties before ratification, or need and procedure of ratification before treaty could be made effective may also be constitutionally provided for. Legislative approval of treaties or parliamentary involvement in treaty ratification would make declaring international law part of domestic law to be applied directly within domestic jurisdiction an easier proposition.

The above issues could also be addressed by statutory regulation, should constitutional amendment be considered too ambitious. It will only require the parliament to introduce a bill on negotiation, conclusion and ratification and implementation of treaties as well as application of international customary norms within domestic jurisdiction. It is also possible to address the problem by making special approaches to specific categories of treaties and customs, e.g. a Bill of Rights incorporating all human rights universally recognized as such as well as all rights enshrined in international human rights instruments, could be adopted by the Parliament to make them part of domestic law as well. This would substantially serve the cause of protection, promotion and development of human rights which has now become a credible measure of human progress and welfare.

Protection of Cultural Rights under the Indian Constitution: An Analysis

Dinesh Kumar*

Abstract

India is a land of myriad ethnic, religious, caste and linguistic minorities affiliated to distinct belief systems, sub-cultures and regions. If one goes in deep down in understanding diverse aspects of Indian cultural and social ethos, one realizes that the Indian society comprises of an extremely differentiated structure with a huge diversity in its cultural ethos. Integration of these diverse communities, some large enough to aspire to a regional homeland and others content to remain as part of the Indian state has been a central preoccupation of Indian governments since 1947.

India's Constitution was drafted during Partition, which had a profound effect on the Constitutional provisions dealing with minorities. The preamble to the Indian Constitution says that India is a secular state. Right to freedom of religion is guaranteed under fundamental rights and Indians of all religious persuasions have the freedom to profess, practice and propagate their religion. India's freedom movement provides insights into how the main pillars of the Indian Constitution - democracy, secularism, social justice and fundamental rights were forged over a period of time.

The Constitution's recognition of the need for affirmative action provisions for socially and educationally disadvantaged groups is also significant. The Directive Principle of State Policy in Article 49 obligates the State to protect every monument or place or object of artistic or historic interest from spoliation, disfigurement, destruction, removal, disposal and export. It is a unique scheme of the Constitution that in

* Dinesh Kumar is Assistant Professor, Department of Laws, Panjab University, Chandigarh-160014, INDIA. E-mail: dinesh@pu.ac.in. I am thankful to my friend and colleague Dr. Anil Kumar Thakur for his remarkable comments on the paper.

addition to a detailed set of rules on fair State-religion relationship, egalitarian approach towards all religions is embedded in it as citizen's duty (Article 51-A (e) and (f)).

The challenges in the protection of cultural rights arises when Equality as a guaranteed right is applied to different cultural groups. India adopted the scheme of non-discrimination, minority rights, reservation and affirmative action with varying degrees of success. Despite the several efforts by the government to improve the condition of the minority, constitutional guaranteed rights, different institution and commission established to monitor, failed. Minority faces discrimination, violence and atrocities. It has created a lot of tensions including communal conflicts and security challenges making governance difficult. The article will explore to what an extent the institutional mechanism established under the Constitution and various other statutes protect the minorities 'identity', recognizing their distinctive character while managing diversity?

Introduction

Culture is fundamental to individual autonomy because it provides a conglomeration of interlocking practices which constitute the range of life options open to one who is socialized within them. Will Kymlicka defines cultural practices as foundational to personal autonomy. Understanding cultural narratives - language, education, religion, custom, myth, symbols, morals, ethics, history and manners - is a necessary precondition to making intelligent judgments about how to live our lives. Culture provides options through which we identify experiences as valuable. Without culture, individuals would be left to invent everything (including language) in their own lives and all aspects of conduct.¹

India is a land of myriad ethnic, religious, caste and linguistic minorities affiliated to distinct belief systems, sub-cultures and regions. If one goes in deep down in understanding diverse aspects of Indian cultural and

¹ William K. Barth (2008) "Cultural Rights: A Necessary Corrective to the Nation State", in Francioni and Scheinin (eds), *Cultural Rights*, Leiden: Martinus Nijhoff Publishers, pp. 79-90 at 81.

social ethos, one realizes that the Indian society comprises of an extremely differentiated structure with a huge diversity in its cultural ethos. Octavio Paz once likened India's civilization to “an enormous metaphysical boa” that slowly but surely and relentlessly digests foreign cultures, religions, ideologies, and beliefs. The idea is that Indian culture, at heart, never changes, and that in Indian civilization the past and the future submerge in the present. This dramatic view of India is confirmed in one way or another by many outside observers.² In the words of Granville Austin, “to venture into the territory called culture is exceedingly risky for someone not an Indian, the more so because it involves making generalities about complexities.”³

The issue of cultural identities has not only been important but it also led to so many controversies. In fact, the cultural diversity in Indian was one of the important factors which held up the progress of the country towards freedom and independence. Moreover, when the long cherished goal of freedom was achieved, this came to us in the form of a divided nation i.e. India and Pakistan.

Therefore, it becomes important how the society in post-independent India addressed the issue of cultural identities of the minorities. In this paper, the author has tried to explore the answer to the following issues: How the concept of ‘minorities’ has been construed under the Indian Constitution? Does the Constitutional framework protect the cultural rights of minorities?

Evolution of Cultural Rights in India

Granville Austin rightly described the Indian Constitution as a “seamless web” woven by the Constituent Assembly into the Constitution for the

² Jan Nijman (2001) Untitled - Book Review, *Annals of the Association of American Geographers*, Vol. 91, No. 1, March, pp. 225-228.

³ Granville Austin (1999) *Working a Democratic Constitution: The Indian Experience*, New Delhi: Oxford University Press, p. 637.

nation, having four strands: (a) protecting and enhancing national unity and integrity; (b) establishing the institutions and spirit of democracy; (c) fostering a social revolution to better the lot of the mass of Indians; and (d) culture, which is omnipresent, visible and invisible. He further explained the term 'culture' that it 'does not include the variety of grandeurs in art, music, dance, theatre, literature, and scripture for which the country is justly famous, but, instead, refers to certain traits, viewpoints, and ingrained experiences and attitudes that are integral to the citizens.⁴ To understand the evolution of cultural rights under the Indian Constitution, it would be pertinent to have a glance at some of the pre-constitutional events which are important in shaping the cultural rights in post-constitutional India.

Cultural Rights in Pre-constitutional Era

The Constitution-making process in India involved culmination of the freedom movement, concretization of the values, goals and institutions consciously developed in the course of generations of public life, and people's direct and indirect participation. The process started with the first non-official draft of the Constitution of India Bill, 1895 also known as Tilak Bill, in which it is stated that "No law shall be made unless for public benefit". In this Bill, efforts were made to assert state sponsored free and compulsory education and various basic rights to all citizens irrespective of religion.

Even though after the revolt of 1857, the British Parliament adopted the policy of non-interference in religious matters, but, at the same time, some historians claim the origin of the cleavage between the two communities, Hindus and Muslims. The British government realized the same and adopted the 'divide and rule policy' by officially propagating

⁴ Id.,

the theory of two communities, i.e. Hindus and Muslims by granting a separate electorate to the Muslims as a minority in the Indian Council Act of 1909. The grant of separate electorates to the Muslims led to similar demands by other communities and the Government of India was forced with granting similar rights to the Sikhs in 1919.

In fact, the recognition of the minorities by the British government was not in order to protect their cultural rights rather it was to protect their own interest of governance and to weaken the movement of freedom struggle. However, responsible opinions did not fail to recognize the same and pointed out the evil effects that such a policy would have. Gopal Krishna Gokhale said:

“The principle of recognizing races and creeds stands in no need of encouragement from government, as the division of interests caused by it has already been the bane of this country.”⁵

However, to undo the damage caused by the British policy and to regain the faith of the minority community, the Nehru Report, 1928 proposed:

“Certain safeguards and guarantees are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the constitution.”⁶

⁵ B. Shiva Rao (1968) *The Framing of India's Constitution - A Study*, New Delhi: IIPA.

⁶ T.L. Venkatarama Aiyar (1970) *The Evolution of the Indian Constitution*, Bombay: University of Bombay, p. 90.

Thereafter, during the negotiations between Indian leaders and the British government for drafting a new constitution, the important question before the parties was whether a provision relating to safeguard the interest of minorities should be included as a fundamental right or not?⁷ The controversy ended with the signing of Poona Pact in 1931, which provided for political reservation for the Depressed Classes rather than separate electorate for them as well as minorities.⁸

The result of all these negotiations and agreements culminated and reflected later on in the form of the Government of India Act, 1935. Under the Act of 1935, the process of communal electorate continued. The Council of States or the Upper House consisted of 260 members. British India had 156 seats and Indian states 104. Out of 156 representatives of British India, 150 were to be elected on communal basis. In the federal assembly, the allocation of seats to different classes and communities were introduced. Out of 250 representatives of the provinces, general seats including the *Harijans* were 105, Sikhs 6, Muslims 82, Anglo-Indians 4, Europeans 8, Indian Christians 8, etc. This composition of the House shows that the federal legislature also retained its

⁷ In 1931, during the Second Round Table Conference, the British Prime Minister Ramsay MacDonald declared that he is in favor of including fundamental rights in the new Constitution of India with a view to safeguarding the interests of the minorities. To fulfill the same, in 1932, he accorded representation through separate electorates to minorities like Muslims, Europeans, Sikhs, Indian Christians and Anglo-Indians. In fact, later on, the concept of minorities was so expanded as to include even the prosperous European commercial and mercantile community in India as needing separate representation in the Legislatures.

⁸ Under the "Poona Pact" the separate electorates were abolished but the depressed classes got a large number of seats; and the members of the depressed classes were to enrol themselves in the general electoral roll. They were to form an electoral college which would in the first instance elect four candidates for each seat in a "primary election". These four would be the candidates for the general election and the poll for the general election would be extended to all the voters in the general constituency – both the depressed classes and others. For further details also see: Gwyer and Appadorai, *Speeches and Documents on the Indian Constitution, 1921-47*, Vol. I, pp. 261-6.

communal character. This system encouraged communal outlook in British India.⁹

Thereafter, due to outbreak of the World War II, further development regarding the freedom as well as constitutional framework came to a standstill. After the War, with the declaration of independence, the process of constitution for a free India started with the formation of the constituent assembly. While framing the constitution, the drafting committee discussed many issues including the protection of cultural rights of minorities as a fundamental right. For instance, while moving the Objective Resolution, Jawaharlal Nehru in the Constituent Assembly on December 13, 1946, observed that in the Constitution drawn up for the future governance of India “adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and other backward classes.”

But at the same time, the framers of the Constitution were aware about the fact that during the British period, the communal policy was adopted as a tool to suppress the freedom struggle. However, in the post independent India, the same question of protecting the cultural right of the minorities has to be seen in a different perspective which should contribute to the unity and integrity of India in a positive sense. This was a real challenge for the framers of the constitution: how they can accommodate the cultural rights of minorities and at the same time promotes the sense of common citizenry among them. The following observation by Govind Ballabh Pant in the Constituent Assembly on January 24, 1947 reflects the same:

“The question of minorities everywhere looms large in constitutional discussions. Many a constitution has foundered

⁹ S.G. Mishra (2008) *Democracy in India*, Sanbun Publishers, p. 171.

on this rock. A satisfactory solution of questions pertaining to minorities will ensure the health, vitality and strength of the free State of India that will come into existence as a result of our discussions here. The question of minorities cannot possibly be overrated. It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian Nation. Imperialism thrives on such strife. It is interested in fomenting such tendencies. So far, the minorities have been incited and have been influenced in a manner which has hampered the growth of cohesion and unity. But now it is necessary that a new chapter should start and we should all realize our responsibility. Unless the minorities are fully satisfied, we cannot make any progress: we cannot even maintain peace in an undisturbed manner.”¹⁰

Finally, the framers of the Constitution accepted principles of secularism¹¹ as the cardinal value of constitutional democracy and a solution for addressing the apprehensions of minorities in independent India. Therefore, they took care to safeguard the interests of the minorities, to give them a sense of security, to protect them against any discrimination, and to help them to get integrated in the main stream of national life. With this in view, a number of provisions have been incorporated in the Constitution for safeguarding especially the social, economic and educational interests of minority groups. In addition,

¹⁰ B. Shiva Rao (1968) at 746.

¹¹ The concept of secularism, though not expressly stated in the Constitution at the stage of its making, was nevertheless, deeply embedded in the constitutional philosophy. Reference may be made in this connection to Arts 25-28, 29-30, to Articles 14, 15 and 16 as well as to Articles 44 and 51 A. However, in 1976, through the 42nd Amendment of the Constitution, the concept of secularism was made explicit by amending the Preamble. The Supreme Court in *M. Ismail Faruqi v. Union of India* AIR 1995 SC 604 observed that “the concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution”.

certain general constitutional provisions, e.g. Fundamental Rights, protect some of the rights of the minority groups.¹²

Cultural and Educational Rights of Minorities under the Constitution of India

After independence, the drafters of the Constitution fulfilled a long cherished demand of all the people by guaranteeing them justifiable Fundamental Rights. Another objective of including these rights as Fundamental Rights was to give a sense of security and confidence among the people of a multi-religious, multi-cultural and multi-lingual society. Moreover, the underlying idea in entrenching Fundamental Rights was to take them out of the reach of transient political majority so that they may not be violated, tampered or interfered with by a government which is dominated by majority community.

The Constitution guarantees to the people certain basic human rights and freedoms as Fundamental Rights in Part III (Articles 12 to 35). These rights includes: right to equality¹³, right to freedom¹⁴, right against exploitation¹⁵, right to freedom of religion¹⁶, cultural and educational rights¹⁷, saving of certain laws¹⁸, right to constitutional remedies¹⁹. Further, to ensure an effective mechanism for the enforcement of these rights, Article 32²⁰, which is a Fundamental Right in itself, guarantees the right to

¹² M.P. Jain (2006) *Indian Constitutional Law*, Nagpur: Wadhwa and Company, p. 1397.

¹³ Articles 14 to 18 of the Constitution of India.

¹⁴ Articles 19 to 22 of the Constitution of India.

¹⁵ Articles 23 and 24 of the Constitution of India.

¹⁶ Articles 25 to 28 of the Constitution of India.

¹⁷ Articles 29 and 30 of the Constitution of India.

¹⁸ Articles 31-A to 31-D of the Constitution of India.

¹⁹ Articles 32 to 35 of the Constitution of India.

²⁰ Article 32 Remedies for enforcement of rights conferred by this Part: (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

move the Supreme Court for their enforcement. This is how Article 32 gives power to the Supreme Court to act as the protector, the guardian, and the interpreter of these rights or in other words as the “*sentinel on the qui vive*”. The Constitution also provides a mechanism for the enforcement of Fundamental Rights at State level under Article 226²¹ in which any person can approach the High Court. During emergency, these rights can be curtailed temporarily with an exception rights contained under Articles 20²² and 21²³. To quote Das C.J.:

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

²¹ Article 226 Power of High Courts to issue certain writs: (1) Notwithstanding anything in Article 32, every High Court shall have the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without –

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favor such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

²² Article 20 Protection in respect of conviction for offences: (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

“So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honor our sacred obligation to the minority communities who are of our own. Throughout the ages endless inundations of men of diverse creeds, cultures and races – Aryans and non-Aryans, Dravidians and Chinese, Scythians, Huns, Pathans and Mughals – have come to this ancient land from distant region and climes. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India’s tradition has thus been epitomized in the following noble lines:

*‘None shall be turned away
From the shore of this vast sea of humanity
That is India’.*²⁴

Since, the focus of this paper is on cultural and educational rights of the minorities, I would like to explore the constitutional provisions for their protection. The question of cultural rights has been addressed in the Constitution primarily in the context of the rights of minorities. The Constitution grants minorities the right to preserve and develop their culture as well as to make institutional arrangements, for instance, by establishing educational institutions under Articles 29 and 30. As formulated in the Constitution, this right is in the nature of a restriction on the powers of the state. To understand the provisions under Sections 29 and 30, first of all, it is important to discuss the concept of ‘minority’ or in

(3) No person accused of any offence shall be compelled to be a witness against himself.

²³ Article 21 Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

²⁴ *Infra* note 27.

other words how the meaning of the term 'minority' is construed in India particular in relation to these provisions.

Who is Minority in India?

'Minority' as a concept has not been defined in the Constitution of India. Article 30(1) uses the terms 'linguistic' or 'religious' minorities. The word 'or' means that a minority may either be linguistic or religious and that it does not have to be both - a religious minority as well as linguistic minority. Even the Constitution does not mention the specifics of language and religion. Even the constituent assembly while addressing²⁵ the issue relating to protection of cultural right of minorities kept the provision a little vague on the question of the definition of the 'minority'. The National Commission of Minorities Act, 1992 was enacted to constitute a national commission for addressing the concerns of minorities. The Act defines the term under Section 2(iii): "'minority', for the purpose of this Act, means a community notified as such by the central Government."

Even after so many years since independence, there seem no serious efforts on the part of the political leadership due to lack of political will among the various political parties to define the same. The definition

²⁵ The debates in the constituent assembly imply a tolerant rather than an encouraging approach of the state towards the minorities. This explains the stand of the Constitution-makers not to provide the promised fundamental rights automatically but to make the minorities assert their demands. It should not be taken to indicate that the national leaders were not in favor of providing safeguards to the minorities for cultural preservation and secular development, but perhaps the historically developed social distance among certain communities and partition of the nation had made them weary of assertive minorities, especially when the history had proven that such assertion might obstruct the process of nation building. This explains restrictions on political rights of the minorities and confinement of the fundamental rights to social and cultural spheres. Even the wording of the Article was kept vague in order to facilitate regular interpretation of the rights by the courts of India, taking into account the historical and spatial requirements of the nation and equations between the minority and the majority-a responsibility, which the courts of India are fulfilling at regular intervals. See: Ranu Jain, "Minority Right in Education: Reflections on Article 30 of Indian Constitution", *Economic and Political Weekly*, Vol. 40, No. 24, (June 11-17, 2005), 2430-2437 at 2436.

under the Act, 1992 reflects the same attitude of the political leadership which gives discretion to the government to define 'minority' which suits their political interests.²⁶ Because of this ambiguity and lack of consensus regarding the meaning of minority the issue has been reaching to the Courts from time to time in one form or another form.

Being the protector, guardian and interpreter of the Constitution, the Supreme Court replied to a relevant question, i.e., how to identify minorities to whom benefits of Articles 29 and 30 can be granted in *Re the Kerala Education Bill*²⁷. The Court suggested the technique of arithmetical tabulation of less than 50 per cent of population for identifying a minority. This population was to be determined in accordance to the applicability of the law in question. If an Act is applicable nationwide then the minority group would be decided on the national figures and in the case of the Act being applicable in a state, the minority group would be decided on the state figures.

The above mentioned ruling has been reiterated by the Supreme Court in *D.A.V. College, Jullundhar v. State of Punjab*²⁸. The court has ruled that a minority has to be determined in relation to the particular legislation which is sought to be impugned. If it is a State law, the minorities have to be determined in relation to the State population. The Hindus in Punjab constitute a religious minority [who are otherwise a majority community in India]. "They are therefore entitled to invoke the rights guaranteed under Article 29(1) because they are a section of citizens having a distinct script and under Article 30(1) because of their being a religious minority". While defining the term 'linguistic minority', the Court held that it is one

²⁶ For long time the political parties have been using 'minorities' as a vote bank in electoral democracy. For further details see: Ghanshyam Shah (2004) *Caste and Democratic Politics in India*, London: Anthem South Asian Studies. Achin Vanaik (1997) *The Furies of the Indian Communalism: Religion, Modernity and Secularization*, London: Verso.

²⁷ AIR 1958 SC 956.

²⁸ AIR 1971 SC 1737.

which must at least have a separate spoken language. It is not necessary that the language should have a distinct script for those who speak it.

However, the Delhi High Court in *A.S.E. Trust v. Director, Education, Delhi Adm.*²⁹, gave a dissenting judgment regarding considering the Hindus as a minority community. The Court pointed out that if various sections and classes of the Hindus were to be regarded as 'minorities' under Article 30(1), then the Hindus would be divided into numerous sections and classes and cease to be a majority any longer. The sections of one religion cannot constitute religious minorities. The term 'minority based on religion' should be restricted only to those religious minorities, e.g., Muslims, Christians, Jains, Buddhists, Sikhs, etc., which have kept their identity separate from the majority, namely, the Hindus.

The Supreme Court has approved its earlier decision of re Kerala Educational Bill, regarding formula to identify the 'minorities' in *T.M.A. Pai Foundation and Ors v. State of Karnataka and Ors*³⁰. The Court has specified the geographical entity of state for consideration of the status of minority for Article 30. To quote from the judgment:

Article 30(1) deals with religious minorities and linguistic minorities. The opening words of Article 30(1) make it clear that religious and linguistic minorities have been put at par, insofar as that Article is concerned. Therefore, whatever the unit - whether a state or the whole of India - for determining a linguistic minority, it would be the same in relation to a religious minority. India is divided into different linguistic states. The states have been carved out on the basis of the language of the majority of persons of that region. For example, Andhra Pradesh was established on the basis of the language of

²⁹ AIR 1976 Del 207.

³⁰ (2002) 8 SCALE 1.

that region viz., Telugu. “Linguistic minority” can, therefore, logically only be in relation to a particular State. If the determination of “linguistic minority” for the purpose of Article 30 is to be in relation to the whole of India, then within the State of Andhra Pradesh, Telugu speakers will have to be regarded as a “linguistic minority”. This will clearly be contrary to the concept of linguistic states.

In *Islamic Academy of Education*³¹ case and *P.A. Inamdar* case, the petitioner’s sought certain clarification on certain matters other than the meaning of the term ‘minorities’ which remained unsolved by the Supreme Court in the *T.M.A. Pai* case. Therefore, it can be concluded till the Parliament defines the term in a statutory manner, the interpretation given by the Supreme Court on the meaning of term ‘minority’ will remain final verdict under Article 141³² of the Constitution. In fact, the apex court on a number of occasions interpreted the term ‘minority’ in a wider manner and tried to strike a balance between the cultural rights of the minorities on the one hand and societal welfare on the other.

Protection of Interest of Minorities

Article 29 Protection of Interest of Minorities: (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

³¹ *Islamic Academy of Education v. State of Karnataka*, AIR 2003 SC 3724.

³² Article 141 Law declared by Supreme Court to be binding on all courts: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

In order to invoke Article 29(1), all that is essential is that a section of the citizens, residing in India should have a distinct language, script or culture of its own. If so, they will have the right “to conserve the same”. In *Jagdev Singh v. Pratap Singh*³³, the Supreme Court has emphasized that Article 29(1) includes the right “to agitate for the protection of the language”. It further held that an appeal by a candidate to vote, refrain from voting, for a person on the ground of language and making promise to work for the conservation of the electorate’s language does not amount to a corrupt practice. The right conferred upon the citizens to conserve their language, etc., is made absolute by the Constitution.

A legal provision requiring the Guru Nanak University to promote studies and research in Punjabi language and literature, and to undertake measures for the development of Punjabi language, literature and culture was challenged in *D.A.V. College, Jullundhar v. State of Punjab*³⁴, as infringement of Article 29(1). The Supreme Court has emphasized that the purpose and object of the linguistic States, which have now come to stay in India, is to provide, greater facility for the development of the people of the area educationally, socially and culturally in the regional language. The concerned State or University has every right to provide for the education of the majority in the regional medium. The provision in question cannot, therefore, be read as requiring the minority institutions affiliated to the Guru Nanak University to teach in the Punjabi language, or in any way impeding their right to conserve their language, script and culture. If the University makes provision for an academic and philosophy study and research of the life and teachings of saint, it cannot be said that the affiliated colleges are being required to compulsorily study his life and teachings.³⁵

³³ AIR 1965 SC 183.

³⁴ AIR 1971 SC 1737.

³⁵ *Ibid.*, at 1745.

Whereas the benefit of Article 29(2) is not confined only to minority groups but extends to all citizens whether belonging to majority or minority groups in the matter of admission to the educational institutions maintained or aided by the State. Article 29(2) is broad and unqualified.

The question of application of Article 29(2) arose for the first time in *State of Madras v. Champakam*³⁶. The Communal Government Order (G.O.) of the State of Madras allotted seats in medical and engineering colleges in the State proportionately to the several communities, viz., non-Brahmin Hindus, Backward Hindus, Brahmins, *Harijans*, Anglo-Indians³⁷, Christians and Muslims. A Brahmin candidate who could not be admitted to an engineering college challenged the G.O. as being inconsistent with Article 29(2). The Supreme Court held that the classification in the G.O. was based on religion, race and caste which was inconsistent with Article 29(2). The only reason for denial of admission to him was that he was a Brahmin and not a non-Brahmin.

In *State of Bombay v. Bombay Educational Society*³⁸, the Supreme Court struck down an order of the Bombay Government banning admission of those whose language was not English into schools having English as a medium of instruction because it denied admission solely on the ground of language. The order, the Court said, would not be valid, even if the object for making it was the promotion or advancement of national language.

³⁶ AIR 1951 SC 226.

³⁷ Anglo-Indians constitute a religious, social, as well as a linguistic minority. An Anglo-Indian, according to Article 366(2), is a person whose father, or any of whose other male progenitors in the male line, is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only.

³⁸ AIR 1954 SC 561.

As a result of the above mentioned verdict of the Supreme Court, the Parliament had to amend the Constitution. Article 15(4)³⁹ was added by the First Amendment of the Constitution to ensure advancement of the socially and educationally backward classes of citizens, or of the Schedule Castes⁴⁰ and Schedule Tribes⁴¹. So, the Fundamental Right guaranteed by Article 29(2) is abridged to some extent by Article 15(4) under which seats may be reserved in an educational institution for certain sections of the Indian citizens.

Right of a Minority to Establish Educational Institution

Article 30 Right of minorities to establish and administer educational institutions: (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice⁴². [(1-A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]. (2) The State shall not, in granting

³⁹ Article 15(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

⁴⁰ The Scheduled Castes are not, strictly speaking, a racial, linguistic or religious minority. They are part and parcel of Hindu society. They are the depressed sections of the Hindus who have suffered for long under social handicaps and thus need special protection and help for the amelioration of their social, economic and political conditions. They are known as untouchables or *Harijans* and constitute nearly 15% of the Indian population. They usually engage themselves in the so-called dirty jobs like tanning and skinning of hides, manufacture of leather goods, sweeping of streets, scavenging etc. The Constitution does not specify the castes or the tribes which are to be called as Scheduled Castes or the Scheduled Tribes. Under Article 366(24) read with Article 341, the President enjoys the power to list these castes and tribes and to notify the same.

⁴¹ The Scheduled Tribes also known as aborigines, are those backward sections of the Indian population who still observe their tribal ways, their own peculiar customs and cultural norms. The tribal people have remained backward because of the fact that they live in inaccessible forests and hilly regions and have thus been cut off from the main currents of national life.

⁴² Inserted by the *Constitution (Forty-Fourth Amendment) Act, 1978, Section 4.*

aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

As it was observed that Article 29 protects language, script or culture of minorities and it is Article 30 which reveals the mechanism by virtue of which these rights can be protected. Article 30 gives right to minority as such, however, even an individual member of the minority can establish and administer a minority educational institution as defined by the Supreme Court in *St. Thomas* case. The right is meant to benefit the minority by protecting and promoting its interests. A minority institution may impart general secular education; it need not confine itself only to the teaching of minority language, culture or religion. But to be treated as a minority institution, it must be shown that it serves or promotes in some manner the interests of the minority community by promoting its religious tenets, philosophy, culture, language or literature. There should be a *nexus* between the institution and the particular minority to which it claims to belong. A considerable section of the minority must be benefited by the institution.

In *re Kerala Education Bill*⁴³, the Supreme Court has observed:

“Article 30(1) gives certain rights not only to religious minorities but also to linguistic minoritiesthe right conferred on such minorities is to establish educational institution of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have to right to establish educational institutions for teaching their language only. In other words, the Article leaves it to their choice to establish

⁴³ *Supra* note 27.

such educational institutions as will serve their religion, language or culture and also the purpose of giving a thorough good general education to their children.”

The material factor to attract Article 30(1) is the ‘establishment’ of the institution by the ‘minority’ concerned. As the Supreme Court has observed in *Azeez Basha*⁴⁴: “Article 30(1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that ... The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise.”

In the case of *St Stephan's College*,⁴⁵ the Court further observed:

“...the words "establish" and "administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution is thus a condition precedent for claiming the right to administer the institution.”

In *Yogendra Nath Singh v. State of Uttar Pradesh*, looking into the antecedent history of institution rights from its inception, the Allahabad High Court concluded that the institution was not established as a minority institution, and therefore, it could not be granted minority status even though presently it was being managed by the minority

⁴⁴ *S. Azeez Basha v. Union of India*, AIR 1968 SC 662 at 669-670.

⁴⁵ AIR 1992 SC 1630

community. Under Article 30(1), the requirements of establishment and management have to be read conjunctively.⁴⁶

The Supreme Court in *St. Thomas* case widened the scope of the provision by stating that the right to administer has been given to the minority, so that it can mold the institution as it thinks fit, and in accordance with its ideas of how the interest of the community in general, and the institution in particular, will be best served. For purposes of Article 30(1), even a single philanthropic individual from the concerned minority can found the institution with his own means.⁴⁷ Even preservation of culture, as such, is not a necessary condition either for acquiring the status of minority or for claiming rights under Article 30. But the Supreme Court emphasized that the object of Article 30(1) is not to allow bogies to be raised by pretenders. The institution must be an educational institution of minority in truth and reality and not mere masked phantoms.⁴⁸

The Supreme Court has thus tried to restrict the misuse of the benefits granted to the minorities. People make false claims that an institution is a minority educational institution because such an institution carries with it a good deal of privileges and protection which are not available to a non-minority educational institution. For instance, in 1993, the Bombay High Court, on a technicality, held that in Minority Degree Colleges affiliated to University of Bombay reservation in posts was not permissible. Within two months about 30 colleges applied for minority status in order to avoid reservation.⁴⁹

⁴⁶ AIR 1999 All 356.

⁴⁷ *Manager, St. Thomas U.P. School, Kerala v. Commr. And Secy to General Education Dept.*, AIR 2002 SC 756.

⁴⁸ M.P. Jain (2006) at 1227.

⁴⁹ Ranu Jain (2005) "Minority Right in Education: Reflections on Article 30 of Indian Constitution", *Economic and Political Weekly*, Vol. 40, No. 24, (June 11-17), 2430-2437 at 2437.

Another question rose before the Supreme Court for a good number of times was regarding the term 'of their choice' used in Article 30(1). In *Re the Kerala Education Bill*,⁵⁰ Chief Justice S R Das stated, "the key to the understanding of the true meaning and implication of the article under consideration are the words "of their own choice". It is said that the dominant word is "choice" and the content of that article is as wide as the choice of the particular minority community may make it. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit..., educational institutions of their choice will necessarily include institutions imparting general secular education also."

The fundamental freedom under Article 30(1) is *prime facie* absolute in nature as it is not made subject to any reasonable restrictions. This means that all minorities, linguistic or religious, have by Article 30(1) right to establish and administer educational institution of their choice and "any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void."⁵¹ However, this does not mean that the state can impose no regulations on the minority institutions. As early as 1958, in the famous *re Kerala Education Bill*, the Supreme Court has observed: "The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right."

Even though the minorities have fundamental right to establish and administer the educational institution, one has to admit that administration of an institution also requires constant interaction among

⁵⁰ AIR 1958 SC 959.

⁵¹ M.P. Jain (2006) at 1230.

the management of the institution and the government. As the interests of the two are different, this generates many conflicting situations. By its interpretative process over the years, the Supreme Court has given a wide sweep to the protection conferred on the minority educational institutions under Article 30(1) as well as permitted some regulation thereof by the concerned government in the interest the institution concerned.

Varied interpretation of Article 30, especially with reference to Articles 29 is yet another cause of the tension between the Government and the educational institutions. The state's suspicion of the minorities more so of the religious ones; evidence of misuse of provisions of Article 30; and the desire of the minorities to avail of their Constitutional rights, especially in a state regulated education system are yet some more reasons for the same.⁵²

The case of *St Xavier's College*⁵³ specifies the scope of control over the minority educational institutions. According to Chief Justice Ray, the government can regulate course of the study, qualification and appointment of teachers, conditions of employment of teachers, health and hygiene of students, facilities for libraries and laboratories. The court also talked about the need of such measures as would bring about uniformity, efficiency and excellence in educational matters. Further to the conditions of merit, excellence and uniformity, the court states "The right to administer cannot obviously include the right to maladminister."⁵⁴

Control over the minority educational institutions is practiced not only for ensuring academic standards, but also for safeguarding interest of the employees. While the management of the minority educational

⁵² Ranu Jain (2005) at 2433.

⁵³ *St Xavier's College vs State of Gujarat* AIR 1974 SC 1389

⁵⁴ *Supra* note 27.

institution has right to take disciplinary action against its employees in accordance with the service rules of the institution, the state is entitled to take regulatory measures to ensure security of the services and interests of the academic and non-academic staff of the institution. Outside authorities like, the vice-chancellor and his/her nominee can be introduced in the administrative bodies of the institution, however, the role of such authorities should be well specified and should be such as not to overshadow the powers of the managing committee.⁵⁵

In a landmark decision in *T.M.A. Pai Foundation*⁵⁶, an eleven Judge Constitution Bench of the Supreme Court held that state governments and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities, but state governments and universities can specify academic qualifications for students and make rules and regulations for maintaining academic standards. They have the right to admit students 'of their choice', but subject to an objective and rational procedure of selection and compliance of conditions if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeship and scholarship. Admissions, the court said, should be on the basis of merit and be conducted in a transparent manner. To quote:

“...in the case of unaided institutions the regulatory measures of control should be minimal. Conditions of recognition and affiliation to a university or board have to be complied with. Managements should have freedom with regard to day-to-day management including appointment of teaching and non-teaching staff and administrative control over them.

⁵⁵ Ranu Jain (2005) at 2434.

⁵⁶ *T.M.A. Pai Foundation and Ors v. State of Karnataka and Ors* (2002) 8 SCALE 1.

Rational procedure for selection of teaching staff and for taking disciplinary action should be evolved. Appropriate tribunals should be constituted for redressing the grievances of employees of aided and unaided institutions. It is open to the state or the controlling authority to prescribe the minimum qualifications, experience and other conditions for being appointed as teacher or principle. Regulations can be framed governing service conditions for teachers and other staff for whom aid is provided by state without interfering with the overall administrative control of the management over the staff. Fees to be charged by the unaided institutions cannot be regulated but no institution should charge capitation fee...the principle that there should be no capitation fee or profiteering is correct."

However, earlier, these provisions were considered applicable only on the aided minority educational institutions but the *Pai* case extended their scope to include even the unaided minority educational institutions. The Court further held that minority educational institution does not lose its minority character simply because it receives aid from the government, but at the same time made it clear that they would have to admit non-minority students whose constitutional rights under Article 29(2) are not to be infringed like on grounds only of religion, race, caste, language or any of them.

The Court also overruled partly the decision in *St. Stephen's* case where it had held that the minority educational institutions were free to reserve seats up to 50 per cent for minority students. The Court has now empowered the States to fix *quotas* for minority students taking into account the type of institution, population and educational needs of the minorities.

After the decision of the *Pai* Foundation case, it was observed that the principles laid down by the Court were so broadly formulated that it gave enough scope to apply those principles in different ways by various High Courts. As a result, the Supreme Court has taken up the some unanswered/conflicting issues in *P.A. Inamdar v. State of Maharashtra*⁵⁷. The Court held that the private unaided professional institutions (minority and non-minority) cannot be forced to accept reservation policy of the State. This would amount to nationalization of seats. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions on the basis of reservation policy to less meritorious candidates. Unaided institutions can have their own admissions provided it is fair, transparent and non-exploitative and based on merit. The Court observed that:

“The employment of expressions ‘right to establish and administer’ and ‘educational institution of their choice’ in Article 30(1) gives the right a very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice, it can, as a matter of its own freewill, admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the freewill of the minority educational institution admitting students belonging to non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admissions should not be violative of the minority character of the institution.”

⁵⁷ AIR 2005 SC 3724.

The Court further observed that:

“The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved

by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid."

To nullify the effect of the *Pai* case and the *Inamdar* case, the Parliament by the Constitution (Ninety-third Amendment) Act, 2005 inserted a clause in Article 15 as Article 15(5). This clause says, "nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes insofar as such special provision relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30". This amendment enables the State to make provision for reservation for the above categories of classes in admission to private educational institutions. The amendment, however, keeps the minority educational institutions out of its purview.

National Commission for Minorities

Besides the Constitutional safeguards, the Government of India appointed a Minorities Commission in 1978 under an administrative resolution to safeguard the interests of the religious and linguistic minorities, to preserve the country's secular traditions, to promote national integration and remove any feeling of inequality and discrimination amongst these sections of the people. The Commission was charged with the function of evaluating the various safeguards

provided in the Constitution for the protection of the minorities and in the laws passed by Parliament and the State Legislature.

In course of time, the Commission suggested that its position be strengthened by conferring on it statutory powers of enquiry under the Commissions of Inquiry Act, 1952. The Commission also suggested that it be given a constitutional status so that it could function more effectively. Accordingly, Parliament enacted the *National Commission for Minorities Act, 1992*, to establish the National Commission for Minorities on a statutory basis.⁵⁸ It is interesting to note down that functions of the old as well as new Commission are same, and the only difference is that the new Commission is a statutory body with more powers.

- 1 The Commission shall perform all or any of the following functions under section 9, namely:
 - a. evaluate the progress of the development of Minorities under the Union and States.
 - b. monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures.
 - c. make recommendations for the effective implementation of safeguards for the protection of the interests of Minorities by the Central Government or the State Governments.
 - d. look into specific complaints regarding deprivation of rights and safeguards of the Minorities and take up such matters with the appropriate authorities.
 - e. cause studies to be undertaken into problems arising out of any discrimination against Minorities and recommend measures for their removal.

⁵⁸ Please visit for various reports of the Commission at <http://ncm.nic.in/>

- f. conduct studies, research and analysis on the issues relating to socio-economic and educational development of Minorities.
 - g. suggest appropriate measures in respect of any Minority to be undertaken by the Central Government or the State Governments.
 - h. make periodical or special reports to the Central Government on any matter pertaining to Minorities and in particular the difficulties confronted by them.
 - i. any other matter which may be referred to it by the Central Government.
- 2 The Central Government shall cause the recommendations referred to in clause (c) of sub-section (1) to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.
- 3 Where any recommendation referred to in clause (c) of sub-section (1) or any part thereof is such with which any State Government is concerned, the Commission shall forward a copy of such recommendation or part to such State Government who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendation or part.
- 4 The Commission shall, while performing any of the functions mentioned in sub-clauses (a), (b) and (d) of sub-section (1), have all the powers of a civil court trying a suit and, in particular, in respect of the following matters, namely:

- a. summoning and enforcing the attendance of any person from any part of India and examining him on oath.
- b. requiring the discovery and production of any document.
- c. receiving evidence of affidavits.
- d. requisitioning any public record or copy thereof from any court or office.
- e. issuing commissions for the examination of witnesses and documents; and any other matter which may be prescribed.

Conclusion

The safeguards to protect the cultural and educational interests of the minorities were inserted in the Constitution to give special sense of security to the minorities i.e., broadly speaking, Muslim, Sikhs, Indian Christian, Jain, Buddhists, Anglo-Indians. This is to maintain the integrity of nation because of its long standing ethos, its rich cultural values and tolerance. To achieve the above mentioned objectives the founding fathers of the Constitution adopted a secular approach as an ideology for the nation building. It seems that the drafters did not define the term 'minority' because of their strong feelings that ultimate goal is to bring them in the mainstream of the nation while keeping the cultural values intact and safe and at the same time they must not feel insecure after some time in the country. Moreover the Constitution does not give this right on the basis of different religious thoughts or less numerical strength or lack of health, wealth, education, power, because that would lead to an endless claim by different groups resulting in conflicts. That would sow seeds of multi-nationalism in India.

Besides providing the above mentioned safeguards, the Constitution in Part IV A imposes certain fundamental duties under Article 51 'A' on every citizen of India. One of the fundamental duties is "to promote harmony and the spirit of common brotherhood amongst all the people

of India transcending religious, linguistics and regional or sectional diversities; to renounce practices derogatory to the dignity of women.” The role played by the Supreme Court is commendable the way it protected and promoted the spirit of the drafters on the one hand and interest of the minorities regarding their cultural and educational rights on the other. The Apex Court has extended the scope of these rights to the widest extent when it pronounced that, even a single philanthropic individual from the concerned minority can establish and administer an educational institution with his own means for the purposes of Article 30(1). However, at the same time, the Supreme Court emphasized that the object of Article 30(1) is not to allow bogies to be raised by pretenders. The institution must be an educational institution of minority in truth and reality and not mere masked phantoms. To fulfill the objectives of the Articles 29 and 30, the Apex Court has given them maximum liberty to run their business and whatever restriction were laid down in various verdicts are only regulatory measures to maintain the academic standards and to prevent maladministration.

To conclude, I would like to quote the observation of Justice H.R. Khanna made in *St. Xavier's case*⁵⁹:

“India is the most populous country of the world. The people inhabiting this vast land profess different religious and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the Nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on Indian polity and India today represents a synthesis of them all. Our mission is to satisfy every interest and safeguard the interest of all the Minorities to their satisfaction.”

⁵⁹ *Ahmedabad St. Xavier's College v. State of Gujarat*, AIR 1974 SC 1389.

Myanmar: The Struggle for the Return to Democratic Rule

Nadaraja Kannan*

Abstract

Despite being one of the first countries in Southeast Asia to become independent of colonial rule in 1948, Myanmar succumbed to military rule in 1962 and it remained so until as recent as 2010 when a nominally civilian government was installed. After having been under the military-junta for almost half a century, the socio-economic and political system in the country is in shambles. In addition the country's human rights record is in a deplorable state as large sections of the population have been subjected to great sufferings as a result of blatant violation of human rights. Various forms of sanctions by western countries to pressure the military junta to bring about political reforms and to improve the human rights situation in Myanmar have had little effect. This paper discusses the struggle for democratic reforms in Myanmar, the roadmap to political reforms subsequently introduced by the military junta, the new constitution and its implication on the main pro-democratic party, the National League for Democracy and its leader Aung San Suu Kyi, the 2010 elections and some recent developments in the country in the human rights situation vis-à-vis political since the change in government from military to civilian rule.

* Dr. Nadaraja Kannan has a PhD in History from Universiti Sains Malaysia. He is currently attached to the School of International Studies, Universiti Utara Malaysia, Kedah, Malaysia (nadaraja@uum.edu.my).

Introduction

The period of military (*tatmadaw*) rule from March 1962 until November 2010, when a nominally civilian government was installed,¹ can be considered a dark period in the history of Myanmar, formerly known as Burma. During this period of almost half a century, what became obvious was that Myanmar, a country so rich in history, culture and tradition and so blessed with an abundance of natural resources had slid into severe economic decline and political isolation under the harsh rule of the military rulers. In comparison, when many of the other independent countries in Southeast Asia had made or were making great strides in industrial and social development, the large majority of the 65 million people of Myanmar remained impoverished due to poor governance by the military. The emergence of the National League for Democracy (NLD), after its land-slide victory in the multi-party elections of 1990 NLD gave a glimpse of hope, for what appeared to be the return to democratic rule. But this hope was soon dashed when the military refused to hand over the country to the democratically elected government. Aung San Suu Kyi, leader of NLD was arrested and jailed together with hundreds of other NLD members. Under military rule the country not only saw economic stagnation and erosion of democratic institutions but more importantly inhuman and blatant violation of human rights. The so called democratic election of 7 November 2010 has installed a 'nominally civilian government' but it is a well-known fact it is dominated by the military men, only difference is that they are no more in military uniform but civilian clothes. One wonders if there will ever be any hope for the return of complete democratic rule and respect for human rights in Myanmar. The focus of this paper is to discuss the roadmap to civilian rule that was introduced by the military-junta to bring

¹ Although it is said to be a nominally civilian government but the top posts in the administration and most of the cabinet members were military men from the previous military government. Only difference is that they have all now shed the uniforms for civilian clothes.

political reforms, including the new constitution, its implications on the main political party, the National League for Democracy, (NLD) and its leader Aung San Suu Kyi, the election of 2010, the new nominally civilian government of Thein Sein and some recent political developments in the country.

Background to the study

Myanmar was one of the first countries in Southeast Asia to free itself from the shackles of colonial rule when it became independent from Britain on 4 January 1948. It was a republic and the new government was a Westminster-style parliamentary democracy with U Nu the leader of the Anti-Fascist People's Freedom League (AFPFL) as prime minister. Due to communist insurrection, ethnic problems, and internal squabbling and power struggle within the ruling party, the armed forces leader General Ne Win staged a coup d'état on 2 March 1962, and seized the government, citing preservation of the Union as reasons for his action. That ended the first experiment with parliamentary democracy. The military suspended the 1947 Constitution and in its place a ruling Revolutionary Council (RC) was established to help govern the country. The RC abolished all political parties and banned independent newspapers and replaced them with a single paper, the government mouth piece named the *Working People's Daily*. With little constitutional guarantees, the people of Myanmar were subjected to various forms of human rights violations under the RC. Dissidents were arrested and jailed. There were severe restrictions on civil liberties and freedom. Authoritarian rule became the order of the day, contrasted with life under the constitutional rule before. The military then formed a cadre party called the Burma Socialist Program Party (BSPP) which restructured the state and society along socialist lines guided by an eclectic approach known as the Burmese Way to Socialism, which was a blend of Buddhism,

Nationalism and Marxist philosophy.² In 1974 a new constitution was put into effect transferring power by referendum from the military RC to a People's Assembly commanded by Ne Win and other former leaders. However after a quarter of a century of authoritarian rule, the Ne Win's regime reached stagnation. The socialist economy of Ne Win proved a total failure. With no Foreign Direct Investment (FDI) the country was on the verge of bankruptcy. In autumn of 1987 the devaluation of the currency (*Kyat*) eliminated any savings people had, and that act angered the people resulting in increased opposition against military rule. Finally Ne Win conceded that a multiparty election system was the answer for the nation. He lost all credibility and was forced to retire from politics in July 1988. Dissent against the oppressive military rule that had been smoldering for more than two decades burst into riots on 8 August 1988. (8.8.88)³. The protests which were spearheaded by students were met with violent repression by the army. This infamous incident witnessed the army brutally opening fire on unarmed demonstrators in Yangon, the capital as well as in other major cities in the country. An estimated 3,000 unarmed people were killed in Yangon and elsewhere in the country. The international community was shocked and called on the military to exercise restraint and demanded a return to civilian rule. Briefly, the head of the riot police took charge to contain the situation. But when the political turmoil worsened with rioting and looting and protests throughout the country, the State Law and Order Restoration Council (SLORC) was set up with Defense Minister General Saw Maung as chairman. When he assumed leadership of the country in September 1988 he pledged to restore law and order and meet the demands of the people. As international pressure against the military junta intensified, the

² Josef Silverstein (1977) *Burma: Military Rule and the Politics of Stagnation*, United Kingdom, Cornell University Press, p. 30

³ For excellent work on the 1988 demonstrations, See Bertil Lintner, *Outrage: Burma's Struggle for Democracy*, Bangkok: White Lotus, 1990

SLORC announced that free and fair elections would be held in 1990, after which it would transfer power to the duly elected party.⁴

Emergence of National League for Democracy and Aung San Suu Kyi

In 1988 Aung San Suu Kyi together with other leaders of the democratic movements founded the National League for Democracy.⁵ In the elections of May 1990, NLD under the leadership of Aung San Suu Kyi, who emerged as the country's democratic icon, won by a landslide victory, taking 80 percent of the seats⁶ and 60 percent of the votes cast in contrast to parties favored by the SLORC, which received just 2 percent of the seats and 25 percent of the votes. Humiliated by the results, the SLORC refused to concede defeat and hand over the government to the victors - the NLD. Instead the military declared that the newly elected parliament could not be convened until a new constitution was written. The promise of transfer of power to the duly elected party was never to happen. Instead the SLORC began arbitrarily arresting, harassing and intimidating political opponents including Aung San Suu Kyi and several leaders of NLD and other opposition party members. Some of the elected representatives, in order to escape arrest fled to the neighboring Thai border and set up an alternative government known as the National Coalition Government of the Union of Burma at the base camp of the Karen resistant movement.⁷ The international community watching developments in Myanmar were utterly disappointed with the military for not handing over the

⁴ See David I. Steinberg, *Burma: The State of Myanmar*, Washington D.C: Georgetown University Press, 2001, pp.45-46.

⁵ It was by a twist of fate that Aung San Suu Kyi was brought into politics. It was never a planned one. Suu Kyi who was living in United Kingdom with her husband was on visit to Rangoon to see her ailing mother. The political situation then in Myanmar dragged her in.

⁶ NLD won 392 of the 485 seats contested.

⁷ Martin Smith (1999) *Burma: Insurgency and the Politics of Ethnicity*, Bangkok, White Lotus Co. Ltd. p. 396-7

government to the democratically elected government of Aung San Suu Kyi. As a punitive measure, it suspended bilateral aid, as well as high level government visits and imposed various forms of sanctions in response to UN reports of human rights violations by the government of Myanmar.

Than Shwe assumes leadership

In April 1992, General Than Shwe replaced General Saw Maung as SLORC chairman, prime minister and minister of defense. Than Shwe's leadership marked a new chapter of political repression and human rights violations in Myanmar. Critics have described him as brutal, paranoid and heavily influenced by astrology. He saw Aung San Suu Kyi as a thorn in his flesh and wanted to get rid of her. So in 1994 Aung San Suu Kyi was offered freedom if she would leave Myanmar and go into exile, but she refused. Her detention then continued even beyond the legal limit, which the government then changed. From this point on, the military junta found Aung San Suu Kyi its main adversary, so on the pretext of security threat the junta kept her under indefinite house arrest. Meanwhile after taking power, Than Shwe strengthened his position in the military by removing those he saw as a threat from key positions in the army, including purging Prime Minister Khin Nyunt in October 2004.

Tension between SLORC and NLD heightened when in May 1996 more than 200 NLD delegates on their way to their party congress were arrested. A similar crackdown also occurred in May 1997 when NLD members wanted to hold a meeting to commemorate the 1990 elections. On 17 November 1997 the SLORC was dissolved and reconstituted itself as the State Peace and Development Council (SPDC) but the top leadership remained the same. Meanwhile in 1997 Myanmar was accepted as a member of the regional organization, Association of

Southeast Asian Nations (ASEAN).⁸ It was ASEAN's belief that democratic reforms could be brought about in Myanmar through the ASEAN-Way.⁹ However, despite high level efforts by ASEAN member states, Myanmar's military leaders remained stubborn to bring about democratic reforms, and release Aung San Suu Kyi from indefinite house arrest.

Meanwhile the United Nations Commission on Human Rights (UNCHR) had reported widespread practice of extra-judicial and arbitrary arrest, torture, rape and execution of the opposition and ethnic minority groups such the Rakhine, Karens, Shans and Kachins. There was also arbitrary seizure of land and property and relocation of forced labor, especially in remote parts of the country. To escape these brutalities, thousands of people, especially from the minority groups fled the country and sought refuge in neighboring Thailand and Malaysia. Currently there are some 85,000 registered Myanmar refugees in Malaysia under the United Nations High Commission for Refugees (UNHCR) protection program.¹⁰ The figure in neighboring Thailand is 141,000.¹¹ In response to United Nations (UN) reports on violations of human rights in Myanmar, the United States increased sanctions against Myanmar in 1997. Member nations of the European Union (EU) also increased sanctions. In August 1998 the International Labor Organization (ILO) Commission of Inquiry found the

⁸ ASEAN was established as a regional organization on 8th August 1967 in Bangkok. According to the ASEAN Declaration, the aims of the association were to accelerate regional economic growth, social progress and cultural development and to promote regional peace and stability through active collaboration and mutual assistance on matters of common interests in the economic, social, cultural, technical, scientific, and administrative fields. The ASEAN Declaration of 8 August 1967 is also known as the Bangkok Declaration. See *Handbook on ASEAN Political Documents*, Jakarta, ASEAN Secretariat, 1998. Myanmar joined ASEAN in the hope it would get some legitimacy.

⁹ The ASEAN-Way is essentially defined by the principles of non-interference in the internal affairs of member countries, peaceful settlement to differences and disputes and non-confrontational approach to conflicts with emphasis on consultation and consensus.

¹⁰ UNHCR, Malaysia <http://www.unhcr.org.my>

¹¹ Thailand Burma Border Consortium, <http://www.wakachaii.com> 2011.

SPDC guilty of employing forced labor on a nation-wide scale. Myanmar's membership was suspended by the ILO in June 1999.

The last major protest against the military junta started on 19 August 2007, when a peaceful march held in Yangon to protest against the hike in fuel prices and the rise in the cost of consumer goods was violently suppressed by the military. When the protesters were beaten by the army, the protest spread nationwide. Tens of thousands of people including monks joined the march demanding democratic reforms. The junta branded the protesters as "stooges of foreign countries putting up a play written by foreign masters". The junta's troops crushed the demonstrations with gunfire on September 26 and 27. The final toll according to official record was 15 killed but dissident groups put the figure at more than 200 killed and another 6,000 detained, including thousands of monks.¹² This protest came to be known as the Saffron Uprising as it included thousands of Buddhist monks. The brutal action by the military-junta on unarmed protesters, including monks marked another phase in the violation of human rights and the continuing struggle of the people of Myanmar for democratic rule. Demonstrations were held in 12 major cities around the world, highlighting the plight of the people of Myanmar and demanding the release of Suu Kyi.¹³

Road Map for Democracy and the Constitution of 2008

Despite international pressure to transfer power to NLD, the military adamantly refused to do so. Instead it grudgingly came up with its own plan of political reforms through the introduction of a "roadmap for

¹² See *Time Magazine*, October 8, 2007

¹³ Demonstrations were held in Bangkok, Sydney, London, Paris, Berlin, Dublin, Vienna, Washington, Toronto, New York, Brasilia and Cape Town. See *New Straits Times* 25.October 2007

democracy".¹⁴ The roadmap also included the writing of a new constitution. The process of drafting a new constitution started on 9 January 1993. However it was only concluded in 2008 – some 15 years later. There were several reasons for this long delay in drafting the constitution. But a major reason was the frequent suspension of the sitting of the constitutional convention by the military junta. Whenever there was increased pressure from the international community on the military junta it would suspend the constitutional convention. Besides that, in the beginning, NLD had agreed to take part in the convention but in 1995, it withdrew citing reasons of non-cooperation from the military junta.¹⁵

Anyway on 9 December 2008, the government of Myanmar for the first time, made public a time frame for the next steps in its political “road map” process towards the establishment of a civilian and democratic government. It also announced that a national referendum on a draft constitution would be held in May 2008 followed by a multiparty election in 2010.¹⁶ When the constitution was finally made public on 4 April 2008, only two versions were made available, one in English and the other in the Burmese language. No consideration was given to the country’s numerous ethnic minorities.¹⁷ So the some ethnic minorities never read nor understood what the provisions of the new constitution were all about. On 10 May 2008 the Government of Myanmar held a referendum on the draft constitution as planned and on 29 May 2008 it announced that the draft constitution had been formally adopted, with a reported

¹⁴ Within the SPDC itself there appears to be power struggle among the small group of elites in the army. General Khin Nyunt, a moderate, emerged as a popular figure. He was the Military Intelligence Chief and Prime Minister and popular with foreign powers, including China. It was he who came up with the idea of a “Roadmap to democracy”. He was however ousted by Senior General Than Shwe in 2004.

¹⁵ “National Convention: The SPDC’s Delusion of Democratic Reform”, Bangkok: *ALTSEAN-Burma*, February 2006, pp.1-7.

¹⁶ *A/63/356 UN Report: “Situation of Human Rights in Myanmar”*, 17 September 2008

¹⁷ *Vote to Nowhere: The May 2008 Constitutional Referendum in Burma*, New York: *Human Rights Watch (HRW)*, 2008, p. 29.

92.48 percent approval. However it was believed to be a highly rigged referendum.¹⁸

One-Sided Constitution

From the manner the constitution was drafted it was clearly one-sided in favor of the SPDC. The Election Commission had not acted as an independent, impartial and transparent organization but a tool of the SPDC. It was the SPDC that appointed the 17-member Election Commission. The majority of the Commission members were retired civil servants who had served the junta. The Commission Chairman Thein Soe, was a former Major General who had served as a military judge.¹⁹ In fact Thein Soe is on the European Union sanctions blacklist.

Although the State media had reported that the government had made every effort to ensure a free and fair process, including measures such as secret ballot and representatives of embassies given observer status, independent reports indicate otherwise. These reports question the manner the referendum was carried out. There was an absence of free and open debate instead there was voter intimidation and harassment. And most importantly the state law criminalized any criticism of, or opposition to, the draft constitution, referendum or the road map process.²⁰ This prevented people from voicing their concern to the numerous weaknesses found in the draft constitution for fear of being harassed or arrested.

From the very beginning it was obvious that the provisions of the constitution were cleverly crafted in favor of the SPDC and to ensure the military continues to remain the dominant force in the future

¹⁸ Christian Fink, *Living Silence: Burma Under Military Rule*, London: Zed Books, pp. 82-86

¹⁹ ALTSEAN-Burma, 15 October 2010

²⁰UN Report: "Situation of Human Rights in Myanmar", 17.9.2008 p.12

government. For instance, according to the new constitution 25 percent of the seats in the two houses of the national parliament (*Pyidaungsu Hluttaw*) are reserved for the military, appointed by the country's commander-in-chief. Besides that, military officers are also allowed to contest the remaining 75 percent seats, only condition being they must retire from the armed forces. And in the Assembly of Nationalities Parliament (*Amoytha Hlutta*), 56 of the 224 seats are reserved for the army. In addition, the military was also assigned the role of selecting the country's president and two vice-presidents as well as all cabinet portfolios, including minister and deputy minister of defense, security and home affairs as well as border affairs ministries. The country's commander-in-chief was given the authority to submit the names of candidates. In addition to that in every ministry there is also a military and security component reserved solely for military personnel.²¹ Another very important constitutional arrangements stacked in favor of the military was that, Than Shwe had a personal insurance – a law permitting the enlistment of retired officers at their previous rank, in the event of an emergency. This law was clearly showed that the military could at any time make a comeback, on the pretext of an emergency. With all legislation passed in parliament requiring a two-third majority, it is obvious the military holds the trump card.

From the provisions in the Constitution it is clear that the military wanted to remain the dominant force in future governments, unless of course, the constitution is changed for the better. Despite the fact the country was ravaged by Cyclone Nargis on 2 and 3 May 2008,²² and despite the intense criticism from the international community, especially the West, on the manner in which the new constitution had been drafted, the

²¹ Christian Fink, *Living Silence: Burma Under Military*, pp. 44-45.

²² Cyclone Nargis caused widespread destruction and loss of life, leaving an estimated 140,000 dead or missing. The Ayeyarwaddy Delta and Yangon Division were badly damaged with some 2.4 million people severely affected. See A/63/356 UN Report: Situation of Human Rights in Myanmar, 17. 9. 2008 p.6

military went ahead with its planned referendum. On 15 May 2008, the military junta claimed that some 92.4 percent of the country's eligible voters had approved the new constitution, with total voter turnout as 99 percent. While Myanmar's allies China and Russia "welcomed" the outcome of the referendum, United States and European Union countries and Australia dismissed the whole process as a "sham".²³ Closer to home, while most of the ASEAN members remained silent, the organization's Secretary-General, Surin Pitsuwan, was quoted to have said that "it is a development in the direct direction".²⁴

Human Rights Abuses and Commission of Inquiry

In March 2010, the UN Special Rapporteur on human rights in Burma Tomas Ojea Quintana said that the "gross and systematic" human rights abuses in Burma "were the result of state policy," and recommended that the UN should consider establishing UN-mandated Commission of Inquiry. Quintana pointed out that Commission of Inquiry should be seen as a possible tool to help Burma "to address impunity and prevent future human rights violations". Two other former UN Special Rapporteurs on human rights in Burma, Paulo Sergio Pinheiro and Yozo Yokota had also called for the establishment of a Commission of Inquiry.²⁵ Since then an increasing number of governments have voiced their support for the creation of a Commission of Inquiry. These include Australia, Canada, Czech Republic, Estonia, France, Hungary, Ireland, Lithuania, the Netherlands, New Zealand, Slovakia, United Kingdom and the United States.

²³ Ibid. p. 49.

²⁴ Ibid., p.52.

²⁵ *Irrawaddy*, 6.October 2010, Former UN Rights Officials call for Burma Inquiry

The 7 November 2010 Election

When the military first announced its intention to hold elections in 2010 it was received with mixed feeling. While there was some optimism that the promised elections were finally going to take place, others saw it as another window-dressing exercise designed to please the people but in reality to allow the military regime to further strengthen itself and continue to rule the country. Although the SPDC had repeatedly promised to hold “free and fair” elections, in reality political parties and individuals could not exercise their fundamental rights of expression, association, assembly and movement. When the date of the elections were finally confirmed, it was found that it was highly restrictive with the main contender and the backbone of the country’s democratic movement, NLD, glaringly excluded. The reason for this was the SPDC’s Political Parties Registration Law had included several discriminatory clauses which purposely restricted the rights of citizens to stand for elections. According to this law anyone convicted by a court and serving a jail term could not or form or join a political party. As of October 2010, there were 2,193 political prisoners in Myanmar, meaning most of them cannot stand for election or be a member of a political party. That would also mean NLD would have had to expel Daw Aung San Suu Kyi and over 370 other members from the party in order to reregister and take part in the elections.²⁶ Obviously it was a well calculated move meant to keep Suu Kyi and other jailed NLD members from standing in the elections. On 14 September 2010, the SPDC Election Commission officially dissolved the NLD because they failed to register as political parties. Articles 4, 10, and 12 of this law stipulate that registered parties will have to expel any member who is convicted and imprisoned in the future.

²⁶ ALTSEAN *Burma*, Burma’s 2010 Elections, 15. October 2010

The SPDC appointed Election Commission had deliberately imposed very restrictive conditions on political parties, such as restriction on movement of political parties and censorship of speeches. Furthermore, the Election Commission had also imposed a non-refundable candidate registration fee of US\$500 – the equivalent of one year's salary of a Burmese civil servant or factory worker. This was considered extremely high in a country where most people earn less than a dollar a day. Obviously this was to deter people from taking part in the elections. This meant a political party would have to fork out some US\$600,000 for registration fee alone if it wanted to contest in all seats.²⁷ Another tactical move by the military junta was to 'buy' votes. Obviously aimed at ensuring that all civil servants vote for the military backed party, on 31 December, the ruling SPDC announced a rise in the salaries of all low income groups with effect from 31 January 2010. This was a fifth time salary increase since 1988, the last four being in 1989, 1993, 2000 and 2006.²⁸

As for the political parties that took part in the elections, they can be categorized into two – (1) pro-junta parties and (2) pro-democracy parties. The two main pro-military parties were the Union Solidarity and Development Party (USDP) and National Unity Party (NUP). The USDP formed in March 2010 was led by the country's former Prime Minister General Thein Sein,²⁹ key ally of junta strongman Than Shwe. The 65-year old resigned from the military to contest the elections. The NUP was a junta-backed party that contested the 1990 election. On the pro-democratic side, in the absence of the NLD, there were only two parties, namely Democratic Party (DP) and National Democratic Force (NDF). The DP was established by Than Than Nu, daughter of Myanmar's first Prime Minister U Nu, while NDF is a breakaway faction of the NLD that

²⁷ *The 2010 General Election*, Bangkok: ALSEAN-Burma, pp. 17, 22-23, 27.

²⁸ "Burma's civil servants expect 380 percent salary hike", *The Irrawaddy*, 1 March 2011

²⁹ "USDA transformed to political party", *Mizzima News*, 29 March 2010

took the decision to contest in spite of NLD's decision to stay away from the election. In all only 37 political parties fielded candidates as compared to 93 political parties in the 1990 elections. The results of the elections were obvious. The pro-military parties won the elections. In the House of Representatives alone, the USDP won 259 seats or 79.6 percent. NDF won 16 seats and another 16 seats went to All Mon Region Democracy Party (AMRDP). Than Than Nu's Democratic Party did not win even a single seat.

As the elections were neither free, fair nor inclusive, most western states dismissed it as a "sham" aimed at perpetuating military rule. On the other hand, as expected, Myanmar's staunch ally, China welcomed the results as signaling the dawn of a new era. India made similar remarks. ASEAN gave a lukewarm response to the election.

The Parliament was convened on 31 January 2011 at the new Parliament house at the new administrative capital of Naypyidaw. On March 30 2011, the military junta that had ruled the country under various guises since 1962 was dissolved and a supposedly parliamentary government under Thein Sein took over, completing two decade-long "roadmap" to civilian rule.

Recent Developments under New Government

Thein Sein took office as the civilian President of Myanmar in March 2011. He was the military regime's prime minister since 2007. There has been much skepticism about him as he was chosen by the Senior General Than Shwe to succeed him. Therefore critics have portrayed him as indecisive, incapable, a puppet president with real power still with Than Shwe who is said to be working from the background. Others describe him as of high caliber and incorrupt. How far this is true can be debated. While there may be some truth in what critics say but there is also reason

to believe that this time around the situation would be different. Thein Sein may be an ally of Than Shwe, could even appear to be soft but as President it is unlikely he would allow himself to be manipulated by his former master, Than Shwe. Ultimately it is the President who decides what is best for the nation and the course of action he should take.

On taking office, he made a number of carefully-worded speeches calling for open government, reform and national reconciliation. He had also cautioned Aung San Suu Kyi against making any political speeches, but of late he has made several good gestures to the Nobel Peace Prize Laureate and icon of democracy in Myanmar. Thein Sein has had direct meetings with her. Suu Kyi has been able to travel outside Yangon unharassed. There have been calls to win over the restive ethnic minorities, has shown tolerance to criticism and has launched more aggressive diplomacy in trying to redeem both his and the present government's image. A cautious optimism exists that Myanmar is slowly carrying out the much-needed reforms under President Thein Sein. Western states have had mixed feelings concerning the new administration. The European Union has displayed a more flexible approach. It has eased travel restrictions on civilian cabinet members and lifted a ban on high-level visits by EU officials to Myanmar although other sanctions remain. President Obama has nominated Derek Mitchell as his special representative to Myanmar to coordinate US policy towards Myanmar. Some of the positive signs in the direction of political reforms and improvement in the human rights situation is discussed below.

Suu Kyi travels outside Yangon

Aung San Suu Kyi who was released from house-arrest on 13 November 2010, one week after elections which installed a nominally civilian government was able to travel outside Yangon in early July this year

unharassed, unlike the 2003 incident when she was ambushed by junta-thugs. She was there for a holiday with her youngest son Kim Aris. She was met at the airport by crowds of journalists and plain clothes policemen. Aung San Suu Kyi has also had two meetings with President Thein Sein at Naypyidaw. What transpired at those meetings is unknown but obviously it was a departure from the past when Than Shwe had simply ignored Suu Kyi.

Press Freedom Sought

Myanmar has sought press freedom in the army dominated country. This call came from no other than Tint Swe, director of the Press Scrutiny and Registration Department, the repressive state censorship body set up more than four decades ago. He was reported to have told Radio Free Asia, censorship should cease as part of the on-going reforms under the new nominally civilian government. He even suggested that his own censorship department should be shut down. He admitted that censorship was not in harmony with democratic practices. He also said that newspapers in Myanmar were now allowed to publish reports on pro-democracy leader Aung San Suu Kyi, without restrictions as previously imposed. He however added that newspapers and other publications should accept press freedom with responsibility. The very fact that this call for greater press freedom comes from Tint Swe himself, indicates that the government of Thein Sein is now slowly loosening up. Some journalists in Myanmar welcomed Tint Swe's call for censorship to be fully lifted. However the Committee to Protect Journalists (CPJ) said that Myanmar's media remained among the world's most restricted, calling for an end to "draconian" reporting laws and for the freeing of jailed journalists.³⁰ The propaganda slogan which was a daily feature in

³⁰ See *Sunday Star*, 9 October 2011

the government-controlled newspaper *The New Light of Myanmar* has been removed of late. This is another positive development.

Political Prisoners Released

In another positive development, the latest, on 12 October Myanmar authorities released at least 100 political prisoners from its Central prison at Insein. Among them was activist and prominent comedian Zarganar, who was detained in 2008 and sentenced to 59 years, for criticizing the junta for their sluggish response to Cyclone Nargis, a storm that left more than 135,000 people missing or dead that year. Also freed was Sai Say Htan, an ethnic Shan State Army leader, in his 70s and who was sentenced to 104 years prison in 2005. Several members of the main opposition party, National League for Democracy were also released as part of the mass amnesty, announced a day earlier. Government officials have said 6,359 inmates, including some criminals would be soon released. The actual number of political prisoners released is however not clear, it could be as many as 155. It is believed that the Myanmar government is still holding about 2,100 political prisoners. The prisoner amnesty is being closely watched by activists, diplomats and foreign countries as the new government is trying to turn the page on decades of military rule. The release has won some guarded praise from western leaders who want to see more political prisoners set free and an end to human rights abuses before opening discussions on lifting sanctions. Human Rights Watch has called on the authorities to release all of its remaining political prisoners." It is disappointing," said Benjamin Zawacki, Amnesty International's Myanmar researcher based in Bangkok. Aung San Suu Kyi had welcomed the release. She said "The freedom of each individual is invaluable, but I wish that all political prisoners would be

released". A spokesman for NLD said 155 of their political prisoners were released.³¹

Suspension to Construction of Hydroelectric Dam

Yet another positive move taken by the new government of Thein Sein, was the suspension to the construction of the US\$3.6 billion Myitsone dam. The wholly China financed project under China Power Investment Corp, had come under severe criticism because it was supposed to export about 90 percent of electricity it generated to China, while the vast majority of the Myanmar's residents have no electricity. The move is seen as a huge turn-about in relation with China, Myanmar's second largest trading partner after Thailand. This has angered China and it is expected to have a political impact. China's Foreign Ministry has already stepped into the debate, urging Myanmar to protect Chinese companies' interests.³² While the former military strongman Than Shwe could feel insulted by this move, as it was he who had signed the deal with China but it could also win praises for Thein Sein for his brave action in putting Myanmar people's interest his first priority.

Workers can form Unions

The latest development that has taken place in Myanmar under President Thein Sein is that the government will allow unions to be formed and workers to strike. Deputy Labor Minister Myint Thein told the Democratic Voice of Burma, which operates out of Norway, that President Thein Sein had signed the bill and the law will take effect at the end of October.³³ The labor organization bill cancels a nearly 60-year old anti-labor union decree, the 1962 Trade Unions Act, introduced by then

³¹ See *The Wall Street Journal*, 13, October 2011. See also *New Straits Times*, *The Sun*, 13 October 2011

³² See *New Straits Times*, 5 October 2011.

³³ *UPI*, 17 October 2011

military leader General Ne Win, which effectively banned trade unions. Myint Thein said the move was to allow more transparency in the labor market and also boost the country's ability to attract foreign direct investment. Steve Marshall, the International Labor Organization's representative in Myanmar called the law "a massive move for the country" in terms of social and economic development. Nyan Win, a spokesman for Suu Kyi's National League for Democracy party said the move to allow unions was in the right direction. The establishment of the union law is another positive move by the government towards a more democratic society for a country ruled by juntas for almost of half a century.

Conclusion

This paper has discussed how almost half a century of military rule had ravaged the political, economic and social fabric of Myanmar and its people. The military rule of Myanmar was not just a political crisis for the country but a huge human crisis as well. Thousands of innocent lives were lost in their struggle for democratic rule during this dark period of its history while several thousands more people have been forced to flee their homeland and seek refuge along the borders with Thailand, in Malaysia and elsewhere. Many continue to live as refugees in refugee camps. More than two thousand people are still languishing in prisons as political prisoners, for the only 'crimes' they committed – the struggle for democracy. How long they will live this way can be anybody's guess. While attempts by both Western and Asian countries to pressure or persuade the military junta to return the country to the democratically elected National League for Democracy government of Aung San Suu Kyi and stop the violation of human rights have had little effect, new strategies must be formulated to deal with the present government so as to help the country back to normalcy. However, despite all the set-backs the Myanmar people's long struggle for the return to democratic rule has

not gone in vain. Although the present nominally civilian government is still dominated by military men in civilian clothes, there are growing signs that present President of Myanmar, Thein Sein is slowly but surely steering the country out of the rot and introducing reforms in the direction of democratic rule for Myanmar.

Case Study: Cultural Barriers and Young Females' Rights to Education in Rural Community of Tajikistan

Ozoda Nurmatova* & Gulbahor Jumaboeva**

*“Education for women – is education for family,
for community, for nation.”
African proverb*

Abstract

This paper contributes to the ongoing debate on social status of women in Tajikistan. Powerlessness, helplessness, repressed sexuality, limited role in the family and community and moreover adherence to traditions - are the most frequent talks about the Tajik women's place in the society and family. During the Soviet era in Tajikistan efforts were made to change the condition of women. Attempts were directed on increase of a level of women's education and their involvement to participation in social production. These measures seemed successful and they really changed a traditional way of life of women. However inequality of women remained up to collapse of the Soviet regime and was aggravated during the Civil War (1992-97) period when women began to return to performance of traditional roles. Tajikistan gained independence in 1991. The Civil War had a negative impact not only on the standard of living but also strongly influenced the role of women in society. Traditional, especially Islamic beliefs of women associated with the house were strengthened during the conflict.

In the last decade, Tajik authority with the support of International Community gave special attention to education of girls in rural community of Tajikistan. It is of concern that very few Tajik young females in the rural areas attend school or complete the nine-year

* Ozoda Nurmatova is a member staff of the OSCE Office in Tajikistan (ozodanurmatova@gmail.com).

** Gulbahor Jumaboeva is a member staff of the OSCE Office in Tajikistan (Fleur_1208@hotmail.com).

compulsory education after primary school. The majority of population (74%) in Tajikistan constitutes rural inhabitants, living in more than thousand villages. This means that the mainstream of isolated young females from schools live in the remote rural areas. By taking into consideration this complex cultural dilemma, the research attempts to highlight the traditional barriers restraining young females from full school education in the rural areas of Tajikistan. It thus, marginally encompasses answers for possible question like, why is the contribution of female community important for the development and stability of the country.

Introduction

Education is important for everyone, but it is especially significant for girls and women. This is because the educational achievements of women can have ripple effects within the family and across generations. Education of woman will consequently change her social status in the society.

In Tajikistan the social status of women raises a universal compassion: powerlessness, silence, helplessness, repressed sexuality, limited role in the family and community and moreover adherence to traditions - these are the most frequent talks about her place in the society and family. During the Soviet era in Tajikistan efforts were made to change the condition of women. Attempts were directed on increasing the level of women's education and their involvement to participation in a social production. These measures seemed successful and they really changed the traditional way of life of women. However inequality of women remained up to collapse of the Soviet regime and was aggravated during the Civil War (1992-97) period when women began to return to performance of traditional roles.

Tajikistan gained independence in 1991. The Civil War had a negative impact not only on the standard of living but also strongly influenced the role of women in society. Traditional, especially Islamic beliefs of women associated with the house were strengthened during the conflict. In the

last decade, Tajik authority with the support of International Community gave special attention to education of girls in rural community of Tajikistan. It is of concern that very few Tajik young females in the rural areas attend school or complete the nine-year compulsory education¹ after primary school. The majority of population (74%) in Tajikistan constitutes rural inhabitants, living in more than 3 thousand villages. This means that the mainstream of isolated young females from schools live in the remote rural areas.

By taking into consideration this complex cultural dilemma, the research



attempts to highlight the traditional barriers restraining young females from full school education in the rural areas of Tajikistan. It thus, marginally encompasses answers for possible question like, why is the contribution of female community important for the

development and stability of the country. The research covers the two target regions in Tajikistan: Garm and Isfara, which for long years have been considered as the most sensitive areas in terms of tradition, religion and security. Garm town locating in Central part of Tajikistan is 185 km far from Dushanbe. Its population comprises 103,057 thousand.² After the collapse of the Soviet Union and the start of the Civil War, Garm was a hot-bed for the Islamic opposition forces and the town was controlled by the opposition during the latter part of the Civil War. Since Soviet era, Garm has remained as backward region in the country compared to other areas in terms of infrastructure facilities i.e. road, school, hospital

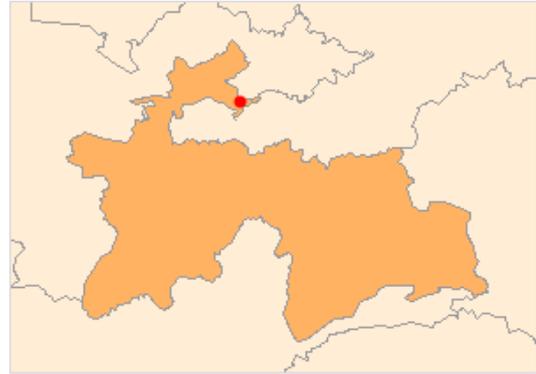
¹ UNICEF "Where have all the school girls in Tajikistan gone?" <http://www.unicef.org/education/index_school_girls.html> (10th August, 2011).

² Information about Rasht valley, Garm http://ru.wikipedia.org/wiki/%D0%E0%F8%F2%F1%EA%E8%E9_%F0%E0%E9%EE%ED.

and communication. Remaining underdeveloped, the traditional peculiarities came to manipulate in the region.

Likewise Garm, Isfara is perceived as one of the most highly Islamic areas in the country.³ It is located in the north-

eastern part of the country and is bordering with Uzbekistan and Kyrgyzstan. It is one of the most highly populated districts with a total of 230,381 inhabitants. When in 1929 Isfara joined the USSR, changes strongly influenced education, particularly



conversion from Persian script to Cyrillic, integration of secular education, development of industries, etc. The secular education was accepted only by part of Isfara. For example, Chorkuh, Surkh and Vorukh sub-districts locating in the south part of the town are known for its strict adherence to Islam. In Chorkuh for instance, there are 27 mosques, which is double the number in other villages.

Data Collection Methods

The research paper contains qualitative data. It was endeavored to conduct in-depth survey and interviews in both of the targeted areas in Garm and Isfara, but due to constraints of resources and time limit, the authors have only visited Garm district to observe the situation and talk to young females. Four interviews were conducted among young females in Garm, whose ages were 16 to 20. Two were attending school and two were staying at home. For Isfara, the authors relied on a couple of interviews with representatives of NGOs from Isfara “*Golos Zhenshin*”,

³ F18News http://www.forum18.org/Archive.php?article_id=742.

“*Oshtii Milli*” and “*SHOTO*” and had phone interviews with a couple of recommended teachers from the region.

The interviews have proved to be effective, because respondents had a lot to share with us, since they were coming from that society and realize obstacles that confront their community to develop. The advantage of interviewing them lay in the fact that questions were straight forward and the answers are, to a greater extent, related to the context. Secondly, interview and phone calls are the most efficient and economic means to collect data from respondents.

The two regions Garm and Isfara were selected based on the reports written by the international communities, representing them as the slow progressing regions in terms of rights of the female community. Other criteria for selection were consideration of political condition, religious and traditional adherent of the two regions.

Thus, the information used includes a couple of articles, reports and two books. The reason for relying on qualitative data is that; firstly, most of them talk about social problems that young females face in contemporary Tajik society. Secondly, the data is reliable and fresh. Thirdly, it is convenient to filter information which is necessary for authors' work. And finally, it is economic and efficient.

Findings:

From the interviews gathered, the authors have found that there are a couple of fundamental roadblocks which significantly disable young females to enjoy their rights to education and emerge as active citizens of their community. Although, legally women have equal status as men in front of the law, cultural aspects in corporation with religious edicts have made it very challenging for them to utilize current opportunities

offered to them. In the context of this paper we consider culture and traditions as a structure, and religion is used as an instrument to justify this structure. The paper indicts the state as the guilty party for young females that drop off from the schools and staying illiterate as a result. Illiteracy further disadvantages women to effectively fight for their legal rights, crumple social barriers, get united for the cause of women, and pursue women's interests through effective means and methods. Challenges that meet young females to get full education in two targeted regions are upsetting. which are discussed in more details beneath.

Stereotypes and Traditional Constraints

"... For serious decisions in the Tajik families, particularly for giving education to son or daughter it is the responsibility of the men. In the families where several generations live, first is respected the word of father, grandfather, husband and eldest sons. In making serious decisions in the family, the role of women is significantly diminished." by Huriniso, head of NGO "Oshtii Milli" in Garm.

These stereotypes have been originated by the community, which result in the community itself suffering. Traditionally, the role of Tajik women is asserted to be a mother, a daughter, and a wife. These entitlements seem to be appreciative and well-regarded by society members that significantly limit the females' area of activities. A good mother is regarded to be the one who takes good care of her children and bring up healthy and well-mannered descendent to the society. A good daughter is considered to be the one who successfully handles the chores, actively participate in domestic affairs, respect family rules, and maintain family virtue and honor. And, a good wife is the one who takes

good care of her husband, obey him and comply with the rules settled by her husband or by her in-laws.

Status of Women in Garm

Story of Asliya:

"... I am 20 years old. I was born into a large family. I studied at school until my 3rd class. I stopped going to school due to the absence of classes for secondary students. In order to continue secondary school I needed to walk more than 5 km by road to get to the neighbouring village school. As my parents needed my help at home I could not farther continue my classes. [...] later, my parents gave me to Biahtun⁴ for taking religious class. Now, I can write and read in Arabic but can write little in Cyrillic.

I have my two brothers who are migrants in Russia now. My elder brother studied religion; he took religious class from my uncle who is a Mullah in our village. My second brother stopped going to school from 7th grade. He is now in migration and is planning to come and enter any high school for getting specialization [...] when I was 17 years my family gave me in marriage to the son of my father's friend. After six months of our marriage my husband left to Russia for migration. He is now for two years working in Russia. [...] I am living with his parents and doing the house chores for them [...] I haven't needed education so far as I am staying at home [...] but now they constructed school, children go to study in the village, however not all girls may continue their school as they would like to. I want to say, they should go and study 10th-11th class, and after

⁴ Title of woman instructing religious class.

that enter any high specialized schools. However, the proportion of girls is - why should she study?!...[...]".

(She completed school in 2001).

In this story we see how Asliya, the main heroine of the story has been deprived of the opportunity to get a full education. She told us about the obstacles and barriers that prevented her to become educated as well as all other children in the village. These were mainly due to:

- i. Absence of secondary school in the village where school only existed up to grade 4, in consequence of which she lost her rights to education;
- ii. Parents did not try to take the girl to a neighboring school where she could continue to learn after the fourth grade;
- iii. Parents gave another alternative education to secular education, which she learned to read and write, but she was taught to read without understanding. This confirms us that girl has potential, and she does not realize it herself;
- iv. When she was 17 years, parents gave her in marriage following the traditions and customs accepted in society. Sons were prepared to become breadwinners and were given opportunities to continue to study after 3rd grade and leave for migration. After returning from migration, Asliya's brother plans to continue his education in order to get specialization and certificate;
- v. The family was noted to have financial difficulties, whereupon one of the sons had to go for migration to Russia;
- vi. Before her marriage she was engaged in household chores at her parents, and continues this work at the home of her husband's parents.

In her story we have seen the problems existing within the society and in the state system. Her example proves us a violation of her rights and interests as a citizen of her country.

Different legal documents and laws had been developed for preventing violence against women in the family and society. Here are the main documents, operating from 1998:

- National Action Plan of the Government of the RT to increase the role and status of women in 1998 and 2005;
- Presidential Decree "On measures to increase women's role in society," 1999;
- State program "Basic directions of state policy" to ensure equal rights and equal opportunities for men and women in the RT for 2001 and 2010;
- The Law of RT "On State Guarantees of equality between men and women and equal opportunities for their implementation," 2005.

State by issuing laws, to improve the women's status in society, has not thought about the mechanism of implementation of these laws, i.e. observed lack of basic conditions such as poorly developed social infrastructure (roads, schools, transport), economic difficulties of the family (high expenses for education of children in a year, corruption in the system of education, low salary of parents, the family is depended on salary of men), as well as political stability (recruiting a healthy society in radical Islam and the use of religion as a tool to satisfy the interests of

certain groups in the society. Here, it is more about religious leaders and men.

The state has not provided conditions for the schoolchildren to receive a full, basic education in the remote areas. As noted in Asliya's story, in order to continue education they needed to go to a school in the neighboring village, which was more than 5 km away from her village.



Girls crossing the field after school in Khos village

Accessibility to road and transport remained unchanged. The relief of Garm is complex, containing mountains, hills and the much smaller part contains plain, where is the regional center. Lack of good roads and long distance to school

often become an obstacle in the families, especially for safety of girls. Now, the state with a task that the children may continue their school in the village, has still poorly thought of infrastructure. The road to the school is far and children have to cut their paths cross agricultural fields, grasslands, and their neighbors' houses. In the rainy season and cold weather, the road becomes slippery and risky for the health of children, especially for girls.

The socio-economic improvement in the sector of education became the most noticeable only after the implementation of the UNICEF's program on life skills-based education (from 2006 to 2009), which

covered 50 schools in the country with low attendance of girls.⁵ Construction of additional schools in remote villages, providing children with books and other conditions were the result of the impact of the project. Now, we have to think about how many children, including girls were left without education after 3rd class prior to Asliya, i.e. after the collapse of the Soviet Union and before implementation of the UNICEF project? It remains to note that her generation is not only girls, but perhaps the poor children of poor families who remained with 3rd grade education. The blame for this lies with the ineffective policy of the state in the field of human rights and education. We can assume that the number of illiterate people in our country is quite a lot.

From a conversation with a student of 10th class of the local village, named Sitora, it became clear that her parents might not allow her to study in her chosen profession due to financial shortages, even if Sitora studies well at school. She is not allowed to go for high school due to financial shortage in the family as her family is poor. First, money is needed to enter University, and then pay the contract, sum of which annually constitute from 500 to 3,500 US dollars, while the average salary in Tajikistan is 100 US dollars.⁶

In the conversation with her, it was also revealed the dominance of the social views among the peers-girls, "Women? Why does she need to study?" they say this, to embarrass the girl, i.e. to put her in an awkward position. Uneducated girls have been accepted in the culture and had become a local custom in this region. The number of girls attending secondary schools has decreased significantly after the Soviet Union. One may rarely meet educated women in leading positions. And even if

⁵ Vladimir Lozinski, Life skills-based education gets girls back to School in Tajikistan; UNICEF <www.unicef.org/infobycountry/Tajikistan_36494.html> August 2011

⁶ Latest Asia News Statistics Agency of Tajikistan: the average wage in the country reached U.S. \$ 100.

we meet, they are those women who managed to study during the system of Soviet education.

Traditional families residing in Garm, are afraid to spoil the honor of their daughters and this is the main reason preventing girls from going to school, especially away from home. Another problem strongly expressed is the traditional society and a strong commitment of community to religion. This has also been stated by Hurinisso Gafurova, the head of NGO "Oshtii Milli" that *"...pressures by traditional customs and different sayings in the community affect the nature of girls, which influence the activeness of their participation in social life."*

Due to fear of dishonor of girl, parents tend to quickly marry the daughter, regardless of her age and the level of education. From an early age they prepare girls to do household chores, child care, customs and traditions as a whole to married life that are accepted in the society. Girls sitting at home i.e. not being outside of the village for study, and practicing reading Quran, are more valuable and are taken to marriage quicker than those who have received 10 years of education. Thus, there is an opinion in traditional society that *"as less the woman knows as better to manage her!"* Unfortunately, the girls from a young age develop the perception of a *"woman for the family and a man for the society ..."* and think about *how to "hurry to get married!"*

The short and informal lessons of religion taught by Bihatun in the village, was the only alternative for Asliya. Her ability in education she showed in religion, and this shows us that the girl can use her memorized knowledge in practice. In this example, we saw the presence of gender inequality between boys and girls in the family, *"husband – king, wife – minister...at best"*, which prevents the receipt of full education in the family, i.e. preference is given to boys as breadwinners. In general, there

is presence of a stable mentality and traditions created by members of the society.

The proposed alternative, by the parents deprived the girl of the right of choice and interest. This isolated her from the information, in consequence of which she could not in time make a decision and analyze her situation as we note it from her last words “[...]I haven't needed education so far as I am staying at home [...]”.

UNICEF's efforts have confirmed that the project embedded in Garm has a good effect in comparison with Isfara.

Status of women in Isfara

Below is an interview about the story of Mehrangez by Ms. Takhmina, a teacher of Chorkuh village in Isfara:

“... in 2008, in grade 7 Mehrangez left school because of the government restriction on wearing hijab. Her parents did not allow her to take off her hijab, but rather decided not to let her to go to school. We visited her family and talked with her parents. They said they would not let the girl to go to school unless the school accepts her with hijab. The number of such girls leaving school because of hijab is not few. [...] we had to go for this compromise and accept the girl with hijab although the government restricts it. Mehrangez was a shy girl but with good ability. [...] in 2010 when she was in 9th class, an educational camp was organized by the government in Varzob [a region close to capital of Dushanbe], where participation of all students was obliged. In such case, not only the parents of Mehrangez were against but it was difficult for all girls of the village to get permission of their parents in joining

this camp. In the case of Mehrangez, we had again to talk and please her parents to let her join this camp through promises that I would care after her daughter. Her father came up and told me that "... okay, I let my daughter go with you, but be aware that she will not continue her school after 9th class. She is already engaged; I am giving her in marriage soon and it is not good for her to go outside the village..." "..."

The story of Mehrangez describes to us the condition of the environment she is living in. This story happened in Chorkuh, where not only girls but the women as a whole experience deprivation of their own rights. Up to marriage, parents decided for Mehrangez what she has to do, where she has to go, and who she has to talk with. From the story we see that wearing hijab is not the choice of Mehrangez but is rather her parents' who made her wear it. They did not even try to complain at school for restraining wearing hijab for their daughter but rather decided to keep her at home.

The teacher told us of how strict the community is in Islam in Chorkuh. The interview with Ms. Huriniso gave us a clearer picture about mystics of girls dropping out of schools in Isfara.

"...when in 2006 we started to run the project of UNICEF in the whole country in order to improve the attendance of girls in schools, the only region we could not embed the program was Isfara. We involved local authority, schools, religious leaders, and parents, and mobilized schoolchildren to help us in inviting girls back to schools through peer-to peer approach. However, in practice what happened was that parents did not recognize the children, [...] or even in trainings not all

stakeholders, mainly religious leaders were coming to take part [...].”

This shows us the absence of excitement of community itself at encouraging girls to go back to school. What are reasons behind it? Huriniso, asserted that *“one thing was observed in the process of the project that the communities in most part of Isfara are adherent to radical Islam i.e. have understanding of wrong Islam [...] Tabligh movement is very active in this region.”* By radical Islam, she explains that the male part of society uses violence towards women, explaining this properly according to canons/*Shariah* of Islam. They do things which are counter to Islam such as forcing women to wear hijab or even *paranja*, ban them of secular education, celebrating weddings with Islamic preaches and without music and so on.

Another similar story was observed in 2005 by the author in Chorkuh when parents sent a small girl age of 7 to a baker to buy bread. The baker looks at the girl and says her ‘if you go and wear hijab I will give you two breads for free.’ The girl leaves without bread. From this, we see that enforcement to hijab is committed by sons, husbands, brothers, and especially by the whole society. Enforcement of wearing hijab – is a violation of women's rights. This has also been stated by Imam Khatib of Mosque *Vahdat*, Ubaydullo Karim who tells that during preaches very often men address him with questions on how to persuade or force women to wear hijab. However, he believes that forcing women – is not right.⁷ A young woman should study and become useful for her family, for her children and for the society.

⁷ Dilafruz Nabieva, *“Tadjikskie zhenshini nosyat hijab po prinuzhdeniyu”*, Central Asia; <<http://centralasiaonline.com/cocoon/caii/xhtml/ru/features/caii/features/main/2011/03/10/feature-01>>

On the other hand, it should be noted that the government is aware of the women's condition in Chorkuh, and still persists in schools prohibiting wearing of the hijab. Knowing that the society is strongly following Muslim rites, the state must create conditions for the education of girls. By this we want to say that the hijab, tradition, gender imbalance, and ethnicity should not become a restrictive factor for education of girls, women and society as whole. Cultural-traditional and religious values should not become the reasons for girls missing their classes.

The following are the research's findings about factors restricting girls from completing the nine-year compulsory education in the two regions of Garm and Isfara:

1. Economic situation and the stereotypes about women's role as housewife. The study shows that girls from rural areas are a more vulnerable group with respect to various forms of discrimination associated with traditional and social structures of society. Such discrimination can result in limited opportunities for education, overloaded with homework, domestic violence, economic dependence on men, limited abilities in decision-making with the family, etc.;
2. Religion is considered to affect the women's role in Tajik society. Reinforced "Islamization"⁸ after Soviet time has alienated many girls from getting an education. Some girls from religious families who are willing to continue their education are forbidden to attend school because of the government's order, which prohibits educational institutions permitting girls with *hijabs*. Sometimes girls, who wear *hijab* are among the families who follow the laws of

⁸ Islamism describes the use of religion in a political context in order to fundamentally change the power structures, Assessment Report by Michael Taarnby, OSCE

Islam, the traditions and the law of constitutional government are for a broad secular society. Ban to cover their heads in the educational institutions leads to girls dropping out of school, and Isfara is a living example.

3. Corruption is another factor that could interfere with girls from rural areas to get an education. The high occurrence of illegal entry fees (bribes) to the universities are forcing parents to choose between their sons and daughters who need to get an education. Given the patriarchal society in Tajikistan, it is easy to predict for whom parents decide to pay the so-called entry fees.

Education and women in the process of development

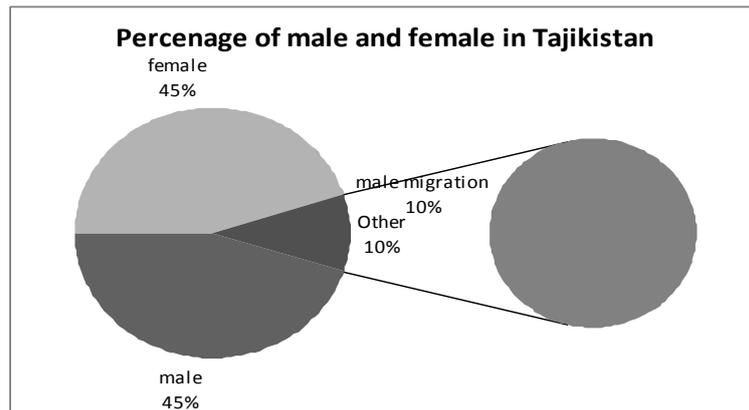
*“Education – is not a way of deliverance from poverty in the country.
It is an action against it.”
Proverb*

In Tajikistan the population is 7,529,900⁹ (census 2009) out of which 50% constitute females and 50% males.¹⁰ If state does not pay attention on quantity of educated women, it will lose 50% of the labour resources, in consideration of high growth of labour migrants, which constitute 800¹¹ thousand males, which is 11% from the total number of males. Consequently, it has to be mentioned that in Tajikistan the percentage of labour resources composes 39%. Therefore, the state needs to give attention on education of girls and accessibility of education for girls.

⁹ Statistic book of the Republic of Tajikistan, 2010

¹⁰ Ibid

¹¹ Ibid



Conclusion

The Government of the Republic of Tajikistan developed the legal documents that protect the rights and interests of women, also there are lots of efforts being made by the international community to create conditions for girls' attendance in secondary schools.

Though significant progress has been made by the government and donor states in the provision of education for all girls, however the task is not yet complete. The OSCE survey conducted in 2009 on girls' education again proves the existence of religious and traditional barriers as among the highest factors restricting girls dropping out of school, the percentage of which constitute 54%. Out of which 42% indicates religious barriers.

In both regions, Garm and Isfara, in fact there were marked violations of the rights of girls in access to education, i.e. violation by the parents and the community. Causes restricting girls from going to school are the following: weak social infrastructure, poor economic condition and religious constraints. By conducting research in two regions, we concluded that the two regions are distinguishing from each other. Garm is more typical to problem of socio-economic shortages, whereas Isfara differs because of its traditional society, in which the community

seems to strongly adhere to religion and listen to the opinion of religious people.

Religious leaders in their turn are not trying to lead innovation in society. The UNICEF's project has confirmed that the religious leaders are not willing to recognize women's equality in access to education. Islam must be correctly interpreted, because it is not a religion of violence. In order to make women have an equal share, equal opportunities, a say, and contribution, the donor states in coordination with the Tajik government needs to reform the social system, public mentality, and the stereotypes that exist within the society and work in close cooperation with religious leaders.

In order to uproot social barriers and undermine roadblocks that restrict girls' attendance in schools, the governmental institutions in coordination with their international partners need to strongly commit themselves to the cause of women. A couple of recommendations would be appropriate to put forward to make the mission possible. By studying the cultural and traditional barriers restraining young females from going to school as well as learning the mentality of society in the two regions, the research comes up with the proposal to consider the role of religion as an instrument for breaking the social bridges and uproot the barriers that prevent them from attending school. This question emerges from the minds that it is necessary to change the mentality of rural community; to do so the role of religion needs to be considered.

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