

A Dialogical Approach to Human Rights: Institutions, Culture and Legitimacy

by

Monica Anne Hlavac

Department of Philosophy  
Duke University

Date: \_\_\_\_\_

Approved:

\_\_\_\_\_  
Allen E. Buchanan, Supervisor

\_\_\_\_\_  
David Wong

\_\_\_\_\_  
Martin P. Golding

\_\_\_\_\_  
Wayne J. Norman

Dissertation submitted in partial fulfillment of  
the requirements for the degree of Doctor  
of Philosophy in the Department of  
Philosophy in the Graduate School  
of Duke University

2009

ABSTRACT

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## **Abstract**

In this study I address the moral and cultural disagreement and conflict regarding the interpretation of human rights norms that threatens the legitimacy of the human rights enterprise. Such disagreements present an opportunity to probe, question and dissect beliefs to uncover inconsistencies and false assumptions and attain a deeper insight into human rights norms that are presently left in a rather abstract form in international human rights documents and conventions.

I describe and defend an institutionally-driven dialogical approach that promises to systematically address these moral and cultural disagreements. My approach rests on two claims. First, clearer content for human rights norms will emerge from within particular cultures if critical cultural and moral investigation through dialogue is encouraged. By engaging in dialogical processes, we not only discharge our obligation to aid in a process that leads to a fair specification of human rights norms, but we also come to understand how human rights norms are, at their very core, participative.

Second, one way that international human rights institutions (IHRIs) can legitimately fulfill their function of supporting human rights is by encouraging critical moral investigation through dialogue. I make this proposal more concrete by discussing the case law on the issue of transsexuals that has come before the European Court of Human Rights.

# Dedication

For Erich

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## Acknowledgements

I would like to thank my advisor, Allen Buchanan, who has been a mentor, role model and source of inspiration. David Wong has been a wonderful resource over the years, beginning especially my third year when I had the luxury of doing an independent study with him. Allen and David have been insightful commentators and critics on the numerous iterations of my research, and without their assistance this dissertation would not have been possible. I also offer sincere thanks to my other committee members, Martin Golding and Wayne Norman, for their time and insight.

I am grateful to the entire philosophy department at Duke University. I participated in challenging and intimate graduate seminars, developed my teaching skills by watching the best via my TAs (especially with Alex Rosenberg) and enjoyed many superb lectures and informal discussions throughout my five years in the department. My fellow graduate students at Duke and UNC provided me with ample opportunities to further refine and challenge my positions.

Friends and family outside of the university have been an extraordinary stabilizing factor. My parents have been a source of support, counseling me through the more difficult periods of graduate school and providing recognition in periods of success. I am forever grateful for their unwavering and unconditional encouragement and love. I am fortunate to have many dear friends from various periods in my life –

especially my amazing sister Diana, my friend Debra, who has seen me “through it all,” and my brilliant, hilarious and compassionate girlfriends from Notre Dame – and without them my life would not be nearly as rich and my smile lines not nearly as deep. Finally, my partner Erich Gerlach has been incredibly generous with his time, critically examining versions of this dissertation, listening to me think aloud, and supporting me as I was working full-time while finishing this study. Without his patience, wit, generosity and warmth this dissertation would still be in its infancy. For this, and for giving me the courage to complete this considerable challenge, he has my thanks and my love.

# 1. Cultural and Moral Disagreement Regarding Human Rights Norms

## 1.1 *Cruel and inhuman treatment? Or justified retaliation?*

In 1982, a conflict emerged between the Iranian government and the UN Human Rights Committee (HRC), the body charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup> Under the Islamic Penal Code of Iran, the legally required punishment for a first time conviction of theft is the amputation of the four fingers of the right hand. As required by their obligations as a party to the ICCPR, the government of Iran submitted a report to the UN Human Rights Committee. The Committee responded that the use of amputation as a punishment violated Article 7 of the ICCPR which prohibits the infliction of “cruel, inhuman or degrading treatment or punishment.” Iran’s government disagreed, claiming that it was interpreting the document in a way consistent with Iran’s existing laws and social norms.

This interpretation of the right by Iran’s government is rooted in a particular religious view. The religious authorities who assumed political power following the Islamic Revolution of 1979 made a priority of replacing Iran’s penal code, based at that

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<sup>1</sup> This example comes from Kristen Hessler, “Resolving Interpretive Conflicts in International Human Rights Law,” *The Journal of Political Philosophy* 13, no. 1 (2005): 29-52.

time on Western legal principles, with one consistent with the *Sharia* law.<sup>2</sup> Since then, criminal offences in Iran have been classified according to the type of punishment, some of which are corporal. Criminal acts in *Sharia* are divided into four groups of punishable acts: Hudud (fixed penalties), Qisas (retaliation), Deyat (compensation or blood money) and Ta'zirat (discretionary punishments). Crimes deserving retaliation (Qisas) include those of physical injury or murder and the retaliation must be in kind and proportional. In classical *Sharia* treatises there are few references to incarceration, and apart from a very few cases, there is no mention of imprisonment.

The international community, human rights organizations, and political and legal authorities of numerous countries have expressed opposition to Iran's imposition of punishments such as amputation. How should this sort of disagreement be adjudicated? In other words, whose interpretation of Article 7 should be recognized as authoritative? According to what I shall call "the received view," international human rights organizations develop, implement, interpret and enforce international human rights as enumerated in various treaties. With grave simplification, once nations sign the treaties that institutional organs are charged with administering, they are required to follow the interpretations and recommendations set by the treaty body. Thus, according

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<sup>2</sup> Mohsen Rahami, "Development of Criminal Punishment in the Iranian Post Revolutionary Penal Code," *European Journal of Crime, Criminal Law and Criminal Justice* 13, no. 4 (2005): 585-602.

to the received view as held by numerous international human rights lawyers and officials, the HRC's interpretation is authoritative because Iran signed the ICCPR.

### **1.1.1 Unveiling a lack of normative legitimacy**

I use this example to interrogate primary assumptions that are made on the received view. According to the received view, the Iranian government is delegitimizing one of the human rights movement's primary methods for addressing and responding to human rights abuses. The Iranian government is directly attacking the HRC's authority to pass judgments on whether or not this punishment is a violation of the ICCPR. The government of Iran appeals to its sovereignty, insisting that the HRC is overlooking its existing national laws and social norms.

Regardless of whether Iran is right, this appeal does focus attention on the question of the legitimacy of the international human rights institutions (IHRIs) such as the UN Human Rights Committee.<sup>3</sup> IHRIs are charged with protecting human rights; they have the authority to ensure states protect rights, and they have power to make human rights abuses public. The received view assumes that one role of certain IHRIs is to settle interpretive disputes so that human rights can be implemented and protected. However, as I will explain below, an argument for this particular interpretive role has not been presented or defended. Further, what role these institutions should play in

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<sup>3</sup> While I refer broadly to International Human Rights Institutions (IHRIs), the various bodies and institutions differ in terms of their organization, functions and powers.

protecting human rights has not yet been clearly defined. Thus, this objection raised by the Iranian government does not threaten legitimacy so much as it directs attention to a lack thereof, raising the normative question as to what exactly IHRI's such as the HRC *ought* to be doing.

### **1.1.2 The relationship between legitimacy and dialogue**

I suggest that we view disagreements such as that between the Iranian government and the HRC not as problems to be overcome or eliminated but rather as opportunities to harness so that we can eventually render IHRI's more legitimate. This can be accomplished by taking this opportunity to explore those features of human rights norms that we care about the most and the function of IHRI's in human rights development. This exchange between the HRC and the Iranian government presents an opportunity to probe, question and dissect beliefs to uncover inconsistencies and false assumptions and attain deeper insight into norms that are presently left in a rather abstract form in the ICCPR.

I will argue that IHRI's should leverage the interest and engagement around human rights disagreements as a catalyst for localized critical moral investigation. Rather than serving a substantive role of human rights interpretation, as the received view posits, IHRI's should adopt a procedural role of supporting the deliberative process so that interpretation occurs in a more justified manner. I maintain that this involves the development and protection of a dialogical space for local and regional human rights



debate. By carefully defining one role that these institutions should play, namely, as “dialogical adjudicators,” or facilitators in the deliberative process of human rights interpretation, I show how IHRIs earn legitimacy. Thus, this disagreement between the HRC and the Iranian government demonstrates one of the primary themes that will be woven throughout this study, that the interpretation of human rights norms cannot be separated from either the investigation of particular cultural, religious and moral communities or that of international human rights institutions. One important role of IHRIs that imbues them with normative legitimacy is the support of local, national and regional dialogue regarding the interpretation of human rights.

### **1.1.3 Preview of this study**

In order to appreciate how such disagreements pose a threat to the legitimacy of the human rights enterprise, and how best to respond to this threat, I provide the following rough argument:

1. Cultural and moral disagreement renders unclear the content of human rights norms;
2. If the content of human rights norms is unclear, justifications for human rights norms will also be unclear;
3. If the justifications for human rights norms are unclear, the normative legitimacy of actions in support of human rights norms will be in jeopardy;
- 3.1. International human rights institutions act to support human rights norms.

Conclusion: Cultural and moral disagreement threatens the normative legitimacy of international human rights institutions.

In this argument, disagreement and conflict threaten the normative legitimacy of IHRI. According to Allen Buchanan and Robert Keohane, an institution is legitimate in the normative sense if it has the *right* to rule, as opposed to being widely *believed* to have the right to rule, where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to noncompliance or benefits to compliance.<sup>4</sup> Thus, the disagreement and conflict is not merely of related sociological concern but is a central normative issue that threatens IHRI's right to rule.

On its face this framing argument is compelling, and no doubt some version or other of this argument motivates many critiques of the human rights enterprise.<sup>5</sup> Insofar as the argument is sound, the normative legitimacy of international human rights institutions is at stake. A number of theorists make arguments that serve to escape this conclusion, perhaps unintentionally, by disputing one or another premise.

I use the framing argument as a framework to discuss the arguments of these theorists which are important elements of the literature on human rights and cultural

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<sup>4</sup> Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20, no. 4 (2006): 405-437.

<sup>5</sup> As Onuma Yasuaki notes, "For those who have experienced colonial rule and interventions under such beautiful slogans as 'humanity' and 'civilization,' the term 'human rights' looks like nothing more than another beautiful slogan by which great powers rationalize their interventionist policies." Onuma Yasuaki, "Toward an Intercivilizational Approach to Human Rights," *The East Asian Challenge for Human Rights*, eds. Bauer & Bell (New York: Cambridge University Press, 2005), 103.

and moral disagreement. By organizing my discussion in this chapter around these three key premises, I show how alternative approaches to undermining the legitimacy threat can either be refuted or lead to a dead-end. Not only do these approaches lead to a dead-end, but they in many cases fail to appreciate the extent of the threat that cultural and moral differences impose on international human rights institutions. By seeing why these approaches fail, we have a better sense of what is required to obstruct this threat.

I will argue that the framing argument only presents a threat insofar as cultural and moral disagreement not only *currently* renders unclear the content of human rights norms, but it does so *necessarily*. If the unclarity is not necessary, the argument is not sound. Through our discussion of the premises and the various theorists that address them, we will come to see that unclarity is not necessary. In particular, once we understand cultures as dynamic, it opens up the possibility for a cultural and moral dialogue that can mitigate such disagreements and disrupt Premise 1. Thus, the real problem with this argument is that it is only compelling insofar as key terms in the premises remain vague and assumptions are left untouched. While cultural and moral disagreement does pose a threat, it is not insurmountable; indeed, the threat can be overcome as long as the proper institutional conditions are in place to engender dialogue and facilitate normative clarity.

My critique of this argument paves the way for my dialogical approach to legitimacy that I lay out in the second and third chapters of this study and render

concrete in the fourth. My approach rests on two primary claims. In Chapters Two and Three I argue that clearer content for human rights norms will emerge from within particular cultures if critical cultural and moral investigation through dialogue is encouraged and supported. In Chapter Four I argue that, for now, one way that international human rights institutions such as the European Court of Human Rights can legitimately fulfill their function of supporting human rights is by encouraging critical moral investigation through dialogue. But first, let us critically examine the above argument, beginning with Premise 1.

### ***1.2 PREMISE 1: Cultural and moral disagreement renders unclear the content of human rights norms***

In order to clarify Premise 1, I first explain what I mean by “cultural and moral disagreement” and “human rights.” I describe various types of rights conflicts and explain why disagreement regarding human rights has become more prominent. Second, I examine how one might dispute this premise by denying the authority of culture and explain why this approach is wrong-headed. Third, I dispute the premise by examining the role that it plays in the framing argument. In order for the argument to be sound, the proposition must assert that cultural and moral disagreement *necessarily* renders unclear the content of human rights norms. I challenge this reading of Premise 1 as resting on a dated conception of culture as univocal and immutable. Once we are equipped with a properly dynamic view of culture, it becomes possible to overcome the threat of disagreement as permanent and irresolvable.

### 1.2.1 Clarifying Premise 1: moral and cultural disagreement and conflict

It is a familiar critique of rights, notes Cass Sunstein, that they are plagued by indeterminacy; in and of themselves, they tell us very little about how to handle particular problems.<sup>6</sup> Sunstein gives as an example the right to equal protection of the law, noting that it requires a great deal of supplemental work to decide cases. It tells us nothing about whether a particular affirmative action program is acceptable, mandatory or permitted.

The right must be specified in order to have concrete meaning. The specification will depend on premises not contained within the announcement of the right itself. Rights purport to solve problems, but when stated abstractly – it is claimed – they are at most the beginning of a discussion.<sup>7</sup>

While this critique might overstate the case a bit, there is no question that interpretive disagreements will arise as we move from a high level of abstraction to a specific decision in any given case. Human rights concepts tend to be very open-ended and so they are capable of being given a wide variety of meanings. Consider, as a rather extreme case, the example given at the outset.

Here one might ask the question: if so open-ended, what uniquely characterizes human rights? What is their function and how do they differ from other values? Like James Nickel, I use the term “human rights” to describe the specific norms that emerged from a political project initially undertaken after World War I and then continued on a

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<sup>6</sup> Cass Sunstein, “Rights and their Critics,” *Notre Dame Law Review* 70 (1995): 727.

<sup>7</sup> Sunstein, 730.

larger scale after World War II. Rather than enumerating all of the defining features of human rights, I think it is most helpful to note those features that distinguish rights from other values.

First, human rights are *universal* in the sense that they apply to every person alive today, irrespective of race, religion, sex, social status, nationality, etc.<sup>8</sup> Second, human rights are *high priority* norms with especially strong justifications. Their justifications should support their high priority, reflecting the fact that they are usually strong enough to win when in competition with other considerations. Third, human rights set *minimal standards*. They do not entail a comprehensive guidance as to how to lead one's life as an individual or within one's community and so leave most political decisions in the hands of national leaders. Fourth, rights are *entitlements* to do, have or enjoy. Rights provide strong moral reasons why human beings have a certain freedom, benefit or protection. Finally, human rights are *decisive*; they promise clear and straightforward answers to challenging moral and political problems.<sup>9</sup>

### **1.2.2 Conflict and disagreement regarding human rights**

So what types of interpretive disagreements arise with regard to human rights?

There are at least four different domains in which a rights conflict may occur:

1. In the identification of rights;
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<sup>8</sup> Of course human rights are not universal in the sense of applying to *all* humans at *all* times, for the obvious reason that they assert that people are entitled to services tied to relatively recent social and political institutions.

<sup>9</sup> James Nickel, *Making Sense of Human Rights*, Second Edition (Malden: Blackwell, 2007), 9-10.

2. In any of the elements or parts of a right (scope, weight);
3. With other values (e.g., security, health, morals);
4. Between rights (e.g., group rights and individual rights)

I discuss each of these conflicts in the context of philosophers that attempt to describe and resolve them. While these theorists helpfully elucidate the nature of the various rights conflicts, I will show that none of them offers a properly systematic approach to addressing the rights conflicts. This discussion will not only make concrete the types of disagreements with which this study is concerned but will also help to motivate the need for an institutional dialogue for the resolution of such conflicts.

I should note that while there are culturally influenced forms of implementation or realization of rights, these are not the conflicts with which the dialogue is primarily concerned. Rather, I investigate cultural or moral conflicts regarding the interpretation, specification, or weighting of a human rights norm, as opposed to its particular institutional embodiment.<sup>10</sup>

#### *1. Conflict in the identification of rights*

With regard to the identification of rights, Nickel offers a six-step justificatory test to help determine whether something is a human right.<sup>11</sup> The identification of a human right requires showing the following:

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<sup>10</sup> While the dialogue I advocate is very much an institutional process, the primary subject of the dialogue is not conflicts regarding institutional embodiment of human rights.

<sup>11</sup> James Nickel 2007, Chapters 5 and 6.

1. That people today regularly experience problems or abuses in the area protected by the proposed right.
2. That the norm has importance or high priority.
3. That the proposed norm fits the idea of human rights (as specified above).
4. That a norm as strong as a right is needed to provide this protection.
5. That the burdens the right imposes are neither excessive nor severely unfair.
6. That the norm is feasible to implement in an ample majority of countries today; to this end, Nickel proposes a taxonomy of the costs of rights.<sup>12</sup>

This test provides a response to the familiar objection that the human rights movement yields a right to everything that is necessary for a good life. In his response to this objection, John Tasioulas notes that judgments of importance (step 2 in Nickel's framework above) will stem profligacy and avoid redundancy.<sup>13</sup> Presumably certain values have a greater significance when considered from a social, cultural, moral and historical viewpoint. But while this framework is helpful, these suggestions only take us so far, as both "feasibility" and "importance" are contestable terms.

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<sup>12</sup> James Nickel, 82-85.

<sup>13</sup> John Tasioulas, "Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps," *European Journal of Philosophy* 10, no.1 (2002): 96-97.



For example, Nickel raises the proposal that government toleration of smoking violates human rights. In order to assess whether or not this is of sufficient importance to warrant protection, Nickel places the question in the context of four secure, abstract moral claims: a secure claim to have a life; a secure claim to lead a life; a secure claim against severely cruel or degrading treatment; a secure claim against severely unfair treatment.

According to Nickel, these four secure claims, perfectly realized, make it possible for every person today to lead a minimally decent or good life.<sup>14</sup> Returning to the question of smoking, Nickel proposes that we ask whether failing to penalize smoking seriously threatens any of these secure claims. But Nickel notes, “The six justificatory steps proposed in this chapter are independent of the [four secure claims]... People who have different views of the starting point(s) for justifying human rights can still accept and use these six tests. All they need to do is substitute their account of the starting points when the question of the egregiousness of threats is being decided.”<sup>15</sup> But if people substitute different starting points, they may not end up with the same result regarding the smoking question. The problem is that when considerations of “importance” are made within a cultural and moral context, different starting contexts may yield different determinations of rights. Nickel’s discussion of justification in the

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<sup>14</sup> Nickel, 62.

<sup>15</sup> Nickel, 75.

abstract fails to appreciate the disagreements that are presented from different moral and cultural positions. I hope to show later in this study that when we see this framework as embedded in a systematic institutional procedure, these suggestions, such as considering “importance” and “feasibility,” have some bite.

## *2. Conflict regarding any of the elements or parts of a right*

As Nickel notes, there can be significant indeterminacy in any of the elements of a right,

There may be a lack of clarity about the identity of the rightholders and addressees. The scope of the right, what it offers its holders(s) and requires of its addressee(s), may be imprecisely defined. And we may lack a clear view of the right’s weight in competition with other considerations.<sup>16</sup>

According to Nickel, weight refers to a right’s rank or importance in relation to other norms. This may be made tangible by considering Joseph Chan’s argument that Asian values may lead to a different understanding of the scope, weight and ranking of human rights.<sup>17</sup> Asian societies seem to embrace a set of attitudes towards morals that is different from the West. For instance, there is a stronger emphasis on stability and harmony as opposed to personal autonomy, and there is a greater reverence for elders and a more conservative attitude towards sexual morality.

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<sup>16</sup> Nickel, 23-4.

<sup>17</sup> Joseph Chan, “The Asian Challenge to universal human rights: a philosophical appraisal,” in *Human Rights and International Relations in the Asia-Pacific Region*, edited by James T.H. Tang (London: Pinter, 1995), 25-38.

While Chan accepts the existence of human rights, he does suggest that different cultures will have unique specifications and weightings of human rights. Yet in acknowledging culturally influenced differences in specification or weighting of rights, Chan does not suggest how we determine whether or not a particular interpretation is morally justified. He notes at the very end of his article that not all limitations on human rights are justified, “To justify restriction of a human right, it has to be shown, firstly, that the right to be restricted is in conflict with a legitimate aim, and, secondly, that the restriction is absolutely necessary and proportional to the protection of that legitimate aim.”<sup>18</sup> But what is a legitimate aim? And who determines whether a restriction is absolutely necessary? Not everyone in a given culture will agree on the same specification, so whose specification is authoritative? We are left with the important question of how much concession we should make to cultural variation and little by way of a reply.

### *3. Conflict with other values*

Human rights may conflict with values such as security, health, and morals. For example, the right to freedom of movement may be severely infringed during a national emergency. Three treaties – the European Convention, the American Convention on Human Rights, and the International Convention on Civil and Political Rights (ICCPR) – provide guidance as to what governments may and may not do during emergencies.

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<sup>18</sup> Chan, 36.

Nickel proposes an alternative, substantially more subtle, approach to the dichotomy between emergency and non-emergency. Nickel proposes working with four ideal categories, normal times, troubled times, severe emergencies and supreme emergencies.<sup>19</sup> Normal times are periods when a country is not facing severe and dramatic problems such as major war or insurrection. Troubled times indicate that a country is engaging in a war outside of the homeland, experiencing occasional terrorist attacks, etc. In severe emergencies the country is experiencing war, armed rebellion, or regular and severe terrorist attacks in some parts of the homeland, with resulting economic problems and political instability. Supreme emergencies threaten the survival of the country as independent and whole.

While Nickel's nuanced approach is certainly a step beyond what is available in the treaties, it is only helpful insofar as we see these ideal types as a way of framing debate. When does an emergency become "severe"? What is significant about a severe emergency? Is there ever a reason to suspend rights in the absence of a severe or supreme emergency? Why or why not?

#### *4. Conflict between rights*

Susan Moller Okin argues that since many cultures are patriarchal, group rights, as defended by theorists such as Will Kymlicka, are in many cases antifeminist and so conflict with women's rights. She describes many cultural customs that aim to control

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<sup>19</sup> Nickel, 114-116.

women and render them servile to men's desires. The most controversial of cultural customs, such as clitoridectomy and polygamy, are explicitly defended as necessary for controlling women.

Will Kymlicka is primarily concerned with cultural diversity and reconciling group-differentiated rights with liberal equality. For Kymlicka, autonomy is a necessary condition of the good life and culture is its necessary basis. So liberalism both grounds and regulates respect for culture, showing why it deserves respect and within what limits.

Since his arguments for group rights are based on the rights of individuals, Kymlicka confines privileges and protections to cultural groups that respect the individual rights of their members. His defense of special group rights depends on the importance of the *cultural community* in building *freedom* and *self-respect* of group members. Membership in a "rich and secure cultural structure" is essential for giving persons a context in which they can develop the capacity to make choices about how to lead their lives.

Given the importance of freedom and autonomy in Kymlicka's argument, it would be inconsistent for him to allow a group to claim special rights without governing itself by liberal principles. A culture that permits "internal restrictions," or the restriction of individual choice in the name of cultural tradition, cannot provide the context for individual development that liberalism requires. Thus, on Kymlicka's

account, theoretically there should be no conflict between individual and group rights: cultural membership is important insofar as “it allows for meaningful individual choice.”<sup>20</sup>

However, Susan Moller Okin challenges Kymlicka, arguing that on his account there will be conflict between minority cultural demands and the norm of gender equality. While Kymlicka denies group rights to cultures that discriminate “overtly and formally” against women, she claims that sex discrimination is often far less overt and usually takes place in the private sphere.<sup>21</sup> Because of the powerful cultural roots of sex discrimination, “far fewer minority cultures that Kymlicka seems to think will be able to claim group rights under his liberal justification.”<sup>22</sup>

In essence, Okin argues that while theoretically there is no conflict between group and individual rights on Kymlicka’s account, practically speaking there will either be conflict or very few group rights, if any. Okin suggests that in making arguments for group rights, we take special care to closely examine inequalities within groups, especially inequalities between the sexes. In order to do so, we must focus attention on adequately representing the *less powerful members* of groups in negotiations about group rights to really assess whether or not their interests are promoted by the granting of group rights.

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<sup>20</sup> Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1991), 171-2.

<sup>21</sup> Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999), 21.

<sup>22</sup> Okin, 21.

I agree with Okin's claims that advocates of group rights tend to treat cultural groups as monoliths and pay little or no attention to the private sphere. As a result, I worry that group rights are granted that are in tension with, and threaten the protection of, individual rights. In order to alleviate this worry, we need a system in place that pays attention to differences within groups, especially the way less powerful members are treated in the private sphere. I will argue that my dialogical approach will help to bring these tensions to light, as they are often pushed to the private sphere.

### **1.2.3 Kymlicka's group rights and the need for dialogue**

While group rights address many minority concerns with individual human rights, I argue that we need dialogue not only as a supplement to group rights to help solve the parochialism charge, but also to reduce the tension between individual and group rights.

Kymlicka's defense of special group rights depends on the importance of the *cultural community* in building not only *freedom*, but also the *self-respect* of group members. The importance of the existence of a secure cultural structure that provides individuals with a context of choice does not itself explain why individuals have a right to the protection of their *own* cultural structure. To explain this, Kymlicka appeals to the importance of individual identity and its connection to culture. Culture is constitutive

of individual identity, providing a “sense of belonging,” “emotional security,” and a “sense of agency.”<sup>23</sup>

Kymlicka does not confer an equal status on all cultural groups, dividing groups into three general categories: national minorities, immigrant groups, and new social movements or “non-ethnic identity groups” such as women, lesbians and gays, and people with disabilities. Kymlicka contends that gays and lesbians create culture-bearing communities that provide their members with a context of choice and group identity, and so he extends his analysis to these non-ethnic social groups. He argues that like immigrants, lesbians and gays are entitled to provisions that serve to fight discrimination and fully integrate group members into mainstream society.<sup>24</sup>

I use the case of lesbians and gays to show that while group rights solve some of the problems associated with the parochialism charge, it doesn’t solve them all, and in some cases actually creates further conflicts; broadly speaking the parochialism objection is the charge that what are called human rights are not really universal in the sense of being rights of all individuals. Thus, conflicts involving group rights must be accompanied by dialogue. Here I give three examples of questionable assumptions made by Kymlicka that illustrate the importance of dialogue for the legitimacy of group rights.

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<sup>23</sup> Kymlicka, *Liberalism, Community and Culture*, 175.

<sup>24</sup> Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998), 100-103.



First, in his defense of giving lesbians and gays group rights along the lines of immigrants, Kymlicka assumes that the cultures of national minorities have a pre-eminent value to their members. He states,

Francophone gays in Quebec, for example, are born and raised to think of themselves as Quebecois, and to think of their life-chances as tied up with participation in Quebec societal institutions. Entering the gay community in later life is unlikely to change this deeply rooted sense of national identity, or the desire to continue to live and work in one's original national language and culture.<sup>25</sup>

The problem here is that Kymlicka assumes that national culture has this pre-eminent value, overlooking the fact that discrimination against the group might reduce its value to them. The way to find out whether or not this is the case is for lesbians and gays to deliberate on this issue. And it is important to note that this deliberation needs to take place on an ongoing basis. One reason for this is that gays are no doubt continuously growing in their understanding of what their group identity as gay means to them, and it is possible that its importance will change over time.

Second, Kymlicka assumes that gays and lesbians desire integration into existing political, social and economic structures as opposed to reforming these structures. For instance, he cites the recognition of same-sex marriage as a group-specific right that lesbians and gays should be afforded. Yet it seems possible that some gays are more interested in reforming the dominant culture than assimilating to it. By overlooking this possibility, he leaves insufficient room for cultural contestation. Perhaps this is a fair

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<sup>25</sup> Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada*, 98.

assumption – or it was at the time. But in order to know if it is still a fair assumption, there must be dialogue, internal to the gay community and between gays and the wider community.

Thirdly, and underlying the first two problems, is the fact that Kymlicka fails to appreciate the fact that there is considerable diversity within groups. In fact, he generally overlooks intra-group differences and disagreements. This is a general danger with assertions of shared group identity, that non-conforming group members risk being ignored, excluded or oppressed. Yet Kymlicka does little to alleviate this danger. I will argue that one remedy for alleviating this danger is increased dialogue, especially among those in the group who have less power.

All of these assumptions made by Kymlicka are worthy of debate and contestation, among gays and lesbians and between them and the wider society. Insofar as his hierarchy of minority rights remains debatable and he offers no way to address conflicts, the legitimacy of group rights, and those institutions that appeal to them, remain in jeopardy.

The tension between individual and group rights in many cases comes down to the issue of how to *specify* the individual and group rights at stake. Consider Janet Halley's response to Kymlicka's discussion of the right to property in the context of a native tribe seeking common land rights. According to Kymlicka, the tribe's purpose is to provide protection against the economic and political power of the larger society to

buy out indigenous land. Unfortunately, when land is held in common, tribe members “have less ability to borrow money, since they have less alienable property to use as collateral.”<sup>26</sup> While Kymlicka notes this consequence, Halley argues that he fails to realize the full implications of tribal common land,

Typically it will mean that most tribe members are left not with less alienable property, but with none. Economically, this means not merely difficulty in finding collateral, but complete abstention from the surrounding market economy... We gain nothing by squabbling over intentions here: common ownership of land has not only fiscal but cultural effects; and the cultural effects include constraint.<sup>27</sup>

Halley’s point is illustrative of a broader problem, Kymlicka’s tendency to view these issues in the abstract, in this case, for example, as a dispute between collective and individual land ownership. This conflict is better understood by placing it in the social and cultural context, as Halley does. As external spectators, theorists do not have the best perspective as to how such a group right will, in practice, effect tribe members. But a dialogue that includes tribe members may provide an interpretation or instantiation of the right to property that is in less tension with group rights. For instance, we can imagine tribe members offering the following proposal. The tribe sets up an insurance policy so they have certain rights over parcels of land that individual members can use as collateral. In the event of foreclosure, the tribe would agree to pay off the debt. Thus,

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<sup>26</sup> For Kymlicka’s analysis of the case, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 43-44.

<sup>27</sup> Janet E. Halley, “Culture Constrains,” in *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999), 102.

through deliberation within groups we might provide creative interpretations of individual rights that reduce the tension with group rights to tolerable levels.

Okin is concerned that freedom of women is limited in certain cases of group rights, and Kymlicka agrees that a more subtle account is needed to identify these limitations. What I attempt to provide in the following chapters is just such a procedure of how to specify limitations and adjudicate disputes between alternative interpretations of women's rights.

#### **1.2.4 Why disagreements are more prominent**

Disagreement has been a part of human rights norms since their inception. Heiner Bielefeldt argues that human rights were not a "natural" or "organic" development from humanitarian ideas rooted in the cultural and religious traditions of Europe.<sup>28</sup> Individuals have had to continuously fight for their rights, facing resistance from a number of angles, including, for example, the Catholic Church, the aristocracy and advocates of the authoritarian state.

Yet there are a number of reasons why disagreements regarding the interpretation of human rights norms have recently become more prominent. Some of these reasons are quite familiar. For example, because of the dynamics of the modern economy, individuals and communities cannot lead isolated lives. Disagreements and

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<sup>28</sup> Heiner Bielefeldt, "'Western' versus 'Islamic' Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights," *Political Theory* 28, no. 1 (2000), 90-121.

conflicts that have heretofore remained concealed between isolating barriers are becoming increasingly more exposed.

There are also some reasons that are perhaps less obvious. As James Nickel notes, recognition of a human right generally starts with an experience of indignity and injustice. He draws on Henry Shue's idea of a right as "a rationally justified demand for social guarantees against standard threats," and of the discovery of threats as a "largely empirical question."<sup>29</sup> What is or is not eradicable may change over time. And with the spread of modern communication such as the Internet, which has increased the speed and breadth of knowledge exchange, we have a better appreciation for the facts of violence and oppression that take place throughout the world and so more types of threats are identified. We have increased disagreement and conflict because we have more information about promising and suitable solutions, so more problems are considered feasible and so meet this condition of a human right. For instance, we've increased our capacity to deliver life-saving medicines across the globe, and this raises the bar for what duties we owe rights-holders when it comes to health.

In the last few decades human rights concepts have gained increasing international credibility and support, and a growing body of treaties has strengthened their international legal basis. As Sally Engle Merry argues, this system is deeply transnational, taking place in global settings with representatives from nations, groups

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<sup>29</sup> Henry Shue, *Basic Rights*, 2<sup>nd</sup> Edition, (Princeton: Princeton University Press, 1996).

and NGOs from around the world. At the same time, activists from many countries have adopted human rights language and translated it for people at the grassroots level. Thus, human rights ideas get implanted in local communities, providing people with opportunities for expressing the threats that are facing them. Through her observations of the drafting process and her reading of resolution texts, Merry notes that new forms of violence against women have been added over time.

In 2000 the resolution referred for the first time to “crimes committed in the name of honour, crimes committed in the name of passion” to the list of forms of violence against women. The definition of violence against women was expanded in 2002 to include trafficking and “early and forced” rather than only “forced” marriages. In 2002, there was discussion about incorporating the violence that women experience as a result of their sexual orientation and about whether to list widows as particularly vulnerable to violence.<sup>30</sup>

She notes how shared academic work and conferences have spread ideas about domestic violence globally. For example, she mentions several global Internet LISTSERVs on violence against women, a six-month seminar focusing on men’s violence, and cedaw4change, an online discussion forum with 683 members.<sup>31</sup>

### **1.2.5 Why disagreement is a problem that must be systematically addressed**

*Disagreement discredits the idea of human rights*

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<sup>30</sup> Sally Engle Merry, *Human Rights & Gender Violence* (Chicago: University of Chicago Press, 2006), 60.

<sup>31</sup> Merry, 161.

Two important features of human rights that I mentioned above are their decisiveness and universality.<sup>32</sup> Rights are *decisive* in that they promise clear and straightforward answers to challenging moral and political problems.<sup>33</sup> One of the virtues of appealing to a right is that it cuts short the debate, saving time and energy. Yet this feature of rights also subjects them to a critique; Mary Ann Glendon argues that rights are dangerous precisely because they simplify debate and ignore the deep cultural, social and philosophical differences that underlie agreement.<sup>34</sup> Even if Glendon is correct that rights have this tendency, it does not mean that rights ought to be functioning in this manner. We should seek a careful balance between allowing rights to serve their important simplification and coordination functions and their tendency to cut short important debate.

Regardless of Glendon's critiques, rights should remain decisive to some degree, to preserve these functions. Yet unresolved tension that is allowed to fester and develop certainly impedes rights' function as a way to reduce conflict and improve social coordination. Insofar as rights increase or exacerbate disagreement and conflict, they are doing precisely the opposite of what they ought to be doing.

Another important feature of human rights is that they are *universal*; importantly, they provide a basis for setting standards that apply to everyone in all societies

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<sup>32</sup> Tom Campbell, *Rights: A Critical Introduction* (New York: Routledge, 2006).

<sup>33</sup> Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), 26-53.

<sup>34</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

irrespective of race, class, gender, or religion. Insofar as conflicts reveal different views on what is or is not a right, the universality of human rights is threatened. The human rights enterprise is especially at risk if what are considered paradigm human rights violations do not disquiet all human beings in the same way. The human rights movement depends greatly on certain cases of human rights violations propelling involvement, support and change.

In his book *On Human Rights*, James Griffin argues that the term 'human right' is nearly criterionless. As an example, he discusses Thomson's defense of a woman's right to determine what happens in and to her body. Griffin queries, "But do we have such a broad right? If the government prohibited us from selling our body parts, as many governments are thinking of doing, would our human rights be infringed?"<sup>35</sup> Griffin's solution is to provide a substantive personhood account of human rights which grounds the existence of rights in autonomy and liberty. In this way we can explain how to identify rights and explain why they have the importance that they do.

Presumably Griffin would ground this right in the value of liberty which would help to explain its importance. Griffin identifies certain formal and material constraints on the content of the right to liberty, and these constraints certainly go part of the way toward giving meaning to the right.<sup>36</sup> But they do not decide the scope of the right, and

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<sup>35</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 9-27.

<sup>36</sup> Griffin, 57-81.



Griffin himself notes that there are genuine right-right, right-welfare and right-justice conflicts, even once we've grasped the content of the right. In order to resolve such conflicts, Griffin proposes a variety of considerations. For instance, we must decide the severity of effects on personhood or quality of life, drawing on the value that our long human rights tradition attaches to our status as persons. The goal is always to minimize loss of personhood or maximize its protection.

But does Griffin's solution really get at the problem that he highlights in Thomson's case of the right to determine what happens in and to one's body? It seems that the issue in this case is one of specification – what is the scope of this right? Does it include the right to sell one's body parts? On the one hand, people should have a right to sell their body parts should they so choose; after all, it is *their* body parts. But is this so degrading to the human body that it violates respect for persons? Griffin's account fails to provide the resources necessary to make such a decision.

*Disagreement makes it difficult to identify instances of human rights abuse*

The appropriate response to human rights violations depends on the clear identification of abuses. In the case described at the outset, the Human Rights Committee finds the amputation of four fingers of the right hand to be a human rights violation (if not one of the most flagrant case of cruel and inhumane treatment). By contrast, the Iranian government finds it equally obvious that this punishment shows

just how seriously it takes human rights protection. So a practice that might seem to be a clear case of abuse to members of the HRC is not so clear after all.

### **1.3 Dispute Premise 1: deny the significance of culture**

Cultural and moral disagreements are rooted in different beliefs that make it difficult to make decisions regarding specific cases of human rights abuses. One way to argue against Premise 1 is to deny the authority of culture such that disagreement arising from different cultures does not threaten the content of human rights norms. For instance, in the context of the dispute between the Iranian government and the HRC, one would deny the Iranian government's appeal to *Sharia* religious law. But in order to appreciate this approach to disputing Premise 1, we first must clarify what we mean by "culture" and what would give, or not give, culture special authority.

#### **1.3.1 James Griffin disputes premise 1**

James Griffin's justification for human rights derives the content of human rights norms by subscribing to a particular ethical and philosophical vision. We might imagine Griffin responding to Premise 1 by denying the relevance of cultural and moral disagreement to the content of human rights norms.

Griffin regards the tradition of human rights as providing a starting point for a philosophical inquiry into the existence conditions of rights. However, he insists that the tradition fails to provide us with suitably determinate existence conditions. Concerned to respond to the proliferation of human rights claims which threatens to

discredit the idea of human rights, he proposes what he considers to be largely a philosophical task of making the term “human right” more determinate.

Griffin’s substantive grounding appeals to the dual values of autonomy and liberty implicit in our personhood or agency, the valuable status that, he argues, is protected by human rights. These personhood values constitute the first ground of human rights. The second ground, what he calls the practicalities, are necessary to give the requisite determinateness to human rights. ‘Practicalities’ are a very diverse group of considerations including general facts about human nature, general facts about social life, and social utilities.

Unfortunately, Griffin’s appeal to the values of personhood is part of a more general ethical and philosophical vision that ignores cultural and moral pluralism. John Tasioulas notes some of the problems that arise when we pay insufficient attention to these differences and disagreements. He argues that Griffin’s personhood account “yields not only an implausibly indirect justification of paradigm human rights, it also creates difficulties about their scope.”<sup>37</sup> As an example of the former, Tasioulas discusses the human right to work. Considerations of liberty and autonomy are important in justifying this right, but so are other values such as accomplishment, understanding, deep personal relations and enjoyment. Tasioulas queries whether

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<sup>37</sup> John Tasioulas, “Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps,” *European Journal of Philosophy* 10, no. 1 (2002): 93.

infants or the severely mentally or physically disabled qualify as 'persons' on Griffin's account. On the one hand, Griffin appeals to a rich notion of autonomy and liberty that seems to fail to apply to those with severe disabilities. On the other hand, surely rights, such as the right to be free from torture, seem to apply with full force to those with disabilities.

### **1.3.2 Michael Walzer might dispute Premise 1**

One might also dispute Premise 1 by denying the authority of culture in the following way. Consider Michael Walzer's distinction between "thin" and "thick" accounts of morality.<sup>38</sup> For Walzer, "thin" moral concepts or values, such as justice or liberty, have universal appeal, while "thick" concepts are constructed in particular times, places and cultures. According to Walzer, this distinction provides "a way of talking among ourselves, here at home, about the thickness of our own history and culture and a way of talking to people abroad, across different cultures, about the inner life we have in common." "Thick" concepts are specifically identified with the varied social circumstances from which the "thin" concepts are drawn. Walzer understands thin or minimal morality as bound up with the thick moralities of particular societies, as it is the sum of all the values that societies share. Thus, Walzer's "universal" morality does not have any special moral appeal but is rather a factual matter of what concepts

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<sup>38</sup> Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994).

and values achieve consensus. Human rights lie in this thin universal domain, whereas cultural and moral disagreements lie in the thick domain of political morality. Hence, such disagreements do not threaten the content of human rights norms which reflect a consensus.

There are a variety of critiques that can be raised against Walzer's definition of human rights. For instance, how do we determine consensus? And why are rights limited in this way? Walzer is too quick to stipulate that human rights are the area of agreement and because of this ignores the fact that there really is significant cultural and moral disagreement that may threaten the content of human rights norms.

## **1.4 The fluidity of culture**

### **1.4.1 Understanding culture**

Like Will Kymlicka, I maintain that "our beliefs about value that are said to give meaning and purpose to our lives..." come from our cultural communities. Kymlicka defines culture as "an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history."<sup>39</sup> Note that culture is not simply synonymous with particular practices, norms or customs. What is significant for my purposes is that culture involves, first, a historical aspect and second, it is something that is closely shared among its members.

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<sup>39</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

While Kymlicka concentrates on cultural communities for the purposes of identifying the value of cultural group membership to liberal theory, I am most interested in his connection between culture and identity. According to Kymlicka, culture is constitutive of individual identity, as it equips its members with a context of choice that helps them to make deliberative choices about their life plans.<sup>40</sup> By identity I do not mean metaphysical identity, but rather something along the lines of Charles Taylor's notion of identity in which our thoughts, beliefs and feelings are at least partly contingent on our horizon or framework. Taylor defines our personal identity in terms of these frameworks, "My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand."<sup>41</sup> If we accept this role that is played by culture in constituting identity, then it is critical that we preserve and respect minority cultures.

#### **1.4.2 The fluidity of culture as a resource for deliberation**

An aspect of culture that is insufficiently addressed by theorists such as Kymlicka is its fluidity. Sally Engle Merry, an anthropologist at New York University,

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<sup>40</sup> Will Kymlicka, *Liberalism, Community and Culture*, 175.

<sup>41</sup> Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989), 27.

emphasizes the importance of viewing culture as contested and flexible.<sup>42</sup> She notes that anthropologists have repudiated the idea of culture as a stable, isolated, consensual, and interconnected system of beliefs and values. A legacy of this outdated view of culture is the idea that a culture must be accepted or rejected as a whole, an idea that encourages maintenance of the status quo. Such a view no doubt influences positions such as Walzer's. If cultures are monolithic and stable, then we have no alternative but to determine what these cultures have in common. But anthropologists have rendered this view of culture obsolete, replacing it with a view of culture as contested, hybrid and porous.<sup>43</sup>

One consequence of this fluid view of culture is that it is wrongheaded to conceive of culture as an obstacle to human rights. Merry states, "Culture in this sense does not serve as a barrier to human rights mobilization but as a context that defines relationships and meanings and constructs the possibilities of action."<sup>44</sup> The power of Merry's suggestion should not be overlooked – not only is culture not a barrier to human rights, it in fact presents an opportunity to render the content of human rights norms clearer. Like Merry, I wish to highlight the struggles over cultural values that

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<sup>42</sup> Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

<sup>43</sup> It may be noted that earlier generations of anthropologists created the very myth that current anthropologists are now taking credit for dispelling. I thank David Wong for this point.

<sup>44</sup> Sally Engle Merry, 9.

take place internally within local communities and encourage attention to local practices as resources for change.

I will argue in the next two chapters that one of the keys to a successful dialogue is to embrace the dynamism of local cultural practices. We must acknowledge the influence of local, national, and global forces on culture and highlight the role of intermediary activists to the process of change within communities, institutions and legal arrangements. There are activists and intermediaries, mostly members of NGOs, who have considerable experience negotiating tensions between transnational institutions, such as the ECHR, and local contexts. A theory of culture as contested, historically produced, and continually defined and redefined in a variety of settings, would enhance understanding the human rights monitoring process as promoting gradual cultural transformation rather than as law confronting intractable cultural difference.<sup>45</sup>

Cultural and moral disagreements do render the content of human rights norms unclear, despite the efforts of theorists to sidestep them. However, the insufficiencies of these approaches have shed light upon the need for dialogue. While disagreements do pose a threat to the clarity of human rights, I will argue that Premise 1 is false insofar as it reads, “cultural and moral disagreement *necessarily* renders unclear the content of human rights norms.” And the soundness of the framing argument depends on this

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<sup>45</sup> Sally Engle Merry, 100.



narrow – and false – construal of the first premise. There is a promising approach for addressing disagreement and conflict.

### ***1.5 PREMISE 2: If the content of human rights norms is unclear, justifications for human rights norms will be unclear***

One may deny Premise 2 by arguing that even if the content of human rights norms is unclear, the justifications for human rights norms are quite clear. John Rawls seeks to avoid the problems that would be posed by an absence of clarity of justification by presenting a political conception of human rights that accommodates a rather limited schedule of human rights. I will argue that this response to the lack of clarity in the content of human rights norms is unsatisfactory for a number of reasons.

#### **1.5.1 Rawls disputes Premise 2 by making disagreement irrelevant**

Out of fear that a lack of clear content for human rights norms might threaten the justification for human rights, Rawls goes to great lengths to insulate the justification for these norms from a lack of clarity about their specific content. Rawls presents human rights as part of a distinctively political conception of justice, one that stands free of any comprehensive moral, religious or metaphysical doctrine. This detachment is required to accommodate the reasonable pluralism of comprehensive doctrines, allowing the schedule of human rights to be accepted by those who hold divergent, yet reasonable, world-views. In this way Rawls is able to dispute Premise 2; even if disagreements render the content of human rights unclear, the justification of human rights remains clear.

If James Griffin does not take culture seriously enough, then Rawls takes cultural and moral disagreement *too* seriously. Rawls believes that to respect reasonable pluralism and ensure the universality of rights we must accept a shallow foundation of rights. According to Rawls, in a genuine democracy there will be a plurality of reasonable "conceptions of the good," where a person's *conception of the good* contains items such as his fundamental values and projects, his basic personal attachments and loyalties, and comprehensive religious, philosophical or moral beliefs.

To say that there will be a plurality of reasonable conceptions in a democracy is to say that they are different, competing and even mutually inconsistent, taken as wholes. By calling some of these conceptions 'reasonable', Rawls means that though some or all of them may be false, none of them is based on a flagrant disregard of basic, non-controversial standards of reasoning and evidence. In essence, though the holders of these different conceptions disagree, theirs is a disagreement among reasonable persons.

Rawls distinguishes five different types of society: liberal societies, decent peoples, outlaw states, societies burdened by unfavorable conditions, and benevolent absolutisms. Rawls argues that fair principles of international justice are those that liberal and decent peoples can both accept. Liberal societies should show respect to societies, such as decent peoples, that observe minimal moral constraints even if they are

not liberal. According to Rawls, both liberal and decent societies would consent to human rights.

Among the human rights are the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).<sup>46</sup>

A very minimal list of rights allows Rawls to accommodate what he terms “decent peoples,” nations which reject or ignore many liberal rights but are not so oppressive or so dangerous as to be considered “outlaw states.” Since Rawls argues that serious violations of rights warrant condemnation and intervention, the only way to respect decent peoples and ensure they remain free from invasion is to have a very short list of rights. In particular, Rawls articulates the idea of *toleration* by disallowing liberals from imposing their values on everyone else.<sup>47</sup>

One might understand Rawls as restricting the sphere of justification for human rights norms to the political as a way of protecting the clarity of those justifications. He renders cultural and moral disagreement innocuous by denying the connection between the specific content and justification for human rights norms. Another way to view this is that Premise 2 rests on an assumption that human rights derive their justification, in

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<sup>46</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 65.

<sup>47</sup> John Rawls, 18-19, 59-60, 68, 82-5.

part, from the cultural and moral considerations that inform their content. Rawls denies this assumption, thereby removing the prima facie plausibility of the premise.

There are a number of critiques that have been raised against Rawls' account of human rights, but I will focus on those most pertinent for our purposes. One objection is that Rawls' account of minimal rights is ad hoc; why are some rights protected but others are not?<sup>48</sup> In *Justice Beyond Borders*, Simon Caney notes that Rawls does address this issue. Rawls argues that a society can be 'decent' only if it can accurately be described as a 'system of social cooperation' and what 'have come to be called human rights are recognized as necessary conditions of any system of social cooperation.'<sup>49</sup> Caney notes this reply runs into two problems. First, why is decency defined in terms of cooperation as opposed to some other ideal? Second, the concept of cooperation is too thin in its content to play the role that Rawls wants it to. For example, Caney claims that someone might plausibly argue that equal political rights are necessary for a regime to be fully cooperative and that no regime with entrenched power inequalities can accurately be described as cooperative.<sup>50</sup>

A related objection is that implicit in Rawls' position is the assumption that there is no logical, empirical, normative or incompleteness-derived interconnections between his list of human rights and those human rights that he rejects. For example, invoking

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<sup>48</sup> Charles Beitz, "Rawls' Law of Peoples," *Ethics* 110, no. 4 (2000): 669-96.

<sup>49</sup> Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), 81.

<sup>50</sup> Simon Caney, 82.

research by Amartya Sen, Andrew Kuper points out that democratic government has been empirically proven to be necessary for the protection of Rawls' other commitments, such as the right to freedom of expression.<sup>51</sup> The charge is that Rawls is mistaken to build some rights into his account and to reject others that are corollaries of the former rights.

Also, why is it that a defining role of human rights is to help specify when outside intervention in a country is permissible? As Nickel notes, human rights serve many international roles, some of them unconnected to enforceability. "A better description of their main role is that they are used to persuade and encourage governments to treat their citizens humanely with respect for their lives, liberties, and equal citizenship."<sup>52</sup> But while this may be their main role, he cautions us to avoid giving an ethnocentric account of the functions of rights, and in particular, to avoid wedding human rights to an overemphasis on social legal procedures.<sup>53</sup> A final important objection to Rawls' treatment is that his minimal account of rights acquiesces in injustice. As Nickel argues, Rawls' minimal list fails to address many severe injustices, and it does not incorporate areas of important political progress in the last two centuries. For instance, he neglects freedom of opinion and expression, peaceful assembly and association, and the freedom to choose one's own marriage partner.

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<sup>51</sup> Andrew Kuper, "Rawlsian Global Justice: Beyond *The Law of Peoples* to a Cosmopolitan Law of Persons," *Political Theory* 28, vol. 5 (2000): 663-4.

<sup>52</sup> James Nickel, 101.

<sup>53</sup> James Nickel, 27.

A far as this study is concerned, the primary problem with Rawls' antiseptic political conception is that it denies us the resources we need for negotiation of human rights, i.e., to find common ground on the sorts of protections that are needed to preserve the value of human life. First, his view is overly optimistic that human beings are able to disengage from their cultural and moral roots in conversation about human rights. Perhaps more importantly, I will show below how these roots are crucial to our identity and so are critical to dialogue about human rights.

***1.6 PREMISE 3: If the justifications for human rights norms are unclear, the legitimacy of actions in support of human rights norms will be in jeopardy***

In this section I describe how one might attack Premise 3, using this as an opportunity to address the relationship between justifications for human rights norms and the legitimacy of IHRI. I then describe what I mean by normative legitimacy as it applies specifically to IHRI and explain why the legitimacy assessment is significant. While I agree with the truth of Premise 3, I argue that legitimacy can be supported by establishing a dialogical approach for addressing cultural and moral disagreement and conflict.

**1.6.1 Dispute Premise 3 by denying a unique justification for human rights**

One might deny Premise 3 by arguing that there are many justifications for human rights norms; regardless of which justifications are ultimately accepted, there

will be some way of legitimating actions in support of human rights norms. In this way, while attentive to the nature of moral and cultural disagreement, John Tasioulas, Martha Nussbaum, Amartya Sen and others fail to appreciate its consequences for legitimacy.

If we broaden out James Griffin's view to one of a pluralistic grounding, we approach views like those of Tasioulas, Nussbaum, Sen and Nickel. Unlike Rawls, these theorists do not maintain that shallowness is required to respect diversity. There is a middle path, so to speak, between the political conception and the dogmatic assertion of one particular ethical conception. Why must we limit the human goods protected by human rights to autonomy and liberty, as suggested by Griffin? Griffin ignores the possibility that there are universal human interests beyond autonomy and liberty and that they too are aspects of the dignity protected by human rights.

For instance, Nickel recognizes a variety of justifications of human rights: prudential arguments, utilitarian and pragmatic justifications, arguments from plausible moral norms and values and linkage arguments that show that one right is necessary to the effective implementation of another. Like Tasioulas he argues that by limiting the set of starting points, one likewise leaves aside plausible justifications. Nickel endorses a non-consequentialist framework for justifying rights which appeals to four "secure claims" as grounds for rights that include the value to have a life, lead a life, avoid

severe unfairness and avoid severe cruel or degrading treatment.<sup>54</sup> Nickel argues that together, these four claims, if realized, would make it possible for every person today to have and lead a life that is decent or minimally good. But he is quick to note that these are merely starting points, as his goal is not to provide a comprehensive theory of normative ethics.

As Tasioulas notes, a pluralist grounding of human rights can respond to the worry of how human rights can be justified for cultures that do not accord the same significance to autonomy and liberty as Western nations. A pluralist account can accommodate different justifications for the same human right which “helps defuse the familiar charge that such norms reflect parochial Western values or orderings of values.”<sup>55</sup>

These theorists agree that the content of human rights is unclear – there are indeed cultural and moral disagreements – but deny that this unclarity poses a problem for the legitimacy of human rights institutions. They deny this conclusion by disputing the availability of a unique justification for human rights. If there is a unique justification, then we must know the content for human rights; but if there is a plurality of justifications, the unclarity of content is not as problematic. Regardless of the

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<sup>54</sup> Nickel, 62.

<sup>55</sup> Tasioulas, 94.



justification, these theorists assume that they all support human rights and render the problem of disagreement insignificant.

However, one issue that Tasioulas fails to seriously address is that if we accept a pluralist account of human rights, we run into a serious problem addressing cultural and moral disagreements and conflicts surrounding human rights. “A pluralist grounding of human rights renders plausible, even if it does not itself dictate, the existence of a plurality of justificatory routes – all equally good or incommensurable – from background values to a unitary schedule of human rights norms.”<sup>56</sup> I have less confidence than Tasioulas that a plurality of values will yield a unitary schedule. But even if Tasioulas is right, a unitary schedule of abstract rights masks a lot of disagreement about ranking, weight and scope of rights.

One of the virtues of a dogmatic account like Griffin’s is that it gives us a relatively clear approach to dealing with conflicts: the answer in the case of conflict is whichever human rights violation most seriously jeopardizes the personhood values. Of course there will be disagreements about this, but the important point is that we have a very specific moral context for the discussion.

By contrast, we face a much more challenging situation on the pluralist account, as interpretive conflicts cannot be solved by turning to any one particular philosophical viewpoint. For instance, Martha Nussbaum describes her approach as “continuous and

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<sup>56</sup> Tasioulas, 94.

international," "tentative and open-ended" and "a working political process." Yet she begins this process with a catalogue of rights based on a working list of features of human life, that is, apparently, self-evident. Her inclusion of cultural differences seems to be somewhat of an afterthought, as opposed to beginning her theorizing with a serious engagement with cultural and historical differences.

However, while they do not provide a systematic approach to addressing these problems, philosophers like Tasioulas and Nickel do give us some helpful considerations to have in mind as we engage in our dialogue, and we shouldn't fail to accommodate them. For instance, Nickel says that in cases of conflict we have to think about what we give up and come to a decision.<sup>57</sup> While thinking about conflict costs is a helpful tool to have in our kit, how, exactly, should we assign weights to various values for such a calculation? We need a systematic approach that incorporates these tools yet does not fall victim to Rawls' critiques.

Thus, while Rawls' response to cultural and moral disagreement is extreme, these thinkers fail to fully appreciate the threat that such disagreement poses. While diversity must be embraced, without a systematic approach to addressing conflicts the legitimacy of human rights institutions remains at stake.

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<sup>57</sup> Nickel, 82.

### **1.6.2 Deny Premise 3: common moral intuition**

One might also deny Premise 3 by appealing to a moral intuition that is widely shared regarding the significance of intervening in threats to our most important rights. For instance, even if the justifications for human rights norms are unclear, there is widespread agreement that some actions to prevent, halt or minimize the harm caused by genocide are legitimate. While there will certainly be disagreement as to what specific actions are most appropriate for intervention, there is a common intuition that *some* action in response to genocide is appropriate. The point here is that even if the justifications for human rights norms are unclear, it is not the case that the legitimacy of *all* activities in support of human rights is in jeopardy.

### **1.6.3 Buchanan on the legitimacy of international legal institutions**

In "Human Rights and the Legitimacy of the International Legal Order," Allen Buchanan argues for an important connection between the justification of human rights and the legitimacy of international legal institutions:

When international legal institutions authorize military interventions, prosecute state leaders for war crimes, or judge states or governments to be illegitimate, they justify such actions by appealing to the special status of certain norms. These norms are thought to be capable of grounding enforcement efforts and legitimacy assessments *because they are human-rights norms*, norms that identify rights that all human individuals have, independently of whether their own governments acknowledge them.<sup>58</sup>

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<sup>58</sup> Allen Buchanan, "Human Rights and the Legitimacy of the International Order," *Legal Theory* 14, no.1 (2008): 39.

According to Buchanan, the legitimacy of international legal institutions remains in jeopardy insofar as we cannot rebut what he calls the parochialism objection, “according to which what are called human rights are not really universal in the sense of being rights of all individuals, but at most are rights that individuals have in certain kinds of societies or cultures.”<sup>59</sup>

Like Buchanan, I am concerned that the lack of a public justification for human rights norms impugns the legitimacy of those institutions that appeal to these norms to justify their actions. Also like Buchanan, I agree that the answer to this objection must be procedural and that we should emphasize the importance of properly designed institutions that possess key moral and epistemic virtues. As Buchanan argues, we cannot legislate *a priori* the content of human rights norms, as they are in some sense a social product of a public deliberative process. My approach builds off of Buchanan’s, defending particular deliberative and epistemic criteria for institutionalized dialogue and describing the role that IHRI play in supporting and adjudicating this dialogue.

In addition, the approach that I defend has a much wider focus and is responsive to a much broader legitimacy deficit. I am interested in the legitimacy of the human rights enterprise, as opposed to a particular subset of this enterprise, international legal institutions. My response attends to a variety of international institutions, legal and

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<sup>59</sup> Allen Buchanan, “Human Rights and the Legitimacy of the International Order,” *Legal Theory* 14, no.1 (2008): 39.

non-legal, as well as national, regional and local institutions, associations, grassroots groups and social movements. While human rights norms are molded during the international legal process, they are molded further when they travel and become a part of local grassroots movements, and finally, travel back to their centers of formation where the process begins again.<sup>60</sup>

#### **1.6.4 Legitimacy as applied to international human rights institutions**

While skepticism about the legitimacy of international human rights institutions (IHRIs) is common, there has been little systematic theorizing on the subject. Elsewhere, I have developed a conceptual and structural framework for understanding and assessing judgments about the legitimacy of global governance institutions.<sup>61</sup> This framework can be profitably applied to understanding IHRIs as a special case. IHRIs include multilateral organizations such as the UN Security Council, International Criminal Court (ICC), the European Court of Human Rights (ECHR) as well as various less formal institutions such as the Human Rights Committee (HRC), the body charged with overseeing the International Covenant on Civil, Political and Social Rights (ICCPR). While we do not yet know enough about IHRIs to work out a general theory, we know enough to construct a partial theory, one that might frame and render more productive further investigations into IHRIs and their legitimacy.

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<sup>60</sup> Sally Engle Merry, *Human Rights & Gender Violence* (Chicago: University of Chicago Press, 2006).

<sup>61</sup> Monica Hlavac, "A Developmental Approach to the Legitimacy of Global Governance Institutions," in *Coercion and the State*, David A. Reidy and Walter J. Riker, eds. (Springer Netherlands, 2008).

Before we can assess the appropriateness of particular legitimacy standards, we must carefully consider what we can and should expect of IHRI. While this project of determining what it is, exactly, that is motivating the problem of IHRI legitimacy is partly empirical, it is most essentially *normative*. While we need to understand more about how IHRI function, we ultimately need to assess whether their current activities are necessary for their proper functioning; this requires that we consider what their function *ought* to be.

### **1.6.5 Features of legitimacy particular to international human rights institutions**

I highlight two features of the legitimacy term as it applies to IHRI. Legitimacy is a *threshold notion* – it constitutes a ground such that any IHRI that stands on or above it is legitimate. This requires that we temper our demands, for if complete justice was a necessary condition for legitimacy, legitimacy would function as an unattainable ceiling rather than as a floor. In addition, legitimacy is *dynamic* – institutions change their capacities and functions, and as they do what legitimacy demands of them may change too. So, legitimacy standards must be provisional. Higher standards may become applicable as institutional capacity develops or functions change.<sup>62</sup>

#### *#1 Restricting the Domain of Discourse*

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<sup>62</sup> By *higher standards* I include both the possibility of (1) an increased level or stringency of a provisional necessary condition as well as (2) additional necessary conditions. For example, in “Political Legitimacy and Democracy” Buchanan argues that democracy is required for political legitimacy when democracy is feasible. Similarly for IHRI, the conditions for legitimacy must be dynamic depending on institutional capacity. See Buchanan, Allen. “Political Legitimacy and Democracy,” *Ethics* 112, no. 4 (2002): 689-719.

I begin with the fact that we lack developed norms regarding how IHRIs ought to function as defenders, interpreters and enforcers of human rights norms. While many IHRIs make authoritative decisions about human rights interpretations, an argument for this specific function has not been put forth nor have its contours been examined. Thus, it is far from clear what feature(s) of IHRIs motivate(s) the problem of their legitimacy. Obviously IHRIs have growing powers to defend, interpret and enforce human rights but what are these powers, exactly? Which, if any, are common to all IHRIs? Which ought they have? I describe this concern, what I call the problem of normative unclarity, by using the Human Rights Committee (HRC) as an example.

The primary activity of the HRC is the implementation of the International Covenant on Civil and Political Rights (ICCPR), in particular, the consideration of state reports. The HRC consists of 18 members who meet for three sessions annually, each three weeks long. According to Article 28(3) of the ICCPR, all members are to be 'elected and shall serve in their personal capacity.' Decisions of the Committee should formally be by majority vote pursuant to Article 29(2) but all decisions to date have been taken by consensus.

The HRC has three dominant functions as set out in the ICCPR, in particular, Article 40:

(1) Article 40 requires states parties to 'submit reports' on measures taken to give effect to the undertakings of the Covenant. The reports are transmitted to the Committee for consideration. The Committee is to 'study' them.

(2) Article 40 instructs the Committee to transmit 'such general comments as it may consider appropriate' to these state parties.

(3) The Optional Protocol to the Covenant authorizes the Committee to receive and consider 'communications' from individuals claiming to be victims of violations by states parties of the Covenant, and to forward its 'views' about communications to the relevant individuals and states.

Regarding function (1), Thomas Buergenthal notes, "The language of Article 40 indicates that those who drafted this provision did not wish to spell out very clearly what powers the Committee had in dealing with State reports."<sup>63</sup> Given that the HRC's functions are left vague in the ICCPR text, the Committee's functions have evolved over time. For example, in 1992 the Committee decided that 'observations or comments reflecting the views of the Committee as a whole at the end of the considerations of any State party report should be embodied in a written text, which would be dispatched to the State party concerned as soon as practicable.' The nature of the dialogue between the States Parties and the Committee has also changed over the years. Buergenthal notes

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<sup>63</sup> Thomas Buergenthal, "The Human Rights Committee," in *International Human Rights in Context*, ed. Henry Steiner and Philip Alston (Oxford: Oxford University Press, 2000), 711.



that the questioning of its members has become increasingly more probing than in the past. The Committee's current practice is more intrusive and leaves few relevant human rights issues unexplored.

The text of the ICCPR is likewise terse and ambiguous about what is intended by 'general comments.' Buergenthal states "...over time the general comments became a juridical instrument, enabling the Committee to announce its interpretations of different provisions of the Covenant in a form that bears some resemblance to the advisory opinion practice of international tribunals." Buergenthal also notes that since the Committee always decides by consensus, the reports remain compromise instruments that on various occasions gloss over issues in need of clearer interpretive guidance.

In addition, the General Comments go beyond the literal text of the ICCPR article under discussion, raising many important questions. Is the Committee making reasonable inferences from the text? Is it interpreting based on the context of all of the articles of the ICCPR? Is it working out the common understanding of representative state parties to the ICCPR of the meaning of various provisions? Is it interpreting in light of all human rights documents and conventions – or more broadly, in light of the development of human rights norms?

These questions raise the larger normative question of what character, structure and functions the HRC *ought* to assume. I raise the above issues to call attention to a lack of normative clarity regarding IHRI. At this point in time, we do not know, with

respect to many IHRI, what to expect of them, normatively speaking.<sup>64</sup> Should the structure and functions be reconsidered, especially in light of 50 years of experience of the human rights movement? Should the Committee be understood and evaluated as an independent organ or as a part of the more comprehensive framework of the human rights enterprise? If the latter, inquiry would be directed to the complementary nature of the functions that different organs should fill under different treaties, with the goal of thereby maximizing the effectiveness of the human rights movement as a whole.

While my approach leaves open the possibility of achieving a *general* account of legitimacy, it embraces the fact that it is best, as a matter of current practice, if we take a more *localized* approach to making legitimacy judgments. By this I mean that from a non-ideal standpoint, we should start by making local legitimacy judgments, focusing our attention on certain IHRI, in the hope of achieving greater domains of normative clarity. One reason to take a localized approach is that we have not yet identified what general features of IHRI we are trying to ground; we do not have sufficient agreement on what IHRI, as a class of institutions, are doing, what their key features are, what their goals ought to be, etc. In fact, we cannot tell if IHRI are even a well-behaved

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<sup>64</sup> Interestingly, Dominic McGoldrick notes how members of the Committee vary tremendously in their view of the institutional character and nature of the Committee. "Mr. Uribe-Vargas described it as a body whose work was of a 'judicial nature.' Mr. Aguilar commented that the Committee 'was not a judicial body' and 'its role was not to find fault.' Mr. Graefath argues that 'Unlike a court the Committee was not required to make judgments, but simply to consider and comment on reports and to act as a conciliatory body in dealing with complaints and communications. Mr. Suy believed the HRC to be 'neither a legislative nor a judicial body but that every expert body was *sui generis*.'" Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991).

“class” about which generalizations are appropriate. Thus, my view suggests that it is most effective if we proceed by using the legitimacy term on a case-by-case basis.

One way this works is by establishing certain IHRI as *loci of activity*. For example, it is likely that it will be easier for certain IHRI to meet the minimal threshold for legitimacy than others, and so these IHRI will become established as sites of investigation. Once attention has been focused on the particular IHRI, there are likely to be disputes about whether or not it should meet even higher normative standards due to its unique functions and institutional capacities. So while the goal is to uncover additional norms that regulate any IHRI, the approach works best by first targeting key institutions. In Chapter Four I focus on one such institution, the European Court of Human Rights (ECHR).

## #2 *The Fact of IHRI Dynamism*

Another reason to take a localized approach is that once we focus attention on one or another IHRI we encounter the problems that accompany the fact of *IHRI dynamism* – the on-going issue of IHRI evolution due to institutional growth, task expansion, etc. This dynamic nature of IHRI demands an ever-vigilant debate regarding the current and potential activities of individual IHRI. This debate will elicit subsequent dispute regarding whether or not certain IHRI ought to meet even higher normative standards, above the threshold of supporting localized dialogues and epistemic practices.

The problems that accompany IHRI dynamism are distinct from the problem of normative unclarity. *Normative unclarity* is a problem, for the most part, because the practice of making legitimacy judgments regarding IHRIs is still in its infancy. However, even if we achieve a substantial degree of normative clarity, and the threshold for legitimacy is raised, we nevertheless will, for the foreseeable future, continue to face the problem of *IHRI dynamism*. This is not only because IHRIs change over time, as they achieve greater institutional capacity and task expansion, but also because there will be normative disagreements as to what any individual IHRI should be expected to achieve, given these tasks and capacities.

### **1.6.6 Why the legitimacy judgment is significant**

*Legitimacy gives human rights institutions the power to define, interpret, and in some cases, protect rights*

Institutions such as the UN Human Rights Committee and the ECHR have the power to define, interpret and in some cases protect rights. Some authors, like James Nickel, argue that this power is “modest” because these institutions mainly threaten exposure and embarrassment, not serious economic or military pressure.<sup>65</sup> Yet in focusing on the protection of rights, Nickel seems to overlook the powers associated with the capacity to influence the definition and interpretation of human rights norms,

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<sup>65</sup> James W. Nickel, “Is Today’s International Human Rights System a Global Governance Regime?” *The Journal of Ethics* 6, no. 4 (2002): 353-371.

as well as their spread. For instance, many other institutions model their practices on those of institutions such as the World Bank. Andres Rigo, former general counsel of the World Bank, notes substantial harmonization among national laws. In her discussion of Rigo's research, Anne-Marie Slaughter notes that, "Where states seek to create new legal rules and policies in the face of a dearth of local knowledge and expertise, they often seek to borrow from other states or internationally renowned experts. The World Bank is an obvious source from which to borrow."<sup>66</sup>

*Legitimate human rights institutions make authoritative decisions and settle conflicts*

In his article "Human Rights and the Legitimacy of the International Order," Buchanan argues that whether political institutions are *legitimate* depends in part upon the credibility of the public justifications they offer for their central activities. International human rights institutions such as the ICC and UN Security Council justify their actions by appeal to the special status of human rights norms. These norms are capable of grounding enforcement efforts, the self-determination of democratic peoples and legitimacy-assessments because of their status as *human rights* norms.

*Legitimacy assessments help us to determine what institutions to support*

Buchanan and Keohane argue that legitimacy assessments help us to determine which institutions to support and which institutions to withhold our support from.

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<sup>66</sup> Slaughter, Anne-Marie, *A New World Order* (Princeton, NJ: Princeton University Press, 2004), 179.

Generally speaking, if an institution is legitimate, then this legitimacy should shape the character of both our responses to the claims it makes on us and the form that our criticisms of it take. We should support or at least refrain from interfering with legitimate institutions. Further, agents of legitimate institutions deserve a kind of impersonal respect, even when we voice serious criticisms of them. Judging an institution to be legitimate, if flawed, focuses critical discourse by signaling that the appropriate objective is to reform it, rather than to reject it outright.<sup>67</sup>

So insofar as we judge a human rights institution legitimate, this fact will help to settle disagreements about which institutions we should support and why.

### **1.6.7 Looking Ahead**

In this chapter I have argued that various approaches to denying or accommodating the three premises are insufficient, and so cultural and moral disagreement does pose a threat to the legitimacy of human rights institutions. This threat is serious and should not be discounted or ignored. However, while serious, the threat is not insurmountable and may be minimized with the appropriate deliberative system is in place.

In the next chapter I transition from my discussion of the framing argument to the beginning defense of my proposal for removing the threat that cultural and moral disagreement poses to the legitimacy of IHRI. I discuss the first claim on which my proposal rests, that clear content for human rights norms will emerge from within particular cultures if critical moral and cultural investigation through dialogue is

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<sup>67</sup> Buchanan and Keohane, 407.

encouraged within societies. I describe my concept of dialogue, argue that dialogue must be connected to institutions, and explain the benefits of dialogue.

## **2 Critical Cultural and Moral Investigation through Dialogue**

In this chapter I provide background on my conception of cultural and moral dialogue and explain how it differs from the accounts of Bhikhu Parekh and Stephen Angle. In the remainder of this chapter and the next, I defend the first of my primary claims that clear content for human rights norms will emerge from within particular cultures if critical moral investigation through dialogue is encouraged and supported within societies. In particular, I aim to show how institutionally-focused dialogue is important to harnessing and formalizing opportunities for contestation and deliberation.

### ***2.1 The idea and origins of dialogue***

#### **2.1.1 Parekh: The Need for Cross-Cultural Dialogue**

Bhikhu Parekh hopes that his cross-cultural dialogue will uncover universal values that enjoy widespread support and are free of ethnocentric biases. Parekh offers his dialogue as an alternative to what he calls “minimum universalism,” the view that shared humanity and cultural differences are both important, but not equally so. Parekh defines minimum universalism as an intermediate position between monism and relativism, and argues that “we can arrive at a body of universal values but that they are few and constitute a kind of floor, or a moral threshold subject to which every society



enjoys what Stuart Hampshire calls a ‘license for distinctness.’”<sup>1</sup> One of the primary problems with the minimum universalist position, according to Parekh, is that the universal values are self-explanatory and univocal in all cultures. Parekh proposes an alternative approach in which the universal values arise out of an open and uncoerced cross-cultural dialogue that includes “every culture with a point of view to express.” The point of a cross-cultural dialogue is to arrive at a body of values to which all the participants can be expected to agree; Parekh arrives at a body of five universal moral values that provide the context of this cross-cultural moral deliberation. By engaging in dialogue, Parekh believes we show respect for other cultures and ensure that the values are free of ethnocentric biases.

In contrast to Parekh, I view dialogue not as a way to arrive at universal values, but rather as a process for strengthening human rights against the objection that there is no way to answer questions about how much leeway a society has in interpreting human rights. To this end, I begin with the human rights norms listed in the major international documents and argue that we engage in dialogue not to *agree on values* but rather to help resolve questions about *specification and interpretation* of norms. I maintain that there is general, although not unanimous, agreement on abstract human rights

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<sup>1</sup> Bhikhu Parekh, “Non-ethnocentric universalism” in Tim Dunne and Nicholas J. Wheeler, eds. *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999), 126.

norms and that dialogue is primarily designed to foster clarity on how these norms should be specified for a given region or country.

Here one might object that the distinction between agreement on norms and agreement on their specification or interpretation is not so easily made.<sup>2</sup> The concern is that disagreement over specification is really, at bottom, disagreement over the abstract human rights norms. First, this objection fails to appreciate the complex process of transnational consensus building examined by anthropologists such as Sally Engle Merry. Merry details her experience at the Beijing Plus Five Conference,

Nevertheless, it was quite extraordinary that representatives from countries all over the world sat together and tried to come up with some shared way of talking about women's roles and rights. They even managed to produce an agreed text. Delegates meet at this and other conferences, talk to each other, develop new ideas and approaches, and reach some level of consensus. They sit for hours watching the text projected on a large screen in front of the delegates, seeking to negotiate their differences.<sup>3</sup>

The fact that debates such as this take place, "often excruciatingly slow and seemingly irrelevant," highlights how much participants are in agreement. They are in agreement about the principles so much that they have hours to spend debating the minutia of the specifications of those principles. On the whole, core human rights norms, laid down in authoritative international documents, are largely invariant in international forums.

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<sup>2</sup> I thank David Wong for raising this objection.

<sup>3</sup> Sally Engle Merry, *Human Rights & Gender Violence* (Chicago: University of Chicago Press, 2006), 38.

However, one might view Merry's experience from a different perspective; the frequency and intensity of these debates merely supports the objector's claim that the agreement on core norms is rather thin. At some point interpretations appear so divergent that they obstruct the critical thrust or core concept of the right. Here it will be beneficial to examine Article 7 of the International Covenant of Civil and Political Rights (ICCPR) which prohibits "cruel, inhuman or degrading treatment or punishment." It seems that whether caning and the killing of convicted criminals is prohibited is a matter of legitimate disagreement and variation. Even Iran's government, when charged with violating this right by using as punishment flogging and amputation, did not deny the right but rather disputed the scope of legitimate interpretation.

No doubt there are bounds to legitimate interpretations set by the core concept of the right. Consider Article 22 of the Universal Declaration of Human Rights, that everyone has the right to work and to free choice of employment. While this standard does require that both women and men have the right to work, it does not require the elimination of differential gender roles. Although women cannot be prevented from working outside the home, they are free to choose not to. While a woman may choose to exercise her human rights in a particular fashion, perhaps in line with a more traditional gender role, this is not an example of a different conception of human rights.

Women in some cultures in Asia face extreme social pressure to conform to traditional gender roles, and that is precisely why it is crucial that they have the right to choose. Joseph Chan explains this important protective function of human rights by employing the concept of a “fallback mechanism,”

Moreover, when personal relationships break down, as when one party in a relationship fails to abide by the relevant norms and virtues, rights can be an important fallback mechanism to protect the vulnerable party against exploitation and harm. Consider the example of the breakdown of marriage. If a husband’s love for his wife has died and he acts in a way that harms her interests, it is highly desirable and even necessary for the wife to have formal rights to fall back on that can protect her.<sup>4</sup>

To allow debates over interpretation and specification to repeatedly penetrate the core concept of a right is to disregard this important protective function of human rights. It is also to ignore the gains that documents such as the Universal Declaration of Human Rights have made. An UNESCO group, formed in 1947, conducted a survey asking for reflections on human rights from Chinese, Islamic, Hindu, and customary law perspectives, as well as from American, European and socialist points of view. The UNESCO group concluded that it was possible to achieve agreement across cultures on rights that “may be seen as implicit in man’s nature as an individual and as a member of society and to follow from the fundamental right to live.”<sup>5</sup>

In particular I find one of Parekh’s suggestions for ensuring full scope for cultural mediation while preserving the integrity of universal values to be especially

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<sup>4</sup> Joseph Chan, “An Alternative View,” *Journal of Democracy* 8 no. 2 (1997): 35-48.

<sup>5</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 77.

promising. He notes that we should distinguish values and institutional mechanisms.

Parekh's idea is that,

Different societies are bound to devise different institutions to realize common values to suit their traditions, moral culture and historical experiences. Human dignity can be nurtured in an individualist as well as a communitarian society, and individualist freedom can be secured in a liberal-democratic or capitalist system as well as in other types of political and economic systems. We might, of course, have good reasons to believe that values are more likely to be realized under one set of institutions than another, but we should neither be unduly dogmatic about our views nor so identify the institutions with the values that the latter cannot be discussed and defended separately.<sup>6</sup>

Considerable cultural mediation takes place not via different interpretations of human rights but via different methods of rights implementation. This is one justifiable way that states can protect rights while allowing for a good measure of individuality and creativity. Also, we must be careful not to mistake a different institutional mechanism *in itself* as evidence of a rights violation. So when discussing a possible case of rights violation, we should always distinguish between the interpretation of the right and its institutional embodiment.

### **2.1.2 Renewed attention to dialogue**

According to David Bohm, 'dialogue' comes from the Greek '*dialogos*'; '*logo*' means "the word" and '*dia*' means "through." This suggests the image of "a stream of meaning flowing among us and through us and between us – a flow of meaning in the

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<sup>6</sup> Parekh, 152-153.

whole group, out of which will emerge some new understanding, something creative.”<sup>7</sup>

Before I describe a specific conception of dialogue, I highlight examples that fail to meet conditions for what I will call “genuine dialogue.”

Recently, in light of all the cultural, ethical, religious and ethnic conflict, there has been resurgence in talk about dialogue as an alternative to coercive or hierarchical modes of coordination. There have been growing attempts to incorporate dialogue in regulatory processes and grass-roots movements, and there is much talk of dialogue in democratic theory and cross-cultural ethics and philosophy. Unfortunately, dialogue’s image is often drawn from the world of commercial transactions and formal contracts. In these cases, the participants intend to get something from dialogue, for example, material gain.

The following types of discussion or deliberation are *not* genuine dialogue: bargaining for mutual advantage, e.g., parties accept a certain distribution when they cannot reasonably expect to get any more; diplomatic conversation between adversaries; alternative dispute resolution and mediation; negotiating a fair exchange with an affected community, for example, plans for siting hazardous waste facilities.<sup>8</sup> In all of these examples, the participants enter the discussion with their minds set, and through the discussion they hope to achieve these set goals. In genuine dialogue the participants

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<sup>7</sup> David Bohm, *On Dialogue* (London and New York: Routledge, 1996).

<sup>8</sup> Amy Helling and John Clayton Thomas, “Encouraging Community Dialog: Approach, Promise and Tensions,” *International Journal of Public Administration* 24, no. 7&8 (2001): 749-770.

do not have their minds set when entering the deliberation; they recognize that they must be flexible and willing to engage in an exploration of ideas.

Collaborative public decision-making is more characteristic of genuine dialogue, as it focuses on collaboration among the different parts of the broad public. First, it is bottom-up, as opposed to top-down, such that the stakeholders themselves, as a group, create both the impetus and select a method of proceeding. Second, it leads to a greater diversity of views heard, and perhaps more commitment to taking the chosen action as opposed to mere bureaucratic interest.

However, there are still a number of reasons why none of these are cases of genuine dialogue. First, participants approach the dialogue with non-negotiable positions. They are unreflective and not willing to explore their intentions or philosophical stances. Second, participants fail to inquire into their fellow participants' reasoning or background context. They have no interest in trying to understand their interlocutors' position or learn from them. Finally, the only goal of the interaction is to address or solve a particular problem or issue. The content of the discussion is fixed and rigid.

In contrast to the above examples, dialogue is also used in a more limited sense. Whether dialogue is genuine does not solely depend on whether claims are aired or voices are heard. As Stephen Linder puts it, "Rather, it is whether such input finds its

way into the formation of collective interpretations and commitments through an active exchange of reasons.”<sup>9</sup>

### **2.1.3 The Origins of Dialogue**

Stephen Linder argues that current models of genuine dialogue (what I will refer to from now on as dialogue) are best understood in the context of a developmental process that originates in the classical Greek polis. The best-known models of dialogue in the Western tradition are Plato’s Socratic interrogations in pursuit of self-knowledge and virtue and the Athenian deliberations for collective governance. Each model contributes distinctive dialogical features to contemporary institutions and practices.

The Socratic model represents dialogue as a mode of inquiry. A serious criticism of dialogue of this sort is that it presumes inequality as opposed to insight, capacity, the reasoning abilities, and so on. The Athenian model treats dialogue as will-formation rather than inquiry; the goal is to form commitments, common purpose, and to reaffirm the symbolic bonds of culture. It is represented in recent writings by Habermas’ public sphere. By contrast to the Socratic model, the focus is not on uncovering underlying truth but rather on coming to some shared understanding of conditions and sentiments as a basis for consensus around a course of action. Because this model presumes equality among participants, it escapes the most serious critique of the Socratic model.

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<sup>9</sup> Stephen H. Linder, “An Inquiry into Dialogue, Its Challenges and Justification,” *International Journal of Public Administration*, 24 (2001): 662.



Unfortunately, the formation of dialogical communities is often accompanied by the exclusion or marginalization of certain groups. Most contemporary models of dialogue are linked to the premises of participant equality and public processes of will-formation demonstrated in the Athenian model, and so must be especially attentive to this potential problem of exclusion.

## **2.2 The Benefits of dialogue**

### **2.2.1 Familiar Benefits of Dialogue**

Stephen Angle, Abdullahi An-Na'Im, Bhikhu Parekh, Seyla Benhabib and others provide many reasons to promote and support dialogue. Here I mention the most important potential benefits of dialogue that have been discussed in the literature.

*(1) Dialogue is personally transformative.*

Dialogical participants often unconsciously carry stereotypes. Dialogue has the capacity to extend horizons and challenge basic assumptions, leading to more reflective and well-supported views.<sup>10</sup> It leads an individual to further critical reflection on his already held views and practices.<sup>11</sup> Seyla Benhabib argues that through deliberation, individuals become more aware of inconsistencies and conflicts between positions and are compelled to undertake a coherent ordering of their beliefs.

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<sup>10</sup> James Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven: Yale University Press, 1997).

<sup>11</sup> Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," in Seyla Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996), 71.

*(2) Dialogue is socially integrative.*

By interacting and deliberating with others, participants often gain a better understanding of others that increases social integration, group cohesion and institutional support. For example, consider a study by Ximena Zuniga et al. that examines college students' participation in diversity-related experiences and found that they instill motivation to take actions for a diverse democracy.<sup>12</sup> Results suggest that interactions with diverse peers, participation in diversity-related courses, and activities inside and outside residence halls inspire students to challenge their own prejudices to work toward a common democracy.

*(3) Through dialogue participants clarify what they can agree on with regard to a minimally good life.*

By learning what others believe and further refining one's own beliefs, dialogue gives participants the opportunity to find fresh areas of agreement. Gutmann and Thompson argue that when agents deliberate, they can expand both their self-understanding and their collective understanding of what will best serve their fellow citizens.<sup>13</sup>

*(4) Dialogue aids in the integration of evidence, knowledge, values, etc.*

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<sup>12</sup> Zuniga, Ximena, Williams, Elizabeth A. Berger, Joseph B. "Action-Oriented Democratic Outcomes: The Impact of Student Involvement With Campus Diversity," *Journal of College Student Development* 46, no. 6 (2005): 660-678.

<sup>13</sup> Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 12.

As Benhabib describes Bernard Manin's article "On Legitimacy and Deliberation," processes of public deliberation increase and make available necessary information. For example, a single individual does not possess all the information deemed relevant to a certain decision affecting all.<sup>14</sup> Public deliberation allows the expression of arguments in the light of which opinions and beliefs need to be revised and leads to the formation of conclusions that can be challenged publicly for good reasons. Thus the deliberative process serves an important function in the integration of technical and scientific analysis with colloquial evidence and norms and values.

I suggest two additional benefits of dialogue that are less prominent in the literature, viz., enhanced institutional normative legitimacy and increased opportunity to develop and understand "the core spirit of human rights" which I will show to be, in part, participative and communal.

## **2.2.2 Dialogue and the legitimacy deficit**

Contrary to some theorists, I have argued that there is real disagreement and conflict regarding the specification and interpretation of human rights norms; that this disagreement is both serious and morally troubling; and that it highlights a potential deficit of legitimacy with regard to the human rights regime. Thus, we should have sufficient cause to address and fairly resolve such cases of disagreement and conflict. Dialogue, when conducted according to conditions that I lay out in Chapter 3, provides

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<sup>14</sup> Benhabib, 71.

a morally justifiable and systematic method for addressing disagreement. In the final chapter I will argue that by supporting such dialogues, international human rights institutions gain legitimacy.

Some authors make a connection between dialogue and legitimacy, but it is most often a reference to *sociological* legitimacy. For example, one of the motivations for the traditional citizen involvement in public planning is the desire for citizens to respect the authority of the public official. By contrast, in the dialogue about human rights, the concern is to lend human rights institutions *normative* legitimacy.

To address the lack of normative legitimacy of IHRI, I propose that we focus on the role of IHRI in dialogue. Benhabib connects public deliberation with the legitimacy of democratic institutions,

The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all. This presumption can be fulfilled only if such decisions are in principle *open* to appropriate public processes of deliberation by free and equal citizens.<sup>15</sup>

Of course not all institutions that deliberate human rights are democratic but by accepting the deliberative model, our goal is to come as close as possible to the “openness” of which Benhabib writes.

There are at least three possible views on the possibility of distinct interpretations of human rights. First, one might argue that distinct interpretations are

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<sup>15</sup> Seyla Benhabib, 69 (emphasis added).

never acceptable; human rights must always be specified the same way. It seems that a view like Griffin's would demand this and I argued against Griffin's approach in the previous chapter.<sup>16</sup> Second, one might argue that it is acceptable because cultures have different values that deserve respect. The problem with this reasoning is that not all values, and so interpretations, are permissible. For instance, just because a given culture supports the stoning of women as punishment for adultery does not make it right. My view is that distinct interpretations are acceptable, in part, because they have been the output of a fair process. Certainly having a fair process increases the chances that all voices have been heard and so the output will be more acceptable than if they had not. As I've noted, many authors tout the virtues of a deliberative procedure that meets certain highly robust conditions. But in many cases these robust conditions will not be met. On my view, multiple interpretations of rights will be acceptable given that they are the output of a dialogical process as defined above.

The question, "Which interpretation of X human right is correct?" is a non-starter. We cannot judge which interpretation is "right" or "superior" in the abstract. First, we have to clarify what we mean by "right" or "correct" or "superior." Do we mean legally, morally, conceptually or philosophically superior? My argument focuses on the legitimacy of methods for developing justifiable interpretations of human rights.

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<sup>16</sup> James Griffin, *On Human Rights* (Oxford, New York: Oxford University Press, 2008).

So let us re-frame the question: what process of deriving interpretations is the most legitimate?

When an interpretation is the output of a dialogue meeting certain conditions, the interpretation has authority and this lends legitimacy to the human rights enterprise. The benefits (1)-(4) highlighted above all contribute in various ways to the legitimacy of a deliberative decision. For example, dialogue has hopefully increased understanding of others and clarified participants' own views. Thus, participants see that in many cases they are in agreement on the "thin" underlying values of human rights. Any differences still respect this core agreement and can hopefully be better appreciated. In the next chapter I discuss how the involvement of what I call "positioned agents" in the dialogue also lends legitimacy to the human rights enterprise.

### **2.2.3 Interpretive claims are context-specific**

Just because a given human right has been debated in a deliberative process meeting (many of) the conditions that I will highlight in the next chapter does *not* mean that the interpretation is legitimate *full stop*. Here we must return to what I say about the legitimacy term in the previous chapter. The legitimacy term is dynamic and provisional, being subject to a number of contextual criteria.

Thus, the answer to the question of which interpretation is legitimate depends on a host of other contextual considerations: the nature of the right, the geographical region, the claim being made, etc. In the end, some interpretations of rights are more

defensible from certain perspectives and for certain purposes. Thus, when we speak of them so generally, we cannot say very much about their legitimacy. In the end, interpretive decisions are context-specific, depending on the nature of the dialogue – what human right is under consideration, what is being deliberated, who is participating, etc. For example, consider the scarf affair in France, a series of public confrontations that began in the late 1980s with the expulsion of three scarf-wearing Muslim girls from their school in Creil. This affair is a manifest of the neutrality of the state toward all kinds of religious practices, institutionalized through the removal of sectarian religious symbols. As Benhabib describes the case, the balance between respecting the individual's right to freedom of conscience and religion, on the one hand, and maintaining a public sphere devoid of all religious symbols, on the other, was so delicate that it only took the actions of a handful of teenagers to expose this fragility.<sup>17</sup> While there are many interesting components of this debate, I raise it here to illustrate the importance of the context in human rights interpretation – the political environment in France, the nature of the right to freedom of religion, the meaning of the scarf, etc.

While the headmaster of the school had forbade the three girls from attending class with their heads covered, the three girls appeared in class one morning wearing their scarves. The girls decided to wear their scarves one more time upon the advice of

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<sup>17</sup> Seyla Benhabib, "Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms," *The Tanner Lectures on Human Values*, Delivered at University of California at Berkeley, March 15-19, 2004.

M. Daniel Youssouf Leclercq, the head of an organization called Integrite and the ex-president of the National Federation of Muslims in France. Benhabib notes that the fact that the girls had been in touch with M. Leclercq indicates that wearing the scarf was a conscious political gesture on their part, a complex act of identification and defiance.<sup>18</sup>

They problematized the school as well as the home: they no longer treated the school as a neutral space of French acculturation but brought their cultural and religious differences into open manifestation. They used the symbol of the home to gain entry into the public sphere by retaining the modesty required of them by Islam in covering their heads; yet at the same time, they left the home to become public actors in a civil public space in which they defied the state. Those who saw in the girls' actions simply an indication of their oppression were just as blind to the symbolic meaning of their deeds as those who defended their rights simply on the basis of freedom of religion.<sup>19</sup>

First, this is a debate that had to occur in France, involving as it did soul-searching on the questions of democracy and difference in the multicultural society, including the meaning of sexual equality and the distinction between public and private and the significance of cultural tradition. Second, it is a debate that would have benefited from the participation of the girls themselves. Rather than dictating the meaning of the act to the girls, the girls should have been given a public say in the interpretation of their own actions. Had their voices been heard, it would have been clear that the meaning of wearing the scarf itself was changing from being solely a religious act to also one of cultural defiance and politicization. I agree with Benhabib

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<sup>18</sup> Seyla Benhabib, "Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms," 143.

<sup>19</sup> Seyla Benhabib, "Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms," 144.



that these girls should have at least been provided the opportunity to account for their actions to their school community; this would have encouraged dialogue among youth about what it means to be a Muslim citizen in a secular French Republic.

#### **2.2.4 The participative spirit of human rights**

I maintain that we have an obligation, as part of our responsibilities generated by human rights, to support and encourage various dialogical processes regarding human rights. We not only have responsibilities to *protect* individual human rights, but we also have a responsibility to aid in this *process* that leads to a fair and just specification of human rights norms and resolution of disagreement and conflict regarding their scope and limitation. Without such a fair process, human rights norms risk being reflective of those who wield the most power in the human rights system. And insofar as human rights are parochial in this sense, they undermine their core function as tools to protect individuals against abuse of power. Thus, by engaging in dialogical processes, we not only discharge our obligations, but we also come to understand, through collective coordinated deliberation, how human rights are, at their very core, *participative* norms.

This claim provides us with an additional response to a familiar critique of human rights that they are necessarily individualistic and even potentially selfish, normative instruments. According to this line of thinking, rights are individual possessions characteristically used to demand things from others and deny our responsibility for each other. Rights are possessed by people who only care for

themselves and give preference to their self-interest.<sup>20</sup> The development of collectivist group rights, such as the right of the self-determination of peoples, provides a response to the critique that human rights are individualistic in the sense of ascribing rights only to individuals. But we are still left with the egoist challenge that rights give individuals the opportunity to develop selfish personality traits, associated as they are with the language of entitlements and justified demands.

But this challenge is misguided in that it overlooks the fact that human rights are in fact participative norms. We are directly exercising rights as participative normative instruments when we embrace our responsibility to assist and engage in the formation of the deliberative process. In this way rights may be seen as mechanisms for protecting ourselves against each other and rousing the more cooperative aspects of our nature. Dialogue is concrete affirmation of the equal worth of human beings. When we ignore these responsibilities and exclude potential participants from the dialogical process, we unashamedly insult the dignity and moral status of human beings.

### **2.2.5 Skepticism about dialogue to be addressed**

While dialogue seems to point towards the most promising path forward, dialogue has always, and continues to be, marked by skepticism. I hope to address these critiques throughout the remaining two chapters.

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<sup>20</sup> See, for example: Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991) and Christopher Wellman, *A Theory of Rights* (Totowa: Rowman and Allanheld, 1985).

First, there is skepticism due to the ambiguity of the term, in particular surrounding the fact that there are many divergent conceptions of dialogue. A large number of theorists – including, but not limited to, Seyla Benhabib, Jurgen Habermas, James Tully and Bhiku Parekh – have put forward different models of dialogue that are informed by different principles and have different goals. For example, Tully’s dialogue allows participants to build common political constitutions whereas for Parekh dialogue ultimately yields a process of intercultural evaluation.

Second, there is concern that dialogue boils down to an undisciplined “free-for-all” that is chaotic and useless. I hope to show that when institutionalized and refined, dialogue is a highly disciplined process of reflection and inquiry.

Third, some argue that dialogue requires both technical mastery and tacit experience. Relatedly, dialogue might not get off the ground because of defensiveness, or once started, might break down. While one cannot will dialogue into being, one can provide a “propositional map” to guide its practice and emergence.

Fourth, there is tension between representation and efficiency. Dialogue comes at substantial cost in time and effort that could be counter-productive. In particular, consensus competes with taking action. A consensus that is acceptable to all participants is likely to change little from the status quo.

Fifth, there is no systematic evaluation. How do we know how effective efforts at community dialogue are or have been?

Finally, perceived obstacles that modernity places in the path of dialogue make the idea of “talking things out” seem not only foolhardy but infeasible. First, differentials in power seem to be a primary barrier to dialogue, as it seems that, with rare exception, dialogue enforces conformity. Second, social and economic inequality also presents barriers. For instance, it has been argued that participants in dialogue tend to be better educated and of higher socioeconomic status than the larger public. There is also the problem of exclusion, by race and gender, in particular. Minorities are often left out of public participatory processes or may lack confidence and comfort in public speaking. Third, the factors that inform the dialogue are quite complex. Broad representation is likely to increase conflict with expert opinion, yet some issues are so specialized and complex that it seems that only experts are qualified to make judgments in the area.

This last objection regarding the impossibility of fully attaining genuine dialogue has been a perennial complaint of all dialogical approaches, notably that of Habermas. If dialogue as I conceive of it can never be reached, what is the value of my approach to the legitimacy of human rights?

### ***2.3 Dialogue and Institutions***

Angle’s book *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* answers the question, Is there a chance for mutual understanding of contemporary human rights discourse between intellectuals from different cultural areas – in particular between

Western and Chinese public intellectuals?<sup>21</sup> He seeks the historical roots of contemporary Chinese rights discourse and shows how prominent Chinese thinkers have understood and interpreted the notion of human dignity and rights. He argues that there are distinctive concepts of human rights in China but that we should be tolerant of one another and “seek an accommodation of differences.”

One of his main theses is that the development of Chinese rights discourse is a joint venture, an interactive process of give and take between Western ideas and Chinese intellectuals. Chinese intellectuals are interested in the communal nature of rights and a full range of civil, political, economic, social and cultural rights in order to protect human flourishing.

For our purposes, what is important is that Angle addresses the question of how scholars representing different cultural traditions can communicate across these cultural boundaries. He shows that it is possible to have a genuine dialogue between different philosophical cultures if comparative scholars are willing to take the time to figure out what their dialogical partners are trying to convey.

Angle’s work is excellent, not only because it is rooted in history and cultural context, but also because he develops nuanced positions and responses to objections.<sup>22</sup> However, the dialogue I present is an alternative in many significant respects. I focus on

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<sup>21</sup> Stephen Angle, *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* (New York: Cambridge University Press, 2002).

<sup>22</sup> I discuss some of these at the end of Chapter 3.

dialogue beyond the academy, especially in local and grassroots communities and movements. I situate dialogue within national and transnational institutions. Angle focuses on key historical figures, which might have been significant during the time periods in which he is discussing, but in the modern human rights era, institutions are the center of human rights activity.

Unfortunately, little talk about dialogue is framed in the context of institutions. Angle views dialogue as primarily a philosophical and historical exercise of working through evolving concepts. While the thinkers he discusses have had urgent practical concerns in mind, these concerns are not explicitly tied to institutional structures. Angle's dialogue is not going to solve all, or even many, of the conflicts and disagreements about human rights.

One reason to focus on institutions, as mentioned above, is that much disagreement is aired via transnational networks and these institutions are the most likely locales to seek resolution. But I do not focus on institutions merely because of happenstance, i.e., because the problem is embedded in institutions, it must be dealt with via institutions. We should take advantage of the fact that institutions have the powers and capacities to support or fail to support various dialogues. A recurring theme throughout this study is that dialogue and legitimacy are not free-standing concepts but rather are embedded within institutions. As Rajagopal notes,

Many, if not most, social movements shape and are shaped by the environment in which institutions and their policies develop... For example, environmental,

human rights, and other movements have driven the evolution of the agendas of the World Bank, and trade unions and women's movements have fed off of each other in India.<sup>23</sup>

It is important to understand how institutions and movements structure opportunities for contestation, resistance, and dialogue.

For example, Seyla Benhabib supports a plurality of modes of association. In order for all affected to have a voice, she accepts a multiplicity of sites for debate: citizens' initiatives, social movements, voluntary associations, etc. And insofar as we accept these different associations and networks, we must emphasize their interrelation – providing a role for IHRI's such as the ECHR. Unfortunately Benhabib has little to say about the practical arrangements that will ensure that dialogue is actually “deliberative” as opposed to merely reflective of majority interests and prejudices. She gestures toward the need for institutional experimentation and redesign but does not offer any new concrete measures.<sup>24</sup> This will be a primary focus of Chapter 3.

### **2.3.1 Looking Ahead**

The dialogue I advocate is not primarily a proposal for the creation of novel sites of discussion and debate; rather, I propose that we focus attention on existing struggles, create a framework for understanding their inter-relation, and re-structure them in a form that is open, fair and imbues institutions and cultural authorities with legitimacy.

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<sup>23</sup> Balakrishnan Rajagopal, *International Law from Below* (Cambridge: Cambridge University Press, 2003), 10.

<sup>24</sup> For example, she urges for language and representation rights for indigenous populations similar to policies advanced by Will Kymlicka. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton and Oxford: Princeton University Press, 2002).

In the next chapter I argue that dialogue occurs in social contexts and that a promising way to investigate these contexts is via “positioned agents” in social movements.



## **3 Cross-cultural dialogue: Where to start**

### ***3.1 Human rights and social movements***

In this section I hope to show that the specification of human rights norms that carry normative authority can – and should – arise from contingent social contexts. In particular, we ought to concentrate attention on the roles played in developing these norms by “positioned agents” embedded in these social contexts, and social movements provide one particularly rich site for this investigation. I argue that we must give more attention to the ways in which social movements construct and deploy human rights discourse. Finally, I shall argue that the proliferation of rights discourses in support of diverse rights interpretations implies a need for a set of criteria for the legitimacy of interpretations of human rights norms.

#### **3.1.1 The social context of human rights specification**

There is nothing inconsistent about the following two claims. First, human rights norms are universal and carry normative authority. Second, human rights norms are and should be developed and specified within contingent social contexts at a variety of places and levels. Recognizing that both of these claims are true is of great importance for understanding the human rights enterprise in general and for resolving the problem of cultural and moral disagreement in particular.

It may be tempting to think of human rights in terms of the historical concept of natural rights. Theorists have argued that natural rights derive their universality and

normative authority from their purported status as timeless truths, discoverable independently of a contingent social context. Whatever the merit of such arguments, we should not mistake them as an argument for the distinct claim that only timeless truths, discoverable independently of a contingent social context, can be universal and bear normative authority. The content of human rights norms with normative authority can and has developed within contingent social contexts and this need not be perceived as a threat to the core concept of human rights.

As Buchanan, Nickel and others argue, we must distinguish human rights from natural rights.<sup>1</sup> This idea of human rights as timeless truths obscures their cultural and historical origins and the role that current social, cultural and political struggles play in their development. Human rights norms gain traction and perform their functions within the cultures of which they are a part. For instance, Merry describes how in 1994 a small group of poor and illiterate women in Hong Kong developed an understanding of their inability to inherit land as a violation of their rights to gender equality.<sup>2</sup> She chronicles a process whereby these women shaped and gave content to the right to gender equality in the context of the Chinese patrilineal system of inheritance. And human rights norms must also be capable of incorporating new insights into the human

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<sup>1</sup> See James Nickel, *Making Sense of Human Rights*, Second Edition (Malden: Blackwell, 2007), 12-14 for a discussion of the ways in which today's human rights differ from earlier, particularly eighteenth-century, conceptions.

<sup>2</sup> Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 192-202.

condition. Therefore, it is crucially important that we recognize that the contextual specification and development of human rights norms does not pose a threat to human rights.

Given the importance of contingent social contexts as sites for the development of human rights norms, positioned agents deserve more careful attention from students of the human rights enterprise. By “positioned agents,” I mean those people firmly embedded within the social contexts within which human rights norms do and should develop. Localized actors “in the trenches” can provide much needed critical normative and philosophical analysis as well as empirical information and input for deliberation about these norms.

My call to increase the attention paid to positioned agents is consistent with and promises to enhance Buchanan’s institutional approach to an interest-based conception of human rights. His approach focuses on the moral-epistemic virtues of the institutions through which human rights norms are specified and revised. Buchanan notes that there are a number of factual presuppositions upon which an interest-based conception of human rights depends: judgments about the conditions that typically undercut a human being’s opportunities for a decent life, about the institutional arrangements that can effectively counter a particular standard threat to basic human interests, and about

both the negative and positive effects of enforcing rights.<sup>3</sup> Human rights institutions, he suggests, should include mechanisms for accessing relevant empirical information by drawing on various “epistemic communities.” While I agree with this important role for experts and researchers, those affected by the deliberative results of human rights institutions are positioned agents; they ought to participate in the acquisition of both empirical and moral information bearing on such deliberations.

Involvement by positioned agents is epistemically beneficial as these agents have special access to pertinent information. In the example above, the illiterate women in Hong Kong were able to describe the ways in which their inability to inherit land was a violation of their gender rights.

For instance, an indigenous woman, Lai-Sheung Cheng, brought prominence to the issue by detailing her personal experience of discrimination.<sup>4</sup> When Ms. Cheng’s father died without a will, her two brothers inherited the house in which she lived and subsequently sold it to a developer. When Ms. Cheng refused to leave the house, the buyer proceeded to harass her by, for example, releasing mice in the home.<sup>5</sup> But participation by positioned agents is important not only for epistemic reasons but is at its very core an issue of respect. By engaging those affected by the human rights, the IHRI is judging these people worthy of involvement and respecting their perspective.

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<sup>3</sup> Allen Buchanan, “Human Rights and the Legitimacy of the International Legal Order,” *Legal Theory*, 14, no. 1 (2008): 39.

<sup>4</sup> Merry, 195-202.

<sup>5</sup> *The Sunday Telegraph*, October 24, 1993.

As I describe in greater detail in the final chapter, by giving positioned agents this voice in human rights interpretation, IHRIIs earn legitimacy.

### **3.1.2 Social movements and positioned agents**

Historically human rights have developed and proliferated in the setting of social movements. According to Neil Stammers,

Social movements have typically been defined as collective actors constituted by individuals who understand themselves to share some common interest and who also identify with one another, at least to some extent. Social movements are chiefly concerned with defending or changing at least some aspect of society and rely on mass mobilization, or the threat of it, as their main political sanction.<sup>6</sup>

For instance, in *Bury the Chains: The British Struggle to Abolish Slavery*, Adam Hochschild describes in detail one of the most successful episodes of human rights activism. Hochschild explains how, in just a few years, a small group of men organized and campaigned to take on the vested interests of state, church and business to end slavery. This group eventually forced parliament to hear the cries of the suffering slaves, "...it was the first time a large number of people became outraged, and stayed outraged for many years, over someone *else's* rights."<sup>7</sup>

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<sup>6</sup> Neil Stammers, "Social Movements and the Social Construction of Human Rights," *Human Rights Quarterly* 21, no. 4 (1999): 980-1008.

<sup>7</sup> Adam Hochschild, *Bury the Chains: Prophets and Rebels in the Fight to Free and Empire's Slaves* (New York: Houghton Mifflin, 2005), 5.

I use this tale as an epistemological exemplar of how the evolution of a social movement developed the content of human rights. Thomas Clarkson chronicled and spread information about a threat to human well-being that was both overlooked and not well-understood. Clarkson, a diligent defender of the abolitionist movement, addressed meetings, wrote pamphlets, collected signatures on petitions and compiled a wealth of evidence on the horrors of the slave trade. Newspapers took up the issue and it became widely discussed in London's debating societies.

I wish to highlight how the abolitionists employed tactics and tools that give this particular social movement special epistemic status. Clarkson traveled thousands of miles between 1787 and 1794, visiting ports such as Bristol, Liverpool, Whitehaven and London, gathering information. He built up a case against slavery by interviewing over 20,000 sailors and collecting artifacts to illustrate the brutality against slaves, such as thumb screws, handcuffs, leg-shackles, and branding irons used on the slave ships and on the plantations.

Clarkson was quite impressed with the first African trading ships he visited. They contained carefully crafted goods such as carved ivory and woven cloth and natural products such as palm oil and beeswax. Clarkson's appreciation for the considerable skill required by the producers of these items made intolerable to him the idea that such men might be subjected to slavery. The samples Clarkson bought the ships became important props for his public meetings.

Clarkson recognized the significance of these artifacts in bringing the activities of the slave trade closer to home. Hochschild notes,

The abolitionists succeeded because they mastered one challenge that still faces anyone who cares about social and economic justice: drawing connections between the near and the distant... in England itself there were no caravans of chained captives, no whip-wielding overseers on horseback stalking the rows of sugar cane. The abolitionists' first job was to make Britons understand what lay behind the sugar they ate, the tobacco they smoked, the coffee they drank.<sup>8</sup>

Clarkson observed how pictures and artifacts were able to influence public opinion and realized that the contents of his collection might add force to the message of his anti-slavery lectures. But these artifacts did more than make the British concretely aware of the horrors of the slave trade. These tools helped the British to situate the case of slavery within a broader moral context. For instance, Clarkson used the contents of his collection, the ivory, cloth and woods, to demonstrate the skill of the Africans. The fact that African peoples could create such distinctive objects not only suggested a possibility for an alternative humane trading system, but also provided evidence in favor of their equality with whites.

Consider a very different way in which tools were used to fit the slave trade into a broader moral context. Josiah Wedgwood, a leading pottery maker, designed and distributed thousands of medals, plates and plaques in an attempt to demonstrate to people his disgust with the slave trade. The words on the plaque read, 'Am I not a man and a brother?' Designed initially as a seal for closing envelopes, the image became a

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<sup>8</sup> Hochschild, 5-6.

logo for the abolitionists. It was used on publications, as well as on snuff boxes, tea sets and cufflinks. The passive view of Africans displayed on the seal suited the religious fervor and moral campaign of the white abolitionists. It engendered support based on helping the downtrodden, rather than appealing to equality and justice as Clarkson's approach did.

These examples illustrate an often-overlooked feature of social movements that is critical in the development of human rights norms. Clarkson and Wedgwood used artifacts in a way that helped the British make a connection between the slave trade and the moral principles that they already held. Clarkson brought attention to the skills of the Africans to highlight their equality in talent with whites. Wedgwood's image of the African connected white people to their dearly held religious principle to offer charity to the downtrodden. Without these tools people lacked the moral focus necessary to properly view the horrors of the Atlantic slave trade. By situating African peoples within a familiar moral context, Clarkson and Wedgwood brought the plight of slaves into better moral resolution.

These tools facilitated epistemic gains by allowing more people to situate slavery in a different part of moral space, connecting it to previously held moral commitments. Thus, Clarkson and others made an important first step in allowing the pain, agony and misfortune of the slave trade to be recognized *as* human rights violations. British soldiers, sent to the Caribbean to suppress slave revolts, returned to London with a true



picture of the evils of slavery. Slowly it became clear that the slaves were human beings and that these human beings were being treated in inhuman ways that had to be corrected.

This case serves to illustrate my claim that many key innovations in the development of human rights are constructed and articulated in the context of a social movement seeking to challenge extant relations and conditions. Social movements have had an important role to play in legitimizing alternative interpretations of human rights norms. They are able to validate the perspectives and identities of those oppressed by particular relations and structures. We need to give more attention to the ways in which social movements construct and deploy the human rights discourse. As Stammers notes, the twentieth century has witnessed the rise of movements such as the women's movement, the green movement, and indigenous peoples' movements. These movements all deploy rights discourses and in many cases have proliferated whole new sets of rights claims.

Social movements provide an overlooked but especially rich site for investigating the role of positioned agents in the development of human rights norms. The philosophical and legal literature on human rights has focused primarily on more formally structured organizations, while social movements have largely been left to sociologists. But there are a range of less formally structured organizations and nongovernmental organizations (NGOs) that exist within or alongside social

movements, or are connected to them in other ways. Social movements, through less formal dialogical processes, have played an important role in the development of human rights norms. I argue that not only can we learn from these processes, we should place emphasis on them in our theorizing of human rights.

However, we cannot accept all new rights claims simply because they arise as part of a social movement or associated NGO. Some practices, movements and institutions serve to sustain particular forms of power and inhibit increased understanding of the human condition, whereas others serve to interrogate, expand and develop further insights. There must be some criteria that these movements, and their participants, must meet in order to be legitimate interpreters of human rights.

### ***3.2 Criteria for genuine dialogue***

I submit that as human rights norms naturally develop in social movements, we should take advantage of this process and formalize it. “Dialogue” must be clarified as a philosophical concept and defined precisely. I argue that “dialogue” should be reserved for special conversations that have certain features, implement educational tools, are appropriately institutionally connected and informed by empirical evidence. I briefly list these criteria and then discuss them below.

(1) Features of dialogue: (i) inclusion, (ii) freedom of expression, (iii) the exchange of reasons, (iv) open agenda.

(2) Dialogue must offer tools to help reduce defensiveness, suspend assumptions, lower costs of interacting, and increase tolerance and respect for a wide diversity of opinions and points of view. First, dialogue should include the education of participants' preferences, so they can better explain and defend their positions and understand those of others. Second, dialogue should be made actionable so that it can be practiced more widely; we should ensure that the tools and methods of dialogue be reliably produced. The goal is to help dialogue blossom more fully in social settings.

(3) Dialogue must be appropriately institutional and connected to other institutions and dialogical processes. There are two distinct points here. First, there must be some mechanism through which these features can be accommodated at the local level; the precise form of the institutional structure is not crucial. Second, more structured institutions must support and facilitate dialogue at the local level.

(4) Dialogue should be informed by empirical evidence, where relevant.

### **3.2.1 The concept of dialogue**

#### *Critical Evaluation is the Core of Deliberation*

The cardinal features of the deliberative model have historically been equality, participation, and consensus. However, the heart of deliberation as I understand it is *critical evaluation*. While participants may not change their minds, they are willing to consider alternative views and appreciate their own views as open to revision. In particular, critical evaluation involves participating in the process of reasoning about

human rights. There has been considerable debate about the types of reasons that must be exchanged in such a forum.

*Public Reason, Human Rights and Public Sphere*

Dialogue occurs within public settings according to certain criteria. There are disagreements in the literature as to what that setting should look like. Discourse ethicists such as Seyla Benhabib and Jurgen Habermas locate the public sphere within civil society and the manifold associations that comprise it. They argue that it is important for the public sphere to be distinct from the apparatus of state and economy.

By contrast, John Rawls has a much more limited, “liberal” conception of the public sphere. According to Rawls, the public sphere is located not within associational life in civil society, but rather within a more restricted sphere including the legal sphere and its institutions. Within this sphere actors use public reason, a normative ideal meant to apply to the judiciary, political officials, the executive, members of political parties and citizens when they “speak in official forums” regarding issues involving the essentials of constitutional design and basic political justice.<sup>9</sup> According to Rawls, officials and citizens must be able to reach a reasoned and determinate resolution on nearly all issues within public reason alone.

The idea behind public reason is to provide a public basis of justification accessible to citizens in a pluralist society. Public reason involves, first, limitations on

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<sup>9</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 215-216.

the reasons invoked in a process of justification to those that appeal to political values or the values of a “political conception of justice” which involves a conception of society as a fair system of cooperation among free and equal citizens possessed of certain basic rights and liberties and entitled to certain basic opportunities.<sup>10</sup> In its strictest form public reason precludes appeals to particular comprehensive moral, religious, or philosophical doctrines. Second, it sets certain limits on the method of reasoning to “accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”<sup>11</sup>

I propose an expanded conception of the public domain that will require not only more relaxed, but also dynamic, standards for deliberation. Benhabib challenges the existence of a strict boundary between civil society and the domain of public reason. However, I am not concerned with whether there is a public-private boundary within democratic states, and if so, where it should be drawn. My concern is rather what kind of reasoning should apply in discussions regarding the interpretation of human rights norms. Is something like the limitations of public reason appropriate in such deliberative processes? The question is whether human rights deliberation must be public in the way Rawls understands the term in order to be accessible to citizens generally.

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<sup>10</sup> Rawls, 15-16.

<sup>11</sup> Rawls, 224-225.

I am sympathetic with the critique that public reason alone is often too thin for the resolution of political issues. For instance, Thomas McCarthy queries, “can individuals reasonably be expected to divorce their private and public beliefs” in such a way as not to appeal to the whole truth as they see it?<sup>12</sup> There may be reasons to do so, whether prudential or moral, but deliberative democrats express concerns that public reason is, as McCarthy suggests, overly restrictive. Indeed, if we want to include social movements and other associations and processes in the dialogue, public reason seems too restrictive.

David Reidy poses a related critique regarding the incompleteness of public reason.<sup>13</sup> First, he argues that there is little reason to think that the content of public reason will prove rich enough to support a rational ordering of competing values. He states,

Now, Rawls is surely right that citizens and officials ought to aim at reasoning their way to a political conception of justice within which political values are coherently ordered and consistently applied. But this is an ongoing process within which the abstract or general order of political values is forever shaped and reshaped in light of considered judgments regarding the concrete and particular order of political values with respect to a wide range of fundamental political issues.

Reidy notes that Rawls accepts the turn to non-public reasons when necessary, but that this is not squared with the remainder of what he says regarding the autonomy

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<sup>12</sup> Thomas McCarthy, “Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue,” *Ethics* 105 (1994): 44-63.

<sup>13</sup> David A. Reidy, “Rawls’s Wide View of Public Reason: Not Wide Enough,” *Res Publica* 6, no.1 (2000): 49-72.

and completeness of liberal public reason. Second, Reidy argues that citizens and officials will find public reason inconclusive in another sort of situation, that in which an issue cannot be resolved unless a background issue – with respect to which public reason is silent or inconclusive – is resolved. He offers as an example the capture of higher primates for the purposes of medical research, “Here, it seems, there is no avoiding the deepest aspects of the moral status question with respect to such animals. But liberal public reason by itself cannot resolve it, since it is indeterminate or incomplete in the matter.”<sup>14</sup> If his arguments are valid, as I believe they are, there is no obvious way to adopt a view wider than Rawls’ without revising or abandoning Rawls’ understanding of political autonomy and liberal legitimacy.

We ought to take a slightly alternative view of how a body politic achieves political autonomy capable of legitimately enforcing a constitutional legal order. But as Evan Charney notes, many discourse theorists, while purportedly offering an alternative to the restrictive limitations of public reason, often embrace principles of reciprocity that are just as restrictive. For instance, Benhabib’s conception “of articulating good reasons in public forces the individual to think of what would count as a good reason for all.”<sup>15</sup> It seems, then, that many of the most important associations comprising civil society will not meet the requirements of her model of discourse. Charney notes that many

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<sup>14</sup> Reidy, 69.

<sup>15</sup> As quoted in Evan Charney, “Political Liberalism, Deliberative Democracy, and the Public Sphere,” *The American Political Science Review* 92, no. 1 (1998), 102.

associations in civil society have hierarchical or authoritarian structures that do not meet Benhabib's deliberative ideals of absolute symmetry and equal opportunity to initiate discourse. For example, conversation in many places of worship, such as a synagogue or church, often involves deference to the judgment of individuals occupying certain roles, such as a rabbi or a priest. Additionally, Charney makes the insightful point that in such places of worship certain topics are denied a problematical status among discourse participants, for instance, whether a text is the word of God.<sup>16</sup> Regardless of whether Benhabib means to exclude such associations from the public conversation, we certainly do not want to make similar exclusions in public deliberations regarding human rights norms.

I propose an expanded conception of the public domain that requires not only more relaxed, but also dynamic, standards for deliberation. Rather than a strict distinction between private and public we should recognize a continuum of deliberative processes. Some reasoning will be private, or internal to an association, and as Benhabib notes, not subject to any deliberative principles. A select few will meet her demanding principles of reciprocity. For instance, in some cases, notably in certain constitutional courts, the reasons exchanged are public reasons in the strong sense. But many dialogues will lie somewhere in between, not fully meeting a principle of reciprocity but approaching it in various degrees. For example, different places of worship will meet

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<sup>16</sup> Charney, 103.



the criteria of inclusion and freedom of expression to varying degrees. Sometimes such demanding criteria will only set back debate. But this does not mean that these associations or movements or churches do not have something of value to contribute to the human rights debate. Thus, what we demand, by way of reason giving, will be highly variable depending on the context.

### **3.2.2 Features of dialogue**

In formalizing the concept of dialogue, we can put normative conditions on the deliberation. While many deliberative processes will not meet all of the criteria for dialogue set out by theorists such as Habermas and Benhabib, they should aspire to meet the features discussed below. My approach to these criteria is best understood in the context of my discussion of legitimacy in the first chapter. As I argued, legitimacy standards for IHRIIs must be provisional; higher standards become applicable as institutional capacity develops or functions change. This lesson can be applied in this context as a way of conceiving the conditions for human rights dialogue. Here I emphasize that standards for less formal deliberative processes will likewise change over time as dialogical skills and capacity are developed and normative standards for dialogue are refined. Some institutions and processes will more closely approximate these conditions than others.

*(i) Inclusion:* Dialogical processes must focus on removing barriers to participation and facilitating engagement. For instance, decision-makers should

proactively consult members of minorities to be affected by decisions and create opportunities for them to participate effectively in the process.

(ii) *Freedom of expression*: Ideally participants will approach the dialogue with an attitude of openness. They will be open to sharing their own perspective and learning about other worldviews. Obviously such openness demands a high degree of trust that participants will not coerce or manipulate and that the dialogue will proceed fairly.

(iii) *Exchange of reasons*: The reasons presented in dialogue will not always be “reasonably acceptable to all” in the vein of traditional public reason. Participants should not feel that they must bracket their fundamental beliefs or traditions in order to participate, as this may have the effect of impeding inclusion and understanding. However, participants are not free to offer any interest or preference as a reason. They should strive to give up self-interested reasoning and provide arguments that others will find compelling.

(iv) *Open Agenda*: Participants are free to raise new topics for discussion and revise current discussion topics. Additionally, features (i)-(iii), as well as the way they are understood and interpreted, must be open to revision as circumstances and participants change over time and space. I propose these criteria as a provisional starting point for distinguishing fair dialogue from other forms of discussion or ignorant abuses of power.

### 3.2.3 Dialogical tools

#### *Simulation Exercises as Preparation for Dialogical Encounters*

Understanding another's perspective is especially difficult when there are large gaps in culture, experience and history. Games and simulation exercises provide a way to help participants overcome these gaps. In "Signals, Symbols, and Vibes: An Exercise in Cross-cultural Interaction," Daniel J. Myers et al. develop an exercise to help students develop the skills needed to negotiate cross-cultural interaction.<sup>17</sup> The authors note that some students are so deeply immersed in their own cultural traditions that the elements of other cultures may not only seem foreign but even disgusting or amusing. Other students are open and prepared to respond to cultural differences but lack experience in cross-cultural settings. Hence, the authors developed an exercise in which two artificial cultures oppose and complement each other.

In their earnest efforts to interact with the other "game" culture, students learn that cultural differences exist, that they must try to discern the cultural patterns of the other in order to achieve a successful interaction, and that negative reactions resulting from minor cultural infractions can exacerbate interaction difficulties in ways that are

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<sup>17</sup> Daniel J. Myers et al, "Signals, Symbols, and Vibes: An Exercise in Cross-cultural Interaction," *Teaching Sociology*, 29, no. 1 (2001): 95-101.

difficult to overcome. At the same time, students who work hard to overcome the communications challenges appreciate the rewards of well-spent effort.<sup>18</sup>

These exercises help participants develop a number of tools that will facilitate fruitful dialogue. First, it helps students recognize when they hold stereotypes of foreign cultures and how they can best overcome them. This is an important skill to develop before one engages in an actual dialogue; once immersed in a conversation stereotypes will likely frame the conversation and so may be even more difficult to overcome.

Second, participants can gain a better understanding of the variety of cultures and the dynamic nature of norms. Finally, it provides students with a more concrete appreciation of the difficulties inherent in cross-cultural dialogue and the missteps that can be taken along the way. In the exercises lead by Myers et al., students remarked that they were made more sensitive to their own behavior and the atmosphere that they were producing in the interaction. They also noted the difficulties that they had in suspending their cultural norms and invoking the standards of the other culture. Through such exercises participants may become more receptive listeners, as they realize all that there is to learn from their interlocutors.

Of course there are important to recognize the limitations of such simulation exercises. For example, no matter how realistic the artificial cultures or the topic of

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<sup>18</sup> Daniel J. Myers et al, 96.

consideration for the exchange, participants will never be able to simulate the emotional stakes of a real-life exchange.<sup>19</sup> So while these tools have great value, they can never fully prepare participants for a real-life dialogical encounter.

### *Dialogical Tools Employed in the Field*

#### *(1) Community Meetings and Surveys*

Oregon's 1990 Health Plan, the nation's most far-reaching state level health care reform, developed an elaborate set of tools for comparatively evaluating costs and benefits of specific services with the intention of discontinuing services that did poorly. Through public hearings, community meetings and an opinion survey, the legislature and the Health Services Commission (HSC) sought to elicit directly from Oregonians the public values on which the ranking of health treatments would in part depend. We can optimize future dialogues by exploring tools that the HSC employed and understanding the ways in which the deliberations could have been improved.

While there were 12 public hearings statewide, such hearings are a fairly routine form of citizen participation and so primary emphasis has been on the more novel components of the program, the community meetings and telephone surveys. The year of deliberations no doubt helped participants come to a better sense of their own values,

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<sup>19</sup> I thank David Wong for raising this point.

shared or not.<sup>20</sup> But while the Oregon priority-setting exercise had some elements of a fruitful deliberative process, it lacked others. Rather than treating the process as an exemplar of local progressive deliberative experimentation, I focus on the ways in which two tools employed restricted full dialogue.

First, there were 47 community meetings as part of the prioritization process, with slightly over 1,000 participants. The goal of the meetings was to accumulate a list of core values for policy makers. The lists developed by the small groups were combined into a final list of 13 ranked community values. The community meetings failed to attract anything like a representative sample, either of Oregonians in general or of people most likely affected by the Medicaid reform.

Second, there was also a telephone survey in which participants were contacted through random-digit dialing. 1001 Oregonians responded to a 77-item questionnaire.<sup>21</sup> An important part of deliberation is *consultation* and in the health process many people were consulted. But while deliberation generally includes consultation, it is only one element of the process. The telephone surveys failed to give respondents the sufficient opportunity to deliberate. The primary problem with the telephone surveys is that they assume that participants have set ideas and that there is no cognitive benefit to

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<sup>20</sup> Amy Gutmann and Dennis Thompson, "Deliberating about Bioethics," *The Hastings Center Report* 27, no. 3 (1997), 38-41.

<sup>21</sup> Jack H. Nagel, "Combining Deliberation and Fair Representation in Community Health Decisions," *University of Pennsylvania Law Review* 140, no. 5 (1992), 1976.

interaction between participants or with experts. Overall, the Oregon health process lacked full participation and integration of knowledge. In the end, the HSC applied their own judgments of “reasonableness” and made significant changes to the results.

*(2) Listening and Avoidance of Politically Sensitive Topics*

There have been a handful of Jewish-Muslim dialogue groups in Los Angeles that developed after 9/11 and these groups exhibit more useful tools than those utilized in the Oregon health process. In these groups, the art of listening is vital. One of these dialogues between Muslims and Jews, *The Finding Our Common Humanity* email dialogue, consisted of five rounds in the spring of 2005.<sup>22</sup> Approximately 20 Jews and 20 Muslims participated with 76 messages being exchanged throughout the dialogue. Sparked by the dialogue, a meeting of about 70 people was held in late May, including about 20 of the dialogue participants. The final message of the dialogue, adopted by both groups together, lists a five point agenda for Southern California.

Another interfaith group, the West LA Cousins, makes an effort to avoid sensitive political topics. 18 women come together to find out what they share as women and to look for areas of spiritual commonality. They try not to emphasize contentious political issues, at least until they are very comfortable with each other and have established their common humanity. The Jewish-Muslim Dialogue Group of LA

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<sup>22</sup> <http://groupdialog.org/humanrights/>

also has a policy of not discussing contentious political issues.<sup>23</sup> While this is more of a listening and questioning group, and so not dialogical in all its elements, groups such as this can serve as important precursors to dialogue, along the lines of the games and exercises previously mentioned above.

### **3.2.4 Micro- and macro-deliberation and their interconnection**

In addition to embracing tools and other aids, another way to deepen and enrich dialogue is by focusing on small-scale, or micro-level, dialogues such as grassroots movements in addition to macro-level ones. Dialogue is more likely to take hold among a smaller discourse community that in many cases has commonalities of experience, tastes, or values. As Michael Froomkin notes in his discussion of Habermas, “Once inculcated in the practices of proper discourse, participants in these small communities can venture out and engage in dialogue with others from different backgrounds who have also undergone similar (re)formative experiences.”<sup>24</sup>

Macro-level and micro-level deliberations each have distinctive advantages and disadvantages. Macro-level dialogues occur in global and transnational organizations such as the Human Rights Committee and the European Court of Human Rights. While these dialogues are more likely to be inclusive and representative, the larger numbers of participants and lack of community cohesiveness is less likely to yield productive

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<sup>23</sup> <http://www.jewishmuslimdialogue.org/>

<sup>24</sup> Michael Froomkin, “Habermas@Discourse.net: Toward a Critical Theory of Cyberspace,” *Harvard Law Review* 116, no. 3 (2003): 766.



participation. Larger numbers of people increase the chances for manipulation of agendas and speech-making rather than deliberation. By contrast, micro-level dialogues, as John Parkinson points out, encourage community cohesion and a public more willing to participate in national politics. But decentralization fosters divisive identity formation, can blind us to local inequalities and is also frequently disconnected from the national power sources. There is a tension between the democratic, or representative, elements and the deliberative elements. The desire for quality deliberation pushes toward the micro path, where there can be small numbers of direct participants, whereas the desire for equal representation pushes toward the macro.

By focusing on both macro- and micro-deliberation, we profit from their respective benefits and overcome the problems of each.<sup>25</sup> There is a time and a place for both types of deliberative processes. The most promising path forward is to support both and encourage their connection, as Parkinson argues. But in order for this to be successful, we must support coordination and communication between various deliberative processes, each of which may have their unique deliberative style or patterns, as well as encourage dialogue between experts and ordinary laypersons. This will demand more understanding of institutional dynamics and increased institutional theorizing. In Chapter 4 I begin the process of theorizing with respect to one institution, the European Court of Human Rights (ECHR).

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<sup>25</sup> John Parkinson, "Localism and Deliberative Democracy," *The Good Society* 16, no. 1, 2007.

As I will argue in the next chapter, one way this connection between local and macro can be made, at least in Europe, is via the ECHR. In fact, I maintain that this should be one of the Court's legitimizing roles – to connect various deliberative publics so that dialogue can be expanded and made effectual. This function as a “connective” institution means the ECHR intentionally focuses attention on people at the local level in a way they would not normally have, thereby offering one way to overcome the dilemma of deliberation or representation. In this manner the ECHR defends and protects human rights in a different way, but a way that promises enhanced legitimacy.

### **3.2.5 Deliberation and evidence**

The evidence pertinent to deliberation depends on the nature of the subject matter, in our case, human rights. Evidence is especially important since caring and deep commitment, especially with regard to fundamental norms such as human rights, can make us vulnerable to error.<sup>26</sup> There are different types of evidence that may be relevant in the case of human rights. It is important to consider what kinds of evidence will be admitted in any particular deliberative process and what forms will be excluded.

An identifying feature of scientific evidence is the way in which the evidence is created or gathered and the way in which it is interpreted. Sometimes it will be historical, sometimes current. Sometimes this information will be scientifically general

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<sup>26</sup> Derek Edyvane, “A Back-Turning Harmony: Conflict as a Source of Political Community, *Res Publica* 11, no. 1 (2005): 36.

and sometimes it will be locally idiosyncratic and certain groups, e.g., women, will have privileged access to the information. Sometimes it will be with regard to facts and sometimes with regard to normative considerations, such as the values people actually hold.

But we should also consider hearsay or “colloquial” evidence as important to deliberation. For example, a description or recollection of a personal encounter may be just as relevant to deliberation. Where more robust scientific data is unavailable or incomplete, we can profitably make use of personal experience, as Ms. Cheng did when she made the story of her harassment public to bring attention to women’s inheritance rights. By focusing on what evidence is available and its quality, we can expose areas in which further research is warranted.

### **3.2.6 Dialogue and inequalities**

#### *Overlooking the Political Dimension of Dialogue*

My emphasis on dialogue requires special attention to various inequalities that may disrupt or restrict it. Unfortunately Seyla Benhabib fails to appreciate the extent of inequalities and their effect on dialogical quality. I should first clarify that I am very much in agreement with Benhabib’s prime arguments in her book *The Claims of Culture*. First, I agree with her critique of cultural holism according to which cultures form unified wholes. On this view, which Benhabib attributes to Will Kymlicka, among others, cultures are discretely bounded entities, each of which covers a specific

population. By contrast, Benhabib argues that cultures are internally contested, with jagged and ill-defined borders. Second, given her dynamic model of culture and her abandonment of the claim that cultural identities are incommensurable, Benhabib opens up the possibility for intercultural dialogue and understanding. Not only are there resources within cultures for facilitating cross-cultural dialogue, there are possibilities for modification and adoption of new beliefs and practices.

However, Max Pensky argues that Benhabib overlooks the important relation between the largely secular majority culture in Western-style democracies and the various forms of traditional cultures that are being assimilated into them. Pensky writes,

By minimizing this state of affairs, Benhabib's argument risks theorizing the wrong problem: not 'intercultural dialogue' between cultures construed as rough equals insofar as all cultures are equally dynamic, but the ongoing political struggle between a majority culture weighted toward procedures and principles, and a finite number of minority cultures, all of which are to differing degrees struggling with the anomic effects of an exceptionless modernization process – all of which, in other words, are on the run.<sup>27</sup>

While I agree with Benhabib's critique of cultural holism, and her nuanced understanding of cultures, like Pensky I fear that her view is not quite nuanced enough.

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<sup>27</sup> Max Pensky, "Comments on Seyla Benhabib *The Claims of Culture*," *Constellations* 11, no. 2, 2004.

For instance, consider the details of her model of cultural identity formation in the democratic sphere. Her view involves three mid-level principles to structure how cultural politics can be legitimately pursued: egalitarian reciprocity, voluntary self-ascription and freedom of exit and association. *Egalitarian reciprocity* stipulates that a liberal conception of equal freedoms must trump the special claims of cultural identity whenever the two cannot be reconciled; *voluntary self-ascription* demands that states not ascribe cultural group membership to an individual without her consent; *freedom of exit and association* must be unrestricted for cultural membership to be tolerated. Benhabib appears to view all cultures as dynamic and contested in the same way and so similarly subject to the three principles. Pinsky makes the point that because of this, Benhabib overlooks the political dimension of dialogue. Consider her second principle regarding voluntary self-ascription of cultural membership. Pinsky notes,

But surely the very idea of voluntary self-ascription has its principle significance on the level of the attitudes of members themselves, who would be required, on these terms, to reconceptualize their cultural membership in terms of voluntary choice. It is not clear whether any member of a cultural minority could possibly feel this way without leading to very peculiar results: persons ought to be free not only to modify,

abandon or supplement their core commitments at their own discretion; they ought also to be able to reject their membership in favor of another.<sup>28</sup>

Thus, we must be sensitive to an asymmetry between majority and minority in a way that Benhabib is not. While Benhabib critiques others for holding a form of cultural holism, it seems that her view is subject to her own critique. All cultures are subject to her three mid-level principles in the same way. Yet not all cultures are similarly dynamic and contested in the same way and so will not be subject to the same dialogical features. For instance, some cultures are less holistic than others and have access to more and less dynamic cultural resources to make use of during dialogue.

A second, and related, point regards what we can expect from a dialogue between the majority and minority cultures. Pensky notes that it is unrealistic to imagine that in this kind of asymmetric relation, members of minority cultures will actually view their commitments as open to contestation in the course of normative discourse with others not sharing them. While this is an empirical question that goes unsupported, it seems plausible that certain core commitments will be off-limits in deliberation between the majority and minority cultures, despite the fact that it is fair game within the boundaries of the minority cultures themselves.

For example, consider the Fijian customary practice of bulubulu as discussed by Merry. In bulubulu, the person who committed an offense apologizes and offers a

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<sup>28</sup> Pensky, 264.

whale's tooth (*tabua*) and a gift and asks for forgiveness. The offended person is under some pressure to accept the apology and make peace with the aggressor.<sup>29</sup> Merry discusses a debate over this practice at the January 2002 CEDAW hearings. A Fiji country report to CEDAW complained about the practice for rape cases in court, yet the CEDAW committee members objected to the very use of this custom. I maintain that the committee members repeated request to eliminate the custom is an example of a topic that is best considered off-limits in a debate, such as this one, between majority and minority cultures. Bulubulu is central to Fijian village life,

When I interviewed the assistant minister for women a few weeks later in Suva, the capital of Fiji, she said that the CEDAW Committee didn't understand bulubulu and how important it is, and she noted that there had already been legal decisions that defined it as inappropriate for rape... The custom of bulubulu, she said, is to encourage people not to hold grudges. Eliminating bulubulu was impossible since it was the basis of village life. The custom was used for a wide range of conflicts and disputes as well as for arranging marriages. Without it, the village could not function.<sup>30</sup>

The CEDAW committee members did not understand the centrality of this custom to Fijian life. However, those positioned agents, including women, who did understand bulubulu had been engaging in open debate internal to the culture and legal

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<sup>29</sup> Merry, 113-114.

<sup>30</sup> Merry, 116.

decisions had defined it as inappropriate for rape. While discussions of abolishing the practice are appropriate for those within the culture, given their understanding of its richness and importance, such deliberations are not appropriate in the context of a CEDAW meeting.

Amartya Sen is another human rights theorist who fails to address the important issue of power relations and inequalities. Sen correctly highlights the significance of fruitful debate and open and informed scrutiny in the process of identifying those freedoms that should be counted as part of the evaluative system of human rights. However, he is naively optimistic about the possibility of “unobstructed public discussion,” by which he means discussion that is open to information and accessible across barriers. Given that this public scrutiny appears to be the cornerstone of Sen’s approach, curiously little is said about how such debate should proceed fairly. What kind of information must be made available and how should it be made accessible to all in a fair manner?

#### *Preserving Dialogue*

The upshot of Pensky’s argument is that there may be some instances in which dialogue should be abandoned in favor of compromise and fair bargaining. While I agree with Pensky’s critique of Benhabib, I disagree with his conclusion. Rather than abandoning dialogue in such situations, we should recognize and be sensitive to the inequalities in power and temper our expectations. Here one might object that in a



society structured by deep social and economic inequalities, even formally inclusive deliberative processes enact structural biases in which more powerful and socially advantaged actors have greater access to the deliberative process and are able to dominate the proceedings with their perspectives.<sup>31</sup> If we participate in these processes, do we not confer undeserved legitimacy on them and fail to speak for those who remain outsiders?

While it is important to highlight the way that structural inequalities limit access of some people, the responsible citizen “should engage and argue with those who design and implement these settings to persuade them that they should devote thought and resources to activities that will make them more inclusive and representative of all the interests and perspectives potentially affected by the outcome of policy decisions.”<sup>32</sup> We should support and create alternative deliberative settings in which basic social and economic structures can be examined.

My approach is sensitive to inequalities in at least two ways. First I focus considerable attention on social movements, as these tend to be outside of, and frequently opposed to, ongoing settings of official policy discussion. This critical element of deliberation is highlighted in James Bohman’s deliberative theory.<sup>33</sup> He

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<sup>31</sup> Iris Marion Young, “Activist Challenges to Deliberative Democracy,” *Political Theory* 29, no. 5 (2001): 670-690.

<sup>32</sup> Young, 681.

<sup>33</sup> James Bohman, *Public Deliberation* (Cambridge: MIT Press, 1996), especially chapter 3.

argues that we should work to expose the exclusions and constraints in supposed fair processes. Second, I do not insist on a highly rigorous and rigid list of criteria that all deliberative processes should meet. The criteria I describe above set a rough guideline for dialogue. Each process will be unique; some involving calm, reasoned disagreement while others will be more rowdy, disorderly and contentious. We should welcome new conceptualizations of the deliberative process.

The criteria I offer for dialogue will be more or less significant in different contexts. We should have different deliberative expectations with regard to different deliberative processes. For example, consider constitutional courts and grassroots movements. In many cases, constitutional courts face demanding deliberative expectations. Constitutional courts must provide reasoned justifications for their decisions and have a careful written record of their deliberations. In contrast to what we expect from courts, there is less demand by way of reason giving of other democratic institutions. We do not generally expect rationales from elected bureaucrats. And informal grassroots discussions will have more face-to-face interaction.

For this reason, I propose that future work on dialogue, while focusing on the features mentioned above, should emphasize the importance of tools, methods, and identification of best dialogical practices. This is because there is not much we can say about dialogue in the abstract – the conditions for dialogue will be dynamic and the content of the deliberation will vary depending on the context.

Here one might object that the social conditions of those who are powerless and oppressed must be improved before they can fairly participate in cross-cultural dialogue. While this would be ideal, in practice it would only make conditions worse for those who are oppressed, as they would face the additional burden of exclusion from dialogue. But we can try to recognize the inequalities and address them as best we can. For instance, we should focus on creating conditions in which the oppressed have a voice and are not threatened.

For example, one way the ECHR might make such a connection to the less powerful is through what Sally Engle Merry refers to as “intermediaries,” such as activists, national political elites, human rights lawyers, feminist activists and movement leaders, social workers and academics. These intermediaries “translate” global ideas into local situations and retranslate local ideas into global frameworks.<sup>34</sup> The coordination of dialogues will demand closer scrutiny of intermediaries, as well as the development of standards for when the work of intermediaries should be supported. Merry discusses a number of problems that intermediaries face in their work. For instance, while human rights ideas must be adapted to local circumstances to become a part of local rights

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<sup>34</sup> “Translation requires three kinds of changes in the form and presentation of human rights ideas and institutions. First, they need to be framed in images, symbols, narratives and religious or secular language that resonate with the local community... Second, they need to be tailored to the structural conditions of the place where they are deployed, including its economic, political, and kinship systems... Third, the target population needs to be defined. Victims of domestic violence in the United States are typically intimate partners, not necessarily married or heterosexual, whereas in China they are typically members of an extended household of several generations but not necessarily in intimate sexual relationships.” Merry, 220.

consciousness, NGOs and social service programs, in particular, are often dependent on international foundations or government for funding and so must also present their work in a way that will reach a wider audience. The pressure for funding and publicity may counter the most effective approaches to translation in a given locale.

I advocate for increased investigation into the appropriate relationship between human rights norms and their institutionalization in different locales. While institutionalization can sometimes be a hindrance to fair interpretation, I focus on how it can serve to legitimate human rights. Part of what is needed is further empirical research into the effects of institutionalizing human rights, along the lines of Merry's work. For example, in what ways does institutionalization help to sustain or challenge the status quo and relations of power? Literature in the disciplines of politics and sociology abound with analyses of the effects of institutionalization, for example, in respect of political parties, interest groups and social movements.<sup>35</sup> I propose that research along these lines be pursued with regard to the institutionalization of human rights. This is important so institutions like the ECHR and responsible citizens can make decisions as to which movements, associations and organizations to support and which to attempt to reform to respond to the needs of those effectively excluded.

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<sup>35</sup> Several essays in Russell J. Dalton & Manfred Kuechler eds., *Challenging the Political Order: New Social and Political Movements in Western Democracies*, (New York: Oxford University Press, 1990).

### 3.2.7 Evaluating dialogue

*The Aim of Deliberation is not Consensus*

The pure deliberative model as discussed by Habermas in *Between Facts and Norms* assumes that given sufficient time and goodwill, it is always possible to reach a consensus.<sup>36</sup> However, my approach does not focus on consensus for a number of reasons. First, the cases of dialogue that I discuss are for the most part approximations. Dialogue should strive to meet the conditions of genuine dialogue, but in many cases this is not only not feasible, but may not be contextually appropriate. The nature of dialogue and its output will vary from association to association and from state to state, reflecting what different participants bring to the table and how they interact with each other.

Second, we should note that even as an ideal or abstraction consensus on my view will not, in many of cases, be possible. For instance, take the example of a proposed law on compulsory wearing of protective headwear on building sites.<sup>37</sup> A consensus might emerge that the benefits of savings to the health services outweigh the interference in individual liberty. But where members of the Sikh community are included in the deliberation, consensus is not possible. It is a fundamental tenet of the Sikh faith that men's headwear should consist exclusively of a turban. Many people hold

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<sup>36</sup> Jurgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1996, translated by William Rehg).

<sup>37</sup> This example is taken from Steven Wheatley, "Deliberative Democracy and Minorities," 14, no. 3 *European Journal of International Law* (2003): 507-527.

certain core beliefs which are not only non-negotiable but which frame their view on particular issues. They should not have to reject that core part of their identity to meet an expectation of consensus. I want to encourage not only analytical deliberation but also discourse that includes personal narratives, rhetoric, story-telling and intuitive argument.

### *Evaluating Deliberation*

We cannot expect to evaluate a deliberative process in the same way that we would assess the effectiveness of a pharmaceutical product. First, we cannot expect a clear method for judging a deliberative process. However, we do know that a primary goal of dialogue is increased normative clarity and so this can be used as one method for evaluation. For example, some time after a dialogue, we might measure the degree to which the dialogue encouraged social integration by assessing how strongly the former participants affirm and embrace the human rights specification. This commitment might be measured along a number of dimensions. Does the community embrace the specification of the human right without formal enforcement? Do former participants use the specification in everyday moral reasoning? How successful are former participants at applying the principle to new cases?

We must be somewhat modest in what we can expect from the deliberative process. In any particular process, the deliberation does not necessarily need to meet all criteria or run smoothly. We need to recall what any given process is after and focus on

the particular issue at hand, i.e., in any one dialogue we do not need to solve all conflicts or have participation by all parties.

Since my interest in deliberation is normative – connected to the enhancement of legitimacy – I do not spend time on the operational level. While this is important, this should be left to international relations theorists, social psychologists and institutional theorists. Thus, I am not in a position to respond to critiques that demand empirical investigation. For instance, by engaging in deliberation, citizens acknowledge the possibility that they may change their preferences. There is much debate about whether and under what conditions deliberation changes agents' preferences. Insofar as I assume that deliberation can change a core actor's preferences, I have a stake in such a debate. Practical questions like this one are significant and those interested in deliberation should support such investigations. But for my purposes here I focus primarily on the realm of political theory.

### **3.2.8 What to expect from dialogue**

#### *Human Rights are Dynamic*

Because cultures are dynamic, the various specifications and interpretations of human rights must be dynamic as well. I have argued that this arises from a fact about the peculiar nature of cultures, namely, that they are dynamic over time and space. Thus our claims about human rights must be qualified, or relativized to particular groups and cultures as they are in a certain point in time. Dialogue is not aimed at a

determinate, uniform specification of human rights for all times and spaces. For example, a dialogue in Hong Kong about women's inheritance rights will not necessarily have a clear impact on the specification of gender rights in the city of Atlanta in the United States. Most obviously, the standard threats facing women in these two regions are not the same. But there are also unique features of the different social contexts that interact with human rights and prevent an easy generalization in interpretation.

*Human Rights Claims are Defeasible*

We have limited epistemic access to the changing nature of cultures. Claims about human rights must be conceived of as defeasible given the facts of emerging empirical data and the progression of philosophical maturity, both of which are starting to gain recognition. But perhaps less obviously, and more importantly, is the defeasibility that results from increased historical understanding and cultural self-reflectiveness. Our claims about human rights are defeasible because our epistemic access will be refined as we gain increased empirical, philosophical, cultural and historical understanding, especially through the dialogical approach I defend. By defeasibility I mean that we must always recognize that there is a possibility that we may have to retract or modify our claims about human rights upon further consideration of the cultural and historical context. For instance, the balance between security and civil liberties shifted in the United States following the September 11<sup>th</sup>



terrorist attack. Now, almost eight years later, the US may decide that the appropriate weighting of these rights needs to be revisited, not necessarily because the culture has shifted but because this is a difficult balance to reach.

### **3.3 Objections to my dialogical approach**

#### **3.3.1 Theoretical objections**

*Is human rights interpretation even a subject amenable to deliberation? Is there a good case for deliberation with regard to human rights?*

There are a number of reasons why human rights is a subject amenable to dialogue. First, evidence from more than one expert discipline is involved, and the evidence is in many cases controversial. Second, stakeholders often have conflicting interests and the deliberation involves controversial issues of equity and fairness. Third, wide public ownership of human rights is desired, not only because they are such important norms but because they have the potential to cause significant cultural rifts.

*Ordinary citizens are not elected or accountable, so why should we leave the dialogue to them?*

Rather than debating the relative merits of experts versus direct democracy, I propose that we follow Jack Nagel's approach of assessing the desirability of any particular process of participation.<sup>38</sup> As mentioned above, particular cases of dialogue

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<sup>38</sup> Jack H. Nagel, "Combining Deliberation and Fair Representation in Community Health Decisions," *University of Pennsylvania Law Review* 140, no. 5 (2002): 1965-85.

should follow best practices, utilize available tools and meet certain criteria. Insofar as they do, we should offer our support; while participants are not electorally accountable, they do participate in an exchange of reasons and display a willingness to subject their positions to revision.

*How can my approach allow full scope for dialogue and cultural mediation while ensuring the integrity of the universal values that are the input of the dialogue?*

First, rather than viewing different inflections as subverting the critical thrust of universal norms, in many cases the diversity of inflections indicates the need for further dialogue. For example, as mentioned in Chapter 1, we might look at Iran's complaints to the HRC not as subverting the right to be free from cruel, inhuman or degrading punishment but as an opportunity to investigate the specifications of this right. Second, dialogue focuses on respecting other cultures, which involves learning about them and exercising one's imagination. We should find ourselves, over time, better able to appreciate cultural differences and assess whether or not a particular interpretation is authentic to the culture. Finally, as Parekh argues, it is important not to confuse a culture's values with its particular institutional mechanisms; just because a culture has different deliberative institutions does not imply that it fails to comply with human rights norms.<sup>39</sup>

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<sup>39</sup> Bhikhu Parekh, "Non-ethnocentric universalism" in Tim Dunne and Nicholas J. Wheeler, eds. *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999).

### 3.3.2 Cultural objections

*How do you draw the line between imposing liberal values, via the conditions for dialogue, and allowing for cultural variation?*

I have argued that we should focus less on imposing (liberal) conditions for dialogue and more on useful tools and methods for dialogue. Other than this, there is not much we can say in the abstract about drawing a line; this is something that must be examined on a case-by-case basis.

*Non-westerns such as Liu Huaqiu argue that they are being measured by Western standards which are at odds with views based on religious or communitarian viewpoints that do not privilege autonomy, choice and individual interests to the same extent as Westerners.*

Angle makes an insightful response to this objection. Rather than try to step outside of our worldview, we should embrace the fact that we all have unique positions that can serve to enlighten the dialogue. We cannot – and need not – escape our traditions and value systems. After all, cross-cultural dialogue must begin from somewhere.<sup>40</sup> In addition, his book as a whole is a testament to what cross-cultural inquiry can achieve. His detailed intellectual history of Chinese rights discourse exemplifies how China has developed its own distinctive discourse that should be viewed as a creative achievement.

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<sup>40</sup> Stephen Angle, *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* (New York: Cambridge University Press, 2002), 70-73.

However, Liu may continue to argue that my conditions for dialogue favor autonomy and individual choice more than traditional communitarian viewpoints. The force of this objection relies on the empirical assumption that traditional communitarian cultures are monolithic. The idea is that all members of a communitarian culture, qua a people, will find my dialogical conditions too focused on autonomy. However, I have argued that cultures are not monolithic and univocal and so it is inaccurate to assume that there is some kind of group “voice” that represents the traditional communitarian ethic. Taking a different tack, Liu may press the point that while the traditional communitarian culture is not a monolith, most members of this culture, qua persons, nevertheless hold traditional communitarian values. Yet insofar as Liu has now shifted the discussion to an emphasis on the beliefs and values of persons, he must agree to the significance of respecting individual autonomy and choice.

### **3.3.3 Pragmatic objections**

*Angle makes a distinction between engagement and accommodation. He argues that engagement might lead to mutual learning and throughout his book engages with positions put forward by contemporary Western and Chinese Rights theorists.<sup>41</sup> But isn't engagement in many cases impossible?*

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<sup>41</sup> Angle, 222-249.

Angle calls active efforts to influence the values of others engagement.<sup>42</sup> He himself acknowledges that when the conceptual distance between moralities is too great, only limited kinds of engagement are possible. Thus, engagement should be an aspiration of dialogue – we should not expect full engagement for each participant in each dialogical encounter. We must keep in mind the manner and aims of dialogue. I have argued that dialogue need not meet overly strict requirements of public reasoning and need not aim for complete intercultural understanding. Second, I have suggested that there are certain tools that can help to increase the likelihood of achieving engagement, such as simulation games and exercises. After all, as David Wong argues, serious disagreement is generally not the result of significant interpersonal differences among ultimate moral principles. Rather, even those who disagree on divisive moral debates generally agree on substantive moral principles and disagree over the applicability or weighting of commonly held principles.<sup>43</sup> Insofar as values are not drawn from “moral universes that are alien to the other” we can put more stock in the simulation games and exercises.

Finally, we should keep in mind that dialogue is an ongoing process and that sometimes it will take time for it to bear fruit. For instance, many minority groups have experienced a history of unfairness and oppression, and it may be hard for members of

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<sup>42</sup> Angle, 65.

<sup>43</sup> David B. Wong, *Natural Moralities: A Defense of Pluralistic Relativism* (Oxford University Press, 2006), Chapter Nine.

these groups to be trusting and entirely open during dialogue. But hopefully through increased attention on dialogue and experiences in actual dialogical encounters, these barriers will become muted. To take another example, Iris Young describes how able-bodied people polled in Oregon felt that being disabled was worse than death, while disabled people did not agree. Young concludes that the projection of one's prior prejudices about the other fundamentally closes off any genuine dialogue, through which participants could truly learn each others' perspectives.<sup>44</sup> While such prejudices may at first close off dialogue, through additional dialogical encounters the falsity of these prejudices will be exposed, allowing for more substantive deliberation in the future. Dialogical understanding must occur gradually in incremental stages.

*For dialogue to succeed all participants must keep an open mind, be willing to listen and learn, and entertain the possibility that their views may be revised. But sometimes our commitments are so different that the dialogue breaks down, or the participants are no longer committed to dialogue.*

Whether or not dialogue can overcome these barriers depends on the context. If the deliberation has a longer history and the participants are more intimately involved, it is more likely that these barriers will be surmountable. But sometimes they are not surmountable in a short period of time. But we must recall that our commitments,

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<sup>44</sup> Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought," *Constellations* 3 (1997): 343-44.

beliefs and values are not fixed in stone – they will change over time; dialogue is an ongoing creative process. Sometimes it will stall, sometimes for months, and perhaps even for decades, but the dynamic is always changing over time. Fresh perspectives join the conversation and so there is always the possibility that deliberative barriers will be overcome.

*Carried out in an unstructured fashion, intensified voluntary participation can prove antithetical to our other goals; it takes too much time and money and it will ultimately obstruct democracy.*

First, as I have enumerated, there will be some structure and tools in place to overcome limitations of time, opportunity, energy, and skill which limit one's capacity to understand another's perspective. However, these cannot all be overcome by simulation games and actual dialogical encounters. Such limitations are encountered in political life all the time, where the scarcity of resources constrains decision-making. All we can focus on is overcoming these limitations as much as possible. Some groups will have an easier time of it than others, for example, minority groups who more regularly have contact with the majority group. But this is not a problem unique to human rights or my dialogical approach. Second, internal to the human rights realm, we will have to

make evaluative judgments about which dialogical processes we will support and which we will not. This will involve, among other considerations, a cost-benefit analysis.<sup>45</sup>

*Many of the most desirable potential participants have neither the opportunity nor perhaps the inclination to engage in dialogue.*<sup>46</sup>

While this practical objection does not defeat my normative argument, it would certainly be preferable if the possibility of actual dialogue were not precluded from the start. This objection stems from an observation and an intuition: people do not have the opportunity to engage in dialogue now, and even if presented with the opportunity, may not have the desire to participate.

While we do not see widespread engagement in dialogue, this may be due to the fact that we have not put forth a strong effort to encourage dialogue. Until quite recently, dialogue was relegated to the theoretical realm of academia. Yet there is no reason to think that widespread dialogical processes will not be available under appropriate conditions. We must make the improvement of conditions under which participation is possible a social priority. One promising direction for improving accessibility to dialogue is new technologies such as the Internet. The Internet holds the possibility of reducing barriers to dialogical participation. Most obviously it reduces geographical barriers, eliminating the need for costly and time-consuming

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<sup>45</sup> See Jack H. Nagel for more on this, p. 1967. This is a broad topic that is beyond the scope of this work.

<sup>46</sup> I thank David Wong for raising this objection.



transportation to potentially distant sites. But the Internet may also reduce some of the barriers to full participation such as racial, gender and class differences. The Internet de-emphasizes the body as a characteristic for social evaluation, hiding inequalities that may be apparent in person behind a computer screen. The basis of dialogue is more likely to rest on the strength of argument as opposed to economic or physical power.<sup>47</sup>

Second, consider the intuition that even if the conditions are ripe for dialogue, many people lack the desire to participate. Again, there is no reason to think that motivation to participate cannot be cultivated under the appropriate conditions. We have not endeavored upon the empirical exercise of identifying conditions that would make dialogue more attractive. Another way to put the point is that we have not cultivated a “culture of dialogue” by which I mean an environment in which people have the requisite skills and desires for dialogical participation.

In order to cultivate the skills that are necessary for dialogue, I have mentioned above the types of tools and exercises that can aid in dialogue. For example, many diversity initiatives have been developed on college campuses to teach about tolerance and structural inequalities in society. Studies focusing on the impact of diversity initiatives on student outcomes suggest that participation in such programs is linked with positive socio-cognitive development and commitment to civic and racial

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<sup>47</sup> For an argument that the Internet Engineering Task Force (IETF) is a concrete example of a rulemaking process that meets Habermas’s demanding procedural conditions for a discourse capable of legitimating its outcomes, see Michael Froomkin, “Habermas@Discourse.net: Toward a Critical Theory of Cyberspace.”

engagement. Consider a study by Ximena Zuniga et al. that examines whether college students' participation in diversity-related experiences instills motivation to take actions for a diverse democracy.<sup>48</sup> Results suggest that interactions with diverse peers, participation in diversity-related courses, and activities inside and outside residence halls inspire students to challenge their own prejudices.

J.A. Banks has argued that the role of education in the 21st century is to prepare students "to know, to care, and to act in ways that will develop and foster a democratic and just society" and to "develop a commitment to personal, social, and civic action, as well as the knowledge and skills needed to participate in effective civic action."<sup>49</sup>

### **3.3.4 Looking ahead**

In the final chapter I focus on the European Court of Human Rights (ECHR) as a case study illustrating the application of my dialogical approach to one particular "disaggregated sphere of authority," as James Rosenau refers to them. The European human rights regime is an appropriate case study for my purposes because it has the largest case law from which we can discuss conflicts and disagreements regarding the interpretation of human rights norms. Like most other IHRI, the ECHR has transformed considerably over time, and so it provides an in-depth analysis of the IHRI

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<sup>48</sup> Zuniga, Ximena, Williams, Elizabeth A. Berger, Joseph B. "Action-Oriented Democratic Outcomes: The Impact of Student Involvement With Campus Diversity," *Journal of College Student Development* 46, no. 6, (2005), 660-678.

<sup>49</sup> J.A. Banks, *An introduction to multicultural education* (3rd ed.). (Boston: Allyn & Bacon, 2002), 32.

dynamism that I mentioned above. For instance, it has not always been an effective legal instrument. For its first twenty years it was, in the words of Jochen Frowein, a Vice President of the Commission, 'a sleeping beauty, frequently referred to but without much impact.'<sup>50</sup> Janis et al. contrast the ECHR with the International Court of Justice (ICJ). They attribute the increasing caseload of the ECHR to the access of individual claimants. While the caseload of the ICJ has remained static, that of the ECHR continues to grow rapidly.<sup>51</sup>

I discuss the case law on the issue of transsexuals, focusing on the most critical cases that have come before the ECHR. I argue that the ECHR gains legitimacy when it explicitly promotes a local environment of dialogue. It must tie deliberation at the national level to dialogue that takes place at the local level among grassroots groups, communities, social movements and NGOs. I give examples of these deliberative connections in an effort to pave the way for a more elaborate normative institutional proposal.

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<sup>50</sup> Jochen Frowein, "European Integration Through Fundamental Rights," 18, no. 5 *Journal of Law Reform* (1984).

<sup>51</sup> Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law: Text and Materials* (Oxford: Oxford University Press, 1995), 70.

## 4 The European Court of Human Rights, Dialogue and Legitimacy

The European Court of Human Rights (hereafter “the Court”) is the judicial enforcement organ of the European Convention on Human Rights. The Court takes a teleological approach to the interpretation of the Convention, progressively incorporating changing European social and legal developments. When these developments or practices reach a “European consensus” the Court raises the standard of rights-protection for all state parties.

My argument in this chapter is two-pronged. First, I argue that the consensus doctrine, as employed by the Court, is empirically and normatively suspect and raises questions about the Court’s normative legitimacy. I argue for the inadequacy of the consensus doctrine by examining the Court’s case law on the issue of transsexualism. By closely examining key cases, it is evident that the Court missed opportunities to protect the rights of transsexuals by appealing to a vague and ambiguous notion of a European consensus. Reliance on the consensus doctrine raises the morally troubling possibility that decisions may be overridden by a European consensus in retreat from the protection of human rights. The failure to articulate the scope and function of the consensus doctrine, and defend it against the use of alternative interpretive tools, threatens the Court’s authority as the arbiter of European human rights.

Second, this examination of the consensus doctrine raises the larger question of what the Court's role in human rights interpretation *ought* to be. While the Court currently has a substantive role in interpretation, I propose an alternative procedural role for the Court. I argue that one step that the Court can take to legitimately fulfill its function of supporting European human rights is to encourage, support and assess critical moral and cultural investigation through dialogue. By assuming the role of a "dialogical adjudicator," the Court seeks evidence that nations have appropriately and fairly supported dialogue and so warrant deference by the Court. I conclude by proposing ways that the Court can best support local dialogues through regional, national and sub-national institutions.

## ***4.1 Transsexualism, dialogue and legitimacy***

### **4.1.1 Transsexualism, identity and the Court**

Some individuals grow up with a strong and persistent cross-gender identification. From an early age, these individuals are certain that they belong to the sex opposite to that which they were assigned at birth on anatomical grounds. This condition is now medically recognized and known as gender dysphoria syndrome or gender identity disorder or what I will call "transsexualism" and can signify a move either from male-to-female or, less commonly, female-to-male.<sup>1</sup>

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<sup>1</sup> Robert Reed, "Transsexuals and European Human Rights Law," in *Sexuality and Human Rights: A Global Overview*, Helmut Graupner and Phillip Tahmindjis, eds. (NY: Haworth Press, 2005).

If the condition is diagnosed and therapy sought, hormonal treatment is available to help alleviate the split between sexual appearance and deep-felt identity. This treatment suppresses or encourages the development of secondary sexual features related to body hair, breasts and voice tone. Some transsexuals seek an even greater reconciliation between their two contradictory identities and subject themselves to what is today referred to as “gender reassignment surgery.” While surgery leads to improved mental well being, it does not necessarily signify the end of the transsexual’s social problems. In particular, her legal identity may lag behind in a past that she felt was never hers.

There are three sets of issues regarding transsexualism that have come before the European Court of Human Rights. The state administration may refuse to (1) correct the mention of the transsexual’s sex on the birth certificate or other identity documents (2) allow the transsexual to marry a person of the ‘opposite’ sex and (3) in the case of a female-to-male transsexual, recognize him as the legal father of the child to whom his partner had given birth following artificial insemination.

It is not surprising that the law, which works through rigid categories, has difficulty accommodating the misfit that the transsexual represents. Yet one would expect human rights, which emphasize that the well being of every individual human being counts in some morally fundamental sense, to offer recognition to the transsexual. However, the Court has had difficulty adjudicating the conflict between individuals’

perceptions of their own sexual identity and their legal status as a member of one sex or the other. Transsexual applicants lost before the Court for twenty years before finally winning in 2002. By the time the Court found the UK in violation of the European Convention of Human Rights in 2002, the great majority of over forty states then belonging to the Council of Europe had adapted their national legal systems to accommodate the transsexual condition.

#### **4.1.2 The legitimacy threat to the Court and the human rights enterprise**

As discussed in Chapter 1, I agree with Allen Buchanan regarding the connection between legitimacy and public justification,

Whether political institutions are legitimate depends in part upon the credibility of the public justifications they offer for their central activities. When international legal institutions authorize military interventions, prosecute state leaders for war crimes, or judge states or governments to be illegitimate, they justify such actions by appealing to the special status of certain norms.<sup>2</sup>

As an arbiter and interpreter of the Convention, the Court provides justifications for its decision to either defer to a state or issue a violation of the Convention. The Court currently justifies its interpretation of human rights by appealing to the doctrines of consensus and margin of appreciation. I will argue that the consensus doctrine is normatively and empirically inadequate and that the margin of appreciation doctrine is important but the Court does not make it clear why. What makes margin important is

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<sup>2</sup> Allen Buchanan, "Human Rights and the Legitimacy of the International Order," *Legal Theory* 14, no.1 (2008): 39.

that national institutions are responsive to the interests of constituents; they are better at gauging public sentiment and have access to relevant contextual and empirical information.

Insofar as the Court's justification for its decisions rests on vague references to the ambiguous term "consensus," without explication or defense, its legitimacy is in jeopardy. But unfortunately this lack of legitimacy is not restricted to the Court – or even to human rights in Europe. The jurisprudence of the Court inspires judges in national courts around the world.<sup>3</sup> Inadequately justified decisions regarding human rights interpretations interfere with the legitimacy of the human rights enterprise as a whole.

#### **4.1.3 Transsexualism and dialogue**

While theorists tout different virtues of dialogue – mutual learning, increased respect, etc. – little attention has been focused on a very important benefit of dialogue, mainly, increased institutional legitimacy. Perhaps this lack of a connection between dialogue and legitimacy is due to the fact that the dialogues these theorists have in mind are frequently on a smaller, interpersonal scale. For instance, Angle imagines how Joseph Raz could benefit from the Chinese tradition to offer a better explanation for why we should care about rights. He is concerned to show how contemporary Western and

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<sup>3</sup> Anne-Marie Slaughter, "A Typology of Transjudicial Communications," *University of Richmond Law Review* 29 (1994): 99.



Chinese rights theorists engage each other. But if we focus on broader, more inclusive, institutionally-structured dialogues, the benefits are grander than those realized by Angle. My investigation of the Court serves as an illustration not only of a way in which the legitimacy of IHRIs is threatened, but also how IHRIs can earn legitimacy by supporting dialogue.

## ***4.2 Articles and doctrines relevant to the interpretation of transsexual cases***

### **4.2.1 The Convention on Human Rights**

The Convention on Human Rights was signed in 1950 and has been in force since 1953. The Convention primarily guarantees civil and political rights (Articles 1 and 2 of the First Protocol are exceptions). The Convention also provides an institutional framework for its enforcement of these rights, enabling individuals to complain of a violation of the Convention at the hand of any state that was party to the Convention.

#### *The Old System of Protection*

The Convention created two organs, the Commission and the Court. The Commission first considered the application for admissibility, and if admissible, issued a non-binding report expressing an opinion. Grounds for refusing a hearing included the applicant's failure to have "exhausted national remedies," and a claim being "manifestly ill-founded." If the case was referred to the Court, there was a full judicial procedure and a decision made by a majority of the judges present and voting. The Court has the

option to pronounce a final judgment, declare the case inadmissible, strike the case off the list, or register a friendly settlement made between the parties.

### *The New System of Protection*

Through Protocol 11, which entered into force in November 1998, the institutional arrangements originally set up in the Convention were amended, and a new – full-time– Court was created. The new Court assumes the functions of the old Court plus those of the Commission, handling both the admissibility and merits phases of application. The new full-time judges are elected by the Parliamentary Assembly of the Council of Europe.

#### **4.2.2 Convention Articles 8 and 12**

The Convention contains no provision that expressly deals with sexual identity or sexual activity, but there are certain provisions relevant to the issue of transsexualism. The transsexual case law principally concerns Articles 8 and 12. One provision that has frequently been pleaded by transsexual applicants is **Article 12**:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of the right.

The applicants in the transsexual cases that I review below all claimed that, under their national governments, they had suffered from a violation of **Article 8**:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the reviewed cases, the Court always accepted that there had been an interference with the private (and sometimes the family) life of the applicant; Article 8 did apply. But having established this, the Court must decide whether the interference by the government met the three conditions outlined in the second paragraph, 8(2) above; if so, no violation of 8(1) could be said to have occurred.

#### **4.2.3 Qualified rights & limitations**

The Convention rights can be divided into two categories: unqualified rights (Articles 2, 3, 4, 5, 6, 7, 12, 13, 14) and qualified rights (8, 9, 10, 11). Qualified rights arise where the Convention specifies a right but indicates that the State may interfere with it in order to secure certain interests. The qualified rights are as follows:

Article 8: the right to respect for private and family life, home and correspondence;

Article 9: the right to freedom of thought, conscience and religion;

Article 10: the right to free expression;

Article 11: the rights of peaceable assembly and of association

Each of these Articles contains a limitation or accommodation clause under

which national governments may condition and restrict rights. In the case of qualified rights, the State must establish that interference was justified. This will involve the State demonstrating the following. First, it must show that the interference was in accordance with the law through the following three-fold test: (i) It must be established that the interference with the Convention right has some basis in national law (ii) The law must be accessible (iii) The law must be formulated in such a way that a person can foresee, to a degree that is reasonable in the circumstances, the consequences which a given action will entail.

Second, it must show that the aim of the interference was to protect a recognized interest. The specified legitimate aims include the following: national security, territorial integrity, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, protection of the rights and freedoms of others, preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary

Finally, it must demonstrate that the interference was necessary in a democratic society. This requires the State to show (i) The action taken is in response to a pressing social need (ii) The interference with the qualified right was the minimum needed to secure the legitimate aim (the test of proportionality).

#### 4.2.4 The margin of appreciation

Central to the case law of the Court on paragraph 2 of Article 8 (in particular, in its decision as to whether the action is “necessary in a democratic society”) is the so-called doctrine of the “margin of appreciation,” through which the Court allows a limited amount of national discretion to member states, accepting that state authorities may be better placed than itself to assess whether an ‘interference’ with a right provided for in the Convention is justified. The presumption is that the state knows its domestic situation better than the Court could know it.<sup>4</sup> This doctrine, which permeates the jurisprudence of the Court, is based on the notion that each society is entitled to a certain amount of latitude in resolving the inherent conflicts among individual rights, between individual rights and national interests or among different moral convictions. As Laurence Helfer notes, this doctrine also gives recognition to the fact that the Convention continues to exist solely by the consent of the Contracting States. States can always choose not to renew the right of individual petition or in extreme cases even withdraw from the Convention. And States always have the option of failing to comply with a judgment or delaying its implementation.<sup>5</sup>

Initially the Strasbourg organs (the Court and the Commission) applied margin principles to cases dealing with national derogations from Convention guarantees in

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<sup>4</sup> Burleigh Wilkins, “International Human Rights and National Discretion,” *The Journal of Ethics* 6, no. 4 (2002): 373-382.

<sup>5</sup> Laurence R. Helfer, “Consensus, Coherence and the European Convention on Human Rights,” *Cornell International Law Journal* 26 (1993): 133.

emergency situations under Article 15. Another category of cases to which the margin principles were applied regards the “Personal Freedoms” Articles (Articles 8-11) containing clauses expressly limiting the rights and freedoms that they guarantee. I discuss two key cases below, *Handyside v. UK* and *Dudgeon v. UK*.

#### *The Handyside Case: Morality and the Margin Doctrine*

The Handyside case was the Court’s first major pronouncement involving its supervision of national regulation of public “morality” as it relates to freedom of expression. The applicant publisher challenged the British government’s censorship by seizure of his controversial and radical children’s handbook, *The Little Red Schoolbook*, under the National Obscene Publications Act. The Court upheld the government’s justification for the infringement of Article 10(1), invoking the Section 2 limitation for the “protection of morals.”

The key to the decision was the determination that in the absence of a guiding European consensus as to what constituted “morality,” individual Member States could regulate broadly, based on the wide margin of appreciation discretion that was to be accorded them under the Convention. The Court decided,

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of requirements of morals varies from time to time and from place to place, especially in our era, which is characterized by a rapid and far-reaching evolution of opinions on the subject.<sup>6</sup>

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<sup>6</sup> *Handyside v. United Kingdom*, 24 *European Court of Human Rights* (ser. A) at 1 (1976).

The Court responded to the applicant's contention that the wide distribution of the book outside Great Britain constituted a European consensus favorable to its publication,

The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, *inter alia*, to the different views prevailing there about the demands of the protection of morals in a democratic society.

However, the Court notes that Article 10(2) does not give the Contracting States an unlimited power of appreciation. The domestic margin of appreciation goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even when given by an independent Court.

*The Dudgeon Case: Morality Reconsidered*

The Offenses Against the Person Act of 1861 and the Criminal Law Amendment Act of 1885 made criminal offenses of all male public or private homosexual activity in Northern Ireland. The applicant in the Dudgeon Case was an avowed homosexual who was active in the campaign to modernize the law on homosexuality in Northern Ireland. At Strasbourg the Court found that the legislation, and the threat of prosecution under it, violated his privacy rights as protected by Article 8(1) of the Convention. The Court elaborated on the components of the relationship of the national margin of discretion to the international supervisory function:

1. The limitation which "necessity" places upon legitimate national

restrictions in the Article 8 context was equated with “a pressing social need.”

2. The national authorities possess a margin of appreciation in making this initial assessment of the existence of a “pressing social need,” but “their decision remains subject to review by the Court.”

3. Restrictions on Convention rights must be proportionate to whichever restrictive aim is pursued under the limitation clauses.

4. The scope of the margin possessed by the national authorities expands or contracts depending upon which specific justification for a restriction is brought into play.

What is interesting is how the scope of the margin of appreciation is determined by the Court. Sometimes the scope of the margin will be broad and sometimes it will be narrow; allegedly this depends on the nature of the rights in issue, or the balancing of competing rights.

#### *Narrow v. Broad Margin of Appreciation*

Where a particularly important facet of an individual’s existence or identity is in issue, the Court will be less likely to accept that the State should be afforded a broad discretion. For example, in *Dudgeon v. UK*, while the tendency is to allow a wide margin where questions of morality are in issue, the applicable criminal law inhibited the applicant from enjoying “a most intimate aspect of private life” and therefore the Court required particularly serious reasons to be demonstrated before it would accept that this



interference was “necessary.” However, in most cases in which morality is at issue the scope of the margin is likely to be wide since there is no uniform conception of morals among the Contracting States. This is illustrated by the *Handyside* case which explains how the publication of the *The Little Red Schoolbook* could be accepted in some Contracting States but not others.

In the cases involving transsexuals the Court has allowed States a wide margin of appreciation, despite the fact the same ‘intimate aspect of private life’ (the individual’s sexual identity) was in issue here as in *Dudgeon*. In all these cases the Court referred to the lack of any common European standard to justify a narrow margin. Until the 2002 decision, with one exception, the Court had repeatedly decided in transsexual cases that the state government had remained within its “margin of appreciation” when it interfered with the right of private and family life of the applicant.

#### **4.2.5 The consensus doctrine**

In the jurisprudence of the Court, consensus is inversely related to the margin doctrine: the less the Court is able to identify a European-wide consensus on a particular issue, the wider the margin that the Court is prepared to grant to the national institutions.

Laurence Helfer argues that the Court interprets the Convention as a modern document that progressively integrates changing European social and legal

developments.<sup>7</sup> In determining the scope of the obligations that the Convention imposes on the Contracting States, the Court weighs the deference to national decision-makers against its conviction that the treaty must be interpreted in light of progressive European conditions and practices. Thus, the Court must attain a balance between deference, or “margin of appreciation,” and the interpretation of the Convention as a “living instrument.”<sup>8</sup> Helfer notes that the Court has progressively narrowed the margin doctrine by analyzing the degree to which common human rights practices can be identified among the Contracting States. Where a majority of states have expanded the scope of a right or broadened the class of individuals to whom it applies, the Court has been more likely to find that a state has violated the Convention by retaining or protecting a law which restricts the particular right.<sup>9</sup> In other words, when practices achieve a certain measure of uniformity, a “European consensus,” the Court raises the standard of rights-protection to which all states must adhere.

While the Court has asserted that the European consensus approach is a fact of Convention jurisprudence, Helfer describes how it has been unclear in defining the elements that are relevant to discerning an emerging legal norm. A comprehensive survey conducted by Helfer reveals that the Court relies on three distinct factors as evidence of consensus: legal consensus, as demonstrated by European domestic

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<sup>7</sup> Helfer, 133.

<sup>8</sup> *Tyrer v. United Kingdom*, *European Court of Human Rights* ser. A, vol. 26 (1978): 31.

<sup>9</sup> Helfer, 138.

statutes,<sup>10</sup> international treaties,<sup>11</sup> and regional legislation; expert consensus;<sup>12</sup> and public consensus.<sup>13</sup> While the Court makes vague references to one or another form of consensus, an exact specification of when legal, expert or public opinion reaches consensus status is wanting. For instance, the Court has not specified what percentage of the Contracting States must alter their laws before a right-enhancing norm has achieved legal consensus status.

### **4.3 The transsexualism case law**

Each of the individuals in the cases that follow has undergone sexual reassignment surgery.

#### **4.3.1 Rees v. UK (1986)**

A female-to-male transsexual applicant, Mr. Rees, had undertaken hormonal and surgical treatment in the 1970s. Mr. Rees sought, unsuccessfully, to have his birth certificate altered to reflect his sex as male. He applied to the Commission in 1979, submitting that a birth certificate on which his sex continued to be recorded as “female” entailed a violation both of Article 8 and Article 12. The Commission unanimously

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<sup>10</sup> See, e.g., *Norris v. Ireland*, 142 *European Court of Human Rights* (ser. A) at 20 (1988), recognizing statutory developments regarding sodomy laws as evidence of consensus.

<sup>11</sup> See, e.g., *Autronic AG v. Switzerland*, 178 *European Court of Human Rights* (ser. A) at 27 (1990).

<sup>12</sup> See *Winterwerp v. The Netherlands*, 33 *European Court of Human Rights* (ser. A) (1979), construing the words “persons of unsound mind” for purposes of Article 5(1)(e), which outlines the right to liberty. The Court noted that the phrase’s meaning “was continually evolving as research in psychiatry progresses.”

<sup>13</sup> See *Winterwerp v. The Netherlands*, “[A]n increasing flexibility... is developing [regarding] society’s attitude to mental illness... so that a greater understanding of the problems of mental patients is becoming more widespread.”

supported the complaint, on the basis that the right to respect for private life imposed on the State a positive obligation to recognize the new status of a post-operative transsexual and to confirm this status via the necessary documents.

The Court was not persuaded by this argument. It determined that having regard to the diversity of practices and the variety of situations obtaining in the Contracting States – with some giving transsexuals the option of changing their personal status to fit their identity and others not – the “respect” due to transsexuals under Article 8 is bound to vary considerably from case to case. This is an area where the Contracting Parties enjoy a wide margin of appreciation.<sup>14</sup>

The Court was not prepared to impose precise obligations on member states as to how national authorities were to run their country, especially in regard to the legal effects of transsexualism – a controversial issue which did not yield European-wide, let alone universal, consensus. In deciding whether a positive obligation existed, regard was given to the fair balance struck between the general interest of the community and the interests of the individual. As Reed notes, “The introduction of some kind of official documentation of current social gender, which would be sufficiently widely used not to be associated exclusively with transsexuals, would run counter to the United Kingdom’s popular and long-standing concept of civil liberties and its non-reliance on any identity

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<sup>14</sup> Reed, 67.

card system.”<sup>15</sup> By 12 votes to 3, the Court found there had been no violation of Article 8 and dismissed the claim that Article 12 had been violated. However the Court did add, “The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”<sup>16</sup>

#### **4.3.2 Cossey v. UK (1990)**

The applicant, born male in 1954, had undergone gender reassignment surgery in 1974. Ms. Cossey complained before the Strasbourg institutions that she could not claim full recognition of her changed status and that she was unable to enter a valid marriage with a man. The question before the Court was whether or not it should depart from its judgment in *Rees*. The Court answered negatively, on the grounds that there had been *no* significant scientific or legal development in the interval.<sup>17</sup> In its opinion, there remained “little common ground between the Contracting States,” which thus continued to enjoy a wide margin of appreciation in respect to transsexualism, “Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.”<sup>18</sup>

Among the dissenting opinions attached to the judgment, Judge Martens’ is particularly interesting. For Martens, it does not follow from the “little common

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<sup>15</sup> Reed, 67.

<sup>16</sup> *Rees v. The United Kingdom* (1987) 9 *European Court of Human Rights*, 56.

<sup>17</sup> Reed, 70.

<sup>18</sup> *Cossey v. The United Kingdom* (1990) 13 *European Court of Human Rights*, 622.

ground” that exists between the Contracting States that states should enjoy a wide margin of appreciation. The preamble to the Convention invites the Court to develop common standards; the Court should only practice self-restraint when it feels that the specific features of the case, or the situation obtaining in the defendant state, leaves the Court unable to fully exercise its power of control.

Martens also argued that social and legal developments within the Council of Europe should have led the Court to overrule its *Rees* ruling in *Cossey*. He cited ‘the ever-growing awareness of the essential importance of everyone’s identity,’ ‘a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered “normal,”’ ‘a markedly increased recognition of the importance of privacy.’ While at the time of the *Rees* judgment only five member states permitted the legal recognition of the new identity of post-operative transsexuals, at the time of the *Cossey* judgment this number had increased to 14. The dissenting opinions were that European society indicated growing acceptance of transsexuals and a prevailing view that transsexuals should have their new identity recognized by the law.

#### **4.3.3 X, Y and Z v. UK (1997)**

This case was brought by a female-to-male transsexual (X), his female partner (Y) and ‘their’ child (Z). In 1990, X and Y applied for fertility treatment in the form of artificial insemination by donor. After Z’s birth, X was not permitted to be registered as the child’s father, being legally of female sex. X, Y and Z complained that they were

denied respect for their family and private life, contrary to Article 8, because of a failure to recognize X's role as father to Z.<sup>19</sup> They pointed to prejudicial legal consequences for Z and also possible social and psychological consequences for the child.

The applicants made another attempt to have the Court re-examine the principles underlying the *Rees* and *Cossey* judgments. The case relied heavily on scientific research suggesting that transsexuality might have a physiological basis in the structure of the brain. But since there was little common ground among the member states with regard to the granting of parental rights to transsexuals, the Court decided that the respondent state was to be offered a wide margin of appreciation. The uncertainty with regard to how to protect the interest of children in the situation of Z meant that the Court could not impose any single viewpoint. By 14 votes to six, the Court concluded,

In conclusion, given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State formally to recognize as the father of a child a person who is not the biological father.<sup>20</sup>

#### **4.3.4 *Sheffield and Horsham v. UK (1998)***

Ms. Sheffield and Ms. Horsham are two unrelated applicants whose cases were joined before the Court because they raised a similar issue. Both individuals were born in the UK in 1946 as male. Ms. Sheffield brought before the Court the issue that her birth certificate and social security and police records mentioned her former sex. Ms.

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<sup>19</sup> Reed, 74.

<sup>20</sup> *X, Y and Z v The United Kingdom* (1997) 24 *European Court of Human Rights* 143.

Horsham had a male partner in the Netherlands whom she was planning to marry; she and her partner wanted to lead a married life in the UK, but this was impossible as a matter of English law since Ms. Horsham was legally male.

The Court kept to the decision it adopted in *Rees* and *Cossey* and Reed notes “Although most Member States permitted some sort of change to be made to a person’s birth certificate to reflect gender re-assignment, there was no common European approach to the problems created by the recognition in law of post-operative gender status.”<sup>21</sup>

The Court concluded,

the Court cannot but note that despite its statements in the *Rees* and *Cossey* cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments, it would appear that the respondent State has not taken any steps to do so...<sup>22</sup>

The dissenting judges, relying on information submitted by the organization Liberty, remarked that only four countries out of 37 member states surveyed at the time of the proceedings expressly prohibited any change in birth-certificate entries following gender reassignment surgery.<sup>23</sup> The minority also emphasized the developing medical and societal acceptance of the phenomenon of transsexualism.

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<sup>21</sup> Reed, 78.

<sup>22</sup> para. 60.

<sup>23</sup> Liberty is also known as the National Council for Civil Liberties. Founded in 1934, it is a cross party, non-party membership organization at the heart of the movement for fundamental rights and freedoms in England. <http://www.liberty-human-rights.org.uk/index.shtml>



#### **4.3.5 *Goodwin v. UK* (2002)**

The male-to-female applicant in this case brought a complaint similar to that of *Rees, Cossey* and *Sheffield and Horsham*. She argued that she had suffered sexual harassment at work. She also complained that her request for a new National Insurance number was refused and her file was marked 'sensitive' instead. As a man, she was prevented from retiring at sixty and had to wait until sixty-five for a free London bus pass.

The Court now concluded,

In the twenty first century the right of transsexuals to personal development cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. [T]he Court has since 1986 emphasized the importance of keeping the need for appropriate legal measures under review... [T]he fair balance that is inherent in the Convention now tilts decisively in favour of the applicant.

The Court unanimously found a violation of both Article 8 and Article 12.

#### **4.3.6 *Van Kuck v. Germany* (2003)**

The case of Ms. Van Kuck, a post-operative transsexual, was directed against Germany, a country which allows for the entry regarding sex to be changed on birth certificates and other official documentation after gender reassignment surgery. The chief complaint raised by the applicant related to Article 6 of the Convention.

Van Kuck's health insurance company had refused to reimburse her for the hormonal and surgical treatment she undertook to treat her transsexual condition. She

lost her dispute in the national courts; the German courts considered her treatment unnecessary. She argued that the interpretation of ‘necessary medical treatment’ adopted by the German courts was arbitrary, and that they had failed to respect her sexual identity. She won on a very tight majority.

#### ***4.4 Criticism of the consensus and margin of appreciation doctrines***

##### **4.4.1 Critique of the consensus doctrine**

The above summary of the transsexual case law raises the important question of how the Court determined a lack of consensus in each of the cases. Did it attempt to measure consensus – legal, expert, public – and if so, how? Did it consult public opinion and medical experts? If so, how did it make determinations of the “prevailing view” regarding transsexuals? How did it decide which medical experts to consult? Unfortunately the answers to these questions will disappoint, as the Court did not measure consensus. It did not defend its choice of experts or explain how it determined prevailing public opinion. It referenced the consensus doctrine without giving the doctrine clear and specific content.

As can be expected, there has been much criticism of the vague process by which the Court identifies consensus, viz., how far a particular practice must evolve before it should be applied against less progressive states. For example, which countries are a part of the consensus and why? Scholars have asked how much weight should be given to different factors (domestic law reforms, international treaties and European public

opinion). Assuming that the Court can ascertain that one or another form of consensus has been reached, the Court has not addressed the possibility of how much weight it should be accorded in its opinion. Nor has the Court addressed the possibility that the different factors may conflict, e.g., there is expert consensus but a lack of public consensus. As Helfer points out, the Court speaks in vague generalities, referring to “developments and commonly accepted standards”<sup>24</sup> and “modern trends.”<sup>25</sup>

Yet less scholarly attention has been devoted to the normative aspects of the consensus inquiry. The problem with which I am most concerned is that the consensus doctrine could undermine global human rights efforts. For example, reliance on consensus allows for the possibility that decisions may be overridden by a European consensus in retreat from the protection of rights. With global consensus barely being reached on basic issues such as gender equality and child labor, the consensus rhetoric could restrain the efforts to promote universal standards.

#### **4.4.2 Critique of the margin of appreciation doctrine**

##### *#1 Unjustified partiality toward democracies*

Fionnuala Ni Aolain argues that States more sympathetic to democratic principles are granted a wider margin of appreciation. She writes,

Where ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the Convention, the Commission and Court are less

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<sup>24</sup> *Tryer v. United Kingdom*, 26 *European Court of Human Rights* (ser. A) at 15-16 (1978).

<sup>25</sup> *Ozturk v. Federal Republic of Germany*, 73 *European Court of Human Rights* (ser. A) at 36 (1984) (Bernhardt, J., dissenting).

exacting in their requirements. The leeway given to such states has been noticeably different. Subjective political rationales are often deemed sufficient to satisfy the Convention mechanisms that derogation was justifiable.<sup>26</sup>

The Court operates under the assumption that a democratic government is making a good faith effort to preserve human rights. She provides an example of a Greek case in which the Commission was strict in its assessment of the factors that may justify the calling of an emergency; in retrospect, the approach of the Commission has been contextualized as a response to the anti-democratic character of the Greek government. Ni Aolain argues that this reflects an abdication by the Court of its duties to guard against states' undue resort to exigency. She cites the consistent approach to frequent derogation by the UK as a prime example to illustrate her point.

The question is whether or not the Court ought to be applying the margin of appreciation impartially. Or better, whether a state's being democratic is a relevant and non-arbitrary feature; if it is, then the Court is not being partial. Suppose Ni Aolain is correct that the Court assumes that democratic governments make good faith efforts to preserve human rights but that non-democratic governments do not. In order to assess the validity of this assumption, we need further information. First, what does the Court mean by a "democratic government"? If the Court wishes to justifiably treat democracies differently, it must define "democracy" and argue why democracy is a relevant feature.

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<sup>26</sup> Fionnuala Ni Aolain, "The Emergence of Diversity - Differences in Human Rights Jurisprudence" *Fordham International Law Journal* 19 (1995): 114.

Second, do all democratic governments make a good faith effort to preserve all human rights? Or do only some democratic governments make a good faith effort to preserve some human rights? It seems more likely that particular democratic governments have some areas in which they excel at interpreting and protecting human rights and some areas in which they are relatively weak. Finally, can the Court be sure that only democratic governments make a good faith effort at human rights preservation? What is it about democratic governments that makes this so?

*#2 The Court overlooks weaknesses inherent in the democratic system*

Eyal Benvenisti seeks to delineate the boundaries of the margin doctrine by emphasizing some of the inherent deficiencies and weaknesses of the democratic system. He argues that while the margins doctrine may be justified in certain matters that affect the general population, it is inappropriate when conflicts between majorities and minorities are examined. He writes, "In such conflicts, which typically result in restrictions exclusively or predominantly on the rights of the minorities, no deference to national institutions is called for; rather, the international human rights bodies serve an *important role* in correcting some of the systemic deficiencies of democracy."<sup>27</sup>

Benvenisti argues that minorities, underrepresented in the political process and absent political influence, rely upon the judicial process to secure their rights. But since

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<sup>27</sup> Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," *NYU Journal of International Law and Politics* 31 (1999), 847.

national judicial processes are often dominated by judges who represent the majority, they frequently fail to protect the minorities, and so international judicial organs are the only reliable avenue of redress. If we leave the issue for the democratic process to decide, the majority will secure their interests at the expense of the minority. Benvenisti argues that national policies warrant no deference when minority rights and interests are implicated, even in the case of democratic states.

In making such decisions, the ECHR has two options: it must either adopt a moral standard or defer to a relativistic approach based on comparative analysis. It has opted for the second approach by developing the doctrine of consensus. According to Benvenisti, "Minority values, hardly reflected in national policies, are the main losers in this approach."<sup>28</sup>

This is an important critique related to the more general concern about the impact that power relationships and politics have on shaping the interpretation and protection of human rights. If we take a majoritarian approach to interpretation, then the minority views risk being overlooked. So what are we to do when there is a conflict between minority and majority interpretation? The Court has opted to defer to majoritarian thinking but on a broader scale: applying the consensus doctrine to the whole of Europe. Admittedly, the broader the sample group, the more likely it is that minority views will not be overlooked. Yet this is no guarantee. It is possible that the

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<sup>28</sup> Benvenisti, 851.

majority in Europe reflects the same position as the majority within the given country. The worry is that there are some minorities that are equally oppressed all over Europe, e.g., women, and that deferring to the European consensus will not solve the problem.

Benvenisti suggests that in cases involving minority interests, the Court might consider adopting a moral standard of some kind. This raises the general question of what role the ECHR ought to have in interpreting rights; in particular, should it be expected to overcome the weaknesses of the democratic system by taking on a more substantive role? Is this the only alternative, as Benvenisti suggests?

#### **4.4.3 Hessler's deliberative standard for interpretive conflicts**

Kristen Hessler articulates a deliberative standard by which to judge how well suited particular agents are to interpret human rights law as applied within states.<sup>29</sup> Hessler argues that liberal democratic governments can be expected to be more reliable than international institutions, while non-democratic governments like Iran can be expected to be less reliable. The government of Iran does not provide sufficient protection for deliberation and basic civil rights, and so it would do less well than the HRC at interpreting this Article 7 of the ICCPR. Thus, according to Hessler, the partiality to democracies that Ni Aolain highlights in some cases may be justified and therefore not arbitrary.

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<sup>29</sup> Kristen Hessler "Resolving Interpretive Conflicts in International Human Rights Law," *Journal of Political Philosophy* 13, no. 1 (2005): 29.

I agree with the general thrust of Hessler's approach of articulating a deliberative standard for assigning interpretive authority. I also agree with her focused attention on institutional and procedural considerations in international human rights law. Yet I focus attention on her deliberative standard: why it is useful, and when, where and how the public deliberation is to be conducted.

According to Hessler, liberal democratic governments provide, among other attributes, wide scope for participation and deliberation, access to local knowledge and a better forum for multicultural deliberation. Thus, they will be "more informed by and accountable to the deliberations of their citizens than undemocratic governments, *at least over time.*"<sup>30</sup> Perhaps this is true, if we consider the deliberation "over time." However, presumably each case that is brought before the HRC is dealing with very different issues that arise in unique social, political, geographical, and cultural contexts. And what matters is not what happens over time, but what happens in this particular context.

If at all possible, we should choose to have actors who are more directly at stake in the debate, viz. people living in Iran under its penal code, engage in the deliberation. And it is possible to imagine a forum in which Iranian stakeholders are brought together to express various viewpoints such that the criteria that Hessler lays out are met, despite

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<sup>30</sup> Hessler, 43 (emphasis added).



the lack of a liberal democracy. So while a democratic government would be more reliable over time, in this instance this forum provides the more reliable interpretation.

It also seems possible to imagine a democracy that is generally accountable to the deliberations of their citizens, yet in a particular case fails to do so. For example, perhaps the case is a sensitive one and there is social pressure to keep the issue away from public forums. The immediate point is that there may be ways for non-democratic countries to satisfy the deliberative requirements in more isolated cases. The larger point is that what is important is the particular deliberative institutional context, not the more general question as to whether or not the institution is a democracy.

Here, one might object that without a democracy we cannot be sure that those in power are listening to divergent views and giving them some weight.<sup>31</sup> In response I have two comments. First, in many cases we do not need the attention of those in power but rather that of an international institution such as the Court. These institutions, if legitimate, will be attentive to the sites of deliberation and give weight to the voices of the powerless. Second, while problems of this sort undoubtedly will arise, democracies, too, sometimes fail to respect rights. In one prominent example, the US maintains a detention center at Guantanamo Bay where the *habeas corpus* rights of enemy combatants are not respected. We should not blindly defer to all democratic countries in all instances of conflict. When, for the purposes of evaluation, we compare democratic to

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<sup>31</sup> I thank David Wong for raising this objection.

non-democratic regimes we are presented with the fact of real, very flawed democracies that have structural failings – democracies that not only occasionally fail to respect rights but also fail to give appropriate weight and expression of views to large numbers of their citizens.

#### **4.4.4 Unsuccessful replies to the critiques**

Transsexualism has been recognized as a treatable medical condition since the second half of the twentieth century. Social recognition of the plight of transsexuals followed the medical trend and is more developed in some societies than others. In contrast to the national developments, the Court has proved “retrograde” – for 20 years the Court has insisted on staying fixed in a direction different from the one that was emerging from medical, social and national legislative moves.

How should we view the Court’s case law on transsexualism? It seems that there are three broad views that one can defend:

- 1) The Court acted with appropriate caution in a culturally sensitive situation. The lack of European consensus is important.
- 2) The Court’s case law consisted of a series of missed opportunities.<sup>32</sup>
- 3) The case law represents not merely a series of missed opportunities but rather a moral failing on the part of the Court.

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<sup>32</sup> This view is defended by the Belgian legal theorist Francois Rigaux, “Hans Kelsen on International Law,” *European Journal of International Law* 9, no. 2 (1998): 325.

With regard to view (1), I have argued that consensus is morally suspect. Not only does it possibly undermine global human rights efforts due to a lack of consensus, but decisions may later be overridden in retreat from the protection of human rights. In defending position (2), Francois Rigaux does not go far enough in critiquing the Court. Insofar as consensus is morally suspect, the Court should be held accountable for continuing to depend on it. If (3) is right, how exactly did the Court fail and how should it make its decisions?

Most theorists support the consensus doctrine but differ as to what the Court should do in the event of a lack of consensus. In the absence of consensus, the Court generally permits a wide margin of appreciation. Benvenisti argues that when a consensus is missing, the Court should sometimes permit a wide margin of appreciation and sometimes should make a moral pronouncement (imposing moral ideas that do not command general acceptance). By contrast to the way the Court currently functions and the proposals of various theorists, I will next argue that the Court should use consensus as one tool in its toolbox, focusing attention on what states with strong epistemic and deliberative features, in this respect, do.

## ***4.5 The Court's role in dialogue***

### **4.5.1 An overview of the proposal**

There is something right about the margin of appreciation doctrine; indeed, positioned agents have privileged access to the local environment and the cultural

context. There is also something right about the assumption that democracies should be granted a wider margin of appreciation. Democracies, construed in the right way, tend to make a good faith effort at preserving human rights. It is important that in overcoming the limitations of the Court's current approach to interpretation, my proposal preserve what is right about the consensus and margin doctrines, as well as what is right about the special deliberative elements of certain democracies.

If the justification for the margin doctrine is correct, then state authorities may be better placed than the Court in some instances to assess whether 'interference' with a right is justified. But how should we determine when and in what respect states authorities are better placed than the Court? Obviously it doesn't have anything to do with the presence or absence of a consensus, legal, expert or public. The presence or absence of a consensus in Europe reveals nothing about the position of the state authorities. So what would help the Court to decide whether deference to national institutions is normatively justified?

Here we may benefit from a consideration of what is insufficient about the margin of appreciation. It seems that the margin doctrine, as appropriated by the Court, is not a sufficiently fine-grained tool to ensure the justified interpretation of human rights. If the assumption is that local actors are in a privileged interpretive position that warrants deference, the Court should make an effort to defend the validity of that assumption in various cases. It is clear that this assumption is false in some cases. For

example, as discussed above, the margin doctrine is often inappropriate in cases of majority-minority conflicts.

Rather than start with an assumption of deference that must be defended in various cases, I propose that the Court start with deliberative and epistemic conditions that national institutions must meet in order to earn deference. Epistemic and deliberative conditions are necessary to ensure that the Court is not acting in an ad hoc manner. The Court's first step should be to closely examine the deliberative and epistemic character of the relevant national institutions. If the institutions meet certain epistemic and deliberative conditions, then the Court should defer to the state in that case. Thus, I am arguing that the Court adopt a procedural role of protecting and encouraging local deliberative processes by enforcing deliberative and epistemic standards. National institutions must be assessed by their ability to sustain a fair and transparent public dialogue.

#### **4.5.2 Epistemic and deliberative criteria**

What conditions must national institutions meet to warrant deference by the Court? In the previous chapter I proposed the following criteria for genuine dialogue:

- 1) Dialogue should have the following features (i) inclusion, (ii) freedom of expression, (iii) the exchange of reasons, (iv) open agenda
- 2) Dialogue must offer tools to help reduce defensiveness, suspend assumptions, lower costs of interacting, increase tolerance/respect for a

wide diversity of opinions and points of view, etc. The goal is to help dialogue blossom more fully in social settings.

- 3) Dialogue must be appropriately institutional and connected to other institutions and dialogical processes. The precise form of the institutional structure is not crucial. What is important is that there is a mechanism through which these features can be accommodated.
- 4) Dialogue should be informed by evidence, where relevant.

We must take into account the role that national institutions play in promoting the formation, preservation, and transmission of true beliefs so far as true beliefs are relevant to giving content to the abstract human rights norms in the Covenant. In his paper "Social Moral Epistemology," Allen Buchanan argues that social moral epistemology provides materials for a powerful argument for liberal institutions and attitudes.<sup>33</sup> For instance, freedom of information and expression makes it more difficult for those in positions of authority to use social institutions to foster beliefs that disable the moral virtues. Buchanan also maintains that his social moral epistemology suggests another quite general conclusion: the more inegalitarian a society is, the greater the risk of there being surplus status trust and surplus epistemic deference generally.

However, while these suggestions put us on the right track, we must be careful not to place our trust wholeheartedly in liberal institutions. As Benvenisti argues, while

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<sup>33</sup> Allen Buchanan, "Social Moral Epistemology," *Social Philosophy and Policy* 19, no. 2 (2002): 126.

the margins doctrine may be justified in certain matters that affect the general population, it is inappropriate when conflicts between majorities and minorities are examined. He writes, "In such conflicts, which typically result in restrictions exclusively or predominantly on the rights of the minorities, no deference to national institutions is called for; rather, the international human rights bodies serve an *important role* in correcting some of the systemic deficiencies of democracy."<sup>34</sup>

Thus, there are two important qualifications to be made regarding the above criteria. First, I propose that we view (1)-(4) above not as necessary and sufficient conditions for genuine dialogue but rather as "counting principles," following Rawls' in his *A Theory of Justice*.<sup>35</sup> Other things being equal, an institution would be considered more deliberative the higher the degree to which it fulfills these conditions. Second, these preliminary conditions should be considered revisable and dynamic; we must explore the effects of different institutional structures and traits on the proper specification of norms.

#### **4.5.3 Deliberative criteria in the case of transsexualism**

Here I describe two conditions for dialogue that are particularly important in the case of transsexualism that should have been emphasized by the Court. First, while empirical information is always necessary for productive dialogue, in this case it is

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<sup>34</sup> Benvenisti. 847.

<sup>35</sup> I thank Allen Buchanan for this suggestion. For an explanation of the idea of "counting principles," see John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

especially crucial. The approach to the transsexual cases has, inevitably and properly, been influenced by the state of medical understanding and the nature of medical treatment. But it should be made clear how such medical information ought to be brought to bear, as well as when and by whom.

Gender dysphoria has only in recent times been the subject of medical study. Some relatively recent scientific studies suggest that gender dysphoria may have a physiological basis in the structure of the brain.<sup>36</sup> However, sexual differentiation is not simply physical. From the subjective viewpoint, gender must be determined psychologically. The Court could have encouraged deliberations that question the validity of the studies and their relative importance (in relation to each other as well as in relation to other considerations).

For example, in the UK case *Corbett v. Corbett*, the medical evidence before the Court identified four criteria for assessing the sexual identity of an individual, chromosomal factors, gonadal factors, genital factors, psychological factors. It was suggested that hormonal factors, or secondary sexual characteristics, be considered as well. But the importance of each of the criteria should have been considered among positioned agents in a dialogical forum.

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<sup>36</sup> J. Zhou, M.A. Hofman, J.G. Gooren and D.F. Swaab, "A sex difference in the human brain and its relation to transsexuality," *Nature* 378, no. 6552 (1995): 68.



Second, the extent of national and sub-national debate is undoubtedly affected by whether or not the country has incorporated the actual text of the Convention into domestic law. Incorporation allows for Convention rights to be argued and considered in national courts and tribunals alongside other issues in cases before them. One advantage of incorporation is that it presents the European organs with an opportunity to discover the views of the national courts regarding the interpretation of the Convention. Thus, the Court could have encouraged states to incorporate the text of the Convention into domestic law.

#### **4.5.4 The Court's role in dialogue**

Currently the Court has a mundane substantive role to adjudicate between European consensus and national sovereignty. I consider this role mundane because it almost always defers to the European consensus if there is one. My suggestion is that the Court has a larger role to play, but it is a procedural role rather than a substantive one. While I regret that it took so long for the Court to support the transsexual plight, I suspect that a proactive European institution would behave in a fashion that would be just as regrettable. After all, the task of the Court is to enforce the law contained in the Convention; its task is not to bring about a form of justice informed by an ethical vision of what human rights might entail.

It is important to note how I conceive of *deference*. First, deference to a national institution is determined on a case-by-case basis. Perhaps the national institution is

sufficiently deliberative in some regards and not others, and so whether or not it merits deference depends on the nature of the case at hand. Second, deference itself should be conceived as an inclination that can be overcome. Deference is not absolute.

The Court's role is to hold national and sub-national institutions accountable for the deliberative standards to ensure that information is being exchanged and that deliberation is occurring in a fair environment. In order to assess whether states meet the standards, the Court will closely investigate and monitor the weaknesses and possibilities of various dialogical institutions. It might turn out that different institutions ought to be held to different standards.

If the Court had the above criteria, understood as "counting principles," to use as a guide, it could have determined, in a normatively defensible manner, whether the Belgian, British, and French national institutions should have been awarded deference. If they met these criteria, the Court would allow a wide margin of appreciation. If they did not meet the criteria, the Court would have to make a decision, taking European consensus into account as one important consideration.

#### **4.5.5 The Court's support of transsexualism dialogue**

It is difficult to say, in retrospect, how the Court could have supported localized dialogue on transsexualism and assessed its epistemic and deliberative quality.

However, I make some general observations to make this discussion more concrete.

In the UK there are a number of nonprofit organizations, associations and national institutions that focus on the issue of transsexualism. Prominent among these institutions are Press for Change, GIRES (Gender Identity Research and Education Society), Transgender News, Transsexual UK, and TransYouth. The Court might indirectly put pressure on these organizations to tailor their activities and findings to ensure that they meet the deliberative and epistemic criteria highlighted above. As an incentive, the Court might emphasize that by meeting the criteria, the organizations make it easier for the Court to advocate on their behalf. In other words, by showing that they meet the criteria, the organizations make it easier for the Court to give their claims the best possible chance of being supported.

Another important role for the Court is to ensure that grassroots and sub-national organizations are interacting with governmental bodies, and vice versa, to ensure that information is being shared and publicized. For example, Dr. Jane Playdon and Lynne Jones, MP, set up the Parliamentary Forum on Transsexualism in 1994. According to Jones's website, the Forum comprises the UK's leading experts on transsexualism, in both the legal and medical fields, along with a number of MPs.<sup>37</sup> At the beginning of 1995, the Parliamentary Forum published the first draft of a document entitled "Transsexualism - The Medical Viewpoint," a work that has been essential in underlining the medical legitimacy of the transsexual case. The Court might encourage

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<sup>37</sup> <http://www.poptel.org.uk/lynne.jones/transsex.htm>

the Parliamentary Forum to interact with the above organizations to ensure that the scientific and legal information was made available to a wide audience in the UK.

Similarly, the Court could encourage dialogue and interaction not only among national and grassroots organizations, but also among national and regional organizations. ILGA-Europe is a European NGO for national and local lesbian, gay, bisexual and transgender (LGBT) groups. ILGA-Europe works for human rights and against sexual orientation and gender identity discrimination at the European level. In April of 2007 ILGA-Europe launched a campaign on freedom of assembly for lesbian, gay, bisexual and transgender people in Europe. According to its website,

The aim of our campaign is to mobilize support by as many mayors of European cities as possible for the right of LGBT people to freedom of assembly and expression by signing our appeal. We hope that by gaining wide support of European mayors we will be able to increase the profile of the issues around bans and restrictions on LGBT Pride marches and other public events in various European cities, and gain greater media interests across Europe.

The Court could encourage widespread awareness of this campaign and ensure that all relevant organizations could participate.

The Court could also use the European TransGender Network as a model for other deliberative processes. Recall that in Chapter 1 I mentioned the importance of focusing on certain loci of activity that can serve as sites for investigation. Progressive deliberative institutions should be looked to as a model that the Court should encourage others to replicate.

For example, consider the European TransGender Network which organized the first European Transgender Council in 2005. The Council meeting exhibited a number of positive deliberative elements. First, it was transparent and inclusive, representing a total of over 100 European and National Trans Support Groups. Second, it focused on uncovering and probing empirical information. Joanne Sinclair delivered a speech that examined her European-wide survey on the Social, Medical and Legal issues affecting Transgender People across Europe. In particular, she made public legal developments taking place across Europe with regard to transsexuals. Notably, several countries, including Switzerland and Hungary, required surgery to change one's name and made divorce a prerequisite for full recognition of the acquired gender.

#### **4.5.6 Issues for future dialogues on transsexualism**

Transsexual case law points us in a direction for future considered dialogue. While the law purports to allow transgender persons to function as fully as possible in their new gender, each society will have to determine what "as fully as possible" really amounts to. What is "possible" must be decided having regard to the interests of others, so far as they are affected, and of society as a whole. Are there compelling reasons for setting limits to the legal recognition of the new gender? This will require knowledge of the context in question, the values prevailing in society, the law (which reflects the evolution of social attitudes) in addition to scientific and medical research and normative analysis.

For instance, at what stage should a change of gender be recognized? Should legal recognition be given to post-operative transsexuals only, or should it be extended to transsexuals who have undergone partial surgery or none at all? One might ask why it is necessary that a transsexual should have to go through drastic, and possibly painful and expensive, surgery in order to be legally recognized as belonging to his or her chosen gender.

Should there be pre-conditions to which the legal recognition of a change of gender should be made subject? Some jurisdictions impose conditions, such as sterilization and the dissolution of any existing marriage, while others do not. Obviously such conditions raise sensitive issues. Another important issue for dialogue is whether transsexuals should be allowed to marry. This will involve an assessment of the nature and purpose of marriage in contemporary society.

#### ***4.6 Objections and replies***

*Will the Court become valueless for some individuals?*

One might object that if a national institution is declared to meet the necessary criteria, then this means individuals will have no reason to re-visit the Court since they know that the Court will defer to their state government.<sup>38</sup> However, this objection misconceives the notion of deference. As I noted above, deference is determined on a case-by-case basis. For example, just because an institution meets the criteria in the case

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<sup>38</sup> I thank Hagop Sarkissian for raising this objection.

involving freedom of assembly, it does not mean it meets the criteria in the case of freedom of religion. I also noted that deference is not absolute. So even if an individual comes before the Court with another case that involves freedom of assembly, it is possible that the institution no longer meets the criteria. Institutions change and evolve, for instance, under new leadership.

*Will the Court's role become a substantive one?*

One might worry that the Court's role, while ostensibly procedural, will slip into a substantive one. For example, if the Court does not approve of the output of the democracy, it can declare that it has not met the appropriate epistemic and deliberative criteria. The danger, then, is that by making deference a fairly imprecise notion, the Court may be criticized for being ad hoc.

I argue that while deference cannot be absolute across all cases, the Court must cite reasons for its decisions. In giving its rationale for a decision, it should discuss other states and use qualities of ideal states as a guide. What makes a state ideal in a certain case is not the substantive content of its decisions on the case, but rather the particular epistemic and deliberative virtues that it embodies.

My goal here is not to identify a priori all the virtues that institutions must meet. Rather, I give a first pass at virtues that are necessary in a particular case. I propose that a promising way of making headway in any case is to focus on ideal states as a guide

and to query what the state under investigation lacks with regard to deliberative qualities.

*Doesn't this dialogue already take place? What, exactly, is unique about your proposal?*

One might argue that this in some places and contexts, this debate already happens on its own. If so, then what is the point of this dialogical proposal? After all, post-operative transsexuals were finally accorded rights to legal recognition of their new gender, under Articles 8 and 12, and presumably this was because of increased deliberation.

I have two comments in response. First, while it is true that in the case of transsexuals there was eventual deliberation and normative advancement, there may not be in the future with other cases. Also, with a focus on dialogue, we might come to a position of normative change and increased respect sooner than we otherwise might. Second, we don't know if the dialogue so far has been fair, meeting conditions for dialogue, as opposed to accidental. For instance, suppose we assume the debate about transsexuals was primarily instigated by the media. Why should the Court trust the media? When, if ever, should it rely on the media to conduct a fair dialogue?

## **Conclusion**

I have argued that the Court's failure to justify the normative importance of "consensus" and articulate with precision the scope and function of the doctrine poses a grave threat to the Court's legitimacy as arbiters of human rights. I propose that IHRI's



such as the European Court of Human Rights earn legitimacy by upholding epistemic and deliberative standards for national institutions, adjudicating deliberative disputes, and promoting and supporting an environment for deliberation. My primary contribution is not a defense of a particular strategy or best practice but rather the promotion of a search for deliberative practices – practices that leverage current cultural and moral disagreement regarding human rights.

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## **Biography**

Monica Anne Hlavac was born in Park Ridge, IL on July 11, 1978. She received her B.S. in Biochemistry with a second major in philosophy from the University of Notre Dame in May of 2000. She is the author of "A Developmental Approach to the Legitimacy of Global Governance Institutions," in *Coercion and the State*, David A. Reidy and Walter J. Riker, eds. (Springer Netherlands, 2008). At Duke University she held the James B. Duke Fellowship and received a Duke Summer Research Fellowship as well as a Duke University Center for International Studies Graduate Award for Research and Training to present her dissertation research at an international conference in Krakow, Poland.