As part of the reparations, the Inter-American Court compensated the victims monetarily. Moreover, the Inter-American Court ordered Suriname, *inter alia*, to investigate the events complained of, prosecute and punish those responsible, and locate and identify the deceased's remains. The State also had to adopt all necessary measures to ensure the delimitation, demarcation and collective titling of the ancestral lands of the community and refrain from actions that would affect the existence, value, use or enjoyment of that property until the rights of the community are secured. Finally, the Inter-American Court ordered the State to establish a developmental fund of US$1,200,000 to invest in health, housing and educational programs for the Moiwana community members.

In *Saramaka People*, the Inter-American Court further developed and solidified the ancestral property rights of tribal communities. In this case, Suriname issued various logging and mining concessions between the years of 1997 and 2004 within the territory of the Saramaka tribal community. The Inter-American Court found that while the American Convention, specifically the right to property in Article 21, did not entirely debar the State from granting these concessions, the State did not consult the Saramaka people prior to these operations.

The specific allegations against the State in this case included non-compliance with Article 2 (duty of State to adopt necessary measures to protect American Convention rights) and violations of Articles 3 (right to juridical personality), 21 (right to property) and 25 (right to judicial protection) of the American Convention. The first issue was whether the Saramaka people constituted a 'tribal community', entitled to special measures that ensure the full exercise of its rights based on Article 1(1) of the American Convention. The Inter-American Court held that, although the Saramaka people were not indigenous to Suriname,[155] they nevertheless constituted a tribal community entitled to protection under the American Convention, because of their dependence on the land and their 'profound' spiritual connection to their ancestral territory.

The next pressing issue was whether Article 21 of the American Convention recognised the rights of the Saramaka people to use and enjoy communal property. In this regard, the Inter-American Court found that Article 21, as interpreted in the light of Suriname's other international human rights obligations, including common Article 1 (the right to self-determination) of the

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the right of indigenous groups to a communal right to property under Article 21 of the American Convention), to the tribal Moiwana community.

[155] The Saramakas' ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17th century, who later escaped to the interior regions of the country and established autonomous communities.

International Covenant on Civil and Political Rights and the *International Convenant on Economic, Social and Cultural Rights*,[156] ensured the right of the Saramaka people to use and enjoy communal property. The Inter-American Court also found that, because Suriname allowed only individuals to claim a right to property under the law, it violated Article 3 of the American Convention, which protects the right to juridical personality defined 'as the right to be legally recognised as a subject of rights and obligations'.[157]

Perhaps the most compelling aspect of this decision, however, was the Inter-American Court's determination of ownership of the natural resources found within the Saramaka territory. The Inter-American Court held that members of tribal and indigenous communities had ownership of the natural resources traditionally used within their territory, because those resources were central to the survival of these groups. Notwithstanding, the Inter-American Court noted that property rights granted under Article 21 were not absolute and that the State, under certain circumstances, could restrict those rights, including issuing concessions for the exploration and extraction of natural resources within Saramaka territory.

To assess the scope of permissible restrictions of the right to property, the Inter-American Court articulated three safety measures that the State had to utilise when granting a concession for the exploration and extraction of a natural resource in Saramaka's territory. First, the State had to consult the Saramaka people and ensure effective participation in regard to any development, exploration, or extraction plan. However, in cases of major developments or investment plans that could profoundly impact the Saramaka people's property rights and affect their traditional territory, the State also had to obtain the free, prior and informed consent of the Saramakas in accordance with their traditions and customs. Secondly, the State had to guarantee that the Saramaka people would receive a benefit from any activity that took place within their property. Thirdly, the State could not issue any concession unless it had consulted with an independent entity to assess the social and environmental impact of the requested project.

In applying these safety measures to the concessions already granted by Suriname in the Saramaka territory, especially the logging and mining concessions, the Inter-American Court found that the State failed to comply with these safeguards, which violated Articles 21 and 1(1) of the American Convention.

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156 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See also n 90.

157 IACtHR, *Saramaka People v Suriname*, Judgment of November 28, 2007, Series C No. 172 [166].

As part of the reparations, the Inter-American Court ordered the State to demarcate the Saramaka territory and grant a collective property title to the Saramaka people. Additionally, the State had to amend any legislation encroaching upon the Saramaka people's right to juridical recognition, access to legal remedies, and the use and enjoyment of their property. The State also had to ensure the right of the Saramaka people to consultation, and, if necessary, set up a process through which they could grant or withhold consent in regard to large-scale projects that might affect their territory. Moreover, the State had to ensure that the environmental and social assessments were conducted by independent and competent agencies.

4 Conclusion

The States of the Americas currently have a more constructive relationship with the Commission and the Inter-American Court, which includes a better understanding of the complementary role that such organs play within their national institutions. This atmosphere allows for better dialogue and coordinated action between civil society, States, the Commission and the Inter-American Court in the common goal of safeguarding human rights. Several States have recently adopted national legislation and practices that broadened effective implementation of standards and decisions.

However, the increasing growth and impact of the Inter-American system has simultaneously adversely affected it. For example, OAS Members are hesitant to allocate essential additional funds for the Commission and the Inter-American Court. Moreover, some States remain suspicious of these organs and have, on occasion, attempted to undermine the system's effectiveness through covered proposals. Noteworthy is the vital role that civil society exercises in defending the autonomy and integrity of both organs – which, to a certain extent, are the main guarantors of the effectiveness of the system.

Lastly, a pending issue that remains to be addressed is the lack of universal ratification by all of the OAS State members of the core treaties of the Inter-American system, in particular the American Convention on Human Rights. Although, as previously discussed, the Commission monitors human rights compliance in the US, Canada and a number of Caribbean States under the *American Declaration on the Rights and Duties of Man*, the effectiveness of that supervision would strengthen if those States became parties to the IACHR. Furthermore, the case law developed by the Inter-American Court demonstrates that access to this tribunal would also benefit the protection of human rights in many of the English-speaking States that have not yet accepted its contentious jurisdiction.

15. African human rights law in theory and practice

Magnus Killander

1 Introduction

Human rights law is developed through the findings of national and international institutions and courts. National courts, human rights commissions, regional and global treaty bodies and courts make reference to each other in reports and judgments in the continuous development of the law of human rights. The African perspective, as developed by African courts, national human rights institutions, the African Commission on Human and Peoples' Rights ('African Commission') and so forth, is often forgotten in this exchange of ideas.[1]

It is sometimes argued that human rights have been imposed on the rest of the world by Western countries. To rebut this argument, the first part of this chapter considers the history of human rights discourse in Africa and its role in the struggle against colonialism. Since independence many regional human rights instruments have been adopted, often as a response to developments in the global arena. The second part of the chapter examines this regionalization of universal human rights norms and also takes note of unique features of the African normative human rights framework and areas where Africa has taken the lead in developing an international framework. The section explores to what extent the African Union ('AU') and its predecessor the Organization of African Unity ('OAU') have responded to African challenges in devising the African regional human rights system and how the often vague provisions of the main regional human rights treaty, the *African Charter on Human and Peoples' Rights* ('ACHPR' or 'the Charter'),[2] have been interpreted by the major regional human rights body, the African Commission.

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[1] Rachel Murray, 'International Human Rights: Neglect of Perspectives from African Institutions' (2006) 55 *International and Comparative Law Quarterly* 193. African case law can be found in the *African Human Rights Law Reports* ('AHRLR') published by Pretoria University Law Press and *International Law in Domestic Courts* ('ILDC'), an online service provided by Oxford University Press. For more information see http://www.chr.up.ac.za at 29 January 2009.

[2] *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 58 (entered into force 21 October 1986). This and other African human

The final part of this chapter considers challenges and innovations in regional monitoring of compliance with international human rights norms. The proliferation of various monitoring bodies is considered in the context of the lack of adequate response to human rights at the national level in African countries and the lack of political commitment at the regional level. Note is also taken of the fledgling developments at the sub-regional level.

Research on the AU and other African organizations is made difficult by the lack of easily available information. Most of the websites of these organizations and their organs have gradually improved but they lack a publicly available document handling system like the Official Document System ('ODS') of the UN.[3]

2 Historical background

Human rights discourse played an important role in the struggle against colonialism.[4] The first Pan-African Congress, held on the fringes of the Versailles Peace Conference in 1919, called for the abolition of slavery, forced labour and corporal punishment and stated that it should 'be the right of every native child to learn to read and write his own language, and the language of the trustee nation at public expense'.[5] Calls for human rights were made again at the third Pan-African Congress in Lisbon in 1923 and at the fourth Congress in New York in 1927. Nnamdi Azikiwe, who was to become the first President of Nigeria, wrote in 1937, commenting on independent Ethiopia, Haiti and Liberia, that 'there is a universal identity of interest, in that Government is based on consent of the governed through constitutional provisions.'[6] This, admittedly overly positive picture, he contrasted with the colonies where 'the black man and woman . . . are protégés, not citizens'.[7]

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rights instruments have been reprinted in Christof Heyns and Magnus Killander, *Compendium of Key Human Rights Documents of the African Union* (Pretoria University Law Press, Pretoria, 3rd ed, 2007).

[3] See, for example, http://www.africa-union.org at 29 January 2009 and http://www.achpr.org at 29 January 2009.

[4] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights* (Martinus Nijhoff, The Hague, 2003) 6; Chidi Anselm Odinkalu, 'Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa' (2003) 47 *Journal of African Law* 1, 25; Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Philadelphia, 1998) 78.

[5] W E Burghardt Du Bois, 'The Pan-African movement' in G Padmore (ed) *Colonial and Coloured Unity – A Programme of Action* (1963) Etext, http://www.etext.org/Politics/MIM/countries/panafrican/pac1963.pdf at 29 January 2009, 16.

[6] Nnamdi Azikiwe, *Renascent Africa* (Frank Cass & Co Ltd, London, 1968) 170.

[7] Ibid 171. Azikiwe also discusses the rights of labourers: ibid 265.

By the time of the Fifth Pan-African Congress in Manchester in October 1945, the focus was on political and economic self-determination of the peoples of Africa, but the Congress also reiterated calls for such individual rights as freedom of association, assembly and expression.[8] In calling for the implementation of the *Atlantic Charter* everywhere, it was not only calling for self-determination but also requesting 'that all the men in all lands may live out their lives in freedom from fear and want'.[9] In December 1958 the All African People's Conference was held in Ghana. The resolutions of the conference made many references to human rights and requested that 'independent African States ensure that fundamental human rights and universal adult franchise are fully extended to everyone within their states, as an example to imperial nations who abuse and ignore the extension of those rights to Africans'.[10]

With more and more African states gaining independence, there was less focus on human rights except as a tool in the fight against colonialism and white minority rule in southern Africa. In 1963 the OAU was created. A few token references to human rights were included, but it is clear that the human rights language that had been used in opposition was no longer of value. To the extent that any attention was given to human rights by African leaders their priority was on socio-economic rights. In the words of the Tanzanian president Julius Nyerere:[11]

> What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.

A new international economic order failed to materialize and the lot of the African farmer did not improve. Authoritarian states became the norm and the bill of rights enshrined in many African constitutions remained paper tigers. The OAU early on took an interest in some human rights issues such as

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8 For a collection of the resolutions adopted see Padmore, above n 5.

9 *Atlantic Charter*, signed on 14 August 1941. See, for example, the resolution on East Africa which also calls for the principles of the Four Freedoms to be put into practice at once: Padmore, above n 5, 57.

10 Conference Resolutions on Imperialism and Colonialism [8], reprinted (with all the resolutions of the conference) in [1959] *Current History* 41, 44.

11 Julius Nyerere cited in Issa G Shivji, *The Concept of Human Rights in Africa* (CODESRIA, London, 1989) 26.

refugees,[12] but the main principle established was the 'non-interference in the internal affairs of states'.[13] It is clear that the OAU did not contest the universality of human rights; after all the member states reaffirmed their adherence to the *Universal Declaration on Human Rights* ('UDHR')[14] in the preamble of the *OAU Charter*. However, the 'focus [of the OAU] was on protection of the state, not the individual'.[15]

3 Regionalizing the universal

The ACHPR was adopted in 1981. The history of the Charter has been traced elsewhere.[16] Ouguergouz notes a 'remarkable resemblance' between the Charter and the *Universal Declaration on Human Rights* ('UDHR').[17] However, it is clear that the drafters of the Charter have been inspired by a number of international treaties including the ICCPR[18] and ICESCR[19], the *American Declaration of the Rights and Duties of Man,*[20] the *American Convention on Human Rights*[21] and the *European Convention on Human Rights*.[22]

In addition to the ACHPR, the OAU and thereafter the AU have adopted many other treaties dealing with human rights. Many of these are regional

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12 Bahame Tom Mukirya Nyanduga, 'Refugee Protection under the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa' (2004) 47 *German Yearbook of International Law* 85. On early OAU initiatives with regard to human rights see Rachel Murray, *Human Rights in Africa – From the OAU to the African Union* (Cambridge University Press, Cambridge, 2004).

13 *Charter of the Organization of African Unity*, opened for signature 25 May 1963, 47 UNTS 45 (entered into force 13 September 1963) Article 3(2) ('OAU Charter').

14 GA Res 217A (III), UN Doc A/810, 71 (1948).

15 Murray, above n 12, 7.

16 Ouguergouz, above n 4, 19–48. See also the drafts and other documentation reprinted in Christof Heyns (ed) *Human Rights Law in Africa 1999* (Kluwer Law International, The Hague, 2002) 65–105.

17 Ouguergouz, above n 4, 56, 60.

18 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

19 International Covenant on Economic Social and Cultural Rights, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

20 *American Declaration of Rights and Duties of Man* (1948), OAS Doc OEA/Ser.L.V/II.82 Doc 6 Rev 1 at 17 (1992).

21 *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

22 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 262 (entered into force 3 September 1953) ('ECHR').

responses to treaties adopted at the UN.[23] Some treaties such as the recently adopted *African Youth Charter*[24] and the *African Charter on Democracy, Elections and Governance*[25] have no equivalent at the global level.

This section explores how the ACHPR and other regional treaties reflect both the universal and the regional.[26] 'Africanness' in these treaties could, according to Viljoen, be measured according to, on the one hand, the degree to which the regional instruments address 'the most pressing and specific human rights violations in Africa' and, on the other hand, the degree to which they reflect African tradition.[27] In the following the provisions of the Charter and associated treaties will be analysed with regard to both their 'Africanness' and their contribution to the development of human rights law.

The African Commission has interpreted the provision in Article 1 ACHPR that states 'shall undertake . . . measures to give effect' to the provisions of the Charter to mean that 'if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation.'[28] Applying this principle in one of its most well-known cases, dealing with the rights of the Ogoni people in the Niger delta, the Commission held that 'the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis'.[29]

Provisional measures are only provided for in the Rules of Procedure of the Commission and not in the Charter itself. In the *Saro-Wiwa* case the

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[23] Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press, Oxford, 2007) 302. For example, the *African Charter on the Rights and Welfare of the Child*, OAU Doc CAB/LEG/24.9/49 (1990) ('*African Children's Charter*') was adopted a year after the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'). Other African treaties were adopted long after the universal instruments. The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, (adopted 11 July 2003, entered into force 25 November 2005) ('*Protocol on the Rights of Women*'), can be seen as a regional response to the *Convention on Elimination of all forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

[24] Adopted on 2 July 2006, available online at http://www.africa-union.org/root/au/Documents/Treaties/Text/African_Youth_Charter.pdf at 1 February 2009.

[25] AU Doc Assembly/AU/Dec. 147 (VIII) (30 January 2007). Reprinted in Heyns and Killander, above n 2, 108–19.

[26] For a detailed examination of the ACHPR, see Ouguergouz, above n 4.

[27] Viljoen, above n 23, 304.

[28] *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) [20].

[29] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) [58] ('*Ogoniland*').

Commission held that the refusal of the Nigerian government to comply with provisional measures requesting a stay of execution constituted a violation of Article 1 ACHPR.[30]

The prohibition of discrimination in Article 2 ACHPR differs from those in the UDHR and the ICCPR and ICESCR in that it includes 'ethnic group', and refers to 'fortune' rather than 'property' as an explicit prohibited ground of discrimination. Its wording indicates that it is only applicable to discrimination with regard to rights protected in the Charter and is thus similar to Article 14 ECHR.[31] However, it should be noted that because of the wide range of rights covered by ACHPR the distinction is of little practical use and the Commission has not interpreted Article 2 restrictively in its jurisprudence.

As with other regional and global instruments, there is an open-ended prohibition of discrimination on the grounds of 'other status'. The question whether 'other status' includes sexual orientation was raised in a case which was considered by the Commission in 1994, but not decided as the complaint was withdrawn.[32] The rapporteur on the case however is reported to have stated: '[b]ecause of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it . . . Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values'.[33] This approach of limiting equality rights on the basis of African values has rightly been criticized.[34] More recent discussions of discrimination on the basis of sexual orientation at the Commission indicate increased tolerance in that respect.[35]

Article 4 ACHPR protects not only the right to life but also the integrity of the 'inviolable' human being. This right can be seen to clash with certain tradi-

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[30] *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) [122]. Cf the decisions of the UN Human Rights Committee in *Piandiong and Others v the Philippines*, UN Doc CCPR/C/70/D/869/1999 (19 October 2000) [5.2] and the International Court of Justice in *LaGrand (Germany v United States of America)* [2001] ICJ 466.

[31] In contrast, Article 26 of the ICCPR prohibits discrimination with regard to any right, rather than only the rights enumerated in the ICCPR.

[32] *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

[33] 16th Ordinary Session 1994 quoted in Evelyn A Ankumah, *The African Commission on Human and Peoples' Rights – Practice and Procedures* (Martinus Nijhoff Publishers, The Hague, 1996) 174.

[34] Ibid 174–5.

[35] See, for example, the examination of the state report of Cameroon in May 2006, discussed in Rachel Murray and Frans Viljoen, 'Towards Non-discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities Before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86, 103–4.

tional practices.[36] That culture cannot interfere with this important right has been further elaborated on in Article 5 of the *Protocol on the Rights of Women* and in Article 21 of the *African Children's Charter*. It is thus clear that African human rights law take precedence over harmful traditions, recognizing that cultural practices are not static. It is noteworthy that African human rights law, for example the *Protocol on the Rights of Women*, often goes further in its protection against harmful practices than equivalent instruments in other regions and at the global level. Article 5 of the Protocol, with the heading 'Elimination of harmful practices', for example, provides that states should adopt criminal legislation banning all forms of female genital mutilation.

As opposed to other human rights treaties, notably the ICCPR, the Charter does not explicitly allow for the death penalty. In *Bosch* the Commission referred to one of its resolutions in urging all states 'to take all measures to refrain from exercising the death penalty'.[37] However, support for the death penalty remains strong in many African states, though there is a slow trend towards abolition.[38]

Article 5 ACHPR sets out a number of rights treated separately in other international human rights instruments: the right to dignity, recognition of legal status, prohibition of exploitation and degradation, in particular slavery, and the prohibition of torture, cruel, inhuman or degrading punishment and treatment. The right to dignity offers an opportunity for protecting rights not explicitly recognized in the Charter.[39] For example, the right to privacy is not explicitly recognized in the Charter, but could perhaps be recognized as within the right to dignity.

Exploitation takes many forms in Africa and includes forced labour. In a continent plagued by poverty, it is however often difficult to distinguish between poor conditions of work and forced labour.[40] Article 29(2) ACHPR provides that everyone should 'serve his national community by placing his physical and intellectual abilities at its service'. This could be seen as endorsing forced labour, but this provision should be interpreted in light of the exceptions for 'normal civil obligations' recognized in the ICCPR and

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36 Ouguergouz, above n 4, 102–8.

37 *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) [52].

38 Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa – A Human Rights Perspective* (Pretoria University Law Press, Pretoria, 2007).

39 Cf the interpretation of Article 10 of the *South African Constitution* by the Constitutional Court of South Africa in *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

40 ILO, *A Global Alliance against Forced Labour* (2005) ILO, http://www.diversite.be/diversiteit/files/File/MH_TEH/documentatie/DECLARATIONWEB.pdf at 29 January 2009, 42.

the ILO forced labour conventions.[41] Mauritania was the last country in the world to formally abolish slavery in 1980. However, a number of cases before the Commission have related to discrimination which has its origin in slavery.[42]

The prohibition of arbitrary arrest and detention in Article 6 ACHPR corresponds to Article 9(1) ICCPR. However, the Charter does not explicitly recognize the procedural safeguards recognized in Article 9(2) to 9(5) ICCPR, such as the right to be promptly informed about the reason for arrest, the right to be brought promptly before a judge, the right to *habeas corpus* and the right to compensation for unlawful detention. These rights have however been recognized in the Commission's case law and in the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* adopted by the Commission in 2003.[43] The Charter also does not include any equivalent to Article 10 ICCPR dealing with conditions of detention. The Commission has instead found violations of Article 5 ACHPR when dealing with inadequate conditions of detention.[44]

In addition to the fair trial rights set out in Article 7 ACHPR, Article 26 ACHPR provides for the independence of the judiciary. Article 7 ACHPR provides for access to courts – 'the right to have his cause heard' – and safeguards with regard to criminal trials. These provisions are less elaborate than in the ICCPR but have been extended by the Commission in its resolutions and case law.[45]

The Commission has found violations of the right to freedom of conscience in Article 8 ACHPR in a complaint against Zaire on harassment of Jehovah's Witnesses,[46] and in a complaint against Sudan on persecution of Christians.[47] In a case against South Africa, the Commission found that the prohibition of the use of cannabis for sacramental use by Rastafarians was justified by the limitation clause in Article 27(2) ACHPR.[48]

The Commission has developed the content of Article 9 in its *Declaration of Principles on Freedom of Expression in Africa*. The right to 'receive

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41 Ouguergouz, above n 4, 111.

42 See, for example, *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

43 Reprinted in Heyns and Killander, above n 2, 288–311.

44 See, for example, *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) [40]–[41].

45 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, above n 43.

46 *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) [45].

47 *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) [76].

48 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) [40]–[43].

information' in Article 9(1) ACHPR is interpreted in the Declaration to include a right to 'access information held by public bodies' and information 'held by private bodies which is necessary for the exercise or protection of any right'.[49] A number of countries in Africa have followed the international trend and adopted freedom of information legislation.

Article 12(3) ACHPR uniquely among international human rights treaties recognizes the right to 'seek and obtain asylum'. This provision should be read together with Article 2(3) of the 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, which provides that a person may not be returned to a country where his or her life, physical integrity or liberty might be threatened.[50] The African Refugee Convention can be seen as a response to the 1967 Protocol to the 1951 *UN Refugee Convention*,[51] which expanded the scope of the latter convention beyond the situation in post-war Europe. It is noteworthy that the African Refugee Convention includes a wider definition of refugee than the UN Convention but that the *non-refoulement* provision in Article 2(3) is limited to threats to life, physical integrity or liberty. Even with this limitation the protection is wider than in Article 33 of the UN Convention, which only prohibits *refoulement* when life or freedom is threatened on the basis of discrimination.[52]

The AU is in the process of developing a treaty on internally displaced persons in recognition of the problems faced by people who are forced to leave their homes but do not cross a border.[53]

The provision in Article 12(4) ACHPR that expulsion decisions must be 'taken in accordance with the law' must be interpreted in the light of the safeguards in Article 13 ICCPR and the provisions in the refugee conventions. The prohibition on mass expulsion in Article 12(5) ACHPR has been addressed by the Commission on numerous occasions indicating that many states do not live up to their undertaking of 'African solidarity'.[54]

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[49] *Declaration of Principles on Freedom of Expression in Africa* (2002) African Commission on Human Rights, http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html at 29 January 2009.

[50] *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted on 10 September 1969, OAU Doc CAB/LEG/24.3 (entered into force on 20 June 1974), reprinted in Heyns and Killander, above n 2, 279–83.

[51] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

[52] The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) further protects against *refoulement* if there are reasonable grounds to believe the person will be tortured in the receiving state.

[53] Permanent Delegation of the African Union in Geneva, 'HE Mme Julia Dolly Joiner, Commissioner for Political Affairs addresses the 58th session Executive Committee of the UNHCR, Geneva' (Press Release, 2 October 2007).

[54] See, for example, *Rencontre Africaine pour la Défense des Droits de*

The right to political participation in Article 13 has been considered by the Commission in a few cases. The AU has also been active in standard-setting for democratic governance. The *African Charter on Democracy, Elections and Governance*, adopted by the AU Assembly in January 2007,[55] was preceded by a number of declarations which will continue to play an important role. These include the *Declaration on Unconstitutional Change of Government* adopted by the OAU Assembly in July 2000 and the *Declaration on the Principles Governing Democratic Elections in Africa* adopted by the Assembly in July 2002.

The question is how sincerely democracy has been endorsed. Military coups are no longer a common occurrence on the continent and sanctions, such as suspension of participation in AU organs, are imposed by the African Union for unconstitutional changes of government in accordance with the *Declaration on Unconstitutional Change of Government*. However, crises such as in Zimbabwe make it clear that these declarations are only applied selectively by African leaders in their response to violations by their peers.[56] It should be noted that some current African leaders came to power through military means.[57] In most of their countries elections have been held to legitimize their rule, though the freeness and fairness of these elections is often questionable. One way of measuring democracy is to see whether a state is viewed as a democracy by its peers: 22 African countries were invited by the Convening Group to the Fourth Ministerial Meeting of the Community of Democracies in Bamako, Mali, in November 2007.[58] None of the 11 African

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l'Homme v Zambia (2000) AHRLR 321 (ACHPR 1996); *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997).

55 On the Charter see, for example, Solomon T Ebobrah, *The African Charter on Democracy, Elections and Governance: A new dawn for the enthronement of legitimate governance in Africa?* (2007) AFRIMap, http://www.afrimap.org/english/images/paper/ACDEG&ECOWAS_Ebobrah.pdf at 29 January 2009.

56 On the response of the AU to unconstitutional change of government see P D Williams, 'From non-intervention to non-indifference: the origins and development of the African Union's security culture' (2007) 106 *African Affairs* 253, 271–5. On the response of the AU to the crisis in Zimbabwe following the 2008 elections see *Resolution on Zimbabwe*, AU Doc Assembly/AU/Res.1 (XI) (1 July 2008).

57 For example Muammar al-Gaddafi of Libya (1969); Teodoro Obiang Nguema Mbasogo of Equatorial Guinea (1979); Yoweri Museveni of Uganda (1986); Blaise Compaoré of Burkina Faso (1987), Omar al Bashir of Sudan (1989); Idriss Deby of Chad (1990); Meles Zenawi of Ethiopia (1991); Yahya Jammeh of The Gambia (1994); Denis Sassou Nguesso (1997); and Francois Bozize of Central African Republic (2003). In 2008 military coups took place in Mauritania and Guinea, to which the AU responded in accordance with the *Declaration on Unconstitutional Change of Government*.

58 They were: Benin, Botswana, Cape Verde, Ghana, Kenya, Lesotho, Liberia,

countries which have a leader who has been in power for over 20 years were invited.[59]

Article 14 ACHPR protects the right to property.[60] In *Huri-Laws v Nigeria* the Commission found that since no 'public need or community interest to justify search and seizure' of the property of an NGO had been shown, Article 14 ACHPR had been violated.[61] In another case against Nigeria the Commission held that:[62]

> The right to property necessarily includes a right to have access to one's property and the right not to have one's property invaded or encroached upon. The decrees which permitted the Newspapers premises to be sealed up and for publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general. The Commission finds a violation of [Article 14 ACHPR].

Considering that the Preamble of the Charter states that 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality', it is noteworthy that only three socio-economic rights are explicitly recognized in the Charter: work, health and education. There is no reference in the Charter to the progressive realization of these rights, which pervades the obligations in the ICESCR, but the Commission has held that progressive implementation is implicit.[63] The Commission has interpreted the rights recognized in the Charter widely to

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Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Sao Tome and Principe, Senegal, Seychelles, South Africa, Tanzania and Zambia. Algeria, Burkina Faso, Burundi, Cameroon, DRC, Djibouti, Egypt, Guinea-Bissau, Mauritania, Nigeria, Rwanda, Sierra Leone and Uganda were invited as observers: *Statement of the Convening Group of the Community of Democracies on the Invitation Process for the Fourth Ministerial Conference to be held in Bamako, Mali, November 14–17, 2007* (2007) Demcoalition, http://www.demcoalition.org/pdf/CG%20Statement%20of%20the%20Invitation%20Process%20to%20CD%20Bamako%20Ministerial%20Conference.pdf at 20 January 2009.

[59] Those leaders were: Omar Bongo of Gabon (in power since 1967); Muammar al-Gaddafi of Libya (1969); Jose Eduardo dos Santos of Angola (1979); Teodoro Obiang Nguema Mbasogo of Equatorial Guinea (1979); Robert Mugabe of Zimbabwe (1980); Hosni Mubarak of Egypt (1981); Paul Biya of Cameroon (1982); Lansana Conte of Guinea (1984); Mswati III of Swaziland (1986); Yoweri Museveni of Uganda (1986); Zine El Abidine Ben Ali of Tunisia (1987); and Blaise Compaoré of Burkina Faso (1987).

[60] Ouguergouz, above n 4, 152–5.

[61] (2000) AHRLR 273 (ACHPR 2000) [53].

[62] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) [54].

[63] *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) [84] ('*Purohit*'); see also Viljoen, above n 23, 240–41.

include also, for example, the right to food and the right to housing.[64] More detailed socio-economic rights are recognized in the *African Children's Charter*, the *Protocol on Women* and the *Youth Charter*. Cultural rights are further elaborated in the *African Cultural Charter*, which was adopted in 1976.[65]

The AU Assembly has also adopted a number of declarations with regard to socio-economic rights such as the *Maputo Declaration on Malaria, HIV/AIDS, Tuberculosis, and Other Related Infectious Diseases*, the *Declaration on Agriculture and Food Security in Africa* and the *Declaration and Plan of Action for Promotion of Employment and Poverty Alleviation*.[66]

Article 18(1) and (2) ACHPR provides:

1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.
2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

These vague provisions can be interpreted as providing for a right to social security when the extended family fails to fulfil this function. It could also be argued that it would act as a safeguard for traditional values, but the Commission's case law gives no indication that such traditional values prevail if they should conflict with rights recognized in the Charter.

Article 18(3) ACHPR is unique in that it provides that the state 'shall ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'. It thus incorporates the substantive provisions of other international instruments such as CEDAW, which were adopted prior to the adoption of the ACHPR.[67] The rights of women and children are further developed in the *African Charter on the Rights and Welfare of the Child* and the *Protocol on the Rights of Women in Africa*.

The *African Children's Charter* was adopted in 1990, shortly after the CRC. It can be seen as a response to perceived marginalization of Africa in the

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64 See *Ogoniland* and *Resolution on Economic, Social and Cultural Rights in Africa*, adopted by the Commission in 2004 and reprinted in Heyns and Killander, above n 2, 315–22.

65 Adopted on 5 July 1976, available at http://www.africa-union.org/root/au/Documents/Treaties/Text/Cultural_Charter_for_Africa.pdf at 1 February 2009. The *Cultural Charter* will be replaced by the *Charter for an African Cultural Renaissance*, adopted by the AU Assembly in January 2006, when this treaty enters into force.

66 AU treaties and declarations can be found on the AU website, http://www.africa-union.org, at 30 January 2009 and on http://www.chr.up.ac.za at 30 January 2009.

67 Viljoen, above n 23, 270–71.

negotiations on the CRC.[68] In some instances the *African Children's Charter* gives wider protection than the CRC, for example with regard to child soldiers, child marriages and internally displaced children.[69]

The *Protocol on the Rights of Women in Africa* was adopted in July 2003 as an additional protocol to the ACHPR. States that have ratified the Protocol shall report on their implementation of the Protocol in their state reports submitted to the Commission under the Charter. According to Viljoen, 'the Protocol speaks in a clearer voice about issues of particular concern to African women, locates CEDAW in African reality, and returns some casualties of quests for global consensus into its fold'.[70] An important aspect of the Protocol is its inclusion of violations in the private sphere, for example domestic violence (Article 4). The Protocol is complemented by the *Solemn Declaration on Gender Equality in Africa* adopted by the AU Assembly in July 2004.[71]

Note should also be taken of the *African Youth Charter*. This treaty was adopted by the AU Assembly in July 2006 and sets out rights of young people between the ages of 15 and 35 years.[72] The focus is on participation in decision making, education and skills development, employment and health. The *African Youth Charter* and the *Protocol on the Rights of Women* are unique among international treaties in addressing the HIV/AIDS pandemic.[73]

The 'right to special measures of protection' for the aged and the disabled in article 18(4) has received less attention. There is no African equivalent to the recently adopted *UN Convention on the Rights of Persons with Disabilities*,[74] though rights of the disabled are included in the *Women's Protocol*,[75] the *Children's Charter*[76] and the *Youth Charter*.[77] At its session in May 2007 the Commission adopted a Resolution on the rights of older persons in Africa and in November 2007 it appointed one of the Commissioners as Focal Point on the Rights of Elderly Persons in Africa.[78]

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68 Viljoen, above n 23, 261.

69 Viljoen, above n 23, 262.

70 Viljoen, above n 23, 271.

71 Reprinted in Heyns and Killander, above n 2, 138–40.

72 As of November 2008 the *African Youth Charter* had been ratified by 11 states out of the 15 required for it to enter into force.

73 *Women's Protocol* Article 14(1)(d) and (e); *Youth Charter* Article 16(2)(d)–(h).

74 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

75 *Women's Protocol* Article 23.

76 *Children's Charter* Article 13.

77 *Youth Charter* Article 24.

78 *Final communiqué of the 42nd ordinary session of the African Commission on*

One of the ostensibly unique features of the Charter is the recognition of peoples' rights.[79] The Charter sets out the right of all peoples to equality (Article 19 ACHPR), self-determination (Article 20 ACHPR), free disposal of wealth and natural resources (Article 21 ACHPR), economic, social and cultural development (Article 22 ACHPR), peace and security (Article 23 ACHPR) and 'a general satisfactory environment favourable to their development' (Article 24 ACHPR).

The rights recognized in Articles 19 to 22 ACHPR are all aspects of the right to self-determination recognized also in common Article 1 of the ICCPR and the ICESCR.[80] As noted in the historical background above, the right to self-determination 'represents one of the most important roots of modern international human rights protection'.[81] Nevertheless, the inclusion of this right in common Article 1 of the ICCPR and the ICESCR was opposed by Western states and only included at the insistence of developing countries.[82] The difference between the right in the covenants and in the ACHPR is that it is more elaborate in the ACHPR than in the covenants, while, as seen above, the opposite is true with regard to most of the individual rights set out in the Charter.

Ouguergouz argues that the term 'peoples' in the ACHPR can be interpreted in four different ways: all of the nationals of the state, all of the inhabitants of the state, populations under colonial or racial domination, or ethnic groups.[83] In the context of the two covenants, Nowak interprets peoples as referring to 'peoples living under colonial rule or comparable alien subjugation' and peoples of 'independent multinational States . . . not protected as minorities'.[84] As the Charter does not include any specific minority protection corresponding to Article 27 ICCPR it is clear that peoples' rights must also be seen to protect the rights of minorities. However, when the Commission made use of the *UN Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*[85] it was

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Human and Peoples' Rights held in Brazzaville, Republic of Congo, from 14 to 28 November 2007 (2007) ACHPR, http://www.achpr.org/english/communiques/communique42_en.html at 30 January 2009.

79 Ouguergouz, above n 4, 57.

80 On the right to self-determination in the covenants see Human Rights Committee, *General Comment No 12: Article 1*, UN Doc HRI/GEN/1/Rev.1 at 12 (1994), and Manfred Nowak, *UN Covenant on Civil and Political Rights* (N P Engel, Kehl, 2nd rev ed, 2005) 5–26. On the free disposal of wealth and natural resources see also Article 47 ICCPR and Article 25 ICESCR.

81 Nowak, above n 80, 6.

82 Nowak, above n 80, 12–13.

83 Ouguergouz, above n 4, 210–11.

84 Nowak, above n 80, 22.

85 GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/Res/47/135 (18 December 1992).

in the context of the non-discrimination clause in Article 2 ACHPR rather than the rights of peoples to equality in Article 19 ACHPR.[86]

The UN Human Rights Committee has held that individual communications under the Optional Protocol cannot deal with Article 1 ICCPR.[87] The ACHPR does not have such a limitation and complaints of violations of Articles 19 to 24 ACHPR have been considered in a few cases.

The Commission has linked the right to political self-determination to the right to political participation in Article 13 ACHPR.[88] A violation of the right to self-determination was also found in the context of military occupation in *DRC v Burundi, Rwanda and Uganda*.[89] In a case where a liberation movement from the Katanga province of the then Zaire argued that Katanga had a right to secede from Zaire, the Commission held:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire could be called into question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by [Article 13(1) ACHPR] . . . Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[90]

This finding is in line with a declaration adopted by the OAU Assembly in 1964 and now included in the *AU Constitutive Act*: 'respect of borders existing on achievement of independence'.[91] However, the Commission seemingly recognized a right to secession under certain limited circumstances.

In *DRC* the Commission linked the freedom of disposal of wealth and natural resources in Article 21 ACHPR to economic, social and cultural development as protected in Article 22 ACHPR:[92]

> The deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development

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[86] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) [131].

[87] *Lubicon Lake Band v Canada*, UN Doc CCPR/C/38/D/167/1984 (26 March 1990).

[88] See, for example, *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

[89] *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR19 (ACHPR 2003) [68] ('*DRC* ').

[90] *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) [6].

[91] *AU Constitutive Act* Article 4(b). The only way to break this principle is arguably with the consent of the country from which secession takes place, as in the case of Eritrea's independence in 1993.

[92] *DRC* [95].

In the *Ogoniland* case the Commission held that:

> [I]n all their dealings with the oil consortiums, the government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland. The destructive and selfish role played by oil development in Ogoniland, along with repressive tactics of the Nigerian government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of [Article 21 ACHPR].[93]

In a case against Mauritania the Commission found that 'unprovoked attacks on villages constitute a denial of the right to live in peace and security' as guaranteed in [Article 23 ACHPR]'.[94] A violation of this article was also found in the first inter-state complaint dealt with by the Commission: *DRC v Burundi, Rwanda and Uganda*.[95] Of relevance to the right to peace and security are also the *Convention for the Elimination of Mercenarism in Africa* adopted in 1977[96] and the *Convention on the Prevention and Combating of Terrorism* of 1999[97] and its Protocol of 2004.

The Commission has only dealt with the environmental rights recognized in Article 24 ACHPR in one case. In the *Ogoniland* case the Commission held that the right to a satisfactory environment in Article 24 ACHPR

> requires the state to take reasonable . . . measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[98]

Of relevance to the protection of the environment are also the *African Convention on the Conservation of Nature and Natural Resources*[99] and the *Bamako Convention on the Ban of Import into Africa and the Control of*

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93 *Ogoniland* [55].

94 *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) [140].

95 *DRC* [68].

96 Opened for signature 3 July 1977, OAU Doc CM/433/Rev. L. Annex 1 (1972) (entered into force 22 April 1985).

97 Opened for signature 14 June 1999, OAU Doc AHG/Dec. 132 (XXXV) 1999 (entered into force 6 December 2002).

98 *Ogoniland* [52]. See also Morné van der Linde and Lirette Louw, 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* communication' (2003) 3 *African Human Rights Law Journal* 167.

99 Opened for signature 15 September 1968, 1001 UNTS 3 (entered into force 16 June 1969). See also African Convention on the Conservation of Nature and Natural Resources (Revised Version) adopted by the AU Assembly in July 2003.

Transboundary Movement and Management of Hazardous Waste within Africa.[100]

The emphasis that the Charter puts on duties is sometimes seen as a distinctive African feature of the Charter. However, duties are also set out in the UDHR and the *American Declaration* and *American Convention*.[101] Indeed the interests of society at large play an important role in determining the limitations of rights everywhere.[102] Many provisions of the Charter contain 'claw back clauses', for example Article 9(2) ACHPR, which reads '[e]very individual shall have the right to express and disseminate his opinions within the law'. These could be interpreted as permitting the removal of the protection of the Charter by national law. Fortunately the Commission has instead applied Article 27(2) ACHPR as a general limitation clause when the need has arisen to balance one right against another or balance a right against a legitimate societal interest.[103] In determining what limitations to allow, it must be kept in mind that limitations of rights 'must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained . . . a limitation may never have as a consequence that the right itself becomes illusory'.[104]

4 Monitoring implementation: African challenges and innovations

Monitoring of human rights implementation is carried out in varying degrees within the states themselves, by sub-regional bodies to which the states belong, and by the various organs and institutions established under the AU. The UN and its various agencies also play an important role.[105]

The African regional human rights system is the youngest of the regional human rights systems. It was for many years limited to the African Commission on Human and Peoples' Rights. The 11-member Commission was designed as 'a tool of African governments',[106] but has gradually asserted its independence. The composition of the Commission today is in clear

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[100] Opened for signature 30 January 1991, 30 ILM 773 (entered into force 1 February 1996).

[101] Ouguergouz, above n 4, 58.

[102] Viljoen, above n 23, 305.

[103] Christof Heyns and Magnus Killander, 'The African regional human rights system' in F G Isa and K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (University of Deusto, Bilbao, 2006) 519.

[104] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

[105] For a detailed discussion of these actors and their human rights related activities see Viljoen, above n 23.

[106] Daniel D C Don Nanjira, 'The protection of human rights in Africa: The *African Charter on Human and Peoples' Rights*' in J Symonides (ed) *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate, Aldershot, 2003) 227.

contrast to the early days of the Commission when it was dominated by civil servants and ambassadors. It is also noteworthy that at the time of writing, in January 2009, 7 of the 11 Commissioners are women, including the chair and vice-chair.[107] The Commission meets twice a year in two-week sessions at which civil society organizations can participate and make statements. The Commission can hold its meetings anywhere in Africa, but they are often held in Banjul, The Gambia, where the Secretariat of the Commission is based. At the conclusion of a session the Commission adopts an Activity Report which is submitted to the next AU Summit.

State reporting to the African Commission has had limited success. Some of the limitations are similar to those of state reporting under the UN human rights treaties;[108] others have been specific to the African system, such as a lack of availability of the reports for civil society organizations to make meaningful input for the process and the lack of dissemination of the concluding observations adopted.

The Commission's system of special rapporteurs and working groups is modelled on the special procedures of the UN. However, as opposed to the UN system, a special rapporteur in the African system is always also a member of the Commission. The Commission currently has six special rapporteurs charged with investigating the following issues: prisons and conditions of detention; rights of women; freedom of expression; human rights defenders and refugees; asylum seekers, migrants and internally displaced persons; and older persons.

Thematic working groups, which include both members of the Commission and external experts, deal with indigenous populations/communities, economic, social and cultural rights, torture, and the death penalty. A working group on specific issues related to the work of the African Commission, whose mandate includes the revision of the Rules of Procedure of the Commission, was established in 2005.

The response of the Commission to the *UN Declaration on the Rights of Indigenous Peoples*[109] gives an example of the innovative work of one of the working groups. In 2003 the Commission adopted a report of the working group which discussed the concept of indigenous peoples in the context of Africa.[110] In June 2006 the UN Human Rights Council adopted the *UN*

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107 http://www.achpr.org/english/_info/members_achpr_en.html.

108 See, for example, Philip Alston and James Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000).

109 GA Res 61/25, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007).

110 *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* adopted by the African Commission at its 28th ordinary

Declaration on the Rights of Indigenous Peoples. However, before the Declaration could be adopted by the General Assembly it was stalled in the Third Committee by African countries. An explanation for this can be found in a declaration adopted by the AU Assembly in January 2007 in which it expressed concern about 'the political, economic, social and constitutional implications of the Declaration on the African Continent' and affirmed that the 'vast majority of the peoples of Africa are indigenous to the African Continent.'[111] As a response the African Commission presented an advisory opinion on the UN Declaration prepared by the Working Group to the AU Assembly in July 2007.[112] The advisory opinion dealt with the issues which the Assembly had identified as the most important with regard to the future negotiations on the Declaration: the definition of indigenous peoples, self-determination, ownership of land and resources, establishment of distinct political and economic institutions, and national and territorial integrity. The advisory opinion seems to have played a role in alleviating the fear of African states with regard to the implications of the Declaration, as the General Assembly finally adopted the Declaration on 13 September 2007 with no African countries voting against.[113]

The judiciary is inaccessible to the majority of Africans and human rights monitoring in African states can therefore not focus on a judicial approach.[114] National human rights institutions ('NHRI') could play an important role.[115] Lack of access to justice at the national level is one of the factors underlying the very limited number of individual petitions which have been submitted to the African Commission, despite the wide approach to standing adopted by the Commission.[116] By December 2008, more than 20 years after its inception, the Commission had published 141 final decisions on individual communications.

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session (2005) International Working Group on Indigenous Affairs, http://www.iwgia.org/sw8768.asp at 1 February 2009.

111 *Decision on the United Nations Declaration on the Rights of Indigenous Peoples*, AU Doc, Assembly/AU/Dec.141 (VIII) (30 January 2007).

112 *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (2007) ACHPR, http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf at 30 January 2009.

113 UN, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples' (Press Release, 13 September 2007).

114 See, for example, Odinkalu, n 4 above.

115 On NHRIs see, for example, Rachel Murray, 'National human rights institutions: criteria and factors for assessing their effectiveness' (2007) 25 *Netherlands Quarterly of Human Rights* 189.

116 See, for example, *Ogoniland* [49], where the Commission permitted the admissibility of complaints submitted by way of *actio popularis.* Such submissions are not, for example, allowed under the ICCPR or the ECHR.

Of these decisions 63 communications were declared inadmissible, 11 were closed after withdrawal and 4 after an amicable settlement was reached. The Commission has taken 63 decisions on the merits and found a violation of one or more articles of the ACHPR in 56 of these.[117]

Under Article 56 ACHPR, local remedies must be exhausted in respect of a complaint in order for a case to be admissible, unless such remedies are unduly prolonged. In a number of cases the complainants have argued that the alleged lack of independence of the judiciary would mean that local remedies need not be exhausted. However, the Commission has guarded against becoming a tribunal of first instance which decides questions of fact rather than law.[118] Nevertheless, the admissibility decision in *Purohit* has potentially far-reaching consequences, as the Commission decided to declare the complaint admissible even though the disputed act could be challenged under Gambian legislation, as the Commission found that the availability of such a challenge would not provide 'realistic remedies ... in the absence of legal aid services'.[119]

With regard to socio-economic rights, the exhaustion of local remedies becomes problematic with regard to the many countries which only recognize socio-economic rights in their national constitutions as non-justiciable directives of state policy.[120] In such a situation a case can sometimes be brought on the basis of national legislation rather than constitutional provisions.[121] Arguably, to make these rights non-justiciable contravenes the ACHPR and anyone who has had their case thrown out by national courts on this ground could bring a complaint to the African Commission alleging a violation of the Charter.

Lack of follow-up by the Commission and the AU political organs contributes to the perceived futility of submitting a communication to the Commission. A study on the implementation of the recommendations of the Commission found that the lack of legal reasoning in many of the Commission's decisions and the long delay in delivering decisions did not

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117 Magnus Killander, 'Communications before the African Commission on Human and Peoples' Rights 1988–2002' (2006) 10 *Law, Democracy and Development* 101, 102–3, updated with information from the *African Human Rights Law Reports* and the Activity Reports of the Commission.

118 However, there seems to be an exception when the state has not responded to a complaint: see *Ogoniland* [40].

119 *Purohit* [37].

120 On constitutional recognition of socio-economic rights see Viljoen, above n 21, 570–84. On the recognition of rights in African constitutions see Christof Heyns and Waruguru Kaguongo, 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673.

121 Viljoen, above n 23, 570–73.

impact on a state's compliance with the decision.[122] The only 'significant link' between the Commission's work and increased compliance was effective follow-up.[123] To improve compliance with its decisions the Commission must fully implement its *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties*.[124] According to the resolution the Commission will include a report on compliance with its recommendations in its Activity Reports submitted to the AU Assembly. States are further requested to indicate the measures they have taken to comply with the recommendations within 90 days of notification of the decision of the Commission. Similar follow-up should be done with regard to recommendations emanating from the state reporting process and reports of special rapporteurs. In implementing the resolution the Commission could seek inspiration from the experience of the Human Rights Committee in its follow-up on concluding observations on state reports and on communications.[125] In particular a Commissioner should be appointed as special rapporteur on follow-up.

The *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* was adopted in June 1998.[126] The Protocol entered into force in January 2004, but the 11 judges were only sworn in in July 2006. The Court has its headquarters in Arusha, Tanzania. It adopted 'interim' Rules of Procedure in June 2008. While the African Charter has been ratified by all 53 AU member states, the Protocol has only been ratified by 24 states, of which only two have made a declaration allowing for direct access for individuals to the Court.[127] The Commission will thus remain important in the individual complaints process under the African Charter as it will have the role of taking cases to the Court. The Court also has advisory jurisdiction at the request of a member state, an AU organ 'or any African organization recognized by the [AU]'.[128]

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122 Frans Viljoen and Lirette Louw, 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' (2007) 101 *American Journal of International Law* 1, 14–16.

123 Ibid 32.

124 AU Doc ACHPR/Res.97(XXXX)06 (29 November 2006).

125 For an evaluation of the follow-up process of the UN HRC with emphasis on African countries see Viljoen, above n 23, 114–20.

126 OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (9 June 1998) ('*African Court Protocol*').

127 Burkina Faso is the only state party to have deposited a declaration allowing individual access with the AU Commission. Mali has also made a declaration but it had as of January 2008 not yet been deposited with the AU Commission: Email from Michel Ndayikengurukiye (African Court on Human and Peoples' Rights) to Magnus Killander, 4 February 2008.

128 *African Court Protocol* Article 4(1).

An African Court of Justice and Human Rights will replace the current court when the *Protocol on the Statute of the African Court of Justice and Human Rights*,[129] adopted in July 2008, enters into force.[130] The new court will have a general affairs section and a human rights section. The main reason to have one African court instead of two as originally proposed is seemingly to save money.

Recently sub-regional courts have also handed down decisions with human rights implications, opening up a parallel system to the African Commission and the Court. In *James Katabazi and 21 Others v Secretary General of the East African Community and the Attorney General of Uganda,*[131] the East African Court of Justice held 'that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law' and thus constituted a violation of the treaty establishing the East African Community. The Tribunal of the Southern African Development Community ('SADC') delivered its first ruling in December 2007, a grant of provisional measures, followed by a judgment in November 2008. The case dealt with the land reform programme in Zimbabwe, which the Tribunal held was discriminatory.[132] The Community Court of Justice of the Economic Community of West African States ('ECOWAS') has abolished the requirement of exhaustion of local remedies, thus opening up a parallel jurisdiction to national courts.[133] The most prominent human rights judgment to date of the ECOWAS Court was handed down in October 2008 and dealt with slavery in Niger.[134]

The promotion and protection of human rights is not only a concern of the specialized human rights bodies, that is the African Commission, the Court and the Committee established under the Children's Charter. According to the *AU Constitutive Act* one of the objectives of the Union is to 'promote and protect human and peoples' rights in accordance with the [ACHPR] and other relevant instruments' (Article 3(h)). The Union shall function with 'respect for democratic principles, human rights, the rule of law and good governance'.

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129 Adopted on 1 July 2008, available online at http://www.unhcr.org/refworld/docid/4937f0ac2.html at 30 January 2009.

130 The Protocol requires 15 ratifications to enter into force.

131 (1/2007) [2007] EACJ 3.

132 *Mike Campbell (Pvt) Limited and William Michael Campbell v The Republic of Zimbabwe* (2/2007) [2008] SADCT 2.

133 Solomon T Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307.

134 *Dame Hadijatou Mani Koraou c La République du Niger*, arrest no ECW/CCJ/JUD/06/08, 27 October 2008.

One of the objectives of the Pan-African Parliament ('PAP') is to 'promote the principles of human rights and democracy in Africa'.[135] PAP, which only has consultative powers, has so far achieved little.[136] The Economic, Social and Cultural Council ('ECOSOCC') is intended to provide a voice for civil society organizations ('CSOs') in the work of the AU.[137] Human rights also fall within the ambit of the Peace and Security Council ('PSC'). However, the close cooperation between the African Commission and the PSC foreseen in the Protocol establishing the PSC has not yet materialized. The AU Commission based in Addis Ababa, Ethiopia, is the Secretariat of the Union, and will be responsible for monitoring implementation of the *African Youth Charter* and the *Charter on Democracy, Elections and Governance* when these instruments enter into force.

The African Peer Review Mechanism ('APRM') is a voluntary review process covering four governance areas: democracy and political governance, economic governance and management, corporate governance and socio-economic development. By January 2009, 29 of the 53 AU member states had signed up to undergo the APRM review, which consists of a self-assessment which should be conducted through a participatory national process leading to a national programme of action to address identified shortcomings. A Panel of African 'eminent persons' oversees the process. A member of this panel leads a review mission to the participating country when the self-assessment has been completed to ensure that the process has been conducted in a participatory and transparent manner. The report of the Panel together with the programme of action is presented to the APRM Forum of Heads of State and Government, which convenes on the fringes of the AU Summit which is held twice a year. Participating countries should submit regular follow-up reports to the Forum which should set out the measures taken to implement the programme of action and the recommendations included in the country review report. By January 2009, nine reviews had been concluded and discussed at the Forum: Ghana, Rwanda, Kenya, Algeria, South Africa, Benin, Burkina Faso, Nigeria and Uganda.[138]

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135 *Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament* Article 3(2), available online at http://www.africa-union.org/docs/civsoc/pap.pdf at 1 February 2009.

136 Viljoen, above n 23, 186–9.

137 AfriMAP, AFRODAD and Oxfam UK, *Towards a People-driven African Union: Current Obstacles and New Opportunities* (AfriMAP, Johannesburg, 2007) 33–7.

138 On the APRM and its relevance for human rights see Magnus Killander, 'The African Peer Review Mechanism and human rights: the first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41.

Lack of funding and human resources have been major constraints on the work of the Commission. However, with recent massive increases in its budget financial constraints will hopefully be a thing of the past.[139]

5 Conclusion

The universality of human rights was reaffirmed by African leaders in the *Final Declaration of the Regional Meeting for Africa*, ahead of the 1993 Vienna World Conference on Human Rights, which held that: '[t]he universal nature of human rights is beyond question; their protection and promotion are the duty of all States, regardless of their political, economic or cultural systems.'[140] This statement could at first glance be seen as contradicting the statement further down in the same declaration that 'no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.'[141] However, this should not be seen as an argument for cultural relativism, but rather that individual rights often need to be balanced against other individual rights or collective interests. In the European human rights system this principle is known as the margin of appreciation. In the first case in which South Africa was taken before the African Commission, the South African government argued that this principle gave the government discretion to implement the African Charter in the way it saw fit. However, the Commission found that the margin of appreciation doctrine does 'not deny the African Commission's mandate to guide, assist, supervise and insist upon member states on better promotion and protection standards should it find domestic practices wanting.'[142]

The ACHPR is the main human rights instrument in Africa. Some observers have argued that because the text of the Charter does not explicitly include all rights and does not properly reflect its interpretation by the Commission, the Charter needs to be revised.[143] In my view the Commission's

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139 The budget allocated to the African Commission from the AU increased from US$1.2 million in 2007 to US$6 million in 2008. See *Activity Report of the African Commission on Human and Peoples' Rights submitted in conformity with Article 54 of the African Charter on Human and Peoples' Rights*, AU Doc EX.CL/446 (XIII) (2008).

140 *Final Declaration of the Regional Meeting for Africa of the World Conference on Human Rights* in *Report of the Regional Meeting for Africa of the World Conference on Human Rights, Tunis, 2–6 November 1992*, UN Doc A/CONF.157/AFRM/14 (24 November 1992) [2].

141 Ibid [5].

142 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) [53].

143 See, for example, André Mbata M Mangu, 'The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership for

flexibility in interpretation makes a review of the Charter unnecessary. Furthermore, an amendment process could be used by non-progressive states to put further restraints on the Commission. A revision of the Charter would also create confusion with some states ratifying the new Charter and some being bound by the old. If revision is needed this could be accomplished by adopting additional protocols.

Odinkalu has noted with regard to the African Union that there seems to be 'a deliberative strategy to bring the notion of supra-national legality into disrepute through the creation of a multiplicity of under-resourced and deliberately ineffectual institutions.'[144] To some extent this concern has been addressed. A process known as the Conference on Security, Stability, Development and Co-operation ('CSSDCA'), which would have conducted review processes similar to the APRM, has been shelved and the CSSDCA unit in the AU Commission has been converted into the African Citizens' Directorate, dealing with contacts between the AU and civil society organizations.[145] The African Court of Justice, provided for in the *AU Constitutive Act* and in a Protocol which has not yet entered into force, is yet to be established and is set to be integrated with the African Court on Human and Peoples' Rights. Other suggested rationalizations include the proposal that the African Commission should take over the responsibilities of the African Committee on the Rights and Welfare of the Child, which has achieved little since it was established in 2002.[146]

Unfortunately, human rights abuses, including those of the most egregious kind, continue to arise across the continent, often with an inadequate response from other African countries. The disappointing performance of the African regional human rights system is linked to the failure of national judicial systems. This problem will not be solved by the establishment of the African Court on Human and Peoples' Rights. Despite the odds the Commission has been quite innovative in interpreting both the substantive and procedural provisions of the Charter widely. Hopefully the Commission will lead the way for a strengthened regional human rights system by addressing submitted complaints in a timely manner, and by referring cases to the Court when the complainant so requests.[147] Without an effective Commission the whole

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Africa's Development and the African Court' (2005) 23 *Netherlands Quarterly of Human Rights* 379.

144 Odinkalu, above n 4, 25.

145 AfriMAP et al, above n 137, 29.

146 Viljoen, above n 23, 223–4.

147 The Commission published a draft of its revised Rules of Procedure in January 2009 for comments. A meeting was planned for later in the year for the Commission and Court to harmonize their Rules of Procedure and thereby clarify the relationship between the two bodies.

African human rights system will continue to be seriously hampered. The AU Executive Council must become more responsive to the Commission's recommendations, but it is also necessary for the Commission to actively respond to the Executive Council and other AU organs and seek active engagement with institutions such as the Peace and Security Council and the African Peer Review Mechanism.

As has been shown in this chapter, Africa has taken an active role in the development of human rights law. African reality has been recognized both in standard-setting and interpretation. In theory the African Charter is a weak human rights instrument but both its substantive and procedural shortcomings have been overcome by innovative interpretation by the African Commission. It is hoped that the African Court will continue to build on the achievements of the Commission.

16. The political economy and culture of human rights in East Asia

Michael C Davis

1 Introduction

East Asian experience has long featured prominently among contemporary debates concerning human rights and development. The authoritarian East Asian challenge to human rights has set human rights in opposition to Asian cultural values and related East Asian developmental needs. While several East Asian countries have defied these claims and established constitutional democracies with liberal human rights protections, several others, including China and other post-communist countries in Southeast Asia, have continued to press these Asian values and developmental arguments to justify authoritarianism and severe limits on human rights. At a time when various UN reports relate achievement of the Millennium Development Goals to human rights and good governance,[1] several newly industrialised countries in East Asia have led the world in economic development.[2] This chapter will argue that full realisation of the promise of these achievements ultimately depends on constitutional reform that embraces democracy, human rights and the rule of law.

East Asian experience has tended to demonstrate that constitutional democracy with liberal human rights protection is the regime type most capable of addressing both cultural values and developmental needs. In the first generation of rapidly developing countries in East Asia, constitutionalism ultimately worked better in constructing the conditions for coping with the diverse interests that emerged in rapidly changing societies. While an East Asian brand of

[1] Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005 (21 March 2005) ('2005 UN Report'); Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations, New York, 2004), www.un.org/secureworld at 18 August 2007 ('2004 UN Report'). See also Kofi Annan, 'In Larger Freedom: Decision Time at the UN' (2005) 84 *Foreign Affairs* 63.

[2] See United Nations, *Millennium Development Goals Report 2007* (United Nations, New York, 2007), http://www.un.org/millenniumgoals/pdf/mdg2007.pdf at 18 August 2008.

authoritarianism, with strong commitment to good governance, worked reasonably well at managing early-stage development, liberal constitutionalism, with strong human rights and rule of law commitments, is thought to have provided better tools for consolidating these achievements at the high-end stage of economic and political development. In this analysis liberal constitutionalism is understood to include three core components: democratic elections with multiparty contestation; human rights, including freedom of expression; and the rule of law with firm adherence to principles of legality.[3] To these core components I add *indigenisation* as a fourth ingredient. Indigenisation is the local institutional embodiment that connects constitutional government to the local condition.

As a preliminary matter, it is important to note that the human rights debate in East Asia has tended to be situated in domestic constitutional debates. This defies a pattern evident in those parts of the world with multilateral regional human rights regimes. In most regions of the world, regional human rights treaties and supporting institutions have provided the tools for importing human rights standards vertically from regional transnational practice. The East Asian importation of rights, in contrast, has tended to be a process of horizontal or comparative importation of international human rights standards through domestic constitutional debates and interpretations. These human rights debates have especially engaged concerns with Asian cultural values and economic development, making the so-called 'Asian values debate' one of the pre-eminent human rights debates in the world. The cultural dimension often involves local movements to promote democratisation, human rights and the rule of law in the face of Asian cultural relativist claims. The economic dimension engages the contest between authoritarian economic development and liberal democratic reform as competing avenues to economic success.

Through these locally grounded debates, countries in East Asia engage familiar international concerns with civil and political rights and economic and social rights, but do so on distinctly local terms. An authoritarian regime might claim that it provides a more stable environment for development and better protection of local cultural and social values. Local democrats and outside critics may contest this, saying that liberal political freedom, a free press, the rule of law and democratic rights best allow a country to address these developmental and cultural issues. Arguing for civil liberties in the context of development becomes an argument not only for civil liberties but

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[3] Michael C Davis, 'The Price of Rights: Constitutionalism and East Asian Economic Development' (1998) 20 *Human Rights Quarterly* 303; Michael C Davis, 'Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values' (1997) 11 *Harvard Human Rights Journal* 109.

also for better protection of a wide range of economic and social rights, including such familiar rights as basic education, safe working conditions, a good environment, adequate health care and the like. The human rights debate is connected to the debate over political and economic stability. While human rights specialists may be more comfortable with an approach that is centered on the international human rights regime, this approach based on domestic constitutionalism may offer more immediate dividends in developmental terms by being better connected to the local condition. I believe it is precisely this strengthening of the domestic human rights debate fostered under East Asian conditions that offers something of interest to a world trying to deal with human rights concerns in many developmental contexts.

While the East Asian debate and the region would certainly benefit from the development of regional and national human rights institutions, human rights advocacy has to date been fundamentally grounded in domestic constitutional practice.[4] This chapter considers: first, the various claims on behalf of authoritarianism made in the name of Asian cultural values; second, authoritarian and competing East Asian claims relating to economic development; and third, the role of human rights and constitutionalism in addressing these issues. The aim is to look beneath the surface of this East Asian debate to better appreciate its contribution to human rights protection.

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[4] Efforts to reach a regional consensus on human rights have gone on for many years. Most famously, in 1993, as part of the Vienna World Conference on Human Rights process, governments across the entire Asian region reached a consensus on the Bangkok Declaration, which was rather sensitive to Asian cultural and sovereignty concerns: http://law.hku.hk/lawgovtsociety/Bangkok%20Declaration.htm at 18 August 2008. The Bangkok Declaration was not converted into an Asian regional human rights charter. More recently ASEAN members have signed an ASEAN Charter, which is essentially a constitution for the ASEAN grouping that was adopted at the 13th ASEAN Summit in November 2007: http://www.aseansec.org/ASEAN-Charter.pdf at 18 August 2008. The ASEAN Charter effectively removes the ASEAN non-interference policy and calls for the creation of an ASEAN Human Rights Body for ASEAN members only, making it the first Asian regional human rights treaty that, once fully ratified, will legally obligate members to respect human rights. While a body of experts has been set up to draft the human rights body terms of reference, the generality of the human rights provisions in the Charter (only calling for respect for human rights and the creation of a human rights body) and the lack of commitment among several member states offer little hope of a robust commitment. See Amnesty International, *The ASEAN Charter and Human Rights: Window of Opportunity or Window Dressing?* (Amnesty International, 2008) http://www.amnesty.org/en/library/asset/ASA03/003/2008/en/384b86ba-4393-11dd-a1d1-2fa8cc41ebbd/asa030032008eng.pdf at 18 August 2008.

2 The Asian values cultural debate

The central challenge to human rights in East Asia has come from the so-called Asian values cultural debate. It is therefore useful to consider several prominent authoritarian-based East Asian arguments made on behalf of cultural values, including: first, the specific Asian values claims on a substantive level; second, a related cultural prerequisites argument which seeks to disqualify some societies from realisation of democracy and human rights; and third, claims made on behalf of community or communitarian values in the East Asian context. In introducing these Asian values arguments I will offer a critique of each, thereby rebutting the claim that human rights and democracy are culturally unsuited to Asian soil.

First, considering Confucian political values as the dominant value system in East Asia, the main substantive claim is that Asian values are illiberal and anti-democratic, rendering a liberal democratic human rights regime unsuited to the Asian cultural condition. East Asian societies are said to favour authority over liberty, the group over the individual, duties over rights, and such values as harmony, cooperation, order and respect for hierarchy.[5] East Asian supporters of authoritarianism have therefore argued that their societies are unsuited to democracy and Western liberal human rights practices. That authoritarian leaders are usually the promoters of these Asian values claims raises suspicion and has spawned a number of challenges to the claims.

The most obvious challenge is a simple empirical one: in recent decades the most successful Asian countries have generally moved on to adopt liberal democratic human rights regimes. The rapid recent development and consolidation of democracy and human rights in several East Asian societies speaks for itself. Former authoritarian systems, including those in Japan, South Korea, Taiwan, the Philippines and Indonesia all underwent democratic transitions and human rights reform in the last decades of the twentieth century. Hong Kong, Thailand, Mongolia and Malaysia have likewise seriously engaged the democracy and human rights debates through constitutional reform, though obstacles remain. While each of these systems has continued to be plagued with the lingering residue of their authoritarian past, the reformist direction is empirically evident and is indicative of a serious attraction to democracy and human rights in East Asian societies.

Beyond the challenge offered by developments on the ground, activists and analysts have offered a direct intellectual challenge to the Asian values claim, especially attacking its historical and philosophical roots. Chinese scholars of

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[5] Samuel P Huntington, 'Democracy's Third Wave', in L Diamond and M F Platner (eds) *The Global Resurgence of Democracy* (Johns Hopkins University Press, Baltimore, 1993) 3, 15.

the Confucian classics have noted that Confucianism does not embrace unquestioning acceptance of autocratic rule; that it shares with liberalism a commitment to higher norms.[6] Confucian scholar Wejen Chang has especially pointed out the prominent position of the golden rule in Confucian ethics.[7] Chang argues that the harsh autocratic practices of traditional Chinese rulers, sometimes known as neo-Confucianism, were more a structural imperative of dynastic rule and a product of Chinese legalism than a result of traditional Confucian thought.

Other scholars have challenged the motives of those who advance the above noted stereotypes concerning Asian values. Edward Said long ago accused Western societies of 'orientalism', of offering up a conception of Asia as 'the other' in order to justify Western dominance.[8] More recently Asian scholars have noted the tendency of East Asian leaders and scholars to adopt orientalism as a self-defining discourse.[9] In this latter conception of orientalism, East Asian exceptionalism replaced Western imperialism as the aim of Asian values discourse.

A related attack on the importation of Western human rights values is to argue that Asians in the early modern period simply did not understand the liberal Western institutions they were importing. So even when they attempted to import Western human rights values, the strong pull of Asian culture led them to reinterpret such Western concepts in Asian terms, surely marking Asian culture as unsuited to such importation. Such Asian reinterpretation saw democracy and related human rights as merely good government and social welfare, comparable to the Chinese *minben* (people as a basis) tradition.[10] There is no doubt that authoritarian-minded misinterpretations did occur and that Chinese nationalists, following the May 4th Movement, would sometimes distort Western liberal concepts.[11] But recent studies of early modern Chinese

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6 Victoria T Hui, *War and State Formation in Ancient China and Early Modern Europe* (Cambridge University Press, Cambridge, 2005).

7 Wejen Chang, 'The Individual and the Authorities in Traditional Chinese Legal Thought' (Paper presented for the Constitutionalism and China Workshop, Columbia University, 24 February 1995). Chang emphasised the Confucian admonition that people should treat others the way they wanted to be treated.

8 Edward Said, *Orientalism* (Vintage Books, New York, 1979).

9 Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge, London, 1995).

10 Andrew J Nathan, 'Political Rights in Chinese Constitutions' in R R Edwards, L Henkin, and A J Nathan (eds) *Human Rights in Contemporary China* (Columbia University Press, New York, 1986) 77.

11 The May Fourth Movement was triggered by the decision of the Versailles Conference on 4 May 1919 that the German concession in Shantung was to be transferred to Japan. This caused a political movement marked by Chinese nationalism and

writings demonstrate that Chinese intellectuals often had a good grasp of leading Western liberal thinkers.[12] Accordingly, this argument may simply exaggerate the claimed distortions and the limitations imposed by cultural values.

Much of what is done today in the name of Asian values can be explained more often than not by expediency. This expediency is often accompanied by other ideological constructs, such as Marxism, that have little to do with Asian traditions. Francis Fukuyama points out that the only neo-Confucian authoritarian system evident in recent East Asian experience was the government of pre-war Japan.[13]

A second line of Asian values argument, of more contemporary relevance, claims that societies which lack certain cultural prerequisites are not suited for democracy and human rights. These claims are rooted in earlier studies that sought to measure the degree of civic culture that existed in Western democracies.[14] This is a categorically different kind of attack than the above culture-based arguments because of its basis in social scientific democratic theory. Though such a theory did not aim to support cultural relativist arguments, it was converted into such a challenge in East Asian application. As pointed out by Elizabeth Perry, in comparative studies of political development and democratisation this hopeful line of reasoning became burdened with the pessimistic view that societies that lacked civic culture were not likely to be successful at democratisation.[15] It was as if societies had to pass a test for democracy. This lent further support for authoritarian Asian values reasoning. Did societies burdened with authoritarian Asian values offer poor soil for democracy and the concomitant values associated with human rights and the rule of law?

The tautological reasoning in this line of argument is apparent. To expect a society to develop democratic culture without democracy itself is a questionable proposition. Many societies in East Asia in fact proceeded with democratisation, with or without the allegedly required civic culture. With

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disillusionment with both the West and Chinese tradition. The ideological struggle between socialism and liberal democracy that would later become so important was born here.

12 Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898–1949* (Department of East Asian Languages, Lund, 1996).

13 Francis Fukuyama, 'Confucianism and Democracy' (1995) 6 *Journal of Democracy* 20.

14 Gabriel A Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Sage Publications, Newbury Park, 2nd ed, 1989).

15 Elizabeth Perry, 'Introduction: Chinese Political Culture Revisited' in J Wasserstrom and E Perry (eds) *Popular Protest and Political Culture in China* (Westview Press, Boulder, 1994) 1.

democratic institutions in place the emphasis then shifted to consolidation and further constitutional development.[16] Political elites and academics in East Asia have nevertheless clung tenaciously to this claim concerning prerequisites.[17] The ongoing task of documenting civic culture in East Asia contributes to a mindset that does appear to conceive of a test for democratisation. This has spawned a persistent argument by those in some communities that the local society is not yet ready for democracy and its related liberal human rights institutions.[18]

A third more consciously intended cultural relativist argument, and one that is to some extent more credible, is the community-based thesis. This argument fails to justify the denial of democracy and human rights, but it does raise some concerns that must be addressed by societies hoping to better secure human rights. For convenience here I divide community-based arguments into three categories: romanticisation of community, civic virtue and communitarianism. Romanticisation of traditional communities is a common theme in many modernising societies. The Vietnamese village has been described as 'anchored to the soil at the dawn of History . . . behind its bamboo hedge, the anonymous and unseizable retreat where the national spirit is concentrated'; while the Russian *mir* was to save Russians from the 'abhorrent changes being wrought in the West by individualism and industrialization'.[19] One may doubt just how liberating traditional village life was. Many in East Asia have migrated to the cities when they have had the chance. Few in East Asia's diverse urban societies still have the option of pursuing a traditional village lifestyle.

The second community-based argument relates to civic virtue. In East Asia this argument has ancient roots and is most often associated with Confucianism. Authoritarian leaders and even some academics in the region argue that it is still of great contemporary relevance.[20] In this view, an emphasis on civic virtue, more than liberal institutions, is seen as the key to good government.[21] Even in the West, an emphasis on civic virtue has been a persistent theme throughout the modern period of democratisation.[22] But many

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16 Juan J Linz and Alfred Stepan, 'Toward Consolidated Democracies' (1996) 7 *Journal of Democracy* 14.

17 Perry, above n 15.

18 See Davis, above n 3 (1997).

19 Samuel Popkin, 'The Political Economy of Peasant Society' in J Elster (ed) *Rational Choice* (Blackwell, Oxford, 1986) 197.

20 See Daniel Bell and Chaibong Hahm (eds) *Confucianism for the Modern World* (Cambridge University Press, Cambridge, 2003).

21 Daniel Bell (ed) *Confucian Political Ethics* (Princeton University Press, Princeton, 2007).

22 Alexis de Tocqueville, *Democracy in America* (Vintage Books, New York, 1945).

democratic founders have not been confident of the persistence of civic virtue and have sought to craft a democracy that, in James Madison's terms, is safe for the unvirtuous.[23] The earlier founding debate in the Czech Republic between Vaclav Havel, the anti-Communist idealist who emphasised civic virtue, and Vaclav Clause, the pragmatic post-communist politician who was more concerned with interest representation, is likely to be rehearsed in post-communist and post-authoritarian East Asia.[24] As has been true in other parts of the world, civic virtue alone will probably not be enough, nor will its persistence be reliable. While Asian philosophies such as Confucianism have often emphasised virtuous rule, Asian leaders, especially in the modern era, have seldom lived up to this standard, as high levels of corruption and tyranny have often prevailed.

A third community-based claim, which I label here simply as communitarianism, offers the centrality of community as an alternative to liberal individualism. Communitarianism is the most challenging contemporary discourse about community. In simple terms, Western communitarianism has tended to emphasise the common good over liberal individual rights and to emphasise the shared values of community. In this respect, communitarianism in the West has primarily offered a critique of liberalism. It also encompasses the civic virtue ethical components already discussed. There is, however, a wide gap between Western communitarianism and the more prominent forms of East Asian communitarian practice. While Western communitarians are apt to see community as a venue for democratic discourse and liberation, the conservative brand of communitarianism officially promoted in Singapore, and to some extent in China, is hardly a venue for democracy and liberation.[25] In East Asia, communitarian rhetoric has generally come with authoritarian government. Authoritarian East Asian regimes may seek to implant a value system that emphasises passive acceptance of the regime's dictates. Western communitarians, on the other hand, have often felt the need to commit to some liberal values to preserve their discourse and overcome some less acceptable values associated with traditional communities.[26] The Asian conservative variety of communitarianism has resisted increased demands for liberalisation. Those

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[23] Robert D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton, 1993).

[24] Aleksander Smolar, 'From Opposition to Atomization' (1996) 7 *Journal of Democracy* 24.

[25] Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge, London, 1995).

[26] The so-called liberal–communitarian debate has become a central debate in contemporary political philosophy: C F Delaney (ed) *The Liberalism–Communitarianism Debate* (Rowman and Littlefield Publishers, Lanham, 1994).

committed to addressing communitarian concerns may face the need to deploy some liberal institutions in ways that are responsive to these concerns or challenges.

3 The East Asian 'economic miracle' and the political economy of human rights

The East Asian authoritarian developmental model has functioned as the other branch of the 'Asian values' debate. For human rights scholars, this is the part of the debate that may indirectly incorporate social and economic rights in its promise of rapid and stable economic development. Although it is really a political economy argument and not about cultural values, it has often been subsumed under the Asian values debate because of its relationship to the political strategies of authoritarian regimes in the area. As with the cultural claim, this political economy claim for authoritarian development has represented a powerful East Asian challenge to universal human rights. First chronicled in a 1992 World Bank report as the 'East Asian miracle',[27] the developmental achievement of the first generation of newly industrialised countries in East Asia was fairly evident in the rapid economic growth of the 1970s and 1980s. It has since been evident in the 1990s and the new millennium in the economic growth of the second generation of East Asian rapid developers.[28]

The East Asian authoritarian developmental model first took shape in Japan, whose development model was said to combine soft political authoritarianism with economic liberalisation in a planned capitalist economy. Under this model, economic guidance was offered by an autonomous bureaucracy led by the Japanese Ministry of International Trade and Industry ('MITI').[29] In his 1982 book, Chalmers Johnson emphasised the importance of a developmentally oriented elite, organised under a tripartite coalition composed of the dominant Liberal Democratic Party, the bureaucracy, and big business.[30]

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[27] World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (World Bank, Washington DC, 1992).

[28] See Paul Krugman, 'The Myth of Asia's Miracle' (1994) 73 *Foreign Affairs* 62.

[29] See Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925–1975* (Stanford University Press, Stanford, 1982).

[30] Ibid 51–2. With substantial state capacity these three worked together to ensure the coherent targeting of certain industries for production of exports under a system of export led growth ('ELG'): see Chalmers Johnson, 'Political Institutions and Economic Performance: The Government–Business Relationship in Japan, South Korea, and Taiwan' in F C Deyo (ed) *The Political Economy of the New Asian Industrialism* (Cornell University Press, Ithaca, 1987) 136. ELG is distinguished from an import substitution industrialisation ('ISI') strategy, which aims to substitute local goods for imports, though both usually coexist.

Johnson differentiates between a 'market-rational' (regulatory) and a 'plan-rational' (developmental) capitalist system.[31]

The Japanese model, with varied modifications, was seized upon as the paradigm for East Asian economic development. In non-Japanese hands this model would involve much higher levels of authoritarian autocratic rule with related constraints on democracy and human rights, thus making it a central feature in the East Asian human rights debate.[32] Throughout East Asia authoritarian economic developmental success often offered an excuse for resisting liberal democratic constitutional change and international human rights standards. Such repression was deemed necessary for such regimes to stay in power and maintain their achievements.

This use of the Japanese model as a basis for denying democracy and human rights is paradoxical. For all of its soft authoritarian tendencies, Japan was actually a democracy, though a democracy with long-established one-party electoral dominance. Notwithstanding Johnson's soft authoritarianism characterisations in 1982, Japan had enjoyed for decades a degree of democracy, with a functioning electoral process, a moderately free press, multiple political parties and independent courts. As a democracy, Japan also offered a paradigm for the brand of illiberal democracy with less robust constitutional and human rights institutions that often followed the overthrow of authoritarianism in the region.

The Japanese economic crisis of the 1990s called into question Japan's developmental model. It also served to highlight the inadequacies of the Japanese brand of democracy in assertively coming to grips with Japan's continuing economic problems.[33] A system based on a tradition of bureaucratic planning appears to have difficulty producing politicians and institutions willing to take political responsibility. It has also produced a rather conservative judiciary with weak protection of human rights.[34]

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[31] Johnson, above n 29, 19. A 'plan-rational' system will be marked by bureaucratic disputes and factional infighting while a 'market-rational' system will tend toward parliamentary contest: ibid 22–3.

[32] Atul Kohli traces the role that Japanese colonialism played in facilitating this model. Atul Kohli, 'Where do High Growth Political Economies Come From? The Japanese Lineage of Korea's "Developmental State"' in M Woo-Cumings (ed) *The Developmental State* (Cornell University Press, Ithaca, 1999) 93. See Robert Wade, *Government and the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, Princeton, 1990); Stephan Haggard, *Pathways from the Periphery: The Politics of Growth in the Newly Industrializing Countries* (Cornell University Press, Ithaca, 1990).

[33] William H Overholt, 'Japan's Economy, at War With Itself' (2002) 81 *Foreign Affairs* 134.

[34] Michael K Young, 'Judicial Review of Administrative Guidance:

The difficulties that other East Asian economies encountered in the late-1990s East Asian financial crisis demonstrated similar political limitations in other East Asian emergent democracies. In spite of these limitations, the authoritarian developmental model has persisted as a model for the second generation of East Asian developers, including China and the post-Communist emerging developmental states in Southeast Asia. This authoritarian model remains a major challenge to human rights in the region.

This authoritarian developmental challenge in East Asia raises the question of whether authoritarianism with suppression of opposition and low levels of human rights protection will persist as a viable model in the region. The historical experience of the first-generation developers suggests this is unlikely. With economic success the authoritarian developmental state may become its own grave-digger.[35] The circumstances that seem to have been favourable to authoritarian development are more likely to be present in the early stages of development. At an early stage, proper economic policy may sometimes be more important for achieving economic growth than regime type.[36] But, at a later stage, political challenges may arise as workers and other subordinate classes demand a greater say in public affairs through protection of civil liberties and greater security for a range of basic social and economic rights. [37]

Several tendencies may operate at once. As economic elites become globally more competitive they may become less compliant and more corrupt.

Governmentally Encouraged Consensual Dispute Resolution in Japan' (1984) 84 *Columbia Law Review* 923; Christopher A Ford, 'The Indigenization of Constitutionalism in the Japanese Experience' (1996) 28 *Case Western Reserve Journal of International Law* 3.

[35] See William W Grimes, *Unmaking the Japanese Miracle, Macroeconomic Politics, 1985–2000* (Cornell University Press, Ithaca, 2001); Meredith Woo-Cumings, 'The State, Democracy, and the Reform of the Corporate Sector in Korea' in T J Pempel (ed) *The Politics of the Asian Financial Crisis* (Cornell University Press, Ithaca, 1996) 116; Gregory W Noble and John Ravenhill, 'The Good, the Bad and the Ugly: Korea, Taiwan and the Asian Financial Crisis' in G W Noble and J Ravenhill, *The Asian Financial Crisis and the Architecture of Global Finance* (Cambridge University Press, New York, 2000) 80.

[36] Adam Przeworski and Fernando Limongi, 'Political Regimes and Economic Growth' (1993) 7 *Journal of Economic Perspectives* (1993) 51. They conclude 'that social scientists know surprisingly little: our guess is that political institutions do matter for growth, but thinking in terms of regimes does not seem to capture the relevant differences'.

[37] In defining economic development, in addition to the GDP, economists have paid attention to a range of social welfare indicators such as education, health, gender equality, life expectancy, working conditions, infrastructure and so forth: see Amartya Sen, 'Development: Which Way Now?' in K P Jameson and Charles K Wilbur (eds) *The Political Economy of Development and Underdevelopment* (McGraw Hill College, New York, 1996) 7; United Nations, *Human Development Report 2002*.

They may seek official assistance in insuring a compliant labour force, in securing loans and in otherwise gaining business-friendly policy. To better guard their privileges, they may resist political reform that may undercut their influence or capacity to get things done. David Kang describes the transformation of corruption under the East Asian developmental paradigm from a top-down predatory state with a weak business sector under early authoritarianism to a strong business sector with bottom-up rent-seeking *vis-à-vis* a fractured state in the early democratic period, both involving large amounts of corruption.[38] Corruption may also become a substitute for dysfunctional government institutions.

Both corruption and the overloading of government institutions tend to retard the protection of human rights. With increased wealth and education in the society, ordinary citizens may become resistant to elite monopolisation of power and demand greater transparency, participation and accountability. This requires political and legal institutional reforms, both of which are instrumental to human rights protection. Because of these developments, the trend of the 1990s in the East Asian newly industrialised countries ('NICs') was toward both political and legal reform and toward integration into world markets.

Unfortunately, as the economic crisis served to illustrate, even with democratisation or substantial reforms the problems of corruption and political overload often persisted. Post-authoritarian regimes failed to reform adequately as they attempted to maintain historical strategies of developmental success. Political reformers, such as Japan and South Korea, in the 1990s clung to developmental economic policies of interference in market decisions, even while pursuing political reform.[39] The second-generation developers have sought to exclude political reform entirely, with great implications for human rights. China's economic success without substantial political reform has spawned questions about whether China will somehow defy gravity and not follow its economic success with political reform and liberalisation.[40] China, one of the newest entries in the East Asian developmental achievement, has to date pursued policies of economic liberalisation and legal reform without

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[38] See David C Kang, 'Bad Loans to Good Friends: Money Politics and the Developmental State in South Korea' (2002) 56 *International Organization* 177, 182. Rent-seeking is understood as 'attempts by individuals to increase their personal wealth while at the same time making a negative contribution to the net wealth of their community': Thrainn Eggertsson, *Economic Behavior and Institutions* (Cambridge University Press, New York, 1990) 279.

[39] Overholt, above n 33.

[40] Minxin Pei, *China's Trapped Transition: The Limits of Developmental Autocracy* (Harvard University Press, Cambridge, 2006).

fundamental civil and political rights.[41] This has required suppression of dissent in general and particularly harsh containment of the public protests that have arisen over the denial of basic educational, health, labour and social rights. Many post-communist Southeast Asian countries in the early stages of economic development likewise cling to similar authoritarian repressive strategies with only limited legal reforms.[42] The difficulty with arguments for authoritarianism with law or other confidence-building institutions is that maintenance of such guarantees ultimately may require the security of a liberal democratic regime that fosters transparency, public accountability and human rights.[43]

The issue is not whether the East Asian brand of authoritarian developmentalism worked – it certainly brought about rapid economic development. The question is what political and institutional change will be required as the developmental process goes forward. The state institutions that are favourable to economic development in a free market system are generally believed to be those that afford the degree of order, reliability, transparency and participation sufficient to inspire confidence and thereby encourage entrepreneurial activity and investment.[44] State institutions with a higher degree of autonomy and transparency may better resist rent-seeking demands and secure open channels for the protection of basic rights. For a democracy this requires a sufficiently stable institutional base so that there are neither too many nor too few institutional actors with sufficient power over the decision-making process to either engage in excessive rent-seeking or interfere with efficient public decisions.[45] Both fighting corruption and attracting investment appear to require an institutional base that affords a balance of public decision-making autonomy and accountability. The kinds of institutions that generally are thought to achieve

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41 Dali L Yang, 'China in 2001, Economic Liberalization and Its Political Discontents' (2002) 42 *Asian Survey* 14. According to a 2002 Organisation for Economic Co-operation and Development (OECD) report, China is experiencing the same economic difficulties as the earlier class of 'economic miracle' states, including high levels of corruption and large problems with bad loans, economic displacement and slow-down. OECD, *China in the World Economy: The Domestic Policy Challenges* (OECD, Paris, 2002).

42 Andrew MacIntyre, 'Institution and Investors: The Politics of the Economic Crisis in Southeast Asia' (2002) 55 *International Organization* 81.

43 See Jon Elster, 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea' (1993) 71 *Public Administration* 169, 199–201. Elster notes that the strength of the dictator is also his weakness: 'He is *unable* to make himself *unable* to interfere with the legal system whenever it seems expedient': ibid.

44 See Mancur Olson, 'Dictatorship, Democracy, and Development' (1993) 87 *American Political Science Review* 567, 572.

45 Kang, above n 38, 182; MacIntyre, above n 42.

these objectives relate to maintenance of democracy, human rights and the rule of law, the ingredients of modern constitutionalism.[46]

Theorists commonly use two approaches to connect liberal constitutional democracy and development. They may focus on the statistical correlation between democracy and development, or they may trace the causal mechanisms in the development context that lead to increased demands for democratic representation, rights and legality. The first approach may address both the survivability of democracy under various economic circumstances and the role of democracy in encouraging economic development or dealing with economic crises or shocks. The second approach is concerned with the causal mechanisms by which economic development contributes to democratisation, highlighting the ways in which such democratisation may be responsive to developmental needs.

Regarding statistical correlation, Adam Przeworski and others used worldwide statistics to gauge the survivability of democracies from 1950 to 1990.[47] Such statistics demonstrated a strong correlation between wealth and the survivability of democracy, and gave no support for using dictatorships to achieve development and democracy.[48] Gerald Scully, surveying 115 countries from 1960 to 1980, reversed the dependent variable to consider the effect of democratic institutions on the economy.[49] Scully notes that open societies with human rights, the rule of law, private property, and market allocation grew at three times the rate and were two-and-a-half times as efficient as societies in which the exercise of related rights was largely proscribed.

When it comes to the special circumstances of dealing with economic crisis or shock, Dani Rodrik finds further that democracy offers more favourable results. Rodrik argues that shock will tend to be worse in societies with deep latent conflicts and that democracy affords the ultimate institutions of conflict management.[50] This argument is supported by Donald Emmerson, who argues that, in the financial crisis, affected East Asian countries with high levels of political freedom were generally more resilient.[51] A democracy such as

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[46] Kang, above n 38, 182.

[47] See Adam Przeworski et al, 'What Makes Democracies Endure?' (1996) 7 *Journal of Democracy* 39.

[48] Ibid 44–9.

[49] Gerald W Scully, *Constitutional Environments and Economic Growth* (Princeton University Press, Princeton, 1992) 12–14, 183–4.

[50] See Dani Rodrik, 'Democracy and Economic Performance' (Paper presented at the Conference on Democratization and Economic Reform in South Africa, 16–19 January 1998).

[51] He contrasts the relatively strong recovery of Thailand and South Korea with Indonesia: Donald Emmerson, 'Americanizing Asia? (1998) 77 *Foreign Affairs* 46, 52. See also Stephan Haggard, 'The Politics of the Asian Financial Crisis' (2000) 11

Taiwan fared better during the height of the crisis and democracies caught by the crisis, such as South Korea and Thailand, bounced back more quickly. Authoritarian China also fared much better, as its financial institutions were largely protected from global currency markets in what began as a currency crisis.

Considering the second approach, Dietrich Rueschemeyer and others argue that quantitative correlative studies reach the right conclusion, but fail to offer a reason.[52] They urge that the case for liberal democracy becomes compelling at a certain stage in the industrialisation process because industrialisation transforms society in a fashion that empowers subordinate classes and makes it difficult to exclude them politically.[53] The subordinate classes, especially the working class, have the greatest interest in democracy and its related rights protections, while the bourgeoisie have every incentive to roll back or restrict democracy.[54] Democracy affords institutions that can deal with diverse interests and the resultant conflicts that emerge.

The path to the demise of the South Korean dictatorship bears a striking resemblance to Rueschemeyer and colleagues' predictions.[55] Authoritarian leadership in South Korea was built on collusion between the military, the political leadership, and the large *chaebol* (local multinational corporations ('MNCs')).[56] The success of development policies under such a narrow coalition brought out a new class force in the 1980s under the banner of the *minjung* (the masses) movement.[57] The Park and Chun regimes' earlier policies of economic liberalisation without political liberalisation brought on the demise of the regime. At the end of 1997, after South Korea's financial collapse, the ruling party, rooted in the past authoritarian regime, was pushed out with the

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Journal of Democracy 130; Mark Baird, 'An economy in the balance', *International Herald Tribune* (New York), 19 September 2002, 6.

[52] Dietrich Rueschemeyer et al, *Capitalist Development and Democracy* (University of Chicago Press, Chicago, 1992).

[53] Ibid 1.

[54] Ibid 7–8, 50, 57–8. 'Capitalist development furthers the growth of civil society – by increasing the level of urbanization, by bringing workers together in factories, by improving the means of communication and transportation, by raising the level of literacy': Ibid 6.

[55] See Hagen Koo and Eun Mee Kim, 'The Developmental State and Capital Accumulation in South Korea' in R P Appelbaum and J Henderson (eds) *State and Development in the Asian Pacific Rim* (Sage, Newbury Park, 1992) 121–49. See also Rueschemeyer, above n 52.

[56] See Koo and Kim, above n 55, 144–5. This ruling coalition was decidedly narrower in South Korea than in the post-war Japanese prototype. It did not include the larger base of a popular well-organised political party and employed much more repressive policies.

[57] Ibid 145.

election of opposition leader Kim Dae-jung as president.[58] Backroom deals within the elite ruling coalition – what was then called crony capitalism – no longer inspired confidence. As David Kang highlights, both the late authoritarian period and the early democratic period were characterised by high levels of corruption.[59] South Korea was pushed to complete the reform process, to dismantle the developmental economic model that had persisted under democratisation. [60] This required South Korea to clean up the conglomerates by instituting systems of oversight and putting loans and other financial decisions on a more sound financial footing. This was added to the earlier efforts at political reform, instituting single terms for the president, a formally acceptable system of constitutional judicial review and greater rights protection through less strict control over the media and public organisations.

Taiwan, a textbook case of the East Asian miracle, appeared to follow a similar pattern. With economic success, increasing calls for democratisation were made in the 1980s. With pressure from below, a confident regime embraced the reform process in a top-down pattern. Along with democratic elections, the previously moribund systems of the rule of law and judicial review began to take on life. Taiwan fared much better than most East Asian countries in the early phase of the economic crisis, though it later showed signs of economic and political weakness associated with continued tension with China.

China is the next great East Asian challenge. China's recent policies of economic reform resemble the earlier authoritarian South Korean policies under Park Chung Hee (1963–79) of economic liberalisation without political liberalisation, accompanied by harsh human rights policies that aim to repress dissent.[61] Like South Korea, China has reached the current developmental juncture with very large industries and substantial numbers of industrial workers at risk in the reform process. Numerous worker-based demonstrations have highlighted these failures to meet basic needs. China's entry into the WTO has

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58 See Kate Wiltrout, 'Kim Leads Knife-edge Korea Poll', *South China Morning Post* (Hong Kong), 19 December 1997, 1. This change of direction apparently received a further vote of confidence in late 2002, with the election of an even more liberal candidate from the same party, President Roh Moo Hyun. Weon-ho Lee and Sung-ho Baik, 'Generation 2030 Bursts Onstage', *International Herald Tribune* (New York), 30 December 2002, 7.

59 See Kang, above n 38.

60 Ibid; MacIntyre, above n 42.

61 One should be cautious about this comparison. While the state-owned enterprises ('SOEs') do encompass the heavy industry sector in China, there are other reforming sectors where the trend is toward dispersal, rather than concentration, of economic activity. The historical Chinese emphasis on workers' rights may also serve as a counterweight, though workers have so far taken a bruising in the reform era.

further pushed China towards a more competitive posture. To accomplish this there was a need to reduce government interventions in the economy and develop regulatory regimes.[62] Ultimately, if the other East Asian examples are instructive, this will require constitutional reform, involving democratic reform, human rights and the rule of law, though the question of timing seems uncertain.

4 Human rights and constitutionalism

In the absence of regional human rights institutions, domestic constitutionalism has become the primary vehicle in East Asia for implementing human rights commitments. This may be supplemented by national human rights institutions.[63] Constitutionalism has offered a venue to respond to the various claims underlying the cultural values and developmental debates in East Asia, a response to authoritarianism. The concept of constitutionalism advanced herein, as noted above, includes the fundamental elements of democracy, human rights and the rule of law and elements of local institutional embodiment – what I call indigenisation.

In the late twentieth and early twenty-first centuries constitutionalism has become one of the primary vehicles for universalising human rights. Constitutionalism serves both as a conduit for shared international and local human rights and political values and the embodiment of those values. It provides the context in which the subordinate classes can voice their basic concerns relating to both civil and political rights and to economic and social rights. In this regard, this section emphasises two aspects of the constitutional equation in East Asia: first, the empowering role of constitutionalism, in contrast to the usual view that emphasises only constraint; and second, indigenisation of constitutionalism, as an avenue to hook it up to the local condition.

A The empowering role of constitutionalism and human rights

Theorists have worried that constitutionalists place too much emphasis on constraint, always using language of 'checking, restraining or blocking'.[64] The

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[62] See OECD, above n 41. The OECD report points out, 'Government interference leads to poor SOE management and inefficient operations, which foster low profits and high debt; this in turn makes it more difficult to restructure to improve efficiency and prompts government interventions that spread the problem by extracting resources from stronger enterprises to prop up those that are failing': ibid 16.

[63] See Brian Burdekin, *National Human Rights Institutions in Asia* (Martinus Nijhoff Publishers, Leiden, 2007).

[64] Stephen Holmes, 'Precommitment and the Paradox of Democracy' in J Elster and R Slagstad (eds) *Constitutionalism and Democracy* (Cambridge University Press, Cambridge, 1988) 195, 226.

notion of voluntary constraint is a questionable proposition in a world where leaders frequently override constraint in the interest of expediency.[65] This may result in what Guillermo O'Donnell calls 'a caesaristic plebiscitarian executive that once elected sees itself as empowered to govern the country as it deems fit'.[66] Such an executive may effectively become an elected dictator and become more concerned about retaining power than protecting human rights.

Too much emphasis on constraint may cause constitutionalists to overlook the important empowering aspects of constitutionalism. The notion of constraint under constitutional government takes on meaning and force only through popular empowerment. Under constitutional government the processes of empowerment extend beyond the institutions of electoral politics to include the institutions of human rights and the rule of law. It is the integration of political and legal institutions in the processes of constitutional government that allows both empowerment and constraint to work.

East Asia has in recent years experienced the phenomenon of the powerful state and the hazard of unconstrained government, elected or otherwise. The most notorious East Asian examples where elected leaders used their mandate to pervert the constitutional order were some of the early South Korean experiments with democracy and the Marcos regime in the Philippines.[67] As noted above, theorists have responded with two nearly opposing alternatives, often applied paradoxically to the same regimes. Some have advocated instituting the rule of law and rights protection along with authoritarianism.[68] The difficulty with this option is in inducing such authoritarian leaders to consistently accept such constraint and respect human rights. There have been some aspirations toward this notion in Singapore, Malaysia and (until recently) Indonesia.

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65 Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364; Linz and Stepan, above n 16, 19.

66 Guillermo O'Donnell, 'Illusions About Consolidation' (1996) 7 *Journal of Democracy* 34, 44.

67 Jang Jip Choi, 'Political Cleavages in South Korea' in Hagen Koo (ed) *State and Society in Contemporary Korea* (Cornell University Press, Ithaca, 1993) 13; S Guingona, 'The Constitution of the Philippines: An Overview' (1989) 65 *New Zealand Law Journal* 419.

68 Shuhe Li and Peng Lian, 'On Market Preserving Authoritarianism: An Institutional Analysis of Growth Miracles' (Conference paper presented at the Chinese University of Hong Kong, Hong Kong, 8 March 1996). This argument picks up some general support in Giovanni Sartori's proposition that 'demo-protection' (protection from tyranny or constitutional constraint) travels better than 'demo-power' (implementation of popular rule) – 'nobody wants to be imprisoned, tortured or killed': Giovanni Sartori, 'How Far Can Free Government Travel?' (1995) 6 *Journal of Democracy* 101, 101–4. Sartori would not advocate that the absence of demo-power be accepted as a long-term solution.

Alternatively, some may advocate instituting democracy but replacing liberal constraints with alleged East Asian cultural constraints and communitarian processes of bargaining to establish a so-called illiberal democracy.[69] Paradoxically this approach may be the aspirational basis of the claims to democracy made by the same regimes in Singapore, Malaysia and Suharto's Indonesia. But an alleged democracy that prohibits or suppresses opposition without core constitutional constraints does not appear to be democracy at all. A system that places emphasis on social connections and networking may lead to particularism and clientelism.[70] This situation is difficult to distinguish from authoritarianism when it comes to the potential for abuse of power and neglect of human rights.

Extra-constitutional action should more properly be understood as not just overriding constraint but as overriding democracy and its concomitant guarantees of human rights and the rule of law. Such extra-constitutional action does not just 'get the job done' but, in fact, deprives the people of democratic power. To deprive people of freedom of speech does not just serve to eliminate meddlesome critics and achieve order but may, in fact, disempower the people in securing basic human rights, both political and economic. Constitutionalists should seek to engender discourse and empowerment. The legal and human rights institutions of constitutional government are enfranchising in nature; they work to engage the citizens in a political conversation about popular concerns and values. Contrary to the Asian values claim, in a modern complex society this is the contemporary venue for values and development discourse. This is what has inspired the Asian movement to constitutionalism. If constitutionalism is openly accepted as the venue for political choice, rather than merely constraint, then the ensuing discourse within this venue may engender respect for its important constraints and processes.

To better understand this claim we must consider the constitutive process. This process can be considered at two levels: constitution-making and constitutional implementation. Constitution-making is where the explicit constitutional conversation begins. A constitutional assembly is a powerful venue for

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[69] Some scholars have advocated an Asian model of democracy along these lines, characterising it as illiberal democracy: see, for example, Daniel A Bell, David Brown, Kanishky Jayasuriya and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (Macmillan Press, London, 1995); Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22.

[70] In East Asia such clientelism has spawned economic and political systems that are particularly noted for problems of cronyism and corruption, problems that are frequently associated with East Asia's leading countries, for example, Indonesia, South Korea, China and Japan: Richard H Mitchell, *Political Bribery in Japan* (University of Hawaii Press, Honolulu, 1996).

discourse about basic political and human rights values. This is especially true because such assemblies are usually called on the heels of a national crisis, which is inherently engaging. In recent decades the East Asian landscape has been riddled with constitution-making exercises. In the 1980s and 1990s constitution-making in the Philippines and Hong Kong offered prominent, seemingly successful examples.[71] In such constitution-making processes Jon Elster describes a venue where passion, interest and reason operate.[72] There are both upstream and downstream constraints, as well as processes for consensus-building and broadening bases of support.[73] Upstream constraints consider political settlements and may also protect members of the former regime. For the Hong Kong Basic Law, as with the post-war Japanese Constitution, the upstream constraints were dictated by outside powers.[74] Downstream constraints look to ratification or acceptance. In the Philippines, after the 'People Power' revolution, downstream acceptance was the substantial constraint.

After a constitutional founding, successful implementation of constitutional government depends on appreciation of the discursive architecture embodied in the notion of checks and balances. Most appreciated in this regard is the positive discursive machinery of constitutional judicial review, the power whereby courts review laws enacted by the elected branches of government for conformity to constitutional requirements. Constitutional judicial review has become the premier institution for securing human rights in East Asia.[75] Constitutional judicial review serves as the engine for the basic constitutional conversation about political values and commitments.[76] This constitutional conversation proceeds as legislatures pass laws and courts respond and legislatures pass new laws.[77] While much of East Asia has adopted Western civil and common law legal systems, only the democratic or quasi-democratic countries of the region

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71 See Guingona, above n 67; Michael C Davis, 'Constitutionalism and the Rule of Law in Hong Kong' (2006) 3 *Loyola University of Chicago International Law Review* 165.

72 See Elster, above n 65, 377–86.

73 Ibid 374.

74 See Ford, above n 34; Michael C Davis, 'Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis' (1996) 34 *Columbia Journal of Transnational Law* 301.

75 Mauro Cappelletti, 'The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis' (1980) 53 *Southern California Law Review* 401.

76 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, New Haven, 2nd ed, 1986).

77 A court can use various avoidance and interpretation doctrines, what Bickel calls 'passive virtues', to carry on a complex dialogue with the elected branches of government and the people: Bickel, above n 76, 23, 65–70, 117.

have fully functioning systems of constitutional judicial review.[78] These countries include Japan, the Philippines and Hong Kong, with such power vested in the ordinary courts, and Taiwan, South Korea, Mongolia, Indonesia, and Thailand, where civil law special constitutional courts are employed.[79] For the authoritarian regimes of the region, little or no judicial review power is the norm. In an authoritarian environment it is unlikely that judges can be counted on to carry out such role assertively. Using a rational choice model, in the context of democratic constitution-making and implementation, Tom Ginsburg has traced the reasoning of both constitutional drafters and courts in creating or developing constitutional judicial review.[80] While one may question whether a narrow rational choice model can fully account for the decisions of actors whose interests and identity are mutually constituted as the process unfolds, it is clear that authoritarian regimes will have little commitment to such constitutional practices.[81]

Constitutional judicial review of legislative enactments is not the sole discursive engine for crafting state-based solutions to broader societal concerns. At moments of crisis – what Stephen Krasner calls 'punctuated equilibrium' – the entire people may be mobilised to civic action or intense reflection on political value concerns of fundamental importance.[82] In normal times

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[78] As a general proposition the structure of constitutional judicial review is divided into those systems with a central constitutional court deciding issues on referral from ordinary courts or other branches of government (usually civil law systems) and those decentralised systems where ordinary courts exercise this power in actual cases (usually common law systems): Mauro Cappelletti, above n 75, 401. Japan is the East Asian exception where a decentralised system exists in a civil law country. Hong Kong has both systems operating at once: a decentralised system for matters within local autonomy and a centralised review process by the National People's Congress ('NPC') Standing Committee in Beijing (advised by a Basic Law Committee) on matters of central authority or involving local central relations. *Hong Kong Basic Law*, Arts 17 and 158. See Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Routledge, New York, 2004).

[79] See Ford, above n 34; Davis, above n 74; C Neal Tate, 'The Judicialization of Politics in the Philippines and Southeast Asia' (1994) 15 *International Political Science Review* 187.

[80] Tom Ginsburg, *Judicial Review in New Democracies, Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003). The rational choice model Ginsburg employs assumes that judges, public officials and constitution drafters will act in their narrow self-interest, typically in ways that aim to advance their power within the system.

[81] Michael C Davis, 'Constitutionalism and New Democracies' (2004) 36 *George Washington International Law Review* 681.

[82] Stephen D Krasner, 'Approaches to the State: Alternative Conceptions and Historical Dynamics' (1984) 26 *Comparative Politics* 223.

the people may be content with representation and constitutional judicial review, while they largely focus on private affairs; while at times of what Bruce Ackerman calls constitutional politics, the level of civic action may become extraordinary.[83] There is evidence of such mobilisation in the recent South Korean and Japanese constitutional politics of reform and resistance to corruption. Considerable civic action also accompanied the post-1987 constitutional reforms in Taiwan and the financial crisis and the overthrow of Suharto in Indonesia.[84]

B Indigenisation of constitutionalism and human rights

With a firm commitment to the constitutional fundamentals in place, a premier concern is that constitutionalism, with its democracy, human rights and rule of law ingredients, should plant its roots firmly in the local soil. Aung Sang Suu Kyi argues that as long as there is a genuine commitment to modern democratic values, there is room for variation in local institutional embodiment.[85] It is through local institutional embodiment – what I call indigenisation – that constitutionalism responds to the above noted concerns with values and development. For indigenous institutions to work, however, the constitutional fundamentals of democracy, human rights and the rule of law must be in place. Otherwise, authoritarian leaders may implant a hegemonic discourse constructive of authoritarian power and destructive of genuine community values. Local institutional embodiment may include traditional organisations and practices and more contemporary institutions responsive to developmental concerns. In this subsection I consider the ways in which constitutionalism and its related human rights institutions in East Asia have responded both to the cultural concerns raised in the Asian values debate and to developmental concerns likely to arise in post-authoritarian constitutional democracies.

Constitutionalists should consider the ways in which local culture and traditions may facilitate constitutional discourse under the umbrella of the core constitutional commitments discussed above. It is in local institutional embodiment that substantive communitarian concerns can be addressed. Local grass

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[83] Bruce Ackerman, *We The People* (The Belknap Press, Cambridge, 1991) 34–57.

[84] The 1987 lifting of martial law in Taiwan triggered popular demonstrations, a judicial review opinion ruling the failure to hold new elections for the Legislative Yuan to replace seats long held by mainlanders elected in the 1940s unconstitutional, a National Affairs Conference and ultimately full democratic elections: Jaushieh (Joseph) Wu, *Taiwan's Democratization: Forces Behind the New Momentum* (Oxford University Press, Oxford, 1995) 125–37. Indonesia experienced high levels of civic action and fundamental constitutional reform: see Maclntyre, above n 42.

[85] Aung San Suu Kyi, 'Transcending the Clash of Cultures: Freedom, Development and Human Worth' (1995) 6 *Journal of Democracy* 11, 13.

roots and minority representation may be achieved through contemporary institutions which secure autonomy or minority rights, or through recognition of traditional ethnic or religious groups. The aim is for a realistic discourse that is anchored in the community but responsive to the contemporary urban and industrial or post-industrial conditions.

Locally sensitive representation may include attention to the usual geographic political institutional options such as federalism or autonomy, as well as consideration of various electoral models that seem likely to increase representation of minorities. Other forms of representation may include substantive or symbolic recognition of distinct ethnic, religious or linguistic communities in which traditional leaders assume leadership roles. This may include a continuing role, symbolic or substantive, for traditional monarchs, such as is evident in contemporary Malaysia, Japan and Thailand.[86] Special minority group rights may be combined with individual rights; in East Asia there are many traditional indigenous groups or distinctive communities who are promised varied degrees of autonomy in the local constitutional system. However, East Asian governments, wary of outside intervention in their sovereign territory, may be reluctant to allow the type of international recognition such autonomous communities usually covet as security for the autonomy arrangement.[87] As a rare exception, China has allowed the security of internationally recognised status for Hong Kong under the Hong Kong Basic Law, as allowed under Article 31 of the Chinese Constitution.[88]

Arend Lijphart has described the effort by elites to overcome the destabilising effect of cultural fragmentation in Europe as 'consociational democracy'.[89] The democratic element is important. A bargain across cleavage lines that only includes the elite strata would be merely authoritarian oligarchy and would not be likely to secure a channel for engaging popular will. The use of various forms of local institutional embodiment, along with core constitutional

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[86] Abdulahi An-Na'im, 'Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights' in C E Welch and V A Leary (eds) *Asian Perspectives on Human Rights* (Westview Press, Boulder, 1991) 31; Y Higuchi, 'The Constitution and the Emperor System: Is Revisionism Alive?' (1990) 53 *Law and Contemporary Problems* 51; C E Keyes, *Thailand: Buddhist Kingdom as a Modern Nation State* (Westview Press, Boulder, 1987).

[87] Robert H Barnes, Andrew Gray, and Benedict Kingsbury (eds) *Indigenous Peoples of Asia* (Association of Asian Studies, Ann Arbour, 1993); Michael C Davis, 'Establishing a Workable Autonomy in Tibet' (2008) 30 *Human Rights Quarterly* 227.

[88] See Davis, above n 71. This has allowed Hong Kong to secure a fairly robust system of human rights and the rule of law, though it still lacks full democratic development. Similar Chinese solicitude has not been extended to minority nationalities in Tibet and Xinjiang.

[89] Arend Lijphart, 'Consociational Democracy' (1968) 21 *World Politics* 207.

commitments, may engender more confidence in the system, encourage local connectedness to the constitutional order and facilitate genuine values discourse.

Beyond political representation, legal structures may also address important indigenous human rights concerns. This may include the application of religious or tribal laws and the provision for genuine autonomy for national or ethnic minority groups. For such autonomy arrangements to work, democratic commitments and basic rights must be emphasised. Traditional practices can be renovated or new institutions invented to sustain important indigenous rights while maintaining core constitutional commitments. For example, in societies with long traditions of citizen petition of leaders, a mechanism for petitioning elected officials could be employed or, perhaps, a modern version thereof, the ombudsman.[90] Even a traditional monarch, who may retain symbolic and ceremonial functions, may take on an ombudsman-like role in a post-monarchical democratic society.[91] Such tradition-bound institutions may open better avenues of communication and protection in ways consistent with historical experience. Even when contemporary institutions are employed, in practice they may be expected to take on indigenous characteristics. Contemporary institutions such as human rights tribunals or commissions, election commissions or corruption-fighting bodies may be employed to address those contemporary problems that neither the core constitutional nor traditional institutions adequately respond to. The goal in all cases is orderly processes of discursive engagement or empowerment.

Hegemonic claims of adherence to Asian values without a commitment to the core constitutional and human rights fundamentals are unlikely to engender a healthy values discourse or contribute to long-term public trust. One might contrast the constitutional paths of modern Japan and China.[92] While these countries bear comparison due to similar traditional values, striking differences are in many ways explainable structurally by their contrasting post-war constitutional paths. While post-war Japan has taken a liberal constitutional path, there has been substantial indigenisation in practice. Indigenisation has even transformed the practice of constitutional judicial review, as the courts are noted for a conservative system of constitutional

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[90] Hong Kong stands out as a system that makes use of an official ombudsman as an avenue of public complaint. This ombudsman role and a similar role played by legislative counsellors in the Hong Kong system appear to be valued for consistency to traditional Chinese systems of complaint – Chinese citizens to this day still travel to Beijing to file petitions over perceived injustices.

[91] This oversight role for a traditional monarch is still evident in contemporary Thailand and Japan.

[92] Davis, above n 3 (1997).

guidance.[93] Though conservative, this system has afforded increased rights protection and does seem to take constitutionalism seriously.[94] Even efforts at reforming the system of one-party dominance have been cautious, engendering renewed public concern with corruption.[95]

Without liberal constitutional fundamentals, China has advanced a hegemonic view concerning the constitutional fundamentals of democracy, human rights and the rule of law, which people challenge at their peril.[96] Constitutional judicial review is not allowed. Minority rights are poorly protected in a top-down system of control. The constitution provides for top-down legislative supervision by people's congresses, which are themselves not subject to competitive elections and are dominated by the central government. Even greater central control is achieved through the Chinese Communist Party. If review occurs at all it is either through informal guidance or through committee or party oversight in the passage of laws.[97] A collectivist notion of rights subjecting the rights of the individual to the interests of the state appears to undermine local rights protections.[98] The Public Security Bureau and the military take a central role in providing public security, often at the expense of basic rights.

China's economic reforms have engendered increased diversification of interests for which inadequate representation is secured. This neglect is especially pronounced for minority groups, some of which are looked upon with great suspicion. Commitments to legality, under the theory of rule by law, are shaky at best, encouraging increased corruption as the economic reform process goes forward. This has produced a values-vacuum, which the society is hard placed to deal with. Efforts to open up democratic and legal channels for representation of diverse and minority interests are often met by government indifference. Opening up appropriate legal and democratic channels will not automatically solve the current problems but such moves may offer hope for crafting orderly solutions in the future.

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93 Young, above n 34, 970; Ford, above n 34, 25–9, 49–55.

94 Ford, above n 34, 29–36.

95 Richard H Mitchell, *Political Bribery in Japan* (University of Hawaii Press, Honolulu, 1996) 121–32.

96 Owen M Fiss, 'Two Constitutions' (1986) *Yale Journal of International Law* 492, 501.

97 *Constitution of the People's Republic of China* (1982) Article 67; Andrew J Nathan, 'Political Rights in Chinese Constitutions' in R Randle Edwards, Louis Henkin, Andrew J Nathan (eds) *Human Rights in Contemporary China* (Columbia University Press, New York, 1986) 77.

98 *Constitution of the People's Republic of China* (1982) Article 51; R Randle Edwards, 'Civil and Social Rights: Theory and Practice in Chinese Law' in R Randle Edwards, Louis Henkin, Andrew J Nathan (eds) *Human Rights in Contemporary China* (Columbia University Press, New York, 1986) 41.

Many of the same indigenisation arguments addressed in relation to cultural values have obvious connections, as well, to economic developmental concerns. Recognition of distinct cultural groups clearly has market and developmental implications, as such groups address their distinct developmental problems and attract investment in various resources.[99] Beyond multiculturalism, economic developmental concerns implicate a wide range of local social and economic rights.

5 Conclusion

This argument has emphasised several points: first, that the Asian values and other cultural arguments do not justify the choice of authoritarianism and the neglect of democracy and human rights; second, that under East Asia's current condition of substantial economic development, an authoritarian regime can no longer be adequately responsive to diverse developmental concerns; third, the positive role of constitutionalism in constructing empowering conversations in modern democratic development and as a venue for values and developmental discourse; and fourth, the importance, especially in cross-cultural and developmental contexts, of indigenisation of constitutionalism through local institutional embodiment. In the absence of the development of regional human rights institutions, in East Asia it has been the linkage of these points that has connected the constitutional regime of a given state or similar territorial community to the international processes of human rights and has established the importance of domestic human rights practices.

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[99] Amy Chua, 'The Privatization–Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries (1995) 95 *Columbia Law Review* 223.

17. Islam and the realization of human rights in the Muslim world*

Mashood A Baderin

1 Islam and human rights in the Muslim world

The discourse about the relationship between Islam and human rights in the Muslim world has been diverse and ongoing for some time.[1] The discourse is not only theoretically relevant to the universalization of human rights generally, but also specifically relevant to the practical realization of human rights in the Muslim world. This is due to the evident role that Islam has generally

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[1] There is a wide range of literature on this subject. See, for example, A A An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press, New York, 1990); M Monshipouri, *Islamism, Secularism and Human Rights in the Middle East* (L Rienner Publishers, Boulder, 1998); M A Baderin, *International Human Rights and Islamic Law* (Oxford University Press, Oxford, 2003); A A Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press, Boulder, 4th ed, 2006); D Arzt, 'The Application of International Human Rights Law in Islamic States' (1990) 12 *Human Rights Quarterly* 202; S A Abu-Sahlieh, 'Human Rights Conflicts between Islam and the West' (1990) *Third World Legal Studies* 257; A Sajoo, 'Islam and Human Rights: Congruence or Dichotomy' (1990) 4 *Temple International and Comparative Law Journal* 23; B Tibi, 'Islamic Law/*Shari'a*, Human Rights, Universal Morality and International Relations' (1994) 16 *Human Rights Quarterly* 277; F Halliday, 'Relativism and Universalism in Human Rights: The Case of the Islamic Middle East' (1995) 43 *Political Studies* 152; H Bielefeldt, 'Muslim Voices in the Human Rights Debate' (1995) 17 *Human Rights Quarterly* 587; J Morgan-Foster, 'A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context' (2003) 10 *ILSA Journal of International and Comparative Law* 35; A Chase, 'The Tail and the Dog: Constructing Islam and Human Rights in Political Context' in A Chase and A Hamzawy (eds) *Human Rights in the Arab World* (University of Pennsylvania Press, Philadelphia, 2006) 21.

played and continues to play in the social, cultural, political and legal affairs of many predominantly Muslim States and societies. Although some commentators do argue that Islam is, essentially, neither the solution nor the source *per se* of political and social problems in the Muslim world,[2] a careful purview of current social, cultural, political and legal developments in Muslim States such as Saudi Arabia, Iran, Iraq, Egypt, Morocco, Sudan, Nigeria, Pakistan, Indonesia, Malaysia, Palestine, and even secular Turkey,[3] among others, reveals different degrees of Islamic influence in both the private and public spheres of those States, which directly or indirectly affects human rights issues.

For example, Bielefeldt has observed that 'traditional sha'ria [sic] norms continue to mark family structures all over the Islamic world' and that 'the sha'ria [sic] criminal law is [still] applied . . . in a few Islamic countries today'.[4] Buskens too has noted that: '[i]n most Muslim societies it is impossible to speak about family law except in terms of Islam',[5] which, on the one hand, denotes the cultural and legal influence of Islam in that regard, but, on the other hand, has significant impact on the application of human rights law, especially in relation to women's rights, in most Muslim States. Modirzadeh has thus observed the need to take Islamic law seriously and engage with it one way or the other in relation to the promotion and protection of human rights in the Muslim world.[6] This domestic influence of Islam is formally reflected in

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[2] See, for example, D Brumberg, 'Islam is not the Solution (or the Problem)' (2005–06) 29 *The Washington Quarterly* 97 (argues, *inter alia,* in relation to democracy in the Muslim world, that 'naming Islam as the solution exaggerates the extent to which Islam shapes Muslims' political identity'); A Chase, 'Liberal Islam and "Islam and Human Rights": A Sceptics View' (2006) 1 *Religion and Human Rights* 145; A Chase, above n 1, 21 (argues for a contextualized understanding of the relationship between Islam and human rights in the Arab world, and notes that 'It is political, social, and economic context that explains the status of human rights, for better for worse: Islam is neither responsible for rights violations nor the core basis for advancing rights').

[3] See, for example, T W Smith, 'Between Allah and Ataturk: Liberal Islam in Turkey' (2005) 9 *The International Journal of Human Rights* 307.

[4] H Bielefeldt, 'Muslim Voices in the Human Rights Debate' (1995) 17 *Human Rights Quarterly* 587, 612 (this situation, observed by Bielefeldt in 1995, remains significantly correct today).

[5] L Buskens, 'Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere (2003) 10 *Islamic Law and Society* 70, 71.

[6] N K Modirzadeh, 'Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds' (2006) 19 *Harvard Human Rights Journal* 192, 192 (observes, *inter alia*, that despite the increasing sophistication in the work of human rights organizations in the Muslim world, they 'remain unsure of how to address questions of Islamic law when it conflicts with international human rights law' and argues

the constitutions of some Muslim States that declare Islam as the religion of the State[7], recognize Islamic law as part of State law[8] or provide for the establishment of State courts that apply Islamic law.[9]

Apart from the domestic influence of Islam in individual Muslim States, Muslim States have also adopted regional instruments such as the *Arab Charter on Human Rights*,[10] the *Charter of the Organisation of the Islamic Conference* ('OIC'),[11] the *OIC Cairo Declaration on Human Rights in Islam*[12] and the *OIC Covenant on the Rights of the Child in Islam*,[13] all of which respectively make references to Islam as a relevant factor in the human rights discourse in the Muslim world. Also at the United Nations ('UN') level, the OIC has, for example, made submissions on behalf of Muslim States regarding proposed reforms of the UN Security Council, stating that 'any reform proposal, which neglects the adequate representation of the Islamic Ummah in any category of members in an expanded Security Council will not be acceptable to the Islamic countries'.[14] With regard to international human rights, the Organisation

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that international non-governmental organizations need to take Islamic law more seriously and engage with it in one way or the other); see also Netherlands Scientific Council for Government Policy ('WRR'), *Dynamism in Islamic Activism: Reference Points for Democratization and Human Rights* (Amsterdam University Press, Amsterdam, 2006) (notes that 'Since the 1970s, Islam has become an increasingly important political factor' particularly in the Muslim world).

7 See, for example, T Stahnke and R C Blitt, 'The Religion–State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2005) 36 *Georgetown Journal of International Law* 7, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=761746 at 25 November 2008.

8 Ibid; see also WRR, above n 6, 232–3.

9 See, for example, the *Constitution of the Federal Republic of Nigeria* ss 260–64. 275–9; the *Constitution of the Islamic Republic of Pakistan* Article 203.

10 Adopted by the League of Arab States on 15 September 1994; reprinted in (1997) 18 *Human Rights Law Journal* 151. The revised version adopted on 22 May 2004 and which entered into force on 15 March 2008 is available online: http://www1.umn.edu/humanrts/instree/loas2005.html at 25 November 2008.

11 Opened for signature 4 March 1972, 914 UNTS 111 (entered into force 1 February 1974); recently replaced by the instrument adopted at Dakar on 14 March 2008: http://www.oic-oci.org/oicnew/is11/english/Charter-en.pdf at 25 November 2008.

12 UN Doc A/45/5/21797 (5 August 1990) 199.

13 Adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Yemen, in June 2005: http://timelessfaith.org/BOOKS_pdf/child-rights.pdf at 25 November 2005.

14 UN Doc A/59/425/S/2004/808 (11 October 2004) [56].

> Expressed its determination to vigorously pursue the promotion and protection of human rights and fundamental freedoms and encouraged greater transparency, cooperation, mutual tolerance and respect for religious values and cultural diversity in the field of universal promotion and protection of human rights.[15]

Furthermore, within international human rights forums, questions regarding the relationship and impact of Islam generally, and Islamic law specifically, on the application of human rights law in Muslim States have been raised before the Human Rights Committee under the UN human rights system,[16] before the European Court of Human Rights under the European regional human rights system[17] and before the African Commission on Human and Peoples' Rights under the African regional human rights system.[18] All these, no doubt, reflect the relevance of Islam to international human rights discourse generally, but particularly its impact and role in relation to Muslim States.

Pragmatically therefore, efforts for the promotion and protection of human rights in the Muslim world must necessarily take the impact and role of Islam into account, be it positively or negatively. Islam generally, and Islamic law specifically, cannot simply be disregarded as irrelevant in any of such endeavours. An-Na'im has observed in that regard that '[t]he implementation of international human rights norms in any society requires thoughtful and well-informed engagement with religion (broadly defined) because of its strong influence on human belief systems and behaviour' and that 'religious considerations are too important for the majority of people for human rights scholars and advocates to continue to dismiss them simply as irrelevant, insignificant, or problematic'.[19] That candid observation is particularly significant in relation to Islam and human rights due to Islam's significant societal role and influence in the Muslim world generally. In her article examining the human rights reports of international non-governmental organizations ('INGOs') in Muslim States, Modirzadeh observed that '[h]uman rights discourse and Islamic legal discourse are powerful forces in the Muslim world

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15 Ibid [57].

16 See, for example, Human Rights Committee, *Concluding Observations of the Human Rights Committee on The Sudan*, UN Doc CCPR/C/79/Add.85 (19 November 1997) [22]; *Concluding Observations of the Human Rights Committee on the Islamic Republic of Iran*, UN Doc CCPR/C/79/Add/25 (3 August 1993) [13].

17 See, for example, *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 European Human Rights Reports 1 ('*Refah Partisi*').

18 See *Curtis Francis Doebbler v Sudan* (2004) 11 *International Human Rights Review* 252.

19 A A An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 *ASIL Proceedings* 95, 95.

today' but noted 'a long simmering dilemma within the Western-based human rights movement' concerning 'how the human rights movement should deal with Islamic law'[20] and thus proposed 'three possible solutions for INGOs to consider in shaping their work on Islamic law' in relation to human rights in relevant Muslim States.[21] Many other commentators have also suggested different possible solutions to the problem of realizing human rights in the Muslim world.

Against the backdrop above, this chapter presents a pragmatic and constructive argument based on two evident facts. The first fact is that Muslim States are amongst the countries with the poorest human rights records in the world today. It has been observed, in that regard, that there is a 'growing sense in the West that *something must be done* about human rights in the Muslim world'.[22] The second fact is that at least half of the predominantly Muslim States have constitutionally proclaimed Islam as the official State religion, and also 'recognize some constitutional role for Islamic law, principles, or jurisprudence'.[23] Although Stahnke and Blitt have observed that the practical ramifications of both the constitutional declaration of Islam as State religion and the constitutional recognition of Islamic law vary respectively from State to State,[24] there is no doubt that the former theoretically reflects the general religious and moral role of Islam in the respective States, while the latter means that Islamic law (as part of domestic law) can impact on the application of human rights in the respective States. This chapter, therefore, argues that while Islam may not be the sole factor for ensuring the realization of human rights in Muslim States, it is certainly a significant factor that can be constructively employed as a vehicle for improving the poor human rights situation in, at least, predominantly Muslim States that recognize Islam as State religion or apply Islamic law or Islamic principles as part of State law.

But, what is the best approach to adopt in that regard to achieve the best possible outcome? This question will be addressed in the light of what I consider to be the two essential approaches (the 'socio-cultural approach' and the 'politico-legal approach') for promoting and protecting human rights generally. After analysing those two essential human rights approaches, the chapter will then examine the two divergent perspectives (the 'adversarial perspective' and the 'harmonistic perspective') on the discourse on Islam and

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20 Modirzadeh, above n 6, 192.

21 Ibid 231.

22 Ibid 192 (emphasis original).

23 See Stahnke and Blitt, above n 7, 6–11, which records that 22 of 44 listed predominantly Muslim States have constitutionally declared Islam as the religion of the State and have some constitutional roles for Islamic law.

24 Ibid 6.

human rights. The chapter will advance the view that the harmonistic perspective would be most helpful for employing Islam as a vehicle for the realization of human rights in the Muslim world within the context of the socio-cultural and politico-legal approaches for promoting and protecting human rights generally. Relevant academic and policy-oriented examples, especially in relation to promoting women's rights in the Muslim world, will be cited to support this position. It is important to note that this chapter does not argue that it is only through Islam or Islamic law that human rights can be realized in the Muslim world, but rather that Islam can, within the context of the socio-cultural and politico-legal approaches to human rights analysed herein, play a significant positive role towards the realization of human rights in the Muslim world instead of the negative role often simplistically attributed to it in that regard.

2 The two essential approaches for promoting and protecting human rights

For their effective realization generally, human rights, in my view, must be pursued through two essential complementary approaches, which, although not usually made explicit in human rights literature, are implicit in the processes of promoting and protecting human rights universally. They are what I refer to as the 'socio-cultural approach' and the 'politico-legal approach' for promoting and protecting human rights. These two approaches relate to the moral and justificatory attributes and the legal and executive attributes of human rights respectively. The socio-cultural approach is a bottom-to-top approach while the politico-legal approach is a top-to-bottom approach. These approaches are complementary and must be simultaneously pursued for the robust and effective realization of human rights globally.

Owing to the traditional state-centric and positivist nature of international law generally, international human rights discourse and advocacy have often concentrated more on politico-legal imperatives, placing emphasis on the human rights obligations of the State, but with less attention paid to the socio-cultural imperatives necessary for the promotion and protection of international human rights norms from the grassroots within communities. Yet, as early as 1958, the first chairperson of the UN Commission on Human Rights, Eleanor Roosevelt, declared as follows:

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighborhood he [or she] lives in; the school or college he [or she] attends; the factory, farm or office where he [or she] works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action

> to uphold them close to home, we shall look in vain for progress in the larger world. Thus we believe that the destiny of human rights is in the hands of all our citizens in all our communities.[25]

This statement acknowledges that an effective socio-cultural approach is as essential as the politico-legal approach for the global realization of human rights generally. In my view, this is even more particularly so with respect to the developing world, of which most Muslim States are part.

A The socio-cultural approach

The socio-cultural approach to human rights relates to education, information, orientation and empowerment of the populace through the promotion of a local understanding of international human rights norms and principles. Through the socio-cultural approach, positive social change and a cultural link to human rights can be advocated, with which negative cultural relativist arguments used by some States to justify their human rights violations can be challenged by the populace themselves from within the relevant norms of respective societies.

It is important to note that the socio-cultural approach to promoting and protecting human rights is different from the traditional concept of cultural relativism in human rights discourse. While the traditional cultural relativist argument is often advanced by States to justify their human rights violations, the socio-cultural approach to promoting and protecting human rights is a positive means for realizing human rights through relevant social and cultural norms that already exist within different societies and communities. The socio-cultural approach to human rights encourages and facilitates the localization of international human rights norms.[26] According to Acharya,

> localization describes a complex process and outcome by which norm-takers build congruence between transnational norms (including norms previously institutionalized in a region) and local beliefs and practices. In this process, foreign norms, which may not initially cohere with the latter, are incorporated into local norms.

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[25] Eleanor Roosevelt, remarks at the presentation of *IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights* to the UN Commission on Human Rights (27 March 1958): http://www.udhr.org/history/inyour.htm at 25 November 2008.

[26] See, for example, K De Feyter, 'Localizing Human Rights' (Discussion Paper 2006/02, University of Antwerp, 2006): http://www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice/participants/papers/de_feyter.pdf at 25 November 2008 (the author argues that: 'International human rights lawyers tend to focus on establishing the universality of human rights rather than on improving the usefulness of human rights in addressing local problems' and thus he 'draws attention to the need to make human rights more locally relevant').

> The success of norm diffusion strategies and processes depends on the extent to which they provide opportunities for localization.[27]

In that regard, the socio-cultural approach to human rights aims principally at the populace, especially at the grassroots, and can help in empowering them with the positive understanding of human rights in their own language and within their own social and cultural contexts. It links human rights positively to relevant socio-cultural values of different societies and communities and thus enables a better appreciation of the concept by the local populace, which helps to establish the moral and justificatory attribute of human rights locally. Nelson Mandela is quoted to have once said: 'If you talk to a man in a language he understands, that goes to his head. If you talk to him in his own language, that goes to his heart.'[28] One could add that if you talk to a man in a language he does not understand, that actually goes nowhere. Thus, the socio-cultural approach to human rights facilitates bringing human rights to the grassroots populace of every society in their own 'language'[29] so that it goes to their hearts. Where the socio-cultural approach to human rights is effectively pursued, the politico-legal approach to human rights will also become much easier to achieve and be more purposeful.

To be effective, the socio-cultural approach to human rights requires a search within different societies and cultures for relevant accommodating models to help realize international human rights norms. It ensures that the local communities understand human rights as part of their own human heritage and thus push the human rights idea from the bottom to the top, which, where effectively achieved, becomes a powerful politico-legal tool for the populace, the State, and for human rights advocates generally. De Feyter has rightly observed in that regard that '[i]f the experience of local communities is to inspire the further development of human rights, community-based organizations will have to be the starting point.'[30] Thus, local non-governmental organizations ('NGOs'), civil groups, cultural groups, religious groups, educational institutions and other local associations have important roles to play in the bottom-to-top orientation of the socio-cultural approach to human rights.

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[27] A Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 *International Organization* 239, 241.

[28] See http://www.saidwhat.co.uk/quotes/political/nelson_mandela/if_you_talk_to_a_man_9870 at 25 November 2008.

[29] 'Language' is used here figuratively and in a broad sense, not just literally to mean 'verbal conversation'.

[30] De Feyter, above n 26, 13.

This idea of a socio-cultural approach for promoting and protecting human rights is inferable from international human rights instruments such as the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* adopted by the UN General Assembly in 1998,[31] which recognizes, *inter alia*, 'the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels'.[32] Its importance has been emphasized mostly by human rights scholars and advocates from developing States who appreciate the need for such an approach especially in the developing world. For example, De Feyter cites the argument of Makau Mutua in that regard that '[o]nly by locating the basis for the cultural legitimacy of certain human rights and mobilizing social forces on that score can respect for universal standards be forged'.[33] Thus, in seeking to remedy the poor human rights situations in Muslim States, as part of the developing world, the socio-cultural approach to human rights is very relevant in relation to Islam.

B The politico-legal approach

On the other hand, the politico-legal approach to human rights is a top-to-bottom approach that relates more to human rights responsibility and accountability on the part of the State and its organs. This approach aims principally at ensuring respect for human rights by the State through relevant political and legal policies and through the establishment of relevant public institutions for the promotion and protection of human rights. As noted earlier, much emphasis has often been placed on the politico-legal approach to human rights, whereby the focus is normally on urging States to fulfil their international, regional or constitutional human rights obligations. State practice, however, shows that developed States are often more responsive to the politico-legal approach than developing States. The guarantee of human rights under this approach depends largely on the positive political will of the government in power, which is often lacking in States of the developing world, including Muslim States. It is, thus, in the context of the politico-legal approach to human rights that States are often lobbied, internally and externally, to ratify relevant human rights treaties and pacifically pressured, where necessary, to fulfil their obligations under such treaties.

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31 GA Res 53/144, UN GAOR, 53rd sess, 85th plen mtg, UN Doc A/Res/53/144 (9 December 1998) Annex.

32 Ibid [Preambular 8] ('GA Res 53/144').

33 M Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia University Press, Philadelphia, 2002) 256, cited in De Feyter, above n 26, 6.

This top-to-bottom approach to promoting and protecting human rights is acknowledged in many human rights instruments, which provide that States have the primary responsibility to promote, protect and implement human rights and that they must adopt all necessary administrative and legislative measures to ensure the guarantee of relevant human rights within their respective jurisdictions.[34] Thus, it is in the context of the politico-legal approach that the legal and executive attribute of human rights is ensured, and through it victims of human rights violations are able to seek legal redress for such violations personally or through the assistance of human rights NGOs. Being a top-to-bottom approach, factors such as good governance, positive political will, justice, good faith, and judicial independence are essential for its successful realization.

However, the politico-legal approach to human rights is, primarily, vertically-oriented and may therefore not effectively address horizontal human rights problems such as human rights violations that occur within family relations and in the private sphere, especially violations grounded on the 'victim's' consent, whereby victims of human rights violations justify the violations against themselves on grounds of cultural and traditional practices they blindly follow without questioning. Where the populace are themselves not informed or aware of their rights, or where they see human rights strictly as a foreign idea, they are often unable to challenge any violation of their human rights by the State or question any of such violations based on cultural or religious grounds. Thus, while the politico-legal approach to human rights is essential for ensuring necessary political and legislative guarantees that facilitate respect for human rights from top to bottom on the part of the State, a parallel bottom-to-top socio-cultural approach is necessary to ensure a robust and effective system of promoting and protecting human rights in every State.

C Application to the Muslim world

In relation to the Muslim world, it is submitted that Islam, owing to its general socio-cultural and politico-legal influence in many Muslim States and societies as identified above, can play a significant role in effectively pursuing both the socio-cultural and the politico-legal approaches for promoting and protecting human rights in relevant Muslim States. The relevance of Islam in both regards is reflected in the views of the WRR in its recently published policy-oriented report on Islamic activism in the Muslim world. The Council observed that '[p]rogressive improvements of human rights in many Muslim countries are simply easier to accept if they can be imbedded in the local tradition and culture',[35] which reflects the need for a socio-cultural approach to

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[34] See, for example, GA Res 53/144, above n 31, Articles 1 and 2.

[35] WRR, above n 6, 10–11.

human rights on the one hand, and also that '[d]espite all the incentives and control mechanisms, they [human rights] can only go beyond the level of rights on paper when they can boast internal legitimacy, in other words, when they are viewed as "one's own law",[36] which reflects the need for a politico-legal approach to human rights on the other hand, both as argued in this chapter. The Council then pointed out notably that 'in a number of countries . . . this "own law" is based on Sharia' and thus '[p]recisely because international law primarily acquires its force through national law, the EU [European Union] must recognize that the legitimizing power of the Sharia in Muslim countries can be used to realize international human rights'.[37]

However, the success of both the socio-cultural and politico-legal approaches for promoting and protecting human rights in Muslim States depends, substantially, on which of two divergent perspectives is adopted in addressing the relationship between Islam and human rights in the Muslim world, as analysed below.

3 The two divergent perspectives on the Islam and human rights discourse

A perusal of the literature on the subject reveals generally that there are two broad divergent perspectives on how the question of Islam and human rights in the Muslim world has been and continues to be addressed. These I refer to as the 'adversarial perspective' and the 'harmonistic perspective' on Islam and human rights. These two divergent perspectives are reflected in both human rights and Islamist arguments on Islam and human rights respectively. The adversarial perspective is a hostile one, while the harmonistic perspective is a receptive one.

A The adversarial perspective

Human rights arguments reflecting the adversarial perspective on Islam and human rights generally presume that Islam is inherently the main cause of all human rights violations in Muslim States and perceive Islam and Islamic law as strictly conservative and fossilized systems that cannot be in synergy with international human rights norms and principles at all. An example of this perspective is seen in the view of a human rights activist that 'Islamic Sharia law should be opposed by everyone who believes in universal human rights'.[38]

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36 Ibid 169–70.

37 Ibid 170.

38 A Kamguian, *Why Islamic Law should be opposed?* (2002) Middle East Women, http://www.middleastwomen.org/html/sharia.htm at 25 November 2008.

The adversarial perspective is also evident in a general view of the European Court of Human Rights expressed in the case of *Refah Partisi (The Welfare Party) and Others v Turkey* that '[i]t is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia'.[39] Similarly, there are adversarial Islamist arguments that perceive the promotion of international human rights as a Western, anti-Islamic agenda, which must not be encouraged to flourish in the Muslim world.[40]

The adversarial perspective on Islam and human rights is a confrontational and negative perspective that tends to place a wedge between Islam and human rights. It disregards any possible areas of common ground between the two systems and thus eliminates the possibility of realizing human rights within an Islamic dispensation, thereby suggesting that Muslims must make a choice between Islam and human rights. This perspective promotes an incompatibility or absolute conflict theory in the Islam and human rights discourse. While there is no doubt that there are some important areas of difference between some human rights principles and some traditional principles of Islam, which need to be addressed, the confrontational nature of the adversarial perspective is problematic in the context of both the socio-cultural and politico-legal approaches for promoting and protecting human rights in the Muslim world. It does not provide room for real dialogue and engagement as it confronts the 'Islam and human rights' question as a sort of competition between two value systems, which makes it a very difficult perspective for the realization of human rights in Muslim States through the socio-cultural and politico-legal approaches. I have argued against this 'discordant' perspective elsewhere by highlighting its general negativity and noted that such a perspective 'emanates from the traditional divide and stereotype of confrontation between the Occidental and Oriental civilisations, between religion and secularism and more specifically between Islamic orthodoxy and Western liberalism'.[41]

Deplorably, however, the poor human rights practices of governments in most Muslim States also nourish the adversarial approach to Islam and human rights, especially when such governments try to justify their human rights violations by reference to Islamic culture or Islamic law. Nevertheless, while

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[39] See *Refah Partisi* and the Grand Chamber judgment: Application Nos 41340/98; 41342/98; 41343/98; 41344/9 (Unreported, European Court of Human Rights, Grand Chamber, 13 February 2003) [123], http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=&sessionid=16524354&skin=hudoc-en at 25 November 2008.

[40] See M Baderin, above n 1, 13–16.

[41] M A Baderin, 'Human Rights and Islamic Law: The Myth of Discord' (2005) 2 *European Human Rights Law Review* 163, 165.

it is essential to challenge the arguments of governments that plead Islam or Islamic law to justify their violations of human rights, it actually tends to help their case to propose that their arguments and deplorable practices confirm that Islam and human rights are inherently divergent and adversarial in nature. In that regard, Entelis has observed, in relation to women's rights, that '[t]he claim that Islamic culture, as influenced by *shari'a* law, cannot accommodate modern human right doctrine is simply a means by which conservative Islamists in Government strive to preserve the patriarchal societies in place'.[42] In my view, it helps the promotion of human rights in the Muslim world better by countering such arguments with relevant evidence showing that neither Islam nor Islamic law supports human rights violations.

Commenting on an adversarial proposition in one article which 'urges that the United States government should put similar energy [to that it used in combating terrorism emerging from militants in the Muslim world] into combating the treatment of women under *Shari'a*', Modirzadeh observed, *inter alia*, that while it is true that serious human rights violations occur as a result of some Islamic rules for which solutions need to be found, 'to suggest that the solution to every violation is merely more "pressure" from the United States government, *seriously undermines the extent to which Islamic law is deeply ingrained in the legal, political, and social frameworks of many Muslim countries*'.[43] Thus, while an adversarial perspective on Islam and human rights might be convenient, for example, in naming and shaming governments of Muslim States that violate human rights on grounds of Islam or Islamic law, it is less helpful in the context of the socio-cultural and politico-legal approaches for promoting the realization of human rights in Muslim States. The observation of the WRR that '[a] climate of confrontation is hardly conducive to the creation of lasting conditions for . . . increasing respect for human rights'[44] is instructive in that regard.

B The harmonistic perspective

Conversely, the harmonistic perspective on Islam and human rights is a responsive one that seeks to develop positive ways by which Islamic principles and international human rights norms can be harmonized as far as possible and thereby operate in synergy. Advocates of this perspective perceive Islamic law as a dynamic system that can respond to the dynamics and reali-

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42 J Entelis, 'International Human Rights: Islam's Friend or Foe?: Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law' (1997) 20 *Fordham International Law Journal* 1251, 1294–5.

43 Modirzadeh, above n 6, 212–13 (emphasis added).

44 WRR, above n 6, 209.

ties of human existence and is thus reconcilable with international human rights norms. In contrast to the adversarial perspective on Islam and human rights, the harmonistic perspective concentrates on realizing the ideals of human rights in Islam rather than perceiving the question of Islam and human rights as a competition between values. The harmonistic perspective on Islam and human rights therefore encourages understanding, constructive engagement and dialogue between Islam and human rights. This perspective emphasizes and explores the possibilities offered by alternative juristic views of Islamic law that are both moderate and legitimate on relevant questions of human rights in the Muslim world and thereby promotes a congruence theory in the Islam and human rights discourse. Although the harmonistic perspective promotes dialogue and understanding, this does not mean that areas of differences and conflict are downplayed or shied away from but, rather, that they should be addressed with the aim of finding constructive resolutions of them. Contextually, this perspective is the more helpful one in relation to the socio-cultural and politico-legal approaches for promoting and protecting human rights in Muslim States analysed above.

Generally, the harmonistic perspective on Islam and human rights is reflected in different ways in the works and practices of many scholars and advocates on the subject,[45] some of which will be referred to in the next section. The report of the WRR also favours this perspective as a positive approach that has much more potential for the realization of human rights in the Muslim world.[46]

Owing to the evident influence of Islam in the Muslim world as identified above, I have consistently argued that approaches which encourage harmonization of Islamic principles and human rights norms have a better chance of facilitating an effective realization of the implementation of international human rights in Muslim States than approaches that tend to place a wedge between Islam and human rights or present human rights as an alternative ideology to Islam in Muslim societies.[47] It is in that vein that I reiterate the need to advance the harmonistic perspective on Islam and human rights in

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[45] See, for example, N A Shah, 'Women's Human Rights in the Koran: An Interpretive Approach' (2006) 28 *Human Rights Quarterly* 868, 875–84, where the author discusses some different approaches to this perspective by reference to the works of Mahmood Monshipouri, Bassam Tibi, Abdullahi An-Na'im, and Mashood Baderin, respectively.

[46] WRR, above n 6.

[47] See, for example, M A Baderin, 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5 *The International Journal of Human Rights* 72; 'Identifying Possible Mechanisms Within Islamic Law for the Promotion and Protection of Human Rights in Muslim States' (2004) 22 *Netherlands Quarterly of Human Rights* 329; above n 41.

conjunction with the socio-cultural and politico-legal approaches to human rights in the Muslim world with relevant substantiations below.

4 Advancing the harmonistic perspective in the Muslim world

In his conclusion in an article on the interdependence of religion, secularism and human rights,[48] An-Na'im made the important observation that: 'peoples and individuals need make no choice among religion, secularism, and human rights' and that '[t]he three can work in synergy.' He noted, however, that 'there is a related choice that does need to be made: whether or not to attempt mediating tensions among the three paradigms' and he thus urged 'scholars and policymakers to take responsibility for that mediation rather than permit further damage to be done by belief in the incompatibility of religion with secular government and human rights'.[49] In relation to Islam and human rights in the Muslim world, the populace certainly 'need make no choice' between Islam and human rights, as demanded by the adversarial perspective on Islam and human rights; they can have both Islam and human rights working in synergy. Such synergy can be achieved using the harmonistic perspective on Islam and human rights in conjunction with the socio-cultural and politico-legal approaches for promoting and protecting human rights, as has been previously argued in this chapter.

In the context of the socio-cultural approach to human rights, it is apparent that while there is a relatively strong human rights debate developing in the Muslim world today, most of that discourse is taking place high above the grassroots in most Muslim States. There is therefore an important need for the human rights debates in the Muslim world to be brought down to the populace at the grassroots in the language they understand. In the course of that, the socio-cultural approach to human rights must address two main elements, namely, social change and cultural control.

In every society, there is a need for some element of social change for the effective realization of human rights, especially in the horizontal interaction of the populace, and this is better achieved through positive improvement in social consciousness than through forceful political or legal control. Promoting social change can, however, be problematic in almost all societies, but particularly in Muslim societies when this is perceived by the populace as being externally motivated. In a recent comment on scholarship for social change in Muslim societies, An-Na'im observed, *inter alia*, that '[e]xternal

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[48] A A An-Na'im, 'The Interdependence of Religion, Secularism, and Human Rights' (2005) 11 *Common Knowledge* 56.

[49] Ibid 80.

interventions, whatever may be [their] motivation and objectives, [are] always likely to be regarded with suspicion and scepticism by local communities.'[50]

Most advocates of human rights at the local level in Muslim societies have probably experienced this problem of suspicion and scepticism. For example, at a conference on women's rights in Islam under the auspices of the Planned Parenthood Federation of Nigeria ('PPFN') but with international sponsorship, held in 1994 at the University of Ibadan in Nigeria, there were suggestions from almost all the local Muslim participants behind the scenes, and from many of them on the conference floor, that the conference had a hidden agenda against Islamic norms and traditions which must be resisted. The local participants perceived the programme as externally driven to undermine Islam.[51] Ten years later, in 2004, there was similar suspicion and scepticism expressed by local participants at an international conference at the University of Jos in Nigeria on comparative perspectives of *shari`a* in Nigeria organized by the University of Jos in conjunction with Bayreuth University of Germany and with international sponsorship from the Volkswagen Foundation of Germany.[52]

Similar scenarios of suspicion and scepticism are not uncommon at such meetings in other Muslim States, and this needs to be addressed through local confidence-building in the international human rights system. An element of this suspicion is also institutionally reflected in the call of the OIC to its Muslim Member States 'to continue their coordination and cooperation in the area of human rights in the relevant international fora with the view to enhance Islamic solidarity in confronting attempts to use human rights as a means to politically pressurize any of the Member States'.[53]

The socio-cultural approach to human rights would work better in addressing that problem in conjunction with the harmonistic perspective to Islam and human rights. In pursuing the socio-cultural approach to human rights here, Islam can play a very positive role. On the one hand, local Muslim communities are not generally inimical to social change, but they are often more amenable to social changes that can be justified in Islam, which, one must however acknowledge, is not always a clear-cut matter due to the different 'Islamic' views that can exist on any particular issue. In that regard, there is often the problem of how to deal with hard-line Islamist views on relevant

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[50] A A An-Nai'm, 'Human Rights and Scholarship for Social Change in Islamic Communities' (2005) 2 *Muslim World Journal of Human Rights* 1, 1–3.

[51] This author presented a paper at and participated in the Ibadan conference.

[52] This author was not present at the Jos conference but was reliably informed by some local participants at the conference.

[53] See *Final communiqué of the annual coordination meeting of Ministers for Foreign Affairs of the States members of the Organization of the Islamic Conference*, UN Doc A/59/425/S/2004/808 (11 October 2004) [57].

human rights issues. It is submitted that, using the socio-cultural approach to human rights, such hard-line views can be engaged by constructively using relevant Islamic sources and arguments, which is more feasible through the harmonistic perspective on Islam and human rights than through the adversarial perspective. There is relevant evidence within Islamic sources to aid such a congruous socio-cultural human rights discourse to promote human rights in Muslim societies.

On the other hand, resistance to social change is usually due to the cultural control of the populace. As culture provides a sense of community for ordinary people they feel protected by it and cling to it for fear of isolation. Apart from being a religion, Islam also theoretically provides a sense of an 'Islamic culture' amongst Muslims. The religious attachment to the 'Islamic culture' gives it stronger control within Muslim societies. However, different negative local traditional cultures have crept into the 'Islamic culture' of different Muslim States and have for long become wrongly perceived as part of the 'Islamic culture', even though in contradiction with Islamic norms and principles. It has been noted that such cultural components have become so deeply rooted in most Muslim societies that 'many Muslims are no longer aware of their non-religious origins.'[54] Most of the grassroots populace in the Muslim world have become subjected to such negative cultural control unknowingly, which adversely affects their enjoyment of some basic human rights.

The issue of women's rights is perhaps the clearest example of such negative cultural control in the Muslim world, which a socio-cultural approach to human rights in conjunction with the harmonistic perspective to Islam and human rights can help to address in almost all Muslim States. One example of such adverse traditional culture that threatens and continues to violate the fundamental right to life of many Muslim women, but which has been peddled wrongly in different Muslim societies as part of an 'Islamic culture', is the so-called 'honour killing' of women that sadly occurs in some parts of the Muslim world.[55] A bottom-to-top socio-cultural approach to human rights, in conjunction with a harmonistic perspective on Islam and human rights with reference to relevant Islamic sources against this inhuman act, is an important means of dealing with this problem from the grassroots in Muslim States.

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[54] A al-Hibri, 'Islam, Law and Custom: Refining Muslim Women's Rights (1997) 12 *American University Journal of International Law and Policy* 1, 5.

[55] The so-called 'honour killing' is the murder of a family member (often female) by another family member (often male) for allegedly bringing dishonour upon the family through unapproved marriage or divorce or for committing adultery or fornication: see, for example, L Welchman and S Hossain (eds) *'Honour' Crimes, Paradigms and Violence against Women* (Zed Books, London, 2005).

Historical evidence indicates that Islamic law has actually never been static generally; rather it has been evolutionary and has responded to changes in most Muslim societies, but mostly to the advantage of the male gender. I have stated elsewhere that 'it is hypocritical if men on the one hand acquire and enjoy many rights and liberties of today's world, often through constructive and evolutionary interpretations of the *Sharī'ah*, but on the other hand consider the rights and liberties of women to be stagnated upon the juristic views of the classical schools of Islamic law'.[56] The enhancement of women's rights is therefore very important in all Muslim States and can be achieved through the harmonistic perspective on Islam and human rights in the context of both the socio-cultural and politico-legal approaches to human rights.

The relevance of the socio-cultural approach to human rights and the harmonistic perspective on Islam and human rights in relation to women's rights in Muslim societies is very well reflected in the observation of one researcher on women's rights in Afghanistan, who stated: '[f]rom my impressions and interviews in Afghanistan . . . [m]any women expressed that while they were keen to have rights, they wanted it within the framework of Islam and not as a cultural imposition from the West.'[57] The author then noted that:

> Many Afghan women believed that the Qur'an offered women enough rights for them to negotiate their rights, but it was the fundamentalist interpretations that prevented women from claiming those rights and from educating themselves. Given the strategies employed by various women's organizations in Afghanistan to empower women, it became obvious that their perceptions of culture and religion played a crucial role in their women's rights strategies.[58]

Likewise Habiba Sorabi, then the Afghanistan Minister for Women's Affairs,[59] was quoted as stating in an interview that 'Islam is here to stay and women want rights within the Islamic framework; . . . Islam gave women rights to education and employment and … her Ministry was working within that framework.'[60]

Similarly, al-Hibri reflected the positive nature of the harmonistic perspective on Islam and human rights in relation to the promotion of women's rights in Muslim States by first observing that '[i]t is important to keep in mind that most Muslim women tend to be highly religious and would not want to act in

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56 Baderin, above n 1, 65.

57 H Ahmed-Ghosh, 'Voices of Afghan Women: Women's Rights, Human Rights, and Culture' (2004) 27 *Thomas Jefferson Law Review* 27, 29.

58 Ibid 31.

59 Habiba Sorabi is currently the Governor of the Bamyan Province of Afghanistan.

60 Ahmed-Ghosh, above n 57, 32.

contradiction to their faith'.[61] She then narrated a personal experience, which corroborates the usefulness of the harmonistic perspective on Islam and human rights in relation to the socio-cultural approach to promoting human rights in Muslim States, as follows:

> A couple of years ago, I met some 'modern' Muslim women behind closed doors in a certain Muslim country. The object was to have frank discussions about Islam and the rights of women. The women reflected a high degree of conflict and frustration. They wanted to be good Muslims, but they wanted to have their rights as well. When we focused on the issue of greatest concern to them, the Qur'anic view of gender relations, and I provided a non-patriarchal Qur'anic interpretation on the subject, sighs of relief filled the room. The conflict created by patriarchal interpretations for Muslim women who do not have the benefit of a religious education is frightening.[62]

She then argued that '[t]he majority of Muslim women who are attached to their religion will not be liberated through the use of a secular approach imposed' on them and that the best way 'is to build a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them'.[63]

In an article commenting on Fatima Mernissi's works on women's rights in the Muslim world, the authors observed that Mernissi's approach had evolved 'from advocating secular reconstruction of Muslim societies to a position that resembles Islamic reformism',[64] which reflects a shift from an adversarial perspective to a harmonistic perspective on Islam and human rights. The authors noted that while Mernissi had argued for a reconstructive approach to Islam in relation to women's rights in her first book, *Beyond the Veil,* published in 1975, which reflected an adversarial perspective on Islam and human rights, she seemed to argue differently 16 years later for a reformative approach, which reflected a harmonistic perspective on Islam and human rights, in her book *The Veil and the Male Elite,* published in 1991. This, according to the authors, represented 'a shift from Mernissi's earlier works, in which she argued that the establishment of women's rights in Muslim societies would necessitate going beyond the limits of Islamic discourse. In *The Veil and the Male Elite*, Mernissi reveals her preference for a reformist approach to Islam and the socio-political establishment'.[65] They concluded that

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61 al-Hibri, above n 54, 3.

62 Ibid.

63 Ibid.

64 R Barlow and S Akbarzadeh, 'Women's Rights in the Muslim World: Reform or Reconstruction?' (2006) 27 *Third World Quarterly* 1481, 1481.

65 Ibid 1483.

'Mernissi's early reconstructivist approach . . . faced the test of relevance' in the sense that '[i]f Muslim feminist theory is separated from its subjects and not able to inspire and motivate Muslim women, then that theory is diminished in relevance and effectiveness',[66] which essentially corroborates the usefulness and relevance of the harmonistic perspective on Islam and human rights in that regard.

It was noted above that the socio-cultural approach to human rights relates to the education, information, orientation and empowerment of the populace through the promotion of a local understanding of international human rights norms and principles, and that local human rights NGOs, religious groups and institutions have an important role to play in that regard. From a harmonistic perspective on Islam and human rights, I have argued elsewhere, regarding human rights education, that there is Islamic evidence to support the promotion of human rights education and awareness in the Muslim world, and that:

> [A]n Islamic and international human rights curriculum for primary, secondary and tertiary institutions in the Muslim world is very necessary in that regard. This needs to be implemented both in private and public schools. Due to the importance and the role of religion and religious institutions in the Muslim world, human rights education should not be limited to the secular institutions but also extended to the Islamic religious institutions and centres. The provisions of the Qur'an and *Sunnah* that promote the ideals of human rights must be stressed. As there are many Qur'anic provisions that buttress most of the human rights guarantees under international human rights instruments, it is essential that the international human rights provisions be explained and illustrated through the Islamic legal tradition for a religious and cultural appreciation of those rights. [67]

I have further observed in that regard that '[t]he duty of promoting human rights through education is not restricted to States alone, non-governmental organisations and religious bodies also have an important role to play in that regard and should be encouraged by the States to do so', and consequently suggested that

> a decade of human rights education and dissemination be declared by the OIC for its Member States, and Muslim States should be encouraged to adopt national plans for human rights education in that regard. Such an approach will be a bold step towards the realisation of the ideal Islamic society in which people are aware of their rights, wherein human rights are duly respected and human beings enjoy the inherent honour (*karāmah*) which their Creator had endowed in them at creation.[68]

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66 Ibid 1493.

67 M A Baderin, 'Identifying Possible Mechanisms Within Islamic Law for the Promotion and Protection of Human Rights in Muslim States' (2004) 22 *Netherlands Quarterly of Human Rights*, 329, 337.

68 Ibid 338.

From a harmonistic perspective on Islam and human rights, the establishment of local NGOs to facilitate a socio-cultural approach to human rights in Muslim States can also be substantiated in Islam by reference to an earlier practice of Prophet Muhammad. Islamic historical accounts indicate that he had participated in an organization called *Hilf al-Fudūl* (League of Excellence)[69] in Mecca around 590CE as a young man before his call to prophethood.[70] The League undertook the task of intervening and protecting the interests of the oppressed and victims of injustice in any transaction involving the chieftains and the powerful people in Mecca at that time. Prophet Muhammed is reported to have said about the League, after his prophethood many years later, that it was a league he loved to join and if he were to be 'invited to have a hand in it even after the advent of Islam, [he] would have undoubtedly joined again'.[71] The *Hilf al-Fudūl* League has been described as the first human rights NGO in Islamic history.[72] The socio-cultural promotion of human rights education and awareness, the establishment of relevant human rights NGOs and the involvement of local groups and religious institutions in that regard can therefore be positively pursued through the harmonistic perspective on Islam and human rights in the Muslim world.

The US-based Muslim Women Lawyers for Human Rights ('KARAMAH') is an example of a women's organization whose work practically reflects the harmonistic perspective on Islam and human rights, which can be seen emulated in other relevant areas of human rights for the Muslim world. Information on the organization's website indicates that it 'is committed to research, education, and advocacy work in matters pertaining to Muslim women and human rights in Islam, as well as civil rights and other related rights under the *Constitution of the United States*'.[73] The organization is said

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[69] Also translated variously as 'League of the Virtuous', 'League of the Righteous', 'Alliance of the Righteous', 'Alliance of Excellence', 'Pact of Excellence', 'Pact of the Virtuous', 'Pact of the Righteous'.

[70] See, for example, A S Najeebabadi, *The History of Islam: Vol 1* (Darussalam International Publishers, Riyadh, 2000) 99–101; Ch Pellat, 'Hif al-Fudul' in B Lewis, V L Ménage, Ch Pellat and J Schach (eds) *Encyclopaedia of Islam: Vol III* (Brill, Leiden, 1986).

[71] Najeebabadi, above n 70, 101.

[72] See A Zaoui, 'Islam and Human Rights' (Lecture presented as part of the Vice-Chancellor's Lecture Series, Massey University, Albany, 10 August 2005) http://www.freezaoui.org.nz/system/files/Islam+and+Human+Rights+MasseyUni+Aug2005.pdf at 29 November 2008; See also 'The Pact of the Virtuous (*Hilf al-Fudul*)' in UNDP, *Arab Human Development Report 2004: Towards Freedom in the Arab World* (UNDP, New York, 2005) 74.

[73] KARAMAH, *Building Bridges* (2004) KARAMAH, http://www.karamah.org/home.htm at 29 November 2008. The Egyptian Initiative for Personal Rights

to be 'founded upon the ideal that education, dialogue, and action can counter the dangerous and destructive effects of ignorance, silence, and prejudice' and it 'supports Muslim communities in America and abroad in the pursuit of justice'. Corroborating the importance of the socio-cultural approach to human rights, the organization has also noted that '[w]hen we talk of human rights abuses, we often direct our attention to governments and institutions. We must not forget, however, that the most basic of our rights emerges within our private and our domestic spheres'.[74]

Now we turn to the politico-legal approach to human rights, which must also address two main elements, namely, political authority and legal order. Politically, the protection of human rights is about good governance and accountability, which is lacking in most parts of the developing world, including Muslim States. As earlier observed, Islam has political influence in most parts of the Muslim world. This is evidenced by the use of Islam as a political tool by the political elites in Muslim States. Even in secular Muslim States, political leaders often unpack and play up their Islamic identity to cajole the Muslim populace to their side when the political terrain gets tough. Being a top-to-bottom approach, this element of the politico-legal approach to human rights can be used to engage governments of Muslim States to adopt welfare policies that ensure the guarantee of the human rights of the populace, as required and encouraged under Islamic political principles. Employing the harmonistic perspective on Islam and human rights, the political authority, at least in those Muslim States that have constitutionally proclaimed Islam as the religion of the State, can be persuaded with relevant evidence from within Islamic sources urging accountability and good governance on the part of those entrusted with political authority.

One political question that often creeps into the Islam and human rights discourse in relation to the politico-legal approach to human rights is the issue of secularism. In relation to international human rights law, the issue of secularism is, apparently, paradoxical. While it is often suggested, from a human rights perspective, that human rights are better guaranteed within a strictly secular political dispensation, there is no specific international human rights obligation upon States to adopt a secular political system. Stahnke and Blitt have observed in this regard that:

> Under international human rights standards, a state can adopt a particular relationship with the religion of the majority of the population, including establishing a

('EIPR'), an Egyptian NGO, is also said to be using the harmonistic approach to argue some of its cases: *About EIPR* (2008), http://www.eipr.org/en/info/about.htm at 29 November 2008.

74 KARAMAH, above n 73.

> state religion, provided that such a relationship does not result in violations of the civil and political rights of, or discrimination against, adherents of other religions or non-believers.[75]

Nevertheless, while predominantly Muslim States may not be in violation of international human rights rules by constitutionally declaring Islam as State religion, Muslim States definitely have an obligation under international human rights law to ensure non-discrimination against adherents of other religions and non-believers within their respective jurisdictions. The poor situation regarding respect for minority rights in Muslim States has rightly attracted the interest of many Muslim scholars, who propose a re-examination of the traditional Islamic jurisprudence on the issue of minorities (*fiqh aqaliyyāt*) under Islamic law,[76] which the political authorities in most Muslim States need to address as a possible means of positively promoting respect for minority rights in the Muslim world. Berween has argued in that regard, citing relevant Islamic sources, that Muslim States have an obligation to protect minority rights under Islamic law. He observed notably that:

> In an Islamic state, although the Muslim majority rules, it does not have the power to deprive the minorities of their basic rights or to stop them from serving their society like any other citizen. The Muslim majority must obey all Islamic laws. In many ways it is like any other majority in any civilized society, the Muslim majority has the power to act, but it must act legally, fairly, and without violating the rights and liberties of any citizen. Finally, to be legitimate the Muslim majority rule must be reasonable and it must respect and protect the rights of all minorities. That requires protection of all those freedoms that make effective opposition possible. Those freedoms must, at least, include the right to full and equal political participation; freedom of expression; freedom of the press; freedom of beliefs; an independent judiciary; freedom of peaceful assembly and petition; and, freedom of choice.[77]

The realization of this obligation can be positively enhanced through the harmonistic perspective on Islam and human rights, in conjunction with the politico-legal approach to human rights as advanced in this chapter.

On the other hand, an effective legal order is also a very important element of the politico-legal approach to human rights. Although this element is often

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[75] See Stahnke and Blitt, above n 7, 8. See also Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [9].

[76] See, for example, A Ahmad, 'Extension of Shari'ah in Northern Nigeria: Human Rights Implications for Non-Muslim Minorities' (2005) 2 *Muslim World Journal of Human Rights* Article 6.

[77] M Berween, 'Non-Muslims in the Islamic State: Majority Rule and Minority Rights' (2006) 10 *The International Journal of Human Rights* 91, 101.

seen as remedial and triggered by human rights violations, it can also serve to prevent human rights violations where relevant laws are promulgated and relevant human rights institutions and mechanisms are created by the State and well utilized in that regard. Many Muslim States today have elements of Islamic law incorporated into their domestic laws, thus the relationship between Islamic law and human rights in Muslim States has constituted an important aspect of the Islam and human rights discourse. As with the issue of secularism above, States have the sovereign autonomy to adopt a legal system of their choice, as international human rights law does not impose any specific legal system on States. The impasse on the role of Islamic law in the drafting of the Iraqi constitution,[78] however, demonstrated the general presumption in human rights circles that Islamic law or *shari`a* is inimical to civil liberties and human rights.

There is no doubt that some traditional implementations of Islamic law, which when viewed historically may be considered to have been ahead of their time, are today contradictory to human rights standards. The problem is that Islamic law has been viewed and promoted in its historical context by most commentators and scholars, and also applied mostly as such by many Muslim States. It is important to emphasize in that regard that Islamic law is not, and must not be perceived as, static and fossilized, but rather is evolutionary. Its evolutionary nature makes it complementary to human rights through the harmonistic perspective advanced in this chapter. Where Islamic legal scholarship, in response to modern human rights challenges, is re-directed at emphasizing the evolutionary nature of Islamic law rather than presenting it in a historical context and as a fossilized legal system stuck in the past, its potential as a vehicle for the realization of human rights will be better enhanced. The methods of Islamic law are quite robust and flexible to facilitate the needed progressive evolution of Islamic law in that regard.[79]

For example, in adopting a new women's rights-friendly Family Code, *the Mudawwana*, based on Islamic law and principles, in 2004, Morocco demonstrated the evolutionary nature of Islamic law and the possibility of a harmonistic perspective on Islam and human rights in relation to the politico-legal approach to human rights. It has been observed that the new Moroccan

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[78] This refers to the initial controversy as to whether Islamic law should serve as a source of legislation in the Iraqi constitution. See, for example, International Crisis Group Report, Iraq's Constitutional Challenge (2003) ICG, http://www.icg.org//library/documents/middle_east___north_africa/19_iraq_s_constitutional_challenge.pdf at 29 November 2008, 17–18, [D].

[79] See, for example, W Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press, Cambridge, new ed, 1999); M H Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, Cambridge, 1991); Baderin, above n 1, 32–47.

Family Code, compared with the old Code, ensures considerable enhancement of women's rights within the context of Islamic law and principles in Morocco.[80] The preamble of the new Family Code stated that the Moroccan monarch had, during its drafting, 'encouraged the use of *ijtihad* (juridical reasoning) to deduce laws and precepts, while taking into consideration the spirit of our modern era and the imperatives of development, in accordance with the Kingdom's commitment to internationally recognized human rights'.[81] The preamble further observed that the provisions of the new Family Code were

> drafted in a modern legal jurisprudential style, in conformity with Islam's tolerant rules and exemplary purposes while providing balanced, fair and pragmatic solutions resulting from enlightened open *ijtihad* (juridical reasoning). This code further stipulates that human and citizenship rights are accorded to all Moroccans, women and men equally, in respect of the holy divine religious references.[82]

While the new Moroccan Family Code may be considered in human rights circles as a modest step in relation to the protection of women's rights generally, it nevertheless demonstrates that with the right political will, governments of Muslim States can positively enhance human rights within their Islamic dispensations through a harmonistic perspective on Islam and human rights in conjunction with the politico-legal approach to human rights generally. In her comments on the new Family Code, Weingartner observed that 'the reformed code more closely aligns with modern views on women's rights and privileges in a democratizing society'.[83] The WRR also referred to the adoption of the new Moroccan Family Code as an example of the harmonistic perspective on Islam and human rights through which 'considerable improvement in women's rights has taken place under the banner of Sharia' in Morocco.[84]

Regarding the establishment of relevant political and legal institutions and mechanisms for ensuring the practical implementation of human rights under the politico-legal approach to human rights, I have argued elsewhere, for example, that the creation of National Human Rights Commissions and the

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80 See, for example, L A Weingartner, 'Family Law and Reform in Morocco: Modernist Islam and Women's Rights in the Code of Personal Status' (2005) 82 *University of Detroit Mercy Law Review* 687.

81 Global Rights, *English Translation of the Moroccan Family Code (Moudawana)* (2004) HREA, at: http://www.hrea.org/moudawana.html at 29 November 2008, [Preambular 4].

82 Ibid [Preambular 5].

83 Weingartner, above n 80, 687.

84 WRR, above n 6, 11.

establishment of human rights courts in Muslim States can be Islamically justified in line with the harmonistic perspective on Islam and human rights, and I have also emphasized the importance of regional cooperation amongst Muslim States in that regard.[85] The WRR has also noted the importance of cooperation among Muslim States in relation to the politico-legal approach to human rights in conjunction with the harmonistic perspective on Islam and human rights by stating, *inter alia,* that:

> Legal implementation is not only the result of internal pressure within Muslim countries and external pressure from multilateral institutions like the UN, but also of mutual discussions and comparison among Muslim countries themselves. It is particularly over such charged issues as gender relations, freedom of religion, and cruel punishments that mutual learning processes can often be more effective than external pressure that can be interpreted as paternalistic, uninformed, or even inimical to 'Islam'.[86]

It is clear from the above analyses and illustrations that the harmonistic perspective on Islam and human rights is a more pragmatic and constructive way to enhance the realization of human rights within the context of the socio-cultural and politico-legal approaches for promoting and protecting human rights generally, which can be adopted by advocates of human rights in Muslim States and further encouraged through both human rights and Islamic legal scholarship.

5 Conclusion

Apart from mere human rights standard-setting, the need for the promotion and protection of human rights is positively acknowledged under international human rights law and affirmed in many international human rights treaties. Without effective promotion and protection, human rights provisions in treaties and declarations would be mere empty rights on paper. However, effective promotion and protection requires important systematic approaches and methodologies, which need to be more seriously addressed in human rights debates and literature. This chapter has been a modest attempt in that regard. Obviously, the situation in Muslim States is more complex due to many factors, with Islam being one significant factor, as analysed in this chapter. The two essential approaches for promoting and protecting human rights, and the two divergent perspectives on the Islam and human rights discourse as analysed herein, have been offered as a pragmatic and constructive take on how best to promote the realization of human rights in Muslim States. The

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85 Baderin, above n 67, 338–46.
86 WRR, above n 6, 172.

position advanced in the end is informed by the author's view that human rights are best promoted through positive engagement, moral persuasion, positive political will and due process of law.

However, in advancing the harmonistic perspective on Islam and human rights in conjunction with the socio-cultural and politico-legal approaches to human rights herein, one must acknowledge the general criticism often expressed that such an approach could be slow and indulgent, especially in the face of human rights violations that need urgent attention, such as the issue of women's rights and minority rights in most Muslim States. The WRR has observed in that regard that:

> Islamic reforms in the direction of international human rights standards often appear to Western eyes either as going too slowly or even as a step backward. However, one should not exclude the possibility that it is precisely these kinds of reforms that have a better chance of taking root than large or Western-imposed steps.[87]

The WRR further noted 'the fact that permanent improvements cannot be imposed and sometimes take a long time'.[88]

To re-emphasize the relevance of the harmonistic perspective on Islam and human rights advanced in this chapter, it is instructive to conclude with another observation by the WRR as follows:

> The argument that Islam is principally incompatible with these ideas [democracy and human rights] is simply untrue. This does not necessarily mean, however, that such a policy will achieve great success in the short term. Not only are power relations stubborn, but views do not change overnight. All kinds of developments may be of influence, such as higher education, women participating in the workforce, migration, and media consumption. For this reason, the present limited influence of positive views of democracy and human rights does not mean that their potential influence will be as limited. Changes in individual behaviour as well as changes in the political make-up can increase the need for interpretations of Islam which support democracy and human rights.[89]

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87 Ibid 151.
88 Ibid 171.
89 Ibid 56.

18. Religion, belief and international human rights in the twenty-first century

Peter Cumper

1 Introduction

From time immemorial human beings have sought to comprehend and celebrate the metaphysical.[1] It is thus perhaps unsurprising that, of all the human rights accorded contemporary legal recognition, freedom of religion (and equivalent belief) has been described as the one with the longest lineage.[2] That said, with organised religion seemingly in decline in the West,[3] and a relative paucity of literature in the field of religious human rights,[4] one might be tempted to assume that religious belief is of little contemporary relevance. However, any such suggestion would be false. Matters pertaining to religion or belief have, in recent years, clearly had an impact on international affairs, leading to claims that there has even been a 'desecularisation of the world'.[5]

The influence of religion in the global arena is evidenced in at least three respects. First, religious belief has increasingly played a significant role in international politics,[6] a by-product of what some refer to as the rise of 'fundamentalism'.[7] Secondly, mass immigration and demographic changes have put

[1] See, for example, Karen Armstrong, *A History of God* (Heinemann, London, 1993).

[2] See Paul Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford, 1983) 324.

[3] See Steve Bruce, *God is Dead: Secularism in the West* (Blackwell, Oxford, 2002).

[4] Prior to the last two decades, very little was written on religious human rights. Whilst this is still a relatively undeveloped area, key texts now include: J D van der Vyver and J Witte Jr (eds) *Religious Human Rights in Global Perspective* (Martinus Nijhoff, The Hague, 1996); Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, Cambridge, 1997); and Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, Oxford, 2005).

[5] Peter L Berger (ed), *The Desecularization of the World: Resurgent Religion and World Politics* (William B Eerdmans Publishing Co, Grand Rapids, 1999).

[6] See David Westurland (ed), *Questioning the Secular State: the Worldwide Resurgence of Religion in Politics* (Hurst, London, 1996).

[7] See Karen Armstrong, *The Battle for God: Fundamentalism in Judaism, Christianity and Islam* (Harper Collins, London, 2001).

liberal democracies increasingly under pressure to accommodate religious practices that go far beyond the Judaeo-Christian tradition.[8] And thirdly, the terrorist attacks on the US on 9/11,[9] and related concerns about 'Islamist terrorism',[10] have focused attention on the role of religion generally and Islam in particular in international affairs.

If the dominant ideological battle of the twentieth century was between capitalism and communism, there is a very real possibility that the twenty-first century will be characterised by an equivalent struggle between obdurate faiths and secular values. Long-standing tensions, once assumed to have been consigned to the dustbin of history, have resurfaced, most notably in regard to the strained relationship between Islam and the West.[11] As a consequence, even though few deny that the manifestation of one's religious beliefs is anything other than a fundamental human right, there is little consensus as to how freedom of religion or belief should be protected in practice, especially in relation to the task of reconciling (seemingly inconsistent) Islamic and secular liberal values.[12] Set against such a background, this chapter seeks to analyse the way in which religion (and equivalent belief) is guaranteed under international human rights law.

The chapter is divided into four parts. First, I critically explore the legal sources of religious human rights. Secondly, I identify a number of principles that govern freedom of religion and belief under international human rights law. Thirdly, I focus on the issue of religious dress, in an attempt to illustrate the challenge of formulating principles of international human rights law that are capable of accommodating both religious and secular values in the twenty-first century. Fourthly, I conclude by commenting briefly on the prospects for reform in relation to the protection of freedom of religion and belief.

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8 See, for example, T Leonon and J Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, Antwerp and Oxford, 2007).

9 Asma Jahangir, the current Special Rapporteur on freedom of religion or belief, has noted that 'the events of 11 September 2001 continue to have a dramatic impact on the situation of human rights, including freedom of religion or belief': Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2005/61 (20 December 2004) [77].

10 See D Hiro, *War Without End: The Rise of Islamist Terrorism and Global Response* (Routledge, New York, 2002).

11 It has, for example, been argued that Islam evokes a degree of fear in the West not witnessed since the Crusades in the Middle Ages: see generally Emran Qureshi and Michael Anthony Sells, *The New Crusades: Constructing the Muslim Enemy* (Columbia University Press, Columbia, 2003).

12 See A An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari`a* (Harvard University Press, Cambridge, 2007), and Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press, Boulder, 1998).

2 The legal sources of freedom of religion and belief

Few issues throughout history have generated more controversy than disputes over religion or belief. As noted by one commentator, '*homo sapiens* appears to be unique in displaying a consistent pattern of persecuting its members for their heterodox opinions or beliefs especially when these are systematically manifested in the form of a religion or philosophy'.[13] Today freedom of thought, conscience and religion is a well-established principle of international human rights law, but religious freedom continues to be denied to people in many parts of the world.[14] The sources of religious human rights, which are clearly taken more seriously by some governments than by others, are now considered.

A The Universal Declaration of Human Rights

The *Universal Declaration of Human Rights*[15] has long been seen as a significant landmark in the protection of international human rights.[16] Drafted largely in response to the atrocities of the Nazis in the Second World War, it was perhaps unsurprising that it should guarantee (under Article 18 UDHR) the principle of religious freedom.[17] There are three elements to Article 18 UDHR. First, it recognises that '[e]veryone has the right to freedom of thought, conscience and religion.' Secondly, it confirms that this right includes an individual's 'freedom to change his religion or belief'. And thirdly, it guarantees that everyone is entitled, 'either alone or in community with others and in public or private, to manifest his [or her] religion or belief in teaching, practice, worship and observance'.[18]

The UDHR claims to be a 'common standard of achievement for all people and all nations' and calls on 'every individual and every organ of society . . . to promote respect for these rights and freedoms'.[19] The question as to whether powerful Western nations exerted a disproportionate influence during

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13 Sieghart, above n 2, 324.

14 Jahangir, above n 9, [73].

15 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) ('UDHR').

16 See José A Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2002) 22 *Human Rights Quarterly* 478; A Eide, G Alfredsson, G Melander, L Adam Rehof and A Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press and Oxford University Press, Oxford, 2002).

17 On the Second World War as a catalyst for the UDHR, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia, 2000) 36–91.

18 On the process of according rights to religious communities see ibid 258–68.

19 Preamble to the UDHR.

its drafting continues to provoke debate,[20] but what is beyond dispute is that the UDHR has been very influential in the formulation of the principles of national and international law.[21] For example, Article 18 UDHR has often provided the template used as the basis for drafting provisions that guarantee freedom of religion in a wide range of international human rights documents.[22] In particular, the phrase used in Article 18 UDHR, '[e]veryone has the right to freedom of thought, conscience and religion', was later replicated in one of the world's most influential human rights treaties, the *International Covenant on Civil and Political Rights*.[23]

B The International Covenant on Civil and Political Rights

As its title indicates, the ICCPR protects a range of civil and political rights, including Article 18(1) ICCPR, which guarantees 'freedom of thought, conscience and religion'. Article 18(1) ICCPR also provides for the right 'to have or to adopt a religion or belief' of one's choice, as well as the freedom (individually and collectively) to manifest one's 'religion or belief in worship, observance, practice and teaching'. Article 18(2) ICCPR forbids coercion in respect of the 'freedom to have or to adopt a religion or belief' of one's choice, while Article 18(3) ICCPR recognises that the right to manifest one's religion or beliefs may be limited on grounds that are 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Finally, Article 18(4) ICCPR stipulates that the state must respect the liberty of parents or legal guardians 'to ensure the religious and moral education of their children in conformity with their own convictions'.

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[20] See Susan Waltz, 'Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights' (2002) 23 *Third World Quarterly* 437, who challenges the traditional view that the final text of the UDHR was due primarily to the influence of a handful of powerful Western nations.

[21] For example, see *South West Africa Cases* [1966] ICJ Reports 6, 288, 293 (Tanaka J).

[22] For example, see *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('ECHR') Article 9; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('ACHR') Article 12; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (21 October 1986) ('ACHPR') Article 8.

[23] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 14668 (entered into force 23 March 1976) ('ICCPR'). This same formulation is also found in the *Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, UN Doc A/Res/36/55 (25 November 1981) Article 1.

The ICCPR requires states parties to submit periodic reports to the Human Rights Committee ('HRC')[24] and, in relation to states parties that have also ratified the *Optional Protocol*, grants individuals the right to complain directly to the HRC of a breach of the ICCPR by those states.[25] As the ICCPR is 'the only global human rights treaty dealing with religion that contains measures of implementation',[26] the HRC clearly has an important role to play in relation to international standard setting in the field of religion and belief.[27] The HRC has, for example, published *General Comment 22*, which offers guidance on freedom of thought, conscience and religion,[28] while it has also ruled in specific cases on issues ranging from faith based objections to military service[29] and moral education,[30] to curbs on religious dress[31] and the use of narcotics in worship.[32]

There is much to be commended in the work of the HRC, but in the field of religion and belief (as in other areas) it has a number of shortcomings. To begin with, the HRC, which consists of 18 experts of 'high moral character and recognized competence in the field of human rights',[33] lacks the status and powers of an international court or tribunal.[34] In addition, states which have ratified the ICCPR must normally report to the HRC every five years,[35] and, because governments are responsible for compiling their own reports, this increases the risk of breaches of human rights remaining

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24 See Article 40 ICCPR.

25 See Article 41 ICCPR and *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

26 Natan Lerner, *Religion, Secular Beliefs and Human Rights* (Martinus Nijhoff, Leiden and Boston, 2006) 26.

27 On this generally see M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl, 2005).

28 See Human Rights Committee, *General Comment 22 on Article 18 ICCPR*, UN Doc CCPR/C/21/Rev.1/Add.4 (20 July 1993).

29 See *LTK v Finland*, UN Doc CCPR/C/OP/2 (18 October 1984) and *Yeo-Bum Yoon and Myung-Jin Choi v Korea*, UN Doc CCPR/C/88/D/1321–1322/2004 (23 January 2007).

30 See *Hartikainen v Finland*, UN Doc CCPR/C/12/D/40/1978 (9 April 1981), and *Leirvåg v Norway*, UN Doc CCPR/C/82/D/1155/2003 (3 November 2004).

31 See *Singh Bhinder v Canada*, UN Doc CCPR/C/37/D/208/1986 (9 November 1989); *Hudoyberganova v Uzbekistan*, UN Doc CCPR/C/82/D/931/2000 (8 December 2004).

32 See *MAB WAT and J-AYT v Canada*, UN Doc CCPR/C/50/D/570/1993 (8 April 1994).

33 See Articles 28–34 ICCPR.

34 See Chapter 1, pp. 20–21.

35 See Article 40 ICCPR.

undetected.[36] What is more, although individuals in states that have ratified the *First Optional Protocol* retain the right to present complaints directly to the HRC, a significant number of states, especially those that have poor records in the field of protecting religion or belief, have yet to grant their citizens this right.[37] And finally, because the principle of religious freedom (Article 18 ICCPR) is enshrined in only one of 27 substantive ICCPR Articles that the HRC must consider when examining state reports, there is a risk that some HRC members may view matters pertaining to Article 18 ICCPR as being relatively low in their overall list of priorities.[38]

Notwithstanding the fact that such considerations inevitably detract from the work of the HRC, it is nonetheless important to recognise the significance of the Human Rights Committee's role in setting standards under Article 18 of the ICCPR. For example, not merely has the HRC often been less deferential to states than the European Court of Human Rights in the field of religion and belief,[39] but, in spite of some textual uncertainty,[40] it has also recognised that Article 18 ICCPR guarantees the right of religious conversion.[41] There is thus little doubt that the HRC is at the vanguard of attempts to accord protection to freedom of religion and belief in the international arena. Indeed, its role in this area is particularly important given the limitations of the only human rights document that deals specifically with matters relating to religion and belief, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* ('UN Declaration (1981)').

C UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

The UN Declaration (1981) was adopted by General Assembly Resolution 36/55, on 25 November 1981. It guarantees freedom of thought, conscience

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[36] On this generally, see Ineke Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee* (Hart Intersentia, Antwerp, 1999).

[37] On this generally see Sarah Joseph, Jenny Schultz and Melissa Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, Oxford University Press, Oxford, 2004) 855–8 and 867–9.

[38] Paul Taylor, *Freedom of Religion* (Cambridge University Press, Cambridge, 2005) 13.

[39] Ibid 350.

[40] The text of Article 18 ICCPR fails to guarantee the right to change one's religion or belief in express terms. It merely refers to an individual's 'freedom to have or to adopt a religion or belief of his choice', whereas Article 18 UDHR recognises, in express terms, an individual's right 'to change his religion or belief'.

[41] The HRC has typically done this in its state reports. For example, see Human Rights Committee, *Concluding Observations: Islamic Republic of Iran*, UN Doc CCPR/C/79/Add.25 (2 June 2000) [36].

and religion,[42] outlaws coercion,[43] and specifies that curbs can only be imposed on the manifestation of religion or belief in limited circumstances.[44] In addition, the UN Declaration (1981) prohibits intolerance and discrimination on the grounds of religion or belief;[45] puts states under an obligation to 'take effective measures to prevent and eliminate discrimination on the grounds of religion or belief';[46] recognises the rights of parents to 'organize the life within the family in accordance with their religion or belief';[47] asserts a child's right to be 'protected from any form of discrimination on the ground of religion or belief';[48] places governments under a duty to ensure that the rights in the UN Declaration (1981) are 'accorded in national legislation';[49] and guarantees a range of fairly uncontroversial principles, which include the rights to conduct religious worship,[50] run 'charitable or humanitarian institutions',[51] 'teach a religion or belief',[52] 'solicit and receive voluntary financial . . . contributions',[53] train and select religious leaders,[54] and celebrate religious holidays or rest days.[55]

In a sense the mere existence of the UN Declaration (1981) represents a triumph for international diplomacy. After all, it should perhaps not be forgotten that while it was being drafted fears were expressed that the task of producing a document that was capable of superseding Cold War rivalries, as well as accommodating differences between the Islamic and non-Islamic worlds, might be impossible.[56] Thus, on the one hand, the UN Declaration (1981) is a worthy and laudable achievement, which is undoubtedly 'a milestone in the progressive development of human rights norms'.[57] Yet, on the other hand, the value of the Declaration is tempered by the fact that it can be criticised on several grounds.

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42 Article 1(1) UN Declaration (1981).
43 Article 1(2) UN Declaration (1981).
44 Article 1(3) UN Declaration (1981).
45 Articles 2(1) and 3 UN Declaration (1981).
46 Article 4(1) UN Declaration (1981).
47 Article 5(1) UN Declaration (1981).
48 Article 5(3) UN Declaration (1981).
49 Article 7 UN Declaration (1981).
50 Article 6(a) UN Declaration (1981).
51 Article 6(b) UN Declaration (1981).
52 Article 6(e) UN Declaration (1981).
53 Article 6(f) UN Declaration (1981).
54 Article 6(g) UN Declaration (1981).
55 Article 6(h) UN Declaration (1981).
56 See Evans, above n 4, 227–61.
57 Donna Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International Law* 488.

For a start, it is phrased in general and imprecise terms, a legacy of its drafters having to take account of a range of (often contradictory) ideological and religious perspectives. Moreover, the UN Declaration (1981), unlike comparable international human rights instruments that outlaw discrimination on the grounds of race[58] and sex,[59] lacks a specialist committee to monitor state compliance with its provisions. In addition, the Declaration's legal status is questionable on account of the fact that it was adopted merely as a General Assembly Resolution, which has only the status of a recommendation and so is not automatically legally binding.[60] And lastly, the Declaration arguably fails to accord sufficient weight to the principle of individual personal autonomy,[61] because it fails to guarantee (in express terms) the right to change one's religion or belief, as a result of opposition from Muslim states in the course of its drafting.[62]

At best the UN Declaration (1981) should be celebrated as a noble affirmation of the principle of religious tolerance, but at worst it is a shabby compromise which contributes little, apart from vague platitudes, to the elimination of religious intolerance and discrimination. Perhaps the true position lies somewhere in between. The fact that such an ill-defined document as the Declaration has been described as 'the most important international instrument regarding religious rights'[63] arguably demonstrates the relative lack of attention paid to the protection of religion and belief under international human rights law. Yet, whilst the UN Declaration (1981) is clearly modest in tone, one should not ignore its influence on the international community, not least in that it is used by those holding the office of the Special Rapporteur on freedom of religion or belief to gauge the extent to which states are complying with their international obligations in the field of religion and belief.

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58 See *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), Article 8 of which establishes the Committee on the Elimination of Racial Discrimination.

59 See *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 34/180, UN GAOR, 34th sess, 107th plen mtg, UN Doc A/Res/34/180 (18 December 1979), Article 7 of which establishes the Committee on the Elimination of Discrimination Against Women.

60 See Evans, above n 4, 257.

61 On this generally see Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 398.

62 See Sullivan, above n 57, 495–6.

63 Nathan Lerner, 'Religious Human Rights under the United Nations', in J D van der Vyver and J Witte Jr (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff, The Hague, 1996) 114.

D The Special Rapporteur on freedom of religion or belief[64]

The Special Rapporteur on freedom of religion or belief is an independent expert given the task (by the HRC) of examining whether government actions are compatible with the UN Declaration (1981).[65] The Special Rapporteur can request information from governments and may also (subject to invitation) undertake fact-finding visits to states. As well as identifying problems in relation to matters concerning freedom of religion and belief, the Special Rapporteur can recommend ways of ensuring that states are acting in conformity with the UN Declaration (1981).[66] In performing these functions, the Special Rapporteur is required to submit annual reports to various UN bodies (for example, the HRC and the General Assembly) on his/her work.[67]

Whilst successive Special Rapporteurs on religion and belief have played an important role in standard setting in this area, their impact overall is limited by the fact that they are under-resourced, and their only real sanction against recalcitrant states is that of negative publicity.[68] Thus, rather than being 'an agent of enforcement', the primary role of the Special Rapporteur is to 'investigate, comment and advise' on the way in which states comply with the UN Declaration (1981).[69]

A characteristic of those holding the office of Special Rapporteur has been the different way in which they have sometimes approached areas of great controversy. A case in point is that of blasphemy, where Asma Jahangir, the current Special Rapporteur, has seemingly been less willing to endorse curbs on free speech than her predecessor, Abdelfattah Amor.[70] For example, Ms Jahangir has emphasised that 'freedom of expression is as valuable as the right

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64 The title of the Special Rapporteur was originally 'Special Rapporteur on religious intolerance', but in 2000 the Commission on Human Rights changed it to 'Special Rapporteur on freedom of religion or belief', a decision that has been subsequently welcomed by the UN General Assembly: *Elimination of All Forms of Religious Intolerance*, GA Res 55/97, UN GAOR, 55th sess, 81st plen mtg, UN Doc A/Res/55/97 (4 December 2000) [11].

65 UN Doc E/CN.4/1986/L.45/Rev.1 (10 March 1986).

66 On the mandate of the Special Rapporteur on freedom of religion or belief, see Angelo Vidal d'Almeida Ribeiro, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Doc E/CN.4/1987/35 (24 December 1986) [17]–[19].

67 For example, the first Report of the Special Rapporteur was submitted to the UN Commission at its 43rd session: UN Doc E/CN.4/1987/35 (4 December 1986).

68 On this generally see C Evans, 'Strengthening the Role of the Special Rapporteur on Freedom of Religion or Belief' (2006) 1 *Religion and Human Rights* 75.

69 Evans, above n 4, 247.

70 To date there have been three Special Rapporteurs: Angelo d'Almeida Ribeiro (Portugal), 1986–1993; Abdelfattah Amor (Tunisia), 1993–2004; and since 2004, Asma Jahangir (Pakistan).

to freedom of religion or belief',[71] whereas the 'issue of [religious] defamation' was one of Mr Amor's 'major concerns',[72] and he was especially critical of the press for what he called its 'grotesque' portrayal of religion.[73] This difference of tone, on an issue as important as that of free speech, illustrates the challenge of formulating principles of international human rights law that are acceptable to those from a broad range of religious or faith traditions. That said, some differences between successive Special Rapporteurs are perhaps inevitable due to each office holder's background and individual priorities, as well as developments in the ever-changing global political arena.

Given the myriad of challenges facing the international community in the field of religion or belief, the impact of a single office holder such as the Special Rapporteur is inevitably destined to be relatively modest. Yet every Special Rapporteur continues to perform a useful function, particularly since their reports not only provide a useful snapshot of state practice in the field of religious freedom but also demonstrate the numerous ways in which religion and belief is manifested in the twenty-first century.[74]

E Regional documents: the European Convention on Human Rights

Aside from the UN, the principles of thought, conscience and religion are recognised in a number of 'regional' human rights documents in the world today.[75] Of these the most influential is the European Convention on Human Rights, which was drafted in 1950 under the auspices of the Council of Europe.[76] Article 9 ECHR guarantees 'freedom of thought, conscience and religion'.[77] It also expressly recognises the right to change one's religion or belief, as well as the right to manifest it 'in worship, teaching, practice and

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[71] See Jahangir, above n 9, [72]. Ms Jahangir has also pointed out that '[c]onstruing all expressions defaming religion as human-rights violations would . . . give rise to religious intolerance': Human Rights Council, UN Doc A/HRC/2/SR (25 October 2006) [60].

[72] See Abdelfattah Amor, *Report of the Special Rapporteur on freedom of religion or* belief, UN Doc E/CN.4/2004/63 (16 January 2004) [137].

[73] See Abdelfattah Amor, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2000/65 (15 February 2000) [108]. Mr Amor even called for 'a campaign to develop awareness among the media' of such matters: ibid.

[74] On the relationship between those holding the office of Special Rapporteur on freedom of religion or belief and the other UN Special Rapporteurs see David Weissbrodt, 'The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights' (1986) 80 *The American Journal of International Law* 685.

[75] For example, see Article 12 ACHR and Article 8 ACHPR.

[76] On the origins and history of the ECHR see J G M Merrills and A H Robertson, *Human Rights in Europe* (Manchester University Press, Manchester, 4th ed, 2001) 1–15.

[77] Article 9(1) ECHR.

observance',[78] subject to a number of limitations that 'are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.[79]

The ECHR is interpreted by the European Court of Human Rights, which has affirmed that Article 9 ECHR is not only 'one of the most vital elements that go to make up the identity of believers', but 'also a precious asset for atheists, sceptics, and the unconcerned'.[80] Moreover, Article 9 ECHR applies not just to long-established 'world religions' (such as Christianity,[81] Islam,[82] Buddhism[83] and Sikhism)[84] but also to new religious movements (such as the Church of Scientology),[85] as well as a range of philosophical beliefs such as pacifism,[86] veganism,[87] and opposition to abortion.[88]

In the past, relatively few complaints relating to religion or belief were brought under the ECHR, and it was not until 1993 that the European Court had to give judgment in a case involving Article 9 ECHR.[89] This has now changed, and with frequent allegations of religious discrimination, and minority faith groups in an ever more religiously diverse continent campaigning for the accommodation and recognition of their religious practices, the Court's workload seems set to increase in the field of religion and belief in twenty-first century Europe.

3 Religion and belief: common principles under human rights law

As noted above, the sources of religious freedom are diverse and varied. However, it is also the case that there are a number of common principles that govern religion and belief under international human rights law.

First, there is a general recognition that a distinction should be drawn between the 'internal' and the 'external' practice of a religion or belief. The

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78 Article 9(1) ECHR.
79 Article 9(2) ECHR.
80 *Kokkinakis v Greece* (1994) 17 EHRR 397, [31].
81 *Stedman v UK* (1997) 23 EHRR CD 168.
82 *X v UK*, Application No 8160/78 (1981) 22 DR 27.
83 *X v UK*, Application No 5442/72 (1975) 1 DR 41.
84 *X v UK*, Application No 8231/78 (1982) 28 DR 5 and *X v UK*, Application No 7992/77 (1978) 14 DR 234.
85 *X and the Church of Scientology v Sweden*, Application No 7805/77 (1979) 16 DR 68.
86 *Arrowsmith v UK*, Application No 7050/75 (1980) 19 DR 5.
87 *H v UK* (1993)16 EHRR CD 44.
88 *Knudsen v Norway* (1986) 8 EHRR 45.
89 *Kokkinakis v Greece* (1994) 17 EHRR 397.

former, which has been described as an 'inner freedom'[90] and typically covers private religious activities such as inner faith, prayer, and personal devotions, is absolute and beyond the remit of the state.[91] In contrast the latter, the right to express or manifest one's religion or belief, is subject to a number of restrictions that are deemed necessary to protect the interests of other members of society.[92]

A second characteristic of international human rights law has been a general unwillingness to define the word 'religion'. After all, the challenge of settling upon a definition that is flexible enough to satisfy a broad cross-section of world faiths yet is also sufficiently precise to apply in specific cases is formidable.[93] Thus, in contrast to some national courts,[94] definitions of religion have generally been avoided by international bodies such as the HRC,[95] the Special Rapporteur on religion or belief,[96] and the ECHR's organs of implementation.[97]

Thirdly, it is a well-established principle that freedom of religion or belief is 'not limited in its application to traditional religions'.[98] With new religious movements having mushroomed over the last half-century, the HRC has stated that it 'views with concern any tendency to discriminate against any religions or beliefs for any reasons, including the fact that they are newly established'.[99] The current Special Rapporteur on freedom of religion or belief has also warned that 'the legalisation of a distinction between different categories of religion is liable to pave the way for . . . discrimination on the basis of religion or belief'.[100]

Fourthly, the mere presence of an official state church is not, *per se*, incompatible with a nation's human rights obligations. This principle, which has

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90 René Cassin, as cited in H Kanger, *Human Rights in the UN Declaration* (Almqvist and Wiksell International, Uppsala, 1984) 119.

91 For example, see Article 18(1) ICCPR and Article 9(1) ECHR.

92 For example, see Article 18(3) ICCPR and Article 9(2) ECHR.

93 'The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task': *Thomas v Review Board*, 450 US 707 (1981) 714.

94 See *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 132 (Mason ACJ and Brennan J), 173 (Wilson and Deane JJ).

95 Human Rights Committee, above n 28, [1]–[2].

96 E Odio Benito, *Study on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, UN Doc E.89.XIV.3 (1989).

97 For example, see *X v United Kingdom*, Application No 7291/75 (1977) 11 DR 55, where the European Commission refrained from classifying Wicca as a religion in the case of a prisoner who claimed to be one of its adherents.

98 Jahangir, above n 9, [8].

99 Human Rights Committee, above n 28, [2].

100 Jahangir, above n 9, [61].

been accepted in both Europe[101] and by the HRC,[102] has also been confirmed by a previous UN Special Rapporteur on religion or belief.[103] That said, where a religion has been accorded a special or established status, governments are prohibited from interfering directly in the affairs of a state/established church,[104] while 'discrimination against adherents to other religions or non-believers' is forbidden.[105]

Fifthly, international human rights law offers protection to *believers* (rather than *beliefs per se*) from very serious vilification, and the Special Rapporteur has criticised states that have failed to make it unlawful to incite religious hatred.[106] Given that the ICCPR prohibits any 'advocacy of . . . religious hatred that constitutes incitement to discrimination, hostility or violence',[107] and the UN Declaration (1981) calls on governments to 'adopt criminal law measures against organisations that incite others to practise religious intolerance',[108] states would appear to be under a duty to place restrictions on words or actions that constitute an incitement to religious hatred.

And finally, human rights documents often expressly recognise parental rights in relation to the place of religion and belief in the upbringing of children. For example, the ICCPR provides that states must 'ensure [that] the religious and moral education' of children is in conformity with the convictions of their parents or legal guardians,[109] while the ECHR stipulates that the state must respect the 'religious and philosophical convictions' of parents in relation to education and teaching.[110] However, the duty on states to respect

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101 *Darby v Sweden* A 187 (1991); 13 EHRR 774.

102 Human Rights Committee, above n 28, 9.

103 Abdelfattah Amor, *Report on Special Rapporteur's visit to Pakistan*, UN Doc E/CN.4/1996/95Add.1 (2 January 1996) [81].

104 Abdelfattah Amor, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/1997/91 (30 December 1996) [86]. See also *Hasan and Chaush v Bulgaria* (2002) 34(6) EHRR 1339 [78].

105 Human Rights Committee, above n 28, [9].

106 See Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief: Summary of cases transmitted to Governments and replies received*, UN Doc E/CN.4/2005/61/Add.1 (15 March 2005) [288].

107 Article 20(2) ICCPR.

108 Natan Lerner, *Religion, Secular Beliefs and Human Rights* (Martinus Nijhoff, Leiden, 2006) 35. Although a duty to outlaw incitement to religious hatred is not expressly mentioned in the UN Declaration (1981), it can be implied from Article 2 (1), which provides that no discrimination should stem from 'any State institution, group of persons or person on grounds of religion or other belief'.

109 Article 18(4) ICCPR.

110 See the *Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1*, opened for signature 20 March 1952, 213 UNTS 262 (entered into force 18 May 1954).

parental rights is not absolute. For example, the European Court has held that compulsory sex education programmes are lawful if 'conveyed in an objective, critical and pluralistic manner',[111] while the Human Rights Committee has also ruled that, irrespective of parental objections, classes on the history of religion and ethics are permissible if 'given in a neutral and objective way'.[112]

4 Religious dress, symbols and international human rights law

A Islamic and secular values in conflict

As noted above, a number of common principles can be identified from the rules governing religion and belief in international human rights law. Yet there are also many areas where there is little agreement. Often this is a by-product of the fact that those responsible for formulating the relevant principles of international human rights law have very different perspectives on matters of faith. Accordingly, with an increasing number of Muslims now living in the West,[113] and secular norms having replaced traditional Christian values in many parts of Europe,[114] the potential for conflict between seemingly incompatible Islamic and secular liberal traditions is obvious.

This challenge of reconciling Islamic and secular western values has already been well documented. For some there is a real risk of a 'clash of civilisations',[115] whereas for others such claims are false and based on a number of erroneous assumptions.[116] It has been argued that the tenets of Islam are compatible with the principles of international human rights,[117] yet conflicts between secular and Islamic values continue to generate acrimonious and bitter disputes. A case in point is the extent to which the state may legitimately impose restrictions on forms of Islamic dress. Although this is far from being the only area where there is disagreement,[118] it is an important issue on which I will focus for four reasons.

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111 *Kjeldsen, Busk Madsen and Pederson v Denmark* (1975) 1 EHRR 711 [53].

112 *Hartikainen v Finland*, UN Doc CCPR/C/12/D/40/1978 (9 April 1981) [10.4].

113 See generally S T Hunter (ed) *Islam, Europe's Second Religion* (Praeger and CSIS, New York, 2002).

114 For example, see L Halman and V Draulans, 'How secular is Europe?' (2006) 57 *The British Journal of Sociology* 263.

115 See, for example, Samuel P Huntington, 'The Clash of Civilisations' (1992–1993) 77 *Foreign Affairs* 22.

116 See Chiara Bottici and Benoit Challand, 'Rethinking Political Myth: The Clash of Civilisations as a Self-Fulfilling Prophecy' (2006) 9 *European Journal of Social Theory* 315.

117 See M Baderin, *International Human Rights and Islamic Law* (Oxford University Press, Oxford, 2005; A An-Na'im, above n 12; and Mayer, above n 12). See also Chapter 17.

118 For example, the challenge of reconciling Islamic and secular liberal values is

First, in recent years, the controversy generated by Islamic dress has been termed 'truly global',[119] giving rise to conflicts between Muslims and governments as far afield as South East Asia,[120] the former USSR,[121] and Western Europe.[122] Secondly, the Islamic headscarf is an emotive topic that is even capable of provoking violence, as witnessed by the kidnapping of two French journalists by an Iraqi-based Islamist group in 2004 as a protest against the French law outlawing conspicuous religious symbols.[123] Thirdly, disputes over religious dress highlight major differences between the Islamic and secular approaches to the place of faith in public life,[124] and with Islamic dress often regarded as being integral to the identity of Muslim women, it is perhaps unsurprising that many Muslims are wary of efforts by 'secular' states to regulate what they can wear in public.[125] Fourthly, it is likely that religious symbols and garments will continue to generate controversy, not least because an increasing number of young Muslims in Europe are adopting traditional Islamic styles of dress in defiance of contemporary secular Western norms.[126]

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demonstrated in relation to contentious areas such as jihad, and the treatment of apostates. On these issues, respectively, see Abdullahi Ahmed An-Na'im, 'Why should Muslims abandon Jihad? Human rights and the future of international law' (2006) 27 *Third World Quarterly* 785 and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Ashgate, Aldershot, 2004).

[119] Anthony Giddens, 'Beneath the Hijab: A Woman' [2004] 2 *New Perspectives Quarterly* 9, 10.

[120] See Li-ann Thio and Jaclyn Ling-Chien Neo, 'Religious Dress in Schools: The Serban Controversy in Malaysia' (2006) 55 *International & Comparative Law Quarterly* 671.

[121] See *Hudoyberganova v Uzbekistan*, UN Doc CCPR/C/82/D/931/2000 (18 January 2005).

[122] See L Auslander, 'Bavarian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State' (2000) 12 *Cultural Dynamics* 283.

[123] See D Malliard, 'The Muslims in France and the French Model of Integration' (2005) 16 *Mediterranean Quarterly* 62, 77.

[124] See Olivier Roy, *Secularism confronts Islam* (Columbia University Press, Colombia, 2007) and Elisabeth Özdalga, *The Veiling Issue, Official Secularism and Popular Islam in Modern Turkey* (Routledge, 1998).

[125] See Michael Humphreys and Andrew D. Brown, 'Dress and Identity: A Turkish Case Study' (2002) 39(7) *Journal of Management Studies*, 927–52, and Debra Reece, 'Covering and Communication: The Symbolism of Dress Among Muslim Women' (1996) 7(1) *Howard Journal of Communications*, 35–52. Moreover, in the UK, a recent opinion poll found that 76 per cent of Muslims considered that schoolchildren should be free to wear religious dress irrespective of a school's particular uniform policy, in contrast to 42 per cent of the general population: see 'Muslims in Britain: a story of mutual fear and suspicion', *The Times* (London) 5 July 2006, 6.

[126] See W Shadid and P S van Koningsveld. 'Muslim Dress in Europe: Debates on the Headscarf' (2005) 16 *Journal of Islamic Studies* 35.

This issue of religious dress will now be explored in order to demonstrate the challenge of formulating principles in the field of religious human rights law that are capable of embracing both the secular liberal and Islamic traditions.

B Curbs on religious dress, secularism and Europe

It is well established that there is often a clear link between the manifestation of religious beliefs and particular forms of religious dress. From Jewish yarmulkes and Sikh turbans to Muslim veils and Christian crosses, the distinctive identity of each group is maintained by what is worn or displayed. This close association between faith and dress can have negative, as well as positive, connotations. Situations where people are *compelled* to display religious symbols in public (for example, Jews forced to wear the star of David in Nazi Germany) can be contrasted with those where individuals are *forbidden* from wearing the religious dress of their choice (for example, bans on Islamic headscarves).[127] Instances of the former, identified by successive Special Rapporteurs on freedom of religion or belief as constituting a serious infringement of religious freedom,[128] are rare. Thus, for the purposes of this chapter, I focus on the latter – the extent to which international human rights law protects those who wish to wear garments or emblems signifying their association with a particular religious group.[129]

It was the introduction of a law in France four years ago, banning the display of 'conspicuous' religious symbols from the classrooms of all French state schools, which particularly focused the attention of the Western world on the topic of religious dress.[130] The French law on 'conspicuous' religious symbols has attracted criticism from many sources, including academics,[131] the European Parliament[132] and the UN Committee on the Rights of the

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127 For example, Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2006/5/Add.4 (8 March 2006) [36].

128 See Abdelfattah Amor, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/1998/6 (22 December 1997) [60]; Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or* belief, UN Doc E/CN.4/2006/5 (9 January 2006) [36]–[68].

129 The Special Rapporteur refers to this as 'positive freedom of religion or belief', Jahangir, above n 128, [36].

130 Law No. 2004-228, of 15 March 2004.

131 For example, see Dawn Lyon and Deborah Spini, 'Unveiling the Headscarf Debate' (2004) 12 *Feminist Legal Studies* 333 and Liz Kekete 'Anti-Muslim Racism and the European Security State' (2004) 46 *Race and Class* 3.

132 For example, see European Parliament Written Declaration, 20 February, 2004, DC\524428EN.doc.

Child,[133] but it continues to remain in force. France has traditionally been less willing to accommodate religious garments and symbols in public than many of its European neighbours,[134] and the law passed in 2004 was an important reaffirmation of its commitment to secular values.[135] The rationale for this was *laïcité*, the principle that religion is fundamentally incompatible with the institutions of the secular French Republic and that the manifestation of one's beliefs should be confined to the private rather than the public sphere.[136]

In considering the *degree* of respect that should be accorded to *laïcité* and comparable secular principles, the Strasbourg human rights institutions have granted states a wide margin of appreciation.[137] It was thus perhaps no great surprise when the European Court (in 2005) rejected a challenge to a Turkish law prohibiting university students from wearing Islamic headscarves in lectures or during exams, on the basis that it was reasonable to preserve the secular nature of the university.[138]

C Criteria for imposing limits on religious dress or symbols

The approach of the European Court to religious dress has been widely criticised,[139] but it should not be forgotten that the right to manifest one's religion or belief in this way is not absolute. There are clearly occasions where the interests of society take precedence over those of the individual in relation to the accommodation of religious beliefs in a multi-faith liberal democracy.[140]

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133 See Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of France*, UN Doc CRC/C/15/Add.240 (4 June 2004) [25]–[26].

134 For example, see S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43.

135 See D Malliard, 'The Muslims in France and the French Model of Integration' (2005) 16 *Mediterranean Quarterly* 62.

136 For example, see J Freeman, 'Secularism as a Barrier to Integration – the French Dilemma' (2004) 42 *International Migration* 5.

137 *Karaduman v Turkey*, Application No 16278/90 and *Bulut v Turkey*, Application No 18783/91, (1993) 74 DR 93.

138 *Şahin v Turkey* (2007) 44 EHRR 5. More recently in *Dogru v France*, Application No. 27058/05, 4 December 2008, the European Court rejected a complaint from two Muslim schoolgirls who had been expelled from school as a result of their refusal to remove Islamic headscarves during physical education lessons.

139 For example, see Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395–414; Jill Marshall, 'Freedom of Religious Expression and Gender Equality: *Sahin v Turkey* (2006) 69(3) *Modern Law Review* 452–461; and Anastasia Vakulenco, 'Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16(2) *Social & Legal Studies*, 183–99.

140 However, 'the burden of justifying a limitation upon the freedom to manifest

This has been recognised by the current Special Rapporteur on religion or belief, who has acknowledged that any limitation on religious dress can only be justified 'under precise conditions'.[141] According to the Special Rapporteur any such restriction must

> be based on the grounds of public safety, order, health, or morals, or the fundamental rights and freedoms of others, it must respond to pressing public or social need, it must pursue a legitimate aim and it must be proportionate to that aim.[142]

The Special Rapporteur's guidelines are of considerable value, and are now examined in more detail.

(i) Public health and safety The protection of public health and safety is a well-accepted criterion under international human rights law for the imposition of limits on those wishing to manifest their faith in the form of religious dress or symbols. For example, national courts and tribunals have long recognised that Sikh males working in food factories must cover their beards in order to avoid contamination.[143] Such restrictions are compatible with the principles of international human rights law.[144] Similarly, on health grounds, the HRC[145] and the European Commission of Human Rights[146] rejected the complaints of a Sikh railway employee and a Sikh motorcyclist, both of whom challenged national laws requiring them to wear (respectively) a hard hat and a crash helmet rather than a turban.

Of course the imposition of dress restrictions in relation to matters of health and safety can, on occasion, be problematic. A case in point is that of the extent to which young Sikhs should be allowed to bring their ceremonial knives (*kirpans*) into state schools, with Courts in the United States permitting this practice,[147] in contrast to those in Canada.[148] What is clear is that, as a

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one's religion or belief lies with the state': Asma Jahangir, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2006/5/Add.4. (8 March 2006) [104].

141 Ibid.

142 See Jahangir, above n 128, [53].

143 See *Panesar v Nestle Co* [1980] IRLR 64 and *Singh v Rowntree Mackintosh* [1979] IRLR 199.

144 For example, see Article 9(2) ECHR, Article 12(3) ACHR, and Article 18(3) ICCPR.

145 See *K Singh Bhinder v Canada*, UN Doc CCPR/C/37/D/208/1986 (9 November 1989).

146 See *X v UK*, Application No 7992/77 (1978) 14 DR 234.

147 Sikh schoolboys were permitted to wear their *kirpans* in a state elementary school as long as the blades were dulled and the knife was 'sewn tightly to its sheath': *Cheema v Thompson* 67 F.3d 883 (9th Cir, 1995) 886.

148 The Quebec Court of Appeal has outlawed the wearing of *kirpans* in its schools. See *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SRC 256.