

**The Contemporary Debate on Global  
Constitutionalism and Democratic Sovereignty: A  
Human Rights Perspective\***

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## 1. The New Legal Landscape

The status of international law and of transnational legal agreements and treaties with respect to the sovereignty claims of liberal democracies has become a highly contentious theoretical and political issue.<sup>1</sup> In his highly controversial decision that struck down the death penalty for juvenile delinquents, Justice Anthony M. Kennedy cited the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, among other documents.<sup>2</sup> In his dissenting opinion, Justice Antonin Scalia, thundered: “The basic premise of the court’s argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.” Seeing this as an all or nothing equation, Justice Scalia drove to a *reductio ad absurdum*: “The Court should either profess its willingness to reconsider all these matters in the light of views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.”<sup>3</sup> (Emphasis in the original)

What indeed is the status of foreign and international law in a world of increasing interdependence? Isn’t legal epistemology enriched by looking across the border and even the ocean?<sup>4</sup> What is the source of the anxieties and fears invoked by so many in recent years within the U.S. context in particular about the problematic relation of transnational legal norms and democratic sovereignty?. Citing a foreign ruling does not convert it into a binding precedent but may be wise judicial reasoning.<sup>5</sup> While recent European discussions focus on global law with or without a state, global constitutionalism, a global *res publica*, juridification (Verrechtlichung) or

constitutionalization (Konstitutionalisierung) in a world society,<sup>6</sup> there is increasing reticence on the part of many that prospects of a world constitution and the global harmonization of legal traditions and jurisdictions are neither desirable nor salutary.<sup>7</sup> What sense can we make of this new legal landscape? Like Swift's giant Gulliver, states have been pinned down by hundreds of threads of international law, some of which they can free themselves from while others, much like those which tie the giant, prevent them from escaping their bonds. The controversy over international law has become the site over the future viability of democracies in a world of growing interdependence.

The first part of this article considers more closely contemporary criticisms of these legal transformations by distinguishing the *nationalist from democratic sovereigntist* critics, and both, from diagnoses which see in the present system of the universalization of human rights norms either the *Trojan horse of a global empire* or *neo-colonialist* intentions that abuse the doctrine of humanitarian interventions to assert imperial control over the globe. Both sets of critics ignore "the jurisgenerativity of law," and in particular, the power of those most prominent cosmopolitan norms, namely universal human rights, to empower local movements. While democratic sovereigntists are wrong in minimizing the extent to which human rights norms contribute to improving democratic self-rule; global constitutionalists are also wrong in minimizing the extent to which even the most cosmopolitan norms, such as human rights, require local contextualization, interpretation and vernacularization by self-governing peoples.

To concretize such processes of legal contextualization, interpretation, and vernacularization, the conclusion considers the impact of CEDAW (*Convention on the Elimination of all Forms of Discrimination Against Women*) upon women in some

Muslim countries and analyzes how rights claims migrate across borders to produce forms of democratic iterations which extend across countries and legal traditions. These considerations are not offered in the spirit of what empirical political scientists would name a “case study,” but rather they are offered to show how the abstract considerations of normative political thought engage in this essay also resonate with the actions and movements of political agents engaged in contemporary struggles. The neglect of social movements as actors of social transformation and of jurisgenerative politics has led to a naïve faith in legal experts, international lawyers and judges as agents of democratic change. They may be that as well; but surely, democratization without political actors who seek to empower themselves by creating new subjectivities in the public sphere; new vocabularies of claim-making, and new forms of togetherness is neither conceivable nor desirable.

## **2. Varieties of Sovereignism**

*Sovereignist territorialism* of the kind espoused by some members of the US Supreme Court is characterized, in Harold Koh’s words, “... by commitments to territoriality, national politics, deference to executive power, and resistance to comity or international law as meaningful constraints on national prerogative.”<sup>8</sup> Sovereignist territorialism in our days suffers from a *sociological deficit* so massive that it almost amounts to a loss of touch with reality: the picture of the world that it proceeds from, namely that of discrete nation-states, at whose borders foreign and international law stops, is radically out of step with legal, economic, administrative, military, and cultural reality and practice.<sup>9</sup>

The *normative* objections raised by sovereigntistes towards global legal developments are more weighty and they cannot be explained away in terms of the historically ingrained attitudes of American exceptionalism and American ambivalence towards international law.<sup>10</sup> These objections can in turn be separated into the *nationalist* and *democratic* variants. The *nationalist* variant traces the law's legitimacy to the self-determination of a discrete, clearly bounded people whose law expresses and binds its collective will alone.<sup>11</sup> The *democratic* variant says that laws cannot be considered legitimate unless a self-determining people can see itself both as the author and the subject of its laws. For the democratic sovereigntiste it is not paramount that the law express the will of a nation, of an *ethnos*, but that there be clear and recognized public procedures for how laws are formulated and in whose name they are enacted and how far their authority extends.

The *democratic sovereigntiste* argument has many adherents, among them Thomas Nagel, Quentin Skinner, Michael Walzer and Michael Sandel.<sup>12</sup> Many who would disagree with the sociological world-picture of nationalist sovereigntisme, would nevertheless argue that recent trends towards a harmonized global legal system are normatively dangerous and undesirable. Consider, for example, Thomas Nagel's "The Problem of Global Justice."<sup>13</sup> Nagel takes the nation-state to be the indispensable framework within which questions of justice can arise and considers foreign and international law to be no more than quasi-contractual commitments entered into voluntarily by discrete sovereign entities. Over and beyond the moral duties we owe each others as human beings, argues Nagel, there are no "thicker" obligations beyond our borders that would place us in relationships of justice with other non-nationals with

whom we can engage in or not, depending on our disposition and interest, in building enduring projects of mutual benefit and cooperation. The global economy, much like the global legal system, on this view, consists of a series of discretely undertaken contractual obligations by individual states with other entities such as states and corporations, and often, as is the case with international treaties, with multiple other states and corporations. Yet neither the global economy nor the global legal system are a “system of cooperation” in the Rawlsian sense of the term, that is, enduring forms of human association whose members willingly undertake to work and live with one another under a framework of clearly demarcated rules of for distributing benefits and liabilities. According to Nagel’s “political conception of justice,” “sovereign states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they don’t have with the rest of humanity, an institutional relation which must be evaluated by the special standards of fairness and equality that fill out the content of justice.”<sup>14</sup>

For Nagel as well, the sociological and the normative dimensions of sovereigntisme are deeply intertwined. Since Nagel assumes that neither the world economy nor the world legal system are systems of cooperation in the Rawlsian sense, he reduces the problem of global justice to the moral duties which individuals owe one another as a matter of moral principle. Many critics of Nagel, such as Joshua Cohen and Charles Sabel, as well as Thomas Pogge, begin by correcting Nagel’s world-picture about international law and institutions in order to draw different normative conclusions.<sup>15</sup>

The terrain of the global legal system has now become the new battle-ground for the future of democracy. Discussions of global justice among political theorists have so far largely focused on distributive justice claims and on how to assess the normative wrongs of the current world-system; the status of international law has rarely been addressed.<sup>16</sup> But the objections of democratic sovereigntistes to the legal universalists and world -constitutionalists need to be taken seriously. We should be concerned that the rush to embrace global constitutionalism, with or without a state, is leaving the question of democratic legitimacy unanswered. Post-democracy and a techno-elitist democracy, attenuated through the systems of anonymous governance initiated by global specialists, are becoming increasingly attractive.<sup>17</sup>

### 3. Critics of International Law

In addition to the democratic and nationalist sovereigntiste positions considered above, there are three additional and well-articulated objections to these developments. They are to be distinguished from the first group in that they situate current legal developments in broader socio-economic and political contexts: first, is *the neo-Marxist critique* according to which cosmopolitan law is but an epiphenomenon of economic globalization and of the spread of empire;<sup>18</sup> second, is the charge that recent actions by the UN Security Council are creating a world-wide *emergency condition*, through which the deformalization of law and extra-judicial political measures are gaining influence;<sup>19</sup> and finally, there is the claim that humanitarian interventions and the prosecution of “crimes against humanity” through the International Criminal Court in particular are *neo-colonial* tools of world-domination.<sup>20</sup>

This latter claim is particularly important for elucidating the ambivalent connection between the recent actions of the UN Security Council and cosmopolitan norms of human rights. Formulae such as “the obligation” or “the responsibility” to protect, which have been increasingly endorsed by the Secretary General of the UN and which are logical consequences of viewing every individual as a being entitled to rights within the global civil society, are becoming slippery slopes towards the creation of an international emergency situation, legitimizing more and more humanitarian interventions. As Mahmood Mamdani puts it in biting terms: “The new humanitarian order, officially adopted at the UN’s 2005 World Summit, claims responsibility for the protection of vulnerable populations...Whereas the language of sovereignty is profoundly political, that of humanitarian intervention is profoundly anti-political .... The international humanitarian order, in contrast, does not acknowledge citizenship. Instead it turns citizens into wards.”<sup>21</sup>

There is a great deal in these objections that should be taken seriously and that ought to give one pause: however, advocates of the neo-imperial capitalist hegemony thesis recapitulate a well-known Marxist trope which views the discourse of human rights as the ideological veneer enabling the spread of free-commodity relations.<sup>22</sup> Certainly, there is a historical as well as conceptual link between the universalization of market forces and the rise of the individual as a self-determining and free being, capable of disposing over her actions as well as goods. *But human rights norms are not norms of person, property and contract alone and they cannot be reduced to norms protecting free-market transactions.* Human rights norms such as freedom of speech, association and assembly, are also citizens’ rights, subtending and enabling collective action and resistance to the

very processes of rapacious capitalist development which post-colonial Marxist critics of “humanitarian intervention” also decry. Many of the international human rights covenants contain, in fact, provisions *against* the exploitative spread of market freedoms, in that they protect union and associational rights; rights of free speech; equal pay for equal work; and workers’ health, social security and retirements benefits. Global capitalism which creates special free-trade zones is often directly in violation of these human rights covenants.<sup>23</sup>

The charge that the defense of these cosmopolitan rights has unwittingly given rise to a *responsibility to protect* and hence to neo-colonial domination in the form of humanitarian interventions is complicated:<sup>24</sup> A very good example of this slippery slope from the *responsibility to protect* to the *duty to intervene*, by military force if necessary, occurred during the great typhoon that hit Myanmar- Burma in Spring 2008. Bernard Kouchner, the former President of Medecins Sans Frontiers and now foreign minister of France, argued that the nations of the world had a duty to intervene even against the will of the secretive Myanmar military junta. Robert Kaplan, the conservative thinker, concurred and suggested that the US Navy could move up the river delta to Myanmar and that once it did so, the mission of humanitarian aid to the victims of the cyclone, could easily morph into one of “nation-building.” Only this time, one would be self-conscious about this task and apply the Pottery Barn principle outright: “If you break it, you own it”!<sup>25</sup>

It would be foolish to deny, therefore, the ambivalences, contradictions and treacherous double meanings of the current world situation, which often transforms cosmopolitan intents into hegemonic nightmares. Nevertheless, the hermeneutics of

suspicion in the face of these new developments will only take us so far, because with very few exceptions,<sup>26</sup> there is also a refusal on the part of these critics to consider law's normativity and jurisgenerativity and instead to reduce law to its facticity, that is to the fact that law can be enforced by state sanctions, and, if necessary, through violence.

One way to introduce some clarity into this debate is to focus on a *family* of global norms which enjoys widespread support and which constitutes the building blocks of any project of world constitutionalism and global legal harmonization. These are international human rights norms, originating with the Universal Declaration of Human Rights of 1948. A democratic sovereigntist such as Nagel and a world-constitutionalist such as Habermas both agree that in addition to international law concerning the prohibition and conduct of war among states, human rights constitute the foundations of the international system.<sup>27</sup> The strategy of Habermas's general answer to Nagel is that the constitutionalization of international law need not take the form of a social contract of state formation which would transcend the political autonomy of existing states.<sup>28</sup> Instead, Habermas argues that "Today any conceptualization of a juridification of world politics must take as its starting point individuals *and states* as the two categories of *founding subjects of a world constitution.*"<sup>29</sup> (Emphasis in the text.) Habermas insists that such a multi-level juridical order "should *not* lead to a mediatization of the world of states by the authority of a world republic which would *ignore the fund of trust accumulated in the domestic sphere and the associated loyalty of citizens to their respective nations.*" (My emphasis. Ibid) By 'mediatization' in this context, Habermas has in mind the necessity to consult the authority of a supranational authority. In contrast, there are forms of 'mediating' international norms and national ones – that is,

interpreting, considering and contextualizing one in the light of the other – which do not suggest a relationship of subordinating the national to the supranational. The present essay seeks to analyze precisely those forms of the mediatization between international norms and the “associated loyalty of citizens of respective nations” to their respective nations.

#### **4. The Rise of Cosmopolitan Norms and Jurisgenerativity**

It is now widely accepted that since the Universal Declaration of Human Rights, we have entered a phase in the evolution of global civil society which is characterized by a transition from *international* to *cosmopolitan* norms of justice.<sup>30</sup> This is not merely a semantic change. While norms of international law emerge through treaty obligations to which states and their representatives are signatories, cosmopolitan norms accrue to individuals considered as moral and legal persons in a world-wide civil society. Even if cosmopolitan norms also originate through treaty-like obligations, such as the UN Charter and the various human rights covenants can be considered to be for their member states, their peculiarity is that they limit the sovereignty of states and their representatives and oblige them to treat their citizens and residents in accordance with certain human rights standards<sup>31</sup>. States have now engaged in a process of “self-limiting” or “self-binding” their sovereignty, as the very large number which have signed the various human rights covenants that have come into existence since the Universal Declaration of Human Rights of 1948 shows.<sup>32</sup>

To get a sense of the intensity and velocity with which these challenges have come upon us, consider a list of the human rights declarations which have been signed by

a majority of the world's states since the UDHR in 1948:<sup>33</sup> the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on December 9 1948 (Chapter II); the 1951 Convention on Refugees (which entered into force in 1954);<sup>34</sup> the International Covenant on Civil and Political Rights (ICCPR; opened to signature in 1966 and entered into force in 1976, with 163 out of 195 countries being parties to it as of 2009)<sup>35</sup>; and the International Covenant on Economic, Social and Cultural Rights (ICESCR; entered into force the same year and with 160 state parties as of June 2009),<sup>36</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW; signed in 1979 and entered into force in 1981, with 186 states parties as of June 2009).<sup>37</sup> These are some of the best known among many other treaties and conventions

By focusing on global human rights norms, as opposed to developments in global commercial, administrative or entertainment law or upon other institutions such as the International Criminal Court, I wish to counter as sharply as possible the democratic sovereigntist objections to these developments. While I would endorse a *legal cosmopolitan* position that considers each human being as a person entitled to basic human rights,<sup>38</sup> my argument is that many critics of cosmopolitanism view the new international legal order as if it were a smooth “command structure,” and they ignore the jurisgenerative power of cosmopolitan norms.

By ‘jurisgenerativity,’ a term originally suggested by Robert Cover<sup>39</sup>, I understand the law’s capacity to create a normative universe of meaning which can often escape the ‘provenance of formal lawmaking.’ “The uncontrolled character of meaning exercises a destabilizing influence upon power,” writes Cover. “Precepts must “have

meaning,” but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.”<sup>40</sup> Laws acquire meaning in that they are interpreted within the context of significations which they themselves cannot control. There can be no rules *without* interpretation; rules can only be followed insofar as they are interpreted; but there are also no rules which can control the varieties of interpretation they can be subject to within all different hermeneutical contexts.<sup>41</sup> It is in the nature of rules in general and law in particular that the horizon of interpretation transcends the fixity of meaning. Law’s normativity does not consist in its grounds of formal validity, that is its legality alone, though this is crucial. Law can also structure an extra-legal normative universe by developing new vocabularies for public claim-making; by encouraging new forms of subjectivity to engage with the public sphere and by interjecting existing relations of power with anticipations of justice to come. Law anticipates forms of justice in the future to come. Law is not simply an instrument of domination and a method of coercion, as theorists from Thomas Hobbes to Michel Foucault have argued; “the force of law,” (to use a phrase of Jacques Derrida’s)<sup>42</sup> involves anticipations of justice to come which it can never quite fulfill but which it always points toward.

Democratic sovereigntists ignore that international human rights norms can empower citizens in democracies by creating new vocabularies for claim-making as well as by opening new channels of mobilization for civil society actors who then become part of transnational networks of rights activism and hegemonic resistance.<sup>43</sup> Conflict of

norms in the new legal universe that we have entered into are unavoidable and may be even desirable, so global constitutionalists are wrong in minimizing the necessity for mediating international norms through the will-formation of democratic peoples. Even human rights norms require interpretation, saturation and vernacularization; they cannot just be imposed by legal elites and judges upon recalcitrant peoples; rather, they must become elements in the public culture of democratic peoples through their own processes of interpretation, articulation and iteration.

### **5. Jurisgenerativity and Democratic Iterations**

How is the jurisgenerative capacity of cosmopolitan norms at play then in the current state-system? It will be important here to distinguish between a *normative-philosophical* analysis of the relationship between cosmopolitan human rights norms endorsed through various covenants and the *institutional channels* through which such covenants shape and influence the signatory states' legislation and political culture.

Human rights covenants and declarations articulate general principles which need contextualization and specification in the form of legal norms. How is this legal content to be shaped? Basic human rights, although they are based on the moral principle of the communicative freedom of the person, are also legal rights, i.e. rights that require embodiment and instantiation in a specific legal framework. There is widespread disagreement regarding not only the content of human rights lists but their justification as well. Joshua Cohen has helpfully distinguished between “justificatory” and “substantive minimalism” in the defense of human rights. While the first refers to the justification strategy considered most appropriate for grounding human rights, the second concerns

the list of human rights which each justification strategy leads to.<sup>44</sup> I find neither justificatory nor substantive minimalism plausible and believe that there is a great deal of confusion in these matters, in part resulting from the reasonable political fear that a substantive conception of human rights somehow licenses international ‘humanitarian’ interventions.<sup>45</sup> According to international law, only the Genocide Convention creates an obligation on the part of all to stop “crimes against humanity,” such as genocide, ethnic cleansing, enslavement and mass deportations. Although states have a legal obligation to live up to the principles of the Universal Declaration, there is no mechanism of international enforcement against violator states. I defend increasing the force of law through the power of global civil society and the jurisdiction of international courts but wish to sharply distinguish the philosophical interpretation of human rights from questions of political intervention and legal enforcement. Human rights straddle that line between morality and justice; they enable us to judge the legitimacy of law.<sup>46</sup>

In negotiating the relationship between general human rights norms, as formulated in various human rights declaration, and their concretization in the multiple legal documents of various countries, we may invoke the distinction between a *concept* and a *conception*.<sup>47</sup> We need to differentiate between a *concept* such as fairness, equality and liberty -- let us say -- and *conceptions* of fairness, equality and liberty which would be attained as a result of introducing additional moral and political principles to supplement the original conception.<sup>48</sup> Should justice be defined as “fairness” (Rawls) or as “from each according to his abilities to each according to his needs” (Marx)? To be able to argue for one or the other, we would need to introduce some further claims about

scarcity, human needs and wants, the structure of the basic subject of justice and the like to supplement our original concept of justice.

Applied to the question of how we move from general normative principles of human rights, as enshrined in the various covenants to specific formulations of them as enacted in various legal documents, this would mean the following: the core *concept* of human rights which would form part of any *conception* of the right to have rights would include minimally -- so I would argue -- the rights to life, liberty (including to freedom from slavery, serfdom, forced occupation, as well as protecting against sexual violence and sexual slavery);<sup>49</sup> the right to some form of personal property; and equal freedom of thought (including religion), expression, association, representation, and the right to self-government. Furthermore, liberty requires provisions for the “equal value of liberty,” (Rawls) through the guarantee of some bundle of socio-economic goods, including adequate provisions of basic nourishment, shelter and education.

How is the legitimate range of rights to be determined across liberal democracies or how can we transition from general *concepts* of right to specific *conceptions* of them?<sup>50</sup> If we agree on the centrality of a principle such as “freedom of religious expression,” must we also accept that minority religions are entitled to rights to public expression equally with the majority, as I would argue, or can we maintain that freedom of religious expression is compatible with some reasonable restrictions upon its exercise, as Rawls has claimed? Certainly, the juridical, constitutional, as well as common law traditions of each human society, the history of their sedimented interpretations, their internal debates and disagreements will shape the legal articulation of human rights. Even as fundamental a principle as “the moral equality of persons”

assumes a justiciable meaning as a human right once it is posited and interpreted by a democratic law-giver. And here a range of legitimate variations are always the case. For example, while equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel and India, this is considered quite compatible with special immunities and entitlements which accrue to individuals in virtue of their belonging to different cultural, linguistic and religious groups. For societies such as the United States and France, with their more universalistic understandings of citizenship, these multicultural arrangements would be completely unacceptable.<sup>51</sup> At the same time, in France and Germany, the norm of gender equality has led political parties to adopt various versions of the principle of “parite”- namely that women ought to hold public offices on a fifty-fifty basis with men, and that for electoral office, their names ought to be placed on party tickets on an equal footing with male candidates. By contrast, within the United States, gender equality is protected by Title IX which applies only to major public institutions which receive federal funding. Political parties are excluded from this. There is, in other words, a legitimate range of variation even in the interpretation and implementation of such a basic right as that of “equality before the law.” The legitimacy of this range of variation and interpretation is crucially dependent upon the principle of self-government. *My thesis is that without the right to self-government which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.*

Herein lies the distinctiveness of an approach based on communicative freedom. Freedom of expression and association are not merely citizens’ political rights the content

of which can vary from polity to polity; they are crucial conditions for the recognition of individuals as beings who live in a political order of whose legitimacy they have been convinced with good reasons.<sup>52</sup> They undergird the communicative exercise of freedom, and therefore, they are basic human rights as well. Only if the people are viewed not merely as subject to the law but also as authors of the law can the contextualization and interpretation of human rights be said to result from public and free processes of democratic opinion and will-formation. Such contextualization, in addition to being subject to various legal traditions in different countries, attains democratic legitimacy insofar as it is carried out through the interaction of legal and political institutions with free public spaces in civil society. When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of western paternalism often associated with them. I call such processes of appropriation “democratic iterations.”

By *democratic iterations* I mean complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.<sup>53</sup> In the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever so-subtle ways. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition. Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositied

and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well.

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards of rights to be properly evaluated? I accept here Juergen Habrmas's insight that "the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation which has been legally constituted."<sup>54</sup> The "legal constitution of a discursive procedure of legislation" is possible only in a society that institutionalizes a communicative framework through which individuals as citizens or residents can participate in opinion- and will-formation regarding the laws which are to regulate their lives in common. Through the public expression of opinion and action the human person is viewed as a creature who is capable of self-interpreting rights claims.<sup>55</sup> Having right means having the capacity to initiate action and opinion to be shared by others through an interpretation of the very right claim itself. Human rights and rights of self-government are intertwined. Though the two are not identical, through institutions of self-government alone can the citizens and residents of a polity articulate justifiable distinctions between human rights and civil and political rights and judge the range of their legitimate variation.

*Democratic legitimacy* reaches back to principles of *normative justification*. Democratic iterations do not alter conditions of the normative validity of practical discourses that are established independently of them; rather, democratic iterations enable us to judge as *legitimate or illegitimate* processes of opinion and will-formation through which rights claims are contextualized and contested, expanded and revised through actual institutional practices in the light of such criteria. Such criteria of judgment enable us to distinguish a *de facto consensus* from a *rationaly motivated one*.<sup>56</sup>

Human rights norms assume “flesh and blood” through democratic iterations. Such processes have also been called “saturation” and “vernacularization.”<sup>57</sup> The democratic sovereigntists’ fears then that cosmopolitan human rights norms must override democratic legislation is philosophically unfounded, because the very interpretation and implementation of human rights norms are *radically dependent* upon the democratic will-formation of the demos, which is, of course, not to say that there can be no conflict either of interpretation or implementation – this is a question to which I return in the final section of this essay.

## **6. Cosmopolitan Norms and Legal Practice**

What is the institutional interaction between cosmopolitan norms and legislative and non-legislative processes and how can democratic iterations help us understand such processes better? It is first necessary to distinguish between international and transnational law. By ‘international law’ I understand public legal conventions pertaining to the world community at large, some of which may be formulated in written form, such as the Universal Declaration of Human Rights is, and others of which, such as norms of

*jus cogens*, are unwritten but pertain to customary international law. *Jus cogens* norms are peremptory and mean that any treaties or international agreements which engage in gross human rights violations by advocating genocide, ethnic cleansing, slavery, mass murder are *eo ipso* invalid and command no obligation to be obeyed.

In defining ‘transnational law’ I follow Harold Koh’s focus on “transnational legal process,” who writes: “... the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret and enforce rules of transnational law... transnational law is both dynamic –mutating from public to private, from domestic to international and back again – and constitutive, in the sense of operating to reconstitute national interests.”<sup>58</sup>

Duly executed foreign and international law is binding upon lawmakers, as the U.S. Constitution itself states in Article VI on the status of treaties.<sup>59</sup> In this respect, there is no contradiction between the will of democratic legislatures and the force of international law and treaties. Entering into such agreements or declining to do so is a crucial aspect of sovereignty itself. Yet unlike some jurisdictions in which foreign and international law become part of domestic law, in the U.S. treaties are not self-executing and require congressional ratification.

It is the jurisgenerative potential of transnational law in Harold Koh’s sense which has interested me in this essay. Transnational norms are not opposed to democratic will-formation; they facilitate rather than limit the expansion of democratic legitimation. However, because the Universal Declaration is “only” a declaration of principles and

does not detail mechanisms for enforcement, some argue that it does not function sufficiently *as law*,<sup>60</sup> while others see it as a different kind *of law*. In several articles Judith Resnik has claimed that by ratifying treaties, domestic obligations are altered, and that particularly in a federal system, judges duly regard valid treaties as binding law.

Resnik calls such processes “law’s migration” and cites numerous examples:

“...federalism is also a path for the movement of international rights across borders, as it can be seen from the adoption by mayors, local city councils, state legislatures, and state judges of transnational rights including the United Nations Charter and the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and the Kyoto Protocol on global warming. Such actions are often trans-local – with municipalities and states joining together to shape rules that cross borders.”<sup>61</sup>

Another common method of implementation for UN provisions are the establishment of “expert bodies” chartered to elaborate the meaning of conventions by promulgating “general comments” and by receiving reports from member-states, which in turn are obliged to detail how they are compliant with or failing to live up to their commitments as parties to conventions.<sup>62</sup> Further, in some jurisdictions (but not generally in the United States), international obligations can be a direct source of legally enforceable rights through litigation in national courts.<sup>63</sup> In addition to processes of law’s migration and the establishment of ‘expert bodies,’ cosmopolitan norms enshrined in multilateral covenants can create process of democratic iterations via the action of social movements and civil society actors.

## **7. Claiming Rights Across Borders. CEDAW and Women Living Under Muslim Law**

In “Global Feminism, Citizenship and the State,” the Iranian sociologist Valentine Moghadam analyzes the effects of an international human rights regime, of transnational civil society, and of a global public sphere on women’s rights in Muslim countries.<sup>64</sup> Moghadam, who considers case studies from the Republic of Iran and the Kingdom of Morocco in addition to Egypt, Algeria and Turkey, explores how “local communities or national borders” are affected by globalized norms. She asks: “What of the migration and mobility of feminist ideas and their practitioners? How do local struggles intersect with global discourses on women’s rights? What role is played by feminists in the diaspora, and what is the impact of the state?” (Mogadham, 255) By analyzing the formation of women’s rights and feminist organizations both within specific countries and through transnational feminist networks, Mogadham shows that international conferences and treaties such as CEDAW have created tools that women can tailor to their own contexts.

Moghadam maps the “significant variations in women's legal status and social positions across the Muslim world.” (Mogadham, 260-61) Yet in general, “similar patterns of women's second-class citizenship” (Mogadham, 260) can be identified in terms of family life and economic opportunity. Citizenship is transmitted through the father, and marriage laws give men rights that women do not have. In both Iran and Morocco, for example, the state, the family and economic forms of dependency create what Moghadam calls the “patriarchal gender contract.” (Mogadham, 258)

Responding in the 1980s to efforts to strengthen application of gendered Muslim family law, various women's networks came into being. Nine women from Algeria,

Sudan, Morocco, Pakistan, Bangladesh, Iran, Mauritius and Tanzania, formed an action committee that resulted in *Women Living Under Muslim Laws (WLUML)*, which serves as a clearinghouse for information about struggles and strategies. WLUML includes women with differing approaches to religion; some are anti-religious while others, such as Malaysia's 'Sisters in Islam,' are observant Muslims. Some women work to abandon religious strictures while others challenge interpretations of religious laws and make arguments from within texts and traditions.

By reviewing recent conflicts in Iran and in Morocco on family rights, Moghadam argues that WLUML, along with the *Women Learning Project*, had an impact through interactions between state-centered and transnational forms of action. She concludes that "The integration of North and South in the global circuits of capital and the construction of a transnational public sphere in opposition to the dark side of globalization has meant that feminism is not "Western" but global." (Mogadham, 271) Raised by her examples are ironies in global struggles: the struggle for women's equality requires revisiting the discourse of universalistic human rights just as the conditions of global migrations raise questions about whether to aspire to global citizenship, to particularized affiliations, or combinations thereof. Further, in an important confirmation of democratic iterations Moghadam suggests that the more culturally embedded a group is within a nation-state, the more effective could be their efforts to incorporate universalist norms.

An extraordinarily interesting case of democratic iterations occurred when, in the course of a debate in Canada concerning whether or not religious arbitration courts ought

to be legalized, Canadian Muslim women turned to WLUML to help them overturn Muslim arbitration courts. This case is worth considering in some detail:

Many countries now promote “alternative dispute resolution” fora to create state-enforced private settlements of conflicts in lieu of adjudication of rights.<sup>65</sup> As Audrey Macklin explains, under the law of the Canadian Province of Ontario, women are rights holders when families dissolve and they can seek compensation for household labors that enabled their husbands to develop careers.<sup>66</sup> Ontario also permits resolutions through negotiations that result in “domestic contracts.” In addition, when disputants use arbitration, those outcomes are enforceable in court. (In contrast, in Quebec, family law arbitrations are advisory rather than binding.)

In 2003, a then-new “Islamic Institute for Civil Justice” offered to arbitrate family and inheritance conflicts under Muslim law, prompting an inquiry about whether faith-based arbitration ought to be given legal force. Opposition came from the Canadian Council of Muslim Women, who worked with the transnational group, *Women Living Under Muslim Laws (WLUML)*, discussed by Moghadam. Reliant on networks “as Canadians, as women, as immigrants, and as Muslims,” the opponents built constituencies both locally and globally, just as they argued from national and transnational principles including the UDHR’s commitments to dignity and equality. Proponents of faith-based resolutions were similarly domestic and international — including “the Christian Legal Fellowship, the Salvation Army, B’nai Brith, the Sunni Masjid El Noor, and the Ismaili Muslims.” The denouement was Canadian legislation that does not prohibit parties from turning to faith-based tribunals but gives such judgments no legally enforceable effect.

As Macklin details, women played central roles in this case, expressing “political citizenship in the public sphere of law reform,” and doing so through transnational and transcultural claims of equality. “Claiming their entitlement as legal citizens of Canada to participate in governance, they demanded equal citizenship as Canadian women. At the same time, they pointedly refused to renounce their cultural citizenship or to confine their gender critique to a specific cultural context.” (Macklin, 276)

Such practices not only render the meaning of citizenship more complex by revealing the interaction of the language of universal rights and culturally embedded identities; they also expand the vocabulary of public claim-making in democracies and aid them in evolving into “strong democracies.” They reconstitute the meaning of local, national and global citizenship through processes of democratic iterations in which cosmopolitan norms enable new vocabularies of claim-making to emerge, assume a concrete local and contextual coloration, and often migrate across borders and jurisdictions in increasingly complex and interconnected dialogues, confrontations and iterations.

### **Conclusion**

Transnational law creates wider and deeper interdependencies among nations, pushing them farther and farther towards structures of global governance. While the world system of states is not one of perfect cooperation with defined rules of justice, neither are relations among states “mere contractual obligations,” as Thomas Nagel has argued. The current global system of interdependence is sufficiently thick as to trigger significant relations of justice across borders, which are weaker than those within nation states, but certainly stronger than those envisaged by the world picture of sovereigntists.

The demands for global coordination in response to the recent economic world-wide meltdown is but one indication, among many others, of this new phase of global interdependence.

The law's migrations and democratic iterations reveal that global human rights discourses move across increasingly porous borders to weaken, and render irrelevant, the Rawlsian distinction between 'liberal' and 'decent-hierarchical' societies. Particularly those societies in which the human rights of women, of ethnic, religious, linguistic and other minorities were curtailed on grounds of faith and religion, must now contend with increasingly transnational movements and actors who network across borders in developing new strategies of claim-making such as to expand the human rights' agenda. These developments are all the more significant since they undermine the divide between 'liberal tolerance' on the one hand and 'liberal interventionism' on the other, by inducting citizens, social movements, churches, synagogues, mosques, cultural institutions, the global media etc., into a contentious dialogue about justice across borders. Recent movements mobilizing to end genocide in Darfur; to help AIDS victims in Africa; against the practice of female genital mutilation; for protecting the rights of undocumented migrants -- *les sans papiers* --and many others are illustrative of this new global activism enabled, in part, by the spread of cosmopolitan norms.

We have entered a new stage in the development of global civil society, in which the relationship between state sovereignty and various human rights regimes generate dangers of increasing interventionism but also paradoxically create spaces for cascading forms of democratic iteration across borders. I see no reason not to acknowledge the ambiguities of this moment. But as a critical social theorist, I look for those moments of

rupture and possible transformation when social actors reappropriate new norms such as to enable new subjectivities to enter the public sphere and to alter the very meaning of claims-making in the public sphere itself. This is the promise of democratic iterations and cosmopolitan norms in the present.

Despite these developments, or may be because of them there is also a multiplication of “zones which seek to escape the force of law.” From the ‘extraordinary renditions’ of enemy combatants to unknown localities with the cooperation of US and European governments to the emergence of *maquilladoras* in Central and South America and free-growth zones in China, Southeast Asia, not to mention the decline of the state everywhere in Africa, there is also a process of “dejuridification” afoot. The attempt is to resist the spread of global law and to create enclaves without democratic accountability and parliamentary supervision and to deny the “right to have rights” (Hannah Arendt) altogether. In many free-trade and growth zones, the rights of workers to fair pay, to assemble, unionize and organize are suspended and violently controlled. In the desperate straits that the current world economic crises will generate in many developing countries, it is likely that these norms will be further suspended in a Faustian bargain to keep foreign direct investment coming and the economies growing.

I don’t have a good explanation for how or why these processes of *constitutionalization* and *dejuridification* continue to coexist in the world society at the present; but I want to insist on the significance of instruments of cosmopolitan norms to help combat them. These are not complicit in the legitimation of, but rather, they are enabling conditions of resistance to, the forces of a global capitalism run amok. Any defensible vision of global justice in the current world-order will have to take these legal

instruments and documents seriously and work with them rather than against them. We need to overcome not only the reductionist resistance of many on the Left to the force of transnational law but also the defensiveness of many on the Right who see transnational law as undermining democratic sovereignty, when in fact, it can enhance it. However, constitutionalization, without a people, who can also claim the constitution as its own law, certainly as embedded in and as interactive with global cosmopolitan norms, is not an ideal that democrats can countenance without some concern. Call this loyalty to an old-fashioned Enlightenment ideal !

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<sup>1</sup> See Adam Liptak, "U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations," *NY Times*, September 18, 2008, p. A1, continued on A 30. Liptak details how in the last decade citations to decisions of the U.S. Supreme Court have declined, while the influence of the European Court of Human Rights and the

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Canadian Supreme Court have grown. This evidence is all the more surprising since so many of these courts and their leading constitutional documents – such as The Indian Constitution of 1949; the Canadian Charter of Rights and Freedoms of 1982; the New Zealand Bill of Rights of 1990 and the South African Constitution of 1996--all drew on American constitutional principles at their inception.

<sup>2</sup> See *Roper v. Simmons* (2005); and Liptak, p. A 30.

<sup>3</sup> Cf. *Roper v. Simmons*, Justice Scalia dissenting, joined by The Chief Justice and Justice Thomas. The U.S. Congress passed a resolution concerning the citation of foreign law by American Courts. See “Reaffirmation of American Independence Resolution,” H.R. Res. 568, 108<sup>th</sup> Congress (2004).

<sup>4</sup> Not only Justice Antonin Scalia, but Chief Justice John G. Roberts Jr. as well, opposes this liberal-minded problem-solving approach to judicial decision-making that would learn and borrow from other courts. Justice Robert considers the citing of foreign law to be not an innocent exercise in decision-making, but a compromise or dilution of sovereignty. Liptak quotes Justice Roberts from his 2005 confirmation hearings: “If we’re relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no senate accountable to the people confirmed that judge. And yet he is playing a role in shaping the law that binds the people in this country.” Liptak, “U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations,” p. A30. By blurring the distinction between “citing an opinion” and “creating a precedent,” Justice Roberts raises the specter of the weakening of democratic sovereignty and judicial accountability.

<sup>5</sup> This controversy concerns not only the heft and weight of foreign courts in influencing the decisions of Supreme Court justices, but broader issues such as: what is the proper epistemology of judicial decision-making? Why should judges not learn from other colleagues who have considered similar problems in their own

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jurisdictions? Eric A. Posner and Cass R. Sunstein in “The Law of Other States,” argue for example, that “The practice of consulting “foreign precedents” has received a great deal of attention in connection with recent decisions of the Supreme Court of the United States... But in some ways, it is quite standard to refer to the decisions of other jurisdictions, and the debate over the references of the Supreme Court should be understood in the context of that standard practice.” Eric A. Posner and Cass R. Sunstein, “The Law of Other States,” 59 *Stanford Law Review* 131 (2006), pp. 131-180. Here p. 133. After observing that “Consultation of foreign law seems to be the rule, not the exception,” (p. 135) the authors set out to provide a framework for why consulting the decisions of other states, domestically or internationally, can enhance the quality of judicial decision-making.

Cf. also Jeremy Waldron, “*The Supreme Court, 2004 Term-Comment: Foreign Law and the Modern Jus Gentium*,” 119 *Harvard Law Review* 129 (2005); Mark Tushnet, “*When is Knowing Less Better than Knowing More? Unpacking the Controversy over the Supreme Court Reference to Non-U.S. Law*,” 90 *Minnesota Law Review* 1275 (2006).

<sup>6</sup> Among the literature discussing ‘world constitutionalization,’ See Bardo Fassbender, “The United Nations Charter as Constitution of the International Community,” *Columbia Journal of Transnational Law* 3 (1998); “We the Peoples of the United Nations’: Constituent Power and Constitutional Form,” in: *The Paradox of Constitutionalism*, M. Loughlin and N. Walker, eds. (2007); Arnim von Bogdandy, “Constitutionalism in International Law,” *Harvard International Law Journal*, 47, 1 (2006), pp. 223-242; Brun-Otto Bryde, “Konstitutionalisierung des Voelkerrechts und Internationalisierung des Verfassungsbegriffs,” in: *Der Staat* 1 (2003), pp. 61-75; Hauke Brunkhorst, “Globalizing Democracy without a State: Weak Public, Strong Public, Global Constitutionalism,” in: *Millenium: Journal of International Studies* , vol. 31, No. 3 (2002), pp. 675-690; Hauke Brunkhorst, “Die Globale Rechtsrevolution. Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?“, in: Ralph Christensen and Bodo Pieroth,

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eds, *Rechtstheorie in rechtspraktischer Absicht* (FS Mueller: Berlin, 2008), pp. 9-34; and the helpful overview of this literature, Hauke Brunkhorst, "There Will be Blood. Konstitutionalisierung Ohne Demokratie?," in H. Brunkhorst, ed. *Demokratie in der Weltgesellschaft*, Special issue, *Soziale Welt* (2009), forthcoming. For historical antecedents cf. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Vienna: Scientia Allen, [1928], 1960); Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926). There are parallel discussions concerning constitutionalization in the EU; in the WTO and the IMF etc. See Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes" 16, No. 2, *Indiana Journal of Global Legal Studies* (2009), pp. 621 ff. This essay gives a lucid overview of the various sorts of systems and institutions that the term constitutionalization is being applied to. From the standpoint of Stone's own theory, however, my position would belong among those naïve normativists who establish connections between constitutions, the social legitimacy of any legal system and the community's "collective identity."

<sup>7</sup> For a thoughtful case against "universalist harmonization schemes," arguing that "normative conflict among multiple, overlapping legal systems is unavoidable and might even be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations," see Paul Berman, "Global Legal Pluralism," 80 *Southern California Law Review* (2008), pp. 1155-1237.

<sup>8</sup> Harold Koh, *The Future of Transnational Litigation*, Part Four, ch. xiii, "The Supreme Court's Emerging Jurisprudence of Transnational Litigation," pp. 247-260, here p. 248 (Forthcoming; on file with the author). Koh contrasts 'nationalist' to 'transnationalist' jurisprudence. See also Judith Resnik, Joshua Civin and Joseph Frueh, "Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TPGAs), *Arizona Law*

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*Review*, vol 50, No 3 (Fall 2008), pp. 709-786. See also, Paul Schiff Berman, “Global Legal Pluralism,” 80 *Southern California Law Review* (2008), here p. 1165.

<sup>9</sup> For a particularly shrill argument in defense of the nation-state, which considers the European Union to be nothing but a revival of the dreams of European domination once entertained by Hitler’s Third Reich, see Jeremy A. Rabkin, *Law Without Nations: Why Constitutional Government Requires Sovereign States?* (Princeton: Princeton University Press, 2005)

<sup>10</sup> One of the most biting criticisms of American policies and American exceptionalism, often repeated in recent years, was Carl Schmitt’s. “With the growing power of the United States its peculiar kind of vacillation would also become visible, a vacillation back and forth between a clear *isolation* behind a line of separation that was drawn over and against Europe on the one hand and a universalist-humanitarian *intervention* which would encompass the earth on the other.” (My translation and emphasis in the text) This is the beginning of Schmitt’s caustic commentary on the destructive role of the United States upon the *jus publicum Europaeum*. See Carl Schmitt, *Der Nomos der Erde im Voelkerrecht des jus publicum Europaeum* (Berlin: Duncker and Humblot [1950] 1997), p. 200. In the period before and after George Bush’s Iraq War Schmitt’s work has found receptive audiences.

For a lively historical account of American government’s vacillations and trepidations during the Armenian Genocide in the Ottoman Empire in 1915 and subsequently Woodrow Wilson’s foreign policy gyrations, see Samantha Power, *A Problem from Hell. American Foreign Policy in the Age of Genocide* (New York: Basic Books, 2002); and Gary J. Bass, *Freedom’s Battle. The Origins of Humanitarian Intervention* (New York: Alfred A. Knopf, 2008) who engages directly with the ambivalencies of humanitarian interventionism as an aspect of imperialist politics, but Bass believes that one can distinguish between imperial and humanitarian interventions. Cf. Bass, pp. 367-375 in particular.

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<sup>11</sup> Cf. the following statement by John Bolton: “While the term “sovereignty” has acquired many, often inconsistent, definitions, Americans have historically understood it to mean our collective right to govern ourselves within our constitutional framework.” And “ ‘Sharing’ sovereignty with someone or something else is thus not abstract for Americans. Doing so by definition will diminish the sovereign power of the American people over their government and their own lives, the very purpose for which the Constitution was written.” “The Coming War on Sovereignty,” *Commentary*, March 2009, accessed through [commentarymagazine.com](http://www.commentarymagazine.com), on 3/25/2009. <http://www.commentarymagazine.com/the-coming-war-on-sovereignty>. Bolton served briefly and controversially as the United States Permanent Representative to the United Nations in 2005-2006.

<sup>12</sup> Thomas Nagel, “The Problem of Global Justice,” *Philosophy and Public Affairs* 33 (2005), pp. 113-147; Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 2008 [1998]); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); Michael J. Sandel, *Democracy’s Discontent. America in Search of a Public Philosophy* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1996). Cf. Sandel’s statement: “If the global character of the economic suggests the need for transnational forms of governance, however, it remains to be seen whether such political units can inspire the identification and allegiance – the moral and civic culture – on which democratic authority ultimately depends.” Sandel, p. 399. I am putting together these thinkers, among whom significant divergences exist, only with respect to their arguments concerning popular sovereignty and in no other regards.

<sup>13</sup> Nagel also argues that for membership in a political society, “...the engagement of the will that is essential to life inside a society...and the dual

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role each member plays both as one of the society's subjects and as one in whose name its authority is exercised," is paramount. "One might say that we are all participants in the general will .... [A] sovereign state is not just a cooperative enterprise for mutual advantage." Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, p. 128. This aspect of Nagel's argument is quite compatible with the argument presented in section 5 of this article about democratic iterations. In each case, the *political* interpretation of rights through the practices and decisions of a self-governing community and the role of citizens as authors and subjects to the law is emphasized. Where my analysis differs from Nagel's is that I see international human rights norms as enabling and not hindering democratic iterations; whereas Nagel either construes them too narrowly or sees them as deriving from mere contractual obligations among states.

<sup>14</sup> Nagel, *Ibid.*, p. 120.

<sup>15</sup> Joshua Cohen and Charles Sabel, "Extra Rempublicam Nulla Justitia?," *Philosophy and Public Affairs* 34 (2006), pp. 157-175; Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (London: Polity Press, 2003 and reissued in 2004); Thomas Pogge, ed. *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007); see also, S. Benhabib, *The Rights of Others: Aliens, Citizens and Residents* (Cambridge: Cambridge University Press, 2004) concerning Rawls's inadequate sociological understanding of the political economy of the world society, pp. 97-105.

<sup>16</sup> Exceptions are Juergen Habermas, "The Postnational Constellation and the Future of Democracy," in *The Postnational Constellation: Political Essays*, ed. and trans. by Max Pensky (Cambridge: Polity, 2001), pp. 58-112; Juergen Habermas, *The Divided West*, trans. Ciaran Cronin (Cambridge: Polity Press, 2006); Juergen Habermas, *Time of Transitions*, trans. Ciaran Cronin and Max Pensky (Cambridge, USA: MIT Press, 2006); for discussions of Habermas's recent

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writings on these matters, see *Anarchie der kommunikativen Freiheit*. Juergen Habermas und die Theorie der internationalen Politik, ed. Peter Niesen and Benjamin Herborth (Frankfurt: Suhrkamp, 2007); William E. Scheuerman, “Global Governance without Global Government? Habermas on Postnational Democracy,” *Political Theory*, vol. 36, No. 1 (2008), pp. 133-151. The pioneering work in this field was Daniele Archibugi and David Held, eds. *Cosmopolitan Democracy* (Cambridge: Polity, 1995); David Held, *Democracy and the Global Order* (Cambridge: Polity, 1995); Joshua Cohen and Charles F. Sabel, “Global Democracy,” *International Law and Politics*, vol. 37 (2005), pp. 763-797; and Daniele Archibugi, *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy* (Princeton and Oxford: Princeton University Press, 2008).

<sup>17</sup> For the first position see Guenther Teubner, “Global Bukovina,” in *Global Law Without a State*, G. Teubner, ed. (Aldershot and Brookfield: Dartmouth, 1997) and for the second, Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004). For a critique see Seyla Benhabib, “Twilight of Sovereignty or the Emergence of Cosmopolitan Norms. Rethinking Citizenship in Volatile Times,” *Citizenship Studies*, vol. 11, No. 1 (February 2007), pp. 19-36.

<sup>18</sup> Cf. Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2001). Although first translated into English in 2001, the Italian version of was written in the period between the Persian Gulf War of 1991 and the Yugoslav Civil War of 1994. Its view of USA power is more benevolent than the subsequent work by Michael Hardt and Antonio Negri, *Multitude. War and Democracy in the Age of Empire* (The Penguin Press: New York, 2004).

A more interesting version of the empire thesis has been recently provided by James Tully, who names such cosmopolitan rights discourse “the Trojan horse” of a neo-imperial order extending throughout the globe. “The two cosmopolitan rights,” writes James Tully, harking back to the development of cosmopolitan discourse in

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the 18<sup>th</sup> century, namely “of the trading company to trade and the voluntary organizations to convert – also fit together in the same way as with the nation state. The participatory right to converse with and try to convert the natives complements the primary right of commerce ... From the perspective of non-Western civilizations and of diverse citizenship, the two cosmopolitan rights appear as the Trojan horse of western imperialism.” James Tully, “On Global Citizenship and Imperialism Today: Two Ways of Thinking about Global Citizenship,” Lecture presented at the Political Theory Workshop, Yale University, ISPS on May 1<sup>st</sup> 2008. Tully develops a concept of ‘diverse citizenship’ in this essay, which he believes can serve as a counter-hegemonic challenge to the modern-statist conception of citizenship. I would argue that cosmopolitan norms, in the sense in which I develop in this paper, are enabling conditions of such diverse citizenship.

<sup>19</sup> Jean L. Cohen, “A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach,” *Constellations: An International Journal of Critical and Democratic Theory*, vol. 15, No. 4 (Fall 2008), pp. 456- 484; Kim Lane Scheppele, “International State of Emergency: Challenges to Constitutionalism After September 11”, Yale Legal Theory Workshop, September 21, 2006. According to this analysis, it is the creation of *an international emergency situation* primarily through the actions of the UN Security Council which must be heeded. “... the seemingly arbitrary redefinition of domestic rights violations as a threat to international peace and security, and the selective imposition of debilitating sanctions, military invasions, and authoritarian occupation administrations by the SC or by states acting unilaterally (‘coalition of the willing’), framed as ‘enforcement’ of the values of the international community, gave some of us pause. This discursive framework opened a Pandora’s box, the import of which is becoming clear only now, in the third post 9/11 phase of the transformation of public international law.” Jean Cohen, “A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach,” p. 456. The member states of the UN can neither oppose these measures, nor can they amend

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them, since the amendment rules place the UN Security Council out of their reach by endowing its members with special veto rights.

But there is now significant judicial opposition to the authority of the Security Council. In the much-discussed cases of *Kadi* (C-402/05P) and *Al Barakaat* (C-415/05P), the judgment of the European Court of Justice of September 3, 2008 reversed the judgment of the European Court of First Instance. Through this decision the ECJ annulled the relevant EC measures which implemented the Security Council's Chapter VII resolution, blacklisting certain individuals as supporters of terrorism and freezing their assets. This case was all the more fascinating since in earlier instances, the European Court of Human Rights had complied with the UN Security Council measures. Cf. *Behrami and Saramati v France, Norway and Germany*; judgment of the European Court of Human Rights of 2 May 2007 (Appl 71412/01, 71412/01 and 78166/01). The European Court of the First Instance followed this precedent and upheld the European Council decisions regarding the freezing of the assets of Mr. Kadi and Al Barakaat. Cf. Court of First Instance Case T- 315/01, *Kadi v. Council and Commission* (2005) and Court of First Instance Case T-306/02 *Yusuf and al Barakaat International Foundation v. Council and Commission* (2005). For a provocative discussion which views this case as a paradigmatic "conflict of norms" in the pluralist global legal order, see Grainne de Burca, "The European Court of Justice and the International Legal Order After Kadi," Fordham Legal Studies Research Paper No. 1321313; forthcoming, *Harvard International Law Journal*, vol. 1, No. 51, 2009.

<sup>20</sup> Mahmood Mamdani, "The New Humanitarian Order," *The Nation* (September 29, 2008), p. 18, and Mahmood Mamdani, *Saviors and Survivors. Darfur, Politics, and the War on Terror* (New York: Pantheon Books, 2009).

<sup>21</sup> Mahmood Mamdani, "The New Humanitarian Order," *The Nation* (September 29, 2008), p. 18.

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<sup>22</sup> Karl Marx, “The *Grundrisse* “ in *The Marx-Engels Reader*, edited by Robert C. Tucker, second edition (New York: W.W. Norton , 1978 ), pp. 238-244.

<sup>23</sup> See my essay, “Twilight of Sovereignty or The Emergence of Cosmopolitan Norms. Rethinking Citizenship in Volatile Times,” *Citizenship Studies*, 11/1 (February 2007), pp. 19-36.

<sup>24</sup> Upon the initiative of the then UN General Secretary, Koffi Anan, a special Report of the International Commission on Intervention and State Sovereignty was issued in 2001. Called “The Responsibility to Protect,” the report maintains “The idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. We hope very much that the report will break new ground in a way that helps generate a new international consensus on these issues.” Of course, the sensitive question is who and how the process of states’ being “unwilling or unable to do so” will be interpreted. The Report has not been adopted by the General Assembly and does not have the status of international law. Cf. <http://www.iciss.ca/pdf/Commission-Report.pdf>, accessed on June 22, 2009.

<sup>25</sup> Seth Mydans, “Myanmar Faces Pressure to Allow Major Aid Effort,” *NY Times*, May 8, 2008 and Robert Kaplan, “Aid at the Point of a Gun,” *NY Times*, Op-Ed, May 14, 2008.

<sup>26</sup> Jean Cohen’s concerns are motivated by an internal critique of the extra-legal powers that the UN Security Council is usurping for itself and not by a rejection of the “constitutionalization of public law,” which she characterizes “as a feasible, albeit difficult to obtain, utopia.” Cohen, “Constitutionalization of International Law,” p. 467.

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<sup>27</sup> Nagel, “Problem of Global Justice,” p. 114; see also Habermas’ comments on Nagel’s article in “The Constitutionalization of International Law and the Legitimacy Problems of a Constitution for a World Society,” in *Constellations: An International Journal of Critical and Democratic Theory*, vol. 15, No. 4 (December 2008), pp. 444-455; on human rights, see pp. 445 and 447 in particular. I should add that under internationally valid human rights Nagel only includes “negative rights like bodily inviolability, freedom of expression and freedom of religion.” Nagel, “The Problem of Global Justice,” 152.

<sup>28</sup> Habermas, “The Constitutionalization of International Law,” *Ibid.*, pp. 448-49.

<sup>29</sup> *Ibid.*, p. 449.

<sup>30</sup> In recent works such as *The Rights of Others* and *Another Cosmopolitanism*, I have argued that understanding cosmopolitanism in terms of the legal and moral status of the individual in the world civil society goes back to Kant’s concept of “Weltbuergerrecht,” as expounded in “Perpetual Peace,” pp. 25 ff. Seyla Benhabib, *Another Cosmopolitanism. The Berkeley Tanner Lectures*, edited and introduced by Robert Post and with commentaries by Jeremy Waldron, Bonnie Honig and William Kymlicka (Oxford: Oxford University Press, 2006); Seyla Benhabib, “Another Universalism: On the Unity and Diversity of Human Rights,” Presidential Address. *Proceedings and Addresses of the American Philosophical Association*, vol. 81, No. 2 (November 2007), pp. 7-32.

<sup>31</sup> For a powerful elucidation of the transformation of international law in the post-WW II period and the emergence of the individual as subject of international law through decisions of the Permanent Court of international Justice and the Charter of the United Nations, see Hersch Lauterpacht, *International Law and Human Rights*, with an Introduction by Isodore Silver, The

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Garland Library of War and Peace (New York: Garland Publishing, Inc., 1973).  
Lauterpacht writes: “Moreover, irrespective of the question of enforcement, there ought to be no doubt that the provisions of the Charter in the matter of fundamental human rights impose upon the Members of the United Nations a *legal* duty to respect them.” p. 34. See also note 33 below.

<sup>32</sup> Debates about the status of the Universal Declaration of Human Rights – whether it is binding law, and if so, how it is to be enforced; whether it is a mere declaration with moral-hortatory intent alone – have accompanied it from the start. In “The Strange Triumph of Human Rights, 1933-1950,” the historian Mark Mazower gives a very good account of why the superpowers, and in particular the United States and Great Britain, asserted “domestic jurisdiction,” and made sure that “the human rights provisions of the UN Charter would not be automatically applicable at home.” They eventually agreed to the UDHR only because “it was a declaration,” and not “a covenant.” Mark Mazower, “The Strange Triumph of Human Rights,” *The Historical Journal*, 47, 2 (2004) pp. 379-398; here pp. 393 and 395. Internationalist jurists such as Hersch Lauterpacht and Hans Kelsen, however, were dismayed very early on that neither the Universal Declaration nor the rights-clauses within the UN Charter made provisions for a court with the authority to adjudicate on rights’ violations nor allowed the right of petition. See, Hersch Lauterpacht, *International Law and Human Rights*, pp. 286 ff. Hans Kelsen, “The Preamble of the Charter – a Critical Analysis,” *Journal of Politics*, 8 (1946), pp. 134-159.

Yet taken together, the institution of the UN Charter, and the UDHR and the Genocide Convention of 1948, had the cumulative effect of opening the floodgates to petitions from around the world complaining about human rights violations, race discrimination and the like. The most well-known of these petitions was presented by W.E. B. du Bois on behalf of the NAACP detailing the history of racial discrimination in the USA. The “father” of the Genocide Convention, Ralph Lemkin, was dismayed at this and claimed that it was a Russian ploy to diplomatically

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embarrass the US. See Seyla Benhabib, “Hannah Arendt and Ralph Lemkin: International Law in the Shadow of Totalitarianism,” *Constellations: An International Journal of Critical and Democratic Theory*, vol. 16, No. 2 (June 2009), pp. 331-350. The “jurisgenerative effect” of these declarations, charters and covenants far exceeds their legal intentions, unleashing a moral surge toward their legalization in various domestic jurisdictions. Even a cautious observer, such as Mark Mazower concedes this point and argues that analyzing these documents, compendia, etc. is not neutral; they continue the hope that “moral aspirations might come themselves to be regarded as the source of law.” Mazower, *Ibid.*, p. 397.

<sup>33</sup> Universal Declaration on Human Rights, G.A. res. 217A (III) (Dec. 10, 1948) [ hereinafter, “UDHR”].

<sup>34</sup> Convention relating to the Status of Refugees, G.A. res. 429 (V) (entered into force April 22, 1954).

<sup>35</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976.) As of Jun 2009, 163 countries were state parties

<sup>36</sup> International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>37</sup> The Convention to Eliminate All Forms of Discrimination Against Women, United Nations, General Assembly Resolution 34/180, Dec. 18, 1979 (entered into force, Sept. 3, 1981) *available at* <http://www.un.org/womenwatch/daw/cedaw/econvention.htm> [hereinafter, “CEDAW”.] These provisions are, of course, augmented by many others. *See, e.g.*, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985) (providing such “aliens” with rights to leave, liberty of movement within a country, as well as to have their spouses and minor children of legal aliens be admitted to join

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and stay with them, and to protect them from expulsion by requiring opportunities for hearings and for decision-making not predicated on discrimination based on “race, colour, religion, culture, descent or national or ethnic origin”; Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, (Dec. 13, 1975) (requiring that nations grant nationality rights, under certain conditions, to "persons born in its territory who would otherwise be stateless"); Migration for Employment (Revised) (ILO No. 97), 120 U.N.T.S. 70, (Jan. 22, 1952) (providing that members of the ILO make work policy and migration policies known and treat fairly "migrants for employment"); Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

<sup>38</sup> I define *moral cosmopolitanism* as a position which espouses a universalistic morality that considers each individual as being worthy of equal moral concern and respect. *Cultural cosmopolitanism* emphasizes that all cultures learn and borrow from one another and that cultures form a dizzying multiplicity, variety and incongruity. *Legal cosmopolitanism* is distinct from both positions, while sharing with moral cosmopolitanism the view that each person deserves equal moral respect and concern. On the question as to whether universalistic obligations always trump particularistic ones owed to kin and clan, the legal cosmopolitan is agnostic. For these definitions and further elaboration, see Seyla Benhabib, “The Legitimacy of Human Rights,” *Daedalus. Journal of the American Academy of Arts and Sciences* (Summer 2008), pp. 94-104; here p. 97.

<sup>39</sup> See Robert Cover, “Foreword: Nomos and Narrative,” *The Supreme Court 1982 Term, Harvard Law Review* 97, no. 4 (1983/84), pp. 4-68.

<sup>40</sup> Robert Cover, “Foreword: *Nomos* and Narrative,” p. 18.

<sup>41</sup> Let me clarify that my reliance on Cover’s concept of ‘jurisgenerativity’ does not mean that I minimize or disregard the “legal origins of legitimacy;” jurisgenerativity is not a process of *law-making but one of law-interpreting*, or more properly speaking, it is about the interplay of legal and non-

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legal sources of normativity. I do not share Cover's claim that "Interpretation always takes place in the shadow of coercion...*Courts, at least the courts of the state, are characteristically "jurispathic."*" Cover, "Nomos and Narrative, p. 40. (Emphasis mine) While the state and the courts undoubtedly seek to control "the circulation of meaning", the courts' relationship to processes of norm interpretation and meaning-generation can be more creative and fluid than suggested here. For Cover "redemptive constitutionalism" (33) originates with "*nomoi* communities" and social movements but rarely with formal institutions. What I am trying to develop is a more complex understanding of legal process, social movements, and transnational actors than Cover offered us.

<sup>42</sup> Jacques Derrida, "The Force of Law: The "Mystical Foundation of Authority," in: *Cardozo Law Review*, vol 11: 919 (1989-1990), pp. 920-1046, bilingual text, trans. By Mary Quaintance.

<sup>43</sup> For a more empirical perspective, see Margaret E. Kick and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

<sup>44</sup> See Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?," *The Journal of Political Philosophy*, vol. 12, No. 2 (2004), pp. 190-213. For philosophical positions which would *not* accept the push towards the positivization of human rights, see Amartya Sen, "Elements of a Theory of Human Rights," in: *Philosophy and Public Affairs* 32, no. 4 (2004), pp. 315-356 and Martha C. Nussbaum, "Capabilities and Human Rights," in: *Fordham Law Review* (1997-98), vol. 66, No. 273, pp. 273-300, each of whom for different reasons, denies that human rights need to be embedded in legal-judicial form. I have dealt with their arguments in greater detail in: S. Benhabib, "Another Universalism: On the Unity and Diversity of Human Rights," *Proceedings and Addresses of the American Philosophical Association*, pp. 7-32.

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<sup>45</sup> For positions which would defend ‘substantive minimalism,’ for fear that a more robust conception of human rights would signal a green-light to interventionism in the affairs of other countries, see. Joshua Cohen, “Is There a Human Right to Democracy?” in: *The Egalitarian Conscience: Essays in Honor of G.A. Cohen*, ed. by Christine Sypnowich (Oxford: Oxford University Press, 2006); Jean L. Cohen, “Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization,” *Political Theory*, vo. 36, No. 4 (2008), pp. 578-606. I plead for a clearer differentiation between a philosophical defense of human rights and the critique of their use and abuse by political powers. See, Seyla Benhabib, “Is There a Human Right to Democracy? Beyond Interventionism and Indifference,” The Lindley Lecture, The University of Kansas, Department of Philosophy (2008). See also note 51 below.

<sup>46</sup> See the classical essay by Ronald Dworkin, “Taking Rights Seriously,” (1970), in: *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), pp. 184ff.

<sup>47</sup> In *A Theory of Justice*, Rawls invokes H.L. A. Hart’s discussion in *The Concept of Law* to introduce this distinction. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), here p. 5 and H.L. A/ Hart, *The Concept of Law* (Oxford: Clarendon Press, 1975 [1961]), pp. 155-159. My usage of these terms is more kindred to Dworkin’s as cited in note 48 below. Many thanks to Ed Baker for clarifying some of the intertextual issues involved here.

<sup>48</sup> Dworkin, “Constitutional Cases,” in: *Taking Rights Seriously*, pp. 131-149; here pp. 134 ff.

<sup>49</sup> Since I consider individuals as “generalized” and as “concrete” others, taking into account their embodiment, the protection of the bodily integrity of

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persons, who are sexed differently, is an important human right. It is not only heterosexual women who are subject to sexual violence, many gay men and lesbians are as well; however because of their capacity to become pregnant, forced and arbitrary violence against women affects their personhood and capacities for communicative freedom differently than gay men. The important point is to keep in view the different kinds of violence that one can be subject to as a result of sexual difference and to incorporate this into our understanding of human rights. Many governments, including the USA and Canada, now recognize and grant as legitimate, requests for asylum for women escaping Female Genital Mutilation.

<sup>50</sup> There are differences between discourse theorists such as Rainer Forst and myself who justify human rights philosophically on the basis of the presuppositions of “speech-immanent” commitments and Rawlsians such as Joshua Cohen, Kenneth Baynes and others who prefer to see human rights as elements of a ‘political conception’ of global justice and reason. According to their view, a ‘political conception’ has the merit of not relying on controversial metaphysical and other philosophically-charged premises. It can therefore be made compatible with the regimes of ‘decent-hierarchical societies,’ which respect most human rights but do not endorse ideals of an egalitarian right to democracy. According to Rawls (and Joshua Cohen) it is also important that such a ‘political conception’ of human rights limits intervention in the affairs of societies which do not engage in gross human rights violations, even if their articulation and protection of rights is weaker than in liberal democracies. See John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), pp. 65 ff.; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996). For the defense of the ‘political conception,’ see Joshua Cohen, “Minimalism About Human Rights: The Most We Can Hope For?” and Joshua Cohen, “Is There a Human Right to Democracy?”. For discourse-theoretic accounts, see Benhabib, “Another Universalism” and Benhabib, “Is There a Human Right to Democracy? Beyond Interventionism and Indifference,” and Rainer Forst, “The Basic Right to Justification: Toward a Constructivist Conception of

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Human Rights,” *Constellations*, vol. 6, No. 1 (1999), pp. 35-60; R. Forst, “The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach,” Forthcoming, *Ethics* (2010). For a helpful overview of these positions and clarifications of the philosophical stakes, see Kenneth Baynes, “Discourse Ethics and the Political Conception of Human Rights,” *Ethics and Global Politics* (2009): DOI: 10.3402/egp.v2i1.1938.

<sup>51</sup> Seyla Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002), ch. 5 in particular.

<sup>52</sup> In his important essay “Is There a Human Right to Democracy,” Joshua Cohen responds in the negative and develops a philosophical account of human rights as “entitlements that serve to ensure the bases of membership.” “Just membership” in his account is distinct than “mere membership,” while just membership does entail democratic self-government mere membership does not. (p. 228) According to Cohen, “the central feature of the normative notion of membership is that a person’s good is to be taken into account by the political society’s basic institutions: to be treated as a member is to have one’s good given due consideration, both in the process of arriving at authoritative collective decisions and in the content of those decisions.” (Ibid., pp. 237-38) But, as Cohen admits, to have one’s good “be given due consideration” must entail freedom of opposition and dissent. So membership is not simply a matter of benevolent despotism but of decent representation. Yet how can the right of dissent and opposition be protected in the absence of representative institutions? Without an enduring commitment to the independence of institutions that express opinions about one’s good which may not be consonant with that of the regime or of the majority, how can Cohen’s demanding conception of membership be satisfied? Cohen does not provide a single empirical example of what such a regime might look like. Cohen’s normative account of membership inevitably sets him on the slippery slope towards self-government whether through representative or more participatory forms of institutions. [Joshua

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Cohen, “Is There a Human Right to Democracy?” in: *The Egalitarian Conscience: Essays in Honor of G.A. Cohen*, ed. by Christine Sypnowich (Oxford: Oxford University Press, 2006)]

Jean Cohen criticizes Cohen’s approach for being “still too demanding,” and asks: “Wouldn’t suspension of the sovereignty argument when rights to individual dissent, free expression, appeal, and the requirement of public justification of policy are violated amount to a green light to intervene against any regime militarily?” Jean Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization,” p. 586. This “functional account” (Jean Cohen, p. 582) of human rights considers human rights in terms of their position within international relations and international law and tries to blunt the justification of ever-increasing interventionism. But this is to put the cart before the horse: an adequate conception of human rights cannot be arrived at by asking the question of which minimal list of human rights would prevent interventionism. Some powers will use existing formulations and institutions to their instrumental purposes some or most of the time; normative theory alone cannot prevent such political abuse. None of the human rights declarations cited above create a *general obligation* to intervene in the affairs of other states; As Cohen herself acknowledges only the Genocide Convention does so. (p. 587) That politicians abuse this is not based on the faulty of logic of these agreements but rather on power and interests. Why then limit conceptions of human rights to this “functional account” at all, rather than viewing them as instruments of *critique* directed against existing state regimes as well as civil societies?

<sup>53</sup> See Seyla Benhabib, *Another Cosmopolitanism*, pp. 45 ff. For a clarification of the status of democratic iterations as processes of generating democratic legitimacy, see the Symposium on *The Rights of Others*, in *European Journal of Political Theory*, vo. 6. no. 4 (October 2007), pp. 395-463 and my contribution, “Democratic Exclusions and Democratic Iterations: Dilemmas of ‘Just Membership’ and Prospects of Cosmopolitan Federalism: Reply to my Critics,” in: the same issue, pp. 445-463. I should also add that democratic iterations are not

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always processes of meaning-enhancement and enrichment; they can lead to stifling, sterile interpretations and to narrowing the circle of interpreters of norms as well. We may name such processes ‘jurispathic,’ following Cover at a distance and only in the sense elaborated here. See note 41 above for my general objections to Cover’s own use of this term.

<sup>54</sup> Juergen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. By William Rehg (Cambridge, MA: the MIT Press, 1996), p. 110.

<sup>55</sup> For a discussion of traditions which do not acknowledge that individuals are “self-authenticating sources of valid claims,” see Joshua Cohen, “Minimalism About Human Rights: The Most We Can Hope For?,” p. 207.

<sup>56</sup> For further clarification of the distinctions between normative justification and democratic legitimation, see Benhabib, “Democratic Exclusions and Democratic Iterations: Dilemmas of ‘Just Membership’ and Prospects of Cosmopolitan Federalism: Reply to my Critics,” pp. 445-463.

<sup>57</sup> Sally Engle Merry, *Human Rights and Gender Violence. Translating International Law into Local Justice* (Chicago: The University of Chicago Press, 2006), cf. chapter 5, “Legal Transplants and Cultural Translation: Making Human Rights in the Vernacular,” pp. 134.

<sup>58</sup> Harold Koh, “Why Do Nations Obey International Law?,” Review Essay, *The Yale Law Journal*, vol. 106, No. 8 (June 1997), pp. 2599-2659; here p. 2626-2627.

<sup>59</sup> “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

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Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Article VI, United States Constitution on “Debts, Supremacy, Oaths.” See also, “Restatement of the Law. The Foreign Relations Law of the United States,” *The American Law Institute*, vol. 1, # 1-488; vol. 2, #501- End. (St. Paul, Minn.: American Law Institute Publishers, 1987).

<sup>60</sup> That critique has been made more generally about many forms of international law. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001).

<sup>61</sup>See Judith Resnik, “Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry,” *The Yale Law Journal* 115 (2006); Judith Resnik, “Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignty of the Nation-State” *International Journal of Constitutional Law* 6, no. 1 (2008); Judith Resnik, “Categorical Federalism: Jurisdiction, Gender, and the Globe,” *Yale Law Journal* 111 (2001). Lauterpacht also claimed that “duly ratified treaties are a self-executing part of municipal law;” and “that the Constitution of the US, gives Congress the right to define and punish, *inter alia*, ‘offenses against the law of nations,’ “ in Article 1, Section 8, Clause 10. Lauterpacht, *International Law and Human Rights*, p. 28 and 39 respectively. See Lauterpacht’s discussion of the *Oyama v. California* (1948), 332 U.S., 633 according to which the concurring opinion of four justice of the Supreme Court relied upon “the provisions of the [UN] Charter in the matter of human rights ... as a source of legal obligations.” Lauterpacht, *Ibid.*, p. 151, fn. 12.

<sup>62</sup> See for example the case of Saudi Arabia, which despite rarifying CEDAW and the Convention on the Rights of the Child, has made general reservations to the effect that where there is a conflict between a Convention article and Islamic law principles, Islamic law shall have precedence. Nevertheless, international standards have started impacting the legal judgments of Saudi judges.

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Zainah Almihdar, "Human Rights of Women and Children under the Islamic Law of Personal Status and its Application in Saudi Arabia," in: *Muslim World Journal of Human Rights*, vol. 5, No. 1 (2008). The Berkeley Electronic Press, pp. 1-15.  
<http://www.bepress.com/mwjhr/>.

<sup>63</sup> See Gerald Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55, No. 5 (May 2003), pp.1863-1901.

<sup>64</sup> Valentine Moghadam, "Global Feminism, Citizenship, and the State" in: *Migrations and Mobilities. Citizenship, Borders, and Gender*, ed. by Seyla Benhabib and Judith Resnik (New York: NYU Press, 2009), pp. 255-276.

<sup>65</sup> See Judith Resnik "Procedure as Contract" *Notre Dame Law Review* 80: 593 (2005).

<sup>66</sup> Audrey Macklin, "Particularized Citizenship: Encultured Women and the Public Sphere," in: *Migrations and Mobilities. Citizenship, Borders and Gender*, Benhabib and Resnik eds., pp. 276-304.