

Human Rights, Sovereignty and Democratic Iterations

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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.¹ In a highly controversial decision striking 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.² 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."³ (Emphasis in the original)

What indeed is the status of foreign and international law in a world of increasing interdependence? What is the source of the anxieties and fears invoked by so many in recent years in the U.S. context in particular about the problematic relation of transnational legal norms and democratic sovereignty? While recent European discussions focus on global law with or without a state, and on global constitutionalism, a global *res publica*, juridification (Verrechtlichung) or constitutionalization (Konstitutionalisierung) in a world society,⁴ there is increasing doubt that prospects of a world constitution and the global harmonization of legal traditions and jurisdictions are neither desirable nor salutary.⁵ 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. They can free themselves from some, while others, much like those which tie the giant, prevent them from escaping their bonds. The controversy over international law has become a contestation site over the future viability of democracies in a world of growing interdependence.

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.⁶ 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 upon their signatory 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 standards⁷. 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.⁸

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 1948:⁹ 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);¹⁰ the International Covenant on Civil and Political Rights (ICCPR; opened to signature in 1966 and entered into force in 1976, with 166 out of 195 countries being parties to it as of 2010)¹¹; the International Covenant on Economic, Social and Cultural Rights (ICESCR; entered into force the same year and with 160 state parties as of 2010),¹² 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);¹³ and the Convention on the Rights of the Child (1989) with 193 state parties. Let me add to these European Convention on Human Rights with its 47 signatories and the European Charter of Fundamental Freedoms adopted by the EU’s 27 member states. These are some of the best known among many other treaties and conventions.

What, however, is the import of these legal developments? After all, although there is an International Criminal Court to deal with the most egregious cases of crimes against humanity, some of the biggest players in the international world, such as the United States, are not party to it. There are no transnational human rights courts where the violations of nation states can be litigated against. Furthermore, these treaties and covenants are accepted by states after multiple RUD, “reservation, understandings and derogations,” have also been declared by states which often have the function of blunting those aspects of these legal instruments that would be most contradictory for the signatory state regimes. Building on these very real gaps in the current architectonic of international law, many political philosophers and social critics have expressed skepticism towards these cosmopolitan developments. I shall call them sovereigntists and will distinguish between *nationalist* and *democratic sovereigntism*.

Varieties of Sovereigntism

Sovereigntist 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.”¹⁴ Sovereigntist territorialism proceeds from a picture of the world that is hardly consonant with today’s realities and certainly not in the European domain: this vision 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.¹⁵

The *normative* objections to global legal developments raised by sovereigntists are more weighty and they cannot be explained away in terms of the historically ingrained attitudes of American exceptionalism and ambivalence towards international law.¹⁶ 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, ethnically more or less homogeneous people whose law expresses and binds its collective will alone.¹⁷ 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 sovereigntist 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 sovereigntist* argument has many adherents, among them Thomas Nagel, Quentin Skinner, Michael Walzer and Michael Sandel.¹⁸ Many who would disagree with the sociological world-picture of nationalist sovereigntism, 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." 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 other 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, of 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.

Critics of International Law

In addition to the democratic and nationalist sovereigntist positions considered above, there are other 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;¹⁹ second 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.²⁰

This latter claim is particularly important for elucidating the ambivalent connection between 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."²¹

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 an ideological veneer enabling the spread of free-commodity relations.²² 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.

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.²³ 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!"²⁴

It would be foolish to deny, therefore, the ambivalences, contradictions and treacherous double meanings of the current world situation, which often transforms cosmopolitan intentions 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, 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.

The Jurisgenerative Power of Cosmopolitan Norms

By 'jurisgenerativity,' a term originally suggested by Robert Cover²⁵, I understand the law's capacity to create a normative universe of meaning which can often escape the 'provenance of formal lawmaking.' 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.²⁶ 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)²⁷ 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.²⁸ 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.

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.

Let me spell out the philosophical approach first: 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 rights that require *justiciable form*, i.e. rights that require embodiment and instantiation in a specific legal framework. Human rights straddle that line between morality and justice; they enable us to judge the legitimacy of law.²⁹

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? In other words, how can we articulate what is called in jurist's language "the margin of appreciation" in the different juridification of these norms? 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 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.³⁰ 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 that 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 a right as basic 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.* Unless a people can exercise self-government through some form of democratic channels, the translation of human rights norms into justifiable legal claims in a polity is short-circuited. So, the right to self-government is the condition for the possibility of the realization of a democratic schedule of rights; just as without the actualization of human rights themselves, self-government cannot be meaningfully exercised. They are coequal; that is the *liberal* defense of human rights as limits on the publicly justifiable exercise of power needs to be complemented by the *civic-republican* vision of rights as constituents of a people's exercise of public autonomy. Without the basic rights of the person, republican sovereignty would be blind; and without the exercise of collective autonomy, rights of the person would be empty.

. 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.³¹ 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 is never merely an act of repetition.³² Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositioned 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? Must not democratic iterations themselves presuppose some standards of rights to be properly evaluated? I accept here Juergen Habermas'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."³³ 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. Having a 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. Although the two are not identical, only through institutions of self-government can the citizens and residents of a polity articulate justifiable distinctions between human rights and civil, political rights and judge the range of their legitimate variation.

A lucid account of the dynamic interaction between politics and the law by Robert Post throws light on the interplay between rights claims and democratic iterations. Post writes: "Politics and law are thus two distinct ways of managing the inevitable social facts of agreement and disagreement. As social practices, politics and law are both independent and interdependent. They are independent in the sense that they are incompatible. To submit a political controversy to legal resolution is to remove it from the political domain; to submit a legal controversy to political resolution is to undermine the law. Yet they are interdependent in the sense that law requires politics to produce the shared norms that law enforces, whereas politics requires law to stabilize and entrench the shared values the politics strives to achieve."³⁴ But if "the boundary between law and politics is essentially contested, then judicial judgments engage but do not preempt politics."³⁵ It is this "engagement" between the juridical and the legal which democratic iterations also aim at.

Thus *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* the 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.

Human rights norms assume "flesh and blood" through democratic iterations. Such processes have also been called "saturation" and "vernacularization."³⁶ The democratic sovereigntists' fears then that cosmopolitan human rights norms will inevitably 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.

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.³⁷ 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?” (Moghadam, 255) By analyzing the formation of women’s rights and feminist organizations both within specific countries and through transnational feminist networks, Moghadam shows that international conferences and treaties such as CEDAW have created tools that women can adopt to their own contexts.

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.” (Moghadam, 271) Her examples highlight ironies in global struggles: the struggle for women’s equality requires revisiting the discourse of universalistic human rights, just as conditions of global migrations raise questions about whether to aspire to global citizenship, to particularized affiliations, or combinations thereof.

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.³⁸ 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.³⁹ 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)*.

Reliant on networks “as Canadians, as women, as immigrants, and as Muslims,” the opponents built constituencies 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 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 thick enough to trigger significant relations of justice across borders. Such relations are weaker than those within nation states, but certainly stronger than those envisaged in the world picture of sovereigntists.

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 moments of rupture and possible transformation when social actors reappropriate new norms, enabling 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.

* This lecture is an abridged and revised version of my article “Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty,” *American Political Science Review*, vol. 103, No. 4 (November 2009), pp. 691-704.

¹ 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 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.

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

³ Cf. *Roper v. Simmons*, Justice Scalia dissenting, joined by The Chief Justice Roberts 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, 108th Congress (2004).

⁴ 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, 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 Souveranetaet und die Theorie des Voelkerrechts. Beitrag zu Einer reinen Rechtslehre* (Vienna: Scientia Allen, [1928], 1960); Alfred Verdross, *Die Verfassung der Voelkerrechtsgemeinschaft* (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."

⁵ 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.

⁶ 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.

⁷ 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 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.

⁸ 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. Cf. 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.

⁹ Universal Declaration on Human Rights, G.A. res. 217A (III) (Dec. 10, 1948) [hereinafter, “UDHR”].

¹⁰ Convention relating to the Status of Refugees, G.A. res. 429 (V) (entered into force April 22, 1954).

¹¹ 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

¹² 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).

¹³ 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 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).

¹⁴ 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**).

¹⁵ 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)

¹⁶ One of the most biting criticisms of American policies and American exceptionalism, often repeated in recent years, was Carl Schmitt's. 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.

¹⁷ 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.

¹⁸ 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).

¹⁹ Cf. Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2001). 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 the 18th 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 1st 2008.

²⁰ 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).

²¹ Mahmood Mamdani, “The New Humanitarian Order,” *The Nation* (September 29, 2008), p. 18.

²² 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.

²³ 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.

²⁴ 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.

²⁵ See Robert Cover, “Foreword: Nomos and Narrative,” *The Supreme Court 1982 Term*, *Harvard Law Review* 97, no. 4 (1983/84), pp. 4-68.

²⁶ 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-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.

²⁷ 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.

²⁸ 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).

²⁹ See the classical essay by Ronald Dworkin, "Taking Rights Seriously," (1970), in: *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), pp. 184ff. But it is important to add Habermas's caveat here as well: "Hence we must not understand basic rights or *Grundrechte*, which take the shape of constitutional norms, as mere imitations of moral rights, and we must not take political autonomy to be a mere copy of moral autonomy. Rather, norms of action *branch out* into moral and legal rules." Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: Polity Press, 1996), p. 107.

³⁰ Seyla Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton, 2004), ch. 5 in particular.

³¹ 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.

³² Cf. Jacques Derrida, "Signature Event Context." In: *Limited, Inc.* (Evanston, Ill.: Northwestern University Press, 1988).

³³ Jürgen Habermas, *Between Facts and Norms*, p. 110.

³⁴ Robert Post, "Theorizing Disagreement: Re-conceiving the Relationship Between Law and Politics," *California Law Review*, vol. xx () here p. 144 – complete. See also the concept of 'democratic constitutionalism,' developed by Robert Post and Reva B. Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," *Harvard Civil Rights and Civil Liberties Review*, 42 (2007), pp. 373-

³⁵ Post, "Theorizing Disagreement," p. 150.

³⁶ 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.

³⁷ 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.

³⁸ See Judith Resnik "Procedure as Contract" *Notre Dame Law Review* 80: 593 (2005), pp.

³⁹ 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.