

HUMAN RIGHTS: SOUTHERN VOICES

Francis Deng, Abdullahi An-Na'im,
Yash Ghai, and Upendra Baxi

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In the context of "globalization," Western jurisprudence has largely ignored non-Western viewpoints, interests, and traditions. This article takes a modest step towards de-parochializing our juristic canon by introducing writings about human rights of four "Southern" jurists: Francis Deng (Southern Sudan), Abdullahi An-Na'im (Sudan), Yash Ghai (Kenya), and Upendra Baxi (India). All were trained in the common law and have published extensively in English, so their work is readily accessible, but their perspectives show some striking differences. Deng argues that traditional values of the Dinka of the Southern Sudan are basically compatible with the values underlying the international human rights regime. For An-Na'im, a "modernist" interpretation of Islam is mostly reconcilable with international human rights, but acceptance of such ideas depends far more on conversations within Islam than on cross-cultural dialogue or external efforts. Ghai questions claims to universal human rights; however, from his materialist stance and his experience of postcolonial constitution-making, human rights discourse can provide a framework for negotiating settlements in multi-ethnic societies. Baxi argues that as human rights discourse is professionalized or hijacked by powerful groups, it risks losing touch with the suffering and needs of the poor and the oppressed, who are the main authors of human rights.

Dans le contexte de la « mondialisation », la jurisprudence occidentale a largement négligé les points de vue, les intérêts et les traditions des Non-Occidentaux. Cet article fait un petit pas vers l'ouverture de notre canon judiciaire en introduisant des écrits sur les droits de la personne de quatre juristes « du Sud », à savoir Francis Deng (Soudan du Sud), Abdullahi An-Na'im (Soudan), Yash Ghai (Kenya) et Upendra Baxi (Inde). Ils ont tous eu une formation en common law et ont écrit nombre d'articles en anglais qui ont été publiés; leurs travaux sont donc facilement accessibles, mais leurs points de vue sont très différents. Deng prétend que les valeurs traditionnelles du Dinka du Soudan du Sud sont en fait compatibles avec les valeurs sous-jacentes du régime international des droits de la personne. Pour An-Na'im, un interprétation « moderniste » de l'islam rejoint surtout les droits internationaux de la personne, mais l'acceptation de telles idées dépend davantage de conversations au sein de l'islam que de dialogues transculturels ou d'efforts externes. Ghai remet en question les droits universels de la personne; cependant, de sa position matérialiste, et compte tenu de son expérience en préparation de constitutions post-coloniales, le discours sur les droits de la personne peut fournir un cadre de négociation de règlements dans les sociétés multiethniques. Baxi prétend qu'avec la professionnalisation et le piratage du discours sur les droits de la personne par des groupes puissants, celui-ci risque de perdre de vue la souffrance et les besoins des pauvres et des opprimés qui sont les principaux auteurs des droits de la personne.

* Quain Professor of Jurisprudence Emeritus, University College London. This is an extended version of the 16th Annual McDonald Lecture, delivered at the Centre for Constitutional Studies, University of Alberta, 31 March 2005. I am grateful to Terry Anderson, Bill Conklin, Marie Dembour, Andrew Halpin, Janna Promislow, Carl Wellman, and participants in seminars at the University of Miami and the University of Sussex for helpful comments and suggestions. I also wish to thank the four subjects of this article for answering questions, and pointing out errors and omissions, while leaving me space to make my own interpretations, for which I am solely responsible.

In Ahdaf Soueif's novel, *The Map of Love*, an Egyptian woman, Amal, is expecting an American visitor: "Wary and weary in advance: an American woman – a journalist, she had said on the phone. But she said Amal's brother had told her to call and so Amal agreed to see her. And braced herself: the fundamentalists, the veil, the cold peace, polygamy, women's status in Islam, female genital mutilation – which would it be?"¹

Amal is a cosmopolitan scholar, who moves easily between the worlds of Cairo, New York, and Europe. She is weary of the simplistic repetitious stereotyping of Egypt, Arab culture, and Islam by Westerners. Western normative jurisprudence faces similar charges of a repetitious parochialism about its agenda and about the bearing of other traditions on normative questions.

Western jurisprudence has a long tradition of universalism in ethics. Natural law, classical utilitarianism, Kantianism, and modern theories of human rights have all been universalist in tendency. But nearly all such theories have been developed and debated with at most only tangential reference to and in almost complete ignorance of the religious and moral beliefs and traditions of the rest of humankind. When differing cultural values are discussed, even the agenda of issues has a stereotypically Western bias. How can one seriously claim to be a universalist if one is ethnocentrically unaware of the ideas and values of other belief systems and traditions?

As the discipline of law becomes more cosmopolitan, it needs to be backed by a truly cosmopolitan general jurisprudence.² My objective here is to make a small contribution to this cause by exploring the work of four non-Western jurists who are from "the South" and who have made substantial contributions to the theory and practice of human rights: Francis Deng (Sudan), Abdullahi An-Na'im (Sudan), Yash Ghai (Kenya), and Upendra Baxi (India). I shall finish with some remarks on why I have selected these four individuals, who else might have been included, the similarities and contrasts in their perspectives, in what sense they can be claimed to be "voices" from or of the South, and their relationship to some familiar strands in Western liberal democratic theory.

Since my immediate objective is to make the views of these four jurists better known, I shall try to provide a clear and fair exposition of their ideas about human rights, based on a finite number of accessible texts. This is part of

1 (London: Bloomsbury, 1999) at 6.

2 William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) [*Globalisation and Legal Theory*]; and William Twining, "General Jurisprudence" in M. Escamilla & M. Saavedra, eds., *Law and Justice in Global Society* (Granada: University of Granada, 2005) 609.

the larger enterprise of de-parochializing our own traditions of jurisprudence at a time when we need to take seriously the implications of the complex processes of globalization for our understanding of law.

Let me begin with a brief overview of the four individuals, each of whom emphasizes seemingly different aspects of “voice.” Francis Deng, justifiably, claims to speak for the traditions and culture of his own people, the Ngok Dinka of Kordofan in the Sudan. He argues that traditional Dinka values are basically compatible, in most respects, with the values underlying the *Universal Declaration of Human Rights*³ and related international conventions and declarations. Abdullahi An-Na’im argues that a “modernist” interpretation of Islam involves ideas that are, for the most part, similarly reconcilable with international human rights ideas, but that acceptance of such ideas (their internalization within Islamic belief systems) depends far more on conversations and debates *within* Islam than on cross-cultural dialogue, let alone external attempts at persuasion or imposition. Yash Ghai is skeptical of most claims to universality that are made for human rights; however, adopting a pragmatic materialist stance, he reports that he has found through practical experience of postcolonial constitution making that human rights discourse provides a workable framework for negotiating political and constitutional settlements among politicians and leaders claiming to represent different majority, minority, and ethnic interests in multi-ethnic societies. Such discourse also facilitates popular participation in constitutive processes. Upendra Baxi argues that as human rights discourse becomes commodified, professionalized by technocrats, and sometimes hijacked by powerful groups, it is in grave danger of losing touch with the experience of suffering and the needs of those who should be the main beneficiaries – the poor and the oppressed. They are the main authors of human rights. To take human rights seriously is to take suffering seriously.

All four have been activists as well as theorists, but in different ways. Francis Deng has had a very distinguished career in international diplomacy. Abdullahi An-Na’im has been a human rights activist within the Sudan and several other countries, and a publicist for human rights internationally. Yash Ghai has played a major role in post-independence constitution making and reform, especially in the South Pacific and Kenya. Upendra Baxi has been an influential publicist and campaigner in India and on the international stage, as well as serving as vice-chancellor of two Indian universities. For the last twenty years, he has campaigned and litigated on behalf of the victims of the Bhopal disaster.

3 GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*Universal Declaration*].

I. FRANCIS MADING DENG⁴

God asked man, "Which one shall I give you, black man; there is the cow and the thing called 'What,' which of the two would you like?"

The man said, "I do not want 'What.'"

God said: "But 'What' is better than the cow!"

God said, "If you like the cow, you had better taste its milk before you choose it finally."

The man squeezed some milk into his hand, tasted it, and said, "Let us have the milk and never see 'What.'"⁵

What you have said, you Mading, we are very pleased. Things we have told you, you will give them a purpose; you will write them down and that is a big thing . . .

If this machine of yours writes and records what a man really says, and really records well, then if what we have said is bad, it will search for our necks; if it is good, then we will say these words have saved our country. Now we have trusted you . . . we trust in you fully. Whatever you think we have missed, whatever you think we should have said that we missed, let it be said that we are the people who said it.⁶

4 A note on sources: Francis Deng is a prolific writer who has dealt with many topics. The main sources for this section are: (i) Francis M. Deng, *Tradition and Modernization: A Challenge for Law Among the Dinka of the Sudan*, 2d ed. (New Haven: Yale University Press, 1971) [*Tradition and Modernization*]; *The Dinka of the Sudan: Case Studies in Cultural Anthropology* (New York: Holt, Rinehart and Winston, 1972) [*The Dinka of the Sudan*]; *The Dinka and Their Songs* (Oxford: Clarendon Press, 1973) [*Songs*]; *Africans of Two Worlds: The Dinka in Afro-Arab Sudan* (New Haven: Yale University Press, 1978) [*Africans of Two Worlds*]; *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* (New Haven: Yale University Press, 1986) [*Deng Majok*]; "The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty" (1998) 52:1 J. of International Affairs 101 ["Cow"], which condenses a series of articles in the *Sudan Democratic Gazette* in 1998 [referred to by date, e.g. *SDG* 9/98]; "The Cause of Justice Behind Civil Wars" in Ifi Amadiume & Abdullahi An-Na'im, eds., *The Politics of Memory* (London: Zed Books, 2000) c. 11 [*Politics of Memory*]; Abdullahi An-Na'im & Francis Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington: Brookings Institution, 1990) [An-Na'im & Deng, *Human Rights in Africa*]; and (ii) interviews, conversations, and correspondence with myself conducted over the years.

On the Dinka, see also Godfrey Lienhardt, *Divinity and Experience: The Religion of the Dinka* (Oxford: Clarendon Press, 1961) [Lienhardt]; and John Ryle et al., *Warriors of the White Nile: The Dinka* (Amsterdam: Time-Life Books, 1982). On the situation of displaced victims of the war, see Mark Duffield, "Aid and Complicity: the Case of War-Displaced Southerners in the Northern Sudan" (2002) 40 J. of Modern African Studies 83, and literature cited there.

5 Dinka folk tale related to Deng by Loth Adija, quoted in *Africans of Two Worlds*, *ibid.* at 71. See also "Cow," *ibid.* at 101. Francis Deng interprets "What" in this creation myth to refer to curiosity and the search for scientific knowledge, and hence the tale becomes a rationalization of Dinka conservatism and backwardness in relation to modern science and technology. *Africans of Two Worlds*, *ibid.* at 71, n. 7.

6 Chief Ayeny Aleu, interview with Francis Mading Deng, reported in *Africans of Two Worlds*, *ibid.* at 34-35.

Francis Mading Deng was born in 1938 near Abyei in Kordofan in the west of the Sudan. His father, Deng Majok, was paramount chief of the Ngok Dinka, the only Nilotic inhabitants in the Northern Sudan. It is commonly said that "Abyei is to the Sudan as the Sudan is to Africa," a bridge between the African and Arab worlds. Deng Majok was an outstanding tribal leader, a national figure, especially prominent for his bridging role between the Arab north and the Nilotic south. He was also known as the creator of a huge family through marrying more wives than any other man in Dinka history. Francis, one of his senior sons, became both the leading interpreter of Dinka tradition and a committed proponent of human rights, maintaining that they are basically compatible. How could this be?

Francis was the eldest son of Deng Majok's fourth wife. Although he did not groom any of his sons to succeed him, Deng Majok believed in education. The education of Francis Deng is a story of a remarkable journey through different cultures. It began in Deng Majok's compound in Abyei and continued in a boarding school for sons of chiefs run on similar lines to a British preparatory school. Francis Deng then proceeded to Khor Taaqqat, a secondary boarding school in the North, where the great majority of the boys were Muslims. He read law at the University of Khartoum, where he was taught in English mainly by expatriate teachers, including myself. The course was largely based on English law, but included an introduction to Shari'a law. Some attempt was made to discuss the role of customary law in the national legal system of the Sudan, but there was not sufficient literature to carry this very far. With encouragement, Deng spent some of his vacations studying customary law by sitting in his father's court, reading the court records, interviewing chiefs and elders, and starting a collection of recordings of several hundred Dinka songs.⁷ This was the start of his very extensive explorations of Dinka traditions, culture, and law over many years.

Francis Deng graduated with a good LL.B. in 1962 and obtained a scholarship to pursue postgraduate studies in London, where he stayed for a year, before proceeding to Yale Law School, from which he obtained a doctorate in 1967. Before the age of thirty, he had been exposed to Dinka, Christian, British colonial, Northern Sudanese, Muslim, and both English and American common law ideas. So it is hardly surprising that one of the central concerns of all his writing has been the problem of identity.

On leaving Yale, Francis Deng worked as an officer in the human rights division of the United Nations Secretariat in New York from 1967 to 1972.

7 *The Dinka of the Sudan*, *supra* note 4 at 8.

During this period he met and married Dorothy Ludwig and became part of an American family. They have four sons, who have grown up mainly in Washington, D.C., but who have kept in touch with their Dinka heritage.

In 1972 Deng joined the Sudanese diplomatic service. He served as ambassador to the United States and Scandinavia, becoming Minister of State for Foreign Affairs between 1976 and 1980. From 1980 to 1983, he was Sudan's ambassador to Canada. Subsequently he has held a number of academic positions, mainly in the United States. He has continued to be involved in public affairs, most notably in efforts to end the civil war in the Sudan and, since 1992, as Representative of the Secretary-General of the United Nations on Internally Displaced Persons, rising to the status of Undersecretary-General. In this capacity he has had enormous influence in bringing the plight of 25 million people in forty countries to public attention, and in persuading governments that this neglected problem is a matter both of sovereign responsibility and legitimate international humanitarian concern.⁸

Even when holding responsible full-time public positions, Francis Deng has been a prolific writer. His first book, *Tradition and Modernization: A Challenge for Law Among the Dinka of the Sudan*,⁹ was based on his doctoral thesis at Yale. Of it, Harold Lasswell, his main supervisor, wrote: "Dr Deng has brought to the task of examining his own culture an impressive objectivity of outlook that testifies to his success in acquiring the essential characteristic of a scientific frame of reference."¹⁰ This frame of reference, based on Lasswell and McDougal's "law, science, and policy" approach, represented a significant departure for Deng:

There was a time when I would have been reticent to speak of values because my earlier legal training made me suspicious of such terms as falling within the realm of metaphysics and therefore irrelevant to hard legal analysis. But then I was fortunate, I would say, to go to Yale Law School, where Myres McDougal and Harold Lasswell attached considerable importance to values. In their jurisprudence of law, science and policy, values were defined in concrete terms, embracing deference values such as power, rectitude, affection and respect, and welfare values like wealth, well-being, skills and enlightenment. Another major principle introduced by the Yale School of

8 Roberta Cohen & Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington: Brookings Institution, 1998). Further examples of his work as an intellectual leader in international relations include Wolfgang H. Reinicke & Francis Deng *et al.*, *Critical Choices: The United Nations, Networks, and the Future of Global Governance* (Ottawa: International Development Research Centre, 2000); and Francis Deng & Larry Minear, eds., *The Challenges of Famine Relief: Emergency Operations in the Sudan* (Washington: Brookings Institution, 1992).

9 *Tradition and Modernization*, *supra* note 4.

10 Harold Lasswell, Foreword to *Tradition and Modernization*, *ibid.* at xi.

Jurisprudence was the concept of human dignity as an overriding goal of community and social processes. Again, human dignity was one of those concepts that I had been conditioned by my earlier legal training to dismiss as metaphysical. The Yale school gave it an empirical meaning by defining it in terms of the broadest shaping and sharing of values.¹¹

For Francis Deng, these concepts resonated with Dinka values as he perceived them and at the same time provide a direct link with universal principles applicable to all societies.

Tradition and Modernization is unusual in another respect. It is one of the few books about law ever to be based quite substantially on songs. Rarer still, the author was qualified by birth to be a poet. This extraordinary feat arose out of necessity: because of the security situation, Deng was unable to return home to do more fieldwork, so he partly made up for this gap in his data by making an extensive collection of songs from fellow Dinkas in the United States and from his earlier recordings and his memory. In time he produced two volumes of translations of Dinka songs and folk tales. His early writings bring out the special role played by song in Dinka social relations in relation to courtship, bridewealth, cattle, disputes, war, religious ceremonies, and celebrations:¹²

Among the Dinka, songs and dance have a functional role in everyday life. They do not deal with constructed situations; they concern known facts, known people, and defined objectives. But, above all they are skills of splendor in which a Dinka finds total gratification and elevation. The vigor and rhythm with which they stamp the ground, the grace with which they run in war ballets, the height to which they jump, the manner of pride and self-approval with which they bear themselves, and

11 *Politics of Memory*, *supra* note 4 at 186-87.

12 Deng writes:

To give some examples of the general significance of songs, the social structure, particularly territorial grouping, is reinforced by age-set group-spirit dramatized in initiation, warfare, and other age-set activities, which without songs would be barren. The concept of immortality through posterity receives a great deal of its support and implementation through songs. Singers not only give genealogical accounts of their families, but also stress and dramatize those aspects which express their relevance to contemporary society. Young members of competitive families have been known to compose songs or have songs composed for them in reply to each other's allegations about incidents affecting the relative position of their families. In this process a young man may do a special investigation into the history of his family and of the tribe, to find additional evidence to sing about and bolster his family.

Songs, *supra* note 4 at 78. In this book Deng anthologizes Ox songs, Cathartic songs, Initiation songs, Age-Set Insult songs, War songs, Women's songs, Hymns, Fairy-Tale songs, Children's Game songs, and School songs.

the way in which the high-pitched solo receives the loud unified response of the chorus combine to give the Dinka a euphoria that is hard to describe. As the singing stops, the drums beat even louder, the dance reaches its climax, and every individual, gorged with a feeling of self-fulfillment, begins to chant words of self-exaltation.

I am a gentleman adorned with beads
I dance to the drums and level my feet
The girls of the tribe gather before me
The wealth of the tribe comes to me.¹³

Francis Deng has produced over twenty books, including two novels. Many of them concern the Dinka or the problems of North-South conflict in the Sudan. Even when writing about broader issues such as human rights, displaced persons, and dispute resolution, he regularly draws on Dinka examples and reaffirms that at the core of his multi-layered identity remains a commitment to central Dinka values. A central concern of his work is to reconcile tensions between tradition and modernity, between Dinka culture and universal standards, and between national unity and diversity in a conflicted Sudan.

The Historical Context

Francis Deng's writings need to be viewed in the context of the history of the Sudan. At Independence in 1956, the Dinka were one of the largest peoples in Africa. In the 1956 census they were estimated to number nearly two million, divided into twenty-five independent groups living a semi-nomadic, semi-pastoral life in settlements dispersed over nearly a million square miles within the Sudan. During the Condominium period they were perceived by outsiders to be strongly religious, immensely proud, exclusive, and resistant to change.¹⁴ For many years they fiercely resisted foreign rule, but under the British they also found that the policy of indirect rule was a convenient way of maintaining their heritage and distinct identity. Whether the motives of the British in maintaining the isolation of the Southern Sudan are attributed to a respect for Nilotic culture amounting almost to romance or to a policy of divide and rule, or to a mixture of both, until Independence the Dinka enjoyed the security and exclusiveness resulting from the policy, while resenting being ruled by outsiders, whether British or Northerners.

¹³ *The Dinka of the Sudan*, *supra* note 4 at 17.

¹⁴ Between 1898 and 1956, Sudan was in theory jointly governed by the United Kingdom and Egypt, but in fact, the British were the sole rulers. The human side of the story is recounted in Robert O. Collins & Francis M. Deng, eds., *The British in the Sudan: The Sweetness and the Sorrow, 1898-1956* (Stanford: Hoover Institution Press, 1984).

The Sudan became independent in 1956. During the past half-century, except for a ten-year break, the Dinka have suffered terribly, experiencing repression, massacres, starvation (sometimes deliberately induced), decimation, enslavement, and displacement. The civil war in the Sudan began in 1955. From 1972 to 1983, there was a break following the *Addis Ababa Agreement*, which gave the Southern Sudan regional autonomy.¹⁵ War resumed in 1983 after the military regime of Gafaar Nimeiry instituted a strategy of Islamicization. The latest peace agreement, in 2005, still holds precariously at the time of writing.¹⁶ Over the years, Francis Deng has been involved in attempts to broker a peace as a statesman and diplomat, but above all as a writer.

Here I shall concentrate on Deng's treatment of universalism and relativism with respect to human rights by focusing on a few of his very extensive writings, especially his biography of his father, the volume *Human Rights in Africa*, edited jointly with Abdullahi An-Na'im,¹⁷ and a series of articles published in *The Sudan Democratic Gazette*¹⁸ and *The Journal of International Affairs*¹⁹ that set out his general position in summary form.

Despite this terrible history of death, suffering, and displacement, Francis Deng emphasizes the resilience and vitality of Dinka culture which has formed the basis of their identity. He has documented this culture in rich detail through interviews, folk tales, legends, biographies, cases, and historic events. In his early work he had to rely quite heavily on his own experience, a sparse but generally excellent scholarly literature,²⁰ and his own recordings of Dinka songs. After he returned to the Sudan, he was able to update his knowledge and supplement these sources with extensive recordings of interviews with Dinka elders and other informants.

15 On the background of the Addis Ababa Agreement on the Problem of the Southern Sudan, 1972, see Peter Woodward, *Sudan 1898-1989: The Unstable State* (Boulder: Lynne Rienner, 1990).

16 A Peace Accord was signed in Nairobi on 9 January 2005. For details, see Sudan Peace Agreements, online: United States Institute of Peace <http://www.usip.org/library/pa/_sudan.html/>.

17 *Supra* note 4.

18 *SDG*, *supra* note 4.

19 "Cow," *supra* note 4.

20 Several works on the ethnography of the Dinka and neighbouring Nilotic peoples became anthropological classics: E.E. Evans-Pritchard, *Witchcraft, Oracles and Magic Among the Azande* (Oxford: Clarendon Press, 1937); *The Nuer* (Oxford: Clarendon Press, 1940); and *Nuer Religion* (Oxford: Clarendon Press, 1956); P.P. Howell, *A Manual of Nuer Law* (London: Oxford University Press for the International African Institute, 1954); and Lienhardt, *supra* note 4. See *Tradition and Modernization*, *supra* note 4 at xlii-iii.

In his scholarly writings about the Dinka, Deng adopted an approach that now might be considered unfashionable in its use of “the ethnographic present” and the rather rigid framework of analysis of Lasswell and McDougal.²¹ However, Dinka history and culture are also powerfully evoked through Dinka folk tales, songs, oral history, and novels. He identifies the unity of Dinka culture in a changing and tragic situation through a few core concepts and values that form a distinctive Dinka identity.²² His interpretation is in a sense “idealized” in that he focuses on core values of a tradition that were never fully lived up to and, as he makes very clear, have been threatened not only by modernity but by nearly half a century of suffering.²³ What follows is a brief outline of his interpretation of these ideas and how they relate to international norms of human rights, democracy, and good governance.

Dinka Culture

The Dinka were said to be among the most religious of African peoples. They believe in a single God who has similar characteristics to the God of other monotheistic religions, including Christianity and Islam, but they have no concept of heaven or hell. “The overriding goal of Dinka society is *koc e nohm*, a concept of procreational immortality which aims at perpetuating the identity of every individual male. Respect for the dignity of any person is central to this principle.”²⁴

21 Deng drew heavily on Harold D. Lasswell & Myres S. McDougal, *Law, Science and Policy* (mimeographed materials, New Haven, 1964), which in due course developed into Harold Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (Dordrecht: Kluwer, 1992). Deng also cites a number of articles, the best known of which is Harold D. Lasswell & Myres S. McDougal, “Legal Education and Public Policy” (1943) 52 *Yale Law J.* 203. See further *Tradition and Modernization*, *ibid.* at xxviii n. 12.

22 Godfrey Lienhardt emphasizes the point that “cultural homogeneity is by no means accompanied by political unity. The million or so Dinka of the Southern Sudan and their neighbours the Nuer, are culturally very similar indeed; but politically they are divided into many mutually exclusive and often hostile tribes.” *Social Anthropology* (Oxford: Oxford University Press, 1964) at 155.

23 It is important to emphasize that most of Deng’s research and writing on the Dinka took place in the 1970s, before some of the worst traumas in Dinka history and before academic anthropology took a self-critical, and sometimes postmodern, turn. In the present context, the significance of Deng’s work in that period is that it provides a rich and detailed reconstruction and interpretation of Dinka culture as an “ideal type,” which emphasizes its distinctive aspects, is quite frank, and is not uncritical. It has the strengths and limitations of “insider research.” See, for example, P.A. Adler & P. Adler, *Membership Roles in Field Research* (London: Sage, 1987). The debate over Deng Majok’s marriages (discussed below) illustrates, in extreme form, the divide between Dinka values and international human rights norms that Francis Deng has sought to transcend. His account is remarkably detached and open, yet he manages to maintain the posture of a loyal and respectful son.

24 *SDG 9/98*, *supra* note 4. See also “Cow,” *supra* note 4.

Both men and women are immortalized by procreation. It determines their social status, wealth, and place in history. Immortality maintains the identity of the dead and enables them to continue to participate in social processes in this world and to influence them.²⁵

Two central concepts are *cieng* and *dheng* (or *dheeng*). The concept of *cieng* sets the standard of good social relations. It has no counterpart in English. As a verb it can mean to treat a person well, to live in harmony, to be generous, hospitable, and kind. A person's character or behaviour can be evaluated in terms of having good or bad *cieng*: "Cieng places emphasis on such human values as dignity, integrity, honor, and respect for self and others, loyalty and piety, compassion and generosity, and unity and harmony. . . . Good *cieng* is opposed to coercion and violence, for solidarity, harmony, and mutual cooperation are more fittingly achieved voluntarily and by persuasion."²⁶

Cieng sums up central values of human relations. Dinka society provides various avenues for developing individual and collective pride through attaining values that demand respect. A person attains the status of *dheng* by his or her conduct: "Among the many positive meanings of *dheng* are nobility, beauty, handsomeness, elegance, charm, grace, gentleness, hospitality, generosity, good manners, discretion, and kindness."²⁷ As with virtue, there are many paths to *dheng* – through ancestry, cattle, sexual prowess, graciousness, generosity, bravery, or wealth in the form of cattle.²⁸

Dinka values are believed to be sanctioned by God and the ancestors. Harold Lasswell commented on the powerful processes of early socialization that created an "inner policeman" which can continue to operate after an individual has moved from his original setting and come into contact with other norms, values, and temptations.²⁹ In traditional society, living up to

25 *Human Rights in Africa*, *supra* note 4 at 264. For example: "When a man dies before marrying, even as an infant, he leaves his kinsmen with a religious obligation to marry on his behalf and beget children to his name." *Human Rights in Africa*, *ibid.* at 265. On levirate, see *Tradition and Modernization*, *supra* note 4 at 137-39.

26 *Human Rights in Africa*, *ibid.* at 266.

27 *Ibid.* at 267.

28 *Ibid.* Deng illuminatingly explores the complexities and nuances of the concepts of *cieng* and *dheng* in their social context in *Tradition and Modernization*, *supra* note 4 at 24-30 and *The Dinka of the Sudan*, *supra* note 4 at 9-24. *Cieng* sets social standards for ideal human relations that promote harmony and unity; *dheng* categorizes individuals according to how they have earned respect through their conduct. It is easy to see why Francis Deng finds that these concepts resonate with more abstract (and usually vaguer) Western concepts such as dignity and respect for persons.

29 Lasswell said that "the basic norms of society are rather fully incorporated into the emerging personality system at an early age. . . . The inner policeman continues to operate after the individual has moved from his original social setting and is exposed to novel norms and sanctions." Foreword

these values was largely left to individual conscience, social approval and disapproval, and persuasion rather than force. Dinka tradition makes no sharp distinction between law, custom, and morals. All are backed by religious and social pressures and especially by individual conscience:

These moral and spiritual principles are also applied to guide and control the exercise of political and legal authority. Dinka law is not the dictate of the ruler with coercive sanctions. Rather it was an expression of the collective will of the community, inherited from the ancestors, generally respected and observed, sanctioned largely through persuasion, or if need be, spiritual sanctions.³⁰

Despite the martial culture of the Dinka as herders and warriors, killing, even in fair fight, is believed to be spiritually contaminating and dangerous according to ritual practices. Killing by stealth or ambush is considered particularly depraved and requires even more elaborate procedures of redress and rites of atonement. Theft was hardly heard of in traditional society and, when it occurred, was met with degrading sanctions that were severely damaging to one's social standing. Virtually every wrong threatens the wrongdoer with misfortune and death.³¹

Dinka norms on killing, marriage, the family, harms, insult, and defamation (including defamation of the dead), social hierarchy, and economic relations are all directly related to the overriding importance of immortality through procreation and the values embodied in the concepts of *cieng* and *dheng*. These values integrate the individual and the community. They are illustrated in concrete form by the role of cattle in Dinka society. "It is for cattle that we are liked, we the Dinka. The government likes us because we keep cattle. All over the world people look to us because of cattle. And when they say 'Sudan,' it is not just because of our color, it is also because of our wealth; and our wealth is cattle."³²

Cattle are wealth, but they signify much more than that. Cattle constitute bridewealth that ensures continuity through procreation; cattle are prepared for special sacrifices to God, the spirits, and ancestors. A great many songs are about oxen or the need for oxen – for marriage, for sacrifice, or just for *dheng*. Young men exalt themselves and their lineage through identification with their personality ox, a castrated bull of little practical value:

to *Tradition and Modernization*, *ibid.* at xi.

30 *SDG 9/98*, *supra* note 4.

31 *Ibid.* at 10.

32 Chief Ayeny Aleu, quoted in *Africans of Two Worlds*, *supra* note 4 at 71.

When I rise I sing over my ox,
gossipers disperse
I am like my forefathers
I rise to be seen by my ancient fathers
I rise to be seen walking with pride
As it was in the distant past
When our clan was born.³³

Leadership

The Dinka lacked any centralized institutions for making or enforcing law, and some anthropologists have maintained that they were an example of an “acephalous” or chiefless society and that “chiefs” were a colonial creation. However, this is misleading. The Dinka did have leaders whom anthropologists have variously referred to as “master of the fishing spear” (Lienhardt) or “The Leopard Skin Chief” (Evans-Pritchard and Paul Howell).³⁴ These titles emphasize the religious nature of traditional leadership which contrasted with British secular conceptions of the role of chiefs. According to Deng, the traditional leader was the embodiment of Dinka values, mediating between God, the ancestors, and the living: “Viewed in local terms, these qualities are often associated with ‘the tongue’ and ‘the belly.’ By the tongue is meant the ability to speak soothing and conciliatory words that bring harmony and mutual co-operation to human relations. The belly connotes showing hospitality to visitors, but also generosity to the needy.”³⁵

During the condominium period, chieftainship among the Dinka became more secular and political. Persuasion remained a prime requirement of leadership, but over time authority came to rely more on secular punishments than on religious sanctions. Such punishments as prison and flogging offended Dinka conceptions of dignity and were resented, although over time they came to be accepted to some extent.³⁶ Pressures on traditional chiefs to meet their material obligations sometimes led to accusations of corruption or abuse.³⁷ The move from religious to secular opened the way to criticism of chiefs and even to political opposition.

33 *SDG 6/99*, *supra* note 4. See also the Cow creation myth, *supra* note 5.

34 *Africans of Two Worlds*, *supra* note 4 at 118.

35 *Deng Majok*, *supra* note 4 at 278.

36 “The alienation of the people from modern-day secular authority may be illustrated by the fact that the Dinka refer to the government, even that represented by the Chief, as ‘ju’ [foreigner].” *Africans of Two Worlds*, *supra* note 4 at 142.

37 *Deng Majok*, *supra* note 4 at 278, suggesting this is a cause of corruption in Africa generally.

Francis Deng's father, Deng Majok, lived through all of these strains between tradition and modernity and was regarded by many as the embodiment of a great Dinka leader. He was widely admired for many qualities, including wisdom, generosity, strong leadership, and progressiveness, and for building good relations with neighbouring Arabs while safeguarding the security and independence of his own people.³⁸ However, he was often criticized for "excessive marriage." At first sight this provides a rather striking example of a conflict between Dinka tradition and modern "universal" values. But the story is more complex than that.

In his biography of his father, Francis Deng deals frankly and in detail with Deng Majok's prodigious uxoriousness. Chapter Twelve is significantly entitled "The Economics of Polygyny."³⁹ By Dinka tradition there is no limit to the number of wives that a man can marry provided that he can afford them. In Deng Majok's case, estimates of the total number of wives he acquired during his life vary between 200 and 400. This appears to have been a record in Dinka history and it occasioned continuing controversy. On the one hand, he was clearly fulfilling the imperatives of procreation and immortality. According to his son, he generally treated his wives and offspring generously and fairly, but he maintained control and surface order within the family through the strict discipline of an authoritarian patriarch. He "granted equal opportunities for procreation,"⁴⁰ but there was often "turmoil beneath the calm."⁴¹ Within Ngok Dinka society the situation was problematic.

The size of his family was a matter of prestige rather than shame. But marriage was costly and the family was worried about the draining of their wealth; others hinted at corruption, though no formal accusations were ever made. Deng Majok's defenders maintained that he always acted in accordance with Dinka mores, if not European ones. Nearly all the arguments seem to have centred on issues of power, wealth, and procreation, rather than on sexual morality. His son reports:

In defending his marriages, Deng Majok gave different reasons to different people. To some, especially his family, he might talk of marriage as an investment and a source of economic and social security. To others he might mention the need to broaden the circle of relatives and the relationships by affinity as a strategy of extending political influence. But the reason he stressed most often and which cut across all others was

38 *Ibid.* at 273-74. See also Francis Deng, *Seeds of Redemption: A Political Novel* (New York: Lillian Barber Press, 1986) at 165-66 [*Seeds of Redemption*].

39 *Deng Majok, ibid.* at 190-209.

40 *Ibid.* at 174.

41 *Ibid.*

procreation. And, in a curious way, all those who discussed the matter with him now report his arguments with considerable sympathy and nearly always end up agreeing with his point of view, if only in retrospect.

“When his marriages began to be excessive”, said Nyanbol Amor [his second wife], we went and said to him: “Deng, what is this? Cattle should be allowed to remain for some time to increase in number. You now seize a cow a woman uses for making butter and you send it off to marriage; why is that? Aren’t we enough? We do not want you to continue with your marriages!”

He replied: “Are you people fools? Have you no sense of judgment? I am marrying these wives for your own good. These women will have children. And it is these children who will remain with you.”⁴²

It was not only his wives who tried to dissuade him. Sons, elders, fellow chiefs, and ordinary people raised the issue with him. The discussions appear to have been quite frank and open, but Deng Majok never relented. In respect of marriage, Deng Majok was treated as a spendthrift investor in wives, but in other respects he was considered to be a great modernizer. He invested in the education of his sons, but was more reluctant to educate his daughters. He built good relations with his Arab neighbours, he emphasized ideas of due process, and he resorted to modern medicine. During the period of the Condominium, Deng Majok also exactly fitted the British policy of indirect rule:

Deng Majok’s leadership represented a peak in the evolution of tribal authority from the role of spiritual and moral functionary to an autocratic government institution backed by the coercive power of the state. The erosion of the egalitarianism and democracy of traditional society has been counterbalanced by the effectiveness of the new institutions in establishing and consolidating broad-based adherence to the rule of law in the broader framework of the nation-state. Deng Majok and other tribal chiefs in both the North and the South were indispensable in the maintaining of order and security among the masses of the rural population and in the context in which the central government machinery was otherwise remote and costly.⁴³

When Deng writes about reconciling Dinka values with “modernity,”⁴⁴ he is concerned more with the relationship to human rights norms than to values of the colonial (or Condominium) state.

42 *Ibid.* at 203.

43 *Ibid.* at 140.

44 *Tradition and Modernization*, *supra* note 4 at xxv-xlii.

Universal Values

In his early writings Francis Deng did not make much reference to human rights, but he has always emphasized human dignity as a basic value. After completing his doctorate at Yale, he worked for five years as a human rights officer in the UN Secretariat and acquired considerable professional expertise in the area, especially in relation to women's rights. Since then he has been a firm, quite orthodox, upholder of the international human rights regime and of basic principles of democracy, both of which he considers to be universal. On human rights he emphasizes the *United Nations Charter*⁴⁵ and the *Universal Declaration of Human Rights*,⁴⁶ especially such general phrases as "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."⁴⁷ On democracy he states:

Among the principles of democracy that have gained universal validity are that governments rule in accordance with the will of the people and adhere to the rule of law, separation of powers, and independence of the judiciary, and respect for fundamental rights and civil liberties. These principles should be safeguarded by transparency, freedom of expression (and of the press), access to information and accountability to the public. Given the tendency of Africans to vote according to their ethnic or tribal identities, democracy will have to mean more than electoral votes. In the context of ethnic diversity, devolution of power through decentralisation down to the local level, combined with some methods of ensuring the representation of those who would otherwise be excluded by the weight of electoral votes, would be necessary. In any case, democracy, however defined or practiced, implies accommodation of differences and a special responsibility for the protection of minorities.⁴⁸

At first sight, these familiar ideas of modern liberal democracy seem a long way from Dinka tradition with its emphasis on immortality – especially through the male line – polygyny, a non-monetary economy, divine chieftainship, and cattle. Nor does this fit with his father's autocratic style. How could a UN human rights officer working on international women's rights continue to respect and honour his father, a patriarch who had over 200 wives? Are Dinka concepts of *cieng* and *dheng* quite the same as the meaning of "dignity" in the *Universal Declaration*? How can one reconcile the immortality of ancestors with so earthbound and secular an ideology as modern human rights? Is Dinka tradition really democratic?

45 *Charter of the United Nations*, 26 June 1945 (entered into force 24 October 1945).

46 *Supra* note 3.

47 *SDG 6/98*, *supra* note 4 at 9, citing the, Preamble to the *Universal Declaration*, *supra* note 3.

48 *SDG 5/98*, *ibid.* at 11.

Francis Deng adopts an elaborate strategy to confront these issues. The following is just a brief summary.

First, Deng is not a cultural relativist.⁴⁹ Following Abdullahi An-Na'im, he emphasizes that for institutions and particular norms to be accepted as legitimate and to be effective they must be debated, interpreted, and applied within the concepts and internal logic of local cultures. However, this does not preclude using universal standards as a basis for judging particular features of a culture or tradition. Relativism that rejects all external standards is unacceptable, but relativism in the sense of taking very seriously the beliefs and values of a given culture complements universalism. In respect of the details of institutional design and specific prescriptions, culture is an essential part of legitimating any social change.⁵⁰ In short, a cultural approach to human rights and democracy involves seeing tradition as supplementing abstract values and principles. *Cieng* and *dheng* are conceptions that concretize, localize, and enrich abstract notions of human dignity.

Second, human rights and the principles of democracy are universal, but only at a very abstract level. At that level, Dinka ideals that emphasize respect for persons, dignity, and harmony are fundamentally compatible; indeed, Deng goes so far as to say that the Dinka "clearly had notions of human rights that formed an integral part of their value system."⁵¹ Furthermore, although the principles of democracy are universal, "democracy should be home grown to be sustainable."⁵² Independence constitutions in Africa tended to fail, not because of their ideals, but because they were essentially imposed from above and in a form that was not the result of a genuine local constitutive process. The ideals, he claims, were already part of African tradition: "In traditional Africa, rulers governed with the consent of the people who participated broadly in their own self-administration; were free to express their will; and held their leaders to high standards of transparency and accountability. In that sense, indigenous societies were more democratic than most modern-states in Africa."⁵³

Third, the Dinka are changing. They have become more open to learning from the outside world and some are less confident about the superiority of

49 See especially *Human Rights in Africa*, *supra* note 4; *SDG 8/98*, *ibid.* at 4.

50 Contrast with Ghai, who plays down the importance of "culture" as compared with material interests.

51 *SDG 8/98*, *supra* note 4 at 9.

52 *SDG 5/98*, *ibid.* at 12.

53 *Ibid.* Not everyone will agree with this generalized account of African political traditions, but there is a recognizable affinity with Deng's accounts of Dinka political tradition. His argument is that the institutions and processes might be different, but the values are closely compatible.

their own culture. There is even talk of giving up the Cow for the pursuit of "What." After over forty years of conflict and suffering they yearn for peace. How far these terrible years and the dislocation of so many have weakened the grip of Dinka culture and its "internal policeman" is uncertain. But for many the core values embodied in *cieng* and *dheng* have sustained their identity. After conducting a series of interviews with chiefs and elders in 1999, Francis Deng concluded that the civil war had been both a destabilizing and a radicalizing factor, ironically increasing motivation for development, but in ways that are compatible with basic elements of their cultural integrity.⁵⁴ For example, in an integrated rural development project, the Dinka strongly resisted any suggestion that cattle could be used as draft animals, but they were prepared to sell them for cash, or use them in ways "that are compatible with the dignity of the animals as they see it."⁵⁵

Fourth, Deng acknowledges that, judged by the standards of human rights norms, some aspects of Dinka culture are open to criticism. In 1990 he summarized the main points as follows:

There are, however, severe constraints on the Dinka cultural system of values in terms of objective universal human rights standards. One set of negative effects derives from the inequities inherent in the logic of the lineage system and its stratification on the basis of descent, age, and sex. Another set of negative characteristics lies in the conservative nature of the system and its resistance to change or cross-cultural assimilation. And yet another shortcoming of the system lies in the fact that its human rights values weaken as one goes away from the structural center of Dinka community.⁵⁶

Women in Dinka Society

Perhaps the biggest test of Deng's argument about the compatibility of Dinka tradition with human rights is the subject of the status and treatment of women, as it is for many of the world's cultures, traditions, and religions. Deng's own accounts of Dinka cosmology and of his father's uxoriousness,

54 "Whether it is a manifestation of characteristics hitherto hidden by their isolationism, the result of the impact of the civil war, or simply adaptability to their present circumstances, the Dinka are demonstrating a degree of commitment to development that would surprise the observers of the 1950s." *SDG 10/99, ibid.* at 13.

55 *Ibid.* at 11.

56 *Human Rights in Africa, supra* note 4 at 273. See also the following summary: "Although Dinka cultural values, in particular the emphasis on procreational continuity, idealised human relations, and the dignity of the individual in the communal context, engendered [sic] the elements of human rights principles, the system had built-in shortcomings, embodied in structural inequities, resistance to change, and a condescending view of the outside world." *SDG 9/98, ibid.* at 11. See also *ibid.* at 9, explicitly linking Dinka values to human rights, but with similar reservations.

although clearly an extreme case, suggest a large gulf between central aspects of Dinka tradition and the norms and standards embodied in such instruments as the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*.⁵⁷ Deng acknowledges this. He accepts that polygamy is inconsistent with equal respect and that Dinka women have a subordinate role in Dinka cosmology and tradition. He himself is committed to UN values on the status of women. He is monogamous, and the Dinka heroes in his two novels are monogamous – indeed, one resists pressures to take additional wives.⁵⁸ He can point out, in mitigation, that the central concept of *thek* applies to women, as well as to men and clan divinities. *Thek* includes, but is broader than, the English concepts of respect and deference. As Lienhardt points out: “*Thek* . . . is a compound of behaviour which shows unaggressiveness and deference to its object, and of behaviour which shows esteem for it.”⁵⁹

Francis Deng is quite explicit about the position of women. After acknowledging the inequities of the social structure in the passage quoted above, he continues:

The problem lies not only in the injustices of the system but also in the fact that those who are less favoured by it tend to react to the inequities, thereby creating paradoxes in the social system. For instance, although women are the least favored by the ancestral values, society depends on them not only as sources of income through the custom of marriage with cattle wealth but also as mothers who perform the educational role of inculcating ancestral values in their children at an early age. Yet women have no legitimate voice in the open channels of decisionmaking and can participate only through indirect influence on their sons and husbands. But because of the close association between mothers and children and the considerable influence wives have over their husbands, women are regarded as most influential in the affairs of men. Nevertheless, because of the inequities of polygyny, women are known for jealousies, divisiveness, and even disloyalty to clan ideals. Their influence, especially on the children, must therefore be curtailed.

The Dinka reconcile these conflicting realities by recognizing the love and affection for the mother as functions of the heart, while those feelings for the father are functions of the mind. . . .

As a result of these contradictions, the position of women among the Dinka is a complex one in which deprivations and inequities are compensated by devices that ensure a degree of conformity and stability, despite ambivalences.⁶⁰

57 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) at 193.

58 *Seeds of Redemption*, *supra* note 38.

59 Lienhardt, *supra* note 4 at 126.

60 *Human Rights in Africa*, *supra* note 4 at 273-74.

This is to state a problem rather than to resolve it. The status and treatment of women in Dinka tradition are closely bound up with Dinka cosmology, with its emphasis on procreation and veneration of male ancestors, a pastoral economy, its practices and attitudes to cattle, and many other matters. This raises a host of complex questions about how far Dinkas living in rural communities could retain their strong sense of cultural identity over time if they were to adjust to the standards of the outside world in respect of monogamy, the education of women, participation in decision making, non-discrimination, and other requirements of even minimalist versions of feminism. How far can the specifics of traditional Dinka values and beliefs justify a margin of appreciation that modifies abstract principles of women's equality? And what of the situation of Dinka women who live outside traditional society? Francis Deng does not attempt to address these issues in a sustained way. In the light of the tragic history of the Dinka over the last thirty years, they may not even be the most pressing questions.

Conclusion

Francis Deng has been a prolific writer on a wide range of topics, and he has addressed a variety of audiences. For present purposes, his most relevant writings can be treated as falling into three groups: First, there is an extensive collection of books and essays that describe, evoke, and explain Dinka culture, with tradition and modernization as a central theme. Most of these writings are scholarly works addressed to mainly Western audiences and published in the 1970s. A second, more varied, group deals with political and social relations between the North and South Sudan. In some instances, the explicit aim is to encourage a more sympathetic understanding of Southern culture and aspirations by Northern Muslims. In these, identity is a central theme. For over thirty years, Deng has supported a unified but pluralistic Sudan in which a strong national identity is forged through an open recognition of cultural diversity.⁶¹ Third, since about 1990 and partly influenced by Abdullahi An-Na'im, he has addressed issues concerning the compatibility of human rights with African traditions. In this context he has adopted an explicitly cross-cultural perspective. These writings are less extensive than the other groups and are addressed to rather varied audiences.⁶²

61 Francis Deng has sometimes been criticized for being too conciliatory and too optimistic. He reports how at a dinner party Nelson Mandela was criticized for being too indulgent, but Francis defended him, arguing that everyone has a good side and a bad side, and in relations with others one should build on their good side. He is well known for the diplomatic way in which he has dealt with heads of government and other political leaders when confronting them about their responsibilities for displaced persons. And he has over the years sought rapprochement with the Northern Sudanese leaders. He claims that this represents the Dinka way. *Politics of Memory*, *supra* note 4 at 185-86.

62 The main ones are *Human Rights in Africa* (academic, mainly addressed to the human rights

In the present context, the first group of writings is probably the most significant. Francis Deng's account of Dinka traditions may now seem somewhat idealized, even outdated, but he has provided a rich body of authentic material that is open to interpretation from other perspectives. Above all, he has given Dinka tradition and values a voice in the outside world. He has also illustrated in a vivid and specific way the more general theme of the complex relationship between long-established traditional values and modern conceptions of human rights.

II. ABDULLAHI AHMED AN-NA'IM⁶³

I am arguing for secularism, pluralism, constitutionalism and human rights from an Islamic perspective because I believe this approach to these principles and institutions is indispensable for protecting the freedom for each and every person to affirm, challenge or transform his or her cultural or religious identity.⁶⁴

To seek secular answers is simply to abandon the field to fundamentalists, who will succeed in carrying the vast majority of the population with them by citing religious authority for their policies and theories. Intelligent and enlightened

community in the United States), "Cow," and *SDG* (articles addressed to fellow Southerners), all *supra* note 4.

- 63 This section is based mainly on the following works by Abdullahi Ahmed An-Na'im: *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, N.Y.: Syracuse University Press, 1990) [*Islamic Reformation*]; *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) [*Quest for Consensus*]; "Human Rights in the Arab World: A Regional Perspective" (2001) 23:3 *Human Rights Quarterly* 701; *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002) [*Islamic Family Law*]; "Promises We Should All Keep in Common Cause" in Susan Moller Okin *et al.*, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 59 ["Promises"]; "The Future of Shari'a Project" [unpublished manuscript, 2004]; *The Future of Shari'a* (2005) at c. 1. [unpublished manuscript, cited with permission of the author] [*Future of Shari'a*]; Abdullahi Ahmed An-Na'im, ed., *Human Rights Under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003); and An-Na'im & Deng, *Human Rights in Africa*, *supra* note 4.

See also: Tori Lindholm & Kari Vogt, eds., *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (Oslo: Nordic Human Rights Publications, 1993) (Proceedings of a symposium held in Oslo 14-15 Feb. 1992, which focused on An-Na'im) [Lindholm & Vogt]; Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" (1994) 15:2 *Michigan J. of International Law* 307 [Mayer, "Universal Versus Islamic Human Rights"]; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 3d ed. (Boulder: Westview Press, 1990) [Mayer, *Islam and Human Rights*]; and Mahmoud Mohamed Taha, *The Second Message of Islam*, trans. & intro. by Abdullahi Ahmed An-Na'im (Syracuse, N.Y.: Syracuse University Press, 1987) [Taha]; Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) [Baderin] contains a mildly critical account of An-Na'im's treatment of international law.

- 64 An-Na'im, *Future of Shari'a*, *ibid.* at c. 1, para. 15.

Muslims are therefore best advised to remain within the religious framework and endeavour to achieve the reforms that would make Islam a viable modern ideology.⁶⁵

On 18 January 1985, Mahmoud Mohamed Taha was publicly executed in Khartoum on the grounds that he was an apostate and a heretic. Taha was the leader of a small radical modernizing movement in the Sudan, known as the Republican Brothers (or Republicans), founded in the late 1940s during the struggle for independence. For the previous two years the Republicans had been peacefully protesting against human rights violations that resulted from President Ja'far Nimeiry's programme of Islamicization that had begun in 1983. Their protest had included bringing several unsuccessful suits in the courts alleging that the introduction of a traditionalist version of Islamic law (Shari'a) was unconstitutional because it involved discrimination against women and non-Muslims.⁶⁶ Taha and some of his followers had been interned in 1983. They were released about eighteen months later, but Taha and some others were re-arrested in January 1985.

Apostasy was not then an offence under Sudanese law. Taha was originally charged and tried for offences under the *Penal Code* and the *State Security Act*. However, the appellate court, without any serious trial of the issue, or even a pretence of due process, convicted Taha of heresy and apostasy and sentenced him to death. The president swiftly confirmed the sentence, which was immediately carried out. This blatantly political and unlawful killing shocked many ordinary Sudanese, Northerners as well as Southerners, who were opposed to Islamicization. It was without precedent and quite contrary to Sudanese ways of handling political disagreements. Instead of representing a great victory for Islam, as Nimeiry proclaimed, Taha's execution strengthened the opposition to his regime, which was overthrown in a peaceful revolution in April 1985, only three months after Taha's death. Human rights activists proclaimed Taha to be a martyr and established Arab Human Rights Day to commemorate the anniversary of his death.⁶⁷

Among Taha's followers was Dr. Abdullahi An-Na'im, who at the time was an associate professor of law at the University of Khartoum. An-Na'im had joined the Republicans in the late 1960s when he was still a law student. After graduating from Khartoum in 1970, he went to Britain for postgraduate work, first in Cambridge and then in Edinburgh, where he obtained a doctorate in

65 An-Na'im, cited by John O. Voll, "Foreword" to An-Na'im, *Islamic Reformation*, *ibid.* [Voll].

66 Mayer "Universal Versus Islamic Human Rights," *supra* note 63 at 361.

67 *Ibid.* at 387.

criminology in 1976. He returned to Sudan to teach and practice law and to resume his association with the Republicans. Mahmoud Mohamed Taha had been banned from public activity since the early 1970s.⁶⁸ An-Na'im was one of his most loyal followers and soon became a leading spokesman for his ideas. In 1983, with Taha and others, he was interned without charge for about eighteen months. They were released in late 1984, but then Taha was arrested again, tried, and executed. Having unsuccessfully campaigned for Taha's reprieve, An-Na'im left the Sudan in 1985, resolved to promote and develop the ideas of his master. He has remained in exile ever since (except recently for occasional visits), first holding some short-term appointments, including as executive director of Africa Watch from 1993 to 1995. Since 1995, he has been a professor of law at Emory University in Atlanta. An-Na'im is now well known, not only as Taha's most prominent follower, but also as a leading Islamic jurist in his own right.

By 2005, An-Na'im had published several books and nearly fifty articles. He has written about public law, family law, international law, and many other particular topics. Here I shall concentrate on his writings about human rights in relation to Islamic law. In order to understand these, it is first necessary to outline Taha's main ideas, as expounded in his most important book, which was first published in Arabic in 1967 and was translated into English in 1987 by An-Na'im as *The Second Message of Islam*.⁶⁹

Mahmoud Mohamed Taha was considered a revolutionary in many quarters of the Islamic world. He had been declared an apostate by Al-Azhar as early as 1973, and he was regularly attacked by Muslim Brothers and other "fundamentalists." His main concern was to adapt Islamic law to modern conditions and to interpret it in a way that would be compatible with human rights as expressed in basic international documents, such as the *Universal Declaration of Human Rights*. Taha's key idea was methodological – what he called "the evolution of Islamic legislation."⁷⁰ He advanced a method of interpretation that would allow the abrogation of some texts of both the *Qu'ran* and the *Traditions of the Prophet* (the Sunna) in favour of other texts in the same sources. The texts should be read in their historical context in order to distinguish between fundamental principles and transitional provisions, which were relative to time and place, and which were never meant to be binding for all time. This method opens the door to the idea of continuous reform of the Shari'a to suit changing conditions, even in respect of doctrines based directly on the holy *Qu'ran*, which many Muslims consider to be immutable.

68 Voll, *supra* note 65.

69 Taha, *supra* note 63.

70 *Islamic Reformation*, *supra* note 63 at 34-35.

The historical argument pointed out that Islamic law was only systematized during the periods of the Medina and Ummayed states some 150-250 years after the death of the Prophet (in the seventh century).⁷¹ In this view, the early generations of Muslims, who are considered to have been among the most holy, were not the subject of the Shari'a in the form that it came to be accepted by most subsequent believers. Moreover, much of the early medieval Shari'a itself was legislation responsive to its immediate social, economic, and political context and could now be discarded as out-dated. Thus Taha (and his followers) treat Shari'a as a medieval construct and advance an Islamic alternative to Shari'a. Only by using this radical method of interpretation would it be possible to bring Islamic law into line with modern needs, conditions, and standards. Furthermore, significant aspects of the received Shari'a could be shown to be incompatible both with human rights and relevant passages in the *Qu'ran*. By far the most important clashes concern the Shari'a's differential treatment of "the other" – slaves, women, and non-Muslims. Taha argued for a strong egalitarian principle of equal treatment of all human beings irrespective of race, gender, nationality, or status.⁷²

An-Na'im's intellectual development is marked by several stages, but he has remained faithful to the basic methodology and conclusions of his teacher. He first promulgated Taha's own ideas in both Arabic and English. His first major book, *Toward an Islamic Reformation* (1990),⁷³ built explicitly on Taha's ideas, but developed them in more detail in respect of political structure, criminal justice, civil liberties, human rights, and international law. Written in a clear and concise style, it provides "the intellectual foundations for a total reinterpretation of the nature and meaning of Islamic public law."⁷⁴ His method is to contrast the Medina version of the Shari'a with international human rights standards and a liberal human rights philosophy.

An-Na'im is a strong supporter of the international regime of human rights. His approach "is based on the belief that, despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a common 'culture' of universal human rights."⁷⁵ Human rights are not universal merely because they are posited in international law.

71 *Ibid.* at 18-19.

72 An-Na'im, *Islamic Reformation*, *supra* note 63. Chapter 7, entitled "Shari'a and Basic Human Rights," is an excellent statement of a general position that is fleshed out in more detail in many subsequent writings.

73 *Islamic Reformation*, *ibid.*

74 Voll, *supra* note 65 at ix.

75 *Human Rights in Africa*, *supra* note 63 at 21.

“Rather, the rights are recognized by the documents because they *are* universal human rights.”⁷⁶ He sums up his basic theory as follows:

The criteria I would adopt for identifying universal human rights is that they are rights to which human beings are entitled by virtue of being human. In other words, universal standards of human rights are, by definition, appreciated by a wide variety of cultural traditions because they pertain to the inherent dignity and well-being of every human being, regardless of race, gender, language, or religion. It follows that the practical test by which these rights should be identified is whether the right in question is claimed by the particular cultural tradition for its own members. Applying the principle of reciprocity among all human beings rather than just among the members of a particular group, I would argue that universal human rights are those which a cultural tradition would claim for its own members and must therefore concede to members of other traditions if it is to expect reciprocal treatment from those others.

In content and substance, I submit that universal human rights are based on two primary forces that motivate all human behavior, the will to live and the will to be free.⁷⁷ Through the will to live, human beings have always striven to secure their food, shelter, health, and all other means for the preservation of life. . . . At one level, the will to be free overlaps with the will to live, in that it is the will to be free from physical constraints and to be secure in food, shelter, health, and other necessities of a good life. At another level, the will to be free exceeds the will to live in that it is the driving force behind the pursuit of spiritual, moral, and artistic well-being and excellence.⁷⁸

An-Na'im's method is to contrast the Medina version of the Shari'a (and the Mecca texts that were intended to be universal) with “enlightened” international standards and his liberal theory of human rights. He is critical of the tendency for some to play down or be evasive about conflicts between the historical Shari'a and international human rights norms. For example,

76 An-Na'im, *Islamic Reformation*, *supra* note 63 at 165-66 [emphasis in original].

77 A footnote at this point reads: “Here I am adopting the analysis of *Ustadh* Mahmoud Mohamed Taha, *Second Message of Islam*. . . .” *Ibid.* It is significant that An-Na'im makes hardly any reference to Western political theorists.

78 *Ibid.* at 164 [footnote omitted]. An-Na'im's interpretation of human rights is recognizable as being within the mainstream of democratic or humanistic liberalism. He appeals to the principle of reciprocity (Kant's Golden Rule), he emphasizes dignity and well-being as values (an echo of Lasswell via Francis Deng?), and he talks of achieving an “overlapping consensus” (Rawls' term) between cultures. He is aware of affinities with Kant, Rawls, and Habermas, but claims that he reached his conclusions by a different route or at least that he was not consciously influenced by them. Interview with the author, 16 August 2003 [Interview]. Rawls, in a solitary discussion of An-Na'im in a footnote, says of his discussion of constitutionalism, “This is a perfect example of overlapping consensus.” John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999) at 590-91. As discussed below, An-Na'im has recently emphasized the role of the idea of “public reason” in Islamic debates about public policy and reform.

some governments in Muslim countries sign up to international human rights conventions, but do not abide by them; others enter vague reservations. Islamic declarations of human rights are silent on key issues relating to the position of women and non-Muslims, and religious freedom.⁷⁹ An-Na'im criticizes the selective nature of many reforms of family law in Muslim countries.⁸⁰ He also criticizes Dr. Hassan el Turabi, the leader of the Islamic National Front in Sudan, in that he was vague and evasive on the status and role of women though claiming that Islam treats all believers equally.⁸¹ Only a few Muslim commentators on human rights are more candid. For example, Sultanhussein Tabandeh indicates clear inconsistencies between the Shari'a and the *Universal Declaration of Human Rights* in arguing that Muslims are not bound by the latter.⁸² Conversely, An-Na'im argues that Shari'a needs to be radically reformed because it is inconsistent with human rights standards, especially in respect of discrimination against women and non-Muslims,⁸³ freedom of religion, and slavery.⁸⁴

79 For forceful critiques of some Islamic declarations, see Mayer, *Islam and Human Rights*, *supra* note 63; and Bassam Tibi, "Islamic Law/Shari'a and Human Rights" in Lindholm & Vogt, *supra* note 63, 61 at 80-81. Referring to a series of declarations of the late 1980s and early 1990s (by Al-Azhar, the London-based Islamic Council, and others), and mentioning specifically the treatment of women and religious minorities, Tibi states: "The Islamization programs supported by these self-professed and alleged exponents of specifically Islamic human rights schemes repudiate rather than embrace the standards of international human rights law" (at 88-89). For a detailed analysis of the 1990 *Cairo Declaration on Human Rights*, see Mayer, "Universal Versus Islamic Human Rights," *supra* note 63 at 327-35.

80 See especially *Islamic Family Law*, *supra* note 63.

81 *Islamic Reformation*, *supra* note 63 at 39-41.

82 Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights*, trans. by Charles Goulding (London: Goulding, 1970) at 171-72. See also Ann Elizabeth Mayer "A Critique of An-Na'im's Assessment of Islamic Criminal Justice" in Lindholm & Vogt, *supra* note 63, 36 at 36-37: "An-Na'im is committed to the proposition that public law in Muslim countries should be based on Islam – unlike many other Muslims who believe that Islamic law should be relegated to the sphere of personal status and private law matters such as contracts, a belief that has dictated the role Islamic law has played in most actual legal systems in the twentieth century."

83 An-Na'im is unequivocal about his own position on the treatment of women and non-Muslims. In a response to Susan Okin, he stated:

I am not suggesting, of course, that either minority or majority should be allowed to practice gender discrimination, or violate some other human right, because they believe their culture mandates it. In particular, I emphasize that all women's rights advocates must continue to scrutinize and criticize gender discrimination anywhere in the world, and not only in Western societies. But this objective must be pursued in ways that foster the protection of all human rights, and with sensitivity and respect for the identity and dignity of all human beings everywhere.

"Promises," *supra* note 63 at 61. On religious toleration, see *Islamic Reformation*, *supra* note 63 at 175-77.

84 An-Na'im's treatment of slavery is a good example of his approach. During the formative stages of Shari'a, a person's status was normally determined by their religion. At that time women were not

His general conclusion is summarized as follows:

Unless the basis of modern Islamic law is shifted away from those texts of the Qur'an and Sunna of the Medina stage, which constituted the foundation of the construction of Shari'a, there is no way of avoiding drastic and serious violation of universal standards of human rights. There is no way to abolish slavery as a legal institution and no way to eliminate all forms and shades of discrimination against women and non-Muslims as long as we remain bound by the framework of Shari'a. . . . The traditional techniques of reform within the framework of Shari'a are inadequate for achieving the *necessary* degree of reform. To achieve that degree of reform, we must be able to set aside clear and definite texts of the Qur'an and Sunna of the Medina stage as having served their transitional purpose and implement those texts of the Meccan stage which were previously inappropriate for practical application but are now the only way to proceed. . . . In view of the vital need for peaceful co-existence in today's global human society, Muslims should emphasize the eternal message of universal solidarity of the Qur'an and of the Mecca period rather than the exclusive Muslim solidarity of the transitional Medina message.⁸⁵

For much of the twentieth century, debates and struggles about interpretation of Islamic theology and jurisprudence have tended to be framed either as debates between schools or as disagreements between fundamentalists and secularists. An-Na'im's aim is to establish an Islamic foundation for "the benefits of secularism," among which he includes religious toleration, equality between Muslims and non-Muslims and men and women, constitutional democracy, and equal status for Muslim and non-Muslim states.⁸⁶ Some Islamic reformers believe that such "benefits" can only be achieved through a secular democratic system, which takes priority over religious doctrine.⁸⁷ An-Na'im, on the contrary, believes that liberal democratic ideas will never

regarded as full persons, and slavery was an established institution in many places. The medieval Shari'a reflected these practices: "The most that Shari'a could do, and did in fact do, in that historical context was to modify and lighten the harsh consequences of slavery and discrimination on grounds of religion or gender. . . . Shari'a as a practical legal system could not have disregarded the conception of human rights prevailing at the time it purported to apply in the seventh century, modern Islamic law cannot disregard the present conception of human rights if it is to be applied today." *Islamic Reformation*, *ibid.* at 170. Recently, An-Na'im has emphasized a continuing role for a re-interpreted Shari'a: "Thus Shari'a does indeed have a most important future in Islamic societies and communities for its foundational role in the socialization of children, sanctification of social institutions and relationships, and the shaping and development of those fundamental values that can be translated into general legislation and public policy through democratic political process. But it does not have a future as a normative system to be enacted and enforced as such as public law and public policy." *Future of Shari'a*, *supra* note 63 at c. 1.

85 An-Na'im, *Islamic Reformation*, *ibid.* at 179-80 [emphasis in original].

86 *Ibid.* at 8; cf. "Promises," *supra* note 63 at 107: "I am proposing an understanding of Islam which will achieve the benefits of secularism with an Islamic rationale."

87 For example, "Promises," *ibid.* at 73.

be accepted by Muslims unless they are persuaded that they are backed by Islamic premises. He therefore sets out to show that Islam, as interpreted by Mohamed Taha, does support the same values.⁸⁸

For An-Na'im, the different schools of Islam are themselves a product of the Middle Ages (although they are probably here to stay) and few devout Muslims will be persuaded by secular arguments. He writes: "To seek secular answers is simply to abandon the field to the fundamentalists, who will succeed in carrying the vast majority of the population with them by citing religious authority for their policies and theories. Intelligent and enlightened Muslims are therefore best advised to remain within the religious framework and endeavour to achieve the reforms that would make Islam a viable modern ideology."⁸⁹

This passage provides a link to the next stage of An-Na'im's intellectual development. In considering the debate about universalism and cultural relativism in respect of human rights, he began to focus on the problems of persuasion and effectiveness in the context of cultural diversity and pluralism of beliefs. While maintaining a universalist stance in respect of basic values, he concluded that cultural legitimacy of human rights ideals could only be achieved by internal dialogue within a culture rather than by external pressure. Dialogue between cultures is also important in order to achieve an overlapping consensus on human rights and the necessary conditions for peaceful co-existence, but acceptance of the legitimacy of human rights standards requires internal cultural support.

In the next stage of his work, An-Na'im placed more emphasis on what he called "cultural legitimization."⁹⁰ He argues that the legitimacy of human rights standards will only be plausible to a given constituency if members believe that they are sanctioned by their own cultural traditions. Since people understand things through their own cultural lenses, such legitimacy can mainly be attained by dialogue and struggle *internal* to that culture. As he put it recently:

While this approach raises the possibility of local culture being invoked as the basis for violating or rejecting the existence of a human right, I am unable to see an alternative to a basic methodology of cultural legitimacy which can be constantly improved through practice and over time. For example, culture may be used to justify

88 "Taha's methodology, however, would not abolish *hudud* as a matter of Islamic law." *Ibid.* at 108.

89 An-Na'im, quoted by Voll, *supra* note 65 at xii.

90 See especially An-Na'im & Deng, *Human Rights in Africa*, *supra* note 63; An-Na'im, "Promises," *supra* note 63.

discrimination against women or the use of corporal punishment against children as being in their own 'best interest'. Rejecting the cultural argument presented in support of such views is unlikely to work in practice. Indeed, women themselves are likely to support their own repression if they believe it to be 'the will of God' or the immutable tradition of their communities. In contrast, an approach that acknowledges the underlying value of respecting the will of God or local tradition, and then continues to question what that means under present circumstances is more likely to be persuasive.⁹¹

Outsiders purporting to advance an interpretation of a culture (as happened in the Salman Rushdie affair) will nearly always be viewed with suspicion.⁹² An-Na'im is critical both of universalist positions based solely on Western or liberal perspectives and of militant cultural relativist positions. He himself explicitly defends a weak form of cultural relativism partly for tactical reasons, but also because belief in human rights can only be internalized when reconciled with other aspects of one's system of beliefs.⁹³ Cross-cultural dialogue has a role not only in identifying shared values but also in building a richer new consensus, provided that the dialogue is genuinely reciprocal.⁹⁴ Both internal and external dialogue can be constructive and dynamic; they do not merely identify existing similarities and differences, but they can also generate new ideas and enriched understandings:

91 *Future of Shari'a*, *supra* note 63 at 18. The passage continues:

As a Muslim, if I am presented with a choice between Islam and human rights, I will always choose Islam. But if presented with an argument that there is in fact consistency between my religious beliefs and human rights, I will gladly accept human rights as an expression of religious values and not as an alternative to them. As a Muslim advocate of human rights, I must therefore continue to seek ways of explaining and supporting the claim that these rights are consistent with Islam, indeed desirable from an Islamic perspective, though they may be inconsistent with certain human interpretations of Shari'a.

Ibid. at 18.

- 92 Nearly all Western discussions ignored scholarly *internal* Islamic debate on the Rushdie affair. See e.g. M.M. Ahsan & A.R. Kidwai, eds., *Sacrilege versus Civility: Muslim Perspectives on The Satanic Verses Affair*, rev. ed. (Leicester: The Islamic Foundation, 1993).
- 93 Discussing a comment by Mohammed Arkoun, "The Concept of Islamic Reformation" in Lindholm & Vogt, *supra* note 63, 11 at 11. An-Na'im replies: "[T]here is an important tactical difference between our approaches. Whereas Arkoun wishes to problematize the text of the Qu'ran itself immediately, I seek to explore the possibilities of transforming the understanding of that text, as it is known by Moslems today." His constant theme is "the practicalities" of achieving consensus. "Toward an Islamic Reformation" in Lindholm & Vogt, *ibid.*, 97 at 101.
- 94 An-Na'im's conception of reciprocal dialogue seems quite analogous to Jürgen Habermas's "ideal speech situation," but he disclaimed firsthand knowledge of Habermas's work at the time he developed these ideas. Interview, *supra* note 78. However, more recently he has cited Habermas in relation to his unpublished manuscript concerning his "The Future of Shari'a Project," *supra* note 63.

This bonding through similarities does not mean, in my view, that international peace and cooperation are not possible without total cultural unity. It does mean that they are more easily achieved if there is a certain minimum cultural consensus on goals and methods. As applied to cooperation in the protection and promotion of human rights, this view means that developing cross-cultural consensus in support of treaties and compacts is desirable. Cultural diversity, however, is unavoidable as the product of significant past and present economic, social and environmental differences. It is also desirable as the expression of the right to self-determination and as the manifestation of distinctive self-identity.⁹⁵

An-Na'im recognizes that "culture" is neither monolithic nor static and typically provides space for internal dialogue, as is well illustrated by the rich tradition of debate within Islamic jurisprudence. He recognizes that the possibilities of genuine dialogue can be curtailed or suppressed if a powerful group claims to have a monopoly of authoritative or correct interpretation.⁹⁶ An-Na'im illustrates his conception of internal dialogue by reference to the controversial topic of Islamic punishments.⁹⁷ Many Islamic countries, including Saudi Arabia and Iran, are signatories to the *International Covenant on Civil and Political Rights (ICCPR)*.⁹⁸ Article 7 of the ICCPR prohibits "torture or cruel, inhuman, or degrading treatment or punishment." Under Islamic law, serious criminal offences are classified as *hudud* and carry with them mandatory punishments that include amputation of the right hand for theft and whipping, stoning to death, and exact retribution (eye for an eye) for specific offences. These offences are defined and punished by the express terms of the *Qu'ran* and/or Sunna. Taking the example of theft, the question arises: can amputation of the right hand be treated as cruel, inhuman, or degrading *as a matter of Islamic law*?

An-Na'im gives a qualified answer to this question. First, he distinguishes sharply between the actual practices of particular regimes and the theoretical, or theological, interpretation of the principles governing

95 *Human Rights, supra* note 63 at 27. The passage continues: "Nevertheless, I believe that a sufficient degree of cultural consensus regarding the goals and methods of cooperation in the protection and promotion of human rights can be achieved through internal cultural discourse and cross-cultural dialogue. Internal discourse relates to the struggle to establish enlightened perceptions and interpretations of cultural values and norms. Cross-cultural dialogue should be aimed at broadening and deepening international (or rather intercultural) consensus."

96 "The claim may of course be made that a certain policy or law is Shari'a, but that is always false because it is nothing more than an attempt to invoke the sanctity of Islam for the political will of the ruling elite." *Future of Shari'a, supra* note 63.

97 See especially *Islamic Reformation, supra* note 63 at 111-15, 123-24; *Quest for Consensus, supra* note 63 at 32-37; and "Promises," *supra* note 63 at 108-13. See also Baderin, *supra* note 63 at 78-85.

98 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, (entered into force 23 March 1976).

punishment. Thus he argues that enforcement of *hudud* in Saudi Arabia, Sudan, by the Taliban in Afghanistan, or recently in Northern Nigeria is all illegitimate from an Islamic point of view.⁹⁹ Second, he points to some of the interpretive resources available to a sincere liberal Muslim who privately is repelled or uneasy about these provisions: "Islamic law requires the state to fulfil its obligation to secure social and economic justice to ensure decent standards of living for all its citizens *before* it can enforce these punishments. The law also provides for very narrow definitions of these offenses, makes an extensive range of defences against the charge available to the accused person, and requires strict standards of proof. Moreover, Islamic law demands total fairness and equality in law enforcement."¹⁰⁰

An-Na'im personally believes that these prerequisites are extremely difficult to satisfy in practice "and are certainly unlikely to materialize in any Muslim country in the foreseeable future."¹⁰¹ Nevertheless, he concludes, "[n]either internal Islamic reinterpretation nor cross-cultural dialogue is likely to lead to the total abolition of this punishment as a matter of Islamic law."¹⁰² Given the political will, much can be done to restrict the scope of *hudud* and its implementation. A strong case can be made for not applying religious sanctions to non-Muslims, and in some predominantly Muslim countries Shari'a has been displaced by secular law. But outright abolition of *hudud* punishments is not likely. The basic idea is embodied in texts that express the will of God, backed by internally coherent theological rationales.¹⁰³ In this kind of case, "the internal struggle cannot and should not be settled by outsiders";¹⁰⁴ what counts as cruel, inhuman, or degrading in a given society must be settled by the standards of that society.

In the process, as in his treatment of *hudud*, An-Na'im appears to concede that there are points at which human rights and Islamic principles may conflict and that here Islamic principle "trumps" secular values. However, he emphasizes that the range and extent of application would be severely constricted. Again, his concern seems to be the practicability of

99 Personal communication to the author, 24 August 2005. In his view, *hudud* should not be enforced by the state at all, unless it were adopted as part of the criminal code through the political process, without reference to religious beliefs and subject to constitutional safeguards. Even then An-Na'im would take a very narrow view of its applicability. *Future of Shari'a*, *supra* note 63 at c. 1.

100 *Human Rights*, *supra* note 63 at 34.

101 *Ibid.*

102 *Ibid.* at 36.

103 For example, a *hudud* punishment may be considered lenient because it is not carried over to the next life. *Ibid.* at 35.

104 *Ibid.*

reaching consensus through persuasion: "I agree with Ann Mayer that many Muslims today would probably prefer to continue within the Western-style criminal justice systems introduced in these countries during the colonial period. However, as increasingly stronger Islamist movements are demanding the enforcement of *hudud*, Muslims in general may find it difficult to maintain the status quo without appearing to be anti-Islamic. In this light, I believe that there is a growing need for thinking about Islamic criminal justice."¹⁰⁵

This is the considered view of a thoughtful scholar who is regarded as an extreme liberal by many Muslims.¹⁰⁶ It sets out with discomfiting clarity his view of the possibilities and limitations of building a worldwide consensus by dialogue. An-Na'im is not a strong cultural relativist. He believes that most of the values embodied in the current human rights regime can be reconciled with interpretations of Islam that would be widely, if not universally acceptable; too much attention, in his view, is paid to headline-catching examples, such as female circumcision, many of which are contested within Islam.

A Third Stage¹⁰⁷

An-Na'im has always been an activist as well as a scholar. He was involved in Taha's Islamic Reform Movement from the late 1960s and, a quarter-century later, became executive director of Human Rights Watch

105 "Promises," *supra* note 63 at 109. An-Na'im distinguishes (*ibid.* at 107) between his own personal beliefs and arguments that are likely to persuade fellow Muslims: "If the reform of Islamic law suggested in [*Islamic Reformation, supra* note 63] is not achieved through one methodology or another, then my personal choice as a Muslim would be to live in a secular state rather than one ruled in accordance with Shari'a. But I seriously doubt if this would be the choice of the majority of Muslims today." For a reflective and generally sympathetic critique of An-Na'im's approach to criminal justice, see Ann Elizabeth Mayer, "A Critique of An-Na'im's Assessment of Islamic Criminal Justice" in Lindholm & Vogt, *supra* note 63, 37.

106 Despite his vulnerability to marginalization or dismissal as the follower of a heretic, An-Na'im seems to attract large audiences and his writings have been widely circulated in (parts of) the Middle East. He is, of course, not alone as a liberal reformer, but he is unusual, first as a jurist writing in English and, second, as a reformer who insists on basing his arguments on Islamic ideas.

107 During the 1990s, An-Na'im developed his cross-cultural approach to legitimation of human rights (partly in association with Francis Deng). Subsequently, his main activities have been concerned with detailed, often practical applications of his general approach, especially modernization of Shari'a. A central concern is human rights advocacy. He sees the relationship between state and religion as a crucial issue. At the time of writing his latest initiative is "The Future of Shari'a Project," which is "particularly concerned with the constitutional and legal dimensions of the post-colonial experiences of Islamic societies, especially issues of the relationship among Islam, State and Society. . . . The fundamental concern of this project is how to ensure the institutional separation of Shari'a and the state, despite the organic and unavoidable connection between Islam and politics." "The Future of Shari'a Project," *supra* note 63 [emphasis in the original].

(Africa) in Washington, D.C. He has always emphasized the importance of implementation and enforcement of human rights. He has been active in many committees and non-governmental organizations concerned with human rights in Africa and the Middle East. He has been involved in projects to promote human rights values at the grassroots through linking to specific local concerns and promoting cross-cultural dialogue about relevant issues such as problems of women's access to land or reform of family law. He has been especially interested in ways of lessening "human rights dependency," professionalizing local non-governmental organizations (NGOs), and encouraging their withdrawal from dependence on foreign funding and dissociation from being perceived as agents of some "Western agenda." All of such "advocacy for social change" is based on his two central ideas: a liberal modernist interpretation of Islam, and the need to strengthen the cultural legitimacy and effectiveness of international human rights standards.

An-Na'im's current project is entitled "The Future of Shari'a." It is mainly concerned with relations between Islam, state, and society. The objective "is to ensure the institutional separation of Islam and the state, despite the organic and unavoidable connection between Islam and politics." It challenges "the dangerous illusion of an Islamic state that can enforce Shari'a principles through the coercive power of the state."¹⁰⁸ This work-in-progress develops a number of themes: that human agency has been central to the development of Shari'a and is necessary for its continuing interpretation and for motivation for social and cultural change; that whatever the state or other authority tries to enforce in the name of Shari'a is necessarily secular; and that the separation of Islam and the state does not involve relegation of Islam to the private domain – for it still has a role in the formation of public policy and legislation, but this role needs to be performed through public reason rather than coercion.¹⁰⁹

A significant development in An-Na'im's thinking concerns "secularism." If, as is widely assumed, "secularism" implies hostility to religion or its decline or exclusion of all considerations drawn from belief in God, this is naturally opposed to an Islamic point of view. But, more narrowly interpreted as a principle for mediating between different religious beliefs through separation of religion and state, it is necessary for ensuring a stable basis for co-existence

108 *Future of Shari'a*, *supra* note 63 at c. 1. See also *ibid.*: "The categorical repudiation of the dangerous illusion of an Islamic state to coercively enforce Shari'a principles is necessary for the practical ability of Muslims and other citizens to live in accordance with their religious and other beliefs."

109 "[B]y public reason I mean that the rationale and purpose of public policy or legislation must be based on the sort of reasoning that the generality of citizens can accept or reject, and make counter-proposals through public debate without being open to charges of disbelief, apostasy or blasphemy." *Ibid.* at 1.

and co-operation in conditions of pluralism of beliefs (now almost universal) and for facilitating “the unity of diverse communities in one political community.”¹¹⁰ In this narrow sense “secularism” is an important part of An-Na’im’s political theory.

Conclusion

An Na’im’s views are, not surprisingly, controversial in the Muslim world. In internal debates within Islam he is in danger of being dismissed as an extremist – as the disciple of Taha who was condemned as an apostate, and as an open subscriber to “Western values.” Clearly his overt challenges to a number of cherished beliefs may be felt to be shocking. However, his views are not quite as extreme as may appear at first sight. His account of history is close to that of many respected scholars. All Muslim countries have accepted the form of the nation state, most with “modern” constitutions. Most of these states are signatories to the bulk of human rights conventions, with surprisingly few reservations. Many of the reforms that An-Na’im advocates have been adopted in several, sometimes most, Muslim countries, but in a more piecemeal fashion than he suggests. His main contribution is to provide a coherent religious justification for reforms that have been, or might be, made in the name of “modernization” or “secularization.”

An-Na’im is controversial, but there is a danger that he should be perceived as the darling of Western liberals, a liberal Muslim who is importing “enlightened” ideas into Islam. But his message to non-Muslims is not so comfortable. First, participants in a debate need to be prepared to learn as well as to teach. There is much in the Islamic tradition from which Westerners can learn – for instance in relation to commercial morality.¹¹¹ Secondly, there is the problem of ignorance. Before rushing to judgment, non-Muslims need to try to understand the internal logic of views that may seem strange or abhorrent to them; they need to be aware of the ways in which such views are contested and debated within the culture of Islam; they should not exaggerate the gap between Islamic beliefs and the values embodied in international human rights norms at this stage in their history; and, above all, before labelling some practices as “barbaric,” they need to consider how some of their own practices appear to members of other cultures. They also need to be aware of the extent of the leeway for interpretation within traditions such as Islam, as is vividly illustrated by recent scholarship on law reform in Malaysia and other predominantly Muslim countries.¹¹²

110 *Ibid.*

111 See Khurshid Ahmed, “The Challenge of Global Capitalism: An Islamic Perspective” in John H. Dunning, ed., *Making Globalization Good* (Oxford: Oxford University Press, 2003) 181.

112 For example, Donald L. Horowitz, “The Qu’ran and the Common Law: Islamic Law Reform and

III. A REALIST AND MATERIALIST INTERPRETATION: YASH GHAI¹¹³

Yash Pal Ghai was born in Kenya in 1938. He is still a Kenyan citizen. He went to school in Nairobi and then studied law at Oxford and Harvard and was called to the English Bar. He started teaching law as a lecturer in Dar-es-Salaam in 1963, eventually becoming professor and dean, before leaving in 1971. Since then he has held academic posts at Yale, Warwick, and Hong Kong. In addition to numerous visiting appointments, he was research director of the International Legal Center in New York in 1972-1973 and a research fellow at Uppsala University from 1973 to 1978. He has written or edited nearly twenty books, mainly about public law and constitutionalism in Commonwealth countries.

the Theory of Legal Change" (1994) 42:2/3 *American J. of Comparative Law* 233/543. See also Norman Anderson's earlier classic work, *Law Reform in the Muslim World* (London: Athlone Press, 1976). On Islamic banking, see Muhammad Nejatullah Siddiqui, *Banking Without Interest*, rev. ed. (The Islamic Foundation, 1997); Ian Edge, ed., *Islamic Law and Legal Theory* (New York: New York University Press, Reference Collection, 1996); and, since 1991, the journal *Review of Islamic Economics*.

- 113 Yash Ghai's recent writings on human rights are only one part of his very extensive list of publications. (i) The biographical section draws on publicly available sources, personal knowledge, and Ghai's "Legal Radicalism, Professionalism and Social Action: Reflections on Teaching Law in Dar-es-Salaam" ["Legal Radicalism"] in Issa G. Shivji, ed., *The Limits of Legal Radicalism* (Dar-es-Salaam: University of Dar-es-Salaam, 1986) 26 [Shivji, *Limits of Legal Radicalism*]. (ii) The section on negotiating claims in multi-ethnic societies draws heavily on two of his publications: "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims" (2000) 21:4 *Cardozo Law Rev.* 1095 ["Universalism"]; and Yash Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000). (iii) The section on the Asian Values debate is based mainly on "Human Rights and Asian Values" (1998) 9:3 *Public Law Rev.* 168 ["Human Rights"]; "The Politics of Human Rights in Asia" in Geoffrey Wilson, ed., *Frontiers of Legal Scholarship* (Chichester: Wiley, 1995) 203 ["Politics of Human Rights"]; "Asian Perspectives on Human Rights" (1993) 23 *Hong Kong Law J.* 342 ["Asian Perspectives"]; "Rights, Duties and Responsibilities" in J. Caughelin, P. Lim & B. Mayer-Konig, eds., *Asian Values: Encounter with Diversity* (London: Curzon Press, 1998) 20 ["Rights, Duties"]; *Asian Human Rights Charter: A People's Charter* (Hong Kong: Asian Human Rights Commission, 1998); "Rights, Social Justice and Globalization in East Asia" ["Social Justice"] in Joanne R. Bauer & Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 241 [Bauer & Bell]. (iv) The section on the role of judges in implementing rights is mainly based on Yash Ghai & Jill Cottrell, eds., *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) [Ghai & Cottrell]. (v) Other writings are cited as they are mentioned. Ghai's views are further developed in two important papers that reached me too late for inclusion: "Redesigning the State for Right Development" [forthcoming] (arguing that the *UN Declaration on the Right to Development* provides a coherent structure for constitution-making and the design of institutions at a national level); and "A Journey Around Constitutions: Reflections on Contemporary Constitutions" (2005) 122:4 *South African Law J.* 804, reflecting on Ghai's experiences as a constitutional scholar and adviser.

Ghai is highly respected as a scholar, but he is even better known as a legal adviser to governments and agencies, especially in the South Pacific and East Africa. He has been highly influential on constitutional development in the South Pacific, serving as constitutional adviser in Papua New Guinea, Vanuatu, Fiji, Western Samoa, and the Solomon Islands, among others. He has also been involved in a variety of peacekeeping and troubleshooting activities in Bougainville, Sri Lanka, Afghanistan, East Timor, and Nepal. He has been prominent in debates about public law in Hong Kong and has recently served as a constitutional adviser in Iraq. Over the years he has received numerous honours, including election as a corresponding fellow of the British Academy in 2005.

From November 2000 to July 2004 he was full-time chair of the Constitution of Kenya Review Commission, on leave from Hong Kong. Despite enormous difficulties, the commission produced a draft constitution in December 2002, almost simultaneously with the ouster of President Moi and the ruling party, KANU (Kenya African National Union), in an election that was accepted by foreign observers as being generally "free and fair." Unfortunately, once in power the new leaders were less keen on reform than they had been when in opposition. At the time of writing no new constitution has been enacted.¹¹⁴

Ghai has unrivalled experience of constitution making in postcolonial states. Besides his unquestioned academic and practical expertise, he has succeeded in winning the trust of many rival political leaders of different persuasions, often in tense situations, not least because of the obvious sincerity of his commitment to opposing all forms of colonialism and racism. He has shown great courage in standing up to domineering heads of government, such as President Moi. His courage and negotiating skills are legendary.

Almost all of the constitutions that Yash Ghai has helped to design and introduce have included a bill of rights.¹¹⁵ They have generally fitted broadly liberal ideals of parliamentary democracy, judicial independence, and the rule of law. He has been an outspoken critic of governmental repression, especially

114 Ghai reflects on the constitutive process in Kenya in the two unpublished papers cited *ibid*.

115 The most influential model has been the *Nigerian Bill of Rights* (1959/1960), which in turn was heavily influenced by the *European Convention on Human Rights*. The 1960 Independence *Constitution of Nigeria* represented a change of attitude by the colonial office in London, which until then had been lukewarm about bills of rights. Thereafter, the Nigerian bill of rights became a model for many Commonwealth countries in the period of decolonization. The story is told in A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) at 862-73.

detention without trial and torture, but there is a discernible ambivalence in his attitude to human rights. For example, he was editor and principal draftsman of an important report by the Commonwealth Human Rights Initiative, entitled *Put Our World to Rights: Towards a Commonwealth Human Rights Policy*, published in 1991.¹¹⁶ Yet in 1987 he was co-editor (with Robin Luckham and Francis Snyder) of *The Political Economy of Law: A Third World Reader*, which presented a distinctly Marxian perspective and which contains no mention in the index of rights, human rights, or constitutional rights, except a few references to habeas corpus.¹¹⁷

After the “collapse of communism,” symbolized by the fall of the Berlin Wall, some former Marxist intellectuals adopted the discourse of human rights.¹¹⁸ However, Ghai’s ambivalence has deeper roots. Perhaps the key is to be found in his own account of his intellectual development.¹¹⁹ In a refreshingly frank memoir, he tells how he moved from orthodox legal positivism (Oxford and the English Bar), through a phase of liberal reformism (Harvard and the early years in Dar-es-Salaam) to accepting the basics of Marxist critiques of neo-colonialism and of Julius Nyerere’s African Socialism from about 1967. He acknowledges that his acceptance of Marxism was not wholehearted. He recognized the value of Marxian structural analysis of political economy, but this was tempered by three concerns: First, as an East African Asian he was especially sensitive to racist attitudes that he discerned among locals as well as expatriates: “What passed in general for radicalism in those days included a large amount of racism and xenophobia.”¹²⁰ Second, he had a “predilection for free debate,”¹²¹ which was beginning to be stifled by a local form of political correctness. And third, while his university colleagues were academically stimulating, most lacked any sense of the importance of legal technicality and practical sense. They taught their students to despise the law, but not how to use it:

My experience seemed to point to the problems when fidelity to the law weakens – the arrogance of power, the corruption of public life, the insecurity of the disadvantaged. I was not unaware, of course, of other purposes of the law which served the interests of the rich and the powerful. But the fact was that it did increasingly less and less

116 London: Commonwealth Human Rights Initiative.

117 Delhi: Oxford University Press.

118 For example, Issa G. Shivji, *The Concept of Human Rights in Africa* (London: Codesria, 1989).

119 This essay, revealingly entitled “Legal Radicalism, Professionalism and Social Action,” *supra* note 113, appears in a volume (Shivji, *Limits of Legal Radicalism*, *supra* note 113) commemorating the twenty-fifth anniversary of the Faculty of Law, University of Dar-es-Salaam.

120 “Legal Radicalism,” *ibid.* at 29-30.

121 *Ibid.*

so; a whole body of statutory law since TANU [the ruling party] came to power had begun to tip the scales the other way. I retained my ambivalence about the legal system, and was not attracted to the attitudes of many private practitioners I met (or the interests they served). At the same time I knew the evasion of the law or the dilution of its safeguards harmed many of the people the radical lawyers were championing.¹²²

Ghai's experiences in Dar-es-Salaam were formative in important respects. In nearly all of his work since then, three tensions are apparent: a strong commitment to certain basic values, tempered by a pragmatic willingness to settle for what is politically feasible in the circumstances; a genuine interest in theory, especially political economy, and a determination to be effective in the role of a good hard-nosed practical lawyer;¹²³ and a materialist, Marxian perspective on political economy sometimes in tension with a sincere belief in liberal values embodied in the rule of law, an independent judiciary, and human rights. For the last thirty years he has also had to balance the demands of teaching, research, and writing with practical involvement in high-level decision making in a continually expanding range of countries. As a consultant he has also had to reconcile his belief in the importance of local context – historical, political, and economic – with a general approach to constitutionalism and constitution making. He is a rare example of a foreign consultant who genuinely rejects the idea that “one size fits all.”

In the early years of his career, Ghai wrote about many topics mainly from a public law perspective. He joined in East African debates about the arguments for and against bills of rights¹²⁴ and he addressed particular topics, such as habeas corpus, racial discrimination, and the position of ethnic minorities.¹²⁵

122 *Ibid.* at 27.

123 *Ibid.* at 31.

124 Y.P. Ghai & J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) at c. XI, XIII [Ghai & McAuslan]. At Independence, Kenya opted for a weak bill of rights, while Tanganyika (later Tanzania) decided against one at that stage of development and nation building. See Julius Nyerere, *Freedom and Unity (Uhuru Na Umoja): A Selection from Writings and Speeches 1952-65* (Dar-es-Salaam: Oxford University Press, 1966) *passim*, esp. c. 62. Ghai and McAuslan argued that even a limited bill of rights is one way of making a government publicly accountable, but after the disillusioning experience of the *Kenya Bill of Rights* in the immediate post-Independence period, they reluctantly concluded that “an ineffective Bill is worse than no Bill at all, as it raises false hopes . . . The total effect of the Bill of Rights in practice is occasionally to require Government to do indirectly what it cannot do directly – a strange mutation of its normal role.” Ghai & McAuslan, *ibid.* at 455-56. This theme is echoed in Ghai's more recent writings: e.g. “Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights” (1997) 60 *Modern Law Rev.* 459. On the post-Independence history of human rights in Tanzania, see Jennifer A. Widner, *Building the Rule of Law* (New York: W.W. Norton, 2001).

125 See especially Yash Ghai, “Independence and Safeguards in Kenya” (1967) 3 *East African Law*

However, it was not until about 1990 that he focused his attention regularly on human rights as such. This is perhaps due to “the increased salience” that human rights discourse achieved during this period.¹²⁶ Even then, he has consistently viewed bills of rights and the international human rights regime as one means among many that may serve to protect the interests of the poor and the vulnerable as well as satisfy majority and minority interests.¹²⁷ As we shall see, his approach has generally been more pragmatic than idealistic and it is only quite recently that he has devoted much space to writing about human rights theory. Rather than try to attempt to trace his intellectual development or summarize his general constitutional theory, I shall here focus on three recent papers that illustrate more general aspects of his approach to human rights: the role of human rights discourse in reaching constitutional settlements in multi-ethnic societies, his critique of the “Asian values” debate of the early 1990s, and his exchange with Abdullahi An-Na’im about the justiciability of economic and social rights. In considering these particular pieces, it is important to bear in mind that Yash Ghai is primarily a public lawyer for whom bills of rights are only one aspect of constitutionalism and human rights discourse is but one aspect of constitutional and political theory.

Negotiating Competing Claims in Multi-ethnic Societies¹²⁸

Yash Ghai, as a Kenyan Asian, comes from an embattled minority. One of his first monographs, written with his brother, D.P. Ghai, a distinguished economist, was entitled “Asians in East and Central Africa.”¹²⁹ In nearly all of the countries where he has served as a constitutional adviser, protecting the interests of significant ethnic or religious minorities has presented a major problem. And of course, multiculturalism is a pervasive phenomenon in most societies today. So it is hardly surprising that this theme has been in the foreground of his more general writings on human rights.

J. 177-217; D. P. Ghai & Y. P. Ghai, eds. & intro., *Portrait of a Minority: Asians in East Africa* (Oxford: Oxford University Press, 1971); and Ghai & McAuslan, *ibid.*

126 “Universalism,” *supra* note 113.

127 For example, in discussing issues and prospects for constitution making in post-war Iraq, “full respect for the principles of universal human rights” is only one of nine principles to be accommodated in a settlement likely to be acceptable to the Shia and other groups. Yash Ghai, “Constitution-Making in a New Iraq” in Yash Ghai, Mark Lattimer & Yahia Said, *Building Democracy in Iraq* (London: Minority Rights Group International, 2003) 27 at 34, online: <<http://www.minorityrights.org/admin/download/Pdf/IraqReport.pdf>>.

128 For the main sources of this section, see *supra* note 113.

129 (London: Minority Rights Group, 1971), reprinted as “The Asian Minorities of East and Central Africa” in Ben Whitaker, ed., *The Fourth World: Victims of Group Oppression* (Eight Reports from the Fieldwork of the Minority Rights Group) (New York: Schocken Books, 1973).

In a symposium published in the *Cardozo Law Review* (February 2000),¹³⁰ Ghai drew on his experiences of constitution-making to make what is perhaps his fullest statement of a general position on human rights. His central thesis is that both debates about universalism and relativism and about “Asian values” obscure the political realities and the potential practical uses of human rights discourse as a flexible framework for negotiating acceptable compromises between conflicting interests and groups.

Ghai warns against interpreting human rights discourse too literally or solely in ideological terms. Rather, he adopts “a more pragmatic and historical, and less ideological, approach.”¹³¹ In his experience, concerns about “culture” have in practice been less important than the balance of power and competition for resources. Human rights rhetoric may be used – sometimes cynically manipulated – to further particular interests or, as in the Asian values debate, to give legitimacy to repressive regimes by emphasizing the right to self-determination of sovereign states (but not necessarily of peoples or minorities within those states).

Nevertheless, in his view, human rights discourse has provided a useful framework for mediating between competing ethnic and cultural claims, and in combating repressive regimes, just because it is flexible and vague and not rigidly monolithic.¹³² In domestic constitutive processes and constitutional law, the international human rights regime has provided a crucial reference point for local debates. In a study of constitution making in four quite different countries – India, Fiji, Canada, and South Africa – he found that the relevance of rights was widely acknowledged, much of the content and orientation of competing viewpoints was drawn from foreign precedents and international discourse, and groups presented their claims in terms of different paradigms of rights, drawn largely from transnational sources. In short, international norms and debates were used as resources for local arguments and negotiations in the process of achieving a constitutional settlement:

130 “Universalism,” *supra* note 113.

131 *Ibid.* at 1099.

132 He proceeds to clarify:

By the “framework of rights” I mean the standards and norms of human rights reflected in international instruments and the institutions for the interpretation and enforcement of rights. This means that no permissible policies are arbitrary. Instead, they must be justified by reference to a recognized right, the qualifications that may be lawfully imposed on the right, or a balance between rights. The procedures and guidelines for the balance and tradeoffs must be included within the regime of rights. The notion of framework also refers to the process of negotiations or adjudication which must be conducted fairly within certain core values of rights. There must also be the acceptance of the ultimate authority of the judiciary to settle competing claims by reference to human rights norms.

“Universalism,” *supra* note 113 at 1103-104.

For multicultural states, human rights as a negotiated understanding of the acceptable framework for coexistence and the respect for each culture are more important than for monocultural or mono-ethnic societies, where other forms of solidarity and identity can be invoked to minimize or cope with conflicts. In other words, it is precisely where the concept or conceptions of rights are most difficult that they are most needed. The task is difficult, but possible, even if it may not always be completely successful. And most states today in fact are multicultural, whether as a result of immigration or because their peoples are finding new identities.¹³³

Ghai uses his four case studies to explode a number of myths: First, he challenges the assumption that culture is the salient element in determining attitudes to rights, a matter of significance when "cultural relativism" is invoked to undermine the case for human rights.¹³⁴ "Culture" is not irrelevant, but it operates in complex ways. Culture is not monolithic, but protean; no community has a static culture,¹³⁵ cultures change and intermix; homogeneity of culture within a nation state is nowadays exceptional, and indeed much state effort is devoted to artificially creating a common culture as a prop for national unity. Questions of the relation of rights to culture arise *within* communities, as when women or minorities have invoked rights to challenge or interrogate "tradition." As Santos and others have suggested, cross-cultural discourse can generate new forms and enrich the culture of rights.¹³⁶ Perhaps, most important, Ghai emphasizes that "the material bases of 'rights' are stronger than cultural."¹³⁷

133 *Ibid.* at 1102.

134 In respect of the four case studies he concluded:

"Culture" has nowhere been a salient element determining attitudes to rights. It has been important in Fiji, Canada, and South Africa, but it has been important in different ways. . . . With the exception of the Canadian first nations ["the Aborigines"], the proponents of the cultural approach to rights were not necessarily concerned about the general welfare of their community's cultural traditions. They were more concerned with the power they obtain from espousing those traditions. . . . The manipulation of "tradition" by Inkatha is well documented. Fijian military personnel and politicians who justified the coup were accused of similar manipulation by a variety of respectable commentators.

Ibid. at 1135-36.

135 See Lisa Fishbayn's insightful paper on judicial interpretations of "culture" in family cases in South Africa, "Litigating the Right to Culture: Family Law in the New South Africa" (1999) 13:2 *International J. of Law, Policy & the Family* 147.

136 "Universalism," *supra* note 113 at 1098, citing Boaventura de Sousa Santos, *Toward a New Common Sense* (London: Routledge, 1995). See Jeremy Webber's thesis that Aboriginal rights in Canada are best understood to be the product of cross-cultural interaction rather than as the result of some antecedent body of law: "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33:4 *Osgoode Hall Law J.* 623.

137 "Universalism," *ibid.* at 1100, 1136.

Second, Ghai attacks as a myth the idea that the origins and current support for universal rights are solely Western. Historically, the sources of the international regime are quite diverse, with different “generations” having different supporters.¹³⁸ During the colonial period, for example, the British were among the strongest opponents of rights talk, especially in relation to self-determination or local bills of rights. At that time, nationalist leaders were strong supporters of human rights, especially the right to self-determination, but that enthusiasm did not always survive beyond Independence. Bentham, Burke, and Marx were among the critics of rights within the Western tradition. During the Cold War, the Eastern bloc generally championed social and economic rights, the Western powers individual civil and political rights. In South Africa it was the whites who historically opposed universal human rights, and, after the end of apartheid, it was the black majority who were the most committed to them.¹³⁹ In modern times, political leaders have invoked “the right to self-determination” as a defence against external criticism of internally repressive regimes and at the same time dismissed “rights discourse” as a form of Western neo-colonialism – as in the Asian values debate.

It is no doubt true that the current international regime of rights derives largely from western intellectual traditions, but Ghai points out that today “there is very considerable support for rights in Asia, among parliamentarians, judges, academics, trade unionists, women’s groups, and other non-governmental organizations.”¹⁴⁰ When Western-dominated organizations, such as the World Bank, the International Monetary Fund, and state foreign aid agencies promote “human rights and good governance and democracy,” they tend to emphasize a narrow band of individual and property rights rather than the whole spectrum that were included in the original *Universal Declaration of Human Rights*.¹⁴¹ Such selectivity illustrates the flexibility, and possibly the incoherence, of the general framework of rights discourse. Whatever the origin, the general framework and current support are not specifically Northern or Western.

Third, Ghai strongly challenges the use of sharp dichotomies in this context. For example, he identifies at least five types of relativist positions that need to be distinguished.¹⁴² (i) strong cultural relativism – i.e., that rights depend

138 Compare Upendra Baxi’s account of alternative human rights histories, at 67-72, below.

139 “Universalism,” *supra* note 113 at 1137-38.

140 “Human Rights,” *supra* note 113 at 169.

141 *The Universal Declaration of Human Rights* included social, economic and cultural rights as well as civil and political rights, and recognized the importance of duties. See “Human Rights,” *ibid.* at 170.

142 “Universalism,” *supra* note 113 at 1095-99. The formulation in the text is mine. Ghai’s categories

upon culture rather than upon universal norms; (ii) that cultural differences do indeed exist, but only the Western concept of human rights is acceptable as a basis for universal norms (conversely, some Asian politicians argue that their societies are superior to the West because their cultures emphasize duty and harmony rather than individual rights and conflict); (iii) moderate cultural relativism – i.e., that a common core of human rights can be extracted from overlapping values of different cultures;¹⁴³ (iv) that cultural pluralism can be harmonized with international standards by largely internal re-interpretation of cultural tradition – the basic approach of Abdullahi An-Na'im; and (v) that an enriched version of rights can be developed by intercultural discourse, which can lead towards a new form of universalism. Ghai concludes:

On the more general question of universalism and relativism, it is not easy to generalize. It cannot be said that bills of rights have a universalizing or homogenizing tendency, because by recognizing languages and religions, and by affirmative policies a bill of rights may in fact solidify separate identities. Nevertheless, a measure of universalism of rights may be necessary to transcend sectional claims for national cohesion. Simple polarities, universalism/particularism, secular/religious, tradition/modernity do not explain the complexity; a large measure of flexibility is necessary to accommodate competing interests. Consequently most bills of rights are Janus-faced (looking towards both liberalism and collective identities). What is involved in these arrangements is not an outright rejection of either universalism or relativism; but rather an acknowledgement of the importance of each, and a search for a suitable balance, by employing, for the most part, the language and parameters of rights.¹⁴⁴

are recognizable, but some writers distinguish between many more positions. On the ambiguities of "relativism," see Susan Haack, "Reflections on Relativism: From Momentous Tautology to Seductive Contradiction," in *Manifesto of a Passionate Moderate: Unfashionable Essays* (Chicago: University of Chicago Press, 1998) 149.

143 A prominent modern example is Alison Dundas Renteln, *Relativism and the Search for Human Rights* (London: Sage, 1990); See also Renteln, "Relativism and the Search for Human Rights" (1988) 90:1 *American Anthropologist* 56 at 64. This continues a tradition that can be traced back to the search for cultural universals by George P. Murdock and the attempts by Father Thomas Davitt, SJ to find an empirical support for natural law in universal values and norms in preliterate societies, e.g. Thomas Davitt, SJ, "Basic Value Judgments in Preliterate Custom and Law" (Paper presented to the Council for the Study of Mankind, Conference on Law and the Idea of Mankind, Chicago, 1963/4) [unpublished]. Apart from problems of the "naturalistic fallacy" (deriving "ought" propositions from "is" premises), such efforts tend to encounter two main lines of objection: (i) General prescriptions of the kind "killing is condemned in all known societies" are so hedged with exceptions and qualifications as to have virtually no content. (ii) Such accounts tend to play down or pass over in silence unattractive near-universals such as aggression and the subordination of women. In "Social Justice," *supra* note 113 at 241, Ghai cites Charles Taylor's argument that although human nature is socially constructed, there is often sufficient overlap to ground a workable common core of human rights. See Charles Taylor, "Conditions of an Unenforced Consensus on Human Rights" in Bauer & Bell, *supra* note 113, 124.

144 "Universalism," *supra* note 113 at 1139-40.

On the basis of these four case studies, backed by his wide practical experience, Ghai suggests some further general conclusions: First, rights provide a framework not only for cross-cultural discourse and negotiation, but also “to interrogate culture” within a given community, as when women have used them to challenge traditionalists in Canada, India, and South Africa.¹⁴⁵ Second, “in no case are rights seen merely as protections against the state. They are instruments for the distribution of resources, a basis for identity, and a tool of hegemony, and they offer a social vision of society. Rights are not necessarily deeply held values, but rather a mode of discourse for advancing and justifying claims.”¹⁴⁶ Third, in multicultural societies, balancing of interests requires recognition of collective as well as individual rights, including rights connected with being a member of a group, as with affirmative action in India.¹⁴⁷ Fourth, where rights are used for balancing interests, there is no room for absolutism of rights. They have to be qualified, balanced against each other, or reconceptualized.¹⁴⁸ Fifth, a stable settlement in a multi-ethnic society often involves recognition and appropriate formulation of social, economic, and cultural rights. This in turn requires an activist state.¹⁴⁹ Sixth, “since interethnic relations are so crucial to an enduring settlement, and past history may have been marked by discrimination or exploitation, a substantial part of the regime of rights has to be made binding on private parties.”¹⁵⁰ Finally, the requirements of balancing conflicting interests within a framework of rights give a major role to the judiciary in interpreting, applying, and reinterpreting the constitutional settlement in a reasoned and principled way.¹⁵¹

Ghai’s approach is illustrated by his treatment of the so-called “Asian values” debate. This is widely perceived as a concerted attack on human rights by advocates for what is wrongly regarded as some kind of Asian consensus. Ghai argues that the debate has obscured both the complexity and the richness of debates about rights within Asia.

145 *Ibid.* at 1137.

146 *Ibid.*

147 *Ibid.* at 1138.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

151 *Ibid.* at 1138-39. See also, however, his caveats about the role of the judiciary in relation to economic and social rights, discussed below.

The “Asian Values” Debate¹⁵²

The authoritarian readings of Asian values that are increasingly championed in some quarters do not survive scrutiny. And the grand dichotomy between Asian values and European values adds little to our understanding, and much to the confounding of the normative basis of freedom and democracy. (Amartya Sen)¹⁵³

“The Asian values debate” refers to a controversy that flared up in the run-up to the Vienna World Conference on Human Rights in 1993. After the collapse of communism, increased attention to human rights issues had led to growing criticism of human rights violations in China and also in countries that had been allies in the Cold War. This was also the period of increased conditionalities being imposed by international financial institutions and Western aid agencies in the name of “human rights, good governance and democracy.” In a regional meeting preparatory to the Vienna Conference, many Asian governments signed *The Bangkok Declaration*,¹⁵⁴ which was widely interpreted as an attempt to present a united front against growing Western hegemony. Lee Kuan Yew (and the Government of Singapore) and Muhathir Mohamed (and the Government of Malaysia), who could hardly be considered representative of the whole of Asia, framed this North-South confrontation in terms of a fundamental conflict between “human rights and Asian values.”

The Asian values debate has rumbled on for over a decade and has surfaced in a number of different contexts, of which one of the most interesting and important is the positions taken by China both internally and externally in response to Western criticism.¹⁵⁵ Yash Ghai was one of a number of “Southern” intellectuals who jumped to the defence of ideas about human rights and democracy as not being peculiarly Western. In a series of papers published between 1993 and 1999, he sharply criticized the arguments and positions adopted by the leaders of Singapore and Malaysia and in the process developed his own general position on human rights.¹⁵⁶

152 For sources of this section, see *supra* note 113.

153 Amartya Sen, “Human Rights and Asian Values: What Lee Kuan Yew and I Peng Don’t Understand About Asia” *The New Republic* 217: 2-3 (14 July 1997) 33 at 40.

154 *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, A/CONF.157/ASRM/8, A/CONF.157/PC/59* (1993), online: <<http://www.unhchr.ch/html/menu5/wcbangk.htm>>. Other accessible documents include Government of Singapore, *Shared Values* (Singapore: Government of Singapore Printers, 1991); and a useful symposium in 1994 in *Foreign Affairs*, including Fareed Zakaria, “A Conversation with Lee Kuan Yew” *Foreign Affairs* 73:2 (1994) 109 and the response by Kim Dae Jung, “Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values” *Foreign Affairs* 73:6 (1994) 89. See also “Social Justice,” *supra* note 113.

155 See Ann Kent, *China, the United Nations and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999); and Rosemary Foot, *Rights Beyond Borders: The Global Community and the Struggle over Human Rights* (Oxford: Oxford University Press, 2000).

156 In the version of “the Asian values position” advanced by Lee Kuan Yew and the Government

We need not enter into the details of Ghai's criticisms of the Singapore and Malaysian versions of the Asian values position, which he treats as both insincere and confused.¹⁵⁷ He suggests that the true motive for their campaign was to justify authoritarian regimes at a time when they were being subjected to criticism both internally and internationally for repression of dissent and civil liberties. However, participating in the debate sharpened Ghai's focus on the connections between culture, the market, and human rights. Here it is sufficient to quote his own summary of his treatment of one phase of the debate as it surfaced before and during the Bangkok meeting in March and April 1993, preceding the Vienna World Conference on Human Rights:

Asian perceptions of human rights have been much discussed, particularly outside Asia, stimulated by the challenge to the international regime of rights by a few Asian governments in the name of Asian values. Placing the debate in the context of international developments since the Universal Declaration of Human Rights 50 years ago, [the author] argues that international discussions on human rights in Asia are sterile and misleading, obsessed as they are with Asian values. On the other hand, the debate within Asia is much richer, reflecting a variety of views, depending to a significant extent on the class, economic or political location of the proponents. Most governments have a statist view of rights, concerned to prevent the use of rights discourse to mobilize disadvantaged or marginal groups, such as workers, peasants, or ethnic groups, or stifle criticisms and interventions from the international community.¹⁵⁸ However, few of them [i.e. governments] subscribe to the crude versions of Asian values, which are often taken abroad as representing some kind of Asian consensus. [The author] contrasts the views of governments with those of the non-governmental organizations (NGOs) who have provided a more

of Singapore, Ghai summarizes the core of the argument as follows: (i) The West is decadent – lawless, amoral, and in economic decline. This decadence is due to its emphasis on democracy and human rights based on extreme individualism. “Rights consciousness has made people selfish and irresponsible and promoted confrontation and litigiousness.” (ii) Asian societies have maintained social stability, economic progress, and a sense of moral purpose on the basis of a culture and ethos that emphasizes duties and subordinates individual interests to the welfare of the community. (iii) There is a Western conspiracy to subvert Asian political independence and economic success by imposing decadent alien values on Asian culture. Ghai challenges all of these positions in “Human Rights,” *supra* note 113 at 176-77. See the more detailed critique in “Politics of Human Rights,” *supra* note 113.

- 157 Ghai tended to dismiss the *Bangkok Declaration* as an incoherent and self-contradictory document, a political compromise that was hardly worth deconstruction (e.g. “Politics of Human Rights,” *ibid.* at 209; “Human Rights,” *ibid.* at 174) and to concentrate on the arguments of Lee and Muhathir, about whom he was equally scathing (“Human Rights,” *ibid.*): “To draw from their pretentious and mostly inconsistent statements a general philosophy of Asian values is like trying to understand Western philosophy of rights and justice from statements of Reagan and Thatcher.”
- 158 Ghai points to the highly selective presentation of Asian values by some protagonists, glossing over the hierarchical structures of relationships, subordination of women, the exploitation of children and workers, nepotism and corruption based on family ties, and the oppression of minorities. *Ibid.* at 177.

coherent framework for the analysis of rights in the Asian context. They see rights as promoting international solidarity rather than divisions. Domestically, they see rights as means of empowerment and central to the establishment of fair and just political, economic and social orders.¹⁵⁹

To start with, Ghai was quite dismissive of arguments that human rights represent a form of cultural imperialism – the imposition of values that are atomistic, confrontational, and self-seeking on a culture that emphasizes harmony, consensus, hard work, and solidarity. This argument, in his view, exaggerated the homogeneity of “Asian” cultures, distorted the nature of human rights, and overemphasized the place of culture in economic success. However, in a later paper on “Rights, Duties and Responsibilities” he decided to take more seriously the argument that some Asian traditions, notably Hinduism and Confucianism, emphasize duties rather than rights, and that this is a superior way to organize society.¹⁶⁰ “Duty” in this context is more abstract than the Hohfeldian idea of duty: it refers to obligations or responsibilities attached to office or status or class, rather than merely being the correlative of claim rights. Such responsibilities prescribe right and proper conduct in respect of a given role or relationship, like father-son, husband-wife, friend-friend, and, most important, ruler-subjects. In one interpretation of Confucianism, such duties could be said to be less self-regarding than rights, more communitarian, oriented to harmony rather than conflict, and more informal, emphasizing honour, peace, and stability. “The key duties are loyalty, obedience, filial piety, respect, and protection.”¹⁶¹ Ghai acknowledges that in some societies this version of Confucianism can be attractive:

I do not wish to oppose a broader notion of duty in the sense of responsibilities or civic virtue. There is clearly much that is attractive in persons who are mindful of the concerns of others, who wish to contribute to the welfare of the community, who place society above their own personal interests. No civilized society is possible without such persons. There is also much that is attractive in societies that seek a balance between rights and responsibilities and emphasize harmony. Nor do I wish to underestimate the potential of duty as a safeguard against abuse of power and office. I am much attracted to the notion of the withdrawal of the Mandate of Heaven from rulers who transgress upon duties of rulers (although I am aware that this was largely impotent as a device of responsiveness or accountability or discipline of rulers).¹⁶²

159 This is based on the Abstract to “Human Rights,” *ibid.*

160 “Rights, Duties,” *supra* note 113.

161 *Ibid.* at 29.

162 *Ibid.* at 37-38.

However, these virtues mainly concern social relations of human beings within civil society rather than relations between citizens and the state, which is the primary sphere of human rights. Moreover, as modern Confucian scholarship suggests, there is a downside to such a philosophy:¹⁶³ a duty-based society tends to be status oriented and hierarchical, and in some societies, Confucian duties rarely extended beyond family and clan, promoting corruption rather than a genuine civic sense. Confucius himself emphasized the moral responsibilities of the ruler, was contemptuous of merchants and profits, and was against strong laws and tough punishments – for authoritarian, market-oriented, and often corrupt governments to invoke Confucius is hypocritical. By conflating the ideas of state and community, the official protagonists of Asian values obscure the role of the regime of rights to mediate between state and community: “That the contemporary celebration of duty has little to do with culture and much to do with politics is evident from the various contradictions of policies and practices of governments heavily engaged in its exhortation.”¹⁶⁴

In the present context, perhaps the important point is a warning against taking any debates and discourse about human rights too literally. The context is typically political, and the same discourse can be used or abused for a wide range of different political ends. Above all, such discourse is historically contingent:

I believe that rights are historically determined and are generally the result of social struggles. They are significantly influenced by material and economic conditions of human existence. It is for that reason unjustified to talk of uniform attitudes and practices in such a diverse region as Asia. Rights become important, both as political principles and instruments, with the emergence of capitalist markets and the strong states associated with the development of national markets. Markets and states subordinated communities and families under which duties and responsibilities were deemed more important than entitlements. Rights regulate the relationship of individuals and corporations to the state. Despite the lip service paid to the community and the family by certain Asian governments, the reality is that the State has effectively displaced the community, and increasingly the family, as the framework within which an individual or group's life chances and expectations are decided. The survival of community itself now depends on rights of association and assembly.¹⁶⁵

163 *Ibid.* at 38, citing William Theodore de Bary, *The Trouble with Confucianism* (Cambridge, Mass.: Harvard University Press, 1991). He also points out (*ibid.*) that traditional Confucianism placed more emphasis on the individual than has generally been recognized, citing Yu-Wei Hsieh, “The Status of the Individual in Chinese Ethics” in Charles Moore, ed., *The Chinese Mind: Essentials of Chinese Philosophy and Culture* (Honolulu: University of Hawaii Press, 1968); and Tu Wei-Ming, *Confucian Thought: Self-hood as Creative Transformation* (Albany: State University of New York Press, 1985).

164 “Rights, Duties,” *supra* note 113 at 34.

165 “Human Rights,” *supra* note 113 at 169. Pressure of space precludes my doing justice to Ghai's

The Role of Judges in Implementing Economic, Social, and Cultural Rights

The *UN Declaration* covered both civil and political rights (CPR) and economic, social, and cultural rights (ESCR). It made no formal distinction between the two classes. However, during the Cold War, the distinction became significant and was sharpened in the ideological battles between the Western powers and the Eastern bloc, the former prioritizing CPR, the latter ESCR. This distinction became further entrenched both in international covenants and through the influence of the colonial powers and the Soviet Union on subordinated countries. Thus the *European Convention on Human Rights*¹⁶⁶ is restricted to civil and political rights, and this limitation has spread to many Commonwealth countries. The distinction still lives on, for example in the domestic and foreign policies of the United States and of the People's Republic of China. However, the constitutions of India (1949) and South Africa (1994) are significant exceptions to this privileging of one set of rights to the exclusion of the other.

The validity of the distinction has long been a matter of contention, and the claim that "human rights are interdependent and indivisible"¹⁶⁷ is widely supported by the human rights community. At the start of the Millennium the debate became sharply focused within Interights, an influential London-based NGO, by the responses to a memorandum prepared by Yash Ghai that was intended to focus the program of Interights on ESCR:

It was not my intention to expound a theory of ESCR, but to suggest a focus for work. I acknowledged the importance of ESCR as rights, but cautioned against an over-concentration on litigation strategies and pointed to limitations of the judicial process in view of the nature of ESCR. The memo implied the need to avoid polarities or dichotomies (such as justiciability and nonjusticiability and civil and political/economic and social rights). In this as other instances of enforcement of the law, there was a division of labour between court-oriented strategies and other modes of enforcement. It was important, in discussions of the enforceability of ESCR, to

analysis of the complex relationship between economic globalization and human rights in Asia, on which see "Social Justice," *supra* note 113.

166 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953).

167 On Baxi's criticism of this and other "mantras," see Baxi, *Future of Human Rights*, *infra* note 190 and accompanying text. Cf. An Na'im on interdependence of rights, *infra* note 173 and accompanying text.

pay attention to the relationship between judicial enforcement and the supporting framework that other institutions could provide, as well as to the effects of litigation on wider participation in the movements, and lobbying, for human rights.¹⁶⁸

The memorandum provoked mixed reactions. The ensuing debate culminated in a valuable collection of essays edited by Yash Ghai and Jill Cottrell.¹⁶⁹ This volume throws light not only on issues such as justiciability but also on the specific nature of ESCR, different methods of implementation, and the experience of the courts in several countries in dealing with them. The final chapter by the editors represents a significant development of Ghai's views.¹⁷⁰

In this volume, the debate was initially framed by contrasting positions asserted by Abdullahi An-Na'im and Lord (Anthony) Lester.¹⁷¹ An-Na'im objected in principle to the classification of human rights into two broad classes. He argued that this distinction leads to the perception that ESCR are inferior,¹⁷² it denies the claim that human rights are indivisible and interdependent,¹⁷³ it is not based on any consistent or coherent criteria of classification, and it undermines "the universality and practical implementation of *all human rights*."¹⁷⁴ In particular, An-Na'im attacked the idea that no ESCR should be enforced by the judiciary. All human rights need to be supported by a variety of mechanisms, and the role of each mechanism should be assessed and developed in relation to each right. But it is not appropriate to leave promotion and enforcement to national governments, for the fundamental aim of protecting human rights "is to *safeguard them from the contingencies of the national political and administrative processes*."¹⁷⁵ The judiciary has a vital role to play in this. An-Na'im placed great emphasis on the importance of human rights as universal standards incorporated in the international regime and backed by international co-operation in their implementation. The framework of international standards is crucial for the recognition of ESCR as *human rights*.

168 Ghai, Foreword to Ghai & Cottrell, *supra* note 113, vii at vii.

169 *Ibid.*

170 Jill Cottrell & Yash Ghai, "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Ghai & Cottrell, *ibid.*, 58 [Cottrell & Ghai].

171 Abdullahi An-Na'im, "To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights" in Ghai & Cottrell, *ibid.*, 7; Lord Lester of Herne Hill & Colm O'Connell, "The Effective Protection of Socio-Economic Right" in Ghai & Cottrell, *ibid.*, 16.

172 For example: "[W]ithin the European system, ESCR has been relegated to non-binding charters and optional protocols." An-Na'im, *ibid.* at 11.

173 For example, a right to freedom of expression is not much use to the vulnerable without a right to education; conversely, implementation of a right to education is dependent on freedom to research and communicate freely. *Ibid.*

174 *Ibid.* [emphasis added].

175 *Ibid.* at 8.

Lord Lester and Colm O’Cinneide developed a familiar response: while acknowledging that ESCR are indeed human rights and the poor and the vulnerable need protection from violations of both classes of rights, they argued that ESCR are best protected by non-judicial mechanisms. For reasons of democratic legitimacy and practical expertise, the judiciary should have a very limited role in those aspects of governance that involve allocation of resources, setting priorities, and developing policies.¹⁷⁶

In the ensuing debate it became clear that the range of disagreement was quite narrow. This is hardly surprising within a group of human rights experts (mainly lawyers) arguing in the context of an NGO that is committed to promoting ESCR. There appears to have been a consensus on a number of points: that ESCR should be treated as *rights*, that their effective enforcement and development was a matter of concern, that this requires a variety of mechanisms, that the idea of the interdependence of rights is of genuine practical importance, and that the concept of “justiciability” is too abstract and too fluid to provide much help in delineating an appropriate role for the judiciary in respect of ESCR.

Ghai took issue with An-Na’im on two main grounds: An-Na’im placed too much emphasis on the international regime as the foundation for national policies on rights,¹⁷⁷ and he was wrong in suggesting that those who want a restricted role for the judiciary are necessarily opposed to ESCR as rights. Nevertheless, Ghai suggested that the differences between An-Na’im and the proponents of judicial restraint can easily be exaggerated – they are mainly differences of emphasis about a role that is contingent on local historical and material conditions. Several of the commentators made the point that courts have taken ESCR into account when interpreting CPR provisions.

One senses that Ghai may have been somewhat impatient with a debate which seems to have been based largely on mutual misunderstandings of the seemingly conflicting viewpoints. No one denied that courts had some role to play in this area, while An-Na’im was not asking that they should be seen as the only relevant mechanism. However, the debate stimulated

176 *Supra* note 171.

177 “Reliance on international norms brings in all of the difficulties of hegemony and alleged imposition; and it ignores the national character of the constitution as a charter of the people themselves to bind their rulers . . . and it ignores the critical importance of local action, democracy etc.” Yash Ghai, “Introduction,” in Ghai & Cottrell, *supra* note 113, 1 at 2. Interestingly, as discussed below, Baxi makes a similar criticism of Ghai in a different context.

Ghai to develop his own ideas about the nature of ESCR and the role of human rights discourse in framing state policies. Without claiming to do justice to a rich and detailed analysis, one can perhaps pinpoint three key ideas underlying his position:

First, he was stimulated to articulate his view of the role of courts in relation to ESCR. This should not be static but generally speaking should be less prominent than their role in relation to CPR. After a survey of the case law developed so far, especially in India and South Africa, including cases in which courts had been felt by critics to have become too involved, Cottrell and Ghai concluded:

Courts can play an important role in 'mainstreaming' ESCR by (a) elaborating the contents of rights; (b) indicating the responsibilities of the state; (c) identifying ways in which the rights have been violated by the state; (d) suggesting the frameworks within which policy has to be made, highlighting the priority of human rights (to some extent the South African courts have done this, by pointing to the need to make policies about the enforcement of rights, and Indian courts by highlighting the failure of government to fulfil [Directive Principles of State Policy] so many years after independence). There is a fine balance here, for there is always a risk that courts may cross the line between indicating failures of policy and priorities and indicating so clearly what these priorities ought to be that they are actually making policy.¹⁷⁸

"The primary decision-making framework must be the political process."¹⁷⁹ The main contribution of courts in Cottrell and Ghai's view should be "in developing core or minimum entitlements."¹⁸⁰ However, once policies have been formulated by government or other agencies, backed by standards and benchmarks, courts may also have a role in implementing such standards.

Second, Cottrell and Ghai point out that issues about justiciability cannot turn on the difference between CPR and ESCR, or on some untenable distinction between negative and positive rights.¹⁸¹ They

178 Cottrell & Ghai, *supra* note 170 at 86. They cite with approval (at 86-87) dicta in the South African case of *Government of the Republic of South Africa & Ors v. Grootboom & Ors* [2000] ICHRL 72 (4 October 2000), 2000 (11) BCLR 1169 (CCSA) (QL), and of Madam Justice Louise Arbour (as she then was) dissenting in *Gosselin v. Québec (Attorney General)* [2002] 4 S.C.R. 429, 2002 SCC 84, where she draws a distinction between recognition of the kinds of claims individuals may assert against the state and questions of how much the state should spend and in what manner: "One can in principle answer the question whether a Charter right exists – in this case, to a level of welfare sufficient to meet one's basic needs – without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable" (at para. 332).

179 *Ibid.* at 89.

180 *Ibid.* at 87.

181 *Ibid.* at 70-71.

distinguish between two aspects of justiciability that are often confused:¹⁸² (i) *explicit non-justiciability*, when a constitution or law explicitly excludes the jurisdiction of the courts, for example the Directive Principles of State Policy in the Indian Constitution; and (ii) *non-justiciability as a matter of appropriateness*, a more delicate and complex matter. This may be based on arguments about separation of powers, or legitimacy, or the competence of courts, or some concept of what is a “political” question or a combination of these. These are contested matters in which no clear consensus has emerged in the case law, except a tendency to reject sharp distinctions.¹⁸³

Third, the discussion of the role of the courts throws light on the nature of ESCR. Ghai rejects any sharp distinction between ESCR and CPR, but nevertheless argues that there are certain tendencies that characterize ESCR and suggest a more limited role for the courts in relation to many, but not all of them.¹⁸⁴ For example, in many domestic and international instruments, there is a tendency for ESCR provisions to be drafted in terms that allow considerable discretion in respect of standards, timing, and methods of enforcement.¹⁸⁵ Such notions as “progressive realisation,” “margin of appreciation,” and “to the extent of its available resources” further limit the role of courts. No human rights are costless, but all implementation of all human rights depends on “a complex interaction of policies in numerous sectors, institutions, and entitlements.”¹⁸⁶ However, as the Indian and South African cases have shown, there is scope for courts to define what is the minimum core of any given right (a notoriously difficult and contentious matter), to sanction state violation of established rights, and to point out that “progressive realisation” implies that the state has a constitutional duty to start implementation and a further duty to ensure that there

182 *Ibid.* at 66-70.

183 “Courts are considered an unsuitable forum where there may be no clear standards or rules by which to resolve a dispute or where the court may not be able to supervise the enforcement of its decision or the highly technical nature of the questions, or the large questions of policy involved may be thought to present insuperable obstacles to the useful involvement of courts.” *Ibid.* at 69. The Supreme Court of India case of *Upendra Baxi v. State of Uttar Pradesh & Ors* (1986) 4 SCC 106 is cited as an example of the courts getting involved in an unsuitable activity. (Here the court supervised a home for women for five years.)

184 See the excellent discussion by Cottrell and Ghai, *supra* note 170 at 76-82, of the way these considerations affect rights to education, medical treatment, housing, environment, and social security.

185 But there are exceptions: for example, the right to free and compulsory primary education. *Ibid.* at 61.

186 *Ibid.* at 62.

is no deterioration of standards. Ghai's essentially evolutionary and pragmatic argument is consistent with An-Na'im's insistence that what are appropriate mechanisms of implementation should be decided on the merits in respect of each right in particular contexts rather than by reference to abstract categories. But in light of the experience of the case law, there may be a considerably more significant role for courts in the long run than An-Na'im suggests.

Fourth, and more important, Ghai's main concern was to focus attention on other means of implementing and developing ESCR and to make a general case for the idea that human rights discourse can provide a broad overarching framework for constructing state policies and priorities.¹⁸⁷ One trouble with the debates about "justiciability" has been that "human rights" has tended to be treated as doctrine (often legal doctrine) rather than as discourse and that it focuses attention on litigation (usually a last resort) and away from the range of other possible mechanisms and resources that need to be employed in the realisation of all human rights, including ESCR.

Conclusion

One senses that Ghai is sometimes impatient with theoretical debates about rights and prefers to work at less general levels. Like many others, he rejects strong versions of both universalism and relativism; he criticizes a tendency to over-emphasize "culture" rather than material interests; he argues that the debate on Asian values greatly exaggerated the uniformities of "East Asian culture" and was used to divert attention away from the failings of repressive regimes and human rights violations – the result being to obfuscate genuine issues about human rights in different contexts in East Asia. Similarly, the debate about the justiciability of ESCR amounted to little more than differences of emphasis among lawyers about the proper role of courts – a role that should depend on timing and context in any given country. Most of the protagonists have been lawyers who have tended to argue on the basis of human rights as legal doctrine rather as a discourse that provides a workable framework for mediating conflicting interests and providing a basis for settlements that are accepted by local people as legitimate.

187 *Ibid.* at 61.

Many of these themes are illustrated in specific ways in Ghai's recent writings about Hong Kong, in which the same dichotomies between theory and practice, socialism and liberalism, and idealism and pragmatism are discernible in creative tension. After a generally pessimistic diagnosis of the situation, he ends on a pragmatic note of hope about the future by appealing to enlightened self-interest:

It is easy for the Central Authorities, if they were so minded, to bypass or undermine the Basic Law, and they would presumably always find people who are willing to collaborate with them in this enterprise. However, China stands to gain more from a faithful adherence to the Basic Law, to keep promises of autonomy, to permit people of all persuasions to participate in public affairs, to respect rights and freedoms, and to let an independent judiciary enforce the Basic Laws and other laws. This is a more effective way to win the loyalty of Hong Kong people. An adherence to legal norms and consultative and democratic procedures would ultimately benefit the Central Authorities as they grapple with the difficult task of managing affairs on the mainland as economic reforms and the movement for democracy generate new tensions.¹⁸⁸

Yash Ghai advances a pragmatic materialist interpretation that is broadly supportive of the current international human rights regime. He emphasizes the uses and limitations of bills of rights as devices for limiting governmental power and increasing accountability. He focuses on the use and abuse of human rights discourse in real-life political contexts, especially by governments that invoke the right to self-determination against external critics of their treatment of their own citizens. His views are not surprisingly controversial.¹⁸⁹ But he provides a uniquely realistic perspective on the practical operation of human rights discourse, especially in the context of constitutional negotiation and settlement.

188 Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2d ed. (Hong Kong: Hong Kong University Press, 1999) at 500.

189 For example, "naturalists" believe that human rights embody universal values. Cultural relativists might argue that he is too dismissive of the core of truth in the idea that there are strong communitarian traditions in Asia that are far less individualistic than Western ideologies of individual rights; and his views are likely to be anathema to free-market "liberals." He has also been attacked from the left by Upendra Baxi for too readily taking the international regime of human rights as the starting-point for constitutionalism and for failing to emphasize how human rights discourse can obfuscate "the real historical struggles" of "subaltern" peoples, as discussed further below.

IV. UPENDRA BAXI¹⁹⁰

For hundreds of millions of “the wretched of the earth,” human rights enunciations matter, if at all, only if they provide shields against torture and tyranny, deprivation and destitution, pauperization and powerlessness, desexualization and degradation.¹⁹¹

[T]he task of human rights, in terms of making the state ethical, governance just, and power accountable, are tasks that ought to continue to define the agenda of activism.¹⁹²

Human rights languages are perhaps all we have to interrogate the barbarism of power, even when these remain inadequate to humanize fully the barbaric practices of politics.¹⁹³

Upendra Baxi was born in Rajkot, Gujerat in 1938.¹⁹⁴ His father, Vishnuprasad Baxi, was a senior civil servant and a noted scholar of Sanskrit. Upendra was brought up in a large household, which sometimes numbered as many as seventy people under one roof, excluding servants. He remembers his childhood environment as a mix of perpetual pregnancies, relentless micro-politics, and a complete lack of privacy. His view of the extended communal family has remained decidedly unromantic. In his words, he reacted against this aspect of Hindu culture, and “I declared UDI

190 This section is based mainly on Upendra Baxi: (i) *The Future of Human Rights* (Delhi: Oxford University Press, 2002) [*Future of Human Rights*] (a new, extensively revised edition of this book is in preparation); (ii) “Voices of Suffering, Fragmented Universality, and the Future of Human Rights” [“Voices of Suffering, 1998”] (1998) 8:2 *Transnational Law & Contemporary Problems* 125; (iii) “Voices of Suffering, Fragmented Universality, and the Future of Human Rights” in Burns H. Weston & Stephen P. Marks, eds. & contribs., *The Future of International Human Rights* (Ardley, N.Y.: Transnational, 1999) 101 [“Voices of Suffering, 1999”] (This 1999 piece contains a succinct restatement of Baxi’s basic ideas. For many it is probably the best place to start, even though there are many more recent writings.); and (iv) an unpublished draft introduction to Upendra Baxi & Shulamith Koenig, *The People’s Report on Human Rights Education* (New York: The People’s Movement for Human Rights Education, 2002) [Baxi & Koenig, *Human Rights Education*]. (A revised version is forthcoming in 2006 as *The Human Right to Human Rights Education? Some Critical Perspectives* (New Delhi: Universal Law Book Co.)) Reference will also be made to a number of articles and to three books published in 1994: *Inhuman Wrongs and Human Rights: Some Unconventional Essays* (New Delhi: Har Anand, 1994); *Mambrino’s Helmet: Human Rights for a Changing World* (New Delhi: Har Anand, 1994); and Upendra Baxi & O. Mendelsohn, eds., *The Rights of Subordinated Peoples* (Delhi: Oxford University Press, 1994). Books are planned on the right to development and the right to food.

191 “Voices of Suffering, 1999,” *ibid.* at 103.

192 *Future of Human Rights*, *supra* note 190 at xii.

193 “Voices of Suffering, 1999,” *supra* note 190 at 102.

194 The biographical information is based in part on conversations and correspondence with Professor Baxi over a number of years, especially 27 August 2005, 12 September 2005, and 9 December 2005.

[Unilateral Declaration of Independence] at the first opportunity.” He went to university, did well, and soon embarked on a career as an academic, public intellectual, and legal activist.

After graduating in law from the University of Bombay (LL.M., 1963), he taught at the University of Sydney (1968-1973). There he worked closely with Julius Stone, the well-known legal theorist and public international lawyer. He also did postgraduate work at Berkeley, where he obtained the degrees of LL.M. (1966) and J.S.D. (1972), having written a thesis on private international law under the supervision of Professor Albert Ehrenzweig. On his return to India he held the post of professor of law at the University of Delhi from 1973 until 1996. During this period he also served as vice-chancellor of South Gujerat (1982-1985), director of research at the Indian Law Institute (1985-1988), and vice-chancellor of the University of Delhi (1990-1994). Since 1996, he has been professor of law and development at the University of Warwick. He has also held visiting appointments at several American law schools.

Baxi has been a prolific writer. In addition to producing over twenty books and many scholarly articles, he has been a frequent broadcaster and contributor to the Indian press. His early work was largely concerned with public law and law and society in India, and he consciously addressed mainly Indian audiences. As an activist he has been very influential both in India and South Asia. He contributed much to legal education. He was a leading commentator and critic of the Indian Supreme Court and a pioneer in the development of social action litigation and “the epistolary jurisdiction” that gave disadvantaged people direct access to appellate courts. He was also extensively involved in legal action and law reform concerning violence against women and opposition to major dam projects. For over twenty years he has campaigned and litigated on behalf of the victims of the Bhopal catastrophe.¹⁹⁵ Over time, Baxi’s interests and audiences expanded geographically, but he has maintained his concern and involvement with Indian affairs. His more recent interests have included comparative constitutional law, the legal implications of science and technology, law and development, and above all the strategic uses of law for ameliorating the situation of the worst off.¹⁹⁶

195 Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law* (The Hague: Martinus Nijhoff, 2000 [*Mass Torts*]).

196 Baxi has written a great deal about the uses and limitations of law in furthering the interests of the worst off, but his views on human rights extend beyond law to include ideas, discourse, and praxis.

Baxi describes his perspective on human rights as that of a comparative sociologist of law. Julius Stone, his main academic mentor, was a student of the sociological jurist, Roscoe Pound. Baxi embraced the sociological perspective, but as a follower of Gandhi and Marx (later Gramsci), and an active participant in protests at Berkeley from 1964 to 1967,¹⁹⁷ he gave the ideas of Pound and Stone a distinctly radical twist. Stone called him a “Marxist natural lawyer”;¹⁹⁸ others have pointed to his lengthy engagement with postmodernism. But such labels do not fit him. Marxism proved too rigid and doctrinaire,¹⁹⁹ and postmodernism too irresponsible to be of much use to a practical political agenda.²⁰⁰ Neither quite fits his not uncritical sympathy for the ideas of Amartya Sen and Martha Nussbaum.²⁰¹ Above all, Baxi’s concern has been for those whom, following Gramsci, he calls “subaltern peoples.”²⁰² Perhaps more than any other scholarly writer on human rights he consistently adopts the point of view of the poor and the oppressed.

Since the early 1990s most of Baxi’s work has concerned human rights. Much of what he writes is critical of discourses of human rights, the complexities and compromises involved, and the misuses to which the discourses have been put. The tone is passionate, polemical, and radical, but the style is learned, allusive, and quite abstract.²⁰³ Some of the distinctions

197 In one communication, Baxi wrote to this author:

It was “heaven to be alive” those days! To go to the Greek Amphitheater adjoining the International Student House and to hear Joan Baez singing protest melodies. To read the classic text *Soul on Ice*, the first to utter the now heavily jargonised phrase: “When confronted with a logical impossibility, you have the choice to be part of the problem or part of the solution.” Before Berkeley, I never marched with the processions carrying placards.

“Radicalization” occurred on a wholly different learning curve as well as when I attended . . . Professor David Daube’s seminars on the notion of impossibility in Roman and Greek law! Professor Daube’s charismatic problematic of course was the situation when a horse was sworn in as a Roman Senator! . . . David taught me memorably – long before the Derridean/postmodernist vogue – the ways in which the law makes the impossible possible.

198 Upendra Baxi, “From Human Rights to Human Flourishing: Julius Stone, Amartya Sen, and Beyond?” (Julius Stone Lecture, University of Sydney, 2001) [Stone Lecture].

199 While there is a distinct Marxian strain in Baxi’s thought, especially through Gramsci, he has been as critical of Soviet ideology and praxis as of free market capitalism: “Both the triumphal eras of bourgeois human rights formations and of revolutionary socialism of Marxian imagination marshalled this narrative hegemony for remarkably sustained practices of the politics of cruelty.” *Future of Human Rights*, *supra* note 190 at xiv, 35, 137-38. Anyway, Baxi is far too eclectic intellectually to be categorized as a Marxist.

200 *Ibid.* at 78-80, 97-100.

201 Stone Lecture, *supra* note 198; also Baxi & Koenig, *supra* note 190 at 50.

202 *Human Rights Education*, *supra* note 90 at c. 1.

203 He moves smoothly from his Indian intellectual heritage (Gandhi, Ambedkar, the Supreme Court

that he emphasizes have occasioned puzzlement: for example, the distinction between the politics *of* human rights and politics *for* human rights,²⁰⁴ between human rights movements, human rights markets, and market-friendly human rights,²⁰⁵ between justified and unjustifiable human suffering,²⁰⁶ and between “modern” and “contemporary” human rights²⁰⁷ – all of which will need explication below. While much of his argument is complex, dialectical, and often ironic, one clear message rings out: taking human rights seriously must involve taking human suffering seriously.

At first sight, Baxi seems deeply ambivalent about rights: he is a fervent supporter of universal human rights, yet he is sharply critical of much of the talk and practice associated with it, and he emphasizes many of the obstacles and threats to the realization of their potential. Much of his account relates “to the narratives of unrealized and even unattainable human rights.”²⁰⁸ Rather than accept this as ambivalence, he recalls Gramsci’s distinction between pessimism of the intellect and optimism of the will.²⁰⁹ Although he writes about human rights futures, Baxi is more concerned with struggle than with prediction.

In the writings that we have already considered, Francis Deng, Abdullahi An-Na’im, and Yash Ghai use the international human rights regime as their starting point. As lawyers, they are aware that this regime is changing, dynamic, complex, and open to competing interpretations. However, they treat it and especially the *Universal Declaration of Human Rights* as being sufficiently stable and clear to provide standards for appraising and giving

of India) to Western (especially Anglo-American) jurisprudence (He has written about Bentham, Kelsen, Rawls, Dworkin, and Stone), through Marxian theory (Marx, Gramsci, Benjamin) and Natural Law (Aquinas, Gewirth), drawing on contemporary sociology (e.g. Beck, Bourdieu, and Castells) and Continental European philosophy (Foucault, Derrida, Laclau, Levinas), engaging with but distancing himself from post-modernism (especially Rorty) and critical legal studies, and dealing more sympathetically with Nussbaum and Sen.

204 *E.g. Future of Human Rights*, *supra* note 190 at x-xi, 13-14, 42-44 *et passim*.

205 *E.g. ibid.* at vi, 121-31.

206 *Ibid.* at 27-28.

207 *Ibid.* at 17-18.

208 *Ibid.* at xii.

209 In writing about attempts to develop “enlightened” policies for the construction of major dams, rather than ceasing their construction as inevitably involving major human rights violations, Baxi comments: “Human rights violations urge us to, however, profess pessimism of will and the optimism of intellect. We need to hunt and haunt all erudite discourses that seek to over-rationalize development. We need to defend and protect people suffering everywhere who refuse to accept that the power of a few should become the destiny of millions.” Upendra Baxi, “What Happens Next Is Up to You: Human Rights at Risk in Dams and Development” (2001) 16 *American Univ. International Law Rev.* 1507 at 1529.

direction to other normative orders.²¹⁰ Like them, Upendra Baxi opposes all forms of imperialism, colonialism, racism, and patriarchy. He steers a subtle path between universalism and relativism.²¹¹ He agrees that humankind as a whole should be the subject of our moral concern. He treats the *Universal Declaration* as one high point of the development of the current human rights regime, but he sees that regime as being inherently fragile and problematic. And his general tone and positions are more radical than the other three.

Like Ghai, Baxi's initial attitude to human rights is pragmatic: we need to work within human rights discourse not because it clearly embodies universal moral principles,²¹² but because in the second half of the twentieth century it became the dominant mode of moral discourse in international relations, edging out other moral tropes such as distributive justice or "solidarity."²¹³ Just because they have become so dominant, the discourses of human rights have been used to support a wide variety of often incompatible interests, and this in turn has led to complexity, compromise, contradiction, and obfuscation in both the discourse and the practices of human rights. More than Ghai, Baxi consistently adopts the standpoint of the worst off.²¹⁴

210 In a 2000 Cardozo Law Review symposium including articles on the theme of "Universal Rights and Cultural Pluralism," Baxi criticizes Ghai for taking the international regime of human rights as his starting point for comparing four constitutional narratives, without mentioning that the Indian constitution preceded and went further than the Declaration and without emphasizing sufficiently the extent to which human rights are the product of struggles rather than benign "top-down" problem-solving. Upendra Baxi, "Constitutionalism as a Site of State Formative Practices" (2000) 21 *Cardozo Law Rev.* 1183 at 1184-92, 1203-205 ["Constitutionalism"] (commenting on Ghai, "Universalism," *supra* note 113).

211 Chapter 6 of *Future of Human Rights*, *supra* note 190, is entitled "What is Living and Dead in Relativism?"

212 Baxi makes interesting points that I cannot pursue here about the intellectual history of who counts as "human" (*Future of Human Rights*, *ibid.* at 28-29), the Hegelian idea of concrete universality – what it is to be fully human (*ibid.* at 92-97), and the implications of biotechnology for ideas of "human dignity" (*ibid.* at 161-63). Baxi distances himself from strong relativist positions, while acknowledging that post-modernists and anti-foundationalists have usefully problematized ideas of universality, *e.g.* *ibid.* at 97-118. (Compare Ghai, *supra* note 144 and accompanying quote.) Baxi concludes: "The universality of human rights symbolizes the universality of the collective human aspiration to make power increasingly accountable, governance progressively just, and the state incrementally more ethical." *Ibid.* at 105 [emphasis in original].

213 Like me, Baxi does not think that human rights discourse can adequately capture the concerns of distributive justice; unlike me he is surprisingly kind to John Rawls' much-criticized *The Law of Peoples* (Cambridge: Harvard University Press, 1999). See William Twining, *Globalisation and Legal Theory* (following Thomas Pogge), *supra* note 2 at 69-75.

214 In a comment on Ghai's "Universalism" (*supra* note 113), Baxi criticizes Ghai from a "subaltern perspective on constitutionalism" ("Constitutionalism," *supra* note 98 at 1191), for too readily treating international standards as the starting-points for modern constitutionalism (*ibid.* at 1190), for masking the suffering involved in human rights struggles, for "a wholly utilitarian construction of rights," (*ibid.* at 1191) and for accepting too readily the views of political elites at the expense of ordinary people. Some of this criticism is, in my view, unduly harsh (*ibid.* at 1208-10). The sharp

Baxi presents the international human rights scene as fragile, contradictory, and riddled with myths, false histories, and ambiguities. It is marked by frenetic activity, explosive articulation of human rights standards and norms, and varied critiques and scepticisms about this dominant discourse. Global capitalism, new technologies, and both global terrorism and post-9/11 responses to “terrorism” (“terrorism wars”)²¹⁵ further threaten the fragile, contingent advances made by human rights movements. Small wonder then that there is a crisis of confidence even among the most committed and “progressive” activists and NGOs:

The astonishing quantity of human rights production generates various experiences of scepticism and faith. Some complain of exhaustion (what I call “rights-weariness”). Some suspect sinister imperialism in diplomatic maneuvers animating each and every human rights enunciation (what I call “rights-wariness”). Some celebrate human rights as a new global civic religion which, given a community of faith, will address and solve all major human problems (what I call “human rights evangelism”). Their fervor is often matched by those NGOs that tirelessly pursue the removal of brackets in pre-final diplomatic negotiating texts of various United Nations’ summits as triumphs in human solidarity (what I call “human rights romanticism”). Some other activists believe that viable human rights standards can best be produced by exploiting contingencies of international diplomacy (what I call “bureaucratization of human rights”). And still others (like me) insist that the real birthplaces of human rights are far removed from the ornate rooms of diplomatic conferences and are found, rather, in the actual sites (acts and feats) of resistance and struggle (what I call “critical human rights realism”).²¹⁶

tone may have spilled over from his criticism, in the same symposium, of Kenneth Karst (“The Bonds of American Nationhood” (2000) 21 *Cardozo Law Rev.* 1095) for painting an idealized picture of American constitutional history without mentioning slavery.

215 This theme is developed at length in Upendra Baxi, “The War on Terror and the War of Terror: Nomadic Multitudes, Aggressive Incumbents, and the ‘New’ International Law: Prefatory Remarks on Two ‘Wars’” (2005) 43:1&2 *Osgoode Hall Law J.* 7 [“Two ‘Wars’”].

216 “Voices of Suffering, 1999,” *supra* note 190 at 116 [footnotes omitted]. A longer version adds: “Some activists celebrate virtues of dialogue among the communities of perpetrators and those violated (what I term human rights *dialogism*).” *Future of Human Rights, supra* note 190 at 51. Baxi is sympathetic to “moderate forms of dialogism” (*ibid.* at 58-59), exemplified by truth and reconciliation commissions and the writings of Abdullahi An-Na’im, but warns that dialogue with the worst kinds of perpetrators of violations may delegitimize the idea of human rights in the eyes of the violated (*ibid.* at 60). For example, “The idea that a handful of NGOs can dialogue with a handful of CEOs of multinationals to produce implementation of human rights is simply Quixotic.” *Ibid.* at 58. See also Baxi’s more pragmatic approach to the UN’s proposed Norms on Human Rights Responsibilities of Transnationals and Other Business Corporations in “Market Fundamentalisms: Business Ethics at the Altar of Human Rights” (2005) 59:1 *Human Rights Law Rev.* 3 [“Market Fundamentalisms”] (arguing for a pragmatic negotiated compromise between the competing ideologies of business and international regulation).

The Future(s) of Human Rights

The Future of Human Rights contains the most comprehensive statement of Baxi's views on human rights.²¹⁷ Since 1990, Baxi has published at least four books and many articles on the subject. More are in the pipeline. Nevertheless, the core of his thinking is quite stable. Perhaps it can be rendered in four parts: first, the starting point is a concern for and a quite complex idea of human suffering as it is actually experienced anywhere, but especially in the South; second, a comprehensive assessment, often sharply critical, of the past history and current state of human rights discourse, theory, and praxis; third, an aspirational vision of a just world in which all human beings know and genuinely own human rights as resources that can empower vulnerable communities and individuals to interpret their own situations, to resist human rights violations, and to participate in genuine dialogues about alternate and competing visions for a better future in a world that will continue to be pluralistic, ever changing, and possessed of finite resources to meet infinite human wants;²¹⁸ and, finally, pragmatic suggestions about possible strategies and tactics in the perpetual struggle to move realistically towards realizing this vision (the politics *for* human rights).

Baxi's aim in *The Future of Human Rights* is "to decipher the future of protean forms of social action assembled by convention, under a portal named 'human rights'. It problematizes the very notion of 'human rights,' the standard narratives of their origins, the ensemble of ideologies animating their modes of production, and the wayward circumstances of their enunciation."²¹⁹

In short, his objective is to mount a sustained and complex critique of much of the discourse and many of the practices that surround human rights at the start of the twenty-first century and to present a vision, rooted

217 This account is based on the first edition of *Future of Human Rights*, *supra* note 80. In the forthcoming new edition, Baxi develops these ideas at greater length, often more concretely, in lectures, speeches, articles, and pamphlets scattered around websites, learned journals, and activist magazines that are spread widely both geographically and intellectually. Some take the form of detailed commentaries on particular reports or draft texts. Among the most substantial of these are "A Work in Progress": The United States Report to the United Nations Human Rights Committee" (1996) 36:1 *Indian J. of International Law* 34; "Global Neighbourhood' and the 'Universal Otherhood': Notes on the Report of the Commission on Global Governance" (1996) 2 *Alternatives* 525 (review essay on the *Brandt Report* (New York: Oxford University Press, 1995)); and comment on the UN Draft Code of Conduct of Transnational Corporations and Businesses (2003) ("Market Fundamentalisms," *ibid.*).

218 This formulation is constructed from several passages in Baxi & Koenig, *Human Rights Education*, *supra* note 190.

219 *Future of Human Rights*, *supra* note 190 at v.

in experiences of suffering, that can serve as a secular equivalent of liberation theology.²²⁰ For Baxi, such a vision – “critical human rights realism” – should become part of the symbolic capital of the poor and the dispossessed to be used as a resource in their struggles for a decent life.

Baxi claims that *The Future of Human Rights* advances a distinctive “subaltern” activist perspective on human rights futures.²²¹ His central theme is that human rights discourse only has value if it fulfils the axiom “that the historic mission of contemporary human rights is to give voice to human suffering, to make it visible and to ameliorate it.”

Baxi considers this task to be formidable. The second half of the twentieth century has been called “the Age of Rights,”²²² and discourses of human rights have been said to be “the common language of humanity,”²²³ yet what difference in fact have human rights made to human suffering?²²⁴ “The number of rightless people grows even as human rights norms and standards proliferate.”²²⁵

The Future of Human Rights is diffuse, polemical, and difficult to summarize. Perhaps the main themes can be succinctly stated largely in Baxi’s own words as follows:²²⁶

- Human rights discourse is fraught with haunting ambiguities, complexity, and contradiction.²²⁷ It is intensely partisan and cannot be reduced to a single coherent set of ideas. A crucial distinction is between the statist discourses of the powerful and educated (*illustrado*) and the subversive discourses of the violated (*indigenou/indio*).²²⁸
- Taking rights seriously must involve *taking human suffering seriously*.

220 Baxi & Koenig, *Human Rights Education*, *supra* note 190.

221 *Future of Human Rights*, *supra* note 190 at xiii.

222 *Ibid.* at c. 1.

223 Boutros Boutros Ghali, “Human Rights. The Common Language of Humanity” in UN World Conference on Human Rights, the Vienna Declaration and the Programme for Action (1993), cited in “Voices of Suffering, 1999,” *supra* note 190 at 101.

224 See also “Voices of Suffering, 1999” *ibid.* at 102: “But politics of cruelty continue even as sonorous declarations of human rights proliferate.”

225 *Future of Human Rights supra* note 190 at viii.

226 This outline is based on *Future of Human Rights*; “Voices of Suffering, 1999,” *supra* note 190; and a talk given at the University of Essex in May 2003.

227 In *Future of Human Rights, ibid.* at 14, Baxi focuses mainly on human rights discourses, but he insists that “[t]he non-discursive order of reality, the materiality of human violation, is just as important, if not more so, from the standpoint of the violated.”

228 *Ibid.*

- *Suffering is ubiquitous*; it can be both creative and destructive of human potential. It is not confined to poor or undemocratic countries.
- *How suffering is justified* must be a central concern of human rights discourse. Historically, human rights discourse has been used to legitimate state power, colonialism, imperialism, and patriarchy in various forms, and to exclude large sectors of humanity from moral concern.²²⁹ Conversely, successful human rights movements create new forms of justifiable suffering.²³⁰
- *The true authors of rights* are communities in struggle, not Western thinkers or modern states.²³¹ Linking human rights to experienced human suffering is the best hope of ensuring that human rights discourse (i) is not hijacked by a trade-related, market-friendly paradigm of human rights,²³² (ii) is not obfuscated by the politics of human rights (e.g. competition between NGOs) rather than political struggles for human rights,²³³ and (iii) is not dominated by the complacent discourse of the powerful.²³⁴
- Modern human rights discourse is secular. It has severed the connection between human rights discourses and religious cosmologies.²³⁵ This involves a radical acceptance of human finitude (no life after life/death); justifications are only of this world; it problematizes custom and tradition; and creates a secular civic religion, a community of faith.²³⁶

229 See 69-70, below.

230 "Gender equality makes patriarchs suffer. The overthrow of apartheid in the United States made many a white supremacist suffer. . . . People in high places suffer when movements against corruption gain a modicum of success." *Future of Human Rights*, *supra* note 190 at 17.

231 A vivid example of this thesis is Peter Linebaugh & Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic* (London: Verso, 2000), which argues that freed slaves were among the main originators of Western human rights ideas.

232 *Future of Human Rights*, *supra* note 190 at c. 8; see also Baxi's satirical Draft Charter of the Human Rights of Global Capital. *Ibid.* at 149-51. Compare the more pragmatic tone of "Two 'Wars,'" *supra* note 215.

233 The former serves the ends of *Realpolitik*, with "the latter seeking to combat modes of governance (national, regional, or global) that command the power to cause unjustifiable human suffering and impose orders of radical evil." *Future of Human Rights*, *ibid.* at ix, 40-41.

234 To the powerful, the World Food Summit goal of halving the number of starving people by 2015 appears ambitious, even unrealistic; to the poor it appears remote and "rather callous." *Ibid.* at vii. Baxi regularly contrasts the glacial pace of response to the *misfortune* of poverty and hunger with the urgency for pursuing the war on terrorism after the *injustice* of September 11, 2001.

235 "[H]uman rights education symbolizes a secular, or multi-religious equivalent of 'liberation theology.'" *Human Rights Education*, *supra* note 190 at 18.

236 *Future of Human Rights*, *supra* note 190 at 14.

- The contemporary production of human rights is exuberant (even “carnivalistic”), producing a riot of perceptions. Clearly there are too many “soft” human rights enunciations, but very few “hard” enforceable rights.²³⁷ To some, human rights inflation is a threat; others point to the glacial progress made in the direction of “hard,” enforceable human rights norms; yet others read the uncontrolled production of human rights as, perhaps, the best hope for a participative creation of human futures; attempts by the UN or other agencies to control the rate of production are likely to favour the rights of global capital.
- Increasingly, human rights movements and NGOs “organize themselves in the image of markets,”²³⁸ competing with each other (in fundraising, advertising, building capital) like entrepreneurs in a spirit of nervous “investor rationality”²³⁹ and being forced into the trap of commodifying human rights.²⁴⁰
- Economic “globalization” threatens to supplant the ideals of the *Universal Declaration of Human Rights* with a trade-related, market-friendly paradigm, which emphasizes the right to property, the rights of investors, and even the rights of corporations (sidelining the poor to feed off the drips from the alleged trickle-down effects of capitalist prosperity).²⁴¹
- Postmodernism, ethical and cultural relativism, and sceptical critiques of rights discourse draw attention to some genuine difficulties, but they fail to provide constructive strategies for action to alleviate suffering and, however well-intentioned, they make possible toleration of vast stretches of human suffering.²⁴²
- The politics of difference and identity views human rights as having not just an emancipative potential but also a repressive one.²⁴³

237 *Ibid.* at 71.

238 “Voices of Suffering, 1999,” *supra* note 190 at 144; *Future of Human Rights, ibid.* at 121.

239 “Voices of Suffering, 1999,” *ibid.* at 145.

240 *Future of Human Rights, supra* note 190 at c. 8.

241 *Ibid.* at 125-29. Committed supporters of human rights have objected to this economic analogy. Baxi concedes (*ibid.* at 121) that non-governmental human rights praxis can be interpreted analytically in terms of both social movements and “quasi markets,” but he maintains that the comfortable language of “networks” and “associational governance” glosses over the contradictions and complexity of human rights movements.

242 *Supra* note 203

243 “Voices of Suffering, 1999” *supra* note 190 at 103. This is the converse of Santos’s (*supra* note 136) argument that, even though law is often repressive, it has the potential to be emancipatory. The difference is mainly one of emphasis.

- Globalization and the development of techno-scientific modes of production threaten to make contemporary human rights discourse obsolescent.²⁴⁴
- Rights have several different uses as symbolic resources in politics for human rights: (i) as markers of policies – testing whether policy enunciations recognize, respect, or affirm human rights; (ii) as constraints on policy implementation (self-conscious restraint and positive disincentives); (iii) as resources for policy – processes and structures of policy implementation legitimated by reference to specific human rights regimes; (iv) as providing access to effective legal redress; and (v) as resources for collective action – e.g. to mobilize discontent with policy or its implementation.²⁴⁵

Each of these themes is developed in *The Future of Human Rights*, some of them at greater length and more concretely in other works. Rather than attempt a comprehensive exposition, I shall focus on a topic that is pivotal in Baxi's argument and among his more original contributions: different conceptions of the history of human rights.

Two Paradigms of Human Rights in History: “the Modern” and “the Contemporary”

A standard account of the history of human rights is presented in terms of “generations”:²⁴⁶ The first phase in response to the Holocaust and the horrors of the Second World War was marked by a pre-occupation with civil and political rights. The second generation was represented by the *International Covenant on Economic, Social and Cultural Rights* [ICESCR].²⁴⁷ The third

244 *Future of Human Rights*, *supra* note 190 at 156. This means that the increasing dominance of science and technology, as a mode of production and as an ideology that presents itself as progressive, “threatens us all with the prospect of rendering human rights language *obsolescent*” (e.g. in civilian use of nuclear energy, expanding information technology, and development of new biotechnologies). *Ibid.* [emphasis in original].

245 This formulation is a paraphrase of a passage on “the place of rights” in policy making and implementation. Although written specifically in the context of a discussion of population policies in India, it has a broader significance. Upendra Baxi, “Sense and Sensibility” (2002) 511 *Seminar*, online: <<http://www.india-seminar.com/semframe.htm>> [“Sense and Sensibility”]. In respect of international law, Baxi emphasizes that the strategic aims should include enforcing positive law, expanding the range and refining the content of *ius cogens*, and moving beyond positive law to address the processes of norm formulation and using the discourse of rights to “write against the law” (“that is [using] subversive forms of story telling against totalizing narratives of human rights”) Baxi & Koenig, *Human Rights Education*, *supra* note 190 at 15-18.

246 E.g. *Put Our World to Rights*, *supra* note 116 at 34-35. Ghai would clearly agree that it is a simplification.

247 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976)

phase marked a move from emphasis on individual rights to recognition of collective rights, including concern for the environment (“green rights”) in tension with “the right to development.” A fourth phase involved a progressive recognition of the rights of peoples. While talk of “generations” of international human rights has sometimes been a convenient simplifying device, most commentators distance themselves from this taxonomy. At best it can describe one phase of international law. It is generally accepted that such “history” is too crude. For example, the *Universal Declaration*, which is the starting point of modern development, covered economic and social rights as well as civil and political – but these became split in the period of the Cold War. Today, most orthodox commentators at least pay lip service to the claim that human rights are universal, interdependent, and indivisible.²⁴⁸

Upendra Baxi advances a more fundamental critique of such “history.” In his view, it represents a complacent, patronizing, Euro-centric (or rather “Northern-centric”), top-down view of the sources of human rights, suggesting that rights are “the gifts of the West to the Rest.”²⁴⁹ It entirely overlooks the contribution of struggles by the poor and the oppressed to the slow recognition of human rights as universal.²⁵⁰

To make sense of human rights, Baxi argues, one must see the basic ideas not as emanating from Christian natural law or the liberal Enlightenment or the reactions of Western governments to the horrors of World War II. The main context of the production of human rights has been local communities in struggle against the diverse sources of suffering; the main impetus has been direct experience of suffering; the main authors have been those involved in grass-roots struggles²⁵¹ – some having become well-known, while the great majority have been unsung:

248 See, for example, the skilful way in which Henry Steiner and Philip Alston, in *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996) – the leading student course book on international human rights – bring out the complexity of the story, first by acknowledging that most development of human rights issues has been local (at 24-25), and second by identifying the different sources out of which the current international regime developed: “It would be possible to study human rights issues not at the international level but in the detailed contexts of different states’ histories, socio-economic and political structures, legal systems, cultures, religions and so on” (*ibid.* at 24). Baxi might criticize this as too top-down or state-centric, underplaying the significance of social movements, but he would no doubt concede that the state would still be a major player in any history written from below.

249 *Future of Human Rights*, *supra* note 190 at vi.

250 See Linebaugh & Rediker, *supra* note 231.

251 “Almost every global institutionalisation of human rights has been preceded by grassroots activism.” “Voices of Suffering, 1999,” *supra* note 190 at 124.

After all it was a man called Lokmanya Tilak who in the second decade of this century gave a call to India: *swaraj (independence) is my birthright and I shall have it*, long before international human rights proclaimed a right to self-determination. It was a man called Gandhi who challenged early this century racial discrimination in South Africa, which laid several decades later the foundation for international treaties and declarations on the elimination of all forms of racial discrimination and apartheid. Compared to these male figures, generations of legendary women martyred themselves in prolonged struggles against patriarchy and gender inequality. The current campaign based on the motto "Women's Rights Are Human Rights" is inspired by a massive history of local struggles all around.²⁵²

Even within the Eurocentric perspective, narratives articulated in terms of "generations" of rights radically foreshorten history in ways that hide the fragmented ideas that preceded the *Universal Declaration*. For example, human rights doctrine *preceded* abolition and often condoned slavery. The right to property and the right to govern were used to justify various forms of colonialism and imperialism. Only very recently in the long history of rights talk has there been reason to celebrate the maxim that "Women's Rights are Human Rights," but this does not mark the beginning or the end of women's struggle for equality.²⁵³

Instead of a linear history, Baxi substitutes two contrasting "paradigms" (or ideal types) of conceptions of human rights, both of which mask the continuities in the historiography of these two forms: the modern (or modernist) paradigm²⁵⁴ and the "contemporary" paradigm:

The distinction between "modern" and "contemporary" forms of human rights is focused on *taking suffering seriously*. In the "modern" human rights paradigm it was thought possible to take human rights seriously without taking human suffering

252 Uprendra Baxi, "The Reason of Human Rights and the Unreason of Globalization" (A.R. Desai Memorial Lecture, Bombay, 1996), cited in *ibid.* at 124-25.

253 Like Deng, An-Na'im, and Ghai, Baxi is unequivocal in his assertions that women's rights are human rights. He sees the phrase "the rights of man" as an example of the logic of exclusion in human rights discourse; and he is cautious of the rhetoric of some claims about progress, e.g. "The near-universality of ratification of the CEDAW, for example, betokens no human liberation of women; it only endows the state with the power to tell more Nietzschean lies." *Future of Human Rights*, *supra* note 190 at 87. He is a friendly critic of the feminist movement in India: *Memory and Rightlessness* (15th J.P. Naik Memorial Lecture, New Delhi: Centre for Women's Development Studies, 2003); see also "Gender and Reproductive Rights in India: Problems and Prospects for the New Millennium" (Lecture delivered for the UN Population Fund, New Delhi, 2000).

254 *Future of Human Rights*, *ibid.* at 27-28. Baxi's labels can be confusing. "Modern" here refers to modernity with its associations with the Enlightenment, liberalism, and rationality; "contemporary" is associated with, but deliberately distanced from, postmodernism. This distinction seems to me to be quite close to Santos's contrast between "regulatory" (modern) and "emancipatory" forms of law. *Supra* note 136 at c. 9

seriously. Outside the domain of the laws of war among and between “civilized” nations, “modern” human rights regarded large-scale imposition of human suffering as *just* and *right* in pursuit of a Eurocentric notion of *human “progress”*. That discourse silenced human suffering. In contrast, the “contemporary” human rights paradigm is animated by a politics of activist desire to render problematic the very *notion of politics of cruelty*.²⁵⁵

This passage needs some unpacking. Baxi presents the two paradigms in terms of four main contrasts:

Modern

1. logics of exclusion
2. right to govern
3. ascetic (a thin conception of rights)
4. rhetoric of “progress”

Contemporary

1. inclusiveness
2. radical self-determination
3. exuberant (proliferation of rights)
4. voices of suffering

First, while the “contemporary” paradigm is inclusive, the “modern” paradigm for most of its history interpreted “human” to exclude all those who were not to be regarded as human by virtue of having the capacity to reason and an autonomous moral will: “In its major phases of development, ‘slaves’, ‘heathens’, ‘barbarians’, colonized peoples, indigenous populations, women, children, the impoverished, and the ‘insane’ have been, at various times and in various ways, thought unworthy of being bearers of human rights... These discursive devices of Enlightenment rationality were devices of *exclusion*. The ‘Rights of Man’ were human rights of all men capable of autonomous reason and will.”²⁵⁶

Baxi is cautious about universalism in relation to claims that there are moral principles that are valid for all times and all places, but he emphasizes the enormous normative significance of the inclusive claim that human rights apply to all human beings by virtue of their humanity.²⁵⁷

Second, the logic of exclusion led to the justification of colonialism. The language of “modern” human rights was often used to justify colonialism, imperialism, and patriarchy through the right of property (especially occupation of “terra nullius” – ignoring the presence of indigenous people) and “a natural collective human right of the superior races to rule the inferior

255 *Future of Human Rights, ibid.* at 34-35; “Voices of Suffering, 1999,” *supra* note 190 at 114.

256 “Voices of Suffering, 1999,” *ibid.* at 109-10; *Future of Human Rights, ibid.* at 29.

257 All human beings are included, but it is “an anthropomorphic illusion that the range of human rights is limited to human beings; the new rights to a clean and healthy environment . . . take us far beyond such a narrow notion.” “Voices of Suffering, 1999,” *ibid.* at 104-105.

ones.”²⁵⁸ In contrast, the contemporary human rights paradigm is based on the premise of radical self-determination, insisting that every human person “has a right to a voice, a right to bear witness to violation, a right to immunity from disarticulation by concentrations of economic, social, and political formations. Rights languages, no longer so exclusively at the service of the ends of governance, open up sites of resistance.”²⁵⁹

Third, “modern” human rights are state-centric and ascetic, treating the state as the only legitimate source of rights and limiting their scope.²⁶⁰ The sources of “contemporary” human rights are ebullient, leading to “a carnival of production,” though this in turn creates problems. They extend not only to discrete minorities but also to “wholly new, hitherto unthought of, justice constituencies”.²⁶¹ “Contemporary enunciations thus embrace, to mention very different orders of example, the rights of the girl child, migrant labour, indigenous peoples, gays and lesbians (the emerging human right to sexual orientation), prisoners and those in custodial institutional regimes, refugees and asylum seekers, and children.”²⁶²

Fourth, the “modern” human rights cultures traced their pedigree to ideas of progress, social Darwinism, racism, and patriarchy. They used these ideas to justify “global imposition of cruelty as ‘natural’, ‘ethical’, and ‘just’.”²⁶³ Because of the exclusionary logic, the suffering of large numbers of “sub-human” peoples were rendered invisible. By contrast, especially in the wake of the revulsion occasioned by the Holocaust and Hiroshima/Nagasaki, “‘contemporary’ human rights discursivity is rooted in the illegitimacy of all

258 *Ibid.* at 110. See also *Future of Human Rights*, *supra* note 190 at 29-30. “The construction of a collective right to colonial/imperial governance is made sensible by the co-optation of languages of human rights into those of *racist* governance abroad and *class* and *patriarchal* domination at home.” *Ibid.* at 31.

259 *Ibid.*

260 For instance., in the conventional discourse, torture, cruel, inhuman, and degrading treatment are classified as violations of human rights, but starvation and domestic violence are not. *Ibid.* at 13, n. 21.

261 *Ibid.* at 32.

262 *Ibid.*; “Voices of Suffering, 1999,” *supra* note 190 at 112.

263 *Future of Human Rights*, *supra* note 190 at 32. Baxi also uses this idea to attack technocratic justifications of dams and population control in the name of “progress.” For example: “Policy-makers as well as human science specialists are not persuaded, on available evidence, by the rights approach. The reasons for this ‘benign neglect’ of rights vary. Malthusians and neo-Malthusians are wary of a rights approach, in general, because they perceive ‘over-population’ as a social scandal and menace; the hard core among them are not perturbed by excesses in ‘family planning’ programmes and measures implementing these. In their view, ‘man-made policy disasters are as welcome as ‘natural’ disasters that in net effect reduce population levels.” Some argue that reduction in population levels may serve better futures for human rights. “Sense and Sensibility,” *supra* note 134.

forms of politics of cruelty.”²⁶⁴ The ensuing regime of international human rights and humanitarian law outlawed some barbaric practices of state power and “this was no small gain” from the standpoint of those violated.²⁶⁵

Baxi presents the “modern” as state-centric, top-down, technocratic, exclusionary, lean and mean, and used by those in power to legitimate their position and their actions; he presents the “contemporary” as bottom-up, rooted in experience of suffering, ebullient, and involving radical self-determination, with human rights serving as weapon of protest and empowerment of the dispossessed. These two paradigms are not meant to represent successive stages in history; rather they are two ideal types of conceptions of human rights that have been used discursively, sometimes concurrently and sometimes sequentially, mainly in connection with state-oriented Western discourses.

Baxi suggests that an adequate account of the future(s) of human rights requires a developed social theory of human rights, as well as a re-imagined history. At present we lack both. Baxi has been a leading pioneer of socio-legal studies in India, although it is fair to say that he has no more than hinted at what such a social theory might be like.²⁶⁶ But he has sketched a general approach to the kind of history needed to underpin his vision of a healthy future for human rights. Clearly such history would need to be based on the kind of detailed “history from below” exemplified by Edward Thompson, Peter Linebaugh, or George Rudé,²⁶⁷ as well as the kind of sardonic work on official archives of a Brian Simpson.²⁶⁸ But it would also need the grand

264 *Future of Human Rights*, *ibid.* at 33.

265 *Ibid.* at 34.

266 “By a social theory of human rights I wish to designate bodies of knowledge that address (a) genealogies of human rights in ‘pre-modern,’ ‘modern’ and ‘contemporary’ human rights discursive formations; (b) contemporary dominant and subaltern images of human rights; (c) tasks confronting projects of engendering human rights; (d) exploration of human rights movements as social movements; (e) impact of science and high-tech. on the theory and practice of human rights; (f) the problematic of the marketization of human rights; (g) the economics of human rights.” *Future of Human Rights*, *supra* note 190 at 32 n. 18. The whole of this book could be said to be a contribution to such a social theory in that it comments briefly on most aspects of this agenda, but mainly in a preliminary and very general way, with very little empirical basis or relationship to mainstream social theory. Baxi cites a number of general books by Santos, Unger, Shivji, and others that mark “beginnings” of such an enterprise, but he acknowledges that we are a long way from achieving the kind of “grand theory” that he thinks is needed. *Ibid.*

267 E.P. Thompson, *Whigs and Hunters: Origin of the Black Act* (Harmondsworth: Peregrine, 1977); *The Making of the English Working Class* (Harmondsworth: Peregrine, 1963); Linebaugh & Rediker, *supra* note 231; and George Rudé, *The Crowd in the French Revolution* (Oxford: Clarendon Press, 1959). See also Balakrishnan Rajgopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at c. 1-2. Like Baxi, Rajagopal locates much of the history of human rights in resistance to colonialism.

268 Simpson, *supra* note 115.

sweep of world history that one associates with Eric Hobsbawm, Immanuel Wallerstein, or Patrick Glenn.²⁶⁹ Baxi does not claim to have written a history of human rights, but he has made a devastating critique of the predominant mode of complacent, self-congratulatory narratives that dominate much human rights literature.

Conclusion

Baxi characterizes human rights discourse as ebullient, even carnivalistic. These adjectives might be applied to his own writings on human rights. Since 1990, he has published at least four books and many articles on the subject. He promises a substantially revised edition of *The Future of Human Rights* and no doubt more lectures, speeches, and articles. He has written specifically on population control, bio-technology, international business ethics, environmental issues, globalization, terrorism and responses to terrorism, and good governance – all in relation to human rights. He has promised books on the right to food and the right to development. In short, he is a prolific writer who presents a continuously moving target. Some of his most colourful passages are found in quite particular studies. Nevertheless, they are given coherence by a single theme:

“Human rights futures, dependent as they are upon imparting an authentic voice to human suffering, must engage in a discourse of suffering that moves the world.”²⁷⁰

V. FOUR SOUTHERN VOICES

A just international order and a healthy cosmopolitan discipline of law need to include perspectives that take account of the standpoints, interests, concerns, and beliefs of non-Western people and traditions. The dominant scholarly and activist discourses about human rights have developed largely without reference to these other perspectives. Claims about universality sit uneasily with ignorance of other traditions and parochial or ethnocentric tendencies.

269 E.g. Eric Hobsbawm, *The Age of Capital 1848-1875* (London: Abacus, 1988), *The Age of Empire 1875-1914* (London: Abacus, 1989), *The Age of Extremes 1914-1991* (London: Abacus, 1995); Immanuel Wallerstein, *The Capitalist World-Economy* (Cambridge: Cambridge University Press, 1979); and H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2d ed. (Oxford: Oxford University Press, 2004). See also Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge: Cambridge University Press, 2002).

270 “Voices of Suffering, 1999,” *supra* note 190 at 156.

Writings about human rights from non-Western perspectives need to be better known in the West. The four individuals whose more general ideas on human rights are summarized here cannot be considered to be a representative sample of “Southern” viewpoints on human rights; nor can they claim to be spokespersons for any group or people any more than can other public intellectuals. There are many other individuals and groups who deserve such attention. For instance, two Nobel Prize winners, Shirin Ebadi and Aung San Suu Kyi, might right the gender balance. There are other contemporary scholars from outside Europe who have written about human rights. Some, like Amartya Sen, Nelson Mandela, and Mr. Justice Christie Weeramantry, are world famous. Others, such as Issa Shivji of Tanzania, several Latin America jurists, or the late Neelan Tiruchelvan of Sri Lanka, are well known in their own regions and in specialist circles. There is a younger generation of scholars who are coming into prominence.²⁷¹ And there is an extensive literature on Islam, human rights, and law reform. But for my own ignorance and linguistic deprivation, these and many others could be added – especially if one goes back in time, to include for instance Mahatma Gandhi or B. R. Ambedkar.

I have selected these four mainly because I believe that their ideas deserve to be better known, many of their writings are accessible, and I am familiar with their work and know them personally. Each has made a distinctive contribution to both the theory and praxis of human rights. The works of these four thinkers are both significantly similar and strikingly different – in short, they are suitable objects for comparison. They belong to a single postcolonial generation (three were born, coincidentally, in 1938; An-Na'im is a decade younger, but started early).²⁷² All four have been concerned with the problems of racism, colonialism, post-Independence politics, weak and corrupt regimes, poverty, and injustice in the South. They have given expression to ideas that are rooted in these concerns without claiming to represent any particular constituency. All four were trained in the common law, have spent substantial periods in the United States and the United Kingdom, and write in English. They have all been activists as well as scholars, but in quite varied ways. Each has a distinctive

271 For example, Makau Mutua, Mahmoud Mamdani, and Balakrishnan Rajagopal.

272 All four belong to the post-Independence generation of public intellectuals in their own country or region. India became independent in 1946, in Baxi's eighth year; the Sudan in 1956, when Deng and An-Na'im were still at school; Kenya became independent in 1963, the year that Ghai took up his first teaching post at Dar-es-Salaam, where Tanzania had attained Independence two years earlier. For each of them, local, regional, and international post-Independence politics formed a crucial part of the context of their intellectual development.

voice and says different things. They make a fascinating study in contrasts. But, although they differ, they do not disagree on most fundamentals; rather they complement each other.

In recent years their ideas seem to have converged in some significant ways. Two aspects of this deserve emphasis. First, all four are acutely aware that we live in a world characterized by a diversity of beliefs, both within and across national boundaries, and that this creates profound problems of co-existence and co-operation. None sees much prospect of papering over such differences. Francis Deng's writings evoke a cosmology and way of life that is beyond the experience and imagination of most of us. Much of Ghai's practice has been concerned with reaching constitutional settlements and handling conflicts in multi-ethnic societies in which civil strife and protection of minorities are acute problems. So far as I can tell, each of them would opt for what Patrick Glenn calls "sustainable diversity"²⁷³ rather than some bland homogenization in which one size is made to fit all. All emphasize the significance of local particularities.

Secondly, the fact of pluralism (of beliefs, cultures, traditions) raises issues that are fashionably discussed in terms of universalism versus cultural relativism. My sense is that all four are impatient about such debates. Each steers a path between strong versions of universalism and particularism. In interpreting them, it is important to distinguish between four different meanings of universalism: (i) *formal universalizability*, as embodied in Kant's categorical imperative or the Golden Rule; (ii) *empirical universalism*, the position that human nature and systems of belief grounded in this nature are in their essentials universal or near-universal and that this can form the basis for an over-arching metaphysics of humanism (a view that has gone out of fashion in anthropology and most social sciences, which tend to emphasize the diversity, plasticity, and contingency of social cultures and belief systems, but that still finds some support in genetics, socio-biology, and more "hard-wired" perspectives on the human psyche); (iii) *ethical universalism*, the position that there are universal moral principles, including principles underpinning human rights, that apply to all persons at all times and in all places; and (iv) *procedural universalism*, the hope that despite diversity of beliefs and conflicting interests, humankind can through reasonable dialogue and negotiation construct sufficient consensus to ground stable institutions and practices to sustain co-existence and co-operation.

On my interpretation, all four jurists are very close to each other on these points. All appear to accept formal universalism and to reject strong empirical claims to universality of cultures and beliefs; in other

273 *Supra* note 267 at c. 10.

words, they accept diversity of beliefs as a psychological and social fact. On ethical universalism, their positions are somewhat different: all four are politically committed to fighting for the basic values embodied in the *Universal Declaration of Human Rights*.²⁷⁴ An-Na'im comes close to espousing a religion-based form of ethical universalism; Deng in all of his writings emphasizes human dignity as a basic value, but seems to use international human rights documents as consensual working premises rather than as embodying a single set of universal moral precepts; Ghai and Baxi pragmatically plugged into human rights discourse quite late in their careers, because it was so dominant in the spheres in which they operated. Ghai sees it as a historically contingent workable framework for negotiating constitutional and political settlements and developing constitutions through genuinely democratic constitutive processes, but he emphasizes material interests rather than cultural differences as the main recurrent basis of conflict. Baxi also treats human rights as a form of discourse and emphasizes its potential for abuse and obfuscation, passionately arguing for it to be allowed to be the medium for expressing "voices of suffering," especially of the half of the world that is deprived of food, water, health, education, and other necessities for a life worth living.²⁷⁵

All four reject strong cultural relativism. They respect cultural diversity and value tolerance, but this does not involve commitment to tolerating the intolerable.²⁷⁶ Each believes in the value of dialogue, but with different emphases: Deng, the diplomat, has always relied on persuasion and mediation; An-Na'im stresses the importance of internal dialogue; Ghai points to the value of human rights discourse as a framework for political negotiation and compromise between people with different interests, concerns, and ethnicities; Baxi, more pugnacious, sees dialogic human rights as the gentler part of struggle.

274 None of them treats the fact of pluralism of beliefs as a ground for abdicating moral commitments or refusing to criticize particular cultural practices.

275 One encouraging sign is that the United Nations Development Program (UNDP)'s social indicators embodied in the Millennium Goals appear to be a basis for a genuinely broad consensus about basic needs, if not about priorities or strategies for achieving them. See *United Nations Millennium Resolution*, GA Res. 55/2, UN GAOR, 55yh Sess., Supp. No. 49, UN Doc. A/55 (2000) 4; and United Nations Statistics, Division, Millennium Development Goal Indicators Database (30 July 2005), online: <http://millenniumindicators.un.org/unsd/mi/mi_goals.asp>.

276 Moderate cultural relativism does not preclude appeal to external standards, but it does require that those standards are not themselves ethnocentric and that a serious effort be made to understand the local conditions and cultural meanings of any practice that is under scrutiny.

What of differences? One can point to differences in ethnicity,²⁷⁷ mother tongue (English was for each of them a second or third language.), attitudes to religion,²⁷⁸ professional fields of specialization,²⁷⁹ the arenas in which they have been activists, and the historical events they have witnessed. By and large they have read different things.²⁸⁰ In the present context, perhaps the main differences in their treatment of human rights are differences of concerns, emphasis, and style rather than any profound disagreements.²⁸¹

It would be tempting to end by trying to compare and contrast these quite different perspectives on human rights with some familiar strands in Western liberal democratic theory.²⁸² There are indeed some interesting issues that could be pursued. But in the present context this would undermine my purpose, which is to point to one possible route out of the intellectual isolationism and parochialism of Western legal theory.

To sum up:

- For a case study of the relationship between an exotic traditional nomadic culture and the international human rights regime, read Francis Deng.

277 Ethnically, Deng is Nilotic, An-Na'im is Northern Sudanese (Arab), Ghai is Kenyan Asian (Hindu), and Baxi is Indian (also Hindu background).

278 Each has somewhat different specialisms: Deng in ethnography, international relations, and diplomacy; An-Na'im in Islamic theology and public international law; Ghai in public law and constitutionalism (and to a lesser extent public international law); Baxi in Indian law, especially public law, and recently environmental protection and responses to terrorism. All converge under the umbrella of "law and development."

279 An-Na'im is a committed Muslim. The others are generally secular and agnostic or even atheist.

280 Ghai and Baxi are well read in both Marxist theory and Anglo-American jurisprudence; Deng and An-Na'im less so. Although some of An-Na'im's ideas seem to echo liberal thinkers such as Rawls (overlapping consensus, public reason), or Habermas (deliberative democracy, ideal speech situation), he denies having read them (interview with author, *supra* note 78). None is an out-and-out postmodernist, but Baxi has flirted with postmodernism and is more familiar with modern Continental European ideas.

281 Baxi's criticism of Ghai, and Ghai's exchange with An-Na'im about the role of judiciaries in protecting economic, social, and cultural rights, seem to me to involve relatively minor differences. In *Who Believes in Human Rights? The European Convention in Question* (Cambridge: Cambridge University Press, 2006), Marie-Bénédicte Dembour puts forward a general taxonomy of schools of thought about human rights: the Natural School, the Deliberative School, the Protest School, and the Construction School (typified or inspired by Kant, Habermas, Levinas, and Derrida, respectively). It is fairly obvious that Baxi belongs to the Protest School, but how the others might fit this classification is open to debate (communication to the author, 29 March 2005).

282 See e.g. Rawls on "overlapping consensus" and "public reason" (*supra* note 102); Habermas's "ideal speech situation" and "the principle of universalization" (especially *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William H. Rehg (Cambridge: Polity Press, 1996)); Lasswell, among others, on values and dignity (*supra* note 10); and Ronald Dworkin's ideas of "equal concern and respect" for persons and "rights as trumps" (*Taking Rights Seriously* (London: Duckworth, 1977)).

- If you wish to learn how a devout Muslim scholar has developed a strategy for reconciling Islamic beliefs with Western liberal democratic ideals, read Abdullahi An-Na'im.
- If you are interested in a pragmatic, materialist argument about the practical value of using human rights discourse to reach political settlements and compromises in multi-ethnic or other conflicted societies, read Yash Ghai.
- And, if you are interested in an impassioned plea that human rights discourse should first and foremost be interpreted and used to further the interests of the worst-off, read Upendra Baxi.

