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TRANSNATIONAL HUMAN RIGHTS: Exploring the Persistence and Globalization of Human Rights

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■ **Abstract** This review considers how a socio-legal approach may be used to explore the relationship between human rights and law in the new century. Drawing on the classic traditions of law and society research, including gap studies, rights consciousness, public interest lawyering, and legal resource mobilization, as well as more recent approaches to legal globalization and epistemic communities or nongovernment networks, this paper begins to define a field of transnational human rights. The review traces the idea of transnational human rights to the struggles between social movements, in national and international fora, and the impact these struggles have had on the relationship between state power or sovereignty and the quest for legitimate and effective forms of governance. A key element of this endeavor, the paper concludes, is the need to integrate and understand the interaction between three traditionally separate domains of rights: international human rights, humanitarian law, and constitutional rights. It is this focus that defines the emerging field of transnational human rights.

INTRODUCTION

Human rights, some have argued, have simply become a fact of life (see Rorty 1993). But the hegemony of human rights discourse coexists with persistent violation and even impunity (Hoffmann 2003). Despite the general rhetoric condemning torture, exposed in digital camera shots from Iraq, Afghanistan, and other fronts in the "war on terror," the practice of human rights has remained highly contextual. Although the U.S. military has conducted hundreds of investigations into allegations of torture and other human rights abuses, most have been inconclusive because victims cannot be located or evidence is not forthcoming. Thus, the practice of human rights is located between the formal requirements of a highly technical legal process and the realities of power and confrontation in the world. In this context, we must first look beyond the formal claims of human rights law and doctrine and consider how socio-legal approaches may help to produce a more deeply textured understanding of the relationship between human rights and law in the early twenty-first century.

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A socio-legal approach to human rights addresses questions of individual and social emancipation from a historical view, recognizing that a link exists between the interaction of claims to citizenship, national emancipation, and individual and collective rights and the demand for law. The aim of this review is to draw together different strands of the law-and-society project to construct and reveal an emerging field of research in the tradition of law and social science that is building a new understanding of the relationship between law and human rights. In addition to recent discussions of human rights in the law and society tradition (Hajjar 2004), the construction of this field requires drawing upon the now classic law and society studies of public interest lawyering (Sarat & Scheingold 2001), legal resources and mobilization (Epp 1998, Rosenberg 1991), and rights consciousness (Williams 1991, Hartog 1988). To these approaches must be added areas of research and analysis that are new to, or have remained on the fringes of, law and society work. First is the work on new forms of transnational governance, from the transmission of new global orthodoxies (Dezalay & Garth 2002a), the construction of counter-hegemonic movements (Santos 1995), and new forms of global ordering (Slaughter 2004) to epistemic communities (Canan & Reichman 2002) and networks (Keck & Sikkink 1998). Second, we must relate these international studies to the work of those who are building a scholarship around the development of new constitutional orders while linking these domestic or national processes to broader global trends (Scheppele 2004, Klug 2000a, Arjomand 1992).

DEFINING A FIELD OF TRANSNATIONAL HUMAN RIGHTS

To understand the important contribution law and society scholarship brings to the field of human rights, we must begin by reconsidering the traditional approach to human rights. Premised on the history of Western philosophical thought and legal doctrine, the traditional approach to human rights focuses first on the emergence of particular human rights claims and their incorporation through international legal processes into binding legal norms (Cranston 1973, Henkin 1990, Ishay 2004). Second, there is a focus on the international legal and institutional machinery that is designed to monitor human rights violations and pursue strategies for the greater recognition and implementation of human rights (Shelton 2002, Thornberry 1989). A socio-legal approach must take a more holistic view of human rights, not only linking the emergence and implementation or enforcement of human rights to continuing social, political, and professional struggles, but also understanding the essential continuity between struggles for rights and the control of power—at the international, national, and local levels. Finally, the emerging field of human rights within the socio-legal tradition must not only apply the existing socio-legal strategies of research and analysis, such as gap studies, public interest lawyering, questions of resources, or the impact on social mobilization; it must also endeavor to break down the traditional distinctions between humanitarian law, international human rights, and constitutionalism to reveal the interconnections that make up the field of transnational human rights.

The field of law and society has already produced an extraordinarily rich empirical scholarship on the question of rights, from the nature and basic function of rights in legal conflicts, "toward understanding how rights operate in the social world" (Nielsen 2004, p. 64). This debate has extended beyond the traditional law and society focus on national law and particularly U.S. law (Abel 1995b), showing that the deployment of legal rights is neither a "uniquely American phenomenon" (Nielsen 2004, p. 73), nor limited to national legal systems. Instead, the "rights explosion" (Epp 1998) has become a central part of the phenomena of globalization (Boyle & Meyer 2002), whether through the rising hegemony of global cultural forces in the form of corporate capital, global finance and related professional elites, and the global campaign to establish the "rule of law," or through colonial encounters (Benton 2002, Chanock 2001, Merry 2000, Badie 2000) and struggles for human rights (Hajjar 1997, Abel 1995a, Sikkink 1993). A major contribution to a socio-legal understanding of the international human rights movement has been made by Yves Dezalay and Bryant Garth, who apply their method of relational biography to trace the creation of the field of international human rights "through the careers of individuals in law and politics" (Dezalay & Garth 2001, p. 355). Although their research reveals the crucial and symbiotic linkages between struggles over human rights in the global South, intra-elite contestations over political power in the North, and the politics of major philanthropic foundations in the United States, their presentation of the construction of the international human rights movement is confined by the tendency in law and society to focus on private power and law outside of the state. Even though they highlight the movement of human rights lawyers into positions of power in the newly democratized states of the South, they do not consider the independent role of states and state-dominated international institutions in facilitating the creation of the international human rights movement. Instead, their analysis leads them to recognize the relative autonomy of international human rights and yet to argue that "the field of human rights expertise is dominated by the influence and prestige of the U.S.-based multinationals" (Dezalay & Garth 2001, p. 357).

Building on their contribution requires us to consider a period before the domestic palace wars so central to their argument (Dezalay & Garth 2002b). First, we must understand how major obstacles, such as the notion of state sovereignty, protected by the United Nations Charter, were overcome, thus creating the legal terrain and space within which an expertise could develop and an international movement flourish. Although this exercise has been traditionally done through a description of changes in legal doctrine, a socio-legal approach should both focus on the broader context, such as the process of decolonization (Wilson 1994), and pay attention to the individual steps through which international diplomats and their allies in national liberation movements—precursors to the international human rights movement—undermined and challenged state assertions of exclusive authority (Von Eschen 1997). A key example is the struggle to place the question

of racial discrimination in South Africa onto the agenda of the newly established United Nations (Thomas 1996, Sohn 1994). This is the story of a transformed world in which newly emerging postcolonial states began to link the issue of racial discrimination, revealed and discredited by the Holocaust, with the question of colonialism and foreign domination. Recognition of the right to self-determination became not only the lodestar of the international human rights framework but also the means to question the authority of states over peoples, and eventually over individuals.

STATE SOVEREIGNTY, ARTICLE 2(7), AND THE ANTI-APARTHEID MOVEMENT

The international campaign against South Africa's policy of apartheid and the anti-apartheid movement that mobilized people across the globe provide a useful lens through which to view the transformation of human rights from the state-based system of international legal norms to what might more accurately be thought of as a normative and institutional system of transnational human rights. This transformation occurs not only in the elaboration of human rights norms, on which most human rights discourse is focused, but also in the changing relationship between states in the international system, as well as in the evolution of a plethora of national and international institutions, organizations, and campaigns designed to oppose and overcome particular human rights problems. A number of different human rights problems—from slavery, to the system of forced labor in the Belgian Congo in the years before the Universal Declaration, to torture in Latin America, to political repression in the former state socialist societies—all play a part in the story of human rights and their emergence in global law and politics. The international response to apartheid, however, played a unique role in the early struggles over the legitimate form and scope of international intervention.

South Africa's assertion of domestic jurisdiction as a defense against United Nations concern over racial discrimination marks the first salvo, even before the adoption of the Universal Declaration, in the struggle over the post–World War II commitment to human rights. In June 1946, in response to the passage of the Asiatic Land Tenure and Indian Representation Act, which both prohibited people of Indian descent from acquiring land and excluded them from the political process in South Africa, the South African Indian Congresses launched a passive resistance campaign. At the same time, the Indian government lodged a complaint against the South African government's increasingly discriminatory policies toward South African nationals of Indian descent, thus raising the issue of racial discrimination in South Africa for the first time in the UN General Assembly. In response, Field-Marshall Smuts, one of the initiators of the League of Nations and, as prime minister of South Africa, a founding member of the United Nations, objected, arguing that "within the domain of its domestic affairs a State is not subject to control or interference, and its actions could not be called into question by any other state" (Sohn 1994, p. 49). Smuts asserted that Article 2(7) of the United Nations Charter "embodied an over-riding principle qualifying. . .all the other provisions of the Charter," and threatened that if it was decided that a recommendation by the General Assembly on such an issue was not an intervention in the domestic affairs of a member state under Article 2(7), then "every domestic matter could be taken through every stage in the procedure of the Assembly" (Sohn 1994, p. 50).

Rejecting this claim, the UN General Assembly initially argued that the pre-existing bilateral agreements between South Africa and India provided a basis for the assembly's jurisdiction. As the conflict over South Africa's discriminatory policies continued, the assembly argued that the situation in South Africa was "a humanitarian question of international importance," and that under Article 14 of the charter, the assembly "had the necessary competence to recommend measures to ensure the peaceful adjustment of a situation which had, in the Assembly's opinion, led to the impairment of friendly relations" (Sohn 1994, p. 55). This assertion of jurisdiction relied in part on the advisory opinion in the case of the Permanent Court of International Justice (PCIJ) in the Nationality Decrees Issues in Tunis and Morocco (PCIJ 1923, p. 24[1]), in which the court held that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." This formulation allowed the General Assembly to claim fealty to the notion of a "reserved domain" of domestic jurisdiction and to argue that "the right of a State to use its discretion may nevertheless be 'restricted by obligations which it may have undertaken towards other States'" and thus, "jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law" (Sohn 1994, p. 51).

Despite continued objections from the South African government and concern by others, such as the Canadian delegation who emphasized the "necessity of making a distinction between the right of the Assembly to discuss the problem under the terms of the Charter and its competence to intervene," which they argued depended on "the kind of action the Assembly might be invited to take" (Sohn 1994, p. 54), the assembly proceeded to strengthen the legal basis of its jurisdiction. This was achieved in practice by, on the one hand, suggesting the weakest form of intervention by merely inviting the parties, India, South Africa, and Pakistan, "to enter into discussion," while, on the other hand, extending the grounds upon which concern could be raised by stating that the discussion should take into consideration the "purposes and principles of the Charter of the United Nations and the Declaration of Human Rights" (Sohn 1994, p. 55).

In September 1952, 13 Asian and African countries requested that the issue of apartheid be placed on the General Assembly's agenda on the grounds that these policies created a "dangerous and explosive situation, which constitutes both a threat to international peace and a flagrant violation of the basic principles of

[1]See Appendix A for a list of national constitutions, human rights documents, and cases.

human rights and fundamental freedoms which are enshrined in the Charter of the United Nations." In response, the South African government argued that it was "completely unfounded and quite preposterous" to view apartheid as a threat to international peace and that the only exception to the prohibition against interference in the domestic affairs of a member state is when the Security Council is authorized to intervene under Chapter VII of the charter and then only in situations specified in Article 39. Furthermore, South Africa argued, the General Assembly is not authorized to intervene in any manner—including by resolutions, recommendations, or even discussion—as the charter provides no other exceptions outside of Article 39, and certainly contains no "additional exception with respect to questions of human rights" (Sohn 1994, p. 64). This position is still maintained by South Africa's last apartheid state president, F.W. de Klerk. In his submissions and appearances before the Truth and Reconciliation Commission in 1997, de Klerk continued to reject the description of apartheid as a crime against humanity, arguing that the international declaration that apartheid is a crime against humanity was invalid as it was merely a General Assembly resolution and not a resolution of the UN Security Council, which in his view was the only body with the authority to intervene in the domestic affairs of a member state.

Addressing the issue of apartheid for the first time in 1952, the UN General Assembly adopted two resolutions in which the assembly affirmed that governmental policies of member states that are not directed toward the goal of "ensuring equality before the law of all persons regardless of race, creed or color," but that instead "are designed to perpetuate or increase discrimination, are inconsistent with the pledges of Members under Article 56 of the Charter" [UN Gen. Assem. Resolution 616(VII) B (1952)[2]]. In response, the South African government refused to cooperate with the commission established by the General Assembly to study and report on the racial situation in South Africa. Reviewing South Africa's objections to the exercise of jurisdiction by the General Assembly, the commission argued that the General Assembly was authorized by the charter "to undertake any studies and make any recommendations to Member States which it may deem necessary in connection with the application and implementation of the principles to which the Member States have subscribed by signing the Charter" [UN Commission Report (1953), paragraph 893(i)]. Furthermore, the commission concluded that this "universal right of study and recommendation is absolutely incontestable with regard to general problems of human rights and particularly of those protecting against discrimination for reasons of race, sex, language or religion" [UN Commission Report (1953), pp. 16–22, 114–19].

The outcome of this process was to slowly disconnect human rights claims from the strictures of Article 2(7) and the standard of noninterference, in effect favoring international or transnational human rights standards over local claims. Over the next 40 years, the international community, driven by struggles in South Africa and the emergence of an international anti-apartheid movement, continued to extend its jurisdiction over the issue of apartheid, moving from recommendation to condemnation [UN Gen. Assem. Resolution 1761 (1962)]; from encouraging discussion of racial discrimination to the rejection of the apartheid government's credentials to represent South Africa in the General Assembly [Bouteflika 1974; UN Gen. Assem. Resolution 3206 (1974); UN Gen. Assem. Resolution 3207 (1974)]; and from support for the victims of apartheid [UN Gen. Assem. Resolution 3411 (1975)] to the imposition of a mandatory arms embargo in response to the 1976 student uprisings and the apartheid regime's brutal response [UN Secur. Counc. Resolution 418 (1977)]. Even then, as UN Secretary General Kurt Waldheim told the Security Council on the adoption of Resolution 418, "[t]he adoption of this resolution marks the first time in the 32-year history of the Organization that action has been taken under Chapter VII of the Charter against a Member State" (Waldheim 1977). In fact, each step of the way was marked by a combination of internal resistance to apartheid and the development of an international social movement opposed to South Africa's racial policies of overt de jure discrimination.

[2]See Appendix B for a list of United Nations documents related to apartheid. Many of these documents have been reprinted in *The United Nations and Apartheid 1948–1994* (United Nations 1994).

The initial assertion of General Assembly jurisdiction "to study and recommend" in the field of human rights provided the stepping stones over which activists and states maneuvered in building an international human rights system during the last half of the twentieth century. This was not merely the construction of a normative framework but rather a globalizing process that only came to prominence through the struggles of national and international social movements, from the civil rights movement in the United States to the mothers of the Plaza de Mayo in Argentina and the international anti-apartheid movement itself. Despite the old formal doctrine that states are the sole or primary subjects of international law, by the end of the twentieth century the reality of a constant renegotiation of state sovereignty was well established, providing a smorgasbord of subjects—international organizations, nongovernment organizations, transnational corporations and movements, as well as individuals—and a fragmentation of jurisdiction in which the nation-state provides the locus for constant renegotiation, realignment, and reassignment of jurisdictional powers. Although many of the participants may have thought that apartheid in South Africa presented an exceptional case, these developments were important markers in the renegotiation of state sovereignty and the exercise of supranational jurisdiction over fundamental political choices and decisions. This then is the "terrain of international human rights" (Dezalay & Garth 2002b, p. 129) upon which the participants in domestic U.S. palace wars, identified by Dezalay and Garth, could operate, simultaneously reconstructing an international human rights movement while focusing "on the state at home" (Dezalay & Garth 2002b, p. 132).

By the end of the cold war, the realm of international human rights—formally constituted through regional treaty systems, international institutions, and a machinery of annual reports and reviews, supplemented by ad hoc commissions

and even the adjudication of some cases—was being supplemented by a more proscriptive set of declarations and commitments that aimed at shaping the future development of intrastate political and social arrangements, captured in the rubric of good governance. In the South African case, this was evidenced in the shift from the rejection and condemnation of the 1983 constitution [UN Secur. Counc. Resolution 554 (1984)]—which represented an attempt at internal reform based on racial power sharing but still dominated by the white minority—to the adoption of a declaration establishing a set of principles for a democratic transition and constitutional framework that would be acceptable to the international community [UN Gen. Assem. Resolution S-16 (1989)]. The idea of constitutional principles that was at the center of this new form of intervention represents an extraordinarily bold assertion of international norms in the context of the exercise of domestic self-determination. Although this may be considered proof of the complete demise of the notion of sovereignty and the guarantee of noninterference contained in Article 2(7) of the charter, in fact it is again bolstered by a series of international declarations by states committing themselves to the principles of democracy and constitutionalism reflected in these principles (see Warsaw Declaration 2000).

BREAKING THE TRADITIONAL HUMAN RIGHTS MOLD

The Universal Declaration of Human Rights is the paradigmatic representation of international human rights—a comprehensive list of rights to be held up as a standard of civilized behavior. At the same time, it reflects the popular experience of human rights, on the one hand realized most often in their repeated violation (Barnett 2002) and, on the other hand, existing at best as a weak form of customary international law, a "soft law" not much more effective than a set of aspirations toward which we must constantly strive. Although international human rights law is grounded most directly in the "hard law" of binding international treaties, particularly in the regional human rights conventions such as the European Convention on Human Rights, the effective implementation of human rights has been achieved either through domestic law or more recently through the exercise of humanitarian intervention and the enforcement of international criminal law. Despite debates over the different philosophical and legal sources of human rights (Rubin 2003), at the local level the assertion of rights comes through experiences of resistance and of mass violation. Human rights thus find their expression, regardless of their formal legal embodiment at any particular level—national or international—in violation, resistance, and struggles for recognition and social emancipation (Santos 1995).

The contours of the relationship between law and human rights may be revealed through a number of different research strategies employed by socio-legal scholars. One classic approach applied to the field of international human rights by Lisa Hajjar is "gap studies," which provides an essential additive to the range of

autobiographies that are beginning to define our understanding of the human rights movement (Mandela 1994, Laber 2002, Neier 2003). Although Hajjar recognizes that the question of a gap between human rights principles and practice has been a traditional issue of concern among human rights scholars, her analysis goes further than the traditional bemoaning of the realities of international law and the fate of human rights. Instead, she traces how the negotiation and implementation of particular human rights agreements—from the Genocide Convention and Geneva Conventions to the Torture Convention—reflect the tension between the pressures to adopt these norms and yet concern among elites that these commitments not be extended to apply to their own domestic or international human rights violations (Hajjar 2004, p. 596). Nevertheless, she argues that the creation of this legal and normative field, and the failure to uphold these commitments, stimulated the emergence of a global human rights movement that today fulfills "a panoptic function of international surveillance by documenting and protesting violations" (Hajjar 2004, p. 597). By combining both the traditional law and society approach to the empirically based "gap problem" with a postrealist conception of rights and legal consciousness, Hajjar demonstrates how "pluralization and fragmentation" (Sarat 2004, p. 8) in the field of law and society offer new methods and insights into the relationship between law and human rights. The effect is to demonstrate how, despite obvious legal limitations and failures, human rights have transformed the global order.

To fulfill the promise of scholarly understanding and engagement that a law and society approach to human rights offers, we must now go further and question the traditional legal divisions that have characterized the evolution of human rights in the transnational context. Instead of approaching the question of human rights through the prism of legal distinctions, between natural and positive law or between humanitarian law, international human rights law, and constitutional rights, it is important to recognize, as Jurgen Habermas has suggested, that "the revolutionary moment of turning natural into positive law has been worn out during the long process of the democratic integration of basic rights," thus creating "both political space and a legal framework for citizen's participation in democratic decision-making procedures" (Savic 1999, p. 5). Building on this insight, a socio-legal approach should trace the linkages and increasing interconnections in state and nonstate legal practice and activism between different notions of human rights in the diverse arenas in which the claims and tools of human rights are brought to bear. Although original claims against sovereign power may have been constituted as privileges won in the battle to create domestic constitutional orders, today this process has come full circle. Domestic constitutional orders are now shaped in part by demands that state reconstruction be negotiated within a framework that recognizes and implements particular forms of the range of available transnational human rights. The task, then, is both to connect the different legal realms in which transnational human rights operate and to trace their slow consolidation as these rights are formulated and given increasing effect through the marshaling of resources and exchange of meanings.

Humanitarian Law

Attempts to codify standards of treatment, based on the recognition that individual humans have inviolable rights over and above those granted or recognized by specific national communities or sovereign authorities, began with the emergence of humanitarian law in the nineteenth century. Humanitarian law, first codified comprehensively at the international level in the Hague Conventions, recognized the worth of individual human beings in the context of armed conflict, but the standards of treatment guaranteed by humanitarian law were closely tied to the particular individual's status—as combatant, noncombatant, injured, or captured—and did not apply universally (De Lupis 1987). Although a series of negotiated agreements extended the protections of humanitarian law, particularly after World War II, the specific context of this law—the realm of international armed conflict—has limited the scope of its effective protections. Attempts to overcome this limitation through the extension of the rules of humanitarian law to civil wars and nontraditional combatants through the Geneva Convention protocols received limited support, and the law of occupation, a significant part of the core 1949 Geneva Conventions, has been consistently avoided or denied (Benvenisti 1993, p. vii) in those circumstances and conflicts where it seemed to be most urgently required—from Namibia to Iraq.

Violations of humanitarian law, including crimes against humanity, war crimes, and genocide, have since the end of the cold war led to the most direct enforcement of international human rights norms, most recently through the work of the international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). At the same time, the impact of human rights law on the evolution of humanitarian law is evident in the judicial interpretation of the Geneva Conventions; for example, in the *Tadic* case the appeals chamber of the ICTY adopted an approach to the fourth Geneva Convention. The appeals chamber held that the applicability of the law of occupation is not "dependent upon formal bonds and purely legal relations," but rather upon its primary purpose, which "is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy diplomatic protection... of the state in whose hands they might find themselves" (*Tadic*, para 168). The coming into force of the Rome Treaty and the establishment of the International Criminal Court offer further promise that international human rights norms—in the form of humanitarian law in particular—might increasingly be enforced in the international arena. Yet resistance remains, and even amid scenes of major human rights violations, such as the conflict in the Darfur region of Sudan, the debate over whether to characterize events as genocide or gross violations of human rights and the refusal of the United States to recognize the jurisdiction of the International Criminal Court all effect the form and effectiveness of the global response. The form these debates take, such as the identification and claiming of specific and at times minute distinctions between factual settings, distinguishes humanitarian law from the broader diffuse claims of human rights, simultaneously limiting the scope of effective humanitarian rules and denying the applicability of broader human rights claims in conflict zones. Embedded in these debates and disputes are continuing political tensions over the reach of international human rights law and its relationship to ideas of sovereign equality, nonintervention in internal affairs, and other legal underpinnings of the community of states that is reflected in the United Nations Charter.

International Human Rights

The universal status of human rights immediately distinguishes this body of law from humanitarian law, which remains primarily based on the status of those falling within its ambit. Although claims of universalism have broadened the scope of human rights law, they have also led to the undermining of specific human rights claims in the name of culture and context. International human rights, particularly in their post–World War II guise, also facilitated the arrival of a host of new subjects into the traditional realm of public international law (Slaughter 2002). Scholars readily recognize that the emergence of international human rights law introduced individuals as subjects of public international law, which before had applied solely to relations between sovereign states with international organizations having a particular and exceptional status. Less often recognized is the fact that the emergence of the individual subject also dramatically enhanced the status of nongovernment organizations. Even though nongovernment bodies such as the International Committee of the Red Cross had managed to transform themselves into international organizations in the post–World War II era, the emergence of international human rights brought forth a new generation of nongovernment organizations, from Amnesty International to Doctors Without Borders, who both represent the organized embodiment of emergent global social movements and articulate networks of human rights defenders independent of, but increasingly engaged with, state actors (Sikkink 2002).

The Challenge of 9/11, the War on Terror, and the Iraq War

Although the ICTY and ICTR provide examples of the enforcement of international human rights, they also reflect the continuing tension between the promise of human rights and the realities of power asserted through claims of national interest, state sovereignty, and the principle of noninterference in the domestic affairs of a member state of the United Nations. Unlike an earlier era in which states simply asserted that domestic human rights issues were insulated from international intervention by Article 2(7) of the United Nations Charter, today most states, and particularly the more powerful states such as the United States and the United Kingdom, simply claim that their actions are consistent with their human rights obligations. Alternatively, there has been a move since the September 11, 2001, terrorist attacks in the United States to claim, in the name of the war on terrorism, that certain categories of people are cast outside of the normally applicable protections, such as the Geneva Conventions (Klug 2003). Despite the power of those arguing for this exception, the discourse of human rights has nevertheless reasserted itself, and even as violations continue, the executive branch in the United States is once again claiming fealty to international human rights standards.

The power of human rights discourse lies not only in the depth of institutional organization, from the United Nations system to transnational nongovernment organizations, but most significantly in the process of internalization that has fundamentally linked the claims of human rights to domestic political arrangements, thus transforming violations against others into a potential threat to domestic constituencies. This transformation has been achieved through the domestic constitutionalization of human rights, either through the interpretation of existing provisions in bills of rights—as happened in the post–World War II interpretation of the rights guaranteed in the U.S. Constitution (Amar 1998)—or through the adoption of new charters of rights in the post–World War II and post–cold war processes of state reconstruction, in which justiciable bills of rights have been adopted by an increasing number of countries (Klug 2000a). This development truly marks the emergence of transnational human rights, claims to rights that are institutionalized at multiple levels in the global system, and where struggles over rights in any particular context both transform the content of these rights and serve as immediate examples to others who then employ these new arguments and claims from other jurisdictions—national or international—to further their local campaigns for rights (Amann 2004, Klug 2000b).

Constitutional Rights

In the last decade of the twentieth century, well over $1 billion was spent on rule of law projects in every conceivable corner of the globe. This rule of law movement accompanied the enormous political reconstructions of the post–cold war era. More than 56% of the 185 member states of the United Nations made major amendments to their constitutions in the decade between 1989 and 1999, and of these at least 70% adopted completely new constitutions (Klug 2000a, pp. 11–14). As a result, about half the member states of the United Nations had, by the beginning of the new millennium, incorporated bills of rights, fundamental rights, or some form of individual and/or collective rights into their constitutional orders. Although the content of these rights varies dramatically in form as well as application, one may nevertheless argue that the notion of human rights, whether individual or collective, had become a central aspect of constitutionalism by the early twenty-first century.

Despite the apparent contradiction between the adoption of universal norms and the particularism of each country's institutional arrangements and even differing understandings of the obligations that flow from these universal commitments, it is precisely the ways in which the particular is bounded by the universal that marks the process of a globalized constitutionalism. Unlike the debates between law and justice, between positive law and natural law, or over universal human rights, a globalized constitutionalism has introduced a dynamic in which the idealism of universal principles both limits the range of local variation and is simultaneously enhanced by incorporating the specific attributes that emerge from viewing the universal through the prism of local conditions. Although this leaves open the possibility of seemingly opposite outcomes—such as the acceptance or rejection of affirmative action as a necessary attribute of equality—it is precisely the dynamic character of this process that precludes an absolute answer to any human rights problem. Instead, this interaction between global norms and local conditions introduces a dynamic and continuing debate about both the nature of the right and the degree of acceptable action in seeking its implementation, such as, for example, acceptable options in implementing a policy to achieve a more equitable distribution of resources in a democratic society. The outcome in any particular circumstance may produce a hybrid form, simultaneously pushing the boundaries of interpretation and offering a new example of how the norm may be shaped to address particular conditions.

The legalization of political conflict (Kogacioglu 2004) inherent in this turn to judicial decision making and the courts marks a central shift in the structure of constitutionalism around the globe. Even though many constitutions had incorporated some form of constitutional review prior to this period, the application of this power by judiciaries has been so limited in many jurisdictions that it is extremely difficult to argue that an effective system of constitutional review existed even when given formal constitutional status. So, for example, although the Malaysian constitution of 1957 explicitly provided for judicial review, during the first 30 years that the constitution was in force "no single legislative enactment. . . [was] held to be void for being unconstitutional" (Ibrahim & Jain 1992, p. 528). Thus, before 1989 only about 10 countries around the globe had effective systems of constitutional review in which a constitutional court or the courts in general regularly struck down proposed or validly enacted legislation as contrary to the state's constitution. A decade after the end of the cold war, at the dawn of the twenty-first century, at least 70 states, or approximately 38% of all member states of the United Nations, had adopted some form of constitutional review.

Although this embrace of rights and the constitutionalization of politics has been heralded as the rise of world constitutionalism (Ackerman 1997), the jury is still out when it comes to judging either the meaningful implementation or effectiveness of these new institutions. In some cases, the decisions of constitutional courts have already been explicitly rejected by executive authorities or the courts themselves disbanded (Trochev 2004). In other cases, despite the explicit inclusion of a power of constitutional review in the constitution, the judiciary has declined or very rarely exercised this power to strike down a legislative act. In more extreme cases, the constitutional developments so heralded in the first half of the 1990s have already been swept aside by military coups or have been ignored in the face of protracted civil wars. However, for those states where there is an attempt to consolidate the process of political reconstruction that swept the globe at the end of the cold war, the balance between adherence to a globally defined constitutionalism and the imperatives of local political dynamics remains a central legacy of this latest wave of state reconstruction (Maveety & Grosskopf 2004).

The continuing relevance of the local context is most evident in the expansion of what might be considered an anomaly in the field of transnational human rights.

At exactly the moment when claims of human rights are being most successfully pursued and institutionalized, we are also witnessing at the domestic level an explosion of alternative ways to address past violations that are in many ways inconsistent with a traditional human rights perspective. On the one hand, in the face of massive violations of human rights, countries undergoing democratic transitions have relied on truth commissions as an alternative to prosecutions, while on the other hand government officials and political party members in former state socialist countries in eastern Europe and most recently Baath party members in Iraq have been denied civil rights, employment, and other opportunities because of their prior connections to authoritarian regimes. These processes of amnesty and lustration are justified under theories of transitional justice (Teitel 2000, Mendez 1997), yet they raise the specter of impunity on the one hand and the fear of unjustified exclusion and punishment without adequate legal process on the other hand. These processes have also opened extremely fruitful avenues of socio-legal research that explore the relationship between law, human rights, and the promise of reconciliation (Gibson 2004, Wilson 2001) and other means of addressing past injustice (Halmai & Scheppele 1997). Once again, only by recognizing the emerging field of transnational human rights is it possible to highlight and adequately theorize the relationship between the promise of domestic civil rights and the obligations of international human rights.

Although the constitutional protection of political and civil rights remains the dominant form of human rights at the national level, more recent constitutional bills of rights have been infiltrated by claims for socio-economic and other even more aspirational rights. Likewise, the understanding of the purpose of constitutional rights—to protect the individual or distinct minorities against state power or unbridled majoritarianism—has been broadened through attempts to expand the application of rights into arenas of power beyond the state. Although earlier recognition of socio-economic rights was implicit in the constitutional definition of the state as a social state (Basic Law of the Federal Republic of Germany 1949), more explicit recognition occurred in the constitutionalization of policy goals in the form of directives of social or state policy (Constitution of India 1950). Unlike the effervescence of the declaratory statement of socio-economic rights that characterized the state socialist constitutions, these directives of state policy have developed into interpretative guides (Constitution of the Republic of Namibia 1990), giving socio-economic rights a jurisprudential reality that provides a basis for their inclusion in more recent bills of rights as enforceable constitutional rights (Constitution of the Republic of South Africa 1996). Here we see a convergence of traditional international human rights and the domestic development of constitutional rights.

Significantly, there has been a similar trend in the expanded application of rights. From the interpretative expansion of the state action requirement to include privately formulated, racially discriminatory contracts by the U.S. Supreme Court, to the notion of *drittwirkung* in the jurisprudence of the German Constitutional Court, there has been a constant struggle over the impact of constitutional rights on the private exercise of power. Although the requirement of state action has remained largely constrictive in the United States, the German Constitutional Court has long recognized the radiating effect constitutional rights have on private actions impugning the rights of other private parties. Although this horizontal application of the bill of rights was at first rejected by the South African Constitutional Court in its interpretation of the 1993 constitution, the reaction of the constitutional assembly was to rewrite the application clause in the final 1996 constitution to explicitly apply the Bill of Rights to relevant private action.

CONCLUSION

Although formal distinctions exist between humanitarian law, human rights, and constitutional rights, a historical link exists between them that gives meaning to the idea of a field of transnational human rights. This link is revealed most clearly in the prosecution of war crimes, genocide, and crimes against humanity in which the substantive meaning of the rights violated are being increasingly informed by developments in human rights law and national constitutional rights. In the field of humanitarian law, this trend may be seen most clearly in the incorporation of understandings of gender and the crime of rape in the jurisprudence of the ICTY and ICTR. Transnational human rights are reflected also in the increasing assertion of rights by communities and individuals in a growing range of places and circumstances. Here the assertion of rights is accompanied by the wholesale borrowing of arguments, as well as the specification of rights by analogizing to similar claims and distinguishing others. These practices are most visible in the arguments of nongovernment organization networks and in the jurisprudence of constitutional and supreme courts in many countries. At the same time, the articulation of the particular field of study within the law and society tradition will help us to understand how the mobilization of resources and the formation of common understandings, networks, epistemic communities, and social movements facilitate the practical or effective evolution of human rights claims across different jurisdictions and legal regimes. It is precisely this interaction that the field of transnational human rights is designed to address. Whether through ethnographies or other more traditional law and society methods, studies focused on the processes that create, or the effects of the practice of, transitional human rights promise to provide insight into the persistence and increasingly global spread of rights, despite vast cultural, economic, and political differences.

APPENDIX A: NATIONAL CONSTITUTIONS, HUMAN RIGHTS DOCUMENTS, AND CASES

African Charter on Human and People's Rights, adopted June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5. Reprinted in 21 I.L.M. 58

American Convention on Human Rights. San Jose, Nov. 22, 1969. Entered into force, July 18, 1978. O.A.S. Treaty Ser. No. 36, at 1, O.A.S. Off.

Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 1979. Reprinted in 9 I.L.M. 673 1970

Basic Law of the Federal Republic of Germany. 1949

Charter of the United Nations. San Francisco, June 26, 1945. Entered into force for the United States, Oct. 24, 1945. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043

Constitution of India. 1950

Constitution of the Republic of Namibia. 1990

Constitution of the Republic of South Africa. 1996

European Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, Nov. 4, 1950. Entered into force, Sept. 3, 1953. Eur. T.S. No. 5

Permanent Court of International Justice. 1923. *Advisory opinion in the nationality decrees issued in Tunis and Morocco Case*. P.C.I.J. Rep., Ser. B, No. 4

Prosecutor v. Dusko Tadic. 1995. ICTY Appeals Chamber, 1995. Case No. IT-94–1-AR72 (Oct. 2). Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction

UN Gen. Assem. Resolution 217 A (III). 1948. *Universal Declaration of Human Rights*, Dec. 10. UN Doc. A/810, at 71

Warsaw Declaration. 2000. *Towards a Community of Democracies*, June 27. 39 ILM 1306

APPENDIX B: UNITED NATIONS DOCUMENTS ON APARTHEID

Bouteflika A. 1974. Ruling by the President of the General Assembly, Mr. Abdelaziz Bouteflika (Algeria), concerning the credentials of the delegation of South Africa. (See United Nations 1994.)

Letter dated 12 September 1952 addressed to the Secretary-General by the permanent representatives of Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, the Philippines, Saudi Arabia, Syria and Yeman, A/2183

UN Gen. Assem. Resolution A/RES/44 (I). 1946. *Treatment of Indians in the Union of South Africa*, Dec. 8. Article 2

UN Gen. Assem. Resolution 616(VII) B. 1952. 7 GAOR, Suppl. No. 21 (A/2361), at 8–9, establishing the UN Commission on the Racial Situation in the Union of South Africa

UN Commission on the Racial Situation in the Union of South Africa. 1953. *Report on the United Nations Commission on the Racial Situation in the Union of South Africa*. 8 GAOR, Suppl. No. 16 (A/2505 and Add. 1)

UN Gen. Assem. Resolution 1761, A/RES/1761 (XVII). 1962. *The policies of apartheid of the Government of the Republic of South Africa*, Nov. 6

UN Gen. Assem. Resolution 3206, A/RES/3206 (XXIX). 1974. *Credentials of Representatives to the twenty-ninth session of the General Assembly*, Sept. 30

UN Gen. Assem. Resolution 3207, A/RES/3207 (XXIX). 1974. *Relationship between the United Nations and South Africa*, Sept. 30

UN Gen. Assem. Resolution 3411, A/RES/3411 C (XXX). 1975. *Policies of apartheid of the Government of South Africa—special responsibility of the United Nations and the international community towards the oppressed people of South Africa*, Nov. 28

UN Gen. Assem. Resolution S-16, A/RES/S-16/1. 1989. *Declaration on apartheid and its destructive consequences in southern Africa*, Dec. 14

UN Secur. Counc. Resolution 418, S/RES/418. 1977. *The question of South Africa*, Nov. 4

UN Secur. Counc. Resolution 554, S/RES/554. 1984. *The question of South Africa*, Aug. 17

Waldheim K. 1977. *Statement by Secretary-General Kurt Waldheim in the Security Council after the adoption of resolution 418 1977 concerning mandatory arms embargo against South Africa S/PV.2046*, Nov. 4

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