

Resolving Interpretive Conflicts in International Human Rights Law*

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UNDER the Islamic Penal Code of Iran, the legally required punishment for a first time conviction of theft is the amputation of the four fingers of the right hand, leaving only the palm and thumb. The punishment for drinking alcohol is eighty lashes.¹ In 1982, as required by their obligations as a party to the International Covenant on Civil and Political Rights, the government of Iran submitted a report to the United Nations' Human Rights Committee. In its response to the report, the Human Rights Committee asserted that using flogging and amputation as punishments violates Article 7 of the ICCPR, which prohibits the infliction of "cruel, inhuman or degrading treatment or punishment." Iran's government demurred; what they were doing, they maintained, was not violating Article 7 but rather interpreting it in a way consistent with Iran's existing laws and social norms. In fact, the Iranian representative assured the Committee that Iran took Article 7 so seriously that the legislature had recently passed a law stipulating a range of possible punishments for "any judicial or non-judicial employee or official" who "subjects someone to mistreatment." The list of potential punishments included seventy-four lashes.²

This case raises two distinct sorts of questions. The first sort has to do with the meaning of Article 7—does it allow amputations, flogging, or stoning? If so, under what circumstances? Answering such questions would require a detailed legal analysis of Article 7; to the degree that the legal content of Article 7 is dependent on the moral human right against cruel and degrading treatment, this sort of question also requires an analysis of that moral right.

The second sort of question is procedural, though still normative: Whose interpretation of Article 7 should be recognized as authoritative in the event of

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¹Amnesty International 1996.

²Ibid.

a conflict between the Human Rights Committee and a state's government, which is in the final analysis responsible for implementing the provisions of the treaty in that state? In the case in question, the Iranian government's position in its conflict with the Human Rights Committee was not primarily that its interpretation of Article 7 is implied by the best philosophical theory of human rights; rather, it was that the government, not the Human Rights Committee, should have the final say on how Article 7 would be implemented in Iran. At issue is the proper distribution of legal authority. An ethically defensible solution to this kind of conflict requires a normative account of how the institutions of international human rights law ought to function.

In this article, I recommend that philosophers pay more attention to questions of institutional or procedural justice in international human rights law.³ I then take up the procedural question of how to distribute interpretive authority in a way that would address the kind of conflict between the government of Iran and the Human Rights Committee. My approach is to articulate a deliberative standard by which to judge how well-suited particular agents are to interpret human rights law as applied within states. This inquiry leads me to consider both different sorts of state-level governments (most saliently, democratic versus undemocratic ones), and the different roles that international institutions should play in the process of interpreting human rights law. I ultimately argue that at least a *prima facie* case can be made that appropriately deliberative and participatory state governments should have final interpretive authority for human rights law within that state. However, I conclude by raising further issues that would have to be addressed in order to translate this *prima facie* case into a strong argument for assigning interpretive authority for human rights law to such states.

I. WHY WE NEED A PROCEDURAL THEORY

In a recent article, James Griffin explores the difficulties one would encounter in trying to square the list of rights enshrined in international human rights law with "the best philosophical account of human rights."⁴ Griffin's motivating concern is that the term "human rights" is only vaguely defined in international human rights law. As a result, international legal documents proclaim all sorts of dubious rights, including a right to inherit and a right to upward mobility in employment. This situation contributes, Griffin believes, to controversy and skepticism about human rights in general, which he thinks constitutes a crisis for the enterprise of human rights law. Griffin's diagnosis of the cause of this crisis is that the system lacks a coherent and defensible philosophical theory of what counts as a human right, against which to justify its claims. Therefore, he

³Several philosophers have already taken up this project. Recent philosophical work on institutional questions in international law includes Buchanan (2004) and Teson (1998).

⁴Griffin 2001.

takes the solution to be for the human rights legal system to adopt a coherent and defensible theory of human rights, and to revise its claims accordingly.

Griffin's analysis is not intended as a merely theoretical effort. This becomes clear when he advises that some legally-recognized human rights are "so flawed that they should be given, as far as possible, the legal cold shoulder," and that "[m]any are so badly drafted that they need interpretation bordering on redrafting."⁵ Indeed, in classifying certain legal human rights as "unacceptable," as compared with others that are "debatable" or "acceptable," Griffin goes so far as to tell us which rights he thinks merit the legal cold shoulder and which do not.

Griffin's approach exemplifies one important part of philosophy's potential contribution to a normative theory of human rights law. One of the most powerful justifications for a system of international human rights law is that it uses the resources and status of the global community to support the moral requirements of human rights. If this justification is to stand, the content of human rights law must at least bear a strong resemblance to those moral requirements. Recommending reforms in international human rights law based on a theory of moral human rights is therefore important work.

However, it is also important for philosophers to attend to the institutions of international human rights law. Andrew Hurrell has described international law as "a dialogue between process and substance, between the value of substantive norms and the legitimacy of the process by which they are arrived at."⁶ This description suggests that we understand human rights law not only as a collection of norms, but as a system of institutions for generating, interpreting and enforcing those norms. On this institutional view of human rights law, the project of critiquing only the system's norms will be necessarily incomplete. There are a range of difficulties we could get into by ignoring institutions. On the milder side, focusing on substantive norms alone might encourage neglect of the important philosophical issues concerning the legitimacy of the system. On the more severe side, such neglect could lead to a problematic methodology, where systematic reforms of international law are recommended solely on the basis of philosophical theory, ignoring the potential obstacles and solutions posed by the institutions that constitute the international human rights legal system.

Griffin's arguments for reforming the norms of international human rights law might be read as recommendations that the interpreters of human rights law should follow particular interpretive principles (though it is not clear who Griffin thinks these agents will be). However, there is some evidence that his position in this article constitutes a problematic methodology that ignores institutions entirely. For example, in defending his recommendations, he suggests that "human right" is, as he says, "a theorist's term." Significantly, he infers that

⁵Ibid., p. 26.

⁶Hurrell 2003, p. 277.

“because philosophers and political theorists introduced it, they have the responsibility, not yet fully discharged, of giving it a satisfactorily determinate sense.”⁷ Here Griffin implies that it is appropriate for philosophers and legal academics to determine the specific content of human rights legal norms without consideration for what Hurrell called the “dialogue between process and substance.” This approach obscures the fact that legitimate institutions may constitute an obstacle to achieving correspondence between a particular philosophical theory of human rights and the content of human rights legal norms. Such an approach also ignores the possibility that the functioning of these institutions over time can lead to greater determinacy of human rights norms with greater legitimacy than would be possible if the task of specifying human rights norms were assigned solely to philosophers and political theorists.

More generally, as John Rawls argued in *Political Liberalism*, a focus on legitimacy is necessary when principles of justice are essentially contested.⁸ Like traditional philosophical theories of justice, philosophical theories of human rights are essentially contested, as are people’s considered judgments about how human rights law should be interpreted.⁹ Indeed, disagreement about interpreting human rights law probably amounts to what Frank Michelman, invoking Rawls, calls “the fact of reasonable interpretive pluralism,” which he defines as “the fact of irresolvable uncertainty and, in real political time, irreparable reasonable disagreement among inhabitants of a modern country about the set of entrenchments and interpretations of human rights . . . that would truly satisfy justice in the country’s historical circumstances.”¹⁰ Assuming the fact of reasonable interpretive pluralism, political philosophers interested in interpretive issues in human rights law cannot confine themselves to the question Griffin considers (“based on what theory of human rights should international human rights law be interpreted?”) but must also consider the institutional, but still normative, question, “What distribution of interpretive authority in international human rights law is justifiable from a moral perspective?” As Michelman puts it, “Reasonable interpretive pluralism thus opens a gap between the question of true justice in politics and the question of what it would be morally right or justifiable for anyone to be doing about the matter of political coercion.”¹¹ Griffin’s approach, while not implying that all interpretive issues can be resolved by a philosophical theory of human rights, nonetheless ignores this gap.

There are further reasons why a philosophical theory about the particular content of moral human rights cannot, by itself, solve the particular problem

⁷Griffin 2001, pp. 27–8.

⁸Rawls 1993.

⁹Griffin (2001, p. 2) realizes this: “Of course ‘human right’ is what philosophers have called an ‘essentially contestable concept’, but that a concept is essentially contestable does not relieve it of the need to be tolerably determinate.”

¹⁰Rawls 1993; Michelman 2000, p. 70.

¹¹Michelman 2000, p. 71.

that concerns us here, namely, how to resolve conflicts between states and international human rights institutions over their respective interpretations of human rights law. It would be a mistake to reduce the conflict between Iran and the Human Rights Committee to a debate about the philosophy of human rights. Instead, that conflict is also, and perhaps primarily, a struggle over who will wield interpretive authority in the international human rights legal system. A resolution to this part of the dispute will require an account of how authority to interpret human rights law ought to be distributed.

Moreover, even if the conflict were ultimately about which principles of interpretation are appropriate in international human rights law, the proposal of a philosophical theory of human rights as the only solution to this conflict problematically assumes that the appropriate standard of interpretation for any particular tenet of human rights law is whatever interpretation corresponds to the best philosophical theory of human rights. This assumption, familiar from natural law theory, is problematic because of the very little respect it shows to legislative intent, judicial precedent, the context of the statute's drafting, and other ascertainable facts about the law that help subjects fix their expectations about the law's application and their own obligations under it. When a dispute arises over the correct interpretation of human rights law, the principle of interpretation that this assumption dictates is that the law should be interpreted, not according to the best fit of the treaty provisions to the circumstances in question, given the discernible intent of the legislators (or some such), but rather according to the best philosophical theory of human rights. When combined with the fact of reasonable pluralism about human rights theory, this way of proceeding creates a deep uncertainty about how the law might be interpreted by different agents who accept different theories of human rights. Moreover, when two different agents with different theories, or with the same theory but different interpretations of a particular statute, both claim authority to interpret the law, this way of proceeding offers no resolution at all to the conflict.

Finally, any philosophical theory of human rights, understood as a theory about the substance of moral human rights, is likely to be too vague to provide determinate solutions to substantive interpretive conflicts. Even if there were consensus on a philosophical account of human rights, such accounts are not designed to fill in all the inevitable indeterminacies of human rights law. So some account of how human rights law should be interpreted, including an account of whose interpretations should be considered authoritative when international and state-level interpretations conflict, will be necessary even in the unlikely event that consensus is achieved on a philosophical theory of the content of human rights.

It is important at this point to emphasize the limits of the claims in this section. I have argued that a philosophical theory of moral human rights will not suffice, by itself, as a solution to conflicts about the interpretation of human rights law. Importantly, I do not claim that human rights theory is irrelevant to resolving

such conflicts, for such a theory will play an important role in establishing appropriate principles of interpretation. Nor do I claim that such conflicts can or should be resolved without any reference to moral reasons. My aim, rather, is to point out an underdeveloped area in philosophical theory about international human rights law. A normative procedural theory—one that will defend on moral grounds a procedure for interpreting human rights law—is essential, but lacking.

II. CRITERIA FOR A PROCEDURAL THEORY

In order to defend a particular procedural theory, we need to specify both the range of procedures to choose from, and the criteria according to which one procedure will be deemed superior to the rest.

Specifying the range of procedures to choose from requires identifying the candidate agents to interpret international human rights law. I will begin the inquiry by assuming that we have exactly two choices: either states' governments or the United Nations treaty bodies, such as the Human Rights Committee, which were established to oversee the implementation of the major international human rights treaties. As will become clear, these are not the only options. However, at least at the outset, I will take advantage of the artificial but instructive contrast between these two sets of institutions. I return to the question of alternatives to these two choices in Section V.B.

On the second point, I propose that interpretive authority be assigned to the party most likely to direct governments to observe the requirements of moral human rights. This criterion is in the spirit of Joseph Raz's thesis that, in the normal case, *X*'s authority over *Y* is justified when following *X*'s directives will help *Y* to comply with reasons that already apply to her better than she would by using her own judgment.¹² Assuming that governments have moral reasons to respect the human rights of those affected by their actions, the question for us in assigning interpretive authority will be whether governments will better observe these reasons by complying with their own interpretations of human rights law or those of international legal institutions.

Because this article is focused on interpreting human rights law, not enforcing it, I will at least initially leave aside the question of how effective the candidate institutions could be expected to be at actually getting governments to comply with their directives. Here I assume that the essentially cognitive work of interpretation can be separated from the work of enforcement, in the same way that in the domestic case judicial authority can be divorced from police authority. As will become clear, however, the two issues do not stay separated for long. Therefore, though I ultimately use only the content of directives as a standard for assigning authority to interpret transnational human rights law, I do not

¹²Raz 1986, p. 53.

expect that concern about effectiveness in enforcement will necessitate a substantial change in the analysis in this article.

III. A DELIBERATIVE MODEL

Our standard requires us to identify the entity that is most likely to issue reliable directives to governments about how to comply with moral human rights. This standard assumes that these institutions—either states or UN treaty bodies—will be able to discern the morally correct interpretation of a vague law, or at least to reliably distinguish morally permissible from morally impermissible interpretations. But, given that the decisions of both international institutions and states' governments are products of political processes, what assurances are available that these decisions will correspond to morally correct judgments?

This problem mirrors one of the issues addressed by normative theorists of democracy, namely, how to justify democratic decisions when their virtue is not necessarily that they are morally correct but that they were made according to fair or egalitarian procedures. By providing a bridge between political procedures and moral accuracy, deliberative theories of democracy provide a starting point for visualizing how political institutions might be able to interpret human rights law in ways that promote moral human rights.

It is a familiar thesis that public deliberation can lead to the moral improvement of policies and laws. For our purposes, two aspects of this thesis are important. First, pre-decision-making deliberation increases the chances that diverse perspectives will be reflected in political decisions, thereby reducing or eliminating biases that might affect decisions made without benefit of deliberation. This point is important for incorporating both different judgments about value and varied sources of factual information in public decision-making. Second, deliberation contributes to a better shared understanding of the abstract moral principles relevant to a political decision. John Stuart Mill famously argued that liberty “of thought and discussion” is essential for reliable moral knowledge. One reason for this is that public deliberation can bring to light mistaken moral beliefs or half-truths and ideas for reform.¹³ Mill also pointed out that when people engage in deliberation about policies for a community, they become accustomed to taking perspectives other than their own. They are trained to see other people's interests as morally significant, and to transcend their narrow, self-interested perspectives.¹⁴ This makes it more likely that public deliberation will be a good faith effort to determine the correct content of moral and political principles, rather than an opportunity to assert one's own interests at the expense of others.¹⁵

¹³Mill 1859/1978.

¹⁴Mill 1861/1991, p. 79.

¹⁵See also Allen Buchanan's recent analysis of how social institutions contribute to individual moral epistemology (Buchanan 2002).

In order to assign interpretive authority either to states or to international institutions, we do not have to show that one or the other is capable of successfully and demonstrably identifying correct answers about what moral human rights require on a case-by-case basis. The conditions of the moral justification for assigning interpretive authority are not so strict. What we need instead is evidence that the interpretations supplied by the authoritative institutions can be expected to promote moral human rights better than the interpretations of rival candidates. According to the arguments sketched above, we can have such evidence even if we cannot be sure that the interpretations supplied by the authoritative institutions are correct in every case, because we can expect institutions that promote deliberation and participatory decision-making to generate morally better interpretations of human rights law than less deliberative or participatory ones.¹⁶

One problem with this line of argument is that public deliberation may not lead toward a clear consensus on a moral question, but rather to further entrenched differences of opinion. For this reason, public deliberation about the content of moral human rights may not provide a “better shared understanding” of moral human rights. One part of the response to this problem is to note that, where entrenched differences of opinion arise, it is entirely possible that the issue is one that permits a plurality of responses. For this reason, different interpretations of human rights law may be equally permissible on moral grounds. Moreover, deliberative institutions tend to keep controversial issues in the public spotlight, so that, as long as those issues are controversial, any legal settlement to those questions will be provisional. Finally, outrageous positions on human rights are likely to be discredited sooner in an open deliberative system than in other systems, so the remaining disagreement is likely to be reasonable disagreement. For whatever cases of disagreement that remain, it is important to remember that it is not necessary for deliberative decisions to be correct in every case. What is important is that decisions resulting from deliberative political procedures are comparatively more likely to be correct, or at least better justified, than decisions generated by non-deliberative procedures. Moreover, by incorporating an important source of information uptake, deliberative institutions have a greater likelihood of self-correcting over time than do non-deliberative ones.

It is a significant limitation of the present project that I am investigating procedures for interpreting human rights law as it applies within states. Therefore, I am relying only on the deliberative advantages of democratic government in improving the moral reliability of decision-making within the domestic realm; I am making no claims about the moral reliability of deliberative democratic government in making international decisions. This parallels a useful distinction described by Allen Buchanan and David Golove:

¹⁶The deliberative model I have in mind owes much to David Estlund’s account of the justification of democracy (Estlund 1997).

Transnational justice concerns those rights and duties that obtain between members of the same state or between the government of a state and its members which ought to be recognized by international law as being universal, that is, applicable to all states. In other words, transnational justice principles articulate the principles of justice that the international community ought to insist are met by all states in their internal affairs. *International justice* concerns the rights and duties of the subjects of international law so far as they are not members of the same state or do not stand in the relationship of government to governed within a state.¹⁷

This distinction between transnational and international justice is helpful here because it helps to define the question that interests us. Using these definitions, I will use the phrase “transnational human rights law” to refer to international human rights law as it applies within state boundaries. The question “who should interpret transnational human rights law?” is therefore the scope of my inquiry in this article.

IV. COMPARING INSTITUTIONS: UN TREATY BODIES

The treaty bodies established by the United Nations to monitor the implementation of the six major human rights treaties were designed on an explicitly deliberative model. According to James Crawford, the main activity of the treaty bodies—hearing regular reports by states that are parties to the treaties on their progress in implementing the treaties’ provisions—was developed “on the assumption that the examination of reports would lead to a dialogue between each state and the relevant treaty body, and to progressive improvements in compliance.”¹⁸ While Crawford emphasizes deliberation between the treaty bodies and states’ governments, Anne Bayefsky emphasizes the effect of the reporting system on public deliberation within a state: “The production of a report, in theory, is intended to generate a dialogue within civil society about the requirements of the treaty, the application of the standards to local conditions, the shortfalls in compliance, priorities for redress and the design of a plan of action.”¹⁹

If the treaty bodies can be expected to live up to these deliberative expectations, this would count in their favor given our deliberative criteria. In fact, there is a tendency to think of the international community, especially as represented by the United Nations and its constituent bodies, as progressive and impartial, in contrast to comparatively parochial and self-interested states. A contributing factor in constructing this picture is the fact that the international community can itself take credit for authoring the major human rights treaties in spite of vast cultural and other differences among countries. For example, in hearing Iran’s report about Article 7, one member of the Human Rights Committee said that, because “the Covenant was the result of a multicultural

¹⁷Buchanan and Golove 2002.

¹⁸Crawford 2000, p. 1.

¹⁹Bayefsky 2001, p. 13.

effort,” he could not accept any argument from the government of Iran justifying punishments like flogging or stoning on the grounds that these were culturally-specific practices that should be permitted by the international institutions: “Generally speaking, and regardless of cultural heritages, it could be generally agreed that the Covenant constituted a zone of convergence for all cultures in an extremely important sphere.”²⁰ These remarks reflect the conviction that international institutions are able to draw from perspectives on a literally global scale, which in turn attests to the wide variety of viewpoints that can get a hearing in deliberations by such institutions. Given our deliberative criteria, this is a strong point in favor of international institutions.

However, the treaty body system faces significant challenges in living up to its mandate. According to James Crawford, some of the major problems currently plaguing the UN treaty system include the following: widespread delinquency on the part of states submitting reports; inability of treaty bodies to keep up with the reports they do receive; resource constraints, including inadequate staffing and technology; inherent difficulties with a system that depends on the consent of the very states the system is supposed to monitor and criticize; and the costs of implementing proposed reforms. The “underlying” problem is, as Crawford notes, “the limited will of the states parties [to the human rights treaties] to improve the system.”²¹

Many of these problems could in principle be solved by appropriate institutional reforms.²² However, the problems resulting from the state-centered nature of the international treaty system are particularly intractable, especially the limited effectiveness of a system that depends on state cooperation to critique states’ efforts to implement human rights law. As one commentator noted, it is difficult to see the wisdom in a situation where “the procedures for securing compliance with major human rights treaties hinge upon a system that makes governments entirely responsible for reporting on themselves, once every five years, subject to soft questioning for a few hours by cautious committee, elected by those very governments, and with almost no likelihood of serious censure or real sanctions.”²³ Moreover, as long as the underlying problem of states’ unwillingness to seriously reform the system persists, realistic expectations for meaningful reform should probably be limited.

Several considerations mitigate the severity of these difficulties, however. First, it is important for our project to keep in mind that we are not searching for international institutions that will successfully coerce states into respecting their human rights obligations under international law. Rather, we are searching for

²⁰Amnesty International 1996, p. 140.

²¹Crawford 2000, p. 10.

²²For analysis of the problems and suggestions for reform, see Alston and Crawford (2000) and Bayefsky (2001).

²³Leckie 2000.

the institutions most likely to issue reliable directives to states regarding those obligations, using deliberative criteria as the standard. Second, the consent-based and cooperative nature of the reporting process is probably essential to getting any dialogue with states started in the first place. The difficulties that Crawford mentioned could therefore be rehabilitated as assets in a “foot in the door” approach: one that settles for less stringent control over states’ behavior in favor of state participation in dialogue, a lesser but more achievable goal. Moreover, the deliberative design of the UN treaty bodies indicates that their interpretations of international human rights law are not intended as a substitute for national legislation or judicial activity. Rather, they are intended as a stimulant to discussion either between the government and the treaty body or within the country’s civil society (or both) about how the state’s legislature or judiciary should themselves implement international human rights law. In this sense, the system can function effectively in this relatively modest way despite its reliance on the consent of states. For these reasons, the issue of effectiveness, understood as getting states to comply with directives, may be less of a disadvantage for the treaty bodies than we might think.

V. COMPARING INSTITUTIONS: STATES’ GOVERNMENTS

At first glance, it would appear that states’ governments would be subject to an unavoidable conflict of interest in both bearing and interpreting obligations under international human rights law. Indeed, human rights scholars often regard the restriction of state sovereignty, at least regarding how governments treat their own citizens, as a measure of the success of the international system of human rights law. As Bayefsky writes: “The treaty system definitively establishes the legitimacy of international interest in the protection of human rights. It is undisputed that sovereignty is limited with respect to human rights.”²⁴ In a similar vein, Anne-Marie Slaughter recently commented that the twentieth century development of international human rights law “today has turned traditional conceptions of sovereignty almost inside out.”²⁵ Against this background, the proposal that states’ governments interpret human rights law as it applies to them seems to go in precisely the wrong direction.

One way to specify what is wrong with that direction is that it would allow states’ governments to be judges in their own cases. The lack of a political authority to adjudicate conflicts between people, leaving people to be judges in their own cases, is for John Locke the defining feature of a state of nature as distinguished from civil society. In describing the state of nature, he acknowledges the problems that are likely to result when private parties must rely on themselves to interpret and execute the laws:

²⁴Bayefsky 2001, pp. 4–6.

²⁵Slaughter (2003). See also Buchanan and Golove (2002); Nickel (2002).

To this strange Doctrine, viz. That in the State of Nature, every one has the Executive Power of the Law of Nature, I doubt not but it will be objected, That it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but Confusion and Disorder will follow, and that therefore God hath certainly appointed Government to restrain the partiality and violence of Men.²⁶

To the extent that human rights law imposed on governments is analogous to Locke's law of nature in a state of nature, this point suggests that having states interpret and implement international human rights law for themselves would lead to problems analogous to those that he thought would lead rational people to quit the state of nature in favor of political society.

Given the opportunity, governments might be inappropriate "judges in their own cases" with regard to human rights law in at least two different ways. First, they might underestimate their human-rights-related obligations to their own citizens, as the Human Rights Committee alleges Iran does in permitting flogging and amputations as legal sanctions. Second, governments might underestimate and downplay their own shortcomings regarding human rights and too aggressively hold other governments to human rights standards via international politics or, if they are powerful enough to initiate unilateral action, the use of military force.²⁷ This latter problem is, however, beyond the scope of this article.²⁸

That leaves us with the problem of governments' underestimating their human-rights-related obligations to their own citizens. As we noted earlier, if assigning authority for interpreting principles of transnational justice to states would be comparable to individuals retaining their right to adjudicate their own conflicts, then Locke's account of the problems with that arrangement would be a good place to start in listing reasons to attribute that authority to international institutions instead. But is the comparison apt?

²⁶Locke 1690/2002, p. 12.

²⁷Telling examples of states' efforts to downplay their own human rights shortcomings in the international arena can be found in the public relations battles that focus on the US State Department's annual "Country Reports on Human Rights Practices." One bizarre moment involved the release of a Chinese report on the state of human rights in the United States, timed to coincide with the release of the US report. Another more recent bizarre moment in the life of this report was marked by the US State Department's delaying its release in 2004 in the wake of revelations about prisoner abuse at a US military prison in Iraq. Recent military action by the United States, including the Bush government's war in Iraq and the Clinton government's bombing campaign in Kosovo, are possible examples of predictable military behavior at least by strong states in the absence of an accepted and effective authority to enforce human rights law internationally.

²⁸As in the conflict between Iran and the Human Rights Committee, we have been discussing whether states should be allowed to interpret transnational human rights law, or human rights law as it applies within their own borders. The second set of problems with states being judges in their own human rights cases are clearly, by contrast, problems of international justice. I am not here considering, much less attempting to defend, the claim that individual states should interpret human rights law as it regards international justice; indeed, absent substantial supplementation, none of the arguments adduced here suggest that this is even a plausible thesis.

To apply the Lockean analogy to states, we would have to accept that states are unitary actors akin to the individuals in Locke's state of nature. But this is a problematic view. Because states are collectivities, we cannot simply assume that patterns of interactions among states will correspond to patterns of interactions among individuals. In particular, since we are interested in transnational human rights law, we are primarily concerned with how the different actors within states relate to each other. This should render suspect any comparison of interactions among individuals in a hypothetical state of nature with interactions among states.²⁹

The denial that states are unitary actors is one central tenet of liberal international relations theory. While the classic model of international law was built on the assumptions of realism, contemporary liberal theorizing in international relations challenges these assumptions. The assumptions of realism crucially include that states are "rational unitary actors who are functionally identical" and that states' preferences as relevant to international politics are "exogenous and fixed." By contrast, according to Slaughter, "If realists focus on States as monolithic entities in their interactions with other States within an anarchic international system, Liberals focus primarily on State-society relations."³⁰ In other words, liberal international relations theory locates the main impetus for a state's behavior in the dynamics between different sectors of the society within the state and conceptualizes states as characterized by complex interactions among different components of society.³¹ To the extent that this conceptualization is accurate, it is therefore correspondingly inaccurate to describe any government as a monolithic entity that could be both subject to and interpreter of transnational human rights law in the problematic Lockean sense.

While liberal theory helps in rejecting the claim that states would necessarily have a conflict of interest in interpreting transnational human rights law, this rejection does not depend on liberal theory. Several points are relevant here. First, to reject the conflict-of-interest claim, all we need is skepticism about the simple analogy between the behavior of individuals and that of states. Justification for this skepticism is available outside of liberal theory. Second, critiques of liberal theory often focus on tenets of liberalism other than the hypothesis that states should not be viewed as identical, unitary actors. For example, in Jose Alvarez's

²⁹As Charles Beitz (1979, p. 38) has argued, one necessary condition for making plausible the view of international relations as a Hobbesian state of nature is "obscuring the fact that states, unlike persons, are aggregations of units (persons and secondary associations) that are capable of independent political action." Beitz's larger point is that persons and associations can act across state borders to exert pressure on governments.

³⁰Slaughter 1995, pp. 507–8.

³¹According to Andrew Moravcsik (1997, p. 513), "Liberal IR theory elaborates the insight that state-society relations—the relationship of states to the domestic and transnational social context in which they are embedded—have a fundamental impact on state behavior in world politics. Societal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments."

sustained critique of Slaughter's liberal theory of international law, he notes that it is not his objective to challenge "the merits of going beyond the concept of a unitary state to examine the impact of preferences within it."³² Finally, realism has itself come in for a number of sustained criticisms, so adherence to the Lockean analogy out of a commitment to realism will face its own challenges.³³

While the simple Lockean analogy does not hold, this does not automatically clear the way for an endorsement of state-level interpretation of transnational human rights law. Indeed, rejecting the view of states as unitary actors might actually lead to a more damning case against state-level interpretation of transnational human rights law. Transnational human rights law assigns legal obligations to states' governments regarding their own citizens, who do not generally have the same status as states in international law. Therefore, while Locke saw "confusion and disorder" following from individuals' interpreting their obligations regarding other subjects of the law of nature, we might expect outright injustice from a system where states interpret their obligations regarding citizens who do not have equal status as subjects of international law.

Assessing this concern requires a further clarification about state agency. If states can be said to act at all, it is through governments. The concern that states will use interpretive authority over transnational human rights law to underestimate their own obligations to their citizens assumes a clear distinction between governments and citizens. However, different sorts of governments are differently situated as agents relative to their citizens. Saliently, participatory governments at the very least blur the distinction between government and governed. Thus, even if we accept that states with nonparticipatory governments would indeed have a conflict of interest if they were assigned the authority to interpret transnational human rights law, we should look more closely at whether this thesis holds for participatory or democratic governments.

A. STATE-LEVEL INTERPRETATION AND DEMOCRATIC GOVERNMENT

How should we define democratic government? A simplistic way would be to say that any government that holds contested elections will be considered democratic. However, as Amartya Sen and others have pointed out, this definition leaves out the conditions for making citizen participation in elections informed and meaningful. Sen argued as follows against equating democracy with elections:

We must not identify democracy with majority rule. Democracy has complex standards, which certainly include voting and respect for election results, but it also requires the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment. Even elections can be deeply defective if they occur without the different

³²Alvarez 2001, p. 193.

³³Buchanan 2004, pp. 29–37.

sides getting an adequate opportunity to present their respective cases, or without the electorate enjoying the freedom to obtain news and to consider the views of the competing protagonists. Democracy is a demanding system, and not just a mechanical condition (like majority rule) taken in isolation.³⁴

Accepting some version of a thick definition of liberal democratic states, we can say with some confidence, given the preceding arguments, that the actions of such governments would reflect the complex interactions among widely diverse sectors of society. Due to the scope of participation and deliberation protected by liberal democratic political structures, we have reason to infer that the actions of democratic governments will be more informed by and accountable to the deliberations of their citizens than undemocratic governments, at least over time.³⁵

Moreover, democratic state-level interpretation of human rights law, preceded by open deliberation among citizens, may take advantage of local knowledge about both human rights problems and potential solutions. As a result, state-level interpretation of international human rights law may yield better results—results that are more effective at improving the local human rights situation—than interpretations issued by international institutions. This is more important than it might seem at first glance. It is not a trivial matter to infer from the abstract standards proclaimed in human rights treaties what should be done about the actual problems of people whose human rights status is poor or precarious, especially when those problems are very different the world over.

This fact becomes especially salient when we consider that any state's resources are limited, and that states possess different levels of resources. This is significant because implementing human rights costs money.³⁶ Accordingly, governments must make decisions about how much of their resources they will spend on different rights. One implication of this fact is that countries should devote more resources to their own most pressing human rights problems. But this general principle will not yield definitive answers about what avenues of human rights implementation countries should pursue and in what order. Funding decisions will not only have to balance different human rights against one another, they will also have to set funding goals for human rights within the larger budget of the state, which must include expenditures for things such as defense and technological development.

³⁴Sen 1999, p. 8.

³⁵Amartya Sen's work on the effectiveness of democratic governments at preventing famines supports the claim that democratic governments are accountable to their citizens in a way that illiberal or undemocratic governments are not: "Famines are easy to prevent if there is a serious effort to do so, and a democratic government, facing elections and criticisms from opposition parties and independent newspapers, cannot help but make such an effort" (Sen 1999, p. 8).

³⁶This is true for both social and economic rights, which obviously require expenditures to provide the goods and services that are the objects of the rights, and for civil and political rights, which (less obviously) require expenditures for adequately trained police and military officials, judges, and prison guards, and to fund procedures to redress human rights violations (Holmes and Sunstein 1999).

It is unlikely that the international system can generate answers to local spending decisions as efficiently as participatory local institutions. It is possible to accommodate differences among states by designing principles of interpretation that would require international interpreters to consider different countries' particular circumstances and interpret human rights law differently for different states. But this solution is inferior to a program of local interpretation by democratic institutions, at least in theory, on two counts. First, participatory local institutions have access to information about locally salient human rights problems and resources; the methods for such information "trickling up" to international institutions are bound to be much less reliable, in comparison. Second, the process of decision-making in local democratic institutions more directly involves the people with that knowledge international institutions can do. It is in this spirit that the "margin of appreciation" doctrine as adopted by the European Court of Human Rights is meant to give states some discretion in implementing human rights law, on the assumption that "a state knows its domestic situation better than the Court could know it."³⁷

So far, our accounting suggests that liberal democratic governments surpass international institutions on access to local knowledge in deliberative decision-making. Moreover, as we have seen, the charge that states' governments would be judges in their own cases if allowed to interpret principles of transnational justice in international human rights law is subject to skepticism about whether states, especially liberal democratic states, are really unitary actors.

This leaves the remaining count in favor of international institutions—that they are a better forum for multicultural deliberation than are states' governments. However, liberal democratic governments may provide the institutions necessary to achieve both local deliberation and accountability, and also at least a significant measure of international and multicultural deliberation. Consider the ongoing debate about the death penalty in the United States. The US has come under increasing criticism from abroad, especially from Europe, over its use of the death penalty. Several countries have refused to extradite suspects to the US unless it was declared that the relevant jurisdiction would not seek the death penalty. International human rights organizations have vociferously criticized US death penalty policies, especially the execution of minors or the mentally retarded. Prominent voices in US law have argued that American use of the death penalty is untenable given that other liberal democracies have taken steps towards eradicating it. For example, in 1994, former US Supreme Court Justice Harry Blackmun wrote, "I am confident . . . that at some point the courts and the country will come to appreciate that the execution of juvenile offenders—and the imposition of the death penalty generally—is no more tolerable than other violations of international law."³⁸

³⁷Wilkins 2002, p. 374.

³⁸Koh 2002, pp. 1103–4.

This and other similar calls for reforming or eliminating the death penalty suggest that liberal democratic governments are susceptible to deliberative pressures from abroad to conform to international legal standards.³⁹

The point of this example is to demonstrate the influence of international dialogue about human rights norms within a liberal democracy (in the “thick” sense described earlier). While deliberation among citizens of a liberal democracy may not always (or ever) include as many international viewpoints as deliberation within United Nations human rights bodies, this example demonstrates that liberal democratic states should not be thought of as having impermeable borders surrounding their deliberations. This in turn implies that the contrast between states and international human rights institutions in terms of multicultural and international deliberation ought not to be depicted as a black-and-white affair.

I conclude that liberal democratic states are more likely than international institutions to interpret reliably transnational human rights law. This constitutes at least a *prima facie* moral reason to devolve interpretive authority over transnational human rights law from these international institutions to liberal democratic states.

B. BEYOND STATES AND TREATY BODIES

Our discussion thus far has not questioned the assumption that the main goal of international human rights law is to ensure that states’ governments are accountable to the international community concerning how well they are respecting the human rights of their citizens. The state-centered institutions of international human rights law were structured around this assumption, which is independently plausible given the great significance of states in the world today. However, some commentators think that states are losing their status as the most important agents on the global stage. For example, Jessica Matthews has argued that, due to globalization, better communications technology, and the proliferation of global actors, “[t]he steady concentration of power in the hands of states that began in 1648 with the Peace of Westphalia is over, at least for a while.”⁴⁰ Slaughter argues, in the same vein but with a different conclusion, that “[t]he state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”⁴¹ These views of the changing significance of states suggest that to the extent that

³⁹Slaughter’s (2000) theory of transgovernmental networks predicts on the basis of the features of liberal states that such cross-border judicial cooperation and responsiveness will be a hallmark of the community of liberal states. See the next section for more on Slaughter’s theory.

⁴⁰Matthews 1997, p. 50.

⁴¹Slaughter 1997, p. 184.

international legal institutions are based on a traditional conception of sovereign states, they are in danger of becoming obsolete and ineffective.

Another reason to look beyond a state-centered system is that not all states have effective governments capable of implementing human rights law. Onora O'Neill reminds us that states can fail to protect human rights within their borders not only because of corruption but also because of weakness. In such cases, she argues that it is essential to look beyond states for other "agents of justice," or actors that possess effective capabilities to achieve justice in the relevant geographical, political and economic circumstances. As O'Neill argues, "The value of focusing on capabilities is that this foregrounds an explicit concern with the action and with the results that agents or agencies can achieve in actual circumstances, and so provides a *seriously realistic starting point for normative reasoning*, including normative claims about rights."⁴²

Both of these phenomena—that is, failed states and the potential marginalization or disaggregation of even strong states—challenge the structure of this article insofar as it considers only states and international institutions as candidates to interpret transnational human rights law. However, even if states are fundamentally changing, it remains the case that transnational human rights law is more often than not respected or violated within the context of state institutions. As Matthews notes, "there are roles that only the state—at least among today's polities—can perform. States are the only nonvoluntary political unit, the one that can impose order and is invested with the power to tax."⁴³ Indeed, many of the rights in the International Covenant on Civil and Political Rights by definition must be enjoyed in the context of a state government. For these reasons, international institutions that recognize this fact and attempt to work with states' governments remain necessary. Therefore, even if one accepts Matthew's or Slaughter's analysis of how states are changing, it is still important to ask how authority over interpreting transnational human rights law should be distributed in a system that takes states seriously as guarantors of human rights within their borders.

The response to O'Neill's point about failed states is more complicated, because where states are incapable of implementing transnational human rights law, it may be unclear how a state-based system can make any difference at all in improving people's human rights status. However, at least the beginnings of a justification for a state-based system can be found in O'Neill's own analysis. She distinguishes between primary and secondary agents of justice as follows:

Primary agents of justice may construct other agents or agencies with specific competencies: they may assign powers to and build capacities in individual agents, or they may build institutions—agencies—with certain powers and capacities to act. . . . Typically, secondary agents of justice are thought to contribute to justice

⁴²O'Neill 2001, emphasis original.

⁴³Matthews 1997, p. 64.

mainly by meeting the demands of primary agents, most evidently by conforming to any legal requirements they establish.⁴⁴

O'Neill's prototypical secondary agents of justice are international nongovernmental organizations and transnational corporations. While these agents are generally expected to work within the rules set by strong states, O'Neill's argument is that in failed states these actors can take on additional effective capabilities to achieve either justice or injustice. O'Neill does not consider the role of international human rights institutions in this analysis. However, it seems that her view can plausibly accommodate a role for state-centered international human rights institutions. One way to view the utility of a state-centered system in cases where states are weak is to support and enable the role of the state's government as a primary agent of justice. That is, where a state is weak but its government is not corrupt (an agent of injustice), state-centered international institutions can help to bolster the weak government's capabilities to identify and empower secondary agents of justice.

The existence of weak states does not alter the analysis offered thus far about how to allocate authority to interpret transnational human rights law. My analysis has uncovered *prima facie* reasons to devolve authority to interpret transnational human rights law only in the case of liberal democratic states. Weak states by definition lack the effective capability to ensure justice within their borders. For this reason, these states are unlikely to have functioning institutions that could serve to interpret transnational human rights law in a legitimate fashion. Notice that this is a different issue from effectiveness, understood as getting the government to comply with a directive. This is instead an issue of capabilities, as O'Neill uses the term, meaning "specific, effectively resourced capacities which they can deploy in actual circumstances."⁴⁵ Due to their lack of capabilities as agents of justice, weak states are not likely to be able to provide the robust protection for civil and political rights necessary to protect public political deliberation. For this reason, weak states are not good candidates for interpreting international human rights law, even as it is to be implemented within their own borders.

VI. INSTITUTIONAL IMPLICATIONS

So far, our deliberative standard provides at least *prima facie* support for the claim that liberal democratic governments can be expected to be more reliable than UN treaty bodies, in general and over time, at interpreting human rights law as it applies within their own borders in a manner consistent with the moral content of human rights. Nondemocratic governments can be expected to be less reliable than UN treaty bodies in this regard. Weak states could be assisted by

⁴⁴O'Neill 2001, p. 181.

⁴⁵Ibid.

international institutions in actually implementing human rights law within their borders, but they are not good candidates for interpreting transnational human rights law on their own.

In this section, I describe a range of institutional responses to the analysis in this article. Without undertaking a full-blown analysis of these proposals, I point out some factors that would need to be considered before any of them could be confidently recommended as a reform of international legal institutions.

One proposal based on the arguments in this article would be to recognize the different degrees of moral reliability of democratic and nondemocratic states, and the different capabilities of strong and weak states, by developing a two-tiered system in which democratic governments interpret transnational human rights law within their own borders while nondemocratic and weak states are still required to participate in something like the current reporting system. The strongest moral argument for such an arrangement would be based on a substantive concern for implementing human rights law in accordance with the requirements of moral human rights. Moreover, a two-tiered policy could, at least in theory, work as an incentive towards state-level democratization: to the extent that governments desire the interpretive autonomy granted to liberal democratic states in a two-tier system, this system could provide an incentive to democratize. Finally, given that deliberation in liberal democratic states occurs across state boundaries, public deliberation about human rights law in one state can play a role in the public deliberation of another state. Therefore, the deliberative benefits of state-level interpretation should not be thought to reside solely within each liberal state.

However, a proposal for a two-tiered system raises serious concerns.⁴⁶ For one thing, it is not very likely that interpretive authority over transnational human rights law will prove to be a huge incentive for democratizing reforms in currently nondemocratic states. More importantly, such a scheme would likely be considered a political insult to governments who were to have transnational human rights law interpreted for them, while liberal democratic states were allowed to interpret transnational human rights law for themselves. A two-tiered system would therefore run the risk of alienating nondemocratic governments from the system of international human rights law entirely. This shows that concern for the merits of substantive interpretations of human rights law can conflict with the value of an inclusive system. A thorough analysis of a proposal for a two-tiered system would require a more detailed account of the relative advantages of this arrangement compared to the likely damage done by attrition of nondemocratic states from the system. An essential component of this analysis will have to be forward-looking. While devolving interpretive authority for transnational human rights law to liberal democratic states will (according to the argument in this article) provide long-term benefits for the implementation

⁴⁶I am grateful to an anonymous reviewer for this journal for suggestions on this paragraph.

of human rights law within those states, it is possible that attrition of nonliberal states from the system of international human rights law will have more disvalue in terms of real human rights progress in the world than the positive value of the proposed reform. One reason for this is that the participation of nondemocratic governments in a consent-based international system provides a sort of toehold for human rights in those states. If these toeholds can realistically be expected to expand over time into greater human rights protection in such states, this is a huge potential benefit that should not be sacrificed lightly.

Another possible institutional response would be to devolve interpretive authority to states regardless of the form of government of any particular state.⁴⁷ One argument for this proposal is that it would provide a way to secure the benefits of devolving interpretive authority to liberal democratic states without the costs of a two-tiered system. However, according to the deliberative criterion used in this article, nondemocratic governments are less likely than international institutions to interpret transnational human rights law in ways that correspond to moral human rights. Therefore, a complete argument for this proposal would have to compare the expected benefits of granting interpretive autonomy to liberal democratic governments against the expected drawbacks of granting the same authority to nondemocratic governments. Moreover, devolving interpretive authority to states would greatly reduce the mandates of the UN treaty bodies currently charged with overseeing the implementation of the major human rights treaties. To the extent that these bodies are successful in carrying out their missions, they constitute an important locus of international deliberation about human rights. Insofar as such a scheme would forestall further development of such inclusive deliberative institutions at the international level, this would count against it.

A third alternative is to retain the system in which interpretive authority resides with international institutions regardless of the form of government of any particular state. This proposal would not involve changing the *status quo* in such a drastic way as reallocating interpretive authority. However, it leaves room for smaller reforms that take seriously the potential of local, participatory political institutions to improve the international human rights legal system by reliably interpreting its norms over time. Significantly, the argument in this article can be read as an argument for increasing the number of liberal democratic governments in the world (though of course not at any cost). It suggests that we take seriously the possibility that the current consent-based international system is especially beneficial to the practice of international human rights law within the community of liberal democratic states, so that expanding the number of liberal democracies will not only increase the numbers of states that respect political human rights within their borders, but also improve the quality of

⁴⁷Thanks to Avery Kolers for this suggestion.

interpretation of human rights law through cross-border deliberation among participatory governments.

Finally, a fully detailed proposal for distributing interpretive authority among international legal institutions would have either to specify avenues for appeals or to indicate why the same entity should have first and final say on interpretive matters. This point indicates another area of potential reform based on the arguments of this article: since interpretive authority can be divided hierarchically, it is possible to recognize the deliberative advantages of liberal democratic states by granting them the first level of authority to interpret principles of transnational justice, while all other states remain subject, even in the first instance, to the interpretive authority of both regional and international human rights courts and committees. However, any such proposal would have to be designed so as to avoid the problems that count against any two-tiered system.

VII. CONCLUSION

We can now return to the question that we started with: whether Iran's government or the Human Rights Committee should have the authority to interpret Iran's obligations under the ICCPR.

The arguments of this article imply that Iran would do less well than the Human Rights Committee at interpreting the ICCPR for implementation within Iran. Currently, the Iranian government does not provide the protection for public deliberation and basic civil rights necessary to make reasonable the assumption that Iranian officials would place the human rights of their citizens ahead of the country's ruling Islamist ideology, or indeed ahead of their own privileged positions in the ruling class. On a case-specific basis, therefore, and all else remaining the same, authority to interpret the ICCPR should remain with the Human Rights Committee rather than devolving to the government of Iran.

The arguments of this article can also say a little more about how the Human Rights Committee should fulfill its role as interpreter of transnational human rights law, even assuming no substantial reforms to the international human rights legal system. My proposal for distributing interpretive authority emphasizes the moral significance of public deliberation. Therefore, the Human Rights Committee should work to improve its own deliberative credentials, and those of states that are parties to the ICCPR, where it can do so without compromising its capability to reliably interpret the ICCPR. Regarding its own deliberative credentials, this would require at the very least a more effective procedure for hearing reports from states on a timely schedule, and for assuring each report a reasonable amount of time and attention. It would also require thinking carefully about whether the current system based on state consent might actually be more conducive to deliberation about human rights than a system in which the Human Rights Committee and other treaty bodies took on a more

powerful role. Regarding the deliberative credentials of states like Iran, instead of just insisting that the Iranian government was wrongly interpreting Article 7, the Human Rights Committee could emphasize the lack of democratic credentials backing up the Iranian government's assertion that corporal punishments reflect the culture and preferences of Iranian citizens. As we have seen, the Committee is cognizant of the fact that the establishment of the ICCPR involved an importantly deliberative process. For the same reasons that the Human Rights Committee treats this fact as evidence for the credibility of its own substantive interpretations of the ICCPR, it could similarly emphasize the deliberative nature of the interpretive process as evidence of the credibility of the process itself.

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