

## PREFACE: ON IDENTITY

DINAH SHELTON\*

I am of no particular race. I am of the human race, a man at large in the human world, preparing a new race.  
I am of no specific region. I am of earth.  
I am of no particular class. I am of the human class, preparing a new class.  
I am neither male nor female nor in-between. I am of sex, with male differentiations.  
I am of no special field. I am of the field of being.

— Jean Toomer, *Essentials*<sup>1</sup>

The concept of human rights is inextricably linked to identity: all individuals are deemed to have rights precisely because of their inherent and equal identity as human beings. As Catherine Powell has stated, “A parsing of the human rights idea reveals its organizing principle: the geography of rights corresponds to human beings, not territorial location, status, or culture.”<sup>2</sup> The contemporary law of human rights began with this premise, largely in reaction to Nazi ideology that denied humanity for millions of people on the basis of specific aspects of their identity, particularly race, religion, language, or ethnicity. Legal responses to the horrors inflicted by the Nazis have emphasized every individual’s human identity and basic rights, whatever differences may exist between those individuals.

Yet, there are increasing challenges to this fundamental framework, in part because the identity of each member of a society is interwoven with the society’s cherished history, values, and traditions.<sup>3</sup> The homogenizing trends unleashed by recent globalization seem to have produced a renewed attachment to national identity,<sup>4</sup> sometimes pleaded as “exceptionalism,” even to justify

---

\* Manatt/Ahn Professor of Law Emeritus, The George Washington University Law School; former President, Inter-American Commission on Human Rights.

1. Jean Toomer, *Poem no. XXIV*, in *ESSENTIALS* (1999).

2. Catherine Powell, *Introduction: Locating Culture, Identity, and Human Rights*, 30 *COLUM. HUM. RTS. L. REV.* 201, 202 (1999).

3. See generally *MYTHS & NATIONHOOD* (Geoffrey Hosking & George Schöpflin eds., 1997) (describing the creation and effects of national identity).

4. See, e.g., Thomas Hylland Eriksen, *Globalization and the Politics of Identity*, 36 *U.N. CHRON.* No. 4, at 8 (1999). The author states, “[W]e have in recent years witnessed the

human rights violations.<sup>5</sup> Yash Ghai posits that globalization “has produced a sense of alienation and powerlessness in the face of new global forces, in which one’s identity depends even more fundamentally on one’s culture, while that culture may be perceived to be under threat from external forces.”<sup>6</sup> If this reaction to globalization represents an attempt to retain distinctive and valued traditions, it can also serve as a pretext to marginalize and exclude those who are different.<sup>7</sup>

Peter Leuprecht writes about the difficulties of and the need for accepting human diversity “as an asset and a value that deserves protection and promotion by the law, including domestic and international human rights law.”<sup>8</sup> He identifies the main challenges as “racism, xenophobia and intolerance, ethnocentric nationalism, colonialism and imperialism, and globalization driven by paneconomic ideology.”<sup>9</sup> At the same time, Leuprecht acknowledges that human unity—rather than diversity—and rejection of “otherness” is “the fundamental principle upon which the edifice of human rights is built, namely, the equal dignity of all human beings.”<sup>10</sup> The challenge for the future of human rights is to reaffirm this unity in diversity, as the following Sections discuss.

## I. THE CONCEPT AND IMPORTANCE OF IDENTITY

Every individual’s identity is composed of many sub-parts. Some of these, such as political affiliation, occupation, and residence, are, in theory, freely and intentionally chosen by each person. Individual decisions may be influenced, however, by family, culture, personality, and circumstances. Each individual exists within a particular culture and is immersed in it from birth, often includ-

---

growth in very many societies in all continents of political movements seeking to strengthen the collective sense of uniqueness, often targeting globalization processes, which are seen as a threat to local distinctiveness and self-determination.” *Id.* at 9; see also Thomas Hylland Eriksen, *Globalization and the Politics of Identity*, <http://folk.uio.no/geirthe/UNChron.html> [<https://perma.cc/T97H-L2TZ>] (expanded version).

5. See, e.g., AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); WHITENESS AND POSTCOLONIALISM IN THE NORDIC REGION: EXCEPTIONALISM, MIGRANT OTHERS AND NATIONAL IDENTITIES (Kristín Loftsdóttir & Lars Jensen eds., 2012).

6. Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Intereethnic Claims*, 21 CARDOZO L. REV. 1095, 1096 (2000).

7. Richard A. Schweder, *Moral Maps, “First World” Concepts, and the New Evangelists*, in CULTURE MATTERS 158, 166 (Lawrence E. Harrison et al. eds., 2000) (noting that “[t]he development of a global world system and the emergence of local ethnic or cultural revival movements seem to go hand in hand”).

8. Peter Leuprecht, *The Difficult Acceptance of Diversity*, 30 VT. L. REV. 551, 552 (2006).

9. *Id.* at 552.

10. *Id.*

ing immersion in a particular religion or political ideology.<sup>11</sup> This socialization process inevitably shapes decisions, signaling the range of acceptable options available to an individual, including, ultimately, the ability to exit from the particular culture, religion, or state.<sup>12</sup>

Other parts of individual identity are largely predetermined by genetics and are visible in characteristics not easily altered: race, sex, physical and mental capacities. Religion appears to occupy a middle place, at least in international law. The Convention on the Prevention and Punishment of the Crime of Genocide, for example, includes religion along with race and ethnicity as characteristics of identity to be protected under the treaty, while excluding economic status and political beliefs.<sup>13</sup> This approach would seem to treat religion as an immutable marker of identity, like race, in contrast with other human rights instruments that consider religion clearly a matter of individual choice.<sup>14</sup> Efforts to condemn religious defamation, enact and enforce blasphemy laws, and otherwise privilege religious groups on the one hand, or to enact laws banning mosques and minarets, prohibit religious dress, and

---

11. Barbara Hauser, for example, has examined whether, in addition to material goods, “children also inherit a set of beliefs, behaviors, and a position in society.” Barbara R. Hauser, *Born A Eunuch? Harmful Inheritance Practices and Human Rights*, 21 L. & INEQ. 1, 1 (2003).

12. See, e.g., BENJAMIN BEIT-HALLAHMI & MICHAEL ARGYLE, *THE PSYCHOLOGY OF RELIGIOUS BEHAVIOUR, BELIEF AND EXPERIENCE* 97–113 (1997).

13. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

14. Article 9 of the European Convention on Human Rights (ECHR), for example, makes clear that religion is a matter of individual choice. It provides that:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law, and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. See generally CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2001) (discussing Art. 9 of the ECHR). For a more nuanced opinion, see MALCOLM EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 202 n.44 (1997) (pointing out that although Article 18 of the International Covenant on Civil and Political Rights deals with religious freedom and the right to change one’s religion, nonetheless “precise wording to this effect was expressly excluded from the text and it is open to the interpretation that it allows an individual to continue a faith, to adopt a faith, but not abandon a faith already held.”).

repress minority religious practices on the other,<sup>15</sup> indicate the depth of feeling aroused by issues of religious identity.

Scholars have affirmed that “all persons are supremely interested in their personal identity”<sup>16</sup> and that the right to culture derives from this interest, because each individual is a product of a culture.<sup>17</sup> Everyone, therefore, seeks to preserve and have society respect one’s unique personal attributes within one’s particular culture.<sup>18</sup> Yet, there can be tensions between protecting the group and protecting the individual. The culture within a group or society generally reflects the power and interests of those who are dominant, often to the detriment of those less privileged.<sup>19</sup> One thus cannot assume that the values, beliefs, and practices of all groups should be immune from scrutiny, whether the group is in the majority or the minority.<sup>20</sup> Laws and institutions may be required in order to protect individuals from the group.<sup>21</sup> Yet it is also clear that bias or misunderstanding of what a particular disfavored practice means for those who participate in it may potentially motivate outside intervention.<sup>22</sup> Further, attempts to end a practice and legally require uniform conduct may backfire and exacerbate tensions within a minority group as well as between it and the society’s majority, or even between a society and the international community as a whole.<sup>23</sup>

15. For examples of these efforts, see H. HANNUM, J. ANAYA & D. SHELTON, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE*, ch. 8 (5th ed., 2011).

16. Avisahi Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *SOC. RES.* 491, 502 (1994); see Chaim Gans, *Individuals’ Interest in the Preservation of Their Culture: Its Meaning, Justifications, and Implications*, 1 *J. L. & ETHICS HUM. RTS.* 6, 6 (2007).

17. See Margalit & Halbertal, *supra* note 16, at 502.

18. See Menachem Mautner, *From “Honor” to “Dignity”: How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 *THEORETICAL INQUIRIES L.* 609, 624 (2008).

19. See, e.g., Theo van Boven, *The Experience of the Committee on the Elimination of Racial Discrimination*, in *DISCRIMINATION AND TOLERATION: NEW PERSPECTIVES* 165, 166 (Kirsten Hastrup & George Ulrich eds., 2002) (noting that in the early years of the Committee on the Elimination of Racial Discrimination, “[r]acism and racial discrimination were seen in the context of white colonial rule and as inherent in patterns of white domination.”).

20. See Gregory H. Fox & George Nolte, *Intolerant Democracies*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 389, 391–92 (Gregory H. Fox & Brad Roth eds., 2000) (arguing that democratic states are under no obligation to tolerate anti-democratic actors.).

21. See Ayelet Shachar, *The Paradox of Multicultural Vulnerability*, in *MULTICULTURAL QUESTIONS* 87, 100 (Christian Joppke & Steven Lukes eds., 1999).

22. See, e.g., Nancy J. Hirschmann, *Eastern Veiling, Western Freedom?*, 59 *REV. POL.* 461 (1997); Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 51 (Chandra Talpade Mohanty ed., 1991); Alon Harel, *Regulating Modesty-Related Practices*, 1 *J.L. & ETHICS HUM. RTS.* 212 (2007).

23. The question of universal standards and cultural diversity comes up frequently in discussions of sex discrimination. See, e.g., Ann Elizabeth Mayer, *A “Benign” Apartheid: How*

## II. IDENTITY AND HUMAN RIGHTS LAW

The acceptance of diversity as not only inevitable among humans but even of positive value has become more pronounced in law in recent decades.<sup>24</sup> In practice, acceptance is often hard-fought. Religious minorities, for example, including sects within the same religion, often have been tolerated only partially and after long and in some cases ongoing conflicts.<sup>25</sup> The League of Nations devoted considerable attention to minority protection in Europe, in an attempt to prevent ethnic tensions, but the system the organization designed succumbed to the rise of fascism and its ideological focus on the perceived “otherness” of various groups.<sup>26</sup>

Today, human rights instruments aim to protect individuals from interference in elective decisions and from discrimination based on biology. Embracing common human identity is the core of the human rights provisions of the United Nations Charter (Charter)<sup>27</sup> and 1948 Universal Declaration of Human Rights (UDHR).<sup>28</sup> Language in the Charter and UDHR emphasizes the shared identity of all humans: equality in dignity and rights.<sup>29</sup> All states have positive and negative obligations to respect, protect, promote, and fulfill the guaranteed rights through domestic laws and institutions.<sup>30</sup> Finally, global and regional institutions and complaint procedures provide avenues for individuals to seek

*Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & AFF. 237, 271 (2001) (“[A]ttempts to deter the practice of reservations in conflict with the object and purpose of CEDAW have met with resistance in the form of accusations that these were tantamount to Western attacks on Islam and/or the Third World.” (citation omitted)).

24. See, e.g., Suzanne Last Stone, *Cultural Pluralism, Nationalism, and Universal Rights*, 21 CARDOZO L. REV. 1211, 1223 (2000).

25. In Europe, the end of the religious wars marked by the 1648 Treaty of Westphalia is but one example. Treaty of Westphalia, arts. XXVIII, CXXIII, Oct. 24, 1648, 1 C.T.S. 271 (Hein No. 47 1648).

26. See Péter Kovács, *The League of Nations Precedents*, in OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 325 (D. Shelton ed., 2013).

27. See U.N. Charter arts. 1, 55, 56.

28. See G.A. Res. 217(III)A, art. 27, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

29. *Id.* art. 1 (“All human beings are born free and equal in dignity and rights.”). Article 7 states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.” *Id.* art. 7. The U.N. Charter repeatedly refers to “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. Charter, *supra* note 27, pmb., arts. 1–2, 55–56.

30. See generally DINAH SHELTON, *ADVANCED INTRODUCTION TO HUMAN RIGHTS LAW* (2014).

redress when states fail to comply with their human rights obligations.<sup>31</sup>

### A. *Universality in Human Rights Law*

Human rights law is universal not only in aspiration, but in practice, insofar as it has been accepted, at least in theory, by all states, despite differences in histories, governments, legal systems, and cultures. Every U.N. Member State is bound by the Charter's human rights provisions and is subject to universal periodic performance reviews.<sup>32</sup> All Member States have also accepted at least one of the nine core U.N. human rights treaties<sup>33</sup> and many of the treaties are approaching universal ratification.<sup>34</sup> Similarly, in the 1993 "Bangkok Declaration," Asian countries—often accused of rejecting universal legal norms on the basis of so-called "Asian values"<sup>35</sup>—acknowledged "the universality, objectivity, and non-selectivity of all human rights"<sup>36</sup> and called for respecting "the interdependence and indivisibility of economic, social, cultural, civil, and political rights, and the need to give equal emphasis to all categories of human rights."<sup>37</sup> The "Bangkok Declaration" countries and all other states participating in the United Nations' 1993 Vienna Conference on Human Rights reaffirmed universality in the concluding Vienna Declaration.<sup>38</sup>

To some extent, however, the very aim of human rights law may appear to establish an internal tension: respecting individual rights, while acknowledging and deferring to different societies and the cultures within them. For example, the U.N. Charter and

31. *Id.*

32. U.N. Charter arts. 55–56. The Human Rights Council set forth the basis, principles, and objectives of universal periodic review in Sec. B, C, and D of the annex to Human Rights Council Res. 5/1, U.N. Doc. A/HRC/RES/5/1 annex (June 18, 2007).

33. For a list and texts of the nine core treaties, see the website *The Core Instruments and Their Monitoring Bodies*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR) (2016), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [<https://perma.cc/3RE5-KDQU>] [hereinafter *U.N. Treaty Database*].

34. Data on signatories and states parties can be found at *Multilateral Treaties Deposited with the Secretary-General*, U.N. <https://treaties.un.org/pages/ParticipationStatus.aspx> [<https://perma.cc/D56U-PBSV>] (last visited Aug. 7, 2016).

35. See Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 109 (1998); AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES 10 (1997). See generally WILLIAM THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998).

36. Regional Meeting for Asia of the World Conference on Human Rights, *The Bangkok Declaration*, ¶ 7, U.N. Doc. A/CONF.157/ASRM/8 (Apr. 7, 1993).

37. *Id.* at 4.

38. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 2, U.N. Doc. A/CONF.157/23; 32 I.L.M. 1661 (June 25, 1993).

UDHR, as well as the later Covenants on Human Rights,<sup>39</sup> explicitly recognize both the existence of different peoples entitled to self-determination<sup>40</sup> and the sovereign equality of states.<sup>41</sup> Both individuals and groups have rights of religious freedom,<sup>42</sup> culture,<sup>43</sup> and language.<sup>44</sup> It would thus appear that, in the first place, human rights law establishes uniform rights to allow the full development of each individual's batch of identities that together constitute a unique person. This set of individual rights promotes the flourishing of diversity through the self-actualization of each person, based on the individual's attributes and life goals. Secondly, the law also recognizes that many human rights are exercised in a group or social setting and that the group itself, be it a family, culture, or indigenous people, may require protection for its continued existence (again assuming that the resultant diversity is a positive good).

The duality resulting from recognizing both human unity and human diversity has produced tensions and debates about the appropriate range of allowable differences between regions and peoples in their exercise of rights and obligations. Respecting individual differences and the many forms of identity, while maintaining a common core of human rights, poses challenges for the future of human rights law as regional human rights systems proliferate and a seemingly endless number of groups each demands its own set of treaty rights. Claims of exceptionalism are nearly universal, with each state and group demanding and receiving some deference to local conditions and traditions,<sup>45</sup> although, as Jeremy Waldron notes, most objections to universal human rights norms

---

39. G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, at 49, 993 U.N.T.S. 3 (Dec. 16, 1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR]; G.A. Res. 2200 (A), International Covenant on Civil and Political Rights, art. 27, U.N. Doc. A/6316, 999 U.N.T.S. 171, 6 I.L.M. 368 (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR].

40. U.N. Charter art. 1; ICESCR, *supra* note 39; ICCPR, *supra* note 39 common art. 1.

41. U.N. Charter art. 2.

42. UDHR, *supra* note 28, art. 18 ("Everyone has the right to freedom of thought, conscience and religion.").

43. *Id.* art. 27 ((1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.).

44. *Id.* art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . language.").

45. Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249, 272, n.59 (1998–1999) (discussing distinction between intra-communal and inter-communal relations).

concern the *content* of specific rights, rather than a wholesale rejection of the notion of rights.<sup>46</sup>

### B. *Protecting Discrete Identities*

Individuals operate between various cultures, social constructs which are constantly evolving.<sup>47</sup> While the human rights paradigm emphasizes individual autonomy, rights also “imply a respect that places one in the referential range of self and others, rights that elevate one’s status from human body to social being.”<sup>48</sup> Linguistic and cultural rights, for example, can be exercised meaningfully only in a group, as Article 27 of the International Covenant on Civil and Political Rights (ICCPR) recognizes: “[P]ersons belonging to [ethnic, religious, and linguistic minorities] shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or use their own language.”<sup>49</sup> As Hurst Hannum has noted, the provision reflects the universalist aims of the UDHR:

This minimalist and individually[-]oriented text (note that ‘persons belonging to’ protected minorities are the possessors of rights) reflected the prevalent view of the 1950s and 1960s that issues of ethnicity, religion, and language would gradually diminish in importance as marginal or less developed population groups were integrated or assimilated into a democratic, non-discriminatory society.<sup>50</sup>

One may question whether this integrative or assimilative model continues to be the norm. Rather, an increasing number of conventions and declarations address claims for the protection of specific aspects of identity, but these more recent norms sometimes lack consistency and coherence.<sup>51</sup>

Commitments to indigenous and minority rights have been written into International Labour Organization Convention No. 169<sup>52</sup>

46. Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 311–12 (1998–1999).

47. See generally JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* (1988) (examining fluidity and hybridity of culture).

48. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153 (1991).

49. ICCPR, *supra* note 39, art. 27.

50. Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination, in Human Rights: An Agenda for the Next Century*, 26 STUD. TRANSNAT’L LEGAL POL’Y 1, 5 (1994).

51. The two recent Inter-American Conventions addressing various forms of discrimination, for example, are hard to reconcile with earlier guarantees on freedom of expression.

52. Int’l Labour Org., *Indigenous and Tribal Peoples Convention* (No. 169), June 27, 1989, 28 I.L.M. 1382. General aims of the Convention include: “Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and eco-

and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>53</sup> Those protections overlap somewhat with various core U.N. human rights treaties, five out of nine of which address identity claims: the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>54</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>55</sup> the Convention on the Rights of the Child (1990),<sup>56</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>57</sup> and the Convention on the Rights of Persons with Disabilities.<sup>58</sup> On the regional level, treaties protecting various identities include: the Charter of Fundamental Rights of the European Union,<sup>59</sup> the European Framework Convention for the Protection of National Minorities,<sup>60</sup> the European Charter for

---

conomic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live.” *Id.* pmbl. In addition, Article 2.2(b) requires governments to promote “the full realization of the social, economic and culture rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.” *Id.* art. 2.2(b).

53. G.A. Res. 47/135, annex, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992). Article 1 states, “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.” *Id.* art. 1. Definitions of what legally constitutes a minority vary considerably. For working definitions, see FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.91.XIV.2 (1979); JULES DESCHÈNES, PROPOSAL CONCERNING A DEFINITION OF THE TERM “MINORITY,” U.N. Doc. E/CN.4/Sub.2/1985/31 (May 14, 1985).

54. G.A. Res. 2107(XX), annex, International Convention on the Elimination of Racial Discrimination, U.N. Doc. A/6014, 660 U.N.T.S. 195, at 47 (Dec. 21, 1965).

55. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 21, 1965, 1249 U.N.T.S. 13; 19 I.L.M. 33, at 193 [hereinafter CEDAW]. CEDAW has the dubious distinction of having the highest number of reservations by the states that are party to it. For the reservations, see *U.N. Treaty Database*, *supra* note 33.

56. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. Article 8.2 of the Convention states, “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.” *Id.* at 167.

57. G.A. Res. 45/158, annex, Convention on the Protection of the Rights of All Migrant Workers and Their Families, U.N. Doc. A/45/49, at 262 (Dec. 18, 1990).

58. Convention on the Rights of Persons with Disabilities, annex II, at 80, Dec. 13, 2006, 2515 U.N.T.S. 3, at 80.

59. Charter of Fundamental Rights of the European Union, 2012/c 326/02 (Dec. 18, 2000). The Charter’s Preamble discusses a commitment to common values while respecting “the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.” *Id.* pmbl.

60. Council of Europe, Framework Convention for the Protection of National Minorities, Feb. 1, 1995, E.T.S. No. 157.

Regional or Minority Languages,<sup>61</sup> the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,<sup>62</sup> the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities,<sup>63</sup> the African Charter Protocol on the Rights of Women in Africa,<sup>64</sup> and the African Charter on the Rights and Welfare of the African Child.<sup>65</sup> Both the United Nations and the Organization of American States (OAS) have adopted declarations on the rights of indigenous peoples,<sup>66</sup> and the OAS has adopted a convention on the rights of the elderly.<sup>67</sup> The UN also has in preparation a declaration on the rights of peasants and other people working in rural areas, with the proposal that these groups be guaranteed not the right to property, which would be consistent with other human rights instruments, but the “right to sovereignty over the natural resources present in their communities,”<sup>68</sup> an extraordinary provision in terms of human rights and general international law, because “sovereignty” is traditionally considered an attribute accorded states only. Persons belonging to sexual minorities have pressed for a declaration of their rights as well.<sup>69</sup>

---

61. Council of Europe, The European Charter on Regional or Minority Languages, Nov. 5, 1992, E.T.S. No. 148.

62. Org. of Am. States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, No. A-61.

63. OAS, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, June 8, 1999, No. A-65, AG/Res. 1608 (XXIX-O/99).

64. Org. of African Unity (OAU), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2000, O.A.U. Doc. No. CAB/LEG/66.6.

65. OAU, African Charter on the Rights and Welfare of the African Child, July 11, 1990, O.A.U. Doc. No. CAB/LEG/24.9/49.

66. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, U.N. Doc No. A/RES/61/295 (Oct. 2, 2007) [hereinafter UNDRIP]. The Organization of American States (OAS) draft, after eighteen years of negotiations, was completed in May 2016 and submitted to the OAS General Assembly for adoption.

67. OAS, Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, O.A.S.T.S. A-70. The UN General Assembly has already approved the United Nations Principles for Older Persons, G.A. Res. 46/91, Dec. 16, 1991, and there are proposals for a convention on the rights of the elderly. For more on the advocacy, see the work done by Global Alliance for the Rights of Older People, <http://www.rightsofolderpeople.org/> [https://perma.cc/XG6L-5G9Z] (last visited Sept. 23, 2016).

68. Human Rights Council, Intergovernmental Working Group on the Rights of Peasants and Other People Working in Rural Areas, Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc. A/HRC/WG.15/3/2, art. 5(1) (Mar. 8, 2016).

69. Non-governmental organizations supporting the adoption of texts of the rights of sexual minorities include: Amnesty International; ARC International; Center for Women's Global Leadership; COC Netherlands; Global Rights; Human Rights Watch; International Committee for IDAHO (the International Day Against Homophobia); International Gay

Identity claims are made by groups and their members on the basis of something distinctive about their identity that they consider important and that they believe requires unique recognition and protection, usually as a consequence of disfavor or disapproval voiced by the majority. An identity claim is a demand to be treated differently because of relevant differences. Such groups may be considered “vulnerable” to human rights abuses (although there is strong support for referring to persons in vulnerable situations, rather than to vulnerable persons).<sup>70</sup>

Activism for specific instruments covering specific identities may reflect so-called “identity politics,” but may also respond to the jurisprudence of some human rights bodies that have accorded considerable deference to the traditions and values of societies as wholes, seemingly overriding the legitimate concerns of minority (often-disfavored or suspect) groups.<sup>71</sup> Such activism may also reflect the failure of general human rights law to protect certain minorities from gross violations of human rights, including instances of genocide and crimes against humanity, such as has occurred in the Balkans, Rwanda, Sudan, and Syria. In each of these instances violence centered on religious and/or ethnic differences. International criminal law has recognized the targeting

---

and Lesbian Human Rights Commission (IGLHRC); International Lesbian and Gay Association (ILGA); International Service for Human Rights; Pan Africa ILGA; and Public Services International. On June 17, 2008, the UN Human Rights Council approved a resolution submitted by South Africa requesting a study on discrimination and sexual orientation. Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (June 14, 2011). The Council adopted a second resolution related to sexual orientation and gender identity on Sept. 26, 2014, calling for a report from the Office of the High Commissioner for Human Rights on best practices for combating discrimination based on sexual orientation or gender identity. Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Sept. 24, 2014). See OHCHR, BORN FREE AND EQUAL: SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW (2012). The 34 member countries of the Organization of American States have adopted several resolutions on the issue of sexual orientation and gender identity. See, e.g., O.A.S. G.A. Res. 2721 (XLII-O/12) Human Rights, Sexual Orientation, and Gender Identity (June 4, 2012).

70. See, e.g., Hilary Charlesworth, *Inside/Outside: Women & International Law*, INTLAWGRRLS (Aug. 20, 2009), <http://www.intlawgrrls.com/2009/08/insideoutside-women-international-law.html> [<http://www.perma.cc/0uwKLReonNo>]. Charlesworth, for example, has objected to the predominance in international law of representations of women as victims “in need of protection” or as inherently vulnerable. *Id.*

71. It is also notable that reservations affect three groups in particular: women, religious groups, and minorities. Among U.N. human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude many treaty provisions.

of persons because of these differences and defined certain crimes, such as genocide, as persecution based on group identity.<sup>72</sup>

Whether the risks of exacerbating differences<sup>73</sup> outweigh the value of reaffirming a shared human identity and rights of members of specific targeted groups is open to debate. In his writings, Charles Taylor presents the rise of the discourses of identity and multiculturalism as a sort of “retreat” to a historical era.<sup>74</sup> He argues that in the pre-modern era, an individual’s identity and status was determined by social hierarchies. Differences in status predetermined how individuals were treated because the notion of difference was at the core of social organization. The modern era, by way of contrast, has been organized around the concept of equal human dignity, regardless of status or birth. In Taylor’s thesis, the rise of current debates over identity and multiculturalism represents a reintroduction of elements of inequality and difference in social relations, rather than an equalizing force.

Finally, human rights law today also struggles with “intersectionality”<sup>75</sup>—the multiple identities that individuals possess, including *inter alia* race, gender, sexuality, nationality, age, and physical and mental capacities. The individuality of a person may involve multiple identity categories simultaneously and thus fall under the guarantees of several core human rights treaties. Separate instruments and supervisory mechanisms do not allow for a single complainant’s procedure that would address intersectional concerns; instead individuals must choose a primary focus of their complaint, a single identity. This problem could have been avoided by adopting only the International Bill of Rights (UDHR and Covenants), without proceeding to conclude instruments based on particular identities. To be effective, however, such a system would have required larger monitoring committees with a membership of sufficient diversity to allow for expertise on the many complex issues of identity that are involved in human rights violations. Instead of

---

72. Genocide includes certain “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 13, art. II.

73. Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, 30 COLUM. HUM. RTS. L. REV. 285, 299–302 (1998–1999) (“In this regard, contemporary human rights proceedings risk emphasizing ethno-conscious elements of persecution that, to some extent, would affirm, and perhaps even in some small way reenact, past persecution.”).

74. Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND ‘THE POLITICS OF RECOGNITION,’ 25 (Amy Gutmann ed., 1992).

75. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244–45 n.9 (1991).

this streamlined system, today there is a proliferation of treaty bodies, and only a few have attempted to address intersectionality.<sup>76</sup>

### C. Debates on Identity and Appearance

In national law and human rights litigation, identity has become a focus of many debates over appearance.<sup>77</sup> Identity is at the heart of divergent views about clothing worn based on religious belief, where such clothing often has an “emblematic status”<sup>78</sup> as a “powerful and overdetermined marker of difference.”<sup>79</sup> The right to wear religious garb varies significantly in law and practice.<sup>80</sup> The Islamic headscarf or hijab, in particular, has generated considerable controversy in many states, as the cases below indicate, although headcoverings for Catholic nuns do not seem to provoke concern, given the absence of lawsuits. Some see headscarves as a positive declaration of faith, while others see them as symbols of oppression or even as representing a threat to national security.<sup>81</sup>

The European Court of Human Rights, in cases challenging dress restrictions under the freedom of religion provision (Article 9) of the European Convention on Human Rights and Fundamental Freedoms (ECHR),<sup>82</sup> has accepted that freedom of thought, conscience, and religion is “one of the most vital elements that go to make up the identity of believers and their conception of life.”<sup>83</sup> Still, the Court has approved nearly all clothing restrictions enacted by Member States, as the cases discussed herein indicate.

76. Convention on the Elimination of All Forms of Racial Discrimination (CERD) General Recommendation 25, for example, addresses gender-related dimensions of racial discrimination. See, e.g., Comm. on the Elimination of Racial Discrimination, *General Recommendation 25 on Gender-Related Dimensions of Racial Discrimination* (2000), in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.7, 217 (May 12, 2004).

77. See Peter Cumper & Tom Lewis, *Taking Religion Seriously? Human Rights and Hijab in Europe—Some Problems Of Adjudication*, 24 J. L. & RELIGION 599 (2008–2009).

78. Myfanwy Franks, *Crossing the Borders of Whiteness? White Muslim Women Who Wear the Hijab in Britain Today*, 23 ETHNIC & RACIAL STUD. 917, 919–20 (2000).

79. Claire Dwyer, *Veiled Meanings: Young British Muslim Women and the Negotiation of Difference*, 6 GENDER, PLACE & CULTURE 5, 5 (1999).

80. See Asma Jahangir, U.N. Econ. & Soc. Council, Comm’n on Human Rights, Civil and Political Rights, Including the Question of Religious Tolerance U.N. Doc. E/CN.4/2006/5/Add.4 (Mar. 2006). See generally W. Shadid & P.S. van Koningsveld, *Muslim Dress in Europe: Debates on the Headscarf*, 16 J. ISLAMIC STUD. 35 (2005) (discussing political approaches to the right to wear the Islamic headscarf in Europe).

81. See generally ALEV ÇINAR, MODERNITY, ISLAM, AND SECULARISM IN TURKEY: BODIES, PLACES, AND TIME 53–98 (2005).

82. European Convention on Human Rights and Fundamental Freedoms, *supra* note 14, art. 9.

83. Kokkinakis v. Greece, 17 Eur. H.R. Rep. 397, ¶¶ 31, 418 (1993).

In *Dahlab v. Switzerland*, the Court upheld a ban on a Swiss primary school teacher wearing a Muslim headscarf in class.<sup>84</sup> The Court found that the ban interfered with the teacher's ECHR Article 9(1) protections, but nonetheless held that the prohibition was justified in view of the religious neutrality of the Swiss education system, the youth of the pupils concerned, and the margin of appreciation in matters of religion. The Court's analysis reflected something of its own identity in the suggestion that the applicant's decision to wear a headscarf "might have some kind of proselytising effect," adding that the court found difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>85</sup>

Similarly, in *Sahin v. Turkey*,<sup>86</sup> a medical student at Istanbul University who was denied access to classes and exams then temporarily suspended from the University because of her insistence on wearing a prohibited Muslim headscarf, lost her case after a Grand Chamber of the Court accepted the government's arguments that the constitutional principle of secularism was a *sine qua non* of liberal pluralistic democracy in Turkey and an "essential prerequisite" to the state's application of the European Convention on Human Rights.<sup>87</sup> The Court also implied that allowing some to wear headscarves would act coercively on others, because the headscarf had taken on political significance.<sup>88</sup>

In the third headscarf case, *S.A.S. v. France*, a Grand Chamber in 2014 rejected a challenge to France's law banning all face-covering apparel in public places and imposing criminal penalties on those violating the ban.<sup>89</sup> The applicant, a self-described devout Muslim, claimed that she wears the burqa and niqab in accordance with her religious faith, culture, and personal convictions. The Court reaffirmed precedents holding that an individual's personal choices as to desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall

---

84. *Dahlab v. Switz.*, 2001 Eur. Ct. H. R. 899 (Feb. 15, 2001).

85. *Id.* at 13. The European Court of Human Rights ignored the fact that the school's inspector admitted to having received no complaints from parents about Dahlab's decision to wear Islamic dress in the classroom. Nor was there any evidence of a political agenda; the Swiss Federal Court accepted that the applicant only wished to wear the headscarf "in order to obey a religious precept." *Id.* at 2.

86. *Sahin v. Turk.*, 44 Eur. Ct. H.R. Rep. 5, ¶¶ 111, 127 (2005).

87. *Id.* ¶¶ 91, 129–30.

88. *Id.* ¶¶ 115, 128 (2005) (quoting *Sahin v. Turk.*, 41 Eur. H.R. Rep. 8, ¶¶ 107–09 (2004)).

89. *S.A.S. v. France*, 2014-II Eur. Ct. H.R. 341 (June 5, 2014).

within the notion of private life protected by Article 8 of the ECHR.<sup>90</sup>

The Government argued that the law pursued two legitimate aims: public safety and “respect for the minimum set of values of an open and democratic society,”<sup>91</sup> later submitting that the second aim could be linked to the “protection of the rights and freedoms of others” within the meaning of the ECHR. The Court accepted the first aim as legitimate, but rejected the second. According to the Court:

[A] State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.<sup>92</sup>

The Court added a reflection on identity:

[R]espect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy. It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body.<sup>93</sup>

Nonetheless, the Court accepted the state’s argument that banning the veil had the legitimate aim of promoting “living together” in a “sociali[zed]” society.<sup>94</sup> The Court proceeded to reject the necessity of the ban as a measure for public safety, but agreed with the state that the ban was both a necessary and proportional means “to ensure the observance of the minimum requirements of life in society as part of the ‘protection of the rights and freedoms of others.’”<sup>95</sup> The Court reached this conclusion by a vote of 15-2,

90. *Id.* ¶¶ 107–08.

91. *Id.* ¶ 114.

92. *Id.* ¶ 119.

93. *Id.* ¶ 120.

94. *Id.* ¶ 121.

95. *Id.* ¶¶ 140–41. According to the Court:

It indeed falls within the powers of the State to secure the conditions whereby individuals can live together in their diversity. Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places.

*Id.* ¶ 141.

despite expressing deep concern about the amount of hate speech accompanying the legislation.

In contrast to the headscarf decisions, in *Lautsi v. Italy*, a Grand Chamber of the Court found no coercive aspect to the requirement that Italian public schools display a Christian cross in each classroom, relying on the cultural traditions and identity of Italian society in upholding the requirement.<sup>96</sup>

As these cases indicate, the Court grants a wide margin of deference to states in regulating religious dress and religious symbols, although it pays lip service to personal autonomy.<sup>97</sup> This contrasts with other private life cases, particularly those involving sexual orientation and gender identity, where the Court afforded a very narrow margin of deference,<sup>98</sup> holding that “there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate.”<sup>99</sup>

Finally, these cases have broader implications for other types of group oppression, within as well as between groups. The questions of who decides what the appropriate balance will be when rights conflict and on the basis of what standards remain open. The current framework arguably lacks the effective capacity to address situations when a minority is oppressed, exploited, or otherwise discriminated against by another minority group,<sup>100</sup> for example, a situation often faced by sexual minorities.<sup>101</sup> This is especially true when broad deference is afforded to state laws and practices.

### III. IDENTITY AND THE FUTURE OF HUMAN RIGHTS

In recognizing group rights, human rights law in the future could further limit individual choice to promote “living

96. *Lautsi & Others v. Italy*, 2011-II Eur. Ct. H.R. 61, ¶¶ 71–72, 74, 76 (Mar. 18, 2011).

97. This is also true of regulating speech to protect religious sensibilities. See *Otto Preminger Institut v. Austria*, App. 13470/87, 404 Eur. Ct. H.R. 485, ¶ 56 (Sept. 20, 1994) (upholding the banning and seizure of a film shown in a private club because it was deemed offensive to the majority’s religious sensibilities).

98. See, e.g., *Goodwin v. U.K.*, 35 Eur. H.R. Rep. 18, ¶ 90 (July 11, 2002); *Keenan v. U.K.*, 33 Eur. H.R. Rep. 38, ¶ 92 (Apr. 3, 2001); *Pretty v. U.K.*, 35 Eur. H.R. Rep. 1, ¶ 61 (July 29, 2002).

99. *Dudgeon v. U.K.*, 4 Eur. H.R. Rep. 149, ¶ 52, 165 (Oct. 22, 1981).

100. See Leslie Green, *Internal Minorities and Their Rights*, in *GROUP RIGHTS 101* (Judith Baker ed., 1994); Gurpreet Mahajan, *Can Intra-group Equality Co-exist with Cultural Diversity? Re-examining Multicultural Frameworks of Accommodation*, in *MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 90* (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

101. See *Rapporteurship on the Rights of LGBTI*, OAS, <http://www.oas.org/en/iachr/lgtbi/default.asp> [<https://perma.cc/XFV5-83YN>] (last visited Sept. 23, 2016).

together,”<sup>102</sup> and Kymlicka argues that this is appropriate—the primary goal of human rights should be to protect and preserve communities—because it is from the norms, values, and traditions of such communities that individuals learn to make the best choices as individuals<sup>103</sup> and thus contribute to the social life of the community.

Zook argues that

expanding the scope and number of human rights, or strengthening the existing enforcement mechanisms, will not fix the serious weaknesses of the human rights system at least as they relate to the formation and protection of human identities. Instead, what is needed now is a new conception of how the individual is constructed and protected by human rights instruments, and how the individual interacts with, and participates in, complex societies through historical time and geographic space.<sup>104</sup>

He sees the problem as one of identity politics, referring either to “the collective set of actions by which groups enter the political process, nationally or internationally, to make rights claims on the basis of identity,”<sup>105</sup> or “the act of creating new instruments or reinterpreting existing human rights documents to support or protect various facets of human identity.”<sup>106</sup> Preceding these claims “is the process by which individuals and groups construct their identities with the express purpose of using such identities to assert claims of recognition in, or enhanced protection from, the framework of human rights law.”<sup>107</sup> States and other actors are then involved in the complex negotiating process that either supports or denies group claims for recognition. In this negotiation process, “there have been both endless accusations that the [United Nations] privileges some individuals and groups more than others, and bitterly contested claims of self-determination rights based on often-dubious claims of historical or cultural authenticity.”<sup>108</sup>

The future of human rights will require grappling with these issues and those discussed at length above. If human rights law aims to protect those individuals who are threatened with abuse

---

102. See, e.g., THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* (1999).

103. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

104. Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, 19 HARV. HUM. RTS. J. 95, 97 (2006).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 98.

because of their membership in a particular group, then it becomes important to correctly identify, recognize, and empower those groups. The question remains, however, whether such identification should result in conclusion of a separate treaty for each one.<sup>109</sup> No doubt it will be argued by some observers that this amounts to creating unfair “special rights.”<sup>110</sup> But the genie may have escaped the bottle; with the number of specific treaties already concluded, it becomes increasingly difficult to reject instruments for other marginalized groups whose situations render them particularly vulnerable to human rights abuses. The contributions to this volume and the symposium held in April 2016 are highly expert and thoughtful contributions to the debate over identity and the future of human rights. I am personally immensely grateful to all my friends and colleagues who gave of their time and effort to be part of this discussion.

---

109. See Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in *THE RIGHTS OF MINORITY CULTURES* 31 (Will Kymlicka ed., 1995); Russel Barsh, *Indigenous Peoples and the Idea of Individual Human Rights*, 10 *NATIVE STUD. REV.* 35 (1995); *PEOPLES' RIGHTS* (Philip Alston ed., 2001).

110. See Gillian Triggs, *The Rights of “Peoples” and Individual Rights: Conflict or Harmony?*, in *THE RIGHTS OF PEOPLES* 141 (James Crawford ed., 1988).