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Claiming Rights across Borders: International Human Rights and Democratic Sovereignty

SEYLA BENHABIB *Yale University*

For Jürgen Habermas on His Eightieth Birthday

The status of international law and transnational legal agreements with respect to the sovereignty claims of liberal democracies has become a highly contentious theoretical and political issue. Although recent European discussions focus on global constitutionalism, there is increasing reticence on the part of many that prospects of a world constitution are neither desirable nor salutary. This article more closely considers criticisms of these legal transformations by distinguishing the nationalist from democratic sovereigntiste positions, and both, from diagnoses that see the universalization of human rights norms either as the Trojan horse of a global empire or as neocolonialist intentions to assert imperial control over the world. These critics ignore "the jurisgenerativity of law." Although democratic sovereigntistes are wrong in minimizing how human rights norms improve democratic self-rule; global constitutionalists are also wrong in minimizing the extent to which cosmopolitan norms require local contextualization, interpretation, and vernacularization by self-governing peoples.

THE NEW LEGAL LANDSCAPE

The status of international law and transnational legal agreements and treaties with respect to the sovereignty claims of liberal democracies has become a highly contentious theoretical and political issue.[1] In his highly controversial decision that struck down the death penalty for juvenile delinquents, Justice Anthony M. Kennedy cited the United Nations (UN) Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, among other documents (Roper v. Simmons 2005). In his dissenting opinion, Justice Antonin Scalia, thundered: "The basic premise of the court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand." Seeing this as an all-or-nothing equation, Justice Scalia drove to a *reductio ad absurdum*: "The Court should either profess its willingness to reconsider all these matters in the light of views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry."[2] (emphasis in original).

What indeed is the status of foreign and international law in a world of increasing interdependence? Isn't legal epistemology enriched by looking across the border and even the ocean?[3] What is the source of the anxieties and fears invoked by so many in recent years within the U.S. context, in particular, about the problematic relation of transnational legal norms and democratic sovereignty? Citing a foreign ruling does not convert it into a binding precedent, but may be wise judicial reasoning.[4] Although recent European discussions focus on global law with or without a state,

Seyla Benhabib is Eugene Meyer Professor of Political Science and Philosophy, Yale University, P.O. Box 208301, New Haven, CT 06520-8301 (seyla.benhabib@yale.edu).

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[1] See Liptak 2008. Liptak details how in the past decade citations to decisions of the U.S. Supreme Court have declined, whereas the influence of the European Court of Human Rights and the Canadian Supreme Court have grown. This evidence is even more surprising because so many of these courts and their leading constitutional documents—such as The Indian Constitution of 1949, the Canadian Charter of Rights and Freedoms of 1982, the New Zealand Bill of Rights of 1990, and the South African Constitution of 1996—all drew on American constitutional principles at their inception.

[2] cf. Roper v. Simmons (2005), Justice Scalia dissenting, joined by Chief Justice Rhenquist and Justice Thomas. The U.S. Congress passed a resolution concerning the citation of foreign law by American courts. See Reaffirmation of American Independence Resolution 2004.

[3] Not only Justice Antonin Scalia, but also Chief Justice John G. Roberts, Jr., opposes this liberal-minded, problem-solving approach to judicial decision making that would learn and borrow from other courts. Justice Roberts does not consider the citing of foreign law to be an innocent exercise in decision making, but rather a compromise or dilution of sovereignty. Liptak (2008) quotes Chief Justice Roberts from his 2005 confirmation hearings: "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no senate accountable to the people confirmed that judge. And yet he is playing a role in shaping the law that binds the people in this country" (A30). By blurring the distinction between "citing an opinion" and "creating a precedent," Chief Justice Roberts raises the specter of the weakening of democratic sovereignty and judicial accountability.

[4] This controversy concerns not only the heft and weight of foreign courts in influencing the decisions of Supreme Court justices, but also broader issues such as what is the proper epistemology of judicial decision making, and why should judges not learn from other colleagues who have considered similar problems in their own jurisdictions? Posner and Sunstein (2006) argue, for example, that "the practice of consulting "foreign precedents" has received a great deal of attention in connection with recent decisions of the Supreme Court of the United States. . . . But in some ways, it is quite standard to refer to the decisions of other jurisdictions, and the debate over the references of the Supreme Court should be understood in the context

global constitutionalism, a global *res publica*, juridification (*Verrechtlichung*), or constitutionalizaton (*Konstitutionalisierung*) in a world society,[5] there is increasing reticence on the part of many that prospects of a world constitution and the global harmonization of legal traditions and jurisdictions are neither desirable nor salutary.[6] What sense can we make of this new legal landscape? Like Swift's giant Gulliver, states have been pinned down by hundreds of threads of international law, some of which they can free themselves from, while others, much like those that tie the giant, prevent them from escaping their bonds. The controversy over international law has become the site over the future viability of democracies in a world of growing interdependence.

The first part of this article more closely considers contemporary criticisms of these legal transformations by distinguishing the *nationalist from democratic sovereigntiste* critics, and both, from diagnoses that see the universalization of human rights norms either as the *Trojan horse of a global empire* or as *neocolonialist* intentions that abuse the doctrine of humanitarian interventions to assert imperial control over the world. Both sets of critics ignore "the jurisgenerativity of law," and in particular, the power of those most prominent cosmopolitan norms, namely universal human rights, to empower local movements. Although democratic sovereigntistes are wrong in minimizing the extent to which human rights norms contribute to improving democratic self-rule; global constitutionalists are also wrong in minimizing the extent to which even the most cosmopolitan norms, such as human rights, require local contextualization, interpretation, and vernacularization by self-governing peoples.

To concretize such processes of local contextualization, interpretation, and vernacularization, the conclusion considers the impact of CEDAW (*Convention on the Elimination of All Forms of Discrimination Against Women*) on women in some Muslim countries and analyzes how rights claims migrate across borders to produce forms of democratic iterations that extend across countries and legal traditions. These considerations are not offered in the spirit of what empirical political scientists would name "a case study," but rather they are offered to show how the very abstract considerations of normative political thought engaged in this essay shape the actions and movements of political agents engaged in contemporary struggles. The neglect of social movements as actors of social transformation and jurisgenerative politics in recent theorizing has led to a naive faith in legal experts, international lawyers, and judges as agents of democratic change. They may be that as well, but surely democratization without political actors who seek to empower themselves by creating new subjectivities in the public sphere, new vocabularies of claim making, and new forms of togetherness is neither conceivable nor desirable.

VARIETIES OF SOVEREIGNTISM

Sovereigntiste territorialism of the kind espoused by some members of the U.S. Supreme Court is characterized, in Harold Koh's words, "by commitments to territoriality, national politics, deference to executive power, and resistance to comity or international law as meaningful constraints on national prerogative."[7] Sovereigntiste territorialism in our days suffers from a *sociological deficit* so massive that it almost amounts to a loss of touch with reality: the picture of the world that it proceeds from, namely that of discrete nation-states, at whose borders foreign and international law stops, is radically out of step with legal, economic, administrative, military, and cultural reality and practice.[8]

The *normative* objections raised by sovereigntistes toward global legal developments are more weighty, and they cannot be explained away in terms of the historically ingrained attitudes of American exceptionalism and American ambivalence toward international law.[9] These objections can in turn be separated into the nationalist and democratic variants.

of that standard practice" (133). After observing that "consultation of foreign law seems to be the rule, not the exception" (135), the authors set out to provide a framework for why consulting the decisions of other states, domestically or internationally, can enhance the quality of judicial decision making. cf. also Waldron 2005; Tushnet 2006.

[5] Among the literature discussing "world constitutionalization," see Fassbender 1998, 2007; von Bogdandy 2006; Bryde 2003; Brunkhorst 2002, 2008; and the helpful overview of this literature, Brunkhorst n.d. For historical antecedents of world constitutionalism, cf. Kelsen [1928] 1960; Verdross 1926. There are parallel discussions concerning constitutionalization in the EU, WTO, IMF, etc. See Sweet 2009. Stone gives a lucid overview of the various sorts of systems and institutions to which the term "constitutionalization" is applied. From the standpoint of Stone's own theory, however, my position would belong among those naive normativists who establish connections among constitutions, the social legitimacy of any legal system, and the community's "collective identity."

[6] For a thoughtful case against "universalist harmonization schemes," arguing that "normative conflict among multiple, overlapping legal systems is unavoidable and might even be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations," see Berman 2007.

[7] Koh n.d. Koh contrasts "nationalist" to "transnationalist" jurisprudence. See also Resnik, Civin, and Frueh 2008, and Berman 2007, 1165.

[8] For a particularly shrill argument in defense of the nation-state, which considers the European Union to be nothing but a revival of the dreams of European domination once entertained by Hitler's Third Reich, see Rabkin 2005.

[9] One of the most biting criticisms of American policies and American exceptionalism, often repeated in recent years, was Carl Schmitt's. "With the growing power of the United States its peculiar kind of vacillation would also become visible, a vacillation back and forth between a clear *isolation* behind a line of separation that was drawn over and against Europe on the one hand and a universalist-humanitarian *intervention* which would encompass the earth on the other" (my translation, emphasis in text). This is the beginning of Schmitt's caustic commentary on the destructive role of the United States on the *jus publicum Europaeum*. See Schmitt [1950] 1997, 200. In the period before and after George Bush's Iraq War, Schmitt's work has found receptive audiences.

For a lively historical account of American government's vacillations and trepidations during the Armenian genocide in the Ottoman Empire in 1915, and subsequently Woodrow Wilson's foreign policy gyrations, see Power 2002 and Bass 2008, who engages directly with the ambivalencies of humanitarian interventionism as an aspect of imperialist politics.

The *nationalist* variant traces the law's legitimacy to the self-determination of a discrete, clearly bounded people, considered to be a homogeneous entity—an ethnos—whose law expresses and binds its collective will alone.[10] The *democratic* variant says that laws cannot be considered legitimate unless a self-determining people can see itself both as the author and the subject of its laws. For the democratic sovereigntiste, unlike the nationalist, it is not paramount that the law express the will of a nation, of an *ethnos*, but that there be clear and recognized public procedures for how laws are formulated, in whose name they are enacted, and how far their authority extends.

The *democratic sovereigntiste* argument has many adherents, among them Thomas Nagel, Quentin Skinner, Michael Walzer, and Michael Sandel.[11] Many who would disagree with the sociological world picture of nationalist sovereigntisme would nevertheless argue that recent trends toward a harmonized global legal system are normatively dangerous and undesirable. Consider, for example, Thomas Nagel's (2005) "The Problem of Global Justice."[12] Nagel takes the nation-state to be the indispensable framework within which questions of justice can arise, and considers foreign and international law to be no more than quasi-contractual commitments entered into voluntarily by discrete sovereign entities. Over and beyond the moral duties we owe each other as humans, argues Nagel, there are no "thicker" obligations beyond our borders that would place us in relationships of justice with other nonnationals with whom we can engage in or not, depending on our disposition and interest, in building enduring projects of mutual benefit and cooperation. The global economy, much like the global legal system, in this view, consists of a series of discretely undertaken contractual obligations by individual states with other entities, such as states and corporations, and often, as is the case with international treaties, with multiple other states and corporations. Yet, neither the global economy nor the global legal system is a "system of cooperation" in the Rawlsian sense of the term, that is, enduring forms of human association whose members willingly undertake to work and live with one another under a framework of clearly demarcated rules for distributing benefits and liabilities. According to Nagel's "political conception of justice," "sovereign states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they don't have with the rest of humanity, an institutional relation which must be evaluated by the special standards of fairness and equality that fill out the content of justice" (120).

For Nagel as well, the sociological and the normative dimensions of sovereigntisme are deeply intertwined. Because Nagel assumes that neither the world economy nor the world legal system are systems of cooperation in the Rawlsian sense, he reduces the problem of global justice to the moral duties that individuals owe one another as a matter of moral principle. Many critics of Nagel, such as Joshua Cohen and Charles Sabel, as well as Thomas Pogge, begin by correcting Nagel's world picture about international law and institutions in order to draw different normative conclusions.[13]

The terrain of the global legal system has now become the new battleground for the future of democracy. Discussions of global justice among political theorists have so far largely focused on distributive justice claims and on how to assess the normative wrongs of the current world system; the status of international law has rarely been addressed.[14] But the objections of democratic sovereigntistes to the legal universalists and world constitutionalists need to be taken seriously. We should be concerned that the rush to embrace global constitutionalism, with or without a state, is leaving the question of democratic legitimacy unanswered. Postdemocracy and technoelitist democracy, attenuated through the systems of anonymous governance initiated by global specialists, are becoming increasingly attractive to some.[15]

CRITICS OF INTERNATIONAL LAW

In addition to the democratic and nationalist sovereigntiste positions considered previously, there are three

[10] cf. the following statements by Bolton (2009): "While the term 'sovereignty' has acquired many, often inconsistent, definitions, Americans have historically understood it to mean our collective right to govern ourselves within our constitutional framework." And "'sharing' sovereignty with someone or something else is thus not abstract for Americans. Doing so by definition will diminish the sovereign power of the American people over their government and their own lives, the very purpose for which the Constitution was written." Bolton served briefly and controversially as the U.S. Permanent Representative to the United Nations in 2005–2006.

[11] Nagel 2005; Skinner [1998] 2008; Walzer 1983; Sandel 1996. cf. Sandel's (1996) statement: "If the global character of the economic suggests the need for transnational forms of governance, however, it remains to be seen whether such political units can inspire the identification and allegiance—the moral and civic culture—on which democratic authority ultimately depends" (399).

[12] Nagel (2005) also argues that for membership in a political society, "the engagement of the will that is essential to life inside a society . . . and the dual role each member plays both as one of the society's subjects and as one in whose name its authority is exercised" is paramount. "One might say that we are all participants in the general will. . . . [A] sovereign state is not just a cooperative enterprise for mutual advantage" (128). This aspect of Nagel's argument is quite compatible with the claims presented in the section of this article on democratic iterations. In each case, the *political* interpretation of rights through the practices and decisions of a self-governing community and the role of citizens as authors and subjects to the law are emphasized. Where my analysis differs from Nagel's is that I see international human rights norms as enabling and not hindering democratic iterations, whereas Nagel either construes these too narrowly or sees them as deriving from mere contractual obligations among states.

[13] Cohen and Sabel 2006; Pogge [2003] 2004; Pogge 2007; and Benhabib 2004, concerning Rawls' (1999) inadequate sociological understanding of the political economy of the world society, 97–105.

[14] Exceptions are Habermas (2001, 2006a, 2006b). For critical discussions of Habermas' recent writings on these matters, see Niesen and Herborth 2007; Scheuerman 2008. The pioneering work in this field was Archibugi and Held 1995; Held 1995; Cohen and Sabel 2005; and Archibugi 2008.

[15] For the first position, see Teubner (1997) and for the second, Slaughter (2004). For a critique, see Benhabib 2007c.

additional and well-articulated objections to these developments. They are to be distinguished from the first group in that they situate current legal developments in broader socioeconomic and political contexts: first is *the neo-Marxist critique*, according to which cosmopolitan law is but an epiphenomenon of economic globalization and the spread of empire[16]; second is the charge that recent actions by the UN Security Council are creating a worldwide *emergency condition* through which the deformalization of law and extrajudicial political measures are gaining influence[17]; and, finally, there is the claim that humanitarian interventions and the prosecution of "crimes against humanity" through the International Criminal Court, in particular, are *neo-colonial* tools of world domination (Mamdani 2008, 18; Mamdani 2009).

This latter claim is particularly important for elucidating the ambivalent connection between the recent actions of the UN Security Council and cosmopolitan norms of human rights. Formulae such as "the obligation" or "the responsibility" to protect, which have been increasingly endorsed by the Secretary General of the UN and which are logical consequences of viewing every individual as a being entitled to rights within the global civil society, are becoming slippery slopes toward the creation of an international emergency situation, legitimizing increasingly more humanitarian interventions. As Mahmood Mamdani (2008) puts it in biting terms: "The new humanitarian order, officially adopted at the UN's 2005 World Summit, claims responsibility for the protection of vulnerable populations.... Whereas the language of sovereignty is profoundly political, that of humanitarian intervention is profoundly anti-political.... The international humanitarian order, in contrast, does not acknowledge citizenship. Instead it turns citizens into wards" (18).

There is a great deal in these objections that should be taken seriously and that ought to give one pause; however, advocates of the neoimperial capitalist hegemony thesis recapitulate a well-known Marxist trope that views the discourse of human rights as the ideological veneer enabling the spread of free commodity relations (Marx 1978, 238–44). Certainly, there is both a historical and a conceptual link between the universalization of market forces and the rise of the individual as a self-determining and free being, capable of disposing over his or her actions and goods. *But human rights norms are not norms of person, property, and contract alone, and they cannot be reduced to norms protecting free market transactions.* Human rights norms, such as freedom of speech, association, and assembly, are also citizens' rights, subtending and enabling collective action and resistance to the very processes of rapacious capitalist development that postcolonial Marxist critics of "humanitarian intervention" also decry. Many of the international human rights covenants contain, in fact, provisions *against* the exploitative spread of market freedoms, in that they protect union and associational rights; rights of free speech; equal pay for equal work; and workers' health, social security, and retirements benefits. Global capitalism that creates special free trade zones is often directly in violation of these human rights covenants (Benhabib 2007c, 19–36).

The charge that the defense of these cosmopolitan rights has unwittingly given rise to a *responsibility to protect* and hence to neocolonial domination in the form of humanitarian interventions is complicated[18]: a very good example of this slippery slope from the

[16] cf. Hardt and Negri 2001. Although first translated into English in 2001, the Italian version was written in the period between the Persian Gulf War of 1991 and the Yugoslav Civil War of 1994. Its view of U.S. power is more benevolent than the subsequent work by Hardt and Negri 2004. A more interesting version of the empire thesis has been recently provided by James Tully, who names such cosmopolitan rights discourse "the Trojan horse" of a neoimperial order extending around the world. "The two cosmopolitan rights," writes Tully, harken back to the development of cosmopolitan discourse in the 18th century, namely "of the trading company to trade and the voluntary organizations to convert—also fit together in the same way as with the nation state. The participatory right to converse with and try to convert the natives complements the primary right of commerce.... From the perspective of non-Western civilizations and of diverse citizenship, the two cosmopolitan rights appear as the Trojan horse of western imperialism" (Tully 2008). Tully develops a concept of "diverse citizenship" in this essay, which he believes can serve as a counterhegemonic challenge to the modern statist conception of citizenship. I would argue that cosmopolitan norms, in the sense in which I develop in this article, are enabling conditions of such diverse citizenship.

[17] Cohen 2008a; Scheppele 2006. According to this analysis, it is the creation of *an international emergency situation* primarily through the actions of the UN Security Council that must be heeded. "The seemingly arbitrary redefinition of domestic rights violations as a threat to international peace and security, and the selective imposition of debilitating sanctions, military invasions, and authoritarian occupation administrations by the SC or by states acting unilaterally ('coalition of the willing'), framed as 'enforcement' of the values of the international community, gave some of us pause" (456). The member states of the UN can neither oppose these measures, nor can they amend them, because the amendment rules place the UN Security Council out of their reach by endowing its members with special veto rights.

But there is now significant judicial opposition to the authority of the Security Council. In the much discussed cases of *Kadi* (C-402/05P) and *Al Barakaat* (C-415/05P), the judgment of the European Court of Justice (ECJ) of September 3, 2008, reversed the judgment of the European Court (EC) of First Instance. Through this decision, the ECJ annulled the relevant EC measures that implemented the Security Council's Chapter VII resolution, blacklisting certain individuals as supporters of terrorism and freezing their assets. This case was all the more fascinating because in earlier instances the European Court of Human Rights had complied with the UN Security Council measures. cf. *Behrami and Saramati v. France, Norway and Germany*; judgment of the European Court of Human Rights of 2 May 2007 (Appl 71412/01, 71412/01 and 78166/01). The European Court of the First Instance followed this precedent and upheld the European Council decisions regarding the freezing of the assets of Mr. Kadi and Al Barakaat. cf. Court of First Instance Case T- 315/01, *Kadi v. Council and Commission* (2005) and Court of First Instance Case T-306/02 *Yusuf and al Barakaat International Foundation v. Council and Commission* (2005). For a provocative discussion that views this case as a paradigmatic "conflict of norms" in the pluralist global legal order, see de Burca 2009.

[18] On the initiative of the then UN General Secretary, Koffi Anan, a special Report of the International Commission on Intervention and State Sovereignty was issued in 2001. Called "The Responsibility to Protect," the report maintains "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. We hope very much that the report will break new ground in a way

responsibility to protect to the *duty* to intervene, by military force if necessary, occurred during the great typhoon that hit Myanmar-Burma in Spring 2008. Bernard Kouchner, the former president of Medecins Sans Frontiers and now foreign minister of France, argued that the nations of the world had a duty to intervene, even against the will of the secretive Myanmar military junta. Robert Kaplan, the conservative thinker, concurred and suggested that the U.S. Navy could move up the river delta to Myanmar, and that once it did so, the mission of humanitarian aid to the victims of the cyclone could easily morph into one of "nation building." Only this time, one would be self-conscious about this task and apply the Pottery Barn principle outright: "If you break it, you own it!"[19]

It would be foolish to deny, therefore, the ambivalences, contradictions, and treacherous double meanings of the current world situation, which often transforms cosmopolitan intents into hegemonic nightmares. Nevertheless, the hermeneutics of suspicion in the face of these new developments will only take us so far, because with very few exceptions,[20] there is also a refusal on the part of these critics to consider law's normativity and jurisgenerativity, and instead to reduce law to its facticity, that is to the fact that law can be enforced by state sanctions, and, if necessary, through violence.

One way to introduce some clarity into this debate is to focus on a *family* of global norms that enjoys widespread support and that constitutes the building blocks of any project of world constitutionalism and global legal harmonization. These are international human rights norms, originating with the Universal Declaration of Human Rights of 1948. A democratic sovereigntiste such as Nagel and a world constitutionalist such as Habermas both agree that in addition to international law concerning the prohibition and conduct of war among states, human rights constitute the foundations of the international system.[21] The strategy of Habermas' (2008) general answer to Nagel is that the constitutionalization of international law need not take the form of a social contract of state formation that would transcend the political autonomy of existing states (448–49). Instead, Habermas argues that "today any conceptualization of a juridification of world politics must take as its starting point individuals *and states* as the two categories of *founding subjects of a world constitution*" (449; emphasis in text). Habermas insists that such a multilevel juridical order "should *not* lead to a mediatization of the world of states by the authority of a world republic which would *ignore the fund of trust accumulated in the domestic sphere and the associated loyalty of citizens to their respective nations*" (449; author's emphasis). By "mediatization" in this context, Habermas has in mind the necessity to consult the authority of a supranational authority. In contrast, there are forms of "mediating" international norms and national ones—that is, interpreting, considering, and contextualizing one in the light of the other—which do not suggest a relationship of subordinating the national always to the supranational. This article seeks to analyze precisely those forms of the mediatization between international norms and the "associated loyalty of citizens of respective nations" to their respective nations.

THE RISE OF COSMOPOLITAN NORMS AND JURISGENERATIVITY

It is now widely accepted that since the Universal Declaration of Human Rights, we have entered a phase in the evolution of global civil society that is characterized by a transition from *international* to *cosmopolitan* norms of justice.[22] This is not merely a semantic change. Although norms of international law emerge through treaty obligations to which states and their representatives are signatories, cosmopolitan norms accrue to individuals considered as moral and legal persons in a worldwide civil society. Even if cosmopolitan norms also originate through treaty-like obligations, such as the UN Charter, and the various human rights covenants can be considered to be for their member states, their peculiarity is that they limit the sovereignty of states and their representatives, as well as oblige them to treat their citizens and residents in accordance with certain human rights standards.[23] States have now engaged in a process of "self-limiting" or "self-binding" their sovereignty, as the large number that have signed the various human rights covenants that have come into existence since the Universal Declaration of Human Rights of 1948 shows.[24]

that helps generate a new international consensus on these issues." Of course, the sensitive question is by whom and how states' being "unwilling or unable to do so" will be determined. The report has not been adopted by the General Assembly and does not have the status of international law. cf. www.iciss.ca/pdf/Commission-Report.pdf (October 9, 2009).

[19] Mydans 2008, and Kaplan 2008.

[20] Cohen's (2008a) concerns are motivated by an internal critique of the extralegal powers that the UN Security Council is usurping for itself and not by a rejection of the "constitutionalization of public law," which she characterizes "as a feasible, albeit difficult to obtain, utopia" (467).

[21] Nagel 2005, 114; see also Habermas' (2008) comments on Nagel's article; on human rights, see pages 445 and 447, in particular. I should add that under internationally valid human rights, Nagel (2005) only includes "negative rights like bodily inviolability, freedom of expression and freedom of religion" (127).

[22] In recent works such as *The Rights of Others* and *Another Cosmopolitanism*, I have argued that understanding cosmopolitanism in terms of the legal and moral status of the individual in the world civil society goes back to Kant's concept of "Weltbuergerrecht," as expounded in "Perpetual Peace," Benhabib 2006, 25–48. See also Benhabib 2007a.

[23] For a powerful elucidation of the transformation of international law in the post–World War II period and the emergence of the individual as subject of international law through decisions of the Permanent Court of International Justice and the Charter of the United Nations, see Lauterpacht 1973. Lauterpacht writes: "Moreover, irrespective of the question of enforcement, there ought to be no doubt that the provisions of the Charter in the matter of fundamental human rights impose upon the Members of the United Nations a *legal* duty to respect them" (34). See also note 33.

[24] Debates about the status of the Universal Declaration of Human Rights—whether it is binding law, and if so, how it is to be enforced; whether it is a mere declaration with moral hortatory intent

To get a sense of the intensity and velocity with which these challenges have come upon us, consider a list of the human rights declarations that have been signed by a majority of the world's states since the The Universal Declaration of Human Rights (UDHR) in 1948: the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on December 9, 1948 (Chapter II); the 1951 Convention on Refugees (which entered into force in 1954); the International Covenant on Civil and Political Rights (opened to signature in 1966 and entered into force in 1976, with 163 of 195 countries being parties to it as of 2009); and the International Covenant on Economic, Social and Cultural Rights (entered into force the same year and with 160 state parties as of June 2009); and CEDAW (signed in 1979 and entered into force in 1981, with 186 states parties as of June 2009). These are some of the best known among many other treaties and conventions (see the Appendix).

By focusing on global human rights norms, as opposed to developments in global commercial, administrative, or entertainment law, or on other institutions such as the International Criminal Court, I want to counter as sharply as possible the democratic sovereigntiste objections to these developments. Although I would endorse a *legal cosmopolitan* position that considers each human as a person entitled to basic human rights, my argument is that many critics of cosmopolitanism view the new international legal order as if it were a smooth "command structure," and they ignore the jurisgenerative power of cosmopolitan norms.

By "jurisgenerativity," a term originally suggested by Robert Cover, I understand the law's capacity to create a normative universe of meaning that can often escape the "provenance of formal lawmaking" (Cover 1983, 4–68). "The uncontrolled character of meaning exercises a destabilizing influence upon power," writes Cover. "Precepts must 'have meaning,' but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion" (18) Laws acquire meaning in that they are interpreted within the context of significations that they themselves cannot control. There can be no rules *without* interpretation, that is, rules can only be followed insofar as they are interpreted; however, there are also no rules that can control the varieties of interpretation they can be subject to within all different hermeneutical contexts.[25] It is in the nature of rules in general and law in particular that the horizon of interpretation transcends the fixity of meaning. Law's normativity does not consist in its grounds of formal validity, that is its legality alone, although this is crucial. Law can also structure an extralegal normative universe by developing new vocabularies for public claim making, by encouraging new forms of subjectivity to engage with the public sphere, and by interjecting existing relations of power with anticipations of justice to come. Law anticipates forms of justice in the future. It is not simply an instrument of domination and a method of coercion, as theorists from Thomas Hobbes to Michel Foucault have argued; "the force of law" (cf. Derrida 1990, 920–1046) involves anticipation of justice to come that it can never quite fulfill but that it always points toward.

Democratic sovereigntistes ignore that international human rights norms can empower citizens in democracies by creating new vocabularies for claim making, as well as by opening new channels of mobilization for civil society actors who then become part of transnational networks of rights activism and hegemonic resistance (Keck and Sikkink 1998). Conflict of norms in the new legal universe that we have entered into are unavoidable and may even be desirable; thus, global constitutionalists are wrong in minimizing the necessity for mediating international norms through the will formation of democratic peoples. Even human rights norms require interpretation, saturation, and vernacularization; they cannot just be imposed by legal elites and judges on recalcitrant peoples. Rather, they must become elements in the public culture of democratic peoples through their own processes of interpretation, articulation, and iteration.

alone—have accompanied it from the start. Mazower (2004) gives a good account of why the superpowers, and in particular the United States and Great Britain, asserted "domestic jurisdiction" and made sure that "the human rights provisions of the UN Charter would not be automatically applicable at home." They eventually agreed to the UDHR only because "it was a declaration" and not " a covenant" (393). International jurists such as Hersch Lauterpacht and Hans Kelsen, however, were dismayed early on that neither the Universal Declaration nor the rights clauses within the UN Charter made provisions for a court with the authority to adjudicate on rights' violations nor allowed the right of petition. See Lauterpecht 1973, 286ff; Kelsen 1946.

Yet taken together, the UN Charter, the UDHR, and the Genocide Convention of 1948, had the cumulative effect of opening the floodgates to petitions from around the world complaining about human rights violations, race discrimination, and the like. The most well-known of these was presented by W.E.B. du Bois on behalf of the NAACP detailing the history of racial discrimination in the U.S. The "father" of the Genocide Convention, Ralph Lemkin, was dismayed and claimed that this was a Russian ploy to diplomatically embarrass the US. See Benhabib 2009. The "jurisgenerative effect" of these declarations, charters, and covenants far exceeds their legal intentions, unleashing a moral surge toward their legalization in various domestic jurisdictions. Even a cautious observer, such as Mazower (2004), concedes this point and argues that analyzing these documents, compendia, etc., is not neutral; they continue the hope that "moral aspirations might come themselves to be regarded as the source of law" (397).

[25] My reliance on Cover's (1983) concept of "jurisgenerativity" does not mean that I minimize or disregard the "legal origins of legitimacy"; jurisgenerativity is not a process of *law making but one of law interpreting*, or more properly speaking, it is about the interplay of legal and nonlegal sources of normativity. I do not share Cover's claim that "interpretation always takes place in the shadow of coercion. . . . *Courts, at least the courts of the state, are characteristically "jurispathic*" (40; author's emphasis). Although the state and the courts undoubtedly seek to control "the circulation of meaning," the courts' relationship to processes of norm interpretation and meaning generation can be more creative and fluid than suggested here. For Cover, "redemptive constitutionalism" (33) originates with "*nomoi* communities" and social movements, but rarely with formal institutions.

JURISGENERATIVITY AND DEMOCRATIC ITERATIONS

How is the jurisgenerative capacity of cosmopolitan norms at play then in the current state system? It will be important here to distinguish between a *normative-philosophical* analysis of the relationship between cosmopolitan human rights norms endorsed through various covenants and the *institutional channels* through which such covenants shape and influence the signatory states' legislation and political culture.

Human rights covenants and declarations articulate general principles that need contextualization and specification in the form of legal norms. How is this legal content to be shaped? Basic human rights, although they are based on the moral principle of the communicative freedom of the person, are also legal rights (i.e., rights that require embodiment and instantiation in a specific legal framework). There is widespread disagreement regarding not only the content of human rights lists, but also their justification. Joshua Cohen has helpfully distinguished between "justificatory" and "substantive minimalism" in the defense of human rights. Although the first refers to the justification strategy considered most appropriate for grounding human rights, the second concerns the list of human rights to which each justification strategy leads.[26] I find neither justificatory nor substantive minimalism plausible and believe that there is a great deal of confusion in these matters, in part resulting from the reasonable political fear that a substantive conception of human rights somehow licenses international "humanitarian" interventions. According to international law, only the Genocide Convention creates an obligation on the part of all to stop "crimes against humanity," such as genocide, ethnic cleansing, enslavement, and mass deportations. Although states have a legal obligation to live up to the principles of the Universal Declaration, there is no mechanism of international enforcement against violator states. I defend increasing the force of law through the power of global civil society and the jurisdiction of international courts, but want to sharply distinguish the philosophical interpretation of human rights from questions of political intervention and legal enforcement. Human rights straddle the line between morality and justice; they enable us to judge the legitimacy of law (Dworkin 1978, 184ff).

In negotiating the relationship between general human rights norms, as formulated in various human rights declarations, and their concretization in the multiple legal documents of various countries, we may invoke the distinction between a *concept* and a *conception*.[27] We need to differentiate between *concepts* such as fairness, equality, and liberty—let us say—and *conceptions* of fairness, equality, and liberty that would be attained as a result of introducing additional moral and political principles to supplement the original concept (Dworkin 1978, 134ff). Should justice be defined as "fairness" (Rawls) or as "from each according to his abilities to each according to his needs" (Marx). To be able to argue for one or the other, we would need to introduce some further claims about scarcity, human needs and wants, and the structure of the basic subject of justice to supplement our original concept of justice.

Applied to the question of how we move from general normative principles of human rights, as enshrined in the various covenants, to specific formulations of them, as enacted in various legal documents, the core *concept* of human rights that would form part of any *conception* of the right to have rights would include minimally—so I would argue—the rights to life and liberty (including freedom from slavery, serfdom, forced occupation, sexual violence, and sexual slavery); the right to some form of personal property; and equal freedom of thought (including religion), expression, association, representation, and the right to self-government. Furthermore, liberty requires provisions for the "equal value of liberty" (Rawls) through the guarantee of some bundle of socioeconomic goods, including adequate provisions of basic nourishment, shelter, and education.[28]

How is the legitimate range of rights to be determined across liberal democracies, or how can we transition from general *concepts* of right to specific *conceptions* of them?[29] If we agree on the centrality of a principle such as "freedom of religious expression," must we also accept that minority religions are entitled to rights to public expression equally with the majority, as I would argue, or can we maintain that freedom of religious expression is compatible with some reasonable restrictions on its exercise, as Rawls has claimed?

[26] See Cohen 2004. For philosophical positions that would *not* accept the push toward the positivization of human rights, see Sen 2004 and Nussbaum 1997, each of whom for different reasons denies that human rights need to be embedded in legal-juridical form.

[27] Rawls invokes H.L.A. Hart's discussion in *The Concept of Law* to introduce this distinction. See Rawls 1971, 5, and Hart [1961] 1975, 155–59. My usage of these terms is more kindred to Dworkin's, as cited in note 48. Many thanks to Ed Baker for clarifying some of the intertextual issues involved here.

[28] A full justification of these claims is not possible in this article, in which I am less concerned to ground human rights claims philosophically and more concerned to develop an account of international human rights that would be compatible with strengthening popular sovereignty. I have offered a justification of human rights in the light of communicative freedom (Benhabib 2007a). I thank the anonymous reviewer for calling my attention to this issue.

[29] There are differences between discourse theorists who justify human rights philosophically on the basis of the presuppositions of "speech-immanent" commitments and Rawlsians such as Joshua Cohen, Kenneth Baynes, and others who prefer to see human rights as elements of a "political conception" of global justice and reason. According to their view, a political conception has the merit of not relying on controversial metaphysical and other philosophically charged premises. It can therefore be made compatible with the regimes of "decent hierarchical societies," which respect most human rights but do not endorse ideals of an egalitarian right to democracy. According to Rawls (and Joshua Cohen), it is also important that such a political conception of human rights limits intervention in the affairs of societies that do not engage in gross human rights violations, even if their articulation and protection of rights is weaker than in liberal democracies. See Rawls 1999, 65ff; Rawls 1996. For the defense of the political conception, see Cohen 2004, 2006. For discourse-theoretic accounts, see Benhabib 2007a, 2008a, 2008b; Forst 1999, 35–60. For a helpful overview of these positions and clarifications of the philosophical stakes, see Baynes 2009.

Certainly, the juridical, constitutional, and common law traditions of each human society; the history of their sedimented interpretations; and their internal debates and disagreements will shape the legal articulation of human rights. Even as fundamental a principle as "the moral equality of persons" assumes a justiciable meaning as a human right once it is posited and interpreted by a democratic lawgiver. And here a range of legitimate variations is always the case. For example, although equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel, and India, this is considered quite compatible with special immunities and entitlements that accrue to individuals in virtue of their belonging to different cultural, linguistic, and religious groups (Benhabib 2002). For societies such as the United States and France, with their more universalistic understandings of citizenship, these multicultural arrangements would be completely unacceptable. At the same time, in France and Germany, the norm of gender equality has led political parties to adopt various versions of the principle of "parité"—namely that women ought to hold public offices on a fifty-fifty basis with men, and that for electoral office, their names ought to be placed on party tickets on an equal footing with male candidates. In contrast, within the United States, gender equality is protected by Title IX, which applies only to major public institutions that receive federal funding. Political parties are excluded from this. There is, in other words, a legitimate range of variation even in the interpretation and implementation of such a basic right as that of "equality before the law." The legitimacy of this range of variation and interpretation is crucially dependent on the principle of self-government. *My thesis is that without the right to self-government that is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.*

Here in lies the distinctiveness of an approach based on communicative freedom. Freedom of expression and association are not merely citizens' political rights, the content of which can vary from polity to polity; they are crucial conditions for the recognition of individuals as beings who live in a political order of whose legitimacy they have been convinced with good reasons.[30] They undergird the communicative exercise of freedom, and therefore, they are basic human rights as well. Only if the people are viewed not only as subject to the law, but also as authors of the law can the contextualization and interpretation of human rights be said to result from public and free processes of democratic opinion and will formation. Such contextualization, in addition to being subject to various legal traditions in different countries, attains democratic legitimacy insofar as it is carried out through the interaction of legal and political institutions with free public spaces in civil society. When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of Western paternalism often associated with them. I call such processes of appropriation "democratic iterations."

By *democratic iterations*, I mean complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.[31] In the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning; rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever so subtle ways. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition. Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is reposited and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority over us as well.

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim, how can we assess whether democratic iterations have taken place rather

[30] Cohen (2006) responds in the negative and develops a philosophical account of human rights as "entitlements that serve to ensure the bases of membership." According to Cohen, "the central feature of the normative notion of membership is that a person's good is to be taken into account by the political society's basic institutions: to be treated as a member is to have one's good given due consideration, both in the process of arriving at authoritative collective decisions and in the content of those decisions" (237–38). But, as Cohen admits, to have one's good be "given due consideration" must entail freedom of opposition and dissent. Yet, without an enduring commitment to the independence of institutions that express opinions about one's good that may not be consonant with that of the regime or of the majority, how can Cohen's demanding conception of membership be satisfied? Cohen (2008b) criticizes Cohen's approach for being "still too demanding" and asks, "Wouldn't suspension of the sovereignty argument when rights to individual dissent, free expression, appeal, and the requirement of public justification of policy are violated amount to a green light to intervene against any regime militarily?" (586). This "functional account" (582) of human rights considers human rights in terms of their position within international relations and international law, and tries to blunt the justification of ever-increasing interventionism. But this is to put the cart before the horse: an adequate conception of human rights cannot be arrived at by asking which minimal list of human rights would prevent interventionism. Some powers will use existing formulations and institutions to their instrumental purposes some or most of the time; normative theory alone cannot prevent such political abuse. None of the human rights declarations cited previously create a *general obligation* to intervene in the affairs of other states. As Cohen herself acknowledges, only the Genocide Convention does so (587). Why then limit conceptions of human rights to this "functional account" rather than viewing them as instruments of *critique* directed against existing state regimes and civil societies?

[31] See Benhabib 2006, 45ff. For a clarification of the status of democratic iterations as processes of generating democratic legitimacy, see the Symposium on *The Rights of Others*, in *European Journal of Political Theory*, vol. 6. no. 4 (October 2007), 395–463, and Benhabib (2007b). Whether democratic iterations are always processes of meaning enhancement or whether they can also impoverish and manipulate meaning is an important question. I am assuming that the conditions of practical discourses provide necessary but not sufficient conditions against the manipulation and impoverishment of meaning. I am not sure that sufficient condition can ever be formulated in this respect, but if they could, the answer would lie more in the direction of a theory of judgment.

than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards of rights to be properly evaluated? I accept here Juergen Habrmas' (1996) insight that "the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation which has been legally constituted" (110). The "legal constitution of a discursive procedure of legislation" is possible only in a society that institutionalizes a communicative framework through which individuals as citizens or residents can participate in opinion and will formation regarding the laws that are to regulate their lives in common. Through the public expression of opinion and action, the human person is viewed as a creature who is capable of self-interpreting rights claims. Having a right means having the capacity to initiate action and opinion to be shared by others through an interpretation of the very right claim itself. Human rights and rights of self-government are intertwined. Although the two are not identical, through institutions of self-government alone can the citizens and residents of a polity articulate justifiable distinctions between human rights, and then civil and political rights, and then judge the range of their legitimate variation.

Democratic legitimacy reaches back to principles of *normative justification.* Democratic iterations do not alter conditions of the normative validity of practical discourses that are established independently of them; rather, democratic iterations enable us to judge as *legitimate or illegitimate* processes of opinion and will formation through which rights claims are contextualized and contested, expanded and revised through actual institutional practices in the light of such criteria. Such criteria of judgment enable us to distinguish a *de facto consensus* from a *rationally motivated* one.[32]

Human rights norms assume "flesh and blood" through democratic iterations. Such processes have also been called "saturation" and "vernacularization" (Merry 2006, 134). The democratic sovereigntists' fears then that cosmopolitan human rights norms must override democratic legislation is philosophically unfounded because the very interpretation and implementation of human rights norms are *radically dependent* on the democratic will formation of the demos, which is, of course, not to say that there can be no conflict either of interpretation or implementation—this is a question to which I return in the final sections of this article.

COSMOPOLITAN NORMS AND LEGAL PRACTICE

What is the institutional interaction between cosmopolitan norms and legislative and nonlegislative processes, and how can democratic iterations help us understand such processes better? It is first necessary to distinguish between international and transnational law. By "international law," I understand public legal conventions pertaining to the world community at large, some of which may be formulated in written form, such as the Universal Declaration of Human Rights is, and others of which, such as norms of *jus cogens*, are unwritten but pertain to customary international law. *Jus cogens* norms are peremptory and mean that any treaties or international agreements that engage in gross human rights violations by advocating genocide, ethnic cleansing, slavery, and mass murder are *eo ipso* invalid, and command no obligation to be obeyed.

In defining "transnational law," I follow Harold Koh's (1997) focus on "transnational legal process": "the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret and enforce rules of transnational law. . . transnational law is both dynamic—mutating from public to private, from domestic to international and back again—and constitutive, in the sense of operating to reconstitute national interests" (2626–27).

Duly executed foreign and international law is binding on lawmakers, as the U.S. Constitution itself states in Article VI on the status of treaties.[33] In this respect, there is no contradiction between the will of democratic legislatures and the force of international law and treaties. Entering into such agreements or declining to do so is a crucial aspect of sovereignty itself. Yet, unlike some jurisdictions in which foreign and international law become part of domestic law, in the U.S. treaties are not self-executing and require congressional ratification.

It is the jurisgenerative potential of transnational law in Harold Koh's sense that has interested me in this article. Transnational norms are not opposed to democratic will formation; they facilitate rather than limit the expansion of democratic legitimation. However, because the Universal Declaration is "only" a declaration of principles and does not detail mechanisms for enforcement, some argue that it does not function sufficiently *as* law (Koskenniemi 2001), while others see it as a different kind *of* law. In several articles, Judith Resnik (2001, 2006, 2008) has claimed that by ratifying treaties, domestic obligations are altered, and that particularly in a federal system, judges duly regard valid treaties as binding law. Resnik (2006, 1564–1670) calls such processes "law's migration" and cites numerous examples: "[A] federalist structure also serves as a path for the movement of international rights across borders. As illustrated by the adoption by mayors, city councils, state legislatures, and state judges of transnational rights stemming from the UN Charter and the

[32] For further clarification of the distinctions between normative justification and democratic legitimation, see Benhabib 2007b.

[33] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, U.S. Constitution on "Debts, Supremacy, Oaths."

Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and the Kyoto Protocol on global warming."[34]

Another common method of implementation for UN provisions is the establishment of "expert bodies" chartered to elaborate the meaning of conventions by promulgating "general comments" and by receiving reports from member-states, which in turn are obliged to detail how they are compliant with or failing to live up to their commitments as parties to conventions.[35] Furthermore, in some jurisdictions (but not generally in the United States), international obligations can be a direct source of legally enforceable rights through litigation in national courts (Neuman 2003, 1863–901). In addition to processes of law's migration and the establishment of "expert bodies," cosmopolitan norms enshrined in multilateral covenants can create a process of democratic iterations via the action of social movements and civil society actors.

CLAIMING RIGHTS ACROSS BORDERS: CEDAW AND WOMEN LIVING UNDER MUSLIM LAW

In conclusion, I want to consider some developments around laws affecting the lives of Muslim women in diverse countries against the background of both the normative and institutional transformations outlined previously. The position of various women's organizations, communicating with one another around interpretations and implementations of Muslim law as well as of CEDAW, illustrates the kind of "jurisgenerative" dynamic to which I have alluded. This case also shows how cosmopolitan human rights norms strengthen popular sovereignty claims without undermining national democracies.

In "Global Feminism, Citizenship and the State," the Iranian sociologist Valentine Moghadam (2009) analyzes the effects of an international human rights regime, transnational civil society, and a global public sphere on women's rights in Muslim countries (255–76). Mogadham, who considers case studies from the Republic of Iran and the Kingdom of Morocco, in addition to Egypt, Algeria, and Turkey, explores how "local communities or national borders" are affected by globalized norms. She asks, "What of the migration and mobility of feminist ideas and their practitioners? How do local struggles intersect with global discourses on women's rights? What role is played by feminists in the diaspora, and what is the impact of the state?" (255). By analyzing the formation of women's rights and feminist organizations both within specific countries and through transnational feminist networks, Mogadham shows that international conferences and treaties such as CEDAW have created tools that women can tailor to their own contexts.

Moghadam (2009) maps the "significant variations in women's legal status and social positions across the Muslim world" (260–61). Yet, in general, "similar patterns of women's second-class citizenship" (260) can be identified in terms of family life and economic opportunity. Citizenship is transmitted through the father, and marriage laws give men rights that women do not have. In both Iran and Morocco, for example, the state, family, and economic forms of dependency create what Moghadam calls the "patriarchal gender contract" (258).

Responding in the 1980s to efforts to strengthen application of gendered Muslim family law, various women's networks came into being. Nine women from Algeria, Sudan, Morocco, Pakistan, Bangladesh, Iran, Mauritius, and Tanzania formed an action committee that resulted in *Women Living Under Muslim Laws (WLUML)*, which serves as a clearinghouse for information about struggles and strategies. WLUML includes women with differing approaches to religion; some are antireligious, whereas others, such as Malaysia's Sisters in Islam, are observant Muslims. Some women work to abandon religious strictures, whereas others challenge interpretations of religious laws and make arguments from within texts and traditions.

By reviewing recent conflicts in Iran and Morocco on family rights, Moghadam (2009) argues that WLUML, along with the *Women Learning Project*, had an impact through interactions between state-centered and transnational forms of action. She concludes that "the integration of North and South in the global circuits of capital and the construction of a transnational public sphere in opposition to the dark side of globalization has meant that feminism is not 'Western' but global" (271). Raised by her examples are ironies in global struggles: the struggle for women's equality requires revisiting the discourse of universalistic human rights just as the conditions of global migrations raise questions about whether to aspire to global citizenship, particularized affiliations, or combinations thereof. Furthermore, in an important confirmation of democratic iterations, Moghadam suggests that the more culturally embedded a group is within a nation-state, the more effective could be their efforts to incorporate universalist norms.

An extraordinarily interesting example of democratic iterations occurred when, in the course of a debate in Canada concerning whether religious arbitration courts ought to be legalized, Canadian Muslim women turned to WLUML to help them overturn Muslim arbitration courts. These events are worth considering in some detail.

Many countries now promote "alternative dispute resolution" fora to create state-enforced private

[34] See Resnik 2006, 1564. Lauterpacht (1973) also claimed that "duly ratified treaties are a self-executing part of municipal law;" (28) and "that the Constitution of the US, gives Congress the right to define and punish, *inter alia*, 'offenses against the law of nations'" (39). See Lauterpacht's discussion of *Oyama v. California*, (1948), according to which the concurring opinion of four justice of the Supreme Court relied on "the provisions of the [UN] Charter in the matter of human rights . . . as a source of legal obligations" (151, fn. 12).

[35] See, for example, the case of Saudi Arabia, which despite ratifying CEDAW and the Convention on the Rights of the Child, has made general reservations to the effect that where there is a conflict between a Convention article and Islamic law principles, Islamic law will have precedence. Nevertheless, international standards have begun to impact the legal judgments of Saudi judges (Almihdar 2008).

settlements of conflicts in lieu of adjudication of rights (Resnik 2005). As Audrey Macklin (2009) explains, under the law of the Canadian Province of Ontario, women are rights holders when families dissolve and they can seek compensation for household labors that enabled their husbands to develop careers (276–304). Ontario also permits resolutions through negotiations that result in "domestic contracts." In addition, when disputants use arbitration, those outcomes are enforceable in court. (In contrast, in Quebec, family law arbitrations are advisory rather than binding.)

In 2003, a then new Islamic Institute for Civil Justice offered to arbitrate family and inheritance conflicts under Muslim law, prompting an inquiry about whether faith-based arbitration ought to be given legal force. Opposition came from the Canadian Council of Muslim Women, who worked with the transnational group, WLUML, discussed by Moghadam. Reliant on networks "as Canadians, as women, as immigrants, and as Muslims," the opponents built constituencies both locally and globally, just as they argued from national and transnational principles, including the UDHR's commitments to dignity and equality. Proponents of faith-based resolutions were similarly domestic and international, including the Christian Legal Fellowship, the Salvation Army, B'nai Brith, the Sunni Masjid El Noor, and the Ismaili Muslims. The denouement was Canadian legislation that does not prohibit parties from turning to faith-based tribunals but gives such judgments no legally enforceable effect.

As Macklin (2009) details, women played central roles in these events, expressing "political citizenship in the public sphere of law reform," and doing so through transnational and transcultural claims of equality. "Claiming their entitlement as legal citizens of Canada to participate in governance, they demanded equal citizenship as Canadian women. At the same time, they pointedly refused to renounce their cultural citizenship or to confine their gender critique to a specific cultural context" (276).

Such practices not only render the meaning of citizenship more complex by revealing the interaction of the language of universal rights and culturally embedded identities, but they also expand the vocabulary of public claim making in democracies and aid them in evolving into "strong democracies." They reconstitute the meaning of local, national, and global citizenship through processes of democratic iterations in which cosmopolitan norms enable new vocabularies of claim making to emerge; assume a concrete local and contextual coloration; and often migrate across borders and jurisdictions in increasingly complex and interconnected dialogues, confrontations, and iterations.

CONCLUSION

Transnational law creates wider and deeper interdependencies among nations, pushing them farther and farther toward structures of global governance. Although the world system of states is not one of perfect cooperation with defined rules of justice, neither are relations among states "mere contractual obligations," as Thomas Nagel has argued. The current global system of interdependence is sufficiently thick as to trigger significant relations of justice across borders, which are weaker than those within nation-states, but certainly stronger than those envisaged by the world picture of sovereigntistes. The demands for global coordination in response to the recent economic worldwide meltdown is but one indication, among many others, of this new phase of global interdependence.

The law's migrations and democratic iterations reveal that global human rights discourses move across increasingly porous borders to weaken, and render irrelevant, the Rawlsian distinction between "liberal" and "decent hierarchical" societies. In particular, those societies in which the human rights of women and of ethnic, religious, linguistic, and other minorities were curtailed on grounds of faith and religion must now contend with increasingly transnational movements and actors who network across borders in developing new strategies of claim making, such as to expand the human rights' agenda. These developments are all the more significant because they undermine the divide between "liberal tolerance" on the one hand and "liberal interventionism" on the other, by inducting citizens, social movements, churches, synagogues, mosques, cultural institutions, the global media, etc., into a contentious dialogue about justice across borders. Recent movements mobilizing to end genocide in Darfur, to help AIDS victims in Africa, to prohibit the practice of female genital mutilation, to protect the rights of undocumented migrants—*les sans papiers*—and many others are illustrative of this new global activism enabled, in part, by the spread of cosmopolitan norms.

We have entered a new stage in the development of global civil society, in which the relationship between state sovereignty and various human rights regimes not only generate dangers of increasing interventionism, but also paradoxically create spaces for cascading forms of democratic iteration across borders. I see no reason not to acknowledge the ambiguities of this moment. But as a critical social theorist, I look for those moments of rupture and possible transformation when social actors reappropriate new norms, such as to enable new subjectivities to enter the public sphere and to alter the very meaning of claims making in the public sphere itself. This is the promise of democratic iterations and cosmopolitan norms in the present.

Despite these developments, or maybe because of them, there is also a multiplication of "zones that seek to escape the force of law." From the "extraordinary renditions" of enemy combatants to unknown localities with the cooperation of U.S. and European governments, to the emergence of *maquilladoras* in Central and South America and free growth zones in China and Southeast Asia—not to mention the decline of the state everywhere in Africa—there is also a process of "dejuridification" afoot. The attempt is to resist the spread of global law, create enclaves without democratic accountability and parliamentary supervision, and deny the "right to have rights" (Hannah Arendt) altogether. In many free trade and growth zones, the

rights of workers to fair pay and to assemble, unionize, and organize are suspended and violently controlled. In the desperate straits that the current world economic crises will generate in many developing countries, it is likely that these norms will be further suspended in a Faustian bargain to keep foreign direct investment coming and the economies growing.

I do not have a good explanation for how or why these processes of *constitutionalization* and *dejuridification* continue to coexist in the world society at present, but I want to insist on the significance of instruments of cosmopolitan norms to help combat them. These are not complicit in the legitimation of, but rather they are enabling conditions of resistance to, the forces of a global capitalism run amok. Any defensible vision of global justice in the current world order will have to take these legal instruments and documents seriously, and work with them rather than against them. We need to overcome not only the reductionist resistance of many on the Left to the force of transnational law, but also the defensiveness of many on the Right who see transnational law as undermining democratic sovereignty, when, in fact, it can enhance it. However, constitutionalization, without a people who can also claim the constitution as its own law, certainly as embedded in and as interactive with global cosmopolitan norms, is not an ideal that democrats can countenance without some concern. Call this loyalty to an old-fashioned Enlightenment ideal!

APPENDIX: PUBLIC DOCUMENTS

Behrami and Saramati v France, Norway and Germany; judgment of the European Court of Human Rights of 2 May 2007 (Appl 71412/01, 71412/01, and 78166/01).

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

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