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Book review of Human Rights in Cross-Cultural Perspectives: A Quest for Consensus

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Human Rights in Cross-Cultural Perspectives. A Quest for Consensus. Edited by Abdullahi Ahmed An-Na'im. Philadelphia: University of Pennsylvania Press, 1992. Pp. vii, 467. Index. \$32.95.

Scholars and politicians alike have long recognized the difficulty of creating a universally applicable framework of human rights in a world of profound cultural and political diversity. Nevertheless, the international human rights system has only sporadically addressed the difficult implications of diversity, focusing instead on creating a basic catalog of abstract, vaguely stated rights. In recent years, however, as the system has increasingly turned its attention to implementation and enforcement, the issues raised by global diversity have gained salience among human rights advocates and scholars.

Human Rights in Cross-Cultural Perspectives is a valuable addition to an important blossoming of literature on this topic. According to its editor, Professor An-Na'im, the goal of this collection of fifteen essays is "not to present an ultimate thesis about the cross-cultural legitimacy of human rights, or the final resolution of real or perceived conflicts and tensions between the ideal of their universality and the reality of cultural diversity," but rather tentatively to explore those topics (p. 6). Authors were invited to consider the implications of diversity for the legitimacy and efficacy of international human rights and to address specifically the potential for reaching cross-cultural understandings of human rights through "reinterpretation and reconstruction" (p. 2). Perhaps as a result of this broad mandate, these essays present wide-ranging topics and sometimes contradictory approaches to the implications of cultural diversity for "universal" human rights. The collection is neither systematic nor entirely coherent, yet it represents an insightful survey of the complex issues involved and provides a useful groundwork for debate.

Although not amenable to precise categorization, the essays roughly focus on four aspects of the topic: (1) theoretical evaluations of various philosophical and political conceptions of human rights; (2) methods for addressing the inherent tension between the cultural legitimacy of rights and

their universality; (3) the role of human rights and culture in the struggles of indigenous peoples; and (4) culture, in relation to other factors, as a cause of human rights violations. Five authors—Virginia Leary, Richard Nordahl, Rhoda Howard, Michael MacDonald and Tore Lindholm—examine various concepts of human rights. Unfortunately, none seriously addresses the others' analyses and, as the editor acknowledges, each focuses almost entirely on western concepts.

Leary describes in some detail the "personalist" and "communitarian" political philosophies of Maritain, Mounier and Unger, which she suggests are more coherent than either Marxist or liberal conceptions of rights. She argues that adoption of a personalist-communitarian perspective would broaden the liberal concept of human rights sufficiently to accommodate group rights and nonwestern versions of economic and social rights, yet would retain adequate protection for individuals. Nordahl, MacDonald and Lindholm discuss western concepts of human rights grounded in Marxism and liberal democratic theory. Nordahl argues for a broadened Marxist concept, while MacDonald evaluates the limited potential of western liberalism to accommodate collective or group rights. Lindholm endorses the editor's call for culturally sensitive human rights standards, but argues that one must adopt a central "base point" rights concept against which to test culturally based interpretive claims. Suggesting a methodology for studying issues of cultural legitimacy and discussing both Marxist and liberal concepts of rights, Lindholm ultimately argues for a broad, but essentially western liberal, viewpoint grounded in John Locke and Ronald Dworkin.

In sharp contrast, Howard rejects the search for an anthropological, cross-cultural basis for international human rights. In support of her position, she repeats familiar arguments favoring a western, liberal human rights concept based on functional or instrumental grounds. According to Howard, the human rights concept is necessarily modern and western, developed to protect individuals from the abuses of strong, modern central governments in a state-centric international system. Thus, she

contends, the quest for culturally legitimate human rights is misplaced.

Many of the essays touch on methods for addressing the tension between cultural legitimacy and universalism. Three (including Lindholm's, previously described) provide extended discussion of this topic. The editor's own contribution is one of the most interesting. It seeks to explicate a "cross-cultural approach" to the "universal cultural legitimacy of human rights" (p. 21). His central premise is that their lack of cultural authenticity is an important cause of widespread noncompliance with human rights norms. In his view, this disabling cultural gap may be bridged through cross-cultural (that is, international) dialogue and "internal cultural discourse" about the content of rights. In other words, scholars and rights advocates should work toward both reformulating international standards and creating broadened interpretations of conflicting cultural values, which would narrow the gap between cultural expectations and international requirements.

Professor Richard A. Falk largely supports An-Na'im's perspective on the importance of cultural legitimacy. Rejecting the "polar positions" of secular universalists and relativistic traditionalists, Falk argues that human rights must be mediated and legitimized through the "web of cultural circumstances" while retaining a universal content that can protect minorities and individuals (p. 45). To accomplish these seemingly antagonistic goals, Falk suggests that the international community focus on "victimization" and cross-culturally agreed-upon "intolerables" to define the relationship between cultural legitimacy and the need for universal standards. Falk adds that the international community should adopt an overriding interpretive commitment to "maximum political democracy" to guide this definitional process (pp. 46, 49-51).

William Alford and Hugo Fruhling address, among other things, the significance of culture in explaining widespread human rights violations in the People's Republic of China and Latin America, respectively. These two essays, otherwise difficult to categorize, are noteworthy for their less-sanguine assessments of the role of culture. Alford first warns that the dichotomy between universal and culturally specific hu-

man rights is often overstated. He nevertheless describes in detail how culture shapes human rights values in China in ways contrary to western standards, and how international standards may prove destructive or inappropriate in the Chinese context. Fruhling contributes a detailed account of political violence in Latin America, arguing that its most significant determinant has been the failure of governmental institutions to mediate between competing ideological factions.

The remaining six essays center on the role of culture and human rights in the struggles of indigenous populations. Allen McChesney's essay offers practical suggestions for rendering international and domestic human rights monitoring systems more accessible and appropriate to the indigenous populations of Canada. Taking an implicitly contrary position, James Zion argues that international human rights standards are essentially assimilationist and culturally inappropriate for Native American societies because of their overly individualist orientation. Until human rights are adapted to the Native American perspective, Zion argues, they may be more destructive than protective of Native American interests. Tom Svensson expresses a somewhat different view of international law and human rights in his discussion of their role in the struggles of the Sami peoples in Scandinavia. Like Zion, Svensson stresses the importance of cultural autonomy, and he argues that self-determination and control over land resources are fundamental to the Sami's survival. In contrast to Zion, however, Svensson suggests that international human rights have played a vital role as tools for achieving the goals of the population in question.

Two authors, Patricia Hyndman and Dianne Bell, analyze the issue of cultural legitimacy and human rights in the context of Australia's treatment of aborigines. Hyndman describes the complexity of the idea of culturally legitimate human rights within a multiethnic society such as Australia and surveys the evolving policies of the Australian Government toward aboriginal peoples. She also briefly addresses the important topic of whether there are distinctions or similarities between the cultural claims of indigenous peoples and

those of minority immigrant populations. Bell's strikingly different approach produces one of the more provocative essays in the collection. In the book's sole feminist critique, Bell addresses the roles of culture and human rights as they affect aboriginal women. The essence of her argument appears to be that international law and human rights, by embodying underlying male-dominated social power relationships within culture, are incapable of addressing the fundamental interests of aboriginal women. Reflecting a fundamental distrust of law, Bell contends that international human rights and indigenous movements toward self-determination have worked against the basic interests of aboriginal women and destabilized their traditional modes of social protection. Similarly, and in sharp contrast to An-Na'im, Bell argues that international law and human rights will continue to oppress aboriginal women so long as they accommodate local customary practices.

Manuela Carneiro da Cunha, who discusses the plight of Brazilian indigenes, argues that international human rights must ultimately be subject to the interpretive authority of indigenous populations if they are to play a positive role in those peoples' survival. This view is directly endorsed by Svensson, Zion and Hyndman, and implicitly shared to a degree by An-Na'im and other authors. By favoring the empowerment of cultural groups over the development and implementation of appropriate standards for the protection of their individual members, this position presents perhaps the clearest example of the dilemma created by the unresolved tension between the goal of human rights universality and the need for cultural legitimacy. As other authors point out, the assertion of cultural autonomy and culturally specific interpretations of rights inevitably results in preserving some cultural traditions that directly oppress individuals within the group—at least when measured by external standards such as international human rights. The implications of this underlying dilemma are revealed in the sometimes contradictory impulses of the authors about culture, human rights and law. For example, Bell suggests that the distinctly male orientation of the international system may erode traditional social structures that protect and nurture

aboriginal women in Australia. Yet, as Bell acknowledges, some cultural traditions within this same context may oppress women, particularly when combined with male-dominated human rights norms. Thus, like law itself, culture means different things to different people and may be simultaneously an oppressor and a protector of human dignity.

The wide variety of approaches and conclusions represented in this collection clearly reflects how problematic the implications of global diversity are for the future of human rights. Indeed, even among these predominantly western-oriented authors, there is a striking diversity of opinion on the most basic questions about the role culture should and does play in international human rights. Many of the authors, including An-Na'im, Lindholm and Falk, see culture as an important filter through which international human rights norms must pass to become meaningful and effective. Authors concerned with struggles of indigenous peoples tend to argue the more relativistic position that human rights must be determined primarily by the cultural group so as to preserve cultural autonomy. Others see cultural traditions as a sometimes powerful impediment to the realization of human rights for significant portions of humanity. Still others disagree about the significance of culture as an appropriate determinant of human rights values or as an explanation of their violation.

The editor's essay perhaps best reveals the nature of the underlying dilemma. An-Na'im supports his position regarding the cross-cultural legitimacy of international human rights with a pragmatic analysis of the prohibition against cruel, degrading and inhuman treatment in the context of corporal punishment in Islamic states. This analysis convincingly demonstrates how culture and custom may produce significant discrepancies between the international human rights standard and entrenched national or local custom. Unfortunately, it also demonstrates that many such differences may be unresolvable. Indeed, in the case study chosen, An-Na'im can at best suggest procedural impediments to what the West sees as unacceptably harsh physical punishments in Islamic law and culture. He ultimately abandons his attempt at rec-

conciliation and adopts the relativist perspective that interpretation of this prohibition "should be determined by the moral standards of [each] society" (p. 37). This apparent inability to chart a course between the competing relativist and universalist perspectives on cultural diversity is not, however, so much a flaw in An-Na'im's approach as a reflection of the difficulty of the issues.

Ultimately, the dilemmas created in applying a universal international norm system in the context of profound global diversity go well beyond the debate about cultural legitimacy. Rather, these dilemmas reflect the lingering, unresolved tensions in international law between international supervision of human rights norms and the still-evolving concepts of state sovereignty, nonintervention and self-determination. An-Na'im's collection of diverse and insightful essays nevertheless presents a tentative airing of this critical debate that is well worth reading.

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The Law of Refugee Status. By James C. Hathaway. Toronto, Vancouver: Butterworths Canada Ltd., 1991. Pp. xxiii, 252. Index. \$65.

For years the standard references for general refugee doctrine have been Grahl-Madsen and Goodwin-Gill.¹ Now a third work should join that list: James Hathaway's *The Law of Refugee Status*. In fact, Hathaway's volume is better written, better organized and more clearly focused on what has become the central question of refugee law: how should we interpret the definition of "refugee" in the UN Convention?² Thousands of administrative officers and judges,

in dozens of countries, spend prodigious amounts of time testing asylum applications against this international law standard. Every one of those decision makers would benefit from Hathaway's thoughtful and thought-provoking discussion—although they should not necessarily accept all his suggested interpretations.

Hathaway helpfully subdivides the definition into five components that constitute his main chapters—a more useful conceptual breakdown than is usually offered. He discusses, in turn, alienage (being "outside his country," as the definition requires), well-founded fear, persecution, nexus to civil or political status (Hathaway's rendering of the definition's requirement that persecution be "for reasons of" race, religion, nationality, membership in a particular social group or political opinion), and the cessation and exclusion clauses (Article 1(C)–(F) of the Convention).

Hathaway is a law professor at Osgoode Hall and has been deeply involved in training members of Canada's respected new Immigration and Refugee Board. Hence, it is not surprising that the main focus of his treatment is Canadian case law (most of it pre-1989), both judicial and administrative, with a dash of U.S., British, French and other precedents. But it would be a mistake to consider this volume as useful only to Canadian lawyers. Hathaway uses the case law as a springboard for a logical, sensible discussion of what the definition *should* be taken to mean, sometimes accepting the precedents or academic consensus, sometimes offering an incisive critique. He seeks "to elaborate a clear, contextually sensitive understanding of the Convention refugee definition as it has evolved through confrontation with the needs of contemporary involuntary migrants" (p. 27).

In doing this, Hathaway draws skillfully on his thorough familiarity with the *travaux préparatoires* of the UN treaties. But, above all, he is guided by a solid understanding of the major objectives of the treaty, namely, to protect "those whose need to move is unassailable, yet simultaneously to tailor and constrain the scope of the refugee class to meet the self-interested preoccupations of asylum states" (p. 231). Although Hathaway's own instincts plainly incline him toward a generous interpretation of the

¹ ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (2 vols., 1966, 1972); GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983).

² Convention Relating to the Status of Refugees, July 28, 1951, Art. 1(A)(2), 189 UNTS 150, as modified by the Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 UNTS 267, 19 UST 6223.