

2-2022

Weaponizing Culture to Undermine International Women's Rights

Lan Cao

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Lan Cao, *Weaponizing Culture to Undermine International Women's Rights*, 73 HASTINGS L.J. 233 (2022).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol73/iss2/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Weaponizing Culture to Undermine International Women's Rights

LAN CAO[†]

The Universal Declaration of Human Rights (“UDHR”) remains an emblem of hope and change in a world filled with continuing human rights violations. Its promise, enshrined in 1948, is as relevant then as it is now—that the international community would no longer allow a state’s brutal treatment of its own citizens to go unchallenged under the mantle of “sovereignty.”

But the UDHR is being challenged by authoritarians and dictators who rightly see the UDHR as an international check on their tyranny. It is also being questioned by Western communitarians who ironically see the UDHR’s enshrinement of international human rights as an intrusive Western cultural projection onto the rest of the world. This supposedly pro-culture position is founded on the charge that human rights has been so unduly expanded that the international rights project has become arrogant, riding roughshod over the non-Western world.

This Article argues against the notion that international human rights has to accommodate cultural practices that are themselves detrimental to human rights. In such instances, cultural exceptions whittle away the very principle of human rights and equally significant, they are especially detrimental to women’s rights. Indeed, many of the practices that deny women freedom, equality, and basic human dignity are defended on “tradition” and “culture.”

Critics have even exploited social psychology studies showing not just cultural but even cognitive differences between Westerners in “thin” societies (individualistic) and East Asians in “thick” societies (individuals embedded in communities). This Article is a defense of universal values common to all humans, regardless of politics or psychology. As noted, this is crucial for international human rights, and more specifically for women’s rights because culture has been singularly weaponized against women; calls for cultural preservation continue to be leveraged to ensure traditional values and practices that subordinate women can remain outside the purview of the UDHR. Yet, the historical record shows that the drafters scoured a wide range of non-Western traditions, and two of its main drafters were P. C. Chang, a Confucian Chinese diplomat and Charles Habib Malik, an Arab philosopher who were intentional in balancing pluralism with universalism.

The concern that culture is not sufficiently accommodated rings hollow calls to protect culture have been rejected in other areas of law such as international trade and law and development. Moreover, cultural preservation is an oxymoron—culture itself is not homogeneous or contained but rather has heterogeneous layers that are fluid and evolving. Paradoxically, even as critics defend cultural pluralism and diversity, their understanding of culture is based on its most narrow, homogeneous version, one founded on demands for purity and unchanging sameness. In essence, the Article demonstrates that calls for cultural protection function as a proxy for ensuring the continued subordination for women worldwide.

[†] Betty Hutton Williams Professor of International Economic Law, Chapman University Dale E. Fowler School of Law.

TABLE OF CONTENTS

INTRODUCTION	235
I. PART I: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.....	243
II. PART II: THE UNIVERSALISM OF THE UDHR AND HUMAN RIGHTS.....	259
A. INTERNATIONAL LAW AND CULTURE.....	260
B. CULTURAL AND COGNITIVE DIFFERENCES.....	265
III. PART III: INTERNATIONAL LAW AND CULTURE.....	276
A. TRADE AND CULTURE.....	277
B. LAW AND DEVELOPMENT AND CULTURE	283
IV. PART IV: HETEROGENEITY IN CULTURE.....	288
CONCLUSION	297

INTRODUCTION

Imagine a society where boys are undervalued and male infanticide and neglect are practiced; where gender-based violence is a pandemic affecting one in three men globally; where boys and men are kept illiterate or uneducated, ensuring that they would be economically and socially dependent on their wives; where very young boys are forced to marry before they reach adulthood; where they could not own or inherit property or have equal access to capital and credit, impeding their ability to enter or participate meaningfully in the marketplace; where they could not vote, ensuring they would be politically voiceless and helpless; where their bodies and sexuality are controlled for sexual and procreation purposes, including sewing up or cutting off parts of their genitals; where perceived sexual misconduct that brings apparent dishonor to the family could result in honor killings meted out by female family members; where gender inequality in education, work, and representation remains entrenched in most parts of the world.

This system could never endure if it were brutally sanctioned by despotic force alone. But it would most likely endure because it would be rooted in and supported by deeply embedded cultural institutions and norms. Yet, if dissenters and critics concerned about such deeply entrenched and pervasive inequality in that particular society were to argue that those arrangements are in violation of the Universal Declaration of Human Rights (“UDHR” or “the Declaration”),¹ would they be derided in this hypothetical example for their so-called inability to understand and respect cultural pluralism?

The answer would be plainly no. Quite simply because that oppressively matriarchal society would be an outlier and would be considered abnormally outside the parameters of the UDHR and the ensuing international human rights framework. But because even in the twenty-first century, societies such as those where women’s rights are violated are neither outliers nor anomalies, the subordination of women in such societies is presented as normal. Even countries that might have outlawed discrimination and violence against women support or tolerate certain practices that are antithetical to women’s well-being if those practices are deemed to be a part of those countries’ culture and tradition.

Indeed, it is rarely acceptable nowadays to defend the continued oppression of women except by resorting to cultural claims. It is important to state at the outset that this Article is not targeting culture or cultural pluralism. But this

1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. The original title of the instrument was “International Declaration of Human Rights.” The title was changed to reflect the fact that the Declaration was meant to be morally binding, not just on the governments that voted for it, but on everyone. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 161 (2001). It was not to be an intergovernmental document but a document to and for all of humanity. *Id.*

Article questions the use of culture to blunt the force and reach of international human rights law in ways that are particularly detrimental to women's human dignity. Thus, this Article disputes the invocation of culture to subordinate women. Indeed, as this Article argues, culture is often downgraded in other areas, such as international trade, but upgraded in human rights because cultural relativism is where women's subordination can still be justified.

This Article also subjects the term "culture" to scrutiny and questions the dominant premise that culture exists in some simple, singular, and homogeneous form in a separate box that is impermeable to and insulated from dissent, change, and heterogeneity. This Article objects to the uncritical, unquestioning deference to a cultural status quo that fails to appreciate all the currents of change and protest beneath the surface and that typically privileges powerful and wealthy men and special interests. This Article will show that cultures throughout history for various reasons have evolved, and it is inaccurate to treat culture as if there is one authentic or sacrosanct version that needs to be preserved.

Proponents of the cultural defense framework deftly pivot the issue away from women's rights and leverage it towards culture, claiming in the process that those who rely on the UDHR to oppose the constriction of women's rights are guilty of varying degrees of cultural imperialism. This anti-UDHR, pro-culture camp, designed to delegitimize the UDHR, is composed of strange bedfellows. First, the blunter, more aggressive version of the cultural imperialism claim is one used by patriarchal leaders, dictators, and tyrants in many parts of the world. These leaders assume a so-called defensive posture against international human rights law even as they lob attacks against it by exploiting the history of colonialism for their own agenda: "How dare you Western imperialists intrude on our culture!"

A second variant of the cultural imperialism claim is a milder version of the first and might be espoused by both Third World culturalists and Western communitarians²: international human rights should respect and accommodate different cultural traditions instead of insisting that cultural diversity be sacrificed for the sake of universalism. Under this claim, the UDHR can and should be understood as embracing a less individual, more collective space for legitimate cultural pluralism. This version is willing to embrace cultural practices that subordinate women in many ways, although it would tolerate "hard" priority rights like the right not to be tortured. Both versions prevent the

2. Communitarians are critical of the classical liberal view of the person as atomized individuals, upholding the social realm and viewing the individuals as socially embedded in the collective or the community. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 64 (1998); CHARLES TAYLOR, SOURCES OF THE SELF 35 (1989); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 33 (1983).

full flowering of women's human dignity, and indeed, even the milder, more subtle version can be just as pernicious in its impact on women.

Broadly speaking, both versions of the pro-culture claim referenced above can be unpacked in the following way. To inflate and highlight the particularities of culture and deflate and downplay the universality of the UDHR, the pro-culture camp continues to misrepresent it as a "Western" document ill-suited for non-Western countries with their own particular cultures and traditions. In reality, the record shows that the UDHR was the result of careful, deliberate drafting by drafters who were fully aware of the cultural traditions around the world. The drafters were amply conscious that they were forging a document that would be broad, ambitious, and intentional in its cultural sensitivities, setting forth interconnected rights and duties designed to ensure human dignity of human beings everywhere (women included).

The diverse countries that came together to adopt the UDHR emphasized in the Preamble that "a common understanding of these rights and freedoms is of the greatest importance . . ."³ In other words, the pro-culture camp maligns the UDHR by downplaying its multicultural roots founded in a "common understanding" of human rights. It falsely portrays human rights universalists as somehow being clueless about the importance of culture in human lives when the historical record reveals the exact opposite.

It is hard to imagine anyone arguing that certain races in a society should be kept subordinate because subordination is part of that society's deep, complex, and rich cultural tradition; or that this cultural tradition should be substantially exempt from the scrutiny of international human rights. But that is precisely the argument being made to explain—if not facilitate—and justify women's continued subordination internationally. This is not to say that every pro-culture advocate would defend violence against women, such as domestic violence or rape. But, rather, that some pro-culture advocates would defend less brutal forms of subordination that are deemed to be culturally embedded and would argue that those supposedly less brutal versions should be entitled to a "margin of appreciation." In the latter case, proponents would never use terms like "subordination," "inequality," "oppression," "indignity," or "violence" against women. Those proponents would rely on concepts like "cultural pluralism" and "cultural diversity" instead because those terms sound more innocuous and even respectable. Indeed, invoking "pluralism" and "diversity" serves at least two functions—it masks the anti-female dimensions that animate certain practices and traditions; and it allows proponents to accuse international

3. UDHR, *supra* note 1, pmb1.

human rights advocates as being somehow oblivious to legitimate cultural differences.⁴

The anti-universalist, supposedly pro-culture argument is as follows. Rich, thick societies, where culture and traditions are vibrant and robust, rooted in a complex moral matrix, must be respected and should not be overridden by an inflexible insistence on rights.⁵ In fact, rights themselves are considered Western.⁶ Since the UDHR is about “rights,” it is a Western instrument. Although one of the main objectives of this Article is to examine the historical drafting record and show that the drafters sifted each clause through a cultural lens, so to speak, it is also worth noting that rights are to be defended regardless of their cultural origin. As a Chinese dissident, Xiao Qiang, asked of a colleague who attacked human rights as a Western notion, “[i]f you were to voice dissent from the prevailing view in China, you would end up in jail, and there you would soon be asking for your rights, without worrying about whether they were ‘American’ or ‘Chinese.’”⁷ From Xiao’s perspective, if rights are good, then cultural diversity will be less important, with respect to rights, at least.

But to return to the culture question, of course cultural diversity is to be valued and culture needs to be engaged—and correctly so. The pro-culture camp asserts that some communities are less interested in rights, and these communities have the right to rank and subordinate different kinds of rights, and it just so happens that women’s rights are at the bottom of the list—no matter the UDHR. Western societies and Western concepts of human rights are “thin,” detached from tradition and communities where human beings derive their identity, comfort, and connectedness.⁸ By contrast, non-Western societies focus on duties, not rights.⁹ In addition, non-Western societies are not state-centric.¹⁰ Rights (presumably to the degree they exist) and duties are not linked to a weak

4. See, e.g., Richard A. Shweder, *Moral Maps, “First World” Conceits, and the New Evangelists*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* 160–62 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

5. SETH D. KAPLAN, *HUMAN RIGHTS IN THICK AND THIN SOCIETIES: UNIVERSALITY WITHOUT UNIFORMITY* 69–70 (2018).

6. Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 *AM. POL. SCI. REV.* 303, 303 (1982) (the concept of “rights” (entitlements) held simply by virtue of being a human—are quite foreign to, for example, Islamic, African, Chinese and Indian approaches to human dignity”).

7. GLENDON, *supra* note 1, at 232.

8. KAPLAN, *supra* note 5, at 70.

9. *Id.* at 73 (“When non-WEIRD [Western, Educated, Industrialized, Rich Democracies] philosophers and traditions develop moral systems, they are more likely to be based on relationships rather than rules, duties rather than rights, and virtues rather than freedoms.”).

10. Donald J. Puchala, *Some Non-Western Perspectives on International Relations*, 34 *J. PEACE RSCH.* 129, 130 (1997) (“‘States’ . . . are not very important in non-Western thinking about world affairs but, . . . ‘peoples’, ‘cultures’, and ‘civilizations’ are important.”); KAPLAN, *supra* note 5, at 69–70 (describing Western societies as “thin” and non-Western societies as “thick” where the former rely on the “state” to enforce rules and the latter rely on “traditions and social institutions.”).

state apparatus but rather strongly bound by and embedded in “thick,” non-state, traditional institutions. Moreover, these differences are not just a matter of superficial paths taken by different societies. They are, to take the pro-culture argument even further, based on fundamental differences in the very psychological and cognitive orientation of non-Westerners, particularly East Asians who emphasize collective rather than individual agency.

This Article aims at debunking two main attacks against the UDHR and the international human rights framework. First, this Article shows that the UDHR is both universal, proclaiming universal rights that belong to all human beings, *and* at the same time, from its inception, richly grounded in the many cultural traditions of the world, as evidenced by the vital contributions of diplomats and women from different countries in the establishment of the UDHR. Second, this Article argues that culture cannot be used to override women’s rights and ensure their continued subordination. Curiously enough, culture is suddenly precious and must be preserved only when it comes to pitting culture against women. In the fight between culture and capitalism or culture and trade, culture has not been preserved or protected but rather marginalized. The use of culture to deflect from women’s rights is thus suspect.

Part I of this Article provides an overview of the UDHR, including the nature and scope of human rights set forth by the drafters who came from many different countries, cultures and philosophical traditions. The UDHR has been broadly attacked, predictably, by tyrants and dictators and despots who rightly see an international human rights regime as a threat to their rule. But even those claiming to support international human rights have escalated their criticism of the UDHR and subsequent human rights law on the grounds that human rights advocates have become, in essence, too greedy and demanding when such advocates insist on rights for so many people; in fact, for “everyone.” But as Part I shows, the UDHR on its own terms has always recognized the human dignity of all persons, not only persons from some cultures. The UDHR is unapologetic and unequivocal about its commitment to the principles of equal rights and anti-discrimination for all.

This Article looks only at the UDHR and not subsequent human rights treaties such as the Covenant on Civil and Political Rights or the Covenant on Social and Economic Rights or even the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) even though as a declaration, the UDHR is not binding and the subsequent treaties are, at least on state signatories. There are two reasons why I have chosen to limit my discussion to the UDHR. First, it is proper to focus on the primary document that is of singular significance to the post-World War II system. The international human rights system emerged from the moral and legal framework laid by the UDHR, which saw itself as but a first step in a progression of instruments that expand, not restrict, the scope of human rights, reaffirming with each new iteration that

international human rights law recognizes the equal worth and equal dignity of all human beings. Thus, although the UDHR has been supplemented by subsequent treaties, it remains foundational and is widely and rightly recognized as “a pillar of a new international system”¹¹ and “the most prominent symbol[] of changes that would amplify the voices of the weak in the corridors of power.”¹² Paying homage to the UDHR in 1986—many years after its initial passage in 1948—Charles Malik,¹³ often described as an Arab philosopher and one of the principal drafters of the UDHR, stated, “[w]henver the question of human rights has arisen throughout the world, the appeal has been far more to the Declaration than to the covenants [T]he morally disturbing or judging is far more important than the legally binding.”¹⁴ Second, the essence of the UDHR is its explicit, textual claim to universality, and universality itself has been and still is under siege. The international human rights regime would be less sweeping and radical in scope if universality were to be successfully eroded, leaving the world with a patchwork of truncated, regional human rights documents, each suitable only to its own culturally specific territory. This Article’s main objective is to defend the foundational principle of universality where human rights are concerned, generally, and, more specifically, where women’s rights are concerned.

While Part I goes *inside* the UDHR to look at the drafting history and at specific articles that garnered debate about cultural relativism versus universalism, Part II looks at the uncomfortable *relationship* between international human rights law and culture. This relationship has been fraught with contentious debates about cultural particularities versus universalism, respect for national or subnational culture versus global or cosmopolitan culture, and individual rights versus communal duties. The pro-culture camp in essence seeks a cultural exception or cultural escape clause from international human rights laws on the grounds that it is in favor of a flexible, not rigid, universalism.

In a novel twist to this perennial debate, the pro-culture proponents seek to further reinforce this dichotomy by pointing to psychological differences, not just cultural differences between the West and the non-West. It is not just that the West is constructed around a thin sense of community that elevates the primacy of the individual, individual autonomy, and individual freedom; or that the non-West is constructed around a thick sense of community composed of interrelated beings with mutual and reciprocal obligations to others. It is rather that these cultural differences have deep, intrinsic psychological roots.

11. GLENDON, *supra* note 1, at xvi.

12. *Id.*

13. *Dr. Charles Habib Malik*, UNITED NATIONS (last visited Jan. 24, 2022), <https://www.un.org/en/ga/president/bios/bio13.shtml>.

14. Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT’L HUM. RTS. 1, 8 (2004).

International human rights law, in this view, does not have the capacity to engage honestly or psychologically with thick communities that are founded on a collective understanding of human life. So goes the argument for a cultural exception, which this Article rebuts in Part III.

Part III shows that the pro-culture argument is actually an argument not so much aimed at preserving culture because it aims at justifying women's continued subordination. This Article demonstrates this by showing that culture has been relegated to the side in other instances. The world view of capitalist accumulation has historically collided with the world view of traditional cultures. The inherent contradictions and tensions between traditional and capitalist modes of production have been well-documented and recognized as one of the exacerbating factors of colonialism.¹⁵ This collision between traditional culture and capitalist culture continues to the present day. As an indigenous activist from the Philippines noted:

Industrialized culture regards our values as unscientific obstacles to modernization and thus worthy of ridicule, suppression, and denigration. The industrial world also views our political, social, and land-tenure traditions as dangerous: our collective identities; our communal ownership of forests, waters, and lands; our *usufruct* system of community sharing, and our consensus decision-making are all antithetical to the capitalist hallmarks of individualism and private property.¹⁶

In the war between traditional culture and capitalism, few cared about preserving tradition when profits and capitalist accumulation were at stake.

One could also go further and say that the tension is not merely between collective versus individual accumulation but rather a collision of two culturally different world views. Resources are seen as sacred in the former community and treated as commodities in the latter.¹⁷ Similarly, claimants who attempt to justify their violation of a provision of the World Trade Organization ("WTO") on the grounds that such a violation should be excused due to a cultural preservation defense have not succeeded. For example, when Canada imposed higher tariffs on American split-run magazines imported into Canada to protect Canadian magazines on the grounds that Canada needs to preserve Canadian

15. See ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* 76 (1982).

16. Victoria Tauli-Corpuz, *Our Right to Remain Separate and Distinct*, in *PARADIGM WARS: INDIGENOUS PEOPLE'S RESISTANCE TO ECONOMIC GLOBALIZATION* 13–14 (Jerry Mander & Victoria Tauli-Corpuz eds., 2005).

17. Arthur Manuel, *Indigenous Brief to WTO: How the Denial of Aboriginal Title Serves as An Illegal Export Subsidy*, in *PARADIGM WARS*, *supra* note 16, at 206.

culture, Canada lost when the United States complained at the WTO, which rejected cultural exceptions to trade norms.¹⁸

As Part III also demonstrates, it is quite commonplace in law and development circles to export the rule of law in ways that implicitly, even if not explicitly, require a transformation of traditional culture. Few inside or outside of law and development circles object to these aspects of the rule of law. For example, corporate law and securities laws are written to facilitate market reform. In a country steeped in thick, relational norms that favor personalistic exchanges, nepotism is often widespread. But to establish the rule of law where justice is fair, nepotism is something that the new law is specifically designed to abolish. If a corporate insider comes across inside information, it might be expected in traditionally thick societies that this insider shares his tip with family members. But in rule of law reform, the new securities law that reformers advocate for would not contain a cultural exception to insider trading to preserve a traditional culture of informal relationships above formal, legal ones. In fact, no one has insisted that cultures that value nepotism specifically, or personal over impersonal exchanges generally, be preserved, and no one has attacked the establishment of rules against insider trading as a reflection of Western values or an example of Western imperialism.

Yet, preservation of culture becomes a bugle call whenever women's equality is involved. Suddenly, the Third World and its culture must be respected. Suddenly, the collective fabric of communal society is to be preserved against the encroachment and predatory reach of international human rights law. Since the UDHR, CEDAW¹⁹ has confronted the culture question directly, calling on state parties to change customary, cultural, and religious laws that are premised upon the inequality of the sexes. CEDAW took the correct approach and did not allow culture to be used yet again as a weapon against women or to dilute women's full equal rights on the grounds of cultural relativism. As Arati Rao noted, "No social group has suffered greater violation of its human rights in the name of culture than women."²⁰ CEDAW's preamble explicitly

18. Status Report by Canada, *Canada—Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/9/Add.5 (Oct. 9, 1998); see also Christina F. Green, *The Great Cultural Divide: The Split-Run Magazines in the 1990s*, at 35 (Aug. 1999) (M.A. thesis, Queen's University) (ProQuest).

19. G.A. Res. 34/180, *Convention on the Elimination of All Forms of Discrimination Against Women* (Dec. 18, 1979) [hereinafter CEDAW].

20. Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 167, 169 (Julie Peters & Andrea Wolper eds., 1995); see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 31–32 (1999) (arguing that in the "development as freedom" approach, "the liberty of all to participate in deciding what traditions to observe cannot be ruled out by the national or local 'guardians'—neither by the ayatollahs (or other religious authorities), nor by political rulers (or governmental dictators), nor by cultural 'experts' (domestic or foreign)"). This approach also encompasses the liberty of any group, including "female children" whose basic participation and

acknowledges that its state parties are “[a]ware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.”²¹

In Part IV, the Article looks at culture and takes it out of the box of homogeneity. Who gets to represent culture and which aspects of a culture constitute “the” culture are all contested. Culture is fluid and heterogeneous and is in flux, whether due to internal transformation or external catalyst. Even when there are indeed authentic cultural differences between the West and non-West, it is still worthwhile to examine such differences to determine if the differences are exaggerated or deployed to achieve a particular agenda, in this case, an anti-female agenda that causes harm to women’s equality, dignity, and bodily integrity.

I. PART I: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Common moral outrage against the Holocaust was the catalyzing context that gave rise to the UDHR. The dehumanization, affront to human dignity, and brutal murder of six million Jews during the Holocaust²²—and the murder and inhumane treatment of other human beings by the Nazi regime, including disabled persons,²³ homosexuals,²⁴ gypsies,²⁵ and others viewed by the Nazis as less than fully human—was the crucial catalyst²⁶ for the governments that came together to agree on the Declaration.

educational skills cannot be denied); *see also id.* at 82–83 (discussing “gender bias in family allocation”); *id.* at 88–89 (discussing traditional norm of “systematic ‘boy preference’ in the family allocation of resources” and “sex bias” against girls as reflected in “greater mortality, morbidity, undernourishment, medical neglect, and so on”); *id.* at 104–07 (discussing the phenomenon of “missing women” in China and the low female-to-male ratios in countries in Asia and North Africa” which can only be explained by reference to social and cultural norms, resulting in “neglect of female health and nutrition,” “hospitalization and even feeding,” and the “hiding” of newborn girls, “higher female infant mortality” and sex-selective abortion); *id.* at 115–16 (discussing how female freedom to participate in the work force “systematically denied in many cultures, and this in itself is a serious violation of women’s liberty and gender equity. The absence of this freedom militates against the economic empowerment of women . . .”); *id.* at 187–203 (discussing how “women’s agency and social change” is influenced by many factors, including “established conventions.”).

21. CEDAW, *supra* note 19, at pmb1.

22. U.S. HOLOCAUST MEM’L MUSEUM, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/learn> (last visited Jan. 24, 2022).

23. *Nazi Persecution of the Disabled: Murder of the “Unfit,”* U.S. HOLOCAUST MEM’L MUSEUM, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nazi-persecution-of-the-disabled> (last visited Jan. 24, 2022).

24. *Persecution of Homosexuals in the Third Reich*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/persecution-of-homosexuals-in-the-third-reich> (last visited Jan. 24, 2022).

25. *Genocide of European Roma (Gypsies)*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/genocide-of-european-roma-gypsies-1939-1945> (last visited Jan. 24, 2022).

26. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE HOLOCAUST: AN ENDANGERED CONNECTION 129–30 (2019).

These horrific realities infused the sense of purpose underlying the Declaration. The overwhelming sense of violation and affront to human dignity galvanized and brought people together from so many different religious and philosophical and cultural traditions at this critical historical moment. Animating the UDHR is a fundamental universal human cry for dignity that has enabled it to speak powerfully, then and now, to human beings everywhere.

The UDHR proclaims universal rights to which all human beings everywhere are entitled. It provides a “common understanding of these rights” and a “common standard of achievement for all peoples and all nations.”²⁷ The Declaration’s living legacy is vast, including its influence on subsequent human rights law, its clear language that speaks to human beings everywhere, and its continuing inspirational power. Article 1 declares that “[a]ll human beings are born free and equal in dignity and rights.”²⁸ Article 2 proclaims that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...”²⁹ Article 7 of the Declaration—its equal protection clause—affirms that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”³⁰

Indeed, it is the UDHR’s powerful recognition of the equal worth and equal dignity of all human beings—and corresponding emphasis on non-discrimination—that animates the Declaration and continues to speak so powerfully ever since. The idea of equal human dignity and equal human worth is—to paraphrase *McCulloch v. Maryland*—so interwoven into the fabric of the UDHR that it cannot be “separated from it, without rending it into shreds.”³¹

In addition, women from different countries played a vital role in shaping the language and rights in the UDHR. Eleanor Roosevelt from the United States, who chaired the UN Commission that wrote the UDHR, played a central role in negotiating the Declaration and strongly supported the inclusion of economic and social rights as well as civil and political rights.³² Moreover, thanks to the determined efforts of female delegates³³ from other countries—such as from India and Denmark—the Declaration has powerfully inclusive language that speaks to everyone: “All human beings...”; “Everyone...”; “No one...”;

27. UDHR, *supra* note 1, at pmbl.

28. *Id.* at art. 1.

29. *Id.* at art. 2.

30. *Id.* at art. 7.

31. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819).

32. GLENDON, *supra* note 1, at 42–43, 186–87.

33. *Women Who Shaped the Universal Declaration*, UNITED NATIONS, <https://www.un.org/en/events/humanrightsday/women-who-shaped-the-universal-declaration.shtml> (last visited Jan. 24, 2022).

“All...”³⁴ There are only a few exceptions where masculine pronouns are used instead.³⁵ The fifth clause in the Preamble specifically mentions women: “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom . . .”³⁶ The express inclusion of women “signals that the Declaration is not just a universalization of the eighteenth-century ‘rights of man,’ but part of a new stage in the history of human rights.”³⁷

These determined female delegates successfully ensured³⁸ that the fundamental emphasis on equality and non-discrimination throughout the UDHR also was reflected in specific provisions. These include Article 16 which affirms the right of men and women “of full age, without any limitation due to race, nationality or religion” to “marry and to found a family” and “equal rights as to marriage, during marriage and at its dissolution.”³⁹ Article 23 likewise affirms that “[e]veryone, without any discrimination, has the right to equal pay for equal work.”⁴⁰

What is especially remarkable is that the diplomats who agreed on these basic foundational ideas came from many different countries and diverse cultures and religious and philosophical traditions. Indeed, even in the fight between an imperial nation like Great Britain and the colonies, with the former against the application of the UDHR to the peoples of the colonies, the latter won; “the pro-colonial, anti-universal argument was rejected by the United

34. UDHR, *supra* note 1, at pmb1.

35. One version of Article 1 reads “All men are brothers. They are endowed by nature with reason and conscience. They are born equal in dignity and rights.” GLENDON, *supra* note 1, at 90. Mrs. Hansa Mehta of India had been fighting against “purdah, child marriage, polygamy, unequal inheritance laws, and bans on marriages among different castes, striving to set these ancient customs on course of extinction” and objected to the use of non-inclusive language. *Id.* Mrs. Mehta warned that the term “men” would be understood to mean exclusively male in many countries and the UN Commission on the Status of Women, as well as the Soviet bloc delegates agreed with her. *Id.* Eleanor Roosevelt, however, repeated her prior assertions that the term “men” included everyone. *Id.* at 68, 112.

36. UDHR, *supra* note 1, at pmb1.

37. *Id.* at 177.

38. Johannes Morsink, *Women’s Rights in the Universal Declaration*, 13 HUM. RTS. Q. 229, 256 (1991).

39. UDHR, *supra* note 1, at art. 16.

40. *Id.* at art. 23.

Nations General Assembly”⁴¹ and the UDHR would thus reach colonized as well as free peoples.⁴²

These multicultural roots favoring universalism—for both the grounding significance of equal human dignity *and* the common list of rights—are important historically, politically, and philosophically. Historically and politically, they provide an important corrective to those who argue that universal human rights are a largely western concept or imposition on other cultural traditions. Despite ideological and cultural divides, the UDHR’s framers were able to forge a human rights instrument that was consciously and intentionally cognizant of cultural differences. And yet, “[t]he argument against the UDHR’s universality, however, persists as an attempt to invalidate its accomplishments.”⁴³

As this Part shows, universality was not just a part, or even a significant part, of the Declaration. Rather, it “was designed with universality constantly at the forefront of the debate.”⁴⁴ The four framers who played crucial roles in the successive drafts were all representatives from different parts of the world: Peng-chun Chang, a Chinese philosopher and diplomat (Ambassador to Turkey and Chile), Vice Chair of the Commission on Human Rights; Nobel Peace Prize laureate Rene Cassin, a French-Jewish jurist of the Free French; Charles Habib Malik, a Lebanese existentialist philosopher, chief spokesman for the Arab League who identified as Arab and Christian, Rapporteur of the Commission; and Eleanor Roosevelt, diplomat, activist and First Lady of the United States, Chair of the Commission.⁴⁵ Other prominent participants included Carlos Romulo, a Filipino Pulitzer Prize winning journalist; John P. Humphrey, the Canadian director of the United Nations’ Human Rights Division who wrote the first draft of the UDHR; Hansa Mehta of India who insisted the Declaration use inclusive language to include equal rights for women; Alexei Pavlov, the Soviet

41. “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” *Id.* at art. 2. The phrase “whether it be independent trust, nongoverning or under any other limitation of sovereignty” was successfully added to Article 2 by Omar Loutfi, the Egyptian delegate, despite vehement opposition from the British delegate, who even took it to a plenary session of the General Assembly. Opposition was derived from concern that the UDHR would grant rights to subjects of the British Empire. Ankeith Prince Illiparambil, Eleanor Roosevelt and Charles Malik: Titans of Peace and Architects of Post-WWII International Cooperation 34–35 (May 2020) (B.A. thesis, University at Albany, State University of New York).

42. See PAUL GORDON LAURENT, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 168–69 (1998).

43. Illiparambil, *supra* note 41, at 41.

44. *Id.*

45. *Drafting of the Universal Declaration of Human Rights*, U.N. DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/undhr/draftingcommittee> (last updated Dec. 16, 2021).

delegate; and Chile's Hernan Santa Cruz, who advocated for the inclusion of socio-economic rights.⁴⁶

There were sixteen member states represented at the first session of the Human Rights Commission held between January 27 to February 10, 1947.⁴⁷ One of the most charged discussions came out of differences in political philosophy of the various representatives.⁴⁸ The record reveals full and robust debates about the relationship between the person and the community—an issue that the pro-culture camp has elevated to the forefront in its attack against the universalism of human rights. For example, even as Rene Cassin insisted on the recognition of the common human nature and the basic unity of human beings,⁴⁹ Yugoslavia's Communist delegate Vladislav Ribnikar declared that the collective interest, represented and manifested through the state, takes priority over individual ones.⁵⁰ Ribnikar's concern about the relationship between the individual and the collective, though couched in Marxist terminology, is similar to that expressed by the pro-culture camp today. He decried the “psychology of individualism . . . used by the ruling class in most countries to preserve its own privileges,”⁵¹ and like communitarians, argued that “the social principle comes first.”⁵²

Malik, on the other hand, took the opposite position, characterizing collectivism as “the deepest danger of the age”⁵³ demanding “the extinction of the human person as such in his own individuality and ultimate inviolability.”⁵⁴ To guard against this danger, Malik suggested the Commission adhere to four principles: first, the human person is more important than the group, national or cultural, to which he belongs; second, a person's mind and conscience are inviolable; third, no state or church or other institution can pressure a person into a form of coerced consent; and fourth, individual conscience is supreme.⁵⁵

46. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 28–35 (1999).

47. GLENDON, *supra* note 1, at 35.

48. *Id.* at 38; *see also* MORSINK, *supra* note 46, at 281–328.

49. U.N. ESCOR, Comm'n on Hum. Rts., 1st Sess., 7th mtg. at 4, U.N. Doc. E/CN.4/AC.1/SR.7 (June 19, 1947).

50. U.N. ESCOR, Comm'n on Hum.Rts., 1st Sess., 8th mtg. at 4, U.N. Doc. E/CN.4/SR.8 (Jan. 31, 1947).

51. *Id.*

52. *Id.*

53. The More Important Speeches and Interventions of Dr. Charles Malik, Representative of Lebanon and Rapporteur of the Commission, Taken from the Verbatim Records 36 (Jan. 27 to Feb. 10, 1947) (unpublished manuscript) (Box 76, Charles H. Malik Papers, Manuscript Division, Library of Congress, Washington, D.C.); U.N. ESCOR, Comm'n on Human Rts., 1st Sess., 9th mtg. at 3, U.N. Doc. E/CN.4/SR.9 (Feb. 1, 1947).

54. The More Important Speeches and Interventions of Dr. Charles Malik, *supra* note 53, at 36; U.N. ESCOR, *supra* note 53, at 3.

55. Ranim Salman, *Meet Lebanon's First UN Ambassador Who Left Us a Legacy to Remember*, THE961 (July 31, 2019), <https://www.the961.com/charles-malik-lebanons-first-un-ambassador>.

In response, a delegate from the Soviet Union, Valentin Tepliakov, reasserted the social, collectivist perspective, declaring that Malik's proposed four principles cannot form the basis for an international bill of rights because individual rights must be understood in conjunction with individual obligations to the community; it is the community that is "the main body which provides for his existence, and the enjoyment of the human rights which belong to him [W]e cannot divide the individual from society."⁵⁶

Rene Cassin's position was that, although "the human being is above all a social creature whose life and development and whose progress have been made possible only because he could lean on his neighbors,"⁵⁷ an international bill of rights must recognize the importance of an individual's freedom of conscience, which is a foundational right that "gives man his value and dignity."⁵⁸

Support for the Soviet bloc position came from the United Kingdom's Charles Duke, from the Labour Party, who insisted individuals must be willing to "pay the price for the advantages that result from our calling upon the State to safeguard our liberties, both in the sense of personal freedoms and also in the direction of a minimum degree of economic security."⁵⁹ The so-called price the individual must be willing to pay in return for being part of a society is a willingness to limit individual freedom to "receive the benefits of any group organization, whether it be religious, ethical, economic, State, whatever it may be."⁶⁰

Other delegates, such as Mrs. Hansa Mehta of India, tried to extricate the discussion from "the maze of ideology."⁶¹ "We are here to affirm faith in fundamental human rights. Whether the human person comes first or the society, I do not think we should discuss that problem now."⁶² Eleanor Roosevelt, as chair of the Commission, staked out a middle ground: "It is not exactly that you set the individual apart from his society, but you recognize that within any society the individual must have rights that are guarded."⁶³ Whether government exists to serve the individual or the group, "we do have to make sure, in writing a bill of rights, that we safeguard the fundamental freedoms of the individual."⁶⁴

Malik reasserted his concern: "I hold it to be eminently true that the human person, in his ultimate freedom, is in mortal danger today from the totalitarian state, and that after every allowance is made for full social responsibility, the

56. The More Important Speeches and Interventions of Dr. Charles Malik, *supra* note 53, at 37-38; U.N. ECSCOR, Commission on Human Rights, 1st Sess., 14th mtg. at 4, U.N. Doc. E/CN.4/SR.14 (Feb. 5, 1947).

57. The More Important Speeches and Interventions of Dr. Charles Malik, *supra* note 53, at 43.

58. *Id.*

59. *Id.* at 40.

60. *Id.*

61. *Id.* at 38.

62. *Id.*

63. *Id.*

64. *Id.* at 39.

state in all its functions is for the sake of the free human person, and that this doctrine should be reflected in the proposed Bill of Rights.”⁶⁵ Although he agreed with the United Kingdom delegate that there is a price to be paid for membership in society, sometimes “the price is too high” because the danger is “not that the State is not strong enough . . . but that social claims are in danger of snuffing out any real personal liberty.”⁶⁶

So nuanced and thorough was the discussion within the Commission that, even though Eleanor Roosevelt and Charles Malik were closer together on the rights/duties spectrum, there were significant differences even between them. Roosevelt referred to the “individual,” whereas Malik used “person” to emphasize social connectedness and avoid inferences of autonomy, as is evidenced by his propensity to use the phrase “There are no Robinson Crusoes.”⁶⁷

Throughout the process, Chang proved himself to be a pluralist committed to the production of a declaration that would reflect more than just Western ideas.⁶⁸ As Eleanor Roosevelt wrote in her memoirs, Chang and Malik engaged in deep philosophical discussions about the Declaration, with Chang even suggesting the works of Confucius as mandatory reads for Humphrey.⁶⁹

The Commission decided that Humphrey would prepare the preliminary draft, which turned out to be a good decision because he and his staff had been collecting and studying relevant materials from all over the world.⁷⁰ There was nothing in the record that would suggest that the drafting process or the ultimate product, the Declaration itself, was a cultural imperialist project, or even one that was oblivious to cultural differences. To the contrary, once appointed the task of producing the first draft, Humphrey and his staff began the meticulous process of studying the world’s constitutions and rights documents, as well as receiving and parsing through the many suggestions that came from Commission members, external organizations, and interested individuals.⁷¹ Humphrey was particularly influenced by two documents, one a draft of a Pan American declaration being considered in Latin America—it delineates rights as well as duties and declares that rights came not from the State but are based on “attributes of . . . human personality.”⁷² The second document was the

65. *Id.* at 46.

66. *Id.* at 45.

67. *Id.* at 44; GLENDON, *supra* note 1, at 42.

68. ELEANOR ROOSEVELT, *ON MY OWN* 77 (1958).

69. *Id.*; Illiparambil, *supra* note 41, at 14; JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 29 (1984).

70. MORSINK, *supra* note 46, at 5–12; GLENDON, *supra* note 1, at 48.

71. Peter André Globensky, *The Life of a Canadian Internationalist: Dr. John Peters Humphrey and the Universal Declaration of Human Rights*, 47 *U.N.B. L.J.* 5, 11–14 (1998); GLENDON, *supra* note 1, at 56.

72. Ian Brownlie, *American Declaration of the Rights and Duties of Man, 1948*, in *BASIC DOCUMENTS ON HUMAN RIGHTS* 488 (Ian Brownlie ed., 3d ed. 1992).

Statement of Essential Human Rights produced pursuant to a study sponsored by the American Law Institute, which had consulted experts from “Arabic, British, Canadian, Chinese, French, pre-Nazi German, Italian, Indian, Latin American, Polish, Soviet Russian and Spanish” countries to “ascertain to what extent there can be worldwide agreement respecting rights.”⁷³

Using materials gathered and distilled from different parts of the world, Humphrey compiled a list of forty-eight items (known as the Humphrey draft) that constituted the common core, including first-generation civil and political rights in the British, French, and American revolutionary declarations from the seventeenth and eighteenth centuries, and second-generation economic and social rights in the constitutions of Sweden, Norway, the Soviet Union, and Latin American countries.⁷⁴

The notion that rights and principles, rooted in national constitutions, would be internationalized was itself novel and radical, prompting some delegates, particularly Vladimir Koretsky of the Soviet Union, to object to the move as a threat to national sovereignty.⁷⁵ Humphrey blithely admitted as much: human rights “has always been, and always will be, a struggle against authority.”⁷⁶ Cassin, who reiterated that indeed, “[t]he right of interference is here,”⁷⁷ was then chosen by the main working group to revise Humphrey’s draft. The principle that the nation-state does not have absolute right over its own citizens is itself the very *sine qua non* of a Universal Declaration of Human Rights. Intervention is not only a result of the UDHR but lies at the core of its creation. And as this Part shows, its creation was based on universal principles culled from national and cultural traditions.

Cassin preserved the substantive content of Humphrey’s draft but worked to create an internally coherent structure consisting of a Preamble to explain why the Declaration was needed. The introductory articles affirmed the equal rights of everyone and “embodied concepts of man and society that were neither

73. *Statement of Essential Human Rights*, in THE AMERICAN LAW INSTITUTE 75TH ANNIVERSARY: 1923-1998, at 269 (1998); GLENDON, *supra* note 1, at 57.

74. Verbatim Record of the First Meeting of the Drafting Committee of the Commission on Human Rights (June 9, 1947) (unpublished manuscript) (Box 80, Charles H. Malik Papers, Manuscript Division, Library of Congress, Washington, D.C.); *see also* U.N. ESCOR, Commission on Human Rights, 1st Sess. at 9–10, 18, U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 11, 1947).

75. Verbatim Record of the Fifth Meeting of the Drafting Committee of the Commission on Human Rights (June 12, 1947) (unpublished manuscript) (Box 80, Charles H. Malik Papers, Manuscript Division, Library of Congress, Washington, D.C.); *see also* *Beyond National Sovereignty: How to Protect Citizens from their Own Government*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/universal-declaration-human-rights/beyond-national-sovereignty> (last visited Jan. 24, 2022).

76. *See* FACING HIST. & OURSELVES, *supra* note 75.

77. Verbatim Record of the Fifth Meeting of the Drafting Committee of the Commission on Human Rights, *supra* note 75.

individualist nor collectivist”⁷⁸ but also “implicitly [took] sides against the extremes of capitalist individualism and socialist collectivism.”⁷⁹ Cassin sought to avoid taking “sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights.”⁸⁰ Cassin’s draft highlighted the Declaration’s universalism, reflecting his belief that human beings are part of the human family; that is, universal rights are to be appropriately based on the “great fundamental principle of the unity of all the races of mankind All men, being members of one family, are free, possess equal dignity and rights, and shall regard each other as brothers.”⁸¹ When presenting his draft to the working group, various changes were suggested and debated, including the addition of “reason” as an essential human attribute applicable to all human beings by nature regardless of culture.⁸² Chang then suggested the inclusion of another concept, which was a Chinese word that, if translated, literally meant “two-man mindedness,” and could be translated into English as “sympathy” or “consciousness of one’s fellow men.”⁸³

The drafters knew that the first draft would have to be approved by the full Commission, sent to all member states for comments, revised, returned to the full Commission for consideration, then submitted for review by the Economic and Social Council for its determination of whether or not to recommend submission to the General Assembly, where it would have to be further examined by the Third Committee on Social, Humanitarian, and Cultural Affairs.⁸⁴ The UDHR would ultimately need to be acceptable to delegates from all the member countries of a United Nations that was constantly expanding in the post-WWII world.⁸⁵ In preparation, the United Nations’ Educational,

78. GLENDON, *supra* note 1, at 64, 68 (in Cassin’s draft, Article 2 stated: “The object of society is to enable all men to develop, fully and in security, their physical, mental and moral personality, without some being sacrificed for the sake of others.” Article 3: “Since human beings cannot live and achieve their aims without the help and support of society, everyone has fundamental duties to society”).

79. GLENDON, *supra* note 1, at 68.

80. *Id.*

81. Verbatim Record of the Eighth Meeting of the Drafting Committee of the Commission on Human Rights (June 17, 1947) (unpublished manuscript) (Box 81, Charles H. Malik Papers, Manuscript Division, Library of Congress, Washington, D.C.).

82. Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 Human Rts. Q. 309, 313–16 (1984).

83. Verbatim Record of the Thirteenth Meeting of the Drafting Committee of the Commission on Human Rights (June 20, 1947) (unpublished manuscript) (Box 81, Charles H. Malik Papers, Manuscript Division, Library of Congress, Washington, D.C.). The version that was finalized in Article 1 of the UDHR reads as follows: “All human beings are born free and equal in dignity and rights. They are endowed with *reason and conscience* and should act towards one another in a spirit of brotherhood.” UDHR, *supra* note 1, at art. 1 (emphasis added).

84. GLENDON, *supra* note 1, at 55–56.

85. By the time the UDHR was put to a vote, in 1948, the United Nations had fifty-eight members. Compiled by Richard Nelsson, *UN Adopts Universal Declaration of Human Rights—Archive, December 1948*,

Scientific and Cultural Organization (UNESCO) contacted various prominent philosophers and historians to be part of a Committee on the Theoretical Bases of Human Rights. To be “as useful as possible” to the Human Rights Commission,⁸⁶ this UNESCO Committee had sent a questionnaire to scholars and statesmen around the world to solicit their views on the idea of a universal declaration of human rights. It received more than seventy responses about reflections on human rights from Chinese, Islamic, Hindu, customary law, American, European, and socialist perspectives.⁸⁷

Most important for the main issue considered in this Article—the universalism versus relativism of the UDHR—many respondents to the UNESCO query from non-Western backgrounds asserted that the concept of human rights was in their particular traditions, even if the language of rights might be a recent, modern European phenomenon. Chung-Shu Lo, a Chinese Confucian philosopher, stated:

The problem of human rights was seldom discussed by Chinese thinkers of the past, at least in the same way as it was in the West . . . [However], the idea of human rights developed very early in China, and the right of the people to revolt against oppressive rulers was very early established . . . A great Confucianist, Mencius (372-289 B.C.), strongly maintained that a government should work for the will of the people. He said: “People are of primary importance. The State is of less importance. The sovereign is of least importance.”⁸⁸

This Confucian statement about the significance of the person vis-à-vis the government or the state is as strong as any coming out of the modern, “Western” human rights movement.

Indian political scientist S.V. Puntambekar explained that Hindu thinkers had “propounded a code . . . of ten essential human freedoms and controls or virtues necessary for the good life”—five freedoms, which included “freedom from violence, freedom from want, freedom from exploitation, freedom from violation and dishonor and freedom from early death and disease”; and five virtues which included “absence of intolerance, compassion or fellow-feeling, knowledge, freedom of thought and conscience, and freedom from fear, frustration or despair.”⁸⁹

THE GUARDIAN (Nov. 28, 2018), <https://www.theguardian.com/law/from-the-archive-blog/2018/nov/28/un-adopts-universal-declaration-human-rights-paris-1948>.

86. U.N. ESCOR, 1st Sess., 4th mtg. at 9, U.N. Doc. E/CN.4/AC.1/SR.4 (June 13, 1947).

87. GLENDON, *supra* note 1, at 73.

88. Chung-Shu Lo, *Human Rights in the Chinese Tradition*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 186–87 (UNESCO ed. 1949).

89. S. V. Puntambekar, *The Hindu Concept of Human Rights*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 88, at 195–98.

The Muslim poet and philosopher Mumayin Kabir wrote eloquently in favor of universalism, human rights, and Islamic tradition. Kabir stated that early Islam had “succeeded in overcoming distinction of race and colour to an extent experienced neither before nor since.”⁹⁰ Kabir was also unequivocally against the notion of different rights for different civilizations, insisting that “[t]he first and most significant consideration in framing any charter of human rights . . . is that it must be on a global scale . . . Days of closed systems of divergent civilisations and, therefore, of divergent conceptions of human rights are gone for good.”⁹¹

The many responses to the UNESCO survey confirmed to the drafters of the UDHR that the basic principles included in the Declaration were indeed present in many cultural traditions, even if not always expressed in rights terms.⁹² The Human Rights Commission’s report showed that, despite different histories and cultural traditions, there was “a sort of common denominator [and that] the members of the United Nations share common convictions on which human rights depend.”⁹³ Nonetheless, the accusation that the Declaration was Western lingered, as Jamil Baroody of Saudi Arabia charged that the articles related to marriage and religious freedom were Western.⁹⁴ Chang and Santa Cruz together defended the Declaration against Baroody’s characterization of the UDHR as Western.⁹⁵ Rebutting the Western accusation, Chang again invoked his “two-man mindedness,” that is, the ability to see the view of oneself as well as that of the other and encouraged each delegate towards the position that each cultural contribution must be geared towards a document “meant for all men everywhere.”⁹⁶ Chang succeeded in getting some support from delegates representing Islamic countries.⁹⁷ Santa Cruz urged Latin Americans not fully satisfied with the draft to see that it was in essence the result of many

90. GLENDON, *supra* note 1, at 74.

91. *Id.* Note also that during the debate in Committee Three of General Assembly, when some South American delegates moved to set up a subcommittee to compare the UDHR draft with the Bogota Declaration, also known as the American Declaration on the Rights and Duties of Man, it was Santa Cruz, the Chilean delegate who swiftly opposed such a move. His reason was that the Bogota Declaration was a regional document, reflecting Western philosophies, and would not be suitable for the diverse countries at the United Nations. *Id.* at 141.

92. GLENDON, *supra* note 1, at 76.

93. Jacques Maritain, *Introduction*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 88, at 268–71.

94. U.N. GAOR, 3d Sess., 91st mtg. at 49, U.N. Doc. A/C.3/SR.91 (Oct. 2, 1948).

95. *Id.*; see also *The First Diary, August 1, 1948 - November 14, 1948*, in 1 ON THE EDGE OF GREATNESS: THE DIARIES OF JOHN HUMPHREY, FIRST DIRECTOR OF THE UNITED NATIONS DIVISION OF HUMAN RIGHTS, at 55–56 (A.J. Hobbins ed. 1994).

96. *The First Diary, August 1, 1948 - November 14, 1948*, *supra* note 95, at 55–56.

97. GLENDON, *supra* note 1, at 142.

accommodations necessary to make the document acceptable to countries with different economic, social, legal, and cultural traditions.⁹⁸

With respect to the relationship between the person and the community, which critics charge is too skewed toward the former in the UDHR, the record also shows that the debate emerging at the initial meeting of committee members remained front and center throughout, including in responses to the UNESCO questionnaire.⁹⁹ Most Asians and some European respondents urged the inclusion of duties in the UDHR.¹⁰⁰ Mahatma Gandhi himself wrote that rights also depended on duties: “I learned from my illiterate but wise mother that rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world.”¹⁰¹ Chung-Shu Lo expressed a similar point—that “the basic ethical concept of Chinese social political relations is the fulfilment of the duty to one’s neighbor, rather than the claiming of rights.”¹⁰² On this point, the Cassin draft adhered to the view of “man in society” rather than as an atomized individual, as discussed above.¹⁰³ The question of rights and duties was further dissected at subsequent committee meetings, with the Cuban and Soviet delegates, along with Chang, expressing concern that the draft did not adequately balance out rights with corresponding duties.¹⁰⁴ Cassin, however, successfully alleviated those concerns by pointing out that the UDHR is covered by a general reference to duties.¹⁰⁵ Ultimately, in its final form, the Preamble itself emphasizes the inherent dignity of “every individual and every organ of society” which is “grounded in an understanding of human beings as both individual and social.”¹⁰⁶ Multiple articles reveal the drafters’ understanding of the person as embedded in society. Article 27 states: “Everyone has the right freely to participate in the cultural life of the community”¹⁰⁷ Article 28 states: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”¹⁰⁸ And Article 29 states: “Everyone has duties to the community in which alone the free and full development of his personality is

98. U.N. GAOR, *supra* note 94.

99. GLENDON, *supra* note 1, at 51, 76, 77

100. *Id.* at 75.

101. Mahatma Gandhi, *A Letter Addressed to the Director-General of UNESCO*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 88, at 18.

102. Lo, *supra* note 88, at 186.

103. Don Salvador de Madariaga, *Rights of Man or Human Relations?*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 88, at 47.

104. GLENDON, *supra* note 1, at 141.

105. U.N. GAOR, 3d Sess., 95th mtg. at 87, U.N. Doc. A/C.3/SR.95 (Oct. 6, 1948), *see also* GLENDON, *supra* note 1, at 141.

106. GLENDON, *supra* note 1, at 175.

107. UDHR, *supra* note 1, at art. 27.

108. *Id.* at art. 28.

possible.”¹⁰⁹ The addition of the word “alone” was proposed by Alan Watt, the Australian delegate, to highlight “the announcement of an organic connection between the individual and the community to which he or she owes duties, not unlike Confucius would have had it.”¹¹⁰ Commentators have since noted that, given the persistent accusation by critics that the UDHR is Western and individualistic, this insertion struck the right balance, stressing “the fact that the individual could not fully develop his personality outside of society.”¹¹¹

As an example of the meticulous care and deliberation given to the principles underlying the UDHR and its textual language, when deliberation of the drafted articles began, it took six full days to get through proposed Article 1 alone.¹¹² “All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience and should act towards one another in a spirit of brotherhood.”¹¹³ For example, the Greek delegate proposed that the second sentence be moved to the later sections that deal with duties. However, Chang emphasized the holistic nature of Article 1, arguing that the phrase “in a spirit of brotherhood” was needed in Article 1 itself to balance out the first sentence and to make sure that “rights” would not appear too individualistic.¹¹⁴

There was controversy also in the word “by nature.” Some delegates wanted it removed and others wanted to substitute it with the phrase “all human beings are created in the image and likeness of God.” Chang was able to get the majority of the delegates to agree to eliminate “by nature” from Article 1, but not add any reference to God, by reminding everyone that the UDHR is supposed to be universal in application. China’s traditions are different from the Christian West; Chinese ideals centered around values such as propriety and consideration of others which he had nonetheless not proposed for inclusion for the UDHR. There should be no explicit mention of God, although God could be inferred from the first sentence and the phrase “endowed with reason and conscience.” Mrs. Lakshmi Menon of India pointed to the conclusion of the UNESCO philosophers’ committee that principles of human rights can be agreed upon without having to reach consensus on their origin or foundation.¹¹⁵

At some point, of course, lines did have to be drawn. If a declaration of human rights was going to include everyone, *even* women, then certain practices that did not promote women’s equality or dignity would need to be explicitly

109. *Id.* at art. 29.

110. MORSINK, *supra* note 46, at 246.

111. *Id.* at 247.

112. GLENDON, *supra* note 1, at 144.

113. UDHR, *supra* note 1, art. 1.

114. GLENDON, *supra* note 1, at 146.

115. Third Committee, at 107, U.N. Doc A/C.3/SR.97 (1948), <https://undocs.org/A/C.3/SR.97>; *see also* Third Committee, at 127, U.N. Doc. A/C.3/SR.100 (1948), <https://undocs.org/A/C.3/SR.100>.

addressed. For example, Article 16 concerned the equal rights of men and women in marriage.¹¹⁶ Mexico proposed an additional “without any limitation due to race, nationality or religion.”¹¹⁷ Even without Mexico’s proposed addition, Article 16 was already provocative for delegates from predominantly Islamic countries. Saudi Arabia complained that the drafters had imposed Western values onto family relations and “ignored more ancient civilizations, which were past the experimental stage, and the institutions of which, for example marriage, had proved their wisdom through the centuries.”¹¹⁸ Saudi Arabia favored replacing the “equal rights” in marriage language with “full rights as defined in the marriage law of their country,” which in essence would mean: if the marriage law of a country gives a woman zero rights, that would be “full rights” under that country’s domestic law. The Saudi position did not prevail in the Committee, not even with Pakistan and Egypt,¹¹⁹ both of which declared their support for the equal rights in marriage provision.¹²⁰ Ultimately, Article 16 contained the Mexican addition and read thus: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.”¹²¹

In the end, when Malik, surrounded by fifty-eight flags of the member states of the United Nations, stood at the podium to introduce the Declaration, he described it as a “composite synthesis” of the existing rights and cultural traditions, and of Asian and Latin American perspectives.¹²² Malik took pains to point out which parts of the Declaration were influenced by which countries and which traditions. For example, the Latin American countries brought into the UDHR ideas developed in the Bogota Declaration on the Rights and Duties of Man. India was instrumental in advancing the nondiscrimination principle, especially with respect to women. The United Kingdom and the United States

116. UDHR, *supra* note 1, at art. 16.

117. GLENDON, *supra* note 1, at 153.

118. MORSINK, *supra* note 46, at 24. Saudi Arabia also objected to Malik’s proposed amendment, which survived and was included in the final Declaration, recognizing the right to change one’s religious beliefs. *Id.* at 70. *See also* U.N. ESCOR, Comm’n on Hum. Rts., Draft Comm. Mtg., at 19–20, U.N. Doc. E/CN.4/AC.1/14 (June 23, 1947).

119. GLENDON, *supra* note 1, at 154. Pakistan’s delegate accepted the equal rights in marriage language as long as equal rights did not mean identical rights. This was also the position of Eleanor Roosevelt. Pakistan also approved the religious freedom article, including the provocative proposal by Malik that a right to change one’s belief be part of religious freedom. *Id.* at 69–70. In stirring language, the Foreign Minister of Pakistan and head of the United Nations delegation Muhammad Zafrulla Khan declared Pakistan’s support for the Malik amendment. For him, it came down to Islam’s honor, citing a passage from the Koran: “let him who chooses to believe, believe, and him who chooses to disbelieve, disbelieve.” *Id.* at 168.

120. *Id.* at 154.

121. UDHR, *supra* note 1, at art. 16.

122. Charles Malik, *Speech of Thursday 9 December 1948*, in *THE CHALLENGE OF HUMAN RIGHTS: CHARLES MALIK AND THE UNIVERSAL DECLARATION* 117, 120 (Habib C. Malik ed., 2000).

had contributed via their political and civil liberties tradition whereas the Soviet Union and others had championed social and economic rights. The balance between rights and duties was struck with help from China, Greece, Latin America, the Soviet Union, and France.¹²³ Malik's point was that the Declaration rested on a "firm international basis wherein no regional philosophy or way of life was permitted to prevail."¹²⁴ Malik was also supported by Syria's Abdul Rahman Kayaly, who declared that the Declaration "was not the work of a few representatives in the Assembly or in the Economic and Social Council; it was the achievement of generations of human beings who had worked towards that end."¹²⁵

When the General Assembly members voted, by alphabetical order, the result was resounding. Forty-eight states in favor, eight abstentions, no nays.¹²⁶ The Soviet abstention was primarily over Article 13, which provides that everyone has the right to leave his country.¹²⁷ Saudi Arabia also abstained, although all the other Muslim nations had voted yes.¹²⁸ Drawing upon ideas of human dignity rooted in diverse religious and philosophical traditions, delegates from all parts of the world came together and forged agreement on a clear, organically connected set of rights indispensable to protecting human dignity.¹²⁹ Later, as many new independent countries were born and joined the United Nations, the UDHR was widely affirmed in new national constitutions and its rights embedded in human rights treaties that enjoy wide ratification.¹³⁰

As this Part has shown, the UDHR was a watershed moment in human history. The thirty articles laid out the core human rights that constituted the beginning of a journey towards expanding and enforcing human freedom and rights. These include the right to equal protection before the law, the right to movement within and between borders, the right to marry freely, the right to freedom of expression, the right to assemble, the right to work, the right to adequate health, and the right to education, among others, for everyone. The UDHR's concluding article prohibited actors,¹³¹ individuals, governments, or organizations, from destroying the rights and freedoms delineated in the Declaration.¹³²

123. GLENDON, *supra* note 1, at 165.

124. Malik, *supra* note 122, at 120.

125. GLENDON, *supra* note 1, at 168.

126. *Id.* at 170.

127. UDHR, *supra* note 1, at art. 13.

128. GLENDON, *supra* note 1, at 170; MORSINK, *supra* note 46, at 24–26.

129. *See generally* MORSINK, *supra* note 46.

130. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1995).

131. UDHR, *supra* note 1, at arts. 7, 13, 16, 19, 20, 23, 25, 26.

132. *Id.* at art. 30.

This Part has provided a deep look at the historical context and the language of the UDHR to underscore the Declaration's universality. After the Declaration's adoption, Malik said, "the Genesis of each article, and each part of each article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles."¹³³

Building on this, the over 170 countries¹³⁴ that have joined the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³⁵—the follow-on treaty—have agreed to take concrete steps "to the maximum" of their "available resources" to progressively realize those rights "without discrimination of any kind."¹³⁶ In some countries and regional systems,¹³⁷ economic and social rights—such as education¹³⁸ and health¹³⁹—are expressly affirmed in law and are subject to litigation in court. Yes, justiciability issues may arise, but there also are concrete examples of courts playing an important and constructive role in protecting such rights, such as the Constitutional Court of South Africa's decision¹⁴⁰ regarding access to antiretroviral drugs. Particularly as the world faces the challenges and disparities of the COVID-19 pandemic, the importance of socio-economic rights to human dignity warrants a central discussion.

The universality of the human rights proclaimed in the UDHR was crucial to the delegates who approved it. As the Declaration makes clear, "a common understanding of these rights and freedoms is of the greatest importance" in order for UN member states to fully realize their pledge to promote "universal respect for and observance of human rights."¹⁴¹ Indeed, Charles Malik's largest contribution to the UDHR was his "constant reminders to the other commissioners that the task at hand extended beyond boundaries; the borders

133. Charles Malik, *Introduction to Otto Frederick Nolde, FREE AND EQUAL: HUMAN RIGHTS IN THE ECUMENICAL PERSPECTIVE* 11–12 (Geneva: World Council of Churches ed., 1968).

134. See U.N. Treaty Collection, International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last visited Jan. 24, 2022).

135. *Id.*

136. *Id.* at arts. 2(1), (2).

137. *Economic, Social and Cultural Rights*, INT'L JUST. RES. CTR., <https://ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2> (last visited Jan. 24, 2022).

138. Marselha Gonçalves Margerin, *The Right to Education: A Multi-Faceted Strategy for Litigating before the Inter-American Commission on Human Rights*, 17 THE HUM. RTS. BRIEF 19, at 6 (2010).

139. See generally O'Neil Institute for National & Global Health Law, GLOB. HEALTH AND HUM. RTS. DATABASE, <https://www.globalhealthrights.org> (last visited Jan. 24, 2022).

140. *Minister of Health v. Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC), <https://www.escriet.org/caselaw/2006/minister-health-v-treatment-action-campaign-tac-2002-5-sa-721-cc>.

141. UDHR, *supra* note 1, pmb1.

that mankind had drawn did not determine the individual rights of human beings owed to them by virtue of their humanity.”¹⁴²

II. PART II: THE UNIVERSALISM OF THE UDHR AND HUMAN RIGHTS

Although the UDHR is rooted in universalism, as Part I has shown, the effort to “delegitimize” the UDHR on the most incendiary and provocative grounds—cultural or Western imperialism—persists. Those critics who oppose equal rights for women cannot simply declare they favor inequality. The best way to attack the principle of equality expressed in this historic document is to criticize it on cultural grounds and to declare it over and over until repetition makes it a “fact,” or at least, makes the charge stick in the air. For example, although the right to self-determination originated in the anti-colonial principle, it has become a “Third World version of the old national sovereignty claim,” facilitating the “Third World critique of the whole Declaration as ‘Western.’”¹⁴³ The idea is that the Third World has its regional, national, and cultural distinctiveness which the UDHR encroaches upon.

But undermining the universalism of the UDHR is not only a Third World effort. In a novel twist, though quite similar to the Third World human rights critique described above, the Report of the Pompeo Commission on Unalienable Rights, which was launched by then Secretary of State Mike Pompeo under the Trump administration, also aimed to completely reverse this understanding of universality. The Pompeo report puts enormous emphasis on states’ prerogative to put their own cultural spin on the implementation and relative weight of the UDHR rights.¹⁴⁴ By emphasizing that the UDHR accommodates different cultures, the report advances a pick and choose approach that elevates culture over universality—an approach that the Trump administration (and any other country) can invoke selectively to “accommodate” their culture.¹⁴⁵ Yet this gets the UDHR backwards, putting a nationalist spin on the rights articulated—what the report calls “legitimate pluralism”¹⁴⁶—rather than emphasizing the universality of the Declaration’s affirmation of equal human dignity and a “common understanding” of the rights proclaimed by representatives of many different countries, cultures, religions, and philosophical traditions.¹⁴⁷

Of course, this very idea goes against the universalist fabric of the UDHR itself. The UDHR was not designed for countries to put their own nationalist or sovereigntist spin on the rights proclaimed. Instead, the UDHR was designed to

142. Illiparambil, *supra* note 41, at 31.

143. GLENDON, *supra* note 1, at 215–16.

144. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Report of the Commission on Unalienable Rights 32–33, 37–39, 55 (2017). The Report uses the terms “legitimate pluralism” and “subsidiary.” *Id. passim*.

145. *Id.* at 32.

146. *Id.* at 56.

147. UDHR, *supra* note 1, pmb1.

set forth a “common standard of achievement” for “all peoples of all nations,”¹⁴⁸ and “to recognize humanity as a trait unfettered by national identity or loyalty.”¹⁴⁹

This Part moves beyond the drafting history and internal provisions of the UDHR and zooms out, looking at the relationship between culture and international law generally and international human rights specifically. Part II examines efforts by Third World dictators, as well as by Western communitarians and others, to call into question the applicability of the UDHR to humanity itself by attacking its claims to universality, mostly by exaggerating differences—differences in culture and even in cognition. In other words, by using the language of difference and cultural diversity, the so-called pro-culture set out to do the opposite of the UDHR drafters’ desire to “unite . . . humanity at the most basic level.”¹⁵⁰

A. INTERNATIONAL LAW AND CULTURE

The Declaration’s insistence on universalism, on the fact that all human beings have certain universal human rights, fundamentally changed the relationship between the national and the international spheres. Sovereignty, a basic principle in public international law, is no longer unlimited and can legitimately be subject to international scrutiny. Indeed, as Part I noted, the tension between universalizing rights on the one hand and national sovereignty on the other was noted and discussed, with Cassin and other drafters insisting that “the right of interference is here.”¹⁵¹ It is not hard to see why the UDHR has provoked significant backlash from states unaccustomed to this brave new world where they can no longer hide with impunity behind the sovereign’s veil of “domestic jurisdiction.”¹⁵² The UDHR and the international human rights regime can be seen as threatening the primacy of the statist, sovereignty-oriented foundation of public international law itself.

But international human rights law has also had its own prickling, contentious relationship with various states that resent the judgment of the former on cultural grounds. In some ways, the culture-based objection is related to the sovereignty issue. Different states are from different parts of the world

148. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *supra* note 144, at 29, 31.

149. Illiparambil, *supra* note 41, at 35.

150. *Id.* at 42. The Declaration is “the least common denominator” because, as its framers hoped, it prioritizes the rights and dignity of the individual, despite the diversity of origins, emphasizing what unites all people: common humanity and the rights derived from it.” *Id.* at 49.

151. GLENDON, *supra* note 1, at 60.

152. Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 723 (1995). In public international law, principles of sovereignty, sovereign equality and exclusive domestic jurisdiction are deemed “first-order international legal principles” that constitute “safeguards of the identity and opacity of the sovereign sphere.” *Id.*

and may also be culturally distinct and diverse, but the principle of sovereign equality among all states is enshrined, in dramatic departure from the colonial era, in the United Nations Charter itself.¹⁵³ Therefore, how can one state, much less non-state actors, judge another state? At the same time, culture is valued, not just as a subcomponent of sovereignty, but also for its own sake. Where there are distinctive cultural traditions *within* a state, international human rights instruments prohibit the state from combating, suppressing, or diluting expressions of such cultural traditions. In fact, culturally distinctive minority groups within the state are supposed to have the right of self-determination, which requires that states allow people to “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁵⁴

There are, of course, limits to this cultural right. States do not have affirmative obligations, for example, to build a public school curriculum around an ethnic group’s history or identity, although states cannot prohibit the group from speaking their own language or learning their own history.¹⁵⁵ The right of tribal or indigenous peoples “to retain their own customs and institutions” is to be respected as long as “these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.”¹⁵⁶ Moreover, even though cultural differences can be, indeed should be, recognized by states, the recognition is assimilated only within the sovereign form of the state in accordance with the imperatives of public international law. In other words, the right to practice and observe one’s cultural traditions does not mean the right to break out of the sovereign form, that is, to secede, and damage the existing territorial integrity of a state.¹⁵⁷

The same tug of war between culture and sovereignty exists in culture and international human rights. There is an internal, built-in “tension between the universalistic principles . . . and the practical realities of a club of members with

153. U.N. Charter art. 2, ¶ 1.

154. International Covenant on Civil and Political Rights, art. 1, ¶ 1, 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The same article 1 can be found in the International Covenant on Economic, Social and Cultural Rights, *supra* note 134. This right of self-determination has been extended to:

tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations [and to] peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

ILO Convention No. 169, *Indigenous and Tribal Peoples*, art. 1, ¶ 1 (June 27, 1989).

155. ICCPR, *supra* note 154, at art. 27.

156. ILO Convention No. 169, *supra* note 154, at art. 8 ¶ 1.

157. MALCOLM N. SHAW, *INTERNATIONAL LAW* 522 (6th ed. 2008).

diverse cultures.”¹⁵⁸ “Attempts to resolve the tension have taken the form of declaring a set of universal rights and principles (some of which seem inconsistent with the ‘cultures’ of its members) and at the same time, declaring the equal claim of every diverse culture to be respected.”¹⁵⁹ The drafters of the UDHR and the delegates from diverse countries that voted on the UDHR recognized this conflict. The conflict, in other words, was not some astonishing, unforeseeable byproduct of the UDHR. After receiving input from philosophers and leaders from many cultural traditions of the world, the drafters opted for a particular vision of universalism. The Declaration presented the world with a universality—a “universality imagined by Charles Malik [that] hinged less on navigating the intricate individualities of peoples and cultures, and more on recognizing that below all of that is an innate humanness that commanded a respect of individual rights and freedoms.”¹⁶⁰

Just as cultural rights are recognized in public international law, subject to exceptions described above (as long as not incompatible with other national and international rights), cultural diversity is also respected in international human rights. But there should also be exceptions. I argue that cultural traditions that are detrimental to women’s equality and dignity cannot be accorded respect if they themselves violate universal human rights norms.

Dictators will naturally object to the reach of international human rights into matters they deem to be their business, in other words, their prerogative to treat their people however they wish. Apologists for Zimbabwe’s Robert Mugabe’s tyrannical regime resorted to the country’s traditional culture to defend his thirty-seven-year rule, claiming that in accordance with Zimbabwean culture, Mugabe is a king, and kings can only be replaced when they die.¹⁶¹ Islamic militants in conjunction with religious authorities have battled against rights discourse because it challenges foundational restrictions such as the right to freely marry and freely divorce.¹⁶² Objecting to the UDHR’S universal status, the Organization of the Islamic Conference (“OIC”) adopted the Cairo Declaration of Human Rights in Islam on August 5, 1990, claiming that the

158. Vijayendra Rao & Michael Walton, *Culture in Public Action: Relationality, Equality of Agency, and Development*, in *CULTURE AND PUBLIC ACTION* 18 (Vijayendra Rao & Michael Walton eds. 2004).

159. *Id.*

160. Illiparambil, *supra* note 41, at 38.

161. Joseph Winter, *Robert Mugabe: The Survivor*, BBC NEWS (Dec. 6, 2011), <https://www.bbc.com/news/world-africa-16010171>.

162. Michael Ignatieff, *The Attack on Human Rights*, 80 FOREIGN AFF. 102, 103 (2001); Dania Akad, *The Universal Declaration vs. The Cairo Declaration*, LONDON SCH. OF ECON. AND POL. SCI.: MIDDLE E. CTR. (Dec. 10, 2012), <https://blogs.lse.ac.uk/mec/2012/12/10/1569>. The majority of Muslim countries such as Egypt, Iran, and Pakistan signed the UDHR in 1948, but not Saudi Arabia (which then as now denied women the right to vote or even to drive a car) which claimed the UDHR violated Islamic law and failed to take into consideration the cultural and religious traditions of non-Western countries. *Id.*

Cairo Declaration was to be complementary to the UDHR.¹⁶³ It is, in fact, anything but. Its so-called culturally-based variant is so antithetical to the four basic freedoms that undergird the UDHR—freedom of speech, freedom of religion, freedom from want, and freedom from fear—that it can only be described as undermining, not supplementing, the UDHR.¹⁶⁴

Even so-called benevolent dictators like Singapore’s Lee Kuan Yew have found that attacking the UDHR serves their purpose—to preempt legitimate criticism and dissent while appearing protective of national culture.¹⁶⁵ Hence Lee Kuan Yew, too, has predictably proclaimed that human rights are not universal but Western, and their enshrinement in the international human rights regime reflects but a novel and even sneaky form of Western domination on the non-Western world.¹⁶⁶

Lee Kuan Yew stated that, for Singaporeans, there is “little doubt that a society with communitarian values where the interests of society take precedence over that of the individual suits them better than the individualism of America.”¹⁶⁷ This “Asian model” conveniently favored by authoritarians ranks “community and family ahead of individual rights and order ahead of democracy and individual freedom.”¹⁶⁸ Even as it acknowledges that human rights are universal, Paragraph 8 of the Bangkok Declaration on Human Rights (“Bangkok Declaration”) smuggled “cultural relativism” into universalism. It states that, although Asian countries “recognize . . . [that] human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and

163. *Id.*

164. Article 18 of the UDHR states that everyone has freedom to religion, including to change religion. Article 10 of the Cairo Declaration states converting someone from Islam to another religion is prohibited. *Id.* The OIC has also been working on revising the Cairo Declaration towards better reconciliation with the UDHR and the revision was to be presented at the OIC’s Council of Foreign Ministers meeting in April 2020. The meeting was cancelled due to Covid-19. TURAN KAYAOGU, THE ORGANIZATION OF ISLAMIC COOPERATION’S DECLARATION ON HUMAN RIGHTS: PROMISES AND PITFALLS 1 (2020), <https://www.brookings.edu/wp-content/uploads/2020/09/The-Organization-of-Islamic-Cooperations-declaration-on-human-rights-promises-and-pitfalls.pdf>.

165. The former democratically elected president of South Korea, Kim Dae Jung, has objected to Lee Kuan Yew’s assertion that democracy is antithetical to Asian values. Kim Dae Jung, *The Myths of Asia’s Anti-Democratic Values*, 73 FOREIGN AFFS. 189, 189–90 (1994). The Nobel Laureate in Economics has made similar arguments. See AMARTYA KUMAR SEN, SIXTEENTH MORGENTHAU MEM’L LECTURE ON ETHICS & FOREIGN POL’Y HUMAN RIGHTS AND ASIAN VALUES 28–31 (2003).

166. See Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFF. 109, 109–26 (1994).

167. Daniel A. Bell, *A Communitarian Critique of Authoritarianism: The Case of Singapore*, 25 POL. THEORY 6, 7 (1997).

168. Ignatieff, *supra* note 162, at 105; see also Bell, *supra* note 167, at 7 (“Whereas Americans may prefer more democracy and less community, Singaporeans are said to prefer less democracy and more community.”).

religious backgrounds.”¹⁶⁹ This paradox has been referred to as “relative universality” which dilutes universalism, supposedly not to further tyrannical self-interest, but to oppose cultural hegemony.¹⁷⁰

But this culturally contingent approach “is in direct conflict with the idea of an international system of human rights, a conception which grew out of the Holocaust and the conviction that states’ treatment of their citizens was no longer a purely domestic concern.”¹⁷¹ As noted, it is quite predictable for dictators and strong men to stake their hostility to universal human rights and launch a counteroffensive on cultural imperialism grounds. But as observed in the Introduction, others have also stepped into this debate to shore up the pro-culture position, on the grounds that international human rights overreach has endangered the human rights agenda and pull back from rigidity and arrogance is needed to save human rights from itself.¹⁷² Acting as if the UDHR reflected solely Western ideas, these critics call for more attention to be shifted to the communitarian portion of the UDHR,¹⁷³ such as Article 29, which highlights not rights but duties: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”¹⁷⁴

Going outside the drafting record of the UDHR, communitarians point to the individual/community dichotomy rooted in cultural differences between the East versus the West to challenge the universalism principle. For communitarians, international human rights are associated with the thin societies of the West. In such thin societies, characterized by liberalism and individualism, the state is strong but the community where deep relationships and attachments are formed is frayed and weak. Pushing a hardline, rigid international human rights agenda onto non-Western or Southern societies¹⁷⁵ on the ground that rights are universal is inappropriate and additionally, counterproductive because it will provoke backlash. The pro-culture, communitarian camp calls this position the hardline Western universalist position. Without jettisoning human rights altogether, this camp exhorts human rights to adopt a flexible universalist position that accommodates culture more. Although rooted in different concerns, it is sometimes hard to tell which statement is by Western communitarians and which is from Asian or non-

169. G.A. 46/116, Bangkok Declaration on Human Rights, at ¶ 8 (Dec. 17, 1991).

170. Jan Kliem, *Human Rights in Southeast Asia and the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, CPG (Apr. 2019), <https://www.cpg-online.de/2019/07/01/human-rights-in-southeast-asia-and-the-asean-intergovernmental-commission-on-human-rights-aichr>.

171. Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55, 66 (2003).

172. KAPLAN, *supra* note 5, at 2.

173. Ignatieff, *supra* note 162, at 105.

174. UDHR, *supra* note 1, at art. 29.

175. Shorthand for the global South, usually also referred to as the Third World, consisting of poorer, developing countries.

Western statesmen. For example, compare this: “although human rights are universal, they need to be implemented in a way that takes the local social and political context into account, especially in thick societies and communities”¹⁷⁶ with paragraph 8 of the Bangkok Declaration mentioned above: although Asian countries party to the Declaration “recognize . . . [that] human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”¹⁷⁷

But this pro-culture communitarian position is not merely one that is anchored in differences in culture, behavior, or values. Supporters of this position have pointed even to cognitive differences between, for example, East Asians versus Westerners, to explain the differences between the former and the latter in their cultural propensity towards collectivism versus individualism. East Asian emphasis on communities and duties and Western emphasis on individuality and rights are not “just” cultural differences but rather, are rooted in psychological differences. Anchoring the relativism/universalism debate not just on culture or cultural differences, but on something that is presumably antecedent to but entwined with culture would seem to suggest that such differences are so profound as to be natural and immutable; and furthermore, that such differences should provide the basis for a different approach to human rights, one that relaxes the supposedly rigid and stringent universalism strand of the UDHR in order to accommodate, account for, and respect cultural diversity in the non-Western world. This Article objects to using psychological differences to justify the subordination of women not just on cultural but now also on cognitive grounds.

B. CULTURAL AND COGNITIVE DIFFERENCES

This Section examines the contribution of cultural psychology research to the question of differences in perception and cognition, most of which has centered around East Asians versus Westerners, how they produce differences in cultural values, and the ensuing differences in social organizations across culture. This Section concludes that, although such differences may exist, they do not justify creating or honoring a cultural exception to international human rights which almost always “happen” to coincide with perpetuating women’s subordination. In fact, this Section argues the opposite. If social psychologists are correct and psychology and cognition in effect create culture, such that East Asians perceive the world holistically and their culture reflects their holistic perception of life, that cultural inclination towards the organic whole should

176. KAPLAN, *supra* note 5, at 5.

177. *Id.*

mean a great concern for all parts within the whole—the opposite of the current gendered reality. In other words, if certain people from certain societies experience themselves relationally as part of an embedded whole, it does not follow that their cognitive propensity towards holism would justify subordination of any part by another part (the female by the male, in our case). Group harmony should truly mean group harmony, not superficial harmony whereby one part of the group self-sacrifices to pacify or elevate the other part in the name of group equilibrium and happiness. This cognitive and cultural disposition towards holistic interconnectedness would be completely in sync with, not oppositional to, the values of the UDHR.

Research has indeed shown that “humans tend to overstate the role of individual *disposition* and underappreciate the role of *situation* in accounting for human behavior.”¹⁷⁸ In Western culture, “a person’s behavior is generally understood to manifest, not simply her disposition, but a particular dispositionist causal schema that presumes that behavior reflects freely willed (often consciously made) ‘choices,’ which in turn reflect a stable set of ‘preferences.’”¹⁷⁹ In reality, according to some scholars, there is a “vast world of situational influence occurring outside our narrow purview;”¹⁸⁰ and although this tendency is the case for human beings generally, it is more pronounced in the West. In other words, the tendency to emphasize the general disposition of human beings—the rationality of the rational actor in economics, the free will of the contracting party in contracts, the reasonable person in tort law, etc., and minimize the particular situation or the context—is a more Western phenomenon.¹⁸¹ The Western model assumes that the human person is disposed to be “bounded, coherent, stable, autonomous, ‘free’ entity” with individual “preferences, motives, goals, attitudes, beliefs, and abilities” that guide and restrain actions.¹⁸²

And yet, unseen cognitive processes, according to social psychologists, exert profound influences on one’s thoughts and preferences.¹⁸³ In reality, social psychology tells us that human disposition is embedded in a culturally specific situation and that “the capacity to form culturally prescribed social relationships is essential for human survival, reproduction, and well-being . . . People must think, feel, and act with reference to local practices, relationships, institutions,

178. Jon Hanson & David Yosifo, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. J. 1, 6 (2004) (emphasis added).

179. *Id.*

180. *Id.* at 23.

181. RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 40–45 (2003).

182. Hanson & Yosifo, *supra* note 178, at 27.

183. *Id.* at 84; see also Alan Page Fiske, Shinobu Kitayama, Hazel Rose Markus & Richard E. Nisbett, *The Cultural Matrix of Social Psychology*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 915, 920 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

and artifacts. To do this, people must use the local cultural models, which consequently become an integral part of their psychology.”¹⁸⁴ Non-Westerners, such as Asian societies, are less individualistic and more situation-oriented.¹⁸⁵

Hence, according to pro-culture communitarians opposed to “rigid universalism” of international human rights, “the holistic thinking of Asians may actually be more suitable than the analytic thinking used by Westerners for interpreting human rights documents like the UDHR”¹⁸⁶ This is “because of the need to balance different elements against each other and to take into account social context in doing so.”¹⁸⁷ These advocates favoring cultural flexibility point to social psychology¹⁸⁸ research that has called into question even some of the most basic assumptions about human cognition. One of the more prominent psychologists relied upon by so-called flexible universalists is Richard Nisbett, whose work this section discusses because Western communitarians have relied upon it to support their call for cultural exception.¹⁸⁹

For example, Nisbett studied differences between ancient Greek and Chinese societies as exemplified by differences in the teachings of Aristotle and Confucius.¹⁹⁰ Such differences are exemplified in the Aristotelian sense of individual agency and debate versus the Confucian sense of community, collectivism, harmony, and self-control.¹⁹¹ Certain metaphysical assumptions

184. Fiske et al., *supra* note 183, at 916–17.

185. This is also referred to as thick versus thin, or low context versus high context societies, with the former composed of people with a sense of interdependent selves versus independent selves in the latter.

186. KAPLAN, *supra* note 5, at 40.

187. *Id.*

188. NISBETT, *supra* note 181, at 50–51. Culture psychology is defined as “the study of the way cultural traditions and social practices regulate, express, and transform the human psyche, resulting less in psychic unity for humankind than in ethnic divergences in mind, self, and emotion . . . It does not presume the premise of psychic unity, that the fundamentals of the mental life are by nature fixed, universal, abstract, and interior . . . Psyche and culture are thus seamlessly interconnected.” RICHARD A. SHWEDER, *THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY* 73, 97, 102 (1991).

189. *See, e.g.*, KAPLAN, *supra* note 5, at 40; Hanson & Yosifo, *supra* note 178, at 1. Hanson and Yosifon reject the Western emphasis on individual choice and will, in other words, individuality itself, as a driver of human behavior. “Social psychologists who have studied self-conceptions across cultures summarize this Western person schema as follows: “The person is believed to consist of a set of ‘internal,’ ‘personal’ attributes such as . . . personality traits, preferences, subjective feeling states, beliefs, and attitudes. These attributes are thought to be internal and personal in the sense that they come from within and characterize the person *regardless of the situation* (that is, a person’s attributes are not generated by or relative to current social context). Taken together, these attributes define each person as an autonomous, freely choosing, special individual.” Hanson & Yosifo, *supra* note 178, at 26–27. Citing to the social psychologist Richard Nisbett, the authors argue for explicit acknowledgment of the limits of individual action in favor of greater awareness that “humans tend to overstate the role of individual disposition and under-appreciate the role of situation in accounting for human behavior.” *Id.* at 6. This is in essence the communitarian argument that the individual is not self-founded but socially embedded in the community; *see also* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *AM. J. SOCIO.* 481, 506 (1985).

190. Richard E. Nisbett & Takahiko Masuda, *Culture and Point of View*, 100 *PROC. NAT’L ACAD. SCI.* 11163, 11163 (Sept. 16, 2003).

191. *See generally* NISBETT, *supra* note 181, at 1–29 for claims in this paragraph.

have led to certain quite divergent ways of seeing and understanding the world.¹⁹² Greek philosophers looked at objects and their properties and observed and categorized those objects by reference to their singular properties, coming up with rules that describe or predict the behavior of the objects.¹⁹³ As Nisbett explained, Aristotle observed a stone falling and a piece of wood floating and attached the property of gravity to the former and levity to the latter.¹⁹⁴ The Greeks were concerned about the attributes of a salient object, used such attributes to create categories of objects, and then constructed rules about them.¹⁹⁵ Although this supposed dichotomy between Greek versus Chinese changes neither the claims nor the arguments in this Article, it is worth noting that Nisbett used very broad strokes, in this case, to describe Greek philosophy, which encompasses broad, profound, and complex ideas ranging from asceticism and atomism to ethics and Hermeticism.¹⁹⁶ There are many Greek philosophers besides Aristotle, and Nisbett clearly failed to capture the diversity and complexity of Greek philosophy.¹⁹⁷ In fact, whether this psychological demarcation exists or not, this Article argues the opposite of what the communitarians argue: there should be no cultural exception to universal human rights in the UDHR.¹⁹⁸

Chinese philosophers, on the other hand, according to Nisbett, looked at the field in which the object was situated, studied interaction between the object and its environment, and focused on a field of forces such as magnetism and acoustics.¹⁹⁹ As Nisbett put it, “[t]he notion that events always occur in a field of forces would have been completely intuitive to the Chinese.”²⁰⁰ The Chinese were concerned about relationships, interactions, and context. In other words, the Chinese were less interested in the properties of the actual objects and any rules governing their behavior; and are more interested in “dialectical schemas, including finding the ‘middle way’ between two apparently contradictory propositions and recognizing the importance of the context in making judgments

192. Nisbett & Masuda, *supra* note 190, at 11163.

193. *Id.*

194. *Id.*

195. NISBETT, *supra* note 181, at 21–22.

196. *Id.*

197. See e.g., THOMAS A. BLACKSON, *ANCIENT GREEK PHILOSOPHY: FROM THE PRESOCRATICS TO THE HELLINISTIC PHILOSOPHERS* (2011).

198. See, e.g., Minakshi Singh, *Human Rights: Liberal and Communitarian Perspectives*, 4 INT’L J. OF RSCH. AND ANALYTICAL REV. 173, 173–74 (2017) (“[A]ccording to communitarian philosophers human rights are not universal. In every culture and society, there are different sets of rights Therefore rights are also culture bound.”). Consequently, a practice might be offensive under the UDHR under the principle of universalism should not be if culture were taken into account.

199. NISBETT, *supra* note 181, at 22.

200. *Id.* Nisbett stated that the Chinese recognized “the principle of ‘action at a distance’ two thousand years before Galileo articulated it. They had knowledge of magnetism and acoustic resonance, for example, and believed it was the movement of the moon that caused the tides, a fact that eluded even Galileo.” *Id.*

about objects and individuals.”²⁰¹ The Greeks saw discrete objects and the Chinese saw “continuous substances, even as interpenetrating substances.”²⁰² This difference is not surprising. As other social psychologists have pointed out, how people from different cultures viewed the relationship between themselves and their surroundings are derived from how those human subjects saw themselves; in other words, are people individual actors with individual personality dispositions internal to them or do they act in response to the broader culturally embedded situations they find themselves in?²⁰³ That is, if one sees oneself as embedded in a larger context, one will see objects and events similarly.²⁰⁴

These are not just differences in traditions or moral beliefs. Rather, they are differences that shape “fundamental thinking and perception.”²⁰⁵ Westerners perceive the world as an agglomeration of discrete objects, leading to an emphasis on individuality and individual actions; East Asians perceive the world as connected, hence Asian emphasis on holistic relations and integration.²⁰⁶ Moreover, once these characteristics or orientations of thinking and perceiving and observing and acting are established, they become part of “a self-reinforcing, homeostatic system. The social practices promote the worldviews; the worldviews dictate the appropriate thought processes; and the thought processes both justify the worldviews and support the social practices.”²⁰⁷

When shown an individual cartoon fish swimming among other cartoon fish, Chinese participants saw the individual fish as being affected by other fish, whereas Americans saw the behavior of the individual fish as being caused by its own characteristics.²⁰⁸ “The differences in causal attribution therefore probably reflect deep metaphysical differences that transcend specific rules about particular domains that are taught by the culture.”²⁰⁹ East Asians also classify objects on the basis of their relationship, not on their individual characteristics.²¹⁰ When shown pictures of a chicken, a cow, and a patch of

201. Nisbett & Masuda, *supra* note 190, at 11163.

202. *Id.*

203. ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 442 (1999) (discussing how Western culture’s emphasis on individual personality traits leads to the incorrect conclusion that human behavior will be consistent across different situations); *see also* Fiske et al., *supra* note 183, at 939; LEE ROSS & RICHARD NISBETT, *THE PERSON AND THE SITUATION* (1991).

204. Hazel R. Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 *PSYCH. REV.* 224, 246 (1991).

205. NISBETT, *supra* note 181, at 52.

206. *Id.* at 47–79.

207. *Id.* at xx.

208. Nisbett & Masuda, *supra* note 190, at 11164; *see also* Akahiko Masuda & Richard E. Nisbett, *Attending Holistically Versus Analytically: Comparing the Context Sensitivity of Japanese and Americans*, 81 *J. PERSONALITY & SOC. PSYCH.* 922, 924–25 (2001).

209. Nisbett & Masuda, *supra* note 190, at 11164.

210. *See supra* notes 188–89, 194–95 and accompanying text.

grass, American children matched the chicken with the cow because both are animals, while Chinese children put the cow and the grass together because cows eat grass.²¹¹ A sense of aesthetic difference between Western and East Asian sensibilities can also be attributed to the collective versus individual cultural dichotomy.²¹² Eastern painting tends to miniaturize the central figure in the painting while providing a larger spatial context; Western painting places the horizon low so the landscape is not as prominent.²¹³

When Japanese and American subjects were presented with twenty-second snippets of animated underwater scenes and then asked to report on what they had seen, American participants mentioned what the experimenters termed salient objects (large, colorful objects), while more Japanese participants made 65% more comments about the background field (water color, floor scene, inert objects).²¹⁴ Americans observed discrete objects: big fish, small fish. Japanese observed background environment: the aquarium itself.²¹⁵

In addition, when participants were shown forty-five photos of previously seen objects against new backgrounds or no backgrounds, Japanese participants were more thrown off by the change than American participants.²¹⁶ Other studies confirm the following: American participants were more likely to notice changes in the central object and Japanese participants were more likely to do so when there were changes in the environment or the relationship between the object and the context.²¹⁷

For the Japanese, “selfness is confirmed only through interpersonal relationships”²¹⁸ The Japanese anthropologist Lebra described the Japanese person as one who strives for “belongingness, reliance, dependency, empathy, occupying one’s proper place, and reciprocity.”²¹⁹ Exclusion would be considered a nightmare for the Japanese because that would show a failure of connection.²²⁰ By contrast, failure to separate, or inability to stand up for oneself or express oneself uniquely would be the American nightmare.²²¹ In Japanese culture, acting in accordance with your ego is considered childish while acting cooperatively is “an act of affirmation of the self.”²²² This involves not just trying to get your own needs met; “meeting another’s goals, needs, and desires

211. Nisbett & Masuda, *supra* note 190, at 11164.

212. *Id.* at 11168.

213. *Id.*

214. *Id.* at 11166.

215. NISBETT, *supra* note 181, at 89–92.

216. Nisbett & Masuda, *supra* note 190, at 11166.

217. *Id.* at 11167.

218. Markus & Kitayama, *supra* note 204, at 228.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 229 (citation omitted).

will be a necessary requirement for satisfying one's own goals, needs, and desires."²²³ This is different from "I attend to my needs and when I can, also to others' needs." It is, rather that, attending to others' needs is part and parcel of attending to my own needs, since I am interdependent with, and connected to, others.

Even though it may indeed be true that the East/West dichotomy pivots on individualism and autonomy versus collectivism and holism, there are two caveats this Article needs to highlight. First, moral sense can be rooted in something other than psychology or culture, so the picture painted by social psychologists which this Article has described in this Section is not the only picture worth noticing. For example, some scholars have posited and defended the idea that human dignity can be rooted in innate human nature.²²⁴ It is by no means uniformly accepted that "one's deepest moral convictions . . . depend exclusively on culture, myth, or ideology."²²⁵ Indeed, researchers from many different academic fields have begun to develop a "scientific theory of human moral cognition"²²⁶ supporting the following claim: "that an innate moral faculty or conscience and with it principles of justice, fairness, empathy, and solidarity are written into the very frame of human nature."²²⁷ These studies support the idea of a "universal moral grammar" that children across the globe believe in and subscribe to, and yes, although this set moral compass may indeed be expressed in different cultural forms, it is a *universal* and thus shared moral intuition²²⁸ about "human rights-related norms"²²⁹ ranging from intentional battery to international homicide.²³⁰

Second, the East/West dichotomy can be overstated, and nuances that narrow the gap and reveal some common ground between these two polar extremes are missed. For example, even within the West, studies have shown that women are grounded in the ethics of care and relationships.²³¹ For example, in her landmark work, *In a Different Voice: Psychological Theory and Women's*

223. *Id.*

224. John Mikhail, *Moral Grammar and Human Rights, Some Reflections on Cognitive Science and Enlightenment Rationalism*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 160 (Ryan Goodman, Derek Jinks & Andrew Woods eds., 2012).

225. *Id.* at 162.

226. *Id.* at 164.

227. *Id.* at 165.

228. Shared moral judgments might be unconsciously acquired and developed, akin to "other cognitive capacities such as vision, depth perception, musical cognition, and face recognition, all of which also depend on unconscious mental operations." *Id.* at 173.

229. *Id.*

230. *Id.* at 180.

231. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 18–19 (1982). See generally NEL NODDINGS, CARING: A RELATIONAL APPROACH TO ETHICS AND MORAL EDUCATION (2013); VIRGINIA HELD, FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS (1993).

Development, the noted feminist psychologist Carol Gilligan challenged the dominant accounts of the various stages of moral development as being male centered because they fail to capture girls' moral experiences.²³² Gilligan found that prominent psychologists, such as Sigmund Freud, Jean Piaget, Erik Erikson, and Lawrence Kohlberg, had presented women as being somehow "deficient in development";²³³ that it was "normal" to select men and boys as subjects in psychology studies; that it was common to portray "men as humans and women as different,"²³⁴ and therefore that "autonomy and rationality ('masculine' qualities) were the markers of maturity."²³⁵ Without belaboring the point, because it is not central to this article, Gilligan demonstrated that women (even in the individualist-oriented West) exhibit qualities that reflect "moral goodness" in "relational sensitivity and empathetic concern"—qualities that Nisbett deemed representative of East Asian culture (but which Gilligan also showed are considered in the West as "deficient in development.").²³⁶ Others have illustrated that seemingly opposite cultural values actually exist in a continuum across societies.²³⁷ As observed, "the concept of Jen, the central concept of Confucian ethics, and the concept of care, the central concept of feminist care ethics"²³⁸ are in fact compatible and mutually reinforcing.

Thus, while social psychology research reveals that basic cognitive differences do exist in people from different cultures, it is also important to refrain from exaggerating these differences. It is fair to say that the above discussion supports the conclusion exhorted by Western communitarians that "'basic' psychological processes depend substantially on cultural meanings and practices";²³⁹ that "'culture and psyche make each other up";²⁴⁰ and that "[p]sychological processes, in turn, generate and transform cultural processes,

232. GILLIGAN, *supra* note 231, at 18–19.

233. Carol Gilligan, *Looking Back to Look Forward: Revisiting in a Different Voice*, CTR. FOR HELLENIC STUD. HARV. U. (2011), <https://archive.chs.harvard.edu/CHS/article/display/4025>.

234. *Id.*

235. *Id.*

236. *Id.*

237. See Joel J. Kupperman, *Feminism as Radical Confucianism: Self and Tradition*, in *THE SAGE AND THE SECOND SEX: CONFUCIANISM, ETHICS, AND GENDER* (Chenyang Li ed., 2000); see also Chenyang Li, *The Confucian Concept of Jen and the Feminist Ethics of Care: A Comparative Study*, 9 *HYPATIA* 70 (1994); Ranjoo Seodu Herr, *Is Confucianism Compatible with Care Ethics? A Critique*, 53 *PHIL. E. W.* 471, 471–89 (2003); Sandra Harding, *The Curious Coincidence of Feminine and African Moralities*, in *WOMEN AND MORAL THEORY* 296, 296–312 (Eva Feder Kittay & Diane Meyers eds., 1989); Thaddeus Metz, *The Western Ethic of Care or an Afro-communitarian Ethic? Specifying the Right Relational Morality*, 9 *J. GLOB. ETHICS* 77, 77 (2013).

238. Li, *supra* note 237, at 70 (showing how Confucian ethics is similar to feminist care ethics). For feminists, "[t]he perspective of care requires that conflict be worked out without damage to the continuing relationships. Moral problems can be expressed in terms of accommodating the needs of the self and of others, of balancing competition and cooperation, and of maintaining the social web of relations in which one finds oneself." *Id.* at 78. Confucian ethics would lead to the same conclusion.

239. KAPLAN, *supra* note 5, at 50 (citation omitted).

240. *Id.*

shaping the very social institutions, practices, and meanings that will in turn influence them.”²⁴¹ However, this Article rejects the conclusion drawn by Western communitarians who rely on this research to argue that cognitive differences and consequently cultural differences should legitimately provide any basis for diluting the universalism of the UDHR.²⁴² While “moral diversity within and across countries ought to be considered natural, a normal product of human evolution,”²⁴³ moral diversity that impinges on human dignity and human rights cannot be condoned. This Article also rejects the argument that, from an instrumental or strategic standpoint, the human rights movement should abandon “moral monism” so it can be more appealing to more people across different societies and cultures.²⁴⁴

It is also important to note that, although this Article devotes much of this Section to discussing social psychology research relied upon by Western communitarians, none of the cognitive and perception differences should matter in the question addressed in this Article, namely, equal rights for women. It is true that Asian proclivity towards the holistic might explain certain organizational or methodological preferences.²⁴⁵ But this proclivity should have no impact on human rights generally and women’s rights particularly.

As Part I showed, there was broad participation in the drafting of the UDHR by people from diverse cultural traditions, including East and West.²⁴⁶ In addition, although the social psychology literature does demonstrate that culture, perception, and social structures are intertwined, it does not show that there is anything inherent in or intrinsic to any particular way of perceiving one’s self, one’s place in the world, or the relationship between the self and the world that would inevitably create the male-dominated societies that we have today. To claim that some cultures subscribe to a different set of ethics—the “autonomy ethic” of the West, the “community ethic” of East Asia, or even the “divinity ethic” of the Middle East²⁴⁷—does not explain why, within the “autonomy ethic,” men get to be autonomous and women get to be dependent on autonomous men; or why within the “community ethic,” women are to get their

241. *Id.* at 51.

242. *Id.* 70; Sirkuu Kristiina Hellsten, *Pluralism in Multicultural Liberal Democracy and the Justification of Female Circumcision*, 16 *J. APPLIED PHIL.* 69, 74 (1999) (“Those people who promote tradition and established common values are often labelled as communitarians, because it is the communitarian theorists who have made the point that liberalism’s individualist premises are unacceptable. Communitarians see that any conception of an individual always presupposes some view of society and community, since all individuals are social beings — and that ethical pluralism appears primarily in the practices of different communities rather than in the ‘free choices’ of individuals.”).

243. KAPLAN, *supra* note 5, at 53.

244. *Id.*

245. See NISBETT, *supra* note 181, at 191–92.

246. See *infra* Part I.

247. KAPLAN, *supra* note 5, at 56–57.

identity from the community, and their husbands and children, while men derive their identity from the community plus whatever they choose; or why, within the “divinity ethic,” the divine being as well as those in the top echelon of the divine institutions are male. Nothing about an interdependent orientation in which a person is viewed as being part of a group inevitably leads to female subordination for the sake of maintaining group harmony. Why not institutionalize and celebrate suppression of male identity and concomitantly male sacrifice for the sake of family cohesiveness? While it is true that different societies adopt different conceptions of the good life, this difference between or among societies does not mean that within each society, these different conceptions should uniformly result in the subordination of women to men. Traditions might very well be crucial to a person’s sense of identity in societies that are “thick” and rooted in relationships and communities. But there is nothing in that observation that should dictate that the inequality of women or patriarchal authority is an intrinsic part of human cognition and traditions.

Indeed, if we are to use a holistic framework, what would explain the subordination of women within embedded, holistic communities except patriarchy? There is nothing about embeddedness that would intrinsically create and perpetuate female inequality. Indeed, if we are to use a truly holistic framework, why would the concern for context not spill out into context itself to address injustices within that context? In fact, if one were to care only about men, and ignore injustice against women, that very perspective, which looks only at men (the equivalent of Nisbett’s Westerner looking only at the big colorful fish²⁴⁸), and ignore the context in which men can exert power over others, for example, women, is more representative of an individualistic than a holistic perspective that should supposedly be acknowledged and respected. If the context were truly respected and valued, injustice and oppression in one part within the whole should be addressed, not sidestepped. Indeed, holistic perception should be an argument in favor of, not against, rectifying inequities within the whole.

In addition, international human rights law is appropriately concerned about *individual* rights. The language of duties and relationships works only when both parties within the collective participate justly in a reciprocal set of duties; that is, when there is compliance by both parties. If one party, the male party, invokes the language of obligations and duties against the female party, but does not impose the same or equivalent obligations and duties he owes because gender equivalency is not in the cultural fabric of the community, imbalance and injustice will continue unabated. We need to supplement duties with rights.

248. See NISBETT, *supra* note 181, at 89–91.

And the language of international human rights must be a universal language if it is to be capable of providing protection for women and children who are at the mercy of patriarchal culture. Take the example of female genital mutilation. About four million girls are subjected to it, even though it is banned in many countries, such as Kenya.²⁴⁹ When it is perpetrated, it is done surreptitiously, with the knowledge and participation of community participants but kept hidden from law enforcement.²⁵⁰ At times when officials are less likely to discover the practice, for example, during the present covid quarantine, traditional communities have revived it, viewing it as a “cultural transition into adulthood,”²⁵¹ and confident that isolation at home will mean that when a girl is cut by a local “cutter,” at times without anesthesia or painkillers, no one outside the home or community will know. Only when the bleeding could not be stopped, and the victimized girl would be brought to a hospital, would the wider society discover what had gone on in the community.²⁵² In this case, despite the romanticized version that Western communitarians extol, it is hard to imagine the community as a source of comfort or sanctuary for these victims because it is the community itself that is the rights violator. Does a UDHR stripped of the principle of individual rights have the moral force necessary to help a girl subject to this practice in the secrecy of her own home or community? How does “duty” apply to this situation?²⁵³

Under human rights law, rights are important for everyone, and “everyone” must include those most vulnerable. Rights entitle rights holders to have their rights “enforced against institutions such as the family, state, and the church”²⁵⁴ or other religious institutions. As Michael Ignatieff so aptly put it:

[Rights language] is the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal and tribal societies; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices – arranged marriages, purdah, civic disenfranchisement, genital mutilation, domestic slavery, and so on – that are ratified by the weight and authority of their cultures.²⁵⁵

249. Sambrian Mbaabu, “*We Want Justice for These Girls*”: *The Kenyan Helpline for Victims of Gender Violence*, UN NEWS (Oct. 17, 2020), <https://news.un.org/en/story/2020/10/1075522>.

250. *Id.*

251. *Id.*

252. *Id.*

253. *See id.* It is not duty that is the relevant principle here, but rather, enforcement of rights to protect victims of assault, rape, child abuse and child marriage. *Id.* In Kenya, the government has set up 24-hours-a-day hotlines for victims of gender-based violence. *Id.* The help line is run by counselors who stay with callers until the police, medical or child protective personnel arrive at the home. Counselors are also trained to provide legal aid. *Id.*

254. Ignatieff, *supra* note 162, at 108.

255. *Id.* at 109.

Patriarchy cannot be justified or defended by referencing the very patriarchal culture that has supported patriarchy itself.

III. PART III: INTERNATIONAL LAW AND CULTURE

The subordination of women worldwide is maintained by patriarchy, perpetuated by a combination of political and economic power, and punitive and coercive measures. Undergirding it all, the enforcement of women's subordination is in the name of an all-pervasive culture itself. As Gilligan observed:

[C]ulture appears in the unspoken. Culture is the way of seeing and speaking that is so much a part of everyday living that it never has to be articulated. Fish don't know they are swimming in water, until they are a fish out of water. It is when culture shifts that we recognize the ocean in which we have been drenched. What we had taken as natural or taken for granted becomes instead one way of seeing and speaking.²⁵⁶

Those working to elevate, protect, and preserve culture argue that culture is valuable and "the law" must protect it, in our case, from overreach by international human rights law. To test whether culture protection is a code for perpetuating women's inequality, this Part looks at select areas of law to see if culture is indeed preserved and protected in the non-international human rights arena. Part III briefly examines instances in the international realm where claims of cultural protection have been rejected. The World Trade Organization ("WTO"), for example, has not allowed a state to rely on cultural preservation arguments as a basis for violating some other trade obligations.²⁵⁷ And in law and development, where predominantly Western lawyers aim to export the rule of law to the Third World, whether explicitly or not, local culture is changed and not preserved when new laws are introduced. Indeed, some laws are designed to counteract local traditions that are deemed antithetical to the law and development agenda.²⁵⁸

This examination is not meant to be exhaustive. This Article includes it merely to illustrate the main point, which is that culture has been routinely sidestepped and even overridden in certain areas of law, and that the vociferous and righteous call for cultural exceptions to international human rights is suspect. For example, it is noteworthy that the indigenous communities in Canada have battled the government to prevent pipelines from running through their land, which endangers culturally and historically significant markers. The Kweese War Trail that constitutes a "Cultural Heritage Resource" for the Wet'suwet'en Nation in Canada is threatened with destruction to make way for

256. Gilligan, *supra* note 233.

257. *See infra* Part III.

258. *See infra* Part III.

a 6.6 billion Coastal GasLink pipeline to move fracked gas from British Columbia.²⁵⁹ For the tribe, the battle is about the right “to defend their cultural heritage from destruction.”²⁶⁰ First Nations are fighting for a greater voice because, as a representative for the Wet’suwet’en Nation said, “If not, then we are going to lose our culture.”²⁶¹

A. TRADE AND CULTURE

A basic principle of international trade, as encapsulated in the WTO, is that it is good to remove trade barriers such as tariffs, quotas, and, subject to certain restrictions, subsidies because they distort normal trade.²⁶² Eliminating barriers allows each country to specialize in the production of goods and the provision of services in which it has the greatest comparative advantage. Where it lacks comparative advantage, it can turn to imports. The WTO contains three foundational pillars to facilitate the free flow of trade.²⁶³ First, national treatment. In a nutshell, each Member must treat imported products, after they have crossed the border, no less favorably than like domestic products.²⁶⁴ What is considered “like” is subject to much litigation.²⁶⁵ The national treatment principle prohibits discrimination against imported products. Second, the Most Favored Nation (“MFN”) treatment prohibits discrimination by WTO Members favoring imports of like products from certain Member countries.²⁶⁶ Third, tariff

259. Amber Bracken, *They Are Erasing Our History*, THE NARWHAL (Jan. 14, 2020), <https://thenarwhal.ca/they-are-erasing-our-history-indigenous-sites-buried-under-coastal-gaslink-pipeline-infrastructure>. It is not surprising that critical cultural markers would be sacrificed to protect and promote the pipeline, which is critical to Canada’s export of liquified natural gas, a formidable industry valued at 18 billion dollars. *Id.*

260. *Id.*

261. Cherise Seucharan, *Indigenous Artifacts Found in the Path of a B.C. Natural Gas Pipeline Could Be Destroyed—and Provincial Permits Allow for It*, TORONTO STAR (Dec. 26, 2019), <https://www.thestar.com/vancouver/2019/12/26/indigenous-artifacts-found-in-the-path-of-a-bc-natural-gas-pipeline-could-be-destroyed-and-provincial-permits-allow-for-it.html>.

262. John A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 INT’L ORG. 561, 566–78 (1981); CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 15–19 (2009); *WTO In Brief*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm (last visited Jan. 24, 2022); MICHAEL K. YOUNG, UNITED STATES TRADE LAW AND POLICY 68–70 (2001). For a discussion and critique of “normalcy” in trade, see Lan Cao, *Toward A New Sensibility for International Economic Development*, 32 TEX. J. INT’L L. 209, 252–55 (1997); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 546–47 (1987).

263. *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 24, 2022); see also Finlayson & Zacher, *supra* note 262, at 580.

264. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 206 [hereinafter GATT]; Peter M. Gerhart & Michael S. Baron, *Understanding National Treatment: The Participatory Vision of the WTO*, 14 IND. INT’L & COMPAR. L. REV. 505, 507 (2004).

265. Gerhart & Baron, *supra* note 264, at 507; Edward S. Tsai, “Like” is a Four-Letter Word—GATT Article III’s “Like Product” Conundrum, 17 BERKELEY J. INT’L L. 26, 27 (1999).

266. GATT, *supra* note 264, at 196–200; Finlayson & Zacher, *supra* note 262, at 566; *Principles of the Trading System*, *supra* note 263.

bindings. Absent certain allowed exceptions, a Member applying a tariff to an import of another Member cannot exceed the tariff that the importing Member has agreed to or “bound” for the relevant product.²⁶⁷ Article XX of the WTO provides strict rules for Members seeking exceptions to the above WTO disciplines on the grounds of environmental protection or human health, among others.²⁶⁸

Globalization and the spread of Western culture have led to an increase in anxiety about cultural homogenization.²⁶⁹ Some WTO members have thus sought exceptions from WTO discipline described above in the name of culture, which would allow the imposition of trade-restrictive measures on imports to protect local culture and its producers and presumably, also to forestall foreign influence.²⁷⁰ A cultural exception in trade law is premised on the notion that “cultural products are vehicles for symbolic messages that transcend the products’ purely commercial value, such that normal market processes will not be capable of fully capturing their value to society.”²⁷¹

There has been an ongoing global movement to get the international trade community to allow culture-based exemptions from free trade norms.²⁷² In convening the first meeting of the International Network on Cultural Policies in 1998 to recognize culture-based exceptions to free trade, the then Canadian Culture minister argued, “[w]e can’t treat culture like any other commodity in the world . . . [it is] at the very heart of our national identity.”²⁷³ The cultural ministers of seventeen countries proclaimed that “cultural goods and services,

267. GATT, *supra* note 264, at 198–200; Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT’s Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1418 (1994); *Types of Tariffs*, WITS (2010), https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm.

268. *See* Farber & Hudec, *supra* note 267, at 1419.

269. HARRY REDNER, *CONSERVING CULTURES: TECHNOLOGY, GLOBALIZATION, AND THE FUTURE OF LOCAL CULTURES* 2 (2004).

270. TANIA VOON, *CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION* 11 (2007) (erecting trade barriers through additional tariffs and other forms of cultural protectionism stem from the “desire to protect local culture”); J. P. Singh, *Tania Voon, Cultural Products and the World Trade Organization*, 33 J. CULTURAL ECON. 161, 162 (2009) (book review) (“The case for restricting cultural trade has been made and will continue to be made directly and indirectly with reference to US dominance.”); *see id.* at 164 (“My concerns are rooted in the underlying politics of cultural products where it is hard to disentangle the argument regarding the special nature of these products from the knee-jerk reactions to US dominance in these products and the international coalitional politics that call attention to them.”); Report of the Panel, *Panel on Japanese Measures on Imports of Leather*, ¶ 7–9, 21 L/5623 (May 15/16, 1984), GATT B.I.S.D. (31st Supp.), at 94, 95–96, 100 (1985) (Japan’s use of import quotas and import licenses to quantitatively restrict U.S. leather from entering Japan was made on the grounds that import restriction was necessary to defend a cultural minority community, the Dowa, who specialized in making leather products).

271. DAVID THROSBY, *ECONOMICS AND CULTURE* 159 (2001).

272. *See supra* notes 267–69 and accompanying text.

273. Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 37 (2000).

including audiovisual means, deserve special treatment, since they reflect national and regional cultural identities.”²⁷⁴

This effort to carve out a cultural exception has been more successful in regional rather than international agreements.²⁷⁵ The WTO has rejected a cultural exception.²⁷⁶ The WTO’s primary agreement, the GATT, imposes strict free trade disciplines and eliminates quantitative restrictions across the board, subject to narrow, specified exceptions.²⁷⁷ There is no cultural exception under the GATT, as explained below.²⁷⁸ For trade in services, there is somewhat of an accommodation: cultural services are sidestepped—they have “neither been expressly excluded nor included under the national treatment provisions of GATS.”²⁷⁹ Nonetheless, it is reaffirmed, in Article XIX:1 of GATS, that GATS

274. *Id.*

275. For example, Article 107(1) of the EC Treaty prohibits subsidies if they distort competition, an exception is provided for aid to “promote culture and heritage conservation.” Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C83) 91–92. Canada and Mexico have worked to limit cultural imports in bilateral and regional agreements with the United States. Paul, *supra* note 273, at 39. Canada succeeded in inserting a cultural exception in the US-Canadian Free Trade Agreement (“CFTA”) and the North American Free Trade Agreement (“NAFTA”). See VOON, *supra* note 270, at 30–31. Article 2012 of the CFTA defines cultural industries to include the production and distribution of books, periodicals, film, video and audio recordings, radio, television, and cable television. Canada-U.S. Free Trade Agreement, January 2, 1988, 27 I.L.M. 293. Note, however, that the United States is entitled to “offset” the exception in ways acceptable to the United States. VOON, *supra* note 270, at 31. For example, the United States could retaliate against any cultural exception by taking measures against Canadian products in an equivalent amount to the harm suffered by U.S. cultural industry. *Id.* In Nafta II or United States-Mexico-Canada Agreement, Canada has retained an exclusion from national treatment and MFN treatment for its cultural industries. CONG. RSCH. SERV., R44981, THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 31 (2020), <https://fas.org/sgp/crs/row/R44981.pdf>. The Canadian “government imposes Canadian content (“Cancon”) requirements on radio and television broadcasts, cable and satellite diffusion, the production of audio-visual material, film or video recording, and on various print media.” *Id.* The U.S. retains the provision allowing it and Mexico to take reciprocal action. *Id.*

276. Liz Schere, *The Culture War: A Look at the Cultural Exception in International Trade Law*, 40 FORDHAM INT’L L.J. 561, 564 (2017) (“[T]here is no explicit, conspicuous mention of the “cultural exception” in the different WTO agreements.”); see also *id.* at 568–69 (discussing the famous 1997 case, Canada-Certain Measures Concerning Periodicals, and the Panel’s as well as Appellate Body rulings rejecting Canadian claim for a cultural exception); *id.* at 572–73 (discussing the 2009 case, China—Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products where China’s restrictive regulations of certain imported entertainment products were struck down because the WTO essentially refused to recognize a cultural exception); Paul, *supra* note 273, at 51.

277. VOON, *supra* note 270, at 225.

278. See *supra* notes 270, 264–67, 276–77; see also *infra* notes 278–94 and accompanying text.

279. Paul, *supra* note 273, at 36. The GATS which deals with trade in services, as opposed to products, recognizes that trade in services “relate to fundamental domestic regulatory choices.” MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 273 (2nd ed. 1999). Barriers to trade in services are complex and GATS disciplines are less stringent in GATS than in GATT. VOON, *supra* note 270, at 23. There is more protectionism in trade in services, particularly cultural services. *Id.* at 23–24. Members that want to claim an exception for cultural services are allowed to exercise this option by not placing certain services on a liberalization schedule. *Id.* at 225. In other words, the “GATS framework primarily involves a ‘bottom up’ or ‘positive list’ approach, with Members choosing the service sectors in which they are willing to make national treatment or market access commitments.” *Id.*

members are to enter into rounds of negotiations to continue to achieve greater liberalization and that “[t]here shall be no a priori exclusion of any service sector,”²⁸⁰ including service sectors that are at the heart of the culture exception debate: the audiovisual sector.²⁸¹

Because an in-depth examination of trade and culture is beyond the scope of this Article, this Article includes but a few representative cases to make the main point, which is that the WTO’s gestalt is one that favors free trade norms over cultural norms. One of the more well-known cases involves a Japanese law restricting imports of certain types of leather through the use of import licenses and quotas.²⁸² The case was brought by the United States, which was joined by Australia, the European Communities, India, New Zealand, and Pakistan as exporters of leather to Japan.²⁸³ Japan’s system violated GATT Article XI prohibiting quantitative restrictions; its defense rested on the grounds of cultural exemption, that is, that these import restrictions were needed to protect a cultural minority community, the Dowa, who were considered to be the lowest social class since the early seventeenth century and whose traditional tanning and leather work industries were inefficient and uncompetitive and thus needed protection on cultural grounds.²⁸⁴ Japan itself framed its system as a way to reconcile the culture versus trade dilemma. “This was a most serious and important social problem deriving from the fact that a segment of the Japanese people, owing to discrimination based on a class system formed in the process of the historical development of Japanese society, was placed in an inferior position economically, socially and culturally.”²⁸⁵ Scholarly commentary on the case has centered around Japan’s assertions about trade and culture. “Japan contended that without import quotas, the Dowa leather industry would collapse causing severe social and economic dislocation to this oppressed minority community and destroying traditional Dowa culture.”²⁸⁶ Others have noted that Japan’s assertion could be viewed as an attempt to help a threatened group and preserve its cultural way of life.²⁸⁷

The GATT panel held:

[The] special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account . . . [by the Panel] . . . since its terms of reference were to examine the matter ‘in the light of the relevant

280. VOON, *supra* note 270, at 28.

281. *Id.* (“[T]he audiovisual sector is open to negotiation like any other.”).

282. *Panel on Japanese Measures on Imports of Leather*, *supra* note 270, ¶ 7–9 at 95–96.

283. *Id.* ¶ 4, at 95.

284. VOON, *supra* note 270, at 13.

285. *Panel on Japanese Measures on Imports of Leather*, *supra* note 270, ¶ 21(i) at 100.

286. Paul, *supra* note 273, at 52.

287. VOON, *supra* note 270, at 13.

GATT provisions' and these provisions did not provide such a justification for import restrictions.²⁸⁸

In a different case, Japan made another culture-based argument to justify its differential (and lower) tax rates for shochu, a traditional Japanese drink, versus "spirits," such as vodkas, by claiming that the Japanese treated shochu differently.²⁸⁹ Under WTO law, if spirits such as vodkas were considered "like" shochu, then Japan must treat the two alike.²⁹⁰ The European Community argued that European spirits were "like" or "directly competitive" with traditional Japanese alcoholic beverages and thus should be granted "national treatment" as required by Article III of the GATT.²⁹¹ Japan argued that the two products were not "like" or "directly competitive" even if objective factors like end use, physical properties, such as alcoholic content, nature, quality, or similar manufacturing and composition processes of the products would make them look as if they are "like" products.²⁹² The Panel concluded that Japanese shochu and imported spirits were in fact "like" products based on objective criteria and rejected Japan's focus on consumer perspectives and preferences, which are themselves based on tradition.²⁹³ As some scholars observed, "[a]lthough Japan did not specifically refer to 'cultural' concerns, the differential tax scheme could be described as simply a reflection of cultural values and practices with respect to alcohol."²⁹⁴

There is a range of other claims that could be viewed as implicitly about culture or cultural tradition that certain WTO Members wish to protect from free trade norms even if they are not framed in cultural terms.²⁹⁵ "[I]t is highly unlikely that a WTO Member would try to defend its measure on the basis of culture. The reason for this may be primarily that . . . the WTO agreements

288. *Panel on Japanese Measures on Imports of Leather*, *supra* note 270, ¶ 44 at 111.

289. Report of the Panel, *Japan - Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, ¶ 2, L/6216 (Nov. 10, 1987), GATT B.I.S.D. (34th Supp.), at 83, 85–86 (1988). The Panel's conclusions were affirmed by the WTO Appellate Body. Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WTO Doc. WT/DSS/AB/R (adopted on Nov. 1, 1996) at 32.

290. GATT Article 1 states in relevant part "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 264, at 198.

291. *Japan-Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, *supra* note 289, ¶ 3.2(a)–(g) at 88–92.

292. *Id.* ¶ 3.12 at 106.

293. *Id.* ¶ 5.7 at 116.

294. VOON, *supra* note 270, at 14.

295. Schere, *supra* note 276, at 570–73. China attempted to defend its import restrictions where certain audiovisual products are concerned without ever asking explicitly for a "cultural exception." *Id.* at 572–73. It claimed instead that certain cultural products such as audiovisuals can have an impact on public morals and through the public morals exception provided in GATT Article XX(a), its restrictions of such cultural products should be allowed. *Id.* The claim did not succeed. *Id.* at 573.

contain virtually no explicit recognition of culture or the legitimacy of Members' cultural interests or policies."²⁹⁶

In another culture versus trade case before the WTO, *Canada—Certain Measures Concerning Periodicals*, involves Canada's protection of its magazines because of their "intellectual or cultural content."²⁹⁷ The WTO Appellate Body summarized the Canadian position as "[t]he Government reaffirms its commitment to protect the economic foundations of the Canadian periodical industry, which is a vital element of Canadian cultural expression."²⁹⁸ To achieve its stated purpose, Canada restricted the publication of "split-run magazines"²⁹⁹ marketed in Canada by imposing an 80% excise tax on advertising in split-run editions. The United States sued Canada, arguing that the differential tax treatment violated the National Treatment provision of the GATT because it discriminated between two "like" or in the alternative, directly competitive or substitutable products—domestic non-split-run periodicals and imported split-run periodicals.³⁰⁰ Canada argued that the two categories of magazines were not "like" or directly competitive or substitutable products and thus, it could treat the imported (basically American) split runs differently than the domestic magazines.³⁰¹

For Canada, the end use of a magazine rests on the transmission of ideas and culture; for the United States, the end use of a magazine is more than that and includes style, appearance, paper, size, texture, thickness, even scent.³⁰² Thus, the U.S. position is that "there was no essential difference between cultural commodities like magazines or books and other commodities"³⁰³

The WTO Appellate Body reversed the GATT Panel holding that imported split-run periodicals and domestic non-split-run periodicals were "like" products but found that they were directly competitive or substitute products; as such, Canada still could not treat the two products differently, discriminating against the American product.³⁰⁴ Although the dispute was framed in technocratic terms, the underlying issue was one that pitted trade against culture. Using different rationales, both the Panel, which found like products, and the Appellate

296. VOON, *supra* note 270, at 18.

297. *Canada—Certain Measures Concerning Periodicals*, *supra* note 18, at ¶ 3.84.

298. Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997) at 31.

299. Split-run magazines have the same content as the foreign publication (in this case, American) but with advertisements aimed at the Canadian market. *See id.* at 6, 17.

300. *See* Richard L. Matheny III, *In the Wake of the Flood: "Like Products" and Cultural Products After the World Trade Organization's Decision in Canada Certain Measures Concerning Periodicals*, 147 U. PA. L. REV. 245, 260 (1998). *See generally* *Canada—Certain Measures Concerning Periodicals*, *supra* note 18.

301. *See generally* *Canada—Certain Measures Concerning Periodicals*, *supra* note 18.

302. *Id.* at ¶ 3.64–3.70, 3.78.

303. Paul, *supra* note 273, at 48.

304. *Canada—Certain Measures Concerning Periodicals*, *supra* note 273, at 35; Matheny III, *supra* note 300, at 247.

Body, which found directly competitive or substitutable products, rejected the Canadian claim that cultural goods should be exempt from free trade norms and as some have observed, the decision could also be seen as a rejection of “economic protectionism masquerading as cultural.”³⁰⁵

Trade and culture, as are “trade and . . .” issues—trade and environment, trade and labor, trade and human health—is complicated because it entails a clash of, as well as trade-offs between, different sets of values. The discussion in this section is by necessity shorter than a fully nuanced examination of the subject warrants, but again, as previously stated, the purpose is a narrow one—to show that it is not uncommon for culture to be marginalized in international law and to provide a specific instance—trade and culture in the WTO, in which that has been the case.

B. LAW AND DEVELOPMENT AND CULTURE

This Section shows that in law and development, there have been few calls, if any, to preserve traditional culture. As this Subpart will demonstrate, even if not explicitly, rule of law exports,³⁰⁶ whereby “experts” from developed countries exported Western laws to the Third World, have had a culture change component. In other words, when Western laws are transplanted into developing countries, it is not just laws that are exported but sometimes even culture. Yet, there is no outcry from the pro-culture camp that, for example, the establishment of contracts law, corporate law, or securities law, is disrespectful of local culture, as there is in the international human rights area.

These projects have more or less followed a standard trajectory that focuses on enacting formal laws and establishing robust institutions to support political and economic development.³⁰⁷ But as this Part will show, despite the appearance of a contained and restricted framework in which “only” laws and institutions will be dealt with, there was, nonetheless, an implicit cultural undercurrent to the rule of law agenda in which culture would at the very least be changed as a byproduct of newly introduced laws.

Development economists questioned “whether traditional institutions, attitudes and values are likely to block or to promote economic growth.”³⁰⁸ “Not

305. Paul, *supra* note 273, at 43.

306. Rule of law reforms have also been referred to as law and development. That is, can law be used to support economic and political development in the Third World. See generally David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972).

307. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 75 (2006); RACHEL KLEINFELD BELTON, COMPETING DEFINITIONS OF THE RULE OF LAW: IMPLICATIONS FOR PRACTITIONERS 16–17 (2005).

308. Jean-Philippe Platteau, *The Role of Culture in Development: An Overview*, in CULTURE, INSTITUTIONS, AND DEVELOPMENT: NEW INSIGHTS INTO AN OLD DEBATE 3 (Jean-Philippe Platteau & Robert Peccoud eds., 2011).

only must economic organization be transformed, but social organization . . . must also be modified so that the basic complex of values and motivations may be more favourable for development.”³⁰⁹ Development economists like Sir Arthur Lewis believed traditional culture would evolve with economic development: “traditional values and attitudes, whenever they are hostile to economic advancement, will eventually adapt themselves to new economic opportunities.”³¹⁰ Against this economic backdrop, law and development lawyers in the first wave of law and development efforts, spanning from the 1960s to the 1970s, strived to replace traditional legal systems with more modern rules and institutions.³¹¹ Western reformers saw traditional legal systems, encompassing different laws for different villages, tribes, or classes, as lacking in purposiveness and rationality,³¹² “historically obsolete and culturally inapposite,”³¹³ and thus sought to replace traditional law with modern law—fair, rational, and universal rules³¹⁴—which reformers saw as the “functional prerequisite of an industrial economy.”³¹⁵ It was widely recognized among first wave law and development experts that modernization of culture was synergistic with the introduction of modern law.³¹⁶ Law was a tool to create and maintain markets and to change traditional societies.³¹⁷ Modern law would be an instrument and a “force which can be molded and manipulated to alter human behavior and achieve development.”³¹⁸ First wave reformers also wanted to introduce not only formal law but also a sense of legal culture which they believe is necessary to create cultural buy-in and support for law.³¹⁹

309. *Id.* (citation omitted).

310. *Id.* at 4.

311. Trubek, *supra* note 306, at 5.

312. *Id.*

313. Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMPAR. L. 75, 92 (2008).

314. Rene David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Code in African Countries*, 37 TUL. L. REV. 187, 192, 203 (1962–1963); Trubek, *supra* note 306, at 9.

315. Trubek, *supra* note 306, at 6.

316. Samuel Huntington, *The Change to Change: Modernization, Development, and Politics*, 3 COMPAR. POL. 281, 285 (1971) (discussing modernity versus tradition and the duality as “the latest manifestation of a Great Dichotomy between more primitive and more advanced societies which has been a common feature of Western social thought for the past one hundred years.”); Brian Z. Tamahana, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470, 472 (1995) (book review) (describing how Western experts prescribed the establishment of Western institutions in traditional societies to change those societies); Mary Packard-Winkler, *Putting the Culture Back into Development*, 13 FLETCHER F. WORLD AFF. 251, 252 (1989) (describing legal development as a form of cultural intervention, whether legal experts recognized it or not); David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74, 76 (David M. Trubek & Alvaro Santos eds., 2006) (describing how first wave practitioners sought “to transform legal culture and institutions through educational reform and selected transplant of ‘modern’ institutions.”).

317. Trubek, *supra* note 306, at 6–7.

318. Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of “Scholar in Self-Estrangement,”* 25 AM. J. COMPAR. L. 492, 505–06 (1977).

319. Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC’Y REV. 29, 34 (2000).

But even when such cultural objective is not plainly acknowledged, cultural transformation is likely to be the result, intended or not, of exporting laws.³²⁰ For example, when first wave reform failed and the second wave took hold in the 1980s with the fall of the Soviet Union, legal reformers focused less on the modern culture aspects of reform and more on market development to bring former Soviet-bloc countries into the international economic system.³²¹ The laws of corporation and other business associations, securities, contract, and property rights were and are regularly included in the conventional rule of law template.³²² Reformers might believe they are “only” doing law. However, in reality, they are in fact doing “law and culture” because the laws they are working to establish in a country implicitly create changes in values and traditions, even deeply entrenched ones.³²³

Securities and contract laws, for example, which are relatively uncontroversial exports in law and development circles, actually have deep implications for certain societies.³²⁴ One of the main differences between the developed and the developing world is not just that one is economically advanced and the other economically less advanced. It is, rather, that:

[That] difference lies in the absolutist objectivity of the developed world versus the relativist subjectivity of the developing world. In other words, developed societies have the demonstrated capability to create, grasp, and rely on a belief system of abstract ideals (e.g., equal justice for all, equal

320. See Trubek, *supra* note 306, at 21–22; see also *infra* notes 321–30 and accompanying text. In addition, law’s relationship with culture has been amply discussed by various scholars. See, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* 165 (1992) (“Does law within a society reflect dominant cultural norms? In one sense, to ask this question is to answer it. Unless law is imposed from outside by an alien power, a society’s law will reflect its patterns of life and morality.”); OSCAR G. CHASE, *LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* 46 (2005) (“[I]nstitutions reflect the deeply held normative values, authority relations, and metaphysics of the society that produced them.”); LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* xii (2006) (“[L]aw is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture.”).

321. THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 165, 168 (1999) (describing the “Rule of Law Assistance Standard Menu” that includes reforming institutions, rewriting laws, upgrading the legal profession through bar association support); Stephen Holmes, *Can Foreign Aid Promote the Rule of Law?* 8 E. EUR. CONST. REV. 68, 68 (1999). Notice the technical nature of the work. See RUMU SARKAR, *DEVELOPMENT LAW AND INTERNATIONAL FINANCE* 113 (2002). Contrast this with the first wave reformers who were influenced by development economists and modernist theorists who were interested in the cultural aspects of development, asking questions such as “whether traditional institutions, attitudes, and values are likely to block or to promote economic growth.” Platteau, *supra* note 308, at 3; see also *id.* at 4 (discussing Sir Arthur Lewis, the Nobel Laureate economist who stated: “traditional values and attitudes, whenever they are hostile to economic advancement, will eventually adapt themselves to new economic opportunities.”).

322. CAROTHERS, *supra* note 321, at 168; Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* 10–11 (Carnegie Endowment for Int’l Peace, Working Paper No. 41, 2003).

323. See *supra* notes 319–22 and accompanying text; see *infra* notes 324–32.

324. See *supra* notes 312–22 and accompanying text.

application of the law, due process, democratic representation and governance.)³²⁵

By contrast, developing societies are organized around relationships, not abstract principles, which means that it is expected that loyalty is to be reserved for “families, patrons, rulers, and ethnic or religious identities”³²⁶

In fact, as communitarian critics of the UDHR have repeatedly claimed, there are thick and thin societies.³²⁷ So when Western-style securities laws are introduced into developing countries and trading on the basis of inside information is prohibited, in a hypothetical posed by the law and development scholar Rumu Sarkar, a Jordanian corporate insider who comes into possession of inside information would be faced with a dilemma:

It may be the perceived duty of such a corporate insider to provide his family and associates with the information and the means by which to enrich themselves. . . . Thus, adhering to a legal regime where insider trading is a criminal offense may be seen as incomprehensible, alien, bizarre, and in conflict with the mores and expectations of Jordanian society.³²⁸

Sarkar explained that Western lawyers should not assume that criminalizing insider trading is self-evident; and that for the new law to be accepted and take root in Jordanian society, Western experts need to come “to terms with the underlying cultural mores that are affected (or offended) by this proposed new legal practice.”³²⁹

As this Article shows below, similarly, contract law interfaces with traditional cultural values as well. For example, a Vietnamese law professor I interviewed in Hanoi insisted that personal trust still is a core principle in contracts, and he would not enter into a contract with any person unless the other person had acted dutifully towards her or his parents.³³⁰ And yet, going by that traditional standard, contracts could not be widely entered into and commercial transactions would be limited.³³¹ It is obvious that contract law facilitates the transition from *gemeinschaft* to *gesellschaft*,³³² from community to society, and

325. RUMU SARKAR, INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS & GLOBAL FINANCE 13 (2009).

326. *Id.*

327. *See supra* notes 2–7 and accompanying text.

328. SARKAR, *supra* note 325, at 13.

329. *Id.*

330. Interview with Vietnamese law professor, Hanoi Law School, Hanoi, Vietnam (1991).

331. Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1519 (2006) (“We argue that at low levels of economic development, informal contract enforcement mechanisms may be reasonably good substitutes for formal contract enforcement mechanisms. At higher levels of development, however, informal contract enforcement may become an increasingly imperfect substitute due to the presence of large, long-lived, highly asset-specific investments, as well as the prevalence of increasingly complex trade in goods and services that often occurs outside of repeated exchange relationships.”).

332. *See generally* FERDINAND TÖNNIES, COMMUNITY AND CIVIL SOCIETY (Jose Harris ed., 2001).

in the process loosening the traditional bonds so that people can enter into economic transactions even with those from outside their clans or familiar circles and with whom they have no prior relationship of trust. Contract law introduced into thick societies facilitates market participation between and among strangers, loosening thick society relational bonds.³³³

“Merely” reforming institutions or introducing formal laws into developing countries implicitly entails a cultural agenda and “is highly dependent on cultural factors.”³³⁴ Even an impartial judicial system, which is one of the most noncontroversial rule of law agenda items, requires a culture that values impartiality because impartiality is a culturally-embedded value, as shown in the following encounter. For example, Confucianism values personalistic relationships based on status and social ranking³³⁵ over abstract principles. In the *Analects of Confucius*, the Duke of Sheh recounted that his subjects were morally upright using the following example: “If their father have [sic] stolen a sheep, they will bear witness to the fact.”³³⁶ But Confucius disapproved, as shown in the following quote: “Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this.”³³⁷

It is known in law and development circles that “[l]egal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of these societies”³³⁸ Thus, whether implicitly or explicitly, legal reformers are changing traditional cultural values when they work to export and establish new legal systems, laws and institutions included.³³⁹ It is usually seen as a virtue to strive for the principle of equality before the law, even if doing so might shake up traditional cultural values.³⁴⁰ Take a concrete example: poverty.

333. Trebilcock & Leng, *supra* note 331, at 1520–23; Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 388–89 (2004) (formal contract law diluting informal contractual relationships).

334. BELTON, *supra* note 307, at 10.

335. Li Ruohui, *The Era of Prefectures and Counties: An Inquiry into the Power Structure and State Governance in Ancient Chinese Society*, 1 J. CHINESE HUMANITIES 67, 70 (2015) (describing how Confucianist principles favor “treat[ing] people differently according to their superior or inferior social status, noble or humble position, senior or junior age, or closeness of relation to someone else” whereas legalist principles favor the establishment of “a uniform and standardized law, which aims at equality and homogeneity”).

336. LAO-TSE [LAO ZI], CONFUCIUS, THE ANALECTS – 13 (James Legge trans., 1901), <https://china.usc.edu/confucius-analects-13>.

337. *Id.*

338. Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65, 72 (1996).

339. *See id.*

340. Susan Rose-Ackerman, *Corruption: Greed, Culture and the State*, 120 YALE L.J. FORUM (Nov. 10, 2010), <https://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state>. Rose-Ackerman studied

It is not just economic but also has a cultural dimension.³⁴¹ As Martha Nussbaum explained:

Poverty alone does not cause women to die in greater numbers than men. When there is scarcity, custom frequently decrees who gets to eat the little there is, and who gets taken to the doctor. And custom is always crucial in determining who gets to perform wage labour outside the home, an important determinant of general status in the family and community.”³⁴²

There is no normatively sound defense of this kind of cultural preference and, not only should it be critiqued as a violation of obligations under the UDHR, it should be changed as exhorted by CEDAW.

The failures of many rule of law projects can be attributed to many factors, but this debate has not revolved around whether or not traditional culture should be preserved against changes wrought by the establishment of new laws and new institutions. Rather, critique, from inside and outside the field, has centered on why changes have not been ushered in and taken root,³⁴³ not on how to insulate developing countries from change, culture or otherwise.

IV. PART IV: HETEROGENEITY IN CULTURE

This Part examines the idea of culture itself. This Part shows that culture is a loaded word and subject to contestation. It is not monolithic or homogeneous, with buy-in from everyone within it.

This Part has two primary objections to the way culture has been understood and deployed. First, culture is not “pure” in the sense that there is one “authentic” culture that must be guarded from change. Culture is not fixed but is fluid and ever-changing. Rather, it is layered in heterogeneity, its boundaries pushed and pulled from within by those seeking voice, representation, and inclusion. To lob the word culture as if it were one solid,

how “payments or gifts given to officials and the mutual exchange of favors, including electoral quid pro quos . . . [may be derived from] traditions that emphasize loyalties to friends, family, region, tribe, religion, or ethnic group. These practices privilege informal, friendly social contacts over arms-length, rule-bound transactions.” *Id.* Modern states and rule of law projects attempt to institute formal rules that would lessen corrupt practices, for example, even if those practices have as their impetus a desire to benefit in-group members. *See id.* Equality and non-discrimination would mean that judges who rule cannot favor in-group members who appear before them. As Rose-Ackerman noted, “All modern states are dominated by a formal set of rules and laws administered by public officials and influenced by the choices of political leaders, whether elected or appointed. States may incorporate values and practices that clash with a society’s traditions. If nepotism and payments in money or in kind are formally illegal, there may be a mismatch between traditional practices, on the one hand, and efforts to develop impersonal bureaucratic processes and democratic electoral systems, on the other.” *See id.*

341. *See id.*

342. Martha C. Nussbaum, *Introduction*, in *WOMEN, CULTURE AND DEVELOPMENT 3* (Martha Nussbaum & Jonathan Glover eds., 1995).

343. David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflection on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062, 1062–64.

insular, and discrete entity is to miss the very thing about culture that makes it worth appreciating—its richness, its evolution, its complexity. Thus, there is no one guardian of culture or one leader whose proclamation of culture is sacrosanct.

Second, because culture is not one homogeneous mass but rather subject to dissent, reevaluation, and reinterpretation, there is no good normative reason why the version of culture that international human rights law needs to kowtow to is the version that results in the perpetuation of inequality contrary to the universal norms of the UDHR.

In today's globalized world especially, the notion that there is an "authentic" culture is not only wrong, but also anachronistic, and as the philosopher Martha Nussbaum put it, "the ideas of every culture turn up inside every other, through the internet and the media. The ideas of feminism, democracy, and egalitarian welfarism, are now 'inside' every known society."³⁴⁴ The Nobel Laureate in Economics, Amartya Sen, has also examined the relationship between culture and freedom and has concluded as follows: culture is not "independent, unchanging and unchangeable"³⁴⁵ and is instead "nonhomogeneous, nonstatic, and interactive."³⁴⁶

Indeed, even before the age of globalization, culture did not exist in its own impermeable space, as culture is porous and available for "borrowing."³⁴⁷ It would be difficult to take one culture and separate out what is "real" to it and what is "foreign." Even when one uses a shorthand term like Indonesian culture, it does not mean that it is monolithic. Indonesia, geographically situated along ancient trading routes, is steeped in Islamic tradition but has also been influenced by Hindu, Buddhist, and Confucian cultures.³⁴⁸ Indonesia itself has 300 ethnic groups and has been "shaped by long interaction between original indigenous customs and multiple foreign influences."³⁴⁹ A culture like that of Indonesia has accumulated centuries of culturally disparate and diverse strands and layers, and

344. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 49 (2000).

345. Amartya Sen, *How Does Culture Matter?*, in *CULTURE AND PUBLIC ACTION* 37, 44 (Vijayendra Rao & Michael Walton eds., 2004).

346. *Id.* at 44.

347. The Nobel Laureate in economics Amartya Sen argued convincingly that cultures are not insular even if "there seem to be many supporters of the belief—held explicitly or by implication—that the fates of countries are effectively sealed by the nature of their respective cultures." Sen, *supra* note 345, at 42. "[C]ultures interact with each other and cannot be seen as insulated structures." *Id.* at 44. Because culture is multi-layered and subject to influence from within and without, it is false to claim that there is one authentic culture. This claim should have "no bite in the modern world, where the ideas of every culture turn up inside every other, through the internet and the media. The ideas of feminism, of democracy, of egalitarian welfarism, are now 'inside' every known society." NUSSBAUM, *supra* note 344, at 49 (2000).

348. *Cultural Heritage*, BINUS U. GLOB., <https://global.binus.ac.id/about-indonesia/cultural-heritage> (Nov. 22, 2016); Sen, *supra* note 345, at 42.

349. *Cultural Heritage*, *supra* note 348.

it is impossible to pick out one practice and proclaim it to be authentic and the others inauthentic.³⁵⁰ As Sen put it, “[c]ultural determinists often underestimate the extent of heterogeneity within what is taken to be ‘one’ distinct culture.”³⁵¹

Cultures throughout history have changed and evolved, and their evolution can be the result of many causes, including foreign.³⁵² Cultures have mixed and mingled through hybridization and creolization.³⁵³ Ideas might originate from a certain culture, but they do not belong only to that culture. For example:

[The] ideas of Marxism, which originated in the British Library, have influenced conduct in Cuba, China and Cambodia. The ideas of democracy, which are not original to China, are by now extremely important Chinese ideas. The ideas of Christianity, which originated in a dissident sect of Judaism in a small part of Asia Minor, have by now influenced conduct in every region of the globe, as have the ideas of Islam.³⁵⁴

Even encounters that are initially threatening, coming from an external source, can result in changes that are now part of the internal cultural fabric. Turks, for example, no longer view as alien or anti-Turkish French transplants such as specialized secular courts for commercial disputes.³⁵⁵

The idea that culture needs to be protected gained traction in 1947 when the Executive Board of the American Anthropological Association (the “AAA”) declined to endorse the UDHR because it was concerned about ethnocentrism, citing the history of colonialism and Western exaggeration of and intolerance of differences.³⁵⁶ As discussed below, it is important to understand the imperial and colonial context in which this repudiation of the UDHR occurred. The 1947

350. Sen, *supra* note 345, at 42; *see also id.* at 49–52 (discussing multi-layered cultural and religious strands in India, Korea, China, Japan).

351. Sen, *supra* note 345, at 43.

352. *See* JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 66 (1999) (describing how the Japanese responded to American occupation and viewed American-imposed changes as derived from “the agents of a revolution from above.”). Indeed, the Americans, supported by the defeated Japanese, “set about doing what no other occupation force had done before: remaking the political, social, cultural, and economic fabric of a defeated nation, and in the process changing the very way of thinking of its populace.” *Id.* at 78; *see* Timur Kuran, *Cultural Obstacles to Economic Development: Often Overstated, Usually Transitory*, in *CULTURE AND PUBLIC ACTION* 115, 131 (Vijayendra Rao and Michael Walton eds., 2004) (describing how “foreign contacts perceived as cultural threats” have created changes in cultural attitudes and preferences as well as setting “the stage for a series of reforms critical to economic development.”); Sen, *supra* note 345, at 47 (describing how South Korea intentionally refused to “rely just on its traditional culture . . . [and] followed lessons from abroad to use public policy to advance its backward school education.”). *See generally* SHELDON GARON, *MOLDING JAPANESE MINDS* (1997).

353. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 15 (2006).

354. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 48–49 (2000).

355. Kuran, *supra* note 352, at 131–32.

356. Executive Board, American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 542–43 (1947); Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association 1947-1999*, 23 HUM. RTS. Q. 536, 536–37 (2001).

AAA saw how Europeans exploited differences to justify colonial conquest: “In the history of Western Europe and America, however, economic expansion, control of armaments, and an evangelical religious tradition have translated the recognition of cultural differences into a summons to action.”³⁵⁷

Since 1947, even as the AAA has reiterated its “ethical commitment to the equal opportunity of all cultures, societies, and persons to realize this capacity in their cultural identities and all social lives,”³⁵⁸ it has also committed in a 1991 Declaration to:

Build[] on the Universal Declaration of Human Rights (UDHR), the International Covenants on Civil and Political Rights, and on Social, Economic, and Cultural Rights, the Conventions on Torture, Genocide, and Elimination of All Forms of Discrimination Against Women, and other treaties which bring basic human rights within the parameters of international written and customary law and practice.³⁵⁹

Indeed, the AAA additionally declared: “People and groups have a generic right to realize their capacity for culture, and to produce, reproduce and change the conditions and forms of their physical, personal and social existence, so long as such activities do not diminish the same capacities of others.”³⁶⁰ As Karen Engle noted in her assessment of the 1991 Declaration, “the idea here is twofold, that cultures are not static or monolithic and that the limit of tolerance is intolerance.”³⁶¹

International human rights law should not succumb to dubious cultural protection claims, allowing itself to be

Enlisted on the side of traditionalists and fundamentalists who turn to law to reinforce their traditional stronghold over a community. Seeing their power threatened by forces such as globalization and modernization, increasingly leaders of cultural groups seek to use the ‘right to culture,’ the ‘right to religion,’ the ‘freedom of association’ and the right to ‘self-determination’ to suppress internal change and preserve the status quo.³⁶²

In 2003, the South African Law Commission, recognizing that South Africa has a tradition of tribal/customary courts alongside modern statutory courts, urged that customary courts be expanded.³⁶³ But in deference to universal human rights norms, it also urged that although the composition of

357. Executive Board, American Anthropological Association, *supra* note 356, at 540.

358. *Declaration on Anthropology and Human Rights*, AM. ANTHROPOLOGICAL ASS’N (June 1999), <https://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=1880>.

359. *Id.*

360. *Id.*

361. Engle, *supra* note 356, at 556.

362. Madhavi Sunder, *(Un)disciplined Response*, 26 POL. & LEGAL ANTHROPOLOGY REV. 77, 83 (2003).

363. SOUTH AFRICAN LAW COMMISSION, PROJECT 90, CUSTOMARY LAW: REPORT ON TRADITIONAL COURTS AND JUDICIAL FUNCTIONS OF TRADITIONAL LEADERS xi (2003).

customary courts should “be in accordance with the customary law of the area,” it is imperative that consideration be accorded to “the constitutional values of democracy and equality.”³⁶⁴

Cultural norms that prefer boys over girls in myriad ways, ranging from access to education, food, medical care, life’s opportunities, labor force participation, etc., cannot be beyond the scope and scrutiny of human rights law merely because those norms are considered by cultural traditionalists to be authentic and immutable. While one might expect authoritarian leaders to “assert that human rights violate the fundamental cultural principles of a nation or a religion and therefore cannot be adopted,”³⁶⁵ one would also expect the international human rights community to object to such assertions whenever culture is used as a weapon against equality, freedom, and human dignity or to preserve the status quo at the expense of women and children,³⁶⁶ or enforce cultural homogeneity and orthodoxy over cultural dissent.³⁶⁷ The Turkish American economist Timur Kuran has written extensively about the dangers of “cultural lock-in”³⁶⁸ and argued that “[t]here are sound reasons . . . for denying present cultures the *blanket* protections often demanded in the name of multiculturalism.”³⁶⁹ For example, footbinding of women was a longstanding tradition in China; it began fifteen hundred years after the death of Confucius and was considered a sign of privilege.³⁷⁰ Although the Qing dynasty tried to eradicate it when it came to power in 1644, the practice became even more popular despite multiple imperial edicts banning it.³⁷¹ This seemingly entrenched cultural practice finally ended when China became more engaged with the outside world and Chinese elites turned against it “because it was a source of national shame.”³⁷² As China tried to take its place on the global stage, footbinding, once supposedly a revered tradition, became associated with the old, mangled China, and Chinese reformers and modernists succeeded in changing the meaning of this long-lasting cultural norm.³⁷³

Cultural traditionalists deem challenging such oppressive norms wrong and illegitimate and insulate changes in the name of cultural diversity, even if these

364. *Id.*

365. MERRY, *supra* note 353, at 14.

366. See Janet E. Halley, *Culture Constraints*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 100, 100–04 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999); see also Susan Moller Okin, *Part 1: Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).

367. Yael Tamir, *Siding with the Underdogs*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 47–48 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds. 1999).

368. Kuran, *supra* note 352, at 117.

369. *Id.*

370. KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* 65 (2010).

371. *Id.* at 69.

372. *Id.* at 91–102.

373. *Id.*

norms are practices that curtail women's autonomy, mobility, freedom, or equality.³⁷⁴ Despite claims to the contrary, it is the cultural traditionalists who are in fact in favor of cultural homogeneity (one authentic culture), ironically defending homogeneity and so-called purity using the language of cultural diversity.

The insistence on and promotion of cultural purity are supported by claims, usually by so-called cultural leaders, that culture change means exploitation by outsiders and that internal dissenters are illegitimate if they receive external support.³⁷⁵ And yet, cultural encounters are bound to involve actors who are both internal to, and external from, the culture at issue, to be “analyzed in the context of national and transnational processes”³⁷⁶ To return to the footbinding example, the push to change the thousand-year-old tradition of female footbinding had internal as well as external stakeholders.³⁷⁷ The Chinese knew full well that “foot-binding produced suffering and debility. Foot-binding was done to young girls, crushing the four smaller toes under the sole and

374. The notion that anti-female traditional or cultural practices should be changed has been met with much resistance among many states. The fact that such practices need to be eradicated is reflected in the ratification by many states of the Convention on the Elimination of Discrimination Against Women, Dec. 18, 1979, pmb., opened for signature, Mar. 1, 1980, 1259 U.N.T.S. 13. CEDAW, *supra* note 22. CEDAW obligates state parties to change customary, cultural and religious laws premised on the inequality of the sexes. *See id.* States are to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either the sexes or on stereotyped roles for men and women.” *Id.* The fact that resistance to such changes is strong and entrenched can be seen in the fact that many ratifying states have nonetheless made reservations from many CEDAW obligations. *See* UNITED NATIONS, DECLARATIONS, RESERVATIONS, OBJECTIONS AND NOTIFICATIONS OF WITHDRAWAL OF RESERVATIONS RELATING TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (May 20, 2008), <https://digitallibrary.un.org/record/630774?ln=en>. Middle Eastern and Islamic countries such as Bangladesh, Egypt, Iraq, Kuwait, Malaysia, Maldives and Morocco claimed their reservations were necessary because parts of CEDAW were contrary to sharia. *See id.* India, Kuwait, Morocco, Niger, Singapore, and Tunisia made reservation based on customary and cultural mores. *See id.* Even as the United Nations have called for states to ratify CEDAW without reservations, see Report of the Fourth World Conference on Women, section 230c, U.N. Doc.A/CONF.177/20 (1995), the states subject to this pressure have retaliated by lobbing charges of cultural imperialism. Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & FOREIGN AFF. 237, 271 (2000). The Algerian-based nongovernment organization Women Living Under Muslim Laws observed, “in the name of the right to difference, they are prepared to support any practice, be it totally unjust and against the common understanding of human rights, if so-called ‘authentic leaders’ of the community justify it by reference to culture or religion.” Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1440 (2003).

375. Kuran, *supra* note 352, at 126 (describing how local cultural protectionists work to impede change by delegitimizing it as Western, “[g]iven the West’s influence on global intellectual trends, such interpretations have given cultural protectionists within underdeveloped countries a rationale for resisting modernization”); Sen, *supra* note 345, at 52–55 (describing how opponents of cultural change use the language of “imperialism” and Westernization to delegitimize change).

376. Merry, *supra* note 171, at 67.

377. Kwame Anthony Appiah, *The Art of Social Change*, N.Y. TIMES (Oct. 22, 2010), <https://www.nytimes.com/2010/10/24/magazine/24FOB-Footbinding-t.html> (describing Chinese intellectuals’ efforts to eradicate the practice as early as the Song and Qing dynasties, in the years 960–1279 and 1644–1911 respectively); *see supra* notes 374–76 and accompanying text.

compressing the rear of the anklebone.”³⁷⁸ Ninety-nine percent of women in China born before 1890 had bound feet—they were

[a] sign of status for women who could afford not to work in the fields or walk to market; the bound foot was a sign and instrument of chastity too, by limiting the movements of women. And you can’t overstate the force of convention: Chinese families bound their daughters’ feet because that was the normal thing to do.³⁷⁹

A cultural practice that began as early as the Song dynasty in 960 was met with serious and effective resistance only in the 1860s when Christian missionaries worked with Christian women who agreed to join the Quit-Footbinding Society.³⁸⁰ A few years later, the Confucian scholar and reformer Kang Youwei founded the Unbound Foot Association which allied itself with other anti-footbinding English organizations like the Natural Foot Society.³⁸¹ Members agreed not to bind their daughters’ feet and to not allow their sons to marry women with bound feet; thus, “a mixture of campaigning outsiders and modernizing insiders built a national movement for change.”³⁸² The synergy between the two groups made success possible, and it would be inaccurate to describe a process as inauthentic just because there were external stakeholders to the movement.³⁸³

In an even more problematic way, the argument that “traditional” culture must be defended from Western encroachment is based on a false foundational assumption—that certain values (such as those in the UDHR) are external to certain traditional societies and belong only to the West.³⁸⁴ Even the categories “Islamic” versus “Western” reveals “an impoverished vision of humanity as unalterably divided. In fact, civilizations are hard to partition in this way, given the diversities within each society as well as the linkages among different countries and cultures.”³⁸⁵ In the Islamic world, for example, there were two Muslim emperors, Akbar and Aurangzeb, of the Mogul dynasty in India.³⁸⁶ Aurangzeb instituted strict policies to convert Hindus into Muslims, using the taxing system to tax non-Muslims.³⁸⁷ By contrast, Akbar, in the 1500s, ensured that his court was pluralistic and multiethnic and proclaimed that no one “should be interfered with on account of religion” and that “anyone is to be allowed to

378. Appiah, *supra* note 377.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. APPIAH, *supra* note 370, at 71–72.

384. SEN, *supra* note 20, at 232–48.

385. Amartya Sen, *A World Not Neatly Divided*, N.Y. TIMES (Nov. 23, 2001), <https://www.nytimes.com/2001/11/23/opinion/a-world-not-neatly-divided.html>.

386. *Id.*

387. *Id.*

go over to a religion that pleases him.”³⁸⁸ For cultural purists or fundamentalists, would Akbar be considered inauthentic? Is it possibly true that tolerance and religious diversity are not and have never been part of Islamic tradition or that they are incompatible with Islam? During Europe’s so-called Dark Ages, the Iberian Peninsula flourished and “the Ottoman Empire prospered not simply because of its armies, but because it was also an empire of ideas, in which Muslim art and technology were enriched by Jewish and Christian contributions.”³⁸⁹

Ideas associated with the international human rights movement are not solely ideas that belong to the West. As already discussed in Part I, the drafters of the UDHR and members of UNESCO consulted with leaders and philosophers from many cultural traditions who agreed that the rights and values in the UDHR were those that also existed in their traditions.³⁹⁰ Emperor Akbar was a supporter of religious freedom and tolerance during a period of history when Europe was in the midst of the Inquisitions.³⁹¹ In India, in the third century BC, Emperor Ashoka mandated respect for all religious sects.³⁹² He also adopted the principle of judicial independence and appointed “dharma ministers” who were exhorted to pay heed to the needs of women and those in marginalized communities.³⁹³ Religious freedom is not only a Western value,³⁹⁴ but also has been part of Islam’s history. That it is now an issue again in many Islamic countries is not because of Western imposition of Western values, but because of an “internal struggle within Islam to re-examine its texts and articulate a path for how one can accept pluralism and modernity.”³⁹⁵ Kofi Annan, former Secretary-General of the United Nations who was from Ghana, has also condemned the notion that only certain societies have a monopoly on the values expressed in the UDHR such as human freedom and basic equality under the law.³⁹⁶ The notion that certain societies are so culturally different that they cannot accept the UDHR is, as Secretary-General Annan stated, “truly

388. *Id.*

389. Kofi Annan, *Kofi Annan Calls for End to Resentment, Stereotypes, Preconceptions Upon Receiving Alliance of Civilizations Report* (Nov. 13, 2006), <https://www.un.org/sg/en/content/sg/speeches/2006-11-13/kofi-annan-calls-end-resentments-stereotypes-preconceptions-upon>.

390. *See supra* Part I.

391. SEN, *supra* note 20, at 238–39; Sen, *supra* note 385.

392. SEN, *supra* note 20, at 235–36.

393. LAN CAO, CULTURE IN LAW AND DEVELOPMENT: NURTURING POSITIVE CHANGE 490 (2015).

394. *See generally* NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY (2003).

395. Thomas L. Friedman, *Foreign Affairs: The Real War*, N.Y. TIMES (Nov. 27, 2001), <https://www.nytimes.com/2001/11/27/opinion/foreign-affairs-the-real-war.html>.

396. Kofi Annan, *Nobel Lecture*, UNITED NATIONS (Dec. 10, 2001), <https://www.un.org/sg/en/content/sg/speeches/2001-12-10/nobel-lecture-delivered-kofi-annan>.

demeaning . . . of the yearning for human dignity that resides in every African heart.”³⁹⁷

Moreover, one can take the position that if something is good, does it really matter where it came from? As a Chinese dissident rhetorically asked, if one is imprisoned, would one not ask for one’s rights because rights might be a Western concept?³⁹⁸ Whether or not a value or a right is indigenous to Indian culture did not weigh heavily on the minds of the drafters of India’s Constitution.³⁹⁹ They viewed certain basic rights as universal and incorporated basic egalitarian and pluralistic commitments into the Constitution, drawing from so many constitutions in the world that critics cautioned that such a Constitution “will ‘break down soon after being brought into operation.’”⁴⁰⁰ Despite such criticism, India’s Constitution drafters believed that “India should be rightfully able to benefit from the world’s intellectual heritage.”⁴⁰¹ “What the Indian Constitutionalists recognized is that the Enlightenment ideals of democracy, equality, reason, and dissent are not and cannot be the intellectual properties of Western nations alone, but are rightfully the treasures of the world.”⁴⁰² A principle or value is judged not by its cultural origin but “by its manifest use and enjoyment.”⁴⁰³

Rabindranath Tagore, who received the Nobel Prize in literature in 1913, said: “Whatever we understand and enjoy in human products instantly becomes ours, wherever they might have their origin.”⁴⁰⁴ According to Sen, Tagore too refused to peddle in the theme of inevitable civilizational clashes and opposed insulating cultures from outside influence.⁴⁰⁵

As Part I demonstrated, this basic view—that differences between what is “inside” a culture and what is “outside” a culture has been exaggerated and what is common among all human beings has not been sufficiently understood and acknowledged and supported—was one of the driving forces that unified drafters of the UDHR and solidified their commitment to forge a document that provides a basic floor of universal rights.⁴⁰⁶ The UDHR rests on a confidence in the

397. Kofi Annan, *Address by Kofi Annan to the Annual Assembly of Heads of State and Government of the Organization of African Unity (OAU)*, UNITED NATIONS (June 2, 1997), <https://www.un.org/sg/en/content/sg/speeches/1997-06-02/address-kofi-annan-annual-assembly-heads-state-and-government>.

398. See sources cited *supra* note 10.

399. Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891, 892–93 (2005).

400. *Id.* at 899.

401. *Id.*

402. *Id.*

403. Sen, *supra* note 345, at 54.

404. Amartya Sen, Banquet Speech at the Nobel Banquet (Dec. 10, 1998), <https://www.nobelprize.org/prizes/economic-sciences/1998/sen/speech>.

405. *Id.*

406. Sen, *supra* note 385 (“To talk about ‘the Islamic world’ or ‘the Western world’ is already to adopt an impoverished vision of humanity as unalterably divided. In fact, civilizations are hard to partition in this way,

human capacity to know and understand—including through conscience—that all human beings are entitled to dignity and equal rights.⁴⁰⁷

As Article 1 affirms: “All human beings . . . are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁴⁰⁸ In Chinese, the word “ren” was used in lieu of “conscience”—the idea of “two-man mindedness” or being able to empathize and put oneself in the other person’s shoes.⁴⁰⁹ The discussions underlying this Article 1—including the use of the word conscience and various interpretations in different languages—reflects a fundamental sense of human solidarity and connection.⁴¹⁰ It would flow from this premise that whether a value originated in a certain culture *first* is less important than whether it promotes human dignity. Philosophically, this resonates with important contemporary research on innate moral grammar that reinforces the idea of common human capacities, regardless of cultural differences, for moral reasoning, empathy, and understanding.⁴¹¹

CONCLUSION

The clear, devastating wrongs of the Holocaust and the struggles of ordinary human beings informed the deliberations of the Declaration’s drafters, and remarkably, notwithstanding their diverse cultural, religious, or philosophical orientations, they agreed on a basic and interrelated list of universal human rights that “everyone” is entitled to, simply by virtue of being human.⁴¹²

In 1998, fifty years after the Declaration came into being, the Chinese democracy activist Xu Wenli, who had served a twelve-year prison term for his part in the 1978 “democracy wall” movement, was again jailed for trying to register a new political party in China.⁴¹³ As his daughter wrote in an op-ed for the *Boston Globe*, “Beijing attempts to justify its departure from universal norms by claiming that the Declaration of Human Rights is a Western instrument not applicable to the unique characteristics of Chinese civilization. But Beijing has

given the diversities within each society as well as the linkages among different countries and cultures.”); see *supra* Part I.

407. See *supra* Part I; UDHR, *supra* note 1.

408. UDHR, *supra* note 1.

409. GLENDON, *supra* note 1, at 67–68, 75–76, 142.

410. *Id.*

411. Mikhail, *supra* note 224, at 196–98.

412. UDHR, *supra* note 1. Article 2 states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” *Id.*

413. Xu Jin & Gregg Carr, *A Loving Farther Jailed in China for Loving Democracy*, BOS. GLOBE, Dec. 9, 1998, at A27.

its history wrong.”⁴¹⁴ She recalled that her father had remembered P.C. Chang as the Vice-Chair of the eighteen-member Commission on Human Rights that drafted the UDHR; that

Chang was a Confucian expert, lover of traditional Chinese high culture, and one of the most influential members of the drafting committee. Chang believed that rights were for everyone, not just Westerners, and in one of the first discussions, he suggested that liberties of the person be grouped together near the front of the declaration.”⁴¹⁵

She specifically invoked the UDHR and claimed on behalf of him and other Chinese political prisoners “their right to all of the universally acknowledged human liberties, not to a list impoverished by some supposed peculiarity of their culture.”⁴¹⁶

This Article is a defense of the principle of universalism at the foundation of the UDHR. It has shown that far from being Western or even Western dominated, the UDHR reflects a universal consensus on basic rights that are rooted in a commitment to human dignity. It embodies a vision of equality and nondiscrimination based on the common bonds of humanity that transcend cultural and other divisions. Critics cannot credibly argue against equality and nondiscrimination and so the next best strategy is to lob accusations that it is the result of a culturally imperial project and hence illegitimate.

This accusation has been used by both dictators and authoritarians as well as by Western communitarians who propose that, because universalism is actually a mask for Westernization, it should be replaced with varying degrees of cultural pluralism.⁴¹⁷ Different cultures will adapt the UDHR differently to their particular circumstances, so the argument goes.⁴¹⁸ This is in essence an argument in favor of a cultural exception to the UDHR, or to certain provisions of the UDHR, as deemed necessary by the state asserting the need for an exception. It goes against the very grain of universalism, distilled from a multiplicity of cultural traditions, that the drafters of the UDHR meticulously established and that the UNESCO philosopher report affirmed: the existence of basic universal rights that are “implicit in man’s nature as an individual and as a member of society.”⁴¹⁹

414. *Id.*

415. *Id.*

416. *Id.*

417. *See supra* notes 2–7 and accompanying text; *see also* Kuran, *supra* note 352, at 126 (“[W]estern-based philosophies of cultural relativism are serving to bolster economically dysfunctional social structures.”).

418. U.S. DEP’T OF STATE COMM’N ON UNALIENABLE RIGHTS, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 32–33, 37–39, 55 (2020), <https://www.state.gov/report-of-the-commission-on-unalienable-rights>; KAPLAN, *supra* note 5, at 112–21 (arguing against human rights monoculturalism where supposedly Western values are forced upon other cultures in the name of universalism and arguing in favor of more cultural flexibility and so-called cultural pluralism).

419. Maritain, *supra* note 93, at 259.

Ironically, even as cultural preservation is sought for in the area of international human rights, culture is sidelined in many other areas of international law, such as international trade and law and development.⁴²⁰ As this Article shows, cultural exceptions to universalism have been urged in ways that are particularly detrimental to women's equality and dignity.⁴²¹ Ironically, this call for cultural pluralism and cultural diversity is in fact based on the narrowest, least pluralistic, least diverse understanding of culture—cultural uniformity and homogeneity. As this Article has shown, efforts to undermine common, universal principles—“the recognition of one common humanity”⁴²²—forged in the UDHR cannot be cloaked under the mantle of culture.

420. *See supra* Part III.A.

421. *See supra* notes 17–18 and accompanying text.

422. GLENDON, *supra* note 1, at 233.
