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Human Rights: An Uprising

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Letter from the Editor

For centuries, protests have been used to mobilize citizenry in efforts to bring about sweeping change in different parts of the world. Protestors have protested to convey their discontent, to demand a moral response, and to speak truth to power. In 2010, antigovernment protests in Egypt inspired similar uprisings in other Arab countries, which became known as the Arab Spring. This year, the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd have led people in the US and across the world to march against racism and police brutality. Despite a global pandemic, thousands have taken to the streets to demand justice for Black lives, demonstrating that the principle of equality, a common moral good, is worth risking both health and life.

"Human Rights: An Uprising," the second issue of our twenty-first volume, sheds light not only on the right to protest itself, but the human rights that have inspired them. Mahmood Monshipouri explores the variations and similarities in contemporary protest while discussing the Black Lives Matter movement. Joudie Roure addresses gender-based violence and LGBTQI rights in Puerto Rico, especially the murder of trans women. Debra DeLaet explains the importance of soft law approaches in making progress toward the realization of gender-based human rights and LGBTQI rights. Randolph Persaud and Jackson Yoder apply the concept of *homo sacer* to examine differential rights within two key areas: migrants/refugees/asylum seekers in Europe and the effects of COVID-19 on African Americans in the US. Nicholas McMurry argues that the right to be heard is developing in human rights law as expounded in the practice of the UN treaty bodies. Kathleen Mahoney discusses Indigenous rights in Canada. Morten Andersen argues that an investigation of the relationship between corruption and human rights is best viewed as a framework of socially constructed norms, political power, and the complex interrelation of political, legal, economic, and social systems. Finally, David Johnson writes about the origins, causes, and contemporary implications of extrajudicial killings in the Philippines.

This issue sheds light on the strata of protests and human rights. It further affirms the growing political salience of human rights and the power of social movements to overcome the tyranny of exclusion, greed, and special interests which have always undermined them.

Sincerely,

Sushant Naidu
Editor-in-Chief

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PROTECTING HUMAN RIGHTS IN AN ERA OF GLOBAL PROTESTS

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Abstract: *The worldwide rise in active protests around the world is a pushback against several state policies, including but not limited to, neoliberal economic measures, rampant corruption, glaring economic and gender inequality, and an era of ongoing political repression. In this essay, I attempt to answer three key questions: (1) what are the variations and similarities among these protests? (2) why do these large-scale movements of unrest often fail to achieve swift and transformative political change? And finally (3) what kind of strategies does the human rights community need to adopt in response to this fundamentally new context (i.e., post-liberal world order) that we now face?*

Introduction

From Ecuador to Sudan, Hong Kong to Bolivia, Puerto Rico to Lebanon, the world has lately witnessed a wave of people taking to the streets to claim their basic right to protest and demand reform from their governments. This massive global surge in popular protests has emerged largely in response to glaring income inequality, rampant corruption, massive youth unemployment, and widespread human rights abuses. These protests have been largely directed at the political establishment, and ironically have generated support for nationalist populist regimes throughout the world. Lacking the elegance of other ideologies like socialism or liberalism, populism is a thin-centered ideology that could be blended with other beliefs and political ideas. It could thus be associated with nativism, anti-neoliberalism, and even anti-racist platforms in different contexts.[1] While fostering the people/elites divide, populist regimes have treated their political opponents as "enemies of the people" and sought to exclude them altogether. Fearful of modernization and globalization, such regimes have turned to cultural wars, patronage, nationalism, and nativism. They have also claimed that "they and only they represent true people."[2]

Despite variations in the grievances and agendas of the protestors, these uprisings point to a broader need for a new social contract between citizens and governments that goes beyond making traditional, incremental modifications in existing political and socioeconomic structures. These demands transcend the capacity of existing political systems to effectively respond. The need for radical change has upended traditional politics in many parts of the world.[3]

These modern protest movements have found a natural tool throughout the world in cyberspace. Digital media has made people acutely aware of their mobilizing potential and the realities of economic inequality. Perhaps more importantly, the paradoxical nature of the use of information and communication technologies (ICTs) has contributed to human rights through its transformative potential and emancipatory rewards on the one hand and constraining risks on the other. While optimism surrounding technological advances and Internet connectivity has bolstered the possibility of tackling human rights abuses, the rise of narrow nationalism and populism throughout the world in the past few years has significantly counteracted that hopefulness. The nativist and anti-establishment revolt sweeping much of the West is a reaction to two things: a suspicion of and hostility toward elites, mainstream politics, and established institutions, and a pushback against increased immigration, cultural fears, and terrorism. For example, these apprehensions have pushed workers in France's rust belt to embrace right-wing populism, raising the pressing question of whether France will remain loyal to its democratic values of liberty, equality, and fraternity.

The ascendancy of the Trump administration in Washington, the referendum on Brexit, and the victories of many right-wing politicians in various European countries, such as Poland and Hungary, point to a worrisome trend. Throughout the world, one critic notes that nationalist populists have cynically exploited the problems surrounding trade liberalization to undermine democratic institutions and link together proponents of globalization, tax evaders, and thriving private equity investors, along with human rights advocates, immigrants, refugees, and many other subjugated groups—into an uniform global rootless elite.[4]

In the United States, immigration has become an increasingly explosive issue that has united populists against their elite antagonists. This may explain why President Trump campaigned on a populist platform that directly appealed to the cultural fears and nationalist sentiments of many Americans. In turn, this has led to Trump's "ban" on nationals from seven countries—Syria, Yemen, Iran, Libya, Somalia, North Korea, and Venezuela—from entering the United States. The Trump administration has also raised the possibility of expanding a similar ban on additional countries, including Belarus, Eritrea, Kyrgyzstan, Myanmar, Nigeria, Sudan and Tanzania. This policy has been met with negative reactions throughout the Middle East and the rest of the world, as many have seen it as collective punishment.[5] It is worth noting that immigrants and visitors from the initial group of seven countries comprise only 2 percent of all foreign-born people living in the United States.[6] Most United States residents from these countries have become citizens, and about 10,000 have served in the U.S. military.[7]

My central argument in this essay is that the worldwide rise in active protests around the world is a pushback against several state policies, including neoliberal

economic measures, rampant corruption, glaring economic and gender inequality, and an era of ongoing political repression. In the first section, I outline the similarities among the different movements, chiefly their targets, methods, and goals. I then turn to the grounds on which they differ. I subsequently argue why these large-scale movements of unrest often fail to achieve swift and transformative political change. Finally, I argue that the human rights community needs to adopt new strategies in response to a fundamentally new context (i.e., post-liberal world order).

Protest Movements: Variations

The explosion of protests throughout the world since the 2008 global economic meltdown has marked a new era of uncertainty. While large-scale protests have become frequent and geographically far-flung in recent years, and while the rise of citizen mobilization has greatly contributed to the current surge in global protest, the triggers that motivate these protests vary from one country to another. It is critically important to note that considerable variations exist across protests in terms of the grievances, popular concerns, and viability of underlying social movements.

As Mohamed Zayani notes, Post-Arab uprising dynamics have also demonstrated considerable variation among factors that undermine the ability of peaceful social movements to bring about change in the Middle East. In countries that experienced a lengthy armed conflict, such as Syria and Libya, factionalism and civil war have replaced social movements. In Egypt, where peaceful uprisings toppled an authoritarian regime, social movements have since been blocked through both legislation and repression. In countries that saw the second wave of the Arab uprisings, such as Sudan and Algeria, social movements assumed the form of street protests against fortified ruling elites, resulting in the collapse of governments in both cases. Only in Tunisia have such social movements evolved into civil society organizations that became more visibly active and effective.[8]

It should be noted that these protest movements also took place in different political and economic contexts. Some of these countries, like Egypt and Tunisia, were autocracies; others were democracies, like Great Britain and India. Some were affluent, such as Israel, while others, like Bosnia and Moldova, were economically weak.[9] While protests erupted in countries that were ravaged by the global economic crisis, such as Greece and Portugal, they were also found in emerging market countries, like Turkey and Russia, which remained largely untouched by the broader economic crisis.[10]

Richard Youngs writes that some protests aim at forcing a regime out of power.[11] Consider, for example, the ongoing revolts in Venezuela that have been seeking "recall referendum" on President Nicolas Maduro's continuation in office. Other observers press for a fair power-sharing democracy (in the case of Iraq) or seek

more basic rights for Indigenous minorities (in the case of Latin America). Still others focus on the campaign against corruption, as in the case of Brazil, and the public protests against India's anti-Muslim citizenship law.[12]

Since India enacted new citizenship rules on December 12, 2019, widespread protests against the new regulations have left two dozen people dead.[13] Narendra Modi, the country's prime minister, supported this law on the grounds of easier naturalization for refugees to become Indians—unless they are Muslims. Critics assert that the law is part of a broader attempt by Modi's Bharatiya Janata Party (BJP) to buttress the Hindu identity of the country at the expense of minority groups. Given that Hindus make up 80 percent of the country's population and that Muslims constitute India's largest minority at 14 percent of the population, such fear and anger over the citizenship law is understandable. Many Muslims fear that these laws may eventually be used to harass them or even call their citizenship and loyalty into question.[14]

In contrast, many protests in the West have been primarily against austerity measures, such as in Greece and Spain. Such protests have been directed against neoliberal policies, including the various national versions of the so-called "Occupy Movement." Some protests have been a backlash to specific, local grievances and have had relatively modest goals. A number of protests in Russia fit this mold.[15]

In one particular case, protesters in Hong Kong directed their attempts toward the maintenance of the rule of law and the independent court system. Since late 2014, Hong Kong youth have captured global attention in massive protests challenging Beijing over the failure to realize promised democratic reforms. The Hong Kong Basic Law, which was drafted in 1990, promised democratic reform with a view toward achieving the ultimate objective of "universal suffrage."[16] More recently, China promised such universal suffrage would be fully exercised for selecting Hong Kong's chief executive in 2017.[17] However, the publication of a Beijing White Paper in 2014, in which the Beijing government has asserted its "comprehensive jurisdiction" over the Hong Kong Special Administrative Region (HKSAR), led to the broad "Umbrella Movement" and related protests. Many Hong Kong citizens blame Beijing's blatant power grab and disregard for Hong Kong's autonomy as laid out in the very foundation of the "one country, two systems" framework as reasons for taking to the streets while accusing China of threatening to undermine both the rule of law and human rights.[18]

Beijing's control over Hong Kong has continued unabated, as many locals fear the swift loss of their rights. One such fear rose to the surface in a controversial extradition bill that triggered a new wave of unrest in 2019. The bill, which was intended to allow the extradition of serious criminals to other countries, was broadly understood as a subtle way of targeting dissidents for deportation to

mainland China. These fears were amplified by several kidnappings of Hong Kong citizens, especially booksellers who sold banned books considered threatening to China's security. Although the extradition bill has—at least for now—been formally withdrawn, protesters' demands have dramatically shifted toward focusing on investigating police brutality, pardoning those charged with rioting, and introducing full democracy.[19]

Protest Movements: Similarities

A number of common features, however, have characterized the current rise in such popular protests. Numerous governments have adopted austerity measures by raising prices on basic services and cutting back on subsidies, including those for education and healthcare. In many of the protests against such measures, similar issues appear to be at work. A combination of price increases, gaping economic inequality, and official corruption has sparked protests across the globe. Some experts have addressed the non-violent nature of such protest movements, arguing that, unlike in the past, these protesters are looking to civil resistance to stake their claims and seek change. Their non-violent nature is precisely "what binds the different movements of our time."[20]

After the Iranian government decided in mid-November 2019 to cut gasoline subsidies to fund handouts for Iran's poor, protests erupted in dozens of Iranian cities, which the government suppressed. While these protests were initially directed at the Iranian government's mismanagement of the economy, they soon broadened to magnify the public discontent and anger over other institutional problems, such as repression and corruption. According to Amnesty International, some 208 people were killed during these protests over Iran's decision to cut subsidies on gasoline prices and the ensuing security crackdown.[21]

Other sources have linked ongoing protests to the environment and climate change. Activists from the Extinction Rebellion movement have demanded decisive action from governments. The protests have arisen in countries such as the United States, UK, Germany, Spain, Austria, France and New Zealand. Participants have glued and chained themselves to roads and vehicles, and have attempted to disrupt busy city centers. While many thousands of miles apart, protestors have pursued similar aims—campaigning against inequality, corruption, and political repression, as well as calling the attention to climate change—across the world, while also taking inspirations from each other on how to organize, mobilize, and promote their goals.[22]

A number of belt-tightening policies have been imposed on many developing countries at the direction of the International Monetary Fund (IMF) and the World Bank as part of Structural Adjustment Programs (SAPs), which are loan guarantees

based on strict economic reforms. Opponents of economic globalization view SAPs as detrimental to the economic and political policies of developing countries, suggesting that these policies fail to deliver the promised economic gains and can even debilitate economic growth. If economic growth dwindles, governments will have to cut social programs and abolish public sector jobs in large part due to their inability to raise necessary funds.[23] Today, the presence of digital technology has rendered transnational solidarity against SAPs all the more possible and highly effective.

The implementation of neoliberal policies renders states less capable of undertaking traditional social tasks of governance, such as providing social safety nets and applying worker safety regulations. Governments must stifle threats to political and economic stability while adopting repressive measures against political opponents, union leaders, and other political activists who may oppose existing policies. Under such circumstances, these opposing groups often respond to the imposition of SAPs with food riots, peaceful protests, and even violent unrest. Ruling authorities are likely to respond by restricting or suspending citizens' civil and political rights.[24]

According to Joshua Keating, austerity-driven protests are widespread. Lebanon has been tormented by ongoing mass demonstrations that were initially sparked by a government proposal to raise the value-added tax and introduce a tax on Internet messaging services like WhatsApp to cope with the country's massive national debt.[25] Likewise, in 2019, austerity measures were the cause behind mass protests in other states, such as Zimbabwe, Sudan, Jordan, and Egypt. Fuel price hikes in 2019 led to mass protests in Zimbabwe. Cuts to fuel and bread subsidies were the key cause of such protests in Sudan, culminating in the overthrow of longtime dictator Omar al-Bashir. The discontinuance of food and fuel subsidies sent many angry people into the streets of Jordan. Austerity measures constituted a major driver of the unanticipated protests in Egypt in late 2019, which Abdel Fattah el-Sisi's government repressed with various policies.[26]

IMF-backed policies have also triggered civil unrest across Latin America, in large part because such measures have contributed to a decline in social spending and a rise in poverty. Against this turbulent backdrop in Latin America, civil society organization (CSO) LATINDADD forwarded a joint statement to the IMF in October 2019 denouncing the "familiar austerity policies" that have resulted in "devastating economic and social impacts."[27] In Ecuador, countrywide protests, spearheaded by Indigenous leaders, burst out against IMF-backed austerity as part of a $4.2 billion loan, which resulted in the government's reversal of its fuel subsidy cuts in October 2019. In Argentina, the IMF's $57 billion loan was met with widespread demonstrations in 2018 and 2019; in October 2019, Mauricio Macri lost the presidential vote to IMF critic Alberto Fernández who blamed the IMF for capital flight from Argentina and loss of credibility for the Fund.[28]

Taking action against official corruption in such situations is context specific and unrelated to austerity measures. For example, in the Middle East, where the state controls oil-related businesses, the lack of public access to information, weak legal frameworks, and inadequate enforcement mechanisms make financial corruption inevitable. Fighting against corruption at the institutional level depends upon the quality of governance generally understood in terms of resource efficacy, consensus building, and international cooperation and a sound institutional structure that can effectively prevent corruption. While the high cost of preventing or reducing corruption may be overwhelming to low- and middle-income countries, developed countries have the necessary means to build strong institutional foundations to impose anti-corruption programs.[29]

Social Media's Effectiveness and Limits

Social media has undoubtedly provided affordable access to social movements by reducing the costs of mobilization and organization, while expediting the dissemination of information. In some Maghreb countries, such as Algeria, Morocco, Tunisia, and Egypt, major social transformations have clearly taken place, including democratizing trends, women's civil and political empowerment, as well as numerous policy and legal reforms for women's participation and political rights. Feminist mobilizations have led to responsive government action in a difficult socio-political context.[30] International Communication Technologies (ICTs) have provided activists in the Middle East and North Africa (MENA) a great opportunity to plan ahead, to communicate with other regional and global actors, and to bypass state censorship and control.[31]

Nevertheless, it is important to guard against the euphoria over social networking. The fact remains that Twitter alone is unlikely to generate successful uprisings. While new media tools have a catalytic role, it is the interdependency between off-line activity on the ground and online activism that is critical to the achievement of protest goals.[32] These empowering tools and connections have lasted only for a short time since the 2011 Arab Spring uprisings.[33] An optimistic view reinforces the notion that human rights can resurface even in the most hostile contexts. While counterrevolutionary setbacks often hinder human rights progress, as is currently the case in the Arab world, those reversals may well be temporary.[34]

New forms of Internet-based activism proved to be a central factor contributing to the ouster of President Morsi of Egypt. Tamarod—or the "revolt" movement—used all available tools of grassroots mobilization, including the Internet, formal media, and street protests to collect signatures demanding Morsi's resignation. Created by the members of the Kefaya movement, the petition of nearly 22 million signatures was collected in a matter of weeks. This widespread campaign became a catalyst for the 2013 demonstrations that culminated in a military coup ousting Morsi.[35]

More and more young people in the MENA region have come to express their opposition to the repressive regimes under which they have lived through the larger strategies of nonviolent protest, non-cooperation, and civil disobedience. Contrary to the widely held view in the West that Arab youth are often raised in a cultural context of religious radicalism and anti-Americanism, and that these values have "become the formative elements of a new and dispossessed generation," in reality, these protests have illustrated that young people "were a big part of the silent, moderate majority."[36]

In the occupied territories of Palestine, social media trends have come to inform and fuel the Palestinian resistance. Ironically, social media has simultaneously unified and fractured the Palestinian people. It has facilitated international condemnation of Israeli occupation and has fueled violence and sectarian conflict. While there is compelling evidence that the Palestinians' attacks on Jews have been centrally organized, some Palestinians have in the past posted such videos on social media. Likewise, experts have also noticed a marked increase in anti-Arab rhetoric on Israeli social media sites, according to Israel's Haaretz newspaper.[37] Pro-Palestinian activists continue to pursue boycott, divestment, and sanction (BDS) efforts and work with ICT professionals to further develop an Internet-based presence and distribute information using social media and new platforms. However, if the Palestinian resistance movement is to succeed, it should come to terms with the contradictory effects of social media.[38]

Protests over Racial Injustice and Police Brutality

The coronavirus (COVID-19) pandemic confronted the United States and the rest of the world by the beginning of 2020. In addition to being the greatest economic calamity since the Great Depression, the pandemic adversely and disproportionately impacted poor and stigmatized communities. The outbreak not only exposed but exacerbated disparities in health and income among blacks and Hispanics compared to white individuals. While there was no causal relationship between the pandemic and such disparities, fallout from the crisis clearly followed the fault lines of pre-existing inequalities in these minority communities.

No sooner had these painful inequities resurfaced in the spread of the coronavirus that other incidents induced an eruption of rage, pain, desperation, disempowerment, and injustice on the streets of the United States. Two events captured on cell phone video led to widespread protests and demonstrations. On February 23, 2020, Ahmaud Arbery, twenty-five, an African-American man, was shot and killed while jogging in southern Georgia by Gregory McMichael, sixty-four, and his son, Travis McMichael, thirty-four, who were arrested three months following the incident—only after a thirty-six-second video that captured the killing and went viral in the ensuing months.[39]

The second incident occurred three months later on May 25, 2020, when George Floyd, forty-six, an African-American man, died in police custody in Minneapolis, Minnesota. While handcuffed and lying face down on the street during an arrest, Floyd was held on the ground by a white police officer, Derek Chauvin, kneeling on his neck for eight minutes and forty-six seconds during which Floyd died. This incident took place in the presence of three other police officers who watched but did not intervene.

The incident was captured on the smartphones of several bystanders and later went viral on the Internet. These videos, which showed Mr. Floyd repeatedly crying out for assistance: "Please, I can't breathe," were widely circulated on social and broadcast media. All four officers were fired the next day, but in the ensuing days, officer Chauvin was arrested and charged with third-degree murder. The growing outrage sparked waves of protests in major cities across the United States, largely energized by broad-based movements comprising young activists, multi-racial, and inter-sectional segments of the population.

These uprisings against police brutality at times resulted in riots, lootings, and confrontations with police. Making no appeal for calm, President Trump wrote in a tweet: "When the looting starts, the shooting starts," a reference to the phrase initially used both by Miami's police chief, Walter Headley, in 1967, and in the ensuing year—also known as a year of deep social unrest—by presidential candidate and racial segregationist George Wallace.[40] After days with only inflammatory Twitter responses to the ongoing national demonstrations, Trump made his most formal statement on June 1, 2020. After police and secret service cleared the block near the white house of peaceful protestors by firing tear gas and flash grenades, Trump and his entourage moved from the White House to the nearby Church of St. Johns and held a photo opportunity with Trump raising a bible.

The sanctity of life—the cornerstone of fundamental human rights—has given a new urgency and impetus to the slogan "Black Lives Matter." Crucial to this movement is the right to dissent, which has taken precedence over social distancing, protesting the inherent biases of the US justice system. As Roxane Gay, the author of *Hunger* (2017), aptly notes, while hopefully in the near future a vaccine will be created to effectively stem the spread of the coronavirus pandemic, a cure for white supremacy and police brutality is in most ways more complex and difficult.[41] Amid the outrage and mayhem that impacted the major cities in the United States, as well as growing responses from major European countries such as Austria, England, France, and Germany in solidarity with the protestors in the United States, one undeniable fact was clear: If deployed properly, digital technologies can help promote demands for justice and acts of solidarity by revealing an ongoing and systemic racism and police brutally.

The Decline of the Liberal Order

The diminishing significance of the human rights campaign in the states of the Global North has been attributed, among other things, to a slow decline of the liberal order. However, some experts argue that the Western world's advocacy of a liberal world order has always been based more on promoting liberal economics and pursuing wealth than on protecting human rights.[42] Others have reminded us that the Western-centric global order, defined as *Pax Americana* more generally, has lost its supremacy in international politics.[43] Still, others maintain that the global order is increasingly attacked from within by nationalists who challenge democracy promotion and the globalization project.

The movement toward globalization has deepened existing inequalities and public distrust of institutions amid a sense that factions of traditional citizenry and ordinary people have been abandoned. Anti-migrant sentiments, along with economic dislocations related to globalization, have contributed to the resurgence of political leaders throughout the world with a strongly nationalist and protectionist economic agenda.[44] This new drift away from globalism and toward nationalist populism has had negative consequences for the promotion of human rights.

In Europe, the aftermath of the Arab Spring uprisings and the wave of refugees, policies toward immigrants have adversely affected the rights of incoming refugees. Differences widened among the European Union (EU) member states as they analyzed the potential successes, or failures, of the Arab Spring uprisings differently since they began in 2011, especially within the context of the ensuing dual crises of terrorism and migration.[45] The EU member states effectively supported uprisings in Tunisia and Egypt, but they strived harder to find common ground in the cases of Libya and Syria—two countries that faced tumultuous and failed uprisings respectively, as protests in both countries led to instability and civil war.

The increase in the sheer number of refugees (some 70 million), along with the new drivers of cross-border displacement, including climate change, food insecurity, civil war, natural disaster, and state fragility, has presented a new layer of complexity to the question of who to protect. The EU burden-sharing in terms of resettling or integrating refugees has been stymied by the rise of populist/nationalist movements throughout the West that are more often against the absorption of asylum seekers. Crucially, the contemporary refugee protection regime—known as the 1951 Refugee Convention—has encountered a variety of new challenges. The line between the "refugees"—that is, "people fleeing a well-founded fear of persecution"—and "migrants"—that is, those who cross the border for reasons of environmental change, political instability, civil war, and/or failed states and economies—has become increasingly blurred.[46]

Whether these and similar movements of people will continue is unclear. However, the larger question involves the normative and practical relevance of human rights in the face of refugee crisis and the continued feasibility of maintaining a liberal order when so few states are willing to take the steps necessary to defend human rights in the realm of the practical, rather than merely the rhetorical. Consider, for example, those states that have taken the risk to protect helpless foreigners. Dozens of Canadian peacekeepers have died in Afghanistan engaged in humanitarian reconstruction. Each year, Sweden contributes more than $3 billion to aid the world's poorest residents and fledgling democracies, expecting nothing in return.

Similarly, some countries have protected LGBTIQ rights despite ongoing resistance from their local communities. According to a 2016 UCLA study, there are still few countries in which discrimination against LGBTIQ is considered illegal. In only five countries in the world—Bolivia, Ecuador, Fiji, Malta and the UK—there exists constitutions that expressly guarantee equality for citizens on the basis of sexual orientation, along with gender identity.[47] Five countries—Mexico, New Zealand, Portugal, South Africa and Sweden—have constitutions that guarantee safeguards based on sexual orientation. The fact remains that across the globe, there are very few necessary constitutional shields for LGBTIQ rights when compared to legal arrangements to protect against gender or racial discrimination.[48]

The core challenge facing the international human rights community is to sustain its tenacious efforts to protect and promote human rights at a time when politicians are engaged in competing claims for sovereignty rights and the principle of non-intervention on the one hand, and modern universal norms, such as humanitarian intervention, on the other. How can human rights scholars, pundits, practitioners, and advocates come to grips with the complexities of a global order that prioritizes security and trade considerations above human rights? It is worth noting that across the world, many observers continue to wrestle with the complexities of a global order that prioritizes security- and trade-related issues over moral considerations. Securitization of borders and migration presents a significant challenge to the rights of refugees and asylum seekers.

Challenges Ahead

As noted above, most protests across the globe have one thing in common: the pushback against neoliberal economic measures and political repression. Can human rights norms, agreements, and institutions serve as effective mechanisms to address the drivers of social unrest?

Some critics, such as Samuel Moyn, have argued that human rights activism has made itself at home in a plutocratic world dominated by populist-nationalist

politics and that the human rights movement has failed to expand its interest in exploring distributional problems and fairness to keep inequality from rising.[49]

According to *World Protests 2006-2013*, many protests in recent years have framed their grievances, such as economic justice and anti-austerity, failure of political representation and political systems, global environmental justice, and basic civil-political rights, as rights-based, but that the majority of protests—especially those aimed at changing the economic system that has generated such inequality—have not pursued their goals in terms of rights, but rather in terms of economic justice and the call for democracy. In sum, the advancement of human rights continues to be a necessary, if not sufficient condition, for the ultimate success of these social movements.[50]

Similarly, A.H. Robertson and J. G. Merrills have noted that although human rights can provide individuals with necessary protections against the power of the state and repressive collectivities, they arguably may not provide a suitable vehicle for contextualizing and addressing a broader range of political and legal issues.[51] Some staunch advocates of human rights, such as Kathryn Sikkink, have pointed to considerable progress made in women's rights, LGBTIQ rights, disability rights, health rights, and decreasing deaths in wars. Yet, they have acknowledged that the protection of human rights has suffered from many setbacks in other areas. Those include the largest refugee crisis the world has ever faced, increasing discriminatory restrictions on immigrants, and the decay of democratic freedoms and institutions in certain parts of the world.[52]

Others, such as David P. Forsythe, have reminded us that there is no inherent law of progress and history in which human rights automatically advance.[53] While human rights have occupied a central place in constructivist and liberal theories in terms of the significance of ideas, state-society relations, and domestic politics for the study of international politics, they have remained on the sidelines of the institutionalist and realist research programs because they usually have fewer concrete cross-border externalities than economic or environmental issues.[54] It is worth noting that the focus on security alone has shifted attention away from the states that have concealed their true motivations and intentions while at the same time avoiding taking the appropriate level of responsibility for human rights violations occurring within their borders.

A Way Forward

The need to treat economic and social rights as full-fledged human rights has gained much traction in the face of massive socioeconomic problems, inequality, and corruption around the world. Major cuts in welfare, education, health care, and social services, as prescribed by neoliberal market ideology, are detrimental to the

economic and social rights of individuals.[55] A broader consensus among human rights scholars holds that SAPs almost always have immediate and deleterious short-term effects on the fulfillment of economic rights of large segments of the population. Additionally, the political unpopularity of largely punitive cuts in social services is likely to hinder progress toward political liberalization and democratization.[56]

There is also a need for ensuring effective synergies between international and local human rights movements.[57] In the context of lessons learned from the 2011 Arab Spring uprisings and their aftermath, Bahey eldin Hassan reminds us that at a time when the whole world is occupied with the growing threat of terrorism in the MENA region and beyond, it is important that human rights NGOs underscore the importance of a central message. The main thrust of this message is that siding with Arab governments' deadly tactics against terrorism to advance human rights—and to the exclusion of global cooperation—is likely to lead to less stability rather than more.[58]

Some experts have urged turning away from an integrated view of global agendas for systemic, order-related change and toward community-level protests that can mobilize for more tightly defined aims, specific to local context. This more local focus explains why so many activists have attempted to target more modest and achievable objectives relating to day-to-day service delivery and the like. Local communities continue to organize even in the face of political repression, keeping at least some notion of defiance and resistance alive in difficult circumstances. Examples of this trend can be found in countries like Ethiopia, Kenya, and Uganda.[59]

Today, most protest movements focus at least initially on very specific and narrowly defined issues of relevance to a particular community, such as the closure of a school or hospital, the destructive effect of local patronage networks, or palpable environmental degradation.[60] The 2011 Arab Spring uprisings, despite their initial euphoria of success and optimism, have shown that new civic and political actors can effectively press their agenda only if they seek collaboration from and coordination with traditional state actors. Relying solely on "leaderless" or "organization-less" movements indicative of the digital age is no substitute for organizational resources and skills poised to engage strategically and systematically larger numbers of scholars, activists, and pundits with an eye toward promoting and protecting human rights on a sustainable basis.

The realization of human rights, as well as its potential progress in the future, remains contingent on a wide variety of mechanisms of the international human rights regime and mobilizing strategies and tactics that can exert pressure for reform, as well as launching formidable media campaigns designed to damage the reputation of corrupt and coercive regimes. The presence of movements for human

rights undoubtedly serves as an effective, if somewhat limited, deterrent against political repression and socioeconomic injustice. As one study finds, an enduring human rights movement, supported by ongoing human rights protests, dissuades a repressive regime's abuses by enhancing the likelihood of accountability for such abuses as well as improving the possibility of reforms to the criminal justice system.[61] Ultimately, as Michael Goodhart notes, human rights are fundamentally political: "to embrace or contest them is to take sides on questions of power."[62] That is why the practice and development of human rights is visible throughout the history of social movements, legal contestation, political argumentation, and public discourse.[63] Protests present an effective and legitimate way to stake claims on governments through new dynamics of participation and contestation.

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THE REEMERGENCE OF BARRIERS DURING CRISES & NATURAL DISASTERS: GENDER-BASED VIOLENCE SPIKES AMONG WOMEN & LGBTQ+ PERSONS DURING CONFINEMENT

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Abstract: *The article focuses on gender-based violence (GBV) during crises and natural disasters, and the reemergence of obstacles that impede the protection of human rights of vulnerable groups often resulting in an increase of GBV, particularly among women and LGBTQ+ persons. It introduces GBV through the case study of Puerto Rico, examining four of the 2020 transgender murders in the United States that occurred there. By exploring how restriction of movement during times of crises affect the human rights of women and LGBTQ+ persons, it will emphasize the particular vulnerability of transgender persons. It offers a web-based research platform, The Domestic Violence Project, as an example of efforts youth and community based organizations can explore to ensure the promotion, protection, and safety of vulnerable groups, particularly women and LGBTQ+ persons during quarantine periods including COVID-19, and proposes recommendations to nation-states, local governments, and communities.*

I. Barriers, Vulnerable Groups, and Spikes in Gender-Based Violence during Times of Crises & Natural Disasters

Gender-based violence (GBV) is typically absent from public discussions when addressing crises or natural disasters. GBV is a global crisis that describes any violence rooted in gender-based power inequalities and gender-based discrimination.[1] During crises and natural disasters, we witness a reemergence of obstacles that impede the protection of human rights of vulnerable groups often resulting in an increase of GBV, particularly among women and LGBTQ+ persons. This article will introduce GBV through the case study of Puerto Rico. It will examine four of the 2020 transgender murders in the United States that occurred in Puerto Rico—the cases of Alexa Negrón Luciano, Yampi Méndez Arocho, Layla Peláez, and Serena Angelique Velázquez. It will discuss GBV spikes during times of crises, especially when restrictions are imposed by governments. By exploring how restriction of movement during times of crises affect the human rights of women and LGBTQ+ persons, it will emphasize the particular vulnerability of transgender persons. GBV often deprives both women and LGBTQ+ persons of their basic human rights and subjects them to heightened levels of violence at the hands

of their aggressors. This is especially true during times of crises, as was the case during the Ebola epidemic, post-hurricanes Irma and María, the ongoing Puerto Rico earthquakes, and the COVID-19 virus pandemic. The Domestic Violence in Puerto Rico project,[2] a web-based example of efforts youth and community based organizations can take to ensure the promotion, protection, and safety of vulnerable groups, in particular those of women and LGBTQ+ persons, will be introduced. Finally, proposed recommendations to nation-states, local governments, and communities will be provided.

II. Gender-Based Violence in Puerto Rico: The Transgender Murders of Alexa Negrón Luciano, Yampi Méndez Arocho, Layla Peláez, and Serena Angelique Velázquez

Data demonstrates that globally women represent the group which suffers the highest rates of GBV.[3] While GBV more often refers to violence perpetrated by men against women, within the LGBTQ+ population, "transgender persons—individuals whose birth-assigned sex does not match their own internal sense of gender identity—are particularly at risk of GBV because they represent a direct challenge to traditional gender norms and roles in society."[4] Gender non-conforming and transgender persons fall vulnerable to humiliation, harassment, and sexual and physical violence at the hands of intimate partners, family members, their communities, and state actors.[5] This type of GBV ultimately deprives them of their basic human rights and increases their risk for poverty, mental health problems, and a variety of illnesses.[6]

It was not until 1980, that attention to GBV directed towards LGBTQ+ persons first occurred in Puerto Rico.[7] At that time, a man known as "Angel of the Bachelors" went on a killing spree, soliciting gay men at bars and killing them.[8] Not until the death of a prominent journalist who was stabbed to death in 1985, did police begin paying attention according to Pedro Julio Serrano, a leading gay rights activist in Puerto Rico.[9] In 2002, the Puerto Rico legislature passed a hate crime bill in which sexual orientation and gender identity were codified as aggravating factors for sentencing felons.[10] Historically, in Puerto Rico, the LGBTQ+ community has been marginalized and law enforcement and state officials have not adequately addressed these issues during non-crisis periods.[11] According to Serrano, prosecutors rarely use sexuality or gender identity as an aggravating factor.[12] Serrano stated that Puerto Rico had a spree of hate crimes for five years in a row after a gender nonconforming teenager named Jorge Steven López, who often wore women's clothing, was dismembered, decapitated, and set ablaze.[13] He also stated that the cases were not handled as hate crimes, even though many of the killers were apprehended and prosecuted.[14]

Across the U.S., "since the start of the year [2020], at least 22 transgender and gender non-conforming people have been killed ... all but one were Black . . . more

than 150 transgender and gender non-conforming people . . . were victims of fatal violence; at least 127 were transgender and gender non-conforming people of color."[15] In 2020, Alexa Negrón Luciano a homeless, transgender woman of color, became one of the first of such hate crimes to occur in 2020 in the US, and the first in Puerto Rico.[16] Negrón was questioned by the police for allegedly peeping at another customer in a women's bathroom at a fast-food restaurant. Someone posted the pictures of her being questioned by police which went viral on social media. Negrón was assassinated 12 hours later. According to news reports, "she was framed in the headlights of a car and shot to death amid a cackle of laughter, her final moments apparently also posted on social media."[17] Investigators have yet to classify Negrón's murder as a hate crime. Puerto Rico Governor Wanda Vázquez stated, "[t]his is violence against women, without a doubt . . . [it is] sad, cruel, and insensitive."[18] The governor also stated the murder would be investigated as a hate crime.[19] Despite these factors, there has been no resolution and the case has gone cold.[20] The COVID-19 crisis has pulled vital investigatory resources away from the case and has instead turned them to protecting public health.

Religious leaders and government officials condemned the murder of Negrón, but also used it to advance further discrimination against transgender people. For example, since the 2020 murder of Negrón, religious leaders from around the island have spoken out against her.[21] María M. Charbonier, a legislator who opposed some of the measures to protect the LGBT+ community, condemned Negrón's killing.[22] However, Charbonier took it one step further and suggested that transgender people should stick to the bathrooms that match their anatomy.[23] Political leaders' use of hate speech during a crisis simply fuels the stress during by creating panic and promulgating violence.[24] There is no room for discrimination or hate speech during a crisis.[25]

One month after Negrón's murder, Yampi Méndez Arocho was murdered.[26] Arocho was a nineteen-year-old transgender man killed in Puerto Rico on March 5, 2020.[27] A woman attacked Arocho five hours before he was found dead in a local park with four gunshot wounds, according to Puerto Rico police.[28] Police are still investigating and have not resolved Arocho's murder.[29] Given the COVID-19 crisis, little to nothing has been made public about this crime as well. Six weeks later, on April 21, 2020, the corpses of Layla Peláez, and Serena Angelique Velázquez, the two most recent transgender women murdered in Puerto Rico, were found shot in a burned car in Humacao.[30] The local authorities are still investigating these murders but have already identified two male suspects.[31] Captain Teddy Morales, head of the Puerto Rico Police Department's Criminal Investigations Unit, stated the Police is classifying these murders as hate crimes because the suspects were socializing with the victims and killed them once they discovered the victims were transgender women.[32] Although the investigation has recently begun, "[o]ne of the suspects allegedly confessed to committing the crime."[33]

Access to accurate information about the nature of the threats and means to protect oneself, others, and our community is paramount to secure and promote the right to freedom of opinion and expression.[34] Governments must permit freedom of information and provide transparent and truthful dissemination of information.[35] The lack of accurate data available to the public has pervaded the ongoing GBV emergency crisis experienced in Puerto Rico. Whether it be the wraiths of hurricanes Irma and María in September 2017, the ongoing earthquakes that began ravishing southern Puerto Rico in December 2019 displacing its people, or the COVID-19 Puerto Rico Executive Order quarantine, each of these crises has restricted the movement of women and LGBTQ+ GBV survivors to some degree. These crises have also caused an increase in the reporting of GBV issues related to each crisis.[36] The Puerto Rico Police Department Agency Statistics reports they received and investigated 141 complaints of domestic violence, "[b]etween March 15—when the curfew Executive Order went into effect—through Sunday, March 22."[37] Other news reports estimate the domestic violence complaints at 160 over the same 8 days.[38] The concern here is that historically, the unreliability and conflicting data from local government institutions in Puerto Rico on GBV has remained an obstacle to understanding, ending, and reducing GBV.[39] Moreover, experts including Vilma González, Executive Director of Cordinadora Paz para la Mujer, a non-governmental organization that supports GBV survivors, estimates Puerto Rico will see a sharp spike in GBV calls when the quarantine is lifted because vulnerable populations often lack access to phones which are typically controlled by their aggressive partners.[40] Additionally, Carmen Castello, founder of Seguimiento de Casos, a research based project that tracks GBV crimes, also expressed concern for the increase in incidents of GBV given the confinement of women and girls with aggressive family members during the COVID-19 quarantine.[41] According to Castello, as of March 29, 2020, in Puerto Rico there have been sixteen femicides of which three were at the hands of their husbands, ex-husbands, partners, or ex-partners; two were murder-suicides; and three women were killed in two family massacres.[42] This data includes the murders of Alexa Negrón Luciano,[43] Yampi Méndez Arocho, Layla Peláez, and Serena Angelique Velázquez . Of these femicides, the authorities have only solved seven cases.[44]

To protect the well-being of society, crisis periods must be times of inclusion, not exclusion.[45] Legislation and education to promote awareness of gender equity and gender-based education in Puerto Rico has been an uphill battle for human rights groups and supportive leaders. A project to conduct sensitivity training on GBV for the police has been stalled.[46] In 2017, there was a bill on Puerto Rico's Senate Floor that never became law.[47] This bill proposed a gender-based curriculum for public schools and was halted by opposition from religious leaders, according to Thomas J. Bryan, Esq.[48] This is a problem since, according to UN Women Deputy Executive Director Åsa Regnér, "decisions and policies are better with a gender perspective… [since] gender-blind decisions and policies … usually fail." Therefore, it is crucial

that decision-makers around the world responding to a crisis, work to implement a gender perspective in their response in order to "achieve better outcomes for everyone."[49] The question of what that looks like is not complicated.

III. Global Concerns: Heightened Gender-Based Violence during Restrictive Crisis Periods

Global concerns have evolved regarding the increase in GBV cases that have been escalating as a result of people in abusive relationships being forced to isolate together. Rights groups across the world have been sounding the horn over potential blind spots in this area. Global experts have stated that people affected by family violence are prone to more violence when social distancing and self-isolation measures are imposed.[50] For example, Diana Sayed, Chief Executive of the Australian Muslim Women's Centre stated, "[w]e know that for people affected by family violence, social distancing and self-isolation measures can pose increased risk."[51] She explains that "[b]eing forced to share space with perpetrators for extended periods of time only exacerbates already stressful living conditions.[52] Sayed agrees that under the COVID-19 quarantines, there are factors including job loss, financial strain, food insecurity, and mental health conditions that exacerbate this highly stressful time throughout the world.[53] This section will comparatively examine the global concerns in several countries concerning the COVID-19 quarantine. Furthermore, the European Institute for Gender Equality's Jurgita Pečiūrienė told EURACTIV that during crises and natural disasters there is a documented rise in domestic abuse.[54] "[V]ictims—who are usually women—can be exposed to abusers for long periods of time and cut off from social and institutional support."[55]

A. Globally

In China, the impact that quarantines have had on GBV victims has been devastating as a result of a lack of protocols to protect the most vulnerable of populations. One retired police officer told an online magazine that domestic violence reports nearly doubled since China's cities went into lockdown, and that the police station in Jingzhou's Jianli County received 162 reports of domestic violence for that month, more than triple the number reported in February last year.[56] In 22 African States, schools are closed which makes girls more vulnerable to GBV as seen during the Ebola outbreak confinement period.[57] Hence, precautionary steps to protect young girls from GBV at home by governments are especially important. In France, the Secretary of State in charge of Gender Equality, Marlène Schiappa, stated "the [COVID-19] crisis that we are going through and the [COVID-19] quarantine could unfortunately create a fertile ground of domestic violence . . . the situation of emergency shelters for female victims of domestic violence is a major concern."[58] The government website states the 3919—emergency hotline

service for domestic violence survivors will be operating under a reduced service.[59] Likewise, in Australia, research has supported a correlation between stress during times of disaster and increased rates of domestic violence.[60] After the 2009 Black Saturday bushfires, more than half of women who participated in an interview study reported experiencing violence after the disaster.[61] Most of these women had not experienced any form of violence prior to the disaster.[62] Reports from Australia during COVID-19, state "men have threatened to lock partners out of their homes, so they get sick; some have withheld money or medication."[63] Experts state, when abusers feel powerless amid circumstances they cannot control, they will commonly turn to means by which they can control a partner."[64] It is imperative that nation-states implement inclusive safeguards and protocols given global spikes in GBV during the COVID-19 confinement period in order to save lives.

B. United States

We see similar patterns of GBV spikes across the United States. For example, in Philadelphia, Women Against Abuse, a nonprofit focused on supporting people experiencing intimate partner violence has seen "a nearly 30% increase in calls this week compared with the same week last year."[65] One consistent consequence of the COVID-19 virus quarantine is that domestic violence centers are experiencing an increase in activity by persons who spend increased secluded time with a partner who is abusive.[66] In Maine, Rebecca Hobbs, Executive Director of Through These Doors, a resource center for survivors of domestic abuse, also reports a 30% increase in calls this month.[67] Domestic violence resource organizations state, "increased isolation can remove a crucial layer of autonomy for abuse victims" and they anticipate a spike in GBV calls as they take steps to increase volunteers to answer hotlines.[68]

C. Puerto Rico

In Puerto Rico, domestic violence shelters and other non-governmental organizations reported an increase in GBV after hurricanes Irma and María annihilated the archipelago colony.[69] More than two years after the hurricanes, there still remains a lack of clearly delineated and inclusive protocols to aid GBV survivors during a crisis situation, as was seen during the earthquakes that continue to devastate Southern Puerto Rico.[70] Currently, due to COVID-19, Executive Order, EO-2020-023, issued by Governor Wanda Vázquez Garced on March 15, 2020, imposed a 9 p.m. to 5 a.m. curfew from March 15 until March 30, 2020 to reduce the spread of the COVID-19 virus.[71] The Executive Order, which was extended until May 25, 2020, initially imposed a closure of non-essential businesses, excluding supermarkets, pharmacies, banks, and gas stations.[72] However, one essential group that was not initially included as an 'essential service' were the non-governmental domestic violence shelters that house GBV survivors. After the continuous demand

by activist groups, the governor finally exempted from the mandatory lockdown "victim shelters" in Executive Order EO-2020-038, issued on May 1, 2020.

Despite the detailed knowledge governments have of the specific needs of these vulnerable populations, there is often little to no mention of preparedness or protocols of support for GBV survivors or the NGOs that support GBV survivors.[73] The Office of the Women's Advocate (OWA), a government based institution dedicated to advocating for women's rights, provides a confidential hotline that is available 24-hours a day and seven days a week.[74] During the COVID-19 quarantine, the hotline offers support to GBV survivors inclusive of counseling, police escorts, and psychological and legal aid.[75] Moreover, the Puerto Rico courts continue to issue restraining orders and extend restraining orders that expire during the quarantine period.[76] However, it is the non-governmental domestic violence shelters who actually provide physical shelter to GBV survivors that need to receive communication and support from the local and federal governments.[77] The non-governmental domestic violence shelters, not to be confused with organizations that provide outpatient services and referrals to GBV survivors, initially did not have the local government's formal authorization as an organization that provides an essential service, according to González.[78] The result of this was that domestic violence shelters in Puerto Rico were not provided with a government protocol that would prioritize their ability to obtain resources during the COVID-19 crisis, González states. González also reports that during the COVID-19 quarantine, domestic violence shelters have not yet been guaranteed access to essential supplies vital to contain the COVID-19 virus, which is especially alarming given that persons in these shelters share confined spaces.[79] Moreover, it is the domestic violence shelters that continue to bear the weight of providing for GBV survivors during the quarantine period. The fact that there have been between 141-160 domestic violence calls within the first eight days of the COVID-19 quarantine, merits that domestic violence shelters should be prioritized. They should also be provided a protocol as a matter of public health during the pandemic and all future natural disasters.[80] The lessons learned post hurricanes Irma and María demonstrated a need to prioritize the partnership of domestic violence shelters with local and federal government, yet we continue to observe a lack of state responsibility regarding the support the shelters desperately require to handle the most vulnerable populations in our society.[81] A similar lack of priority was observed immediately after the first of the ongoing earthquakes in the southern region of Puerto Rico when GBV survivors stayed in state sponsored shelters for displaced persons and feared contact with their aggressors.[82] The question of when this lesson will be taken seriously remains.

Home becomes a risk when you share it with your abuser.[83] The COVID-19 pandemic invokes stressors that trigger violence. The loss of employment resulting in a reduction of income, the caring for children, the inability to attend school, the

responsibility of elderly or ill family members, are just some of the many factors that compound the stress during confinement.[84] We must also be aware that there are many means by which aggressors prey on their survivors using social distancing measures to exert further control over women and children during this time.[85] The aggressor's control makes it difficult and sometimes impossible to seek support or an escape for GBV survivors.

Prior budget cuts imposed by the U.S. government's imposition of the Financial Oversight and Management Board of Puerto Rico, which aims to secure the payment of Puerto Rico's debt to its shareholders at all costs, have severely impacted the response rate of social services, including that of police by reducing the force dramatically.[86] This factor is not unique to Puerto Rico, as it was also observed in China where funding cuts directly impacted the survivors' access to the agencies that provide these services, resulting in fewer options for shelters, and limits on the tools to empower women economically.[87] The GBV increase has been so severe, that there has been a call to declare a state of emergency in Puerto Rico by women's rights advocates over the years.[88] In Puerto Rico, 266 women were murdered between 2014 and 2018, or one every seven days.[89] More than thirty organizations led by *Coordinadora Paz para la Mujer* demanded Puerto Rico's governor to take concrete actions to address GBV during the pandemic.[90] In a letter addressed to the governor, the groups urged her to clearly recognize shelters for domestic violence survivors as essential services, define how the government will administer COVID-19 tests in domestic violence shelters, guarantee said shelters will have access to cleaning products, and divulge government agencies' plans to protect survivors who are confined to close quarters in shelters.[91] The COVID-19 quarantine puts domestic violence survivors at risk by minimizing their visibility, states Social Worker Larry Alicea-Rodríguez.[92] He emphasizes that the Puerto Rico government fails to implement plans to address the social problems caused by the measures taken during emergencies.[93] The guaranteed continuation of essential social services which include the protection of survivors at a macro-policy level is essential to the protection of the human rights of all persons, with emphasis on populations vulnerable to GBV.[94]

IV. Human Rights Considerations

Ensuring Fundamental Human Rights during Crises and Natural Disasters

COVID-19 and other crises are a test of our principles, values, and shared humanity.[95] We must implement holistic efforts globally to combat COVID-19 while protecting the human rights of all persons.[96] UN experts have stated that our efforts must medically and economically protect the most vulnerable people in our global society.[97] States must consider a multitude of factors they face when issuing orders that restrict movement. Specifically, governments must ensure that while

issuing executive orders, the human rights to life and freedom of movement must be protected.

Article 3 of the Universal Declaration of Human Rights (UDHR) establishes that every human being has the inherent right to life; this right shall be protected by law; and no one shall be arbitrarily deprived of their life.[98] Moreover, Article 6 of the Convention on the Rights of the Child further provides that States Parties recognize every child has the inherent right to life and they shall ensure to the maximum extent possible the survival and development of the child. In Puerto Rico, when domestic violence shelters are deprived of the support they necessitate during crises, it impedes the ability to afford the most vulnerable of populations the basic protections of life, liberty, and security of person.

Article 13 of UDHR, protects the right to freedom of movement by establishing that everyone has the right to freedom of movement and residence within the borders of each state.[99] Additionally, Article 12 of the International Covenant on Civil and Political Rights provides, everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; and the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, *are necessary to protect* national security, public order, *public health* or morals or *the rights and freedoms of others*. Despite this limitations clause, which allows governments lawfully to suspend some civil and political rights under certain conditions, the necessity of protecting society's public health should not override the individual protections of those who face violence at home. Women and LGBTQ+ persons who are victims of GBV must be assured they will have means by which they may escape their aggressors. This is particularly difficult when aggressors are confined to a space where they have total control over their victim(s), and when they can restrict the person from the home, rendering them homeless. Governments must secure a right to housing and ensure that talks about providing housing to vulnerable populations are ensured and available during pandemic periods.

Under Article 22 of the UNDHR, everyone has the right to social security and is entitled to realization, in accordance with the resources of each State, of the economic, social and cultural rights indispensable for their dignity and the free development of their personality. The current hate crime rate in Puerto Rico demonstrates that transgender persons are targeted as a vulnerable group and not provided social security, thus not afforded the protection of their right to life and freedom of movement. Consequently, under these conditions, it is clear that LGBTQ+ persons are not being afforded the ability to live a dignified life, nor the freedom to fully develop their personality.

1. Housing & Homelessness

There were many lessons regarding vulnerable populations learned after Hurricane María annihilated Puerto Rico. Amarilis Pagán Jiménez, Executive Director of Proyecto Matria, states that throughout the hurricane period in Puerto Rico in 2017, many agencies and non-progressive organizations denied services to LGBTQ+ persons despite their having the option to waive the required paperwork during the state of emergency in Puerto Rico.[100] As a result, LGBTQ+ persons were rendered more vulnerable, thereby compounding the hardships they experienced as GBV survivors.

It is crucial that "emergency declarations based on the COVID-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health."[101] This is particularly applicable to the most vulnerable groups in society, which is inclusive of LGBTQ+ persons. Pursuant to UDHR, Article 25, everyone has the right to a standard of living adequate for the health and well-being of themselves and of their family, including food, clothing, *housing* and medical care and necessary social services.[102] States must issue orders to isolate with specific measures in place for those who are homeless or living in substandard conditions; provide emergency housing with services to persons who cannot self-care; and containment measures must not penalize any person based on their housing status.[103]

The issue of homelessness is one of the challenges facing the LGBTQ+ community. According to Human Rights Campaign, "LGBTQ youth are more likely than cisgender and heterosexual youth to experience homelessness, unstable housing, or live in foster care—often times due to family rejection."[104] LGBTQ youth are 120% more likely to experience homelessness than non-LGBTQ youth, and it is estimated that 40% of homeless youth identify as LGBTQ.[105] The widespread closure of schools place LGBTQ youth at further risk of accessing basic needs provided by schools. Thus, LGBTQ youth "may also be required to spend more time in unsupportive environments including home environments where they face family rejection."[106] The issue of homelessness was addressed by the Executive Order 2020-25 signed by Governor Wanda Vázquez Garced on March 17, 2020, to aid the homeless in Puerto Rico during COVID-19.[107] Three agencies: Family, Housing, and Health were directed to comply with the order and activate a protocol to serve the most vulnerable population—the homeless.[108] Governmental agencies were mandated to develop a plan to establish centers that offer medical services, tests, personal hygiene, laundry, and food.[109] Fifty days after the Executive Order was signed, there has not been adequate implementation of the measure.[110] In Puerto Rico, many homeless people reported they had not received guidance on the Executive Orders signed for the COVID-19 emergency or the services available to them.[111] Not addressing the order may culminate into thousands of infected patients and deaths. Based on the aforementioned research, LGBTQ+ persons in Puerto Rico represent a part of this homeless population.

2. Social Discrimination & Access to Healthcare

Within the LGBTQ+ community, transgender persons often face discrimination in social environments and healthcare.[112] Transgender people are also more susceptible to COVID-19.[113] Compared to the general population, "LGBTQ Americans are more likely...to live in poverty and lack access to adequate medical care, paid medical leave, and basic necessities during the pandemic."[114] HRC Foundation estimates there are nearly 14 million LGBTQ adults and two million LGBTQ youth in the United States.[115] Analysis of General Social Survey (GSS) data, demonstrates that more than five million work in jobs that are more likely to be impacted by COVID-19.[116] This includes those working in restaurants and food services, hospitals, K-12 and higher education, and retail industries.[117] The U.S. Department of Health and Human Services (HSS) commissioned a report to assess the health status of LGBTQ persons.[118] The report's findings clearly explain there are health disparities that face older LGBTQ+ adults because they face unique needs.[119] As the country remains in the height of a pandemic, the Trump administration seeks to lessen protections to the LGBTQ+ community under §1557 of Obamacare. Politico reports that the HHS Department is close to finalizing its long-developing rewrite of Obamacare's §1557 provision, which barred health care discrimination based on sex and gender identity.[120] Section 1557's nondiscrimination protections assist some of the populations that have been most vulnerable to discrimination, including LGBTQ+ persons, and provides those populations equal access to healthcare and health coverage.[121] Federal courts have consistently recognized over many years that sex discrimination includes discrimination based on gender identity, including in the context of §1557. The subsequent regulations promulgated under §1557 further clarify that discrimination based on gender identity and sex stereotyping is prohibited in healthcare coverage and access.

The Williams Institute published a study in April 2020, which identified over half a million transgender adults as being at an elevated risk from COVID-19.[122] According to the CDC, those who are over age 65 and those with underlying medical conditions are most at risk of serious COVID-19 illness.[123] The chart below illustrates the severity of the challenges that transgender adults are facing in the U.S. as of April 2020.

A. *217,000 transgender people are 65 or older*
B. *319,000 transgender people have underlying health issues that contribute to higher mortality rates.*
C. *137,600 transgender people are uninsured.*
D. *450,400 transgender people have not seen a doctor last year because they could not afford it.*
E. *667,000 transgender people live below 200% of the poverty line.*
F. *294,800 transgender adults live alone without family or any mutual support systems*

The current administration's amendment to Obamacare's §1557 would result in legalizing discrimination against patients based on their gender or sexual orientation by hospitals and health care workers. Similar discriminatory positions are already taking place as seen in the case of Arizona Republican Congressman Andy Biggs. Congressman Biggs stated he voted against the Families First Coronavirus Response Act (FFCRA) because it included provisions for domestic partnerships, including same-sex relationships.[124] These statements from leaders do not take into account that all human beings, regardless of sexual orientation or gender, deserve protection and equal access to adequate treatment and health care during natural disasters and pandemics.

3. LGBTQ+ Gender-Based Violence

Since 2013, at least 137 transgender women were victims of fatal violence."[125] These numbers underreport the lethal violence that transgender and gender non-confirming people, who may not be properly identified as transgender or gender non-conforming, face daily.[126] "[T]ransgender women are living in crisis, especially Black transgender women."[127] "[T]he toxic intersection of racism, sexism, transphobia and easy access to guns conspire to deny so many members of the transgender and gender non-conforming community access to housing, employment and other necessities to survive and thrive."[128] Systemic discrimination pushes many transgender and gender non-conforming people to underground economies, which often include sex work to survive, and into circumstances where they more often than not encounter GBV.[129]

In Puerto Rico, the data available on LGBTQ+ survivors of GBV is scarce. The most recent quantitative research performed regarding domestic violence in same sex couples was conducted in 1999 and it surveyed only Puerto Rican gay and bisexual males. Out of 302 participants, 48 percent perceived having been subjected to emotional abuse in a relationship and 26 percent reported being victims of physical abuse.[130] There is no recent data available on lesbians who have suffered domestic violence. The most recent study was conducted in 2004 and out of 50 females surveyed, 54 percent reported being a victim of domestic violence abuse in their lives.[131]

The members of the transgender community in Puerto Rico are also in desperate need of legal protections since, "many transgender women experience interpersonal, institutional, and structural violence, [but] there are few well-developed mechanisms for reporting and documenting violence against them."[132] To make matters worse, "[i]n recent years, Puerto Rico has seen an escalation of violence against transgender women that has dominated local media." as seen in the 2020 Puerto Rico transgender murder cases of Negrón, Arocho, Peláez, and Velázquez.[133] Between 2011 and 2013, a research study was undertaken in which

fifty-nine self-identified Puerto Rican transgender women participated.[134] In the said research, 35 percent reported having experienced verbal violence based on their gender identity, 25 percent experienced physical violence, and 16 percent reported being a victim of sexual violence.[135] Even more alarming is the fact that three quarters of its participants reported having known a transgender person who was killed.[136] Based on the research discussed above, the fear is that these numbers will escalate under the confinement by quarantine orders in Puerto Rico and across the globe.

One of the most recent surveys in which people in the LGBTQ+ community were questioned was conducted in 2013, two months after Puerto Rico's Law for the Prevention and Intervention with Domestic Violence was amended to extend its protections for same sex couples.[137] This survey revealed that out of 178 individuals, 49.4 percent identified protection from GBV as a priority "for the social wellbeing of people identifying as lesbian, gay, bisexual, or transgender in P.R."[138] Furthermore, said study revealed that 62 percent of those surveyed identified the "management of intimate partner violence" as a health services priority within the Puerto Rican LGBTQ+ community.[139]

In Puerto Rico, Section IX of the Order titled *Domestic Violence Incidents between LGBTQ+ Couples*, instructs all police officers that all investigations must be conducted as established by the Order without any type of discrimination on the grounds of sexual orientation, gender identity, or gender expression of any of the parties involved in the relationship. However, the reality reflects a differential application of the law to the LGBTQ+. The reality, as per Francisco Rodriguez Fraticelli, Executive President of *Coalición de Coaliciones*, a local non-governmental organization, is that the LGBTQ+ community faces analogous issues with law enforcement during domestic violence incidents, especially during times of emergencies caused by natural disasters.[140] For example, out of 567 persons surveyed within the LGBTQ+ community after Hurricane María, 37 percent reported being discriminated against when applying for subsidized housing and 55 percent reported being treated unfairly or mistreated because of their sexual orientation or identity.[141]

Moreover, the LGBTQ+ community in Puerto Rico has an access-to-justice problem given many social and cultural impediments. According to Dr. Esteban, there is scholarly research in Puerto Rico that documents the prevalence of homophobia and transphobia throughout the archipelago colony, and LGBTQ+ communities face constant violence and different levels of aggression.[142] He states that the research has found there exists severe discrimination and verbal aggression towards LGBTQ+ persons throughout most agencies of the Puerto Rican government.[143] This aversion combined with a crisis situation can lead to zero access-to-justice.[144] Dr. Esteban proposes this lack of access can be addressed

by accepting and creating visibility of the problem, offering continuing mandatory training and education, and following up the issue with the collection of scientific data.[145]

V. Recommendations

Quarantines should not provide opportunities for aggressors to unleash GBV, but there can be little empirical question that they do. It is clear that orders issued by various states to quarantine populations is essential as a protective measure to mitigate the spread of the COVID-19 virus. However, it is also essential to recognize and address the consequences of social isolation for survivors of GBV, as isolation periods provide an opportunity for "abusers to unleash more violence."[146] The data demonstrates that GBV "increases during times of stress or anxiety, and experts say the next few months are likely to be particularly acute due to financial insecurity, alcohol consumption, and health concerns."[147] Yet, during crises, governmental agencies either disregard the conversation of GBV all together or do not implement sufficient measures aimed at reducing the risk factors in an effort to minimize GBV.

Engagement of youth in the conversation of how to involve the public and support vulnerable groups during times of crisis is beneficial and vital. The creation of research-based websites is one way to create a public social platform to enhance communication and sharing of information between the GBV survivors, the community, and the state during times of crisis. These research based websites should be accompanied by quick exit smartphone applications. However, it is vital that the technology developed be accompanied by an energy free sustainable model to support users during times where there is no electricity. For example, the Domestic Violence in Puerto Rico project created by the Hurricane María Assistance & Relief Institutional Alliance, Inc. (HMARIA), uses a research based website platform to demonstrate its work between youth, local community based organizations (CBO), and institutional entities. It liaisons local CBOs with U.S. continental and global organizations and institutions in an effort to garnish specific types of support to meet the needs of local vulnerable groups post-natural disasters.[148] Currently, volunteer youth work on this research web-based project. Youth serve on youth-led teams focused on addressing specific human rights issues with guidance and support from HMARIA.[149] The matters the youth work on include: (1) access to healthcare as a human right, (2) support of domestic violence shelters and GBV survivors, and (3) mental health initiatives to aid persons displaced by the ongoing earthquakes in southern Puerto Rico.[150] The HMARIA research based website continually gathers related data and resources for public use on these human rights issues. It also links its research based website to experiential learning experiences on the ground for youth creating cyber experiential learning experiences and mentoring projects to espouse awareness and social consciousness during the COVID-19 social distancing confinement period. Volunteer surgeons

from the American College of Surgeons and HMARIA RDPA lawyers dedicate time to support aspiring doctors and lawyers in an effort to develop a more socially conscious and inclusive cohort of future leaders in the two fields that GBV survivors interact with the most, medicine and the law.

Non-governmental organizations and women leaders who participate in GBV social discourse and services must be included in the decision making process of a nation-state's emergency response plan at all levels of government.[151] Inclusion of their concerns in executive orders are beneficial to society. It builds a sense of solidarity during stressful times.[152] In cases where non-governmental organizations are providing the primary services for survivors of GBV in a nation-state, they need to be included as essential service providers and provided provisions for the safe transport and care of GBV survivors.[153] They need to have a seat at the emergency management table and a voice in the policy decision making process as it pertains to vulnerable groups.[154] It is essential during confinement that all executive orders be written clearly and include why persons are being isolated and how they should proceed with the isolation.[155]

Gender conscious financial considerations must be part of the government funded stimulus discussion during crises. Many nations during COVID-19 have begun to evaluate and respond to financial costs borne by households and are working to compensate individuals for income losses associated with the quarantine.[156] These packages must be considerate of the reality that in households where GBV exists or may exist, women are often disadvantaged by economic stimulus packages that are paid to the aggressor when taxes are filed jointly.[157] Individuals should have the option to choose subsidies to be paid separately to each person in the household, as opposed to family units. This will assist in mitigating the GBV survivor's economic dependency on their partner.[158]

When the intersectionality of race, ethnicity, socio-economic status, sexual orientation, gender, language, immigration status, age, and other such factors are added to the equation, women and members of the LGBTQ+ community are rendered to a lesser class status. Factors of intersectionality, essentially produces a lower class citizenship. It is important to take a closer examination of factors that intersect which make groups vulnerable during crises. Nation-states and civil society must be prepared to understand how to best assist these populations.[159] They must also understand how to practice acts of solidarity in everyday interactions that can assist us all, as it is especially important to be aware of and center the most vulnerable members of our communities.[160]

Lastly, nation-states must ensure the fundamental principles of human rights enshrined in the documents promulgated by the United Nations. Fundamental principles found in human and civil rights guided by declarations of nation-states

around the globe must be protected to preserve the sanctity of all humanity.[161] Truth and transparency during periods of crisis is critical.[162] Fundamental rights must not be infringed upon by states as they are the basic protections that must be afforded to every individual in our global society.[163] Governments must not encroach fundamental rights before having exhausted all feasible measures that guarantee the dignified lives of all individuals.

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they believe it is the authentic recorded event of Negrón's murder. Negrón was continually misgendered after her death in reports. A small but powerful force of conservative Christians in Puerto Rico remain vocal about pushing back against moves to be more inclusive despite the global change in the perception and attitude of gay and transgender people.

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43 Point of clarification. In the data published on Facebook by Seguimiento de Casos, Neulisa Luciano Ruiz, also known as Alexa Negrón Luciano, was referred to as Alexa Torres.

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141 Ibid.
142 Interviewed by Luis Gabriel Nieves Pérez on Dec. 12, 2018 in Carolina, Puerto Rico, at 5:30 p.m. Dr. Ebola Esteban, holds a PhD in Clinical Psychology from Albizu University, Puerto Rico. He is certified in LGBTQ+ Affirmative Therapy by the American Association for Marriage and Family Therapy. He has a private practice where he sees primarily LGBTQ+ patients. He is an Assistant Professor at the Ponce Health Sciences University. He teaches in courses including Human

Sexuality, Psychology of Sexual Orientation and Gender Identity, and is part of the Ponce Research Network on Health Disparities: Gender and Sexual Diversity Core where he conducts original research studies on LGBTQ+ issues. He is the Coordinator for the Sex, Gender, and Sexual Orientation Diversity Committee for the Puerto Rico Psychological Association.

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149 "Hurricane Maria Assistance & Relief Institutional Allince, Inc.," The Hurricane Maria Assistance & Relief Institutional Allince, Inc., accessed May 11, 2020, https://hmariainc.weebly.com/. The website design team consists of Patricia Padrinao (Liaison), Aura Soto-Peguero, Kinza Awais, and James Lopez Olvera, who design the virtual platform and ensure the public engagement and visibility of the website for the public to use to promote access and information on human rights related issues. The website map team consists of Lisa Cho (Liaison), Cayetana Lazcano Etchebarne, Shawn Louis, Brianne Ortiz, Samuel Win, Arianna Aguilar, Bianca Hayles, Miss-Kye Gallon and Jade Williamson, creates and organizes the virtual platform that ecompasses the human rigths projects for the public accordingly. The website maintenance team consists of Asmaa Hamdan (Liaison), Santos Garcia, Stephanie Johns, Elizabeth Zapata, Maribel Susano, Sema Sarsour, Trevonna Hepburn, Adam Fane, María Gomes, and Lenora James, provides weekly scholarly research, translates articles from Spanish to English, and creates youth led videos to promote awareness and advocacy of human rights during times of crisis.

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158 Ibid. See also that women are the majority of the elderly around the world. Most people over eighty are women. In many countries, fewer women than men have healthcare insurance. Countries must take this into account during times of crisis to ensure full inclusion for the most vulnerable, especially the elderly who may often also have some type of disability due to aging.
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ABOLITION LITE AND EXTRAJUDICIAL KILLING IN THE PHILIPPINES

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Abstract: *Some analysts believe that the abolition of judicial killing (capital punishment) is one of the great (albeit unfinished) triumphs of the human rights movement. But extrajudicial killing remains a major problem in many parts of the world, and sometimes its scale so far exceeds the number of judicial executions that death penalty reductions seem like small potatoes. One striking example is what has occurred in the Philippines since Rodrigo Duterte became President in 2016: thousands of extrajudicial executions in a country that abolished capital punishment in 2006. The Philippine case illustrates a pattern that occurs in polities with weak law, strong executives, and fearful and frustrated citizens. In such countries, state killing often survives and sometimes thrives after capital punishment is abolished, and where capital punishment has not been abolished, extrajudicial executions often continue to be carried out even after the number of judicial executions has fallen to near zero.*

Introduction

For most cultures and most of human history, the death penalty was taken for granted and directed at a wide range of offenders. In ancient Israel, death was prescribed for everything from murder and magic to blasphemy, bestiality, and cursing one's parents. In eighteenth century Britain, more than 200 crimes were punishable by death, including theft, cutting down a tree, and robbing a rabbit warren. China of the late Qing dynasty had 850 capital crimes, many reflecting the privileged position of male over female and senior over junior.[1]

In the past half-century, there has been a remarkable decline of capital punishment in many parts of the world. As of 1970, only twenty-one nations had abolished capital punishment for all crimes or for "ordinary offenses" (all crimes except insurrection and offenses committed in wartime). In 2020 the total is 114, and 28 more retain it in law but have not executed anyone for at least 10 years, while 56 countries retain capital punishment and continue to conduct executions on a regular basis. At present, therefore, more than 70 percent of all countries (142 out of 198) have abolished capital punishment in law or practice. The pace of abolition slowed in the 2000s and 2010s, but the death penalty's decline continued. Most notably, of the twenty-nine heaviest users of capital punishment in the 1990s (countries that conducted at least twenty executions in the five-year period from 1994–1998), eleven had stopped executing by 2017, and ten more had experienced

execution declines of more than 50 percent. In the other eight countries that were heavy users in the 1990s, executions decreased modestly in two (Saudi Arabia and Egypt), remained stable in one (Japan), and increased significantly in four (Iran, Vietnam, Pakistan, and Indonesia). The execution rate change for Iraq cannot be determined because reliable figures are unavailable.[2]

Some analysts claim that the abolition of capital punishment is "one of the great, albeit unfinished, triumphs of the post-Second World War human rights movement."[3] Others believe the "abolition of capital punishment in all countries of the world will ensure that the killing of citizens by the state will no longer have any legitimacy and so even more marginalize and stigmatize extrajudicial executions."[4] But extrajudicial killing[5] remains a major problem in the age of human rights and abolition, and sometimes its scale so far exceeds the number of judicial executions that death penalty reductions seem like small potatoes. The most striking example concerns what has occurred under Rodrigo Duterte since he became President of the Philippines in June 2016: thousands of extrajudicial executions in a country that has abolished capital punishment. The case of the Philippines illustrates a pattern that has been seen before and will be seen again in polities with weak law, strong executives, and fearful and frustrated citizens.[6] In fact, state killing often survives and sometimes thrives after capital punishment is abolished (see also Mexico and Brazil). And where capital punishment has not been abolished, extrajudicial executions continue to be carried out frequently in some countries even after the number of judicial executions falls to near zero (as in India, Thailand, and Myanmar). The rest of this article describes the practice of extrajudicial killing in the Philippines under Duterte, explains why it is so common there, and suggests some lessons to learn from the persistence of this form of state-killing in the "age of abolition."[7]

Extrajudicial Killing

The Philippines has not practiced capital punishment since 2006. In fact, the country has abolished the death penalty twice: first in 1987 after dictator Ferdinand Marcos was overthrown by the "People Power" movement, and then again in 2006 (after capital punishment was reinstated in 1993) under President Gloria Macapagal Arroyo, by votes of 120 to 20 in the Philippine House and 16 to 0 in the Senate. Between 1993 and 2006, this Roman Catholic country—the only Christian nation in Asia and "the most Westernized society in the region"[8]—sentenced more than 1,200 people to death but executed only 7 of them (by lethal injection): 3 for rape, 1 for rape with homicide, and 3 for robbery with homicide. More broadly, since 1898, when the U.S. began its "only major colonial experience" in a country that had been colonized by Spain for 333 years, the Philippines has sentenced to death and executed a total of 89 people, for an average of less than 1 judicial execution per year.[9] The number of judicial executions in the Philippines since the turn of

the twentieth century is less than the annual total in the U.S. (98) for 1999, and it is approximately the same number of judicial executions as the People's Republic of China averaged in a two-day period during its "Strike Hard" (*yanda*) anti-crime campaigns of the 1980s and 1990s.[10] When it comes to capital punishment, the Philippines has never been an especially aggressive killing state even though it has long had one of the highest homicide rates in Asia. In 2017, the Philippine rate of 8.4 homicides per 100,000 population was the highest intentional homicide rate among all the countries of East and Southeast Asia, and it was more than four times higher than the average rate (2.0) for the other 18 jurisdictions in this region.[11]

Since Duterte was elected President in June 2016, he has pushed to reinstate capital punishment in the Philippines once again. Time will tell if a death penalty stature gets enacted before he completes his term in 2022. But since the start of his six-year presidency, Duterte has directed a War on Drugs that has resulted in extrajudicial killing on a scale far exceeding the judicial killing that occurred at any time in Philippine history (as Duterte promised in his election campaign).[12] Accurate counting is difficult, but in the first 6 months of Duterte's Presidency, it appears that more than 7,000 citizens were killed by police or other agents of the Philippine state who were encouraged to prosecute the War on Drugs.[13] And after 3 years of Duterte's leadership, the number of Filipinos killed extrajudicially was at least 20,000—and the true total may well be substantially higher.[14] Thus, during the first half of Duterte's presidency, an average of twenty people were killed extrajudicially each day. Most of them were poor people in and around Manila, but at least thirty-four Filipino lawyers were executed without trial in the first two years of this War on Drugs, as were many mayors and other local politicians accused of protecting or participating in the drug trade.[15]

Extrajudicial killing in the Philippines was common long before Duterte became President. It has been practiced for decades by local governments in many of the country's eighty-one provinces,[16] seventy-three of which are ruled by "entrenched political families."[17] Extrajudicial killing has long been practiced by the central government too. Under Ferdinand Marcos, who ruled the country from 1965 to 1986, the central government carried out 31 judicial executions and at least 3,000 extrajudicial ones – a ratio of 1 to 100.[18] And in the first half of Gloria Macapagal Arroyo's presidency (2001-2006), more than 8,000 Filipinos were victims of "extrajudicial, summary, or arbitrary execution"—an average of 137 per year.[19]

Under Duterte, extrajudicial killing has been modeled on practices that he directed when he was mayor of the city of Davao on the southern island of Mindanao. His Davao "Death Squads" killed at least 1,400 persons during the 22 years he was mayor, and Duterte himself confessed to killing 3 kidnappers in 1988, his first year in that position.[20] When Duterte became mayor, Davao was

often called "Murder City" of the Philippines. But when his daughter Sara became mayor in 2016, Davao was included in a list of the "Top 20 Most Livable Cities in Asia," and it was widely but wrongly believed to be one of the safest cities in the country.[21] This public misperception emboldened Duterte to deploy the Davao model during his presidency, with similarly deadly consequences and with many of its hallmarks, including: "watch lists" with the names of suspected or accused drug users and sellers; "knock and plead" operations aimed at getting drug offenders to quit drugs and turn themselves in ("or else"); official pronouncements that many drug users will be killed ("the fish will grow fat" from the bodies dumped in Manila Bay) and that their executioners will be protected, not punished; encouragement of the police and other security forces to "go ahead and kill them [drug users]"; and other audacious declarations ("rich or poor, I do not give a shit—my order is to destroy").[22]

In comparative perspective, the fact of extrajudicial killing in the Philippines is not especially unusual. As described at the outset of this article, countries that have abolished capital punishment or ceased judicial executions often continue to carry out extrajudicial executions. The frequency of extrajudicial killing in the Philippines is not unique either. In Myanmar, which has not carried out a judicial execution since 1989, extrajudicial killing of the Muslim Rohingya people took at least 20,000 lives in late 2016 and 2017, and possibly many more.[23] And in the Brazilian state of Rio de Janeiro, police killed more than 1,500 people in 2018 (an average of 4 per day), while in the first 4 months of 2019 they killed 558 more (nearly 5 per day). Per capita, the rate of state-killing in Rio rivals that which has occurred in the Philippines under Duterte,[24] and it has been encouraged by Duterte-like pronouncements from President Jair Bolsonaro, who once said "the crime of extermination, in my understanding, will be very much welcomed,"[25] and who frequently repeats a popular saying that "a good criminal is a dead criminal."[26]

Causes

How is it possible for a state that has abolished capital punishment to kill so many of its own citizens with impunity? A one-cause-explains-all account is implausible and impossible, but three conditions that help explain extrajudicial killing in Duterte's War on Drugs also apply in other contexts, including Myanmar and Brazil. These three conditions are a populist political strategy that involves governing through crime; chronic democratic underdevelopment; and a deeply dysfunctional system of criminal justice that makes extrajudicial approaches to crime control seem appealing to many citizens and officials.

First, extrajudicial killing in the Philippines has been the target of much foreign criticism, but domestically it remains highly popular, as does Duterte himself, whose public approval ratings have consistently exceeded 80 percent since he took

office in 2016.[27] Duterte's War on Drugs has done little to tame the country's drug and crime problems, but as a display of penal populism it is a striking example of political "words that succeed and policies that fail."[28] At its core, Duterte's brand of penal populism consists of the pursuit of punishment policies and practices based primarily on their anticipated popularity rather than their effectiveness. In this sense, Duterte—a former prosecutor— and his minions are "governing through crime,"[29] much as many of their American counterparts have done over the past several decades, albeit with far more lethality. Central to this strategy of governance are orchestrated efforts to foster fear in Filipinos – of drugs, of crime, and of official responses to both. To liberals and progressives, the War on Drugs in the Philippines may seem uniquely horrifying in its bloodiness, brutality, and brazenness, but in many of its essentials it is actually quite familiar.[30]

Second, extrajudicial killing under Duterte reflects fundamental economic and political problems in Philippine society. The country is not a "failed state" like North Korea or Zimbabwe, but it is far from a success story. In 2017, its GDP per capita (purchasing power parity) placed Asia's oldest democracy 154th out of the 230 countries in the CIA World Factbook—a little above India and the Republic of Congo, and a little below Jamaica and Guatemala, to name four other countries that also have serious problems with extrajudicial killing. In the same year, Freedom House gave the Philippines a score of four out of sixteen for "Rule of Law" because its institutions of justice "heavily favor ruling dynastic elites."[31] The extent of dynastic rule in the country is stunning, exceeding even those found in the countries of Latin America, with the dynastic share of leaders above 80 percent for governors and vice-governors in the Philippines, and at 77 percent for members of the House of Representatives and 69 percent for mayors.[32] The Philippines remains poor not only because of the lasting effects of Spanish and American colonialism and Japanese occupation, but also because it continues to be ruled by a narrow elite that organizes society for its own benefit, at the expense of the vast majority of citizens. This remains true under Duterte, whose rhetoric frequently appeals to Philippine peasants, but who has consistently pursued policies that reinforce "the dominance of a handful of landowning families, and the landlessness of tens of millions of farmers who till the soil in near-feudal conditions."[33] There is also the problem of corruption, which is so extensive that many Philippine leaders and governments resemble glorified gangs, with "thieves of state" undermining both development and security.[34] Of course, economic institutions influence how poor or prosperous a country becomes, but the root problem in the Philippines is political, for it is political practices and institutions that largely determine what economic institutions and incentives each country has.[35] Politics also underlies the problem of state killing. It is no coincidence that political and state institutions are central in explanations for the trajectory of the other form of state-killing known as capital punishment.[36]

Third, the Philippines is a country with high rates of lethal violence and strong public demand for drugs (especially methamphetamines, which are especially attractive to the poor because they enable manual labor, alleviate hunger, and provide emotional escape from the grinding conditions of daily life). There is also widespread public concern about violence, drugs, and disorder coupled with little public faith that justice is being delivered by the country's criminal "injustice system."[37] Among other criminal justice problems, there is such a huge backlog of cases that the average prosecutor handles 500 cases per year and the average public defender 5,000. The police are similarly understaffed. The country's jails and prisons have "an average overcrowding rate of some 500 percent."[38] Under Duterte's predecessor as president, Benigno Aquino III, only 25 percent of criminal cases in the country resulted in conviction—and even that was an improvement over what transpired under the administration of President Arroyo. In short, criminal justice in the Philippines is ineffective, inefficient, and corrupt. It is also toothless. According to the Center for Studies on Impunity and Justice, the Philippines in 2017 had the highest Global Impunity Index of any country in the world—just above Mexico, where drug crime and extrajudicial killing also flourish. These basic failures of criminal justice lie "at the root of broad acceptance of Duterte's draconian drug war."[39] They also help explain why millions of Filipinos support extrajudicial killing or passively acquiesce to it even though there is little evidence that it effectively controls crime or deters drug use and trafficking.[40]

Lessons

Duterte's chapter in the history of extrajudicial killing in the Philippines is not over yet, but the evidence that has surfaced so far suggests at least four lessons that students of law and society should learn from it. First, extrajudicial killing deserves much more study than it has so far received. In comparison to the number of studies of capital punishment, serious studies in this field are few and far between. Of course, research in this area does face empirical and methodological challenges. For one thing, reliable information is often difficult to obtain because few governments that kill extrajudicially are as open about it as Duterte's government has been. For another, there are different types of extrajudicial killing that use of a single broad label obscures.[41] Nonetheless, this subject is so important and neglected that one hopes these challenges will do more to motivate future study than to discourage it. Preventing this form of state killing and holding its perpetrators accountable requires an understanding of its contours, consequences, and causes.[42]

Second, since state killing does not necessarily decline after capital punishment is abolished, students of capital punishment should be less sanguine about the consequences of abolition. Too much death penalty scholarship is triumphalist about the effects of abolition and oblivious about the scale of extrajudicial execution. More broadly, the persistence of extrajudicial killing after death penalties are

abolished (as in the Philippines, Mexico, and Brazil) or judicial executions decline to near zero (as in Myanmar, Thailand, and India) suggests that there is reason to wonder whether "violence" in the world (of various kinds) has really declined as significantly as analysts such as Steven Pinker[43] and James Payne[44] have argued.[45]

Third, scholars and legal professionals have long recognized that there are tensions and tradeoffs between crime control and due process values.[46] Too often, though, analysts fail to recognize that failures of crime control can motivate disregard for due process. The problem of impunity in Philippine criminal justice—the failure to catch and convict criminals—is so severe that many citizens believe ignoring human rights and the procedural requirements of law is both justified and imperative. In Latin America, too, impunity is a key cause of the large increases in crime that every country has experienced over the past quarter-century. This impunity also motivates many of the lethal and extrajudicial shortcuts that governments in the region take.[47] Effective prevention of extrajudicial killing requires recognizing that impunity is the fertile ground in which lethal brands of penal populism frequently find root.

Finally, in recent years several well-regarded books have described and lamented the decline of democracy in many countries of the world, including *How Democracies Die, How Democracy Ends, On Tyranny, The Road to Unfreedom*, *Democracy May Not Exist But We'll Miss It When It's Gone*, and *How to Save a Constitutional Democracy.*[48] And there is reason to worry about the decline of democracy[49] and the rise of "the strongman."[50] Freedom House has observed that in 2018, more countries became more oppressive than more free—the thirteenth consecutive year of more democratic decline than progress.[51] If more democracies erode and if human rights continue to be ignored by authoritarian and populist forces, extrajudicial killing could spread. In the Philippines, extrajudicial killing will continue to occur after Duterte leaves office unless the country undergoes deeper democratic development than it has experienced since Marcos was overthrown more than three decades ago. Time will also tell whether other nations become abolitionist lite with respect to state killing.

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Notes

1 David T. Johnson, “Asia’s Declining Death Penalty,” *Journal of Asian Studies* 69, no. 2 (May 2010): 337-346.
2 David T. Johnson and Franklin E. Zimring, “The Death Penalty’s Continued Decline,” *Current History* 118, no. 811 (November 2019): 316-321.
3 Peter Hodgkinson, “Capital Punishment: Improve It or Remove It?” in *Capital Punishment: Strategies for Abolition*, ed. Peter Hodgkinson and William A. Schabas (New York: Cambridge University Press, 2004), 1.
4 Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (New York: Oxford University Press, 2008), 6.
5 By “extrajudicial killing” I mean the killing of a person by governmental authorities without the sanction of any legal or judicial process. The precise nature of governmental involvement ranges from tolerating, condoning, and encouraging the killing of suspected drug users or sellers, to the fiction of buy-bust operations in which the targets of a sting resist arrest and are killed in a shoot-out, to cold-blooded assassination as an act of government terrorism. All of these types of extrajudicial execution (and more) have occurred frequently in Duterte’s War on Drugs.
6 David T. Johnson and Jon Fernquest, “Governing Through Killing: The War on Drugs in the Philippines,” *Asian Journal of Law & Society* 5, no. 2 (November 2018): 359-390.
7 David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Cambridge: Harvard University Press, 2010).
8 Stanley Karnow, *In Our Image: America’s Empire in the Philippines* (New York: Random House, 1989), xi, 26; David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York: Oxford University Press, 2009), 108.
9 Johnson and Zimring, *The Next Frontier*, 108.
10 Ibid., 241.
11 United Nations Office on Drugs and Crime (UNODC), Data on Intentional Homicide Victims at https://dataunodc.un.org/crime/intentional-homicide-victims.
12 In addition to extrajudicial killing, which is the focus of this article, there are other troubling features of Duterte’s approach to order control, including a large increase in the country’s imprisonment rate (as of 2019, the Philippines had “the most overcrowded prison system in the world”) (Clarke Jones and Raymund Narag, “How Inmates Help Run Philippine Prisons,” *Current History* [November 2019], 298-303), and an aggressive, “broken-windows”-style crackdown by police on minor offenses such as drinking or being shirtless in public (Aurora Almendral, “In Duterte’s Philippines, Having a Beer Can Now Land You in Jail,” *New York Times*, July 22, 2018, A6).
13 Alfred W. McCoy, “Philippine Populism: Local Violence and Global Context in the Rise of a Filipino Strongman,” *Surveillance & Society* 15, no.3 (2017):

514-522.

14 Sheila Coronel, Mariel Padilla, David Mora, and The Stabile Center for Investigative Reporting, "The Uncounted Dead of Duterte's Drug War," *The Atlantic*, August 19, 2019.

15 Jason Gutierrez, "Gunned-Down Lawyer Opposed Duterte's War on Drugs," *Honolulu Star-Advertiser*, November 8, 2018.

16 Alan Berlow, *Dead Season: A Story of Murder and Revenge* (New York: Vintage, 1996); Laurel Flores Fantauzzo, "Deadly Populism," *Mekong Review*, no. 11 (May 2018): 3-4.

17 Laurel Flores Fantauzzo, "Deadly Populism," *Mekong Review*, May 2018: 3-4.

18 Johnson and Fernquest, "Governing Through Killing," 362.

19 Ibid.

20 Ibid., 369.

21 Ibid., 370. Crime statistics in the Philippines are not very reliable, but those that are available indicate that Davao remains one of the most dangerous cities in the country. See Johnson and Fernquest, "Governing Through Killing," 359-390; and Felipe Villamor, "Philippine Women Fire Back After Duterte Jokes About Rape," *New York Times*, September 2, 2018, A7.

22 Ibid., 363-365.

23 United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar, at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23575&LangID=E.

24 Azam Ahmed, "Fighting as Masked Vigilantes, Brazil's Police Leave a Trail of Bodies and Fear," *New York Times*, December 20, 2019; Benjamin Fogarty-Valenzuela, "Trump of the Tropics?" *The New Yorker*, May 6, 2019; Ernesto Londono and Manuela Andreoni, "Almost 5 a Day Die at Hands of Rio Police," *Honolulu Star-Advertiser*, May 27, 2019.

25 Quoted in Benjamin Fogarty-Valenzuela, "Trump of the Tropics?", 3.

26 Quoted in Ernesto Londono and Manuela Andreoni, "Almost 5 a Day Die at Hands of Rio Police," *Honolulu Star-Advertiser*, May 27, 2019, A6.

27 Johnson and Fernquest, "Governing Through Killing," 368.

28 Murray Edelman, *Political Language: Words That Succeed and Policies That Fail* (New York: Academic Press, 1977).

29 Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

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31 Ibid., 376.

32 Patricio N. Abinales and Donna J. Amoroso, *State and Society in the Philippines* (New York: Rowman & Littlefield Publishers, 2017).

33 Peter S. Goodman, "Philippine Peasants Were Promised Land. Staking a Claim Can Be Deadly," *New York Times*, December 27, 2019.

34 Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security*

(New York: W. W. Norton & Company, 2015).
35 Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Publishing Group, 2012).
36 Franklin E. Zimring, *The Contradictions of American Capital Punishment* (New York: Oxford University Press, 2003), 12; Johnson and Zimring, *The Next Frontier*, 295; David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge: Harvard University Press, 2010), 127. Of course, extrajudicial killing also occurs in countries that are economically and politically developed. See, for example, the use of drones to kill in the U.S. "war on terror" (Jameel Jaffer, ed. *The Drone Memos: Targeted Killing, Secrecy, and the Law* [New York and London: The New Press, 2016]). For "targeted assassinations" by Mossad and other security forces in Israel, see Romen Bergman, *Rise and Kill First: The Secret History of Israel's Targeted Assassinations* (New York: Random House, 2018).
37 Miguel Syjuco, "The Injustice System," *New York Times*, April 26, 2017.
38 Clarke Jones and Raymund Narag, "How Inmates Help Run Philippine Prisons," *Current History* 118, no. 811 (November 2019): 298.
39 Miguel Syjuco, "The Injustice System," *New York Times*, April 26, 2017.
40 Johnson and Fernquest, "Governing Through Killing," 371-373.
41 See endnote 5.
42 Ibid.
43 Steven Pinker, *The Better Angels of our Nature: Why Violence Has Declined* (New York: Viking, 2011).
44 James L. Payne, *A History of Force: Exploring the Worldwide Movement Against Habits of Coercion, Bloodshed, and Mayhem* (Sandpoint, ID: Lytton Publishing Company, 2004).
45 See Pasquale Cirillo and Nassim Nicholas Taleb, "On the Tail Risk of Violent Conflict and Its Underestimation," *Statistical Mechanics and its Applications* 429 (2016): 252-260.
46 Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968).
47 Chapter 8 from Marcelo Bergman, *More Money, More Crime: Prosperity and Rising Crime in Latin America* (New York: Oxford University Press, 2018).
48 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018); David Runciman, *How Democracy Ends* (Profile, 2018); Timothy Snyder, *On Tyranny: Twenty Lessons from the Twentieth Century* (Crown, 2017); Timothy Snyder, *The Road to Unfreedom: Russia, Europe, America* (Crown, 2018); Astra Taylor, *Democracy May Not Exist, but We'll Miss It When It's Gone* (Metropolitan Books, 2019); Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018).
49 Ginsburg and Huq, *How to Save a Constitutional Democracy.*
50 Ian Bremmer, *Us vs. Them: The Failure of Globalism* (New York: Portfolio/ Penguin, 2018); Ian Bremmer, "The Strongman Era: How Tough Guys Came to Rule the World," *Time*, May 14, 2018, 43-45.

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HUMAN RIGHT – WHICH HUMAN; WHAT RIGHTS? BIOPOLITICS AND BARE LIFE IN MIGRATION AND COVID-19

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Abstract: *This article argues that human rights are outcomes of relations of power. Invariably, the privilege of enjoying state protected rights are at the expense of vulnerable and marginalized populations. We apply the concepts of homo sacer and bare life to interrogate differential rights in the Europe and the United Sates with specific focus on two issue areas – migrants/refugees/asylum seekers, and the effects of Covid-19 on African Americans.*

Introduction

This paper argues that what are generally known as human rights are really relational forms of power where some must be denied rights for others to have them. Human rights go beyond juridical rights; rather, they are one of the conditions of emergence and reproduction of state sovereignty, where the denial and guarantee of rights are not disconnected instances, but are outcomes of different constellations of social forces within a social formation. In what follows we draw on the work of Michel Foucault[1] and Giorgio Agamben,[2] both of whom have broached the reduction of the human to 'bare life' (*zoe*) in order to make possible life as *bios*, which is life within a political community where rights are granted and protected. We show that there are relations of antagonism between *zoe* and *bios* and that these relations are an essential part of life in liberal democracies. *Zoe* amounts to the reduction of the human to a position of overdetermined insecurity, while *bios* is constituted in the language and symbols of the dominant social forces. Accordingly, we argue that unless the human *in toto* becomes the referent object of security, liberal democracies and other forms of socio-economic and political configurations will not be able to establish rights as a generalized condition. We look at recent and current developments in European and American security policies and practices, with emphasis on migrants who come from marginalized populations. We also analyze current developments around COVID-19, not only because the pandemic has revealed the unevenness in human rights, but because it is indicative of the idiom of the bare life thesis—that some must die for others to live. One must recall that as the COVID-19 pandemic is wreaking havoc, Texas

Lieutenant Governor Dan Patrick has called for the economy to be reopened. The Governor went so far as to advocate sacrificing older Americans so that the American economy, and the American people who are not aged, can have life.[3]

Biopolitics and the Sovereign Ban

In his lecture at the Collège de France between 1975 and 1978, Michel Foucault engaged in a broad shift in his theory of state power. The fulcrum of this shift can be found in a movement away from the political economy of discipline and punish, where state power had traditionally been invested in the sovereign, and where the *raison d'ètat* was the right of the sovereign over life and death. Put differently, the basis of the sovereign power was the right to decide on the right to live or die. As Foucault states, "…the classical theory of sovereignty, the right to life and death was one of sovereignty's basic attributes."[4] In this instance, life and death are not *inherent* human rights in the Kantian sense of a categorical imperative that is morally universal, but practices of power where some are designated as the deserved whom must be protected, against the "damned," whom the power of the state shall be brought to bear. Accordingly, "…the lives and deaths of subjects become rights only as a result of the will of the sovereign."[5] The giving of life is condemnatory, in that it is only conducted in terms of the denial of death. The preponderant action is for the sovereign to retain the right to kill, or "the right to take life and let live."[6]

The shift to biopolitics took place toward the end of the seventeenth century, and developed steadily during the eighteenth and the nineteenth centuries. In the contemporary political economy of discipline, where the targets are individuals and the objective is conformity, states began to think in more structural terms, focusing more on populations. The apparatus of "make life and 'let' live" replaced the idea of "take life and let live."[7] The leitmotif of biopower is to make national populations available as resources for capitalism and war, consistent with the rise of the modern nation-state. If Hobbes' Leviathan was to end anarchy and institute order, then biopolitical governmentality is to manage life through a new array of techniques and strategies.[8] These methods include statistics, demography, medicine, health and hygiene, and education. The aim is to produce new forms of subjectivities, rationalities, imaginaries, such as patriotism, nationalism, the family, markets, work ethic, and self-discipline. In turn, these become a *derivative* set of rights; that is, human rights for the individual, the citizen, the patriot. In the current conjuncture, biopower is expressed in terms of neoliberal governmentality, where the well-being of individuals and populations are reciprocal co-implications, and where new regimes of social rights, such as the right to education or medical care, must be understood along with old disciplinary tendencies, which are embodied as the carceral state, the management of borders, and the ideologization of the marginalized in the languages of racism.

The Italian philosopher Giorgio Agamben has also written extensively on the idea of bare life, some of it criticizing Foucault. In particular, Agamben thinks that Foucault's perspective on biopower underestimates the extent to which death is still central to sovereignty and the giving of the right to life. Agamben builds his theory of bare life around *homo sacer*, a juridical figure in Roman law, who apparently, was not worthy of sacrifice, but can be killed without punishment. In modern parlance, when a government declares a state of emergency, it assumes the right to kill without being held accountable, or the right to abandon those whom contribute to the life of "the citizen" by being abandoned. In other words, *homo sacer* represents a figure whose *existence* is both expendable and valued, allowing for the paradoxical treatment of these individuals. The differential treatment within the territorial nation-state is part of the process of constituting the state of exception, which are the grounds for establishing the relative autonomy of the state in the discriminatory exercise of state power. Differential treatment is more than an exercise of state power in the narrow sense of the state. Rather, a more extended understanding of the state, such as one propounded by Italian philosopher Antonio Gramsci, allows for an understanding of difference as an instrument of mobilization of those whom must be saved.[9] *Homo sacer* can be observed in practice when governments and security agencies adopt policies and strategies that subsequently lead to the suffering and probable death of "irregular" migrants and other marginalized populations while simultaneously touting the wellbeing of the vulnerable, in so far as they can be saved or exploited for labor. For Agamben, the death camps of Nazi Germany were the fullest expression of the sovereign ban, or state of exception, where the state could kill without committing homicide, or where those considered "not sacred" could be abandoned through punitive exclusion. Non-humans cannot have human rights, because they are lives "unworthy to be lived."[10] A more expanded interpretation that we adhere to is where bodies, or sub-sets of populations, are allowed in but placed outside of citizenship, outside the bio-cultural field of humanity. One will soon note that immigrant labor, and especially "illegal" immigrant labor embodies this category, where the product of the illegal human labor is appropriated but simultaneously separated from the human. This non-human, therefore, can supply labor, but cannot have human rights, the same rights afforded to the citizen. Neoliberal capitalist regimes of accumulation thus disembody the human from labor power. In Marxian political economy, it is labor-time, that is, labor in the abstract, that is sold as a commodity, *not* the sensuous human being as *homo faber*.[11]

Agamben's objections to Foucault, though useful, are not universally accepted. For instance, Roxanne L. Doty, an accomplished scholar working at the intersection of poststructuralism and postcolonialism, believes that too much emphasis is placed on Foucault's peripheralization of death in the problematic of bare life, and more broadly of the biopolitics of governmentality.[12] In fact, Doty's argument correctly credits Foucault with broadening bare life by introducing race as a specific element.

For Doty:

> *race performs two functions in the Foucauldian oeuvre – namely: (1) it introduces a break in the domain of life under power's control between what must live and what must die thus fragmenting the field of the biological that power controls, and (2) it establishes a relationship between life and death.*[13]

As Doty points out, Foucault is clear that "if you want to live, you must take lives, you must be able to kill."[14]

Doty applies the strategy of bare life to the techniques of US border control, where she finds that the "prevention through deterrence" strategy amounts to knowingly violating the human rights of migrants, asylum seekers, and refugees by willfully abandoning them to the vagaries of the borderlands between Mexico and the United States. These borderlands are an amalgam of technological surveillance and monitoring, a kind of abstract instrumentalization of state-sponsored sovereignty based on abject racism. More fundamentally, the willful abandonment of the migrants in the desert or in the sea is intended to have them die as a warning to other prospective migrants who may want to take the risk. Abandonment is veritably the technology of some must die in order for others to live.

Nick Vaughan-Williams also engages the biopolitics of bare life in his analysis of the European border crisis of the 2010s.[15] Building on Foucault and Agamben, Vaughn-Williams expands the security-identity matrix by culling from Roberto Esposito's theory of immunity. Vaughn-Williams' work bears directly on the general politics of human rights. These rights include the different ways in which the rights of migrants, asylum seekers and refugees are dealt with at the local, national, and international levels. In particular, the contradictions between security and humanitarianism come to the fore in the European Frontex policies.[16]

Vaugh-Williams poses the question thus: "Why do European border security practices often expose the very irregular migrants they are supposed to protect to dehumanization and death?"[17] The exposure to death, which Vaugh-Williams notes has increased dramatically after Italy abandoned its humanitarian rescue program, *Mare Nostrum,* in 2014, has been thoroughly documented. For example, Omar Shatz[18] and Juan Branco[19] submitted a 245-page report to the International Criminal Court, claiming that EU political leaders had committed serious breaches of human rights because their deterrence-based migration policy "intended to sacrifice the lives of migrants in distress at sea, with the sole objective of dissuading others in similar situation from seeking safe haven in Europe."[20] Italy, Germany, and France were named in the report because they played prominent roles constructing routes in the Mediterranean Sea that they would have known to be dangerous.

The report by Shatz and Branco noted above also states that the charge of "crimes against humanity" were partially based on "internal papers from Frontex." Frontex's website represents itself as follows:

> *Frontex, the European Border and Coast Guard Agency, supports ER Members and Schengen Associated Countries in the management of EU's external borders and fighting cross-border crime. The agency is a centre of excellence for border activities at the EU's external borders, sharing intelligence and expertise with all EU Member States, as well as neighboring non-EU countries affected by migratory trends and cross-border crime.*[21]

European border countries knowingly sponsor wars that contribute to the displacement of peoples from the Middle East and North Africa; they subsequently deny responsibility for the wellbeing of migrants before they ever cross a national border by hiring local reconnaissance organizations to intercept migrants and return them to their home countries, or simply letting them die at sea. Despite these actions, many European border countries continue to champion the rescuing of refugees as a patriotic and humanitarian act to continue to exploit the positive prospects of migrant labor and in order to maintain the image of Europe as a giver of life, this notion being a civilizational claim. This dichotomy renders migrants within the realm of Agamben's concept of bare life and *homo sacer*, demonstrating how the lives of migrants are seen as both worthy of abandonment and protection.

The European border crisis demonstrates two key points regarding the significance of language in the securitization of borders and identity. In the case of the "regular" and "irregular" migrant binary, the "regular" migrant represents a person who has endured all of the legal and bureaucratic procedures to become legitimately "human" within a European country. Conversely, the "irregular" migrant represents someone that has resorted to means other than those bureaucratic processes established by European states and independent agencies to gain passage to European countries, including through boatlifts, caravans, and overstaying legal visas. By categorizing migrants in this way, European states and their agencies are able to a conduct a subtle, yet effective way of demonizing migrants viewed as outside of the norm. When labeled as "irregular," the name implies that these migrants have strayed from what is normal and routine, and, by extension, are seen as defective and, therefore, violators of the rational. Suddenly, the connotations of the "irregular" migrant as intrinsically lazy, freeloading, or conniving become easier to accept if a migrant has been labelled as deviating from the status quo of immigration routines. As we can see, the reduction of the "irregular" migrant to *homo sacer* can be done through processes of bureaucratization, where standard operating procedures governing asylum seekers, refugees, and migrants are mere objects in the vast and impersonal apparatuses of the state. The mechanisms through which state power is wielded inscribes the differential between affirmative biopolitics and destructive thanatopolitics; that is, a situation

where the rights of the human are suspended. Put differently, human rights or the denial of rights to some humans are conducted through an abstracted machinery of sovereign power. Nasir's examination of Article 2 of the European Convention on Human Rights, as applied to two case studies, reveals that "the juridical interpretation and application of the right to life produces a differential governmental management of life."[22] The politics of death adumbrated by Governor Patrick above comes to mind here, when he suggested that there is an "anti-death bias," a bias that must be put aside in order for citizens to live.

This anomaly is compounded by the fact that, in recent years, the definitions of who is a "regular" and "irregular" migrant has expanded to include larger swaths of people. The increasing importance of technological innovation and the devolution of border security authority to lower bureaucratic agencies has allowed considerable elasticity in the definition of who is "regular" and who is "irregular". In other words, it is entirely possible that migrants that were considered "regular" before the Arab Spring of 2011, or before Mare Nostrum ended, may now be considered "irregular" due to the narrowing of the "regular" and the widening of the "irregular." Coupled together with the manipulation of language to vilify migrants, the dynamic nature of the definitions of migrants contributes to a narrative that the scale of issues surrounding "irregular" migration are much larger than they are. In practice, governments and media agencies apply this strategy further when labelling migrants as "swarms," "plagues," and other pejoratives designed to dehumanize and homogenize these people into a group that needs to be expelled or killed. Greece's Minister of Health, for example, warned of a "hygiene bomb," a clear case of negatively labelling refugees as diseased.[23]

In the same way that bare life portrays "irregular" migrants as passive beings that can only be acted *upon*, it is important to acknowledge that dehumanizing practices *within* border and identity securitization occur both at the national and regional levels. While this biopolitical governmentality may serve to disenfranchise "irregular" migrants at the individual level, it also does an enormous disservice to people living in European countries at the societal level. Following Roberto Esposito, Vaughan-Williams likens biopolitical governmentality to an auto-immune disorder, whereby in an attempt to protect the populace, or "body," the policies adopted result in the suffering and killing of others. Control of the border is intended to immunize citizens within the territorial border, against the diseased. In this way, biopolitics not only refers to the politics of the life and death among individuals, but also highlights the quasi-biological processes that governments utilize to preserve their security and identity from "irregular" migrants viewed as potentially harmful to nationalist paradigms of sovereign and citizen.

Whereas previous focus on humanitarianism as both having a positive impact on "irregular" migrants' lives and serving as a naturalized opposite to the

militarized security measures that governments otherwise use, humanitarianism and disenfranchisement fundamentally satisfy the same role of keeping migrants suspended in their journeys.[24] Regarded as a sort of purgatory, migrants are subject not only to the dehumanizing policies that may ultimately lead to their deaths, but they also endure the humanitarian propaganda that helps to justify these policies and thereby offset the consequences to an entity rather than the governments and agencies ultimately responsible.

The work of Didier Fassin is also of great value in understanding the relationships among borders, boundaries, and human rights, all of which are linked to the biopolitics of bare life and neoliberal governmentality.[25] For Fassin, borders and boundaries are hemmed into a structured but dynamic totality that allows differential rights, namely, human rights for citizens, and bare life for Others. In the U.S. for instance, immigration policies, combined with the processes of naturalization and assimilation "separates the wanted from the unwanted among immigrants, but eventually reminds its newly naturalized members how they still differ from the Indigenous fellow-citizen."[26]

Case Study: Coronavirus and Covid-19 in the United States

Borders and boundaries have become virtually seamless since the COVID-19 pandemic reached the shores of the United States. In what follows, we examine the ambiguity of the immigrant figure as both enabler of life, and object of the politics of bare life, or even death. The immigrant dimension, however, can only be understood in terms of intersectionality, meaning in this instance that the elements of race and class are integral to the human rights contradictions that currently exists.[27]

Let us begin with a recent White House press briefing on COVID-19, a novel coronavirus, which is now a global pandemic. The transcript begins with an exchange between a reporter and Acting Secretary of Homeland Security Chad F. Wolf. Following Secretary Wolf, President Trump responds to questions related to farm workers in the United States:

> *[President speaking to Sec. Wolf]*
>
> *THE PRESIDENT: While you're up, could you talk about how tight that southern border is right now?*
>
> *ACTING SECRETARY WOLF: Absolutely. We have—we continue to build miles of the wall every day. We're up to over 150, I believe. We're continuing to build new—new miles of wall. And a lot of folks ask about a replacement wall or new miles. And it's a new capability on our southwest border that we haven't had before. And so, whether you talk to the agents—the Border*

Patrol agents—they like that capability. They like that impedance and denial that it provides them. And it provides the ability for those agents to focus elsewhere on parts of the border that are very difficult to patrol so we can use our resources in a different way. And so, we see a lot of benefits from the border wall system. And again, that includes not only the physical infrastructure, but the cameras, the roads, the lighting, the fiber-optic cables. And we're looking forward and we're still well on our track — well on our mark to meet 400–450 miles by the end of the calendar year.

Q: Mr. Wolf, can I get one more question from you while you're here? There's been concern among farmers about being able to get enough migrant labor to keep the food supply moving as we go into the harvest season. What are you doing to address that?

ACTING SECRETARY WOLF: Well, at the direction of the Vice President and the task force, we are looking at a number of different options with the H-2A workers that you mentioned, on how do we either extend the validity of their visa or looking at a couple of different options. Nothing to announce here today. But again, at the direction of the President and the Vice President, we're looking at a very—a variety of different options that I think we will have soon and it will be very beneficial.

[The President replaces Secretary Wolf at the podium]

Q: What about waiving visa restrictions for —

THE PRESIDENT: But I am glad you asked that question because we want the farmers—they've had this for years. We want the farmers to be able to get the people that have been working those farms for years or we're not going to have farms. So, they're going to come in and they're going to be given a certain pass. And we're going to check them very, very closely, especially over the next month. Because remember, after a month or so—I think once this pass, we're not going to have to be, hopefully, worried too much about the virus. But we want them to come in. We're not closing the border so that we can't get any of those people to come in. They've been there for years and years, and I've given the commitment to the farmers: They're going to continue to come. Or we're not going to have any farmers. Okay? Yeah. One more question.

Q: What about waiving visa restrictions for immigrant doctors?

THE PRESIDENT: Who are you with, by the way?[28]

This exchange provides a window into the ways in which the basic necessities of sustaining life, in this case through food production, is a *negotiated* contradiction between the necessity of producing food on the one hand and "securing" the nation against the same population that provides the necessary labor for farming to be sustained on the other. Secretary Wolf's pronouncement on the Mexico/U.S. border offers determined clarity about the border-wall currently being built, and the commitment to "impedance and denial." Moreover, Secretary Wolf points out that protecting the border "includes not only the physical infrastructure, but the cameras, the roads, the lighting, the fiber-optic cables." What is striking here is the nonchalant way in which the border wall gets accommodated within the briefing about a pandemic, as if the former is a natural continuation of the latter. The sealing-off of the border is not total. Migrants still cross in significant numbers, many of whom work both on farms with and without proper documentation.

In his address, the president explicitly tells the nation that "They're [the migrants] are going to continue to come. Or we're not going to have any farmers." The controlled entry at the U.S. southern border may be understood as offering a triple benefit. The first is that the discourse surrounding the wall provides some measure of ontological security by not only patrolling the border, but also by simultaneously governing the internal boundary between the saved and the damned.[29] Secondly, the seepage through the border feeds into neoliberal economic strategies of accumulation by having a plentiful source of labor, but labor without the protection of labor law, or protection of their human rights, as per the United States constitution. The third dimension, one that Doty brings forcefully to light, is that the techniques of surveillance noted by Secretary Wolf directly lead to the abject condition of bare life. The technological apparatuses of surveillance have pushed migrants to more dangerous routes in the desert, a strategy that has led to an immense loss of life. The International Migration Organization estimated that between 2014 and 2018, nearly 1900 persons died while trying to travel to and cross the U.S. border.[30] The publicity around the loss of life is intended to send a message to would–be migrants on the other side of the border. Put differently, and in the theoretical framework of Esposito as articulated by Vaughn-Williams, the sophisticated techniques of surveillance are really the instruments of immunization of the American people from dangerous "pathogens" that threaten the body-politic. In the meantime, the Washington Post reported that President Trump has used emergency powers during COVID-19 to implement an even stricter enforcement regime at the U.S. southern border, compared to what was in place before the pandemic. Laws that protect minors and asylum seekers have been suspended so that the government can immediately deport the unwanted, or turn them away.[31]

The race and class dimensions of COVID-19 are inextricable, and though gender no doubt figures in the admixture of "penalties," the data currently available

makes it harder to establish any clear-cut patterns. Since the last week of March 2020, numerous commentators and publications started to identify a pattern of higher infection and death rates for African Americans. In Chicago, for instance, while African Americans make up 29 percent of the population, they accounted for 70 percent of COVID-19 deaths.[32] The same pattern holds state-wide in Illinois, where althoughAfrican Americans make up only 18 percent of the population, 38 percent of those infected are in that population group. On April 7, 2020, the New York Times reported that while African Americans make up only a third of Louisiana's population, they accounted for nearly 70 percent of COVID-19 deaths. The situation in Milwaukee where about 27 percent of the population is African American, the infection rate is over 50 percent. While data is not readily available, the patterns appears to be nationwide.[33]

Since race is more of a sociological category, it is imperative that we understand the broader societal forces that have contributed to these developments of disproportionate deaths. These pertain to preexisting health conditions, location in the economy, access to insurance, economic health in terms of savings, the density of inner cities where the African American population shows high occupancy, and finally due to what is commonly known as "implicit bias," which makes African Americans more likely to be denied testing and treatment. Native Americans and immigrants of color also face many of these conditions, though for the latter, a good deal of the reduction to bare life cannot be generalized without significant qualifications. Notable among these is that large sections of the visible minority populations are at the higher end of the service economy, especially in education, healthcare, and small businesses.

We want to take a more radical position on "pre-existing condition" by extending it beyond health issues. African-Americans and illegal immigrants have lived in an entire ecology of historically produced and reproduced pre-existing conditions of bare life. The economic, political, social, and cultural institutions that accorded affirmative biopolitics for the "American people" always had its exceptions. These pre-existing conditions have been wide-ranging, beginning with violations of the most basic principle of human rights, such as equality before the law in all things existing, especially regarding life and property. The general architecture of society that maintained separate lives during conquest and enslavement, and then through Jim Crow, were "reinvented" in the post–1945 period, and this happened despite significant gains through the civil rights movements and concomitant legislations. Neoliberal globalization became the new platform for the new economic segregation. As for legal immigrants, the situation is much more complicated, reflecting the split in the economy between high-end and lower-end service jobs. Notwithstanding these nuances, an objective measure of quality of life after the Great Recession paints a picture of significant disparities.

The human development index in the Measure of America indicates major disparities across education, health, and income. The aggregated Human Development Index scores of different groups by race and sex bring out these disparities. The highest and best score is ten; the lowest and worse score is zero. In 2010–2011, the scores were as follows: all Asian Americans 7.68; all Whites 5.53; all Latinos 4.19; all African Americans 3.91; all Native Americans 3.24. Let us look at the gender and race/ethnicity configurations: Asian American men 7.81; Asian American women 7.47; White men 5.61; White women 5.46; African American women 4.45; Latina women 4.29; Latino men 3.60; Native American women 3.60; African American men 3.33; and Native American men 2.84.[34] Clearly, Native Americans and African American men and women lag behind Whites and Asians in all categories of human security. While Native Americans scored lower than African American men and women, there is only scant data on the impact of COVID-19 on this population so far. Note that Latino men have a higher life expectancy than White men.

Our argument here is that the death rate of African Americans triggered by COVID-19 has a deeper structural, or pre-existing, cause; namely, a general subjugation of vast sections of the Black population to economic peripheralization, and, more broadly, to bare life. Taken together, the amalgam of vulnerabilities has lacerated their human security, but relatedly also afforded opportunities for upward social mobility with all its privileges to the racially privileged section of white America. COVID-19 has revealed what was always known in the background; namely, that some humans have more rights in the United States than others. The privileged sectors of the population fall "nicely" into the biopolitics of neoliberal governmentality, with the obverse of bare life and thanatopolitics for the Others.

Conclusion

Societies built on the principles and practices of liberalism and capitalism are readily thought of as the great bastions of human rights. There are good reasons for this; it is the case that, broadly speaking, individual rights and property rights are well-protected where liberal-democratic governance prevail. The right to protect life, limb, and property has a long history in the Western tradition. There is little doubt that it is indeed Western philosophers and political theorists who have articulated the most systematic disquisitions. As noted above, Immanuel Kant, one such thinker, even went as far as arguing that rights are universal, and are products of reason rather than derived from historical development and lived experience. In Kant's pure practical architecture, reason, morality, and rights are logically connected.[35]

The promise of universal rights has no doubt flowered in liberal democracies more than in any other types of social formation. While true, the question of what rights, and for whom, has always dogged Western liberalism. As Sven Beckert has shown, even the most cursory examination of the history of the modern

world system, will show that human rights have never been the same rights, for all humans.[36] One could argue that modernity itself unfolded with inequalities through multiple calculated denials of rights for some, in order for others to have them. These inequalities which have been based on race, gender, class, nationality, sexualities, as well as biases against rural populations, have been widespread, leading to devastating consequences especially in times of economic and other crises such as the current situation with refugees and vulnerable migrant laborers. Liberal democratic theorists have themselves accepted as much, but almost always with the caveat that there is no better system for the articulation and guarantee of human rights.

While basically true at first glance, we, along with many critical theorists working out of radical feminism, postcolonial theory, decolonial theory, critical race theory, and some dimensions of postmodernism and poststructuralism, insist that human rights in liberalism have been at the expense of the repression of these same rights; so much so that the denial of rights of the marginalized are the condition of possibility for those who do have the privileges of being fully human, that is, human without qualifications.

The theory of biopolitics and bare life seem to us especially apposite to capturing the productive contradictions between Kant's pure practical reason of the categorical imperative, and the more historical, phenomenological experiences of lived rights and rights denied. We suggest, and at this point it cannot be more than a suggestion, that the coalescence of borders and boundaries as articulated by Doty, Fassin, and Vaughan-Williams is subsumed in a long history of differential, hierarchical humanities where some lives were killed off in order for progress to take place. Conquest and slavery were the quintessential forms; though these have ended, many of the institutional structures and ideologies of supremacy remain, and when triggered by such an event as the COVID-19 pandemic, the limits of the guarantee of equal human rights for all come to the surface in ways that are both shocking yet predictable. The biopolitics of neoliberal governmentality is deeply implicated in multiple vulnerabilities of which the struggles of the displaced, the asylum seeker, the refugee, and the migrant, have come to occupy a global space that is viscerally present in their public agonies, and also publicly managed into self-serving acceptance or outright denial. *Homo sacer*, the ancient, tragic figure of Roman jurisprudence, is regrettably alive, if only to speak to that which cannot be hidden; namely, that some must be shorn and exposed for others to be embraced and protected.

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HUMAN RIGHTS ARE WHAT PEOPLE MAKE OF THEM: SOFT LAW APPROACHES TO ADVANCING GENDER-BASED HUMAN RIGHTS

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Abstract: *The central argument of this paper is that soft law approaches are critical to making progress towards the realization of gender-based human rights. Soft law approaches are particularly critical in efforts to advance the realization of gender-based human rights due to the reality that gender-based violence and gendered sociocultural inequities, propelled by structural patriarchy, remain deeply embedded in societies across the globe. Absent authoritative enforcement, the law will not transform culture. Instead, localized politics rather than statist legal initiatives typically drive productive change in regard to gender-based human rights. This paper draws on constructivist theory as a lens for understanding why a focus on socio-cultural transformation and norm diffusion are as critical as legal enforcement in making progress on human rights. It examines the Universal Declaration of Human Rights to provide historical context for the argument. The final section of the paper applies the core arguments to a brief analysis of several issues at the intersection of human rights and gender: gender-based violence, female genital cutting, and LGBTQ rights as human rights.*

Introduction

The central argument of this paper is that soft law approaches are critical to making progress towards the realization of gender-based human rights. Although soft law is an important tool in promoting human rights across the board, it is particularly critical in efforts to advance the realization of gender-based human rights, due to the reality that gender-based violence and gendered sociocultural inequities—propelled by structural patriarchy—remain deeply embedded in societies across the globe. Violations of gender-based human rights are commonly perpetrated by non-state actors within private institutions, including families, and are rationalized by widely supported cultural practices that are invoked as an obstacle to change.[1] Sociocultural change does not necessarily or readily follow the removal of formal legal barriers to the realization of human rights, especially in the absence of robust enforcement mechanisms. Law does not automatically transform the private sphere and, in fact, faces enormous resistance when it clashes with prevailing cultural values in particular societies.[2]

It is important to note that this argument does not reject the importance of the hard dimensions of international human rights law. By codifying human rights norms, international human rights law establishes a foundation in which states

and non-state actors may leverage these norms to mobilize policy and resources for the promotion of human rights. The development of international human rights treaties has been the primary mechanism through which the international community has articulated, disseminated, and mobilized support for human rights norms; soft law approaches are typically grounded in hard law frameworks.[3]

Nevertheless, if formal law is a necessary step in norm generation, it is not itself sufficient to enact change. The extent to which formal law produces social transformation depends extensively on cultural and political transformations at the local level.[4] Furthermore, the law is a blunt instrument that often has unintended consequences. It can be difficult to adopt enforceable legal norms in contexts where there are not clear lines between victims and perpetrators, and in which gender-based rights violations are perpetrated on grounds that implicate other core human rights, including the rights to freedom of religion and self-determination. Additionally, over-reliance on top-down, statist approaches to the law may exacerbate the vulnerabilities that international human rights laws are intended to mitigate.[5]

The paper begins by discussing the theoretical approaches and key concepts that shape the argument. Most prominently, this paper draws on constructivist theory as a lens for understanding why a focus on sociocultural transformation and norm diffusion are as critical as legal enforcement in making progress on human rights. Next, the article provides an overview of the Universal Declaration of Human Rights and the role that its framework has played in constructing global understandings of universal human rights as aspirational norms.

The final section of the article applies the core arguments to a brief analysis of several issues at the intersection of human rights and gender: gender-based violence, female genital cutting, and LGBTQ rights as human rights.

Constructivism and Human Rights Norm Diffusion

In his seminal 1992 article, Alexander Wendt cogently articulated the ways in which states construct power politics. Rather than treating self-help behavior among states as an inevitability in an anarchic system, Wendt challenged the *logic* of anarchy and argued that state interest and identity formation fundamentally shape state behavior. Cooperative state responses to anarchy are possible, and self-help behaviors are not inevitable; anarchy is what states make of it.[6]

Variations of Wendt's argument can be applied to the construction of global human rights norms. Narrowly applied, a constructivist interpretation helps illuminate the statist bias of international human rights law. If human rights are merely what states make of them, then we gain understanding of the limitations of international human rights law as a framework for achieving their progressive

realization. There is a notable gap between codified international human rights norms and the status of human rights across the globe. International human rights treaties—written, negotiated, and ratified by states—inevitably include provisions that limit strong enforcement and defer to state sovereignty.[7]

More broadly, a constructivist lens can be used to challenge the view of international human rights law as inevitably statist. Although international human rights law defers to state sovereignty and lacks robust juridical frameworks for enforcement, it does not stand that state behaviors and interests regarding human rights are fixed or that cooperative approaches are not possible. Furthermore, a constructivist lens offers a more hopeful interpretation if the analysis is broadened to include the role of transnational social movements, advocacy networks, non-governmental organizations, and individuals in defining human rights and acting to advance them in their own communities. The status of human rights depends not only on state behaviors and governmental policies but on the beliefs and political behaviors of people. This broader construction of human rights helps shift the focus from exclusive reliance on top-down enforcement of human rights by international organizations and states to the possibility of bottom-up sociocultural transformation that is essential for progress on human rights.

Considered within this broader view, the inherent statism of international human rights law is not immutable. States play a central role in the creation of international law. As such, it is not surprising that human rights treaties contain weak enforcement mechanisms and numerous provisions that defer to state sovereignty. If states are conceived as the primary perpetrators of human rights violations in the public sphere, it is easy to understand the critique that international human rights law represents a weak and ineffective system of law; the actors most likely to perpetrate human rights violations are writing the laws meant to restrict these violations. For this reason, international human rights law does not institutionalize effective measures for holding states accountable for the legal obligations it codifies. Instead, international human rights law relies primarily on treaty-monitoring bodies that depend on the voluntary cooperation of states for implementation. These bodies have the authority to make non-binding recommendations to state parties to the relevant treaties; it is up to states whether or not to follow these recommendations.

Nevertheless, the international human rights regime has great significance beyond its creation of a system of formal laws and institutions. Relying primarily on voluntary state participation and cooperation, international human rights law has enormous influence in constructing a normative framework that fundamentally shapes global understandings of human rights. It drives the growth of transnational human rights advocacy that has major influence on domestic and global policy. Important human rights discourses would not exist at a global level without the

international human rights regime. Global dialogues concerning concepts of genocide, refugees and asylum, and even the concept of human rights itself, have been produced and disseminated through the international human rights regime.

Keck and Sikkink's work on transnational advocacy networks and norm diffusion and Sikkink's subsequent work on norm cascades clarify how the emergence of norms can eventually shape global discourses and policies in specific issue areas. In Keck and Sikkink's formulation, norm entrepreneurs contribute to the emergence of new global norms.[8] An example of this is the work of Rafael Lemkin, a Polish lawyer who coined the term genocide and led the global movement that resulted in the adoption of the Genocide Convention.[9] Norm entrepreneurs may also mobilize broad public support for existing norms. An example of this is transnational advocacy networks and new human rights organizations which helped consolidate global support for human rights in the decades after the UN General Assembly adopted the Universal Declaration of Human Rights in 1948. When norm diffusion passes a certain threshold, a norm cascade can lead states to adopt and internalize these norms in response to global political pressure and socialization, even if there is no strong domestic coalition coalesced around a particular norm. States may comply with norms even in the absence of compellence for a range of reasons, including their identities as members of an international society and habituation to common state practices.[10] When norms are widely internalized among non-governmental organizations, transnational social movements, and states, a norm cascade can drive significant political and cultural change locally, nationally, and internationally. Notably, norm cascades result from deliberate, strategic organizing. They do not emerge by happenstance. Human rights are what people make of them.

This brief review of key international relations scholarship on constructivism and global norms does not break new scholarly ground. Its importance here is to shed light on potential sites of transformation in international human rights law. If one relies primarily on statist, juridical conceptions of law as the locus for achieving progress in the promotion of international human rights, one may get locked into a logic of sovereignty that suggests that international human rights law is inherently limited as a tool for promoting human rights. If, instead, there is a focus on the aspirational, normative foundations of international human rights law, one can recognize the political spaces in which the needed sociocultural transformations are more likely to occur.

The Universal Declaration of Human Rights and the Construction of Global Human Rights Norms

The Universal Declaration of Human Rights (UDHR) provides historical context for understanding the importance of soft law approaches to advancing international human rights. In thirty short articles, the UDHR articulates a

comprehensive vision of interconnected rights that span civil and political rights as well as economic, social, and cultural rights. Contrary to an oft-cited belief that universal human rights are exclusively Western in origin, the UDHR's vision was shaped by delegates from countries and cultures across the globe. The political process that led to the creation of the UDHR involved voices and perspectives from not only governing elites but also a range of non-state actors, including philosophers, novelists, poets, and activists from across the globe. The politics that led to the creation of the UDHR were complicated and imperfect, but the emergent universal underpinnings of the document were genuine.[11]

To be sure, the document was created at a time when the United States and Europe dominated global politics, and twentieth century decolonization had not yet transformed emerging global discourses on human rights. As historian Samuel Moyn has documented, human rights language was not widely embraced by global populations as a rights and justice-seeking framework until the 1970s with the proliferation of human rights advocacy organizations and transnational human rights movements.[12] Moyn's perspective comports with the argument being developed here: soft law approaches are key to the advancement of human rights. The UDHR framework created in 1948 established the foundation for the articulation of human rights as legal entitlements. However, this legal foundation did not truly become resonant until it was embraced by popular social movements decades later.

The emergent universality of the UDHR represented both its greatest strength and its greatest weakness. It is striking that the drafters of the UDHR were able to navigate incredible political, ideological, cultural, and religious differences to forge global consensus on universal human rights. A *global* discourse of human rights—rights that belong to all humans, everywhere—effectively did not exist prior to the creation of the UDHR. Concurrently, the language remained largely aspirational and did not codify binding norms or enforcement mechanisms. As religion scholar Jenna Reinbold argues, the Declaration—a non-binding statement of global norms—demonstrates the extra-judicial logic of many legal documents. Its purpose is to create the very human rights that it claims already exist as inherent entitlements belonging to all human beings.[13] The UDHR represents an *explicit* attempt to construct the norms that it simultaneously asserts exist as fundamental rights.

Eleanor Roosevelt erred on the side of believing that original drafts of the UDHR were excessively juridical. She was supported by delegates from countries that wanted to emphasize aspirational language and to downplay the creation of concrete legal obligations. Note here that this debate was not one between "the West and the rest,"[14] but one where many state representatives resisted the creation of concrete legal obligations and enforcement mechanisms. Delegates from low-income countries stressed the importance of language expressly indicating that

states would only have obligations commensurate with what their resources would allow. Others, including Roosevelt, wanted language which affirmed states would not be the only actors assumed to have the capability to provide the rights in the document. This perspective contrasted with the strong preference expressed by Soviet bloc states for clear language indicating a state role in implementing human rights, as well as explicit language respecting state sovereignty.[15] Ultimately, the drafting committee's ability to forge agreement among country delegates depended on the adoption of language that was more aspirational than juridical.

Compare the aspirational nature of the UDHR with the subsequent human rights treaties that were developed and adopted within the United Nations system. At first glance, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights might be seen as advancements in the progressive development of human rights, with the covenants transforming aspirational norms into codified law. However, despite their status as binding law, these covenants include ambivalent language, legal loopholes, and minimal enforcement mechanisms. The tone of the language in these treaties is more forceful and juridical, but the substance of the treaties' provisions creates, at best, weak enforcement mechanisms. Might it be the case that "hard law" is just as "soft" as soft law in the absence of strong enforcement provisions and effective judicial institutions for prosecuting and punishing human rights violations? In this case, the effective gap between ambitious legal language and the likelihood that rights can be enforced risks delegitimizing human rights treaty systems as frameworks for advancing global human rights.[16]

The UDHR ultimately calls for citizens to have primary responsibility for protecting human rights. In a 1958 speech before the General Assembly, Eleanor Roosevelt famously said the following:

> *Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.*[17]

Roosevelt's notion of rights requires citizen action as much, if not more than, legal enforcement, a view that highlights the central argument of this article. If citizens expect states to close the gaps in existing human rights laws and to institutionalize enforcement mechanisms to police their own human rights

violations, they will be waiting in vain. Roosevelt's vision places the onus for translating human rights norms into realities on individuals and non-state actors to work to advance human rights norms in their own communities. Human rights are what *people* make of them.

The Soft Construction of Gender-Based Rights as Human Rights

This section briefly examines three cases to demonstrate the importance of prioritizing aspirational normative frameworks over juridical hard law approaches in pursuing the advancement of gender-based human rights. Because gender-based violence and gendered sociocultural inequities are deeply embedded in political, social, and economic systems across the globe, hard law remains an imperfect tool for addressing violations of gender-based human rights. National and international laws that formally prohibit gender-based violence and discrimination commonly involve weak enforcement and low levels of participation in judicial processes. Further, laws intended to mitigate gender-based violence and discrimination often produce unintended consequences and counter-productive outcomes. Finally, laws that are passed with the intention of mitigating harm may sometimes reinforce or reproduce the vulnerabilities or inequities that are being targeted.

To illustrate these points, the paper will briefly examine three distinct issues involving gender-based rights: gender-based violence, female genital cutting, and LGBTQ rights as human rights. Each case highlights a distinct limitation of hard law as a mechanism for advancing gender-based rights and briefly discusses potential advantages of alternative, soft approaches.

Gender-Based Violence: Weak Enforcement and Limited Participation in Judicial Processes

Survivors of gender-based violence commonly remain silent about the violations that have been perpetrated against them and are reluctant to seek redress through judicial institutions that prioritize the punishment of perpetrators as a mode of justice-seeking. Adversarial legal processes involve many risks for survivors, including re-traumatization, the fear of not being believed, cultural stigmas, negative consequences in the workplace, and damage to interpersonal relationships. Not surprisingly, major gaps exist between the high numbers of individuals who say they have experienced various forms of gender-based violence and the low reporting rates to legal authorities.[18] This pattern manifests itself in societies across the globe.

Gender norms that create stigmas for survivors of gender-based violence amplify the psychological and social factors that incentivize individual, familial,

and collective silence in the face of trauma. Constructions of femininity that prioritize female sexual purity and modesty contribute to feelings of shame that make survivors reluctant to speak publicly about gender-based violence that has been committed against them. Such gendered patterns transcend cultures and are prevalent in societies across the globe; that is a central reason that silence among survivors of gender-based violence is common throughout global society. Likewise, constructions of masculinity that emphasize male dominance and invulnerability make men resistant to publicly acknowledge when they have been victims of gender-based violence. These dynamics constitute obstacles to relying on legal enforcement as a mode of recourse for violations of gender-based rights.[19] Global patterns of silence in response to gender-based violence reflect inequitable gender norms that are deeply embedded in sociocultural structures. In such contexts, formal legal prohibitions against such norms are insufficient to disrupt these patterns.[20]

As an alternative to a hard law framework prioritizing legal enforcement of codified norms, a soft law framework suggests that global norms calling for gender-based human rights protections may be more readily achieved through non-legalist mechanisms. At the least, soft law approaches should supplement legal enforcement to increase the likelihood that survivors' needs are prioritized. Such approaches include restorative justice initiatives,[21] and therapeutic justice as an approach that prioritizes the healing of survivors rather than merely the punishment of perpetrators.[22]

Female Genital Cutting: Unintended Consequences

Female genital cutting (FGC) has been widely condemned at the international level.[23] Female genital mutilation (FGM) has been condemned by bodies within the United Nations system. For example, the United Nations Office of the High Commissioner for Human Rights (OHCHR) has identified FGM as a harmful traditional practice affecting the health of women and children.[24] FGM has been criminalized by many states, including France, the Netherlands, the United Kingdom, and the United States, among other countries across the globe, and is illegal throughout the European Union.

Despite global condemnation and legal prohibitions in many countries, the practice of FGC continues across the globe. National legal prohibitions have generated few prosecutions and produced little meaningful change among populations in which FGC is a prevailing practice. A number of countries, including Canada, formally ban FGC but have not widely prosecuted the crime. Other countries, such as France, have not formally banned FGC but criminalize the practice under other laws, including prohibitions against torture, barbarity, and bodily harm. France has prosecuted more cases than many other countries, but FGC continues to be widely practiced in some communities in France.[25]

According to estimates from the United Nations Children's Fund (UNICEF), upwards of 140 million of the current global female population has undergone some form of FGC, and approximately three million girls annually are at risk of being subjected to it. In a seeming paradox, FGC is legally prohibited in some of the countries with the highest incidence of the practice, including Togo, Egypt, and Ethiopia.[26] One of the additional unintended consequences of prohibitions against FGC involves the prevalence of the practice in migrant communities. In some cases, migrant parents will take their daughters back to their countries of origin to avoid the risk of prosecution in their current homes that have prohibited FGC. In these cases, girls are often subjected to more invasive forms of FGC than they would have been in the countries to which they migrated.[27]

The case of the United Kingdom is illustrative. The UK adopted a legislative ban on FGM in 1985 that prohibits a range of procedures constituting female genital mutilation performed on any person, without distinctions regarding age or nationality. The law also makes it illegal to aid, abet, counsel, or procure the performance of banned procedures and provides for a range of penalties, including imprisonment or fines. The UK ban on FGM initially only applied within British territory but was expanded in 2003 to apply extraterritorially.[28] Despite its clear-cut and comprehensive nature, the UK's legal prohibition on FGM has not been strongly enforced. Until recently, no one had been prosecuted under the law even though it has been in effect for three decades. The first prosecution under the legal prohibition against FGM was brought in 2015 against a doctor who, for medical reasons after childbirth, re-stitched a woman who had previously undergone the procedure. He was found not guilty.[29] Despite its ban on the practice, the United Kingdom has the highest rates of FGM in Europe, with estimates suggesting that approximately 66,000 women and girls in Britain have been subjected to the practice and 30,000 girls under the age of fifteen remain at risk.[30] Indeed, due to lax enforcement of British laws, some migrants in other European countries have even been known to travel to the United Kingdom to have FGC performed on their daughters.[31]

State policies designed to regulate FGC inevitably extend into the realm of familial and gender relations. In every case, these regulatory impulses produce pressure on the family as a site of political contestation where broader social, cultural, and ideological conflicts play out. In order for anti-FGC laws to be effective in any meaningful way, they need to have some degree of buy-in from targeted populations. Such buy-in is difficult to generate within an adversarial legal framework that would pit neighbors against neighbors, family members against family members and, specifically, children against parents. Furthermore, social workers, police, and other actors with implementation responsibilities for anti-FGC laws often have not built productive relationships in communities in which FGC is a prevalent practice. An absence of cross-cultural understanding and

connections diminishes the likelihood that these communities will reach out to local authorities.[32]

The presumption that FGC is an abhorrent cultural practice requiring adversarial and punitive legal strategies for its eradication fails to recognize that decisions about FGC and other traditional practices are made not exclusively by individuals but within families. In turn, family decision-making structures and processes are deeply embedded in communities. Prevailing cultural norms within these communities sustain FGC, and any successful effort to reduce the incidence of FGC will need to directly engage with the communities where it is practiced. Starting with this assumption will be more likely to generate progress in reducing the incidence of FGC in populations in which it is practiced, rather than punitive and adversarial laws that treat parents as the enemies of their children.

LGBTQ Rights: Reproducing Vulnerability

Discrimination and violence targeted at persons because of their sexual orientation or gender identity is pervasive across the globe. At least seventy-six countries across the globe criminalize same-sex relationships and activities. Same-sex relationships and activities are punishable by the death penalty in at least six countries. In other countries, LGBTQ people are targeted for repression by the state, often under laws that treat the social and political expressions of their identities as propaganda or threats to security and order.[33]

The majority of the world's countries do not provide formal legal protections for LGBTQ persons. Fewer than thirty countries across the globe have legalized same-sex marriage. Even in countries where discrimination and violence are formally prohibited by law, pervasive discrimination and violence against LGBTQ people exists. For example, until recently in the United States, individuals could still be fired for their sexual orientation in over twenty states. It wasn't until June 15, 2020, five years after its ruling legalizing marriage equality, that the Supreme Court ruled to protect LGBT workers across the country. Where legal protections are in place, a key obstacle to enforcement is that institutions responsible for implementing the law do not prioritize investigation or punishment of discrimination and violence against LGBTQ persons.[34]

Notably, the United Nations also has been unable to codify and institutionalize specific treaties governing LGBTQ human rights in the same way that it has led the creation of specialized treaties governing women's rights, children's rights, and the rights of persons with disabilities. A primary example is the status of the Yogyakarta Principles, a set of principles adopted by representatives of human rights groups in Yogyakarta, Indonesia in 2006. These principles represent an attempt to explicitly apply international human rights standards to address

violations of the human rights of LGBTQ populations. Although key UN officials, including the Secretary General, the UN High Commissioner for Human Rights, and the UN Special Rapporteur on the Right to Education have expressed support for the rights of LGBTQ persons, the Yogyakarta Principles have been rejected on numerous occasions by the General Assembly, the UN Human Rights Council, and other UN bodies.[35] In this regard, the United Nations' inability to codify LGBTQ human rights reflects the state of the world's politics on this issue; LGBTQ human rights simply do not have sufficient support among the majority of the world's countries.[36]

The gaps in protection on LGBTQ human rights in international human rights law represent a significant deficit in the universality and comprehensiveness of international human rights. Significant efforts to close these gaps are warranted and should be pursued. For example, non-state actors should continue to pressure states and UN bodies to adopt the Yogyakarta Principles. In pursuing the further development of international human rights law on LGBTQ rights, human rights advocates should emphasize normative rather than juridical approaches to implementing these laws. The failures of hard law in other cases involving gender-based human rights illustrate why normative, soft law approaches are more likely to succeed. Further, the minimal effectiveness of national legal prohibitions against violence and discrimination against LGBTQ persons should remind advocates of the importance of sociocultural change.

The case of LGBTQ human rights illustrates another limitation of hard law approaches to the advancement of human rights. Initiatives that prioritize the codification of global norms with an emphasis on legal enforcement risk (re)producing vulnerability, risk, and marginalization. The case of Tiwange Chimbalanga, a woman from Malawi whose persecution received widespread international media coverage, is illustrative. Ms. Chimbalanga was assigned male at birth but identifies as a woman. In 2009, she was jailed in Malawi for unnatural acts and indecency because of her marriage to Steven Monjeza. Malawi's President pardoned Ms. Chimbalanga in 2010 and subsequently sent her to South Africa, where she was granted refugee status, largely on the grounds of her presumed transgender identity. Transnational human rights activists relied heavily on the term transgender in advocating for Ms. Chimbalanga despite the fact that she fully identified as a woman—not transgender. The imposition of the universalized transgender discourse by outsiders undermined her own autonomy and right to define her own gender identity. Notably, Ms. Chimbalanga had not heard of the terms gay or transgender until her arrest. These discourses risk generating unwanted visibility and reproducing vulnerability that may harden dynamics that lead to marginalization.[37] It is important to acknowledge the potential benefits of progressive laws intended to codify LGBTQ human rights. At the same time, the Chimbalanga case also highlights the importance of taking

the perspective of individuals who are the intended beneficiaries of such laws seriously.

This example illustrates the way that juridical frameworks may construct rigid categories of LGBTQ identities in ways that exacerbate rather than diminish the factors that produce violence, especially in terms of racial and cultural differences. Such approaches risk reinforcing structural violence and contributing to what critics describe as human rights imperialism.[38]

As in the case of female genital cutting, this discussion highlights why cultural humility and careful attention to local context should be essential in efforts to promote LGBTQ human rights. Human rights initiatives are always implemented in particular local contexts, and the needs, preferences, and identities of individuals who live in these communities need to be centered.

Conclusions

This article asserts that soft law approaches emphasizing the aspirational rather than the juridical aspects of international human rights law are essential to advancing gender-based human rights. Instead of expecting uniform legal enforcement through judicial institutions, soft law approaches emphasize the translation of global norms into particular local contexts. Localized human rights initiatives should be led by non-state actors and individuals in particular communities in culturally appropriate ways, rather than exclusively by states.[39] Instead of focusing exclusively on legal enforcement through judicial institutions, human rights can be constructed through varied human rights discourses and local activism.[40]

Survivors of human rights abuses may be more likely to obtain justice via restorative mechanisms or psychosocial processes than trials.[41] Families may provide a more fertile site for the transformation of cultural values than governmental bureaucracies.[42] Local initiatives for advancing gender-based human rights might include the development of community-based advocacy, women's shelters, and training on gender violence and gender inequity across a range of professions, including police, health care professionals, and educators.[43] Advocacy directed at local governing structures and community-building may also be more likely to produce meaningful political change in specific communities.[44] Absent authoritative enforcement mechanisms, the law will not transform culture. Instead, localized politics rather than statist legal initiatives typically drive productive change in regards to gender-based human rights. Thus, politics remain essential to advancing the normative aspirations of law.

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THE RIGHT FOR PROTEST TO BE HEARD

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Abstract: *The human right to protest is well established in international human rights law. However, this has not generally been understood to entail a right for protest to be heard. This paper argues that a right to be heard is developing in human rights law as expounded in the practice of UN Treaty Bodies. The right can be drawn most clearly from the right of children to be heard and the Committee on the Rights of the Child has drawn such conclusions in relation to children's Climate protests. Where protests reveal human rights issues and problems, the State may also be required to act, and UN Committees have responded to protests to identify State obligations. Finally, in contemporary democratic theories, protest movements may contribute to the development of the common will which must underscore the authority of government. The UN Committee on Economic, Social and Cultural Rights has drawn on the right to self-determination to argue that the State must hear popular protest. In the contexts explored in the article, the tentative conclusion is that the State has an obligation to engage with protesters in participatory processes and may have further obligations to respond to protest.*

Introduction

The human right to protest, while often denied in the most brutal ways, is well-established under international human rights law. The UN Human Rights Committee has found that persons have a right to hold political rallies, protected under the freedom of assembly, freedom of expression, and protesters are also protected under liberty of person, the right to life, and freedom from torture.[1] The Committee has developed an understanding of the legitimacy of restrictions on protest,[2] and on what constitutes a peaceful protest.[3] While peaceful protests are thus legal, they are not integrated into the political system. This paper follows Della Porta and Diani in defining protests broadly as "nonroutinized ways of affecting political, social, and cultural processes".[4]

Many protesters find that while they are indeed permitted to carry out rallies and other protest activities, that these have no impact on public policy. Examples include the largest protest in world history on February 13, 2003 against the imminent war on Iraq, in which protests by millions of people worldwide appeared to have no impact on a major policy decision.[5] Occupy Wall Street is perceived as having been a failure by one of its instigators.[6] Even when protesters like Greta Thunberg are invited to speak at the United Nations and Davos, they still complain that their voice is not adequately reflected in subsequent policy.[7] William Smith has written that protest to the extent of civil disobedience is an important part of the

deliberative democratic process.[8] The seeming insignificance of protest dampens the public's engagement in politics and thus undermines democracy.

It has generally been held that the right to protest does not entail any positive obligation on the State to respond to claims or recommendations made in the course of protests. It is left to the political sphere to negotiate the outcome of protests. However, this ensures that those with more political influence will continue to have their voices heard, whether through protest or through other political activity, while the marginalised will have less impact. It is therefore submitted that it is important to establish not merely the right to protest, but also the right for protest to be heard: that the State's responsibility extends beyond allowing protests to responding to them.

This article explores the tentative emergence of a right for protest to be heard within UN human rights law. It infers such a right from analysis of international treaties, soft law instruments, and the General Comments of UN treaty bodies. It finds explicit or implicit support for these arguments within the Concluding Observations and Views of these bodies, within the *travaux préparatoires* of the Universal Declaration of Human Rights, and within the writings of academic experts on deliberative democracy, all of which can contribute to the interpretation of international law. Initially it draws from the right of children to be heard. It then argues that protest can identify human rights issues and thereby have a direct impact on the State's obligations. The last argument for a right for protest to be heard is rooted in modern democratic theories that should affect how the right to self-determination may be interpreted. Finally, the acknowledgement of a right for protest to be heard does not establish the content of that right, or the obligations that may flow from it. It is not within the scope of this article to provide detailed content for a right for protest to be heard, especially considering the lack of extensive development of the right by authoritative bodies. However, this article will conclude by identifying the bases on which such content may be built, and some of the challenges in developing this content.

The Right of the Child to be Heard

The most compelling argument for a right for protest to be heard is based on Article 12 of the Convention on the Rights of the Child:

> *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*[9]

The UN Committee on the Rights of the Child has interpreted this provision to mean not only that individual children have the right to influence decisions

that affect them personally, but that groups of children have the right to influence decisions that affect them collectively.[10] Its reasoning is that since the "best interests of the child," a primary concern under the Convention,[11] must be determined through listening to the child, and since the "best interests of the child" must be a primary consideration in "all matters affecting children", the collective voice of children must also be heard.[12] Similar provisions for children exist within the Convention on the Rights of Persons with Disabilities, which provides that the voices of children with disabilities should be heard on an equal basis with other children and also that their "best interests" should be a primary consideration in all actions affecting them.[13]

Protest is a means through which children do express their views, and as such, the views expressed should be given due weight. The Committee on the Rights of the Child has recommended that children be permitted to express opinions including through demonstrations,[14] "so that they can freely discuss, participate and express their views and opinions on all matters affecting them."[15] In response to protests of police brutality, the Committee has recommended setting up complaints mechanisms so that these can be formally heard and assessed by an independent agency.[16]

There is a limitation to the right to be heard within the text of the treaties in that the views have to relate to "matters affecting the child." The Committee on the Rights of the Child accept that this does not endorse a "general political mandate" for children, but nevertheless supports a wide interpretation of the former clause to include "the social processes of their community and society."[17] If this wide interpretation is taken seriously, it is very difficult to identify a political question that does not affect children. While some political issues may have complex technical dimensions, there is no reason why older children cannot express valid views on them to the same extent that non-expert adults can. The Committee has not clarified how to draw the line between matters that affect children and those that extend to a general political mandate beyond the scope of the article.

The other question unaddressed by the Committee is whether children should be heard when they are part of a larger protest movement led by adults. The only comment the Committee has made on such situations is to express concern that vulnerable children who live and/or work on the public street situations may be paid to take part in demonstrations, unaware of the dangers.[18] However, if a protest movement concerns a matter affecting children, and children freely choose to express their views through participation in such protests, it should follow that the State is required to take these views into account irrespective of the fact that the movement is led by adults.

There are of course protest movements that are led by children and in which children represent a large majority of those taking part. The current phenomenon

of worldwide protests on climate change led by children clearly relates to an issue that will disproportionately affect children in their later lives. The Committee on the Rights of the Child believes that such protests do constitute an expression of the views of children under Article 12 of the Convention, and has recommended that States "ensure that children's views are taken into account in developing policies and programmes addressing climate change, the environment and disaster risk management."[19] In the language of the Convention their views need to be "given due weight in accordance with their age and maturity."[20]

This indicates that the Committee interprets the scope of Article 12 to include issues of general political application that particularly affect children, at present or in the future. However, they have not made explicit the criteria on which they base their interpretation, which means that there is still considerable uncertainty in determining what might be considered matters affecting children and which would fall outside that scope as relating to a general political mandate. There is also uncertainty of the extent to which this interpretation would extend to other protest movements that might be led by adults but include children. Nevertheless, it can be concluded that protest movements led by children on matters affecting them constitute the voice of children that must be considered by the State.

Protest Revealing Human Rights

Protests can raise important issues that pertain to human rights. They can alert the State to a possible violation of human rights, and they can also alert the State to a situation that imposes a specific human rights obligation on the State, e.g. a dearth of adequate housing or healthcare. Where the State is made aware of information that is relevant to human rights, this can have a direct impact on the State's obligations. In particular any allegation of violations may require the State to prevent, investigate, prosecute and punish those responsible.[21] The UN Committees make frequent references to the right to protest in the context of allowing human rights defenders to carry out their activities effectively.[22] If human rights defenders are particularly to be enabled to carry out protests, it follows that these protests are an important tool in advocating for human rights.

Committees note that protests often arise from claims that rights have been abused. For example, the Committee against Torture has noted that claims of ill-treatment have led to protests.[23] In Benin in 2004, the Human Rights Committee noted that protests by judges raised important human rights issues relating to summary extradition and urged the State to carry out such extraditions in accordance with the law.[24] In *Yakubova v Uzbekistan*, the applicant had conducted a hunger strike in protest, specifically alleging his torture in detention, and the denial of family visits, both of which raise human rights concerns.[25] However, in finding that the government was aware of the allegation, the Committee focused

in their views on the formal complaints lodged by a lawyer rather than on the protest.[26]

UN Committees have recommended that States respond to protest with dialogue and consultation, thereby requiring that the views of the protesters be formally heard. Some of these protesters will have a strong right to consultation and therefore their protest can highlight a need for such consultation. In particular, the Declaration on the Rights of Indigenous Peoples asserts that such peoples have a right to free, prior and informed consent before relocation, use of their resources, measures affecting them are introduced, or their land is taken, used or put under environmental threat.[27] Although this is not a binding treaty, it has nevertheless been seen as a subsequent agreement[28] by the parties to existing treaties in order to interpret them.[29] Protests by Indigenous peoples are a strong indication that consent has not been given to extraction of natural resources from their land, and therefore that consultation may be required in order to obtain such consent before any further measures are taken.[30] The Committee on the Elimination of Racial Discrimination has identified a lack of consultation in Guatemala as being a cause for protest, implying the need for such consultation.[31]

The Committees have recommended responding to protests by consulting protesters in other contexts too. The Committee on Economic, Social and Cultural Rights has urged States to respond to protests not with violence but with dialogue and participation.[32] The Committee on the Elimination of Racial Discrimination has recommended "the adoption and full implementation, in consultation with civil society and with Indigenous peoples, of an effective mechanism for protecting human rights defenders and journalists."[33] The Human Rights Committee has recommended that the State develop "a well-structured dialogue with civil society and Indigenous peoples, to restore confidence in the State party's commitment" to freedoms of expression, peaceful assembly, and association.[34]

States may have to take other measures in response to protests. The Committee on Economic, Social and Cultural Rights has noted in one case the positive impact that a public protest against eviction of a family from temporary sheltered housing can have.[35] In the complaint in question, Spain was still found in violation due to the inadequacy of the housing in the first place. The Committees have also recommended that States do respond to protest with policy changes. The Committee on the Rights of the Child, in response to teachers' strikes, recommended Gabon take measures including to "prevent delays in the payment of teachers' salaries and students' benefits" in order that children get an education.[36]

A useful contrast can be drawn between two individual complaints to the Committee on the Elimination of Racial Discrimination. In *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, the State responded to protests against a police

officer who had written discriminatory material in a magazine, by suspending the officer in question.[37] Ultimately this response to the protest meant that the Committee held that Germany had not violated the Convention: the Committee noted that the material had "carried consequences for its author, as disciplinary measures were taken against him."[38] In contrast, in *TBB-Turkish Union in Berlin/ Brandenburg v. Germany*, a former member of the Berlin Senate had made discriminatory comments. While there were protests from all sectors of society, the State felt that he had freedom to express these views, and the Committee found that the lack of any action constituted a violation of the Convention.[39] While there are other relevant differences between these cases—the former concerned a current employee of the State and the latter concerned a former State representative—the response of the authorities to protest in the former case was critical to the finding of no violation.[40]

Where protests raise issues of human rights concern, the State should understand that it has been informed of this concern, and that this can have an impact on its subsequent obligations. This does not necessarily mean that it needs to accede to the protesters' demands, nor that the protesters should have a specific form of access to the State. In one complaint, the Human Rights Committee found that no group "has the unconditional right to choose the modalities of participation in the conduct of public affairs."[41] However, where a State is alerted to a violation or a situation that implies a particular obligation, and fails to act, this failure can constitute a violation of human rights. Having been made aware of an issue through protest, the State can no longer claim lack of liability due to lack of knowledge. Of course, this will empower protests that highlight specific problems and allegations that would otherwise be ignored. Large scale protests that express strong public opinion on an issue that is already in the public domain cannot usually be said to be providing information to the State. However, they may form part of the development of the common will, which can also inform State obligations.

Protest and the Common Will

The common will is, under Article 21 of the Universal Declaration of Human Rights, to be the "basis of the authority of government."[42] While the only explicit means of expression of this will mentioned in the Declaration is the holding of elections, the *travaux préparatoires* of the Declaration make clear that other unspecified means were also considered. The French delegate to the Human Rights Commission, Pierre Cassin, stated in its drafting that "elections were not the only means of manifesting the wishes of the people."[43] While he was thinking primarily of referendums, he also stated that in drafting this provision it was important to introduce the article with a statement of general principle as there was a need "to find a compromise between the present state of the world and men's aspirations,"[44] implying that future developments could transform the means of determining the

will of the people. It is clear from the *travaux préparatoires* that he was primarily responsible for the inclusion of this general principle in the Declaration, giving further weight to the arguments that he personally made for including it.

Modern theories of deliberative democracy have indeed developed an understanding of the common will derived not from results of elections but from deliberation in society. Drawing from Jürgen Habermas' work on the public sphere,[45] these theories have inspired the development of deliberative assemblies and innovative definitions of democratic legitimacy.[46] John Dryzek writes, "Legitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern."[47] According to many political theories, public protest is a part of such free and unconstrained deliberation, and for some it is a core element of democracy.[48] William Smith argues that protest is justified where public deliberation is insufficiently considered in official decisions.[49] These theories can be drawn upon as "the teachings of the most highly qualified publicists of the various nations," which are a "subsidiary means for the determination of rules of law" under the Statute of the International Court of Justice.[50] It follows that where protest takes place, it must be accepted as a contribution to the deliberation of the community and the State should make efforts to involve protesters in the process of deliberation leading to policy decisions.

Under the UN human rights system there are some indications that this reasoning is followed with regard to the right to self-determination. The right to protest was linked with political participation in a report by the Secretary General in 1985, which stated that there was "a close underlying relationship between freedom of expression… and popular participation"[51] and that "[p]articipatory aspirations express themselves, at first, in assemblies."[52]

In 2009 there was a significant protest movement in Madagascar against the lease of millions of acres of the country's land to the corporation Daewoo, and several died in the protests.[53] The Committee on Economic, Social and Cultural Rights made a recommendation to the State to carry out a national debate, explicitly referring to the right to self-determination.

> *… The Committee is also concerned that such land acquisition leads to a negative impact on the realization by the Malagasy population of the right to food. (art. 1)… It also recommends that the State party carry out a national debate on investment in agriculture and seek, prior to any contracts with foreign companies, the free and informed consent of the persons concerned.*[54]

The suspicion that this might be a misprint for Article 11 (the right to food) proves groundless as the Committee progresses in order through the articles of the

Covenant in these concluding observations, beginning here with the right to self-determination. Although the Committee does not explicitly make the connection, the presence of a widespread protest movement has contributed to its conclusion that deliberation has been insufficient and that those concerned need to be involved in a national debate.

As is evident, the UN Committees have made an explicit link between protest and the freedoms of expression and assembly. They have also linked public debate, the will of the people, and the right to self-determination. They have responded to situations of public protest by concluding that national debate is required. Modern democratic theories also indicate that protest, should be considered part of public deliberation leading to the development of collective will. If so, the right to self-determination should be interpreted to understand protest as one contributor to the common will, and that there is therefore an obligation to respond to mass protest.

Content of the Right

The right for protest to be heard does not have any self-evident content. Clearly there are many challenges to identifying precisely what obligations the State may have to respond to protest. The State cannot be expected to accede to all demands of protesters, even where these demands may be precise and limited. Protesters may sometimes call for others' rights to be curtailed, and there is often a balance to be drawn between the demands of protesters and the rights of others, or other important goals of national policy. The balancing of competing rights and of rights with other interests is a core topic that has been well developed within the human rights project. Any limitations on rights must be lawful, pursue the general welfare of society or one of a limited set of other goals, and be necessary and proportionate to achieve it.[55] The human rights of others will normally take precedence over the views of protesters unless they can demonstrate that their demands relate to an important public good.

Arising from the right of children to be heard, their views need to be given weight in accordance with their age and maturity. The Committee acknowledges that determining the age and maturity of a group of children poses a particular challenge.[56] But it gives very little guidance in relation to clarifying the meaning of "giving weight" beyond stating that "the views of the child have to be seriously considered."[57] While it is clear that the views of older and more mature children should be given greater weight than those who are younger or less mature, it is not clear how they should be weighed against the views of adults or other policy consideration.

The necessary considerations become a little clearer when Article 12 of the Convention on the Rights of the Child is considered in the context of Article 3,

which requires that "in all actions concerning children… the best interests of the child shall be a primary consideration."[58] The Committee on the Rights of the Child notes that the best interests of the child should be determined in part through listening to children.[59] The term "concerning children" is to be interpreted broadly: while the Committee recognises that all decisions have some impact on children, it stresses that "where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate."[60] This clarifies that in any political decision that particularly affects children, there must be some procedure to assess their best interests and that that should be determined, at least in part, by their express views, including through protest. This will require engagement with the students,[61] in particular perhaps where the children are part of a wider protest movement in order to establish the specific views of the children involved. With regard to climate change, the best interests of children would need to be considered in agricultural, transport, energy, and economic policies. Challenges persist, however, the Committee does not clarify who within the State should determine the best interests of children, and while these interests should be a primary consideration, this still does not clarify how they could be balanced against other interests.

Where protesters identify a human rights issue, the obligation to respond is clearer. Where a potential violation is identified, the State must investigate and attempt to remedy this violation as it does when it is made aware of a violation through any other means.[62] Where they highlight the inadequacy of access to some socio-economic right, the State is obliged to take steps to progressively realise this right.[63] Protests may also provide other data that the State is required to monitor and which will affect the State's subsequent obligations,[64] such as the availability of resources and the acceptability, particularly the cultural acceptability, of services provided.[65] Protests by Indigenous peoples who have a right to free, prior and informed consent before many measures are taken concerning them, give a strong indication that such consent is not forthcoming. In such a case, the State may only proceed where it can demonstrate that these protests are not reflective of the attitude of the specific people as a whole. Finally, UN committees have indicated that States should engage with protesters.[66] This can enable clarification of the protesters' views.

With regard to the right to self-determination, the State needs to consider that mass mobilisations in particular, and any mobilisation of a whole sector of society, constitutes a discourse which is an element of the deliberation of society. John Dryzek has stated that "legitimacy is achieved to the extent a collective decision is consistent with the constellation of discourses present in the public sphere."[67] It is of course not straightforward to assess such consistency, but Dryzek and other democratic theorists have developed more detail on that determination. The UN Committee on Economic, Social and Cultural Rights has advised that the State

open up a national debate in response to general protest.[68] Such debate might, for example, be modelled through a representative forum as proposed by a number of theorists.[69]

Conclusion

The tentative conclusion of this article is that a right for protest to be heard is in the process of developing within the UN human rights system. The conclusion is tentative because the most explicit evidence is drawn from the Concluding Observations of Committees in response to the periodic review of States and is couched in language of recommendations. There is no legal exposition of the detail of the right within Committees' General Comments, for example. That said, this article argues that the right is implicit within the wording of treaties, and Committees' General Comments and Views on individual complaints.

The evidence for the right seems strongest where it is drawn from provisions within the Convention on the Rights of the Child that children's views must be taken into account. Protest can also raise issues that unquestionably affect the obligations of States. Finally, protest can form a discourse that can contribute to the common will which must form the basis of the authority of government. Regarding each of these arguments, the common obligation is to create some kind of process enabling the participation of protesters. This is supported by the Human Rights Committee's statement that citizen participation is enabled by the freedom of assembly among other rights.[70] The development of such a process could develop as the core obligation of this right although other obligations may emerge also.

Some protests may not easily fit into the arguments made in this article. The Committees have identified limitations by dismissing an idea of a general political mandate for children, and by stating that no group may choose the modalities of political participation, but neither of these statements clearly identifies where the line is to be drawn. Further research on the right for protest to be heard should be conducted on evidence for the right within regional human rights systems. More attention to the work of democratic theorists may clarify how mass protests should be considered in understanding the will of the people. If the right is to develop, it is important that all international human rights bodies develop explicit reasoning behind the right and the obligations that derive from it. The right is critical to enabling the voices of the most marginalised to be heard in public decisions.

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principle of participation, as manifest in international treaties and their interpretation by authoritative bodies. He has also conducted research and advocacy on minority rights, refugee rights, privatisation and human rights, and housing rights.

Notes

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INDIGENOUS LAWS AND HUMAN RIGHTS UPRISINGS

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Abstract: *This article describes how human rights uprisings in Canada often occur because of Canada's lack of recognition and respect for Indigenous laws. The most recent example noted involves pipe line construction on traditional Wet'suwet'en territory in British Columbia, the building of which proceeded without considering Indigenous laws and customs. The result was country-wide blockades and protests by First Nations that brought the nation's economy to a halt. The paper argues that these uprisings happen because Canada's justice system and the lawyers, judges, policy makers, and politicians that operate within it are generally ill prepared to comprehend or reconcile the relationship between colonial legal systems and Indigenous systems of law. The article goes on to illustrate how the historic Indian Residential School Settlement—the largest and most comprehensive in Canadian history—was achieved by following Indigenous law and processes, harmonized in part with principles of the common law of tort. The article then ends with a discussion about how Indigenous laws could be made more accessible and intelligible and how they could be applied territorially and generally. The paper makes the ultimate point that different perspectives and legal theories are necessary to craft appropriate reparations and the processes used to achieve them. Unless Indigenous laws, traditions, and practices are central to the design and implementation of reparations for colonial misdeeds, state responses to the cultural genocide perpetrated against Indigenous peoples in Canada will not open pathways to either healing or reconciliation.*

Introduction

The protests left no doubt that much more than the fate of a single pipeline was at stake. They gave voice to frustrated Indigenous peoples who believe that the government has failed to deliver on its "nation-to-nation" promises to transform the colonial relationship that has ignored the existence of their traditions and laws and denied them self-determination.[1]

Lack of respect for Indigenous laws, Aboriginal title over land, and environmental concerns are at the root of Canada's most recent human rights uprising. The flashpoint of the uprising was the construction of the six billion dollar Coastal GasLink pipeline on unceded Indigenous lands in British Columbia.[2] Local protests developed into a national political storm involving blockades of railways and highways.[3] The rail shutdown stranded hundreds of millions of dollars in goods, caused hundreds of temporary layoffs, and disrupted trade with the U.S., as Canadian trains that move oil, grain, and forestry shipments across the border were stalled.

One industry group estimated that C$425 million worth of goods were stranded every day the rail stoppage continued, and a coalition of industry associations claimed that Canada's reputation as a dependable partner in international trade suffered.[4] First Nations groups from across Canada joined the uprising[5] to support the traditional Wet'suwet'en laws regarding environmental protection against a court decision in favor of the pipeline company. Specifically, the court granted the pipeline company an injunction ordering members of Wet'suwet'en tribe to stop blocking construction of the pipeline. Traditional Wet'suwet'en chiefs and their supporters claimed that Canadian law did not apply to them on their traditional lands and erected a camp over the access roadway to protest the construction of the pipeline, saying there could be no construction without their consent. Members of the national police force then occupied the camp and arrested fourteen of the protestors which further inflamed supporters across the country.[6] In addition to setting up rail blockades in several provinces, protesters blocked access to the B.C. Legislature, Vancouver ports, an Ontario border crossing, bridges and city streets.

This dispute was particularly complicated because it was both an internal and external conflict. The tribe in question is divided into six First Nation bands with elected chiefs and councils that were created under Canadian federal legislation, the *Indian Act*.[7] The five Wet'suwet'en First Nations along the pipeline route signed agreements with Coastal GasLink, as did twenty affected First Nations in B.C. However, the Wet'suwet'en Nation, organized into five traditional clans with thirteen hereditary chief positions, follows Indigenous law and in accordance with it, opposed the pipeline.

Supporters of the hereditary chiefs insist it is widely accepted in their community that by Indigenous law, the hereditary chiefs have ultimate authority over the 22,000 square kilometers of Wet'suwet'en traditional territory unlike the band councils who they say have jurisdiction over only reserve lands.[8] They say elected chiefs signed on to the pipeline project under duress much like Indigenous peoples across the country who have been coerced into similar agreements because of a long history of colonialism and impoverishment and deprivation. Proponents of the pipeline counter that band councils are democratically elected and have signed agreements with Coastal GasLink to provide much-needed jobs for their people. They say the democratically elected Chiefs and band councils should have the final say.[9]

After about two weeks of blockades, the hereditary Chiefs and the federal government arrived at an agreement with respect to their Aboriginal land rights, the details of which have yet to be revealed.[10] The blockades came down and the country has started to get back to normal but many predict the protests could revive in the summer months when the construction of the pipeline is to begin.

This paper argues that the Canadian legal system must come to terms with Indigenous law as a real source of rights and obligations and incorporate them into their decisions. Otherwise, blockades and other forms of human rights uprisings will be unavoidable in the future. When Indigenous laws are subverted or ignored, confusion and disrespect for an imposed system of laws follows, especially when they are perceived as being arbitrary and unjust. On the other hand, if Indigenous laws are considered an important part of Canada's legal framework, the normative orders within Indigenous communities, as well as respect for the law in the broader sense is strengthened.[11] Indigenous laws have been recognized from time to time in several cases that have come before Canadian Courts but as yet, Indigenous law has not been part of the official legal narrative. But recent developments, like the example set by the Indian Residential School Settlement Agreement for the mass human rights violations in the Indian Residential School era, demonstrates how that can be done.[12] The overwhelming success of the settlement suggests that the time is right to apply Indigenous law on a much broader scale.[13]

How Indigenous Law Solved Canada's Biggest Problem

What follows is a detailed description of how Indigenous laws and legal traditions were used to successfully resolve Canada's largest and most egregious human rights violations resulting in the largest class action settlement in Canadian history.[14]

Background

For 150 years, the government of Canada undertook a policy of cultural genocide to intentionally destroy the cultural identity of several generations of Indigenous peoples.[15] Between the late 1800s to 1996, Indigenous children were taken from their homes and forced to live in Indian Residential Schools.[16] There were 130 schools located in all the provinces and territories of Canada except New Brunswick and Prince Edward Island. The policy was designed to destroy Indigenous languages, cultures, and ways of life.[17] Deliberate, often brutal strategies destroyed family and community bonds. While attending the boarding schools, children had no meaningful contact with their parents, sometimes for their entire childhoods. About one child in three experienced physical, sexual, and emotional abuse.[18] Children were subjected to medical experiments, forced labor without pay, and inferior nutrition and education.[19] Research into deaths in residential schools found that some 3,201 deaths could be documented.[20] The number could be much higher but cannot be proven because of the government's policy of destroying health records of the residential schools.[21] Many of the children who died in the schools were buried on school sites sometimes buried in unmarked graves.[22] Often no notice was given to their families and their bodies were never returned to their families and communities.[23] Further evidence suggested that the numbers of student deaths over

time were much higher, when taking into account that many children died shortly after leaving the schools.[24] At the same time this was occurring, the assimilation policy continued to be implemented with the view that the government "could not kill the Indian but it could kill the Indian in the child."[25] These gross human rights violations were committed against at least 150,000 Indigenous children, their families, and communities over several generations. Their effects caused hundreds of thousands of Indigenous people to become impoverished and illiterate with limited occupation opportunities and lost income,[26] addictions, psychological disorders, physical injuries and deformities, sexual dysfunction and numerous other unresolved problems[27] that continue to this day.

After many years of lengthy and unsatisfactory litigation and a failed dispute resolution process driven solely by monetary remedies in civil law,[28] the Assembly of First Nations[29] (AFN), the representative organization for all the 633 First Nations in Canada, intervened with a view to resolving the matter using Indigenous legal traditions and principles.

The National Chief of the Assembly of First Nations, Phil Fontaine, had a long personal and political history of connection with the residential school disaster. He and members of his family, extended family, and community were survivors of the residential school system over generations. In 1990, as Grand Chief of the Assembly of Manitoba Chiefs, he was the first Indigenous political leader to bring national attention to the brutal history of residential schools issue by relating his and his community's experience of systemic and personal abuse in the Fort Alexander Indian Residential School.[30] His revelations contributed to a flood of litigation such that by the time he was elected National Chief in 1997, the courts were overrun with an unmanageable number of residential school claims. The Treasury Board of Canada estimated that it would take fifty-three years to conclude court proceedings of residential school cases, at an inestimable cost.[31]

Charting a Different Course

The National Chief realized that not only did the crisis of litigation create leverage for settlement negotiations, it presented an opportunity to chart a different course in the relationship between Indigenous peoples and the rest of the Canadian population with respect to Indigenous law.[32] He knew that unless the AFN and other Indigenous groups were an integral part of the solution, the historic opportunity to properly and authentically deal with the residential school tragedy in the Indigenous way with Indigenous remedies, would not occur.

The opportunity, as the AFN perceived it, was both practically and historically important. Leaving the settlement in the control of non-Indigenous lawyers, government officials, and church representatives would not only restrict the range

of reparations survivors needed, it would reinforce colonial dominance over Indigenous peoples—a prospect that would be an anathema to survivors who suffered through the most egregious forms of colonial subjugation in the residential schools.[33] Moreover, to have any chance of reconciliation for the enormity of the harms caused, the parties would have to start from the recognition that the policy of cultural genocide[34] not only affected every aspect of life for the survivors of Indian Residential Schools, but also that of all Indigenous peoples. Any settlement would have to dignify the Indigenous collective—including those who had passed away without recognition, communities who lost their children, intergenerational survivors, as well as the individual experiences of those who lost their languages and cultures and were brutalized by their caretakers.

Political and Legal Strategies—the Shift from Litigation to Reconciliation

To seek support for their position in the Indigenous communities and to raise public awareness in non-Indigenous communities, the AFN took a number of strategic steps. First, it jointly convened an international interdisciplinary conference of experts, survivors, elders, government and church representatives, and grass roots activists with the University of Calgary Faculty of Law that called for an examination and analysis of the reparations offered in the government's proposed Alternative Dispute Resolution plan (ADR).[35] Second, it established relationships with senior government and church officials and politicians, ensuring they knew the critical importance of AFN's positions on resolving the matter.[36] Third, it published the AFN Report[37] that explained how and why the government's ADR plan was unacceptable and made extensive recommendations consistent with Indigenous principles. Fourth, it negotiated a Political Agreement with the federal Government committing it to resolve the settlement in the under the AFN's lead.[38] Finally, the AFN filed a statement of claim[39] with the National Chief as the class representative to ensure it would have standing at the negotiating table with the other litigating parties.[40]

There is no question that the breakthrough for the adoption of Indigenous legal principles in the Settlement Agreement came when the AFN signed the Political Agreement with Canada.[41] It spoke to a relationship of cooperation and reconciliation and ensured the AFN would play a "key and central" role in achieving a lasting resolution to the Indian Residential School legacy. The Agreement reads as follows:

> *Whereas Canada and First Nations are committed to reconciling the residential schools tragedy in a manner that respects the principles of human dignity and promotes transformative change;*

Whereas Canada has developed an Alternative Dispute Resolution (ADR) process aimed at achieving that objective;

Whereas the Assembly of First Nations prepared "The Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools" (the AFN Report) identifying the problems with the ADR process and suggesting practical and economical changes that would better achieve reconciliation with former students;

Whereas the Assembly of First Nations participated in several months of discussion with Canada, the churches and the consortium of lawyers with respect to the AFN Report, moving the towards settlement and providing education and leadership for all the people in the residential schools legacy;

Whereas Canada and the Assembly of First Nations recognize that the current ADR process does not fully achieve reconciliation between Canada and the former students of residential schools;

Whereas Canada and the Assembly of First Nations recognize the need to develop a new approach to achieve ·reconciliation on the basis of the AFN Report;

Whereas Canada announced today that the first step in implementing this new approach is the appointment of the Honourable Frank Iacobucci as its representative to negotiate with plaintiffs' counsel, and work and consult with the Assembly of First Nations and counsel for the churches, in order to recommend, as soon as feasible, but no later than March 31, 2006, to the Cabinet through the Minister Responsible for Indian Residential Schools Resolution Canada, a settlement package that will address a redress payment for all former students of Indian residential schools, a truth and reconciliation process, community based healing, commemoration, an appropriate ADR process that will address serious abuse, as well as legal fees;

Whereas the Government of Canada is committed to a comprehensive approach that will bring together the interested parties and achieve a fair and just resolution of the Indian Residential Schools legacy, it also recognizes that there is a need for an apology that will provide a broader recognition of the Indian Residential Schools legacy and its effect upon First Nation communities; and

Whereas the Assembly of First Nations wishes to achieve certainty and comfort that the understandings reached in this Accord will be upheld by Canada:

The Parties agree as follows:

I) Canada recognizes the need to continue to involve the Assembly of First Nations in a key and central way for the purpose of achieving a lasting resolution of the IRS legacy, and commits to do so. The Government of Canada and the Assembly of First Nations firmly believe that reconciliation will only be achieved if they continue to work together;

2) That they are committed to achieving a just and fair resolution of the Indian Residential school legacy;

3) That the main element of a broad reconciliation package will be a payment to former students along the lines referred to in the AFN Report;

4) That the proportion of any settlement allocated for legal fees will be restricted;

5) That the Federal Representative will have the flexibility to explore collective and programmatic elements to a broad reconciliation package as recommended by the AFN;

6) That the Federal Representative will ensure that the sick and elderly receive their payment as soon as possible; and

7) That the Federal Representative will work and consult with the AFN to ensure the acceptability of the comprehensive resolution, to develop truth and reconciliation processes, commemoration and healing elements and to look at improvements to the Alternative Dispute Resolution process.[42]

The shift from litigation to reconciliation and recognition of the need for a comprehensive resolution ultimately led to reparations that had never been achieved before by victims of mass human rights abuses in the Western world. However, in a subsequent letter the Deputy Prime Minister demurred on recognizing that the AFN's approach constituted law. The letter states:

the Government has also recognized that ***broad resolution will require more than just a legal settlement,*** *(emphasis added) and it is with that in mind that the Representative has also been mandated to work and consult with the AFN on the acceptability of all parts of a comprehensive resolution package and what improvements should be made to the ongoing Alternate Dispute Resolution process. The Assembly of First Nation's Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools will be an important foundation for these discussions.*[43]

Her statement that the resolution package would require "*more than just a legal settlement*" unfortunately failed to recognize that the AFN's claims indeed were legal. She also seemed to have misunderstood that the Settlement Agreement itself would be a legal contract enforceable by the Courts. The letter was also an ironic recapitulation of colonial attitudes that caused the residential school debacle in the first place. Moreover, according to the Supreme Court of Canada decision in the *Delgamm'uukw* case, the statement of the Deputy Prime Minister was also wrong according to Canadian law. In *Delgamm'uukw* the Court decided that Indigenous ways of addressing the resolution of issues of rights, including ways of making appropriate compensation, are now part of Canadian law.[44]

Using Indigenous Legal Processes

The AFN practised Indigenous processes of consultation, consensus, inclusiveness, collaboration, transparency, trust, hope, and healing both before, during and after the negotiations. the AFN reached out to thousands of survivors, elders, community members and intergenerational survivors from coast to coast to coast to ascertain what they wanted from the settlement, under what terms and how it could be accessed. Other consultations were conducted with the AFN executive, Chiefs, and survivor's groups to seek their input and participation in the decision-making process. The consultative approach is one shared by many Indigenous tribes. In Mi'kmaq legal traditions, for example, while a certain degree of concentrated authority is important to their legal order, they also aspire to give everyone an opportunity to participate in decision-making.[45] Ojibway tradition also requires people to talk to one another, using persuasion, deliberation, council, and discussion.[46] In Cree legal traditions, consultation and deliberation are used to create and maintain good relationships in order to maintain peace between different people with different perspectives.[47]

During the consultations the AFN was able to determine the priorities, objectives and goals of survivors.[48] Some of the typical comments made by survivors are as follows:

> *Not everyone wants courts and litigation – some just want to heal… Survivors need validation – have their experience accepted as real;…Money never equals healing. Need accountability, redress, closure, resolution and rebuilding relationships.*[49]

> *Experience of victims has to be central—have to understand what actually happened to them to be able to react—need to understand scope and extent of trauma. Need to respect those with the courage to speak—don't just listen—believe them.*[50]

Give victims choices, lawsuit, settlement, healing, nothing. Government needs to give up some power and believe in power of aboriginal people to do it in their own way.[51]

Need to work to develop a culture of resolution…Must deal with culture and intergenerational impacts.[52]

Need apology, including individual apology, extended to family if victim wants. Need televised apologies from Prime Minister and Department of Indian Affairs and Northern Development minister.[53]

Apologies are at the heart of reconciliation. It must go beyond words to action.[54]

Compensation must be accessible, fair and just and supported by financial and vocational counselling.[55]

Need to tell the story and have it memorialized in a public way…including the means to commemorate those who have died.[56]

We want to learn how to be Indians again – to get back language…Must restore culture and dignity…must address loss of culture and language and parenting skills…[57]

As well as taking the specific suggestions from the consultations, the AFN was guided by general Indigenous principles that emerged:

a) To be inclusive, fair, accessible and transparent;
b) To offer a holistic and comprehensive response recognizing and addressing all the harms committed in and resulting from residential schools;
c) To respect human dignity and racial and gender equality;
d) To contribute towards reconciliation and healing;
e) To do no harm to survivors and their families.[58]

It is noteworthy that compensation was not a top priority with the survivors. Healing, the opportunity to tell their stories, language restoration and reconciliation were by far the most predominant reparations the survivors sought.

The AFN also incorporated consecration ceremony into the process based on Ojibway spiritual tradition. Before negotiations started, the National Chief (who is Ojibway) organized a special ceremony to consecrate the process so they would start, according to tradition, "in a good way." In the Ojibway tradition, ceremonies

are performed to communicate to the Creator, and to acknowledge before others how one's duties and responsibilities have or are being performed.[59] Dancing, singing, and feasting sometimes accompany these rituals as a way to ratify legal relationships.[60] On this occasion, the government representative, the Honorable Frank Iacobucci,[61] along with other government officials, church representatives, and members of the AFN negotiating team, and survivors were invited to the traditional round house on Pow Wow Island located on the Rat Portage First Nation. The ceremony was performed by a senior Ojibway elder Fred Kelly. During the ceremony, the government representative was brought into the round house by women elders from the First Nation. A ceremonial pipe from the Treaty 3 area[62] was shared first by the government representative and the National Chief, then by men and women elders from the Treaty three territory. This was followed by singing, dancing, and praying for a successful outcome.

After the consecration, the group travelled to the Sagkeeng First Nation, the National Chief's birthplace, where a community meeting was held to hear testimony from residential school survivors, answer their questions and hear their suggestions about the negotiating process. The consecration ceremony was an important procedural step because Anishinabek law focuses on the process and principles that guide actions more than on specific outcomes. Accountability is closely connected to those to whom duties are owed, how those duties should be exercised, and the consequences that flow from such exercise.[63]

By holding the ceremony in the Roundhouse and by hosting the public meeting of the community at the Sakeeng First Nation, the National Chief presaged to all parties that he and his team would follow Anishinabek legal principles throughout the negotiations.

Direct engagement and consultation with survivors, empowering them to express their feelings and influence the outcome of the negotiations, was key to their ultimate acceptance of the final outcome.

The incorporation of ceremonial practices into the negotiating process honored the connection of survivors to the Creator and underscored the importance of accountability of the negotiators and the interconnectedness of culture to Indigenous law.

Using Indigenous Substantive Law—Asking the Right Questions

Substantively, Indigenous law and legal theory required the settlement negotiations to directly confront the individual and collective effects of colonialism on Indigenous women, men and children.[64]

For example, political and social conditions from the perspective of Indigenous women victims at the intersection of racial, colonial, and gendered acts of violence had to be considered.[65] Questions such as: how did the gender dynamics in the residential schools shape the ways in which women and girls were treated? How are those dynamics reflected in the reparations strategy? Do the responses and proposals for reparations include Indigenous women's experiences and knowledge?[66] Was the violence against girls in the residential schools perpetuated by social norms in which the degradation of Indigenous women and girls was treated as normal? Did the abusive acts and their resulting harms impact Indigenous women and men differently? How did the violence in the residential schools affect Indigenous women's experience of domestic violence in their adult lives? In their participation in the work force? In their child bearing and child rearing experiences?

The use of Indigenous legal principles enabled the negotiators to identify culturally inappropriate and gender biased aspects of the Government's ADR plan.[67] An example was its failure to recognize gender specific harms experienced by girls and women in the residential schools. If women could fit their harms into the harms males suffered they could be compensated. Otherwise they could not. The government's gender blind ADR plan did not compensate girls or women for pregnancy, abortion, or forced adoption of a child. Other questions pertinent to all Indigenous peoples asked how can Western criteria for reconciliation be moved to an Indigenous understanding of reconciliation? How can the relationship be rebalanced? How did the residential school strategy affect Indigenous identity, relationships, family and citizenship? How did the schools affect the economic, cultural, and linguistic knowledge of Indigenous peoples? How can we make space for Indigenous law, conflict resolution, and peacemaking traditions?

Applying Indigenous legal principles and values led to the adoption of more culturally appropriate rules for the individual assessment process such as relaxed proof requirements and non-adversarial hearings, healing funds, health supports, the Truth and Reconciliation Commission (TRC), a payment for loss of language and culture and loss of family life, an advance payment for the elderly, commemoration for deceased survivors, intergenerational reparations for education and community development, a research center and archive, and public apologies from Canada and the churches.

The design of the TRC and its mandate[68] reflected substantive objectives and goals informed by Indigenous law.[69] The preamble of the mandate states:

> *The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continual healing. This*

> *is a profound commitment t establishing new relationships embedded in mutual recognitioin and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.*[70]

The research center and archive, healing resources, health supports, and commemoration activities were designed to assure survivors that their ancestors would be honored, that they would be respected, safe, receive healing resources, and be protected in the future from any prospect that residential schools could be imposed on them again.

The composition of the AFN negotiating team further reflected its view that the settlement had to be survivor-centered and represent their diverse and unique interests. The majority of the team was made up of Indigenous negotiators who are non-lawyers—residential school survivors, including an elder advisor, and intergenerational survivor, and the National Chief. The non-Indigenous membership on the team included a human rights professor and lawyer, a mathematician with a law degree and family ties to holocaust survivors, a class action expert with a Jesuit background and a small group of other experts completed the team.

Recognition and Application of Indigenous Law into the Canadian Legal Framework

Having looked at the specific context of the Indian Residential School Settlement Agreement and how Indigenous law addressed a long standing, harmful problem in Canadian society, the question arises, how could a broader recognition of Indigenous law provide for future development, and what would that look like? Even though the Settlement Agreement was approved, enforced, and overseen by all of the Courts in Canada, it was still a settlement agreement derived from out-of-court negotiations. For Indigenous laws to become recognized as an integral part of the mainstream Canadian legal framework, Indigenous legal principles must be more widely articulated, debated and discussed just as common law and civil law principles are.[71]

Promoting the understanding that Indigenous law has always been a part of the Canadian legal reality is a first step. Unbeknownst to most Canadians, Indigenous laws have helped to shape contemporary laws dealing with Indigenous peoples in some of the most important cases defining the Indigenous relationship with Canada.[72] Educating Canadians, especially the legal profession, that Canada is a multi-juridical country with civil law, common law, and Indigenous law would help achieve its broader acceptance. Besides recognition and respect however, accessibility, intelligibility, and applicability of Indigenous law must be understood

and improved. Explaining and applying the nature and scope of Indigenous laws, putting them in written form, has started and some attempts at codification has occurred.[73] These efforts must be amplified by different tribes if courts, band councils, and other decision making bodies in their jurisdictions are to use and apply them.

To the question of to whom will Indigenous laws apply is a complex one which is beyond the scope of this paper. However, John Borrows offers a very detailed explanation,[74] essentially making the point that from a democratic perspective, Indigenous laws, like other laws, must respect the fundamental principle that those who are bound by laws must have some potential to create and administer them.[75] However, from a territorial perspective, laws made by self- governing reserves should apply to those who visit or do business on reserve, just as municipal laws apply to every person in a given municipality whether resident or not.

In the broader legal system Indigenous laws should directly apply in cases related to treaty and Aboriginal rights. This would accord with Section 35 of the *Constitution Act, 1982*[76] which constitutionally recognizes and affirms existing Aboriginal and treaty rights. In other legal matters off reserve where colonial laws have greatly influenced or overtaken Indigenous laws, a well-functioning multi-juridical system should allow for Indigenous law to influence civil and common law principles in a positive and constructive way. The Indian Residential School Settlement Agreement is a clear example of this. The common law courts were used by survivors to create the leverage needed to force Canada and the churches into settlement negotiations where Indigenous laws were then applied, using Indigenous legal principles to come to a successful conclusion. This example of interdependence shows how both legal systems could be made stronger while reflecting the multi-juridical nature of the country.

Conclusion

The AFN's ultimate goal was to conclude a Settlement Agreement that would be transformative and create a path for reconciliation. Without reparations informed by Indigenous laws and principles the AFN knew that their goals would fail.

The Indian residential School Settlement Agreement demonstrates that adopting Indigenous law and legal traditions to legal problems has the potential to build trust, restore dignity, and provide a measure of justice to Indigenous peoples not available through the common law system Canada inherited from the Britain and French colonizers.

The formal justice system and the lawyers, judges, and policymakers that operate within it are for the most part, ill prepared to comprehend or correct the

relationship between the Indigenous peoples and Canada in relation to the rule of law. Their lack of training or willingness to understand Indigenous law or legal traditions so vital to crafting appropriate reparations and policies for the wrongs of colonial practices and prejudices makes progress in creating a healthy and productive "nation-to-nation" relationship very difficult. One is left to wonder if the economic and political turmoil caused by the Wet'suwet'en human rights uprising could have been avoided if a higher level of awareness and appreciation of Indigenous laws existed in the halls of justice and government.

The Indian Residential School Settlement Agreement stands as an excellent example of how Indigenous law was an indispensable tool in resolving a complex and intractable human rights and Indigenous rights problem that not only appeased the Indigenous peoples of Canada but educated non-Indigenous Canadians about their own history and opened up possibilities for reconciliation. If even one lesson can be learned from the process and substance used to achieve the Settlement Agreement, it is to listen to what Indigenous peoples say and what solutions they propose when their rights and interests are engaged or jeopardized. The longer the delay in finding solutions or building solutions together to create mutual understanding and benefit, the more we are going to end up in the kind of human rights uprisings like the Wet'suwet'en dispute.

Professor Kathleen E. Mahoney has a JD from the University of British Columbia, an LLM degree from Cambridge University and a Diploma in International Comparative Human Rights from the Strasbourg International Human Rights Institute in France. She is Professor of Law at the University of Calgary and Queen's Counsel. She was the Chief Negotiator for Canada's Indigenous peoples claim for cultural genocide against Canada, achieving the largest settlement in Canadian history. She was a primary architect of the Truth and Reconciliation Commission of Canada and participated in the negotiations for the historic apology from the Canadian Parliament and from Pope Benedict XVI at the Vatican. She was co-counsel for Bosnia Herzegovina in their genocide action against Serbia in the International Court of Justice. Her representation of Bosnian victims of military rape influenced the judicial interpretationof genocide to include mass rapes and forced pregnancy. Among her many awards and distinctions, Professor Mahoney is a Fellow of the Royal Society of Canada, Queen's Counsel, a Trudeau Fellow, and a Fulbright and Human Rights Fellow (Harvard). She received the Governor General's medal for her contribution to equality in Canada. She has held Visiting Professorships or Fellowships at Harvard University, The University of Chicago, Adelaide University, University of Western Australia, Griffiths University, the National University of Australia and Ulster University.

Notes

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12 The author was the Chief Negotiator for the Assembly of First Nations for the Indian Residential School Settlement Agreement. She also served as the

AFN representative on the National Administration Committee (NAC) for the Settlement Agreement from 2007 until 2018. The NAC mandate was to oversee the implementation of the Agreement and hear appeals for the common experience payments. The author also represented many individual survivors in their claims for compensation under the terms of the settlement agreement during the same period.

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21 Ibid., 91. Between 1936 and 1944, 200,000 Indian Affairs files were destroyed.

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23 The Chief Medical officer for the federal government spoke out as early as 1907 about the unacceptable conditions and deaths of children in the schools saying the churches and the federal government and had the means to save many lives but failed to take adequate action. See Bryce, *Report on the Indian Schools of Manitoba and the Northwest Territories* (Ottawa, ON: Government Printing Bureau); Peter Henderson Bryce, *A Story of Courage* (Ottawa, ON: First Nations Child and Family Caring Society of Canada, 2016).

24 John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999).

25 The term has been attributed to Duncan Campbell Scott but more accurately it originated in the U.S. military. See also Truth and Reconciliation Committee, *Final Report*.

26 The Settlement Agreement in the Independent Assessment Process (IAP) provides for loss of opportunity described as one of chronic inability to obtain employment; chronic inability to retain employment, periodic inability to obtain or retain employment, inability to undertake or complete education or training resulting in underemployment and/or unemployment, or diminished work capacity. Claims can alternatively be made for actual income loss. For the settlement agreement, see Government of Canada, "Statistics."

27 Some of the harms listed as compensable in the IAP compensation model are loss of self-esteem, pregnancy, forced abortions, forced adoptions, psychotic disorganization, PTSD, self- injury, sexual dysfunction, inability to form or retain relationships, eating disorders, severe anxiety, guilt or self-blame, lack of trust in others, addictions, nightmares, aggression, hypervigilance, anger, retaliatory rage, and humiliation.

28 Neither the court actions nor the government's ADR plan included the reparations the survivors wanted most, such as the truth commission, healing resources, commemoration, special attention for the elderly, compensation for loss of language and culture or intergenerational remedies.

29 The Assembly of First Nations (AFN) is a political organization representing approximately 900,000 First Nations citizens in Canada. The AFN advocates on behalf of First Nations on issues such as treaties, Indigenous rights, and land and resources.

30 See "Phil Fontaine's Shocking Testimony of Sexual Abuse," broadcast on CBC, October 30, 1990, https://www.cbc.ca/archives/entry/phil-fontaines-shocking-testimony-of-sexual-abuse

31 The cost was estimated to be $2.3 billion in 2002 dollars not including the value of the actual settlement costs. See Canadian Treasury Board, *Performance Report for the Period Ending March 31, 2003* (Ottawa and Ontario: Treasury Board of Canada Secretariat, 2003).

32 For a full discussion of the AFN's approach, see Kathleen Mahoney, "The Untold Story: How Indigenous Legal Principles Informed the Largest Settlement in Canadian Legal History," *University of New Brunswick Law Journal* 69 (January 2018). See also, Kathleen Mahoney, "The Settlement Process: A Personal Reflection," *University of Toronto Law Journal* 64, no. 4 (August 2014): 505-528.

33 Many scholars have written on the impacts of colonization and the rights of Indigenous peoples to take control of their lives through employing Indigenous laws, principles and customs. One of the best sources is Borrows, *Canada's Indigenous Constitution*.

34 Even though some of the defendants did not accept that residential school policy was a form of cultural genocide, the conclusion that it was, is now well accepted. The Truth and Reconciliation Commission, the former Chief Justice of

Canada as well as the former Prime Minister of Canada, Paul Martin all described the residential school policy as one of cultural genocide or attempted cultural genocide. The comments of the former Chief Justice and the former Prime Minister Paul Martin can be found at Sean Fine, "Chief Justice Says Canada Attempted 'Cultural Genocide' on Aboriginals," *The Globe and Mail*, https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/; and "Paul Martin Accuses Residential Schools of 'Cultural Genocide,'" *CBC News*, April 26, 2013, https://www.cbc.ca/news/politics/paul-martin-accusesresidential-schools-of-cultural-genocide-1.1335199. For a summary of opinions and analysis see Ruth Amir, "Cultural Genocide in Canada? It Did Happen Here," *Aboriginal Policy Studies* 7, no. 1 (2018).

35 The conference agenda is at https://kathleenmahoney.files.wordpress.com/2019/03/2004-residential-school-legacy-conference-agenda.pdf.

36 An example of the outreach to senior government officials is the Letter to Mario Dion on line: https://kathleenmahoney.files.wordpress.com/2015/11/adr-critique-2nd-dion-leter-irs.pdf and the meeting with the Prime Minister. See Mia Rabson, "Fontaine Recalls when Former PM Agreed to Address Residential School Legacy," *Winnipeg Free Press*, February 6, 2015, https://www.winnipegfreepress.com/special/trc/Fontaine-recalls-when-former-PM-Martin-agreed-to-address-residential-schools-legacy-305901261.html.

37 *Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, https://kathleenmahoney.files.wordpress.com/2018/03/afn-report-indian_residential_schools_report.pdf.

38 A letter from the Deputy Prime Minister discussing the political agreement can be found at https://kathleenmahoney.files.wordpress.com/2019/01/a-mclellan_letter.pdf.

39 Jeff Ross, "AFN Class Action Lawsuit Over Residential Schools Policy," *The Nation*, August 19, 2005, http://www.nationnewsarchives.ca/article/afn-class-action-lawsuit-over-residential-schools-policy/.

40 A position at the negotiating table was crucial for the AFN to ensure that the governemnt honored the terms of the political agreement.

41 "Political Agreement between the Assembly of First Nations and Her Majesty the Queen in Right of Canada (represented by Deputy Prime Minister Anne McLellan)," May 30, 2005, https://web.archive.org/web/20070319141417/http://www.afn.ca/cmslib/general/IRS-Accord.pdf.

42 Political Agreement, May 30, 2005, https://kathleenmahoney.files.wordpress.com/2019/ 01/irs-political-agreement-en_fr-1.pdf.

44 The Court emphasized that if the path to resolving claims when dealing with Indigenous nations are the principles governing the legal systems of those nations.

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46 Ibid. See also Hadley Friedland, *The Wetiko Legal Principles: Cree and*

Anishinabek Responses to Violence and Victimization (Toronto: University of Toronto Press, 2018).

47 Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2013).

48 For a record of the outreach dialogues, see Glenn Sigurdson, *Reconciliation and Healing: Alternative Resolution Strategies for Dealing with Residential School Claims* (Ottawa, Minister of Indian Affairs and Northern Development, 2000).

49 Ibid., 7.

50 Ibid., 16

51 Ibid., 17.

52 Ibid., 19.

53 Ibid.

54 Ibid., 21.

55 Ibid., 22.

56 Ibid.

57 Ibid., 34.

58 Ibid. This was a summary of many ideas that were recorded in the dialogues.

59 See generally Basil Johnston, *Ojibway Heritage* (Toronto: McClelland & Stewart, 1976). See also stories and histories that shaped the Omushkego Crees in Louis Bird, *The Spirit Lives in the Mind: Omushkego Stories, Lives and Dreams* (Montreal & Kingston: McGill-Queen's University Press, 2007) which stories describe similar ceremonies and traditions.

60 Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Hayward: Indian Country Communications, 1988).

61 The AFN chose Justice Iacobucci, a former Chief Justice of the Federal Court of Appeal and a former justice on the Supreme Court of Canada as their preferred choice for the position of government representative for the negotiations.

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63 Borrows, *Canada's Indigenous Constitution*, 333

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by Canada, see the NAC Report, *infra* paras. 21-26.

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69 The AFN was the plaintiff's only representative at the table negotiating the TRC and other collective remedies.

70 Ibid.

71 This process has started in Canada with increasing numbers of law schools teaching Indigenous legal principles as a part of the curriculum. The University of Victoria Faculty of Law has introduced a program that will graduate its first students with Indigenous law degrees in 2023.

72 For example, see Connolly v. Woolrich, 17 R.J.R.Q. 75 (1867); R. v Mitchell, 1 S.C.R.911 (2001), para 8; R. v. Vander Peet, 2 S.C.R. 507 (1996), para 31; Calder v. Attorney General of British Columbia, S.C.R. 313 (1973).

73 See for example, *Indigenous Law Research Unit, Accessing Justice and Reconciliation: Cree Legal Summary* (University of Victoria, [no date]).

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75 Ibid., 156.

76 And described in Section 2 of Chapter N-27 of the *Revised Statutes of Canada*, 1985, as amended by Section 77 of Chapter 28 of the *Statutes of Canada*.

THE NEXUS OF CORRUPTION AND HUMAN RIGHTS

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Abstract: *Corruption and human rights are complex phenomena arising in a multitude of forms that inextricably link politics, governance, and legality in complicated ways and with intricate implications for individuals and societies. However, our knowledge on the dynamics of corruption and practices of legal institutions is wanting; there is dire need of new knowledge on the nexus between corruption and human rights that can contribute to national and international efforts of understanding and to counteracting institutional deficiencies, mismanagement, malpractices, and their societal implications on a global scale. The article argues, we need an additional lens that focuses on the societal constructions of norms and configurations of political power, to understand the persistent unfolding and distribution of social and economic inequalities in specific contexts.*

Corruption is a phenomenon with wide-ranging consequences, notably the facilitation and institutionalization of human rights violations. Corruption's pervasive and malign nature enormously impacts the daily lives of billions of people. The World Economic Forum estimates that the cost of corruption is $2.6 trillion,[1] and companies and individuals pay more than $1 trillion a year in bribes, according to the World Bank.[2] Corruption also facilitates money laundering and illicit financial flows.

The Secretary General of the UN, António Guterres, has recently stated that corruption

> *deprives people of their rights and drives away foreign investment and despoils the environment. Breeds disillusion with government and governance—often at the root of political dysfunction and social disunity. And, drives and thrives on the breakdown of political and social institutions.*[3]

There is no challenging that corruption "facilitates, perpetuates and institutionalizes" violations of human rights, and that more instances of violence and torture are found where there are higher levels of corruption. According to the Human Rights Committee, it is "difficult to find a human right that could not be violated by corruption," since it disproportionately aggravates and compounds existing societal and global disadvantages and inequalities.[4] As Rose-Ackermann states, widespread corruption is a sign that something has gone wrong in the relationship between the state and society.[5] In this process, political corruption

which unfolds as corruption-violence linkages is generally underemphasized.[6] There is a mounting consensus among policymakers and scholars that corruption erodes popular trust in political institutions, undermines generalized trust in others, distorts political participation, and reduces legitimacy.[7] Our knowledge on the dynamics of corruption and practices of legal institutions is wanting;[8] there is dire need of new knowledge on the nexus between corruption and human rights that can contribute to national and international efforts of understanding and to counteracting institutional deficiencies, mismanagement, malpractices, and their societal implications on a global scale.

However, we need to explore corruption and human rights beyond conventional understandings of economy and law which so far have dominated analyses. We need new angles and avenues in order to achieve deeper empirically grounded understandings of interlinkages and interdependencies, and how they play out in real-life situations, for example during arrest, detention, and court proceedings. Our efforts should attempt to illuminate the interrelations between structures, institutions, and practices. An additional lens to understand the persistent unfolding and distribution of social and economic inequalities in specific contexts could be to focus on the societal constructions of norms and configurations of political power. This would provide a deeper analysis of the complex interdependencies and contestations of social norms, legal frameworks, international agreements and conventions, and situated practices. The conceptualization of the nexus of corruption and human rights offers a foundation for future analysis and interventions across contexts and cultures.

Corruption and human rights are complex phenomena arising in a multitude of forms that inextricably link politics, governance, and legality in complicated ways and with intricate implications for individuals and societies. Conceptually, corruption and human rights have been defined by international conventions and standards in ways that connote law and legality; this consequently limits analysis. Generally speaking, human rights violations are violations of the individual whereas corruption constitutes a transgression of the market and the functioning of the state.[9] However, when both practices are conceptualized legalistically, they become conceptually slippery, partly because they are shaped by political interests and contested in the social reality of legal practices and institutions.[10] Colleagues and I have tried to address the complex relationships underpinning corruption and human rights along three themes: violent social orders,[11] violent exchanges,[12] and accidental citizenship.[13]

The three themes attempt to address the complexities and interdependencies between different levels of corruption and human rights practices. In combination, they offer a multilayered perspective which incorporates the structural, institutional, and practical levels of analysis with the connections

and contestations between international soft law regimes, national legislation, institutional practices, and everyday life. Thus, we simultaneously study corruption and human rights at different levels of analysis and through particular institutional expressions. These include international bodies (the UN); state institutions and public authorities; politicians and civil society; and individual citizens—from the international to the local levels. The analysis focuses on the encounters between public authorities and citizens, for example before arrest, during arrest, detention, etc., and is always underpinned by the potentiality of violence—implied or realized.

In novel ways, the themes attempt to illuminate the interconnections and interdependencies between different levels of analysis and institutional expressions where corrupt acts and human rights violations unfold. The themes seek to understand the obstacles promoting effective and accountable legal regimes and to fill the knowledge gaps that exist. In other words, the research has tried to capture the everyday processes actualizing the principle of the rule of law into practice, to explore corruption and human rights relations as a continuum between legal discretion and extralegal impunity. We do so in order to uncover the ways in which legal practices are understood, used, and abandoned in particular historical and political contexts.[14]

In this perspective, rule of law refers to the legal principle of law governing the state, whereas practice refers to situated entanglements and everyday actions. It is an analytical dynamic perspective that embraces a move from making the state (discretion), to making use of the state (impunity)—from rule of law to rule *through* law—from legal principles to mundane politics.[15] It is a heuristic device for exploring rule of law in practice at the intersections between authorities and people. It attempts to illuminate institutional dynamics, and the relational processes that encompass constructions of collective behaviors, norms, and state-citizenship relationships. It enables examination of how rule of law is practiced, authority exercised, and justice administrated within the backdrop of the wider social and political context.

The approach builds on two strains of literature. One explores law as a dynamic social and political concept, not necessarily defined by the state,[16] another explores the exercises of authority and state-making as emerging through legitimizing practices and expressions of power.[17] The first captures how the potentiality of law is present in relationships between authorities and people that open a space for negotiations of rights, claims-making, and citizenship. The latter addresses the practices of order-making and the exercises of authority. It focusses on how authority does not emanate from one single source, *i.e.* the state, but is made through a multitude of conflictual practices. These perspectives help to explain how constitutions, laws, and legal practices (including policing) move

from an ideal of making the state as a collective and public good, to making use of the state.

While constitutional and societal legality signify a sublime image of the state, in practice legal institutions' and authorities' encounters with citizens unfold as the constitutive opposite with violence, extortion, and bribery being common realities. This often unfolds as a forced interaction between actors, which reflects wider societal power disparity and is imbued with notions of impunity[18] and violence, with law as a regulating and governing principle.[19] Investigating rule-of-law practices provides for a wider analysis of interactions between authorities and citizens as well as the divisions and conflations of moral and legal transgressions.[20] Thus, corruption and human rights are linked through the intricate empirical processes of violent social orders and violent exchanges which produce social and legal differences, which I elsewhere have called accidental citizenship.[21]

Research in recent years has moved beyond *a priori* definitions, such as those purported by international organizations, e.g. the UN and the OECD, and the explorations of the behaviors that people categorize as corrupt. This movement seeks to identify the frameworks in which these judgments are made in order to grasp the drivers of such actions. Standard corruption analysis, popularized by Transparency International, continues to focus on the use of public office for private interest. Such analyses have traditionally departed from standard practice by considering rational economic behaviors, legalistic approaches, and approaching the bribe-taker as the main legal and moral transgressor.[22] While this perspective is dominant within political science and economic disciplines, other social science disciplines, e.g. anthropology and sociology, have broadened the field to embrace institutional and social perspectives on corrupt practices which are based in ethnographic methodologies and grounded empirical data.[23] This involves attention to how actions, practices, and state-citizen relations are context-dependent and how constructions of moral codes, social norms, and notions of legalities vary according to local legal and cultural standards—for example, what is labeled corruption and what is considered a rights violation.

However, detection and documentation are pertinent challenges within research and for the development of practical countering measures and longer-term policy oriented solutions to the problem of corruption and rights violations. Corrupt acts are by definition kept secret due to their immoral and illegal nature. Likewise, human rights work on state violence such as torture, start out with the detection of violations, victims, and perpetrators, and focuses on the production of evidence for advocacy and legal actions, e.g. through fact-finding and reporting. These are used as analytical devices to sort through acts of misuse and violence, with the ultimate goal of redress and justice. This involves analysis of processes of victimhood and the identification and prevention of abusive and/or violent acts

and other forms of ill-treatment.[24] This approach involves investigations of the ways in which international norms influence national settings and affect local practices[25] as well as an examination of the legal complex of actors and institutions that make and shape the practices of the rule of law.[26]

While human rights researchers have access to an abundance of information and data, often through their victims, corruption research has suffered from a lack of grounded information. Human rights institutions, activists, and organizations, along with international and intergovernmental organizations for decades have documented rights violations on a global scale, most often from a victim/survivor perspective. This information includes government statistics, prevalence and perception surveys, and case-based information, all more or less systematically collected by rights-based and humanitarian organizations such as those working on rehabilitation, legal aid, prevention (legal reform and advocacy), and/or news media. Information is made available in reports (thematic and yearly) for public consumption and is used by the international community to criticize regime, government, and state transgressions in an effort to force them to respect and protect their citizens—for example, at the Universal Period Review (UPR) processes at the UN. Much of this information is anecdotal, case-specific, and collected after the violation has happened; it is a reaction to authorities' abusive practices, and is intended for the purposes of criticism, accountability, legal redress, and justice. Although many victims do not come forward out of fear for repercussion, especially in countries and constituencies with numerous and severe violations. The sheer volume of publicized cases in particular contexts and situations testifies to the systematic and widespread character of abusive practices. At times this is supported by perception and prevalence studies, e.g. on trust in police and administration practices.

Quite the reverse, corruption researchers rarely have access to similar information for grounded and empirically-based analysis. There is mounting recognition within the field that standard research and analysis, which most often rely on generic global databases, do not provide significant insights to understand the dynamics and processes of corruption, nor do they provide relevant and adequate contextual countering measures. In the opening article in *Routledge Handbook on Political Corruption*, Paul Heywood identifies two conundrums in research: that most analyses of corruption take nation-states as their principal unit of assessment, and that corruption is predominantly seen as a public-sector issue.[27] He concludes that our understanding is limited by the data we have and the conceptual approaches that we take in our analysis of the problem.[28] In the same volume, Mark Philip identifies that corruption, in its most widely used understanding, is molded on a particular conception of the state and political order as a sense of unity and cohesiveness, harmed or destroyed by malign influences.[29] The challenge is to "extend the focus of concerns about cultural differences and the

importance of local understandings from a concentration on what behavior people classify as corrupt, to identify the framework in which they make these judgements," how they understand "the political system and its operation, and how far they have a sense of the political as a sphere in which conflicts could be resolved in ways that can be widely legitimated."[30] This understanding would allow us to grasp what is motivating people to do as they do.[31] He concludes that "a fine-grained analysis of the exact form that corrupt relations take in any given state is necessary if we are to think constructively about how we might explain and address the problem."[32]

Following this line of thought, we need to pay more attention to how different forms of authority use their power and position in encounters with citizens, shaping relations and interactions, from voluntary transactions to brutal extortions. For instance, Heidenheimer's distinction between white, black, and grey corruption,[33] is an attempt to understand local notions and situated practices of morality and illegality. In the words of Heywood: "One which is accepted and tolerated, its opposite which is widely rejected and criticized, and intermediate forms which elicit different responses from different groups."[34] This approach is sensitive to contexts and is similar to Alatas' approach which refers to the abuse of trust in the interest of private gain. He distinguishes between "transactive" and "extortive" corruption. Transactive refers to an arrangement between a giver and a taker, pursued by and to the advantage of both parties. Extortive refers to compulsion or force, to avoid or fend off some form of harm or impediment being inflicted on the giver or on individuals close to him/her.[35] Alatas further qualifies his approach with what he calls defensive corruption. This is inversely integrated to the concept of extortive corruption that entails some form of compulsion, usually to avoid some form of harm being inflicted on the person making payment or those close to him/her.[36] Such approaches recognize and attempt to capture the fact that the majority of people are preoccupied with minimizing risks, solving problems, and maintaining safety—not working for gains, which is the basic understanding in standard corruption research.[37] It brings attention to the fact that for many that live in societies of widespread and systematic corruption, invisibility and avoidance are the preferred strategies to stay safe, away from the attention of law and legal authorities. It also shows how systematic corruption incorporates ordinary citizens and administrators into unlawful and immoral actions due to the presence of violence (realized or implied) and the fundamental absence of accountability and justice. However, at the same time, we should not lose sight of the fact that some people also engage in corrupt acts, or acts in the boundaries of the moral and legal orders, due to the implied or real material and symbolic benefits, e.g. money or influence, etc. Altogether a simple typology for corrupt engagement could be: routine behaviors—reiterate daily actions and relations; precautionary behaviors—to prevent, fend off, or avoid problems; advantageous behaviors—to take advantage and gain from position and relations; rapaciously behaviors—actively seeking out situations, positions; and relations to secure (undue) gains. The typology

marks a move in analytical perspective from people/citizens, over bureaucrats and institutional practices, to politicians and other social and economic elites. It involves attention to political economy and the structural conditioning involved in framing and shaping motivations and actions. Although very simple, the typology could serve as an analytical entry point to understand the boundaries and operations of multiple legal and morals orders in context, for example customary systems, cultural nodes and axioms, ethnic affinities and ties, religious sentiments and outlooks, etc.[38]

Corruption should be investigated from the viewpoint of the actors and not from the conventional normative viewpoint in order to explore how corrupt practices are rendered legitimate or illegitimate in context. Olivier de Sardan brings attention to the fact that corruption is highly stigmatized and often something that people will not admit to having taken part in. He suggests that corruption is not one practice but rather a complex set of practices that, to different degrees and in different situations, can be deemed legitimate or illegitimate.[39] This is quite a diversion from standard policy and legal frameworks which treat corruption as inherently illegal, wrong, and bad. It recognizes that in many contexts corruption in the everyday lives of people is trivialized and the lines between what is legal and illegal, right and wrong, good and bad, are blurred and contested to the extent that conventions and legal frameworks are brought into question.[40] This blurs the lines between what is considered corruption and what is not, and hints at a conflict between empirical realities and legal frameworks that in turn challenges conventional research and countering measures, such as oversight, audit, and whistleblowing mechanisms. This does not mean that corruption is deemed acceptable. It is in most contexts understood as something that ruins society. Yet, in situations marred by widespread and systematic corruption, it is difficult to avoid and escape without detrimental consequences to one's life and livelihood.[41]

Why is an approach to corruption and human rights important? In a world where politics and business are increasingly entangled, an understanding of the interweaving of political and economic interests at the highest levels of government in numerous countries illuminates the complexities and interdependencies of power, corruption, and human rights, and also offers a multilayered perspective which incorporates the structural, institutional, and practical levels of rule of law, and its implications for societies. For example, the UN is already involved in work to address corruption and human rights as an interconnected and interdependent complex of problems. There have for years been discussions on how to forward the agenda within the organization and in relevant policy arenas. There have even been suggestions to establish a special rapporteur on corruption and human rights. This all follows wider discussions on how to break down the compartmentalization of jurisdictions, policies, and practices within the UN and its associated institutions and organizations. This process generates information and provides new

knowledge on the nexus between corruption and human rights and the way that it can contribute to national and international efforts of understanding and to counteracting institutional deficiencies, mismanagement, malpractices, impunity, and their societal implications on a global scale. This constitutes a joint effort for activists, organizations, and researchers to keep states and politicians accountable and make positive changes in the lives of those that suffer the most from oppressive and abusive systems and practices.

Morten Koch Andersen specializes in the interdisciplinary study of the nexus between violence, human rights, and corruption with a special focus on the administration of justice and legal and institutional reform. He has worked on issues of torture, political mobilization, human rights and corruption for more than a decade, with a special interest in rule of law practices, impunity and citizenship. He has worked as program manager on anti-torture and research programs in Albania, Bangladesh, Sri Lanka, West Africa and Libya.

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