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Minority Rights, Minority Wrongs

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MINORITY RIGHTS, MINORITY WRONGS

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Many of the new democracies established in the last twenty years are severely ethnically divided, with numerous minority groups, languages, and religions. As part of the process of democratization, there has also been an explosion of "national human rights institutions," that is, independent government agencies whose purpose is to promote enforcement of human rights. But despite the significance of minority concerns to the stability and success of these new democracies, and despite the relevance of minority rights to the mandates of national human rights institutions, a surprisingly limited number of national human rights institutions have directed programs and resources to addressing minority issues. This article explores the activities of national human rights institutions, identifying regional and content trends in these programs, identifying factors correlating to the existence of such programs, and considering the implications of these patterns for the established legal frameworks for minority and indigenous rights. Finally, this article suggests some productive roles that national human rights institutions might play in protecting the interests of minority groups.

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INTRODUCTION

Since the fall of the communist bloc fifteen years ago, the practice of democracy has spread infectiously from the old epicenters of Soviet power in Russia, Central Asia, and Eastern Europe through the distant African, Asian, and American satellite states sponsored by the Cold War conflict. Some genuine democratic transitions have taken place, while other shifts have been democratic more in form than in substance. But most of the countries of the world now at least go through the motions of holding elections and making verbal obeisance to concomitant respect for constitutional limits on government authority and incarnations of universal human rights. Unless a nation has the economic, military, or political clout to shoulder its way into the world community on its own, at least some show of reverence for these values is perceived as necessary for successful participation in vital international institutions and processes.[1]

In the wake of these developments, there has been an explosion of "national human rights institutions," that is, independent government agencies whose purpose is to promote enforcement of human rights. Whereas there were only a few national human rights institutions before 1970, hundreds were established in the democratization wave of the 1990s.[2]

Like holding elections, drafting constitutions with pristinely separated powers and lengthy human rights guarantees, and ratifying international human rights instruments, creating national human rights institutions has provided a way for new democracies to signal to the international community

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[1] *See* MONTY G. MARSHALL & KEITH JAGGERS, CTR. FOR INT'L DEV. & CONFLICT MGMT., POLITY IV COUNTRY REPORTS 2003: GLOBAL REGIMES BY TYPE 1946-2003, http://www.cidcm.umd.edu/inscr/polity/report.htm (last visited Feb. 25, 2006) [hereinafter POLITY IV COUNTRY REPORTS] (dataset measuring global, regional, and national trends in democratization).

[2] *See* RICHARD CARVER, INT'L COUNCIL ON HUMAN RIGHTS POLICY (ICHRP), PERFORMANCE AND LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS 57-59 (2000) [hereinafter ICHRP REPORT]; Office of the U.N. High Commissioner for Human Rights, Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights, http://www.unhchr.ch/html/menu6/2/fs19.htm (last visited Feb. 25, 2006) [hereinafter UNHCHR Fact Sheet]. The United States has not established national human rights institutions as such on the federal level, preferring to channel such concerns exclusively through the courts, apart from a few specialized bodies like the Equal Employment Opportunity Commission, which focuses on a narrow set of issues, and the Helsinki Commission, which focuses primarily (but not exclusively) on foreign rather than domestic compliance with certain human rights obligations. However, corollary institutions such as human rights commissions and ombudspersons are more common in the United States on the state and municipal level.

their commitment to human rights and liberal values.[3] These institutions look much alike on paper, but their actual effect has varied enormously from state to state. While some have languished in limbo, awaiting legislative implementation or the appointment of key officials, many are active, and some have become influential forces promoting human rights within their states.[4]

Minority groups[5] should be a primary constituency for institutions whose purpose is to promote successful democratization and whose mandate is to investigate claimed abuses and to protect vulnerable populations. Many transitioning states[6] are highly ethnically divided: from Afghanistan to the

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[3] Of course, this signaling purpose for acceding to international human rights standards is by no means unique to new democracies. *See* David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U.L. REV. 879 (2003). But the development of new norms and institutions are steps that are inherent to the process of creating a new government, and are therefore characteristic of, although not exclusive to, new democracies' efforts to signal compliance and thereby establish international credibility.

[4] *See* ICHRP REPORT, *supra* note 2, at 111-17.

[5] I am using the term "minority group" here and throughout the article to refer to a non-majority community in a state made up of multiple communities, including ethnic, racial, and religious groups. This term, like the others used to describe groups in this article, is both highly contestable and vigorously contested. *See, e.g.*, Framework Convention for the Protection of National Minorities, Explanatory Report, ¶ 12, *opened for signature* Feb. 1, 1995, Europ. T.S. No. 157 (*entered into force* Feb. 1, 1998) [hereinafter Framework Convention] ("It should also be pointed out that the framework Convention contains no definition of the notion of 'national minority' . . . . based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States."). Nonetheless, I am employing the term "minority group" in this context because it and its variants (e.g., "national minority," "ethnic minority") are in wide use in the relevant legal documents and academic literature, in spite of their shortcomings. In particular, because I am discussing a set of legal rights that are commonly referred to as "minority rights," it is helpful to use a corresponding term to describe the groups to whom those rights might accrue. Those attempting to define the term "minority" have managed to reach agreement that a minority is a group of people within a state. The sticking points have been: (1) whether the test for minority status should be objective or subjective or both; (2) if objective, (a) whether the relevant criterion for minority status should be relative numbers or power or both, and (b) what other criteria are relevant for defining the scope of groups, e.g. ethnic, religious, or linguistic differences; and (3) if subjective, whether the relevant viewpoint should be that of other communities, that of the group in question, or both. *See, e.g.*, U.N. Comm'n on Human Rights, Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶¶ 560-68, U.N. Doc. E/CN.4/Sub.2/384/1979/Rev.1 (June 1979) (*prepared by* Francesco Capotorti) (hereinafter Capotorti).

[6] A number of ongoing studies survey modern political transitions. Elias Papaioannou and Gregorios Siourounis identify 62 states as having moved to full or partial democracy in the "third wave" of democratization, while David Epstein and his collaborators identify 86 countries that have shifted between full democracy, partial democracy, and autocracy during the

Balkan states, from Uganda to Nepal, these states comprise numerous ethnic groups, languages, and religions.[7] These divisions and the conflicts they produce represent a fundamental challenge for the continuing existence of these states. In these sensitized contexts, national human rights institutions seeking to safeguard minority rights could find a legal mandate for at least some action in international human rights law, which has long enshrined basic protections for minority groups against discrimination and cultural or physical destruction.[8]

Nonetheless, few of the newly established institutions in transitioning states report developing programs to reach minority populations effectively, and many shy away from involvement in their conflicts. Instead, the institutions that report establishing programs or offices to address minority concerns tend to be in better established democracies and less severely divided societies. The programs that do exist in transitioning states tend to be limited, both in their aspirations and in their implementation.[9]

To some extent these lapses can be described in pragmatic terms, as failures of resources, legal imagination, or political will. But the experiences of those national human rights institutions that have implemented minority-directed programs suggest another concern: in some settings, the current legal frameworks for protection of minority rights do not accurately map the concerns of either minority groups or the state. Instead, those frameworks

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sample period. *See* Elias Papaioannou & Gregorios Siourounis, *Economic and Social Factors Driving the Third Wave of Democratization* (London Business School, Working Paper, Jan. 2005), *available at* http://phd.london.edu/epapaioannou/detrm_democ_jan.pdf; David L. Epstein et al., *Democratic Transitions* (Working Paper, Apr. 17, 2005), *available at* www.columbia.edu/cu/ciber/research/Transitionsv5.pdf. Detailed country data and analysis is available in the Polity IV database. *See* POLITY IV COUNTRY REPORTS, *supra* note 1.

[7] Several recent studies attempt to define and measure ethnic division in each state on a worldwide basis. Particularly relevant for this article is James Fearon's 2003 study of ethnic fractionalization, which thoughtfully discusses the problems of definition and measurement and presents data on 160 countries worldwide. This study suggests, among other findings, that sub-Saharan Africa is far more complexly divided than the rest of the world, and that states in Eastern Europe and the former Soviet Union tend to be substantially more ethnically divided than most Western European states. James D. Fearon, *Ethnic and Cultural Diversity by Country*, 8 J. ECON. GROWTH 195, 215-19 (2003); *see also* Alberto Alesina et al., *Fractionalization*, 8 J. ECON. GROWTH 155 (2003); Minorities at Risk Project, Ctr. for Int'l Dev. and Conflict Mgmt., http://www.cidcm.umd.edu/inscr/mar/data.asp (last visited Feb. 25, 2006) (providing data on 284 politically-active ethnic groups).

[8] *See* discussion, *infra*, Part I.

[9] As discussed below, many of the severely divided or transitioning states that do have minority-directed programs are current or aspiring members of the European Union, spurred to action by EU mandates. *See* discussion, *infra*, Part II.

reflect idealized conceptions of state goals and define minority group interests according to inaccurate and outmoded categories, leaving vulnerable constituencies unprotected and institutions without a mandate or rationale for intervention. Indeed, the reports from national human rights institutions suggest the "problem cases" that have always existed on the fringes of democratic theory and positive law are no longer the exception, but, rather, are becoming some of the most important and frequent of their minority claims.

National human rights institutions offer a particularly useful vantage point for considering these issues. While legal scholars and political scientists have the luxury of debating the nature of minority rights at their leisure, and while courts rule on minority claims that have been reformulated into the proper legal jargon, national human rights institutions are the forum to which people come to demand their rights directly. These institutions must make day-to-day decisions on how best to navigate the conflicts and convergences of human rights and minority interests in the problems that come before them. Their practical experiences and assessments of the gaps in the principles that ought to guide them provide a prism for viewing the contested ideals advocated by constitutional court doctrines and ivory-tower elites.

This article reviews the work of institutions in four regions: Africa, South and Southeast Asia, Central and South America, and Europe, as well as Canada, Australia, New Zealand, and the U.S., to the extent such institutions exist in this country. Part I begins with a discussion of the system of minority rights that provides the framework for the work of national human rights institutions on these issues. In part II, I provide a brief introduction to national human rights institutions and then examine the patterns that can be observed in their work with minority groups. There are striking regional trends, with minority-directed programs increasing rapidly in Europe as compared to the rest of the world, and with few programs reported in Asia or in the highly fractionalized African states. There are also trends in the content of minority-directed programs, which tend to emphasize improving institutional accessibility and addressing discrimination claims. But the most striking pattern is not in the content or scope of the known programs, but in their absence. In many states, either national human rights institutions are not doing any work on discrimination or other minority group concerns, or if they are, they are not reporting it as such.

Part III considers the implications of these observations, first looking for correlations with international and regional legal frameworks and with political factors, and then evaluating the minority rights framework described in part I in light of the reports from national human rights institutions that do describe work on minority issues. Those reports identify gaps in the core

concepts that are the building blocks for minority rights theory and law. They also recount their attempts to contend with collective community concerns and with the familiar but still unresolved tension between concepts of justice in indigenous[10] legal systems and other human rights values. Finally, part IV proposes a role for national human rights institutions in reshaping our current conceptions of minority rights and in contributing to the much praised but little practiced notion of dialogue and consultation between minority groups and the state.

The experiences of national human rights institutions attest that minority interests are more varied and complex than present legal categories admit. To be effective in addressing those interests, the minority rights framework must be able to encompass that complexity. But it is not enough to create a more elaborate set of groups, a longer list of rights, or a more sophisticated set of mechanisms for accessing them. For what is characterized as "minority interests" or sought after as "minority rights" is not a static, absolute set of interests determined by the characteristics of the community or by its minority status. Rather, it is an evolving product of the relationships amongst communities, and between communities and the state. Until we develop models for assessing the conflicting claims that emerge from these relationships, "minority rights" as such will remain relevant only to the narrow set of circumstances, states, and groups from which they originally evolved; and even there, less and less so. National human rights institutions do not solve this problem, but they do offer a means of gaining the richer understanding of minority concerns that is necessary to grapple with it.

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[10] As with the term "minority group" (*see* discussion *supra* note 5), there is no single authoritative definition for the term "indigenous." The term originated as a self-designation to facilitate political activism in the UN and other international contexts. *See* JOHN H. BODLEY, CULTURAL ANTHROPOLOGY: TRIBES, STATES, AND THE GLOBAL SYSTEM 392 (1996). The International Labour Organization defines indigenous peoples as:

> [P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Int'l Labour Org. [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, art. 1, ILO Convention No. 169 (June 7, 1989) (*entered into force* Sept. 5, 1991) [hereinafter ILO Convention No. 169], *available at* http://www.ilo.org/ilolex/cgilex/convde.pl?C169. The convention also endorses self-identification as "a fundamental criterion" for indigenous or tribal status. *Id.*

I. POLITICAL AND LEGAL BACKDROP

A. Community Complexity and Conflict

Most modern political states are comprised of multiple communities—ethnic, religious, linguistic, and cultural—that have conflicting interests, rights, and political preferences. But while many long-standing democracies may rightly consider themselves multi-ethnic states, the transitioning states of Eastern Europe and the former Soviet Union are on average one-and-a-half times as ethnically diverse as Western Europe, while sub-Saharan Africa is nearly three times as diverse, with over 37 of 43 sub-Saharan states more ethnically divided than any state in Western Europe.[11] Some states are composed of hundreds of groups, as in Nigeria, Chad, Papua New Guinea, and Nepal. In some instances, ethnic and religious identities predominate over national ones. Inter-group rivalries and allegiances may be inconstant and shifting or may extend back for generations before the establishment of the state.[12] Adding to this already complex picture is the accelerating movement of peoples and information across political borders, catalyzing rapid, dynamic changes in community and national identities.

Each state must determine how to accommodate its communities' divergent interests within its political and legal structure. But in the absence of measures specifically designed to address minority groups, ordinary state institutions and processes may not offer effective avenues for minority groups to raise their concerns. While well-established states struggle with these issues, the problem can be particularly acute for transitioning states. By its nature, of course, the democratic process limits minority influence in policy-making by centering political power in majoritarian institutions. This problem can be exacerbated in transitioning states that have mastered the form of democracy in the shape of elections, but have not developed the underpinnings of strong political parties or institutions of civil society that might integrate minority constituent interests into political platforms. Legal mechanisms may also be inadequate to resolve minority concerns. Guaranteed civil and political rights may not be directly enforceable in court, for example, or may not encompass minority groups' interests, as when those interests concern questions of autonomy or community control of mineral resources or land.[13]

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[11] *See* Fearon, *supra* note 7, Table 3 at 212, app. at 215-19.

[12] *See, e.g.*, DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985); ROTIMI N. SUBERU, FEDERALISM AND ETHNIC CONFLICT IN NIGERIA (2001).

[13] *See id.*

In these contexts states have adopted a range of political accommodations, from explicit political power-sharing arrangements on the national level, to local guarantees of self-government, to deliberate repression of non-dominant minority groups and identities. They have also adopted legal accommodations in the form of minority rights.[14]

At this point it is worth pausing to consider why this issue is important to states. Why don't states simply ignore the claims of non-dominant communities who do not succeed in asserting those claims through the existing political and legal structure? Often, of course, states do ignore minority claims. But just as often they cannot. If the state lacks the means to suppress, or at least to contain, separatist movements and minority calls for recognition and autonomy, it must somehow conciliate them or risk destabilization.[15] Often, it is the reality of violent conflict that moves a state to take account of minority concerns.[16] Indeed, ethnic and religious conflict is a frequent catalyst of unrest, war, and state failure; separatist movements among communities that feel alienated from the state threaten the identity and territorial integrity of states from the Russian Federation to Indonesia to Iraq.

Where internal pressure to entertain minority concerns is not sufficient, international pressure and regional interests often play a role. In Europe, for example, candidate states must demonstrate "respect for and protection of minorities" to meet the Copenhagen Criteria for accession to the European Union, and the long-embattled province of Kosovo must ensure adequate minority protections as one prerequisite for resolving its political status.[17] Finally, while states with a true commitment to liberal democratic values may debate how and to what extent minority values should be accommodated, they will find themselves hard-pressed to deny entirely minority communities' claims without abandoning fundamental precepts of justice and equality.[18]

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[14] *See* RODOLFO STAVENHAGEN, THE ETHNIC QUESTION: CONFLICTS, DEVELOPMENT AND HUMAN RIGHTS 129-41 (1990).

[15] *See, e.g.,* Shaista Shameem, *New Impulses in the Interaction of Law and Religion*: *The Fiji Human Rights Commission in Context*, 2003 BYU L. REV. 661, 662 (2003).

[16] *See* Kieran McEvoy & John Morison, *Beyond the "Constitutional Moment": Law, Transition, and Peacemaking in Northern Ireland,* 26 FORDHAM INT'L L.J. 961, 993 n.101 (2003); Honourable Hari N. Ramkarran, *Seeking a Democratic Path: Constitutional Reform in Guyana*, 32 GA. J. INT'L & COMP. L. 585, 597-98 (2004).

[17] *See* EU Monitoring and Advocacy Program, Minority Protection, http://www.eumap.org/topics/minority (last visited Feb. 26, 2006); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L. L. & POL'Y 387 (2003).

[18] *See* Mark D. Rosen, *Liberalism and Illiberalism: "Illiberal" Societal Cultures, Liberalism,*

B. Minority Rights

Under these influences and imperatives, many states have pursued strategies of limited accommodation, including the recognition of a range of minority rights.[19] Over the last fifty years, a body of international and regional treaties has developed guaranteeing some rights to minority and indigenous groups.[20] These rights range from rights of self-determination, to rights to promote their own culture, religion, and language, to rights of equality and non-discrimination under the law.[21] Some of these rights are contained in fundamental international human rights treaties, whereas others are the subject of newer multilateral treaties focused specifically on minority groups.[22] Especially in the last fifteen years, constitutions and national legislation have implemented some minority and indigenous rights protections.[23]

However, the legitimacy of minority rights as such is highly contested, and the nature of those rights (if their legitimacy is accepted in principle), hardly less so. There are three problematic aspects to defining minority rights: determining the content of those rights, determining to which groups those rights will accrue, and determining whether the rights are collective or individual in nature.[24]

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and American Constitutionalism, 12 J. CONTEMP. LEGAL ISSUES 803, 830-31 (2002).

[19] Protecting minority rights rather than universal rights is not a new phenomenon, but rather represents a resurgence of an earlier practice. After World War I, the fear that minority groups' vulnerability presented a threat to international peace spurred, states to agree to bilateral and then multilateral treaties protecting particular minority groups. These earlier treaties were then superseded by the individual human rights approach after World War II. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 2 (1985); Capotorti, *supra* note 5, ¶ 92.

[20] For discussions of the contested definitions of the terms "minority group" and "indigenous group," see *supra* notes 5, 10.

[21] *See, e.g.*, Int'l Covenant on Civil and Political Rights, art. 1, 26-27, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]; Framework Convention, *supra* note 5; ILO Convention No. 169, *supra* note 10, art. 3.

[22] *See id.* However, many of the most robust and well elaborated statements of minority rights come in the form of unenforceable declarations and many are subject to numerous caveats acknowledging the ultimate sovereignty of the state. *See, e.g.*, Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities Res. 1994/45, Annex, U.N. Doc. E/CN.4/SUB.2/RES/1994/45 (Aug. 26, 1994); *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*, Inter-Am. C.H.R., OEA/Ser.L/V/II.110, doc. 22 (2001), *available at* http://www.cidh.oas.org/Indigenas/Indigenas.en.01/index.htm.

[23] *See, e.g.*, ETH. CONST. art. 39. States have also entered bilateral treaties for the protection of particular minority groups.

[24] *See* Miriam J. Aukerman, *Definitions and Justifications: Minority and Indigenous Group*

i. In Democracy Theory and State Practice

In considering these questions, democracy theorists who focus on minority rights offer a range of views about the proper place and scope of those rights.[25] For purposes of this discussion, there are three focal points on this spectrum that represent important touchstones for newly emerging democracies: traditional liberalism, liberal pluralism, and communitarianism.[26]

a. Traditional Liberalism

Liberal thinkers such as Chandran Kukathas and Jürgen Habermas argue that the core of legitimate democracy is individual, liberal rights. Traditional, or classic, liberals contend that these rights adequately protect minority cultures, and that minority group claims that cannot be characterized as classic liberal, individual rights inevitably conflict with and diminish those individual rights in practice.[27] The United States has, by and large, adopted this approach, providing minorities with the full gamut of individual political

Protections in a Central/East European Context, 22.4 HUM. RTS. Q. 1011, 1030-32 (2000).

[25] The writing on the place of minority group rights in the democratic state is only one branch, albeit a fairly discrete one, of the vast literature on minority and majority groups in the modern state. *See, e.g.*, AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES (1977); ERNEST GELLNER, NATIONS AND NATIONALISM (1983); DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985); BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991); HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990); STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM (2004).

[26] Surrounding these three focal points are numerous subtle distinctions and debates that I cannot explore here, in the interest of focusing on those aspects that are most crucial to my study. Several concerns that I do not discuss are the relative "thickness" or "thinness" of national and minority identities, the significance of other political values to this debate, and the contested definitions of virtually every crucial term. *See, e.g.*, MULTICULTURALISM (Amy Gutmann ed., 1994) (essays include Charles Taylor, *The Politics of Recognition*; Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*; and K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*).

[27] A correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed. This does not require an alternative model that would correct the individualistic design of the system of rights through other normative perspectives. All that is required is the consistent actualization of the system of rights. *See* Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* MULTICULTURALISM, *supra* note 26, at 113. Chandran Kukathas makes the more modest claim that while liberalism may not optimally protect minority interests, it nonetheless provides the best possibility for conflicting groups and individuals to coexist by not promoting any individual or group notion of the good but merely "upholding the framework of law within which individuals and groups can function peacefully." CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM 249 (2003).

and civil liberties including the right to be free from discrimination, and offering particular minority protections only through narrowly crafted exceptions granting autonomy for Native Americans and permitting racial distinctions to facilitate certain affirmative action programs.

b. Liberal Pluralism

"Liberal pluralists" such as Will Kymlicka and Charles Taylor argue that traditional theorists err by conceiving of the liberal state as culturally neutral, whereas it in fact possesses and enforces certain culturally specific characteristics (such as its choice of official language) on a multicultural polity.[28] Because individuals value their cultures and can exercise freedom of choice meaningfully only in the context of those cultures, individual autonomy requires that minority cultures be preserved. Accordingly, providing some additional, systematic protections for minority groups with other cultural characteristics will not necessarily conflict with, and in fact will often promote, core liberal values of justice and individual autonomy.[29]

The difficult questions for liberal pluralists are identifying which groups should be entitled to protections, what sorts of claims should be recognized, and what sort of protections are appropriate. Liberal pluralists such as Kymlicka have developed a typology of groups (e.g., immigrants, national minorities, and indigenous groups) and of the corresponding claims they might make (non-discrimination, respect for language, territorial autonomy) and the justifications for those claims (distinctiveness, consent, authenticity, and so on). On the margins, of course, these are line-drawing questions, but liberal pluralists approach these questions in the first instance by weighing the justifications in liberal philosophy for each group's core claims. The hard cases are those groups, claims, or protections that threaten to impinge on liberal values or that place liberal values in conflict with each other.[30]

From either the traditional or the new perspective, however, liberals

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[28] The terms to be used in describing the plural communities within a state are many and contested. I am using the term "multicultural" here as the broadest of those terms, to encompass many kinds of difference within a state. However, liberal writers more frequently deploy narrower terms such as "multinational," "polynational," "polyethnic," and so on, to distinguish amongst communities as to the basis and legitimacy of their claims for protection, and to describe the subset of groups for which they would endorse such protections. "Multiculturalism," therefore, describes the total set of communities within the state, and not the subset(s) of groups for which one or another liberal thinker would endorse protections. *See* KYMLICKA, *supra* note 19, at 10.

[29] *See id.* at 75-84; Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM, *supra* note 26.

[30] *See* KYMLICKA, *supra* note 19, at 75-84.

agree that a fundamental risk in recognizing minority group claims for cultural protections or self-government is that these communities will form illiberal enclaves that will threaten the state's essential character as a liberal democracy.[31] For liberals, then, the limits of the state's toleration of a minority community's peculiar qualities and practices are set by the group's illiberal tendencies.[32] South Africa has adopted a version of the liberal pluralist approach. Its constitution protects minority languages, cultures, and religions and recognizes the authority of tribal governments, but its constitutional court has consistently held that the constitution's individual liberties trump these minority group protections, so that, for example, traditional inheritance rules cannot be applied to disfavor women.[33]

c. Communitarianism

Communitarians such as James Tully argue that liberal values should be only one of many sets of values in a robust constitutional democracy.[34] Beginning with the two premises endorsed by liberal pluralists (that liberal constitutional states endorse a particular set of cultural values, and that individuals perceive the value of their choices and exercise their autonomy

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[31] *Id.* at 75. A second, inter-related risk is to the unity of the state. If the liberal democratic state is held together by a common faith in liberal democratic values, the illiberal values of some communities undermines state unity. *See* KUKATHAS, *supra* note 27, at 98.

[32] This is, of course, not the end of the argument. For a discussion of the details of this ongoing debate between traditional liberals (Liberalism I) and new liberals (Liberalism II), see TIERNEY, *supra* note 25, at 51-68. Kymlicka, Taylor, and the rest disagree sharply not only on line-drawing, but also on vital questions of the basis for discerning the character of particular claims, whether some groups can call upon foundational principles of the liberal state to reconcile their claims with liberal ideals and compel their recognition, and whether it might in some instances be appropriate for liberal democratic states to recognize certain minority group claims in spite of the concomitant risk or reality of illiberality, but without reaching consensus on these issues. *See* KYMLICKA, *supra* note 19, at 94-101; Chandran Kukathas, *Cultural Toleration*, *in* ETHNICITY AND GROUP RIGHTS 72-78 (Ian Shapiro & Will Kymlicka eds., 1997) (comparing but not endorsing the views of John Rawls, Will Kymlicka, and Deborah Fitzmaurice).

[33] *See* S. AFR. CONST.; Shibi v Sithole and Others, 2005 (1) BCLR 1 (CC) (S. Afr.).

[34] While Kymlicka and Taylor are at times identified as communitarians by traditional liberals, they straddle the gap between the traditional liberal and communitarian positions. The line I draw between liberal pluralists and communitarians is whether the theorist uses core liberal values as the ultimate test: liberal pluralists insist that minority communities must cede at least to certain core liberal values; communitarians do not. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM, *supra* note 26, at 60 ("Even pluralist models of liberalism do call for the invariant defense of *certain* rights, of course. There would be no question of cultural differences determining the application of *habeas corpus*, for example.").

within the cultural values established by their communities), Tully and other communitarians argue that constitutional democracy should not center on individual rights or on participation in a constitutional order that is preconceived as privileging a certain set of liberal rights. Rather, for a constitutional order to be legitimate, all the communities[35] within the state must be true constituents of the state, in the sense that their preferences as to how the state should be constituted and organized must be incorporated into the state order.[36] Inevitably, this will produce a non-uniform order, as communities will have different preferences.[37] Sanctifying liberal rights over other rights and interests preferred by minority communities thus undermines the legitimacy of the democracy for those communities.[38] For communitarians, therefore, not liberal values but authenticity is the touchstone, and not tolerance or assimilation, but incorporation (at least, to the extent desired by the community) is the goal.[39]

However, since most individuals are members of multiple communities, and since each of those communities is likely to have at least slightly different preferences,[40] the difficulty for communitarians, as for liberals, is determining which communities to privilege. Because community values will inevitably and frequently come into conflict, particularly when extruded from the community and incorporated into the state as a whole, the hard cases, for communitarians, are those that require either/or, irreconcilable choices between community preferences that "conflict violently in practice."[41] In making such choices, communitarians use criteria such as authenticity and continuity of community traditions, criteria that overlap with liberal pluralist

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[35] For a discussion of the competing definitions of community for purposes of communitarian theory, including geographical and kin communities, perceptions of the common good, and shared interests, see KUKATHAS, *supra* note 27, at 168-78.

[36] *See* JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 5-6 (1995).

[37] *See id.* at 55-56.

[38] *See id.* at 86-89.

[39] *Id.* at 5-6.

> [C]ulture is an irreducible and constitutive aspect of politics. . . . if the cultural ways of the citizens were recognised and taken into account in reaching an agreement on a form of constitutional association, the constitutional order, and the world of everyday politics it constitutes, would be just with respect to this dimension of politics. Since the diverse cultural ways of the citizens are excluded or assimilated, it is, to that extent, unjust.

Id.

[40] *See* KUKATHAS, *supra* note 27, at 177.

[41] TULLY, *supra* note 36, at 6.

concerns, especially in so far as they tend to favor the groups also favored by the liberal pluralist typology, namely indigenous groups followed by other national minorities.[42] Ethiopia has adopted a version of the communitarian approach: recognized ethnic groups have the constitutional right to cultural protections, self-government, and even secession, and the question of whether liberal rights also protected by the constitution must be enforced within self-governing communities has not yet been decided.[43]

d. Common Elements

While these three theories differ in their answers to questions of the content, scope, and mechanisms of minority rights that can best ensure a minority group's effective and appropriate participation in a democracy, there are several notable commonalities to all three theories. All three presume that the state in question is fully democratic, with an interest in promoting liberal values.[44]

And all three (the liberal pluralists and communitarians especially, but also, to a lesser extent, the classic liberals), rely on the mechanism of categorizing groups into a typology as a means of describing and, to some extent, determining and justifying, the nature of their claims vis-à-vis the state. In particular, national minorities and indigenous groups are understood to have—and, importantly, to be justified in having—different kinds of rights and interests than immigrants or other minority groups.

However, there is also an area of significant divergence: whereas classic liberals tend to characterize the role of the state as being one of protection of and non-interference with pre-determined liberal rights, liberal pluralists and communitarians call upon the state to engage in a mutual dialogue with minority groups as a means of determining an acceptable balance between state and minority interests. James Tully, for example, invokes a "post-imperial dialogue on the just constitution of culturally diverse societies," while Will Kymlicka contends that the fundamental "[r]elations between national groups should be determined by dialogue" rather than by forcible imposition of liberal values.[45] Like other aspects of these theories, this call for dialogue has come to play a central role in the framework of minority rights deployed by national human rights institutions and expressed in international law.

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[42] *See id.* at 138.

[43] *See* ETH. CONST. art. 39.

[44] Will Kymlicka, *Preface & Acknowledgments*, *in* CAN LIBERAL PLURALISM BE EXPORTED? xii (Will Kymlicka & Magda Opalski eds., 2001) [hereinafter LIBERAL PLURALISM].

[45] TULLY, *supra* note 36, at 24; KYMLICKA, *supra* note 19, at 171.

ii. In International Law

The concepts and categories espoused by theorists and in national law are reflected and further developed in international and regional treaties that address minority rights. In international law, as in democratic theory and state practice, the core minority rights are those that are identifiably individual and liberal and that form an integral part of the human rights canon. The prohibition of discrimination and the rights to practice one's religion, use one's language, and enjoy one's culture without interference from the state are well established in positive law and are accepted by most states, at least in principle.[46] While they tend to operate for the benefit of minority groups, only the cultural rights are defined by reference to minority status; otherwise, the rights accrue to everyone and not solely to designated groups. Although these rights, particularly the cultural rights, are by their nature exercised together with others rather than alone, they are often understood to be enforceable in court by individuals rather than by the group as a whole; that is, they are individual rather than collective.[47]

Beyond these well-known rights, a broader set of minority rights is emerging in international and national law: rights of political participation as well as autonomy, measures designed to promote substantive as well as procedural equality, and provisions designed to permit groups greater authority to define their interests in relation to the state. If interpreted and applied expansively, as the Inter-American Commission and Court have done in a couple of cases concerning indigenous control of land and resources,[48] these new rights could come to challenge the categories of content and justiciability that characterize the core rights described above.[49] But for now, access to

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[46] *See* ICCPR, *supra* note 21, art. 1, 26-27.

[47] *See id.* arts. 26-27. The right to self-determination provides a striking contrast. While self-determination has been guaranteed repeatedly in international instruments, including the UN charter, it is problematic in each of the three aspects described above: content, to whom it accrues, and its collective nature. No consensus has developed as to the scope of this right, nor as to which groups are entitled to exercise it, and because it is a right that is understood to be collective rather than individual, it is often treated as non-justiciable. *See, e.g.*, R.L. et al. v. Canada, Communication No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 (U.N. Human Rights Comm'n 1990).

[48] *See* Maya Indigenous Communities of the Toledo District, Case No. 12.053, Inter-Am. C.H.R. Report No. 40/04 (2004), *available at* http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm ("Maya Indigenous Communities case"); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R. Report No. 79 (2001), *reprinted in* 19 ARIZ. J. INT'L & COMP. L. 395 (2002) ("Awas Tingni case").

[49] *See, e.g.*, ILO Convention No. 169, *supra* note 10; Dr. William Bradford, "*Save the Whales" v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Dis-*

these rights is largely defined and determined by those categories. They are typically limited to only certain minority groups, such as indigenous peoples or national minorities, and usually to individuals within those groups rather than to the group collectively. Some of the most difficult minority-related issues for national human rights institutions lurk here, at the cusp of newly developing minority rights.

Several important recent developments have been implemented through regionally accepted treaties focused specifically on minority rights: the International Labour Organization's Convention No. 169 on indigenous peoples (ratified primarily by American states) and the Framework Convention for the Protection of National Minorities (ratified solely by European states).[50] While these treaties and their precepts have been implemented primarily in certain regions, they reveal important trends in the legal framework of minority rights that correspond to the developments in democracy theory described above. These treaties are notable, first, for their reliance on the typology and categories developed by democracy theorists: indigenous peoples and national minorities are entitled to their protections, while immigrants and other minorities are not.

These protections are considerable. Both conventions list extensive and detailed rights accruing to the protected groups, beyond the general principles espoused by prior human rights treaties. For example, ILO Convention No. 169 not only protects indigenous groups' rights to use their traditional lands, but also requires states to take account of their spiritual connection to the land, traditional ownership and methods of transmitting land, and their

putes in the New International Economic Order, 13 ST. THOMAS L. REV. 155, 162-63 (2000) ("As indigenous groups have grown more articulate in propagating human rights discourses replete with alternative visions and repositories of rights . . . . no response has yet crystallized into the necessary series of proscriptions and prescriptions which can be considered authoritative and widely-accepted by even the most liberal of states. . . .").

[50] ILO Convention No. 169 requires states to implement "special measures" to protect indigenous peoples and their cultures in areas as law, development, land use, and education, but it has been ratified by a limited number of countries, most heavily in Central and South America. These rights apply only to indigenous peoples as defined by the treaty. *See* ILO Convention No. 169, *supra* note 10, arts. 1, 5; Int'l Labour Org., Ratifications, http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169 (last visited Feb. 25, 2006). *See also* Framework Convention, *supra* note 5; Council of Europe, European Charter for Regional or Minority Languages, Europ. T.S. No. 148, Nov. 5, 1992 (entered into force Mar. 1, 1998). The Framework Convention has been ratified by virtually all European states, but it has no equivalent outside of Europe and has not been ratified by any non-European states. *See* Council of Europe, Treaty Office, Framework Convention Ratification Page, http://conventions.coe.int (last visited Feb. 26, 2006).

traditional use and natural resources. Not only must states permit indigenous communities to maintain their own internal legal systems, they must also respect their methods of punishment and take account of their culture when punishing them in state courts.[51] Likewise, the Framework Convention not only guarantees national minorities' use of their own language privately and upon arrest,[52] but also in public areas, as well as in education and communication with the government, so long as their numbers or historical connection to the area warrant such measures.[53] States must not only guarantee equality before the law and prohibit discrimination,[54] but also "promote . . . full and effective equality between persons belonging to a national minority and those belonging to the majority."[55] States must not only refrain from interfering with national minorities' enjoyment of their own culture,[56] but also abstain from adopting assimilation policies and instead promote national minorities' preservation of "essential elements of their identity."[57]

It is not merely in their specificity and extent that these claimed but contested minority rights differ from older, better-accepted ones. Both conventions push the boundary of what can be treated as individual rather than collective rights. While minority community members' rights to nondiscrimination and equality under the law are readily exercised and enforced as individual rights, some of the interests promoted by these new treaties are, by their nature, exercised by the community as a whole, or at least by community members in concert with one another. In particular, the specific rights to use of land and to legal systems protected by ILO Convention No. 169 are less consonant with classic political and civil liberties, which are held and enforced individually, and more consonant with collective rights, whose justiciability is not universally accepted.[58]

It is notable, therefore, that the Framework Convention on National Minorities carefully couches its protections as accruing to individual commu-

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[51] *See* ILO Convention No. 169, *supra* note 10, arts. 8-10, 13-15, 17.

[52] *See* ICCPR, *supra* note 21, arts. 14, 27.

[53] *See* Framework Convention, *supra* note 5.

[54] *See* ICCPR, *supra* note 21, art. 26.

[55] Framework Convention, *supra* note 5, art. 4.

[56] *See* ICCPR, *supra* note 21, art. 27.

[57] *See* Framework Convention, *supra* note 5, art. 5.

[58] *But see* Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Council of Europe (Strasbourg) (Sep. 9, 1995), http://conventions.coe.int/Treaty/en/Treaties/Word/158.doc; Office of the U.N. High Commissioner for Human Rights, Fact Sheet No.16 (Rev. 1), The Committee on Economic, Social and Cultural Rights, http://www.ohchr.org/english/about/publications/docs/fs16.htm#n_20_ (last visited Apr. 7, 2006).

nity members, rather than to the communities themselves.[59] In so doing, the Convention makes its mandates more amenable to enforcement in courts; however, this approach simultaneously limits the scope and character of the rights that can be claimed.[60]

The other sense in which these new rights are defined differently than the old is in the relationship that these treaties anticipate the state will develop with its minority groups: one of mutual dialogue. In the fundamental human rights treaties as well as classic liberalism, states are expected to respect minority groups by not interfering with them (e.g., by granting autonomy, ignoring private cultural practices, and so on) or by actively protecting them from outside threats.[61] The new conventions require the state also to consult with indigenous and national minority groups, to interact with them, and to grant them the right to participate authoritatively in the state, rather than solely giving them a defined sphere of autonomy.

Thus, ILO Convention No. 169 does not merely require the state to refrain from interfering with indigenous groups' traditional land through development, nor merely to protect indigenous groups from unwanted development by private parties. The state must also consult with indigenous communities about state development plans that would affect them, take account of their independently determined development goals, and ensure that they are able to participate in decision-making regarding development.[62] Similarly, although less expansively, the Framework Convention requires states to "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social, and economic life and in public affairs, in particular those affecting them."[63]

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[59] *See id*.

[60] Some authors have decried the lack of direct enforcement mechanisms for these treaties. *See, e.g.*, David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV. 597 (1997) (critiquing the Framework Convention). However, the European Court of Human Rights, for example, has now taken account of a state's ratification of the Framework Convention in assessing its responsibilities to its minority groups. *See* Case of Gorzelik and Others v. Poland, 2004-I Eur. Ct. H.R. Minority claims that are either collective or socio-economic in nature, or both, have presented challenges for national human rights institutions. Some minority groups have complained that their interests are fundamentally diminished by being reduced from collective claims to individual ones, and from claims for community governance to claims for particularized protections for narrow interests. *See* C.C. Tenant & M.E. Turpel, *A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination*, 59 NORDIC J. INT'L L. 287, 291 (1990).

[61] *See, e.g.*, ICCPR, *supra* note 21, art. 27.

[62] *See* ILO Convention No. 169, *supra* note 10, arts. 6-7.

[63] *See* Framework Convention, *supra* note 5, art. 15.

These conventions entrench the liberal pluralist and communitarian calls for dialogue in positive law, while still couching their requirements in general terms. Nonetheless, these conventions call for a complex and consultative relationship between certain minority groups and the state, one that is in some ways far more demanding than a mere cession of limited autonomy.

As the categories and mandates of minority rights are exported to transitioning states in the form of international pressure to ratify human rights and minority rights treaties and to include protections in their constitutions, most new democracies have adopted one or another of these basic approaches, at least formally. Both the state and its minority groups have begun exploring the opportunities these legal structures present for framing and pursuing their interests.

In this conflicted context, national human rights institutions are positioned to play an active role. In particular, the difficulties that national human rights institutions face in using the categories and other core concepts defined in democratic theory and international law to address minority claims reveal gaps and limits in this legal framework. But just as national human rights institutions' critiques expose these lapses, so also their experiences may provide the requisite information and forum for mitigating them.

II. NATIONAL HUMAN RIGHTS INSTITUTIONS AND MINORITY GROUPS

A. What Are National Human Rights Institutions?

National human rights institutions are a part of the process of democratization, the latest tool to be touted by international bodies and funded by international donors for effective enforcement of human rights on the national level. As such, from the international perspective, they represent another aspect of the ongoing effort to export human rights norms to transitioning states.[64] At least on the formal level, this effort has been successful: more states have established national human rights institutions in the last twenty years than in all the time before. Virtually every national human rights institution in Africa and Latin America has been established since 1985.[65]

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[64] From the national and local perspectives, the institutions' significance and meaning are variable and contested. *See, e.g.*, Mary Ellen Tsekos, *Human Rights Institutions in Africa*, 9 HUM. RTS. BRIEF 21 (2002); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000).

[65] *See* Tsekos, *supra* note 64, at 21; Lorena González Volio, *The Ombudsman Institution: The Latin American Experience*, 37 REVISTA IIDH 219, 223 (2003) (Costa Rica), *available at* http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/37/pr/pr9.pdf.

In essence, national human rights institutions are independent government agencies with the mandate of addressing human rights concerns. Their functions typically include investigating possible human rights abuses either sua sponte or in response to complaints; issuing non-binding recommendations; organizing education, training and publicity programs; and reporting to national legislatures and international bodies. Some institutions have jurisdiction over both government and private conduct, whereas others can review only government actions.[66]

National human rights institutions traditionally have been organized as one of two major types, ombudspersons[67] or human rights commissions.[68] The office of the ombudsperson was originally designed to investigate government maladministration. As concern with human rights has grown, some ombudsperson's offices have taken on investigation of government human rights violations under the umbrella of their general authority to investigate government misconduct, while in other states, governments have established ombudspersons' offices with the specific mandate of human rights enforcement.[69] There are now numerous hybrids and variations on these central

[66] *See* Reif, *supra* note 64.

[67] The office of the ombudsman originated under the Swedish monarchy in the eighteenth century and was gradually adopted by other states. Accordingly, ombudspersons usually have jurisdiction over only government, not private, actions. *See* MARNIE LLOYDD & ALEXANDER H.E. MORAWA, EUROPEAN CTR. FOR MINORITY ISSUES, OMBUDSPERSONS AND MINORITY RIGHTS: A SKETCH 2-3, http://www.ecmi.de/doc/ombudsman/download/Background%20Paper.pdf (last visited Feb. 26, 2006); Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, *in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE 272, 273-74, 288-91 (Linda C. Reif ed., 1999).

[68] In spite of the shared name, these human rights commissions are different from the "truth commissions" and "human rights commissions" that transitioning governments sometimes establish to address the transitional justice problem of abuses by past regimes, such as the Truth and Reconciliation Commission in South Africa. Transitional justice-oriented truth and human rights commissions are temporary and typically have jurisdiction only over the prior government, not the present one. In contrast, national human rights institutions are permanent and have jurisdiction over the present government. As such, they serve different purposes: transitional justice commissions aim to account for the atrocities of the past and promote reconciliation in the present, while national human rights institutions are meant to call the current government to account in the present and promote better policies for the future. National human rights commissions are also different from the similarly named United Nations Human Rights Commission, which is an international body addressing human rights concerns worldwide, and from both international and national non-governmental organizations that may also have similar names. It is a human rights commission's mandate and organization, not its title, that determines whether it should be considered a national human rights institution.

[69] *See* Lloydd & Morawa, *supra* note 67; Reif, *supra* note 67, at 273-74, 288-91.

types—anti-corruption ombudspersons, human rights ombudspersons, and defensores del pueblo in Central and South America—so many, in fact, that it is now impossible to construct a rigid typology of institutions.[70] The United Nations, the international community at large, and the academic literature on the subject of national human rights institutions have all tended to focus on national human rights commissions and to brush aside ombudspersons as subsidiary bodies that serve many of the same functions.[71] This has had two unfortunate results: a failure to take account of ombudspersons' work in the field of human rights, and a tendency to conflate the two bodies and their numerous hybrid entities, inaccurately subsuming them all into the single model of the classic human rights commission and ignoring the numerous variations that exist in mandate and function.[72]

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[70] *See* LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 393 (2004); ICHRP REPORT, *supra* note 2, at 4; Reif, *supra* note 64.

[71] *See* Lloydd & Morawa, *supra* note 67, at 2-3.

[72] Although this paper will not focus on those variations, it is important to recognize that national human rights institutions are multifarious and not singular. While they share a common purpose and certain general attributes such as flexible, informal procedures, ombudspersons, human rights commissions, and the hybrid human rights institutions have distinct histories and institutional characteristics. In particular, while human rights commissions often work on individual cases, they also investigate and make recommendations concerning systemic human rights violations on an institutional or national level. In contrast, the ombudsperson's core function is not to analyze and comment on broad issues in the abstract, but to resolve individual complaints. However, an ombudsperson may recognize systemic problems and recommend solutions that range from personal responses to individual petitioners to structural changes across government institutions. Its influence, like that of the human rights commission, therefore extends beyond the limits of the immediate case to the government and nation as a whole. Human rights commissions usually have jurisdiction over both government and private conduct. Linda Reif notes that human rights commissions may be better suited to address human rights complaints in states that have both institutions, because they can handle complaints "which arise in both the private and public spheres, typically enjoy a stronger arsenal of powers, are often directed to provide educational and promotional activities and employ human rights norms as an imperative aspect of their mandate." Reif, *supra* note 67, at 272. They are also more likely than ombudspersons to be empowered to advise the legislature on pending legislation or on ratification of or compliance with international human rights treaties. *See* Brice Dickson, Chief Comm'r, N. Ir. Human Rights Comm'n, The Harry Street Lecture at the University of Manchester: The Contribution of Human Rights Commissions to the Protection of Human Rights (Nov. 21, 2002), *available at* http://www.nihrc.org/documents/speeches/harry_street_lecture.doc. Some states have established an individual commissioner who operates more like an ombudsperson than like a human rights commission, in spite of the title. *See* Mjemmas Kimweri, *The Effectiveness of an Executive Ombudsman, in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE, *supra* note 67, at 382-85 (concerning the Tanzanian Permanent Commission of Enquiry, since replaced by the hybrid Commission on Human

National human rights institutions are intended to complement the work of other government institutions such as courts, and of private institutions such as non-governmental organizations ("NGOs"), in investigating and redressing human rights abuses. They are designed to be highly accessible to the public by maintaining an open door policy for accepting complaints. They are also meant to influence the government, but unlike courts, national human rights institutions promote change by means of persuasion and have no coercive powers.[73]

Specifically, the authority of national human rights institutions to remedy human rights violations usually extends only to investigation and recommendation and not to binding judgment or to direct enforcement of their recommendations. The primary tools used by these institutions to promote change are therefore independent, impartial inquiries; where the institution is empowered to do so, direct mediation between the parties; and publicity, reporting, and public shaming.[74] Some institutions do, however, have standing to bring disciplinary actions, lawsuits, or other proceedings against government officials and entities to remedy violations of the law.[75]

On first consideration, these limits on judgment and enforcement seem to represent a disturbing compromise of institutional effectiveness, perhaps as a means of inducing states to establish human rights institutions in the first place.[76] However, the trade-off is not as stark as it may seem. National

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Rights and Good Governance, see REIF, *supra* note 67, at 230).

[73] *See* UNHCHR Fact Sheet, *supra* note 2.

[74] Attitudes toward mediation differ. Most ombudspersons are obligated by their mandates to maintain impartiality until they have completed their investigations, and thus are barred from mediating directly between the parties, though there are a few exceptions to this rule. *See* Edward Hill, *The Ombudsman as Mediator: Challenges, Limitations and Opportunities in Vanuatu*, 5 INT'L OMBUDSMAN Y.B. 146 (2001).

[75] *See* Udo Kempf & Marco Mille, *The Role and Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States*, *in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE, *supra* note 67, at 195, app. 3 at 217. This is particularly important in countries that limit standing to raise constitutional challenges to certain government officials. As Lloydd and Morawa note, this role is also vital in countries in transition, where many old laws and institutional practices may conflict with the new constitution and where there may be a lack of institutional traditions and practices to rectify the matter. *See* Lloydd & Morawa, *supra* note 67, at 10.

[76] This bears on the question often raised in human rights circles concerning the enforceability of human rights norms: whether unenforceable or unenforced norms are valuable even in the breach, or whether they are at times implemented even if unenforceable, and if so, why and how. *See, e.g.*, Oona Hathaway, *Do Human Rights Treaties Work?*, 111 YALE L.J. 1935 (2002). My argument is one commonly, although not universally, endorsed by ombudspersons: that the lack of enforcement mechanisms makes these institutions complementary to,

human rights institutions operate in the context of other institutions that do have enforcement powers, such as the courts, and they are intended to supplement, not to replace, those institutions.[77]

Such critiques also fail to recognize the inherent limits on the effectiveness of enforceable legal mechanisms: they are expensive, inaccessible, and slow, and therefore often go unused. For everyday claims, a national human rights institution offers a swift means for an individual to get behind the walls of bureaucracy and have her complaint considered by the otherwise inaccessible officials who have the authority to remedy her concern. National human rights institutions have also been effective in certain controversial, high-profile cases precisely because their investigations do not present as direct and immediate a threat to governments as they would if their conclusions were enforceable.[78] In Malaysia and Togo, for example, national human rights institutions have investigated politically sensitive allegations of severe government abuse, and their conclusions and recommendations have revealed and challenged otherwise untouched and seemingly untouchable government policies and practices.[79] It is up to other forces in society to pick up the gauntlet thrown down by the national human rights institution, and to provide the pressure necessary to back the institution's call for change.

Thus, the appropriate comparison in many cases is not between the enforcement mechanisms available through a court and the lack of mechanisms available to the human rights institution, but between having human rights claims evaluated through some process, even if only advisory, or not having them addressed at all. This being the case, national human rights institutions represent an important potential resource for all those who have human rights-related claims, including minority groups.

B. Minority-directed Programs

National human rights institutions report work on a wide range of human rights issues, including police and military brutality, repression of political opposition, government corruption, and prison and detention condi-

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and at times even more effective than, courts and other binding means of enforcing human rights.

[77] Also, obstruction of the ombudsperson or failure to follow her formal recommendation is a punishable offense in some states, even if the ombudsperson lacks enforcement power of her own. *See* Volio, *supra* note 65, at 24.

[78] *But see* Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1, 30-31 (2000).

[79] *See* ICHRP REPORT, *supra* note 2, at 26, 63.

tions, among many others.[80] But although most transitioning states are ethnically divided, and in spite of the developing framework of minority rights in international and national law, many national human rights institutions do not report any work on minority group issues.[81] However, there are regional patterns in the existence of such programs, and there are also identifiable trends in their scope and content.[82]

i. Regional Trends

There are striking regional differences amongst those national human rights institutions that do describe themselves as working with minority groups. In Africa, where many states have an extreme diversity of ethnic groups, ethnic identification is often strong, and conflicts between groups are not uncommon, there were reports of only nine states whose national human rights institutions had made some effort to address minority concerns.[83]

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[80] *See* Reif, *supra* note 64, at 38-61.

[81] There may, of course, be a gap between publicly reported activities and actual activities. If so, at a minimum these institutions do not view it as being to their advantage to advertise their work with minority groups. The case studies and interviews reviewed during this research, however, tend to confirm these results. *See, e.g.*, Proceedings of International Ombudsman Institute Quebec Conference (Sept. 7-9, 2004) [hereinafter Notes on IOI Quebec Conference] (notes on file with author).

[82] These findings are based on three lines of research: a study of the public reports of national human rights institutions' work with minority groups; a review of case studies of individual national human rights institutions and minority communities; and interviews and participation in public discussion with individual ombudspersons and commissioners. Included were all national human rights institutions that could be identified in the records of international and regional organizations that interact with those institutions, as well as local and regional institutions that indicated some work with minority groups, and specialized institutions focused on minority groups or on issues of racism or discrimination. Many of the interviews and discussions cited in this article took place in person at the International Ombudsman Institute meeting in Quebec City, Quebec in September 2004. Other interchanges with ombudspersons and commissioners took place by phone and e-mail. Notes for all interviews, communications, and country data are on file with the author.

[83] These included: Ghana, Kenya, Madagascar, Nigeria, Sierra Leone, South Africa, Togo, Uganda, and Zambia. *See* ICHRP REPORT, *supra* note 2 (focusing on Ghana's Commission on Human Rights and Administrative Justice); Report of Madagascar to the Committee on the Elimination of Racial Discrimination ¶¶ 114-15 (Dec. 30, 2003), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.476.Add.1.En?Opendocument; NAT'L HUMAN RIGHTS COMM'N OF NIGERIA, 2003 STATUTORY REPORT OF THE NATIONAL HUMAN RIGHTS COMMISSION FOR THE YEAR 2003, http://www.nigeriarights.gov.ng/statu.html (last visited Feb. 27, 2006); NIGERIAN PUB. COMPLAINTS COMM'N, 2003 ANNUAL REPORT (on file with author); Uganda Human Rights Comm'n, www.uhrc.org; South Africa's Human Rights Comm'n, http://www.sahrc.org.za (last visited Feb. 25, 2006); South Africa's Public Protector,

There was a wide range in the nature and effectiveness of these efforts, ranging from Togo's Human Rights Commission's appointment of a single local chief as a commissioner to the Ugandan Human Rights Commission's national campaign against racism, investigations into unlawful arrests and detentions of Muslims and refugees, efforts to reach minority groups through use of local languages, and intervention in a violent inter-ethnic conflict.[84] However, reporting by and concerning African institutions is limited and inconsistent.[85]

In South and Southeast Asia, ten general national human rights institutions identified some programs addressing minority concerns, and two states also reported developing separate, specialized minority institutions.[86] Some

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http://www.publicprotector.org (last visited Feb. 25, 2006); South Africa's Comm'n for the Rights of Cultural, Religious & Linguistic Communities, http://www.crlcommission.org.za (last visited Feb. 25, 2006); HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA (2001), http://www.hrw.org/reports/2001/africa/contents.html [hereinafter AFRICAN HRC REPORT] (focusing on human rights commissions in Kenya, Nigeria, Sierra Leone, South Africa, Togo, Uganda, and Zambia).

[84] *See* Uganda Human Rights Commission, *supra* note 83; AFRICAN HRC REPORT, *supra* note 83; *cf.* La Commission Nationale des Droits de l'Homme du Togo, http://www.cndh-togo.org/ (last visited Feb. 25, 2006).

[85] Of 64 identified national human rights institutions in Africa, this study was able to obtain primary information reported by the institutions themselves on minority-related activities or detailed secondary information from non-governmental organizations, scholars, and similar sources focusing specifically on such issues for only 34. The lack of empirical data about human rights practices in Africa has been noted by other scholars. *See* Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 840 (2000). I found African institutions in particular less likely to make information available over the internet, less likely to report regularly to regional and international institutions, and less likely to be the subject of scholarly reports than institutions in other regions. Even when secondary reports noted work on discrimination or other minority related issues, these were rarely noted by the institutions themselves. *See, e.g.*, Ghana's Comm'n on Human Rights and Administrative Justice website, http://www.chrajghana.org (last visited Feb. 26, 2006); Kenya's National Human Rights Comm'n website, http://www.knchr.org (last visited Feb. 26, 2006).

[86] These were the Taiwan Control Yuan, the Parliamentary Commissioner for Human Rights of Uzbekistan, and the Human Rights Commissions of Fiji, Korea, Malaysia (Suhakam), Mongolia, Nepal, Pakistan, the Philippines, and India. India also has three specialized commissions on minority issues, and Singapore has a Presidential Council on Minority Rights. *See* Taiwan Control Yuan promotional booklet (on file with author); Report of Uzbekistan to the Committee on the Elimination of Racial Discrimination, ¶ 51 (27 Dec. 1999), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.327.Add.1.En?Opendocument; Report of Fiji to the Committee on the Elimination of Racial Discrimination, ¶¶ 35-36 (Aug. 7, 2002), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.429.Add.1.En?Opendocument; Report of Korea to the Committee on the Elimination of Racial Discrimination, ¶¶ 23-25 &

institutions have been noted for occasional high profile inquiries into riots or violent police abuse (or for their failure to inquire into such matters), while others have received attention for addressing conflicts between religious communities.[87] While the available studies of individual South and Southeast Asian institutions' programs tend to be more detailed than those on the African programs, reporting by and concerning these institutions was nonetheless limited as well.[88]

In Mexico and Central and South America, roughly half of the identified institutions reported at least some minority-directed programs and offices.[89]

75-76 (4 Oct. 2002), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.426.Add.2.En?Opendocument; India's National Human Rights Comm'n website, http://www.nhrc.nic.in/ (last visited Feb. 25, 2006); Human Rights Comm'n of Malaysia website, http://www.suhakam.org.my/ (last visited Feb. 25, 2006); National Human Rights Comm'n of Mongolia website, http://www.nhrc-mn.org/ (last visited Feb. 25, 2006); Report of Nepal to the Committee on the Elimination of Racial Discrimination 7-8 (Jul. 30, 2003), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.452.Add.2.En?Opendocument; Pakistan's Human Rights Comm'n website, http://www.hrcp.cjb.net/ (last visited Feb. 25, 2006); Philippines Comm'n on Human Rights website, http://www.chr.gov.ph/ (last visited Feb. 25, 2006); Singapore's Presidential Council for Minority Rights website, http://www.parliament.gov.sg/Education/edu-fun-factsheet2pg5.htm (last visited Feb. 25, 2006).

[87] *See, e.g.*, Carolyn Evans, *Human Rights Commissions and Religious Conflict in the Asia-Pacific Region*, 53 INT'L & COMP. L.Q. 713 (2004).

[88] Of 42 identified Asian institutions, primary or detailed secondary information could be found for 23. Of these, ten described some minority-directed programs or investigations. There are also a few additional human rights institutions in the South Pacific, such as Fiji's Human Rights Commission, which report some minority-directed programs. *See* Fiji's Human Rights Comm'n website, http://www.humanrights.org.fj/ (last visited Feb. 25, 2006).

[89] Of 24 identified institutions, primary or detailed secondary information was available for 17, and of these there were reports of relevant offices, officers, or programs for 13. There were reports of specialized activities, programs, or sub-units for for the Ombudsman in Costa Rica; for the Defensor del Pueblo in Argentina, Bolivia, Columbia, Ecuador, Peru, and Venezuela; for the Procurador para la Defensa de los Derechos Humanos institutions in El Salvador, Guatemala, and Nicaragua; and for human rights commissions in Mexico, Guyana, and Honduras. *See* Report of Costa Rica to the Comittee on the Elimination of Racial Discrimination ¶¶ 39 & 43 (Mar. 13, 2001), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.384.Add.5.En?Opendocument; Argentina's Defensor del Pueblo de la Nación website, http://www.defensor.gov.ar/ (last visited Feb. 25, 2006) [hereinafter Argentina website]; Bolivia's Defensor del Pueblo website, http://www.defensor.gov.bo/ (last visited Feb. 25, 2006); Ecuador's Defensor del Pueblo website, http://www.dlh.lahora.com.ec/paginas/judcial/PAGINAS/Defensoria.base.htm (last visited Feb. 25, 2006); El Salvador's Procurador para la Defensa de los Derechos Humanos website, http://www.pddh.gob.sv (last visited Feb. 25, 2006); Guatemala's Procurador de los Derechos Humanos website, http://www.derechos.org/nizkor/guatemala/pdh/ (last visited Feb. 25, 2006) [hereinafter Guatemala website]; Indymedia website, www.indymedia.org [hereinafter Indymedia website]; Nicaragua's Procurador Especial de los Pueblos Indígenas y Comunidades Étnicas website, http://www.visioncostena

Without exception, these are devoted to indigenous groups: none describe programs relating to other minority groups. However, while many institutions reported officers or sub-units dedicated to indigenous issues, in many cases there was no additional information provided about their activities.[90] For those that did report programs and not merely the existence of offices or officers, the scope and level of activity varied considerably, from educational and promotional activities such as producing pamphlets and publishing newspaper op-eds in Bolivia and Argentina, to extensive programs investigating indigenous complaints and studying indigenous concerns in Guatemala and Peru.[91]

In Canada, Australia, and New Zealand, there are offices, commissioners, and programs devoted to indigenous groups, often on the provincial level, and these report substantially more activity than their Central and South American counterparts.[92] National and regional human rights institutions in these states have taken on high-profile discrimination cases. Human rights commissions in Canada may be either exclusively or primarily devoted to anti-discrimination efforts.[93] The US does not have a national human rights institution. In its local and municipal institutions, programs directed at minority groups are focused solely on anti-discrimination initiatives. The few exceptions, as in other American states and Australia and New Zealand, are for indigenous groups.[94]

.com.ni/qsomos/qsomos.htm; Peru's Defensoria del Pueblo website, http://www.ombudsman.gob.pe/ (last visited Feb. 25, 2006) [hereinafter Peru website]; Venezuela's Defensoria del Pueblo website, http://www.defensoria.gov.ve/ (last visited Feb. 26, 2006); Volio, *supra* note 65, at 22 (Colombia, Ecuador, Honduras, Venezeula); Ramkarran, *supra* note 16 (Guyana); ICHRP REPORT, *supra* note 2 (Mexico); Mexico's National Human Rights Comm'n website, http://www.cndh.org.mx/ (last visited Feb. 26, 2006) [hereinafter Mexico website].

[90] However, there was activity information available only for seven of these institutions (Argentina, Bolivia, Colombia, Ecuador, Guatemala, Mexico, and Peru). *See* Volio, *supra* note 65, at 22; Argentina website, *supra* note 89; Guatemala website, *supra* note 89; Indymedia website, *supra* note 89; Mexico website, *supra* note 89; Peru website, *supra* note 89.

[91] The Argentinean, Bolivian and Peruvian activities are self-reported on their websites, *supra* note 89. The Guatemalan Procurador's activities were reported by a secondary institution, www.indymedia.org.

[92] A prominent example is the Aboriginal and Torres Strait Islander Social Justice Commissioner in Australia. In these states, minority-directed work is frequently carried out on the regional or local level. *See, e.g.*, Australian Human Rights & Equal Opportunity Comm'n website, http://www.hreoc.gov.au/ (last visited Feb. 26, 2006).

[93] *See* David M. Tanovich, *Racial Profiling and Police Practice in Canada: E-racing Racial Profiling*, 41 ALBERTA L. REV. 905, 908 (2004); Carlos Scott Lopez, *Australian Immigration Policy at the Centenary: The Quest for Control*, 18 GEO. IMMIGR. L.J. 1 (2003).

[94] *See* Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of*

In Europe, in contrast, programs and institutions with the primary mandate of addressing issues of race, ethnicity, and discrimination are rapidly expanding, driven by the work of the OSCE High Commissioner for National Minorities and now by European Union requirements, in particular by a Directive requiring member states to establish such institutions.[95] Currently, all the EU member states except one report having established bodies that promote racial and ethnic equality as part of their mandates, and most have established special institutions or programs directed specifically at racism and ethnic discrimination.[96] Finland, for example, has long had an ombudsperson for foreigners but expanded that office to serve all ethnic minorities in response to the EC Directive;[97] similarly, Germany has a commissioner for minorities;[98] Sweden has an ombudsman against ethnic discrimination;[99] and Hungary has both an Equal Treatment Authority and a Parliamentary Commissioner for National and Ethnic Minority Rights.[100]

Post-War Liberalism, 25 BERKELEY J. EMP. & LAB. L. 129 (2004). One exception is the Ombudsperson for American Indian Families in Minnesota, who works to ensure that social service agencies and officials follow the requirements of the Indian Child Welfare Act. *See* Ombudsperson for American Indian Families brochure (on file with author). Also, as noted above, while the Helsinki Commission does consider some domestic human rights issues, it does so only in connection with its primary task of monitoring the compliance of all 55 members of the Organization for Security and Cooperation in Europe with their human rights obligations, rather than focusing primarily on U.S. human rights concerns. *See* Helsinki Commission website, www.csce.gov.

[95] *See* High Commissioner on National Minorities: Ten Years of Reducing Ethnic Tensions (Feb. 3, 2003), http://www.osce.org/hcnm/item_2_129.html; Council Directive 2000/43/EC, art. 13, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22, 23 (EC) [hereinafter Directive 2000/43/EC].

[96] Many but not all of these entities are national human rights institutions as such. European states also have a number of general and special national human rights institutions, apart from those established under the auspices of the Directive. *See* EUR. COMM'N, DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES, EQUALITY AND NON-DISCRIMINATION - ANNUAL REPORT 2005, at 23-24 (2005) [hereinafter EC EQUALITY REPORT 2005], *available at* http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/annualrep05_en.pdf.

[97] *See* EUR. MONITORING CTR. ON RACISM AND XENOPHOBIA [EUMC], MIGRANTS, MINORITIES AND LEGISLATION 17-18 (2004), *available at* http://eumc.eu.int/eumc/material/pub/comparativestudy/CS-Legislation-en.pdf [hereinafter EUMC REPORT].

[98] *See id.* at 130.

[99] *See id.* at 55.

[100] *See* EC EQUALITY REPORT 2005, *supra* note 96, at 24; Lloydd & Morawa, *supra* note 67, at 39. Also reporting specialized institutions or programs directed particularly at minorities are: Belgium, the Danish Institute for Human Rights, Italy, Luxembourg, Portugal, the United Kingdom, Slovenia, and Latvia.

These trends present an interesting counterpoint to the overall regional patterns of institutional development. The "boom in NHRIs in the 1980s and 1990s . . . with a handful of exceptions . . . has occurred in the South,"[101] but there has not been a corresponding increase in attention to minority interests in those regions. Rather, minority-oriented programs within national human rights institutions seem to have developed primarily in other areas: in particular, in the new minority institutions in Europe and, to some extent, in the Commonwealth countries of Canada, Australia, and New Zealand.[102]

ii. Content Trends

There are also trends in the content of programs directed at minority groups. Many have been focused on one of two issues: the institution's accessibility to minority group or anti-discrimination measures. Notably, both issues are readily encompassed by the traditional, liberal minority rights that are widely protected in both national and international law, as discussed in part I of this article. Two other trends concern issues that fit less neatly into traditional liberal categories: cultural claims and inter-ethnic conflicts.

a. Accessibility

A number of institutions have developed initiatives to identify potential barriers to access for members of minority groups, and to reduce or remove those barriers. For example, the national human rights commission in India, which has high rates of illiteracy among certain minority groups, has adopted informal procedures for accepting complaints rather than requiring complaints to be filed in writing.[103] Some institutions have undertaken publicity programs aimed at extending their reach beyond the urban centers into rural communities. The Ugandan Human Rights Commission has broadcast information over the radio in local languages in an effort to reach rural and illiterate segments of the population.[104] Representatives of the Mexican National Commission for Human Rights have visited indigenous communities in Oaxaca, Veracruz, Chiapas, and elsewhere to solicit and accept complaints directly.[105]

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[101] ICHRP REPORT, *supra* note 2, at 65; *see also* Volio, *supra* note 65.

[102] *See* EC EQUALITY REPORT 2005, *supra* note 96; Lloydd & Morawa, *supra* note 67.

[103] *See* Sripati, *supra* note 78, at 20.

[104] *See* Uganda Human Rights Commission website, www.uhrc.org.

[105] *See* Jorge Madrazo, *New Policies on Human Rights in Mexico*, *in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE, *supra* note 67, at 337, 351-52.

Another way of improving accessibility is to establish local and provincial offices. Doing so may have synergetic effects. At the most basic level, a single national office may be geographically inaccessible to most of the population, especially in states with substantial rural populations and poor transportation and communication.[106] In countries with numerous minority groups, local offices are better placed to provide services directed at the particular groups in their area. While the national office of the Commission for Human Rights and Administrative Justice in Ghana accepts complaints only in the country's major languages, it hires speakers of local languages for its regional and district offices.[107] Also, some institutions have hired local minority representatives for their staff, or have appointed minority community leaders to positions among the commission or ombudsperson officials.[108]

At least one case study suggests that measures and programs specifically directed at local minority populations are at times effective not only because they are objectively more accessible but in part because they signal interest in and seriousness about addressing minority community concerns, establishing credibility with that community, and increasing community members' subjective willingness to approach the institution.[109] However, if not staffed with minority community members or supported by that community, such outreach can breed suspicion on the basis of past experiences of discrimination.[110] Such programs also run the risk of cabining minority concerns to only certain offices and officers, and reducing the accountability of the institution as a whole to minority groups.

b. Anti-discrimination

While many national human rights institutions may not make a priority of minority concerns or report programs directed at minority groups, few would exclude claims of affirmative government discrimination or oppres-

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[106] *See* Afghanistan Independent Human Rights Comm'n website, http://www.aihrc.org.af/ (last visited Feb. 26, 2006); Zambian Human Rights Comm'n website, http://www.sahrc.org.za/afr_sec_main.htm.

[107] *See* Reif, *supra* note 64, at 26; *see also* Australian Ombudsman website, http://www.ombudsman.gov.au/publications_information/Annual_Reports/ar2002-03/office_profiles.pdf (last visited Feb. 26, 2006).

[108] *See* Sripati, *supra* note 78, at 11-12.

[109] *See* Shannon Adair Williams, Human Rights in Theory and Practice: A Sociological Study of Aboriginal Peoples and the New Brunswick Human Rights Commission, 1967-1997, at 71-72, 85-86, 93-95 (1999) (unpublished Masters thesis, University of New Brunswick) (on file with author).

[110] *See id.;* JOAN KIMM, FATAL CONJUNCTION: TWO LAWS, TWO CULTURES 27 (2004).

sion from their mandates, at least in principle (whereas other kinds of minority claims, such as those advocated by liberal pluralists and communitarians may or may not fall within individual institutions' mandates).[111] If an institution does report work on substantive minority claims, it is likely to be on discrimination issues. Efforts to promote this focus may well overlap with strategies to increase accessibility: Belgium's Centre for Equal Opportunities and Opposition to Racism, for example, has established local anti-discrimination centers specifically to receive discrimination complaints.[112]

There is a striking contrast between those institutions that deal with minority issues primarily when highly publicized cases arise but are unresponsive to daily complaints, and those, like the Belgian Centre, that reportedly work steadily on everyday claims. Carolyn Evans describes high-profile investigations of violent conflicts targeting religious minorities by human rights commissions in the Philippines and India,[113] and other commentators note a similar focus on high-profile claims to the exclusion of daily concerns in the work done by other Asian and South Pacific institutions.[114]

c. Cultural Claims

Apart from the issues of access and discrimination, a few national human rights institutions do address minority claims of the kind elaborated in the new minority rights treaties and by liberal pluralists and communitarians: claims for protection of particular cultural rights, for example.[115] However, such claims are pursued almost exclusively by specialized institutions whose core mandate is work with minority groups, and who are backed by a legal framework establishing those rights in national law. The Parliamentary Commissioner for the Rights of National and Ethnic Minorities in Hungary, for example, enforces the constitutionally established rights of national minorities to practice their language and culture.[116] The Guatemalan Procurador

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[111] There are however some institutions, such as the National Ombudsman of the Philippines, that have a very narrowly defined mandate, in this case, "to fight corruption, graft and crimes" so that discrimination claims are cognizable only if they relate to that mandate. *See* Office of the Ombudsman, Republic of the Philippines, *Ombudsman Hymn*, http://www.ombudsman.gov.ph/index.php?pagename=Ombudsman%20Hymn (last visited Feb. 26, 2006).

[112] *See* Ctr. for Equal Opportunities and Opposition to Racism website, http://www.antiracisme.be/ (last visited Feb. 26, 2006).

[113] *See* Evans, *supra* note 85, at text accompanying notes 73-102.

[114] *See* Shameem, *supra* note 15, at 662 (Fiji Human Rights Comm'n); ICHRP REPORT, *supra* note 2, at 25 (Malaysian Komnas Ham).

[115] For a discussion of these treaties and rights, see *supra* part I.

[116] *See* Notes on IOI Quebec Conference, *supra* note 81. Hungary "recognizes certain minori-

de los Derechos Humanos, which has a special division for indigenous concerns, has pursued complaints from indigenous peoples that include claims against a beer company for making disrespectful references to the Mayan religion in its advertising and against a restaurant that denied service to a patron who was wearing indigenous dress.[117]

Both the Swedish and Hungarian minority ombudsman's offices reported sharp divisions in their work between the kinds of claims brought by different minority groups. Although indigenous groups in Sweden are entitled to sweeping cultural protections, claims from these groups were rare. Instead, most claims were brought by members of immigrant groups concerning either discrimination or access to government social and economic benefits.[118] Similarly, the Hungarian ombudsperson reported that his work was divided between the claims of groups recognized as national minorities—who have a long-standing connection to Hungary, are entitled to certain protections for language and culture, and represent roughly 25% of claims—and the Roma—who have no such protections, face severe discrimination, seek socio-economic benefits from the government, and file 75% of claims.[119]

But minority-directed programs aimed at particular cultural practices may well be targeting human rights violations within minority communities rather than defending minority interests against external threats. Ghana's Commission for Human Rights and Administrative Justice has taken on controversial practices such as witchcraft accusations and *trokosi*, a form of forced labor and slavery.[120] The Mexican human rights commission has criticized tribal courts for failing to follow due process standards.[121] Other commissions have challenged community practices such as child marriage and reviewed procedures in local and religious courts.[122] Indeed, oversight of

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ties as constituent nationalities and gives them certain self-government rights." Lloydd & Morawa, *supra* note 67, at 39. In respect of these rights, the Commissioner works on new legislation on minority protections and monitors implementation, inconsistencies, and violations. *See id.*

[117] *See* Indymedia website, *supra* note 89.

[118] *See* Interview with Anna Theodora Gunnarsdottir & Nils-Olof Berggren, Parliamentary Ombudsman's Office of Sweden, at IOI Quebec Conference (Sept. 8, 2004) (notes on file with author) [hereinafter Gunnarsdottir and Berggren interview].

[119] *See* Notes on IOI Quebec Conference, *supra* note 81.

[120] *See* ICHRP REPORT, *supra* note 2, at 16-17.

[121] *See id.* at 37-39.

[122] *See* Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STAN. J. INT'L L. 59, 81 n.181 (2003); Sripati, *supra* note 78, at 39-40.

indigenous communities is the sole mandate of some institutions: the Métis Settlement Ombudsman in a Canadian regional government institution was established in 2003 solely to hear complaints of maladministration and conflicts of interest against the General Council of the Métis Settlements, an indigenous community granted some rights of autonomy and self-government by the Alberta government.[123]

d. Inter-ethnic and Religious Conflicts

Finally, in at least a few cases, ombudspersons' offices have been established precisely to address acute ethnic or religious tensions. In Kosovo, the Organization for Security and Cooperation in Europe (OSCE) established an ombudsperson's office in 1999, in the context of UN administration of the protectorate that maintains the forced peace between Serbs and Albanians. In 2004, it created a Deputy Ombudsperson for minority communities to address the particular needs of the Serbs living separately in guarded enclaves.[124] In Bosnia and Herzegovina, the Dayton Accords mandated establishment of a Human Rights Commission made up of a Human Rights Ombudsman to investigate human rights complaints and a Human Rights Chamber to hear such cases.[125] Northern Ireland is another example of this phenomenon.[126] Uganda's Human Rights Commission, while not established for the purpose of resolving ethnic tensions, is nonetheless striking for its unusual willingness to direct programs at this problem: as mentioned above, it has devoted enormous resources to efforts to resolve inter-ethnic violence in the Karamoja region.[127] However, such involvements are not necessarily either neutral or beneficial for minority groups: Kenya's Human Rights Commission has been accused of whitewashing its account of politically-

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[123] *See* OFFICE OF THE MÉTIS SETTLEMENTS OMBUDSMAN, 1ST ANNUAL REPORT FOR THE PERIOD APRIL 1, 2003 TO MARCH 31, 2003, at 1 (2004), *available at* http://www.metisombudsman.ab.ca/Annual%20Report.pdf [hereinafter MÉTIS REPORT]; Métis Settlements General Council website, http://www.msgc.ca/ (last visited Feb. 26, 2006); CATHERINE E. BELL, CONTEMPORARY MÉTIS JUSTICE (1999).

[124] Interview with Legal Adviser, Kosovo Ombudsperson's Office (June 7, 2004) (notes on file with author); *see also* Paul R. Williams, *supra* note 17, at 403.

[125] *See* J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice*, 14 INT'L LEGAL PERSP. 44, 45 (2004). The Dayton Accord's mandate has since been superseded by domestic legislation.

[126] *See* Dominic Bryan, *Parading Protestants and Consenting Catholics in Northern Ireland: Communal Conflict, Contested Public Space, and Group Rights*, 5 CHI. J. INT'L L. 233, 247 (2004).

[127] *See* UGANDA HUMAN RIGHTS COMM'N, HUMAN RIGHTS AND THE SEARCH FOR PEACE IN KARAMOJA (2004).

motivated violence against ethnic groups in the Coast Province and Rift Valley to absolve the government of involvement.[128]

e. No Minority-directed Programs

But in many states, national human rights institutions seem to play no role in addressing minority concerns at all. This is particularly troubling in severely divided states.[129] The ethnic and religious divisions in Indonesia, for example, are of the utmost urgency, spurring not just political opposition and violent conflict, but even full-scale war by separatist movements far from the capital. Nonetheless, the Indonesian National Human Rights Commission has been criticized for having no resources directed to minority groups or concerns, nor even any branch offices to serve the numerous groups scattered along the nation's vast archipelago.[130] Indeed, the commission has been notoriously uninvolved in these concerns, such that activists in Irian Jaya, where the commission has at least carried out a few high-profile investigations, regard it as essentially a "foreign institution."[131]

Indonesia is not alone in this. In the most acute cases, states that are in the grip of violent conflicts or political unrest have not established national human rights institutions, or if they do exist, there is no information available on their activities. But in other instances—Liberia, Sri Lanka, Zimbabwe, Nepal—institutions in severely divided states do not seem to be engaged with their countries' acute minority concerns.[132]

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[128] *See* AFRICAN HRC REPORT, *supra* note 83.

[129] I am using the term "severely divided states" here to refer to states where ethnic or religious identities are strong and that suffer intense and at times violent conflicts between groups, or are complexly divided, with their population splintered amongst many groups, or both. Complexly divided states tend to be in Africa and Asia and include Indonesia, Nepal, Nigeria, and Ethiopia, with many ethnic groups and languages. *See* Fearon, *supra* note 7. While there is no index for the severity of divisions between groups, the Minorities at Risk Project has developed a database of 284 politically active minorities subject to political or violent repression. *See* Minorities at Risk Project, *supra* note 7. *See generally*, HOROWITZ, *supra* note 12.

[130] *See* ICHRP REPORT, *supra* note 2, at 28-29.

[131] *Id.* at 33.

[132] *See* Nepal National Human Rights Comm'n, http://www.nhrcnepal.org/ (last visted Feb. 26, 2006); Human Rights Comm'n of Sri Lanka, http://www.hrc-srilanka.org/ (last visited Feb. 26, 2006); AFRICAN HRC REPORT, *supra* note 83 (follow "Liberia"); S. Afr. Regional Poverty Network, Executive Summary of the Regional Fact-Finding Mission to Zimbabwe (2002), http://www.sarpn.org.za/documents/d0000901/index.php. Others include Rwanda, Burundi, Angola, Democratic Republic of Congo, Burma, Algeria, and Azerbaijan. *See* Minorities at Risk Project, *supra* note 7.

III. IMPLICATIONS

A. Factors Correlating to Minority-directed Programs

In considering whether and why national human rights institutions have developed minority-directed programs, two factors in particular deserve consideration: international and regional legal frameworks that, to some extent, shape national decision-making, and common political influences that are repeatedly cited as affecting institutional choices.[133]

i. International and Regional Legal Regimes

a. UN Benchmarks

If what transitioning states are looking for in creating national human rights institutions is often to gain political capital with the UN and other international institutions as much as to make strides in promoting human rights, then it is telling that the UN benchmarks for the success of these institutions do not require them to address minority concerns. In 1993, the UN General Assembly endorsed the Paris Principles, which set minimum standards for national human rights institutions' functions, authority, resources, and independence from government influence.[134] The UN and other international organizations use the Paris Principles as the primary test for certifying agencies as national human rights institutions and for judging their competence and independence.[135]

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[133] Of course, it is impossible without delving into the details of each institution's situation to define precisely the influences affecting their programmatic decisions. As discussed above in parts I and II, states have adopted various legal frameworks for minority rights, and national human rights institutions are themselves multifarious in their functions and mandates. Addressing the particulars of each institution's setting is, however, well beyond the scope of this article.

[134] *See* Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights, G.A. Res. 48/134, Annex, U.N. Doc. A/RES/48/134 (Dec. 20, 1993) [hereinafter Paris Principles]. The United Nations has supported the development of national human rights institutions since the 1960s. It has sponsored a series of international meetings of representatives of national human rights institutions, and various guidelines and principles have emerged from these meetings, including the Paris Principles. *See* UNHCHR Fact Sheet, *supra* note 2.

[135] For example, compliance with the Paris Principles is a prerequisite for participation in the Asia-Pacific Forum, a regional association of national human rights institutions. *See* Evans, *supra* note 87, at 714-15. Similarly, the National Human Rights Institution Forum uses the Paris Principles as the sole criterion for its accreditation ratings. *See* National Human Rights

The Paris Principles are not designed to, and in fact do not, offer incentives for institutions to work closely with minority groups or on minority rights. In short, although the Paris Principles do make reference to discrimination, to pluralism, and to "vulnerable groups," their requirements can be met without any involvement in minority issues or with minority groups at all.[136] Furthermore, observers report that UN assistance programs for national human rights institutions tend to be generic and standardized rather than tailored to particular countries, much less to the country's particular minority groups.[137] From the perspective of transitioning states' interest in demonstrating measurable progress toward establishing independent, effective human rights institutions, therefore, the UN benchmarks give them little reason to invest in institutional capacity to address minority concerns.[138]

Recently, there have been indications of an increasing recognition of the relevance of minority group interests, both within the UN and at international meetings of national human rights institutions.[139] In particular, some

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Institutions Forum, Explanation Note on Accreditation Status, http://www.nhri.net/default.asp?PID=276&DID=0 (last visited Feb. 26, 2006). Scholars also treat the Paris Principles as the first measure of a national human rights institution's legitimacy, analyzing the structure of the institution against the Paris Principles' requirements. *See* Evans, *supra* note 87, at text accompanying notes 8-60*;* Sripati, *supra* note 78, at 10-13; Reif, *supra* note 64, at 4, 24.

[136] At first, it seems promising that the Principles require that the "pluralist representation of the social forces" of a state be represented in its national human rights institutions, but minority groups are not among the examples of the relevant "social forces" listed, which instead focus on representatives of segments of civil society. *See* Paris Principles, *supra* note 132. In assessing compliance with this requirement, observers tend to treat it in exactly this way, describing as "broad and pluralistic" institutions whose members are drawn from a range of institutions in civil society. *See, e.g., Senegal: Staffing and Appointment Procedures, in* AFRICAN HRC REPORT, *supra* note 83, *available at* http://www.hrw.org/reports/2001/africa/senegal/senegal2.html. The Paris Principles also suggest that human rights institutions should associate with NGOs that, among other things, work with vulnerable groups and that it should promote human rights by, among other things, publicizing efforts to end race discrimination. But these proposals each come as the last in a laundry list of possible subjects for publicity and association, and do not require the institutions to take any particular steps or to advance any programs of its own. *See* Paris Principles, *supra* note 134. The Paris Principles are a limited tool in other respects as well. S*ee* REIF, *supra* note 70, at 394. Case studies suggest that the Principles' markers of independence do not necessarily correlate with effectiveness. *See* Evans, *supra* note 87, at 713 n.33; ICHRP REPORT, *supra* note 2, at 3.

[137] *See* Tsekos, *supra* note 64, at 22.

[138] Indeed, to the contrary: in order to gain the hoped-for economic and political benefits for compliance with international norms, states must put the limited resources they are willing to allocate to national human rights institutions into the UN-identified agenda.

[139] *See, e.g.*, Sixth International Conference for National Institutions for the Promotion and Protection of Human Rights, Copenhagen Declaration, ¶¶ 1(b), 3(b)-(d) (Apr. 13, 2002), *available at* http://www.unhchr.ch/html/menu2/copendec.htm; UNHCHR Fact Sheet, *supra*

of the declarations that have emerged from these meetings have acknowledged the tensions between minority groups and human rights claims, by raising the issue of how and to what extent human rights should be adapted to local cultures, at times gingerly and at times with a sense of grievance against cultural imperialism, but without reaching any consensus on the question.[140] These developments highlight another fundamental limitation of the Paris Principles: the document's approach is both formal and formulaic, taking the legal texts of human rights instruments as its foundation, treating the content of human rights as unproblematic, and viewing the promotion of human rights as a one-way transfer of these values from the UN system to receptive national governments. As such, it lacks any contextual framework acknowledging the variety of national and ethnic settings in which national human rights institutions operate or the potential for the institution to be caught in conflicts between human rights-defined interests.[141]

b. Regional Institutions

In contrast, it is notable that the most dramatic shift toward minority concerns, the establishment of programs and institutions for minority groups in Europe, has been driven by precisely the opposite legal reality: Directive 2001/43/EC on racial and ethnic discrimination requires states to establish independent institutions to assist with complaints, carry out surveys, and provide reports and recommendations on combating discrimination.[142] This is not a mere suggestion to member states. States must report on their progress in implementing the directive at regular intervals, and they can ultimately be brought to the European Court of Justice and ordered to pay dam-

note 2. In addition, the United Nations has also established a Permanent Forum on Indigenous Issues, which is the first such body to have direct indigenous representation amongst its members, and which has commented on the work of national human rights institutions, among other matters. *See* United Nations Permanent Forum on Indigenous Issues website, http://www.un.org/esa/socdev/unpfii/index.html (last visited Apr. 7, 2006).

[140] *See* Fifth International Workshop for National Institutions for the Promotion and Protection of Human Rights, Rabat Declaration, ¶¶ 6-8 (Apr. 15, 2000), *available at* http://www.unhchr.ch/html/menu2/rabatdec.htm; World Conference on Human Rights, Bangkok Declaration, ¶¶ 7-11, 22-23 (Apr. 7, 1993), *available at* http://www.unhchr.ch/html/menu5/wcbangk.htm#I.

[141] At a very basic level, the Paris Principles refer solely to discrimination and particularly to "racial discrimination," ignoring the many other minority interests that national human rights institutions may need to address. *See* Paris Principles, *supra* note 134.

[142] *See* Directive 2000/43/EC, *supra* note 95; *see also* Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16-22 (EC); EUMC REPORT, *supra* note 97.

ages for failure to comply.[143] In addition, the European Union has set high standards in minority protections for countries seeking entry to the Union. In order to gain the economic, political and social benefits of accession, candidate countries are meeting the EU standards both with substantive guarantees for their minorities and with human rights institutions designed to ensure them.[144]

The demands of other regional human rights institutions and systems, such as the Inter-American Human Rights system and the African Commission on Human and Peoples' Rights, for national human rights institutions to address minority issues are more limited and indirect.[145] In Mexico and Central and South America, where the only reported work with minority groups is solely with indigenous groups, there may be some correlation between ratification of the ILO Convention No. 169 on indigenous peoples (a convention dominated by Latin American states) and the likelihood that a national human rights institution will report a program or office directed at indigenous groups.[146] While the convention is not enforced by punitive measures, the ILO does make general observations on states parties' implementation of the treaty.[147]

In contrast, the African human rights system does promote some minority and indigenous rights in principle but does not require member states to

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[143] *See* Treaty Establishing the European Community arts. 226-28, Nov. 10, 1997, 1997 O.J. (C340) 269-76, *available at* http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/11997M/htm/11997M.html#0145010077.

[144] *See* Presidency Conclusions, Copenhagen European Council 13 (June 21-22, 1993), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf#search='SN%2F180%2F1%2F93.

[145] While the Inter-American Human Rights Commission and Court have issued notable opinions affirming indigenous rights, these have not been directed at national human rights institutions. *See* Maya Indigenous Communities case, *supra* note48; Awas Tingni case, *supra* note 48.

[146] Of the twelve states in the region that have ratified the convention and have identified national human rights institutions, nine reported some minority-directed programs (two did not, and there was one for which no information was available on minority programs or otherwise). Of the seven countries that have not ratified the convention, two reported minority-directed programs (one did not, and there were four for which no information was available). In light of the lack of reporting from non-states parties to the Convention, it is difficult to tell whether ratification correlates to programs, reporting, or neither one. The ILO Convention No. 169 on indigenous rights is dominated by central and south American states in two senses: the majority of states parties to the treaty are Central or South American, and many of the states in Central and South America are parties. *See* Int'l Labour Org., Convention No. 169 Was Ratified by 17 Countries, http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169 (last visited Feb. 26, 2005).

[147] *See* Int'l Labour Org., List of Conventions, http://www.ilo.org/ilolex/english/convdisp1.htm (last visited Feb. 25, 2006).

establish national human rights institutions to address these issues, much less enforce such requirements with punitive mechanisms.[148] In the Asian and Pacific regions, which lack regional frameworks for minority protections, national approaches vary, and regional concerns play no apparent role.[149]

ii. Limited Political Purposes and Resources

For are a number of political and institutional reasons, a national human rights institution might not wish to involve itself with minority concerns. In some cases the political purpose for establishing a national human rights institution has been to forestall criticism of human rights practices with a toothless institution, so that the last thing decision-makers want is to make the institution more accessible or effective.[150] As one Ugandan observer pointed out, "even [Idi] Amin had his own human rights commission."[151]

While national human rights institutions are officially empowered to carry out investigations against their governments, some lack the institutional clout or resources to do so. A number of national human rights institutions do not exercise the far-reaching powers they possess on paper but limit their activities primarily to less controversial and less resource-intensive educational programs and public awareness campaigns.[152] Furthermore, an institution may face a truly daunting array of human rights abuses by its government, so that minority concerns, however serious and fundamental, may simply not be its highest priority. Even if such an institution is operating in good faith and receiving government cooperation, it may be still in the early stages of institution-building, lacking the capacity for extended projects or programs.[153]

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[148] *See* African Charter on Human and Peoples' Rights arts. 26, 45; Inter-American Convention on Human Rights and Fundamental Freedoms. In Asia, the only regional support for the development of national human rights institutions is a voluntary association, the Asia-Pacific Forum. S*ee* Asia-Pacific Forum website, http://www.asiapacificforum.net/ (last visited Feb. 26, 2006).

[149] Of course, these results do not indicate whether it is state interests that are driving the development of regional systems or vice versa. Once in place, however, regional enforcement mechanisms may create independent incentives for state behavior that take on a life of their own.

[150] S*ee* Reif, *supra* note 67, at 278; Whiting, *supra* note 122, at 75-96 (Malaysia).

[151] *See Uganda: Assessment, in* AFRICAN HRC REPORT, *supra* note 83, *available at* http://www.hrw.org/reports/2001/africa/uganda/uganda5.html (quoting James Otto, Secretary General of Human Rights Focus, an Ugandan NGO).

[152] For example, as of 2000, the Benin Human Rights Commission had primarily carried out trainings and workshops. *See* AFRICAN HRC REPORT, *supra* note 81.

[153] *See* Marten Oosting, *The Ombudsman and His Environment, in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 67, at 1, 8-9.

As one would expect, it is states with greater resources, both financial and political, whose national human rights institutions tend to have established more elaborate and extensive programs, including programs aimed at minority groups. Thus, for example, although Australia's indigenous population is relatively small, it has designated a human rights commissioner to promote the rights of its aboriginal people.[154] In contrast, in Malaysia, where society is polarized along ethno-religious lines and these differences are built into the basic structures of government, the Malaysian Human Rights Commission has no commissioner dedicated to these issues. Rather, it has kept silent when faced with complaints of infringement of religious rights, limiting itself to private hearings and occasional neutral statements urging interfaith dialogue.[155] Indeed, in some cases there tends to be an inverse relationship at work: the more central and significant minority concerns are to a state, the more resources and political clout it would take to address them, and so the less likely they are to be addressed.[156]

Some limitations may relate to the national human rights institution's identity as a national, government entity. Although its mandate may be investigation of government abuse, it is nonetheless structured by and for the purposes of the government. A national institution, located in the capital city and created by national authorities, may not have an understanding of or sympathy for minority views, especially as such concerns are held by distant, rural populations and particularly as they implicate other government interests. By the nature of the appointment process, the members of national human rights institutions are likely to be urban political and social elites with development-oriented agendas that view minority concerns as ultimately subservient to the greater good of the state interest in economic and social progress. In short, the national human rights institution may well be a political or national agent—whether by political motive or merely as an effect of its members, structure, and overall design—rather than a neutral body in interactions with minority groups.[157]

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[154] *See* Australian Human Rights Comm'n website, http://www.hreoc.gov.au/social_justice/index.html (last visited Feb. 26, 2006).

[155] *See* Evans, *supra* note 87, at text accompanying notes 61-72.

[156] The International Council on Human Rights Policy has also noted this dynamic in its review of the work of national human rights institutions in general. *See* ICHRP REPORT, *supra* note 2, at 1.

[157] The process of appointing commissioners is typically undertaken by the central government. In assessing the plurality of those appointments, a premium is placed on consultation with, and representation of, civil society, not regional or minority interests. *See, e.g.*, AFRICAN HRC REPORT, *supra* note 83. *See also* Lisa Statt Foy, *A First Nations Ombudsman: Some Considerations*, 7 INT'L OMBUDSMAN Y.B. 76, 78 (Linda Reif ed., 2003).

Finally, beyond these questions of institutional identity and political involvement, the institution may also face tensions within its mandate. As mentioned above, the mandates of these institutions vary widely, ranging from narrow functions of reviewing acts of maladministration by particular public agencies, to broad mandates to promote human rights, to a focus primarily on discrimination issues or on a particular minority community.[158] As discussed below, where conflicts arise between communities that are both considered minority groups, or when conflicts could be characterized either in terms of human rights or in economic, political, or social terms, a national human rights institution may find human rights concerns and values on all sides of a conflict.

Without becoming mired in an analysis of the formidable financial and political difficulties that national human rights institutions functioning in transitional states face, there are certainly reasons enough that these young agencies might not yet be ready or able to take on the complexities of minority group claims. But when national human rights institutions do nonetheless grapple with minority concerns, their experiences are revealing.

B. Implications for the Minority Rights Framework

National human rights institutions' limited involvement in minority concerns can be explained at least in part by the failures of resources, of political will, or of relevant regional incentives discussed above. But this pattern may signal something else as well: that the current understandings of minority rights are not entirely applicable in the places they are being ignored. Echoing Leslye Obiora, perhaps "what is often mistaken for apathy might actually be the most poignant commentary on the limitations of the approach."[159] At a minimum, this pattern ought to spur us to consider what limitations there may be on the direct transplantation of minority rights as understood through the lens of democracy theory.

In severely divided states, the relationships between ethnic and religious groups are fundamental to the nature and stability of the state. Accordingly, the decisions that a newly developing state makes about how to accommodate those groups in its legal and political system are among the most important for its success, and for its survival.

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[158] A survey of the mandate of each national human rights institution is well beyond the scope of this study; however, the salience of this concern is evidenced by the ongoing debate amongst these institutions concerning the actual and desirable scope of their mandates.

[159] *See* L. Amede Obiora, *"Supri, supri, supri, Oyibo?": An Interrogation of Gender Mainstreaming Deficits*, 29 SIGNS: J. WOMEN CULTURE & SOC'Y 649, 656 (2003).

But do the theories formulated in the distant contexts of well-established and less-divided states provide a good framework for managing multiculturalism within new democracies? The theorists themselves offer only highly qualified responses to this question,[160] and critics have pointed to extensive social, political, economic, and historical differences as discrediting efforts to apply these theories out of their original context.[161]

The experiences of national human rights institutions in their work with minority groups suggest we should reconsider two key aspects of the minority rights framework: the current identification of the core interests of the state with liberal rights and the typology of minority groups. National human rights institutions have also struggled to address two particularly problematic situations: collective group interests and indigenous legal systems.

i. Core Interests of the State

Although each of the theorists discussed in part A above came to different conclusions about the proper balance of liberal and minority rights within the state, all "took for granted" (as Kymlicka puts it) in staking their positions, that the state in question was a well-established liberal democracy and that the fundamental tension to be resolved in considering minority claims was that between those claims and the liberal values at the core of the state's identity.[162] Here, the views of national human rights institutions suggest that democracy theory may overstate both the extent to which liberal rights are the core interest that the state wishes to protect and with which it identifies, and also the extent to which the central challenge posed by minority groups is illiberality. When ombudspersons from around the world were invited to characterize minority interests, they began with classic liberal restatements of minority interests as extensions of liberal interests, such as: "the Ombudsman's traditional role of protecting citizens from excesses in government power means that we have particular responsibilities towards those

[160] *See, e.g.*, Kymlicka, *supra* note 44, at xii; Will Kymlicka, *Nation-Building & Minority Rights: Comparing Africa and the West*, *in* ETHNICITY AND DEMOCRACY IN AFRICA 54, 54 (Bruce Berman, Dickson Eyoh & Will Kymlicka eds., 2004) [hereinafter ETHNICITY AND DEMOCRACY].

[161] *See, e.g.*, Will Kymlicka, *Reply and Conclusion*, *in* LIBERAL PLURALISM, *supra* note 44, at 347-48 (summarizing Central and East European scholars' critiques of his position, including concerns about the role of elites in defining minority interests, oppressive minorities, and risks to the process of democratic development); Kymlicka, *supra* note 160, at 64 (considering African scholars' critiques, including fundamentally different patterns of ethnic groups and interactions).

[162] Kymlicka, *supra* note 44, at xii.

who are vulnerable or marginalized."[163] But they did not end there. Instead, the descriptions quickly shifted to other concerns: minorities' claims to socio-economic equity (from the Argentinean ombudsperson),[164] the role of immigration and international relations (from the Swedish and European ombudsmen),[165] and minorities' effect on national identity (from the Greek ombudsperson).[166]

These varying concerns are not surprising, in light of the diverse roles minorities have played in the lives of states, and the differences in self-perceptions of identity amongst these states. Governments in Central and Eastern Europe tend to view minority issues more as a national security concern than as a threat to liberal values, in light of the violent inter-ethnic conflicts there.[167] In Africa, not only are national security and stability crucial issues, but few states enforce liberal rights consistently, and while ethnic communities flourish on the social level, in the political realm ethnicity most often is deployed as a form of patronage.[168] The European Monitoring Centre on Racism and Xenophobia suggests that historical differences in patterns of immigration have shaped not only the distribution of minorities within states but also "public perceptions of their place in society and hence, public policies vis-à-vis these minorities."[169] Finally, while many states, wherever located and however constituted, have guaranteed liberal rights in principle, no small number are all too illiberal in practice.[170]

Liberal and communitarian democratic theory's misplaced presumption that the state's identity is liberal can be misleading when conflicts arise between minority groups and the state that are ostensibly about liberal values.

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[163] *See* Bruce Barbour, *The Ombudsman and Today's Demographic Realities* (2004) (discussion paper, on file with author); *see also* Dr. Jenö Kaltenbach, *Special Protection Requirements for Minorities: The Parliamentary Commissioner for the Rights of National and Ethnic Minorities of Hungary*, 7 INT'L OMBUDSMAN Y.B. 64, 65 (2003).

[164] *See* Dr. Jorge Luis Maiorano, *Workshop 2: Social Condition*, at 7-9 (2004) (discussion paper, on file with author).

[165] *See* Notes on IOI Quebec Conference, *supra* note 81 (panel session Sept. 7, 2004).

[166] *See id.*

[167] *See* Will Kymlicka, *Western Political Theory and Ethnic Relations in Eastern Europe*, *in* LIBERAL PLURALISM, *supra* note 44, at 66-67.

[168] *See* Emile Francis Short, *The Development and Future of the Ombudsman Concept in Africa*, 5 INT'L OMBUDSMAN Y.B. 56, 57 (2001); Dickson Eyoh, *Liberalization and the Politics of Difference in Cameroon*, *in* ETHNICITY AND DEMOCRACY, *supra* note 160, at 96, 98-99; Peter Ekeh, *Individuals' Basic Security Needs and the Limits of Democracy in Africa*, *in* ETHNICITY AND DEMOCRACY, *supra* note 160, at 22.

[169] *See* EUMC REPORT, *supra* note 97, at 6.

[170] *See* FAREED ZAKARIA, THE FUTURE OF FREEDOM (2003); Papaioannou & Siourounis, *supra* note 6.

If applied uncritically, its principles may place too much credence in a state's liberal rhetoric, mistaking talk for actual devotion to those rights, overestimating the extent to which the state actually protects liberal rights (especially vis-à-vis its minorities), and underestimating the extent to which the state is willing to use those rights as a weapon against minority groups without protecting them itself. In Mexico, case studies of interactions between several indigenous groups and the Mexican government illustrate these concerns. The Mexican government and its national human rights commission have criticized indigenous legal systems for failing to ensure due process guarantees in their internal legal systems.[171] There is no doubt that in fact due process norms are not followed in the communities' courts: they employ models of community judgment and punishment that do not correspond to liberal ideals. But the Tlapanec, Tierra y Libertad and Zinacantán communities object to using the state's legal system not only on grounds of autonomy or of cultural rights, but also because the Mexican government has itself failed to guarantee crucial elements of due process, as when it has systematically failed to provide translators for non-Spanish speaking defendants from their communities.[172] While the Mexican government deploys the language of liberal rights in arguing that indigenous autonomy must be limited, it does so as a rhetorical tactic, inviting us to compare indigenous realities to liberal ideals rather than, as we should, to the realities of state interests.

As well as overestimating the importance of liberal values to the state, democracy theorists may also overestimate the risk of minorities creating "illiberal enclaves" within the state, in the sense of deliberately creating systemic inequalities within their communities. There is an intriguing pattern in the claims filed with certain Canadian regional institutions: while some human rights claims by tribal community members against tribal government institutions did concern systematic gender discrimination or other systemic problems, many complained of simple favoritism, nepotism, or abuse of power of the barest sort. For example, most of the formal complaints re-

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[171] In one case, Mexican authorities objected to the detention of two brothers, Pascual and Pedro Gómez Domingo, by the autonomous authorities of Tierra y Libertad for 7-10 days while investigating complaints that they had illegally cut wood. The government viewed this detention as exceeding human rights norms for such detentions and, more fundamentally, as usurping state authority over criminal law. *See* Shannon Speed & Jane F. Collier, *Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government's Use of Human Rights* 22 HUM. RTS. Q. 877, 897-900 (2000).

[172] *See id*. at 884-85; Martin Hébert & Caroline Aubry, *Linguistic Competence, Cultural Categories and Discrimination: Indigenous People Before the Mexican Court System* (forthcoming) (manuscript at 11).

ceived by the Métis Settlement Ombudsman in 2003 regarding Métis Settlement leadership were such claims of nepotism, conflicts of interest, or other failures of professional conduct.[173] Similarly, while the New Brunswick Ombudsman did receive some complaints of discrimination against tribal leadership, many of its complaints concerned simple abuse of political authority to favor friends and disfavor rivals.[174] While such problems are obviously undesirable, they are neither inherent to minority systems nor different in kind than the problems that arise within liberal democratic systems.

Accordingly, theorists might also be misjudging the extent to which any human rights concerns that arise within minority communities will represent fundamental conflicts between liberal and minority values. Because nepotism and favoritism do not implicate deeply valued community principles or traditional practices, and indeed often violate community values and customs as well as human rights values and customs, these claims are likely to represent, not true clashes of values, but rather, the divergence of political reality from both sets of values, minority and liberal.[175]

This is not to say that there is not a risk of fundamental conflicts between liberal and minority community values, for there are myriad examples of irreducible conflicts, the most commonly noted being entrenched gender discrimination.[176] Canadian cases could prove to be exceptional. But they do raise the intriguing possibility that the traditional focus on liberal rights as the point of conflict between minority groups and the state may tempt us too often to look to fundamental differences between minority and liberal values for the cause of conflicts, rather than considering other possibilities.

Finally, scholars tend to give short shrift to the limits on state power and capacity that make effective enforcement of any rights, liberal or minority, a pipe dream for many new democracies. In some states, government infrastructure has not infiltrated very far beyond the capital city, and even liberal freedoms, well-established in principle, are at the whim of local officials. Whether the state perceives its interests as relating to liberal rights, national

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[173] MÉTIS REPORT, *supra* note 123, at 10.

[174] *See* Williams, *supra* note109, at 55-56.

[175] In a similar vein, Makau wa Mutua argues that human rights violations by African state leaders often are not in pursuit of alternative visions of the good but represent mere abuses of power for power's sake or private benefit. *See* Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Elevation of the Language of Duties*, 35 VA. J. INT'L L. 339, 374 (1995).

[176] *See* KIMM, *supra* note 110, at 18-19 (discussing violence against women in Australian Aboriginal communities). The due process concerns raised in the Mexican examples above also present a frequently noted conflict between liberal and minority community values that might or might not be fundamental and irreducible, depending on the circumstances.

security, or something else entirely, it may not be capable of enforcing them. These strictures apply to national human rights institutions as well: again and again, the institutions in transitioning states lament that they lack the necessary funding and resources to perform their functions.[177]

But the implications of these limits on state resources are more far-reaching than simply a practical obstacle to rights enforcement. In this context, the state may not be in a position to determine the set of rights that will accrue to its minority community at all. Rather, minority communities in some states are de facto governing themselves.[178] Any set of rights supposedly guaranteed by the state may be utterly ephemeral, so that talking about a conflict between liberal rights and minority rights may be an entirely theoretical debate, the human rights equivalent of theological treatises on the number of angels that can dance on the head of a pin.[179]

ii. Categories of Minority Groups

In addition to mischaracterizing the primary interest of the state as a predominantly liberal one, liberal pluralists and communitarians place too much weight on the historicity and authenticity of the group's relation to the state as the basis for the legitimacy of its claims, and as the criterion for distinguishing between groups. In both theory and positive law, recognized minority groups fall into three major categories: indigenous groups who were once hegemonic in their territory and who were displaced by the current state or its predecessor,[180] other "national minority" groups who have

[177] In its review of seventeen African national human rights institutions, Human Rights Watch noted inadequate funding as a major, and at times crippling, problem for half of them, including Benin, Chad, Ghana, Liberia, Malawi, Sierra Leone, South Africa, Uganda, and Zambia. *See, e.g., Malawi: Funding*, *in* AFRICAN HRC REPORT, *supra* note 83, *available at* http://www.hrw.org/reports/2001/africa/malawi/malawi5.html (noting that "[t]he major drawback for the commission is the lack of adequate funding."); *see also* Short, *supra* note 168, at 68 (describing "inadequate resources and lack of training" as the "two main challenges facing ombudsman institutions in Africa" and noting that "even annual budgets approved by parliament for ombudsman offices may not be met during the year.").

[178] This is the case, for example, in some areas of Ethiopia.

[179] *See* Ivan Bizjak, *Special Features of the Role of the Ombudsman in Transition Conditions*, 5 INT'L OMBUDSMAN Y.B. 83, 87 (2001) (listing responses to a survey of ombudsperson's offices in transition countries concerning "special problems" relating to transition).

[180] See discussion regarding the definition of the term "indigenous," *supra* note 10. Kymlicka treats indigenous groups as a subcategory of national minority groups, but I list them here as a separate category because they are treated separately by many other commentators and by international law, and because Kymlicka himself regards indigenous groups as having both unique claims and unique justifications for those claims, as compared to non-indigenous national minorities. *See* Kymlicka, *supra* note 167, at 23-31.

long co-existed within the state,[181] and new immigrant groups.[182] This typology implies that differences in historical relationship are a good descriptor of the group's interests vis-à-vis the state, a correspondingly good predictor of the nature of the group's claims, and a principled basis for different treatment by the state.[183] This basic typology is also expressed in the treaties and constitutional protections for minority groups. Thus law and theory feed on and drive each other in framing these concerns.[184] National human rights institutions also work within some version of this typology, as expressed by, or modified in, their states' constitutions and treaty obligations.[185]

No one has ever claimed that this typology is perfect; advocates have always acknowledged the existence of problem cases on the margins.[186]

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[181] While most writers would include as "national minorities" all long-standing minority groups within the state (as I describe it in the text), some would limit this group only to splinter groups associated with other states, e.g, Greeks but not Kurds in Turkey, and Hungarians but not Silesians in Poland. *See* Aukerman, *supra* note24, at 1027.

[182] This group may be further subdivided, however, to reflect the differing claims of different kinds of immigrants. *See* Kymlicka, *supra* note 160, at 59-61.

[183] In brief, this typology focuses on distinctiveness, authenticity, continuity, and consent as crucial characteristics determining the viability of claims for group recognition and rights. Indigenous groups are expected to present an identity and worldview that is comprehensively different than that of the state and to make claims focused on cultural protection through substantial territorial autonomy and control of traditional lands. The philosophical basis for their claim is supposed to be an authentic and continuous tradition that predates and survives the state and a lack of consent to be governed by the state. Other national minorities are anticipated to present an identity and culture that is distinct from the state's, although not as different as indigenous groups, and to present claims primarily for protection of those distinct characteristics, and perhaps for some degree of territorial autonomy. The justification for their claims is also described as the authenticity and continuity of their distinctive tradition, but it is expected to be more limited in scope and more consonant with the state's own traditions. Immigrants are acknowledged to present identities with a wide range of levels of difference in characteristics, but they are regarded as having abandoned claims to territorial autonomy and to a continuous cultural tradition by virtue of their decisions to migrate to other cultures. For a full introduction to the topic, see TIERNEY, *supra* note 25; TULLY, *supra* note 36; Kymlicka, *supra* note 167.

[184] *See* ANDREAS FØLLESDAL, *Minority Rights: A Liberal Contractualist Case*, *in* DO WE NEED MINORITY RIGHTS? 59-60 (J. Räikka ed., 1996).

[185] In Slovenia, for example, the Human Rights Ombudsman is limited in its efforts to work on behalf of Roma and other minority communities by the constitution's distinction between enumerated national minority groups and other unenumerated groups, who are entitled to lesser protections. *See* HUMAN RIGHTS OMBUDSMAN OF SLOVENIA, ANNUAL REPORT 2004, at 8 (2004), *available at* http://www.varuh-rs.si/fileadmin/user_upload/ pdf/lp/vcp_lp_2004 _eng.pdf.

[186] Some groups do not fit the categories neatly: African-Americans cannot readily be characterized either as national minorities or as immigrants. Other groups fit their category neatly in

Nonetheless, the typology has persisted, perhaps as much because it is effective in limiting the groups entitled to rights on a basis that is difficult for them to manipulate (history), as because it is a useful or descriptive one.[187]

But in new democracies and severely divided societies, the problem cases in this typology move from the margins to center stage: they are the majority of cases instead of the few. In some new democracies the kinds of groups that have always formed democratic theory's problem cases have been and continue to be more numerous and conflict-ridden than those in the established democracies where this typology was developed. As mentioned above, the Hungarian Ombudsman for Ethnic and National Minorities receives most of his claims from the Roma, who have long been considered a "problem case" for the typology, as they are not readily categorized as indigenous, national minorities or immigrants, nor do their claims readily fit the simple categories of non-discrimination, territorial autonomy, or purely cultural rights.[188] The Slovenian Ombudsman has complained vigorously about the inadequacy of this typology for purposes of addressing minority claims in that new state. Slovenia recognizes a certain set of "national minorities" that include neither the Roma community nor "the erased," members of non-Slovenian ethnic groups who have lived in Slovenia since it was part of the former Yugoslavia and whose identities were summarily erased by the government in 1992.[189]

Furthermore, in many African and Asian states, many or all ethnic groups might equally lay claim to national minority or indigenous status.[190] In such states, this characteristic provides no basis for distinguishing between, limiting, or even predicting the kinds of interests that a group will posit in its relationship to the state. Here the typology is simply irrelevant.[191]

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a formal sense, but the reality of their circumstances belies the core characteristics of the category nonetheless; for example, refugees, who have not chosen to abandon their own cultures and therefore do not lend themselves to the argument that they have consented to assimilation by voluntarily migrating.

[187] Mark Rosen also argues that a concern with limiting the number of beneficiaries underlies Kymlicka's distinction between national minorities and other groups in particular. *See* Rosen, *supra* note 18, at 823.

[188] Notes on IOI Quebec Conference, *supra* note 81 (panel session Sept. 7, 2004).

[189] *See* HUMAN RIGHTS OMBUDSMAN OF SLOVENIA, *supra* note 185, at 65-66.

[190] Nigeria, for example, has several hundred ethnic groups that pre-date the colonial period and the modern Nigerian state. *See* SUBERU, *supra* note 12, at 20; *see also* HOROWITZ, *supra* note 12, at 202-16 (concerning the complexity of claims of indigenity in African and Asian contexts).

[191] In her analysis of minority rights in Eastern Europe, Miriam Aukerman suggests that each category is truly descriptive only in a certain area of the world, so that groups in North and

In severely divided societies, there are often groups with unquestionably venerable historicity and authenticity, but who nonetheless present problematic claims. For example, the position of the formerly dominant minorities in Eastern Europe vis-à-vis formerly dominated majorities defies the analysis of liberal and communitarian theory. In Kosovo, the ombudsperson's reference to "the minority" inevitably means the Serbs, with whom the majority Kosovar Albanians were engaged in violent conflict only a few years ago, and who were themselves the majority only a few years ago.[192] Similarly, for the human rights institutions of the Baltic states, the minority is the Russian population, many of whom came to the region during Soviet rule.[193] The claims of once dominant national minorities to protection of the language and culture may be formally identical to those of other national minorities in other states, but the philosophical justifications for those claims and the political and social reaction that the ombudsperson's offices face in addressing them are quite different. For these severely and, at times, violently divided societies, the question is not whether these groups have maintained authentic and continuous traditions, but whether traditions that have been forcibly imposed by one group upon another can or should be secured thereafter.

Furthermore, it appears that the number of problem cases is increasing. Ethnic identities persist even as internal cultural traditions are rapidly changing and being reshaped by interaction with other groups and with international influences.[194] This phenomenon is of course not unique to severely divided societies. In Canada, the Métis have long presented a "problem case" in that their ethnic heritage is a mix of indigenous and immigrant peoples. Recently they have begun developing joint forms of governance and adjudication in cooperation with the regional Alberta government, based in part on their own customs and in part on the customs of the state.[195] In Mexico, indigenous groups have formed new local legal and political systems that mix indigenous and non-indigenous forms of government.[196] In Europe, political lines are shifting, and ombudspersons there are increasingly receiving claims from foreigners and migrants seeking to define and make use of changes in

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South America and Oceania most neatly fit the indigenous category, which is progressively less useful in Europe, Asia and Africa. *See, e.g.*, Aukerman, *supra* note 24, at 1044-46.

[192] *See* KOSOVO OMBUDSMAN, ANNUAL REPORT 2003 (on file with author).

[193] *See* ULZIIBAYAR VANGANSUREN, THE INSTITUTION OF THE OMBUDSMAN IN FORMER COMMUNIST COUNTRIES (2002).

[194] *See generally*, HOROWITZ, *supra* note 12.

[195] *See* MÉTIS REPORT, *supra* note 123, at 1; Métis Settlements General Council website, *supra* note 123; BELL, *supra* note123.

[196] *See* Speed & Collier, *supra* note 171, at 884-85; Hébert & Aubry, *supra* note 172, at 1-3.

their status as the EU consolidates, leaving them no longer immigrants, but not national minorities or indigenous groups either.[197] In complexly divided societies with hundreds of ethnic groups, and in transitioning states engaged in rapid processes of social and political change, these blended peoples and systems are becoming the norm, not the exception.

Wherever groups reshape themselves and their traditions but nonetheless maintain some separate ethnic identity, they pose challenges not just to the typology, but to the fundamental concepts of democratic theory. For some of these groups defy easy categorization precisely because their characteristics and concerns belie the philosophical justifications that underlie those categories. In such cases, it is hazardous to rely on authenticity or the historical relationship of the group to the state to define the legitimacy or nature of its claims.

iii. Collective Claims

Traditionally, even those minority rights that are exercised together with others, such as use of language or religion, have been characterized as individual rights held by members of the group. However, some collective group interests, such as claims for socio-economic equity or inter-community disputes, are particularly ill-matched to individual rights frameworks.[198] Faced with these divergences between rights and interests, communities and national human rights institutions do not passively accept and apply the rights structures they are presented with by the state and international institutions. Rather, they are engaged in an active process of characterizing and recharacterizing minority claims in ways that relate not only to the letter of the law, but also to their perceptions of their mutual and conflicting interests.

One way that this occurs is that national human rights institutions and minority groups at times choose to emphasize the individual, liberal aspects of minority claims and minimize the socio-economic aspects, characterizing the claims in ways that bring them within their mandate and to minimize any

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[197] *See* Gunnarsdottir & Berggren interview, *supra* note 118.

[198] As discussed above in part I, while some socio-economic and equity claims are acknowledged in newer minority treaties like ILO Convention No. 169 and, to a lesser extent, the Framework Convention for Protection of National Minorities, these conventions have been ratified by only a limited number of states, and the Framework Convention's protections, at least, accrue to individuals rather than groups. Apart from these conventions, socio-economic rights, equity claims, and collective claims are far less likely than discrimination claims or claims for individual political and civil rights to be protected under national law or to be found justiciable in court.

conflicts between the minority claims and liberal rights.[199] The New Brunswick Human Rights Commission in Canada, for example, has a mandate that is limited to discrimination claims, but has received claims from a Native American community concerning socio-economic inequities in living conditions and economic status, claims that the community regards as representing collective, systemic experiences of discrimination.[200] Rather than treating them as such, the institution has recharacterized some such claims as individual ones. The community, however, became reluctant to pursue claims through the commission in part because they did not view investigating and remedying their individual claims of discrimination against other individuals as addressing the systemic problems they observed:

> [C]ases of discrimination [are] treated as isolated events and removed from the economic and social causes of inequity. As Aboriginal critics observe, the discrimination experienced by Native people is by its nature *social*, and is based on collective identities and status. Reluctance to pursue the occurrence of discrimination in broader social contexts owing to limited resources, narrow legislative mandates or lack of organization will contribute to the perception that human rights codes are impotent measures for achieving social justice.[201]

Particularly where inter-ethnic socio-economic stratification is acute, minority groups may well regard their concerns not as either cultural or liberal, but rather as a demand for equity, for a share of the tangible goods of society.[202] Here the commission's narrowed approach could bring particular claims within its mandate, but only at the cost of essentially mischaracteriz-

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[199] This is the case in the theoretical literature as well. *See* KYMLICKA, *supra* note 19; JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996).

[200] *See* Williams, *supra* note109, at 51-77. That the gap remains unmitigated is reflected in a more tangible sense as well: the harm of collective socio-economic degradation cannot be adequately remedied through the damages associated with an individual discrimination claim.

[201] *Id.* at 126.

[202] Interviewing women in Nigeria on behalf of the World Bank, Leslye Obioria recounts that:

> [Many] seemed confounded by the conceptualization of gender *equality* in human rights discourses. . . . they extolled *respect* as a more realistic paradigm for ordering specific social relations. . . . educated, elite, and urban women were more inclined to subscribe to an equality-based discourse, while women in rural areas had more of a tendency to lament the paucity of resources. . . . Arguably, the rural perspective suggests that it may be somewhat facile to quarrel over who does the dishes after dinner when dinner is a fast-disappearing routine in many rural households.

Obiora, *supra* note 159, at 652.

ing them. This narrowed focus could not close the more fundamental gap between the state's way of framing the harm for which minorities are entitled to redress, discrimination, and the community's perception of what it had been denied by the state, economic and social equity.

In this regard the newer multilateral treaties that require the state to take account of equity and encourage community consultation and participation in governance seem to better capture claims such as those described by the New Brunswick community. However, the experiences of other national human rights institutions suggests that, while characterizing collective minority interests as rights may be feasible, it may not be a productive way of resolving their claims.

In particular, some observers have criticized the application of minority group rights to address disputes between communities. Dominic Bryan suggests that in Northern Ireland, the introduction of human rights standards into inter-communal disputes has been counterproductive. The parades that are a tradition of both the Protestant and Catholic communities frequently present a flashpoint for conflict. While neither community originally construed its concerns as a human rights claim, the National Human Rights Commission participated in redefining standards for parades, introducing both individual and minority rights standards in addition to traditional security and stability concerns.[203] But neither individual rights to formal equality nor group rights to substantive equity provide criteria for choosing between "the rights of Protestant Orangemen to follow their 'traditional' route and the rights of Catholic Nationalist residents who feel threatened by what they argue is the intolerance and bigotry of the Orangemen."[204] Likewise, there are equivalent cultural rights present on both sides of the dispute.

Bryan argues that human rights standards are effective in providing guidelines for state behavior vis-à-vis minority groups, but not in adjudicating disputes between communities with similar rights and concerns.[205] Rather than providing a basis for balancing the parties' respective interests and concerns, the introduction of human rights norms has merely encouraged government agencies to "couch . . . their decision in the language of rights" all the while "adopting a standardized boilerplate format for their determinations."[206] In this case at least, the addition of human rights standards has merely provided another gloss on the situation, rather than a determinative basis for distinguishing the parties' interests or deciding between them.

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[203] *See* Bryan, *supra* note 126, at 241-42.

[204] *Id*. at 248.

[205] *Id*. at 249.

[206] *Id.*

Some national human rights institutions seem to have deliberately chosen not to deploy the applicable framework of minority rights in addressing inter-ethnic and socio-economic complaints, choosing instead to frame a dispute in other terms. As described above, the Nigerian Public Complaints Commission has heard at least one complaint regarding employment preferences for persons who are not indigenous to the local area, but the discussion of this complaint in the Commission's report is rather opaque. It is only with the knowledge of bitter and sometimes violent conflict between "indigenous" ethnic Christian minorities and the "settler" migratory Muslim Hausa-Fulani majority, as well as other longstanding ethnic conflicts, that this complaint of favoritism comes into relief as being one that likely concerns inter-ethnic discrimination.[207] Similarly, the Nigerian Human Rights Commission's 1999 investigation of "human rights issues arising in connection with unrest in the oil producing [Niger Delta] region"[208] may well amount to investigation of inter-ethnic violence over socio-economic inequities and competing claims to resources between the "desperately poor" Ogoni, Igaw, and other ethnic groups of this region, which produces 90% of Nigeria's oil revenues, and the dominant Igbo, Yoruba, and Hausa-Rulani groups in the central government.[209]

Certainly, the Nigerian institutions' domestic constituency is well aware of any possible component of inter-ethnic discrimination or conflict posed by these complaints. In situations of intense ethnic division and conflict, even superficially neutral situations may be understood in ethnic terms. An institution's list of regional offices could signal sympathy with the ethnic groups dominant in those areas; attacks on corruption in government could amount to opposition to clientelism within a dominant ethnic group. In these circumstances, institutions need not identify scenarios as "ethnic" or "minority" related for them to be understood as such, at least by those involved. Some institutions view emphasizing ethnic or minority roles in such circumstances as perverse or counterproductive. The Human Rights Ombudsman of Bosnia-Herzegovina, for example, issued a policy document arguing that the focus on ethnicity to the exclusion of other identities was "limiting and

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[207] *Compare* NIGERIAN PUBLIC COMPLAINTS COMM'N, 2003 ANNUAL REPORT, *supra* note 83, *with* MONTY G. MARSHALL & KEITH JAGGERS, CTR. FOR INT'L DEV. & CONFLICT MGMT., POLITY IV COUNTRY REPORT 2003: NIGERIA, http://www.cidcm.umd.edu/inscr/polity/Nig1.htm (last visited Feb. 26, 2006) [hereinafter POLITY IV NIGERIA REPORT].

[208] *See Nigeria Report*, *in* AFRICAN HRC REPORT, *supra* note 83, *available at* http://www.hrw.org/reports/2001/africa/nigeria/nigeria3.html.

[209] *See* POLITY IV NIGERIA REPORT, *supra* note 207; MINORITIES AT RISK PROJECT, CTR. FOR INT'L DEV. AND CONFLICT MGMT., ASSESSMENT FOR OGANI IN NIGERIA, http://www.cidcm.umd.edu/inscr/mar/assessment.asp?groupId=47504 (last visited Feb. 26, 2006).

hampering progress and prosperity," and that "many individuals and groups . . . would prefer not to have to identify themselves as Bosnjaks or Croats or Serbs."[210]

These instances suggest that current minority rights frameworks are limited in their capacity to address collective concerns and inter-community conflicts, even if the involved communities and institutions deliberately reframe those concerns. In the Canadian and Irish experiences, the effectiveness of the available minority rights framework depended on how well it reflected the parties' perceptions of the interests at stake and whether it presented criteria or principles that are determinative of those interests, while the Nigerian and Bosnian approaches suggest that the introduction of highly contested ethnic categories is itself problematic.

As suggested above, democratic theories developed in well-established liberal democracies may emphasize factors that are tangential in severely divided or transitioning societies, such as the historicity of a group's claim or the potential conflict it presents with liberal values that the state itself may not effectively enforce. In situations of inter-community conflict, particularly where all the involved communities are "minorities" or "indigenous" with equivalent claims of rights, these categories and the associated rights do not present a means of distinguishing or weighing the claims presented.

But the interactions of the communities and institutions in these examples suggest something more, as well. In each of these cases, communities and national human rights institutions consciously exploited the categories of minority and liberal rights to frame the relevant interests as either within or without the available rights. In so doing, they were not merely passive recipients of rights that were pre-determined by the nature of community identities or imposed by the good graces of the state. Rather, they participated actively in determining what would be conceptualized as minority rights. While these rights may be fixed on paper, in reality they seem to be relational, shaped by state and community interests, by the divergences between those interests, and by the dynamics of the relationships amongst communities and between communities and the state.

iv. Indigenous Systems

Because indigenous groups present the most compelling case for alternatives to liberalism according to the categories employed by democracy

[210] THE HUMAN RIGHTS OMBUDSMAN OF BOSNIA AND HERZEGOVINA, ETHNIC EQUALITY AND EQUAL OPPORTUNITIES IN BAH, http://www.ohro.ba/articles/policy.php?id=11 (last visited Feb. 27, 2006).

theorists, one of the classic minority rights questions is how to accommodate indigenous interests in self-definition and self-governance with liberal ideals when there is a risk of conflict between the two. National human rights institutions' experiences in working with autonomous indigenous legal systems reveal the complexities that arise when they are confronted with this tension in practice. But while liberal pluralists and communitarians struggle over the proper balance between liberal and minority rights, national human rights institutions typically seem to find the matter unproblematic, treating deviations from liberal norms as unacceptable irrespective of their significance within the community's system.

It is important to acknowledge at the outset that indigenous communities and cultures themselves are not singular but multiple, and differ amongst each other as to values and practices as much as any one of them does to state structures. Bedouin blood feuds, for example, have little in common with Native American sentencing circles.[211] Indigenous cultures are not static but dynamic, and not necessarily isolationist but often interactive. Indeed, community laws and legal systems may not be ancient, customary, or based in tradition. The image (and even to some extent the legal definition) of indigenous peoples and their practices includes all of these elements, and indigenous communities themselves may call on tradition or ancient origin as legitimizing their laws and practices, even when those laws and practices are of recent vintage. Both the state and the community may make use of this notion of tradition as a basis for legitimacy and recognition. Therefore, it is also important to recognize the tension between indigenous laws and state laws is not necessarily one between old and new, between customary and written, or between traditional and modern, but may be far more complex, reflecting the dynamic interactions between groups and systems.[212] In this sense, indigenous groups increasingly pose problem cases of the sort discussed in part III, above. The Métis in Canada, as well as the Tlapanec and other indigenous peoples in Mexico, have formed legal and political systems that are neither strictly indigenous nor defined by the state, but a deliberate blending of state and community ideals and practices.[213]

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[211] Likewise, as discussed above, the state structures and cultures in which such communities act range from liberal democracies to authoritarian governments to failed states, and from states with strong national identities to sharply divided states to states in which disparate cultures rarely interact. Thus, it would be misleading to speak of conflicts between the state and indigenous cultures as if all such conflicts were of the same nature.

[212] *See* TULLY, *supra* note 36, at 137; Ibhawoh, *supra* note 85, at 841; Hébert & Aubry, *supra* note 172.

[213] *See* BELL, *supra* note 123; Hébert & Aubry, *supra* note 172; Speed & Collier, *supra* note 171.

There is also considerable variation in the level of mutual recognition and interactivity between indigenous and state systems. Some states permit their courts to recognize indigenous communities' legal decisions or apply some version of the community's laws. So, for example, the South African constitution affirms the legitimacy of tribal institutions and laws, the Ethiopian constitution permits the state to recognize religious courts, and the United States recognizes the authority of tribal courts on Native American reservations.[214] In defining the relationship between recognized indigenous systems and human rights norms, some constitutions expressly provide that indigenous practices must comply with constitutional norms, while others, like Zimbabwe's, expressly exempt indigenous communities' traditional practices from certain constitutional norms such as anti-discrimination rights.[215] Where the constitution is silent or where indigenous practices are themselves legitimized by the constitution, there is often ambiguity about precedence. In Ethiopia, the constitution recognizes the rights of its "Nations, Nationalities and Peoples" as well as a range of individual rights and does not indicate which should prevail in case of a conflict.[216]

Furthermore, it is not just state policies toward indigenous legal systems that vary; the extent to which indigenous systems accept or reject the state's system, and even the extent to which they take account of it, also varies substantially. Community institutions may apply customary, religious, or other community-defined laws in place of, or in addition to, formal state law. Some communities maintain jurisdiction over family and minor civil and criminal matters while ceding larger cases to the state.[217] Others claim jurisdiction over all issues, big or small.[218] Indigenous communities may govern areas that the state considers private, or vice versa.[219]

In such contexts, minority group concerns will first be defined within the minority community itself in the context of the community's self-defined

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[214] *See* S. AFR. CONST.; ETH. CONST.; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[215] *See* ZIMB. CONST. art. 23(3); *see also* Ibhawoh, *supra* note 85, at 843. Within the United States, Supreme Court decisions have granted partial but not absolute sovereignty to tribal governments, and that sovereignty has at times been found to outweigh constitutional interests such as equal protection. *See* Thomas Biolsi, *Bringing the Law Back in: Legal Rights and the Regulation of Indian-White Relations on Rosebud Reservation,* 36 CURRENT ANTHROPOLOGY 543, 545 (1995).

[216] *See* ETH. CONST. art. 39. *See* Ibhawoh, *supra* note 85, at 848 (Ghana and Uganda).

[217] *See* Ibhawoh, *supra* note 85, at 846.

[218] *See* Hébert & Aubry, *supra* note 172 (Tlapanec community in Mexico).

[219] *See* Mark D. Rosen, *Our Non-Uniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community,* 77 TEX. L. REV. 1129, 1157 (1999) (discussing practice of "welfare checks" on U.S. Native American reservations).

political and legal system. Similarly, state concerns with community practices will confront a separate legal and political system operating under different norms and conceiving of the conflict in alternative legal and political terms. The systems may differ not only in their substantive rules, but also in their processes, and even in the underlying assumptions, cultural values, and symbols that each system deploys.[220]

Several cases illustrate the role that national human rights institutions have tended to play in their interactions with indigenous systems. In the Karamoja region in Uganda, local intra-clan disputes over cattle raiding have escalated into widespread violence. This violence has been exacerbated by the operation of parallel community and state justice systems.[221] Here, the local communities' system centers on direct compensation of the victim by the perpetrator, rather than on incarceration or other punishments unrelated to the victim.[222] The Human Rights Commission regards this system as functionally granting impunity to the rich and does not consider it to be an effective system of criminal justice at all, asserting that a failure to pursue criminal charges in state court after compensation has been paid amounts to leaving people "above the criminal justice system."[223] For their part, the Karamojong prefer not to cooperate with the police and state justice system for reciprocal reasons: they are not satisfied by its substantive and procedural justice values, which have "failed to incorporate the traditional mechanism of detection and punishment of crime."[224]

As the inter-ethnic violence in the area has escalated, so has state involvement in the form of army intervention, arrests, and efforts by the Human Rights Commission to persuade the parties to disarm. The Commission characterizes the violence in the area as itself being "human rights abuses that invariably . . . draw[] in [the state] to avert, mitigate, or deal with a situation."[225] It also describes the secondary conflict between the state and local legal systems as one centered in human rights. In so doing, however, while it criticizes failures and limitations in the state system, it does not take

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[220] *See* KIMM, *supra* note 110, at 91-92.

[221] UGANDA HUMAN RIGHTS COMM'N, *supra* note 127, ¶ 2.2.2.1, at 19.

[222] As the core dispute is over cattle raiding, it is striking that the system of compensation itself relies on cattle as the mode of compensation as well, suggesting that the cattle represent in this context some return of status and dignity as well as their economic worth: "In a case of murder, the culprit is fined 60 head of cattle and is supposed to undergo cleansing rituals." *Id.* ¶ 5.2.5, at 41.

[223] *Id.* ¶ 5.2.6, at 41.

[224] The "traditional justice system is based on the value system of the Karamojong." *Id.* ¶ 2.2.2.1, at 19.

[225] *Id.* ¶ 2.2.2.2, at 19-20.

account of minority rights or the local interest in maintaining their own system as a legitimate concern. Instead, the Commission describes the situation as a "culture of impunity" in which the Karamajong have taken the law into their own hands, driven by their misunderstanding of essential human rights protection in the state system and fears of retribution for participation in it.[226] Eventually, faced with the stalling of its disarmament program during a period of decreased security in the region, unable or unwilling to engage with the indigenous justice system, and likewise unable to persuade the Karamojong to participate in the state system, the Commission saw its peacebuilding efforts collapse in a series of violent raids and was forced to withdraw.[227]

Case studies of the Tlapanec, Tierra y Libertad, and Zincantan communities mentioned above also portray a human rights commission that has taken a narrow view of the rights at stake. Here, the communities have initiated their own parallel judicial systems, which the Mexican government views as illegitimate and as a challenge to its sovereignty.[228]

Human rights claims are present on all sides of these interactions. The Tlapanec and other communities developed these judicial systems in response to inadequate police attention and alien legal standards, processes, values, and languages within the state system. They allege violations of their due process rights by the state, because state trials are conducted in Spanish and they are not provided with translators. They also claim violations of their community justice norms: if an accused is imprisoned during vital agricultural seasons, not only the defendant but his family will suffer as a result. Finally, they assert that community rights to autonomy and self-determination authorize them to develop their own system. The Mexican government, in contrast, contends that the communities' legal processes violates due process norms by, for example, failing to provide defendants with counsel and basic rights such as non-self-incrimination, and that the exercise of criminal jurisdiction exceeds the scope of the community's authority.[229]

The response of the National Commission for Human Rights has ranged from non-involvement to direct criticism. In the Zincantan and Tierra y Libertad situations, it has criticized the indigenous systems for failing to adequately protect rights, while it apparently has had no involvement in the Tlapanec community. Like the Ugandan Commission, it has also criticized the government for failing to maintain order and making arbitrary arrests in indigenous communities, but has treated these lapses as a separate matter from

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[226] *Id.* ¶ 14.4.2, at 116-17.

[227] *See id.*

[228] *See* Hébert & Aubry, *supra* note 172, at 11; Speed & Collier, *supra* note 171.

[229] Speed & Collier, *supra* note 171.

the legitimacy of the communities' systems.[230]

Liberals, liberal pluralists, and communitarians characterize indigenous communities as presenting a subtle problem of balancing liberal rights with conflicting minority interests in norms of culture and autonomy. In developing and using their systems in preference to the state systems, indigenous communities themselves express the predicted concerns with differences in community and state values and justice norms. They also accuse the state of violations not only of their community norms, but also of the state's own liberal protections. But national human rights institutions do not seem to be engaging in an effort to weigh or analyze indigenous communities' rights to maintain their own systems of self-governance; rather, in their interactions with indigenous systems, they are acting to defend purely liberal interests.[231]

IV. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

What is most striking about the work of national human rights institutions with minority groups is the limits of that work: the limits of the programs that exist in institutions now, the limits of the legal constructs that inform them, and the limits of institutional reports on the concerns of the minority groups that come to them. What national human rights institutions have reported is enough to suggest that democracy theory and the minority rights available in positive law do not adequately account for some important minority concerns. It also indicates that these institutions could serve as an important forum for developing an understanding of minority claims and for

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[230] Mexico's National Commission on Human Rights has an outreach program for indigenous groups, and its constitution was amended in the 1990s to introduce indigenous rights. *See* Notes on IOI Quebec Conference, *supra* note 81; Madrazo, *supra* note 105, at 337, 338, 352. The Commission also has studied social economic and political conditions through its "Program for Natives." Magdalena Aguilar Alvarez, *The Teaching, Learning and Training Process for Human Rights*, *in* THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 67. The Commission reports having investigated and issued a recommendation to the Governor of Oaxaca in response to complaints from indigenous peoples, including complaints that indigenous people had not been arrested without being informed of the reason, denied a translator, charged with crimes they had not committed, arrested and detained arbitrarily, and violently attacked by police. *See Recommendations*, NEWSLETTER (National Commission for Human Rights, Mexico), Apr. 2005, at 3. In similar cases, other indigenous groups have complained either of being ignored by the Commission or of being criticized by it. *See* ICHRP REPORT, *supra* note 2; Speed & Collier, *supra* note 171.

[231] In this respect the warning issued by Lisa Statt Foy concerning the wisdom of introducing the ombudsman institution into the First Nations system is apropos: "the essential characteristics of the ombudsman institution . . . are not culturally-neutral but reflect western values and philosophy . . . . [and] may run contrary to a First Nation's values, beliefs and traditional practices." *See* Foy, *supra* note 157, at 78.

addressing at least some of the unconventional claims they raise. Finally, national human rights institutions offer an opportunity to assess the efficacy of theorists and regional treaties' calls for dialogue between minority groups and the state, as put into practice on a day to day level.

A. Identifying and Incorporating Minority Claims

In particular, the gaps between experience and theory discussed above suggest that national human rights institutions could play a more systematic role in developing a better understanding of minority concerns and principles for addressing them. As illustrated above, when national human rights institutions are accessible to minority groups and receptive to their claims, they obtain a wealth of direct information about the groups' interests and concerns, including some that fall outside the typical understandings of minority group rights. However, this information is little collected or considered, and so it has not been taken into account in formulating policy or theory.[232]

By consistently identifying and discussing minority concerns in their claims handling, independent investigations, and reports, national human rights institutions could make this information available. Some institutions are already doing this: the Slovenian Human Rights Ombudsman, for example, has devoted a considerable portion of its annual reports to extensive discussions of the concerns of minority groups. It has examined not only the legally protected rights of national minorities, but also the neglected interests of the Roma and the "erased" members of certain other minorities, thereby exposing for consideration the minority concerns that still lie outside Slovenia's legal framework of minority rights.[233]

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[232] The exception, as usual, is Europe: the European Centre for Minority Issues has a project on ombudspersons and minority rights that has produced several reports on the work of ombudspersons' offices in Europe and the role of ombudspersons in addressing minority rights in the European context. *See* Lloydd & Morawa, *supra* note 67; EUROPEAN CTR. FOR MINORITY ISSUES, MINORITY OMBUDSPERSON PROJECT NETWORK CONFERENCE REPORT (2003), http://www.ecmi.de/doc/ombudsman/download/Berlin%20Conference%20Report.pdf [hereinafter NETWORK CONFERENCE REPORT]. The European Commission on Racism and Intolerance has also studied the European entities established to comply with EC Directive 200/43/EC. *See* European Commission on Racism and Intolerance, *Examples of Good Practices: Specialized Bodies to Combat Racism, Xenophobia, Anti-Semitism and Intolerance at National Level* (June 13, 1997), *available at* http://www.coe.int/T/e/human_rights/ecri/4-Publications/#P675_9404 (follow "Recommendation N° 2" hyperlink).

[233] *See* HUMAN RIGHTS OMBUDSMAN OF SLOVENIA, *supra* note 185.

i. Good Offices

There is one institutional practice in particular that could serve as a resource for discovering and understanding minority concerns that are not currently addressed in minority rights law and theory: good offices. "Good offices" refers to a national human rights institution's use of its contacts, influence, and mediation experience to conciliate a claim that does not actually fall within the institution's formal jurisdiction.[234] Good offices practices vary considerably between institutions: some institutions will offer to conciliate virtually any claim that comes in the door, whereas others stick closely to the terms of their mandate.[235] In New Brunswick, for example, where the human rights commission's mandate is narrowly limited to discrimination and to events on non-tribal lands, one-third of the cases brought were good offices cases, including complaints of political favoritism and discrimination against tribal leaders, as well as derogatory comments by public officials and the media, and other incidents falling outside the commission's strictly defined jurisdiction.[236] The commission in Ghana also encourages its local offices to accept good offices cases.[237] Where institutions do offer good offices services, a systematic evaluation of those cases might yield valuable information about local concerns.

ii. Best Practices

In the same vein, because the resolutions reached by national human rights institutions are neither binding nor precedent-creating, they present an opportunity for experimentation with a range of solutions for minority group problems and for development of "best practices" guidelines. Such guidelines offer a way of organizing, presenting, and comparing institutions' successful experiences in working with minority groups. The European Commission on Racism and Intolerance has developed a set of good practices guidelines for specialized institutions focused solely on racism and minority interests, but it reviews the practices only of European entities.[238] Because

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[234] If informal conciliation does not resolve the claim, than the institution must either step aside or refer the claim to the agency that does have jurisdiction: informal efforts do not obligate the institution to take further formal steps to follow up on the claim, and indeed, by the terms of its mandate it could not do so. *See* Williams, *supra* note 109, at 51-57.

[235] *See* ICHRP REPORT, *supra* note 2, at 1-2.

[236] *See* Williams, *supra* note 109, at 51-57.

[237] *See id*. at 14-15.

[238] *See* European Commission on Racism and Intolerance report, *supra* note 232; *see also* EUROPEAN CTR. FOR MINORITY ISSUES, OMBUDSMAN INSTITUTIONS AND MINORITY ISSUES: A GUIDE TO GOOD PRACTICE (Marnie Lloydd ed., 2005), *available at* http://www.ecmi.de/doc/

minority interests are, as discussed above, highly various and contextual, experience-sharing amongst national, regional, and local contexts is crucial. As with the good offices cases, information on resolution of minority claims, and especially on efforts at systematic reform, ought to be collected and made available in a systematic way. In so doing, national human rights institutions could serve as a laboratory for ideas that might ultimately percolate up to the national level or be adopted by institutions in other regions.

iii. Addressing Claims

In addition, national human rights institutions are well-designed to address at least some of the minority group concerns they have uncovered that do not fit the predicted mold. For example, Bruce Berman and others have suggested that one of the fundamental obstacles to the development of effective democratic governance and inter-ethnic stability in Africa is that government bureaucracy functions according to destructive clientelism, defined along ethnic lines.[239] Similarly, in the experience of ombudspersons who served indigenous communities, a large percentage of the complaints brought against community leadership concerned conflicts of interest and nepotism.[240] The ombudsperson, with her mandate of rooting out government maladministration and favoritism of every kind, is ideally suited to address such concerns.

However, the capacity of individual national human rights institutions to address the disparate demands of minority communities discussed above depends to a large degree on their similarly disparate structures and legal mandates.[241] While ombudspersons may be well suited to addressing corruption and clientelism, other claims, such as those relating to economic and social inequalities or land rights, for example, might be beyond their legal jurisdiction and institutional expertise. While national human rights institutions may prove capable of systematically exposing unrecognized minority concerns, no small number of these may prove to be issues that they

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ombudsman/download/guide_uk.pdf.

[239] [T]he state bureaucracy is a realm of nepotistic appropriation of office, ethnically biased distribution of patronage, extortion of bribes, and kick-backs and direct theft of public revenues. . . . [D]emocratic reforms in Africa cannot succeed, the bonds of ethnic communities cannot significantly relax and a civic politics of broader ties of cooperation cannot develop without a corresponding transformation of the bureaucratic apparatus.

Bruce Berman, *Ethnicity, Bureaucracy & Democracy: The Politics of Trust*, *in* ETHNICITY AND DEMOCRACY, *supra* note 160, at 38, 39.

[240] *See* discussion *supra* section III, A.

[241] *See* Kaltenbach, *supra* note 163, at 64-67.

will not then have the capacity to address themselves.

B. Dialogue and Consultation

National human rights institutions are also playing a role promoted by theorists and demanded by minority rights treaties, but left largely undefined by them: that of a forum for dialogue and consultation between minority groups and the state.

i. In Theory and Practice

On a theoretical level, dialogue seems to mean all things to all people. Democracy theorists envision a fundamental constitutional negotiation of the essential nature of the relationship between minority groups and the state, along the lines of James Tully's "post-imperial dialogue on the just constitution of culturally diverse societies"[242] Others propose dialogue for the purpose of nation-building in severely divided societies. Adeno Addis suggests that "a genuine sense of shared identity, social integration, in multicultural and multiethnic societies will develop only through a process where minorities and majorities are linked in institutional dialogue."[243] Similarly, Leslye Obiora proposes that "'dialogic democracy'—recognition of the authenticity of the other, whose views and ideas one is prepared to listen to and debate, as a mutual process—is the only alternative to violence in many areas of the social order where disengagement is no longer a feasible option."[244] But these theorists do not suggest how these dialogues might take place, nor what particular characteristics would be necessary to provide an adequate forum for their envisioned dialogues.[245]

Certainly national human rights institutions present a forum for dialogue of some sort between minority groups and the state over human rights values. Their current reporting practices establish a dialogue of sorts between

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[242] TULLY, *supra* note 36, at 24; *see also* KYMLICKA, *supra* note 19, at 171 (Liberal states' fundamental "[r]elations between national groups should be determined by dialogue" rather than by forcible imposition of liberal values.).

[243] Adeno Addis, *On Human Diversity and the Limits of Toleration*, *in* ETHNICITY AND GROUP RIGHTS, *supra* note 32, at 30.

[244] Obiora, *supra* note 159, at 660 (quoting Anthony Giddens, *Living in Post-traditional Society*, *in Reflexive Modernization* 56, 106 (Ulrich Beck et al. eds., 1994)); *see also* Ibhawoh, *supra* note 85, at 854.

[245] There are naysayers as well: Iris Young contends that multicultural participants in a dialogue cannot reach mutual understanding, while Chandran Kukathas expresses the concern that they will understand each other, and that understanding will breed dislike and conflict. *See* TULLY, *supra* note 36, at 132-33 (quoting Young); KUKATHAS, *supra* note 27, at 33.

their informants (whether those be individuals, NGOs, or other groups), and the government or international bodies that receive the reports and respond to or comment on them. If they were to establish a process of systematically collecting and considering the information they receive from minority claimants, as proposed above, that process itself could become a multi-layered dialogue, moving from the local level to the national and back again, and accreting mutual understanding over time.

There are also a number of ways that national human rights institutions already facilitate dialogue in a more immediate and direct sense. The Commission Nationale des Droits de l'Homme in Senegal, for example, does not carry out independent investigations, but rather, serves as a conduit for communication between international, national, and local, as well as governmental and non-governmental actors: a "forum within which nongovernmental organizations can . . . draw the attention of the authorities to possible violations of human rights . . . an intermediary between the civil society and officialdom," and a means to use "international pressure . . . to reinforce[e] the power of local initiative."[246] Other institutions play the role of intermediary in particular situations, either by formally mediating individual complaints on a regular basis, as does the Vanuatu Ombudsman, or by operating as an informal conciliator or go-between from time to time, as the Fiji Ombudsman did for some period. [247] The investigation and reporting, education and promotion activities that are at the core of most national human rights institutions' functions also represent a form of dialogue between the institution and its constituents.

But can the sort of dialogue carried on in national human rights institutions achieve such lofty goals as nation-building, social integration, and constitutional negotiation of the sort envisioned by theorists? The terms of national human rights institutions' interactions with minority groups are to some extent already set by external influences: the legal frameworks for their offices, and the constraints of institutional competence and credibility. A national human rights institution's mandate and its powers of investigation and reporting are directed more toward enforcing known and understood legal

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[246] *See Senegal Report, in* AFRICAN HRC REPORT, *supra* note 83, *available at* http://www.hrw.org/reports/2001/africa/senegal/senegal.html. Djibouti's Mediateur de la Republique reportedly plays a similar role. *See* Mediateur de la Republique website, http://www.mediateur.dj/discours.htm (last visited Feb. 27, 2006).

[247] *See* Hill, *supra* note 74, at 149. A number of other institutions report mediating claims, either formally or through an informal process of negotiation, including Cameroon's National Commission for Human Rights and Freedoms and Ghana's Commission on Human Rights and Administrative Justice.

rights than toward defining those rights in the first place.[248]

Where the basis for minority rights is limited, where the balance between minority rights, individual rights and state values is a hotly debated political question, and especially where there is of yet no established legal framework for striking this balance, an attempt to define and determine these issues independently takes the institution well outside its usual activities and threatens to strain its credibility and legitimacy both with the government and with the public.[249] In new democracies, where rights are as yet ill-defined, national human rights institutions may find themselves playing this role.[250] However, it is not clear that these institutions will, except at times by happenstance, have the legal and political resources to do so effectively. Furthermore, while the institution may have the authority to recommend change, it does not have the authority itself to enact that change either upon the law or the essential political structure of the state, and so it is not in a position to negotiate fundamental constitutional change of the sort envisioned by many democracy theorists for cross-cultural dialogue. Instead, where such a negotiation is taking place, a national human rights institution might more effectively contribute by observing, commenting on, and publicizing the proceedings than by participating itself.

ii. With Indigenous Systems

Working with indigenous legal systems presents an additional layer of complexity. In interacting with indigenous legal systems, the Ugandan and Mexican human rights commissions found themselves confronting different processes, different punishments, and fundamentally different conceptions of justice. Neither institution tried to participate in the indigenous system or to make use of its terms of reference; rather, the indigenous system's concerns were considered solely in terms of the rights, interests, and processes available in the state system. Similarly, the New Brunswick Commission in its work with local Native American communities employed its own definition

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[248] *See* Kaltenbach, *supra* note 163, at 65.

> [A]n ombudsman may protect only what is guaranteed by the legal system, but no ombudsman may protect something that does not exist. The rights of minorities were, for quite some time, not included in the list of internationally recognised human rights. This situation has changed materially only during the recent decade but the emancipation of the rights of minorities cannot be considered as fully resolved, even today.

Id.

[249] *See* Notes on IOI Quebec Conference, *supra* note 81.

[250] *See* NETWORK CONFERENCE REPORT, *supra* note 232, at 19-20.

of discrimination and equality, not the community's.

Can there be a meaningful or effective dialogue between indigenous communities and the state if the indigenous community must always frame its interests in the state's terms and pursue them through state processes and institutions? While many liberal theorists appear to endorse the notion that productive dialogue can be had on the state's terms, against the background of liberal institutions and values, indigenous groups contend that their concerns are fundamentally misstated and misunderstood in this context.[251] Likewise, communitarian commentators assert that "the dialogue must be one in which the participants are recognised and speak in their own languages and customary ways."[252] Meanwhile, other theorists argue that there can be no productive cross-cultural communication: the participants will either be unable to understand each other or will be repulsed by each other's utterly foreign concerns.[253] At a minimum, the parties must agree upon some common forum to carry on a dialogue at all,[254] and currently such dialogue is being carried out only in state-defined fora such as the courts and the national human rights institutions.[255] Is there an alternative?

One possibility would be for a national human rights institution to adapt to the community's system in certain contexts, either by participating in the community's cultural, legal, and political processes, or by incorporating some aspects of the community's system. This would permit the indigenous group to participate in defining the forum and the terms of discussion. As discussed above, national human rights institutions' capacity to serve as fora

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[251] Tenant & Turpel, *supra* note 60, at 291.

> The adjudicative mechanism proposed by the state, namely the domestic legal system, is inadequate. Within domestic legal systems, indigenous claims are divided and translated into categories that decontextualise and depoliticize them. Claims for political recognition become questions of minority rights, language rights, equality rights and education rights. Collective claims by indigenous peoples are read down to become individual claims by indigenous persons. In every case, concepts like justiciability and the separation of law and politics are used to purge these claims of any political content which is offensive to the state, or which challenges the notion that the state represents the population.

Id.

[252] TULLY, *supra* note 36, at 24.

[253] *See* discussion *supra* note 245.

[254] Adeno Addis raises a similar concern regarding choice of language: "How does the notion of pluralistic solidarity, which emphasizes dialogue among groups and societies as networks of communication, deal with the question of linguistic plurality? . . . [H]ow would dialogue (and shared deliberation) be possible without the dominant group coercively imposing a single language (more likely its language) on all citizens?" Addis, *supra* note 243, at 138.

[255] *See* TULLY, *supra* note 36; ANAYA, *supra* note 199.

for dialogue with minority groups is limited: they do not have the authority to participate in negotiation over allocation of rights and resources, for example. But where such weighty matters are not at stake, national human rights institutions might be better placed than other institutions to participate in this sort of innovative dialogue with indigenous groups. Because their procedures tend to be more informal and flexible than those of courts, many have some freedom to vary their practices to some extent. Depending on the particular terms of their mandates, the Ugandan and Mexican human rights commissioners could conceivably appear before community courts or councils. Alternatively, they could develop their own processes for considering complaints that make use of some community rituals or procedures, such as the Karamajong's post-compensation rituals for reconciliation of a criminal with the community.

Another relevant feature of human rights institutions is their focus on discussion and conciliation as a first approach to conflict. Although the extent to which indigenous groups rely on consensual systems for conflict resolution is often overstated, in at least some instances there may be commonalities between institutions. Ombudspersons in places as disparate as Burkina Faso and Canada reported feeling a sense of compatibility between their techniques and local preferences for conciliatory approaches to conflict resolution.[256] The indigenous assessment, however, has been more skeptical about the extent of the resemblance: "In order for the commission to serve Native people they have to understand Native people. They have to learn about Native cultures, traditions, and spirituality."[257]

So far, only a few institutions have tried to apply this prescription. Even among institutions with programs or officers devoted to an indigenous group or groups, almost none have tried to participate in or incorporate indigenous practices in any way. The examples are scattered: an ombudsperson for American Indian Families in Minnesota engages in traditional prayer and rituals with her clients before beginning meetings;[258] a local Argentinean ombudsperson's office that works extensively with the indigenous Mapuche people held a workshop to train its employees in traditional Mapuche media-

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[256] E-mails from Marianne von der Esch of the Swedish Ombudsman's office suggested that the use of prominent local leaders to head local offices and vigorous public education campaigns had also been crucial to success in Burkina Faso. E-mails from Marianne von der Esch, Head of International Division, The Parliamentary Ombudsmen, Sweden (May 21, 23 & 31, 2003) [hereinafter von der Esch correspondence] (notes on file with author).

[257] Williams, *supra* note 109, at 107-09.

[258] Telephone Interview with Dawn Blanchard, Ombudsman for American Indian Families (Sept. 22, 2003).

tion techniques;[259] and the African Ombudsman Association discussed the topic of reclaiming traditional mediation practices at its 2003 annual meeting.[260]

Pursuing this approach poses difficulties and risks, for both the institution and the community. This is not an easy task. If most human rights institutions have not mustered the will and resources to engage in simple outreach programs to minority groups, such as hiring staff who speak local languages, it is unlikely that they will organize themselves to master local legal systems. [261] Nor did it seem, in the Ugandan and Mexican situations at least, as if the involved institutions had any interest in doing so. Furthermore, even if undertaken in good faith, walking the tightrope of participating

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[259] E-mails from Blanca Tirachini, Defensora del Pueblo de la ciudad de Neuquen, Argentina (May 16 & 19, 2003) (notes on file with author); E-mail from María Laura Cassiet, Defensor del Pueblo de la Nacion, Argentina (June 26-27, 2003) (notes on file with author); and von der Esch correspondence, *supra* note 256.

[260] E-mail from Bience Gawanas, Office of the Ombudsman of Namibia (May 20, 2003) (on file with author). In one region in South Africa, it was not a human rights institution but local police who adopted indigenous practices in an effort to bridge a divide between liberal rights, security concerns, and minority rights in addressing accusations of witchcraft and witch killings and trials. John and Jean Comaroff describe what they call "a small vanguard of diviner detectives" in a local police force:

> Described in the national media as "one of the few success stories in a police force that has almost collapsed under the strain of democracy," Gopane uses methods that require a high level of local knowledge. At relevant moments, he exchanges his police uniform for the paraphernalia of a traditional healer. In him, the forensic and the oracular, scientific investigation and social diagnostics, become one. . . . While such efforts remain unorthodox and limited, they do seem to be spreading; the SAPS liaison officer in the Northwest Province, Patrick Asneng, told us that dealing with the occult has become part of the mundane work of policing in the countryside.

John Comaroff & Jean Comaroff, *Policing Culture, Cultural Policing*, 29 LAW & SOC. INQUIRY 513, 530-31 (2004).

[261] Numerous authors have noted the difficulty of understanding the fundamental concepts of another legal system. *See, e.g.*, Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998). Concerning Malay customary law, Joseph Minattur asserts that:

> The only persons who can be expected to have a clear understanding and a proper appraisal of customary law are the traditional leaders of the community. They are interested in maintaining the norms of their community and to them should be instructed the administration of the customary law. They will know how to reinterpret it to keep pace with social changes, changes which their own community has accepted as being relevant to it.

Joseph Minattur, *The Nature of Malay Customary Law*, *in* 1 FOLK LAW 558 (Alison Dundes Renteln & Alan Dundes eds., 1994).

in community processes without becoming a part of them is likely to strain institutional capacity and credibility, particularly in contexts like these where the institutions themselves present conflicting human rights concerns.[262]

Such engagement also presents a risk of undermining the indigenous system. In the past, efforts by states to incorporate indigenous legal systems have represented a mechanism for state hegemony over the community, rather than an attempt at true dialogue or genuine acceptance of community norms as constitutive of the state. The most well-known examples are those of efforts by colonial states to codify their understanding of the customary law used by the peoples they colonized.[263] Colonial governments' misapprehension of, mischaracterization of, and misuse of indigenous religious and community legal norms has been well documented across numerous settings and cultures.[264] In some cases, as in South Africa and the Democratic Republic of Congo, these systems spawned inter-ethnic conflicts that outlasted the systems themselves.[265] Such problems have not been limited to colonial set-

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[262] Even if operating with the best of intentions, an outsider's perception of the significant aspects of another's system is likely to depend on her own interests in the system. Human rights advocates, alternative dispute resolution advocates, and others tend to acknowledge and legitimize selective elements of indigenous legal processes that favor their projects, such as mediation practices, and ignore elements that would undermine their projects, such as corporal or capital punishment. They also tend to acknowledge and legitimize community values that align with their projects, such as respect for the environment, but to declare the hegemony of human rights values when there is a conflict, as in the case of child marriage.

[263] *See* MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER (1985); *see also* UGANDA HUMAN RIGHTS COMM'N, *supra* note 127, at 39-40. This was problematic on several levels: first, the colonial codifiers rarely got it right; second, they transplanted the customary law into the colonial system and process and thereby changed it; and third, they used this process as a means to implement a two-tier system of justice in which those they colonized invariably occupied the lower tier. *See* Robert J. Gordon, *The White Man's Burden*, *in* FOLK LAW, *supra* note 260, at 367, 369-70.

[264] *See, e.g.*, M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975); CHANOCK, *supra* note 263.

[265] In South Africa, "institutionalization of customary law was thus part of a process for redistributing power" during the colonial period in South Africa, "deceiv[ing] people into believing that law supported their interests." *See* Gordon, *supra* note 263, at 369-70. The ultimate consequences of this approach of indirect rule through newly established, ostensibly local institutions was often dire: in South Kivu in what is now the Democratic Republic of Congo, the institution of indirect rule through anointment of certain ethnic groups with Native Authorities institutionalizing their indigenous status and authority in certain regions enabled the later disenfranchisement of others not so designated, anointing some as rights-bearing citizens and denigrating others as non-indigenous immigrants, and thereby catalyzing what is still ongoing ethnic conflict. *See* MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS 247-61 (2001).

tings. Rather, efforts by the former Derg government in Ethiopia to import their own progressive rules on marriage into a local village council model served to undermine the council system.[266] By attempting to adapt or participate in indigenous legal systems, a national human rights institution risks serving as a mechanism for state oppression of indigenous groups, stirring up conflict between the state and the group through more intensive and frequent interaction, or undermining its own credibility, with the indigenous group, with other communities, or with the government.

There are ways of mitigating these risks, to some extent. The Argentinean, Minnesota, and African Ombudsman Association efforts above all involve limited institutional incorporation of certain aspects of local practices into their own systems, rather than an attempt to create an entirely new system or to wrest jurisdiction from local institutions. The Mapuche and African focus on mediation techniques represents an effort to choose elements of indigenous practice that are most closely aligned to pre-existing institutional practices. All three are focused on resolving problems of accessibility and effective communication within their ordinary tasks of considering community complaints, rather than being aimed at more lofty goals of negotiating fundamental relationships between the community and the state. Of course, such efforts should be pursued only upon an expression of interest by the indigenous community. An indigenous community member or members might act as the community's representative within the institution. Depending upon community preferences for its level of involvement, an institution might keep itself apart from internal community systems but incorporate some aspects of the community systems into its practices, or alternatively, might appear as a representative of the state within the community system but make no effort to adapt community practices in its own work.

In weighing the risks and benefits of encouraging national human right institutions to adapt in some ways to indigenous legal systems, it must be admitted that while any attempt to do so will be inherently problematic, the status quo is no less so. As it is, indigenous communities have no choice but to interact with the state in state institutions, through state processes, according to the state's terms—conditions that some communities regard as manifestly unjust.

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[266] From the state's perspective, the councils were problematic because they tended to function by finding ways to accommodate the formal rules to local preferences. From the community's perspective, the council's use of the formal rules undermined their authority, which stemmed from knowledge of, and adherence to, community practices. TRANSPLANTS, INNOVATION AND LEGAL TRADITION IN THE HORN OF AFRICA (Elisabetta Grande ed., 1995).

iii. In Minority Rights Treaties

In the new minority rights treaties, dialogue is not the basis for establishing a just framework for the state, but rather, an iterative, ongoing process of consultation and participation in governance. Nonetheless, here it should be other government agencies, rather than national human rights institutions, that should undertake much of the kind of consultation called for by international treaties such as ILO Convention No. 169 and the Framework Convention for National Minorities. The purpose of those provisions is to guarantee minorities' involvement in the process of government policy making: the ILO Convention requires the state to consult with indigenous groups in deciding public policy matters relevant to them, while the Framework Conventions mandates that states take measures to ensure national minorities' effective participation in public affairs.[267] Such consultations and participation would be meaningless unless they took place with an institution with decision-making authority in the matters at stake. Here, again, a national human rights institution might more effectively contribute to the circumstances necessary for a productive dialogue, by identifying and drawing attention to the need for minority participation and by observing and publicizing the course of negotiations.

A national human rights institution may be particularly well suited to establish the setting for consultation and policy making in matters where it has used its accessibility and experience with minority claims to explore minority interests and to build up knowledge of them gradually over time. An institution that is receptive to minority claims is in a unique position, not only to address minority claims that lie beneath the surface of already identified minority interests and rights, but also to bring those claims up to the surface and to call upon government agencies to carry out their treaty responsibilities of consultation when those arise.

CONCLUSION

By their structure, mandates, and skills, national human rights institutions could play a role in addressing minority rights in democracies new and old, but often, they do not. Lack of legal incentives, political will, and resources all limit their involvement, as do legal frameworks that mischaracterize the players and the issues, driven by democratic theory developed primarily in well-established states. There are some minority interests, especially those in highly conflict-ridden states or concerning highly politicized issues, that national human rights institutions are unlikely to deal with effec-

[267] *See* discussion, *supra*, Section I, B.

tively, due to their structure, mandates, and the limits of their authority. But there are others that these institutions are well suited to address. Developments in the European Union and other regions suggest that regional systems and institutions may be better placed than international ones to define minority interests and to encourage national human rights institutions to consider them. In particular, national human rights institutions could enrich the framework of minority rights and the understanding of minority interests that is its foundation by attentively considering minority claims, whether or not those fit within currently protected rights, and making their observations concerning those claims systematically available. National human rights institutions could also serve as contributors and watchdogs, and less frequently, as participants, in dialogue between minority groups and the state.

Liberal and communitarian theorists have looked for centering principles to provide a fixed point to which these disparate minority claims might relate and to serve as the philosophical core justifying consideration of their concerns. Minority demands, such as the Tlapanec's, for toleration of their cultural practices could be characterized, for example, as a group demand for liberty, for group freedom from state interference. This characterization is an appealing one on certain levels, for it frames the group's demand in terms that resonate with liberal philosophy and can therefore be analyzed in traditional liberal terms. Demands for liberty are common currency in our courts and legislatures, and so these institutions feel themselves equipped to balance such claims with other concerns. Under such a construction, in any given case, a group demand for liberty might stand in tension with an individual demand for liberty within the group or with the state's interest in promoting goals of equality or security. In this vein, Kymlicka and other liberal pluralists seek to define minority interests in terms of their relation to individual autonomy.

But while it may be appealing for these reasons to characterize minority and indigenous interests as being claims for liberty, they do not seem to fit the mold. Isaiah Berlin long ago argued that the desire for internal community autonomy "has little to do with the classical Western notion of liberty as limited only by the danger of doing harm to others."[268] He characterized this instead as a desire for "recognition—of their class or nation, or colour or race—as an independent source of human activity, as an entity with a will of its own, intending to act in accordance with it (whether it is good, or legitimate or not), and not to be ruled, educated, guided."[269] Rather than repre-

[268] Isaiah Berlin, *The Search for Status, reprinted in* THE POWER OF IDEAS 195, 198 (Henry Hardy ed., 2000).
[269] *Id.* at 195.

senting an increase in liberty amongst the group, this recognition of community existence and independence may well reduce the liberty of its members, who will to some extent be governed by this community identity—but who may prefer that identity and governance to non-recognition and liberty.[270] And since Berlin, other efforts have been made to refine this notion of "recognition" or "belonging" and the tensions it presents with guaranteed liberty rights.[271] Communitarians such as Tully have accordingly characterized minority claims as being alternative forms of self-rule.

In so doing, however, liberal and communitarian theorists have clung to the notion that minority concerns could be characterized in terms of some single unifying principle, even as they recognized the relational and disparate nature of those claims. In contrast, Chandran Kukathas has cautioned against casting all minority group claims in the same mold, and the experiences and analysis of national human rights institutions suggest that this warning is correct.[272]

Indeed, one reason for the diverse nature of the minority rights and claims reported by national human rights institutions seems to be that they should be understood not as absolute unchanging interests, but as claims that are developed in relation to, and in some sense even as a reverse image of, the interests of the state. What the state and the majority understand to be "minority rights" is not the set of all interests that a minority group claims, but rather, only the subset of those interests that do not happen, in their state, to coincide with those of the majority. This is true of the liberal approach as well as the others: minorities' expressed interests in liberal values are not understood as minority interests, merely ordinary ones. So to Kymlicka and Tully, living in a liberal democratic state that guarantees individual rights as a matter not only of course but of national identity, minority claims appear to be claims for the autonomy to pursue community-defined values, even if they are at times illiberal values. But for other states with other concerns, minority claims resound differently, according to their own terms of power.

In this vein, Adeno Addis's comment on an additional aspect of minority interests is telling:

> The complaints many cultural and ethnic minorities have against majorities is not that they are forbidden to affirm privately their convictions and commitments and the capacity to plead as special interests in the political and economic markets, but rather that they ought not

[270] *See id.* at 197.

[271] *See* ZAKARIA, *supra* note 170.

[272] *See* KUKATHAS, *supra* note 27, at 33-34.

> be seen as special, narrow and private interests while the culture and the ethnic affiliation of the majority is viewed implicitly or explicitly as representing the general interest.[273]

Confronted by these narrow definitions of their interests, minority communities and national human rights institutions engage in actively shaping and recharacterizing minority interests, thereby also redefining what they consider "minority rights" and how those should be applied to minority concerns.

Because minority rights are, in the end, not absolute but relational, relative to the nature of relationships amongst communities and between communities and the state, democratic theory and concepts of rights based in the experiences of well-established liberal democratic states cannot be expected to capture the concerns of minority groups in new and severely divided democracies. Although new democracies are adopting either liberal or communitarian forms of government that superficially bear the forms advocated by liberal and communitarian democratic theory, and although they may use the rhetoric of liberal and minority rights to describe and justify their choices, their purposes in doing so and the effects on minority group concerns are not likely to follow the predicted path. In these complex contexts, national human rights institutions could serve as a necessary forum for exposing and considering these disparate and disputed minority rights.

[273] Addis, *supra* note 243, at 125.