

Cultural Values and Human Rights: A Matter of Interpretation

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Abstract

This thesis addresses a neglect of legal analysis in the scholarship on cultural relativism, international human rights law, and Asian values. While a wealth of scholarship exists on cultural relativism as a philosophical or political question, and while the cultural rights of members of minority groups are often addressed from a legal perspective in the context of the European Court of Human Rights, the interaction between broader cultural values – those operant at the societal level – and human rights standards has not been adequately analysed as a question of law.

Chapter I provides an overview of the debates on cultural relativism to detail how questions of law have been neglected, and how they would complement the existing scholarship if fully addressed. It concludes there is a need to examine how far international human rights law permits cultural values to affect the manner and extent of implementation as an empirical issue.

Chapter II makes it clear that the core question is one of interpretation – i.e., in seeking to establish whether cultural values are permitted to affect implementation of human rights norms in any fashion, this hinges on how the terms of international human rights treaties are interpreted so as to permit it, or not.

Chapter III then takes this principle and sets out what the accepted rules of treaty interpretation are, and how international human rights treaty terms in particular are to be interpreted in light of their unique character. This leads us to what is sometimes argued to be the legal basis for the programmatic interpretation of human rights treaties: Article 31(3)(b) of the Vienna Convention on the Law of Treaties, or subsequent practice establishing the agreement of the parties on a given interpretation. We postulate that the interpretations given by the United Nations human rights treaty bodies are potentially constitutive of subsequent practice under the Vienna Convention, and, if so, we argue that this would be the most appropriate focal point for answering our core question.

The rules guiding the use and formation of subsequent practice, however, are not clear. Chapter IV examines what guidelines have been developed in other contexts; in particular, this involves surveying the jurisprudence of the International Court of Justice and the World Trade Organization's Dispute Settlement Procedure, and drawing some inferences from that jurisprudence to arrive at a method for assessing the development of subsequent practice in international human rights law.

Using this pattern of analysis, Chapter V then illustrates how it can be applied by using a case study – the interpretive practice of the Committee for the Elimination of Discrimination Against Women regarding Singapore, Malaysia, and Indonesia – and draws preliminary conclusions to demonstrate how this mode of analysis addresses the gap in the scholarship.

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Introduction

Arguments over the role of culture in the way human rights law is created, implemented and interpreted have a long pedigree, stretching back to the famous *Statement on Human Rights* issued by the American Anthropological Association in 1947 in response to the Commission on Human Rights' drafting of its Universal Declaration.¹ The Association's document held that "respect for the culture of differing human groups" was equally important in the new world order as respect for individuals², and a debate over this claim has continued ever since. Though the system of international human rights law has evolved along strictly individualist lines, the notions that human groups should have the right to their own cultural practices, languages, values and traditions, and that societies have cultural mores which radically affect how they interpret and implement human rights norms, has been a constant undercurrent. In the 1980s and 1990s, this undercurrent came to the surface when Asian States such as Singapore, Malaysia and Indonesia began to advance what came to be known as the 'East Asian challenge for human rights', in which it was argued that individualistic, Western human rights were incompatible with Asian social and cultural norms. This, as Donoho succinctly puts it, reflects one of the principal challenges confronting the international system – namely, "how to develop and implement meaningful human rights standards in the face of profound diversity".³

This question has been confronted by scholars working in numerous fields – in

¹Executive Board, American Anthropological Association, 'Statement on Human Rights', 49 (4) *American Anthropologist* 539 (1947).

²*Ibid.*, p. 539.

³D. Donoho, "Relativism versus Universalism in Human Rights: The Search for Meaningful Standards" 27 (2) *Stanford Journal of International Law* 345 (Spring 1991), p. 346.

philosophy³, in political philosophy⁴, in international relations⁵, in sociology⁶, as well as in law – and has created an entire sub-branch of scholarship. Yet for all of that has been written on the subject, it is apparent that this body of work has generally tended to avoid dealing with one crucial element of the overall picture: the relationship between cultural values at the societal level and international law itself – i.e., how international law in fact resolves conflicts between traditional norms and human rights standards as questions of law, if it does so at all; and whether and to what extent cultural values affect the obligations of States which are party to human rights treaties. While there is a wealth of scholarship on cultural diversity and the law from cultural rights or minority rights perspectives⁷, as well as on legal pluralism in international and domestic contexts⁸, when it comes to ‘grand’ cultural values – differences between East and West, perhaps most notably – and their impact on the law, this area is relatively unexplored. This, it seems, is primarily because scholars have quite naturally focused on foundational questions (being interested in the philosophical bases for cultural relativism and universal human rights) and implementational concerns (how human rights are to be protected in view of the prevalence of traditional values which seem to

³ See e.g. R. Pannikar, “Is the Notion of Human Rights a Western Concept?” 30 *Diogenes* 75 (1982); M. Hamashita, “The Non- and Anti-Democratic in Post-Modernity” 55 (4) *Diogenes* 27 (2008).

⁴ See e.g. J. Rawls, *The Law of Peoples* (1999); S. Macedo, “What Self-Governing Peoples Owe to One Another: Universalism, Diversity and the Law of Peoples” 72 *Fordham Law Review* 1721 (2003-2004); D. Bell, *East Meets West: Human Rights and Democracy in East Asia* (2000); M. Davis, “Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values” 11 *Harvard Human Rights Journal* 109 (1998).

⁵ See e.g. T. Franck, “Is Personal Freedom a Western Value?” 91 (4) *American Journal of International Law* 593 (1997); T. Pogge, “What We Can Reasonably Reject” 11 (1) *Philosophical Issues* 118 (2001); R. Goodman and D. Jinks, “How to Influence States: Socialization and International Human Rights Law”, 54 *Duke Law Journal* 621 (2004).

⁶ See e.g. M. Roshwald, “Toleration, Pluralism and Truth” 55 (3) *Diogenes* 25 (2008); B. Ibhawoh, “Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State” 22 (3) *HRQ* 838 (2000).

⁷ See e.g. R. Grillo, “Cultural Diversity and the Law: Challenge and Accommodation” MMG Working Paper 09-14, 2009; Grillo, R., R. Ballard, A. Ferrari, A.J. Hoekema, M. Maussen & P. Shah (eds.) *Legal Practice and Cultural Diversity* (2009); A. Renteln, *The Cultural Defence* (2004); D. McGoldrick, “Multiculturalism and Its Discontents” 5 (1) *Human Rights Law Review* 27 (2005); E. Baylis, “Minority Rights, Minority Wrongs” 10 *UCLA Journal of International Law and Foreign Affairs* 66 (2005).

⁸ See e.g. P. Berman, “Global Legal Pluralism” 80 *South California Law Review* 1155 (2006-2007); S. Merry, “Legal Pluralism”, 22 (5) *Law and Society Review* (1988); B. Tamanaha “Understanding Legal Pluralism: Past to Present, Local to Global” 30 *Sydney Law Review* 375 (2008).

mitigate against them), both of which are of profound importance. Yet it has created a bifurcation, in which abstract and practical questions are answered, while mid-level concerns – what we shall come to see as issues of *interpretation* – are passed over. This, in turn, has left much of the scholarship on this issue untethered from its own subject: human rights are legal rights as well as being representative of certain political philosophies, yet this critical *legal* element of their composition is commonly ignored in the literature on cultural relativism.

The aim of this thesis is to address this apparent bifurcation by confronting the area of weakness identified in the overall body of scholarship on this issue: the relative lack of eagerness to address cultural relativism as a question of international human rights *law*. Since this is an empirical rather than a normative concern – a question of fact rather than values – it will require what will be referred to as an empirical approach, using the word ‘empirical’ in its traditional meaning as an approach emphasising fact over theory. What, in other words, do the legal facts suggest about the relationship between cultural values and the law?

In essence, we reduce the debate to one, core empirical question: To what extent does international law permit cultural values to affect how human rights treaty obligations are implemented? The thesis then set out a legal approach to answering this question, gradually narrowing our scope and crystallising around rules of interpretation which, it is suggested, will provide a new perspective on this crucial problem of balancing universal human rights standards with profound diversity.

I. Cultural Relativism and Human Rights, and the Role of the Law

Introduction

The arguments surrounding cultural relativism in international human rights law are well-rehearsed. In this chapter I survey the literature and identify what I believe to be a critical failure on the part of most of the scholars who have approached the topic: a neglect of the law itself. While a wealth of far-reaching political, philosophical, sociological and anthropological attempts have been made to advocate one position or another on the need to 'respect culture', almost none of these have been based on a firm understanding of how international human rights law itself actually accommodates culture in the way it is created, interpreted and implemented. In particular, there are very few analyses of which I am aware of the way in which the institutions charged with interpreting the law – the treaty bodies, courts, and States themselves – have actually grappled with the cultural question in relation international human rights law *as law*. In the absence of such an analysis, the debate, I will argue, is divorced from the actual reality of the legal response to cultural values, and thus critically disengaged from its own subject.

The structure of this chapter is as follows. First, I briefly describe and analyse two separate debates that have taken place over the very broad question: how far should 'cultural differences' be taken account of when assessing how a given State implements or fails to implement agreed human rights norms? These two debates are, in order of abstraction, the discussions surrounding the 'nature of rights' (which questioned whether human rights could ever be truly universal in any meaningful sense), and the 'East Asian Challenge' for human rights (in which, drawing on the Asian values literature, a vociferous

discourse emerged advocating a uniquely Asian understanding of human rights which required a repositioning of the political and legal framework for the entire system of international human rights).

As we shall see, it is in the very phrasing of the question – how far *should* cultural differences be taken into account, rather than how far *are* cultural differences taken into account – which forms the crux of the problem. It is this emphasis on the normative rather than the empirical⁹ which draws scholars away from the law and into the political and philosophical. This is problematic for the discourse as a whole, because without a clear empirical understanding of the way the law functions, normative suggestions will naturally have little or no effect: based on a lack of knowledge, they can hardly be expected to be of great impact or value.

The challenge, then, is for an analysis of what international law actually 'does' when it comes to assessing, analysing, and interacting with culture. The final section of this chapter will comprise a framework on which such an analysis can take place. The particular focus of this framework is an understanding of what we actually *mean* when we talk about culture, what we can reasonably expect the law to do, and how it has evolved.

A. Relativism versus Universalism and the Nature of Rights

At its most abstract, the discussion over culture and rights has largely revolved around the question of whether human rights norms should be viewed as applying universally (i.e. that

⁹ I use the term 'empirical' in its philosophical sense – that is, as an approach to epistemology which sees human knowledge as emerging from facts rather than reason or theory. It is used in this sense throughout this thesis. 'Empirical research' in the lay sense of scientific method or social science research I refer to as 'methodological empiricism'.

culture is or should be irrelevant to their validity¹⁰) or as applying differently or not at all depending on the culture of the society in which they are interpreted (stemming from the cultural relativist position that values – notions of truth and morality – are socially constructed, and hence contingent on cultural context¹¹). As with most such debates, in reality we find that scholars who have written on the topic tend to fall on a spectrum of positions somewhere between the two extremes: nobody argues that human rights should always be interpreted in precisely the same way in every human society on earth, and nobody argues that cultural context is so important that even the most basic rights such as the prohibition of torture or the right to a fair trial should be viewed as contingent on social mores. But, broadly, it is possible to identify groups of advocates who can be said to be 'universalist' or 'relativist' in their outlook.

It is important at this stage, although the implications of the point will be argued in more detail below, to be absolutely clear about the nature of the arguments that tend to be advanced. Because the universalist/relativist debate is rather abstract, it tends to be the case that scholars have approached it as a philosophical, ethical, or political question rather than a legal one. This means that the entire argument tends to take place without reference to how existing law came into being, how it tends to be interpreted and implemented, and how it has evolved. Thus, in examining the literature on the issue, we are faced with much in the way of normative assertion and persuasive argumentation, but little in the way of concrete evidence; ultimately, this makes the entire debate a somewhat sterile and irresolvable one.

One of the most prominent theorists of the nature of rights in recent decades has

¹⁰ See e.g. Donnelly, J., "Cultural Relativism and Universal Human Rights" 6 (4) HRQ 400 (1984).

¹¹ For a typical definition, see Binder, G., "Cultural Relativism and Cultural Imperialism in Human Rights Law" 5 Buffalo Human Rights Law Review 211 (1999), page 214.

been Jack Donnelly, whose work has rather dominated the field since the 1980s.¹² Donnelly, in his own words, summarises his oeuvre as "a defence of a conception of 'universal' human rights that acknowledges and incorporates the obvious historical contingency of both the idea of human rights and its dominant international expressions".¹³ The core of this argument is, essentially, that although human rights are not timeless, unchanging, or absolute, and that although there will always be particular interpretations owing to cultural difference, levels of economic development, geography, and so forth, human rights must by definition in some sense be 'universal' because in order to have any meaning or value they are held by all human beings.¹⁴ Moreover, in practical terms, human rights are universally accepted inasmuch as almost all States are party to the UDHR and almost all States at least claim to adhere to and accept that human rights exist; Donnelly calls this 'international normative universality'.¹⁵

Donnelly sets out a vision of human rights as being equal, inalienable, and universal – as being the rights that one is entitled to simply as a human being.¹⁶ (This is, of course, hardly a novel proposition.) They inhere, in his view, in man's 'moral nature', and constitute what is needed for every human individual to realise for him/herself a 'life of dignity'.¹⁷ Though this is a utopian ideal, as he acknowledges, it is also a practical tool for realising it; human rights are a "self-fulfilling moral prophecy [which says:] Treat a person like a human being and you'll get a human being"¹⁸, and also a checklist of how, realistically, a society goes

¹² See e.g. J. Donnelly, "Cultural Relativism and Universal Human Rights", 6 *Human Rights Quarterly* 400 (1984); "Human Rights and Group Rights" 13 *Bulletin of the Australian Society of Legal Philosophy* 6 (1989); and "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" 76 (2) *American Political Science Review* 303 (1982).

¹³ J. Donnelly, *Universal Human Rights in Theory & Practice* (2nd Edition, Cornell University Press, 2003), Preface.

¹⁴ *Ibid.*, Introduction, p. 1.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 10.

¹⁷ *Ibid.*, p. 14.

¹⁸ *Ibid.*, p. 15.

about achieving this.¹⁹ Donnelly readily admits that this is an entirely philosophical theory, baseless in terms of science²⁰, and comprised entirely of axioms.²¹ Recognising that simply asserting a foundation for human rights based on nature and morality²², or human needs²³, is inadequate, and that even the core human rights Covenants - which appeal to "human dignity" - are hardly persuasive as a philosophical argument, he dismisses this problem by arguing that in fact there are good reasons for accepting the system of human rights set out in the UDHR, when set against competing theories and practices.²⁴ He calls the UDHR an "attractive moral vision of human beings as equal as autonomous agents living in states that treat each citizen with equal concern and respect"²⁵. This boils down to, essentially, a Dworkinian view of the role of government and society, in which the government treats every individual as an equal in every aspect²⁶; this requires that personal liberty and economic liberty be protected and each individual be insulated as much as possible from social and economic inequalities, and in Donnelly's view the UDHR is the best tool for realising such goals.²⁷

It is here that Donnelly is forced to tackle the issue of universalism and culture, for as he readily admits, his defence of the UDHR, and in fact that document itself, rests on an understanding of the world that is firmly within the liberal tradition of Locke, Kant, Rousseau, Rawls and Dworkin. And this means that it is not based on a "transhistorical,

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 14.

²¹ *Ibid.*, p. 17.

²² For instance, J. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980).

²³ For instance, A. Dyck, *Rethinking Rights and Responsibilities: The Moral Bonds of Community* (The Pilgrim Press, 1994).

²⁴ J. Donnelly, *supra* note 13, p. 21.

²⁵ *Ibid.*, p. 38.

²⁶ See R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

²⁷ J. Donnelly, *supra* note 13, pp. 44-47.

'anthropological' consensus".²⁸ Rather, it is a historically specific product of modernity and the political dominance of 'the West' in the world since the 19th Century. Indeed, it is only a slight oversimplification, in Donnelly's view, to say that the international human rights Covenants "set out a hegemonic political model something very much like the liberal democratic welfare state of Western Europe, in which all adult nationals are incorporated as full legal and political entities to an extensive array of social welfare services, social and economic opportunities, and civil and political liberties".²⁹ Rights are necessary in liberal democratic welfare states, and strongly linked to them historically, and since liberal democracies and liberal economics tend to be dominant in the world, this is largely the reason why human rights have achieved the kind of global normative hegemony that they have.³⁰

In Donnelly's view, therefore, it is not the case (as some theorists³¹ have argued) that conceptions of human rights are present in all societies and cultures, and that people in all societies share similar beliefs about dignity and rights. Non-Western cultural and political traditions, according to him, do not have either the practice or the concept of 'human rights', though they may have systems of duty and obligation which are functionally equivalent.³² Surveying traditional Islamic, African, Chinese and Indian societies³³, he concludes that "it simply is not true that all peoples at all times have had human rights ideas and practices, if by 'human rights' we mean equal and inalienable paramount moral rights

²⁸ *Ibid.*, p. 51.

²⁹ *Ibid.*, p. 61.

³⁰ *Ibid.*, pp. 61-70.

³¹ Such as in A. Pollis & P. Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives* (Praeger, 1980), Y. Khushalani, "Human Rights in Asia and Africa" 4 (4) *Human Rights Law Journal* 403 (1983), or A. Renteln, *International Human Rights: Universalism versus Relativism* (Sage, 1990).

³² J. Donnelly, *supra* note 13, p. 71.

³³ *Ibid.*, pp. 71-88.

held by all members of the species"³⁴, and that the literature which argues otherwise is "theoretically muddled or historically inaccurate (or both)".³⁵ It is rather the case, he argues, that while every society has its own understanding of justice and fairness, their legal and political practices are not human rights masquerading under another name; they are different and separate, usually because they do not do what human rights does – they do not inhere in *all* human individuals equally, but make distinctions between people. The Indian caste system, for example, "denies the equal worth of all human beings"³⁶ by assuming that there are fundamental and inalterable differences between human beings who are members of different castes; this is effectively opposite to human rights, which assume an inherent and *equal* dignity arising in all people simply as a result of being human. Donnelly quite rightly points out that this does not make human rights an inherently superior basis for a society's moral, political and legal system than caste or any other.³⁷ It is important, as he says, to have such debates. But to pretend that there is no difference between Western liberal human rights and traditional practices in other regions of the world will result in a debate that has no grounding in reality.³⁸

This means that, for Donnelly, cultural relativity is a fact – "moral rules and social institutions evidence astonishing cultural and historical variability".³⁹ But it does not follow that culture necessarily creates a problem for the universal model; while there is some conflict between different societies over some international human rights norms, by and large there is considerable overlapping consensus⁴⁰ on the rights contained in the UDHR – at

³⁴ *Ibid.*, p. 87.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 83.

³⁷ *Ibid.*, p. 86.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 89.

⁴⁰ He borrows this concept from John Rawls. See J. Rawls, *Political Liberalism* (Columbia University Press, 1996).

least at the level of abstract statements of orienting value.⁴¹ When it comes to interpretation of the rights, and implementation (or 'form'), consensus disappears, but this is not necessarily damaging to universality of concepts and universality of human rights itself. For instance, there is consensus among most if not all States that everybody should have the right to protection from cruel, inhuman or degrading punishment.⁴² Though interpretation might differ (for instance, is the death penalty 'cruel?'), this does not damage the near-universal consensus around the norm.⁴³ Similarly, while there is consensus around freedom of expression, there are differing levels of implementation and restriction on that right – for instance, surrounding pornography, which is permitted in some States but prohibited entirely in others.⁴⁴ Much is true of almost all of the rights contained in the UDHR.

This leads Donnelly to state that human rights are "relatively universal"⁴⁵. Yet we can identify some flaws in his argument. First, conceptually, his division of 'abstract statements of orienting value' from 'interpretation' and 'implementation' is useful for the purposes of advancing his own position, but is not particularly compelling otherwise; of course, at some level of abstraction there is almost always agreement on any norm, but the higher the level of abstraction, the more banal and amorphous norms become. It is all very well that, for instance, the right to life is respected as an 'orienting value' in Iran, Italy, China, North Korea, Brazil and the United States, but in practical terms, we may question how useful this apparent consensus is, given that it produces such vastly different results from State to State. In fact – especially when it comes to actual questions of *law* – interpretation and implementation are much more important than agreements about concept; if we wish to

⁴¹ J. Donnelly, *supra* note 13, p. 94.

⁴² Article 5, Universal Declaration of Human Rights.

⁴³ J. Donnelly, *supra* note 13, p. 95.

⁴⁴ *Ibid.*, pp. 97-98.

⁴⁵ *Ibid.*, p. 106.

have a system in which it is possible to determine whether a State has acted in violation of the law, interpretation and implementation are everything. To continue with Donnelly's example of the prohibition of cruel, inhuman or degrading punishment, the details (whether, for instance, the death penalty should be considered cruel) are of fundamental and paramount importance as legal questions – far more so than any content-less overlapping consensus on terminology of the abstract norm – and if there is no agreement on interpretation and implementation of the abstract norms we can hardly expect a coherent legal human rights framework to develop. We can here contrast Donnelly's appropriation of Rawls's overlapping consensus with Cass Sunstein's notion of the low-level incompletely theorised agreement⁴⁶, which takes effectively the opposite approach:

Well-functioning legal systems...tend to adopt a special strategy for producing agreement amidst pluralism... They agree on the result and on relatively low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case. When they disagree on an abstraction, they move to a level of greater particularity. The distinctive feature of this account is that it emphasises agreement on (relative) particulars rather than on (relative) abstractions.⁴⁷

That is, in Sunstein's view at least, a 'well-functioning' legal system tends to avoid foundations and focuses on outcomes; judges seek the lowest possible level of abstraction they can in order to decide a case.⁴⁸ This is desirable in his view because the social function of rules is "to allow people to agree on the meaning, authority, and even the soundness of a governing legal position in the face of disagreements about much else".⁴⁹ Judges may have widely differing opinions in principle, but be able to reach a decision on the particulars

⁴⁶ C. Sunstein, "Incompletely Theorized Agreements" 108 (7) Harvard Law Review 1733 (1995).

⁴⁷ *Ibid.*, pp. 1735-1736.

⁴⁸ *Ibid.*, p. 1737.

⁴⁹ *Ibid.*, p. 1741.

nonetheless, and this is a virtue inasmuch as it allows contentious and problematic issues to be set aside or even ignored in the name of reaching whatever agreement or decision can be reached. 'Deep theorising' is sacrificed, in other words, to expediency.

Donnelly's account of universal human rights, for Sunstein, would represent an incompletely theorised agreement at 'mid-level principle'⁵⁰ – consensus around certain norms (e.g. people should have the right to freedom of expression) without agreement either on the general theory that accounts for them (utilitarianism, libertarianism, Kantianism, Marxism, etc.) *nor* the particular outcomes that result from them (e.g., should pornography be permitted or not?). This may be compelling as a description of how the current system has come into existence – it is certainly a plausible description of how the international human rights framework, such as it is, is constituted – but it tells us little or nothing about how particular outcomes arise, why they do so, and whether they are desirable. That is, we know that there is broad consensus among States that there ought to be a rights-based prohibition against cruel punishments contained in a human rights treaty. This is what Donnelly would call consensus around an abstract norm or an orienting value, and what Sunstein would call agreement on a 'mid-level principle'. Yet this tells us nothing about the particulars – what constitutes 'cruelty' being foremost among them – and, specifically, how the right is interpreted by the treaty bodies and other international interpretive bodies, and how it is given form (if at all) in the legal systems of individual States.

This is the second flaw in Donnelly's work – a lack of reference to international law as law. Though he devotes some time to describing the various international human rights

⁵⁰ *Ibid.*, p. 1739.

regimes⁵¹ and discussing the priority of national action⁵², broadly speaking his perspective is that of a scholar of international relations and political theory, not law. Thus, he offers no analysis of how either States, regional human rights courts, or the United Nations treaty bodies, actually interpret international human rights norms – leaving his conceptual analysis almost entirely empirically⁵³ void. How, for instance, are we to verify that there is genuine consensus even at the abstract level, as he asserts, without first thoroughly examining the legal evidence, in the form of case law and authoritative decisions and interpretations, and discovering the extent to which consensus actually exists? And how are we to determine whether that consensus has any effect on 'facts on the ground'?

To put it in more concrete terms, if we discover that, despite apparent consensus around the right to freedom of expression, that this right is interpreted in one State to be restricted to the point at which criticism of the government is illegal, true consensus can hardly be said to exist around that right even if it apparently does so in semantic form. So much we have already argued. And it is especially true with regard to culture and the way it affects how societies 'view' rights within their own legal systems, and the way in which human rights courts and quasi-judicial bodies respond to that. Crucially, then, a more robust and detailed legal analysis is required.

Like Donnelly, several other writers have argued that despite the 'descriptive truth' of cultural relativism, liberal rights made universal are the best means by which to promote 'human dignity'. Sloane, for instance, notes that it is entirely correct that means of protecting human dignity vary according to the culture and society in which they develop⁵⁴,

⁵¹ J. Donnelly, *supra* note 13, pp. 127-154.

⁵² *Ibid.*, pp. 173-181.

⁵³ Again, I use the term 'empirically' here in the sense in which knowledge emerges from facts rather than theory.

⁵⁴ R. Sloane, "Outrelativizing Relativism: A Liberal Defence of the Universality of International Human Rights" 34

but universal human rights – which developed in the West and are a unique product of it⁵⁵ - have a normative force which makes them preferable. This normative force stems from liberal human rights' enshrinement of individual autonomy, which allows human beings to pursue their own concept of the 'good' unfettered and unimpeded by government or institutions.⁵⁶ He then goes on to argue that, in fact, in protecting value pluralism, a liberal human rights framework would be the most inclusive means by which human dignity could be fostered and promoted; in allowing individuals and "cultural units" to pursue their own values and ideals as they see fit (within reason) through defending their rights to autonomy, it would paradoxically be the framework most accommodating of different conceptions of what is 'good'.⁵⁷ He contrasts it with other, traditional means of promoting 'human dignity', which demand universal assent and coerce people into adopting certain sets of values.⁵⁸

However, unlike Donnelly, Sloane is willing to accept that any consensus which exists around universal human rights as encapsulated by the UDHR is tenuous and superficial at best: the level of consensus was so abstract, he notes, that the language of the final text allowed in many instances almost antithetical interpretations.⁵⁹ Essentially, he makes the same point which we have already set out – that consensus between different States and societies at a certain level of abstraction clearly *does* exist, but the content of that consensus might be, in practical terms, meaningless. The fact that consensus is so weak or meaningless forces Sloane to make a normative defence of universal human rights, which leads him to the conclusion (though he states it weakly) that universal human rights are the creation and preserve of the Western nation-state, which, since it is the predominant political form on

Vanderbilt Journal of Transnational Law 527 (2001), p. 593.

⁵⁵ *Ibid.*, pp. 541-547.

⁵⁶ *Ibid.*, pp. 587-591.

⁵⁷ *Ibid.*, p. 592.

⁵⁸ *Ibid.*, p. 590.

⁵⁹ *Ibid.*, p. 550.

the planet, ensures that universal human rights are the "appropriate concept"⁶⁰ for protecting human dignity in the modern age - rather than any other traditional means of doing so that might once have prevailed in some areas of the world. Once again, this forces us to ask questions about the empirical basis for his position: his assertion may in fact be true, but until a detailed examination of how the law deals with culture in practice – at both the domestic and international levels – it cannot be argued that the apparent consensus is meaningless or otherwise.

In contrast to Donnelly, Abdullah An-Na'im argues for a reformation of the international human rights system based on the understanding that human rights norms must be seen as legitimate within the culture or society in which they are to be given form, in order for them to achieve genuine recognition and internalisation.⁶¹ This means that, unlike Donnelly (who argues simply that the existing consensus on abstract orienting values is enough to demonstrate 'relative universality', despite the historic specificity of human rights) and Sloane (who argues that human rights are the product of the liberal West and uniquely appropriate for a world which the liberal West dominates), An-Na'im adopts a quite strongly Rawlsian position, seeking an overlapping ("cross-cultural") consensus around a set of norms that promote 'human dignity' – rather than an imposed and legalistic insistence on Western, liberal human rights.

In doing so, he notes (correctly and obviously) that 'universality' of a legal norm can either refer to its universal validity (i.e. nominal support in all societies), or its universal

⁶⁰ *Ibid.*, p. 538.

⁶¹ See A. An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in A. An-Na'im (ed.) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, 1995), and A. An-Na'im, "The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts" 11 *Emory International Law Review* 29 (1997).

application (i.e. enforcement as law in all societies), or both.⁶² In his view, both are mutually supportive and inclusive – if a right is considered to be valid within a given society, it is likely to find application within that society; and at the same time, if a right can be in some sense 'located' within the pre-existing cultural practices of that society, its international expression is more likely to be considered valid within it. To take an example, An-Na'im makes the argument that the prohibition of cruel, inhuman or degrading treatment or punishment can, in Islamic societies, be related to the already-existing *Sharia* principle that Koranic principles of punishment should not apply in situations in which there is reasonable doubt.⁶³ This, he argues, will allow the norm to be internalised in a more organic and acceptable way to Islamic societies – and thus bring about greater compliance with the agreed-upon international norm than would be realised by simple coercion.

However, regarding freedom of expression he makes a somewhat different, perhaps slightly contradictory (or at least orthogonal) argument. Here, using the examples of Kenya and Sudan, he makes the instrumentalist point that freedom of expression can reduce or ameliorate ethnic tensions and provide the best means of mediating conflict⁶⁴, and then goes on to make the ultimately circular argument that, in denying the right to freedom of expression, the government of Sudan is failing to allow its citizenry the capacity to "verify...facts for themselves...or debate...matters of fundamental national importance".⁶⁵ This means that his 'strategy of integration' makes little reference to cross-cultural dialogue or embedding rights within cultural norms, but simply boils down to a rather banal argument for "[emphasising] that the struggle for protecting this right never ends", producing "institutional and educational measures to secure achieved gains", and giving

⁶² A. An-Na'im, "The Contingent Universality of Human Rights", *supra* note 61, p. 33.

⁶³ A. An-Na'im, "Towards a Cross-Cultural Approach", *supra* note 61, p. 36.

⁶⁴ A. An-Na'im, "The Contingent Universality of Human Rights", *supra* note 61, p. 60.

⁶⁵ *Ibid.*, p. 61-62.

"due regard must also be given to the role of external factors and actors", amongst other things.⁶⁶

Once again, we are forced to ask what the ultimate conclusion to the 'cross-cultural dialogue' approach is, beyond a very broad and not particularly strong normative argument in favour of a certain conceptualisation of international human rights law. And again, the salient point seems to remain: what is the empirical basis upon which the edifice rests? To what extent does cross-cultural dialogue already take place in the interpretation of human rights law? Do international courts and monitoring bodies already make any attempt to understand how different societies might interpret or incorporate abstract, agreed-upon norms? Do the actual legal systems in countries like Kenya and Sudan reflect the culture of the society at large, and how does this affect the way in which international human rights law actually becomes implemented? These questions are left unanswered.

Similarly to these authors, Charles Beitz argues for a view of human rights as aspiration: if fully and universally realised, he argues, they will be the "necessary conditions of political legitimacy, or even of social justice"⁶⁷; they are a "certain ambition about how the world should be".⁶⁸ Like Donnelly and Sloane, he denies the timelessness or descriptive universality of human rights⁶⁹, but rather views them as standards "appropriate to the institutions of modern or modernising societies".⁷⁰ Also like Donnelly, he points to the 'virtual unanimity' surrounding international human rights norms at a certain level of generality⁷¹, and, anticipating a certain criticism which we have already made, goes on to suggest that the genuine differences that exist surrounding interpretation and

⁶⁶ *Ibid.*, pp. 62-64.

⁶⁷ C. Beitz, "What Human Rights Mean" 132 (1) *Daedalus* 36 (Winter 2003), p. 39.

⁶⁸ *Ibid.*, p. 40.

⁶⁹ *Ibid.*, p. 43.

⁷⁰ *Ibid.*, p. 44.

⁷¹ *Ibid.*, p. 45.

implementation are merely to do with political practice rather than genuine cultural differences; arguments tend to be about relative prioritisation of one right over another, or of rights over other values and vice-versa.⁷²

He developed these ideas more fully in his book *The Idea of Human Rights*⁷³, which makes the oft-noted assertion that the lack of philosophical coherence behind human rights is not a weakness, but rather one of its strongest features: in being divorced from any single religious or cultural tradition it is a doctrine that can be endorsed from many different viewpoints – which allows it to be a kind of value-neutral “general understanding of the purposes of human social organisation”.⁷⁴ This means that the notion of human rights as an order of values deriving from deep universal norms is wrong; in fact, the universality which human rights exhibit is entirely practical, arising from the fact that human rights are now a “global practice”⁷⁵ – there is a “global discursive community whose members recognise the practice’s norms as reason-giving and use them in deliberating and arguing about how to act”.⁷⁶ It is a political rather than a philosophical doctrine that has been deliberately constructed for a certain function in global political life.⁷⁷ This is not to say that there is total agreement throughout the community on the actual content of rights, nor what they result in. It is only to say that there is near-universal agreement that there is a distinctive class of norms called human rights, and that they are guides for actions or reasons for actions within a society.⁷⁸ This means that we should reject both “naturalistic theories”⁷⁹ (those based on an understanding of rights as inhering in natural rights, or arising from the need to protect

⁷² *Ibid.*

⁷³ C. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009).

⁷⁴ *Ibid.*, p. 8.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 49.

⁷⁸ *Ibid.*, p. 9.

⁷⁹ *Ibid.*, pp. 49-73.

'human dignity' or fulfil 'human needs') and "agreement theories"⁸⁰ (those, like An-Na'im's or Donnelly's, which see human rights as inhering in intercultural agreement around what norms are acceptable) about human rights, in favour of a "practical conception".⁸¹

Drawing on the later work of Rawls⁸² on international human rights, Beitz then sets out this practical conception as, essentially, a repositioning of first principles around practice rather than around foundations – taking human rights as they are found in international political life, and constructing an understanding of human rights based on that.⁸³ This understanding sees human rights as, critically, an *emergent* enterprise, in the absence of a central global authority, that was/is undertaken by the international community in pursuit a certain aim – basically, a remedy for the deficiencies or structural faults that arise from the inescapable fact that it is the sovereign State which is at the centre of international law. (These deficiencies are, specifically, the fact that sovereigns had the autonomy to abuse their own citizens and that those sovereigns who abused their own citizens would be more likely to undertake aggression against their neighbours⁸⁴). They are, in other words, *sui generis*. The end result of this is a theory of human rights as a set of norms which guide global political action, created by the members of the international community, and contested between them – universal in the sense that, in principle, they are accepted as carrying normative weight worldwide, but not in the sense that their content is unanimously agreed.

Beitz makes no pretence to a legal argument, and in fact seems to downplay the

⁸⁰ *Ibid.*, pp. 74-95.

⁸¹ *Ibid.*, pp. 102-106.

⁸² *Ibid.*, pp. 96-125, primarily citing J. Rawls, *The Law of Peoples* (Harvard University Press, 1999).

⁸³ *Ibid.*, p. 102.

⁸⁴ *Ibid.*, p. 129. Beitz acknowledges that there is no empirical evidence for believing that States which abuse the human rights of their citizens are likely to be aggressive against their neighbours. The obvious response to this is that it hardly matters: we need not believe that this is empirically true, but only believe that the original conceivers of the international human rights system believed it.

important of human rights as *law*, preferring to envisage them as a “background norm” by which various government politics can either be justified or criticised.⁸⁵ Even though human rights exist within treaty law and arguably as customary law in some cases, describing them as legal rules is mistaken, because: a) although viewing them as legally binding will help make judgements about them in courts, it will not be ‘dispositive’ in aiding “practical reasoning about conduct in global politics”⁸⁶; b) since international law is less well-developed than municipal law, “the obligation to comply must turn more substantially on background considerations”⁸⁷; and c) reasonable disagreement should be possible between the members of the international community on all but the most simple cases, because of the importance of respect for each other’s practical reasoning – which would be undermined by thinking of human rights as settled rules.⁸⁸ This means that human rights should not be conceptualised as a canonical list; rather, “a theory of rights [should] clarify the uses to which they may be put in the discourse of global political life and...identify and give structure to the considerations it would be appropriate to take into account...in deliberating about their content and application”.⁸⁹

Beitz’s reasoning is, in many respects, persuasive. It is easy to have sympathy with the view that enshrining human rights in treaty law does not, in general, form a guide for global politics (or, indeed, domestic politics). In fact, it could readily be argued (and often is argued) that human rights as international law are a hindrance to practical reasoning in the domestic and global spheres.⁹⁰ Yet Beitz does not provide us with a concrete, factual base on

⁸⁵ *Ibid.*, pp. 209-210.

⁸⁶ *Ibid.*, p. 210.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, p. 210-211.

⁸⁹ *Ibid.*, p. 212.

⁹⁰ One thinks in particular of Aryeh Neier’s critiques expressed in, for instance, *Taking Liberties: Four Decades in the Struggle for Rights* (Public Affairs, 2003), or in “Social and Economic Rights: A Critique” 13 (2) *Human Rights*

which to rest his argument. What is ‘reasonable disagreement’, and does international human rights law (by which is meant the entire edifice of treaty and customary law as well as courts, States, private actors, quasi-judicial bodies, and so on) already allow for it, or not, and to what extent?

Anthony Langlois, in his 2001 book *The Politics of Justice and Human Rights*⁹¹ comes to a similar conclusion to Beitz. Exploring the work of Cass Sunstein (as described above), he attempts to understand global human rights discourse through the lens of the incompletely theorised agreement⁹², imagining a kind of ‘safety net’ in which diverse and plural view on morality can interact. Within this safety net there are no foundational justifications or agreements on abstract principle, only a general discourse which finds “sufficient commonality for there to exist outcomes which can then be incompletely agreed”.⁹³ But while there can never be a Dworkinian human rights Hercules because there can never be complete agreement between all States on the fundamental underlying principles, the alternative is not random agreement reached indiscriminately. Rather, there exists a kind of normative structure provided by the codification of the discourse in the form of treaty law and other authoritative texts, which acts in an analogous fashion to *stare decisis* as envisaged by Sunstein, giving form to the discourse.⁹⁴

Langlois identifies two problems with Sunstein’s work, however, noting that a) incompletely theorised agreement itself relies on a foundational principle, at least of a kind (namely, that incompletely theorised agreement itself must be sacrosanct if it is to provide a guide to human action), and that b) in some areas it is impossible to find even mid-level

Brief.

⁹¹ A. Langlois, *The Politics of Justice and Human Rights* (Cambridge University Press, 2001).

⁹² *Ibid.*, pp. 100-124.

⁹³ *Ibid.*, p. 120.

⁹⁴ *Ibid.*, p. 121.

agreement on certain principles (Langlois uses the example of an environmental movement which holds the preservation of the environment above all other principles, pitted against a religious movement which envisages nature as being entirely subject to the dominion and stewardship of humans; in this case, there can be no agreement on outcomes – so one group’s “normative position [must] be dismissed”.⁹⁵) So although, in his eyes, incompletely theorised agreement provides a useful tool and a way of avoiding the problems associated with trying to find universal agreement on grand norms, it cannot work in all cases (in some scenarios, normative positions have to be dismissed), and it requires a theory of just institutions – i.e., it requires that there is agreement on the framework surrounding it – on the very notion of incompletely theorised agreement itself. This takes the debate into the realm of theory and abstract principle almost by default.

The problem, for Langlois, is that incompletely theorised agreement belongs in the realm of the judiciary and assumes, at least, that there is relative political agreement surrounding the fundamental principles of liberalism, so that the so-called safety net remains intact.⁹⁶ In other words, Sunstein envisages incompletely theorised agreement as operant in the legal sphere, but not in the political sphere: there, abstract theories of what is good and right in a liberal democracy have to be (and largely are) settled. This is not true in the global community – rather the opposite, in fact. So, like Beitz, Langlois speaks mainly to the sphere of politics, and views such a move as unavoidable: if the principles and institutions in which the law operates are themselves contested (as they are in the global discourse) then the key issues surrounding human rights must be above and beyond the law – they must be political. But within politics, unlike in law, he argues, not even outcomes can

⁹⁵ *Ibid.*, p. 123.

⁹⁶ *Ibid.*, p. 124.

be agreed; almost no decisions are met with universal assent. Rather, collective decisions are made based on a formative discourse in which various parties argue their cases and contest principles. This means that not even incompletely theorised agreement is really possible here – instead, the issues will always remain fundamentally contested. Rather than being a “fixed body of normative principles which merely need to be enacted once they have been recognised by right reason”⁹⁷, in fact any model of human rights should be “an arena for the discussion, debate and institutionalisation of our various and sometimes antithetical conceptions of justice and emancipation”.⁹⁸

This leads Langlois to what he calls a political account of universal human rights, mostly based on the work of Chantal Mouffe.⁹⁹ Unlike Donnelly, he is cynical about any apparent consensus which exists surrounding human rights, citing Brown to the effect that the current version of ‘universal’ agreement is best seen as “a willingness to subscribe to unspecific norms which do not, in practice, affect state behaviour”.¹⁰⁰ Outside of basic values, such as the prohibition of torture or genocide, and perhaps the right to economic subsistence, Langlois does not see major substantive agreement.¹⁰¹ When it comes to other areas – women’s rights, abortion, freedom of religion, etc. – agreement is not to be found, and unlike Donnelly, Langlois bases this assertion on at least some methodologically empirical research.¹⁰²

Langlois argues that what is needed is recognition of conflict, antagonism, diversity and disagreement within the field of human rights – an embracement of the fact that human

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, p. 125.

⁹⁹ See e.g. C. Mouffe, *The Return of the Political* (Verso, 1993).

¹⁰⁰ A. Langlois, *The Politics of Justice and Human Rights*, *supra* note 85, p. 127-128, citing C. Brown, “International Theory and International Society: The Viability of the Middle Way?” 21 (2) *Review of International Studies* 183 (1995).

¹⁰¹ *The Politics of Justice and Human Rights*, *supra* note 91, p. 127.

¹⁰² *Ibid.*, p. 127, *see also* pp- 46-72.

rights norms are contestable and contested.¹⁰³ Rather than being fixed philosophical standards, they are best seen as being entirely political and discursive, and thus forever “dynamic, evolving and changing”.¹⁰⁴ This does not mean they are entirely arbitrary, but rather that “the criteria for what is finally adopted into the discourse are determined by the state of the discourse at any one point in time, conceptualised as a set of living shared practices, combined with those ideas and ways of life that can be absorbed through interaction, discussion, living together, and so forth”.¹⁰⁵ It is not arbitrary, therefore, but arises in an emergent fashion from the discourse of many different traditions, perspectives, and voices.

As with the views of Beitz, it is easy to find sympathy with Langlois’s general theory. But there are, again, several criticisms we can make of his approach, which manifest as genuine weaknesses in his entire framework. The first criticism is that, setting aside the merits of his general theory, we are still left with a situation in which human rights claims and counterclaims are adjudicated as law in both domestic and international/regional courts, and in which quasi-judicial proceedings are one of the primary means by which human rights norms are interpreted outside of the domestic context. In some sense, then, politics is actually far less relevant than Langlois might suggest; there might not be any true consensus or unanimity on the interpretation or implementation of the law, but it most certainly is still law inasmuch as it is justiciable and enforceable as such. Therefore, whatever model of human rights he advocates, he cannot simply ignore the fact that legal concerns are relevant at some stage, whether in the substance of human rights themselves or simply in the understanding that there is such a thing as public international law and it has real-

¹⁰³ *Ibid.*, pp. 128-136.

¹⁰⁴ *Ibid.*, p. 134.

¹⁰⁵ *Ibid.*, p. 134-135.

world effects.

The second criticism is that there is little or no substance to his conclusion, other than that human rights is a political discourse that remains fundamentally contested and contestable. In what fora this takes place, and how it proceeds, is left unclear. This is a concern, and is linked to Langlois' rejection of the importance of law: currently, at least, the law is the means by which existing standards that have been arrived at discursively find expression and enforcement, and there needs to be some explanation for how this would occur in a world in which contestability and disagreement on the norms themselves was embraced. Whether we find sympathy with Langlois' vision or not, his account is lacking an explanation for how the norms arrived at through his contested processes find expression.

This leads us to the third (linked) criticism, which is that Langlois, like the other major theorists listed above, does not give an adequate empirical account of the situation that pertains currently *within the law*. Law itself can be "dynamic, evolving and changing" with or without reference to politics – and in fact it is impossible to argue that international human rights law has not evolved and changed over the course of the 60 years since its general inception. This is true not only in the naïve sense – i.e., inasmuch as there are new international and regional human rights treaties and courts. It is also true in the more complex and interesting sense in which the interpretations of the terms of those treaties, and the jurisprudence of those courts, have evolved and changed over time. Because Langlois refers human rights almost entirely to the realm of politics, he neglects this point, and its relevance to his wider theory is therefore left totally unexplored.

Whether or not we view the arguments of these various thinkers as persuasive either descriptively or normatively, what is indisputable is that all of them would benefit from a

more empirical and grounded understanding of how the law currently intersects with culture, how the cultural defence has worked in practice, how relevant judicial bodies have dealt with the notion of cultural relativism, and how States have interpreted the major human rights treaties through the lens of culture and how courts and quasi-judicial bodies have viewed those interpretations. Such an empirical account would provide a more concrete basis on which to approach the fundamental and foundational questions which these thinkers have attempted to answer. As we shall see, much the same is true of scholarship surrounding the less abstract debate surrounding the so-called 'East Asian Challenge' for human rights.

B. The East Asian Challenge for Human Rights, and Asian Values

A more concrete discussion of cultural difference occurred in the 1990s, when in the lead-up to the 1993 World Conference on Human Rights a discourse on 'Asian values' – a set of supposedly uniquely Asian institutions, characteristics and philosophies – coalesced around the notion that the existing global human rights framework was Western-centric and not suited to application in Asian societies because of their own distinct character. The concept of Asian values bears discussing in some detail, as it will become especially important in the latter half of the thesis, and serves as a useful springboard for elaborating on the rationale behind the empirical approach the thesis takes.

The first and most important consideration on this point is the nebulosity of the concept of Asian values itself, which is not only ill-defined even by its proponents, but defined differently in different contexts. (It is notable that this extends to whether it is referred to as "Asian values" or "Asian values" – with the former tending to be used by its

advocates and the latter by its critics – or even, more recently “values in Asia”¹⁰⁶. For the sake of simplicity, this thesis avoids the use of scare quotes.) The second is the fact that the notion has been subject to significant criticism, as being artificial, without empirical basis, and a political tool. And the third is the way in which its importance has waxed and waned over the course of the previous 20 years – it was of significant importance in the early 1990s, became dismissed as outmoded¹⁰⁷ in the late 1990s and early 2000s, and has since been somewhat revived.

Generally speaking, “Asian values” could be defined as a common set of values shared by the different societies present in East and Southeast Asia. These common values are not always agreed upon. Sopheer lists a stress on the community over the individual, the privileging of order and harmony over personal freedom, union of religion with other spheres of life, emphasis on the importance of thriftiness and hard work, respect for political leaders, belief that government and business can work cooperatively for the good of society, and an emphasis on the family as the basic foundation of society¹⁰⁸. In an oft-cited 1993 article, Tommy Koh listed ten uniquely Asian characteristics that were incompatible with universal human rights:

- A scepticism about individualism;
- Belief in strong families;
- Reverence for education;

¹⁰⁶ See e.g. R. Peerenboom, “Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia”” 14 *Indiana International & Comparative Law Review* 1 (2003-2004).

¹⁰⁷ The chief reason being the 1997 Asian economic crisis which, in the eyes of many commentators, “discredited the international discussion about ‘Asian values’” – a rather astonishingly premature diagnosis in view of subsequent developments. See e.g. M. Thompson, “Pacific Asia after ‘Asian values’: Authoritarianism, Democracy and ‘Good Governance’” 25 (6) *Third World Quarterly* 1079 (2004), p. 1079.

¹⁰⁸ See N. Sopheer, “The Development of an East Asian Consciousness” in G. Sheridan (ed.) *Living with Dragons* (Allen & Unwin, 1995), pp. 180-193.

- Belief in the virtues of saving and frugality;
- Hard work seen as virtuous;
- ‘National teamwork’;
- A social contract between the people and the state, with the government maintaining law and order and providing citizens with jobs, housing and health care;
- Deliberate efforts to build ‘communitarian’ societies;
- Desire for a ‘morally wholesome’ environment in which to bring up children;
- A belief that the press should be free only under the proviso that it behave responsibly.¹⁰⁹

Another frequently referred-to survey conducted in 1994, meanwhile, found that among Asian academics, officials, businessmen, journalists and religious leaders, orderly society, harmony and accountability of public officials were chosen as the most important societal values, in contrast to the USA, where freedom of expression, personal freedom and individual rights were considered most important.¹¹⁰ And while it noted some similarities between American and Asian correspondents’ views, it also noted some strongly ingrained attitudes of most Asian correspondents against interpersonal conflict and in favour of consensus, and the high importance those correspondents placed on the role of government as guardian of societal order.¹¹¹

¹⁰⁹ T. Koh, “The 10 Values that Undergrid East Asian Strength and Success” International Herald Tribune, Dec. 11-12, 1993.

¹¹⁰ See D. Hitchcock, *Asian Values and the United States: How Much Conflict?* (Centre for Strategic and International Studies, 1994). The survey’s results were ambiguous in other areas but discovered that Asian correspondents (from Singapore, Malaysia, Indonesia, Thailand, China, Republic of Korea, and Japan) rated an “orderly society” very highly (71% of respondents considered it critically important compared to only 11% of Americans), whereas they tended not to place great importance on individual rights and freedoms (only 32% considered “personal freedom” to be critically important and only 29% considered “individual rights” to be so; this can be contrasted with figures of 82% and 78% of American correspondents, respectively).

¹¹¹ See D. Hitchcock, “The United States and East Asia: New Commonalities and then, All Those Differences”,

Amongst governments themselves, there was some level of both commonality and variance. The Singaporean government, in its official statement on values in 1991, put it that the core of Asian societies revolved around collectivity and community: society is placed above self; the family is the basic building block of society, rather than the individual; and major problems are resolved through consensus rather than contention¹¹². Malaysian and Indonesian leaders were much more likely to emphasise the prominent role of religion – Islam – within Asian societies alongside this preference for communalism, while in the Singaporean case if there was any ideological emphasis it was more likely to be Confucianism¹¹³.

These examples are broadly illustrative of the values that are generally advanced as ‘Asian’. Of particular emphasis, found throughout the literature, is the preference for communal interests (whether ‘society’, the family, the nation, etc.) over individual rights, the importance of social harmony (especially consensus-based decision making), and the view of government as inherently benevolent.

Of course, as could only be expected, the notion of Asian values has been subject to considerable, not to say vociferous, critique. Most fundamentally, it has been described as simply failing to reflect the reality of Asian diversity. All the world’s major religions are represented in Asia and are state religions or enjoy comparable status in at least one Asian country; there are socialist, democratic and feudal political structures in different areas of the continent; and economic systems range from subsistence hunter-gathering societies to

paper presented at “*Asian Values*” and *Democracy in Asia*, Conference of 28th March 1997; available at <http://unu.edu/unupress/asian-values.html#COMMONALITIES>

¹¹² Government of Singapore, *Shared Values* (1991), p. 5, para. 26.

¹¹³ There is no need to belabour this point, except to note that it is covered extensively in, e.g., A. Langlois, *Politics of Justice*, *supra* note 91.

planned economies and developed free markets¹¹⁴. Simply put (at least in Ghai's view), it would be surprising if there were in fact common values held amongst all of that apparent difference. As well as this empirical observation, however, he and other commentators are keen to note the existence of dissenting voices within the continent, from pro-human rights NGOs, to ethnic minorities, to "the oppressed and marginalised" – whoever they may be – to members of the middle classes seeking a greater level of individual freedoms¹¹⁵.

Elsewhere, it is argued that Asian values are not in fact particularly Asian at all, but merely a means of conceptualising Western constructs useful to Asian leaders – whether a market economy (a strange assertion given that most Asian values proponents advocated a strong role for government within the market), national unity, faith in the government, etc. – as Asian in order to give them additional justification¹¹⁶. Other commentators have argued that the concept of Asian values simply embodies a kind of reverse Orientalism¹¹⁷. This led Daniel Bell to suggest that Asian values, as commonly presented, are in fact "not Asian, not values"¹¹⁸, and it became fashionable to suggest replacing the phrase "Asian values" with "values in Asia".

Moreover, the initial momentum generated for Asian values was very much a product of rising material wealth in the continent – a result of rapid developmental success. (Most of the governmental proponents of the concept were unabashed about this, making significant claims about the rise of Asia and mocking those Asian States, such as the Philippines, which were perceived as lagging behind as a result of their adherence to liberal,

¹¹⁴ This is a common observation, but see e.g. Y. Ghai, "Asian Perspectives on Human Rights" 23 Hong Kong Law Journal 342 (1993), pp. 342-343, or F. Fukuyama, "Asian Values in the Wake of the Asian Crisis", in F. Iqbal and J. You (eds.) *Democracy, Market Economics & Development: An Asian Perspective* (2001), pp. 149-68.

¹¹⁵ See Y. Ghai, *Ibid.*, p. 343.

¹¹⁶ See e.g. M. Thompson, *supra* note 107.

¹¹⁷ T. Inoue, "Liberal Democracy and Asian Orientalism" in D. Bell and J. Bauer (eds.), *infra* note 196, p. 49.

¹¹⁸ D. Bell, "Beyond Asian Values" 41 Korea Journal, Winter 2001, p. 163.

Western values¹¹⁹.) This momentum, naturally, ground to a halt in the Asian financial crisis of 1997, when most Asian countries experienced devalued currencies, rising debt-to-GDP ratios, credit crunches, and stock market slumps, and briefly faced default; and this, in turn, lead to an era of triumphalism on the part of the critics of Asian values, who were quick to declare victory in a manner which, to the modern reader, seems amusingly short-sighted in light of the direction Asian development has taken since the 1997 crisis¹²⁰. Nonetheless, this serves to show the extent to which Asian values, as a distinct notion, has seen its fortunes wax and wane with the pace of economic growth; at the same time as indicating its survivability, it also demonstrates its malleability and lack of clarity. These problems with the concept of Asian values – its malleability, its reductionism, and the dubiousness of some of its empirical claims - should not be underplayed, but, equally, should not be exaggerated. As Peerenboom puts it, a plurality of Asian values is still Asian values¹²¹. The fact that a diversity of values can be found throughout Asia does not make them less Asian; and nor does the existence of difference obviate the existence of dominant patterns. And strong patterns of differences between ‘East’ and ‘West’ do exist. It is notable that most, if not all, survey data on the matter (though, unfortunately, scant) indicate statistically significant gaps in opinion between people in Asia and the US or Europe¹²² on a number of issues, particularly regarding individualism and consensus.

Asian values, however, was not the only strand of the East Asian challenge, as it was

¹¹⁹ Mahbubani in particular has written extensively on this.

¹²⁰ Francis Fukuyama, who built a reputation for making ill-advised predictions, was perhaps most notable among them. See F. Fukuyama, *supra* note 114.

¹²¹ R. Peerenboom, *supra* note 106, p. 66.

¹²² See above survey data, also B. Welsh, “Attitudes Towards Democracy in Malaysia” 36 *Asian Survey* 882 (1996), discovering that most respondents were willing to sacrifice freedom of speech in the name of social order; R. Peerenboom, *China’s Long March Toward Rule of Law (2002)*, pp. 53-56, describing several studies showing a higher demand for law and order than democracy in China; and S. Cooney, “The Application, and Non-Application, of Rule of Law Principles in Taiwan”, in R. Peerenboom (ed.) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US (2004)*, p 411.

bundled together with disparities in economic development, issues of morality and legal pluralism, questions of the politics of globalisation and post-colonialism, and the importance of nation-building, as one of a package of related but distinct concerns. Separating the 'cultural' elements is important, therefore. More crucially still, much of the debate occurred at the political/discursive level, both among scholars and government representatives – with those two groups rarely if ever referring to the actual legal processes which (supposedly) give international human rights their force. The rhetoric was almost entirely pitched at a foundational level, challenging the assumptions on which the system is founded rather than the way the law actually operates. As with the more theoretical arguments outlined in the first part of this chapter, most writings on the East Asian Challenge suffer from an overemphasis on the normative (how the system ought to be) at the expense of the empirical (how the law in fact currently operates and deals with diversity). This results in a clear problem: the theory does not speak to the practice in anything like a convincing fashion. It is not a novel observation that this is a general problem within scholarship on the Asian values issue: it has been obvious for decades that there is a need to base any critique of the general position to be based on some kind of grounded empirical understanding of the legal processes and institutions within East Asian states.¹²³ What has rarely been noted is that the same is true of *international* legal processes and institutions, which are after all the crucial filter between treaty law and domestic law.

Typically, the arguments of Asian government representatives have been rhetorically targeted at rejecting external scrutiny of the way in which they implement the human rights norms that they have recognised. Often, this is based merely on accusations of hypocrisy and rather transparent *tu quoque* attacks. For instance:

¹²³ See e.g. R. Peerenboom, *supra* note 106, esp. pp. 82-86.

[Western criticisms of the human rights record of Asian States, writes Kausikan] grate on East and Southeast Asians [because] it is, after all, the West that launched two world wars, supported racism and colonialism, perpetrated the Holocaust and the Great Purge, and now suffers from serious social and economic deficiencies.¹²⁴

At the Vienna Conference Datuk Badawi made a similar point:

Nowhere is the double-standard approach to human rights more glaring [he noted] than in the West's evasion of its responsibilities through its inaction in the face of the massive and grave violations of human rights in Bosnia-Herzegovina...[this] apathetic and meek response to genocide, ethnic cleansing and rape, in the heart of Europe, makes a total mockery of their preaching and posturing on the promotion and protection of human rights...We ask ourselves what credentials do they still have to preach about human rights when the most blatant abuse of those rights before their very eyes goes unpunished?¹²⁵

This 'argument from double standards' is not a particularly convincing one, either political or legally; the fact that one or more parties to a multilateral treaty fail to fulfil their obligations under that instrument does not have any particular effect on the obligations of the other parties except in certain circumstances¹²⁶; Asian States which are parties to a given human rights treaty are bound by it irrespective of whether Western states are guilty of hypocrisy or not, and are still obligated to undertake reports to, and submit to monitoring by, the relevant monitoring committees. (Indeed, more thoughtful commentators have been keen

¹²⁴ Bilahari Kausikan, "Asia's Different Standard" 92 *Foreign Policy* 24 (Autumn 1993).

¹²⁵ Statement of June 18, 1993, cited in Tang, J. (ed.), *Human Rights and International Relations in the Asia Pacific Region* (1995) pp 236-237.

¹²⁶ Article 60 of the Vienna Convention on the Law of Treaties, which governs termination or suspension of the operation of a treaty as a consequence of its breach, permits a party to a multilateral treaty to suspend the operations of that treaty with respect to itself if "the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty" – which clearly does not apply in the case of human rights treaties.

to stress the distinction between the political and legal, with Kausikan, for example, stating that although Western approaches to human rights issues in Asia had to be "formulated with greater nuance and precision", the ICCPR and ICESCR themselves were "flexible enough"¹²⁷ to accommodate adequate discretion for culturally diverse interpretations.) More subtle positions are taken, however, foremost among them what we might call the 'argument from prioritisation', which boils down to two linked debates about implementation and compliance – namely, whether the implementation of certain rights into domestic law should be prioritised in time and resources over that of others; and where the emphasis should be in the inevitable conflicts of rights that occur in any legal system.¹²⁸

This gives the argument two separate strands. One is based on rather more prosaic matters – resource allocation, comparative levels of development, and brute economics. The other is more abstract and philosophical, and relates to issues of cultural and societal mores and their relative value in different contexts. We shall examine each in turn:

i) Priority of Resource Allocation: 'Economic Relativism'

It has been held on many occasions that it is sometimes necessary for there to be a kind of rights triage taking place when States (particularly developing countries) make decisions on how to implement rights protections in their domestic law. To take a paradigm example, since the right to food is unquestionably of more direct importance to people who are starving in a famine than the right to freedom of expression, it would be perverse not to concentrate on realisation of the former even at the expense of implementation of the latter

¹²⁷ B. Kausikan, "Asia's Different Standard", *supra* note 124, p. 39.

¹²⁸ Probably the most famous expositions of this problem can of course be found in Isaiah Berlin's *Liberty: Incorporating Four Essays on Liberty* (Oxford University Press, 2nd Edition, 2002) (1969), so it is hardly unique to the Asian context.

in such a situation, given that realisation of both would require some expense of monetary and other resources, and such resources are finite. As the Chinese government stated in 1991, “to eat their fill and dress warmly were the fundamental demands of the Chinese people who had often suffered cold and hunger” - the implication being that freedom of expression and other civil and political rights were hardly the most pressing matter facing the country at that time, so regardless of the suitability or otherwise of implementing comprehensive systems for protecting such rights within China, their realisation should not be the State's immediate focus.¹²⁹

The argument, of course, is tied strongly to the debate surrounding the indivisibility or otherwise of civil and political, and economic and social, rights: a well-worn bugbear of international human rights law which does not require detailed exposition here. The argument from prioritisation forcefully promotes the idea that the protection of economic and social rights can and should take preference over that of civil and political rights in certain contexts, and that the relationship is not so much of indivisibility as it is hierarchical – with comprehensive realisation of economic and social rights the necessary foundation for others. “[The] first task was to lift [Singapore] out of the degradation that poverty, ignorance and disease had wrought,” as Lee Kuan Yew put it in 1992. “Since it was dire poverty that made for such a low priority given to human life, all other things became secondary.”¹³⁰ Occasionally this is expressed as simple prioritisation of economic development over anything else. Liu Huaqiu advocated this view very forcefully at the Vienna Conference: “When poverty and lack of adequate food and clothing are commonplace and people’s basic

¹²⁹ *Human Rights in China*, Information Office for the State Council of the People’s Republic of China, 1991, p. 3.

¹³⁰ Interview with Nathan Gardels, “What Kind of New Order in East Asia?” *New Perspectives Quarterly* 1 (1992), p. 6.

needs are not guaranteed...human rights are completely out of the question.”¹³¹ At other times the emphasis seems to be on economic growth (and thus fulfilment of economic and social rights) and the role it plays in fostering a society in which, eventually, civil and political rights can be comprehensively protected: essentially, once poverty is no longer a concern and society is thus more stable, the resources of the State can be directed towards developing the kind of civic infrastructure which allows for the protection of 'negative' rights. As the Singapore spokesman at the 1991 session of the General Assembly's Third Committee put it:

[In developing countries] the conditions required were stability, consensus and cooperation, without which the countries concerned would be unable to produce an adequate agricultural surplus on which to build their industrial sector, and feed their peoples. In the urban sectors, economic restructuring meant dislocation, job losses and lower standards of living. If, during the process, everybody had the right to express freely his desires and frustrations, confusion and discord would reign.

The more developed a country was, the more democracy was relevant, since it would then have an urban population with a trained and well-educated workforce which would have more demands, particularly regarding the administration of the country. A more representative system of government would then have to be introduced to meet such demands and to facilitate the country's move to the next stage of development.¹³²

Of course, the argument rests on a large set of nested assumptions: That it is possible for there to be a meaningful trade-off in monetary and human resources between giving 'right a' versus 'right b' full effect; that such a trade-off could be measurable in any empirical

¹³¹ Statement of June 17, 1993, cited in J. Tang (ed.), *supra* note 125, pp. 214-215.

¹³² Statement by Mr. Anderson (Singapore), United Nations General Assembly, 46th Session (1991), Third Committee, 46th Meeting, UN. Doc. A/C.3/46/SR.46, paras. 31-41.

sense; that such a trade-off can be taken in isolation so that it can be viewed objectively; and that individual governments have the legitimacy and expertise to make such trade-offs in a fair and effective way. Clearly, all of these assumptions are questionable, even on their own terms, and they are the point at which the most effective attacks against the argument from prioritisation have been targeted. However, nor are they either readily refutable or restrained to the rhetoric of East Asian elites – they are issues which every legal system must deal with if it is to interact with the concept of human rights in any productive sense.¹³³

Rhoda Howard (speaking directly to the situation in Africa, but making broader points about the prioritisation of rights) has attempted to formulate a critique of economic relativism through an amorphous argument that human dignity, self-respect and autonomy are “fundamental requirements of human nature” that should not be subordinated in importance to mere physical wellbeing¹³⁴. The implication of this is that self-actualization in a democratic society was in its own way just as important to individual human beings as adequate food, clothing and housing. However, her arguments regarding “fundamental requirements of human nature” are poorly defined, and she often makes self-contradictory points – on the one hand stressing the importance of individualistic civil and political rights, while on the other claiming that “ones belonging to, and fulfilling ones role in” common social structures such as kinship systems and ‘the community’ are vital and that communitarianism must be protected within African states.¹³⁵ She also seems to advance an implicit argument for a hierarchy of rights, in spite of her stated position, when she notes that evidence from Nigeria suggests that different values take on different importance for

¹³³ A thoughtful recent article that examines such questions in a broader context is G. Beck, "The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness" 25 Penn. State International Law Review 615 (2006-2007).

¹³⁴ Howard, R., "The Full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa" 5 HRQ 467 (1983), p. 469.

¹³⁵ *Ibid.*, p. 479.

individuals in different wealth categories.¹³⁶

More persuasive and coherent, perhaps, is the critique advanced by Yash Ghai, who argues that economic development and economic *rights* are not the same thing, and that what the ‘prioritisation’ argument masks is naked pursuit of economic development for its own sake.¹³⁷ In his view, apparent prioritisation of economic over civil and political rights is an excuse for focusing on economic development in general, which “increases state resources, enables governments to establish larger armies, enhances the status of their leaders, and secures the support of the populace.”¹³⁸ This makes the Chinese or Singaporean insistence on fulfilling economic rights a canard – the emphasis is not on the rights of the populace themselves, but rather on strengthening the power of the authoritarian State through economic growth. This argument would seem to be at least partially borne out by the facts. After all, economic development in Asia has not in general resulted in the creation of institutions and procedures for the protection of economic and social rights, at least as legally enforceable ones.

Leading economists have further advanced this critique. One of the most prominent has been Amartya Sen, who has spoken of the danger of confusing *post hoc* with *propter hoc* – i.e. that merely because Singapore, China, Vietnam, Malaysia (and before them Japan, South Korea and Taiwan) have undergone rapid economic development under authoritarian regimes, that does not make the trade-off between civil and political rights versus economic rights *necessary* for economic development.¹³⁹ Sen in fact argues that the opposite is the case – that “freedoms are not only the primary ends of economic development, they are

¹³⁶ *Ibid.*, p. 484.

¹³⁷ See Ghai, Y., “Human Rights and Governance: The Asia Debate” 1 *Asia-Pacific Journal on Human Rights and Law* 9 (2000), p. 35.

¹³⁸ *Ibid.*

¹³⁹ See Sen, A., “Freedoms and Needs” in *The New Republic* (Jan. 10 and Jan. 17, 1994).

also among its principal means”¹⁴⁰. This, he believes, is because democracy and the so-called negative civil and political rights protect the individual, who is the main agent of social change and thus development¹⁴¹, and also because those rights specifically mitigate against government abuses which might result in the violation of economic rights. Famously, for example, he argued that a free press was a necessary factor in the prevention of famine, because it allows for public scrutiny of government policies (such as those of Mengistu) that might directly or indirectly result in famine.¹⁴² Thus, rather than there being a trade-off to be made between protecting economic development and protecting civil and political rights, the two were in fact mutually supportive.

William Easterly, following on from Sen, notes that there are numerous cognitive biases associated with the notion that “benevolent autocracy” such as that espoused by East Asian government spokespeople at the Vienna Conference can be beneficial to the economic and social wellbeing of the populace.¹⁴³ One of the most important of these biases is the reversing of conditional probabilities: 9 out of 10 big economic growth success stories in recent decades have been autocracies – so the probability that, if a given country is a growth success, it is an autocratic one, is 90%. However, what is relevant is the probability of *whether* a State will be a growth success *if* it is autocratic – and in actual fact this is only around 10% (while 9 out of 10 large economic successes in recent decades were autocratic, the other 80 autocratic States had either low-mediocre growth or failed disastrously). Thus, the relevant probabilities have been confused.¹⁴⁴ Another such cognitive bias is the failure to recognise or understand regression to the mean: or, in other words, that random sequences

¹⁴⁰ Sen, A., *Development as Freedom* (2000) at 10.

¹⁴¹ *Ibid.*, at 19.

¹⁴² Sen, A., “Freedoms and Needs” *supra* note 139.

¹⁴³ W. Easterly, “Benevolent Autocrats” (working paper), available at <http://williameasterly.files.wordpress.com/2011/05/benevolent-autocrats-easterly-2nd-draft.pdf>, p. 31-39.

¹⁴⁴ *Ibid.*, pp. 31-32.

sometimes feature streaks. It may be true that China experiences exceptional economic growth rates for a number of years in a row – but it does not necessarily follow that this is as a result of its autocratic form of government, or that it will continue indefinitely. With the large number of countries in the world, it would be unusual not to expect that some among their number would experience positive growth for a number of years irrespective of their leadership and government, by pure random sorting, and this would be no indicator of future performance – which tends to revert to the mean.¹⁴⁵

ii) Absolutist Prioritisation

The second strand advocates the prioritisation of the implementation of some rights over others regardless of the state of economic development in the given society, simply by virtue of their intrinsic value. For example Lee Kuan Yew, speaking in 1994, appeared to advocate in absolutist terms what might be called rights to personal security (freedom from crime, freedom from antisocial behaviour) over rights to individual freedom (freedom of expression, freedom of association, freedom from arbitrary detention, and so forth):

[A]s a total system [he writes], I find parts of [American society] totally unacceptable: guns, drugs, violent crime, vagrancy, unbecoming behaviour in public – in sum the breakdown of civil society. The expansion of the right of the individual to behave or misbehave as he pleases has come at the expense of orderly society. In the East the main object is to have a well-ordered society so that everybody can have maximum enjoyment of his freedoms. This freedom can only exist in an ordered state and not in a natural state of contention and anarchy.¹⁴⁶

¹⁴⁵ *Ibid.*, pp. 36-37.

¹⁴⁶ F. Zakaria, "Culture is Destiny: A Conversation with Lee Kuan Yew" 73 *Foreign Affairs* 109 (1994), p. 111.

Likewise, other commentators have spoken in favour of severe forms of punishment in the name of protecting the life and physical wellbeing of 'law-abiding' members of society through deterrence of potential criminals (as Mahbubani puts it, "the tougher the punishment, the less the likelihood of reoccurrence...[in Singapore] the benefit of the doubt is given to the victim, not the criminal"¹⁴⁷). Another common motif is that while human rights are to be respected as a general rule, "[they] must be exercised with strict regard for the family and the community"¹⁴⁸ – presumably meaning that the rights of individuals are to be protected only in as much as they do not subordinate family or societal harmony.

Again, the prioritisation of certain rights over others in absolutist terms rest on a set of assumptions, similar in nature to those on which the 'economic relativist' argument are based, and likewise is vulnerable to a large group of critiques. Again, however, given that trade-offs between rights have to be made within any society and legal system, simply by virtue of the fact that protection of one individual's rights will almost by necessity involve prioritisation over the rights of another, the argument is not readily refutable without an extended and complex debate.¹⁴⁹

However, it seems that there is something rather circular about the argument from absolutist prioritisation, as some writers have implied. While it may be true that a group of people could exercise their freedom by voluntarily surrendering certain rights (freedom of expression, freedom of association, freedom from arbitrary detention) in the name of others (to personal safety), or even forswearing democratic governance to be "happy slaves"¹⁵⁰, it is

¹⁴⁷ See K. Mahbubani, "The United States: Go East Young Man" in *The Washington Quarterly* (Spring 1994) 5, p. 7.

¹⁴⁸ Statement of Miss Goh (Singapore), United Nations General Assembly, 47th Session (1992), Third Committee, 51st Meeting, UN Doc. A/C.3/47/SR.51, para. 25.

¹⁴⁹ See generally C. Sunstein, "Rights and Their Critics" 70 *Notre Dame Law Review* 727 (1994-1995), esp. pp. 735-739.

¹⁵⁰ See e.g. N. Englehart, "Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian

difficult to imagine how they might communicate this desire to their leaders without the protection of the very rights which they apparently foreswear. If democratic institutions are not present in a society, how are its populace to transmit their desire to restrict their freedoms (or otherwise) to the government?¹⁵¹ The argument is paradoxical.

The responses to this critique would seem to be twofold. The first is practical: the risk of ethnic conflict and social disruption in most Asian States is so severe that freedom of expression must needs be curtailed¹⁵², effectively rendering the point moot. The populace may wish to live as happy slaves or they may not, but the need for the governing institutions to preserve the stability of society is more pressing. This would hardly be a persuasive response, as it merely defers the question, which then becomes: do the citizenry prefer to risk societal stability in the name of being able to transmit their views to the government, or not?

The second response is cultural: people in East Asian societies prefer to sacrifice individual freedoms for personal safety and societal stability; they prefer a social contract to exist in which the State “provide[s] citizens with their basic needs for jobs, housing, education and health care” and the citizens abide by the law and respect authority.¹⁵³ In other words, there are cultural predispositions in Asia away from individualistic civil and political rights and towards a group-based, communal, consensus-oriented vision of society.

This leads us around full circle to our starting point: that East Asia and the West are different in some important, cultural sense which makes it difficult or impossible, and

Ethics in Singapore” 22 Human Rights Quarterly 548 (2000), p. 548, citing D. Herzog, *Happy Slaves: A Critique of Consent Theory* (1989).

¹⁵¹ See e.g. C. Lingle, *Singapore’s Authoritarian Capitalism: Asian Values, Free Market Illusions, and Political Dependency* (1996).

¹⁵² See e.g. S. Goodroad, “The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order” 9 *Indiana International and Comparative Law Review* 259 (1998-1999), pp. 295-300.

¹⁵³ See e.g. The 10 Values that Undergrid East Asian Strength and Success, *supra* note 109.

illegitimate, to create and impose universal standards on human rights across Eastern and Western societies. This last facet of the 'East Asian Challenge' shall be briefly examined in more detail now.

There is a considerable amount of academic literature dealing with 'political culture' and the role which culture plays in allowing democracy and democratic institutions to evolve.¹⁵⁴ Much of this has revolved around the notion of culture prerequisites: that in order for a society to develop into a democracy (with fully realised civil and political rights) it must have a certain set of cultural characteristics, often referred to in a bundle as a 'civic culture'.¹⁵⁵ Mostly, these characteristics are associated with the Western, liberal tradition – implying that, in order for a society to become democratic and civil-rights-respecting, it must be a Western one (or, perhaps, renege on its own traditional cultural mores).

A complementary scholarly movement sees the political culture of East Asia being dominated by a supposedly Confucian tradition. This movement arose out of a reversal in attitudes in both Singapore and China towards Confucianism during the 1980s and 1990s, which had previously been seen as retrograde and a barrier to development in Singapore and as hampering revolutionary change in China.¹⁵⁶ During this period, both countries began to rehabilitate Confucianism and propound its virtues as an indigenous Asian philosophy of government and society, more suited to the (real or imagined) cultural predispositions of Asian people. It was argued that Confucianism, with its emphasis on reverence for leaders, strong familial and communal ties, and maintaining social order¹⁵⁷, was somehow more

¹⁵⁴ See e.g. M. Davis, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" 11 *Harvard Human Rights Journal* 109 (1998), esp. pp. 120-124.

¹⁵⁵ See esp. G. Almond and S. Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Sage, 1989) (1963),

¹⁵⁶ See e.g. W. De Bary, *Asian Values and Human Rights*, Harvard University Press (2000), pp. 1-16.

¹⁵⁷ See e.g. J. Chang, "What is Confucian Spirituality?", in J. Eber (ed.) *Confucianism: The Dynamics of Tradition* (Macmillan, 1986).

suited to the cultural prerequisites of Asian societies and Asian people, who prize social order and communitarianism and have a different set of institutions and an un-civic political culture¹⁵⁸ based around the family and established hierarchies.

Many scholars have taken issue with these positions, attacking their depiction of Confucianism, their depiction of 'Asian' culture, and their understanding of how democracy evolves. Englehart, for instance, portrays Singapore's rehabilitation of Confucianism as a cynical attempt to give plain authoritarianism a veneer of philosophical or cultural credence.¹⁵⁹ Rather than being a genuine attempt to put Confucian ideals into practice, he argues, it was a means of giving ideological coherence to the blend of economic liberalism and political authoritarianism that the ruling party (the People's Action Party, or PAP) advocated from the 1980s.¹⁶⁰ The fact that it was not a sincere movement is borne out, in Englehart's view, by the fact that there was "scant evidence" of Confucianism in Singapore before the 1980s¹⁶¹, and in fact the PAP had attempted to systematically eradicate Confucian schools during the 1970s.¹⁶² Meanwhile, most non-Chinese people living in Singapore were extremely hostile to what they saw as Chinese expansionism which threatened their own cultural traditions.¹⁶³ Ultimately, he concludes, the effort to unify the Singaporean populace around a notion of Confucian ethics was an attempt to falsely depict the nation as homogenous, to "essentialise [Singaporean] citizens as people who are obedient and devoted to the community", and an "auto-orientalist" fiction falsely conceiving of Western

¹⁵⁸ See G. Almond and S. Verba, *The Civic Culture*, *supra* note 155.

¹⁵⁹ N. Englehart, "Rights and Culture in the Asian Values Argument", *supra* note 150.

¹⁶⁰ *Ibid.*, pp. 554-557.

¹⁶¹ *Ibid.*, p. 555.

¹⁶² *Ibid.*, p. 556.

¹⁶³ E. Kuo, "Confucianism as Political Discourse in Singapore: The Case of an Incomplete Revitalization Movement" in T. Weiming (ed.) *Confucian Traditions and East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (1996).

and Eastern people as “utterly different”.¹⁶⁴

Moving on to China, De Bary devotes considerable effort to demolishing the rehabilitation of Confucius carried out by the government since the late 1980s, by examining the issue on Confucianism’s own terms.¹⁶⁵ Arguing that Confucianism is in fact completely compatible with a notion of human rights, he points out that for much of its lifespan the Chinese Communist Party saw Confucius’ teachings as dangerously *individualistic*. They were seen as an anachronism in the era of world revolutionary struggle, in which individuals were to dissolve themselves in the Party and place its interests above all their personal concerns.¹⁶⁶ (Mao Tse Tung himself condemned “Confucian individualism” on numerous occasions.¹⁶⁷) In fact, until the late 1980s, Confucianism was seen as a danger to the common cause, whether of class struggle or Chinese nationalism.¹⁶⁸

As was argued by Englehart in reference to Singapore, De Bary considers the revival of Confucianism in the 1980s and 1990s to have been an appropriation of certain cultural practices or trends by the government for entirely Statist ends: “defend[ing] the right of the State to act on behalf of the people as a whole, often at the expense of the individual”.¹⁶⁹ It came to be seen, after the death of Mao and the retreat from rhetoric of class warfare and revolution, as a better unifying ideology on which to found a long-term governing tradition than Marxist-Leninism, and thus became rehabilitated by the political mainstream. This involved a ‘repackaging’ of Confucianism as being supportive of authoritarian and autocratic government, thus associating ancient Chinese cultural traditions of governance and social

¹⁶⁴ N. Englehart, “Rights and Culture in the Asian Values Argument”, *supra* note 150, p. 559.

¹⁶⁵ W. de Bary, *Asian Values and Human Rights*, *supra* note 156.

¹⁶⁶ See e.g. Liu Shaoqui, *How to Be a Good Communist* (New Century, 1952).

¹⁶⁷ See e.g. Yan Jiaqui and Gao Gao, *Turbulent Decade: A History of the Cultural Revolution*, trans. D. Kwok (University of Hawaii Press, 1996), p. 139.

¹⁶⁸ W. de Bary, *Asian Values and Human Rights*, *supra* note 156, p. 136.

¹⁶⁹ *Ibid.*, p. 92.

organisation with a powerful dynastic State.¹⁷⁰

De Bary does not dismiss cultural differences between East and West, acknowledging that Confucianism and Chinese society in general does greatly value communitarianism, and prefers to emphasise mutual respect through reference to “rites” rather than “laws”¹⁷¹. This, indeed, echoes Chinese scholars who emphasise that Confucianism advocates virtue and ethics over norms.¹⁷² But, he argues, the communitarianism that the Confucian tradition espouses is the very opposite of how it appears in the rhetoric of the Chinese leadership: it envisages the ‘community’ as a crucial intermediary between the individual and the State, protecting the interests of the individual or local group against governmental authority.¹⁷³ On the contrary to the prevailing view that China presents on the international stage, Confucianism communitarianism would serve, in his view, to support the development of a civil society in which citizens bear both rights and responsibilities, emphasising “norms of human respect, personal responsibility, and mutual support that could supplement modern legalistic definitions of human rights” and balancing the relationship between the individual and the State.¹⁷⁴

Similarly, Anthony Woodiwiss, in his book *Globalisation, Human Rights, and Labour Law in Pacific Asia*¹⁷⁵, attempts to reconcile the existence of what he sees as genuine cultural differences between Asian and Western societies with the universalising ambitions of human rights. A comparative study comprising the legal systems of Hong Kong, The Philippines, Malaysia and Singapore, his book examines the cultural and sociological context

¹⁷⁰ See *ibid.*, pp. 4-16.

¹⁷¹ *ibid.*, pp. 30-40.

¹⁷² See e.g. A. Chen, “Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law” 17 *UCLA Pacific Basin Law Journal* 125 (2000), p. 129.

¹⁷³ *ibid.*, pp. 90-117.

¹⁷⁴ *ibid.*, pp. 156-157.

¹⁷⁵ A. Woodiwiss, *Globalisation, Human Rights and Labour Law in Pacific Asia* (Cambridge University Press, 1998).

for labour law in each of these States, and suggests that there is indeed a particular 'patriarchalist' approach to rights within each of those societies¹⁷⁶. It then goes on to argue that the notion of universal human rights can be accommodated in such traditions, while also at the same time being reconciled with Asian patriarchalist interpretations; meanwhile States in Pacific Asia will evolve and adapt towards the practice of 'enforceable benevolence' due to the influence of global human rights norms. In essence, according to Woodiwiss, "there is nothing about either patriarchalism as a discourse or Pacific capitalism as a set of institutions that is intrinsically antipathetic to the maintenance of respect for human rights"¹⁷⁷, but whereas in the West human rights are pursued as 'liberties', in the Asian patriarchalist societies examined, they may be presented rather as 'claims'.¹⁷⁸

We need not draw any general conclusions about the persuasiveness or otherwise of the many arguments and positions taken around the issue of Asian values. Rather, we need only point out what these many thinkers and commentators have not primarily addressed, and that is, very broadly, the issue of international human rights law *as law*. Though Woodiwiss and, to a much lesser extent, De Bary discuss some aspects of municipal law in Asian States in the course of setting out their arguments, they do not focus a great deal of attention on either how international legal standards find their implementation in domestic law in practice, or how international norms are interpreted. Rather, they are focused at a level that is either too abstract (do different cultures understand 'rights' in different ways, and to what extent?), too normative (are Asian governments which have

¹⁷⁶ In The Philippines Woodiwiss argues this takes the form of 'mendicant patriarchalism' (*ibid.*, pp. 87-142); in Hong Kong, 'patriarchalist individualism' (pp. 143-184); in Malaysia 'authoritarian patriarchalism' (pp. 185-215); and in Singapore 'enforceable benevolence' (pp. 216-243).

¹⁷⁷ *Ibid.*, p. 261.

¹⁷⁸ *Ibid.*, p. 262.

espoused some form of Asian values-based cultural defence justified in doing so?), or too instrumentalist (how can cultural differences in Asia be reconciled with universality of human rights?).

This creates a large gap between, on the one hand, conceptual, sociological, and political arguments over the nature of international human rights norms, and on the other, analysis of the role of culture in society and as a foundation of legal systems. While these different discourses are important to the question of how culture features in the interpretation of norms given force as international human rights law, they do not answer it fully. This is problematic for two reasons. First, and most obviously, regardless of any other issue, we must at least concern ourselves with addressing that which gives international human rights norms their force, and thus gives rise to the entire debate: the law. Without treaties, courts, and quasi-judicial bodies, human rights would no doubt still be an important aspect of international relations, but their enforceability (or otherwise) at law is the crucial element of their current composition and status. Even if it may be argued that international human rights law is inadequately enforced or has minor or non-existent effects outside of the law itself, the fact that the law exists, was created by States, and continues to be created and discussed by them, indicates at least that they consider it to be representative and meaningful in some sense. What the law 'does' about culture and human rights, then, cannot and should not be ignored or glossed over.

This point bears some elaboration, as it brings to the fore the important and somewhat fashionable issue of 'verticalization'¹⁷⁹, or the pluralisation of international norm-making. Broadly speaking, this refers to the (perhaps obvious) recent phenomenon which

¹⁷⁹ See e.g. J. Klabbers, "Setting the Scene", p. 14, in J. Klabbers, A. Peters and G. Ulfstein (eds.) *The Constitutionalization of International Law* (OUP, 2009).

finds international legal rules in the classical sense being joined or perhaps even superseded by more non-traditional processes and actors in the creation of international norms¹⁸⁰. That is, more simply, there is a growing trend in international legal scholarship to view normativity in international rules as being more accurately represented as a continuum from law to non-law, rather than a question of distinguishing legal rules from non-law¹⁸¹. This is tied to two other trends: an interest in the pluralisation of law-making processes in the international sphere¹⁸² and a linked interest in the process-based work of the New Haven Law School¹⁸³. These trends are more than adequately summarised and tackled in Jean d'Aspremont's recent *Formalism and the Sources of International Law*¹⁸⁴.

This thesis bears this scholarly trend in mind, while not addressing it directly. It is undoubtedly true that norm-creation in the international sphere has become increasingly pluralised, fragmented, and verticalised since the Second World War, for many reasons. However, the significance of the scholarship examining this trend seems overplayed, both in terms of its empirical value and its practical usefulness. For instance, while it seems a plausible criticism of traditional positivism/formalism that "the doctrinal quest for 'the law' is a...disconnected enterprise, explaining little of how international law actually operates, how it affects decisions, interacts with municipal law, and shapes norms"¹⁸⁵, and while it also seems a plausible description of international norm-making that "private parties, [NGOs], and/or mid-level technocrats coalesce around shared, on-the-ground experiences and

¹⁸⁰ See e.g. J. d'Aspremont (ed.) *Participants in the International Legal System - Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011).

¹⁸¹ Or, as Koskenniemi famously put it, identifying law is a matter of "more or less". See *From Apology to Utopia*, *infra* note 308, p. 393.

¹⁸² See e.g. N. Krisch, *Beyond Constitutionalism - The Pluralist Structure of Postnational Law* (OUP, 2010).

¹⁸³ See e.g. P. Berman, "A Pluralist Approach to International Law" 32 *Yale Journal of International Law* 301 (2007).

¹⁸⁴ J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP, 2011). See esp. Chapter 1.

¹⁸⁵ J. Levit, "Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law" 32 *Yale Journal of International Law* 393 (2007), p. 394.

perceived self-interests, 'codifying' norms that at once reflect and condition group practices"¹⁸⁶, it seems a semantic deceit to conflate these process-based rules, agreements, codes of practice and behavioural norms with 'law' in the strict sense. Much is made in the New Haven Law School literature (and especially the "New" New Haven Law School literature¹⁸⁷) of transnational legal process¹⁸⁸ - the means by which States come to internalise international norms in the absence of coercion - or the "world constitutive process"¹⁸⁹ (viewing the creation of international law as a continuous, social process arising from the interaction between a vast array of actors not limited to States or international bodies). Yet too little of the literature devotes itself to considering whether there is a distinction between process- and socially-created norms in the international sphere and international law itself; it is infrequently considered that modern human societies, communities and groups all have socially-created norms, and social processes by which norms are created, yet at the same time they also have a phenomenon which their members consider to be notionally separate from those norms, which they call "law". It may well be the case that such a distinction is a fiction¹⁹⁰, or disguises the manner in which social norms and law are linked, or form a penumbra. But even if this is true, the fiction retains meaning. Social rules and norms regulate behaviour, but human actors treat law differently from non-law, and maintain the distinction - and the distinction affects them in concrete ways. The same is true of States: the New Haven scholars are undoubtedly correct that process and community is crucial in affecting the manner in which States and international actors behave and create norms which influence their behaviour. But recognising this does not, and should

¹⁸⁶ *Ibid.*, p. 395.

¹⁸⁷ P. Berman, *supra* note 183, p. 303.

¹⁸⁸ See H. Koh, "Transnational Legal Process" 75 *Nebraska Law Review* 181 (1996).

¹⁸⁹ See M. McDougal *et al*, "The World Constitutive Process of Authoritative Decision" 19 *Journal of Legal Education* 253, 254055 (1967).

¹⁹⁰ See e.g. R. Cover, "Nomos and Narrative" 97 *Harvard Law Review* 4 (1983).

not, lead us to the conclusion that there is no such thing as "international law" that is worthy of study and analysis as a distinct phenomenon. On the contrary, we might treat that distinction as worthy of study in its own right - though that would be beyond the remit of this thesis.

Moreover, purely in practical terms, process-based, soft-law oriented approaches are extremely difficult to analyse and quantify persuasively. As Berman puts it, "to the extent that international human rights are now an important element of global legal consciousness, it is because of a long process of rhetorical persuasion, treaty codification, and other forms of 'soft law' slowly changing the international consensus, not because of positive decree"¹⁹¹; yet the usefulness of this assertion must be questioned given its absence of empirical support, not to mention the near-impossibility of empirical support (for how can the process of rhetorical persuasion, treaty codification and other forms of soft law be separated as a variable from all those other potential variables which might be of relevance, sufficient to establish its impact?). The concern is not that Berman is incorrect, but rather that the extent to which he is correct is impossible to ascertain. The "New" New Haven scholars have in large part to resort to mere proof-by-example¹⁹² - which may be in large part inappropriate or hasty generalisations. Taking international law doctrinally as positive law - what might be called an Oppenheimian approach - avoids this problem for obvious reasons. Secondly, if we are to make normative or instrumentalist assertions or recommendations, there must at least be a clear understanding of the *status quo* for such suggestions to have any effect or bearing on reality. This should go without saying, but it is a point which has not been adequately addressed in the scholarship to this stage. It bears repeating that, before "ways

¹⁹¹ P. Berman, *supra* note 183, p. 304.

¹⁹² See e.g. J. Levit, *supra* note 185, using the examples of export subsidies, climate change regulation, and corporate social responsibility.

forward” are postulated, it is vital that we have a solid understanding of what is both currently possible within the existing framework, and what the existing framework contains.

Ultimately, this returns us to a point that was made at the beginning of this chapter; that the literature has been heavily biased towards what *should* be the case, versus what *is* the case. Questions which have interested scholars working in the Asian values issue have tended to be: how universal should human rights be? How should the system take account of any cultural differences that might exist between East and West? What should be done about recalcitrant Asian States? Where they have been empirical they have been directed abstractly towards the philosophical (how universal are human rights?) and neglected the concrete (what does international law itself say about the nature of universality?).

We once again find ourselves returning to the requirement for there to be an empirical assessment, from a legal perspective, of what international human rights law actually 'does' when it comes to assessing, analysing, and interacting with culture. The second section of this chapter will comprise a framework on which such an analysis can take place. The particular focus of this framework is an understanding of what we actually *mean* when we talk about culture, what we can reasonably expect the law to do, and how its approach to 'culture' has evolved and developed.

II. International Human Rights Law and Cultural Values

Two questions have by now arisen which require answering, and this will comprise the basic structure of this second Chapter. The first of these questions is, in what sense are we referring to 'culture'? This is a nebulous term in common usage, and the nomenclature surrounding the debates over it is equally nebulous. However, culture has a certain meaning in international human rights law, referring to cultural rights under the ICESCR and also under Article 27 of the ICCPR, as well as certain aspects of the developing law on indigenous rights. Some space will need to be devoted to clarifying this issue, and in particular what aspects of culture and cultural rights will not be discussed in this thesis.

The second question is methodological: at what level should our analysis be conducted? That is, following on from our assessment of what we mean by 'culture' in this context, and what is to be excluded or included in our analysis of the law's stance on it, we must examine with more specificity where within the body or structure of the law the issue of cultural values is likely to 'appear' most frequently and where it is likely to be most relevant. For, irrespective of how unified the different parts of the overall system are, it is inescapable that international human rights law is very broad and can be approached from a number of different perspectives – whether foundational, interpretational, or operational. Likewise, the manner in which we frame our analysis will be strongly influenced by the perspective from which we make our approach. We will need to set out in more specific and focused terms from which analytical angle we will approach the issues raised.

Ultimately, I will argue that the most interesting and illuminating angle from which to conduct our analysis is at the interpretational level, examining the role that the United Nations treaty bodies have played in analysing culture, how they have dealt with cultural or societal values which might affect implementation of treaty provisions, and what the implications of their approach are. From this, I shall set out in greater detail the structure

that the analysis will take.

A. Terminology and Clarification: What is Culture?

i) Is a Definition Necessary?

In the literature surrounding the issue of culture and human rights law it is, perhaps, at first glance surprising that so few scholars have devoted relatively little energy to defining what 'culture' means. Most have been satisfied with a lay definition or have simply elided the issue – Donnelly, for instance, while noting that the way 'culture' is discussed in much of the argumentation is "highly problematic" and rests on "dubious caricatures", he is satisfied to deal with it as it has been presented in the "elite and popular discussions of international human rights".¹⁹³ Some writers use such terms as 'culture', 'custom', and 'traditional practices' interchangeably.¹⁹⁴ Others tend to fold religious practices or viewpoints into 'culture' more generally, without any attempt at justification¹⁹⁵, or else examine human rights from an 'Islamic' or 'Buddhist' perspective without undertaking to expand on whether or not religion is or should be treated separately from culture when it comes to foundations and interpretations of human rights.¹⁹⁶ And in much of the Asian values discourse, those involved tend to avoid specifying what is meant by terms like 'culture', 'values', 'tradition', and so forth. This is not true universally of course, and some scholars have made an effort to

¹⁹³ J. Donnelly, *supra* note 13, pp. 71-72.

¹⁹⁴ See e.g. B. Weston, "The Universality of Human Rights in a Multicultural World" in R. Claude and B. Weston (eds.) *Human Rights in the World Community* (University of Pennsylvania Press, 2006), pp. 39-53.

¹⁹⁵ See e.g. J. Donnelly, *supra* note 13, also A. Langlois, *supra* note 91.

¹⁹⁶ See e.g. N. Othman, "Grounding Human Rights Argument in Non-Western Culture: *Shari'a* and the Citizenship Rights of Women in a Modern Islamic State", in J. Bauer and D. Bell (eds.) *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), pp. 169-192, and S. Satha-Anand, "Looking to Buddhism to Turn Back Prostitution in Thailand", *ibid.*, pp. 193-211.

draw distinctions between, for instance, culture in the artistic, ‘high culture’ sense versus the anthropological sense, or between material heritage, artistic heritage, and values.¹⁹⁷

These definitions, however, seem rather banal and obvious, although necessary given the evolving practice of UNESCO and the CESCR Committee.

There is, certainly, much productive research to be done examining the relationship between law and culture in general, and indeed a wealth of scholarship exists in this area.¹⁹⁸

We have already, in Chapter I, given a brief description of the work of academics like De Bary and Woodiwiss, who have positioned a critique of Asian values around careful analysis of culture and law in various Asian States.¹⁹⁹ However, Donnelly’s approach – taking the terminology as it is found in the discourse at face value, rather than to aiming to provide a sociologically or anthropologically accurate analysis of its meaning – is certainly the most appropriate for our purposes. Since our aim, that is, is to address the position of cultural or societal values in the context of international human rights law itself, our first and primary concern must undoubtedly be how the relevant actors (States Parties to human rights treaties, human rights treaty bodies, and so on) use the nomenclature, rather than a sociological approach which would be orthogonal to it – and which would probably raise more questions than it answered.²⁰⁰

This means that, notwithstanding the fact that the reality is obviously much more complicated and nuanced than is presented by either States Parties to the human rights treaties or human rights treaty bodies themselves, and regardless of the fact that many

¹⁹⁷ See e.g. R. Stavenhagen, “Cultural Rights: A Social Science Perspective” in H. Niec (ed.) *Cultural Rights and Wrongs* (1998); L. Prott, “Cultural Rights as Peoples’ Rights in International Law”, in J. Crawford (ed.) *The Rights of Peoples* (1988) 93.

¹⁹⁸ See e.g. N. Mezey, “Law as Culture”, 13 *Yale Journal of Law and the Humanities* 35 (2001).

¹⁹⁹ See *supra* notes 156, 175.

²⁰⁰ It is worth considering that, according to an anthropological study in the 1950s, there were 164 different definitions of ‘culture’ in the literature. See e.g. S. Wright, “The Politicization of Culture” 14 *Anthropology Today* 7, p. 7 (1998).

scholars have pointed out inconsistencies, oversimplifications, and misrepresentations²⁰¹ in the way in which these actors have portrayed culture, we ought to take it as it is represented by them at face value, for the purposes of this thesis at least. That is, we shall take an instrumentalist view of the terminology surrounding 'culture' and refrain from establishing a comprehensive and clear definition. Our definition, such as it is, is merely "that which is presented, as 'culture' within the discourse", which should suffice for the purposes of our examination.

However, this, in itself, is more complicated than it appears at first glance. This is because the term 'culture' is not merely a lay term in international human rights law, but is itself a right; individuals under the jurisdiction of any State Party to the ICESCR have the right to culture, and there are other substantive cultural rights in the major human rights treaties. Yet this is not generally how the term 'culture' has been used in the Asian values debate. Before proceeding, then, we must decide on the parameters for this thesis: what are we referring to specifically when we examine the way in which cultural or social values are presented in international human rights law?

ii) Defining Parameters

We shall begin by outlining what will, for the sake of clarity, be largely ignored in the course of this thesis: cultural rights and culture's role in the principle of non-intervention.

Cultural rights are a relatively undeveloped area in terms of scholarship, but in recent years they have been the focus of a considerable amount of discussion.²⁰² Much of this has

²⁰¹ See e.g. A. Pollis, "Cultural Relativism Revisited: Through a State Prism" 18 HRQ 316 (1996).

²⁰² See e.g. D. McGoldrick, "Culture, Cultures, and Human Rights" in M. Baderin and R. McCorquodale (eds.) *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007), p. 448; E. Stamatopoulou,

revolved around four key areas: the ‘classical’ right to participate in cultural life; the rights of members of minorities and indigenous peoples to participate in their own cultural practices and the implications for statehood and sovereignty²⁰³; the question of self-determination and the right of groups *qua* groups to their own culture²⁰⁴; and the issue of multiculturalism, recognition/protection of cultural diversity, and so forth.²⁰⁵ To this can be added several subsidiary issues which do not require greater detailing here, such as cultural rights in the WTO, the protection of cultural artefacts, commercial use of the traditional cultural products of indigenous peoples, and various others.²⁰⁶ This adds up to a rather complex interweaving of different intellectual strands, which will be briefly summarised below; as will become clear, none of these aspects of the law/culture interaction are relevant to the focus of this thesis to any great extent.

Cultural rights, classically understood, are contained within Article 15 (1) (a) of the ICESCR, in the form of the right of everyone to participate in cultural life, enjoy the benefits of scientific progress, and benefit from their scientific or artistic products.²⁰⁷ It is widely recognised that the formulation is problematic, nebulous, and difficult to adjudicate: it is described as a “remnant”²⁰⁸ and its apparent depiction of ‘cultural life’ as a monolithic entity “unrealistic”²⁰⁹. It is perhaps for this reason that Article 15 of the ICESCR slipped from notice

Cultural Rights in International Law: Article 27 of the Universal Declaration on Human Rights and Beyond (Martinus Nijhoff Press, 2007); W. K. Barth, *On Cultural Rights: The Equality of Nations and the Minority Legal Tradition* (Martinus Nijhoff Press, 2008); F. Francioni and M. Scheinin (eds.) *Cultural Human Rights* (Martinus Nijhoff Press, 2008).

²⁰³ See e.g. M. Scheinin, “The Right of a People to Enjoy Its Culture: towards a Nordic Saami Rights Convention, in F. Francioni and M. Scheinin (eds.), *supra* note 202, p. 151; W. K. Barth, *supra* note 202, pp. 3-36.

²⁰⁴ See e.g. A. F. Vrdoljak, “Self-Determination and Human Rights”, in F. Francioni and M. Scheinin (eds.), *supra* note 202, pp. 41-78.

²⁰⁵ There is a vast literature that perhaps does not require further elaboration here.

²⁰⁶ Essays on these topics are available in some number in F. Francioni and M. Scheinin (eds.), *supra* note 202.

²⁰⁷ International Covenant on Economic, Social and Cultural Rights, Article 15 (1).

²⁰⁸ A. Eide, “Cultural Rights as Individual Human Rights”, in A. Eide, C. Krause, and A. Rosas (eds.), *Economic and Social Rights: A Textbook* (Nijhoff, 1995), p. 289.

²⁰⁹ D. McGoldrick, *supra* note 202, p. 453.

and remained almost entirely unaccounted for in the workings of the CESCR for many years, until very recently.²¹⁰ For a considerable period after the ICESCR's coming into effect, the Committee only created a set of guidelines for State parties making reports on their progress in implementing these cultural rights²¹¹, and otherwise spoke merely so as to attempt to draw a distinction between the right to benefit from one's scientific or artistic products and intellectual property rights.²¹²

The basic understanding of this right would seem to be that individuals have the right to express a cultural life as they see fit (whatever that might mean), and whatever community they might belong to²¹³; or, as the ESCR Committee put it, there is a "right of everyone to take part in the cultural life which he or she considers pertinent, and to manifest his or her own culture"²¹⁴. This becomes problematic when we explore the matter in any depth: does this mean that individuals have the right to participate 'in' cultural life, that they have a right 'to' culture, or both?²¹⁵ And what does the right to participate in cultural life actually mean? If it is merely a participatory right, it would seem merely an adjunct to the rights to freedom of expression and association. But a right 'to' a culture would not seem to be borne out by the terms of the treaty itself, which only discusses the right to "participate in the cultural life of the community."

This problem, it would appear, reflects a confusion between the original intention of the drafters of the Article (and of Article 27 of the UDHR) that the right to take part in

²¹⁰ See e.g. R. O'Keefe, "The 'Right to Take Part in Cultural Life' under Article 15 ICESCR" 47 *International and Comparative Law Quarterly* 904 (1998).

²¹¹ Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN doc E/C.12/1991/1 (17 June 1991).

²¹² General Comment 17, Committee on Economic, Social and Cultural Rights.

²¹³ See e.g. S. A. Hansen, "The Right To Take Part in Cultural Life: Towards Defining Minimum Core Obligations Related To Article 15(1)(A) of the ICESCR" in A. Chapman and S. Russell (eds.), *Core Obligations: Building A Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) p. 279.

²¹⁴ Revised general guidelines, *supra* note 211.

²¹⁵ S. A. Hansen, *supra* note 213.

cultural life meant the right to have contact with works of art, museums, libraries, theatres, cinemas and so on, rather than the right to use one's own language or practice one's own religion or cultural traditions²¹⁶, and the broader approach taken subsequently by, for instance, UNESCO, which emphasised culture as a "way of life"²¹⁷, as well as the ICESCR in its Concluding Observations.

The CESCR attempted to clarify matters in its 2009 General Comment No. 21.²¹⁸ This involved a definition of "cultural life" which meant a "broad, inclusive concept encompassing all manifestations of human existence"²¹⁹ whereby "individuals and communities...give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society."²²⁰ It encompasses "ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give their existence..."²²¹ The language used is mellifluous to say the least, but it is at least clear that the broader definition of culture – not limited to 'high culture' but including the anthropological sense – was preferred.

The CESCR's emphasis, in its view on cultural diversity, is clearly on minority and indigenous groups and on women, children, migrants, and disadvantaged groups.²²² Partly, this comes in the requirement for States Parties to the ICESCR to give effect to specific rights

²¹⁶ See e.g. Y. Donders, "Cultural Life in the Context of Human Rights", Day of General Discussion – the Right to Take Part in Cultural Life, UN Doc. E/C.12/40/13 (May 9 2008).

²¹⁷ See e.g. UNESCO Declaration on Cultural Diversity, 41 ILM 57 (2002).

²¹⁸ CESCR, General Comment No. 21.

²¹⁹ *Ibid.*, para. 11.

²²⁰ *Ibid.*, para. 12.

²²¹ *Ibid.*, para. 13.

²²² *Ibid.*, paras. 25-39.

in the Covenant in a way that is “pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples”.²²³ The Committee described this as a requirement for ‘cultural appropriateness’, insofar as it was compatible with human rights guaranteed by international law and did not limit their scope.²²⁴ And partly, it required an active role from States in ‘respecting, protecting and fulfilling’ cultural rights, which meant, amongst other things, refraining from hindering individuals from choosing their own identity, from expressing themselves in the language of their choice, from creative activity with other groups members, and accessing their own cultural and linguistic heritage²²⁵; respecting cultural heritage, particularly of disadvantaged and marginalized groups, cultural products of indigenous groups, and creating legislation prohibiting culture-based discrimination²²⁶; and adopting policies to protect and promote cultural diversity, free association, cultural activities, and so on²²⁷.

The Committee was also keen to stress that cultural rights were individual in nature, and it was careful to make this clear: the language it uses is rather meticulous in that respect, describing the Covenant as requiring States Parties to “create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice”.²²⁸ This is in keeping with the standard view, which is also inherent in Article 27 of the ICCPR, which uses the phrase “persons belonging to...minorities”, indicating that minority rights are possessed by individuals alone, not groups or communities. This standard conception, elaborated on in

²²³ *Ibid.*, para. 16 (e).

²²⁴ *Ibid.*, para. 18.

²²⁵ *Ibid.*, para. 49.

²²⁶ *Ibid.*, para. 50.

²²⁷ *Ibid.*, para. 52.

²²⁸ See e.g. *Ibid.*, para. 55.

the HRC's General Comment on Article 27, is that "the rights protected under Article 27 are individual rights [although] they depend in turn on the ability of the minority group to maintain its cultural, language or religion".²²⁹ Or, in other words, the tendency is to view minority rights as individual rights with a "limited collective dimension"²³⁰; much the same seems to be true of cultural rights.

This has not stopped many theorists and scholars from attacking the notion of cultural rights as inhering only in individuals, since those rights have such a strong group dimension and are almost meaningless without recognition of that fact.²³¹ Probably the most notable of these theorists is Will Kymlicka, who argues that the classical understanding of cultural rights is inherently flawed, because individuals' well-being (especially their cultural well-being) is so closely bound to the group or collective which they belong to.²³² This means that some accommodation for group interests, between the individual and the State, must be accounted for.²³³ Indeed, Kymlicka argues that the traditional 'culturally neutral' liberal individual human rights are a *de facto* crystallisation of a group right of a kind – the rights of the majority – because they invariably shore up the language, culture, calendar and social mores of that majority.²³⁴ It is also sometimes argued that one legal instrument or another indicates a developing sense in international law that "peoples" could

²²⁹ HRC, General Comment No. 23, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 6.2.

²³⁰ See e.g. A. Yupsanis, "The Concept and Categories of Cultural Rights in International Law – Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties" 37 *Syracuse Journal of International Law and Communications* 207 (2009-2010), pp. 246-248.

²³¹ See e.g. J. Gromacki, "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" 32 *Vanderbilt Journal of International Law* 515 (1992), J. Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" 21 *Arizona Journal of International and Comparative Law* 13 (2004).

²³² See W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995).

²³³ *Ibid.*

²³⁴ *Ibid.*, p. 10.

or should possess cultural rights.²³⁵ Most notable among these is the United Nations Declaration on the Rights of Indigenous Peoples, which contains several articles which at least heavily imply that indigenous peoples *qua* peoples, rather than individuals, have cultural rights²³⁶ - though of course, the document is not legally binding.

Cultural rights are clearly conceptually linked with cultural relativism – a fact that has not gone unnoticed in the scholarship on the issue.²³⁷ Both cultural rights and cultural relativism, as Stamatopoulou memorably puts it, potentially threaten the “delicate and fragile universality concept that has been painstakingly woven” into the system of international human rights law²³⁸ by generating a troubling debate about the importance of respecting cultural values in general. The apparent contradiction between requiring States to respect, protect and fulfil the cultural rights of individuals under their jurisdiction while at the same time eliminating cultural practices which might impact negatively on other individuals’ rights is an obvious one, imaginable in a wide variety of circumstances and familiar to us through cases such as Lovelace v Canada²³⁹. Perhaps the classic case where this contradiction might be found is in Islamic personal law regimes vis-à-vis divorce proceedings, polygamy, and so on. It is certainly a problem of which the CESCR is acutely aware, and it attempted to address in its General Comment, when it emphasised the duty incumbent on States Parties to the Covenant to fulfil their obligations under Article 15 (1) (a) in tandem with all of their other human rights obligations: “while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of

²³⁵ See e.g. M. Ahren, “Protecting Peoples’ Cultural Rights: A Question of Properly Understanding the Notion of States and Nations?” in F. Francioni and M. Scheinin (eds.), *supra* note 202, p. 91.

²³⁶ United Nations Declaration on the Rights of Indigenous Peoples, especially Articles 8, 11, 15, and 31.

²³⁷ See e.g. A. Yupsanis, *supra* note 230, p. 236; also P. Macklem, “The Law and Politics of International Human Rights” [Review Essay] 16 IJMGR 481 (2009), pp. 484-485.

²³⁸ E. Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff, 2007), p. 4.

²³⁹ Human Rights Committee, Lovelace v Canada, Communication No. R.6/24*/ 30 July 1981.

States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms”.²⁴⁰ In other words, limitations on the right of everybody to take part in cultural life would be necessary “in particular in the case of negative practices, including those attributed to cultures and traditions, that infringe upon other human rights”.²⁴¹ These limitations must be in the name of legitimate aims and proportionate to them, and must only be as is necessary in “the promotion of general welfare in a democratic society”.²⁴² Of course, the detail of how this is to be achieved is more difficult to establish.

However, it is absolutely not the case that the States at the centre of the ‘East Asian Challenge’ have relied on cultural rights in their argumentation. Indeed, at almost no stage do Singapore, Malaysia, Indonesia, or China attempt to portray the problem of culture as being solvable through a robust interpretation of cultural rights – their arguments do not rely on claims to the effect that individuals under their jurisdiction have a right to engage in cultural life. That is, while it is somewhat easy to imagine a theory of Asian values which used the notions of proportionality and legitimacy to balance human rights in general with the rights of individuals in Asian States to engage in their own ‘Asian culture’ and have it protected and promoted, in actual fact this kind of reasoning has not been pursued.

Similarly, the attempted repositioning of the cultural rights discourse (to which can be added the work of such writers as Anaya²⁴³ and Schachar²⁴⁴) away from individuals and towards groups is firmly and self-evidently aimed at communities, collectives, and groups within States, particularly minorities and indigenous peoples. It should be seen, in other

²⁴⁰ CESCR, General Comment No. 21, *supra* note 218, para. 18.

²⁴¹ *Ibid.*, para. 19.

²⁴² *Ibid.*

²⁴³ See e.g. J. Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).

²⁴⁴ See e.g. A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge University Press, 2001).

words, as an attempt to develop a moral and legal argument for the protection of ‘subaltern’ minority cultures that is more robust than the current rather weak individual rights to participate in a culture and not to be discriminated against. It is therefore quite clearly distinct from the kind of positions which Asian governments – who tend to espouse such notions as the “Chinese people”, “Singaporean society”, and so forth - have taken. These positions, indeed, have rather obviously been in express opposition to the kind of argument that Kymlicka and others have made – as critics have noted on numerous occasions.²⁴⁵ While it could, perhaps, be argued that the natural conclusion to the Kymlickian perspective is that ‘the majority’ in a State, just like minorities, should have group rights which find expression in their own State’s legal system and social norms, and hence the State should be free from external critique, this argument has in fact not been made, or at least has tended to manifest itself in different terms.

The reasons for this are easy to speculate about: neither Singapore nor Malaysia is party to the ICESCR or the ICCPR, and China is only party to the ICCPR insofar as it applies in Hong Kong; none of these States has ever been particularly enthusiastic about the promotion and protection of individual rights of any kind. Moreover, the link between cultural relativism and cultural rights is as potentially problematic from an Asian values perspective as it is from a universalist one: once individual cultural rights become the vehicle for relativist arguments, they bring with them rights that are intrinsically linked to them, such as to freedom of religion, freedom of expression, the right to peaceful assembly, freedom of association, and so on – which might by their very nature begin to undermine the core of Asian values itself, which as will be recalled attempted to de-emphasise the

²⁴⁵ Englehart, for instance, notes that much of Singapore’s insistence on Confucian values has masked the multiracial nature of Singaporean society; see N. Englehart, “Rights and Culture in the Asian Values Argument”, *supra* note 150.

individualistic, and hence Western, character of human rights. This might explain the reluctance to follow this line. Similarly, recognition of group cultural rights would also raise the issue of minority and indigenous rights, which is an area which East Asian statesmen have generally been keen to avoid.²⁴⁶

While it is recognised, then, that there is a clear conceptual overlap between cultural relativism and cultural rights, and that the issues of limitations on cultural rights, and the proportionality-based balance between protecting the rights of individuals to engage in cultural practices and the concomitant rights of other individuals not to have their rights infringed by those cultural practices, are an area of great potential for scholarship, they are not the focus of this thesis. Rather, the debate over the East Asian Challenge has mostly taken place on an understanding of the term 'culture' either as referring to broad supranational trends (for instance, Asian values) or apparently national characteristics (for instance, 'Chinese culture'), or both, and as an independent factor, conceptually distinct from human rights of any kind (particularly cultural rights), which has an impact on whether human rights are recognised and how those rights are interpreted and implemented once they are recognised. Culture has, in other words, been presented as a kind of independent variable, or a lens or filter through which human rights norms become internalised within the society: a set of values inherent in society which by their very nature affect the way in which human rights become realised within it.

Similarly, our focus is not what might be called the cultural aspect of sovereignty: the argument, implicit or explicit in much of the Asian values discourse, which portrays human rights law in general as being culturally imperialist and a threat to the principle of non-

²⁴⁶ No Southeast Asian statesmen, for instance, expressed any opinions in the Working Group on the Draft Declaration on the Rights of Indigenous Peoples; see Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN Doc. E/CN.4/2002/98 (2002).

intervention or domestic jurisdiction; in this paradigm, the fact that different societies have different values is a justification for the principle of domestic jurisdiction itself. Many spokespeople for East Asian States have given statements to this effect, particularly in the political forums of the United Nations. Here, for instance, is a statement by Dato Hishamuddin Tun Hussein, the Malaysian representative at the Commission on Human Rights, speaking on a draft resolution calling for an international moratorium on the use of the death penalty:

Although human rights had a universal dimension, their promotion was a matter that fell within the jurisdiction of individual States. It was inadmissible that a country should try, through the decisions of the Commission or other United Nations bodies, to have the death penalty abolished or to impose its values and its legal system on another country. At both the national and international levels, the protection of human rights should always take into account the combination of the historical, demographic, cultural, economic, social and political factors peculiar to the country in question, *so that the principle of national sovereignty could be respected* [emphasis added]. From that standpoint, draft resolution E/CN.4/1997/L.20 was not balanced, since it reflected only one point of view and failed to take into account the fact that various legal systems adopted by democratically elected Governments reflected the will of the people who were alone able to decide whether or not capital punishment should be imposed for the most serious crimes in a given context. A single concept could not be applied on a global scale.

... The sponsors of the draft resolution were trying to railroad the members of the Commission, and had not had the courtesy of engaging in the necessary consultations in order to draw up a text based on consensus as demanded by current trends.

For those reasons, it was proposed to replace the sixth paragraph of the preamble, which reflected only the opinion of the Human Rights Committee, by a reference to article 6, paragraph 2, of the International Covenant on Civil and Political Rights, which did not prohibit

the death penalty.²⁴⁷

In this statement, we can identify several different elements. The first of these is the assertion that, although in principle human rights are in some respect universal, their promotion falls under the jurisdiction of individual States. The second is the notion that a State or group of States should not seek to impose a set of values on another State or group of States through manipulating a supranational body such as the Commission on Human Rights. (This comment concerned a CHR draft resolution, E/CN.4/1997/L.20, sponsored by a number of European States, calling for a worldwide moratorium on the use of the death penalty; similar draft resolutions, and similar arguments against them, were a feature at the CHR until its disbanding in 2005.) And the third is that human rights protection will differ from State to State depending on the “historical, demographic, cultural, economic, social and political factors” that are present, and the principle of national sovereignty requires this fundamental fact to be recognised. As we have seen, in the case of East Asia, that is generally argued to be a combination of traditional Asian values of collectivism and hierarchy, Confucian preference for virtue and ethics rather than legal rights, and so on.

A fourth element can be drawn out by examining, for example, the following comment, by Shen Guofang of China before the ECOSOC Committee:

The major obstacles to the implementation of the follow-up to the Vienna Declaration and Programme of Action could only be removed through dialogue and international cooperation. Countries with differing social systems, ideologies, cultural traditions and levels of development naturally had different emphases in their promotion and protection of human rights. The adoption of presumptuous and arrogant approaches or the politicization of the issue harmed the cause of the protection of those rights. China was happy to note that in

²⁴⁷ UN Doc. E/CN.4/1997/SR.36, paragraph 57-60.

recent years more and more countries had conducted human rights dialogue on the basis of equality and mutual respect, a trend which the United Nations should seek to encourage.²⁴⁸

This theme – that the politicisation of human rights in international or United Nations bodies, whether at the instigation of States or those bodies themselves, is counter-productive, and an emphasis on dialogue between equals is more appropriate – is a further element of the East Asian Challenge, supplementing the view that the attempted imposition of values by State(s) on others was a violation of national sovereignty and an unwelcome intrusion. Rather than seeking to use international forums to condemn responses to human rights in a given State, a conceptualisation of all States as respectful equals engaging in dialogue about how best to protect and promote universal human rights is the message. This line has been further developed through emphasising the notion that States should engage in “exchanges of views”²⁴⁹ to generate “constructive dialogue”²⁵⁰ rather than condemnation.

The common theme running through all these elements is, clearly, a defence of the primacy of national sovereignty and the principle of non-intervention, essentially (although not stated explicitly here) as it derives from Article 2(7) of the UN Charter. This can be coupled with a supplementary reference to the right to (internal) self-determination, which, it is implied, supports the principle of domestic jurisdiction inasmuch as it enshrines the right of “all peoples [to] freely determine their political status, and freely pursue their political, economic, social and cultural development”²⁵¹; that is (taking the orthodox view that the ‘self’ inheres within the existing territorial framework of nation-states²⁵²), it

²⁴⁸ UN Doc. E/1998/SR.37, page 2.

²⁴⁹ See e.g. Statement by Zhang Yishan (China), UN Doc. E/2002/SR.38, p. 6.

²⁵⁰ See e.g. Statement by Wang Min (China), UN Doc. A/C.3/65/SR.47, p. 9.

²⁵¹ UN General Assembly Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); see also Resolution 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations (1970).

²⁵² As set forth in, e.g., the 1970 Declaration on Principles of International Law Concerning Friendly Relations.

protects the group rights of each society, or in effect, State, to determine its own legal system and its own response to human rights. (Whether this interpretation of the right to self-determination or, indeed, the principle of non-intervention is currently considered acceptable in mainstream legal opinion is of course doubtful²⁵³.) For instance, the Bangkok Declaration, in stating that “self-determination is a principle of international law and a universal right recognized by the United Nations for peoples under alien or colonial domination and foreign occupation, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development [and] should not be used to undermine the territorial integrity, national sovereignty and political independence of States”²⁵⁴, seems to imply that the right to self-determination is conducive towards, rather than prohibitive of, a robust definition of national sovereignty and the principle of non-intervention.

It should be immediately clear that this discourse – even setting aside all other considerations – is not an important topic of discussion for our purposes, for the simple fact that it is a political, and not a legal, debate. Ultimately, indeed, it is a question of legitimacy: a debate which harks to the broader, compliance-related questions discussed by Koh²⁵⁵, Franck²⁵⁶, Chayes²⁵⁷, Goodman²⁵⁸, and so on, which are concerned with the reasons why States become parties to international treaties, and whether or not they comply with treaty obligations when they do. Fundamentally, that is, even if we view the arguments of East

²⁵³ See e.g. Institut de Droit International, *La protection des droits de l’homme et le principe de non-intervention dans les affaires intérieures des Etats* (1989), available at http://www.idi-iiil.org/idiF/resolutionsF/1989_comp_03_fr.PDF.

²⁵⁴ Bangkok Declaration, Articles 12 and 13.

²⁵⁵ See e.g. H. Koh, “Why Do Nations Obey International Law?”, 106 Yale L.J. 2599 (1997).

²⁵⁶ See e.g. T. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990).

²⁵⁷ See e.g. A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (HUP, 1998).

²⁵⁸ See e.g. R. Goodman and D. Jinks, “How to Influence States: Socialization and International Human Rights Law” 54(3) Duke Law Journal 621 (2004).

Asian States in this regard as persuasive, they are without question firmly within the sphere of international politics, not law. They speak to concerns about partaking in the system of international human rights law itself – not to how the law itself should be given effect.

Moreover, the argument from non-intervention on the grounds of cultural difference is not persuasive even on its face. The notion that external scrutiny of human rights issues within States is inconsistent with Article 2(7) of the Charter is no longer one which has any persuasive force for a variety of reasons.²⁵⁹ And even Singapore and Malaysia, two of the most recalcitrant States when it comes to participating in international human rights treaties, are parties to the CEDAW and the CRC, while China and Indonesia are party to all of the major treaties, except for the ICCPR in the case of China (except insofar as it applies in Hong Kong). They have, therefore, by definition voluntarily entered into treaty arrangements with other States which, by their very nature, require such external scrutiny to take place.

If we are to take a legal perspective on the Asian values debates and on cultural relativism within international human rights law in general, then, these broader issues located in international politics, legitimacy and compliance are a red herring. For, not only are they irrelevant in relation to questions of law, they are also irrelevant when it comes to matters regarding scrutiny of legal obligations entered into by the States concerned.

It is clear, then, that our focus is neither on cultural rights, nor on this outmoded view of domestic jurisdiction, but on something else: on culture as an independent variable – a social value or set of social values – which may or may not affect how international human rights obligations are given effect, and to what extent.

This, it will be seen, effectively reduces to a question of interpretation: are

²⁵⁹ See e.g. H. Steiner, P. Alston and R. Goodman (eds.) *International Human Rights in Context* (3rd edition, OUP 2007) pp. 700-703.

international human rights treaties interpreted so as to admit of culture as a factor affecting the implementation of human rights obligations, and to what extent?

B. The Matter of Interpretation

i) Why interpretation?

Cultural factors are, of course, relevant when international human rights law is formulated – i.e. in the drafting of treaties – when it is interpreted, and also when it is implemented. We have already made clear that interpretation of human rights treaties is the most appropriate angle for our analysis, but why the formation and implementation stages are passed over must now be explained.

First, when it comes to the formation of treaty law, it is clear from examining the *travaux préparatoires* of the major covenants that issues surrounding socio-cultural mores and values were of some considerable importance and controversy during the drafting processes for those treaties. For example, during the drafting of the Convention on the Rights of the Child (CRC), state representatives often differed over, for instance, what the rights of children to freedom of expression, education, or freedom of religion should substantively contain. An extreme example is the right of children born out of wedlock to the same rights as those born in lawful wedlock: though this putative right was discussed at some length by Working Groups in 1986²⁶⁰ and 1988²⁶¹, it was ultimately withdrawn and scrapped, because “although the principle of recognising children born out of wedlock was a

²⁶⁰ See UN Doc. E/CN.4/1986/39, pp. 4-5.

²⁶¹ See UN Doc. E/CN.4/1988/28, p. 47.

good one, there were many countries in which it had not been incorporated in the legislation and customs and culture were in contradiction with it”.²⁶²

In other cases the result was less fatal to the discussion, but State representatives were nevertheless eager to use cultural mores as reasons for preferring one wording or other in the final text. Bangladesh’s permanent representative on a number of occasions made statements to the effect that Islamic culture demanded a distinct understanding of the role of children’s rights (arguing, for instance, that with regard to the right to education “a clause [had] to be introduced to safeguard the autonomy and privacy of the Islamic family from encroachment and impingement by externally applied standards”²⁶³, and that the right to freedom of religion “appears to run counter to the traditions of the major religious systems of the world and in particular Islam”²⁶⁴). From a different perspective, the Holy See advocated a particular interpretation of the right to life, arguing that a “conceived child was entitled to rights”, not merely a born one.²⁶⁵

Depending on how liberal and broad a reading of the term ‘culture’ the reader takes, especially with regard to supposed differences between ‘East’ and ‘West’ surrounding the relative importance of consensus versus the freedoms of expression and assembly, one might also interpret the debates over these rights in the CRC as incorporating some elements of the cultural defence of sovereignty – for broadly speaking a split between Western States and others can be discerned in the importance attached to those freedoms. Where the United States, Sweden, Canada and others seemed in favour of a very expansive right of children to have freedom of expression, association and peaceful assembly²⁶⁶, the

²⁶² *Ibid.*, paragraph 229.

²⁶³ UN Doc. E/CN.4/1986/39, Annex IV, p. 3.

²⁶⁴ UN Doc. E/CN.4/1986/39, Annex IV, p. 2.

²⁶⁵ UN Doc. E/CN.4/1988/28, paragraph 25.

²⁶⁶ See e.g. UN Doc. E/CN.4/1987/25, pp. 26-27.

Chinese delegate argued that those freedoms “could not be enjoyed by children in the same way as they are enjoyed by adults because the intellect of a child was not as developed as that of an adult”.²⁶⁷ In this and in other areas, ‘culture’ was not used explicitly, but seems an ever-present background motif that suggests it would be ripe for textual analysis.

Since, then, the formation of law is such fertile ground for examining how cultural factors have affected the development of the law, it seems a level that is ripe for our analysis. However, there are a number of reasons to why this is not preferred.

The first is that, by and large, it seems safe to say that the corpus of human rights treaties is now fixed, and there is unlikely to be another major covenant or convention in the short or medium term future. This means that, while an examination of this stage might be illuminative, its importance in indicating how the issue evolves and continues to evolve is perhaps somewhat diminished.

The second reason is that, while it is of course true that the decisions of interpretive bodies such as the United Nations treaty bodies, courts, and so on are not direct sources of law-making, it is also the case that at a certain point in the decisions of such bodies we find formation and interpretation becoming intertwined: the very act of interpretation itself, indeed, comes to constitute formation of the law in an indirect sense. This is because, in any current understanding of how international human rights treaties are interpreted, that process has to be viewed as ‘evolutive’ in character²⁶⁸, resulting in the understanding of terms and provisions being refined and changed over time through, primarily, subsequent practice under Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and the doctrine of dynamic interpretation. Much more will be said on this point during the course

²⁶⁷ *Ibid.*, paragraph 117.

²⁶⁸ See e.g. *Tyrer v United Kingdom* 26 ECtHR (ser. A) (1978) para. 183.

of the thesis, but for the moment it suffices for our purposes to note that, in practical terms, the distinction between law formation and interpretation is in some sense arbitrary in the context of human rights, given the importance of viewing human rights treaties as ‘living instruments’.²⁶⁹ While the standard traditional view, in other words, is that “doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist”²⁷⁰, a modern understanding of the human rights treaty must incorporate an interpretive role for interpretive bodies that is in effect law-making.²⁷¹ This means that concentrating on treaty interpretation will also likely result, ultimately, in conclusions which will apply more generally in the formative dimension also.

However, another level at which to direct our analysis presents itself: what we might call the ‘implementative’ dimension. By this is meant the point at which international norms are incorporated (or otherwise) into the domestic law of States, what shape this incorporation takes, and how effectively it is done; and, from the opposite perspective, how States can be held accountable for failures to implement their legal obligations.

There are several different perspectives we might take in reference to this matter, if we are interested in the role played by cultural values in the realisation of human rights law in domestic legal systems. The first would be to undertake a practical assessment of the impact of ratification of human rights treaties or recognition of international human rights norms on domestic law, as for instance Heyns and Viljoen did in 2002 in conjunction with the OCHR.²⁷² This study examined 20 States from around the world, giving an overview of the level of awareness of the treaties within their judiciaries, their constitutional recognition of

²⁶⁹ *Ibid.*

²⁷⁰ Baron Deschamps, PCIJ Advisory Committee of Jurists, *Proces-Verbaux* of the Proceedings of the Committee, 16 June-24 July (The Hague, 1920), p. 336.

²⁷¹ See e.g. A. Boyle and C. Chinkin, *The Making of International Law* (OUP 2007), pp. 276-278.

²⁷² C. Heyns & F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Martinus Nijhoff, 2002).

treaty norms (if any), examples of legislative reform, judicial decisions in which any human rights treaties were cited, use by NGOs, and other 'limiting and enhancing' factors. Other authors have given thorough single-country analyses of how international human rights treaties are enforced and implemented.²⁷³ Anthony Woodiwiss's *Globalisation, Human Rights, and Labour Law in Pacific Asia*²⁷⁴ also fits into this category. Amongst other things, such a study could analyse the extent to which international human rights norms find interpenetration and actual practical enforcement within domestic law in a given State or States, in light of the prevailing cultural values and traditions within those societies. Such a study might shed light on the extent to which cultural values, at the societal level, have any practical impact in terms of municipal law and 'facts on the ground', as opposed to their political or rhetorical importance.

A second potential line of inquiry which presents itself with respect to the implementation domain is to examine the kind of (legal and extra-legal) factors which cause those States which most readily or forcefully present cultural values as being a relevant consideration in their compliance with and/or implementation of human rights treaty provisions, so as to form a basis of comparison with States which are less likely to do so. Such a methodologically empirical analysis would perhaps indicate to what extent it is possible to discuss the foundations for the Asian values discourse, or other cultural relativist critiques at the national level, sensibly and accurately.

Thirdly, we might focus more empirically on the ultimate realisation of international human rights standards in the domestic sphere, and assess the extent to which cultural

²⁷³ See e.g. B. Conforti and F. Francioni (eds.) *Enforcing International Human Rights in Domestic Courts* (1997), S. Oeter, "International Human Rights and National Sovereignty in Federal Systems: The German Experience" 48 *Wayne Law Review* 871 (2001), Y. Iwasawa, *International Law, Human Rights Law and Japanese Law: The Impact of International Law on Japanese Law* (1998).

²⁷⁴ A. Woodiwiss, *supra* note 175.

values affect that realisation or form a barrier to it. For instance, we might draw a comparison between how far States such as China, Singapore, Malaysia and Indonesia, which have drawn on culture most readily, as opposed to States with similar levels of development that have tended not to rely on it, so as to discover what actual effect it has in terms of human rights goals.²⁷⁵

The implementation level, then, is rich in possibilities for analysis. It is not, however, the level at which this particular analysis will be pitched, for the following reasons.

First, it will not have escaped the reader's notice that the kind of study briefly detailed above would be complex, and involve a long, protracted examination of the legal systems of many different States, not to mention other extra-legal, societal factors. Simply put, a comparative study akin to that conducted by Heyns and Viljoen, or Anthony Woodiwiss, would not be particularly feasible in a thesis of this kind (or, at least, if it were carried out, it would not be feasible to conduct it in sufficient depth).

Second, there are in fact good reasons to be dubious about the effectiveness of the kind of study outlined above. Without the ability to generate neutral 'control' variants of States which are subject to study (because by definition, such a State cannot exist) it is impossible to prevent at least some level of confounding or omission of variables – a problem inherent in all socio-legal studies, if not often remarked on.²⁷⁶ What is meant by this is that, quite simply, without an adequate scientific control, it is always a danger that the researcher confuses correlation with causation, thus failing to properly identify exactly what the reasons are for a given set of circumstances being the way they are. Thus, for instance, to take a very simple example, when Heyns and Viljoen conclude that “when one compares

²⁷⁵ Such studies are sometimes carried out: see for instance T. Risse, S. Ropp & K. Sikink, *The Power of Human Rights* (CUP, 1999).

²⁷⁶ Though a growing body of literature is bringing these problems to light; see e.g. J. Manzi, *Uncontrolled: The Surprising Payoff of Trial and Error for Business, Politics and Society* (Basic Books, 2012).

the world as it is with what it would have been without the [core human rights] treaties, treaties have made a huge difference”²⁷⁷, they are in fact making a meaningless statement: they do not know how, and in fact cannot know, the human rights records of the 20 States which they studied would have looked without the human rights treaties, because there is no counter-factual; there is no scientific control. While perhaps the ratification of the human rights treaties is correlated with some level of improvement in human rights standards, it is impossible to know how the outcome for those 20 States could have been different with a different set of variables: causation is not clear, and the conclusion is at best of no value and at worst actually pernicious.

Similarly, the problem of omitted-variable bias is ever-present in such studies, since by definition not every variable can be studied. Human societies are complex, and the factors which affect the level of rights protection available at law and elsewhere are many and varied – so much so that one must question how far it is possible for a researcher or scholar to identify which are relevant and which are not. Thus, for instance, when Oeter attributes the German system’s neglect of international human rights standards on the political activities of foreign citizens to “intrinsic inwardness of the intellectual perspective of ordinary lawyers”²⁷⁸ and “part of the political game, proposing radical measures that mobilise voters”²⁷⁹, he may well be correct, yet a host of other legal, political, and societal factors may in actual fact be of more importance – and there is no readily apparent method by which to ascertain precisely which are the most important. Oeter may thus be ignoring factors of vital consequence – a problem which this thesis would be similarly affected by, if it focused itself on the implementation level. (Omitted-variable bias is problematic enough in

²⁷⁷ *Supra* note 272, Afterword.

²⁷⁸ S. Oeter, *supra* note 273, p. 888.

²⁷⁹ *Ibid.*

actual scientific research, let alone in the kind of socio-legal analysis which would be required if one were to approach the cultural defence from the angle of implementation.)

So there are genuine reasons to be sceptical about the results and conclusions of the kind of studies that were mentioned above. But there is also a crucial, third reason to avoid a study of this nature, and it is simply this: the premise of this thesis, as established in the first chapter, is that international law itself has been critically neglected within the scholarship on cultural relativism and universalism. And while, of course, the law would not be absent from an analysis taking an implementation perspective, it would certainly be diluted by a focus skewed towards *results*, rather than actual *law*. That is to say, as soon as implementation and enforcement become the core subject of analysis, immediately the examination becomes oriented towards the outcome of legal regimes, rather than the legal regimes themselves.

The unsuitability of approaching the issue from an implementational or foundational perspective means that, almost by definition, our focus is interpretation. What is meant by this, and what the consequences are for the structure of the thesis, shall now be briefly discussed.

ii) The Focus on Interpretation

What is meant by the 'interpretive' dimension? If the 'formation stage' refers to the processes through which international law is created, and the 'implementation stage' regards enforcement, then by definition interpretation is what happens in between: it is everything relating to how different courts, tribunals, lawyers and State parties determine what obligations, rules and principles arise from international treaties once they have been

formed – it is the filter through which created law becomes enforced.

Different approaches to interpretation have been advanced, whether objective (emphasising the actual words used²⁸⁰), subjective (primarily focusing on the intentions of the parties in adopting the treaty²⁸¹) or teleological (taking into consideration the object and purpose of the treaty²⁸²). Since a certain emphasis on one of these approaches as opposed to others can result in rather different outcomes, and since the jurisprudence of different international institutions is rather varying²⁸³, this means that the issue of ‘how to interpret treaties’ has never been settled. It has thus been called “one of the most enduring problems”²⁸⁴ in international law, reflecting its complexity and ambiguity, and in the arena of international human rights law it is perhaps at its most intractable. This is because international human rights law is almost unique in terms of treaty interpretation; unlike in other arenas, where treaties are created between States under a general principle of reciprocity, human rights covenants are created to establish obligations between States which are intended to apply towards all individuals under their jurisdiction, not those other States. This means that the monitoring committees set up under the treaties play a greater role than the arbitral one given to other treaty bodies or committees in international law in interpreting provisions, for their role is not merely to settle differences of opinion

²⁸⁰ See e.g. G. Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-4” 33 BYIL 203 (1957), p. 204-7.

²⁸¹ See e.g. H. Lauterpacht, “De L’Interprétation des Traités : Rapport et Projet de Résolutions” 43 *Annuaire de l’Institut de Droit International* 366 (1950).

²⁸² See e.g. G. Fitzmaurice, *supra* note 280, p. 207-9.

²⁸³ The ICJ, for instance, tends to take a more objective perspective, relying first and foremost on the “natural and ordinary meaning” of terms “in the context in which they occur”, and stating that interpretation “must be based above all on the text of the treaty”. See Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports, 1950, p. 8, and the Case Concerning the Territorial Dispute (Libya/Chad) ICJ Reports, 1994, p. 6. This is in contrast to the European Court of Human Rights, which leans towards teleological standards – arguing as we have seen that the ECHR is a living instrument with a purpose requiring its provisions to be interpreted in an up-to-date fashion. See e.g. Soering v. UK, ECtHR, Series A, No. 161 (1988), also Loizidou v. Turkey, ECtHR, Series A, No. 310 (1995).

²⁸⁴ M. Shaw, *International Law* (6th edition, OUP, 2010), p. 932.

between States, but to hold States to account for failing to implement the standards they have undertaken to adopt. The crucial point, of course, is that unlike in a bilateral treaty, where States enter a reciprocal relationship with the ultimate sanction of termination as an incentive to abide by the treaty's provisions, for international human rights treaties the potential for termination as a sanction for breach is non-existent. This necessarily forces the monitoring committees into a somewhat adversarial role towards State parties, and generally ensures that argument over interpretation of provisions is often the norm rather than the exception. Since the nature of the opinions of the monitoring committees with respect to interpretation is fundamentally unclear²⁸⁵, matters are further complicated.

This is one of the reasons why the interpretive domain is of such interest for a study such as this one, as it presents a stark insight into one of the perennial problems with the way in which international human rights law actually functions. It provides a lens through which can be examined the way in which an apparently irreconcilable set of circumstances (States interpreting the law in absence of apparent consequences, in opposition to an external body with different 'authoritative' interpretations) are either resolved, or not. And naturally, since our aim is to examine the way in which the law deals with 'culture' or cultural values as a factor which may or may not be of consideration in the manner in which human rights treaty provisions are given effect, this makes the interpretive domain crucial: we would expect that, quite naturally, culture would here constitute one of the major factors in how the reconciliation between State and treaty-body interpretations occurs in some

²⁸⁵ Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (2nd edition, 2005), at pp. XXXI-XXXIII, suggests that the decisions of the HRC lack internationally binding effect, whereas Scheinin (in R. Hanski and M. Scheinin (eds.), *Leading Cases of the Human Rights Committee* (2003), p. 22) argues that in fact the Committee's views at least in terms of individual complaints decisions are "the authoritative interpretation of the Covenant". Committee members have expressed the view that while its findings are not legally binding, they "[have] considerable authoritative status" (Statement of Mr. Kalin, UN Doc. CCPR/C/SR.2380 (2006), paragraph 57).

contexts.

A second reason why the level of interpretation is preferred is more prosaic: it allows us to take a primarily law-centred perspective on the issues, rather than one of politics or international relations. That is (as will be recalled), one of the crucial bases for this entire thesis, and one of the major reasons for its existence, is that hitherto the analysis of national culture and human rights law has been characterised by a lack of rigor in the *legal* dimension – being political, sociological, or philosophical in tone. Since the law has been downplayed, this thesis has the specific and particular aim of focusing on it. Given that this is the case, it should be obvious why the arena of interpretation is key – it is the place at which international human rights law takes its greatest concern with actual points of law. Where law formation at the international stage is intimately connected with international politics and international relations, and where implementation is bound up in socio-economics, domestic politics, and societal issues, the interpretation stage is more ‘purely’ concerned with the law itself. That is to say, while of course the interpretation of international human rights treaties and treaty obligations is hardly a matter of ‘black letter’ law, it is nevertheless the area in which points of law are at their most important: it is where international human rights law is at its most ‘legalistic’, if such a statement can be sensibly made.

Thus, the best and most appropriate level at which to pitch our approach is in the interpretive domain. Or, to constitute the issue more specifically: how are international human rights treaty provisions interpreted so as to permit cultural values to be taken into account in their implementation, if they are interpreted in such a fashion at all? In other words, while we accept that cultural diversity may not be invoked by States to limit the

scope of the human rights treaty obligations they have voluntarily entered into²⁸⁶, we must turn to the question of what it means to say that a given cultural value is limiting the scope of a treaty obligation, and where the line of permissibility lies. And that exercise is, by definition, interpretive.

C. Conclusion

Let us now briefly summarise what has been established in this chapter.

First, we have established that our definition of 'culture' is generally not definitive nor detailed, but instrumental. We will take it *prima facie* as it appears in relevant documents, and assume that it encompasses a relatively wide range of phenomena, including religion.

Second, we have elaborated on the focus of our study and distinguished it from any discussion on cultural rights, which in this context are best viewed as a red herring. The crux of the matter, and what this thesis grapples with, is the role that cultural values at the societal level play as an independent factor influencing how human rights norms are implemented or interpreted, not the cultural rights of individuals. It is important to maintain the conceptual differentiation between these two rather distinct concepts.

And thirdly, we have briefly surveyed a number of potential different analytical approaches to addressing our focus. The formation of law – i.e., the creation of treaty law – while interesting, has been dismissed as a focal point, as has implementation/enforcement. Instead, we shall use the interpretive dimension as the lens through which our analysis will proceed. What this means shall be explored in the next chapter.

²⁸⁶ See UNESCO Declaration on Cultural Diversity, Article 4.

III. Culture and the Interpretive Domain

Introduction

We have established, in the first two chapters, our basic aim and the best analytical approach to reach it. That is, we are attempting to assess the position of ‘cultural interpretation’ of rights in international human rights law from a strictly legal perspective, and our analytical approach is to examine how the terms of the major human rights treaties are interpreted to take cultural or social values into account, if at all.

It is important, then, to discuss treaty interpretation itself in more detailed terms – for as we have already stated, it is hardly an uncomplicated or uncontroversial matter in its own right.²⁸⁷ Thus, this third chapter on the thesis is devoted to exploring the general principles of interpretation and various scholarly approaches to the matter, with the aim of answering some of the questions which will naturally arise during the remainder of the thesis: what is the nature of the interpretations of State Parties and human rights treaty bodies, how authoritative are they, and what role does subsequent practice play in the evolutive nature of human rights treaty law? Does the unique nature of international human rights treaties, which create obligations between States Parties *erga omnes* for the benefit not of each other, but for individuals under their jurisdiction, require a different interpretive approach?

Procedurally, of course, we will conclude that for our purposes an empirical rather than a normative perspective is of more value. That is to say, in keeping with the general

²⁸⁷ Indeed, according to, for instance, Jan Klabbbers, it has in recent years become “an obsession” for international lawyers. J. Klabbbers, “Virtuous Interpretation”, in M. Fitzmaurice, O. A. Elias and P. Merkouris (eds.) *Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010), p. 21.

theme of this thesis, we shall take more of an interest in how the ‘interpreters’ (State parties and treaty bodies) view their own roles than in the suggestions advanced by scholars and their broader theoretical perspectives. While not taking the apparent views of the actual ‘interpreters’ merely at face value, we will bear in mind that those views have a practical existence and consequence of their own.

Ultimately, we shall see that the interpretation of human rights treaties is a complex matter that concerns in particular the issue of subsequent practice under Article 31 of the Vienna Convention on the Law of Treaties. This issue, indeed, is unavoidable if we have any intention of discovering to what extent culture is a permissible factor in how treaty provisions are implemented. What this ‘subsequent practice’ is, and how we shall go about analysing it, will be set out towards the end of this chapter.

A. General Principles of Interpretation: Preliminary Overview

We have already described, in very discursive terms, some different approaches to treaty interpretation – objective, subjective and teleological²⁸⁸ – and briefly discussed the special nature of human rights treaties in regard to the matter. We shall now examine some of these issues in more detail, beginning with preliminary comments on the interpretation of treaties in general public international law. Our aim is not to offer definitive answers about rules of interpretation, but merely to set the stage for our discussion of the specifics of interpretation vis-à-vis human rights treaties.

It is, of course, impossible to discuss the issue without first examining the Vienna Convention on the Law of Treaties (VCLT). Articles 31 and 32 set forth the basic principles

²⁸⁸ See Chapter 2, notes 246, 247 and 248.

governing interpretation, and bear reproducing in full:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

It is relatively uncontroversial to state that Articles 31 and 32 reflect or codify customary norms on the interpretation of treaties, as this has been affirmed on a number of occasions by the ICJ (in for example the Genocide Convention (Bosnia v Serbia)²⁸⁹ case, the Indonesia/Malaysia²⁹⁰ case, and in LaGrand (Germany v United States of America)²⁹¹), the Dispute Settlement Panel of the World Trade Organisation (WTO) (in for example the United States - Restrictions on Imports of Tuna panel²⁹²), and the Permanent Court of Arbitration (in for example The Rhine Chlorides Arbitration²⁹³). And in practice, “the rules set forth in the Convention are invariably relied upon even when ... States are not parties to it”²⁹⁴.

Of course, while this is more-or-less agreed, in practice what the terms of these Articles mean is slightly less clear, and in fact there is some level of inconsistency in the views of the relevant bodies, particularly the ICJ and the International Law Commission (ILC). On certain occasions the ICJ has taken a relatively objective, text-based approach, stating that “the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the

²⁸⁹ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgement, ICJ Reports, 2007, paragraph 160.

²⁹⁰ Sovereignty over PulauLigitan and PulauSipadan (Indonesia/Malaysia), Judgement, ICJ Reports, 2002, paragraph 37.

²⁹¹ LaGrand (Germany v United States of America), Judgement, I.C.J. Reports 2001, paragraph 99.

²⁹² United States - Restrictions on Imports of Tuna, Report of the Panel (DS29/R), paragraph 3.17.

²⁹³ The Rhine Chlorides Arbitration Concerning the Auditing of Accounts (Netherlands-France), Permanent Court of Arbitration, 2004, paragraph 59.

²⁹⁴ A. Aust, *Modern Treaty Law and Practice* (CUP, 2000), p. 10.

context in which they occur”²⁹⁵ and that “interpretation must be based above all on the text of the treaty”²⁹⁶, while on others it has adopted a more teleological standard, governed by the principle of effectiveness²⁹⁷ (i.e. that treaties should be interpreted in light of the effect sought by the States parties who created them). The International Law Commission, meanwhile, seems to have tried to take a more holistic approach, incorporating elements that could be described as objective (emphasising “the primacy of the text”²⁹⁸), subjective (noting that “interpretation of documents is to some extent an art, not an exact science”²⁹⁹), and teleological (emphasising the “the objects and purposes of the treaty as a means of interpretation”³⁰⁰).

This slight inconsistency, or lack of clarity, partly reflects the fact that the rules contained in the VCLT are not exhaustive, but merely represent an approximation of general principles.³⁰¹ This is in some respects a result of a lack of clarity existing before the VCLT was created; Jans Klabber notes that amongst earlier scholars – Prudhomme, Satow, Hyde, Grotius and Westlake – there was very little agreement on whether there should even be rules on interpretation (Hyde had written, “the formation of rules of interpretation can hardly serve a useful purpose”³⁰²), let alone what those rules might be.³⁰³ But it also seems to have been a conscious, or at least subconscious, choice to design Articles 31 and 32 in such a way; it allows the process of interpretation to be “adjusted to suit the needs of

²⁹⁵ Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, ICJ Reports, 1950,

²⁹⁶ Case Concerning the Territorial Dispute (Libya/Chad), Judgement, ICJ Reports, 1994, paragraph 41.

²⁹⁷ See e.g. Fisheries Jurisdiction Case (Spain v Canada), Judgement, ICJ Reports, 1999, paragraph 52.

²⁹⁸ Yearbook of the ILC 1966 II, pg. 218, paragraph 2.

²⁹⁹ *Ibid.*, paragraph 4.

³⁰⁰ *Ibid.*, paragraph 2.

³⁰¹ J. Christoffersen, “Impact on General Principles of Treaty Interpretation” in M. Kamminga and M. Scheinin (eds.) *The Impact of Human Rights Law on General International Law* (OUP, 2009), page 39.

³⁰² C. C. Hyde, “Concerning the Interpretation of Treaties”, 3 *American Journal of International Law* 46 (1909), p. 47.

³⁰³ J. Klabbers, *supra* note 287, pp. 27-29.

specific treaties or situations”³⁰⁴, and results in what the ILC has called the ‘crucible’ approach to interpretation: “[a]ll various elements, as they are present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation”³⁰⁵, rather than a system resulting in “an irrebuttable interpretation in every case”.³⁰⁶ None of the various different rules or elements contained in these Articles should be taken independently, then, but as a unified whole.

Though this approach has its advantages, of course, it also has its disadvantages: it is even argued that the generality of the rules will arouse more controversy than they might resolve.³⁰⁷ Certainly, it has not precluded a wide variety of scholarly views on interpretation from arising, particularly in recent years. We shall now briefly examine some of the literature on interpretation, as it will inform our later discussion of the interpretation of human rights law and the role of the treaty bodies.

The views of Koskenniemi, of course, are in many ways the starting point for any modern scholarly analysis of the interpretation of international law. Naturally, he took a sceptical view:

[R]ules are not automatically applicable. They need interpretation and interpretation seems subjective. This is not merely a ‘practice’ difficulty of interpretation. The doctrine of sovereign equality makes it impossible to decide between competing interpretations...there is no other basis to make the choice than...either by referring to a theory of justice or to the identities of the State involved: one interpretation is better either because it is more just, or because it is produced by this and not that State. And the former solution is utopian, the latter violates sovereign equality. Both seem purely political.³⁰⁸

³⁰⁴ U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007), p. 3.

³⁰⁵ See R. Gardiner, *Treaty Interpretation* (OUP, 2008), p. 9, fn. 16.

³⁰⁶ *Ibid.*, p. 9.

³⁰⁷ See e.g. D. P. O’Connell, *International Law*, Vol. I, 2nd edition (Stevens and Sons, 1970), p. 253.

³⁰⁸ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edition (CUP,

That is, there are two approaches to interpretation, but both are, ultimately, denying of law. The first – the ‘pure fact’ approach, assumes that sovereignty is the “starting point” of international law³⁰⁹, as a natural consequence of the Lotus principle: that sovereignty is unlimited unless it is restricted by law, or, to put it in Koskenniemi’s words, “the essence of the law is not to allocate competences but to establish duties as exceptions to the initial liberty”.³¹⁰ This means that restrictions on sovereignty can only be restricted in the light of clear evidence, cannot be made by analogy, and cannot be interpreted restrictively.³¹¹ In the case of ambiguity, then, sovereignty cannot be infringed upon. This, for Koskenniemi, must needs prevent the law from being truly binding, because it results in the assumption that, if there are no clear obligations, the initial (sovereign) liberty of the State must be given normative effect.³¹² And “if norms have no natural meaning but require interpretation and if the interpretative rule calls simply for respect to liberty, then hard cases can only be decided by letting the State do what it wishes”.³¹³

On the other hand, the constructivist approach – appealing to the ‘spirit of the system’ - might allow the avoidance of this unpalatable consequence of ‘pure fact’.³¹⁴ By looking beyond fact to the goals and values underpinning the system, and interpreting in a way that harmonizes with those goals and values – that is, by coming at the matter from the perspective that “it is not sovereignty which determines the extent of a State’s legal rights, liberties and competences – it is the latter which determine the extent of its sovereignty”³¹⁵, interpreters might still find a place for law.

2005), p. 282.

³⁰⁹ *Ibid.*, p. 256.

³¹⁰ *Ibid.*, pp. 255-256; see also The Case of the SS Lotus, France v Turkey, PCIJ, Ser. A 10, p. 30.

³¹¹ *Ibid.*, p. 257. See also the German Reparations case, I UNRIIAA, p. 76, and the Free Zones case, PCIJ, Ser. A/B 46, p. 167.

³¹² M. Koskenniemi, *From Apology to Utopia*, *supra* note 308, p. 257.

³¹³ *Ibid.*, p. 258.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*, pp. 267-268.

But this approach cannot be consistent, for Koskenniemi, as it is ultimately “just another version of the utopian position”: it still denies law, and reduces it to politics.³¹⁶ The more that words and concepts such as reasonableness, equity, proportionality and so on, find their way into the frame, the less and less law looks like law, and the more it comes to resemble simply a group of subjective values. And in the absence of objectivity, there is no basis whatsoever to force a recalcitrant State to abide by the rules; the only conceivable argument is that the rules are binding because other States say so, but “this fails to explain why a State should be bound by other States’ subjective values”.³¹⁷ It simply looks as if political views are being imposed by some States on others.

Ultimately, both of these approaches become inconsistent and self-defeating:

Lawyers commonly argue about the limits of sovereignty as if they assumed the existence of objective values. They ground their propositions on equity, “peace and stability”, economic efficiency, vital interests etc. They assume that liberties can be limited objectively, by recourse to such ideas. But they remain at a loss in respect of the justification of such objectivities and ultimately justify them by subjective acceptance – behind which looms the metavalue of liberty. And lawyers argue about sovereignty as the need to honour the State’s subjective consent, domestic jurisdiction or self-determination. To justify this, they appeal to the law which, they assume, contains these within itself and thus remains anterior to them.³¹⁸

This means that, for Koskenniemi, in the final analysis, modern law has simply developed “strategies of evasion” for pretending that there are justifications for decisions when there are none, and relying on interpretations that cannot actually be justified³¹⁹; in actual fact

³¹⁶ *Ibid.*, p. 268.

³¹⁷ *Ibid.*, p. 269.

³¹⁸ *Ibid.*, p. 271.

³¹⁹ *Ibid.*, p. 272.

such strategies are 'undefensible' because they always reduce to politics.³²⁰ This brings us back to the initial problem he raised: that "rules are needed. But rules are not automatically applicable. They need interpretation and interpretation seems subjective...[and] the doctrine of sovereign equality makes it impossible to decide between competing interpretations".³²¹

Linderfalk discusses the scholarship on the matter as existing on a spectrum between those viewing interpretation as a political exercise ("Koskenniemi's radical legal scepticism") and those viewing it as governed entirely by rules of law ("the one-right-answer thesis").³²² Rather neatly, this of course mirrors the dichotomy at the heart of Koskenniemi's classic critique of international law. But Linderfalk's conclusion is that, in the final analysis, neither such approach actually reflects the legal reality. Ultimately, he argues:

[T]he regime laid down in Vienna Convention Articles 31-33 amounts to a system of rules, but the system would still have to be described as to some extent open-textured. The rules provide a framework for the interpretation process; but within this framework, the political judgment of each individual applier is still allowed to play a part (although, of course, not the leading part suggested by radical legal scepticism).³²³

He bases this assertion on a thorough survey encompassing first-order and second-order rules of interpretation³²⁴, the use of 'ordinary language'³²⁵, use of context³²⁶, use of object and purpose³²⁷, and use of supplementary means of interpretation³²⁸, which ultimately results in a lengthy list of first-order rules which he believes govern the interpretation of

³²⁰ *Ibid.*, p. 282.

³²¹ *Ibid.*, p. 282.

³²² U. Linderfalk, *supra* note 304, p. 4.

³²³ U. Linderfalk, *supra* note 304, p. 374.

³²⁴ *Ibid.*, pp. 29-56.

³²⁵ *Ibid.*, pp. 61-100.

³²⁶ *Ibid.*, pp. 101-201.

³²⁷ *Ibid.*, pp. 203-234.

³²⁸ *Ibid.*, pp. 235-278.

treaties in international law, as an extension of what is contained in the VCLT.³²⁹ These rules range from the basic (such as Rule no. 1: “If it can be shown that in a treaty provision, there is an expression whose form corresponds to an expression of conventional language, then the provision shall be understood in accordance with the rules of that language.”) to the complex (such as Rule no. 34: “If it can be shown that a treaty provision permits an act or a state-of-affairs, which – from the point of view of the parties – can be considered less tolerable than another generically identical act or state-of-affairs, then the provision shall be understood to permit this second act or state-of- affairs, too.”)³³⁰, and are designed to establish a model that “in general terms” describes the content of the current rules³³¹, while also bearing in mind the fact that value judgments are required at all stages of the process – making the approach not simply rule-based, but a combination of rules and political judgment.³³²

Linderfalk’s work is perhaps the only one of its kind, inasmuch as it attempts to establish in highly detailed terms the unspoken rules which develop from the apparent current approach to interpretation exhibited within the system. But by its own (implicit and explicit) admission, the framework of rules he elaborates are not definitive or exhaustive, because of the extent to which value judgments play a role. That is, although detailed, his rules to a degree merely transpose the problem to a different, less abstract level; it may very well be the case that “if, by using any ratification work of a treaty, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of an interpreted treaty provision, then the provision shall be understood in such a way that it

³²⁹ *Ibid.*, pp. 387-395.

³³⁰ *Ibid.*

³³¹ *Ibid.*, p. 29.

³³² *Ibid.*, pp. 374-375.

logically agrees with the concordance”³³³, but how ratification works might show that a concordance exists with regard to norm contents is still left to the question of art rather than science, and, by Linderfalk’s own admission, still a point at which political judgment plays a role. One wonders, therefore, whether such approaches do not simply serve a reiterative function, playing out an old debate in a new form.

It is this which leads Jans Klabbers to conclude, like the forebears he cites³³⁴, that an exercise in elaborating rules of interpretation such as that undertaken by Linderfalk is in part a mistake, for although at least some guidelines are necessary, “at the end of the day...interpretation is still a human activity, depending on the efforts of human beings, their intellectual capacities, their sensibilities, and, perhaps most of all, their sense of virtue”.³³⁵ Ultimately, that is, in his view much of what governs, and ought to govern, treaty interpretation is politics: “at best one can hope for political debate, open and without obstacles between participants on an equal footing. This calls for rules on how to conduct the debate, of course, but rules of interpretation cannot play that role, for their main function is to stifle today’s debate in the name of yesterday’s (seeming) agreement.”³³⁶ Rather than mechanistic “virtuoso” techniques, the prevailing theme should be the principle that treaties shall be performed in good faith.³³⁷

Klabbers’ argument perhaps arises naturally from the facts; it seems indisputable, as we have already noted, that even an elaborate 44-entry list of rules such as Linderfalk’s must nevertheless recognise the (fortunate or unfortunate) reality that human judgment will have to play an important role in the process of interpretation at some stage. Yet, nevertheless, it

³³³ Rule no. 22, *ibid.*, p. 392.

³³⁴ J. Klabbers, *supra* note 287, p. 28.

³³⁵ J. Klabbers, *supra* note 287, p. 35.

³³⁶ *Ibid.*, p. 36.

³³⁷ *Ibid.*, p. 37.

contains a fundamental inconsistency of its own: on the one hand, interpretation according to Klabbers should be a matter of virtue and good faith, but on the other, he explicitly recognises that “what matters is not so much how to interpret, but who has the power to do so”³³⁸ and cites with approval Powell’s appreciation for the “primacy of the political”.³³⁹ His position therefore seems to embody the very essence of Koskenniemi’s apology/utopia dichotomy: is treaty interpretation an apologia for realpolitik (what matters is not the rules on interpretation, but who does the interpreting) or is it a false utopian ideal (if only interpretation could be achieved virtuously)? This leaves his conclusions to be ultimately unsatisfying.

In this respect, Klabbers, and Koskenniemi both have something rather similar to say about interpretation: that it is ultimately an act of politics, not an act of law. Linderfalk attempts to tease out a set of rules on which interpretation is based, but ultimately resorts to an implicit admission that this is not possible, leaving us with an approach that is thorough and detailed but ultimately somewhat dissatisfactory, seeming to merely reframe the terms of the debate at a different level of detail.

Orakhelashvili goes further than Linderfalk in resisting the ‘politics-not-law’ position, arguing that the process of interpretation is subject to fixed rules, which are not French’s “working assumptions”³⁴⁰ but genuine rules which do not allow freedom of choice between interpretive methods.³⁴¹ He provides what is, ultimately, a consequentialist argument: “If interpretation were to be identified with politics, all difference between law and pure politics would fall to the ground. This requires rejecting the option of purely political

³³⁸ *Ibid.*

³³⁹ *Ibid.*, citing H. J. Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (University of Chicago Press, 2008).

³⁴⁰ I. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules” 55 ICLQ (2006) 281.

³⁴¹ A. Olekhashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, 2008), p. 309.

interpretation. Interpretation is thus a legal activity.”³⁴² What is more, it necessarily follows that interpretation must be free from the influence of non-law, because that is the essence of what a treaty ultimately is:

In the international arena, nearly all State attitudes are inherently political, guided by whether and to what extent the original agreement suits the political interest of the relevant State at the time of interpretation. If these attitudes are accorded decisive importance, the outcome very often will be the absence of legal regulation which may be conducive to the political interests of certain States, but not reflective of what was originally agreed in the relevant instrument, and hence incompatible with the basic principle of the observance of international obligations. States may agree on political grounds on interpreting or even reinterpreting the relevant instrument (just as they agree on concluding agreements), but this (re)interpretation would take place because the States in question so agreed, not because it is a political phenomenon.

As Visscher observes, the security afforded by the treaty to States-parties is measured by its capability to resist the pressure that can be exercised on it by the intervening transformations relating to interests and force. This confirms that the process of interpretation aimed at clarifying the content of law has to be seen as independent of the influence of non-law.³⁴³

Indeed, for Orakhelashvili this not only has to be the case, it also is the case: currently, international law “admits of no doubting of the thesis that the process of interpretation should be conducted in accordance with fixed rules arranged in hierarchical order. Whether one or another rule reflects the consent of the State, subjective intention or objective agreement is not a matter that influences the interpretative process. The relevant rules of interpretation apply because the Vienna Convention so establishes, independently

³⁴² *Ibid.*, p. 293.

³⁴³ *Ibid.*, citing Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963).

of what an academic or political assessment would make of them.”³⁴⁴ This, in his view, is the approach which courts have taken³⁴⁵, and they base their decisions on the textual scope of the relevant clauses they are interpreting, not external values³⁴⁶. Thus:

Nearly all attempts to upset the sequence of interpretation methods and especially the primacy of plain meaning are motivated either by dissatisfaction with the positivist background of international law as based on agreement between States, by desire to subordinate law to political factors, or to evade the operation of treaties as *lex specialis*.³⁴⁷

In the final analysis, however, even Orakhelashvili is driven towards subjectivity and external values of a kind, as he finds himself drawing from the principle of effectiveness – “construing the original consent and agreement of States-parties effectively and not as unreal or illusory”³⁴⁸ – very broadly as a basis for the entire undertaking of treaty interpretation. In doing so, he seems to ignore the fundamental subjectivity at the heart of the principle of effectiveness, which is not structured by rules (what, after all, is “effectiveness”, and how is it adjudicated?), and falls prey to this very subjectivity, as review essays have noted:

The author seems to oscillate between benign visions of principled interpretation relying on effectiveness (in human rights) and interpretation run askew driven by policy interests (in investment arbitration). It appears that whether, and how, the principle of effectiveness should be applied is often in the eye of the beholder.³⁴⁹

³⁴⁴ *Ibid.*, p. 294.

³⁴⁵ Citing cases such as Brogan and Others v United Kingdom, ECHR A 145 B, and the Belgian Linguistics Case 1 EHRR 252.

³⁴⁶ A. Orakhelashvili, *supra* note 341, p. 296.

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*, p. 394.

³⁴⁹ M. Waibel, “Demystifying the Art of Interpretation”, 22 (2) EJIL 571 (2011), p. 582.

It also must be said that Orakhelashvili seems to require Hume's guillotine to separate his proposition that since law and politics *ought* to be separate, then interpretation *is* a legal activity. It hardly needs explaining that this is not a particularly convincing position to hold.

The most persuasive accounts are those which, like Richard Gardiner's *Treaty Interpretation*, avoid answering questions such as those which Linderfalk, Orakhelashvili, Koskenniemi and so on seek to, but which take the more pragmatic and empirical position that answers to questions such as how rules are applied to treaties, how the VCLT rules should be weighed against each other, how conflicts between them should be resolved, and so on, cannot in fact be answered at all, and nor can a properly thorough and convincing theoretical analysis be given.³⁵⁰ Instead, Gardiner simply takes each of the VCLT rules in isolation, on the assumption that there is no hierarchy between them³⁵¹, and examines them as dynamic principles guiding interpretation, which continually evolve during practice. In other words, his approach begins not with theory but with practice: "The core of [his book] is an account of the rules, with guidance for their practical application from examples of how they have actually been applied so as to provide precedent (in a loose sense) and analogy."³⁵²

This means, primarily, examining case law to discover how the rules have actually been interpreted and applied, and how they have developed over time, while playing down the notion of final 'correct' answers and avoiding the temptation to be definitive. It is an approach which does not deny 'art', but rather aims to understand the rules which govern the art.³⁵³ No doubt this neglects the important issue of value judgments and politics, and no doubt it also lacks objectivity and absolute clarity. But its approach is persuasive: we can

³⁵⁰ See R. Gardiner, *Treaty Interpretation* (OUP, 2008).

³⁵¹ That is, drawing on the ILC's "crucible" approach.

³⁵² R. Gardiner, *supra* note 350, pp. 7-8.

³⁵³ *Ibid.*, p. 5.

see that, while the practice of international courts might merely boil down to Koskenniemi's 'strategies of evasion' – ways of avoiding the problem of there being no real justification for their interpretations – the fact of the matter is that the practice of these courts does exist and does have real-world meaning and content, strategy of evasion or not. And moreover, the practice appears to have some level of predictability: by examining what kinds of arguments have been used in the past, and what arguments have not been persuasive, we can begin to make presumptions about the way the law will be interpreted in future and the way the rules will be applied. But at the same time, by acknowledging that there is no hierarchy of rules, and embracing the 'crucible' approach, Gardiner avoids the accusations that his account is overtly and implausibly mechanistic.

Gardiner's method also seems admirably empirical, in the spirit in which this thesis is also intended. It seeks first to look at the facts, rather than examine them through the lens of theory. This is precisely our goal, as described in Chapter One. It is thus the basic principle on which we understand the general rules of interpretation in public international law: as a crucible in which "all the various elements, as they [are] present in any given case, [are] thrown into the crucible, and their interaction [gives] the legally relevant interpretation".³⁵⁴ And in emphasising interaction, it fits neatly with what many scholars have written – persuasively – about the nature of intention and meaning in treaties themselves: that the interpretation process is not about discovering latent meaning within the text, but about constructing a meaning through the process itself.³⁵⁵

Our general understanding of the interpretive process is simply that there is no specific hierarchy or strict set of rules: it is an art, with guidelines. How it is conducted, and

³⁵⁴ United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, UN Doc. A/CONF.39/11/Add.2, p. 39, paragraph 8.

³⁵⁵ See e.g. R. Higgins, *Problems and Processes: International Legal Argument* (OUP, 1994), p. 3.

its results, are based on the processes by which it is carried out, and the way the interpreters themselves use the various elements in the 'crucible'. What this means, as we shall see, is a discussion of how the interpreters of human rights treaties have argued human rights to be subject to a set of its own special regimes³⁵⁶, which revolve around so-called programmatic interpretation and the use, in particular, of the notion of subsequent practice in the Vienna Convention.

B. The Interpretation of Human Rights Treaties and the Role of the Treaty Bodies

The interpretation of human rights treaties creates a number of problems that can be considered additional to the general concerns associated with interpretation. First, the articles of human rights covenants are, in general, indeterminate and ambiguous in their language. This is a matter which has already been noted, and is often argued to be the great saving grace of the international human rights system and perhaps even essential to it³⁵⁷, but the fact remains that ambiguity is not a friend of *easy* interpretation. Secondly, the VCLT seems built on a number of assumptions that do not apply in the case of human rights treaties – primarily that international law is only a matter of reciprocal obligations between States. Thirdly, the issue of 'subsequent practice', which appears in Article 31.3(b) of the VCLT, has to be viewed as of crucial importance in the process of interpretation, much more so than it might be in other forms of international treaty. And fourthly, the principle of effectiveness is a thorny area, because there is a strong argument that human rights treaties were not created to enshrine a particular agreement to be 'given effect', but rather have to

³⁵⁶ See e.g. M. Scheinin, "Impact on the Law of Treaties", in M. Kamminga and M. Scheinin (eds.) *The Impact of Human Rights Law on General International Law* (OUP, 2009) 23.

³⁵⁷ Ambiguity, that is, allows consensus to form around indistinct norms by virtue of their indistinct nature, whereas concrete, specific and detailed provisions would never be agreed upon by diverse States.

be understood as a constantly changing, dynamic set of goals.³⁵⁸ All of these problems seem to suggest that human rights law is a special regime under international law, requiring different rules and methods of interpretation. We will now briefly examine each of them, and ask what the consequences are for our analysis of culture in the interpretation of treaty terms.

i) The Problem of Ambiguity

It is indisputable that almost all of the terms in all of the major international human rights are amorphous in their scope and indeterminate in content. This is true even of the most traditional civil rights, such as the right to a fair trial, which has at least eight potentially different interpretations in the European Convention on Human Rights (ECHR).³⁵⁹ For the rights to health, housing, education, water, and so on, it is infinitely more so – to take the example of the right to health as found in the ICESCR, the number of questions that can be raised about its nature include:

What is the meaning of the highest attainable standard of health, what is the meaning of health, does it extend to the social determinants of health, what obligations flow from the requirement that States recognise the right to health, are the measures required to fulfil these obligations universal or do they differ between States, what is the minimum core of the right to health, to what extent should States be responsible for ensuring the health of an individual in the home, workplace and general community, to what extent must States prevent threats to an individual's health from non-state actors, is privatisation of health care services compatible with the right to health, is the right to health justiciable, and to what extent must intellectual

³⁵⁸ One thinks of Amartya Sen's visions of 'rights as goals'; see A. Sen, "Rights and Agency", 11 (1) *Philosophy and Public Affairs* 3 (1982).

³⁵⁹ G. Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR" 15 (2) *EJIL* 279 (2004), pp. 292-293.

property rules be designed to maximise access to medicine and medical services?³⁶⁰

Of course, it has been argued that this ambiguity is, in fact, a great virtue. To refer back to Chapter One and our summary of Jack Donnelly's position, it would seem that ambiguity fosters agreement around norms: at the level of the Universal Declaration, where rights are at their most ambiguous, there is practically no disagreement over their nature.³⁶¹ And if rights had been less nebulous, more concrete and specific, it may well have been impossible to have generated the consensus necessary for the major human rights treaties to have been drafted.³⁶²

Nevertheless, it also poses problems of its own. First, from a practical point of view, no matter whether or not it allows consensus to form around norms at the conceptual level, it obviously makes agreement more difficult when it comes to points of law. (Again, this brings us back to the discussion of Donnelly's position in Chapter One.³⁶³) This is a problem merely at face value, because if agreement on the exact nature of a State's legal obligations is difficult to achieve then it hardly suggests that the system can function effectively *as law* – the benefits of viewing the system through a lens of agonistic pluralism notwithstanding.³⁶⁴

Secondly, speaking in general terms, States are probably more likely to abide by their legal obligations if they agree about what they are, while at the same time being more likely to interpret their own obligations in a meretricious fashion if the ambit is there. (Chayes and Chayes, for instance, describe the behaviour of States in cases where there is a "zone of ambiguity, within which it is difficult to say with precision what is permitted and what

³⁶⁰ J. Tobin, "Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation" 23 *Harvard Human Rights Journal* 1 (2010) p. 4, fn. 15.

³⁶¹ J. Donnelly, *supra* note 13, pp. 94-95.

³⁶² See, for instance, M. Glendon, "Knowing the Universal Declaration of Human Rights" 73 (5) *Notre Dame Law Review* 1153 (1997-1998).

³⁶³ See discussion at notes 50-51.

³⁶⁴ See A. Langlois, *The Politics of Justice and Human Rights*, *supra* note 91.

forbidden”³⁶⁵; the more general and broad the language of treaty terms, the wider is the range of permissible interpretations.³⁶⁶) This problem, it is sometimes suggested, cuts in two directions, as ambiguity in treaty terms can tempt adjudicators to “indulge personal moral convictions”³⁶⁷ as they are less bound by restrictive legal texts and precedents.³⁶⁸ Waldron’s problem of “results-drive jurisprudence”³⁶⁹ would seem to be acute, then, in relation to human rights law, and the treaty bodies are indeed criticised from time to time on such a basis – most notably the CESCR, which has been accused of “revisionism”³⁷⁰ and “reading into a legal text a content which simply is not there”³⁷¹ in its “deconstruct[ion] into an all-encompassing concept containing several novel rights” of the right to an adequate standard of living.³⁷²

These problems are all made apparent in the somewhat infamous dialogue between the Human Rights Committee and the USA which emerged after that country’s submission of its second and third periodic reports.³⁷³ Here, the issue of detention and interrogation of terrorist suspects was raised, and a dispute developed over whether Article 2(1) of the ICCPR required a State to protect the rights of all individuals within its territory and its jurisdiction, or within its territory and/or its jurisdiction, and over whether Article 7 of the

³⁶⁵ A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995), p. 10-11.

³⁶⁶ *Ibid.*

³⁶⁷ J. Waldron, “Judges as Moral Reasoners” 7 *International Journal of Constitutional Law* 2 (2009), p. 17.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ M. Dennis and D. Stewart, “Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?” 98 *AJIL* 462 (2004), p. 495.

³⁷¹ “Experiences with legal enforcement of the right to education as food-for-thought in exploring models for an optional protocol to the International Covenant on Economic, Social and Cultural Rights”, Information provided by the Special Rapporteur on the Right to Education, UN Doc. E/CN.4/2004/WG.23/CRP.4, paragraph 8.

³⁷² See e.g. S. Tully, “A Human Rights to Access Water? A Critique of General Comment No. 15”, 23 *Netherlands Quarterly on Human Rights* 35 (2005).

³⁷³ See UN Doc. CCPR/C/SR.2380 and the Concluding Observations at UN Doc.A/61/40 (Vol. 1) (2006), page 60.

Covenant contained a non-refoulement obligation.³⁷⁴ Here, ultimately, an impasse was the only result, as the US representatives found the Committee's interpretations "difficult to accept"³⁷⁵, stated that they did not agree with its jurisprudence³⁷⁶, and stressed their government's "sovereign right to decide which obligations to assume under international treaty law"³⁷⁷. The Committee, for its part, "note[d] with concern the restrictive interpretation made by the State party of its obligations under the Covenant"³⁷⁸, which was not in conformity with its own. This episode neatly illustrates the interpretive problems which can arise due to the problems outlined above.

ii) The Problem of the Vienna Convention and International Human Rights Law

The Vienna Convention is said to have resolved some traditional controversies surrounding interpretation. Foremost among these is that it effectively did away with the distinction between law-making treaties and contract treaties, or *traité-lois* versus *traité-contrats*. There is no necessity to go into the details of this distinction, but it is important to note that, to some authors at least, this distinction has not disappeared but remains pertinent – and, indeed, the VCLT did not resolve it but merely ignored it, and effectively subsumed the different types of treaty into *traité-contrats*.³⁷⁹ This means that its rules are not particularly suitable for treaties which would be best viewed as *traité-lois*. These authors point out that there is something unique about human rights treaties (and also, perhaps environmental

³⁷⁴ UN Doc. CCPR/C/SR.2380, para. 9-10.

³⁷⁵ *Ibid.*, para. 8.

³⁷⁶ *Ibid.*, para. 105.

³⁷⁷ *Ibid.*

³⁷⁸ Concluding Observations, *supra* note 374, paragraph 10.

³⁷⁹ See e.g. J. Brunée, "Reweaving the Fabric of International Law?" in M. Craven and M. Fitzmaurice (eds.) *Interrogating the Treaty* (Wolf Legal Publishers, 2005), page 120, arguing that the VCLT enshrines a contract-based understanding of international law.

treaties) in that they go beyond reciprocal binary obligations between States, as they have third-party beneficiaries, large numbers of parties, autonomous monitoring mechanisms, and “an aspiration to establish objectively binding normative international standards”.³⁸⁰ This means that the VCLT rules as they stand are not particularly suitable: they permit States to change the ‘rules of the game’ as they see fit, and do not seek to promote normativity, rather representing elements of realpolitik.

This, it is argued, suggests that human rights treaties are *sui generis* in nature and ought to operate under rules separate from the existing ‘standard’ rules of public international law, as *lex specialis*.³⁸¹ These rules might allow, for instance, monitoring bodies to give binding interpretations, assess the permissibility of reservations, or prevent States from modifying the relevant treaties.³⁸² This is not merely a suggestion advanced by scholars, but an approach which has found traction among interpretive bodies themselves. The Human Rights Committee, for instance, has described the VCLT rules regarding reservations as “inappropriate” with regard to human rights treaties³⁸³, while the European Court of Human Rights (ECtHR) has consistently emphasised the “special character” of the ECHR as a “treaty for the collective enforcement of human rights and fundamental freedoms”.³⁸⁴

The notion that international human rights law has a special character gains further support from the International Law Commission, in its notion of the special or self-contained regime: a group of rules and principles concerned with a particular subject matter, applied

³⁸⁰ See e.g. M. Scheinin, *supra* note 285, p. 28.

³⁸¹ See e.g. K. Vasak, “Towards a Specific International Human Rights Law” in K. Vasak and P. Alston (eds.) *The International Dimension of Human Rights* (UNESCO, 1982).

³⁸² *Ibid.*

³⁸³ Human Rights Committee, General Comment No. 24, paragraph 17.

³⁸⁴ See e.g. *Soering v United Kingdom* (App. No. 14038/88), ECtHR, Judgment of 7 July 1989, Series A No. 161, paragraph 87.

as *lex specialis*.³⁸⁵ Here, human rights law would fit into the ILC's third category of special regime – "all the rules and principles that regulate a certain problem area...collected together".³⁸⁶ The effects of international human rights law being such a special regime are as follows:

- Its significance derives from its norms expressing a "unified object and purpose". This means that their interpretation and application should "reflect that object and purpose".³⁸⁷
- It may derogate from general law under the same conditions as *lex specialis* generally (i.e. depending on context).³⁸⁸
- General law will be applied when matters arise that are not regulated by it, or where it fails.³⁸⁹

This would suggest that international human rights law treaties can be interpreted in a special way, reflecting their object and purpose, and potentially in a manner different to that of other treaties.

Two further questions now arise. The first is, what actually *is* the special character of human rights law? And the second is, what is the special way in which it ought to be interpreted? The issue of 'object and purpose' leads us on to two other important concepts: the issue of 'subsequent practice' and programmatic interpretation, which both have a

³⁸⁵"Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", Report of the International Law Commission, 58th Session, UN Doc. A/61/10, paragraphs 11-16.

³⁸⁶*Ibid.*, paragraph 12.

³⁸⁷*Ibid.*, paragraph 13.

³⁸⁸*Ibid.*, paragraph 14; see also paragraphs 5-8.

³⁸⁹*Ibid.*, paragraph 15, 16.

special relationship with the notion that international human rights law is a special regime.

iii) Subsequent Practice, Programmatic Interpretation, and the Role of the Treaty Bodies

Those in favour of a special approach to human rights treaty interpretation generally rely on Article 31.3(b) of the VCLT, which contains a reference to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. The interpretation of this Article itself, which does not make clear how the parties would indicate their agreement, is not a simple task, but the *travaux préparatoires* would suggest that in the case of a multilateral treaty, only tacit approval of a practice by States parties would be necessary to indicate that it constitutes “subsequent practice” under Article 31.3(b).³⁹⁰ This would, by definition, indicate that only formal objection to a given practice by States parties would be enough to prevent it from being construed as “subsequent practice”, almost reversing the burden of proof.

This is coupled with an emphasis on the reference to the “object and purpose” of a treaty found in Article 31(1) of the VCLT. Since, it is argued, human rights treaties are set up to establish objective obligations for States parties to protect the human rights of individuals in their jurisdiction, rather than to establish reciprocal rights, there is a requirement to envision them as ‘living instruments’ which are interpreted dynamically and in context, rather than statically, so as to continue to achieve their object and purpose of protecting the rights of individuals. In other words, in continually changing international and social environments, human rights treaties will need to be continually reinterpreted to reflect reality and apply flexibly to changing situations. Moreover, States cannot be relied upon to

³⁹⁰ See Yearbook of the ILC 1966 II (UN Doc. A/CN.4/SER.A/1966/Add.1), pp. 221-222.

interpret the terms of human rights treaties *inter se*, because of this special nature: the States parties would obviously have every incentive to interpret them restrictively and not, in fact, in line with their object and purpose at all.

The European and Inter-American Courts of Human Rights have been notably active in promoting this ‘programmatically approach’ to human rights treaty interpretation. The ECtHR in particular has emphasised the Convention is a “living instrument...which must be interpreted in light of present-day conditions” rather than in light of general principles at the time of conclusion.³⁹¹ Examples are plentiful, including Loizidou v Turkey, in which the Court argued that:

[T]he [notion that the] Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court’s case-law...Such an approach, in the Court’s view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46...which govern the operation of the Convention’s enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago³⁹²

Marckx v Belgium:

It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the “illegitimate” and the “legitimate” family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions... In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in

³⁹¹Tyler v. United Kingdom (App. No. 5856/72), ECtHR, Judgment of 25 April 1978, Series A No. 26, paragraph 31.

³⁹²Loizidou v Turkey (App. No.15318/89), ECtHR, Judgment of 23 March 1995, paragraph 71.

company with the relevant international instruments, towards full juridical recognition of the *maxim mater semper certaest*³⁹³

and ZarbAdami v Malta:

[S]ince the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved³⁹⁴

Indeed, in the ECHR context, the legitimacy of this approach by now “cannot be contested”³⁹⁵, although the extent of its scope is something that remains controversial.³⁹⁶

However, the concept of dynamic or programmatic interpretation is not limited to these regional human rights instruments. The ILC expressed the opinion, for example, that under Article 31.3 (c) of the VCLT, “rules of international law subsequent to the treaty to be interpreted may be taken in to account particularly where the concepts used in the treaty are open or evolving”, such as in cases where “the concept is one which implies taking into account subsequent technical, economic or legal developments [or] sets up an obligation for further progressive development for the parties [or] has a very general nature or is expressed in such general terms that it must take into account changing circumstances”.³⁹⁷

All three of these are fitting descriptors for most if not all the terms of the major international human rights treaties, and have a basis not just under the auspices of human

³⁹³ Marckx v Belgium (App. No. 6833/74), ECtHR, Judgment of 13 June 1979, Series A No. 31, paragraph 41.

³⁹⁴ ZarbAdami v Malta (App. No. 17209/02), ECtHR, Judgment of 20 June 2006, paragraph 74.

³⁹⁵ J. Christoffersen, “Impact on General Principles of Treaty Interpretation”, in M. Kamminga and M. Scheinin (eds.), *supra* note 301, page 49.

³⁹⁶ *Ibid.*, page 50.

³⁹⁷ ILC, *supra* note 385, paragraph 23.

rights but in general law also.³⁹⁸

Thus, an approach viewing the practice of the treaty bodies as constituting subsequent practice, recognising that international human rights treaties are not static but were created for a particular object and purpose, would not be unfounded either in law or reality. This approach would view final views on individual complaints, concluding observations on State party reports, and general comments, as being, if not binding, then indicative and authoritative indications of subsequent practice and thus to be taken account of in the application of the relevant treaties *insofar as States Parties tacitly endorse it*.³⁹⁹ If we discover that the practice of the treaty bodies permits State Parties to interpret their treaty obligations through a cultural lens, or not, with the apparent tacit endorsement of those States Parties, then we could say with some level of accuracy “what the law permits”.

Of course, this assertion requires a number of caveats to be stated. First, as the ILC itself has argued that while special or self-contained regimes such as international human rights law may “take better account of the particularities of the subject-matter to which they relate [than general law does]”⁴⁰⁰, they never exist in isolation, because general law is both the “normative background” and the failsafe if the special regime fails to function effectively.⁴⁰¹ The special regime can only receive legally binding force by reference to

³⁹⁸ The ILC cites, for instance, Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia), ICJ Reports 1997, paragraph 112, stating that terms of a treaty to the effect that, for instance, the parties must “ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks” were “not static, and open to adapt to emerging norms of international law...”, and the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa), ICJ Reports, 1971, paragraph 53, stating that interpretation of a treaty cannot “remain unaffected by the subsequent development of law”.

³⁹⁹ M. Scheinin, *supra* note 285, p. 33. See also M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995), page 91.

⁴⁰⁰ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, paragraph 191.

⁴⁰¹ *Ibid.*, paragraph 192.

general rules and principles of international law.⁴⁰² Of course, the practice of the treaty bodies is itself not legally binding, and does not seek to be, but nonetheless it must function against the normative background provided by general law. This, effectively, is another way of saying that, as Mechlem points out in her critique of the monitoring practice, human rights treaty bodies ought to follow by the same rules of interpretation as States (i.e. the VCLT), since they in effect take the place of States in the process.⁴⁰³ This obviously does not prevent the treaty bodies from delivering any opinion they see fit, but it does suggest that there are limits on how far the treaty bodies can develop their own interpretations while retaining a perception of legitimacy and a sense of being part of the system of international law as a whole.

Following on from this point, in international human rights law there is a particular urgency to view interpretation as being as much an act of persuasion as determining meaning.⁴⁰⁴ This is because, with States holding the primary legal responsibility to implement their own obligations in the treaties to which they are party, they are the central actors within the system: put crudely, it is the activities of States parties which largely decide whether human rights will be protected or violated.⁴⁰⁵ And since there is no real mechanism by which States can be forced to participate in the protection of human rights, except arguably with regard to gross violations, persuasion has to play a crucial role.⁴⁰⁶ If there is uncertainty about the meaning of a particular treaty term, in other words, again to put it simply, States must be persuaded to adopt a certain meaning, or else they will auto-interpret

⁴⁰² *Ibid.*, paragraph 193.

⁴⁰³ K. Mechlem, "Treaty Bodies and the Interpretation of Human Rights" 42 *Vanderbilt Journal of Transnational Law* 905 (2009), page 920-921.

⁴⁰⁴ J. Tobin, *supra* note 360, pp. 6-8.

⁴⁰⁵ *Ibid.*, p. 11.

⁴⁰⁶ Though it is not the only mechanism, of course. See e.g. R. Goodman and D. Jinks, "How to Influence States: Socialization and International Human Rights Law" 54 (3) *Duke Law Journal* 621 (2004).

– which is naturally unacceptable if the human rights system is to function as it is supposed to.⁴⁰⁷ For international human rights, then, persuasion is crucial.

In order for this persuasion to be effective, it must be “rational and legitimate as far as legal issues are concerned”, in Mechlem’s view.⁴⁰⁸ This is because, although of course the human rights treaty bodies are not courts, their findings are by their own words ‘authoritative’: when delivered, they indicate with some authority what States’ legal obligations are. As Alston puts it, for instance, with regard to General Comments, the practice of the treaty bodies can be viewed as “an expert committee [distilling] its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance”.⁴⁰⁹ The important, authoritative nature of the practice, therefore, requires constraint by, and respect for, legal rules of interpretation and the “normative background” of general law – at least, insofar as it wishes to retain some level of authority and persuasiveness.

This suggests that, although concluding observations, findings on individual complaints, general comments and so on can be viewed as part of a dynamic and programmatic approach to interpretation as part of the ‘subsequent practice’ with regard to the major human rights treaties, at the same time this body of work risks putting at risk its own practical value if it ceases to link itself to the “normative background” of general law. And since this “normative background” includes all of the stipulations of Articles 31 and 32 of the VCLT (given that they are generally assumed to constitute norms of customary

⁴⁰⁷ See J. Tobin, *supra* note 360, p. 13.

⁴⁰⁸ See e.g. K. Mechlem, *supra* note 403, p. 924.

⁴⁰⁹ P. Alston, “The Historical Origins of ‘General Comments’ in Human Rights Law” in L. de Boisson de Chazournes and V. Gowlland-Debbas (eds.) *L’ordre juridique international, UN system en quete d’equite et d’universalite – Liber amicorum Georges Abi-Saab* (2001), p. 764.

international law), there remains a requirement for the practice of the treaty bodies to adhere to the requirement to interpret States' obligations in line with not only the object and purpose of the treaties but also the ordinary meaning of their terms. So while we should not expect their interpretations to be "narrowly literal"⁴¹⁰, to use Zemanek's phrase, we should also, from both a legal and a practical point of view, be dubious about any attempt to stray too far from the ordinary meaning of the text of the respective treaties.

iv) Consequences for the Thesis

What are the consequences of the above in terms of our study? We have established, effectively, two things. Firstly, we are persuaded by Gardiner's emphasis on the actors involved – the interpreters – and how they combined various elements in practice. Our concern is not to approach the interpretation of human rights treaties from a theoretical perspective, that is, and in particular we shall be at pains to use exactly what Koskenniemi calls a 'strategy of avoidance', dealing with the law as it comes to us, *prima facie*.

Secondly, we bear in mind a number of facts that have arisen from our brief analysis of the background to the interpretive practice of the different human rights treaty bodies:

- Terms in human rights treaties tend to be ambiguous, and consequently there is likely to be some level of conflict between States, who have the ambit to interpret vague terms restrictively, and treaty bodies, who will take a purposive approach.

⁴¹⁰ K. Zemanek, "Vienna Convention on the Law of Treaties", United Nations Audiovisual Library of International Law, available at <http://untreaty.un.org/cod/avl/pdf/ha/vclt/vclt-e.pdf>, page 2.

- Broadly speaking the notion that human rights treaties are a special regime is not particularly controversial. Whether this means that they require special and different rules of interpretation is not absolutely clear or agreed on, but irrespective of this, a dynamic and programmatic approach to the interpretation of human rights treaties must be viewed as standard across international human rights bodies.
- It would not be problematic to view the practice of the treaty monitoring mechanisms, in the form of final views on individual complaints, concluding observations, general comments and so forth, as constituting ‘subsequent practice’ under Article 31.3(c) of the VCLT. However, both this subsequent practice and the programmatic approach takes place against a “normative background” provided by general international law: straying from the ordinary meaning of the terms of the treaties causes both practical and legal problems.

What this means, in effect, is that our approach must strike a balance between the undeniable need to recognise the importance of programmatic interpretation with the necessity of recognising the “normative background” against which it rests. That is, our aim is to attempt to understand, from a legally empirical perspective, to what extent international human rights law permits socio-cultural values as a consideration in the manner in which provisions are implemented by a given State Party. And since this is our aim, we need to be as accurate as possible about the legal value of the sources we will be examining. This means neither adopting the kind of restrictive interpretations that might be offered by strict adherence to the text, nor a *lex ferenda* approach relying on “sloppy

humanitarian argument”⁴¹¹, but treading a realistic middle-ground between the two. This may, in fact, require accepting a certain level of ambiguity and a lack of clear answers – something that should be expected, given that the rules underlying the ‘art’ of interpretation themselves are so open-textured.⁴¹² Certainly, it will require a level of agnosticism about theory. But this should not be mistaken for a lack of descriptive or factual accuracy, given that the facts themselves are not concrete, and given that there is nothing scientific about the law itself in this area.

Our focus, in any event, is the interpretation of States’ legal obligations both on the part of States’ parties and the treaty bodies, and the extent to which the elements cited in Article 31.2 and 31.3 of the VCLT – primarily ‘subsequent practice’ (in the form of the practice of the treaty bodies) – and so on provide a reference for this, as a way of assessing whether or not national or societal cultural values are taken account of to any extent in determining what States’ obligations are and how they might be implemented. We shall now briefly describe exactly what these elements might consist of with respect to international human rights law, what the sources of the ‘subsequent practice’ are, what their relative value and importance are, and how they might provide an indication of what we are looking for.

C. The Work of the Treaty Bodies as Subsequent Practice Establishing the Agreement of Parties Regarding Interpretation

Examining the work of the treaty bodies is important from two perspectives: it allows us to

⁴¹¹ D. Kennedy, “The International Human Rights Movement: Part of the Problem?” 15 *Harvard Human Rights Journal* 101 (2002), 120.

⁴¹² R. Gardiner, *supra* note 350, p. 9-10.

see the interpretations of both the treaty bodies and States parties themselves. That is, it not only enables us to see what the ‘subsequent practice’, which we have already established is a crucial factor in understanding how international human rights treaties are interpreted and ought to be interpreted, is, but it also serves as a window onto what States think – and States remain at the core of the international legal system, as the only actors who can create legal obligations. The reason why it allows us to do this is very simple: the practice of the treaty bodies almost always – with the exception of General Comments – manifests itself as a dialogue between the treaty bodies themselves and States parties.

Of course, treaty bodies do not only interact with States parties, and States parties do not only interact with treaty bodies. There is, it must be said, a considerable amount of literature on the notion of ‘interpretive communities’⁴¹³ and their role in the interpretation and implementation of international human rights law, by which is meant the “institutional setting” within which sets of assumptions and beliefs coalesce into accepted facts.⁴¹⁴ For international human rights law, these interpretive communities consist of a variety of actors, all of which have diverse opinions and understandings but all of whom comprise what Simma calls the “worldwide social consciousness” of international law.⁴¹⁵ These interpretive communities are always in the background, informing the views of both States and treaty bodies alike, because they provide the general framework and context in which interpretations are made. They are important not only in forming views and opinions, but also in achieving implementation, because if there is consensus around a particular interpretation within and between interpretive communities (including treaty bodies, NGOs,

⁴¹³ I. Johnstone, “Treaty Interpretation: The Authority of Interpretive Communities” 12 *Michigan Journal of International Law* 371 (1990-1991). See also O. Fiss, “Objectivity and Interpretation”, 34 *Stanford University Law Review*. The notion of ‘interpretive communities’ comes from S. Fish, *Doing What Comes Naturally* (1989).

⁴¹⁴ *Ibid.*, page 374.

⁴¹⁵ B. Simma, “From Bilateralism to Community Interest in International Law” 250 *Recueil des Cours* 217 (1994).

policy makers, practitioners, etc.) there is considered to be a much greater likelihood that States will be persuaded by it.⁴¹⁶

However, for the purposes of this thesis, we will leave this wider discourse surrounding interpretive communities in the background. As was stated in Chapter I with regard to the discussion surrounding verticalization and pluralism, there may be much to recommend the view that there is a shared "interpretive process" in treaty practice which "generate[s], elaborate[s] and refine[s] shared understandings and expectations"⁴¹⁷, as a general description of how international norms take on their meaning. Yet as an analytical subject it is problematic, and to a degree undesirable. To begin with, at least in the initial conception, interpretive communities were primarily seen as important in the context of auto-interpretation: the argument was that, rather than States interpreting their own obligations as monoliths, it was rather disparate communities of professionals within the relevant State who engaged in the process⁴¹⁸. This is, obviously, also an important point to consider when it comes to human rights treaty obligations, but it is equally obviously not the full story.

Secondly, just as there are unavoidable problems with the study of verticalization and pluralism in international norm-creation in terms of what is possible to conclude (given the complexity of the subject matter), there are similar difficulties in achieving anything beyond the rather banal and obvious observation that a large array of individuals and groups have some level of influence, big or small, on the interpretation of treaty provisions. That conclusion is indisputably true, but not of particular value in advancing our understanding.

But most critically, it must be questioned what difference it makes as a legal question

⁴¹⁶ See J. Tobin, *supra* note 360, pp. 7-11.

⁴¹⁷ I. Johnstone, *supra* note 413, p. 381.

⁴¹⁸ *Ibid.*, pp. 371-372.

to establish to what extent interpretive communities take part in the process of interpretation. Certainly, each State party to a human rights treaty has an interpretive community which affects how it interprets its obligations. And equally certainly, each treaty body has an interpretive community which affects how it interprets individual States parties' obligations. Yet if our immediate point of analysis is interpretation itself, in large part it hardly matters what those interpretive communities are comprised of, and the extent of their influence, so long as we can establish what their effects are - i.e., what interpretations they give rise to. Our stance, in other words, is that while we acknowledge that a vast array of actors and influences affect the interpretations given by both States and treaty bodies, since our emphasis is on actual interpretations rather than *the manner in which they are arrived at*, the appropriate focal point is what we can identify as being of actual formal legal consequence, and that is relatively simple: the views of States Parties, which are binding, and the views of the treaty bodies, which are indicative of 'subsequent practice' insofar as States Parties tacitly (or expressly) endorse them. This is, on its face, our area.

We shall now briefly describe the various forms of practice, and assess their importance and worth as indicators of subsequent practice.

i) The Reporting Process and Concluding Observations

The bulk of the work which the treaty bodies perform is the hearing and analysis of reports delivered by States through the reports process, and the giving of concluding observations on those reports. It is important to note, of course, that this is not primarily *interpretive* in function – it is, quite simply, an investigation into whether the given State is in compliance with the obligations it has undertaken by ratifying the corresponding Covenant.

Nevertheless, the terms of the Covenants imply that the process involves interpretation, simply by dint of the very terminological ambiguity which we have already discussed: the reports are supposed to be “on the measures [the States parties] have adopted which give effect to the rights recognised [in the Covenant] and on the progress made in the enjoyment of those rights”⁴¹⁹, but given that what the rights recognised in the Covenant are, and how they are to be enjoyed, are to some extent nebulous, the assessments conducted by the monitoring bodies will always have to be to some extent interpretive by their very nature. That is, they will always have to constitute some form of judgment regarding what the precise nature of States’ obligations are, and whether the measures they have undertaken fulfil those obligations. This makes the process a jurisprudence of a kind, indicating how the treaty bodies interpret the terms of their respective Covenants with respect to each individual State and its context – though, of course, the interpretation is merely ‘authoritative’ rather than binding.⁴²⁰

There are numerous practical problems with the reporting process that will be well known to the reader – among them delinquent reports, failure by States parties to provide follow-up information, the generality of the bodies’ pronouncements, the problem of overlapping, lack of quality, lack of independence or expertise of Committee members, and the lack of time devoted to each report⁴²¹ – but it is not particularly necessary or useful to analyse these problems in this thesis. They regard implementation. Purely from a legal perspective, our interest is in what the reporting process reveals about interpretation and

⁴¹⁹ ICCPR, Article 40.1.

⁴²⁰ T. Buergenthal, “The Human Rights Committee” 5 Max Planck Yearbook of United Nations Law (2001) 341, p. 347.

⁴²¹ See e.g. International Law Association Committee on Human Rights Law and Practice, “Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies”, in ILA, Report of the 71st Conference 621 (2004); “Concept Paper on the High Commissioner’s proposal for a unified standing treaty body” UN Doc. HRI/MC/2006/2 (2006); A. Bayefsky, *The United Nations Human Rights Treaty System: Universality at the Crossroads* (Transnational, 2001); P. Alston and C. Crawford (eds.) *The Future of Human Rights Treaty Monitoring* (CUP, 2000).

interpretation alone, and what function and value it has as law.⁴²²

That concluding observations are non-binding, and only have authoritative status, has already been established. What does this actually mean? Former members of the HRC have written at some length about the ‘special status’ of concluding observations⁴²³ nothing that:

The absence of specific provisions on the legally binding nature of the findings...does not mean that such findings are merely ‘recommendations’. The treaty obligations themselves are...legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question. Therefore, a finding by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy the situation.⁴²⁴

And:

Whenever a State has submitted to an international procedure, it must participate in that procedure *bona fide* until its very end...As in the case of recommendations of the General Assembly, those parties, and in particular the respondent State, have to examine the views addressed to them carefully, with due respect to their author. Generally there exists a presumption in favour of substantive correctness of such views, [and] [n]o better expertise as to the scope and meaning of any of the human rights treaties can be found than in the expert bodies set up to monitor their observance by States.⁴²⁵

Dimitrijevic notes simply that “a statement of an authoritative body performing an

⁴²² Here, we draw in particular from O’Flaherty’s excellent analysis of the legal status of concluding observations. See M. O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies” 6 *Human Rights Law Review* 27 (2006).

⁴²³ *Ibid.*, p. 34.

⁴²⁴ M. Scheinin, “International Mechanisms and Procedures for Implementation”, in Hanski and Suksi (eds.) *An Introduction to the International Protection of Human Rights* [Textbook] (Institute for Human Rights, 1997), p. 369.

⁴²⁵ C. Tomuschat, *Human Rights: Between Idealism and Realism* (OUP, 2003), p. 183.

important supervisory function cannot remain without consequences.”⁴²⁶

Of course, former members of the HRC have both a vested (undoubtedly subconscious) interest in emphasising the importance of their own work, and a natural tendency to view it as having a certain level of legal weight. The picture must be viewed as somewhat more mixed than it comes as presented by these authors. Nonetheless, the understanding of concluding observations being at least indicative of States’ legal obligations is present in more neutral fora. The ICJ chose to view remarks made in the HRC’s concluding observations on reports submitted by Israel as authoritative interpretations of Israel’s obligations in its advisory opinion on the construction of the security wall⁴²⁷, while the International Law Association’s Committee on International Human Rights Law and Practice thought that “it appears arguable that in interpreting [human rights treaties]...relevant subsequent practice might be broader than subsequent State practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.”⁴²⁸

O’Flaherty leaves us with the conclusion that concluding observations have no binding status for States, but that they have authority (“albeit ill-specified”) which is “most apparent where they...purport to interpret treaty provisions” but less clear where they “provide general advice on strategies for enhanced implementation of a treaty and when they opine on matters which...have little or nothing to do with the actual treaty obligations of the State Party”⁴²⁹ (as when, for instance, they recommend that States parties

⁴²⁶ V. Dimitrijevic, cited *ibid*.

⁴²⁷ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, page 184, citing UN Doc. CCPR/C/79/Add.93 and UN Doc. CCPR/CO/78/ISR.

⁴²⁸ ILA, *supra* note 421, paragraph 22.

⁴²⁹ O’Flaherty, *supra* note 422, p. 36.

incorporate treaty provisions in a monist fashion⁴³⁰). This seems a satisfactory summation, and the distinction between direct interpretations of treaty provisions versus general advice on the implementation of a treaty will be borne in mind.

ii) General Comments

If the reports procedures and the giving of concluding observations are primarily concerned with implementation and deal with interpretive issues simply as a result, general comments are more directly concerned with interpretation itself. In the words of Opsahl, they are the primary opportunity for the treaty bodies to “[apply] the Covenant, [discuss] interpretations, and [draw] conclusions, in the manner of a quasi-legislative body”.⁴³¹ By their nature, then, their focus and value is in elaborating in some authoritative manner on the nature of obligations both specific and general – which is to say, interpreting treaty terms.

The legal importance of general comments is, however, of some debate. As Alston notes, there are a large variety of different incentives for different actors to portray the significance of general comments in different ways.⁴³² The ILA’s valuable report on the work of the treaty bodies shows that national courts exhibit a considerable variety of views on the matter.⁴³³ In the US, New Zealand and Switzerland, for example, general comments have been described as “major source[s] for interpretation of the ICCPR”⁴³⁴, “essential points of reference for the interpretation of national constitutions and legislation and the

⁴³⁰ *Ibid.*, p. 33.

⁴³¹ T. Opsahl, “The Human Rights Committee”, in P. Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon, 1995), p. 415.

⁴³² P. Alston, *supra* note 409.

⁴³³ International Law Association, Interim report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals (2002).

⁴³⁴ *Maria v McElroy*, District Court for the Eastern District of New York, Judgment, 1999, 68 F Supp 2d 206, at 232.

development of the common law”⁴³⁵, and “of importance for the interpretation and jurisprudential development” of the treaties, if not directly binding⁴³⁶. However, they have also been described as having “moral authority but nothing more than that”⁴³⁷ and only of account “as opinions on the level of facts”⁴³⁸, stressing their non-binding nature. Moreover, as the ILA interim report notes, there has been very little scholarly analysis of the legal basis of general comments (and, indeed, all of the work of the treaty bodies) – specifically, whether they constitute subsequent practice in the interpretation of the treaties – and their persuasive or authoritative nature seems to derive largely from the expertise and reputation of the different bodies’ membership.⁴³⁹ This chimes with Opsahl’s view that general comments “carry some practical authority because they represent an important body of experience in considering matters from the angle of the Covenant”.⁴⁴⁰

In practice, this means that in some jurisdictions general comments have been seen as an important source of “interpretive guidance” despite their non-binding nature.⁴⁴¹ It must be said, of course, that as a general rule the jurisdictions where this occurs tend to be those whose level of incorporation of international human rights norms into domestic law is relatively strong. The ILA’s interim report⁴⁴², and the following final report⁴⁴³, contain exhaustive lists of cases in which general comments have been considered by domestic courts, and the national courts and tribunals referred to are those of New Zealand, Hong Kong, Switzerland, Germany, the United Kingdom, South Africa, Malawi, Japan, the USA, the

⁴³⁵ Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218, page 235 (High Court of New Zealand, Cartwright J).

⁴³⁶ A and B v Regierungsrat des Kantons Zurich, Judgment of 22 September 2000, S 2(g), Swiss Federal Supreme Court (Bundesgerichtf), cited ILA, Interim report, *supra* note 433, paragraph 32.

⁴³⁷ Kavanagh v Governor of Mountjoy Prison [2001] IEHC 77, paragraph 23 (High Court of Ireland, Finnegan J).

⁴³⁸ Judgment of 27 March 1998, Kyoto District Court, 45 Shomu Geppo 1259.

⁴³⁹ ILA interim report, *supra* note 433, paragraph 33.

⁴⁴⁰ T. Opsahl, *supra* note 431, p. 415.

⁴⁴¹ ILA interim report, *supra* note 433, paragraphs 44-47.

⁴⁴² *Ibid.*, paragraph 55.

⁴⁴³ ILA, Final report on the impact of findings of the United Nations treaty bodies (2004), paragraphs 80-102.

Netherlands, India, Canada, Australia, Hungary, Latvia, Norway, Poland, and Mauritius. The conclusion must therefore be that, for the vast majority of States Parties to the human rights treaties, domestic courts do not consider general comments to be of enough influence or importance to be relevant. Nevertheless, this hardly constitutes a reason to dismiss general comments as having no authority as interpretations of the treaties: it should come as no surprise that in certain jurisdictions international human rights law is not referenced in court proceedings, for a variety of obvious reasons. And when international courts and tribunals are examined, it becomes clear that general comments are of some influence, or at least have some legal weight: they have been referred to on occasion by the European Court of Human Rights, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and the ICJ, as guides for interpretation.⁴⁴⁴

As with concluding observations, of course, many criticisms can be levelled against general comments from a practical or advocatory point of view. Their implications are sometimes "insufficiently considered"⁴⁴⁵; they contain "considerable inconsistencies and discrepancies"⁴⁴⁶; and their conclusions are sometimes too controversial to be accepted by States Parties.⁴⁴⁷ But given our perspective, a critical analysis of individual general comments as texts is not particularly important: it suffices to note that there are reasonable indications that general comments can have legal value and weight beyond simply being statements of opinion – though they are not binding and do not purport to be, nor are they insignificant or mere recommendations. They inhabit the space between binding authority and hortatory statement, carefully considered by some States Parties and in some jurisdictions, and by

⁴⁴⁴ *Ibid.*, paragraphs 118-155.

⁴⁴⁵ T. Opsahl, *supra* note 431, p. 415.

⁴⁴⁶ K. Mechlem, *supra* note 403, p. 931.

⁴⁴⁷ See e.g. "Comment on Some Controversies Addressed in General Comments", in H. Steiner, P. Alston and R. Goodman (eds.), *International Human Rights in Context* (3rd edition, OUP, 2007), p. 885-890.

some international courts.

iii) Responses to Individual Communications

The area in which the treaty bodies most resemble courts issuing binding decisions is, of course, the individual complaints procedures found in the treaties or under the relevant optional protocols (where they exist). They are especially interesting in terms of interpretation, because they are essentially a form of jurisprudence, undertaking to address the specific legal obligations of States Parties; this means that unlike concluding observations (which have to be viewed primarily as recommendations, even if by necessity their function is quasi-interpretive) and general comments (which by their nature are general and hortatory whilst retaining interpretive functions), the views on individual complaints represent a method for deliberating on, and refining, the meaning of treaty terms in actual practice.

The legal status of views on individual communications is, in common with the other forms of treaty-body work, controversial. Certainly, there are opinions to the effect that views are legally binding, on the grounds that under the relevant treaties or optional protocols States have voluntarily submitted themselves to the competence of the committee concerned and its decisions on communications. For instance, Martin Scheinin argues:

[I]t would be wrong to categorise the [Human Rights Committee's] views as mere 'recommendations'. They are the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. It would be incompatible with these preconditions of the procedure if a State that voluntarily has subjected itself to such a

procedure, would, after first being one of the two parties in a case, then after receiving the Committee's views, simply replace the Committee's position with its own interpretation as to whether there has been a violation of the Covenant or not... [T]he presumption should be that the Committee's views ...are treated as the authoritative interpretation of the Covenant under international law.⁴⁴⁸

The Human Rights Committee itself also, it is said⁴⁴⁹, seems to take the view that its own decisions are binding in effect, in stating that "by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not"⁴⁵⁰. This at least suggest that the Human Rights Committee sees its views as, if not binding in the sense that they force States to comply, at least binding in the sense of finding States Parties to be in compliance with the treaty or not – as if States Parties have effectively ceded that power to the Committee in lieu of themselves. Fausto Pocar supports this interpretation, arguing that Article 2(3) of the ICCPR provides that where a violation of a right under the Covenant takes place the State has an obligation to provide a remedy, and thus where the HRC finds a violation then, in effect, the relevant State is legally obliged to remedy it.⁴⁵¹

On the other hand, it is more commonplace among commentators to suggest that, in fact, views on individual complaints are "not formally binding" or words to that effect.⁴⁵² And certain of the relevant treaty terms do not suggest in themselves that views are to be considered legally binding: the Optional Protocols to CEDAW, and the ICESCR, for instance,

⁴⁴⁸ R. Hanski and M. Scheinin (eds.), *Leading Cases of the Human Rights Committee* (Institute for Human Rights, 2003), p. 22.

⁴⁴⁹ See for instance H. Steiner, P. Alston and R. Goodman (eds.) *International Human Rights in Context* (OUP, 2007), pp. 915-916.

⁴⁵⁰ This formulation concludes every view adopted by the Human Rights Committee.

⁴⁵¹ See F. Pocar, "The Legal Value of the Human Rights Committee's Views" 1991-1992 Canadian Yearbook of Human Rights 119, pp. 119-120.

⁴⁵² See e.g. T. Opsahl, *supra* note 431, p. 421 (on the views of the HRC); A. Byrnes, "The Committee Against Torture, in P. Alston (ed.) *supra* note 431, p. 536.

merely oblige States to “give due consideration” to the views of the Committee.⁴⁵³

It certainly seems to be the case that courts in most States Parties interpret views in a restrictive light when it comes to giving effect to them in individual cases arising from their own jurisdictions. The classic example is Kavanagh v Governor of Mountjoy Prison⁴⁵⁴, in which the claimant, after making an individual communication to the HRC and successfully receiving a view that his rights under the Covenant had been violated⁴⁵⁵, attempted to have his conviction reopened. This was rejected by the Irish Supreme Court, who took the view that treaties did not form part of domestic law, and that ratification of the First Optional Protocol to the ICCPR did not create an enforceable obligation for the State to give effect to the HRC’s views.⁴⁵⁶ Courts in Spain have similarly ruled that decisions of the HRC did not constitute new facts that would permit the reopening of criminal proceedings.⁴⁵⁷

Moreover, it is often argued that it would be a mistake to portray the views of the treaty bodies as being akin to actual court judgments. None of the committees give particularly detailed justifications for their reasoning and conclusions, and they do not have the kind of resources available in fact-finding and investigation that genuine courts do. Many members are of non-legal backgrounds and are not trained as judges.⁴⁵⁸ And the proceedings do not resemble those of a court – there are no oral hearings, for instance. This has led Steiner, among others, to argue that the treaty bodies cannot realistically serve the functions that courts proper do, nor do justice to the individual cases coming before them,

⁴⁵³ In Articles 7.4 and 9.2, respectively.

⁴⁵⁴ Kavanagh v Governor of Mountjoy Prison[2002] IESC 11 (1 March 2002), Supreme Court of Ireland.

⁴⁵⁵ Kavanagh v Ireland, Communication No. 819/1998, CCPR/C/71/D/819/1998.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ See e.g. Tribunal Supremo, auto 69/2001, 25 July 2002, following Hill and Hill v Spain, Communication No. 526/1993, CCPR/C/59/D/526/1993.

⁴⁵⁸ This is especially true of CEDAW and the CERD Committee: see Committee on the Elimination of Racial Discrimination – Members, available at <http://www2.ohchr.org/english/bodies/cerd/members.htm> and Committee for the Elimination of Discrimination Against Women – Members, available at <http://www2.ohchr.org/english/bodies/cedaw/members.htm>.

but can elucidate, interpret, and explain the Covenant.⁴⁵⁹ Their function, in other words, is not to act as a court does in resolving disputes and acting as a deterrent or vindicating the rule of law. Rather, their role is precisely to clarify the treaty under their respective ‘jurisdiction’. Views on individual complaints, then, are best seen as tools for interpreting the treaties (as well, of course, as seeking redress for individuals whose rights have in fact been violated).

It might be more accurate, then, to conclude as the ILA has done that views are not formally binding on States in the same way that a judgment of the ECtHR might be, but States are nonetheless not free to disregard them simply because they disagree.⁴⁶⁰ And this lends them “considerable persuasive force” in domestic legal settings.⁴⁶¹ This can be seen in the case law of several jurisdictions, too numerous to detail here at length⁴⁶², but exemplified by the Privy Council’s thoughts on the matter in Tangiara v Wellington District Legal Services Committee:

It is true that [the HRC’s] views are not binding on the State Party concerned, which is free to criticise them and may refuse to implement them. Nevertheless...a State Party may find it hard to reject such findings when they are based on orderly proceedings during which the State Party has had a proper opportunity to present its case. The views of [the HRC] acquire authority from the standing of its members and their judicial qualities of impartiality, objectivity and restraint... [W]hen it reaches a final view that a State Party is in breach of its obligations under the Covenant, it makes a definitive and final ruling which is determinative of an issue that has been referred to it.⁴⁶³

⁴⁵⁹ H. Steiner, “Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?” in P. Alston and J. Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* (2000).

⁴⁶⁰ ILA, interim report, *supra* note 433, pp. 8-9.

⁴⁶¹ *Ibid*, p. 10.

⁴⁶² Though lists of many examples can be found in both the ILA interim and final reports, *supra* notes 433 and 443.

⁴⁶³ Tangiara v Wellington District Legal Services Committee (2000) 1 NZLR 17, at 21.

Of course, this means that ultimately much of what is said about the views on individual complaints is similar to that which was said about general comments: the views inhabit the space between binding law and recommendation: they are persuasive authority, with all the ambiguities that term suggests. This may result in a situation in which, as Davidson suggests, “there is an obligation to provide a remedy under [a given human rights treaty] that is independent of any legally binding determination of a breach”, which he views as “extremely troublesome to say the least”.⁴⁶⁴ However, troublesome or otherwise, it appears to accurately reflect reality.

iv) Assessment: Which Area to Focus on?

Clearly, all of the different means by which the treaty bodies express their views – Concluding Observations on State Reports, General Comments, and Final Views on individual communications – are potentially capable of constituting or indicating subsequent practice establishing the agreement of the parties, if the parties do in fact agree. This is because all are, to some extent, interpretive in function, and authoritative in character. We must now briefly consider to what degree they are useful areas of analysis in this regard.

Final views on individual communications must, it seems, be treated with the most caution, simply by assessing them at face value: none of the major treaties includes provisions for individual communications, all of which must take place through Optional Protocols to which not all Parties to the relevant treaties are signatories. For instance, there are 167 parties to the ICCPR but only 114 to its Optional Protocol; the corresponding figures

⁴⁶⁴ J. Davidson “Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee” 2001 New Zealand Law Review 125, p. 133.

for CEDAW are 187 to 104.⁴⁶⁵ It seems doubtful, then, simply based on this fact, that final views given by treaty bodies could be deemed to be constitutive of subsequent practice establishing the agreement of the parties: not all States Parties to the treaty concerned have consented to be bound by the process by which such views are given, so it would be controversial to say the least to deem interpretive practice in the form of such views to indicate the formation of subsequent practice. By definition, it would be unusual if an interpretation of a treaty provision, given in the context of a process in which certain parties to the treaty itself do not participate, came to be seen as potentially establishing the agreement of those parties.

Certainly, General Comments do not have this same problem for our purposes. And superficially General Comments would appear to be most suitable as a focus for our discussion. They are by their nature given universally across all parties to the respective treaty, and must be considered to apply to all States Parties: thus, provided those States Parties do not disagree with their content, there is potential to view them as being potentially constitutive of subsequent practice establishing their agreement.

However, General Comments are given relatively infrequently – most of the treaty bodies have issued between 20 and 30 – and we would not expect all of that number to be relevant to the focus of our analysis, which is, of course, somewhat specific in nature. This restricts the amount of material that can be analysed. Moreover, State delegates sometimes comment on the content of General Comments in the Third Committee of the General Assembly when the treaty bodies make their annual reports, but they are not directly involved in the decision-making process; while this would not necessarily preclude us from

⁴⁶⁵ As of September 8th 2012; see United Nations Treaty Collection: Status of Treaties, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

considering General Comments as being constitutive of subsequent practice, it does make them less comprehensive guides, which lack the level of detail which a participatory process like the reporting procedure would provide.

The reporting procedure, indeed, does not suffer from any of the difficulties which General Comments and final views would if they were the focus of a search for subsequent practice. They are given frequently and universally (if in a State-specific manner) across all of the parties to the relevant treaty, and they are given in a relatively detailed and careful fashion, in a process which provides plentiful material giving insight into the decision-making of the treaty bodies themselves and also the State Parties (thanks to the summary records of the constructive dialogue and the responses to the lists of issues, which are often comprehensive and detailed). What is more, since they are given on a cyclical and repetitive basis, they provide us with a view of the interpretation of treaty provisions over time, giving an insight into programmatic interpretation that General Comments usually do not. And finally, the reactions of State Parties to Concluding Observations are generally direct and easily discernible: they are present in the dialogue itself.

This means that, of all the formats in which treaty bodies give their views on the interpretation of treaty provisions, it is the reporting procedure which we must consider most suitable for an analysis such as this, and which will be our main subject matter. How this will be done is set out in more detail in Chapter IV.

v) Summary: The Practice of the Treaty Bodies as ‘Subsequent Practice’

We have established, then, that human rights treaties, because of their special character, and also because of their broadness and ambiguity, require distinctive rules of

interpretation. However, we have also established that, as a point of law, even if we accept the view that concluding observations, general comments, and/or final views on individual communications do constitute subsequent practice establishing the agreement of the parties regarding interpretation, it is only insofar as States are supportive of, or at least acquiescent with, the opinions of the treaty bodies expressed within them. That is, it would be more accurate to describe 'subsequent practice [establishing] the agreement of the parties regarding its interpretation' in the context of human rights treaties as the interpretive dimension of the treaty bodies' work *taken together with* the responses of States Parties. Thus, although the views of the treaty bodies expressed in these different formats are both authoritative and interpretive to varying degrees, the role of States Parties themselves remains critical - for they are, it hardly need repeating, free to reject those interpretations.

Moreover, even though the different types of practice of the treaty bodies are to be considered authoritative, they must nonetheless still be conducted against the general 'normative background' of international law, which means that their programmatic interpretations must still be given in a context supported by, in particular, the Vienna Convention.

This means that a simple inspection of the views offered by treaty bodies in any of the forms discussed above would be inadequate for our purposes: they would have to be discussed in light of State Party responses. States are as much a part of the interpretive process as the treaty bodies themselves, even if, as happens in practice, they give the treaty bodies the initiative in offering interpretations through their practice.

How this kind of analysis might proceed is detailed in the next Chapter. What is clear is that examining the issue is of crucial importance for our main aim of discovering to what

extent international human rights law incorporates a notion of cultural values as a factor affecting how treaty obligations are given effect in domestic law. Since the terms of the treaties are vague, it is not only unclear through a mere textual analysis whether this is the case or not, but impossible to make clear. And moreover, since the treaty bodies are authoritative but not final arbiters of meaning, a more thorough and probing approach to their interpretive work is required. Our discussion must move beyond both the text and the views of the treaty bodies to the broader understanding of 'interpretation' which has been set out above, considering particularly the issue of subsequent practice as represented by the interpretive work of the treaty bodies in their monitoring practice regarding State reports and the responses of States Parties to it.

IV. Subsequent Practice in the Human Rights Context

Introduction

We have now narrowed our focus to the point at which we can begin to analyse our question in concrete terms. To review, we have established our question: to what extent does international human rights law accept that cultural or societal factors affect how treaty obligations are implemented or internalized? We have also established that this question is fundamentally one of *interpretation*. And we have considered how international human rights treaties are interpreted in a general sense, noting that the argument for the kind of ‘evolutive’ or programmatic interpretations given in the human rights context tends to rely, in legal terms, on Article 31(3)(b) of the VCLT, or subsequent practice establishing the agreement of the parties regarding interpretation. This has led us to the conclusion that an examination of the State reporting process would be the most fruitful way to answer our question, as a means to discern exactly what the subsequent practice is. We now turn to the more specific and technical question of how this can be analysed and assessed in detail.

Generally speaking, while it is fairly commonly argued that the work of the United Nations human rights treaty bodies (“the treaty bodies”) can be constitutive of subsequent practice in some sense⁴⁶⁶, there has not been a particularly detailed analysis in the literature of which the author is aware, and nor have the treaty bodies themselves offered a view on the matter. However, other international judicial and quasi-judicial bodies, most notably the International Court of Justice (“ICJ”) and the World Trade Organization’s Dispute Settlement

⁴⁶⁶See e.g. International Law Association, “Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies”, Berlin Conference (2004), paras. 20-27; also K. Mechlem, *supra* note 403, pp. 918-920; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995), p. 91.

Panels and Appellate Body, have done. We take the jurisprudence of these bodies as our starting point, using it to establish rules and principles for understanding what is constitutive of subsequent practice and what is not, and comparing them to the human rights context to illustrate how these rules and principles would apply to the State reporting process under the various international human rights treaties. We then turn to the question of alternatives, and consider the legal implications of failure to determine treaty body practice as constitutive of VCLT subsequent practice.

Finally, we move to consider procedural issues for the thesis' substantive analysis: how the materials are selected, what the focus is (in particular which States and treaties are chosen as the subjects), what problems are inherent in the investigation, and what conclusions might emerge.

A. Subsequent Practice Establishing the Agreement of the Parties and the State Reporting Process

i) Subsequent Practice in International Tribunals – Some General Principles

To begin with a recent and simple definition, incorporating the thoughts of Linderfalk and Orakhelashvili and the way the law has developed since the VCLT was drafted, Peters describes subsequent practice as:

[C]onsistent, treaty-related actions and omissions of the parties to or organs established by the treaty on the international level, which reflect the common ideas of all the parties about

the interpretation of the treaty.⁴⁶⁷

This definition provides us with a framework, but it raises a number of questions:

- What actions and omissions count as “consistent, treaty-related actions and omissions”?
- What is the relationship between “parties to” and “organs established by” the treaty in question?
- How are the common ideas of all the parties reflected?

These questions are difficult and complicated to answer in any context, and doubly so with regard to multilateral treaties such as the major human rights covenants. Moreover, the rules on how subsequent practice functions as a means of interpretation are not at all clear, mostly because international tribunals have dealt with the issue almost at random, as cases at hand have required, and because the area has only very recently become an issue for academic research.⁴⁶⁸ We shall, however, attempt to come to an understanding by reference to the jurisprudence of the ICJ and the WTO’s Dispute Settlement procedures in particular.

The ICJ’s approach, which is perhaps most commonly cited, has been particularly haphazard, though certain standards or principles can be discerned from its case law. The first is that, for actions to be constitutive of VCLT subsequent practice, intentionality is required. In Kasikili/Sedudu⁴⁶⁹ the presence of tribespeople, who were Namibian nationals,

⁴⁶⁷ C. Peters, “Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?” 3 (2) Goettingen Journal of International Law 617 (2011), p. 619.

⁴⁶⁸ See Report of the Working Group of the ILC in its Sixtieth Session, ILC, 60th Session, “Treaties Over Time in Particular: Subsequent Agreement and Practice” (Mr. Georg Nolte), UN Doc A/63/10, Annex A.

⁴⁶⁹ Kasikili/Sedudu Island (Botswana/Namibia) 1999 ICJ Reports 1045.

on a river island, was argued by Namibia to be subsequent practice to a boundary treaty between Namibia and Botswana which established their agreement over its interpretation as including the island in Namibian territory. Botswana had never objected to the presence of the tribespeople on the island, and their usage of it had been consistent: practice thus indicated that there was agreement between the two parties to the treaty that Namibia had jurisdiction over the island. But the ICJ thought that there was a requirement for conduct to be linked to the belief that the conduct was undertaken as an interpretation of the treaty in question, in order to qualify as subsequent practice. Here, since there was no intentionality on the part of the tribespeople or either party that their 'practice' should be linked to the interpretation of the treaty, it could not be constitutive of subsequent practice. It was not relevant to the question of whether or not there was any agreement between the parties on the boundary treaty's interpretation.

The second is that the consent or acquiescence of parties can, in the context of the constitutional instruments of international organizations, be deduced or implied. For example, in Continued Presence of South Africa in Namibia⁴⁷⁰ the Court argued that the requirement of Article 27(3) of the UN Charter that decisions of the Security Council on non-procedural matters must be made by the 'affirmative' vote of 9 of its members, plus the concurring votes of the permanent members, should be interpreted as if 'concurring' meant 'not objecting' - because subsequent practice indicated as much. This was despite the fact that none of the Members of the General Assembly had participated in the practice in question (not being members of the Security Council) and had merely tacitly approved through silence or non-objection⁴⁷¹.

⁴⁷⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1971), 1971 ICJ Reports 16.

⁴⁷¹ *Ibid.*, paras. 20-22.

Another established principle would appear to be that subsequent practice can lead to interpretation that in fact modifies the meaning of the treaty text. In Certain Expenses⁴⁷², President Winiarski stated (in his dissenting opinion) that “if a practice is introduced without opposition in the relations between the contracting parties, this may bring about, at the end of a certain period, a modification of a treaty rule”.⁴⁷³ This has been confirmed by other international tribunals, as in the Air Services⁴⁷⁴ and Ethiopia/Eritrea⁴⁷⁵ cases, and by the European Court of Human Rights, as for example in Ocalan⁴⁷⁶ and Soering⁴⁷⁷. The traditional view, at least espoused by Sir Gerald Fitzmaurice, is that it is for tribunals “to interpret treaties, not revise them”, but that there is a clear duty “to interpret them *as revised*, and to give effect to any revision arrived at by the parties”.⁴⁷⁸ Arato goes so far as to say that “in light of the proliferation of cases recognizing the possibility of modification on the basis of subsequent practice...the argument could even be made that the VCLT has been reinterpreted, on the basis of subsequent practice in its application, to mean that under Article 31(3)(b) interpretation can shade into modification by subsequent practice”.⁴⁷⁹

So much generally seems to be agreed. However, this hardly allows us to draw distinct conclusions as regards subsequent practice in the context of human rights treaties. It leaves many questions unanswered: how consistent must practice be? How many States are

⁴⁷²Certain Expenses of the United Nations 1962 ICJ Reports 151.

⁴⁷³*Ibid.*, Dissenting Opinion of Judge Winiarski, pp. 230-231.

⁴⁷⁴Agreement Arbitration (US v France) (1963), 38 ILR 182, p. 249.

⁴⁷⁵Delimitation of the Border (Ethiopia v Eritrea) (April 2002), 25 RIAA 83, esp. paras. 3.29, 4.60.

⁴⁷⁶Ocalan v Turkey 2005-IV ECtHR (2005), holding that “practice within the Member States could give rise to an amendment of the Convention” (para. 163).

⁴⁷⁷Soering v United Kingdom App No. 14038/88, 11 Eur. HR Rep. 439 (1989), para. 103, holding that “subsequent practice in national penal policy...could be taken as establishing the agreement of the Contracting States to abrogate [an exception]”.

⁴⁷⁸G. Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” 33 BYBIL 203 (1957), p. 225.

⁴⁷⁹J. Arato, “Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation Over Time and Their Diverse Consequences” 9 The Law and Practice of International Courts and Tribunals 443 (2010), p. 464, fn. 73.

required to engage in the practice? Are there any restrictions on the type of practice being participated in? How is intentionality demonstrated? Is silence a clear indication of acquiescence or approval? More crucially for our purposes, what is the role of the UN treaty bodies in constituting subsequent practice establishing the agreement of the parties?

Here, turning to the literature on subsequent practice in the context of the World Trade Organization (WTO) and its dispute settlement procedure would be instructive, as it is here that subsequent practice has been addressed more than in any other international judicial (or quasi-judicial) body.⁴⁸⁰

There are, of course, some distinct differences between the dispute settlement panels (“the panels”) and the Appellate Body (“the AB”) and the UN human rights treaty bodies. The Articles in the major human rights covenants which establish the treaty bodies are generally terse and do not elaborate to any great extent on the role of the bodies themselves. (The ICCPR, for instance, merely describes the HRC’s role as to “study the reports submitted by the States Parties to the present Covenant [and] transmit its reports, and such general comments as it may consider appropriate, to the States Parties”.⁴⁸¹) The WTO panels and AB, by contrast, operate under clearer guidelines - the Understanding on Rules and Procedures Governing the Settlement of Disputes⁴⁸²:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot

⁴⁸⁰ A. Feldman, “Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement” 41 *New York University Journal of International Law and Politics* 655 (2008-2009), p. 676.

⁴⁸¹ ICCPR, Article 40 (4).

⁴⁸² Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401 (1994).

add to or diminish the rights and obligations provided in the covered agreements.⁴⁸³

This has been further expanded on in the case law of the panels. Here, Articles 31 and 32 of the VCLT have been understood to be the incorporation of the “customary rules of interpretation of public international law”, and thus “the wording [of the GATT] should be interpreted in its context and in the light of the object and the purpose of the treaty as a whole and subsequent practice and agreements should be taken into account.”⁴⁸⁴ This has meant that subsequent practice has featured somewhat heavily in the decisions of panels and the AB, and has been examined in a far more detailed and rigorous fashion than that offered in the human rights context. Nevertheless, it can be argued that some of the principles developed in the WTO’s dispute settlement procedures can be applied to all multilateral treaties to a certain degree, and that elements of these are directly transferrable to human rights treaty interpretation.

In the Japan – Alcoholic Beverages Panel decision, the Panel dealt specifically with a number of issues arising from subsequent practice of the parties to the GATT. The dispute regarded the taxation of alcohol in Japan, and in particular differential treatment in the Japanese tax code for vodka and *shochu*, and whether or not this constituted a violation of Article III:2 of the GATT. It was argued that previous adopted Panel reports had dealt with the question of “like products” and that those Panel reports were constitutive of subsequent practice. Firstly, the Panel “noted that other GATT and WTO panels have interpreted Article III and that panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to

⁴⁸³ *Ibid.*, Article 3.2.

⁴⁸⁴ Japan – Taxes on Alcoholic Beverages Panel, WT/DS8/R (July 11, 1996), para. 6.9.

adopt them”⁴⁸⁵; and it further argued that “Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice. Such reports are an integral part of GATT 1994, since they constitute ‘other decisions of the CONTRACTING PARTIES to GATT 1947’.”⁴⁸⁶

This does not mean, however, that the entire contents of all adopted reports constitute subsequent practice. In an AB review of the Japan – Alcoholic Beverages dispute the AB disagreed partially with the Panel’s conclusion, deciding that the definition of subsequent practice offered by Sir Ian Sinclair suggested that there were further requirements for subsequent practice to be established than merely the adoption of a Panel report:

Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.⁴⁸⁷

A single Panel report, in other words, could not be a “concordant, common and consistent’ sequence of acts or pronouncements...sufficient to establish a...pattern”; it was not indicative by itself of consistent party conduct.⁴⁸⁸

This, it is argued, did not deny that adopted Panel reports could *ever* constitute

⁴⁸⁵ *Ibid.*, para. 6.10.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Japan – Taxes on Alcoholic Beverages AB, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS12/AB/R (Oct 4, 1996), p. 13.

⁴⁸⁸ See e.g. A. Chua, “Precedent and Principles of WTO Panel Jurisprudence” 16 Berkeley Journal of International Law 171 (1998), 185.

subsequent practice – only that isolated Panel reports could not.⁴⁸⁹ However, the AB further restricted the extent to which Panel reports could constitute subsequent practice by stressing that “[it did] not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947”, and nor did it “believe that this is contemplated under GATT 1994”.⁴⁹⁰ Taking this together with the decision in United States – Continued Dumping and Subsidy Offset Act 2000 (which found that previous arbitrations were not constitutive of ‘subsequent practice’⁴⁹¹), it can be concluded that even party conduct which is concordant, common and consistent might still not be adequate to establish subsequent practice.⁴⁹²

This was compounded by the Panel’s decision in United States – Section 110(5) of the US Copyright Act⁴⁹³. Here, the US argued that the doctrine of ‘minor exceptions’, which is accepted explicitly in Article 10 of the World Intellectual Property Organization Copyright Treaty (WCT), was incorporated into the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement since its inclusion within the WCT constituted subsequent agreement or practice under Article 31 of the VCLT. The US representatives argued that since 99 members of the Berne Convention had adopted the WCT by consensus there was an indication that subsequent State practice suggested an interpretation of the TRIPS as incorporating the ‘minor exceptions’ doctrine; it implied general agreement that the doctrine should be applicable in the overall framework of multilateral copyright protection. The Panel rejected this view rather baldly, stating that subsequent developments in the area since TRIPS were “of rather limited relevance in the light of the general rules of

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Japan – Taxes on Alcoholic Beverages AB, *supra* note 487, p. 13.

⁴⁹¹ WT/DS217/ARB/BRA (August 31, 2004), para. 3.42, n.57.

⁴⁹² A. Feldman, *supra* note 480, p. 683.

⁴⁹³ WT/DS160/R (June 15, 2000).

interpretation as embodied in the Vienna Convention”.⁴⁹⁴ Indeed, it seemed to take an extremely cautious approach to subsequent practice in general, preferring to follow the decision in Japan – Alcoholic Beverages AB and stating that it “did not wish to express a view on... ‘subsequent practice’ within the meaning of Article 31 (3) (b)” in relation to State practice in the TRIPS context.⁴⁹⁵

Feldman criticises the approach taken by the Panel in United States – Copyright in particular as an “example of a tribunal avoiding application of subsequent practice to a dispute because how to apply it is hard to figure out”.⁴⁹⁶ He then discerns what appears to be an implicit framework for considering subsequent practice in the jurisprudence of the Dispute Settlement process – what he calls a “two-step analysis” requiring demonstration of party consent at two different stages.⁴⁹⁷ Here, he draws from the more recent Chile – Price Band⁴⁹⁸ and US – Gambling⁴⁹⁹ Panel and AB reports. In the first of these, the AB addressed the issue of silence or tacit acceptance and seemed to dismiss it as irrelevant – it set the requirement as “a discernible pattern of acts or pronouncements implying an agreement”⁵⁰⁰ and did not consider a failure to challenge Chile’s Price Band on the part of other WTO members a such a discernible pattern: this “effectively dismissed acquiescence, estoppel, and implied agreement by silence as incapable of establishing subsequent practice without more, [although] it did not remove the possibility of using them as corroborative

⁴⁹⁴ *Ibid.*, para. 6.69.

⁴⁹⁵ *Ibid.*, para. 6.55, fn. 68.

⁴⁹⁶ A. Feldman, *supra* note 480, p. 685.

⁴⁹⁷ *Ibid.*, pp. 685-689.

⁴⁹⁸ Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Panel), WT/DS207/R (May 3, 2002), and Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (AB) (WT/DS207/AB/R (September 23, 2002).

⁴⁹⁹ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (April 7, 2005).

⁵⁰⁰ Chile – Price Band (AB) *supra* note 498, para. 214.

evidence”.⁵⁰¹

In the second, a case that is particularly relevant for the international human rights context, as we shall discuss below, Antigua claimed that the GATS Scheduling Guidelines adopted in 2001 constituted subsequent practice regarding the interpretation of the terms of the GATS. The AB disagreed, but its reasoning was especially instructive. The WTO Council for Trade in Services had adopted the 2001 Scheduling Guidelines, but it had explicitly stated that these guidelines were non-binding – there was no intent to agree to an authentic interpretation.⁵⁰² By its nature, practice which itself indicates that it should not be binding cannot provide a binding interpretation. And here, the parties’ consent to the Guidelines was indeed based on the very fact that they were non-binding. This meant that, like Panel reports (as the AB had found in Japan – Alcoholic Beverages), such negotiations could not constitute practice, at least not by default. This case can be taken to signify, in Feldman’s opinion, how, in the context of large multilateral treaty regimes, there is a requirement to carefully examine the plethora of negotiations, reports, and other materials that are generated to discern whether or not they are in fact capable of signifying agreement.⁵⁰³

The two-step model, then, is firstly that party conduct has to be demonstrated to be concordant, common and consistent (with mere silence being inadequate), and secondly that there must be *intent* to provide an authentic interpretation. If at either stage this cannot be demonstrated, the conduct cannot constitute subsequent practice. This would seem to follow certain of the principles established in the case law of the ICJ – especially with regard to intentionality, for which this WTO Dispute Settlement jurisprudence might be seen as a refinement.

⁵⁰¹ A. Feldman, *supra* note 480, p. 687.

⁵⁰² United States – Gambling, *supra* note 499, para. 193.

⁵⁰³ A. Feldman, *supra* note 480, p. 689.

However, Feldman is again critical of these two decisions and the nascent two-step model itself, taking the view that they leave the issue confused: they revolve around the character or nature of the conduct of Members, but leave aside a more important and basic question – what “concordant, common and consistent conduct” actually requires in order to imply agreement.⁵⁰⁴

This has been further elaborated on by Panels and the AB in recent cases, beginning with US - Zeroing⁵⁰⁵, in which the EC claimed that since its interpretation of the Anti-Dumping Agreement was supported by the practice of 105 other WTO Members it constituted a pattern of conduct sufficient to be classified as subsequent practice under the VCLT. The Panel decided otherwise, stating that even if all the Members the EC referred to did in fact apply the treaty provision at question in the same way, it would still “only mean that a considerable number of WTO Members have adopted an approach different from that of the United States”.⁵⁰⁶

This would suggest – as we know⁵⁰⁷ – that any element of disagreement would obviate concordant, common, and consistent practice. In EC-Chicken Cuts⁵⁰⁸, the AB turned to the more complicated questions of how to establish agreement of silent parties, which States’ practice was most relevant, and what “concordant, common and consistent conduct” meant.⁵⁰⁹ The decision hinged on the interpretation of the word “salted” but, for our purposes, we need only focus on the crucial question: did the EC’s consistent practice of classifying frozen boneless chicken cuts as belonging under heading 2.10 of its tariff

⁵⁰⁴ *Ibid.*, p. 690.

⁵⁰⁵ United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) (Panel), WT/DS294/R (Oct 31, 2005), and United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) (AB), WT/DS294/AB/R (May 9, 2006).

⁵⁰⁶ *Ibid.* (Panel), para. 7.218.

⁵⁰⁷ See e.g. A. Aust, *Modern Treaty Law and Practice* (2nd edition, OUP, 2007), p. 195.

⁵⁰⁸ European Communities – Customs Classification of Frozen Boneless Chicken Cuts (AB), WT/DS269/AB/R (September 12, 2005).

⁵⁰⁹ *Ibid.*, para. 254.

schedule amount to subsequent practice under the VCLT Article 31, and did certain subsequent Commission Regulations amounting to a reclassification so that they fell under heading 2.07, result in less favourable treatment than that provided in the EC's schedule in violation of the GATT? In other words, was the EC's consistent practice between 1996 and 2000 of classifying the product a certain way subsequent practice establishing the agreement of WTO Members regarding the interpretation of the EC's schedule, and was this reclassification thus in effect a violation of the schedule and hence the GATT?

Firstly, the AB examined the issue of which States Parties' practice was relevant. The Panel had considered whether or not all WTO Members needed to have engaged in a practice for it to constitute subsequent practice under the VCLT, and had concluded that, in fact, they did not.⁵¹⁰ It was simply sufficient to demonstrate that all the parties had accepted the relevant practice.⁵¹¹ The AB did not disagree, although it felt that in the context of a multilateral treaty it would be difficult to discern a concordant, consistent and common practice from a small number of States Parties.

Secondly, the AB addressed the question of whether one State's practice could amount to subsequent practice under the VCLT. Here, the Panel had decided that since it was the EC's schedule which was being interpreted, and that the schedule was particular to the EC, this meant that it was only the EC's classification practice which was relevant in determining the agreement of WTO members regarding the schedule.⁵¹² Furthermore, the EC was the only WTO Member which apparently imported the type of product in question.⁵¹³

The AB overturned this, arguing instead that the EC's schedule was based on the

⁵¹⁰ European Communities – Customs Classification of Frozen Boneless Chicken Cuts (Panel), WT/DS269/R (May 25, 2005), paras. 7.251, 7.252.

⁵¹¹ *Ibid.*, para. 7.253.

⁵¹² EC- Chicken Cuts (Panel), *supra* note 510, paras. 7.253-7.289.

⁵¹³ *Ibid.*, para. 7.255.

Harmonized System and hence was not as unique as would be required if it were to be argued that only the EC's practice was relevant.⁵¹⁴ Despite the comparative importance of the EC's practice in constituting subsequent practice regarding the interpretation of its own Schedule, the classification practice of all the other WTO Members was not irrelevant *per se*.⁵¹⁵ Nevertheless, in rejecting the Panel's findings the AB did not dismiss outright the notion that the consistent practice of a small number of States could constitute subsequent practice under the VCLT. In a multilateral treaty this would be difficult, but not impossible.⁵¹⁶

Thirdly, the AB examined the issue of silence or acquiescence. Here, it rejected the earlier conclusions drawn in Chile – Price Band, which as we have seen seemed to require overt acts or pronouncements indicating acceptance of a practice in order for it to be constitutive of subsequent practice. Rather, the AB agreed with the Panel in thinking that silence or lack of reaction could imply acceptance of practice as an authentic interpretation by a State Party and thus was not a barrier to the developing of VCLT subsequent practice.⁵¹⁷ It did, however, set out the following caveat:

[W]e have misgivings about deducing, without further inquiry, agreement with a practice from a party's "lack of reaction". We do not exclude that, in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties.⁵¹⁸

Such situations, it went on, "may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of

⁵¹⁴ EC – Chicken Cuts (AB), *supra* note 508, para. 264.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*, para. 259.

⁵¹⁷ *Ibid.*, para. 272.

⁵¹⁸ *Ibid.*

notification or by virtue of participation in a forum where it is discussed), but does not react to it.”⁵¹⁹

Feldman draws on this jurisprudence to suggest a “three step analysis” as a framework for examining subsequent practice, to replace the implicit two-step model suggested by the decisions in Chile – Prince Band AB and US – Gambling AB. He argues that international tribunals are currently “at risk of analysing subsequent practice by indiscriminately using Sinclair’s formulation that the practice must be concordant, common, and consistent, and must imply agreement”.⁵²⁰ This, he argues, is too strict, and a more flexible three-step analysis, drawing from EC – Chicken Cuts, is warranted – examining (1) the character of the practice, (2) the degree to which the practice is concordant, common and consistent, and (3) the extent to which the practice implies agreement.⁵²¹

The first step is to ensure that the practice actually falls under Article 31(3)(b) of the VCLT – it cannot be, for instance, statements designed to demonstrate consensus for political purposes but which do not imply actual agreement: for instance, non-binding General Assembly Declarations.⁵²² Feldman also includes treaty negotiation materials in the category of practice which would not indicate subsequent practice – such materials are not intended to be binding.⁵²³

The second step is then to ask whether the practice is concordant, common and consistent, analysed on a sliding scale. Here, Feldman argues, the number of parties and the length of time that they have conducted themselves consistently must be considered: the less concordant, common and consistent, the higher the burden should be to demonstrate

⁵¹⁹ *Ibid.*

⁵²⁰ A. Feldman, *supra* note 480, p. 695.

⁵²¹ *Ibid.*

⁵²² *Ibid.*, fn. 167.

⁵²³ *Ibid.*, p. 696.

that the practice implies agreement, and vice versa.⁵²⁴ Whether or not the parties are the ‘main actors’ in the area also needs to be taken into account.⁵²⁵

The third step is to assess if the practice implies agreement among the other parties (i.e. the non-participating ones). Here, the more time passes, and the more concordant, common and consistent the practice is, the more other States have the opportunity to object and the more their silence becomes “probative of agreement”.⁵²⁶ In Military and Paramilitary Activities in Nicaragua⁵²⁷ the ICJ ruled that since the United Nations had regularly placed Nicaragua on the list of States that had recognised the compulsory jurisdiction of the Court for years, there had been “every opportunity of accepting or rejecting” it, for example.⁵²⁸ In other words, it found that silence could demonstrate agreement if there had been sufficient opportunity to object.

This three-step analysis, Feldman argues, is more efficient than the implicit two-step model, because the latter is both inflexible and restrictive, resulting in excessive formality, and because it does not accurately reflect ICJ jurisprudence⁵²⁹. His approach is normative rather than descriptive, in the sense that it is a recommended framework on which international tribunals ought to operate and not an accurate reflection of the general perspective taken in all areas – in the WTO context, for instance, it seems that the three-step analysis is not actually yet fully applied.⁵³⁰ But as a reflection of the standards which appear to have developed through the jurisprudence of international tribunals, it appears accurate.

How might we use the jurisprudence of the WTO on subsequent practice, particularly

⁵²⁴ *Ibid.*, p. 697.

⁵²⁵ *Ibid.*, p. 698.

⁵²⁶ *Ibid.*

⁵²⁷ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US), Jurisdiction and Admissibility, 1984 ICJ 395, p. 408.

⁵²⁸ *Ibid.*

⁵²⁹ A. Feldman, *supra* note 480, pp. 700-701.

⁵³⁰ WTO law textbooks (Matsushita), for instance, do not deal with the implications of EC- Chicken Cuts in great depth.

with regard to Feldman's proposed three-step analysis, and taking into account the background of ICJ case law, to generate an analytical approach towards the state reports procedures under the major international human rights treaties?

ii) The Application of ICJ and WTO DSP Jurisprudence in the International Human Rights Context

a) Differences of Approach

There is one major function which the treaty bodies and the dispute settlement system have in common: to clarify the provisions of the respective agreements with which they are concerned. This role is expressly stated for the dispute settlement in the Dispute Settlement Understanding⁵³¹, whereas among the treaty bodies it is implicit⁵³², but it is clearly common ground between the two. This means that much of what can be said about treaty interpretation in dispute settlement jurisprudence can be said about the work of the treaty bodies, and vice-versa. In particular, some of the controversy in both systems about the interpretive role of the respective organs has a similar tone, and has been reconciled in a similar fashion. As with the interpretations offered by the treaty bodies, the WTO dispute settlement system has had to confront certain difficulties regarding the legal nature of the interpretations it offers: Article IX:2 of the WTO Agreement provides that the exclusive authority to adopt interpretations of the Agreement and the Multilateral Trade Agreements

⁵³¹In Article 3.2, which requires the AB to interpret the provisions of the GATT and the WTO Agreements.

⁵³²The treaty bodies' two main roles are to monitor implementation and provide authoritative guidance on the meaning of treaty provisions, according to the Office of the High Commissioner for Human Rights. See "In Larger Freedom: Towards Development, Security and Human Rights for All: Plan of Action Submitted by the United Nations High Commissioner for Human Rights", UN Doc A/59/2005/Add.3 (May 26, 2005), Annex, para. 95.

rests in the Ministerial Conference and the General Council (i.e. the States Parties), just as the ultimate authority to offer binding interpretations of the major human rights treaties is generally argued to reside in the States Parties.⁵³³ As with the treaty bodies, the WTO dispute settlement AB has sought to play down this problem – in its case by reasoning that Article IX:2 is “not dispositive” for resolving certain issues, and stating that it “fail[ed] to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions...would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the Vienna Convention”.⁵³⁴

However, it is important to acknowledge that the WTO Dispute Settlement system is based around detailed procedural rules, and has an appellate procedure, a follow-up arbitration process for implementation, and sanctions for non-compliance: in this respect it far more closely resembles an actual court than do any of the UN human rights treaty bodies⁵³⁵. This arises, of course, from the fact that it is contentious: it is designed to resolve disputes between States, which is not the case in the UN human rights system. This is all the more true of the ICJ. Additionally, the WTO DSP and the ICJ have the role of a tribunal – they resolve questions of law in an adversarial process. This contrasts with the role of the treaty bodies, which instead have the responsibility to monitor, advise, assess, and participate in the practice themselves. This contrast of emphasis causes differences to arise between both the form and function of the UN treaty bodies and the WTO DSP mechanisms which mean that, if we are to come up with a satisfactory way to apply the concept of VCLT subsequent practice in the human rights context, we must utilise it somewhat differently to the manner in which the WTO DSP has developed it.

⁵³³As was stridently argued by the United States delegates to the Human Rights Committee during the examination of its Second and Third Periodic Reports; see UN Doc. CCPR/C/SR/2380, 27 July 2006.

⁵³⁴*EC – Chicken Cuts AB*, *supra* note 508, para. 273.

⁵³⁵See e.g. A. Guzman and J. Pauwelyn (eds.) *International Trade Law* (Kluwer, 2009), pp. 115-134.

The first and perhaps most important of these differences is that the WTO DSP panels and appellate body do not, in themselves, create practice – as was emphasised in the Japan – Alcoholic Beverages AB⁵³⁶. However, this is not, and cannot, be true in the human rights context, as we have seen: in any understanding of how subsequent practice functions in regard to the interpretation of human rights treaties, it is largely the interpretive work of the treaty bodies themselves which is itself the practice (or, what we might refer to as “interpretive practice”). This creates a difference of emphasis in the roles of the treaty bodies compared with the WTO DSP: whereas the WTO DSP examines the practice of States Parties in its search for commonality, concordancy and consistency, and agreement, and then decides on whether there is VCLT subsequent practice to guide interpretation, the human rights treaty bodies instead create interpretive practice which, if it is common, concordant and consistent, and has the agreement of the States Parties, we could say is constitutive of subsequent practice.

The International Law Association expressed this view in its final report on the impact of the treaty monitoring bodies⁵³⁷, and we can again here draw a contrast with the WTO AB, whose reasoning in Japan – Alcoholic Beverages was that the contracting parties to GATT 1947 had not intended that the adoption of panel reports should constitute definitive

⁵³⁶ Japan – Alcoholic Beverages AB, *supra* note 487.

⁵³⁷ Final report, *supra* note 395 paras. 21-23. See also T. Meron, “The Implications of the European Convention on Human Rights for the Development of Public International Law” (2000), report prepared for the Ad Hoc Committee of Legal Advisors on Public International Law (CAHDI) of the Council of Europe, available at <https://wcd.coe.int/ViewDoc.jsp?id=348429&Site=CM>, paras. 2-4, taking the position that “[E]CHR jurisprudence] may, in the long run, influence the interpretation and application of other normative and multilateral treaties which implicate common values rather than just the interests of the individual State parties. Possible candidates for such a development include treaties concerning the environment and arms control. The jurisprudence of the European Court of Human Rights may thus contribute to filling the void left by the Vienna Convention on the Law of Treaties; which hardly dealt with the special problems raised by multilateral normative treaties. This Strasbourg jurisprudence will continue to drive the movement of international law from its State-centred focus to an orientation towards individuals.”

interpretations and that this was not contemplated in GATT 1994.⁵³⁸ The treaty bodies, it might sensibly be argued, have had powers conferred upon them by the States Parties to undertake interpretation and monitor compliance, and hence it is in fact contemplated in each treaty that concluding observations/comments should constitute definitive interpretations. This would suggest that, in contrast to WTO DSU Panel reports, concluding observations/comments do come under the umbrella of a broader definition of ‘subsequent practice’ *if the other criteria are met*.

Here, the issue of ‘traditions of interpretation’ also becomes relevant. Peters raises the possibility, in a 2011 paper, that the way in which the rules of Article 31 (3) (b) operate can be influenced by the established practice of an international organization through Article 5 of the VCLT, which states that the Convention applies to any treaty adopted within an international organization *without prejudice to any relevant rules of the organization*,⁵³⁹ which are further described as “in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization”.⁵⁴⁰ In other words, when the VCLT is applied to the constituent instruments of an international organization, it has to – because of Article 5 – be applied subject to the rules of that organization.⁵⁴¹ This means that it could, in fact, be modified or even preceded by the rules of the organization, and thus that the established practice of the organization could change how the rules contained in the VCLT operate in relation to it.

Since Article 31 (3) (b) is one of those rules like any other, Peters argues, it can be influenced “*via* Article 5 VCLT to the effect that the requirement of an agreement of the

⁵³⁸ Japan – Alcoholic Beverages AB, *supra* note 487, p. 13.

⁵³⁹ Article 5, VCLT, emphasis added.

⁵⁴⁰ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Article 2 (1) (j). It is important to note that this treaty has not entered into force.

⁵⁴¹ C. Peters, *supra* note 470, p. 621-622.

parties is...softened".⁵⁴² That is, established practice of a given international organization under Article 5 of the VCLT can be that the practice of its own constituent organs deserves more weight in interpretation than that of the parties, and can operate independently of them, meaning that the way in which Article 31(3)(b) operates is altered. The 'tradition of interpretation' of the organization, in other words, can also have an effect on what is constitutive of subsequent practice.

It is not a great leap to arrive at the conclusion that the tradition of interpretation of the United Nations in relation to the major human rights treaties gives more weight to the 'organ practice' of the treaty bodies than it does to that of individual State Parties, at least within the actual act of interpretation. (The obvious caveat remaining that the reaction of the parties to the treaty bodies' interpretations also has critical importance.) If this were the case, it could convincingly be argued that the practice of the treaty bodies in formulating concluding observations/comments is itself formative of subsequent practice establishing the agreement of the parties, in light of the established practice of the United Nations with regard to human rights treaties, and the 'tradition of interpretation' surrounding it (provided the States parties do not signal clear disagreement).

This, it follows, means that what States Parties *do* in regard to implementing treaty provisions is far less relevant than what they *say*: our primary interest in the States Parties is confirming their agreement or disagreement with the interpretive practice of the treaty bodies, not examining their own actual practice. This contrasts with the approach taken by the WTO DSP and the ICJ, whose primary focus is what States do as well as say, as an attempt to discern whether States' actions are common, concordant and consistent.

A further consideration on this point is that there is always likely to be a lag between

⁵⁴²C. Peters, *supra* note 470, p. 638.

a given State Party acknowledging that it has a certain obligation under a human rights treaty, and it putting that obligation into effect, for good practical reasons – no matter which State, one would never expect it to be instantaneously possible even to merely change a piece of internal legislation, let alone address extra-legal issues or the behaviour of private/third parties, even where it agrees with the treaty body in question. To take a simple hypothetical scenario: in the United Kingdom the minimum age for marriage is 16; were one of the treaty bodies, such as the CEDAW or CRC Committee, to recommend that this be raised to 18, the government of the United Kingdom would still be required to go through the relevant procedure for changing the legislation even if it chose to conform with the relevant Committee's recommendation, which would be a lengthy and somewhat complex process. Yet this would surely not require us to consider there to be no agreement on the part of the UK with the interpretive practice of that Committee until the necessary legislation had come into effect.

This means that, when we conduct our analysis and search for agreement or implied agreement under Step 3, the relevant locus in terms of establishing subsequent practice is not necessarily what States Parties do. More relevant, and more useful, is surely the question of whether they can be said to agree with the interpretive practice of the treaty bodies. Put simply, it is not in general State practice, but rather States' *reactions* to the interpretive practice of the treaty body in terms of what their delegates represent as their governments' views, which is most important when attempting to establish whether there is agreement or disagreement.

This is not necessarily the view taken by the International Law Association, which in its 2004 report on the findings of human rights treaty bodies expressed the view that pronouncements by courts and their application of treaty body interpretations might also be

relevant in establishing the agreement requirement for subsequent practice, as well as the organs of whichever State was concerned, including their courts and legislature.⁵⁴³ However, even the ILA was unclear on this point, emphasising this would only be true “if it is accepted that national court decisions are relevant practice for the purpose of Article 31”⁵⁴⁴. And there are good reasons not to prefer such an approach. The first of these is that – as we have already noted – human rights treaties have a special character in international law, being created for the protection of individuals under the jurisdiction of the States Parties and not in order to create a contractual relationship between States. Or, to put it more bluntly, the purpose of a State ratifying a human rights treaty (in the ideal sense, setting aside *realpolitik*) is to ensure that the rights of individuals under its jurisdiction are protected – and this means, often, protecting the rights of those individuals from the very organs of the State which it is supposed are to influence the development of subsequent practice. It would be somewhat perverse to imagine that organs of State whose own practice directly affects the rights of individuals of that State should affect that very development. It would, aside from the troubling relocation of legal authority which it implies, in effect render the entire notion of the development of subsequent practice into a tautology: if the standard required all of the State Parties and all of their relevant constituent organs to agree with the interpretation given by the treaty body, the doctrine of subsequent practice in the human rights context would surely lose all meaning – it would simply be another way of saying that a given right has achieved universal protection.

A second reason is that it is not altogether clear from the VCLT rules themselves that domestic courts and tribunals and other organs of State are necessarily relevant actors.

⁵⁴³International Law Association, *supra* note 466, para. 24-26.

⁵⁴⁴*Ibid.*, para. 24.

Article 7 of the VCTL, which lists the categories of person with the authority “for expressing the consent of the State to be bound”, considers those to be either persons who “appropriate full powers”, or those for whom “it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers”.⁵⁴⁵ Georg Nolte expressed the view that this was “obviously too narrow when it comes to determining the range of state organs or other actors that are capable of contributing to relevant subsequent practice or agreement”⁵⁴⁶, yet he does not express a clear view on which state organs or other actors would be capable – only stating that the actors listed in the rules on State responsibility⁵⁴⁷ would be too broad.

This problem, of the disconnect between the activities of the State at the international level and those of low-ranking domestic State organs, is one which has arisen at international tribunals, as in the UNESCO officials residing in France⁵⁴⁸ case. Here, the question arose in the context of contradictory declarations given by authorities competent to express the position of the French State, and those given by the French tax authorities: while UNESCO argued that the practice of a State consisted of the “acts, attitudes and conduct of all of its organs”⁵⁴⁹, France argued that “in relation to subsequent practice...only the positions of authorities competent to enter into commitments on behalf of the State should be taken into account”.⁵⁵⁰ The Tribunal gave a somewhat lengthy consideration of the issue, and while it decided that it was not the case that *only* the positions of authorities

⁵⁴⁵Vienna Convention on the Law of Treaties, Article 7 1 (a) and (b).

⁵⁴⁶G. Nolte, “Treaties over time in particular: Subsequent Agreement and Practice”, Report of the International Law Commission on the Work of Its 63rd Session, UN Doc. A/66/10, Annex A, para. 27.

⁵⁴⁷Article 4, Draft Articles on State Responsibility, GAOR, 56th Session, Supplement No. 10, UN Doc. A/56/10.

⁵⁴⁸Question of the tax regime governing pensions paid to retired UNESCO officials residing in France (France v UNESCO), Award of 14 January 2003, UNRIIAA, vol. XXV, pp. 231-266.

⁵⁴⁹*Ibid.*, para. 65.

⁵⁵⁰*Ibid.*, para. 66.

competent to enter into commitments on behalf of the State should be taken into account, it came to the conclusion that “where there is a difference between the conduct of the administration and that of the authorities competent to express the position of a State, precedence should be given to the latter”⁵⁵¹; it chose to give greater weight to the conduct of the authorities competent to speak for France than the internal organs of the French state.⁵⁵² It seems, then, that there is some justification and precedent for understanding 'agreement' in the context of subsequent practice in the interpretation of human rights treaties as, in general, meaning the agreement of authorities competent to express the position of the relevant State Party – which would include, presumably, the delegates to the treaty bodies. Acts of other organs, domestic courts and so on might be relevant, but they would not be considered conclusive where they conflicted with the stated views of those delegates.

The second difference between the human rights treaty bodies and the WTO DS Panels and AB is that the “interpretive practice” in the human rights context tends not to be specific to single treaty provisions, but to encompass several. This is especially true in the human rights treaties which have a particular focus, most notably the CEDAW and CRC, where Articles tend to overlap. For instance, in the CEDAW, most of the substantive rights (to health, to education, etc.) are linked both conceptually and practically to other more general rights provided for in the Convention, particularly Articles 2 and 3. Indeed, it is somewhat difficult to imagine how, for instance, Article 12 of the Convention, providing for the elimination of discrimination in the giving of healthcare, cannot be read alongside, and in an interrelated manner with, Article 2, enshrining the protection from discrimination based on

⁵⁵¹ *Ibid.*, para. 74.

⁵⁵² *Ibid.*, para. 75.

sex, and likely also Article 3, which requires States Parties to take all appropriate measures to ensure the full development and advancement of women on a basis of equality with men.

This means that the interpretations given by the treaty bodies are, by necessity, not always tightly or explicitly linked to a single Article or provision of the Convention, but given in a more holistic fashion, as for example the CEDAW Committee's views given on violence against women in its General Recommendation No. 19⁵⁵³, in which States Parties are described as having various obligations to eliminate violence against women under Articles 1, 2, 2(f), 3, 5, 6, 10 (c), 11, 12, 14, and 16 (5). Indeed, it is also not uncommon to find treaty bodies describing a State Party's obligations "under the Convention", or requiring a State Party to bring its laws "in line with the Convention" – something which is not imaginable in the WTO context. This also means that, interpretive practice and, hence, subsequent practice establishing the agreement of the parties, will not map directly on a practice-to-provision basis to terms in the relevant treaty, but will have to be viewed in a similarly holistic and provision-spanning fashion to the manner in which the treaty itself operates in practice. While, as we shall see, this is not true of the interpretive practice with regard to every obligation of a State Party, it is true of many if not most.

These differences mean that a somewhat broader and more nuanced approach is required to the proposed 3 Step analysis if it is to apply with any relevance to the question of subsequent practice in the interpretation of human rights treaties. Most particularly, what is meant by commonality, concordancy, and consistency, and what is meant by "agreement", must be viewed in a different manner to the way in which they operate in the context of the WTO's DSP. This shall need to be borne in mind when we discuss in more detail how the requirements for each part of the 3 Step analysis function.

⁵⁵³CEDAW, General Recommendation No. 19, Eleventh Session, 1992, UN Doc. A/47/38.

b) Applying the 3 Step Analysis in the State Reporting Procedures

Our aim, restated, is to assess whether and to what extent the provisions of the major human rights treaties are interpreted to allow for differing levels and methods of implementation in light of the cultural characteristics of the State/society in question. We must now turn to the question of how subsequent practice can be used to indicate this within the context of the State reports procedures, and it is suggested that, despite the differences identified above, Feldman's three-step analysis is an appropriate way of assessing this.

The first step in the analysis requires proving that the practice actually falls under Article 31(3)(b) of the VCLT. Here, caution must be taken, as it is probably the case that not all of the documentation at all stages of the reports procedures do actually meet this requirement. In order for us to examine the issue carefully, we now need to explore in some depth what each of the different stages in the reports procedure represents in legal terms.

The reports procedure is composed of a number of stages: the submission of the report; the drawing up of the list of issues and the State Party response; the Constructive Dialogue; and the Concluding Observations, as we have seen. Of these, the State Report and the Concluding Observations must be seen as being potentially of authentically interpretive character. The relevant treaty body's Concluding Observations must be considered to be its own authoritative interpretation of the given State Party's obligations, as well as having their more obvious recommendatory function. By definition, they involve the treaty body offering interpretation of treaty articles which, binding or otherwise⁵⁵⁴, are nonetheless clearly intended to *be* interpretive in the VCLT sense.

⁵⁵⁴There is a considerable level of controversy over this, as we have seen in the previous chapter.

The State Reports themselves are more complex, but must also be considered to be partially interpretive. On the one hand, we might consider the State Report to be, as near as is possible in the context, the State Party's own auto-interpretation of its obligations. However, in actual fact, this generally takes place in light of the authoritative interpretations given by the relevant treaty body in previous sessions involving the State Party, unless the report is the initial one: a large part of any given report is supposed to be taken up by the State Party's responses to issues raised by the relevant body at the last session. That is, the report describes what the State Party has done to implement its treaty obligations in the period in question, incorporating its own understanding but conducted in view of the interpretations given by the treaty body and filtered through its own interpretations; in any case, it is at least partially authentically interpretive.

However, it could be convincingly argued that the List of Issues, Response to List of Issues, and the Constructive Dialogue, are not in fact intended to be either authoritative or interpretive – analogously to the kind of guidelines which the AB reasoned in US – Gambling were not indicative of subsequent practice for the reason that they were not intended to be binding nor implying agreement.⁵⁵⁵ The List of Issues and the State Party response, and the Constructive Dialogue, are clearly not intended to have either a binding function or to imply agreement. The lists of issues vary in format slightly between the different committees, but in general they are used for clarification or to request more information, or to give States Parties an indication of the kinds of themes that will be addressed.⁵⁵⁶ The responses, similarly, provide information rather than imply agreement. Likewise, the constructive dialogue, by its very nature, could rather be said to imply *disagreement*, or at best

⁵⁵⁵ US – Gambling AB, *supra* note 499, paras. 193-195.

⁵⁵⁶ See e.g. "Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process", Note by the Secretariat, 12th Inter-Committee Meeting of the Human Rights Treaty Bodies, UN Doc. HRI/ICM/2011/4, paras. 43-45.

negotiation –it allows for further clarification, for elaboration, and, in some cases, for dispute. It certainly falls at the first hurdle of the three-step analysis inasmuch as it could constitute subsequent practice (although it will, of course, be relevant in terms of determining whether the State Party agrees with the interpretation of the treaty body, which is important for Step 3).

It seems more likely that the lists of issue, replies, and constructive dialogue might come under Article 32 of the VCLT, which lists supplementary means of interpretation, at least insofar as parts of them are illustrative or clarifying of how the State Party views its own obligations. This was, indeed, what the AB decided in US – Gambling with regard to the Scheduling Guidelines, with the approval of both the United States and Antigua.⁵⁵⁷ This allowed it, ultimately, to hold that the United States’ GATS schedule did include specific commitments on gambling, despite the absence of subsequent practice indicating that it was interpreted to be so.⁵⁵⁸

Thus, the requirement for Step 1 is that the practice is authentically interpretive, for which we have already described the crucial probative factor: that the practice is *intended* to be interpretive. The term “authentic” is used in the sense that it is a synonym for “genuine”, “duly executed”, or “reliable”⁵⁵⁹. In other words, when something is referred to as being “authentically interpretive”, we mean that it is a genuine and formal interpretation of a treaty provision made in a formal context, rather than a clarification, statement of opinion, or piece of argumentation. We described the implications of this in somewhat general terms in the analysis above: the list of issues and reply to the list of issues, and the constructive dialogue, in any given State Party’s reporting cycle, are not generally intended to be

⁵⁵⁷ US – Gambling AB, *supra* note 499, paras. 196-212.

⁵⁵⁸ *Ibid*, paras. 211-212.

⁵⁵⁹ See e.g. definitions in *Collins English Dictionary* (2003), *Collins Thesaurus of the English Language* (2002).

interpretive; rather, only interpretive practice contained in Concluding Comments/Observations and General Comments/Recommendations can be viewed as such.

However, nor should we view everything contained in every Concluding Observation or General Recommendation as being authentically interpretive on this basis alone. Notwithstanding the fact that we must take a much broader and more holistic approach to the interpretation of human rights treaty terms, acknowledging the fact that by necessity those terms are often conceptually and practically intertwined with one another, it is also the case that some practice which seems on its face to be interpretive is in fact too unspecific and vague to be viewed as having the intentionality required to be an authentic interpretation.

For example, treaty bodies regularly make statements in their Concluding Observations which ought better to be viewed as being of exhortative, rather than interpretive, intent. For instance, when the Children’s Rights Committee recommends that the United Kingdom “Intensify its efforts to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities”⁵⁶⁰ under Articles 5, 18 (paragraphs 1 and 2), 9-11, 19-21, 25, 27 (paragraph 4), and 39 of the Convention; or when the CEDAW Committee recommends that India “be proactive and to take all necessary measures and initiatives to ensure that the rule of law is upheld and justice is delivered”⁵⁶¹, it is difficult to view such comments as being interpretive of the State Party’s obligations except in the most aspirational and abstract sense: what “appropriate assistance” is, and what “necessary measures and initiatives” are, and how they are supposed to be

⁵⁶⁰CRC Committee, Consideration of reports submitted by states parties under Article 44 of the Convention, Concluding Comments: United Kingdom’s Third and Fourth Periodic Reports, 20 October 2008, UN Doc. CRC/C/GBR/CO/4, para. 45(a).

⁵⁶¹CEDAW Committee, Consideration of reports submitted by states parties under Article 18 of the Convention, Concluding Comments: India’s exceptional report, 3 November 2010, UN Doc. CEDAW/C/IND/CO/SP.1, para. 24(a).

implemented, is left unclear and – consequently – open to further interpretation. (Presumably, following the standard VCLT approach, by moving onto examining supplementary means of interpretation under Article 32, which in our case would mean the constructive dialogue, list of issues and response, and also the *travaux préparatoires*. Due to space constraints, these supplementary means of interpretation will not be examined in depth in these instances of “exhortative interpretation”, but there is clearly some potential for further research in that respect.) Moreover, as a consequence, the less concrete and focused an apparent instance of interpretation is, the less possible it is to discern the actual intent – and, hence, the less apparent intentionality becomes.

This means that there might be, effectively, a specificity bar for establishing authenticity: for interpretive practice to be authentically interpretive, it must have a certain degree of clarity and detail in order to establish both intentionality and genuine interpretive character. This does not mean, of course, that exhortative comments or recommendations in Concluding Observations are of no value or usefulness; it merely precludes them from being considered as satisfying Step 1 of our 3 Step test for establishing VCLT subsequent practice exists.

The second and third steps in the three-step analysis are to assess how concordant, common and consistent the practice is, and whether it implies agreement on the part of the other parties. Here, the practice must clearly be assessed on a case-by-case basis. However, some general points can be made about how this can be done in the context of the state reporting procedure.

The first point to address regarding Step 2 is that, if we accept this view of the role of the practice of the treaty bodies in the context of concluding observations – i.e., that it can be potentially constitutive of subsequent practice – the requirements for establishing

whether it is concordant, common and consistent, are complex. This is because concluding observations are not universal to all of the States Parties, only applying to the State Party in question, and dealing with that State Party's individual circumstances and specific obligations alone. Thus, we are faced with two different possibilities: in deciding on whether the practice is concordant, common and consistent, is it necessary to consider only whether the practice is concordant, common and consistent in relation to the specific State Party concerned, or in relation to all of the States Parties as a whole? For example, if a concluding observation offering an interpretation on how the obligation set forth in Article 11 of the CRC is to be implemented in Singapore is given in a common and consistent fashion over the course of the reporting history of that State, would it then be established to be constitutive of subsequent practice with regard to the interpretation of Singapore's treaty obligation under that Article of the CRC? Or is it necessary to establish that concluding observations regarding that Article are read in a concordant, common and consistent pattern across all States Parties to the CRC in order for them to constitute subsequent practice across all States Parties? To put the matter in more simple terms: are the States Parties treated individualistically or as a collective when it comes to the question of how concordant, common and consistent the practice of the treaty bodies is?

In EC – Chicken Cuts AB, it was considered that the practice of one State was probably not sufficient, even if it fulfilled the other requirements, to constitute subsequent practice; the practice of other WTO Members was not irrelevant despite the arguably 'unique' nature of the State and the practice in question.⁵⁶² While the AB did not dismiss outright the notion that consistent practice concerning one or a small number of States could be constitutive of subsequent practice in the context of a large multilateral treaty, it did express the view that

⁵⁶²See discussion *supra*.

this would be “difficult”.⁵⁶³ This would seem to indicate that the practice should be taken ‘collectively’. Earlier jurisprudence cited by the AB from EC – Computer Equipment AB⁵⁶⁴ would further support this:

The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties.⁵⁶⁵

This, the AB in EC – Computer Equipment had argued, was because the Schedule of a single party to GATT 1994 represented a common agreement among all members. Although the commitment was unique in the sense that each State Party had a different Schedule, there was a common interest on the part of all Members in each other’s commitments and hence, even while the practice of the Member in question would be of greatest import, the practice of the other Parties could not be considered irrelevant.⁵⁶⁶

The EC – Computer Equipment decision related to Article 32 of the VCLT and supplementary means of interpretation, but the same reasoning can be fruitfully applied to the issue of subsequent practice and Concluding Observations on State Reports. Here, while there is not as direct a relationship between the States Parties to international human rights treaties as there is between WTO Members, it remains the case that international human rights treaty obligations are owed by all States Parties to each other – they have a common interest, by definition. The jurisprudence of the WTO AB, then, would suggest that common, consistent and concordant interpretive practice in relation to the reporting history of one of

⁵⁶³ *Ibid.*, para. 259.

⁵⁶⁴ European Communities – Customs Classification of Certain Computer Equipment, WB/DS62/AB/R, WB/DS67/AB/R, WB/DS68/AB/R (5 June, 1998).

⁵⁶⁵ *Ibid.*, para. 93.

⁵⁶⁶ *Ibid.*

the States Parties to a human rights treaty would be of greatest import inasmuch as the interpretation of its own obligations was concerned, but that the practice relating to the other States Parties in the same area could not be ignored or discounted. We must also bear in mind, however, that, although the WTO AB overturned the Panel in EC – Chicken Cuts when it had ruled that the practice of one party could be constitutive of subsequent practice provided it was the only State concerned with the issue at hand, the ICJ did recognise the special importance of the practice of one individual State where the obligation was incumbent on that State alone in Legal Status of South-West Africa⁵⁶⁷, and hence we might view the interpretive practice of a treaty body with regard to one State Party alone as being constitutive of subsequent practice where the issue pertained to that State alone.

Strictly speaking, then, even if we accept the view espoused here that the interpretive practice of the treaty bodies can be formative of subsequent practice if the other preconditions are met, the interpretations must be applied as universally as possible across all States Parties: they are not bespoke for those States Parties individually. When a treaty body offers a view on what Singapore’s obligations are under Article 11 of the CRC, in other words, it is not creating interpretive practice regarding the meaning of Singapore’s obligations (despite the specificity of its comments) – it is creating interpretive practice regarding the meaning of Article 11 of the CRC in general. This must then fit into the requirements for commonality, concordancy and consistency, therefore, and have the implied agreement of all of the States Parties, in order for subsequent practice to be deemed to have developed.

Regarding the consistency, commonality and concordancy requirements themselves, Sinclair’s view was that a “discernible pattern” had to be present implying the agreement of

⁵⁶⁷ *Supra* note 398.

the States Parties to a treaty, and that “isolated acts” were not sufficient.⁵⁶⁸ In Japan – Alcoholic Beverages AB, as we have seen, the AB considered that one adopted report would not be enough to establish a pattern and hence the adoption of a Panel report was not indicative of party conduct to the extent that it could be constitutive of subsequent practice. This reasoning is difficult to argue with. It is undoubtedly the case, then, that one observation offered in a single Concluding Observation would not be sufficient to constitute subsequent practice. A discernible pattern would require repeated observations over a period of time, across a number of States Parties – though, of course, what is deemed a sufficient period of time will vary. It might be suggested that since the EC’s consistent classification practice during the years 1996 to 2000 was not considered insufficient for discerning a pattern by the AB in EC – Chicken Cuts (though ultimately it was discounted as constitutive of subsequent practice under the VCLT for other reasons), the period of time required is not particularly great. In the recent Costa Rica v Nicaragua⁵⁶⁹ ICJ decision, Judge Skotnikov implied that around 10 years of practice was sufficient to change the meaning of a term in a treaty.⁵⁷⁰

Other requirements suggested by the common meaning of the terms also suggest themselves. “Commonality” suggests that the interpretive practice does not exist in isolation from that for other State Parties: the treaty body has rendered similar interpretations to other State Parties, or in the form of a General Recommendation. And “concordancy” suggests that, when interpretive practice exists in relation to another State Party on the

⁵⁶⁸I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edition, 1984), p. 137.

⁵⁶⁹Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua), Judgment of the ICJ, July 13, 2009.

⁵⁷⁰In this case, use of a river was permitted by treaty for the Spanish word “*comercio*”. This word was deemed by Judge Skotnikov to have come to incorporate tourism as well as trade on the river, since subsequent practice (the use of the river for tourism by Costa Rica without any objection on Nicaragua’s part for at least 10 years) indicated that both parties considered tourism to be included in the meaning of “*comercio*”.

same element of the treaty, or in a General Recommendation, it is given in the same or similar fashion, set in context, and does not, for instance, imply a significantly different obligation for the one State Party from the other with all other things being equal. So, for instance, when the CEDAW Committee interprets Nigeria to have the obligation under the CEDAW to eliminate the practice of female genital mutilation, we should say that this interpretive practice is common, concordant and consistent if we can identify instances of interpretive practice on the subject of female genital mutilation regarding other States Parties (the practice is common), if we can establish that the interpretive practice for those other States Parties is that they have the obligation under the Convention to eliminate female genital mutilation, all other things being equal (the practice is concordant), and if we can establish that the interpretive practice regarding Nigeria and/or the other relevant States Parties is given in the same or similar fashion over a number of reporting cycles (the practice is consistent).

Give the holistic nature of human rights treaty interpretation, and given the fact that there is considerable overlap and inter-relation between provisions even in the same treaty, and given the fact, especially, that reporting cycles are not particularly frequent, it is arguable that these requirements of commonality, concordancy and consistency should perhaps be viewed as guidelines rather than absolutes, with some level of flexibility permitted. However, that flexibility should certainly not extend to viewing even a single instance of contradictory interpretive practice as permissible while retaining concordancy, for obvious reasons.

The final point to consider, for Step 3, is the extent to which silence can imply agreement. As we have seen, the jurisprudence of the WTO DSP has fluctuated on this point, as in Chile – Price Band AB a mere failure to challenge Chile's Price Band on the part of the

WTO Members was not deemed to be indicative of agreement, whereas in EC – Chicken Cuts the AB accepted that silence or lack of reaction *could* in fact imply acceptance. Here, the AB’s wording in EC – Chicken Cuts is especially instructive:

[W]e have misgivings about deducing, without further inquiry, agreement with a practice from a party’s “lack of reaction”. We do not exclude that, in specific situations, the “lack of reaction” or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties... *[Such situations] may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.*⁵⁷¹ (Emphasis added.)

This, clearly, has relevance for the State Reporting procedures and Concluding Observations (and the other activities of the treaty bodies, such as General Comments). Concluding Observations are made public almost immediately after formal adoption in all instances with slight variations between the treaty bodies⁵⁷², and are included in all the sessional/annual reports which appear in the respective body’s submission to the General Assembly; all the treaties also provide a mechanism whereby States Parties may submit comments on the Concluding Observations, which are also made public. This would imply that States Parties which are not engaged in a particular element of the practice (i.e. all of the States Parties except for the one whose Report is being examined) are all made aware of the practice of the other parties by the means suggested by the AB in EC – Chicken Cuts. This in turn would suggest that “lack of reaction” in the context of Concluding Observations would imply agreement – the third of Feldman’s three steps. The AB in EC - Chicken Cuts did, of course, express reluctance about assuming agreement on the basis of silence or a lack of

⁵⁷¹EC – Chicken Cuts AB, *supra* note 508, para. 272.

⁵⁷²See “Report on the Working Methods of the Human Rights Treaty Bodies”, *supra* note 556, paras. 77-78.

reaction, but it bears noting that the sources which the AB itself relied upon (primarily Anzilotti's *Corso di Diritto Internazionale*⁵⁷³ and Cot's *Revue Generale de Droit International Public*⁵⁷⁴) all stressed that, while it could not be held that silence or failure to express a view would directly indicate acceptance in all cases, nor would the converse be true: it would depend on the facts or circumstances of the case. Given that the facts of the interpretation of human rights treaty provisions are as they are described above (taking place in a special regime which has individuals rather than States as its subjects; being given primarily by an independent monitoring body rather than by the States Parties themselves; being given with the object and purpose of the treaty specifically in mind), it could convincingly be argued that the circumstances of most cases of interpretive practice in the human rights context are such that only overt rejection of interpretive practice would be enough for agreement not to be implied.

How much rejection would be necessary? The jurisprudence of the WTO dispute settlement procedure indicates that any instance of outright disagreement would prevent the crystallisation of subsequent practice under the VCLT, and this is in keeping with the general view that where any difference of opinion exists regarding interpretative practice, it "may not be relied upon as a supplementary means of interpretation"⁵⁷⁵ – it is "not necessary to show that each party has engaged in a practice, only that *all* have accepted it [emphasis added]"⁵⁷⁶.

Unanimity was considered crucial by the International Law Commission when the Vienna Convention was drafted, and indeed the original text of Article 31(3)(b) spoke of

⁵⁷³ D. Anzilotti, *Corso di Diritto Internazionale* (CEDAM, 1955).

⁵⁷⁴ J. P. Cot, "La Conduite subsequente des Parties a un traite" in *Revue General de Droit International Public* (1966).

⁵⁷⁵ See A. Aust, *supra* note 294, p. 195.

⁵⁷⁶ *Ibid.*

practice establishing “the understanding of *all* the parties [emphasis added]”; the omission of the word ‘all’ in the final version did not change that rule, but rather signified that the Commission considered the phrase “the understanding of the parties” to necessarily encompass the “parties as a whole” – it “omitted the word ‘all’ merely to avoid the possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.”⁵⁷⁷

This means, at the very least, that any instance of disagreement on the part of one of the States Parties with a given interpretation by a treaty body would obviate the crystallisation of subsequent practice, as by definition the interpretation would not have the understanding or acceptance of all of the parties. In the context of state reports procedures, implied agreement by silence should be so obvious as to be assumed in the case of States Parties’ views on the interpretive practice of the treaty bodies with regard to *other* States Parties. This is for the obvious reason that, although the possibility is open for States Parties to express their views on the Concluding Observations of treaty bodies regarding other States, in actual fact they never do so. (This, indeed, supports the notion that the ‘regime practice’ for human rights treaty bodies is somewhat distinct.) This is, however, not true of General Comments, to which States Parties do occasionally express positive disagreement, usually in the Third Committee of the General Assembly. And it is, of course, not true of States Parties’ reactions to the interpretive practice of the treaty bodies with regard to their *own* reports. Indeed, while we dispel the notion that statements made in the Lists of Issues provided by the treaty bodies, or in the constructive dialogue following submission of State Reports, can be ‘authentically interpretive’ under Step 1, they are the

⁵⁷⁷ See *EC – Chicken Cuts Panel*, *supra* note 510, para. 7.521, quoting *The Yearbook of the International Law Commission* (1966) Vol. II, p. 222, para. 15.

primary means by which we can discern agreement or disagreement with the interpretive practice of the treaty bodies on the part of delegates from State Parties.

This means that searching for disagreement is a difficult process that is beyond the capacity of this preliminary, illustrative study, because it would require a comprehensive and detailed survey of the reporting histories of all of the States Parties to the treaty in question to try to identify any examples of disagreement. This means that, any conclusion that a given instance of interpretive practice meets the requirement for Step 3 in our analysis must be accompanied by the implied caveat: “Unless disagreement exists elsewhere”, which is to say, in the reporting history of other States Parties not studied in this analysis.

iii) The Three-Step Analysis as a Framework for Investigating Subsequent Practice in the International Human Rights Context

We have, then, the rudiments of a structure in which to address our question, through examination of the State Reports and Concluding Observations of the UN treaty bodies. The structure is based on Feldman’s three-step analysis, and requires us to confirm all of the following if we are to be satisfied that there is subsequent practice establishing the agreement of the parties on cultural factors affecting implementation:

- That the given practice falls under Article 31(3)(b) of the VCLT and is what we shall call ‘authentically interpretive’. The general assumption is that practice contained in the State Report and Concluding Observations will do so, although that instantiated in the list of issues, reply to list of issues, and constructive dialogue, will not. The

latter may, however, form part of the supplementary means of interpretation provided for in Article 32 of the VCLT.

- That any part of the State Report and the Concluding Observations which gives an indication as to whether there is agreement that a cultural or societal factor has a role in how a treaty obligation is implemented or internalized, has to be demonstrated to be commonly, consistently, and concordantly interpreted in such a fashion in order for it to be constitutive of subsequent practice.
- That, in general, silence on the part of other State Parties regarding such an interpretation is sufficient to imply agreement, and therefore active rejection must be present in order for it to be discounted as constitutive of subsequent practice. Active rejection is most likely to be found either in the State Reports themselves and particularly the summary records of the constructive dialogue.

We must now briefly turn to the question of the consequence of rejection. If no subsequent practice can be argued to have been established – that is, if there is no agreement between the Parties - what is the result in terms of the law?

We have already suggested that Article 32 of the VCLT also has some relevance here, by noting that materials which do not otherwise fall under Article 31(3)(b) of the VCLT may nevertheless be considered under Article 32. This was deemed to be the case in US – Gambling AB, in which, it will be recalled, the AB, after disagreeing with the Panel’s reasoning that the GATS 2001 Scheduling Guidelines constituted subsequent practice, decided that it was necessary to turn to the issue of supplementary means of interpretation

under Article 32 of the VCLT.⁵⁷⁸ This, indeed, ultimately led to it adopting the same conclusion as the Panel – albeit for different reasons. The way the AB used Article 32 of the VCLT is instructive, and bears analysing in some greater detail.

Supplementary means of interpretation arose in US – Gambling because the AB did not believe that merely examining the text, context, and object and purpose of subsector 10.D of the United States’ Schedule was sufficient for it to establish whether “Sporting and other recreational services” included gambling, and the Scheduling Guidelines and the W/120 Services Sectoral Classification List were not (for reasons already set out) constitutive of subsequent practice. Given the lack of clarity as to the scope of the United States’ commitment on these bases, the AB thus decided that it was appropriate to consider supplementary means of interpretation under Article 32 of the VCLT – which included, in its view, W/120 and the Scheduling Guidelines.⁵⁷⁹

In the W/120, the entry for subsector 10.D, “Sporting and other recreational services”, corresponded to the Central Product Classification group number 964. (The CPC classification scheme was created by the United Nations Statistical Commission as an international standard, and is used in the international trade context for clarification and guidance.) CPC group number 964 is further broken down into two classes – Sporting services, and Other recreational services – the latter of which includes subclass 96492, which reads “Gambling and betting services”. This, it was taken by the AB, meant that the W/120 entry for subsector 10.D, “Sporting and recreational services”, which mapped directly to CPC group number 964, included gambling and betting services.

While the United States did not use CPC codes in its Schedule, the 1993 Scheduling

⁵⁷⁸ US – Gambling AB, *supra* note 499, paras. 195-212.

⁵⁷⁹ *Ibid.*, para. 197.

Guidelines makes it clear that parties not using the CPC should give their own subsectoral classifications and definitions in a detailed fashion to avoid ambiguity⁵⁸⁰, and the United States had not done this, and moreover had appeared to seek to comply with the Scheduling Guidelines during the drafting of its GATS Schedule, stating that except where it was specifically noted otherwise, its sectoral commitments corresponded to those in the Secretariat’s Sectoral Classification List (W/120).⁵⁸¹ Moreover, the wording it had used exactly reproduced those of the W/120 in all other respects.⁵⁸² Taken together, this meant that the commitment made by the United States in subsector 10.D of its Schedule had to be read as corresponding to subsector 10.D of W/120 – which, in turn, corresponded to Class 964 of the CPC, and, as a consequence, meant that it included gambling and betting services as a subclass.⁵⁸³

Thus, while these documents and materials did not constitute subsequent practice as the Panel had reasoned – due to the fact that they were explicitly not intended to be binding – they did constitute supplementary materials that could be used to establish the precise nature of the United States’ obligations. Ultimately, a “proper interpretation according to the principles codified in Articles 31 and 32 of the Vienna Convention” lead to the same result that the Panel had reached.⁵⁸⁴

The use of supplementary means of interpretation is only to be used either to confirm an interpretation based on the Article 31 rules, or where the Article 31 rules do not provide a clear answer – and the AB strictly applied this standard in Chile – Price Band, when it decided that the Panel had erred in applying VCLT Article 32; here, a clear interpretation of

⁵⁸⁰ *Ibid.*, paras. 202-203.

⁵⁸¹ *Ibid.*, para. 206.

⁵⁸² *Ibid.*, para. 204.

⁵⁸³ *Ibid.*, para. 205.

⁵⁸⁴ *Ibid.*, para. 212.

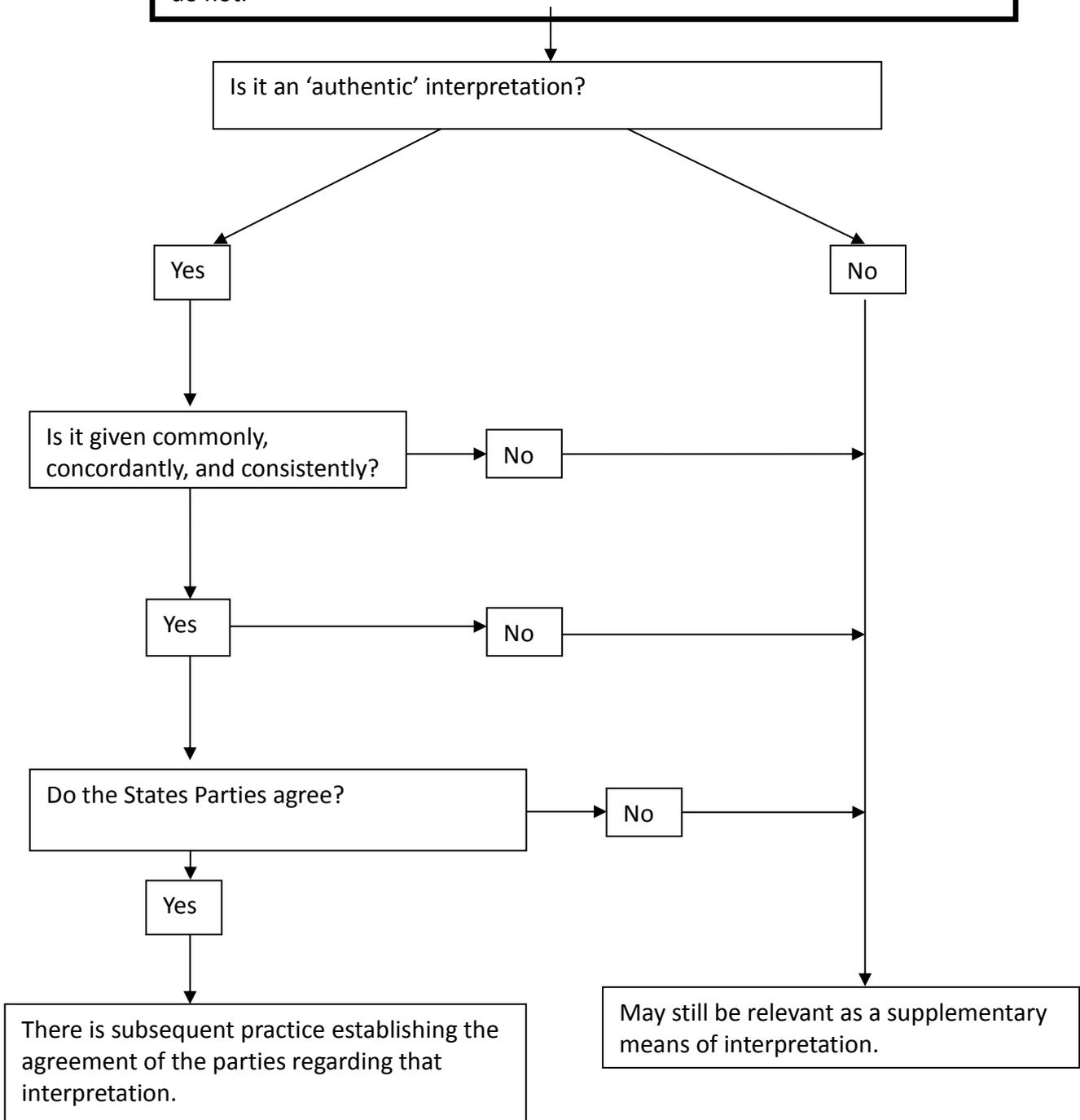
various terms (“variable import levies”, “ordinary customs duty” and “minimum import prices”) could be arrived at simply by discussing them in terms of their ordinary meaning, their context, and the object and purpose.⁵⁸⁵ But clearly, supplementary means of interpretation can be used in a wide variety of circumstances – not merely the preparatory works and the circumstances of the treaty’s conclusion – and can include documents and materials which are not intended to offer binding interpretations but are merely indicative. This would suggest that Lists of Issues and Replies, and statements made during the Constructive Dialogue in particular, could in certain circumstances be used to clarify the meaning of unclear treaty terms. This would allow us to incorporate such materials and documents in our analysis where the meaning of the text is not clear and where there is not enough concordant, common and consistent practice implying agreement to be constitutive of subsequent practice. This, clearly, is an area for further productive research and analysis.

iv) 3 Step Flowchart

This analysis of the WTO and ICJ case law on subsequent practice allows us to generate a framework or checklist for assessing the work of the UN treaty bodies. This would take the following form:

⁵⁸⁵ Chile – Price Band AB, *supra* note 498, paras. 230-287.

An interpretation of a treaty term is offered, to the effect that prevailing cultural or societal conditions either affect how that term is implemented, or do not.



B. Procedural and Practical Considerations

Before commencing with the substantive analysis in the next Chapter, there are now some further considerations to be made regarding its focus – which States Parties' reports to consider? Under what treaties? And what kind of conclusions might this kind of analysis allow us to make?

i) Which States?

It is not possible, for reasons of space, to analyse the entirety of the reporting history of all States Parties to all the major human rights treaties. This means that it is important to identify a group of States which to be the focus for our analysis. The task here is to identify a sufficient number of States to be able to generalise, while avoiding identifying so many that there becomes too little space to discuss their reporting history in enough depth. The States should be those for whom cultural barriers have been cited most frequently as a factor affecting internalization or implementation of human rights norms.

These States are Singapore, Malaysia, and Indonesia. The reasons for focusing on these three States should be relatively obvious – the most important being that these States are most closely associated with the East Asian Challenge which gave rise to this discourse in the first place. Singapore and Malaysia are politically and socially different in many respects, but they have expressed a similar sceptical approach to international human rights law (Singaporean politicians have been described as being “allergic” to human rights⁵⁸⁶ while

⁵⁸⁶L. Thio, “Singapore Human Rights Practice and Legal Policy” 21 Singapore Academy of Law Journal 326 (2009).

Malaysia has “continuously derogated” human rights since independence⁵⁸⁷) makes them natural fits for an analysis like this, which concerns itself primarily with international legal issues. Indonesia, meanwhile, has a long history of engagement with all of the major human rights treaties, but also is the largest Islamic State in the world by population; this allows us to address religious aspects of cultural relativism and human rights interpretation and implementation.

Focusing on these States seems appropriate for this very reason. Nevertheless, it may be questioned whether or not Middle Eastern or African States, which are sometimes the locus for cultural relativist arguments⁵⁸⁸, might also be important and relevant subjects of analysis. Certainly, taking a cursory view of many Middle Eastern and African Islamic States’ relationships with the major human rights treaties, we can see instances where reservations would indicate this to perhaps be the case, as for instance Pakistan and Djibouti’s initial reservations to the CRC, which held that “[p]rovisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values” and “[the Government of Djibouti] shall not consider itself bound by any provisions or Articles that are incompatible with its religion and its traditional values”⁵⁸⁹, respectively (although these reservations were withdrawn by the governments concerned in 1997 and 2009).

There are three reasons for preferring a focus on East Asia rather than on Middle Eastern or African States. First, the fact remains that, for good or ill, it is the East Asian States, particularly Singapore, Malaysia, and Indonesia, which have attracted by far the most

⁵⁸⁷See e.g. A. Woodiwiss, *supra* note 175, p. 185.

⁵⁸⁸The literature here is broad and varied, but see e.g. R. Howard, “The Full Belly Thesis”, *supra* note 114; J. Cobbah, “African Values and the Human Rights Debate: An African Perspective” 9 HRQ 309 (1987); J. Morgan-Foster, “A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Perspective”, 10 ILSA Journal of International and Comparative Law 35 (2003-2004).

⁵⁸⁹See United Nations Treaty Collection, Chapter IV, 11 – Convention on the Rights of the Child, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#20.

scholarly and political attention when it comes to cultural relativist debates – largely because of the manner in which politicians from those countries have conducted themselves in public forums and because of the nature of their rhetoric, but also because, taken together, their political and economic significance in the world requires that the views of their representatives are treated extremely seriously. Without being side-tracked into political scientific analyses of international relations, of all the regions of the world outside of what is traditionally thought of as “the West”, it is these States which can most credibly stake a claim to a successful alternative paradigm of societal development, given their relative recent economic success.

Secondly, representatives, politicians, thinkers and scholars from these East Asian States have (increasingly) demonstrated a level of confidence in advancing self-consciously “non-Western”, anti-universalist positions. (One thinks in particular of Kishore Mahbubani’s *The New Asian Hemisphere*⁵⁹⁰.) Thus, it seems, the issues surrounding the ‘East Asian Challenge’ seem only likely to grow more acute and pertinent. The level of sureness and eloquence exhibited by government spokesmen, thinkers, and scholars, and the apparent genuine developmental success behind them, means that they require close and dedicated examination in their own right.

Thirdly, and perhaps most importantly for our purposes, to a certain extent it seems likely that some generalisations can be made from the conclusions drawn from any close analysis of East Asian States’ interactions with the relevant treaty bodies, potentially allowing information gleaned from this analysis to be illustrative of general principles that would apply in regard to African, Middle Eastern, or indeed European or North American

⁵⁹⁰K. Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East* (Public Affairs, 2008).

States Parties. For instance, the relationship between Islam and human rights is crucial in any kind of analysis of the interpretations offered in regard to Middle Eastern States. Yet, to a certain extent, any examination of the way Malaysia and Indonesia have approached the reporting procedures under the human rights treaty bodies could be expected to raise similar questions in that regard, as both are predominantly Islamic societies with politicians who have at least partially embraced public religion as an element of the political structure of the State⁵⁹¹. While it would be reductionist and naïve to claim that Islam's role in public life is exactly the same throughout the Islamic world, it certainly seems that, at least as far as human rights treaty monitoring is concerned, the role and position of "Islamic values" can in some regard be generalised about from examining subsequent practice with respect to Malaysia and Indonesia. The same is surely true of many of the other issues raised in an examination focusing on East Asian States.

ii) Which Treaty?

Naturally, the documentation we can examine is restricted to that under the treaties which our States are party to. There are only two major treaties which Singapore, Malaysia and Indonesia have all ratified: the CEDAW and the CRC. Due to space constraints, it is only possible to select one of these treaties as the context for our analysis. For a number of reasons, the CEDAW has been selected, but in actual fact the interactions between Singapore, Malaysia and Indonesia and the Committee on the Rights of the Child would also be a suitable focus, given that both treaties naturally cover areas in which one would expect societal norms and values to be of great importance.

⁵⁹¹See e.g. A. Ibrahim, *The Asian Renaissance* (Times Books International, 1996).

The CEDAW is partly preferred for the simple reasons that there is a greater volume of documentation to examine than under the CRC. Singapore has only partaken in two reporting cycles for the CRC as opposed to four for the CEDAW; Indonesia has partaken in four for both treaties; and Malaysia one for each. This means that there is slightly more material to examine and remark upon for CEDAW given our geographical focus. It is also preferred because, especially in the case of Indonesia, what we might call Islamic cultural values play a greater role in the arena of women's rights than in those of the child, affecting the laws on marriage, on work, on health, on violence against women, and discrimination in general to a much more significant degree than they do for the rights of the child. Thus, on balance, the CEDAW is the treaty under whose reporting procedures we prefer to examine the development of subsequent practice establishing the agreement of the parties regarding interpretation.

Does this focusing on the reporting histories of only three States Parties to the CEDAW pose a problem for our approach, given that, as we know, subsequent practice does not develop in relation to one State Party but broadly across all the States Parties? It will not have escaped the reader's notice that there is something somewhat artificial about examining the reporting histories of three parties to the treaty to identify instances of interpretive practice in our area of interest and extrapolating upwards from those instances to attempt to identify commonality, concordancy and consistency and agreement: it is, indeed, something of a fiction. That is to say, the CEDAW Committee creates interpretive practice in all of its Concluding Observations to all States Parties. Strictly speaking, the correct way to conceptualising the process is that the Committee creates interpretive practice vis-à-vis all States Parties, which, if common, concordant and consistent, and agreed with, constitutes subsequent practice establishing the agreement of the parties on

interpretation. However, as we have established, since such an extensive survey is not possible in the current analysis, the fiction created by merely focusing on Singapore, Malaysia and Indonesia is a necessary one; while the impression is given that only the interpretive practice in relation to those States is authentic, in truth it is entirely a matter of perspective. We could equally focus on any three given States Parties to the Convention and conduct an exactly similar analysis.

C. What the results allow

Finally, we must address what the results of our survey will allow us to conclude. How clear and convincing can they be? There are a number of obstacles present which will prevent us from making absolute and definitive conclusions.

The first of these is the problem of the small sample size. Step 2 and 3 in the three-step analysis, it will be recalled, require the practice concerned to be common, concordant and consistent and to have the agreement of all State Parties in order for it to be constitutive of subsequent practice. To properly assess whether this is the case, it is necessary for the entire practice to be surveyed – i.e., in the treaty body context, a given interpretation of an obligation must be demonstrated to be common, concordant and consistent across all States Parties to the relevant treaty, and no instances of outright disagreement must be present. Since this analysis only examines the reporting history of a small number of States under the CEDAW this is, therefore, impossible to assess comprehensively and conclusively.

Generally speaking, of course, the monitoring practice of a given treaty body is relatively uniform. It would be unusual, not to mention self-defeating, if contradictory recommendations were made to different States Parties regarding the same treaty Articles

by the same treaty body. Nevertheless, this should not mean that commonality and concordancy are assumed. Even if common, concordant and consistent practice can be identified with regard to all of the States Parties which this study focuses on, that is, it cannot be presumed that the practice is common, concordant and consistent with regard to *all* States Parties to the CEDAW. Some effort is made to survey the entirety of the Concluding Observations of the CEDAW Committee across all States Parties to attempt to determine commonality and concordancy, but a detailed analysis is not possible given space constraints. This is doubly true of agreement: a detailed analysis of the responses to lists of issues, summary records to constructive dialogue, and State Reports for all of the parties to the CEDAW to determine agreement or disagreement is not possible at this stage. This means that any conclusions about monitoring practice being constitutive of subsequent practice can only be tentative at this point: it may be the case that there is disagreement on the part of States Parties which it is not possible for us to identify at this stage, and hence it may be the case that our conclusions could in fact be obviated by a detailed analysis of State Party responses elsewhere.

The second issue is that the treaty bodies are not unified and take slightly different approaches and have different compositions – most notably this is true in the ICESCR context⁵⁹², but there is variation across all the treaties. It is particularly notable that, for instance, almost all the members of the HRC have a legal background, whereas on CEDAW it is only around half⁵⁹³. It may be the case, then, that a situation arises in which it appears that our core question is answered differently depending on the treaty concerned. It might

⁵⁹²See e.g. P. Alston, “Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights” 9 Human Rights Quarterly 332 (1987).

⁵⁹³The curricula vitae of the members of the treaty bodies are available at <http://www2.ohchr.org/english/bodies/hrc/members.htm>, replacing “hrc” with the relevant abbreviation (“cerd”, “crc”, etc.).

be that, for the sake of argument, CEDAW is more admitting of cultural and societal factors affecting implementation than the HRC. It is important to be aware of this possibility and note that any tentative conclusions could be fragmentary across the different treaties.

This means that what follows is best seen as having a twofold value. In the first place the thesis establishes a framework in which to analyse cultural relativism from a legal perspective, by describing how to identify subsequent practice in the human rights monitoring context which establishes the agreement of the parties on how treaty provisions are interpreted so as to permit cultural values to affect implementation. After this, the thesis provides examples of how this framework can be used, and provides indicatory answers, in the form of the case studies which follow. The small sample size and information-gathering difficulties make it impossible to provide definitive conclusions, but nonetheless, they will serve to point towards those conclusions, and set up an analytical structure in which to find them. This analytical structure is one which can then be transferred to other broader contexts, examining other of the major human rights treaties and encompassing a more thorough and detailed survey of the interpretive practice with regard to all States Parties to those treaties.

V. Subsequent Practice in the Interpretation of Human Rights Treaties: An Analytical Framework

We shall now move on to our illustrative analysis, as described in the preceding chapter. It will be recalled that our aim is primarily to illustrate how an approach to the cultural relativist question through examining subsequent practice would work in practice, and demonstrate how it can be used to provide a framework in which to answer some of the questions raised by the East Asian Challenge in particular. The aim, that is, is somewhat more modest than resolving once and for all the question of how societal or national cultural mores and traditions are permitted to affect the manner in which human rights treaty provisions are interpreted; rather, the aim is to provide a method for tackling the manner in which such questions might be resolved in future.

The procedure will involve analysing three selected case studies, which are, respectively, the reporting histories of Singapore, Malaysia, and Indonesia, under the Convention for the Elimination of all forms of Discrimination Against Women.

The case studies will proceed as follows. First, the reporting histories of Singapore, Malaysia and Indonesia are surveyed. This involves making some general remarks about the reporting histories of those States under the CEDAW, establishing their general character and the core issues to be discussed. This is followed by an overview of their reporting histories, surveying primarily the Concluding Comments and State Reports – as the documents containing authentic interpretive practice – but also including, where necessary, the summary records of the constructive dialogue and the lists of issues and responses in order to discern agreement. The aim is not to catalogue the entirety of each Report and set of Concluding Comments, but to identify areas in which it might either explicitly or implicitly

be argued that socio-cultural factors ought to, or ought not to, affect how provisions of the Convention are implemented. The aim is not, of course, to attempt to identify socio-cultural issues in sophisticated terms from a sociological perspective: a layman's approach, taking into consideration what the treaty bodies and States Parties seem to view as relevant, as well as the broader discourse surrounding Asian values, will suffice for the purpose of this illustrative analysis. That is, although it has been clearly established, in Chapter I of the thesis, that "Asian values" is a contested term, without consensus surrounding its meaning, it is not our aim to discover that meaning through an examination of the reports, nor to problematize the manner in which it is used either by the CEDAW Committee or the States Parties. Our aim, rather, is to attempt to understand how far anything that might be construed as an Asian value could be used as a justification for the manner and extent to which a treaty provision is implemented. This means we shall take as naïve and broad a view of Asian values as possible, including all of those factors mentioned in our précis of the literature provided in the first Chapter of the thesis. Then, once this overview has been completed, an examination of it is conducted in order to establish which instances of interpretive practice satisfy the Step 1 requirement for being authentically interpretive, and then to discuss what would be needed for them to meet the Step 2 and 3 requirements.

The discussion of the Step 2 and 3 requirements is necessarily limited, for reasons which have already been explained. However, to the extent possible, once authentic interpretive practice satisfying the Step 1 requirement has been identified, an attempt is made to establish whether it is given commonly, concordantly and consistently by reviewing the Concluding Observations given to the reports of other States Parties. And since there is also a great deal of interplay between General Recommendations and Concluding Observations when it comes to the issue of commonality, concordancy and consistency (that

is, if it transpires that the Committee gives a Concluding Observation that offers a different interpretation to that given in one of its General Recommendations, this would clearly prevent the interpretive practice meeting the Step 2 requirement – and vice versa), by necessity, General Recommendations will comprise part of this analysis.

We are thereby able to make some tentative remarks in each instance about whether the authentic interpretations identified satisfy the standards set out within the WTO jurisprudence and by Sir Ian Sinclair. However, because of the nature of assessing fulfilment of the Step 3 requirement, this is not attempted except insofar as disagreement can be identified within the responses of Singapore, Malaysia and Indonesia alone.

Finally, after completion of the survey of the reporting histories of our three subject States, we shall make some remarks about various issues that arise from our illustrative analysis and that are tangential to it.

At this stage, it must also be reiterated that, irrespective of the results of this analysis, its purpose is not to evaluate the effectiveness or otherwise of the reporting procedure to treaty bodies in general, nor the CEDAW Committee in particular. The effectiveness of the reporting procedure in achieving greater compliance with human rights treaties and improving the lot of the citizens of States is an issue entirely separate to the legal question of to what extent treaty provisions are interpreted to permit implementation that is sensitive to Asian values or national/societal values and traditions.

A. Singapore

i) General Remarks

At face value, the reader will perhaps be surprised at the Singaporean Government's relative lack of reference to Asian values, Confucianism, and other cruxes of its stance expressed towards human rights in United Nations political forums; quite unexpectedly, in large part cultural particularism is apparently absent from Singapore's reports to the CEDAW. Indeed, at various stages the government presents itself as being largely in favour of the removal of prevailing cultural or societal mores which might impact negatively on women's rights. In its Initial Report, for instance, it makes the statement that:

The low representation of women in politics [and other male dominated occupations] is due mainly to stereotyped attitudes, cultural practices and values among woman members rather than to discriminatory laws or the lack of opportunities. Singapore recognises the existence of such long-standing societal attitudes and cultural practices which pose obstacles to a more active and higher participation rate of women in some fields. Singapore is seeking an improvement in the situation through long-term public education and awareness programmes.⁵⁹⁴

And where the Government makes particularist arguments they tend to be based on economic, rather than cultural, circumstances. For instance, in its Third Periodic Report the government describes a number of economic challenges facing the country which might impact on its implementation of the Convention:

⁵⁹⁴Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Initial Report of States Parties: Singapore, UN Doc CEDAW/C/SGP/1, para. 3.3.

The Asian Financial Crisis in 1997 plunged Southeast Asia, including Singapore, into an economic recession in 1998. Although growth resumed in 1999-2000, Singapore was hit by another recession in 2001. The synchronised downturns in the major developed economies as well as the global electronics industry led to a sharp deceleration in global growth.

The economic malaise was further aggravated by the terrorist attacks on the US on 11 September 2001 and the Severe Acute Respiratory Syndrome (SARS) crisis...

Further, globalisation and rapid technological advances are driving fundamental, long-term changes in commerce, industry and our daily lives...In the short term, the entry of China and India into the market will mean dislocation in many countries, as industries restructure and relocate, and trade patterns change. Some workers will lose their jobs, while other industries will need workers, but those with different skills...

This restructuring is a major reason why Singapore is experiencing higher retrenchments and unemployment. The average unemployment rate has been rising steadily from 3.1% in 2000 to 4.7% in 2003.

Set against this economic backdrop, Singapore has to take decisive steps to strengthen itself in order to stay competitive and save jobs.⁵⁹⁵

Nonetheless, there are some indications of an attempt to justify certain interpretations or implementations of the Convention through reference to cultural values – both explicit and implicit. Probably the most prominent example is the repeated assertion that Singaporean government and society place special importance on the family – which, it will be remembered, is one of the core Asian values.⁵⁹⁶ This is a running theme throughout Singapore's reports. Thus, in its Initial Report:

⁵⁹⁵Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Third Report of States Parties: Singapore, UN Doc CEDAW/C/SGP/3, para. 11.19-11.29.

⁵⁹⁶See e.g. F. Zakaria, "Culture as Destiny", *supra* note 146.

As a pro-family society, Singapore attaches great importance to the institution of the family. Many policies in Singapore are designed specifically with the family in mind and these policies do affect and benefit women.⁵⁹⁷

And:

The Singapore government makes known its adherence to traditional Asian values, especially with regard to the importance of the family.⁵⁹⁸

And:

The [school] curriculum is a means to disseminate values cherished by society. These include values which can strengthen the family and promote the importance of sharing of roles and responsibilities by both male and female members of the family. The Civics and Moral Education syllabus includes components on the Family where issues such as Family Harmony and Communication, Roles in the Family and Responsible Parenthood are discussed. Students are taught moral concepts such as family unity, love, respect and care for elders, communicating and co-operating with family members, sharing household responsibilities and upholding the sanctity of marriage and the importance of parenthood.⁵⁹⁹

Large sections of the Second Periodic Report are devoted to detailing pro-family measures the Singapore government has taken⁶⁰⁰, while in the Fourth Report further statement were made re-affirming Singapore's commitment to strong family units:

⁵⁹⁷ CEDAW, Singapore's Initial Periodic Report, *supra* note 594, para. 3.1.

⁵⁹⁸ *Ibid.*, para. 6.1.

⁵⁹⁹ *Ibid.*, para. 11.10.

⁶⁰⁰ See e.g. Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Second Report of States Parties: Singapore, UN Doc CEDAW/C/SGP/2, pages 6-7.

Singapore subscribes to the philosophy that the family undergirds society and that closely knit and supportive families make for a cohesive nation. Therefore, many policies in Singapore are designed to promote the healthy development of families.⁶⁰¹

At the same time, the government expressed concern that the family's important in Singaporean society might be being eroded:

In general, Singaporeans continue to possess pro-family attitudes and values...However, there are a few emerging trends which are cause for some concern. The first is that more Singaporeans are choosing to remain single, and for those who marry, are doing so at a later age. Married couples are also delaying parenting.⁶⁰²

This concern about singlehood and divorce is an indication of how strongly the government views the importance of the family in Singaporean society.

This importance mostly manifests itself as a driver of policy and, more generally, a kind of philosophical underpinning to Singapore's implementation of the CEDAW rather than a factor presented as explicitly and directly affecting how and to what extent that implementation is carried out. Thus, for example, in its Fourth Report the government highlights its "many policies and programmes aimed at supporting family formation and development"⁶⁰³ under its section on its implementation of Article 16, such as:

- Government agencies which provide dating and matchmaking services⁶⁰⁴

⁶⁰¹Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Fourth Report of States Parties: Singapore, UN Doc CEDAW/C/SGP/4, para. D.1.

⁶⁰²*Ibid.*, para. 16.1-16.2.

⁶⁰³CEDAW, Singapore's Fourth Periodic Report, *supra* note 601, para. 16.4.

⁶⁰⁴*Ibid.*, para. 16.6.

- Social Development Officers who “facilitate social interaction opportunities for singles at various touch-points, such as at government agencies, community organisations, and private firms”⁶⁰⁵
- Financial support for parents, including through tax rebates, “child relief”, “baby bonuses”, and so on⁶⁰⁶
- Incentives to marry, such as paid maternity leave for single mothers who marry the father of their child⁶⁰⁷

There are, however, two exceptions which shall be discussed in more detail below, regarding the status of the husband as the head of the household, and regarding marital immunity for rape.

As well as this focus on the family, with its standing as one of the pillars of Singapore’s interpretation of Asian values, the government also explicitly separates Islamic personal law as a distinct category where provisions of the CEDAW either do not apply or must be implemented differently than for the non-Islamic populace. While this is partially justified simply by dint of respect for Islamic cultural values, and thus in part appears to be an area which comes under the rubric of minority rights, it is also presented as being for the protection of a purportedly unique aspect of Singaporean society in general – its cultural pluralism – and hence part of the fabric of the national character. For instance, Article 12(3) (requirement for all persons to be equal before the law and free from discrimination does not invalidate personal law or restrictions relating to religion) and Article 152 (responsibility of the Government to protect interests of minority groups) of the Constitution of Singapore,

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*, para. 16.7.

⁶⁰⁷ *Ibid.*, para. 16.8.

“require the respect of the freedom of minorities in the practice of their personal and religious laws [and] are necessary to maintain the delicate balance in a multi-cultural society”⁶⁰⁸; this can be contextualised in a tradition of Singaporean discourse which presents the country's ethnic and religious harmony as being somewhat precarious and in need of protection.⁶⁰⁹

Unlike the rhetoric surrounding the importance of the family unit, which is largely presented as a perspective on the CEDAW's implementation without any direct intimation that it is in any way incompatible with it, Islamic personal law is specifically delineated as an exception to CEDAW's application, or, at best, an area in which it is to implemented in a manner differently than in other areas of Singaporean law. At the time of ratification the government entered a reservation to Articles 2 and 16 to the effect that:

In the context of Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2, paragraphs (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, where compliance with these provisions would be contrary to their religious or personal laws.

This, effectively, refers only to Islamic personal law, as is explained by the elaboration on the reservation provided by the government in Singapore's Initial Report:

Article 2 and 16 require States Parties to take all appropriate means including legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. Whilst Singapore has to large extent [sic] complied with this,

⁶⁰⁸CEDAW, Singapore's Initial Periodic Report, *supra* note 594, para. 2.2.

⁶⁰⁹We recall Kausikan's remarks, for example, emphasising that since Singaporeans will bear the consequences of social change, they rather than 'the West' must be the engine of that change. See B. Kausikan, "Asia's Different Standard" 92 Foreign Policy 24 (Autumn 1993).

Article 12(3) and Article 152 of our Constitution require the respect of the freedom of minorities in the practice of their personal and religious laws. These provisions under our Constitution are necessary to maintain the delicate balance in a multi-cultural society. There are provisions under our Administration of Muslim Law Act (AMLA) which may not be consistent with the CEDAW, for example, the right given to a Muslim man to marry up to 4 wives and not vice versa. We consider it necessary to maintain our reservations to Article 2 and 16 of the CEDAW in view of the need to respect the right of Muslim citizens to practice their personal and religious laws.⁶¹⁰

Of course, a distinction must be drawn between the issues to do with minority rights and personal law regimes which these reservations raise, and the like of which are common throughout the world - and on which there is a wealth of academic commentary - and the appeals to national or supra-national 'Asian' culture which are the focus of this thesis. Much was said on this point at an earlier stage in our analysis, but it is important to reiterate the point that, while there is some conceptual overlap between cultural particularism at the minority level and at the national or supra-national level, they are notionally distinct at least as far as this thesis is concerned, and thus our search for authentic interpretative practice regarding the role of culture in implementation will not analyse these exceptions for Islamic personal law or minority rights.

ii) Authentic Interpretations

As has been established, subsequent practice in the context of human rights treaty interpretation is likely to be found primarily in the interpretive practice of the treaty bodies, combined with the States Reports procedures; thus, this study begins with an overview of

⁶¹⁰CEDAW, Singapore's Initial Periodic Report, *supra* note 594, para. 2.2.

the reports made by Singapore and the Concluding Observations given by the CEDAW Committee in order to attempt to identify whether such interpretive practice exists and whether it satisfies our three-step analysis. This shall proceed by outlining and detailing the key themes from Singapore's Initial and Second, Third, and Fourth Reports and the Concluding Observations on them, preceded by an examination aimed at identifying subsequent practice.

Initial and Second Reports

Singapore's Initial Report was submitted on January 18th, 2000, and its Second Report was submitted shortly afterwards, on May 3rd, 2001, so both Reports were considered together by the Committee.⁶¹¹

There was a considerable level of discourse in the first reporting cycle, and which would be a continual theme in Singapore's reporting history, surrounding what the Committee identified as the “major stumbling block” to progress towards equality for women in Singapore – namely, “Singapore's adherence to what it had defined as Asian values, in particular the importance of the family unit and the notion of the man as head of household and primary provider.”⁶¹² On a number of occasions throughout the session this point was raised by various members of the Committee. Singapore was urged variously to “move towards genuine partnership and equality and do away with traditional and cultural stereotypes”⁶¹³ and to “completely abandon the notion of the woman bearing the primary

⁶¹¹Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Singapore's Initial and Second Periodic Reports: Concluding Comments, UN Doc. A/56/38 (2001).

⁶¹²*Ibid.*, para. 36.

⁶¹³*Ibid.*, para. 35.

responsibility within the family for raising children and performing household tasks”⁶¹⁴ (which, presumably, was deemed to be implied by the government’s emphasis on the man as the head of household and breadwinner); ratification of the CEDAW, it was argued, “implied a willingness to remove traditional and cultural barriers, such as the patriarchal concept of family and society”⁶¹⁵ – which was signified by the government’s insistence on maintaining the traditional position of the father in the family. “Since traditional values discriminated against women,” another Committee member stated, “it was disquieting to note the absence of any efforts to counter the impact of traditional values and ensure a genuine sharing of duties. The stereotype of the woman as homemaker was reaffirmed throughout the report.”⁶¹⁶

More specific comments than these rather generalised observations were also made. Singapore’s parental leave legislation was said to be geared only towards women (for instance, the government would pay up to eight weeks’ salary for maternity leave for the first three children a woman had⁶¹⁷, but would only permit three days’ paid leave for married male civil servants⁶¹⁸), which “upheld the breadwinner concept”⁶¹⁹. The Chairperson, meanwhile, expressed concern about Singapore’s tax regime, which provided that wives would only be assessed separately from husbands for tax purposes if they opted to do so, otherwise deeming a married woman’s income to be that of her husband, which might mean that women had no legal capacity⁶²⁰. These remarks on the traditional view of the male as head of the household are, to a large extent, remarks which could be made

⁶¹⁴ *Ibid.*, para. 36.

⁶¹⁵ *Ibid.*, para. 37.

⁶¹⁶ Committee on the Elimination of All Forms of Discrimination against Women, 25th Session, Summary Record of the 515th meeting, 9 July 2001, UN Doc. CEDAW/C/SR.515, para. 5.

⁶¹⁷ CEDAW, Singapore’s Second Periodic Report, *supra* note 600, para. 7.16.

⁶¹⁸ *Ibid.*, Update, para. 8.

⁶¹⁹ Committee on the Elimination of All Forms of Discrimination against Women, 25th Session, Summary Record of the 515th meeting, 9 July 2001, UN Doc. CEDAW/C/SR.515, para. 4.

⁶²⁰ *Ibid.*, para. 32.

about any number of States that are party to the Convention and where stereotyped views of the family remain the dominant paradigm, but in Singapore's case it is significant that those stereotyped views are justified by the State as part of its cultural, and indeed, legal framework.

For its part, Singapore expanded on the philosophical underpinnings to its views on the family and Singaporean culture later on in the 25th meeting:

Various Committee members had expressed concern that Singapore's emphasis on the family might reinforce gender stereotyping in the workplace and at home. However, the concept of family in Singaporean society was an all-inclusive one: everyone belonged to an extended family. Strong families were vital to the well-being of both men and women and responsibilities should be shared in all areas of family life. Moreover, Singapore was not a Chinese city. It was a multiracial, multicultural and multireligious country whose shared national values were: nation before community and society before self; the family as the basic unit of society; community support and respect for the individual; consensus, not conflict; and racial and religious harmony. Its five gender-neutral family values were love, care and concern; mutual respect; commitment; filial responsibility; and communication.⁶²¹

This seems to suggest that, rather than strictly adhering to traditional views of the male as head of household, Singapore took a more nuanced and considered approach to the issue. It is notable, after all, that it entered no reservations to the CEDAW regarding Articles 5 (requiring States parties to modify the social and cultural patterns of men and women to eliminate prejudices and stereotypes) or 10 (requiring removal of stereotypes in education). And this is further borne out by some of its statements in the Summary Records and also in its Initial and Second Reports themselves, which do not indicate an absolutist stance on this point – rather indicating an attempt to reconcile the 'traditional Asian family' with

⁶²¹Committee on the Elimination of All Forms of Discrimination against Women, 25th Session, Summary Record of the 522nd meeting, 12 July 2001, UN Doc CEDAW/C/SR.522, para. 26.

Convention commitments.

For instance, regarding the issue of taxation, the Singaporean representative to the Committee explained that the joint tax assessment was an opt-in procedure, and not a requirement – this was “consistent with the State’s philosophy that the family was the foundation of society”⁶²², but not designed with a view of the male breadwinner in mind. In general, Singapore is described as a “nation in transition”, with older women finding fulfilment as homemakers while younger women were seeking equality with men in the workplace; support services “were not intended to reinforce women’s role as caregivers; rather, facilities such as before- and after-school care were a response to working women’s needs”.⁶²³ This indicates a somewhat subtler viewpoint than that implied by some of the Committee’s observations. This is further borne out by statements in the Initial Report on, for example, Article 6: “Family life education in Singapore has always stressed on both men and women sharing a common role in raising their children...What is often overlooked by many is that the role of the homemaker cannot be left to women only. To counter this, both boys and girls in school are given the opportunity to study Home Economics (traditionally a subject for girls) and technical subjects (traditionally for boys).”⁶²⁴ Nonetheless, at least insofar as Singaporean law is concerned, married men have an obligation to maintain their wife and children during marriage and after divorce, as provided by the Women's Charter 1961.

This lead to further statements in the Concluding Observations of the Committee:

While the Committee recognizes the importance of the family as the basic social unit, it

⁶²² *Ibid.*, para. 69.

⁶²³ *Ibid.*, para. 27.

⁶²⁴ CEDAW, Singapore's Initial Report, *supra* note 594, para. 6.16 – 6.22.

expresses concern that the concept of Asian values regarding the family, including that of the husband having the legal status of head of household, might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women.⁶²⁵

And:

The Committee urges the Government to ensure that laws, policies and programmes with regard to the family incorporate the principle of equality between women and men in all spheres, including the family, and the full realization of women is human rights.⁶²⁶

Though further remarks were made on the need to eliminate gender stereotypes within Singapore based on other Articles of the Convention (for instance, recommending that efforts be made to reduce stereotyping in the workplace⁶²⁷), it is in this area – Asian values and the family, and the woman's role within it – in which we can see discourse surrounding national or supranational socio-cultural values and their impact on implementation of the Convention developing.

Finally, one more remark from the Summary Records bears recording – relating to the issue of caning. One member of the Committee – Mr. Melander – felt Singapore's law regarding the use of corporal punishment was discriminatory towards men, as under Section 231 of the Criminal Procedure Code, a sentence of caning can only be passed against adult males, and it could not be justified by reference to traditional Asian values. He spoke on this issue on the basis that the CEDAW was "one of the very few human rights instruments which

⁶²⁵ CEDAW, Concluding Observations on Singapore's Initial and Second Periodic Reports, *supra* note 611, para. 79.

⁶²⁶ *Ibid.*, para. 80.

⁶²⁷ *Ibid.*, para. 85.

Singapore had ratified” and hence caning a relevant issue to raise⁶²⁸ - reasoning hardly like to be treated favourably by the government, but interesting for the purposes of this analysis.

Third Periodic Report

Singapore's Third Periodic Report⁶²⁹ was submitted on 22nd November 2004 and considered by the Committee at its 39th session, in 2007.⁶³⁰

The Committee continued to pursue its line on the family and Asian values:

The Committee reiterates its concern about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men within the family and society at large. These stereotypes present a significant obstacle to the implementation of the Convention, are a root cause of violence against women in the private and public spheres, put women in a disadvantaged position in a number of areas, including in the labour market, and limit their access to leadership positions in political and public life.

The Committee recommends that the State party take measures to bring about changes in traditional patriarchal attitudes and in gender-role stereotyping...⁶³¹

However, this area was not subject to the extensive discussions which it received during the 39th session. Probably, this can be attributed to a retreat from language linking traditional Asian values or Singaporean social mores with the importance of strong families

⁶²⁸Committee on the Elimination of All Forms of Discrimination against Women, 25th Session, Summary Record of the 514th meeting, 9 July 2001, UN Doc. CEDAW/C/SR.514, para. 43.

⁶²⁹Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Third Report of States Parties: Singapore, UN Doc CEDAW/C/SGP/3.

⁶³⁰Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Singapore's Third Periodic Report: Concluding Observations, UN Doc. CEDAW/C/SGP/CO/3 (2007).

⁶³¹CEDAW, Concluding Observations on Singapore's Third Periodic Report, *supra* note 630, para. 31-32.

in the Report itself. The government, rather, adopted an approach that was much more amelioratory to the philosophy adopted by the Committee itself. For instance:

Recognising that gender stereotypes are developed from childhood through people's surroundings in family and society, efforts have to be made to ensure that unhealthy gender stereotypes are not perpetuated. The media plays an important part in shaping values. The Government can do its part to promote strong family structures and values while addressing gender stereotypes.⁶³²

And:

Family life education is promoted in Civics and Moral Education which is a compulsory subject in both primary and secondary schools. Students learn about the important role that each family member plays in building strong family relationships regardless of gender. They are also taught to appreciate that both parents have an equal responsibility in bringing up the children and looking after the interests of the family unit.⁶³³

Meanwhile, measures to support working mothers and promote a work-life balance are cited.⁶³⁴ Overall, the approach taken seems to be one in which a continued emphasis on pro-family policy and a vision of the family as the basis of Singaporean society is combined with a move to de-emphasise the traditional, more patriarchal outlook present in the Initial Report.

However, there were other issues relevant to our discussion that were raised during the meetings at the 39th session and which, while they were not mentioned in the Concluding Observations, would continue to be themes of the Committee's interactions with

⁶³² CEDAW, Singapore's Third Periodic Report, *supra* note 595, para. 5.3.

⁶³³ *Ibid.*, para. 5.6.

⁶³⁴ *Ibid.*, e.g. paras. 11.58, 11.63, 11.64.

Singapore in the coming Fourth Report. These include non-consensual sex in marriage, and homosexuality.

At the time of its Third Report, Singapore's Penal Code had an exemption from the definition of rape for a married man who engaged in non-consensual sexual intercourse with his wife – 'marital immunity': "Sexual intercourse by a man with his own wife, the wife not being under 13 years of age, is not rape."⁶³⁵ This was noted by a member of the Committee:

[Ms Patten] asked whether the Government was considering the enactment of legislation to criminalize marital rape. She had information that recently there had been an initiative to withdraw the marital immunity, but only in three specific situations where the wife was separated from her husband. She urged the Government to remove the immunity completely.⁶³⁶

The response from the Singaporean representatives was as follows:

...Singapore recognized intimacy as a private matter between two consenting adults. In the case of non-consensual intercourse, it was up to the couple to resolve the issue privately within the context of the marriage. Although the Constitution currently provided that men who engaged in non-consensual intercourse had marital immunity, Singapore was gradually taking steps to amend the relevant provisions. The first step was to remove marital immunity in cases where the wife had filed for separation or a protection order. It was expected that the new provision would take effect within the next six months.⁶³⁷

This hints at the recurring theme of the primacy of the family, emphasising, effectively, the need to ensure the continuation of marriage where possible, though it does not state it explicitly; it is however, important to bear in mind in considering Singapore's

⁶³⁵Penal Code of Singapore, Section 375, Exception. This provision was amended in 2008; detailed below.

⁶³⁶Committee on the Elimination of All Forms of Discrimination against Women, 39th Session, Summary Record of the 803rd meeting, 1 August 2007, UN Doc. CEDAW/C/SR.803(A), para. 25.

⁶³⁷*Ibid.*, para. 71.

Fourth Report. It is also, however, worth noting that here the Singaporean representatives also sought to use a straightforward majoritarian argument to explain the existence of marital immunity - "the majority of people still considered sexual issues to be private and did not wish marital rape to be included in the Penal Code".⁶³⁸ This, in itself, can be linked by implication to the 'Asian value' of placing the wishes of the community or the rights of society (to use Lee Kuan Yew's term) above the rights of the individual: the wishes of the majority trump the individual women the law mitigates harshly against.

Committee members also sought to raise the issue of homosexuality during the 39th session:

Ms Pimentel understood that the Government intended to repeal the law criminalizing sodomy between a man and a woman, but that there was no proposal to repeal the similar law concerning homosexual men. Indeed, religious pressure was building to extend the law to outlaw sexual conduct between women. Since a democratic and secular state should refrain from penalizing private sexual relations between consenting adults, she asked how the Singaporean Government proposed to tackle that issue and protect lesbian women. Noting that the Constitution currently guaranteed freedom from discrimination for single, married and divorced women, she asked how the Government intended to prevent discrimination against lesbian women in the workplace, in access to health services and in society in general.

Setting aside the many legal issues raised by this remark, which will be analysed in more detail after this overview of the Reports and Concluding Observations, we shall turn to the Singaporean representatives' responses, which again made implicit reference to the Asian values arguments their government had used in the past:

Singapore respected human rights [said Ms Yu-Foo Yee Shoon], but it was subjected to

⁶³⁸ *Ibid.*, para. 76.

contradictory pressures. It upheld morality and human rights very stringently, but in the context of what was best for the majority and for society. With regard to homosexuality, the majority was still quite conservative. Homosexuals were not discriminated against; they had the same right to employment, education or housing as everyone else.⁶³⁹

...

Mr. Keok Tong San said that the provision criminalizing sodomy between men and women would not be repealed; however, the wording of the provision would be amended to refer to sexual assault by penetration, and the penalty for such acts would be increased. With respect to the criminalization of lesbianism, he said that Singapore did not wish homosexuality to enter mainstream society.⁶⁴⁰

Here, the implication is relatively clear, and refers back to a statement made in the 25th session: “[Singapore] was a multiracial, multicultural and multireligious country whose shared national values were: nation before community and society before self...”⁶⁴¹, which in turn harks back to one of the pillars of the Asian values – the primary of society and 'the community' over the individual, and the paternalistic State as guardian and facilitator of majoritarian concerns. Here, although there is no discrimination against homosexuals, nonetheless 'the majority' maintain conservative attitudes towards homosexuality and Singapore as a whole does not wish homosexuality to become mainstream, hence homosexual acts must be criminalised.

Fourth Periodic Report

Singapore's Fourth Periodic Report was submitted on April 3rd 2009 and considered by the

⁶³⁹ *Ibid.*, para. 44.

⁶⁴⁰ *Ibid.*, para. 73.

⁶⁴¹ *Supra* note 594.

Committee at its 49th session.⁶⁴² Several themes from previous Reports continued to be included, as did several newer issues. Firstly, patriarchal stereotyping remained a concern for the Committee:

The Committee reiterates its concern about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men within the family and society at large. In this regard, the Committee is particularly concerned that, despite the legal equality accorded to spouses, discriminatory traditional cultural attitudes that continue to utilize “the head of the household” concept, assigning this role to men, persist in the State party.⁶⁴³

This Observation was made after Committee members had raised the issue in a pattern similar to that expressed in the discussion of Singapore's Initial and Second Reports. Ms Acar inquired about the National Family Council (a consultative body created in 2006 to “promot[e] support services and programmes to enable women to harmonise their work, personal and family responsibilities”⁶⁴⁴):

The Committee had received information from alternative sources suggesting that the National Family Council still promoted the notion of men as heads of households. [Ms Acar] asked what measures the Government had taken to ensure that such entrenched cultural conceptions of men were being eliminated from the people’s mindset.⁶⁴⁵

In reply, Ms Ong explained that:

⁶⁴²Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of all forms of Discrimination Against Women – Singapore's Fourth Periodic Reports: Concluding Observations, UN Doc. CEDAW/C/SGP/CO/4.

⁶⁴³*Ibid.*, para. 21.

⁶⁴⁴CEDAW, Singapore's Fourth Periodic Report, *supra* note 642, para. D.3.

⁶⁴⁵Committee on the Elimination of All Forms of Discrimination against Women, 49th Session, Summary Record of the 993rd meeting, 14 October 2011, UN Doc. CEDAW/C/SR.993, para. 48.

[T]he Government of Singapore recognized that men and women had shared roles and responsibilities in a family. For statistical purposes, the head of household was defined as the person who was generally acknowledged as such by the other members of the household, usually either the oldest member, the person earning the main income, the owner/occupier of the house, or the person who managed household affairs. In the 2010 census, households had been able to decide for themselves who to designate as head — either the man or the woman — the term was gender-neutral in that respect. In addition, efforts had been made in recent years to introduce policies and programmes that supported the importance of role-sharing in the family.⁶⁴⁶

This implied that, since the oldest person in a household or the earner of the main income was usually a man, it would be likely that men would be designated by households themselves as heads, and thus had no relation to Government policy on the matter, which was gender neutral. This would, in itself, represent something of a change from Singapore's position in previous Reports which, it will be recalled, stressed the traditional cultural value of having the husband as the head of the household. In any case, Ms Acar was not satisfied with the answer, since her question, as she put it “had not been about the prevailing legal rules but rather about the prevalent values and attitudes in society and policies being implemented to change those attitudes”⁶⁴⁷.

Placed alongside this was a newer general concern with stereotyped attitudes towards female beauty:

Additionally, the Committee is concerned by the pervasiveness of advertising for products and services to improve body image and conform to societal expectations, as well as at the lack of clear guidelines to non-medical practitioners, such as aesthetic clinics, beauty clinics and spas. It notes that such cultural overemphasis of women's beauty and the lack of effective regulations on its commercial exploitation, including by the media, reinforces the image of

⁶⁴⁶ *Ibid.*, para. 79.

⁶⁴⁷ *Ibid.*, para. 88.

women as sex objects and constitutes serious obstacles to women's enjoyment of their human rights and the fulfilment of the rights enshrined in the Convention.⁶⁴⁸

This point had been raised, against by Ms Acar, during the 49th session:

[The] backbone of the Convention was the obligation to modify discriminatory traditional cultural norms and stereotypes. In that regard, it was of concern that women in Singapore seemed so occupied with their physical appearance — the country's beauty industry (including the use of surgery and pharmaceuticals) was booming, with the support of the media. Such a focus on appearance simply put a new face on the traditional stereotype of women as sex objects, and the trend should be examined critically, from the perspective of gender equality. She asked whether there had been any efforts to regulate the beauty industry, with particular regard to advertising and the media. The Committee would appreciate further information on any proactive measures the Government had taken to address gender stereotypes.⁶⁴⁹

This point, both in the Concluding Observation and in the summary records of the 49th session, seems to indicate that the Committee was focusing on something it deemed unique in Singaporean culture which strongly emphasised women's physical appearance more than it might in other societies. It is notable, however, that the Singaporean representatives were somewhat dismissive of this line of criticism.⁶⁵⁰

As an addendum, the Committee also began to express an opinion on Singapore's laws on homosexuality in its Concluding Observations:

The Committee further notes that despite the fact that the State party recognizes the principle of equality of all persons before the law, as enshrined in the Constitution, regardless of gender, sexual orientation and gender identity (CEDAW/C/SGP/Q/4/Add.1, para. 113), there is still

⁶⁴⁸ CEDAW, Concluding Observations on Singapore's Fourth Periodic Report, *supra* note 642, para. 21.

⁶⁴⁹ *Ibid.*, para. 47.

⁶⁵⁰ *Ibid.*, para. 76.

negative stereotyping of women belonging to this group [presumably this refers to lesbians].⁶⁵¹

Again, as stated previously, this Observation raises a number of important legal questions, but for the purposes of this overview they will not be analysed here. For now it suffices to outline the reasoning behind the Committee's statement, and the State's response.

The reasoning itself was based on two notions – firstly that since Male homosexual activity was illegal in Singapore this might also result in an indirect impact on homosexual women's rights in the country, and secondly that the Committee had declared in its 28th General Recommendation that it deemed the prohibition of discrimination against women to include discrimination on the grounds of “gender orientation and gender identity”⁶⁵² (which presumably also forbade discrimination against women based on their sexual orientation). In particular, the Media Development Authorities' regulations, which prohibited positive depictions of lesbianism, were singled out as an example where change was required.⁶⁵³ It was considered by the Chair of the Committee that censorship of homosexuality in the media should be eliminated, since “the media had great power to reinforce prejudices”⁶⁵⁴. Other concerns were expressed about, for example, whether women's same-sex partnerships were recognised in public health policies⁶⁵⁵, or whether the government's requirement for public servants to consult all stakeholders when developing policies extended to “women of sexual minorities”.⁶⁵⁶

The Committee also recommended, in its Concluding Observations, that Singapore remove entirely its regulations on marital immunity and specifically criminalise marital

⁶⁵¹CEDAW, Concluding Observations on Singapore's Fourth Periodic Report, *supra* note 648, para. 21.

⁶⁵²CEDAW, 49th Session, 993rd meeting, *supra* note 645, para. 20.

⁶⁵³*Ibid.*

⁶⁵⁴*Ibid.*, para. 57.

⁶⁵⁵Committee on the Elimination of All Forms of Discrimination against Women, 49th Session, Summary Record of the 994th meeting, 17 October 2011, UN Doc. CEDAW/C/SR.994, para. 35.

⁶⁵⁶*Ibid.*, para. 15.

rape.⁶⁵⁷ In the space between the Third and Fourth Reports, Singapore had made the expected changes in this regard, so that marital immunity in instances of non-consensual sex would be removed where the man and woman concerned were separated, a court injunction was in force, or similar.⁶⁵⁸ However, the government had not removed marital immunity entirely from the Penal Code, and had preferred a 'calibrated approach'. Explaining why, the Report stated:

The previous law was lacking as a husband is given unconditional exemption from the offence of rape of his wife regardless of how unreasonably he may have conducted himself. However, the amendment recognised that a balance needs to be struck between the needs of women who require protection, and the general concerns about conjugal rights and the expression of intimacy in a marriage. Abolishing marital immunity entirely may change the whole complexion of marriage in our society. Hence, the Penal Code amendments afford the necessary protection for women whose marriages are, in practical terms, on the verge of a break-down or have broken down. These clearly signal that her consent to conjugal relations has been withdrawn.⁶⁵⁹

While the Report does not elaborate on what changing “the whole complexion of marriage” in Singapore society would entail, it seems relatively clear that it draws a connection between this issue and family unity and the divorce rate, since in the Report itself the section on marital immunity comes directly after a number of general statements expressing concern on the Government's part about the lowering birth rate, the average age of marriage and motherhood growing higher, and an increase in the divorce rates.⁶⁶⁰ It seems that the implication is that marital immunity is connected in part to preserving

⁶⁵⁷ CEDAW, Concluding Observations on Singapore's Fourth Periodic Report, *supra* note 648, para. 24 (a).

⁶⁵⁸ CEDAW, Singapore's Fourth Report, *supra* note 601, para. 16.11.

⁶⁵⁹ *Ibid.*, para. 16.12.

⁶⁶⁰ *Ibid.*, para. 16.1-16.3.

marriage, and thus to the family-centric Asian values that the government has consistently emphasised. Similarly to the other areas where the Committee presented a challenge, the government defended its stance on majoritarian grounds:

The present definition was the most that Singaporean society was currently prepared to accept. It was something that had been debated in society, and the Government intended to return to the issue, but for the time being that was as far as society was prepared to go.⁶⁶¹

This replicates the philosophical underpinning to Singapore's justification of its stance on homosexuality expressed at the 25th session, which presents a hierarchy of society over the individual, and the government as guardian of society as much as, or more so than, individual members. In the reply to the List of Issues on its Fourth Report, in which the issue of homosexuality was also raised, Singapore stated that it was “by and large a conservative society... [and] the Government strives to maintain a balance, to uphold a stable society with traditional, heterosexual family values, but with space for homosexuals to live their lives and contribute to society”.⁶⁶²

iii) Analysis

The above overview of Singapore's reporting history and the Concluding Observations given by the Committee gives us a number of different socio-cultural themes, many of which are linked and come under the umbrella of the broader theme of the family and its place in the general corpus of Asian values. These are:

⁶⁶¹CEDAW, 49th Session, 994th meeting, *supra* note 655, para. 62.

⁶⁶²CEDAW, Singapore's response to the list of issues and questions with regard to the consideration of the fourth periodic report, UN Doc. CEDAW/C/SGP/Q/4/Add.1, para. 114.

- Equal rights for men and women in determining nationality of children
- Gender stereotyping, particularly the husband/father as breadwinner or head of household
- Marital immunity
- Homosexuality and discrimination against women members of 'sexual minorities'
- Stereotyping of women as sex objects

Each of these themes either directly or indirectly relates to national or supranational socio-cultural values, by Singapore's own apparent interpretation. The reservation to Article 9 regarding the nationality of children born overseas was entered with the aim of preserving the Asian tradition where the husband is the head of the household; while the Committee's continued focus on the issue of the 'breadwinner' concept, while surely reminiscent of lines taken with respect to many other – if not all – States parties, is tied directly to Singapore's own implicit and explicit connections between that concept and Asian values, particularly regarding the importance of the family unit.

The themes of marital immunity and homosexuality are somewhat less directly linked to national or supranational socio-cultural values, but the relationship is still apparent. Both are linked in large part to the majoritarian sentiment that is readily seen in the discourse of Singaporean government representatives throughout the past three decades, and which has always been linked with the notion that society is ranked above the individual in its importance in Asian societies. The line of interpretation, that in order to preserve certain aspects of Singaporean society the rights of some individuals need be restricted, is a

clear derivation from the type of statements made by Mahbubani or Lee Kuan Yew.⁶⁶³

Marital immunity was also implicitly linked to the preservation of the family and reducing divorce rates in the Fourth Periodic Report, harking back to the notion of the family as a core Asian value.

Our aim is now to attempt to derive from these themes what authentic interpretations are contained in the Concluding Observations, before putting them through our three step test for subsequent practice establishing the agreement of the parties.

Equality in the Nationality of Children

The first theme is relatively easily dealt with: the interpretive practice of the Committee, requiring Singapore to remove the discrepancy between its treatment of the nationality of children born overseas to men with foreign spouses versus women with foreign spouses, is clearly authentically interpretive: the Committee's position is that, under Article 9 (2) and Article 2 of the Convention, Singapore is obliged to ensure that there is absolute equality between men and women in passing nationality to their children, irrespective of socio-cultural values and, in particular, the 'Asian Value' of the husband as the head of the household. This issue of course is germane to the discussion of reservations which takes place at the end of the Chapter.

Is the interpretive practice common, concordant and consistent? The reservation which Singapore entered was removed by the time of its Third Report and its nationality laws changed to bring them into line with the recommendations made in the Concluding Comments of the Committee, so the point is almost moot – we do not have many instances

⁶⁶³See for instance F. Zakaria, *supra* note 146 esp. pp. 112-114.

so as to prove consistency - but it is certainly the case that the interpretive practice is not inconsistent insofar as the reporting history of Singapore is concerned. To establish whether it is also common and concordant would of course require an examination of how the Committee has interpreted such discriminatory nationality laws in all other jurisdictions: we do however find that the Committee has in fact given almost identical interpretations of Article 9 (2) in regard to the obligations of Algeria⁶⁶⁴, Jordan⁶⁶⁵, Egypt⁶⁶⁶, Guinea⁶⁶⁷, Sri Lanka⁶⁶⁸, Tunisia⁶⁶⁹, Morocco⁶⁷⁰ (in the case of Tunisia and Morocco, the interpretive practice involved the Committee congratulating the States concerned on changes to the nationality law giving women and men absolute equality in passing on nationality to their children), and Bangladesh⁶⁷¹. While it is not possible here to examine the justifications given by all those States for maintaining laws preventing women from passing on nationality to children of foreign-born husbands, it is clearly the case that commonality, concordancy and consistency would be difficult to disprove.

Thus, we can at this stage suggest that there is authentic interpretive practice regarding Singapore's obligations under Article 9 (2), to the effect that maintaining the Asian tradition where husbands are heads of households has no impact on the implementation of those obligations insofar as it creates a distinction in the rules on nationality between children of Singaporean women and foreign husbands, and children of Singaporean men and foreign wives, who are born overseas. And we can also conclude that it is likely that this interpretive practice is given commonly, concordantly and consistently. Is there also

⁶⁶⁴See e.g. CEDAW, A/54/38/Rev.1, part I (1999), para. 83.

⁶⁶⁵See e.g. CEDAW, A/55/38, part I (2000), para 172.

⁶⁶⁶See e.g. CEDAW, A/56/38, part I (2001), para. 327.

⁶⁶⁷See *Ibid.*, part II, para. 125.

⁶⁶⁸See e.g. CEDAW, A/57/38, part I (2002), para. 274.

⁶⁶⁹See e.g. *Ibid.*, para. 184.

⁶⁷⁰See e.g. *Ibid.*, para. 156.

⁶⁷¹CEDAW, A/59/38, part II (2004), para. 249.

agreement on the part of Singapore? The reservation which it entered was removed by the time of the Third Report, and Singapore's nationality laws were changed to bring them into line with the recommendations made in the Concluding Observations of the Committee. This has remained the case ever since. Agreement, then, while not present at the time of the initial report, and while not made explicit, can certainly be said to be present from the Second Report onwards – at least as far as Singapore is concerned. Thus, we can provisionally conclude that there is subsequent practice establishing the agreement of the parties on the Committee's interpretation of Article 9 (2).

Gender Stereotyping and the husband as breadwinner

This area is more complex, as there are a number of different threads covering a number of different Articles of the Convention. In broad summary, the potentially authentic interpretations given in the Concluding Observations on this point are as follows:

- 1) “While the Committee recognizes the importance of the family as the basic social unit, it expresses concern that the concept of Asian values regarding the family, including that of the husband having the legal status of head of household, might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women. The Committee urges the Government to ensure that laws, policies and programmes with regard to the family incorporate the principle of equality between women

and men in all spheres, including the family, and the full realization of women's human rights.”⁶⁷² (Consideration of Initial and Second Periodic Reports)

2) “The Committee reiterates its concern about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men within the family and society at large. These stereotypes present a significant obstacle to the implementation of the Convention, are a root cause of violence against women in the private and public spheres, put women in a disadvantaged position in a number of areas, including in the labour market, and limit their access to leadership positions in political and public life. The Committee recommends that the State party take measures to bring about changes in traditional patriarchal attitudes and in gender-role stereotyping. Such measures should include awareness-raising and public education campaigns, with a special focus in the curriculum on human rights education and women’s rights and children’s rights issues, in cooperation with a wide range of stakeholders, including the national machinery for the advancement of women, women’s organizations, trade unions, the National Employers Federation, the media, educational institutions and the People’s Association, with a view to eliminating stereotypes associated with traditional gender roles in the family and in society, in accordance with articles 2 (f) and 5 (a) of the Convention. It recommends that the State party expand its current awareness-raising efforts and training activities to leaders of political parties and senior managers in the private sector. The Committee calls upon the State party to ensure that all measures to enhance work/life balance are targeted at both women and men in the public and private sectors, so as to further support the equal sharing

⁶⁷²CEDAW, Concluding Observations on Singapore's Initial and Second Periodic Reports, *supra* note 611, para. 79-80.

of family and work responsibilities between women and men.”⁶⁷³ (Consideration of Third Periodic Report)

3) “The Committee reiterates its concern about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men within the family and society at large. In this regard, the Committee is particularly concerned that, despite the legal equality accorded to spouses, discriminatory traditional cultural attitudes that continue to utilize 'the head of the household' concept, assigning this role to men, persist in the State party..The Committee calls upon the State party:

- To put in place, without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, including those based on sexual orientation and gender identity, in conformity with the provisions of the Convention. Such measures should include efforts, in collaboration with civil society, to educate and raise awareness of this subject, targeting women and men at all levels of society... [and]
- To engage in pervasive, sustained and proactive efforts to combat and eliminate discriminatory cultural concepts, including “the head of the household”, that have a negative impact on the achievement of equality between women and men”⁶⁷⁴

(Consideration of Fourth Periodic Report)

These remarks are, in essence, restatements of the same interpretive 'line', in increasing detail and specificity. Can this interpretive line be viewed, in sum or in part, as being

⁶⁷³CEDAW, Concluding Observations on Singapore's Third Periodic Report, *supra* note 630, para. 31-32.

⁶⁷⁴CEDAW, Concluding Observations on Singapore's Fourth Periodic Report, *supra* note 648, para. 21-22.

authentically interpretive in the subsequent practice sense?

Some of these statements are relatively abstract, suggesting that they should, perhaps, be regarded as “exhortative practice” as discussed in Chapter IV, rather than authentic interpretations. However, in general, it is difficult to argue with the view that the Committee is offering an interpretation across these reports of Article 5 (a) and (b), to the effect that the requirement to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” and to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children” includes the requirement to eliminate the notions that the husband and/or father is the head of the household either legally or in stereotype, and that he is also the breadwinner or primary earner.

The Concluding Observations to the Third Report suggest a more specific interpretation. Here, clear and relatively detailed measures are listed as the means by which Singapore is to implement Article 5 of the Convention, and these, it is arguable, also fulfil the Step 1 requirement and qualify as authentic interpretive practice:

The Committee recommends that the State party take measures to bring about changes in traditional patriarchal attitudes and in gender-role stereotyping. Such measures should include awareness-raising and public education campaigns, with a special focus in the curriculum on human rights education and women’s rights and children’s rights issues, in cooperation with a wide range of stakeholders, including the national machinery for the advancement of women, women’s organizations, trade unions, the National Employers Federation, the media, educational institutions and the People’s Association, with a view to eliminating stereotypes

associated with traditional gender roles in the family and in society, in accordance with articles 2 (f) and 5 (a) of the Convention.

Or, in other words, in order to fulfil its obligations under Article 2 (f) and Article 5 (a) of the Convention, Singapore ought to undertake awareness raising and public education campaigns “with a special focus in the curriculum on human rights education and women's rights and children's rights issues”, in cooperation with women's organisations, trade unions, the National Employers Federation, the media, educational institutions and the People's Association, with a view to eliminating traditional stereotypes and gender roles in the family and society, particularly the concept of the husband/father as the breadwinner.

The next step is to establish whether all of this interpretive practice is common, concordant and consistent. Concordancy, commonality and consistency are somewhat difficult to establish or refute, as we have already noted, given that this would require a comprehensive survey of the reporting history of the rest of the States Parties to the CEDAW, which is beyond the capacity of a thesis such as this. Nonetheless, a cursory survey of the Committee's Concluding Observations to other States Parties reveals that it has given similar views on the topic of the male breadwinner to Luxembourg⁶⁷⁵, Kyrgyzstan⁶⁷⁶, Fiji⁶⁷⁷ and Indonesia (on which more will follow below). It has also made similar recommendations to other States Parties regarding the use of the media (for example, to Turkey⁶⁷⁸, Venezuela⁶⁷⁹, and Armenia⁶⁸⁰), the use of awareness-raising campaigns (for example, to Georgia⁶⁸¹, Democratic Republic of Congo⁶⁸², and Nicaragua⁶⁸³) and the use of public

⁶⁷⁵ See e.g. CEDAW, A/55/38 part I (2000), para. 408.

⁶⁷⁶ See e.g. CEDAW, A/54/38 part I (1999), para. 120.

⁶⁷⁷ See e.g. CEDAW, A/57/38, part I (2002), para. 55.

⁶⁷⁸ See e.g. CEDAW, A/52/38/Rev.1, part I (1997), para. 197.

⁶⁷⁹ See e.g. *Ibid.*, para. 245.

⁶⁸⁰ See e.g. *Ibid.*, part II, para. 65.

⁶⁸¹ See e.g. CEDAW, A/54/38/Rev.1, part II (1999), para. 95.

education campaigns (for example, to Portugal⁶⁸⁴ and Estonia⁶⁸⁵), to eliminate gender stereotypes. It also gave a similar statement in General Recommendation No. 3⁶⁸⁶. Here, the Committee “Urge[d] all States parties effectively to adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women”; this comes after the Committee had noted the existence of socio-cultural factors which perpetuated discrimination based on sex. Obviously, this is consistent and concordant with the recommendations which the Committee has made to Singapore and the other States mentioned, and no State has expressed disagreement with it at the Third Committee of the General Assembly. The use of the word “urges” indicates that this General Recommendation is of an exhortative rather than interpretive character, but it certainly provides a context of consistency, concordancy and commonality. While an absolutely affirmative statement is impossible at this stage, therefore, it certainly seems likely that the Step 2 requirements are fulfilled and we can state that authentic interpretive practice has likely been given commonly, concordantly and consistently, to the effect that States Parties have the obligation to cooperate with the media in undertaking awareness-raising and public education campaigns with a view to eliminating patriarchal attitudes and gender-role stereotyping, irrespective of socio-cultural factors; and that “customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” includes the notion of the husband or father as breadwinner or head of the household.

We now turn to the question of agreement, of which there is a considerable number

⁶⁸²See e.g. CEDAW, A/55/38, part I (2000), para. 216.

⁶⁸³See e.g. CEDAW, A/56/38, part II (2001), para. 295.

⁶⁸⁴See e.g. CEDAW, A/57/38, part I (2002), para. 330.

⁶⁸⁵See e.g. *Ibid.*, para. 95.

⁶⁸⁶CEDAW Committee, Sixth Session, 1987, General Recommendation No. 3, contained in UN Doc. A/42/38.

of instances. In its reply to the List of Issues for the Third Report⁶⁸⁷, for example, in which the Committee had enquired about specific efforts to address these issues, the government of Singapore described efforts it had made to urge husbands and wives to share domestic responsibilities⁶⁸⁸ and to engage with NGOs in awareness campaigns⁶⁸⁹, while its delegates also discussed media guidelines to eliminate gender stereotypes in the constructive dialogue⁶⁹⁰; indeed, Singapore had been describing the use of the media to remove harmful stereotypes since its Initial Report (although it had not instituted a specific code on sex-role stereotyping in advertising, for instance)⁶⁹¹. It is certainly difficult to find any examples of instances of disagreement on the part of the Singaporean government with the Committee's interpretation of its obligations. This leads us towards the conclusion that there is subsequent practice establishing the agreement of the parties that traditional conceptions of the family are to have no effect on the manner in which Article 5 is implemented, and that the implementation of that Article requires the government to use the media, public awareness campaigns, and educational campaigns, to eliminate such stereotypes.

Marital Immunity

On the issue of marital immunity the conclusion is relatively straightforward. In the 39th session during its consideration of the Third Report the Committee had raised the issue of marital immunity, and it gave a specific and detailed interpretation in both its Concluding

⁶⁸⁷See CEDAW, Responses to the list of issues and questions with regard to the consideration of the third periodic report: Singapore, 29 May 2007, UN Doc. CEDAW/C/SGP/Q/3/Add.1.

⁶⁸⁸*Ibid.*, at question 16.

⁶⁸⁹*Ibid.*

⁶⁹⁰CEDAW, 39th Session, Summary Record of the 804th meeting, 20 September 2007, UN Doc. CEDAW/C/SR.804(A), para. 18.

⁶⁹¹See, in general, CEDAW, Singapore's Initial Periodic Report, *supra* note 594, paras. 6.1-6.9.

Observations to Singapore's Third and Fourth Reports:

The Committee requests the State party to enact legislation criminalizing marital rape, defined as lack of consent of the wife/spouse.⁶⁹²

The Committee urges the State party [to] review its Penal Code and Criminal Procedure Code in order to specifically criminalise domestic violence and marital rape and ensure that the definition of rape covers any non-consensual sexual act.⁶⁹³

This is clearly deliberate and intentional interpretation of Singapore's obligations, to the effect that no socio-cultural factors (Asian majoritarianism, the need to prevent the complexion of marriage in Singapore changing, etc.) ought to have any effect on the implementation of Article 2, 3, 16 and others, and that implementation should include removal of marital immunity from the Penal Code. It therefore undoubtedly meets the Step 1 requirement.

This interpretive practice is also given across two Reports, and hence can likely be viewed as consistent. It is also arguably given commonly and concordantly: the Committee, as we shall see, gave almost exactly similar interpretations to the obligations of Malaysia and Indonesia in this regard, as well as General Recommendation No. 19⁶⁹⁴. This latter interpreted Article 1 to include gender-based violence (defined as "violence directed against a woman because she is a woman, or that affects women disproportionately) under the broad umbrella of discrimination, and thus categorised marital rape as in contravention of that Article; and it also interpreted Article 2 (f), 5 and 10 (c) as being violated by family abuse (probably including marital rape). The Committee has also congratulated Germany on

⁶⁹²CEDAW, Concluding Observations on Singapore's Third Report, *supra* note 630, para. 28.

⁶⁹³CEDAW, Concluding Observations on Singapore's Fourth Report, *supra* note 648, para. 24 (a).

⁶⁹⁴CEDAW Committee, Eleventh Session, 1992, General Recommendation No. 19, contained in UN Doc. A/47/38.

criminalizing marital rape⁶⁹⁵, and urged South Africa⁶⁹⁶ and Belize⁶⁹⁷ amongst many others to do so. This interpretive practice almost certainly, therefore, meets the Step 2 requirements.

However, establishing agreement is less simple: Singapore itself clearly rejects the interpretation offered by the Committee – it considers its obligations under Article 16 with regard to marital rape to be tempered by a societal value: the need to preserve the status of marriage in Singaporean society. Nor do the summary records of the constructive dialogue clarify the issue, but reinforce the disagreement, as we have seen: the government insisted that on majoritarian grounds it was not prepared to go beyond its current ‘calibrated approach’ described in its Fourth Report.⁶⁹⁸ Thus, we can most accurately summarise the position as being one in which the Committee has given an authoritative interpretation which Singapore has rejected. This would mean that there is no agreement on this interpretation, and hence no subsequent practice establishing the agreement of the parties.

Homosexuality and Women Members of Sexual Minorities

The Committee’s interpretive practice with regard to Singapore in this area is relatively scant – despite a considerable amount of attention being paid to the issue of women members of sexual minorities in the Summary Records, there is only a tiny fraction of space devoted to it in the Concluding Observations: those on the Fourth Report, where the Committee exhorts Singapore “to put in place, without delay, a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, including those based on sexual orientation and gender identity, in conformity with the provisions of the

⁶⁹⁵See e.g. CEDAW, A/55/38, part I (2000), para. 299.

⁶⁹⁶See e.g. CEDAW, A/53/38/Rev.1, part II (1998), para. 124.

⁶⁹⁷See e.g. CEDAW, A/54/38/Rev.1, part II (1999), para. 62.

⁶⁹⁸See *supra* note 601.

Convention” [emphasis added].⁶⁹⁹ It does accord with the Committee's General Recommendation No. 28⁷⁰⁰, in which discrimination against women was linked to discrimination based on sexual orientation, and in which lesbian women were described as a special category of women who were especially vulnerable⁷⁰¹, but there are no instances of similar interpretive practice in the Concluding Observations to other States Parties. This, in itself, would probably obviate subsequent practice developing in the area, especially given that Singapore takes the diametrically opposite view that a comprehensive strategy to modify or eliminate stereotypes that discriminate against women on the basis of sexual orientation or gender identity is *not* one of its obligations under the Convention, justified on the basis that Singaporean society does not wish for homosexuality to become mainstream.

Stereotyping of Women as Sex Objects

This issue, raised only in the Concluding Observations to the Fourth Periodic Report, can also be dealt with relatively simply. Constituting, as it does, only one instance of interpretive practice, it would not – yet – be possible to state that subsequent practice to the effect that States Parties have an obligation to modify the apparent cultural preference for women’s concern with their physical appearance and to institute “effective regulations on its commercial exploitation”⁷⁰² has developed. It cannot be said that there is interpretive practice to the effect that implementation of any Article of the Convention requires the elimination of this (alleged) cultural preference.

⁶⁹⁹ *Ibid.*, para. 22 (a).

⁷⁰⁰ CEDAW Committee, 47th Session, 2010, General Recommendation No. 28, UN Doc. CEDAW/C/2010/47/GC.2.

⁷⁰¹ *Ibid.*, para. 30.

⁷⁰² CEDAW, Concluding Observations on Singapore’s Fourth Periodic Report, *supra* note 648, para. 21.

v) Concluding Remarks

The position in terms of Singapore's obligations under the CEDAW, then, is rather mixed. We have identified that subsequent practice has established the agreement of the parties with respect to the interpretation of Article 9 (2), to the effect that the "Asian tradition where husbands are the heads of households" should have no impact on how that Article is implemented, and also that the implementation of Articles 3 and 5 requires the use of awareness-raising and public education campaigns in cooperation with the media, educational institutions, women's organizations, and so on to eliminate societal stereotypes, particularly of the husband/father as the breadwinner, and that no traditional or societal values ought to be a consideration in how those Article are implemented – rather, the reverse.

However, it seems that no such statements can be made with any confidence about the other themes we have identified: there is no agreement from Singapore on the Committee's interpretive practice with respect to the position of marital immunity or homosexuality under the Convention, and the practice regarding the obligation to eliminate the commercial exploitation of cultural preferences for female beauty is not extensive enough to be common, concordant or consistent. In those areas, then, there is no clarity on whether the treaty is to be implemented taking into consideration socio-cultural values, or not.

B. Indonesia

i) General Remarks

Indonesia, to an even greater extent than Singapore, is surprisingly eager to avoid discussion of Asian values – certainly as a factor influencing implementation of the Convention – and indeed, cultural particularism and socio-cultural mores are more-or-less uniformly depicted simply as barriers to progress which the government intends to remove. Moreover, Indonesia entered no substantive reservations to the treaty on ratification (it entered a procedural reservations regarding Article 29(1)).

In this context, Indonesia's comments on socio-cultural factors come to take on an explanatory purpose for not implementing the Convention in the manner in which it deems it is obligated to: “[N]orms and values persistent in the society still hinder women's full participation and constrain the full understanding on concepts of gender and development in society”⁷⁰³, and “many religious customs and traditional norms and values of society favour a male dominated social system, although *de jure* men and women have equal rights...[T]he majority of men are not willing to give up their acquired privileges, thus undermining the very foundation of the Convention”.⁷⁰⁴

This makes Indonesia's reporting practice especially notable for indicating the fundamental problem, described in Chapter IV, of using the standard ICJ/WTO-based view of subsequent practice in the context of human rights treaties. This will become more apparent as the reporting practice is discussed in detail, but in Indonesia's reports we can see the

⁷⁰³CEDAW, Consideration of reports submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Indonesia: Combined Second and Third Periodic Reports, 12 February 1997, UN Doc. CEDAW/C/IDN/2-3, p. 12-13.

⁷⁰⁴*Ibid.*, p. 28.

disconnection between the position expressed by the State Party and the actions of its organs exhibited rather starkly: on a number of issues we find the Indonesian delegates analysing Indonesian law with a critical air, and citing reviews of national law conducted by government ministries such as the Ministry of Women Empowerment (MOWE) to identify discriminatory laws for amendment and revision – with particular focus on the Marriage Law No. 1 of 1974⁷⁰⁵ - while not detailing any apparent major changes. The most notable example of this disconnect can be found in the area of polygamy, which is officially discouraged – there is a clear intention to eliminate the practice within Indonesian society – and yet, despite recommendations to revise the relevant provisions of the Marriage Law No. 1 1974, because of its “extremely discriminative”⁷⁰⁶ nature, the practice remains permissible to the present day. Thus, while the Indonesian government's statements of its own position appear to be consonant with that of the Committee, the practice of some of the organs of the Indonesian States are not so. This is an instance which is illustrative of the problems associated with examining the practice of domestic organs when attempting to establish whether agreement exists in relation to the establishment of VCLT subsequent practice for human rights treaties.

This issue is further complicated by the Indonesian State's decentralised nature, where by-laws, or “local laws”, are many and varied. Despite the official standpoint of the State and the position of national law, and despite the fact that these local by-laws are at the absolute bottom of the legal hierarchy⁷⁰⁷, the impression given is that the central government has some difficulty preventing the creation of local laws which it considers

⁷⁰⁵See e.g. CEDAW, Consideration of reports submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Indonesia: Combined Fourth and Fifth Periodic Reports, 27 July 2005, UN Doc. CEDAW/C/IDN/4-5, para. 161.

⁷⁰⁶*Ibid.*

⁷⁰⁷CEDAW, Responses to the list of issues and questions with regard to the consideration of the combined sixth and seventh periodic report: Indonesia, 19 January 2012, UN Doc. CEDAW/C/IDN/Q/6-7/Add.1, para. 24.

discriminatory: the Ministry of Home Affairs annulled 2,524 by-laws between 2002 and 2011, certain of which were “contradictory to Indonesian commitment in the promotion and protection of human rights”.⁷⁰⁸ Similarly, the Council of Ulemas (the MUI), the top Muslim clerical body in Indonesia, gives opinions and fatwas on a variety of different issues, some of which have conflicted with the government's official line and which, indeed, might be deemed to ultimately affect Indonesia's agreement or disagreement with the interpretive practice of the Committee if we took a very broad-based view of relevant actors - this will be further discussed below.

This leads us onto the question of Islamic traditions and customs in Indonesia. Unlike in either Malaysia or Singapore, in Indonesia Muslims comprise a large majority of the population. (Indeed, it is not unusual to find Indonesia described as the “largest Islamic nation” in the world or words to that effect, as indeed members of the Committee do during their dialogue with Indonesian delegates.⁷⁰⁹) This means that, unlike our discussions regarding Malaysia and Singapore, where Islam is represented within the legal system primarily in the form of personal law regimes, particularly in regard to marriage and divorce, it is entirely appropriate to include certain Islamic norms, values and traditions under the rubric of societal mores in the context of Indonesia, given that they form part of what any lay person would describe as ‘Indonesian culture’. Thus, whereas for Singapore and Malaysia we do not discuss Islamic personal law regimes in great depth when it comes to our core question, because it is not correct to view them as relevant when it comes to the issue of broad societal values as factors affecting implementation, in the Indonesian reporting history cultural values stemming from Islam precisely function at that broader level and are

⁷⁰⁸ *Ibid.*, para. 25.

⁷⁰⁹ See e.g. *infra* note 736, paras. 42, 43.

suitable for our analysis. Thus the view of the Committee and Indonesian delegates on polygamy, female genital mutilation, and other practices rooted in Islam are discussed in more depth.

Finally, Indonesia uses nomenclature that is much more consonant with the kind of terminology and recommendations given by the Committee than do Malaysia or Singapore. In particular, Indonesia adopts a positive approach to “gender mainstreaming”, or “mainstreaming a gender perspective”, one of the Committee's particular focuses and a cornerstone of the United Nations development community since the mid-1990s. (It was formally described as follows: “Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”⁷¹⁰) In the year 2000, indeed, a Presidential decree (Presidential Instruction No. 9) obliged all Government representatives and agencies “to mainstream gender in their policies, programs, projects, activities and budgets to eliminate gender-based discrimination”.⁷¹¹ Again, the importance of this issue in relation to the development of subsequent practice will be elaborated on during the overview of Indonesia's reporting history.

⁷¹⁰ECOSOC, “Report of the Economic and Social Council for 1997”, UN Doc. A/52/3, para. I A., 18 September 1997.

⁷¹¹CEDAW, Indonesia's Combined Fourth and Fifth Periodic Reports, *supra* note 705, para. 35.

ii) Authentic Interpretations

Initial Report

Indonesia's initial report was submitted in 1986⁷¹² and examined in 1988⁷¹³. It must be borne in mind that, prior to 1990 the pattern of State Reporting established by the CESCR Committee (report submission followed by the list of issues and reply to list of issues, dialogue with the State Party, followed by Concluding Observations) was not being used by all of the treaty bodies. A simple account is given of the dialogue, alongside some of the questions raised and recommendations made. This means that this document provides something between a Summary Record and an authentically interpretive statement.

In it, we see some of the pattern which emerges over Indonesia's reporting history of referring to problematic traditional social and cultural practices as obstacles to implementation. For instance, "among the problems and obstacles to increasing women's participation in development" was "the traditional social and cultural value system that did not sufficiently support the aspirations of and opportunities for women to play an active role in material development".⁷¹⁴ The fact that the social development of Indonesia was "embedded in a pluralistic society, comprising various religions and subcultures with different levels of education and economic life"⁷¹⁵ was also emphasised in answer to various questions aired by the Committee, presumably to indicate the difficulties faced by the

⁷¹²CEDAW, Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Indonesia: Initial Periodic Report, 17 March 1986, UN Doc. CEDAW/C/5/Add.36/Rev.1 & Amend. 1.

⁷¹³CEDAW, Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Consideration of Indonesia's Initial Periodic Report, 19 February 1988, UN Doc. A/43/38 (1988), para. 290-340.

⁷¹⁴*Ibid.*, para. 292.

⁷¹⁵*Ibid.*, para. 324.

government in implementing its obligations under the Convention.

The Committee itself also raised concerns about Indonesian traditions and cultural practices. These included the fact that women tended to only pursue “traditional lines of university studies”⁷¹⁶, that the law on marriage, especially for polygamy, did not seem to provide for equality between women and men⁷¹⁷, and so on. However, it did not restrict itself to comments merely about Indonesian socio-cultural mores, but also implicitly disagreed with the delegates' portrayal of the government as restricted in implementing the Convention by culture and tradition: in its opinion, on a number of issues, government policy seemed to reinforce or supplement those traditions. For instance, the initial report overall “gave the impression that policies were not aimed at the advancement of women, but rather at improving the status of the Indonesian family and at emphasizing the maternal role of women...Women seemed to be given major tasks in the family, but not in decision-making and economic activities and they did not have a big enough share in the development process” - this would “only perpetuate the traditional stereotypes”.⁷¹⁸

Continuing this line of approach regarding the family, the experts expressed the view that Indonesia's objectives in family planning – which specified the desirable number of children in each family – were not suitable, and State policy on family planning should consist only of giving information and guidance rather than putting out directives.⁷¹⁹ Women's roles appeared to be clear in relation to their families, but the Committee was unsure whether their rights as individuals were also promoted by the State.⁷²⁰ Like Singapore, the Indonesian state appeared to be attempting to implement certain provisions of the Convention through

⁷¹⁶ *Ibid.*, para. 316.

⁷¹⁷ *Ibid.*, para. 322.

⁷¹⁸ *Ibid.*, para. 298.

⁷¹⁹ *Ibid.*, para. 321.

⁷²⁰ *Ibid.*, para. 302.

a family-centric lens, and a level of conflict between Committee and State Party can be discerned on this point. Similarly, government labour programmes which were cited in the Initial Report seemed to be directed at workers only in “traditionally female” jobs, which implied reinforcement by the government of the gender division in labour.⁷²¹ This suggests that, as far as the Committee was concerned, the government was, consciously or unconsciously, perpetuating some of the traditional cultural stereotypes which were affecting the implementation of certain articles of the Convention.

Finally, there are some other miscellaneous issues of note for our purposes. One is the clear influence of religious norms, especially Islamic ones, on various facets of Indonesian law – for instance, adultery considered as a crime⁷²², abortion made illegal and only permissible for health reasons⁷²³, and polygamy allowed only by decision of a religious court⁷²⁴. In contrast to some other Islamic States, however, women and men in Indonesia had equal rights to file for divorce.⁷²⁵ Marital rape was not considered a crime, although it constituted grounds for divorce⁷²⁶, and prostitutes were given religious teaching in rehabilitation centres, although the Committee asked why it was not also provided for men (presumably those using prostitutes)⁷²⁷.

Most of these issues can implicitly be linked to cultural particularist interpretations of how to implement various Articles of the Convention, even if this is not made explicit by the State. Some of these are directly religious – for instance, the illegality of abortion and the permission to practice polygamy on decision of a religious court, which in keeping with our

⁷²¹ *Ibid.*, para. 318.

⁷²² *Ibid.*, para. 329.

⁷²³ *Ibid.*, para. 337.

⁷²⁴ *Ibid.*, para. 339.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*, para. 329.

⁷²⁷ *Ibid.*, para. 308.

general policy on such issues we shall not discuss in this section except in overview. Others seem related to Asian values – the importance of the family, the prioritisation of communitarianism and consensus over individual rights – such as the emphasis on the woman's role within the family and directives on family planning which included recommended numbers of children.

Second and Third Periodic Reports

There was a considerable gap between the submission of the Initial Report and the Second, such that Indonesia was invited to submit its Second and Third Reports in a combined document, which it did on 6 February 1997⁷²⁸. This was examined in 1998, and concluding comments were provided on 2 February 1998⁷²⁹.

In general, the Committee was “convinced” that:

[T]he existence of cultural attitudes that confine women to the roles of mothers and housewives presents a great obstacle to the advancement of women. Policies and programmes developed on the basis of those stereotypes limit women's participation and entitlements, thereby impeding implementation of the Convention. The Committee expresses the view that cultural and religious values cannot be allowed to undermine the universality of women's rights. It also states its belief that culture is not a static concept and that the core values in Indonesian society are not inconsistent with the advancement of women.⁷³⁰

This sort of comment – expressing the view that, effectively, women's rights are not

⁷²⁸CEDAW, Indonesia's Second and Third Reports, *supra* note 703.

⁷²⁹CEDAW, Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Indonesia's Second and Third Periodic Reports: Concluding Observations, UN Doc. A/53/38/Rev/1., paras. 262-311.

⁷³⁰*Ibid.*, para. 282.

fundamentally contingent on culture (which brings to mind the criticisms of this view expressed by Jack Donnelly⁷³¹) was not made in relation to Singapore (or Malaysia, as we shall see). It is not particularly coherently stated – one wonders about the reasoning of the Committee, and in particular what it views the “core values” in Indonesian society to be – but nonetheless, if we set aside the somewhat problematic final sentence of that paragraph, the opinion of the Committee in terms of its view on Indonesia's obligations is relatively clear at least in general terms – that it likely views policies and programmes based on the notion that women's role is that of the mother or housewife as in contravention of the Convention and that, in the broad sense, it did not view cultural and religious values as having an effect on how the Convention ought to be implemented.

It reiterated some of these remarks throughout its concluding comments, expressing its opinion that Indonesia's rules on polygamy, the age of marriage (girls could marry at 16; males at 19); the requirement that a wife obtain her husband's consent for a passport; the requirement that a wife obtain her husband's consent to work at night; and the requirement for a wife to obtain her husband's consent for sterilization or abortion, were on their face “discriminatory”⁷³² – although the Committee's also linked these issues to the “existing social, religious and cultural norms that recognise men as the head of the family and the breadwinner and confine women to the roles of mother and wife”⁷³³. This is, of course, by now a familiar motif in the Committee's Concluding Observations in general, and is linked to further areas of concern for the Committee, such as the “predominant view” that married women might provide supplemental income for the family but should not pursue their own

⁷³¹ See Chapter I, *supra* notes 27-30.

⁷³² *Ibid.*, para. 284.

⁷³³ *Ibid.*, para. 289.

careers⁷³⁴. A second, familiar motif was also raised in relation to school textbooks, which the Committee felt should be revised to eliminate stereotypes within education and thus modify cultural attitudes such as the notion that the husband ought to be the breadwinner.⁷³⁵

Referring to the constructive dialogue gives some more detail about the Committee's views, and clarifies some of its comments regarding 'core values' of Indonesian society. One member described an "incongruity" between Indonesia's expressed desire for equality and the continued existence of discriminatory legislation – for example, designating the man as head of the household or establishing different minimum ages of marriage for men and women.⁷³⁶ The Labour Force Act was criticised for its paternalistic provisions allowing a woman to work at night only with her husband's permission.⁷³⁷ These types of legislation institutionalized women's domestic roles, it was argued.⁷³⁸ Indeed, these were probably examples of what the Committee referred to as "laws designed to protect women [which] seemed to actually reinforce [their] traditional stereotyped role".⁷³⁹ Regarding the requirement for a woman to seek her husband's consent for sterilisation, the Committee deemed the matter a "free-choice issue" which was a "private matter for the woman to decide", and the "Government's position on spousal authority was in violation of the Convention".⁷⁴⁰ This also applied to abortion: requiring the consent of the husband was "a clear violation of a woman's right to reproductive health and her right to life"⁷⁴¹ (the latter because the requirement for consent was by definition – since abortion was only legal in cases where the woman's life was at risk – linked to the life of the woman concerned).

⁷³⁴ *Ibid.*, para. 292.

⁷³⁵ *Ibid.*, para. 289.

⁷³⁶ Committee on the Elimination of Discrimination Against Women, 18th Session, Summary Record of the 378th meeting, 2 February 1998, UN Doc. CEDAW/C/SR.378, para. 26.

⁷³⁷ *Ibid.*, para. 28.

⁷³⁸ *Ibid.*

⁷³⁹ *Ibid.*, para. 42.

⁷⁴⁰ *Ibid.*, para. 32.

⁷⁴¹ *Ibid.*

Polygamy was also singled out: it was even argued that, since Indonesia was the country in the world with the largest population of Muslims, it should outlaw polygamy, the obvious implication being that Indonesia should set an example to other Islamic nations.⁷⁴² A final criticism, which did not appear in the Concluding Observations, was on the requirement for women to have permission from their husbands before taking maternity leave.⁷⁴³

The Committee members were also particularly eager to emphasise the role of education in modifying cultural attitudes. Textbooks needed to be revised in order to change deep-rooted attitudes⁷⁴⁴, and “education would have to be the starting point in overcoming the acknowledged difficulty of modernising a patriarchal society in a multicultural and multiethnic nation”.⁷⁴⁵

On the issue of ‘core values’, members had made a number of illustrative comments. “Some of Indonesia’s traditional values and religious principles constituted fundamental impediments to the implementation of the convention,” it was stated, and “Indonesia should examine its traditional values in order to determine those that were core values and those that were the result of patriarchal or historical customs, separate from the real core values... [the member] was sure that the basic core values of Indonesia were not in contradiction with human rights principles”.⁷⁴⁶ Meanwhile, “The main obstacle, recognised by the government, were the traditional norms and culture, reinforced by the patriarchal values of the religion, which defined women as wives and mothers and men as breadwinners. Such a separation of roles was also common in north-eastern Asia, where it harked back to Confucianism, but the premise was still so deeply rooted in Indonesia that all

⁷⁴² *Ibid.*, para. 43.

⁷⁴³ *Ibid.*, para. 37.

⁷⁴⁴ *Ibid.*, para. 34.

⁷⁴⁵ *Ibid.*, para. 36.

⁷⁴⁶ *Ibid.*, para. 39.

attitudes towards women seemed to stem from it.”⁷⁴⁷

Such remarks do nothing to clarify the Committee’s reasoning in some respects – why the committee member felt “sure that the basic core values of Indonesia were not in contradiction with human rights principles” is not elaborated on. It is fairly obvious that this comment is based not on any particular familiarity with Indonesian society, but rather on the desire to perpetuate the notion human rights are implicit in societies without Western liberal backgrounds which Jack Donnelly roundly, and probably rightly, criticised.⁷⁴⁸ Nonetheless, the implication in terms of Indonesia’s obligations under the Convention are clear enough: the Committee made it known that it did not, in general, accept the notion that socio-cultural values were a justification for implementing the provisions of the Convention in a particularist fashion.

For their part, the Indonesian delegates had in fact expressed similar views in the Report itself and the constructive dialogue to the Committee, as they did throughout the State’s reporting history, at least in a broad sense. Traditional norms were blamed for the lack of participation by women in public life⁷⁴⁹ for instance, and the delegates agreed that polygamy was undesirable: measures cited as efforts to abolish polygamy included denial of family allowances for second wives, loss of rank for civil servants and members of the armed forces who practiced polygamy, and so on.⁷⁵⁰ It also acknowledged the need to reform its school textbooks to remove stereotypes⁷⁵¹, and to enact measures such as advocacy campaigns and guidance for teachers to encourage girls to study non-traditional subjects.⁷⁵²

⁷⁴⁷ *Ibid.*, para. 34.

⁷⁴⁸ See *supra* note 34

⁷⁴⁹ Committee on the Elimination of Discrimination Against Women, 18th Session, Summary Record of the 377th meeting, 2 February 1998, UN Doc. CEDAW/C/SR.377, para. 7, 18.

⁷⁵⁰ CEDAW 18th Session, 378th meeting, *supra* note 736, para. 23.

⁷⁵¹ *Ibid.*, para. 3.

⁷⁵² *Ibid.*, para. 15.

It agreed that the sex-based division of labour in the family was an obstacle to female development⁷⁵³. And it revealed itself as keen to adopt the language of gender mainstreaming – in national development programmes⁷⁵⁴, education⁷⁵⁵, and so on. It did refer obliquely to Asian values in its insistence that “by tradition and culture, Indonesia sought to settle disputes through dialogue and consultation among the parties concerned”⁷⁵⁶, but it did not view this as a factor affecting the government’s “serious commitment” to implementing the Convention.⁷⁵⁷ Perhaps the only major voiced discrepancy between the views of the Indonesian delegates and the Committee members was on a point of fact: it was not the case that a woman must have her husband’s permission to apply for a passport in terms of law – this was merely a “moral acknowledgement of the husband’s existence” but the practice was “gradually diminishing” in any case.⁷⁵⁸

Indonesia’s combined Second and Third Reports give further evidence of, by and large, relatively concordant interpretive practice with the Committee – the crucial difference being the rather different view of the role of the State, with the Committee stressing the importance of government policy in shaping societal attitudes and Indonesia emphasising that the great difference between what was prescribed by law and what cultural belief and religious philosophy dictated made implementation difficult.⁷⁵⁹ At almost every point during its report, this point was reiterated in one form or other – for example, the problem is apparently acute in the private sector, where most firms are family owned enterprises where

⁷⁵³CEDAW 18th Session, 377th meeting, *supra* note 749, para. 25.

⁷⁵⁴*Ibid.*, para. 34.

⁷⁵⁵CEDAW 18th Session, 378th meeting, *supra* note 736, para. 5.

⁷⁵⁶CEDAW, 18th Session, 377th meeting, *supra* note 749, para. 10.

⁷⁵⁷*Ibid.*

⁷⁵⁸CEDAW, 18th Session, 378th meeting, *supra* note 736, para. 14.

⁷⁵⁹CEDAW, Indonesia’s Second and Third Periodic Reports, *supra* note 703, p. 24.

social attitudes favour male heads; it is therefore difficult for the government to directly affect the number of women in leadership positions⁷⁶⁰. At other stages, the Report goes so far as to call the State's own laws discriminatory, as for instance it does for Article 43 of the Marriage Act, which "clearly discriminates" against women in giving children born out of wedlock a civil claim to the mother and her family, but not the father.⁷⁶¹ A further example is the Labour Act; Government Decree No. 37/1967 of the Wage System for Employees in State Companies stipulates that "dependants" are to be considered a man's wife and children, meaning that women are classified as single regardless of their marital status and the woman will only be considered the main income earner if widowed or the husband does not work.⁷⁶²

Measures which Indonesia had implemented, or states it intends to implement, in an attempt to solve these problems include:

- Instruction of the Minister of Women Affairs No. 28/1982, recommending women do not marry until the age of 19, and men 22⁷⁶³
- Attempts to "engender" the school curriculum – measures such as revision of textbooks to eliminate stereotypes and sensitize women about possibilities open to them in terms of careers⁷⁶⁴
- Measures to protect women in the workplace, such as Ministerial Decree 04/MEN/1989, implementing an ordinance of 1925, providing that women shall not be obliged to work at night, except where it is essential to do so and that they are

⁷⁶⁰ *Ibid.*, p. 44.

⁷⁶¹ *Ibid.*, p. 29.30.

⁷⁶² *Ibid.*, p. 43.

⁷⁶³ *Ibid.*, p. 27.

⁷⁶⁴ *Ibid.*, p. 28.

over 18 and married, they have food and transportation provided, and they have the permission of their husband or guardian; and Act No.1/1951, which prohibits women from working in mines and pits⁷⁶⁵

- Various items of legislation providing maternity leave⁷⁶⁶
- The system of family allowance within the public sector, which considered married women whose husbands also worked in the public sector to be single, “needed to be revised”⁷⁶⁷
- A recommendation that men do not marry until the age of 25 and women until the age of 20⁷⁶⁸
- Permitting married women to set up trades and businesses without requiring the permission of the husband (although “because of culture and customs” women are reluctant to do this)⁷⁶⁹

However, the law provides that the duty of the husband is to provide for the family and, although he must “jointly undertake household responsibilities” he is the head of the family and the wife is “the mother of the household”.⁷⁷⁰

Indonesian measures also provide a certain contrast with the way Syariah law is reconciled with the Convention in Malaysia and Singapore. Here, there is not a large material difference between the right to divorce of the wife or the husband: the concept of repudiation, or the *talaq*, is not used in Indonesian law.⁷⁷¹ Instead, either party to a Muslim

⁷⁶⁵ *Ibid.*, p. 42.

⁷⁶⁶ *Ibid.*, p. 41-42.

⁷⁶⁷ *Ibid.*, p. 55.

⁷⁶⁸ *Ibid.*, p. 71.

⁷⁶⁹ *Ibid.*, p. 71.

⁷⁷⁰ *Ibid.*, p. 74.

⁷⁷¹ *Ibid.*, p. 73.

marriage may submit a letter to a district court containing the intent to divorce and the reasons, and thereby sue for divorce.⁷⁷² There are, however, some restrictions on how long a woman may wait before remarrying after a divorce which do not apply to men, such as the requirement to wait for 130 days in the case of death of the husband, for the duration of the pregnancy in cases where the marriage was dissolved during pregnancy, and so on. Property acquired during the marriage is joint property, and that brought into the marriage by either party remains their respective property; on dissolution of marriage property is divided on this basis. Both parents continue to have responsibility for maintaining and educating the children, although it is the father who is accountable for all the expenses incurred.⁷⁷³

Fourth and Fifth Periodic Reports

Indonesia's Fourth and Fifth Reports were, again, submitted in a combined document due to lateness, this time on 27 July 2005.⁷⁷⁴ It was considered by the Committee at its 39th session between 23 July and 10 August 2007.⁷⁷⁵ The Concluding Comments continue the theme of emphasising the importance of changing traditional patriarchal attitudes within Indonesian society, but they also introduce some newer concerns, regarding restrictive interpretation of sharia law and female genital mutilation.

The Committee was once again

Concerned about the persistence of entrenched patriarchal attitudes and stereotypes about the roles and responsibilities of women and men in the family and society that discriminate

⁷⁷² *Ibid.*, p. 75.

⁷⁷³ *Ibid.*, p. 77.

⁷⁷⁴ CEDAW, Indonesia's Fourth and Fifth Periodic Reports, *supra* note 705..

⁷⁷⁵ CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Indonesia, 10 August 2007, UN Doc. CEDAW/C/IDN/CO/5.

against women. Such stereotypes and attitudes [it continued] constitute serious obstacles to women's enjoyment of their human rights and the implementation of the Convention and are the root cause of the disadvantaged position of women in a number of areas, including in the labour market and in political and public life...[It] encourage[d] the State party to design and implement comprehensive awareness-raising programmes to foster a better understanding of and support for equality between women and men at all levels of society, in accordance with articles 2 (f) and 5 (a) of the Convention. Such efforts should aim at changing stereotypical attitudes and traditional norms about the responsibilities and roles of women and men in the family and society and strengthening societal support for gender equality. The Committee further urges the State party to remove family and spousal consent requirements in the areas of women's employment and health.⁷⁷⁶

Of particular concern in this last regard was the requirement for a woman to obtain her husband's consent regarding night work, or regarding sterilisation and abortion.⁷⁷⁷ Another issue requiring significant reform was the Marriage Act 1974, which perpetuated the stereotype that the man was the head of the household and the woman had merely a domestic role.⁷⁷⁸ Polygamy was still permitted, and the legal age of marriage for girls was 16 – two areas which were singled out as examples of areas where amendments to the Marriage Act 1974 needed to be carried out.⁷⁷⁹ The Committee recommended that the State Party revise the Marriage Act 1974 to bring it in line with General Recommendation 21.

Indonesia had, in its report, explained that it had been undertaking a “critical review” of the Marriage Act 1974 since ratification of the CEDAW.⁷⁸⁰ This review had come to the conclusion that some of the articles of the Act were discriminatory, particularly regarding household responsibilities and the division of labour between the sexes – and it concluded that “there was a need to revise Article 31(3) which identifies the husband as head of the

⁷⁷⁶ *Ibid.*, para. 16-17.

⁷⁷⁷ *Ibid.*, para. 16.

⁷⁷⁸ *Ibid.*, para. 18.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ CEDAW, Indonesia's Fourth and Fifth Periodic Report, *supra* note 705, para. 161.

family and the wife as a head of household. It was recommended that women should have equal rights as men to be the head of the family, so that stereotyped positions between women and men in the family should not be reaffirmed”.⁷⁸¹ On polygamy, it had noted that Article 4(2), which permitted the practice, did so if the following reasons applied: the wife was unable to carry out her responsibility as wife; that she had a physical disability or fell victim to an incurable disease; or was unable to bear children⁷⁸² - it was strongly recommended that this be totally amended because it was “extremely discriminatory”. Amendment of the Act was indeed on the legislative agenda for the years 2004-2009, and the Indonesian delegates stated that a new Act was likely to be adopted by the end of 2007. This would make the minimum age of marriage for men and women the same.⁷⁸³ The Marriage Act 1974 was defended, however, as it had vastly diminished paternal authority – prior to its adoption women had been viewed as property – and it had caused polygamy to decrease.⁷⁸⁴

On the marriage of girls under the age of 18, the government described a recommendatory, rather than prohibitive approach: although the minimum age for a girl to marry was 16, it recommended that girls not marry until the age of 20 (as it had stated in its previous Report) so they could continue their education and be more prepared for marriage.⁷⁸⁵ Law No 23 of 2002 on Child Protection had recommended an age of 18 for the minimum age for marriage, so as to discourage parents from forcing children into early marriages.⁷⁸⁶ The government also elaborated on this in its Response to the List of Issues⁷⁸⁷,

⁷⁸¹ *Ibid.*

⁷⁸² *Ibid.*

⁷⁸³ Committee on the Elimination of Discrimination Against Women, 39th Session, 800th meeting, 27 July 2007, UN Doc. CEDAW/C/SR.800(A), paras. 34-38.

⁷⁸⁴ *Ibid.*

⁷⁸⁵ CEDAW, Indonesia’s Fourth and Fifth Periodic Report, *supra* note 705, para. 163.

⁷⁸⁶ *Ibid.*

blaming the continuing prevalence of child marriage in certain areas on the socio-cultural norms of society “which encourage the belief that marriage at a later age amounts to shameful conduct and therefore should be prevented”, as well as poverty.

Indonesia itself, in its Report, cited a number of further measures for combating socio-cultural stereotyping and, in particular, patriarchal biases in the population and the concept of the male breadwinner. One of these was the amendment of school text books, which it had discussed in previous sessions: a move towards more “gender sensitive” curricula and textbooks was described.⁷⁸⁸ A second was gender mainstreaming, which was cited on numerous occasions throughout Indonesia’s Report, in relation to Article 3⁷⁸⁹, Article 5⁷⁹⁰, Article 6⁷⁹¹, Article 10⁷⁹², and Article 12 (regarding reproductive health)⁷⁹³. The government was congratulated on this by the Committee, which commended this commitment to a policy of gender mainstreaming “at all levels”.⁷⁹⁴

On the issue of female genital mutilation, the Committee gave the following comment:

The Committee is concerned about the incidence of the practice of female genital mutilation in Indonesia, which constitutes a form of violence against women and girls and is in violation of the Convention. It is further concerned about the reported phenomenon of the medicalization of the practice of female genital mutilation. The Committee is also concerned that there is no law prohibiting or penalizing the practice of female genital mutilation in Indonesia.

⁷⁸⁷ CEDAW, Responses to the list of issues and questions with regard to the consideration of the combined fourth and fifth periodic report: Indonesia, 17 May 2007, UN Doc. CEDAW/C/IDN/Q/5/Add.1., response to question 27.

⁷⁸⁸ See *ibid.*, response to question 6.

⁷⁸⁹ CEDAW, Indonesia’s Fourth and Fifth Periodic Report, *supra* note 705, paras. 39-40.

⁷⁹⁰ *Ibid.*, paras. 52-57.

⁷⁹¹ *Ibid.*, para. 76.

⁷⁹² *Ibid.*, para. 97.

⁷⁹³ *Ibid.*, para. 135.

⁷⁹⁴ CEDAW, Concluding Observations on Indonesia’s Fourth and Fifth Periodic Reports, *supra* note 775, para. 5.

The Committee urges the State Party to speedily enact legislation prohibiting female genital mutilation and to ensure that offenders are prosecuted and adequately punished. It also recommends that the State party develop a plan of action and undertake efforts to eliminate the practice of female genital mutilation, including implementing public awareness-raising campaigns to change the cultural perceptions connected with female genital mutilation, and provide education regarding the practice as a violation of the human rights of women and girls that has no basis in religion.⁷⁹⁵

Although this does not refer explicitly to General Recommendation 14, it is clearly in line with it. The issue was not discussed in greater depth in session or in the list of issues and response, although the Chairperson of the Committee did argue that “female genital mutilation was not an Islamic custom, but rather an African one, [and] a clear fatwa had been issued specifying that the sharia prohibited the custom as a violation of a human right”⁷⁹⁶, though she did detail who had issued the fatwa or on what basis.

While female genital mutilation did not feature heavily in this reporting cycle except in the comment cited above, it leads us to the broader issue of Islamic custom, the sharia law, and restrictive/fundamentalist interpretations of it. This is a somewhat problematic area for our discussion, as we have hitherto attempted to draw a contradistinction between two conceptual strands of particularism: that which applies at the national or supranational level (Asian values, Singaporean Values, etc.), and that which applies at the individual minority level. Yet this issue is more complicated than it appears at face value. At one level is clear that the Indonesian State does not view sharia law as an element of its national character or legal system, but rather as an (unfortunate) by-product of its attempt to decentralise power and promote autonomy at the local government level. This was recognised, indeed, by the

⁷⁹⁵ *Ibid.*, para. 20.

⁷⁹⁶ CEDAW, 38th Session, 800th meeting, *supra* note 783, para. 24.

Committee in its Concluding Comments:

While appreciating the State party's efforts to promote empowerment, flexibility and autonomy at the local government level and to increase the contributions of regional governments to the democratization of the country, the Committee is concerned that the process of decentralization has resulted in the uneven recognition and enforcement of women's human rights and discrimination against women in some regions, including Aceh. The Committee is also concerned about the rise of religious fundamentalist groups advocating restrictive interpretations of sharia law, which discriminate against women, in several regions of the country.⁷⁹⁷

The Committee then recommended that Indonesia review the implementation of local and regional laws to ensure that they fully complied with the national human rights laws and also Indonesia's obligations under the Convention⁷⁹⁸, such as those regarding dress codes and similar, following comments in session to the effect that the central government, which had the authority to rescind local by-laws, "needed to be more forceful in exercising that authority in order to override discriminatory laws enacted at the local level".⁷⁹⁹

So while we attempted to maintain a conceptual distinction between national or supranational values and those held by members of religious or ethnic minority groups within States, it is important to keep in mind this sub-theme in Indonesia's reporting practice, as it has some relevance in terms of future concerns, and we shall also attempt to address some of its implications in the final section of this Chapter.

⁷⁹⁷ CEDAW, Concluding Observations on Indonesia's Fourth and Fifth Periodic Reports, *supra* note 775, para. 12.

⁷⁹⁸ *Ibid.*, para. 13.

⁷⁹⁹ CEDAW, 39th Session, 800th meeting, *supra* note 783, para. 21.

Sixth and Seventh Periodic Reports

Indonesia submitted its combined Sixth and Seventh Periodic Reports in January 2011⁸⁰⁰; the Concluding Comments are pending and hence cannot be analysed, but a brief overview of the Report and some of the issues involved will be briefly given, followed by a summary of the List of Issues and the Response.

The Report begins with a reiteration of the problems associated with decentralization and democratization, which, despite the many positive opportunities it brought, and the growth in personal freedom, meant that a “moralistic perspective based on narrow interpretations of religious teachings that undermine women” had become legitimized.⁸⁰¹ Allowing people to determine what was best for themselves often “became construed with a gender-biased perspective”.⁸⁰² However, alongside this, the new atmosphere now allowed societal problems “which were previously hidden” to be raised openly, and public participation in decision making strengthened.⁸⁰³ This illustrates rather neatly something of the wider concerns surrounding the Asian values discourse: the notion that individual freedom might lead to undesirable social outcomes. But it also indicates that, at least as far as Indonesia was concerned, the picture was more complicated than it might have been previously portrayed in the literature.

Gender mainstreaming, particularly as an attempt to break down patriarchal values, remains a constant motif. For instance, regional by-laws on gender mainstreaming in some areas are cited as measures designed to help implement Article 2⁸⁰⁴, and the universal

⁸⁰⁰ CEDAW, Indonesia’s Sixth and Seventh Periodic Reports, *supra* note 707..

⁸⁰¹ *Ibid.*, para. 1.

⁸⁰² *Ibid.*

⁸⁰³ *Ibid.*

⁸⁰⁴ *Ibid.*, para. 6.

gender-mainstreaming strategy is cited as a measure under Article 3⁸⁰⁵. Additionally, a 30% quota for women representatives was introduced for political parties as a special temporary measure in view of the fact that, “culturally at the macro level” and “practices in micro circles and the family” were still not conducive for women playing active roles in politics.⁸⁰⁶ This was also cited as a measure under Article 7 as a way of breaking down the “patriarchal mindset”.⁸⁰⁷ Gender mainstreaming was also used in education as a means to changing attitudes and biases.⁸⁰⁸

The Marriage Act 1974 remained controversial. It still set a young age (16) for women to enter marriage, and stipulated that the husband was the head of the family and that the husband could practice polygamy⁸⁰⁹, remaining unchanged from the state of play in previous reports. Efforts to reform it had been going on for “years”⁸¹⁰, but had come up against considerable opposition and problems.

Indonesia reiterated the problems associated with actual implementation of the Convention in view of the “de facto situation” in which values and cultural practices posed obstacles to change⁸¹¹. This was also true with respect to the implementation of Article 12. The practice of female circumcision in Indonesia was described in some detail⁸¹², with the conclusion being that, although “the majority of FGM practiced in Indonesia is symbolic and/or slight snips, and not brutal genital mutilation that cuts off parts of a baby girl’s genitalia”⁸¹³, it would “be better to eliminate and prohibit female circumcision”.⁸¹⁴ However,

⁸⁰⁵ *Ibid.*, para. 13.

⁸⁰⁶ *Ibid.*, para. 25.

⁸⁰⁷ *Ibid.*, para. 53.

⁸⁰⁸ *Ibid.*, paras. 74-95.

⁸⁰⁹ *Ibid.*, para. 35.

⁸¹⁰ *Ibid.*, para. 197.

⁸¹¹ *Ibid.*, paras. 31-36.

⁸¹² *Ibid.*, paras. 125-136.

⁸¹³ *Ibid.*, para. 132.

⁸¹⁴ *Ibid.*, para. 152.

the Ulemas Council, the government's Islamic advisory body, had "banned the prohibition" of the practice⁸¹⁵, and groups supporting female circumcision and women's rights quoted hadiths that a woman's clitoris ought to be nicked for sexual intercourse to be enjoyed.⁸¹⁶ Ultimately, it was felt that research ought to be conducted to "map the practice of female circumcision as well as study the various physical, biological, sexual, cultural, psychological and religious implications" so that a better policy could be produced.⁸¹⁷

On Articles 15 and 16, the government highlighted, again, the obstacle of the difference between its own attitudes and those within society. In "certain cultures and sub-groups", for instance, discriminatory practices in matters of inheritance and the position of the husband and wife were still prevalent⁸¹⁸ - the multitude of different ethnicities and cultures within Indonesia meant that some were more amenable to equal and mutually respectful "gender relations" than others. Furthermore, there were religious groups, driven by middle class women, which used the justification of women's rights and religious teachings to advocate their presumably fundamentalist agenda and encourage polygamy.⁸¹⁹ In total, as an indication of the difficulty of the task of reconciling central government policy with regional by-laws, by 2007 the National Commission for Women had identified 1,406 regional by-laws, out of 5,518 it had reviewed, that it recommended for annulment on the basis of being discriminatory towards women.⁸²⁰

The Committee took up some of these strands in its List of Issues, while also raising various questions that had been brought to it from NGOs.⁸²¹ It was particularly concerned

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*, para. 188.

⁸¹⁹ *Ibid.*, para. 191.

⁸²⁰ *Ibid.*, para. 20.

⁸²¹ CEDAW, List of issues and questions with regard to the consideration of periodic reports: Indonesia, 9-27 July

about Islamic-based regional by-laws in the province of Aceh which apparently demanded dress codes for women, placed restrictions on their daily conduct, prevented menstruating women from participating in social life, criminalizing adultery, and so on.⁸²² It also asked the government to explain the legal status of female circumcision; it referred to the 2010 fatwa on the subject (which the government had described as a fatwa “banning the prohibition” on female circumcision) and a subsequent Ministerial Regulation, No. 1636, which authorized female circumcision when practiced by medical personnel.⁸²³ It asked what steps were being made to withdraw this regulation and eliminate the “re-emerging practice” of female circumcision. Harking to its interactions with Malaysia and Singapore, the Committee also enquired about marital rape, a matter on which the Marriage Act 1974 was silent. Once again, the issue of the male domination of Indonesian society and culture was raised.⁸²⁴

In response, Indonesia explained that it was undertaking a number of measures to eliminate patriarchal stereotypes, including gender mainstreaming and reviewing school textbooks.⁸²⁵ It also explained its approach to female circumcision as follows: in 2006 the Director General of Public Health Management had issued a Circular Note prohibiting medical personnel from performing female circumcision, but the practice continued to take place performed by traditional medical practitioners, i.e. “dukuns” or shamans, which was likely to make it considerably more harmful to girls concerned. The situation was then rendered more complicated by the Indonesia Council of Ulemas’ 2008 fatwa that the abolition of female circumcision was against sharia provisions. This had resulted in Minister of Health regulation 1636 which provided a set of safeguards for medical personnel in

2012, CEDAW/C/IDN/Q/6-7.

⁸²² *Ibid.*, para. 4, 23.

⁸²³ *Ibid.*, para. 6.

⁸²⁴ *Ibid.*, para. 24.

⁸²⁵ CEDAW, Response to the list of issues and questions with regard to the consideration of the combined sixth and seventh periodic report: Indonesia, 19 January 2012, UN Doc. CEDAW/C/IDN/Q/6-7/Add.1., para. 29-32.

conducting the procedure, if requested to by parents. This “should not in any way be construed as encouraging or promoting the practice of female circumcision”⁸²⁶, but on the other hand “Indonesia pays attention to the dynamic of the implementation of rights and freedom of its citizens, particularly with regards to the freedom to practice their religion and beliefs”.⁸²⁷ This rather neatly encapsulates the difficulty of reconciling governmental and societal attitudes, but it also introduces that area of the cultural relativist issue which we have deliberately avoided discussing: the reconciliation of the rights of minorities to their religious and cultural practices where those practices conflict with internationally dictated standards. The caveats and comments regarding that issue that were stated earlier in the thesis still apply.

On marital rape, the government directed the Committee to its Law No. 23 of 2004 on Domestic Violence, which “regulated marital violence such as marital rape”.⁸²⁸ This does not make it entirely clear whether it prohibited it or not, although it appears from a reading of the law itself that it prohibits sexual violence and that “Sexual violence, including marital rape...is defined as any act that constitutes forced sex, sexual harassment, abnormal and unwanted sexual relation, forced sex for commercial purposes and or for certain objectives”.⁸²⁹

And finally, on the topic of Aceh, which had been singled out in particular, the government described special cultural and economic privileges given to the province thanks to Law 11 of 2006 on Aceh Government. These had been instituted as part of the peace settlement which followed the lengthy independence conflict in Aceh, and provided for a

⁸²⁶ *Ibid.*, para. 36.

⁸²⁷ *Ibid.*, para. 37.

⁸²⁸ *Ibid.*, para. 119.

⁸²⁹ See e.g. Z. Munir, “Domestic Violence in Indonesia”, 2 [1] *Muslim World Journal of Human Rights* 5 (2005), p. 6.

sharia court, a consultative assembly of Ulama, and sharia police, which although subject to national law had a special and distinctive character; the government's solution to problems arising in the sphere of women's rights thanks to this special arrangement was training on gender perspectives to state apparatus and "other stakeholders" in the province itself.⁸³⁰

iii) Analysis

We can identify a number of different themes in the above overview which would constitute fruitful lines of inquiry in attempting to discern subsequent practice establishing the agreement of the parties on whether socio-cultural factors can justifiably affect the implementation of various provisions of the Convention. In keeping with our general approach, we will not address the questions of polygamy and female genital mutilation at this stage. The areas that have been identified are as follows:

- Government guidelines on family size
- Polygamy
- The "breadwinner concept" and patriarchal attitudes in general
- Requirements for women to seek consent from their husband or family for abortion, sterilization and night work
- Minimum marriage ages
- Quotas to encourage political participation
- Female Circumcision

⁸³⁰CEDAW, Response to the list of issues for Indonesia's sixth and seventh periodic report, *supra* note 825, para. 121-122.

We shall now examine each of these in turn.

Government guidelines on family size

The Indonesian government had in its Initial Report stated that it put forth directives on the desirability of having a certain number of children in each family, and mentioned again in its Second and Third Report that the government suggested that the ideal family size was to have 2 children of either sex.⁸³¹ The Committee took the view, in its comments in the Initial Report, that this was unsuitable, and that State family planning should only consist of giving information and guidance, and not directives of this kind.⁸³² If we take an expansive view of the extent of Asian values and its impact, we can attribute Indonesia's approach to family planning as an extension of the notion of a paternal government making decisions based on what is best for society, placed above the individual. If so, we can likewise portray the Committee's comment as an authentic interpretation, to the effect that the socio-cultural values which would lead to the government issuing directives of this kind ought not to affect the way in which Article 12 obligations are implemented.

The recommendation that Indonesia's guidelines on family size were not an appropriate means to implement the Convention was given in only one Concluding Observation and it is also difficult to find any similar interpretive practice with respect to any other States Parties to the Convention; this thus probably fails to satisfy the Step 2 requirements of commonality, concordancy and consistency, although it is true, as we have

⁸³¹CEDAW, Indonesia's Second and Third Periodic Reports, *supra* note 703, p. 6.

⁸³²CEDAW, Comments on Indonesia's Initial Periodic Report, *supra* note 713, para. 321.

established, that where there is practice in respect to only one State Party it can still be constitutive of VCLT subsequent practice if that State Party is the only relevant actor. Thus, if the Indonesia was the only State Party to have issued such recommendations, interpretive practice regarding that act could still possibly be considered. It is also worth noting that, in its General Recommendation No. 21, the Committee expressed the view that the decision of a woman to have children “must not be limited by spouse, parent, partner or government”⁸³³. Nonetheless, in the absence of other interpretive practice on this point, it seems most appropriate to suggest that there is no interpretive practice with regard to the Indonesian government's recommendation on family size to whether there is an obligation to implement Article 12 in this fashion or not.

Polygamy

The Committee takes a more-or-less consistent line on polygamy in Indonesia: that the practice was discriminatory and prohibited under Article 2 and Article 16 of the Convention. In its remarks on Indonesia’s Initial Report this is not made absolutely clear; indeed, the comments seem to imply that polygamy would be permissible were women to have the same right as men to take more than one spouse.⁸³⁴ Yet, at least from the Second and Third Periodic Report onwards, the Committee’s clear stance has been that polygamy is discriminatory *per se* – presumably on the unspoken basis that, since in practice the right to practice polygamy was never likely to extend to women there was little to be gained from entertaining the notion. The Committee’s interpretive practice in this area is specific,

⁸³³ CEDAW Committee, Thirteenth Session, 1994, General Recommendation No. 21, contained in UN Doc. A/47/38.

⁸³⁴ CEDAW, Comments on Indonesia’s Initial Periodic Report, *supra* note 713, para. 322.

focused, and simple: socio-cultural mores should not affect implementation of the Convention to the extent that they allow for the practice of polygamy in any form whatsoever. This is, then, authentically interpretive practice which meets the Step 1 requirement.

The practice is also clearly consistent, in that it was stated more-or-less continuously throughout Indonesia's reporting history (with the possible exception of the Initial Report, where the Committee appeared to imply that allowing men and women the same right to marry multiple spouses would not be in violation of the Convention). Given what is stated in General Recommendation No. 21⁸³⁵, which expressed the view that the failure of a State Party to eliminate polygamy contravened women's equality with men (presumably under Articles 2 and 3), and given what we know from the Committee's interpretive practice with regard to Singapore and Malaysia, let alone other States such as Uganda⁸³⁶, the Congo⁸³⁷, or Bhutan⁸³⁸ (to name but a few), it is undoubtedly the case that there is common, concordant and consistent interpretive practice indicating that Article 1, 5 (a) and 16 are to be interpreted to mean that States Parties have an obligation to eliminate polygamy where it exists, irrespective of socio-cultural norms.

The Indonesian government's responses show obvious agreement with the Committee's position: as our overview demonstrated, in practically every instance in which the issue of polygamy was raised, the government expressed the view that the practice ought to be prohibited and eliminated, whether in the constructive dialogue for its Second/Third Periodic Report⁸³⁹, or for the Sixth/Seventh, where polygamy was described in

⁸³⁵ CEDAW Committee, General Recommendation No. 21, *supra* note 833.

⁸³⁶ See e.g. CEDAW, A/57/38, part III (2002), para. 153.

⁸³⁷ See e.g. CEDAW, A/58/38, part I (2003), para. 180.

⁸³⁸ See e.g. CEDAW, A/59/38, part I (2004), para. 115.

⁸³⁹ See *supra* note 736.

purely negative terms, as a “problem” women faced⁸⁴⁰. Notwithstanding all of the difficulties that it faced in implementing this element of Article 16, in other words, from Islamic personal law to the campaigning of pro-polygamy women’s groups, Indonesia expressed its agreement with the Committee’s interpretive practice in this area explicitly.

However, the usual caveat applies that, whether or not Indonesia agrees with the interpretive practice of the Committee in this regard, disagreement of other States Parties on the permissibility of polygamy would prevent us from stating that there was subsequent practice establishing the agreement of the parties on this interpretation of Articles 1, 5(a) and 16.

The “breadwinner concept” and patriarchal attitudes

It is clear from the reporting history as a whole that the notion that the husband is the head of the household, and conversely the cultural attitudes that confined women to being mothers and housewives, is at the core of most of the concerns that the Committee has had with respect to Indonesia – whether it be expressed under comments regarding discrimination in general, health, education, labour, or elsewhere. Indeed, it is difficult to identify interpretive practice that is specific or detailed enough to constitute authentic interpretations meeting the Step 1 requirement, given that the theme is expressed so generally and universally: while statements such as “policies and programmes developed on the basis of these stereotypes limit women’s participation and entitlements, thereby impeding implementation of the Convention”⁸⁴¹ are useful in terms of establishing the

⁸⁴⁰ See CEDAW, Indonesia’s Sixth and Seventh Periodic Report, *supra* note 707, para. 31.

⁸⁴¹ CEDAW, Concluding Observations on Indonesia’s Second and Third Periodic Reports, *supra* note 729, para. 282.

Committee's overall stance, they are not specific enough to constitute authentic interpretations – primarily because of the lack of intentionality discussed above.

Nonetheless, there are some areas where more concrete interpretive practice sufficient to satisfy the Step 1 requirements can be identified.

The first of these is gender mainstreaming. Gender mainstreaming in itself is cited on so many occasions throughout Indonesia's reporting history in relation to, primarily, efforts to combat stereotypes and socio-cultural factors which impact negatively on the status of women (patriarchal norms chief among them) that it is difficult to categorise the interpretive practice as anything other than a general assumption that the Committee deems it to be an appropriate means by which to implement the Convention in broad terms. Nonetheless, it is recommended by the Committee, and, more frequently, approved of by the Committee when raised by Indonesian delegates as a means of fulfilling Convention obligations, on a sufficient number of specific occasions, and in relation to sufficient number of specific policy areas, that we can readily state that there is authentic interpretive practice to the effect that gender mainstreaming is the preferable means by which to remove socio-cultural stereotypes and patriarchal attitudes. To put it more simply: gender mainstreaming ought to be used as a means to implement the provisions of the Convention, and, far from the socio-cultural factors of patriarchal attitudes having any impact on the manner of implementation, those socio-cultural factors are by definition to be removed.

The second of these is the use of school text books to combat stereotyping, which is, again, a prominent element of Indonesia's reporting history – both as a recommendation of the Committee and as a response by the State. Here, the authentic interpretative practice would be that "engendering" the school curriculum ought to be used as a means of eliminating socio-cultural stereotypes under Article 5, and that prevailing cultural attitudes

ought to have no effect on this (and indeed will ultimately be undermined by it).

The third is in legislation: the fact that the Marriage Act 1974 perpetuated the notion that the man was the head of the household and that the wife had a domestic role meant that the legislation had to be amended to eliminate the provisions in which this occurred. This is authentic interpretive practice to the effect that socio-cultural mores should be no consideration when delimiting the roles of husbands and wives – i.e. in the implementation of Article 16 insofar as it results in legislation which provides for the husband being the head of the household.

The fourth and final is that the Committee approved of Indonesia's 30% quota for women representatives in political parties. This constitutes authentic interpretive practice indicating that affirmative action in the form of quotas is an appropriate means by which to implement Article 7 and Article 4 of the Convention.

This is a complex area comprising a number of separate strands of interpretive practice. First, there is interpretive practice indicating that gender mainstreaming ought to be used to realise the general implementation of the Convention as a means of realising the obligations to eliminate gender stereotyping, discrimination, and genuine equality. Second, there is practice indicating that the revision of school textbooks to include non-stereotyped depictions of men and women is an effective means of eliminating gender stereotypes and overturn patriarchal attitudes. Third, there is practice indicating that legislation stipulating that the husband/father is the head of the household perpetuates stereotypes, patriarchal attitudes, and the "breadwinner concept", and hence Indonesia has the obligation to alter that provision. Finally, there is practice indicating that quotas are a suitable and effective means of resolving the problem of a lack of female participation in politics due to traditional custom or societal attitudes.

Gender mainstreaming is mentioned so often by the State Party itself, and interpretive practice praising its use in the implementation of various Articles of the Convention so frequent, that it is difficult to argue that the view it as anything other than consistent: the Committee interprets the Convention to require gender mainstreaming as a means by which to realise at the least Articles 1, 2, 3, 5, 7, 10 and 12, specifically insofar as it would reduce stereotyping and patriarchal attitudes, and mitigate against religious or cultural factors which might perpetuate them. It must also be regarded as common and concordant – it is required of numerous other States Parties in relation to a wide range of Articles, among them the Dominican Republic⁸⁴², the UK⁸⁴³, Trinidad and Tobago⁸⁴⁴, and Canada⁸⁴⁵. It may be recalled that the Committee also criticised Singapore for failing to pay adequate attention to gender mainstreaming or demonstrate a clear understanding of what it meant⁸⁴⁶. It would seem that the interpretive practice viewing gender mainstreaming as a requirement for fulfilling Indonesia's obligations under the Articles mentioned passes both Steps 1 and 2.

Revision of school textbooks as a means for eliminating stereotypes and patriarchal attitudes is likewise a fixture of the reporting history of Indonesia, as it is for many States Parties, such as Nepal⁸⁴⁷, Croatia⁸⁴⁸, Israel⁸⁴⁹, and so on. As with gender mainstreaming, then, it seems relatively clear that the interpretive practice viewing the revision of school textbooks to remove content perpetuating stereotypes or patriarchal attitudes as necessary in Indonesia's implementation of Articles 1, 2, 3, 5, 7, and 10 is common, concordant and

⁸⁴²See e.g. CEDAW, A/53/38/Rev.1, part I (1998), para. 341.

⁸⁴³See e.g. CEDAW, A/54/38/Rev.1, part II (1999), para. 297.

⁸⁴⁴See e.g. CEDAW, A/57/38, part I (2002), para. 144.

⁸⁴⁵See e.g. CEDAW, A/58/38, part I (2003), para. 340.

⁸⁴⁶See e.g. Summary Records of the 514th Meeting, *supra* note 628, para. 46.

⁸⁴⁷See e.g. CEDAW, A/59/38, part I (2004), para. 205.

⁸⁴⁸See e.g. CEDAW, A/60/38, part I (2005), para. 200.

⁸⁴⁹See e.g. CEDAW, A/60/38, part II (2005), para. 255.

consistent.

On the obligation to alter the provision in the Indonesian Marriage Act 1974 to remove provisions perpetuating the notion of the husband or father as the head of the household and, hence, the breadwinner, it is certainly the case that the Committee has given similar interpretations of Convention obligations in other areas. In General Recommendation No. 21 the Committee had described the tendency in some countries towards a belief in patriarchal family structures which places a father, husband or son in a favourable position in negative terms⁸⁵⁰, and had given a similar view regarding the amendment or abolition of legislation which set the husband or father as head of the household in its Concluding Comments towards Burundi⁸⁵¹. This makes the case for arguing commonality and concordancy somewhat less complete for the interpretive practice in this area, but still perhaps plausible, although the Human Rights Committee has, in fact, been much more likely to interpret the removal of this type of provision in the ICCPR context than has the CEDAW Committee⁸⁵²; it is clear in the wider context that the CEDAW Committee takes the view that State Parties have the obligation to change societal attitudes placing males as head of households by dint of their sex, although the question of whether the interpretive practice is widespread enough to be common, concordant and consistent remains debatable.

Finally, we come to the question of quotas as a suitable and effective means of increasing female participation in politics and thus circumventing or diminishing socio-cultural attitudes. The Committee has certainly expressed views on this in a wide variety of

⁸⁵⁰See *supra* note 833.

⁸⁵¹See e.g. CEDAW, A/56/38, part I (2001), para. 56.

⁸⁵²See for example its Concluding Observations with regard to Togo (UN Doc. A/58/40, vol. 1 (2002), para 78(21)), Senegal (UN Doc. A/48/40, vol. 1 (1993), para. 105), and Algeria (UN Doc. A/53/40. Vol. I (1998), para. 361).

contexts. In General Recommendations No. 5 and No. 23 it gave the opinion that quotas and numerical goals were appropriate special measures under Article 4 giving effect to Articles 7 and 8, and noted that a rate of female participation in politics of around 30% was needed.⁸⁵³ The need for quotas as a means of implementing Article 7 in particular has also frequently been expressed by the Committee to other States Parties, among them Estonia⁸⁵⁴, Guatemala⁸⁵⁵, Brazil⁸⁵⁶ and Yemen⁸⁵⁷, and has often given the number of 30% as a recommended figure, as it did with, for instance, Peru⁸⁵⁸. It is certainly arguable that the interpretive practice here is common, concordant and consistent.

Agreement regarding the use of gender mainstreaming, the revision of textbooks, and the use of quotas to encourage female participation in politics on the part of Indonesia itself should be obvious from our overview of its reporting history, in which agreement is made explicit by numerous examples of the measures taken by the government in those areas. Likewise, in its Fourth and Fifth Periodic Report, the government described the review it had undertaken on its Marriage Act 1974 and its conclusion that the law had to be revised and amended to remove the provision establishing the husband as the head of a household⁸⁵⁹, demonstrating clear agreement with the interpretive practice of the Committee. Only a comprehensive assessment of the views of the other States Parties would reveal whether there were instances of disagreement, however; and in fact there are some reasons to be dubious about agreement on the issue of gender mainstreaming: Singapore, at least, expressed the view that it did not deem gender mainstreaming to be necessary in

⁸⁵³See CEDAW, 16th Session, 1997, General Recommendation No. 23, para. 16.

⁸⁵⁴See e.g. CEDAW, A/57/38, part I (2002), para. 94.

⁸⁵⁵See e.g. *ibid.*, part III, para. 191.

⁸⁵⁶See e.g. *ibid.*, part II, para. 118.

⁸⁵⁷See e.g. *ibid.*, part III, para. 403.

⁸⁵⁸See e.g. *ibid.*, para. 468.

⁸⁵⁹See CEDAW, Indonesia's Fourth and Fifth Periodic Report, *supra* note 705, para. 161.

order to meet its obligations under the CEDAW.⁸⁶⁰

Requirements to seek consent

The Committee expressed concern about a number of areas in which women were required under Indonesian law to seek the consent of their husbands in order to undertake various activities. These included abortions, sterilization, working at night, and taking maternity leave (though this appeared only in the summary record of the 378th meeting and not in any Concluding Comment, so its consideration as authentic interpretive practice is doubtful). The interpretation that socio-cultural values should have no effect on women's rights to equality in health care (regarding abortion and sterilization) and right to equality in employment (regarding night work) is specific and detailed enough, and has the requisite intentionality, to satisfy the Step 1 requirements.

The Committee several times expressed the opinion that the provisions in Indonesian law requiring women to gain the consent of their husband before undergoing sterilization or an abortion, or from their husband or father before performing work at night, perpetuated patriarchal attitudes and were in contravention of the Convention. The interpretive practice certainly qualifies as consistent, having been mentioned by the Committee throughout Indonesia's reporting history. The Committee has also stated that any decision on whether or not to have children must not be limited by either the spouse or the government under Article 16 (1) (e), in General Recommendation No. 21⁸⁶¹, and has required States Parties to similarly amend legislation requiring spousal consent for "tubal ligation" (i.e. sterilization) in

⁸⁶⁰ See CEDAW, Summary Records of the 514th Meeting, *supra* note 628, para. 44.

⁸⁶¹ See *supra* note 833, para. 22.

Saint Vincent and the Grenadines⁸⁶², for sterilization in Chile⁸⁶³, and for abortion in Turkey⁸⁶⁴. Regarding night work, a cursory survey of the Committee's Concluding Comments for other State Parties did not reveal similar interpretive practice as that for Indonesia expecting the State to remove the requirement for spousal or parental consent, though there were instances in which general provisions prohibiting women from working at night were required to be removed.⁸⁶⁵ The interpretive practice deeming the requirement for spousal consent regarding abortions or sterilization is arguably common, concordant and consistent, therefore, although the case for making a similar argument regarding spousal consent for night work is less well established.

Agreement regarding the interpretive practice is however, not apparent. Indonesian delegates appeared to take a fundamentally different view to that of the Committee with regard to the issues of sterilization and abortion and night work, apparently deeming the requirement for spousal consent regarding abortion to be justifiable on the basis that it reflected the "mutual consent and responsibility within the family"⁸⁶⁶ and for night work to ensure extra safety and provide additional protection by a woman's family for her rights and dignity⁸⁶⁷. The connotations between these views and the Asian values tropes of the strong family are obvious, and indicate somewhat robust disagreement on the part of Indonesia with the Committee's view that socio-cultural attitudes should not affect implementation in this sphere. Thus, simply on the basis of Indonesia's reaction to this line of interpretation alone, we can conclude that there is no subsequent practice establishing the agreement of

⁸⁶²See e.g. CEDAW, A/52/38/Rev.1, part I (1997), para. 140.

⁸⁶³See e.g. CEDAW, A/54/38/Rev.1, part II (1999), para. 229.

⁸⁶⁴See e.g. *ibid.*, para. 184.

⁸⁶⁵See e.g. Concluding Observations for Ukraine, UN Doc A/57/38, part II (2002), para. 293.

⁸⁶⁶See CEDAW, Response to the list of issues for Indonesia's sixth and seventh periodic report, *supra* note 825, para. 90.

⁸⁶⁷See CEDAW, Response to the list of issues for Indonesia's fourth and fifth periodic report, *supra* note 787, para. 20 (b).

the parties that socio-cultural values should not affect how Article 16 is implemented insofar as spousal consent for abortion, night work or sterilization is concerned.

Minimum Marriage Ages

The Committee consistently recommended that Indonesia revise its laws on marriage to make the minimum age of marriage for both men and women at least 18. Indonesia's recommendatory approach, in which girls were advised to marry at the age of 20 or above, was not considered suitable, and the socio-cultural norm that marriage at a later age was "shameful conduct and therefore should be prevented" was no justification for not instituting equality in this regard.

The Committee's view the Indonesia was requirement to amend its laws on marriage to make the minimum age 18 for both men and women is given consistently throughout its reporting history, and clearly a mere recommendation on the part of the government that women not marry until 20 is not viewed as satisfactory. Here, of course, there are in fact two separate lines of interpretation: that the minimum marriage age for men and women should be the same, and that it should be at least 18. This is concordant with General Recommendation No. 21, which had expressed the view that the minimum age for marriage should be 18 for both men and women, notwithstanding the provisions of the CRC, and provisions setting different marriage ages for men and women ought to be abolished as discriminatory and based on what the Committee deemed to be a false view about rates of development.⁸⁶⁸ The Committee has also given many similar interpretations with regard to the obligations of other States Parties, both in terms of making the minimum age the same

⁸⁶⁸See *supra* note 833.

for both sexes, and it terms of raising the minimum age to 18 or greater, such as Romania⁸⁶⁹, Moldova⁸⁷⁰, Armenia⁸⁷¹, Mexico⁸⁷² and others. The case for commonality, concordancy and consistency is therefore reasonably strong.

The question of agreement here is somewhat complicated, however. Indonesia's overall approach was to recommend that girls not marry until the age of 20 and boys not to marry until the age of 25; it clearly, then, disagreed with the fundamental reasoning of the Committee as given in General Recommendation No. 21 that there was absolutely no difference in intellectual development between boys and girls, and different marriage ages based on this rationale was based on an "incorrect assumption".⁸⁷³ It also, clearly, seemed to view the fact that marriage at a later age amounted to "shameful conduct" in the socio-cultural norms of some groups within Indonesian society meant that it had to take a sensitive or pragmatic approach.⁸⁷⁴ However, at the same time a review of the Marriage Act 1974 had resulted in a draft Act that would make the minimum marriageable age for men and women the same.⁸⁷⁵ This draft Act apparently remains a draft, yet it indicates a certain commonality of views between at least some elements of the government and the Committee. While in the Sixth and Seventh Report Indonesia describes ongoing efforts to reform the Marriage Act, it does not give a final opinion on amending the provision on the minimum marriage age. The case for Indonesia's agreement, then, is uncertain, and given that this is the case, we must conclude that there is no subsequent practice establishing the agreement of the parties on the interpretation of Article 16 in this regard.

⁸⁶⁹See e.g. CEDAW, A/55/38, part II (2000), para. 318.

⁸⁷⁰See e.g. *ibid.*, para. 113.

⁸⁷¹See e.g. CEDAW, A/57/38 part III (2002), para. 64.

⁸⁷²See e.g. *ibid.*, para. 449.

⁸⁷³See CEDAW, General Recommendation No. 21, *supra* note 833, para. 30-35.

⁸⁷⁴See *supra* note 787..

⁸⁷⁵See CEDAW, , Indonesia's Sixth and Seventh Periodic Reports, *supra* note 707, paras. 197, 198.

Female Circumcision

The Committee's stance on female circumcision was clear: that it constituted a form of violence against women and hence the existence of the practice was a violation of Indonesia's obligations under Article 1 and 12. Despite the socio-cultural and religious values surrounding the practice, therefore, interpretive practice indicates the Committee believed that those values should have no impact on the implementation of Indonesia's obligations in this area.

The issue of female circumcision does not arise until later in Indonesia's reporting history, although it is dealt with across two reporting cycles. The Committee gives categorical statements establishing that it views Indonesia's obligation as to eliminate the practice without delay, irrespective of societal values and the difference between its form in Indonesia as opposed to societies in Africa where it is practiced. This is concordant with the Committee's General Recommendation No. 19 and No. 24; it is also in common with the Committee's interpretive practice regarding Uganda⁸⁷⁶, Yemen⁸⁷⁷, Switzerland⁸⁷⁸, Ethiopia⁸⁷⁹ and Nigeria⁸⁸⁰. The case for its consistency, concordancy and commonality is therefore very strong.

There is also a good case for agreement, at least on Indonesia's part if not those other States. The Indonesian government, in its Sixth and Seventh Reports, expressed the view that it "would be better to eliminate and prohibit female circumcision" even though, in its opinion, the practice as it occurred within Indonesia was far less damaging than the

⁸⁷⁶ See e.g. CEDAW, A/57/38 part III (2002), paras. 135 and 136.

⁸⁷⁷ See e.g. CEDAW, A/57/38 part III (2002), paras. 398 and 399.

⁸⁷⁸ See e.g. CEDAW, A/58/38 part I (2003), paras. 118 and 119.

⁸⁷⁹ See e.g. CEDAW, A/59/38 part I (2004), paras. 251 and 252.

⁸⁸⁰ See e.g. CEDAW, A/59/38 part I (2004), paras. 288, 299 and 300.

manner in which it took place in Africa.⁸⁸¹ However, there is also some ambiguity on this point: after going into some detail on the role of the Ulema in “prohibiting the ban” on female circumcision, as the Indonesian delegates put it, the ultimate conclusion appears to have been that research ought to be conducted to “map the practice of female circumcision [and] study the various physical, biological, sexual, cultural, psychological and religious implications” so that a better policy could be produced.⁸⁸² The implication of this statement appears to be that Indonesia’s view on the matter is not settled, and some level of leeway for Islamic or cultural norms regarding the practice was being considered. This undermines the case for arguing that the interpretive practice of the Committee here meets all of the 3 Steps for subsequent practice, and if Indonesia’s qualified statements on the matter are too ambiguous to be viewed as constituting agreement, then development of subsequent practice establishing the agreement of the parties on the matter would be obviated.

iv) Concluding Remarks

Thus, despite the spirit of cooperation present in Indonesia’s interactions with the Committee, the results are somewhat mixed. Regarding government recommendations on family size, it is difficult to state anything definitive, as the interpretive practice of the Committee in that area seems to relate to Indonesia alone: we have seen that practice of, or in relation to, only one State Party to a multilateral treaty would be extremely unlikely to be constitutive of subsequent practice establishing the agreement of the parties, unless that State Party is the only relevant actor – and even then, at least based on the WTO

⁸⁸¹ See *supra* notes 811-817.

⁸⁸² See *supra* note 817.

jurisprudence, there would have to be some reluctance in drawing any conclusions from it.

On polygamy, the situation is much clearer: commonality, concordancy and consistency are certainly present in the Committee's interpretive practice, to the effect that under Article 1, 2, 3, 5(a) and 16 States Parties have an obligation to eliminate and prohibit polygamy, irrespective of social or cultural mores. And Indonesia, at least, appears to agree with this interpretative practice, even given the difficulties associated with implementation. The usual caveat that disagreement *may* exist on the part of other States Parties, does of course apply. Similarly, we can with a degree of certainty argue that there is commonality, concordancy and consistency in the interpretative practice on Articles 1, 2, 3, 5, 7, 8, and 10 inasmuch as the use of gender mainstreaming, textbook revision, and quotas to encourage female participation in politics are to be implemented irrespective of socio-cultural values – and, indeed, to directly affect those values; but that disagreement may exist, and, in the case of gender mainstreaming, does appear to be expressed by Singapore at the very least.

However, in other areas (requirements to seek consent, minimum marriage ages, and female circumcision) Indonesia's responses to the Committee's interpretive practice make the results ambiguous at best – too ambiguous in the case of the requirement to seek consent and the minimum age for marriage, indeed, to satisfy the Step 3 requirement for agreement implied by silence. Indonesia's disagreement by itself would be enough to prevent us from drawing a conclusion that there was subsequent practice establishing the agreement of the parties on the Committee's interpretations, setting aside the responses of other States Parties.

C. Malaysia

i) General Remarks

Malaysia has currently submitted two Reports to the CEDAW Committee, though due to tardiness they were ultimately submitted together in one document⁸⁸³; this is the only document which the Committee has thus been able to give Concluding Observations to. At the end of its Concluding Observations to that first Report⁸⁸⁴ the Committee invited Malaysia to submit its Third and Fourth Reports in a combined form in 2008, which it did not do.

There is an interesting difference in tone between the Committee's treatment of Malaysia and Singapore, and indeed between the approaches taken by Malaysia and Singapore. Surprisingly, Malaysia does not adopt the standpoint that the government has any role in giving effect to Asian values – at least with respect to women's rights – and nowhere claims that particularist interpretations of the Convention are required. By contrast, like Indonesia, Malaysia tends to portray socio-cultural factors as hindrances to the implementation of the Convention which need to be ameliorated or removed. On numerous occasions throughout its combined report the government "recognises that poverty, lack of education and sometimes culture and tradition are major hindrances to women's progress"⁸⁸⁵, that "access to social services is, to some extent, culturally and socially

⁸⁸³ Committee on the Elimination of Discrimination Against Women, Consideration of reports submitted by States Parties under Article 18 of the Convention of the Elimination of All Forms of Discrimination against Women: Combined Initial and Second Periodic Reports of States Parties: Malaysia, 12 April 2004, UN Doc. CEDAW/C/MYS/1-2.

⁸⁸⁴ CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Malaysia, Combined Initial and Second Periodic Reports, 31 May 2006, UN Doc. CEDAW/C/MYS/CO/2.

⁸⁸⁵ CEDAW, Malaysia's Initial and Second Periodic Reports, *supra* note 883, para. 77.

determined”⁸⁸⁶, and that “various cultural and institutional factors which are predicated on restrictive notions of a woman’s role in society often intersect to form barriers to the advancement of women’s career and upward mobility in an organisation”⁸⁸⁷. It bemoans that fact that “in many cultures in Malaysia, the man is normally the head of the household while the wife is subservient and has to attend to his needs and comfort as well as take care of the children and elderly relatives in an extended family”.⁸⁸⁸ Perhaps most surprisingly, given Malaysia’s recent history with regard to human rights, it even cites Asian values as a barrier to progress: “Gender roles and ethnicity have been found to impact women’s participation in nation building. In the construction of gender role, each ethnic group in Malaysia is influenced by Asian values, which determine the role of women in the domestic/private sphere while men dominate the public sphere”.⁸⁸⁹

Unlike Singapore, whose stance was more ambivalent, the Malaysian government, like Indonesia's, casts itself in the role of working against these “conservative and traditional attitudes”⁸⁹⁰, which form barriers to its implementation of the Convention, leading women to women prioritising their family over their career due to “social conditioning”⁸⁹¹, causing girls to choose traditionally female-oriented university courses⁸⁹², being detrimental to the opportunities of women to become managers and decision-makers in business⁸⁹³, and failing to reward women economically for the fact that they bear most of the responsibility for maintaining the health of their families.⁸⁹⁴ The government, in this context, has the duty to

⁸⁸⁶ *Ibid.*, para. 79 (ii).

⁸⁸⁷ *Ibid.*, para. 90.

⁸⁸⁸ *Ibid.*, para. 81.

⁸⁸⁹ *Ibid.*, para. 92.

⁸⁹⁰ *Ibid.*, para. 95.

⁸⁹¹ *Ibid.*, para. 90.

⁸⁹² *Ibid.*, para. 99.

⁸⁹³ *Ibid.*, para. 126.

⁸⁹⁴ *Ibid.*, para. 284.

“eradicate stereotypical/negative assumptions about women in the workplace”⁸⁹⁵, to introduce gender mainstreaming and facilitate changes in the socio-cultural environment⁸⁹⁶, to address and change prevailing perceptions about the role of women so as to allow them more effectively to enter the labour market, and so on.

What is also notable is that, while the government does describe Asian values as a kind of umbrella term to describe commonalities between the different cultural and ethnic groups within Malaysia, it does not talk about Malaysian society in the kind of unified terms in which Singapore does. By contrast, the government is eager to emphasise that Malaysia has a pluralism of different groups, each with somewhat different customs and traditions, even if these have similar effects. For instance:

In most cultural practices of the ethnic groups in Malaysia, the concept of family includes also the extended families of the respective husband and wife. Thus, this affects the autonomy and decision-making powers in a family particularly decisions pertaining to woman issues [sic] as well as the rights of a wife. For instance, in all cultures in Malaysia, a wife is expected to obey her husband who includes the husband’s family and to behave according to their wishes.⁸⁹⁷

Or:

In many cultures in Malaysia, the man is normally the head of the household while the wife is subservient and has to attend to his needs and comfort as well as take care of the children and elderly relatives in an extended family.⁸⁹⁸

⁸⁹⁵ *Ibid.*

⁸⁹⁶ *Ibid.*, para. 87, 88.

⁸⁹⁷ *Ibid.*, para. 380.

⁸⁹⁸ *Ibid.*, para. 81.

Or:

In the construction of gender role, each ethnic group in Malaysia is influenced by Asian values, which determine the role of women in the domestic/private sphere while men dominate the public sphere. The Malays are influenced by the customs or “adat” and religious (Islamic) teachings...Likewise, the Indian community is also influenced by the Hindu religion and Indian customs. The Chinese, on the other hand, determine gender roles through customary rather than religious practices.⁸⁹⁹

It rarely talks in general terms about the values or norms of Malaysian society in general, and even draws attention to varying attitudes between economic classes: “Although the ideas about the role of women have changed and become more liberal among the educated or modern communities in Malaysia, there are still many people who cling to the traditional socio-cultural stereotypes and attitudes about the role of women”.⁹⁰⁰

The overall impression is that, while both Malaysia and Singapore take socio-cultural values relatively seriously as factors which affect the implementation of some aspects of the Convention, Malaysia’s view of those socio-cultural values is predominantly negative, where Singapore’s is mixed. Where the government of Singapore to a certain degree takes on some socio-cultural values as its own – for instance, the focus on the strong family - Malaysia portrays itself in opposition them.

Nonetheless, it is important to note the one major exception which Malaysia sets out in this schema – Islamic personal law. The government had entered a number of reservations in this respect, declaring itself not to be bound by the Convention where its provisions might clash with Islamic personal law or its constitution. Gradually, in 1998 and

⁸⁹⁹ *Ibid.*, para. 92.

⁹⁰⁰ *Ibid.*, para. 95.

2010 these reservations were partially withdrawn, although as of writing Malaysia still retains the following reservation:

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 9 (2), 16 (1) (a), 16 (1) (f) and 16 (1) (g) of the aforesaid Convention.

In relation to article 11 of the Convention, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

In practice, this primarily relates to the rules on marriage for Muslims, which for a separate regime than for non-Muslims. The primary differences in substance in this category are different rules on polygamy (which is prohibited under civil law but permissible for Muslims – despite there being a tradition of polygamy in Chinese custom it is not permitted for Chinese non-Muslims⁹⁰¹), the right to dowry of Muslim brides⁹⁰², and a separate system for divorce for Muslims incorporating the concept of the *talaq*, the *fasakh* and the *khuluq*.⁹⁰³ As we shall see, this area was one in which the Committee voiced a number of concerns.

It bears repeating that this thesis does not have the aim of addressing questions of minority rights, personal law regimes, or cultural rights in depth. As was stated in Chapter II, and in the section of this Chapter on Singapore and the CEDAW, although those areas are all conceptually linked to cultural particularism in some respects when it comes to traditional or religious practices, our analysis does not have a minority-rights or cultural-rights

⁹⁰¹ *Ibid.*, para. 403-405.

⁹⁰² *Ibid.*, para. 408.

⁹⁰³ *Ibid.*, paras. 420-426.

perspective.

Nonetheless, as with Indonesia, it seems appropriate to discuss what we might describe as Islamic traditions or Islamic values in our analysis, since those values form part of what any lay person would describe as ‘Malaysian culture’: the majority of the population are Muslim and the Constitution of Malaysia makes Islam the state religion⁹⁰⁴ and stipulates adherence to Islam as one of the constituent elements of being a Malay; indeed, if an ethnic Malay were to abandon Islam, his or her ethnic status would, constitutionally, no longer be Malay⁹⁰⁵. Since Malays constitute more than half of the population, then, in effect Islamic marriage rules affect the majority of the people of Malaysia. This means that we shall include these Islamic marriage rules as an element of the broad, societal-level cultural values which this thesis focuses on.

Initial and Second Periodic Report

The Committee gave its Concluding Comments to Malaysia’s combined Report on 31st May 2006.⁹⁰⁶ In contrast to the approach taken with Singapore – a reflection, perhaps, of Malaysia’s own approach – the Committee adopts a somewhat more conciliatory perspective. One of its first recommendations was that Malaysia remove its reservations to Article 9 (2), 16 (1) (a), 16 (1) (c), 16 (1) (f), 16 (1) (g), and 16 (2) – especially those to Article 16, which it deemed to be contrary to the object and purpose of the Convention.⁹⁰⁷ (At no stage during the 731st meeting, however, does it appear to have discussed the reasons for the reservations to Article 16 with the Malaysian representatives.) These reservations, which

⁹⁰⁴ Federal Constitution of Malaysia, Article 3.

⁹⁰⁵ *Ibid.*, Article 160.

⁹⁰⁶ CEDAW, Concluding Observations on Malaysia’s Initial and Second Periodic Reports, *supra* note 884.

⁹⁰⁷ *Ibid.*, para. 9-10.

create exemptions for the application of Islamic personal law, refer to:

- Equal rights for men and women in choosing the nationality of their children
- The same right to enter marriage
- The same rights and responsibilities during marriage and its dissolution
- The same rights and responsibilities for guardianship of children
- The same personal rights as husband and wife
- The betrothal of a child having no legal effect

Of particular concern to the committee were the issues of polygamy (the same right to enter marriage), the marriage of minors, division of property, and the question of divorce, though most of these issues were raised only in the meetings and thus are not mentioned in great detail in the Concluding Comments. It is notable also that there was a general comment made in session that Malaysia seemed to be adopting a narrow reading of the sharia, which was not in keeping with the “encouraging trend” to adapt Islamic personal law to “the current realities of women's lives” in some jurisdictions.⁹⁰⁸

Regarding polygamy, while the question was aired as to why women did not have a reciprocal right to take more than one husband⁹⁰⁹, the main comments revolved around the specific application of the law on polygamy (the Islamic Family Law (Federal Territories) (Amendment) Bill 2005 (IFLA)). The emphasis was on “controlling” the practice of polygamy, and in particular there were questions about the provision in the IFLA after amendment which allowed the sharia court to grant a polygamous marriage where it was “just or

⁹⁰⁸Committee on the Elimination of All Forms of Discrimination against Women, 35th Session, Summary Record of the 731st meeting, 24 May 2006, UN Doc. CEDAW/C/SR.731, para. 6.

⁹⁰⁹Committee on the Elimination of All Forms of Discrimination against Women, 35th Session, Summary Record of the 732nd meeting, 24 May 2006, UN Doc. CEDAW/C/SR.732, para. 32.

necessary” as opposed to the previous “just and necessary” (the former apparently being a looser set of criteria).⁹¹⁰ The answer was provided that, in fact, the word “just” was more difficult to prove if it was not tied to necessity and thus the amendment made the law more stringent.⁹¹¹ A second concern was on the relationship between Islamic and civil law: it was not clear what the status of a first wife and her children would be if her husband was a non-Muslim who converted to Islam and then married a second wife.⁹¹² For its part, Malaysia stressed that Islam “favours monogamy” and that polygamy under Syariah law was an exception; it seems relatively clear that disapproval of polygamy is strongly implied.⁹¹³

In any event, the Committee does not issue the direct recommendation that polygamy ought to be prohibited. This may be in recognition of the fact that, in spite of its own stance that Malaysia's reservations to Article 5 (a) and the various provisions of Article 16 are against the object and purpose of the Convention, it needed to take a pragmatic stance and argue for a reconciliation between this area of Islamic personal law and the Convention given that Malaysia's reservations remained in place. It is important to note that the Committee has, in its General Recommendation 21, expressed the view that, where a constitution guarantees equal rights for men and women, and yet polygamous marriage is permitted in accordance with personal or customary law, this would violate that constitutional right. (Although, somewhat inexplicably, it deems this to be a violation of Article 5 (a) of the Convention, on the removal of gender stereotyping.)

On the marriage of minors, the Committee expressed the general concern about the fact that the minimum age of marriage for women was 16 but 18 for men, and the opinion

⁹¹⁰ *Ibid.*

⁹¹¹ *Ibid.*, para. 45.

⁹¹² *Ibid.*, para. 33.

⁹¹³ CEDAW, Responses to the list of issues and questions for consideration of the combined initial and second periodic report: Malaysia, 27 March 2006, UN Doc. CEDAW/C/MYS/Q/2/Add.1.

was expressed that removing the reservations to Article 16 (1) (a) and (b) with a view to making the minimum age of marriage 18 for both sexes would strengthen the position of women in society.⁹¹⁴ However, a more pressing concern that emerged in session was the marriage of girls in the 10-14 year old bracket, which was “entirely unacceptable”.⁹¹⁵ Although Section 8 of the IFLA states that no marriage where the man is under 18 or the woman under the age of 16 may be solemnized or registered, it provides an exception where the Syariah Judge “has granted his permission in writing in certain circumstances”.⁹¹⁶ These certain circumstances are not revealed in the Report or in the Summary Records, but it is clear from the Summary Records that figures for marriages of girls between the age of 10 and 14 were made available to the Committee – presumably through an NGO submission – and this was not denied by the Malaysian representatives. Indeed, the delegation “shared the Committee’s concern”.⁹¹⁷

On the division of property, the pre-sessional working group had inquired about certain provisions of the IFLA which appeared to give a Muslim man “the right to claim a share of his existing wife’s assets upon his polygamous marriage and the right to get a court order to stop his wife from disposing of her assets, forcing a wife to choose maintenance or division of marital property upon a husband’s polygamous marriage”.⁹¹⁸ This, the delegation explained, was a misrepresentation, or misunderstanding, since the law itself was relatively clear in stating that “any party to [a] marriage” registered by the Syariah Court could make an application for the division of assets jointly owned by the husband and wife, and that this

⁹¹⁴*Ibid.*, para. 34.

⁹¹⁵*Ibid.*, paras. 39-40.

⁹¹⁶See CEDAW, Malaysia’s Initial and Second Periodic Reports, *supra* note 883, paras. 399-402.

⁹¹⁷CEDAW, 35th Session, Summary Record of the 732nd meeting, *supra* note 909, para. 47.

⁹¹⁸CEDAW, List of issues and questions with regard to the consideration of an initial and periodic report: Malaysia, 10 February 2006, UN Doc. CEDAW/C/MYS/Q/2.

did not apply to assets acquired solely by the wife.⁹¹⁹ The Syariah Court had the power to issue orders for a husband to provide maintenance for a wife, for a husband to provide maintenance to children, or for the distribution of assets jointly acquired by the husband and wife during marriage, but no more.⁹²⁰ There remained some confusion on this point – in session, one of the Committee members expressed the concern that “allowing a polygamous husband to dispossess his existing wife or wives and use the joint matrimonial assets to prepare the dowry for a new wife implicitly forced those women to choose between maintenance and the division of matrimonial property”.⁹²¹ This was not possible, according to the delegates, because any property acquired by the wife alone during the course of a marriage was not regarded as joint property, and a husband would have no claim to property belonging to his wife before their marriage.⁹²² A number of Committee members confessed to being “confused” by the laws on polygamy and the disposal of property⁹²³, but the rules as explained in Annex IX to Malaysia’s reply to the list of issues seem relatively clear; they also indicate that, at least insofar as disposal of property was concerned, it was determined that there should be no discrimination.

Finally, in its list of issues the Committee had raised a potential violation under Article 16 of the Convention in the way Syariah rules on divorce were applied in Malaysia: traditionally men had the right to *talaq* divorce (repudiation of marriage) whereas women could only petition the court for divorce (through *falakh*), and yet amendments to the IFLA meant that men would now also be able to divorce through *falakh* while the woman did not

⁹¹⁹CEDAW, Malaysia’s Response to the list of issues on its first report, Annex IX.

⁹²⁰*Ibid.*

⁹²¹CEDAW, 35th Session, Summary Record of the 732nd meeting, *supra* note 909, para. 32.

⁹²²*Ibid.*, para. 35.

⁹²³*Ibid.*, paras. 38-41.

receive the reciprocal right to *talaq*.⁹²⁴ This indicates, again, a somewhat pragmatic perspective on the part of the Committee: while separate systems for divorce operated for men and women, the primary concern should be that men did not have access to *both* systems where women had only one. The Malaysian delegates justified extending the right of *falakh* to men on the grounds that it was only to be used in limited circumstances, so that it did not result in a man having to pay maintenance to his wife where “conditions of the wife defeats the intention of the marriage”, as he would if he could only divorce her through *talaq*.⁹²⁵

The pre-sessional and sessional discussion of all of these issues seems to have remained oddly inconclusive in the final analysis. The Committee’s Concluding Comments on the area are as follows:

The Committee is concerned about the existence of the dual legal system of civil law and multiple versions of Syariah law, which results in continuing discrimination against women, particularly in the field of marriage and family relations. The Committee is also concerned about the State party’s restrictive interpretation of Syariah law, including in the recent [IFLA], which adversely affects the rights of Muslim women. The Committee is further concerned about the lack of clarity in the legal system...

The Committee urges the State party to undertake a process of law reform to remove inconsistencies between civil law and Syariah law, including by ensuring that any conflict of law with regard to women’s rights to equality and non-discrimination is resolved in full compliance with the Constitution and the provisions of the Convention and the Committee’s general recommendations, particularly general recommendation 21 on equality in marriage and family relations. In this regard, it encourages the State party to obtain information on comparative jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms. It also encourages the State party to take all necessary

⁹²⁴CEDAW, List of issues for Malaysia’s combined initial and second reports, *supra* note 918, para. 29.

⁹²⁵CEDAW, Malaysia Annex IX, *supra* note 919.

steps to increase support for law reform...⁹²⁶

This is somewhat nonspecific – it is not clear, for instance, what “progressive interpretations of Islamic law” refers to - and leads us back to general recommendation 21, which we have discussed above.

Besides the rules on marriage and related issues, the Committee aired concerns in a number of other relevant areas – marital rape and gender stereotyping.

Like Singapore, Malaysia does not criminalise marital rape: sexual intercourse by a man with his wife is not rape, except where the wife is living separately, where there is an injunction, and so on.⁹²⁷ In keeping with the different approaches taken by the two countries, however, Malaysia does not seek to justify this through appeal to societal mores in its report. It does, nonetheless, raise the defence of its laws as an attempt to reconcile women’s rights with the sharia law: a Parliamentary Select Committee had discussed the issue and concluded that marital rape could not be made an offence as this would be “inconsistent with sharia law”, but a compromise was the proposal that hurting or threatening to hurt a wife in order to compel her to “have relations” would constitute an offence.⁹²⁸ However, the Committee deemed this to be unsatisfactory: “the Committee is concerned that the proposal before Parliament on this issue is narrowly tailored to criminalise sexual assault based on the use of force and death threats by the husband, rather than marital rape based on lack of consent of the wife....the Committee requests the State party to enact legislation criminalizing marital rape, defining such rape on the basis of

⁹²⁶CEDAW, Concluding Observations on Malaysia’s Initial and Second Periodic Reports, *supra* note 884, para. 13-14.

⁹²⁷CEDAW, Malaysia’s Initial and Second Periodic Reports, *supra* note 883, para. 453.

⁹²⁸CEDAW, 35th Session, Summary Record of the 732nd meeting, *supra* note 909, para. 54.

lack of consent of the wife”.⁹²⁹ It is notable, however, that there was some confusion over which Article of the Convention this issue fell under: Article 2 or one of the provisions of Article 15 or 16.

Finally, the issue of gender stereotyping is also raised. In its Concluding Comments the Committee recommends that Malaysia “implement[s] comprehensive measures to bring about change in the widely accepted stereotypical roles of men and women...[including] awareness-raising and educational campaigns addressing women and men, girls and boys, and religious leaders with a view to eliminating stereotypes associated with traditional gender roles in the family and in society.”⁹³⁰ It also urged Malaysia to encourage political parties to introduce quotas, like it did to Indonesia, and also to use training programmes “on leadership and negotiation skills for current and future women leaders”⁹³¹. Although, by and large, there was much less discussion of this area than there was for some of Singapore’s reports, presumably because Malaysia did not at any point raise even a partial justification for gender stereotyping in its Report or its response to the list of issues. When Committee members stressed the importance of eliminating gender-based stereotypes over the long-term, calling cultural change a “long and difficult process” and opining that the “ideological shift necessary to bring about lasting attitudinal changes” would take “much longer than the corresponding legislative process”⁹³², the Malaysian delegates expressed more-or-less complete agreement, and cited a number of measures designed with the long-term goal of eliminating gender-based stereotypes in mind, both during the dialogue and the response to the List of Issues. These included, for instance, using guidelines on school

⁹²⁹ CEDAW, Concluding Observations on Malaysia’s Initial and Second Periodic Reports, *supra* note 884, para. 21-22.

⁹³⁰ *Ibid.*, para. 16.

⁹³¹ *Ibid.*, para. 18.

⁹³² CEDAW, 35th Session, Summary Record of the 731st meeting, *supra* note 908, paras. 40-43.

textbooks to attempt to combat stereotypes of women as inferior to men, or being incapable of holding leadership positions⁹³³, and providing a 30% quota for the number of leadership posts in the civil service to be held by women⁹³⁴.

The Committee also “noted with concern that restrictions on women’s employment, as well as protective employment legislation, policies and benefits for women, perpetuate traditional stereotypes regarding women’s roles and responsibilities in public life and in the family”.⁹³⁵ This ‘protective employment legislation’ refers to the Employment Act 1955, which amongst other things contained provisions preventing women from working between 10pm and 5am and preventing them from working underground; the government delegates suggested that exemptions from the former provision were generally given blanket approval by the Director General of the Department of Labour⁹³⁶, though this was not true of the prohibition on night work.

ii) Analysis

As was said at the start of this section on Malaysia, there is not a large amount of actual interpretive practice by the Committee in relation to Malaysia, because of the fact that the State has effectively only submitted one report to this date.

Nonetheless, what has emerged from this brief survey is certainly of interest, especially when we compare Malaysia and Singapore: aside from the thorny issue of Islamic personal law, Malaysia makes practically no attempt to justify the manner in which it

⁹³³ CEDAW, Malaysia’s Response to the list of issues on its first report, UN Doc. CEDAW/C/MYS/Q/2/Add.1, para. 10.

⁹³⁴ *Ibid.*, para. 9.

⁹³⁵ CEDAW, Concluding Observations on Malaysia’s Initial and Second Periodic Reports, *supra* note 883, para. 19.

⁹³⁶ CEDAW, Malaysia’s Response to the List of issues on its first report, *supra* note 913, para. 23.

implements the Covenant by referring to socio-cultural factors – quite the opposite, in fact. And, indeed, even when it comes to Islamic personal law, Malaysia (despite its apparent obsession with the Asian man as *persona religiosa*⁹³⁷) hardly portrays itself as unwilling to attempt to better reconcile the Sharia with the Convention, as its comments in the Summary Records and its gradual withdrawal of its various reservations shows.

That said, however, there are three areas which bear a more detailed examination for the purposes of our illustrative analysis. These are the issue of marital rape; gender stereotyping in the family, the political field, and the labour market; Islamic rules on marriage and divorce; and minimum marriage ages.

Marital rape

The Committee's views on marital immunity in Malaysia are very clearly expressed: it is of the opinion that Malaysia has the obligation under Articles 2, 15 and 16 to criminalise the practice, defining it as lack of consent of the wife.⁹³⁸ This is a clear instance of authentic interpretive practice which also meets the Step 2 requirements, given the fact that the Committee has expressed the view that marital immunity for rape is in violation of the Convention to a number of States Parties and in its General Recommendation No. 19, as was discussed earlier in this section. However, as we have also seen, Singapore seems resistant to that interpretation and in disagreement, considering marital immunity to be an area in which socio-cultural factors – the importance of preserving the special character of marriage in Singapore – ought to affect how the Convention is implemented, to the extent that

⁹³⁷See A. Ibrahim, *The Asian Renaissance* (Times of Singapore, 1996).

⁹³⁸*Ibid.*, para. 21-22.

marital immunity ought to be permissible. Thus, there is no subsequent practice establishing the agreement of the parties regarding this apparent interpretation, and the Committee's recommendation to Malaysia is of exhortative value alone. The fact that a Parliamentary Select Committee had dismissed the possibility of criminalising marital rape outright because it would conflict with sharia law suggests that Malaysia's stance, too, could not be categorised as one of agreement with the Committee. Although this raises the question of whether a Parliamentary Select Committee could be deemed a relevant actor for expressing agreement or disagreement, in the absence of statements from the delegates themselves it is certainly indicative.

Gender stereotyping in the family and the political sphere and the labour market

The Committee, as we have seen, had recommended to Malaysia that it institute two sets of measures to attempt to eliminate traditional stereotypes portraying women in a subservient role in the family, and in the political field, as obligations under Article 2 (f) and 5 (a)⁹³⁹. This included educational and public awareness campaigns, and encouraging the use of quotas for female candidates in political parties. As we have seen from the reporting history of Indonesia and Singapore, both of these are consistent with recommendations that the Committee has made to other States Parties in Concluding Observations, and in the form of General Recommendations, in a common, concordant and consistent fashion.

Malaysia's reply to the List of Issues for its Initial and Second Periodic Report, and the summary records of the constructive dialogue, also do not indicate any form of disagreement with any of this interpretive practice. Indeed, in the constructive dialogue

⁹³⁹ *Ibid.*, paras. 15-18.

delegates explained that the government encouraged NGOs to conduct educational campaigns to combat gender stereotypes⁹⁴⁰, and that it had instituted a so-called “SMARTSTART” campaign to encourage newly married couples to share responsibilities equally in the household.⁹⁴¹ It also described efforts on the part of political parties to establish leadership programmes for young women⁹⁴². And it is worth noting that, at least at the time of Malaysia’s report, 32.3% of the members of the Federal Parliament and 32% of the members of the Senate were women. This does not necessarily indicate agreement on the use of quotas, of course, but nor does it indicate disagreement. Regardless, the agreement on using educational and public awareness campaigns to reduce gender stereotypes in the family and political field is clear.

On the issue of the Employment Act 1955 and its restrictions on women working between 11pm and 5am and working underground, there was no discussion in the constructive dialogue, and thus the Malaysian delegates did not have an opportunity to expand on the issue or give the government’s opinion on the matter. The Committee has, however, expressed concern with ‘paternalistic’ restrictions on women’s capacity to work to some States Parties, such as Morocco⁹⁴³, Armenia⁹⁴⁴, and Kuwait⁹⁴⁵. It will also be recalled that protective restrictions on women’s right to work instituted by the government of Indonesia were viewed as in violation of Indonesia’s obligations under Article 11. However, it will also be recalled that Indonesia’s response to this recommendation can hardly be categorised as in agreement, and given that the issue was not raised in the constructive dialogue on Malaysia’s Report, the case for this interpretive practice meeting the Step 3

⁹⁴⁰ CEDAW, Summary Record of the 731st meeting, *supra* note 908, para. 46.

⁹⁴¹ *Ibid.*, para. 44.

⁹⁴² *Ibid.*, para. 57.

⁹⁴³ See e.g. CEDAW, A/52/38/Rev.1 part I (1997), para. 65.

⁹⁴⁴ See e.g. CEDAW, A/52/38/Rev.1 part II (1997), para. 58.

⁹⁴⁵ See e.g. CEDAW, A/59/38 part I (2004), paras. 72 and 73.

requirement is somewhat weak on this basis alone.

Marriage and divorce

As we have seen, the Committee's interpretive practice regarding the rules on marriage in Malaysia is inconclusive and vague – possibly as a result of the complexity of the rules themselves. Though a recommendation is made that Malaysia should “undertake a process of law reform to remove inconsistencies between civil law and Syariah law”⁹⁴⁶, and it is encouraged to “obtain information on comparative jurisprudence and legislation, where more progressive interpretations of Islamic law have been codified in legislative reforms”⁹⁴⁷, and although the Committee does refer to its general recommendation 21, it hardly needs emphasising that its concluding observations here are non-specific, open to further interpretation, and probably unable to even satisfy the Step 1 requirement of being authentically interpretive.

Moving into the summary records of the constructive dialogue, we find more detail, but we have already established that statements made in this format should not be viewed as being authentically interpretive for VCLT subsequent practice purposes. Thus, although the Committee's views on *talaq* and *fasakh* divorces and the division of property, for instance, are relevant as supplementary means of interpretation, they are not relevant insofar as Article 31.3(b) is concerned. Nonetheless, here we also find items of relevance for our analysis of the interpretive practice of the Committee regarding Indonesia. It will be recalled that the Committee gave common, concordant and consistent statements

⁹⁴⁶ See *supra* note 884.

⁹⁴⁷ *Ibid.*

expressing its view that permitting polygamy under any circumstance was in violation of Article 1, 5(a) and 16 of the Convention to Indonesia and various other State Parties, and that Indonesia appeared to be in agreement; but it is doubtful that this is also true of Malaysia. Although the Malaysian delegates expressed disapproval of polygamy and favoured monogamy, it is also true that they seemed to view polygamy under the Syariah law as an exception⁹⁴⁸. Thus, it is hard to categorise Malaysia as being in agreement – implied or otherwise – with the Committee on this point: it seems to view Islamic values as being a permissible influencing factor in how Articles 1, 5(a) and 16 are implemented insofar as polygamy is concerned. If this were the case, it would mean that there is in fact no subsequent practice establishing the agreement of the parties in the Committee’s interpretive practice in this regard.

Minimum marriage ages

We have already seen that it is difficult to view the Committee’s interpretive practice regarding minimum marriage ages as constituting subsequent practice, because Indonesia’s stance is best characterised as being in disagreement. Malaysia’s own stance would seem to reinforce this: although the Malaysian delegates shared the Committee’s concern about girls aged 10-14 being married⁹⁴⁹, they did not take issue with separate rules based on the Syariah in this respect (though, of course, this exception is based on reservations Malaysia entered to Article 16 (1) (a) and (b)).

⁹⁴⁸ See *supra* notes 908, 909.

⁹⁴⁹ See *supra* note 908.

iii) Concluding Remarks

More than is the case for Singapore and Indonesia, we can see that the Committee's Concluding Observations towards Malaysia are generally too broad and nebulous to be definitive enough to satisfy the Step 1 requirement, and that most of its specific concerns are expressed in the List of Issues and the dialogue with the Malaysia delegates, which have value as supplementary means of interpretation rather than as elements constitutive of subsequent practice. This is, undoubtedly, in part due to a lack of clarity in Malaysia's combined Initial Report and a lack of expertise with Malaysia's legal system on the part of Committee members, preventing more definitive recommendations from being made.

This makes it worth repeating that our assessment makes no normative critique of the way in which the treaty bodies give their recommendations: our aim is to address the extent to which, specifically, those recommendations can be constitutive of subsequent practice establishing the agreement of the parties to the CEDAW on the interpretation of its provisions, and in this sense at least we can say that, regarding Malaysia, the interpretive practice of the CEDAW Committee does not do so to a great extent. This, in turn, suggests to us that even where, superficially, there appears to be less disagreement than might be guessed at, given the history of the State Party concerned, it may still be the case that there is sufficient lack of agreement to, in turn, hinder the development of subsequent practice and hence, ultimately, evolutive/programmatic interpretation.

D. Other Issues

Finally, our overview of the reporting practice of Singapore, Indonesia and Malaysia has

raised a number of other issues which do not come under the rubric of subsequent practice, but which are worth briefly discussing. These are, firstly, reservations, and secondly, various areas in which the Committee seemed to view certain socio-culturally particular implementations of the Convention as being permissible, or at least did not raise objections to them.

i) Reservations

We have seen, from the overview of the reporting histories of Singapore and Malaysia, that those States both entered a number of reservations on ratification of the CEDAW – sufficient in number to show that they are certainly an area which bears further consideration and analysis. Singapore, for instance, entered the reservation that:

Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such laws and conditions governing the entry into, stay in, employment of and departure from its territory of those who do not have the right under the laws of Singapore to enter and remain indefinitely in Singapore and to the conferment, acquisitions and loss of citizenship of women who have acquired such citizenship by marriage and of children born outside Singapore.

This does not imply that there is any socio-cultural value at stake in making this reservation to Article 9⁹⁵⁰. However, in its Initial Periodic Report it was stated that the reservation was entered to “ensure that [Singapore's] immigration policy remains in line with our Asian

⁹⁵⁰See *United Nations Treaty Collection*, Chapter IV, 8. Convention on the Elimination of All Forms of Discrimination Against Women, Status, Singapore, fn. 55, available at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#55 (visited 15/07/2012).

tradition where husbands are the heads of households”⁹⁵¹, as we have seen.

The Committee took the view that this reservation was unjustifiable:

The Committee urges the State party to further amend the nationality law so as to eliminate discrimination against women, and withdraw its reservation to article 9. The explanation that a Singaporean woman cannot transfer nationality to her child when a [sic] marries a foreigner and the child is born overseas, since dual nationality is not recognized, is unconvincing. The Committee wishes to point out that since both mother and father can transfer nationality to children born within the country in many countries, including Singapore, the same problem can arise with respect to the children born of Singaporean men and foreign women.⁹⁵²

However, it is notable that these remarks make no particular reference to the ultimate rationale given by Singapore in the Initial Report – that the state immigration policy had to remain consonant with the Asian tradition where husbands are the heads of households – and rather rely on a (somewhat difficult to follow) instrumentalist position⁹⁵³, seemingly arguing that Singapore's reservation was unsuitable to achieving the goal which the government entered it for (and not necessarily implying that the Committee actually saw the goal itself as problematic). That is, it seems that the Committee's objection was not based on the reservation being incompatible with the object and purpose of the treaty *per se*, but rather on it being incompatible to the extent that it deprived Singaporean women of equality with men in a fashion that was disproportionate to the desired goal.

In other words, it is not entirely clear that the Committee took the view that absolutely no discrimination would be permitted regarding Article 9 (2) on socio-cultural grounds. As mentioned above, the rationale for the Committee's position on that

⁹⁵¹CEDAW, Singapore's Initial Periodic Report, *supra* note 594, para. 2.3.

⁹⁵²CEDAW, Singapore's Initial and Second Periodic Reports, Concluding Observations, *supra* note 611, para. 75.

⁹⁵³What the ECJ might refer to under the rubric of 'proportionality'.

reservation seemed to rely on a relatively standard proportionality-based analysis: nowhere in its reasoning did it state that it was of the opinion that Singapore's nationality law was inherently incompatible Convention. Rather, it adopted a functionalist perspective, taking Singapore's explanation as a failure on its own terms:

The explanation that a Singaporean woman cannot transfer nationality to her child when a [sic] marries a foreigner and the child is born overseas, since dual nationality is not recognised, is unconvincing. The Committee wishes to point out that since both mother and father can transfer nationality to children born within the country in many countries, including Singapore, the same problem can arise with respect to the children born of Singaporean men and foreign women.⁹⁵⁴

This suggests that its opposition was based on the fact that the law would not achieve the end set for it (and hence the discrimination was not proportionate, in the sense that it would have no positive effect) rather than an absolutist perspective that discrimination in this regard would never be acceptable were the State to provide a coherent justification for it. Certainly, it is difficult to take from the Committee's reasoning on this issue that it judged cultural particularism in implementing the obligations contained in this Article to be entirely unjustifiable in all circumstances.

It is worth referring to the Summary Records of the meetings where these Reports were considered. Here, the Singaporean representative had stated that:

[A] key reason for [the reservation to Article 9] was to allow the non-citizen father the first opportunity to register his son or daughter as a citizen of his own country. Singapore did not recognize dual nationality and its prevailing social values and norms considered it primarily the

⁹⁵⁴ CEDAW, Singapore's Initial and Second Periodic Reports, Concluding Observations, *supra* note 594, para. 75.

father's duty to provide for the child.⁹⁵⁵

This makes the Committee's reasoning more confused – it is not abundantly clear how its comment actually incorporates any sort of response to this justification, nor what it is referring to as “the same problem” – but setting that issue aside, it remains the case that its rationale seems based on an ECJ-style proportionality argument (the discrimination is disproportionate to the intended goal, in the sense that it would not be effective in realising it) rather than speaking directly to the socio-cultural particularist justification given by Singapore itself that there was a need to recognise the prevailing social values and norms which considered the father to be the head of the household and to have the duty of providing for children. Of course, the Committee has expressed its views on such social values and norms on numerous occasions, but it is somewhat unusual that in the context of this reservation it did not apparently deem such a justification as incompatible with the object and purpose of the Convention.

This probably indicates that this reservation was, in fact, permissible as not being in contravention of the object and purpose of the Convention. Some States did object to Singapore's other, more general reservations, but only the Netherlands objected to this reservation to Article 9, stating that it was “an implicit reservation to Article 9, which is incompatible with the object and purpose of the Convention”⁹⁵⁶. This indicates that the Netherlands was of the opinion that any reservation to Article 9 – or, perhaps, any reservation to the Convention itself – was by definition inadmissible. It seems to have been alone in this view, however, and in any event the Netherlands did not see its objection as a

⁹⁵⁵ Committee on the Elimination of All Forms of Discrimination against Women, 25th Session, Summary Record of the 514th meeting, 9 July 2001, UN Doc. CEDAW/C/SR.514, para. 24.

⁹⁵⁶ Chapter IV.8 Multilateral Treaties Deposited with the Secretary-General, note 31.

barrier to the entry into force of the CEDAW between itself in Singapore.

Of course, Singapore ultimately withdrew this reservation shortly before its submission of its Third Periodic Report:

[I]n April 2004, the Singapore Parliament passed a bill to amend the Constitution of the Republic of Singapore to allow overseas-born children to acquire Singapore citizenship by descent from their Singaporean mothers. Hence, Article 122 of the Constitution of the Republic of Singapore is now gender neutral in that where a child is born on or after 15 May 2004, he/she shall be a citizen of Singapore by descent if at the time of his/her birth, either his/her father or mother is a citizen of Singapore, by birth, registration or descent.⁹⁵⁷

No particular reason was given for this, although it can be surmised that the government had not been able to adequately justify the discrimination and had perhaps been persuaded by the proportionality-based reasoning offered by the Committee during its consideration of the prior Reports.

This does, however, demonstrate that there are perhaps areas in which States Parties to the CEDAW or other human rights treaties might make use of reservations to attempt to make allowances for socio-cultural values in the way in which they implement human rights treaty provisions, and that such reservations might not be incompatible with the object and purpose of the treaty or viewed as such by the relevant treaty body. A detailed analysis of the reservation practice of other State Parties under other treaties would be required to make any further assessments on this point.

Malaysia, of course, entered a great deal more reservations than Singapore – initially to Articles 2(f), 5 (a), 7 (b), 9(1), 9(2), 16(a) 16(b), 16(d), 16(e), 16(1)(f), 16(1)(g), 16(h), and 16 (2) – all on the basis that they conflicted with the provisions of its Constitution and sharia

⁹⁵⁷CEDAW, Singapore's Third Periodic Report, *supra* note 595, para. 9.2.

law. These were objected to by Sweden, Norway, the Netherlands, Germany and Finland, generally on the basis that some or all were incompatible with the object and purpose of the Convention, were too general, or contravened the principle that internal law should not be invoked as a justification for failure to perform treaty obligations. By the time of its combined Initial Report Malaysia had already withdrawn its reservations to Article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h), and in 2010 it further withdrew those to Articles 5 (a), 7 (b) and 16 (2). It also modified several of its reservations to make them more specific, and attracted further objections, from Austria and France. However, the Committee's views on these reservations were expressed in a cursory fashion – “the Committee urges the State party to review all its remaining reservations with a view to withdrawing them, and especially reservations to article 16, which are contrary to the object and purpose of the Convention”⁹⁵⁸, and difficult to interpret (it is not clear whether the Committee meant that any reservation to Article 16 would be impermissible in its view, or whether it was implying that Malaysia should withdraw those reservations to Article 16 which were contrary to the object and purpose of the CEDAW; this then raises the question of which reservations those were). It is clear that here, too, further assessments would require a more detailed and thorough analysis than is possible in this thesis, locating the reservations of Malaysia and Singapore in a wider context of reservations to human rights treaties and their permissibility or otherwise.

ii) Permissible means of implementation

At various stages during the reporting history of Singapore, Malaysia and Indonesia we find

⁹⁵⁸ CEDAW, Concluding Observations on Malaysia's Combined Initial Report, *supra* note 884, para. 10.

instances in which measures of implementing the Convention are described in a manner which suggests that socio-cultural factors are of significant importance in how the treaty is put into effect, and which the Committee impliedly views as permissible by not drawing attention to them as being in any sense incompatible with the Convention either during the dialogue with the State or in Concluding Observations.

One such area is the use of censorship, in particular to ban pornography. All three States Parties cite measures taken in this regard. In Singapore's Initial Report, for instance, we find the State Party stating that:

In Singapore, censorship plays a role in creating a balance between maintaining a morally wholesome society and becoming an economically dynamic, socially cohesive and culturally vibrant nation. It helps to protect the young against undesirable influences and safeguards central values such as the sanctity of marriage, the importance of the family, respect for one's elders, filial piety, moral integrity, and respect for and tolerance toward different racial and ethnic groups. Pornographic materials are banned in Singapore.⁹⁵⁹

The use of censorship, in the Singaporean government's view, contributes towards the elimination of gender stereotypes under Article 5 of the Convention. And these comments, clearly, link censorship with protecting precisely the kind of values that are the hallmarks of the Asian values movement – the importance of the family, filial piety, social cohesion, and also the view of the government as benevolent and paternal guardian of society.

Likewise, Malaysia, in its reply to the list of issues for its Report, cites its Communications and Multimedia Content Code, which bans pornography under 'obscene content'⁹⁶⁰, as a measure to combat the stereotyping of women, again under Article 5. And

⁹⁵⁹ CEDAW, Singapore's Initial Periodic Report, *supra* note 594, para. 6.4.

⁹⁶⁰ Malaysian Communications and Multimedia Content Code, para. 3.1(i): "Any portrayal of sexual activity that

Indonesia, too, instituted a law banning pornography on the recommendation of its Ministry of Women's Empowerment in 2008⁹⁶¹, and again cites this as one of its measures taken to implement Article 5 of the Convention. Malaysia and Indonesia were less prolix in their explanations for the reasoning behind the banning of pornography, but the Indonesian delegates at the 39th session explained that "[the law's] intent was to stipulate how the Indonesian people should be protected from the harmful effects of pornography"⁹⁶², again calling to mind the notion of the State in the Asian values schema as the benevolent guardian.

The Committee did not pass comment on such measures in any of its Concluding Observations, or during its dialogue with any of the States Parties, indicating that, at the very least, it did not view them as being in any way incompatible with the Convention, and that Article 5 could be interpreted to so as to be implemented in this fashion – i.e. by censoring or banning pornography. While it would perhaps not be correct to discuss subsequent practice developing on this issue, it is certainly not the case that the Committee takes a view that any of the socio-cultural factors involved in the three governments' decisions to ban pornography ought not to affect implementation of Article 5.

Another example is the various measures enacted by Singapore in particular to strengthen the position of the family and incentivise marriage, which are also presented as means of implementing Article 5. For example, in its Initial Report Singapore describes how "strengthening families...to build a strong and resilient society is given strong emphasis by

a reasonable adult considers explicit, and pornographic is prohibited." Available at www.cmcf.my/download/CONTENT_CODE_V6-Final.pdf (last accessed 24th August 2012).

⁹⁶¹Law 44/2008; see also CEDAW, Indonesia's Fourth and Fifth Periodic Report, *supra* note 705, para. 71, and CEDAW, Indonesia's reply to the list of issues on its fourth and fifth report, *supra* note 787, p. 5.

⁹⁶²CEDAW, 39th session, 799th meeting, UN Doc. CEDAW /C/SR.799 (A), para. 48.

the government”⁹⁶³, through organising a National Family Week every year and setting up a Family Development Division within its Ministry of Community Development to “co-ordinate policies and programmes to strengthen families and to adopt a family approach in solving problems”.⁹⁶⁴ Alongside these generalised policies, however, are other more specific measures, such as the Public Scheme for public housing, which requires a ‘family nucleus’ comprising either an applicant and spouse with children if there are any; the applicant and his/her parents and/or siblings; or the applicant and children in his/her custody if widowed, separated or divorced – two single people must generally be over the age of 35 in order to purchase a publicly owned property.⁹⁶⁵ Likewise, priority schemes for public housing include the Multi-Tier Family Scheme to encourage extended families to live in the same flat, the Third Child Priority Scheme to “promote three-child family norm”, and the Joint Selection Scheme encouraging married children and parents to live in the same estate to foster family interaction and care of aged parents.⁹⁶⁶ These schemes – which it is arguable constitute a form of discrimination based on personal status – are not taken up by the Committee, and it seems that, again, the argued Asian preference for the strong family seems to have been impliedly deemed as an influencing factor in the manner in which Article 13 is given effect in Singapore, and that the Committee has not rejected that perspective.

Another such instance is the Malaysian government’s emphasis on what it calls “Women for Health”: emphasising the role played by women in maintaining the health of family members and noting that, particularly in the informal sector, it is women who attend to the health needs of the family rather than men.⁹⁶⁷ The government seems to view the

⁹⁶³ CEDAW, Singapore’s Initial Periodic Report, *supra* note 594, para. 6.19.

⁹⁶⁴ *Ibid.*

⁹⁶⁵ See *ibid.*, para. 14.3-14.5.

⁹⁶⁶ *Ibid.*, para. 14.6.

⁹⁶⁷ CEDAW, Malaysia’s Initial and Second Periodic Report, *supra* note 883, para. 283-284.

fact that women are not recognised for this financially or economically as problematic, but does not seem to view this socio-cultural tendency as one requiring elimination or rectification, and the Committee does not take a view on the matter.

Finally, the Committee also has an ambiguous relationship with sharia law, giving the impression in some instances that it believes Islamic law to be capable of being interpreted ‘progressively’ and in a manner compatible with the Convention (in other words, that Islamic values might affect how the Convention is implemented in form, but not substance) while on others expressing the view that the existence of a “dual legal system” was itself a concern. Perhaps the best example of this dichotomy is found in the Concluding Observations to Malaysia’s combined Initial Report, in which, in the space of two paragraphs, the Committee both gives a negative assessment of the lack of clarity in the dual legal system in Malaysia, “which results in continuing discrimination against women”, while at the same time encouraging Malaysia to draw from “comparative jurisprudence and legislation” to develop a more progressive interpretation of Islamic law⁹⁶⁸. It is not altogether clear whether the Committee itself is sure whether it views the existence of separate systems of Islamic personal law as intrinsically in violation of the Convention *per se*, nor where the line between progressive and non-progressive interpretations of Islamic law might lie. Nonetheless, it is by the same token arguable that the Convention might be implemented while maintaining separate legal regimes for Muslims.

This indicates that further research is required, taking the reverse perspective to that offered in this illustrative analysis – i.e., examining States Parties’ own interpretations of the Convention to attempt to discern agreement and commonality, concordancy and consistency, since it is the States Parties themselves from which this interpretive practice

⁹⁶⁸ See *supra* note 884.

seems to flow. Such an analysis would further complement the approach taken in this section of the thesis, and provide a more complete and accurate answer to our initial question.

E. Future Developments

It is important to emphasise once more that this illustrative analysis is incomplete in several respects, and has not been intended to be comprehensive. Several of these areas of incompleteness have already been described and the reasons given, but in summary, those are as follows. First, we have not examined the role reservations play in any great detail, aside from Singapore's reservation to Article 9. This was an omission made by choice, because the reservations which these States Parties did make tended to relate specifically to Islamic personal law rules, but it is an omission nonetheless. It is clear that further analysis of the role reservations play in carving out culture-based exceptions is necessary if we wish to answer our core question regarding the permissibility of cultural values affecting implementation, particularly in light of the ILC's 2011 report discussed in Chapter IV. Such an analysis would likely examine the treaty bodies' views on reservations in greater detail, and survey the reservations entered by all States Parties to attempt to discern any patterns and to judge them against the ILC's standards, which would require assessing their compatibility with the object and purpose of the relevant treaty and hence assessing what the actual 'object and purpose' of the treaties are.

Our analysis is also incomplete in that general recommendations are only included as an element of the commonality, concordancy and consistency test for subsequent practice arising out of the reporting process. This is, clearly, important, but it is not the only

relevance that general recommendations have. As we discussed in Chapters III and IV, general comments are certainly of interpretive character themselves, and hence formative of subsequent practice in their own right, provided of course that the 3-Step test is satisfied. Again, this is an omission made by choice, for reasons given in Chapter III, but it is still an omission, and further analysis incorporating this awareness of the role of general comments and recommendations must also be carried out. Additionally, much of these remarks could also be made about the individual complaint mechanisms. It so happens that neither Indonesia, Singapore nor Malaysia has ratified the Optional Protocol to the CEDAW, but it is impossible to imagine that individual complaints would have no bearing on the development of interpretive practice, despite the problems with that view that were discussed in Chapter III. This, clearly, is an area which would bear more thought.

And finally, given the nature of the requirements of commonality, concordancy and consistency, and of agreement implied by silence, it was not possible to form any absolute conclusions on the existence of subsequent practice, simply because it was not feasible to analyse the reporting histories of all States Parties to the CEDAW to assess agreement or disagreement on every point. Our analysis is therefore preliminary in nature, and would have to change were it to emerge through more refined and extensive study that other States Parties indicated disagreement with the interpretive practice of the Committee on any given issue. This is doubly true when we consider the size of the sample we have taken. There are important differences between all three of our State Parties. Singapore is notably more willing to disagree with the Committee than Malaysia and Indonesia for instance, while Malaysia makes far more use of reservations to attempt to carve exceptions for Islamic personal law in particular; Indonesia on the other hand presents a more amelioratory stance than either. Given that these differences are so apparent just between these three

geographically contiguous and culturally somewhat similar societies, we should expect even greater differences between other States Parties – so the potential for disagreement with the interpretive practice of the Committee is likely to be correspondingly great.

This naturally leads us to the question: what follows from our preliminary analysis? Three different analytical routes suggest themselves. The first would be addressing issues surrounding Asian values specifically. The second would be answering the broader issue of cultural relativism in the implementation of human rights treaties in general. And the third would be providing a method for analysing the interpretive practice of the treaty bodies in general as subsequent practice under the VCLT.

i) Asian Values

Our first route would lead us to conclusions about Asian values specifically: to what extent is it permissible for the implementation of human rights treaty provisions to be influenced by Asian values, however they are defined? This would involve the following pattern of analysis.

Firstly and most obviously, Step 3 of our three-step analysis requires examining all of the responses of all of the relevant actors to determine whether there is disagreement or agreement with any interpretive practice of the treaty bodies which is common, concordant and consistent. This would mean, at the very least, surveying all of the responses of all of the delegates to the Concluding Observations of the CEDAW Committee, including the responses to the Lists of Issues and summary records of the dialogue, to ascertain whether there was any disagreement with anything meeting the criteria for common, concordant, and consistent interpretive practice of the Committee with respect to Singapore, Malaysia and Indonesia. This would obviously be an extensive and time-consuming process, encompassing

the reporting histories of 184 States Parties. However, nor would it be an unfeasible task, and it will have been noted that, once the pattern of analysis has been crystallised, an examination of these documents would be a relatively straightforward matter. Thus, it is proposed that the next and most important stage in the process would be to extend our analysis to cover the other 184 parties to the CEDAW, focusing on those issues which our preliminary examination of the reporting histories of Singapore, Malaysia and Indonesia revealed to be of particular interest. These would be those issues which, at least within the reporting histories of these three States, appear to satisfy all of the requirements for the 3 Step analysis – the purpose being to provide a comprehensive conclusion to whether Step 3 is satisfied for the interpretive practice regarding those issues, through the extensive survey of all of the States Parties.

This would provide us with concrete answers, as far as the issues raised in respect of Singapore, Malaysia and Indonesia were concerned, within the CEDAW interpretive practice context. The next stages would require broadening the analysis to cover the interpretive practice of the CEDAW Committee with respect to those other States which have been involved in the Asian values discourse – China, and to a lesser extent South Korea, Taiwan and Japan – following a similar pattern, identifying interpretive practice and subjecting it to our 3-step analysis. Once done, this would allow us to begin to make definitive statements about the extent to which the CEDAW is currently permitting of implementation influenced by socio-cultural factors – primarily in the general context of ‘Asian values’ – although it would also have to be accompanied by a more complete and nuanced overview of the Committee’s General Recommendations and views on individual complaints where they existed.

Naturally, what would then follow would be a replication of this process with regard

to the other human rights treaties: the CRC (to which all of the States concerned are signatories) and then to the ICCPR, ICESCR, and so forth. The results from such a survey would provide us with a more conclusive and definitive answer to the question to what extent is it permissible for the implementation of human rights treaty provisions to be influenced by Asian values. This, in turn, would provide us with the full legal perspective which was identified in Chapter I of this thesis as lacking in the Asian values debate.

The pattern of analysis could also be productively applied, it will not have gone unnoticed, to what was described in Chapter I as the 'economic relativism' expressed by nations such as China in tandem with the wider arguments in favour of cultural values being a mitigating factor in the face of universal human rights norms. This, as has been noted, led to – in extreme cases – Chinese political representatives at the Vienna Conference arguing that until a certain level of economic development had been achieved, "human rights were out of the question". But it is also present in much of what is provided in the State Reports to the CEDAW Committee by Singapore, Malaysia and Indonesia. We have seen, for instance, how Singapore described the negative effect the poor state of the regional economy (in its view) had on its capacity to fully realise its efforts to ensure full female participation in the work place and to ensure that maternity and paternity leave were provided in its Initial and Second Periodic Reports. Just as examining the interpretive practice of the treaty bodies as VCLT subsequent practice allowed us to provide a legal perspective on the cultural elements of the Asian values debate, so it could also provide a perspective on the economic ones.

ii) Cultural Relativism in General

Asian values is, of course, only a facet of a much wider debate surrounding culture and

economic development and how these variables should affect how human rights treaty obligations are implemented, as was elaborated upon in Chapter I, and as has been implicit in the thesis even if not explicitly addressed. Clearly, our analytical framework also has the capacity to contribute towards filling what was identified as a gulf in the scholarship in this wider discourse at the beginning of this thesis: using it, we can begin to answer the question of how far international law permits factors such as culture to impact on implementation.

However, it has to be accepted that attempting a comprehensive answer is likely to be overambitious. Attempting to survey, let alone analyse, the reporting histories of all States Parties to all of the major human rights treaties in an attempt to discern commonality, concordancy and consistency of interpretive practice regarding socio-cultural values, and agreement or disagreement with it, would be an effort monumental in scope. Less ambitiously, however, this analytical framework could fruitfully be used to address more specific and narrow questions about the legal weight of a given treaty body's interpretation of a given treaty provision.

For example, to take an obvious issue that has been discussed extensively in the scholarship on cultural relativism and human rights, the legal value of the various treaty bodies' interpretations of provisions in their respective treaties regarding female circumcision could be relatively simply assessed through the use of this framework. The process would involve examining all of the treaty bodies' interpretive practice on the issue (in Concluding Observations, General Comments, and so on) and weighing its commonality, concordancy and consistency before surveying State Party responses for agreement or disagreement. If all of the requirements set out in our framework were met, it could then be argued that there was subsequent practice establishing the agreement of the parties on the interpretations given by the treaty bodies; and, likewise, the reverse if those requirements

were not met. Other areas where such an analysis could be applied will be obvious.

This, it goes without saying, could apply equally to the interpretive practice of the treaty bodies regarding minority rights or personal law regimes. As we saw in Chapter II, minority rights regimes and personal law regimes are intimately connected with cultural rights, and hence provide us with an additional layer of complexity, but the crux of the relationship between international human rights norms and minority rights regimes is usually where the line between cultural rights and other rights (of women, children, etc.) lies, and that itself is an area in which interpretation is of paramount importance. The treaty bodies, that is, must offer views on whether minority rights regimes or personal law regimes are being reconciled in a permissible fashion with treaty obligations, and this act is by its nature interpretive. Since this is the case, our framework can also be used productively to provide us with a particular, more concrete legal perspective on that relationship.

iii) General interpretative practice of the treaty bodies

Finally, since so much of the work of the treaty bodies is interpretive, a similar pattern to that undertaken in this thesis could also be productively applied to their work in general, again on an issue-by-issue basis. For instance, to take an obvious example, the CEDAW Committee generally expresses a view that a quota of 30% female participation in political parties is required in order to provide the critical mass to encourage women to enter into politics of their own volition and thus realise the right to political participation expressed in Article 7 for the female population of a given State. It is not difficult to imagine how, based on our 3-Step analysis, we could examine this view as a potential instance of VCLT subsequent practice. It might also be suggested that the 3-step analytical framework could

be used for assessing the effect of final views on individual complaints where they exist, and General Comments issued by treaty bodies, by subjecting them to the same process: locating them in context and deciding whether they form part of a body of interpretive practice that is common, concordant and consistent, and whether States Parties agree.

None of this, it should be repeated, is to suggest that the interpretive practice of the various treaty bodies is without value if it cannot be considered constitutive of subsequent practice under the VCLT. The monitoring process is not fully judicial, and its role has always been presented as being exhortative or persuasive: put simply, the work of the treaty bodies is, in large part, an exercise in attempting to cajole States Parties into compliance with what the treaty bodies view as being their obligations. This, of course, does not require their interpretations to have the kind of legal weight which being subsequent practice under Article 31 (3) (b) of the VCLT would carry.

At the same time, however, we should take seriously the suggestions of those such as Mechlem, who notes that the legitimacy of the process is at stake if the treaty bodies do not operate in the same 'normative background' as States Parties do; in other words, if they do not follow the same rules. As we know from disputes involving the United States, France and the Human Rights Committee, this not an imaginary concern: it potentially undermines the entire process. This means that an awareness of the legal rules that could potentially inform the process is important, even if it is not decisive.

As well as providing us with considerable insights into how cultural values are permitted to affect implementation, then, our analysis has also provided us with a pattern which we can apply, productively, in a wide variety of contexts – indeed, wherever conceptualising the work of the treaty bodies as being potentially constitutive of subsequent practice under the VCLT would be useful or important. It also, naturally, suggests its own

expansion and elaboration, firstly as a means of providing a definitive legal perspective on the Asian values debates in the CEDAW context and ultimately within all of the major human rights treaties, then by giving more particular legal perspectives on specific issues wherein cultural values intersect with treaty interpretation and implementation. These, of course, are the next steps which follow on from this thesis. We now turn to what has been achieved within it.

Conclusion

This thesis has attempted to address what was identified in Chapter I as a critical problem in the previous scholarship on cultural relativism in general and Asian values in particular: the focus on concerns which were by turn philosophical (such as the work of Donnelly or Beitz), political (such as that of Langlois or An-Na'im), or sociological (such as that of De Bary or Woodiwiss). International law itself, it was argued, was underrepresented, both in its own right – the focus was on either compliance or on theoretical foundations, and hence either less, or more, abstract than the level at which international human rights law itself is operant – and doctrinally, for there has been little or no scholarship examining cultural relativism as a question of *law*.

This led us to attempt to establish what the legal aspects of that issue might be – how, in other words, cultural relativism might be addressed within the law as a matter of doctrine, and also how its legal basis might be analysed. This led us to the conclusion that if cultural relativism was a question of law, it was fundamentally a matter of interpretation; the issue was, in effect, whether the law was interpreted to permit cultural values to exist as factors influencing the implementation of treaty provisions, and to what extent. This, in turn, led us to dismiss cultural rights as the correct locus for our examination: our interest was in cultural values as extraneous, independent variables affecting implementation of human rights treaty norms, not the balancing of cultural rights versus other rights.

Since cultural relativism was fundamentally a matter of interpretation, this led us to consider how international human rights law is to be interpreted in general, and how the unique aspects of human rights law – the manner in which it creates obligations between States to protect third parties, and the inappropriateness of contract-making *quid pro quo* –

require a special doctrine of programmatic, evolutive interpretation, and necessitate the creation of independent bodies to participate in the interpretive process, rather than leaving States to auto-interpret their own obligations. This was linked to a more practical consideration: international human rights treaties, for good reason, lack textual specificity, leaving their interpretations open and amorphous at first glance. This meant that, as well as being programmatic, interpretation of human rights treaties required elaborate and lengthy consideration, and was far from straightforward. At the same time, however, we concluded that, despite the interpretation of human rights treaties necessitating these ‘special’ considerations, it still must take place against what we described as the normative background of international law – it must still be conducted in a manner compatible with the rules of international law generally understood.

This led us to Article 31 of the Vienna Convention on the Law of Treaties, and in particular to Article 31(3)(b), which provides “subsequent practice establishing the agreement of the parties” on the interpretation of a treaty provision as one of the rules guiding interpretation itself. This, it is most often argued, is the legal basis for programmatic interpretation, and also for the interpretive work of the United Nations treaty bodies in their Concluding Observations on State reports, their General Comments, their views on Individual Communications, and so on; and it was decided that, if we were interested in to what extent cultural values were permitted to influence the implementation of human rights treaty provisions, our window ought to be this rule of subsequent practice. In other words, for any given human rights treaty provision, does subsequent practice establish the agreement of the parties on its interpretation; and if so, what does that agreement say about the role of cultural values in implementation?

Once this was decided upon, it became necessary to develop a framework of rules –

what we have called a ‘pattern of analysis’ – for assessing whether subsequent practice exists or not in any given instance. This has not hitherto been addressed in the context of human rights, except briefly by the International Law Association, and so we were led to examining how such patterns of analysis have been developed in other contexts – in the International Court of Justice, in other international tribunals, and in particular in the Dispute Settlement Procedure of the World Trade Organization. This led us to a framework which drew upon the way in which subsequent practice has been dealt with by those tribunals, while taking account of the ways in which international human rights law is distinctive and separate. This framework – the 3-step analysis – is as follows:

Step 1 requires determining whether a given instance of interpretive practice (a treaty body offering an interpretation of a treaty provision) was ‘authentically interpretive’: that is, whether it was intended to be a definitive interpretation, and whether it was specific enough to be viewed as such. By and large, it was considered that only interpretive practice in the form of Concluding Observations, General Comments and final views on individual communications could be deemed authentically interpretive on a *prima facie* basis, and that even in those forms, some statements were too lacking in specificity or intentionality to be truly definitive interpretations.

Step 2 requires taking an instance of authentic interpretive practice and assessing whether it could be deemed common, concordant and consistent. Are interpretations of that treaty provision made with some amount of frequency across the monitoring practice with respect to other States Parties? Are those interpretations given in a manner that is similar? And are there any instances of contradictory interpretation? These requirements were left

somewhat vague, because of the way in which interpretation of human rights treaties by the treaty bodies occurs – being cyclical, infrequent, and, except in the case of General Comments, specific to individual States Parties. Yet it was made clear that isolated instances of interpretive practice should certainly not be viewed as potentially constitutive of subsequent practice, and contradictions should likewise obviate it.

Finally, Step 3 requires determining whether States Parties expressed their agreement. In general, it was accepted that agreement could be implied by silence: that, provided States Parties did not expressly disagree with an instance of interpretive practice performed by a treaty body, it could be assumed that they agreed with it impliedly. However, Step 3 is a strict requirement: any disagreement expressed by a State Party with any instance of interpretive practice of a treaty body would be enough to render it non-constitutive of subsequent practice establishing the agreement of the parties. States Parties, it was decided, primarily express agreement or disagreement through delegates to the treaty bodies and in other international forums. Domestic organs are not generally relevant actors for this purpose, because if they were deemed as such it would result in a tautologous situation in which the very institutions which are charged with the protection of rights would feed into the process by which their obligations were interpreted.

While we were not able to conduct a full analysis of the CEDAW as a case study in how this pattern of analysis could be used, our survey achieved three things. Firstly, it allowed us to test whether this 3-step, subsequent practice-based analysis was a fruitful method by which to answer our question about cultural relativism: to what extent are cultural factors permitted to affect implementation of human rights treaty provisions? Secondly, it gives us

some insights into the conceptual arguments surrounding cultural relativism that were outlined in the first half of Chapter I of this thesis. And thirdly, it allows us to make some preliminary comments about the legal elements of the 'East Asian challenge'.

On the 3-step analysis generally, even though our case study was only preliminary in nature (primarily because it was not possible to conduct a full enough examination of the interpretive practice regarding all of the States Parties to meet the Step 3 requirements), we were still able to see how it could provide us with valuable insights: we were able to see, for instance, among other things, that subsequent practice does not indicate agreement of the parties that cultural values should not affect the implementation of Article 16 regarding minimum marriage ages or spousal consent for sterilization or abortion, but that it does seem to indicate agreement of the parties that cultural values permitting polygamy should be ignored in the implementation of Article 16. This, in itself, demonstrates how this sort of subsequent practice-based technique could function, while also providing us with some concrete – though contingent - results.

When it comes to the broader, conceptual debates about cultural relativism and human rights, our legal analysis also provides valuable insight. It was argued that an understanding of the legal issues was what was missing from the scholarship on this issue in general, and indeed, we can see how this understanding helps us evaluate the theoretical positions that are often advanced.

For instance, the very process of State reporting which we have examined calls to mind the kind of discursive, evolutionary, inconclusive mechanism – 'agonistic pluralism' – which Anthony Langlois advocates. As will be recalled, Langlois' view was that human rights should be seen not as fixed philosophical standards but as contested, discursive, and emergent processes: as he put it, "the criteria for what is finally adopted into the discourse

are determined by the state of the discourse at any one point in time, conceptualised as a set of living shared practices, combined with those ideas and ways of life that can be absorbed through interaction, discussions, living together, and so forth". As this thesis seems to show, this is in fact a summation of the legal processes which currently exist, and which we can surely describe as 'agonistic' themselves, being composed of a discourse between the treaty bodies and the States Parties which is itself formative of law, and which evolves and changes over time. The present system, indeed, could be said to contain both the potential for discursive pluralism and a considerable level of discourse inherent to it. The recognition of conflict, diversity and disagreement which Langlois calls for already seems to exist within the field of human rights *as law*. In failing to take account of this, indeed, his arguments could be said to be superseded, at least as far as their normative content is concerned.

Beitz and An-Na'im, as we saw, also concern themselves with dialogue and discourse, and, as should be apparent, a better understanding of the legal processes can also inform their approaches. Beitz argues that human rights are not an order of values deriving from deep universal norms but, rather, a 'global practice', which arises from the process by which members of the global community use human rights as a means for deliberating and arguing about how to behave. He attempts to provide a 'practical conception' of human rights, repositioning them around their usage rather than philosophical foundations, and in the end concluding that reasonable disagreement should be possible between members of the international community in most cases, and that ensuring that decisions on rights issues were legally binding would hinder 'practical reasoning about conduct in global politics'.

None of what is revealed by our analysis would contradict any of these points, and, like Langlois, Beitz seems in fact to be describing what, in fact, occurs: there is, certainly,

room for reasonable disagreement in the reporting process, and, perhaps most crucially, as our 3-step method reveals, practical reasoning about conduct in global politics is not hindered by the process, since nothing is binding without the consent of the State Parties - despite the authoritative nature of the treaty bodies' interpretive practice. And his description of human rights as emergent values rather than foundations deriving from universal norms is compelling, but also seems to be, in effect, an impressionistic description of the creation of subsequent practice through the monitoring work of the treaty bodies: we can envision human rights treaties, without difficulty, as the basis on which emergent processes clarify and crystallise agreement between the parties through discourse and dialogue – with the treaty bodies as facilitator and central organiser. Indeed, it could be reasonably argued that our legal, subsequent practice-based analysis provides us with a better understanding of the mechanisms whereby Beitz' notion of 'global practice' takes place.

An-Na'im's views are also given flesh by a closer reading of the legal processes. His argument, as we saw, was fundamentally one of legitimacy: if a right could be located within the cultural practices of a society, rather than being imposed from outside, it would be likely to be seen as legitimate and hence more likely to be complied with. The basic flaw with this argument – that there is no methodologically empirical way of confirming or refuting it – is still apparent, but our analysis has clarified the extent to which the cultural practices and values of societies in Southeast Asia tend to be viewed as barriers to the implementation of human rights treaty provisions, rather than as by means of giving effect to, and legitimising, that implementation. Where An-Na'im portrays the process as one in which liberal Western values are imposed, however, we have seen that in fact, at least as far as Southeast Asia is concerned, it is just as much a question of governments imposing values on their own

populations than it is of treaty bodies or Western States, and that in general government delegates tend to portray their own populations as (regretfully) intransigent on women's rights, for example. This may be a crucial consideration to those, such as An-Na'im, who express concern about the legitimacy of human rights norms which do not find expression in existing social values or express cross-cultural consensus, and it adds a considerable requirement for nuance to these critiques.

For Donnelly, our framework provides a technique for solving what was identified as the crucial flaw – the lack of a concrete means for assessing the extent to which consensus actually exists around a given norm. Donnelly's argument, as will be recalled from our survey in Chapter I, was deemed crucially lacking in that it assumed that agreement between States would generally exist at some level of abstraction, but the assertion was meaningless without some means by which to discover at what level that agreement or consensus existed. Our framework permits us to make more concrete statements about what States agree on, and to what extent: it allows us to judge at what level Sunstein's incompletely theorised agreements are present, if at all. At the preliminary stage, we might say that, at the very least, the level of abstraction at which agreement exists varies a great deal, but is relatively 'low' in most cases: in general, disagreement tends to occur around relatively specific and narrow issues – whether marital immunity should exist or not, for instance – and concerns how implementation is to be effected. That is not to say, of course, that consensus over grand and abstract norms is to be assumed. Discussion of the philosophical bases for treaty provisions, and even over foundational questions such as the appropriateness of censorship, is extremely rare within the treaty monitoring process: rather than there being 'agreement' on higher, more abstract questions, indeed, we might better characterise the entire system as one in which there is agreement to disagree on

foundations, with much of the discourse surrounding specifics: Sunstein's incompletely theorised agreement operating at the 'mid-level principle', in other words.

In the final analysis, then, it seems that in actual fact it is those theorists – Langlois and Beitz – who view the process as emergent, discursive and evolutionary who are most descriptively accurate: the vision of human rights as a framework in which agreement is gradually and progressively, and perhaps inconclusively, arrived at through practice, rather than from foundations or theory, is compelling. What has not hitherto been adequately acknowledged, however, is that the mechanisms of international law-making, interpretation and implementation are themselves constitutive of the framework by which these discursive and practice-based processes occur. This, as we have seen, is primarily achieved because of very way in which these processes work: they are, in themselves, dynamic and evolutive in nature, as is required because of the nature of international human rights law itself, which is almost unique in the ambivalence of its provisions and the way in which it creates obligations for States Parties. That is, human rights treaties, owing to their own lack of specificity, and owing to the way in which they are monitored and implemented, create the very need for evolutive interpretation, and that in itself creates the space in which discourse and practice solidify and crystallise meaning and agreement.

This, finally, illustrates the truth of what many scholars have identified as the crucial element of the human rights system's success: its absence of foundational or philosophical justifications, allowing reasons and norms to be contested. To paraphrase Maritain's anonymous Chinese delegate at the drafting of the UDHR, the system of international human rights law has created the means by which the conditions for agreement are created, without a requirement to ask the reason why agreement occurs. Previous scholarship has failed to adequately take account of the fact that international law is itself part of that

mechanism.

As far as Asian values is concerned, if the preliminary analysis of the reporting history of Singapore, Malaysia and Indonesia under the CEDAW is broadly indicative of the reporting history of other States Parties to that Convention, and of all of the States Parties to other human rights treaties, then we can be relatively comfortable in stating that in the great majority of instances, socio-cultural factors are usually deemed within the interpretive practice of the treaty bodies to be a hindrance to the implementation of treaty provisions which ought to be removed. Aside from some nebulous comments to the effect that human rights are not incompatible with traditional culture in Indonesia, or with some 'progressive' conceptions of sharia law, in almost no circumstances do the treaty bodies view socio-cultural values with a sympathetic eye or view it as permissible for those values to be taken into account in the manner in which implementation occurs. In some areas there seems to be tacit or implied acceptance, as in the case of censorship as a means for eliminating gender stereotypes in Singapore and Malaysia, which is sometimes tied to Asian social values.

What is perhaps somewhat surprising is that, at least as far as the reporting procedure is concerned, we can safely assert that, as Sonia Harris-Short discovered in her analysis of African and Islamic States' reports under the CRC, it is rare, if ever, that delegates take an uncompromising line on tradition or culture.⁹⁶⁹ Indeed, like her, we can state that "an important feature [of the reports] is that, in many instances, the 'appeal to culture' is not being used to launch a direct challenge to the basic legitimacy or relevance of the Covenant's standards but instead comes down to a less contentious plea for patience and

⁹⁶⁹S. Harris-Short, "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" 25 HRQ 130 (2003), p. 154.

sensitivity while working towards change".⁹⁷⁰ This is less true, perhaps, of Singapore, which as we saw in our overview does take what might be considered an 'uncompromising line' on some issues – most notably on marital immunity and homosexuality. However, it can certainly be argued with respect to Malaysia, and even more so of Indonesia. The overwhelming tenor of the comments made by delegates from those States Parties at least in the CEDAW context is one of broad support for the interpretations offered by the Committee, coupled with an almost rueful acknowledgement that ordinary members of society do not share the delegates' attitudes. Like Harris-Short, we might even say that the delegates adopt an almost hostile perspective towards their society's traditions.⁹⁷¹ It might be concluded, of course, that this signifies the importance of human rights norms becoming 'internalised' within pre-existing cultures and traditions if they are to be implemented successfully, calling to mind the arguments of An-Na'im discussed in Chapter I. Clearly, that is an argument that takes us beyond the limits of this thesis, however.

Following on from this, we have seen how government members and intellectuals from Singapore, Malaysia and Indonesia alike have made sometimes strident remarks about the undesirability of human rights, about the cultural imperialism which the treaty bodies represent, and so on, in political forums and in opinion pieces in journals. However, when it comes to matters of law, we find that much of this variety of disagreement disappears – that once obligations have been undertaken under the CEDAW, these States Parties do not make any attempt to present an anti-imperialist cultural defence of their traditions. Rather they seem, at least at face value, to view obligations under the CEDAW as actual legal obligations, and while they do not in all instances discuss the interpretation of the provisions of the

⁹⁷⁰ *Ibid.*, p. 155.

⁹⁷¹ *Ibid.*, p. 149.

Convention as a matter only of law, nor do they do so purely as a matter of international politics. When Singapore, for instance, disagrees with the Committee on marital immunity or homosexuality, its delegates at no point make any attempt to raise cultural imperialism or Western values or anything of that nature as an attempt to divert any critique; largely, it resorts to simple majoritarianism: Singaporean society does not wish for homosexuality to enter the mainstream, for example. The disagreement is overwhelmingly framed as one of interpretation, not foundation.

The value of this thesis is threefold, then. First, it provides an empirically legal perspective on cultural relativism by setting out an analytical framework for examining how cultural values interact with international human rights law itself, and thus contributing to answering our core question: To what extent does international law permit cultural values to affect how human rights treaty obligations are implemented? Second, because of this empirically legal perspective, it begins to fill a gap in a branch of scholarship which has hitherto focused on cultural relativism in international human rights as a philosophical, political, sociological, but not *legal* question – to its detriment. And thirdly and finally, it sets the stage for further, more elaborate, and more conclusive research, which will provide definitive answers as regards how far international law permits cultural values to influence the implementation of human rights treaty obligations, and hence, if not provide a solution to reconciling universality of human rights standards with profound diversity, at least provide a means by which to assess to what extent this reconciliation already occurs.

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