

MINORITY RIGHTS, MINORITY WRONGS

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Since the fall of the communist bloc fifteen years ago, the practice of democracy has spread infectiously from the old epicenters of Soviet power in Russia, Central Asia and Eastern Europe through the distant African, Asian, and American satellite states sponsored by the Cold War conflict. Some genuine democratic transitions have taken place, while other shifts have been democratic more in form than substance. But most of the countries of the world now at least go through the motions of holding elections and making verbal obeisance to concomitant respect for constitutional limits on government authority and incarnations of universal human rights. Unless a nation has the economic, military, or political clout to shoulder its way into the world community on its own, at least some show (although arguably, no more than that) of respect for these values is perceived as necessary for successful participation in vital international institutions and processes.

In the wake of these developments, there has been an explosion of “national human rights institutions,” that is, independent government agencies whose purpose is to promote enforcement of human rights. Whereas there were only a few national human rights institutions before 1970, hundreds were established in the democratization wave of the 1990s.¹

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

¹ See International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions 1 & 57-59* (March 2000), available at www.international-council.org (last visited Mar. 7, 2005) (hereafter ICHRP report); Office of the U.N. High Commissioner for Human Rights, Fact Sheet No. 19, *National Institutions for the Promotion and Protection of Human Rights* (1993), available at <http://www.unhcr.ch/html/menu6/2/fs19.htm> (last visited Jan. 20, 2005) (hereafter “UNHCR Fact Sheet”). The United States has not established national human rights institutions as such on the federal level, preferring to channel such concerns exclusively through the courts apart from a few specialized bodies like the EEOC. However, corollary institutions such as human rights commissions and ombudspersons are more common in the United States on the state and municipal level.

international community.² These institutions look much alike on paper, but their actual effect has varied enormously from state to state. While some have languished in limbo, awaiting legislative implementation or the appointment of key officials, many are active, and some have become influential forces promoting human rights within their states.³

Minority groups⁴ should be a primary constituency for institutions whose mandate is to investigate claimed abuses and to protect vulnerable populations. Many transitioning states are severely ethnically divided, with numerous minority groups, languages and religions, and with entrenched divisions between the groups. These divisions and the conflicts they produce represent a fundamental challenge for the continuing existence of these states. In these conflicts, human rights and minority

² Of course, this signaling purpose for acceding to international human rights standards is by no means unique to new democracies. See David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 *Northwestern Univ. L. Rev.* 879 (2003). But the development of new norms and institutions are steps that are inherent to the process of creating a new government, and are therefore characteristic of, although not exclusive to, new democracies' efforts to signal compliance and thereby establish international credibility.

³ See ICHRP report, *supra* note ___, at 111-17.

⁴ I am using the term "minority group" here and throughout the article to refer to a non-majority community in a state made up of multiple communities, including ethnic, racial and religious groups. This term, like the others used to describe groups in this article, is both highly contestable and vigorously contested. Nonetheless, I have chosen to use it because the term is in wide use in spite of its shortcomings and because much of what I will discuss in this article is a set of legal rights that are commonly referred to as "minority rights," and so it is helpful to use a corresponding term to describe the groups to whom those rights might accrue. Those attempting to define the term "minority" have managed to reach agree that a minority is a group of people within a state. The sticking points have been (1) whether the test for minority status should be objective or subjective or both; (2) if objective, (a) whether the relevant criterion for minority status should be relative numbers or power or both, and (b) what other criteria are relevant for defining the scope of groups, e.g. ethnic, religious, or linguistic differences; and (3) if subjective, whether the relevant viewpoint should be that of other communities, that of the group in question, or both. See, e.g., Francesco Capotorti, Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* ¶ 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979). See also Explanatory Report, *Framework Convention for the Protection of National Minorities* (entered into force 1998) ("It should also be pointed out that the framework Convention contains no definition of the notion of 'national minority' based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.")

rights values are one set of battlefields, and claimed abuses are the weapons of choice for allside s.⁵

Nonetheless, only a few of the newly established institutions in severely divided states report developing programs to effectively reach minority populations, and many shy away from involvement in their conflicts. Instead, the institutions that report establishing programs or offices to address minority concerns tend to be in better established democracies and less severely divided societies. The programs that do exist in transitioning states tend to be limited, both in their aspirations and in their implementation.⁶

To some extent, these lapses can be described in pragmatic terms, as failures of resources, legal imagination, or political will. But on another level the question of the relationship between minority groups and rights – individual liberal rights and minority group rights – goes to the heart of a state’s vision of democracy. Should these transitioning states constitute themselves as liberal democracies, minimizing minority identities and emphasizing individual freedoms and a broader civic loyalty to the state? Or would they do better to establish themselves as communitarian democracies, recognizing their multiple communities as the constituent elements of the states? In these struggles to define the structure of political power, both minority groups and the state put human rights values to use in service of their interests.⁷

⁵ Northern Ireland presents a classic example of a severely divided state where human rights claims are used by battling communities and the state. See Dominic Bryan, *Parading Protestants and Consenting Catholics in Northern Ireland*, 5 Chi. J. Int’l L. 233 (2004).

⁶ As discussed below, many of the severely divided or transitioning states with minority-directed programs are current or aspiring members of the European Union, spurred to action by EU mandates. See discussion *infra* section C.2.

⁷ Of course, whatever its structure, a democracy need not be either liberal or communitarian in its function. Instead, elections may serve as a guise for establishing authoritarian control, for instituting a tyranny of the majority, or for minority rule through an effectively one-party system. However, few governments will announce themselves as authoritarian. A final possibility, then, is an illiberal, non-communitarian state that will nonetheless conceptualize and market its rule to the population and the international community as the expression of either a confederation of multiple peoples, or of a single national identity, whether civic or ethnic in nature. See generally FAREED ZAKARIA, *ILLIBERAL*

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

This article is based on three lines of research: a qualitative global study of the work of national human rights institutions with minority groups; a review of case studies of individual national human rights institutions and minority communities; and interviews and participation in public discussion with individual ombudspersons and commissioners. To my knowledge, the qualitative study I have conducted is the first to look at the work of national human rights institutions with minority groups on a global basis. My purpose in using this tripartite approach was, first, to offer new empirical data about the work of national human rights institutions with minority groups; and, second, to create synergies between the different types of information produced by each line of research while balancing their inherent strengths and weaknesses. The appendix at the end of this article describes my research methodology, including the selection criteria and sources used for each of the three lines of research.

This article offers first, in part A, a discussion of the development of the system of minority rights and the democracy theory concerning those rights that provide the framework for the work of national human rights institutions on these issues. In part B, I provide a brief introduction to national human rights institutions and then discuss the results of my research concerning their work with minority groups. I identify patterns and trends in the development of minority-directed programs, and consider some of the crucial legal and political factors affecting such programs.

In part C, I consider the implications of my findings for the essential concepts of minority rights and democracy theory discussed in part A. The problem cases that have always existed on the margins of democratic theory are far more central in severely divided and transitioning states and seem to be increasing, both in number and severity. This theory of minority rights, developed in well established liberal democratic states, ought not be exported directly to the context of new democracies.

Finally, in part D, I discuss what role national human rights institutions might play in working with minority groups, focusing in particular on the complex concerns that arise in states where indigenous groups govern themselves under their own legal and political systems. While there are limits on the capacity of national human rights institutions, they could play a greater role than they do by serving as a forum for dialogue between minority groups and the state.

A. Minority Rights in Democracies

1. Group Conflict and International Rights

Most modern political states comprise multiple communities – ethnic, religious, linguistic, and cultural – that have conflicting interests, rights, and political preferences. Each state must determine how to accommodate these communities’

divergent interests within its political and legal structure. While well-established states struggle with these issues, particularly in the context of the rapid social movements and changes produced by globalization, the problem is particularly acute for transitioning states whose basic political structures are in flux. Because the make-up and interrelationships of communities are various and fluid, transitioning states cannot expect to resolve this conundrum with a universal, readily transplantable solution.

In this context, it must be noted that what Americans may consider obvious and natural solutions to minority group tensions in fact represent American exceptionalism based in the unrepresentative nature of American circumstances. The United States' indigenous communities⁸ represent a relatively small part of its population and do not now pose a fundamental threat to its security or national identity. Since its inception, the United States has been accustomed to sweeping tides of immigration that have resulted in constantly shifting social group patterns, and in accordant shifts in inter-group dynamics and allegiances. This is not to suggest that there is not substantial, significant group conflict in American society: of course, there is. But the scope and intensity of that conflict, as well as the risks that it poses, are on a smaller scale than in other, severely divided states. The United States has also developed a tradition of democratic process and judicial review that offers non-violent mechanisms for producing social change, such as lobbying and lawsuits, that

⁸ As with the term "minority group," *see* discussion *supra* note ___, there is no single authoritative definition for the term "indigenous." The term originated as a self-designation to facilitate political activism in the United Nations and other international contexts. *See* JOHN H. BODLEY, CULTURAL ANTHROPOLOGY: TRIBES, STATES, AND THE GLOBAL SYSTEM 361 (1994). The International Labor Organization defines indigenous peoples as: "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, (entered into force Sept. 5, 1991), art. 1 (hereafter "ILO Convention No. 169"). The convention also endorses self-identification as "a fundamental criterion" for indigenous or tribal status. *Id.*, art. 2.

have been at least relatively open to minority groups. Accordingly, the American approach has been to guarantee a unique status for indigenous peoples and individual rights for other minority group members, while relying on representation through political parties and political process rather than group accommodations, rights or power-sharing to assure inter-group stability. Whatever the pros and cons of these mechanisms in the American context, they are grounded in and shaped by that context.

In other states with different socio-political settings, the dynamics, the stakes, and the solutions are different. Ethnic and religious conflict is a frequent catalyst of unrest, war, and state failure. Separatist claims by communities that feel alienated from the state threaten the identity and territorial integrity of states from the Russian Federation to Indonesia to Iraq. Some states are comprised almost entirely of indigenous groups with claims that predate the state, and there may be hundreds of such groups, each with their own interests, cultures, and languages, as in Nigeria and Nepal. Inter-group rivalries and allegiances may likewise extend back for generations before the establishment of the state.⁹

Minority groups may have little or no opportunity to use lawsuits enforcing individual rights to raise their concerns, either because individual rights are not directly enforceable in court (as they are not in many states), or because the concerns of minority groups are not encompassed by purely individual rights, as when they concern questions of autonomy or land. By its nature, of course, the democratic process limits minority influence in policy-making by centering political power in majoritarian institutions. This problem can be exacerbated in transitioning states that have mastered the form of democracy in the shape of elections, but have not yet

⁹ See e.g., Donald L. Horowitz, *Ethnic Groups in Conflict* (1985); Rotimi N. Suberu, *Federalism and Ethnic Conflict in Nigeria* (2001).

developed the underpinnings of strong political parties or institutions of civil society that might integrate minority constituent interests into political platforms. In these contexts, states have adopted a range of political solutions, from explicit political power-sharing arrangements on the national level, to local guarantees of self-government, to, on the other hand, deliberate repression of non-dominant minority groups and identities.¹⁰

At this point, it is worth pausing to consider: Why is this issue important to the state? Why don't states simply ignore the claims of non-dominant communities who do not succeed in asserting those claims through the existing political and legal structure? Often, of course, states do ignore minority claims. But, as often, they cannot. If the state lacks the means to suppress, or at least to contain, separatist movements and minority calls for recognition and autonomy, it must somehow accommodate them, or risk destabilization.¹¹ Often, it is the reality of violent conflict that moves a state to take account of minority concerns.¹² And where such internal pressure does not exist, international pressure often plays a role.¹³ Finally, states with a true commitment to liberal democratic values will find themselves hard-pressed to deny entirely minority communities' claims without abandoning fundamental precepts of justice and equality.¹⁴

Under these influences and imperatives, many states have pursued strategies of limited accommodation. One such strategy has been the recognition of extensive

¹⁰ See Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development and Human Rights* 129-41 (1990).

¹¹ See e.g., Shaista Shameem, *New Impulses in the Interaction of Law and Religion: The Fiji Human Rights Commission in Context*, 2003 B.Y.U. L. Rev. 661, 662 (2003).

¹² See Kieren McEvoy & John Morison, *Beyond the Constitutional "Moment": Law, Transition and Peacemaking in Northern Ireland*, 26 *Fordham Int'l L. J.* 961, 993 n. 101 (2003); Honourable Hari N. Ramkarran, *Seeking a Democratic Path: Constitutional Reform in Guyana*, 32 *Ga. J. Int'l & Comp. L.* 585, 597-98 (2003).

¹³ See Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 *Denv. J. Int'l. L. & Policy* 387 (2003).

¹⁴ See Mark D. Rosen, *Liberalism and Illiberalism*, 12 *J. Contemporary Legal Issues* 803, 830-31 (2002).

minority rights, both on an individual and group basis.¹⁵ To this end, a body of international and regional treaties has developed guaranteeing some rights to minority and indigenous groups, ranging from rights of self-determination, to rights to promote their own culture, religion, and language, to rights of equality and non-discrimination under the law.¹⁶ Especially in the last fifteen years, constitutions and national legislation have also implemented at least some minority and indigenous rights protections.¹⁷ However, many of the most robust and well elaborated statements of minority rights come in the form of unenforceable declarations and many are subject to numerous caveats acknowledging the ultimate sovereignty of the state.¹⁸

Furthermore, the legitimacy of minority rights as such is highly contested, and the nature of those rights (if their legitimacy is accepted in principle), hardly less so. There are three problematic aspects to defining minority rights: determining the content of those rights; determining to which groups those rights will accrue; and determining whether the rights are collective or individual in nature.¹⁹

The best-established minority rights are those that are an integral part of the human rights canon. The prohibitions on genocide and discrimination, and the rights to practice one's religion, use one's language, and enjoy one's culture without

¹⁵ Protecting minority rights rather than universal rights is not a new phenomenon, but rather, represents a resurgence of an earlier practice. As concern over minority groups' vulnerability rose in Europe in the early part of the twentieth century, states agreed to bilateral and then multilateral treaties protecting particular minority groups. These earlier treaties were then superceded by the individual human rights approach after World War II. See Will Kymlicka, *Multicultural Citizenship* 2 (1985) (hereafter "Multicultural Citizenship").

¹⁶ See, e.g., International Covenant on Civil and Political Rights, art. 1, 26 & 27 (entered into force Mar. 23, 1976) (hereafter "ICCPR"); Framework Convention for the Protection of National Minorities, (entered into force 1 February 1998) (hereafter "National Minorities Framework Convention"); Convention concerning Indigenous and Tribal Peoples in Independent Countries, art. 3, (entered into force Sept. 5, 1991) (hereafter "ILO Convention No. 169").

¹⁷ See, e.g., ETH. CONST., art. 39.

¹⁸ See, e.g., Draft United Nations Declaration on the Rights of Indigenous Peoples, Adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26, 1994. U.N. Dec./CN.4/1995/2, E/CN./Sub.2/1994/56, at 105 (1994); Proposed American Declaration on the Rights of Indigenous Peoples, Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session.

¹⁹ See Miriam J. Aukerman, *Definitions and Justifications: Indigenous and Minority Group Protections in a Central/East European Context*, 22.4 HUMAN RTS. Q. 1011, 1030-32 (2000).

interference from the state are well established in positive law and are accepted by most states, at least in principle.²⁰ While they tend to operate for the benefit of minority groups, only the cultural rights are defined by reference to minority status. Although these rights, particularly the cultural rights, are generally exercised in a group, they are understood to be enforceable in court by individuals rather than by the group as a whole.²¹

In contrast, while the right to self-determination has been asserted repeatedly in international instruments such as the UN charter, there is not consensus on the scope of this right nor on which groups are entitled to exercise it. Because it is a right that is understood to be collective rather than individual, it is often treated as non-justiciable.²² And although a set of other, commonly asserted minority rights has emerged – rights of participation as well as autonomy, rights to measures designed to achieve substantive as well as procedural equality, rights to self-definition as well as self-determination – there is not broad international consensus on these additional rights either.

Some of the most difficult minority-related issues for national human rights institutions lurk here, at the cusp of newly developing minority rights. The most notable recent developments in recent minority rights standards have been implemented through new, regionally accepted treaties focused specifically on minority rights, such as the International Labor Organization's Convention No. 169 on indigenous peoples (ratified primarily by American states) and the Framework Convention for the Protection of National Minorities (ratified solely by European

²⁰ See Convention on the Prevention and Punishment of the Crime of Genocide (entered into force Jan. 12, 1951) (hereafter "Genocide Convention"); ICCPR, *supra* note __, art. 1, 26, & 27.

²¹ Protection against discrimination extends to all individuals, while protection against genocide is held by all members of national, ethnic, religious, or racial groups, regardless of minority status. See ICCPR, *supra* note __, art. 26-27; Genocide Convention, *supra* note __, art. 2.

²² See, e.g., R.L. v. Canada, Communication No. 358/1989: Canada 28/11/90. CCPR/C/43/D/358/1989 (UN Human Rights Committee decision).

states).²³ These treaties list extensive and detailed rights accruing to the protected groups, far beyond the general principles of prior human rights treaties. For example, ILO Convention No. 169 not only protects indigenous groups' rights to use their traditional lands, but also requires states to take account of their spiritual connection to the land, traditional ownership and methods of transmitting land, and their traditional use and natural resources. Not only must states permit indigenous communities to maintain their own internal legal systems, they must also respect their methods of punishment and take account of their culture when punishing them in state courts.²⁴ Likewise, the Framework Convention not only guarantees national minorities' use of their own language privately, but also on public signs, with the authorities in minority areas, and upon arrest.²⁵

But it is not merely in their specificity and extent that these claimed but contested minority rights differ from older, better accepted ones. While minority community members' rights to non-discrimination and equality under the law are readily exercised and enforced as individual rights, some of the interests promoted by these new treaties are by their nature exercised either by the community as a whole, or at least by community members in concert with one another. In particular, the specific rights to use of land and to legal systems protected by the ILO convention are less consonant with political and civil liberties which are held and enforced individually,

²³ ILO Convention No. 169 requires states to implement "special measures" to protect indigenous peoples and their cultures in areas as law, development, land use, and education, but it has been ratified by a limited number of countries, most heavily in Central and South America. These rights apply only to indigenous peoples as defined by the treaty. See ILO Convention No. 169, *supra* note __, art. 1 & 5; International Labor Organization website, ratifications, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (last viewed Feb. 25, 2005).. See also Framework Convention, *supra* note __; Explanatory Report, Framework Convention for the Protection of National Minorities, par. 13; European Charter for Regional or Minority Languages (Council of Europe) (entered into force Mar. 1, 1998). The Framework Convention has been ratified by virtually all European states, but it has no equivalent outside of Europe and has not been ratified by any non-European states. See Council of Europe website, Treaty office, Framework convention ratification page, <http://conventions.coe.int> (last visited February 27, 2004)

²⁴ See ILO No. 169, *supra* note __.

²⁵ See Framework Convention, *supra* note __.

and more consonant with economic and social rights, which are held collectively and therefore often regarded as non-justiciable. It is notable, therefore, that even as it ensures rights such as language that could be characterized as group or collective rights, the Framework Convention on National Minorities carefully couches these rights as accruing to individual community members, rather than to the communities themselves.²⁶ In so doing, it makes its mandates more amenable to enforcement in courts; however, it simultaneously limits the scope and character of the rights that can be claimed. Some minority groups have complained that their interests are fundamentally diminished for being reduced from collective claims to individual ones, and from claims for community governance to claims for particularized protections for narrow interests.²⁷ Minority claims that are either collective or socio-economic in nature, or both, have presented challenges for national human rights institutions.

The other sense in which these new rights are defined differently than the old is in the relationship that these treaties anticipate the state will develop with its minority groups. Ordinarily, states are expected to respect minority groups by not interfering with them (e.g., by granting autonomy, ignoring private cultural practices, and so on) or by actively protecting them from outside threats.²⁸ These new treaties require the state also to consult with indigenous and national minority groups, to interact with them, and to grant them the right to participate authoritatively in the state, rather than solely giving them a defined sphere of autonomy. Thus, ILO Convention No. 169 does not merely require the state not to interfere with indigenous groups' traditional land through development, nor merely to protect indigenous

²⁶ *See id.*

²⁷ *See* C.C. Tenant and M.E. Turpel, A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination, 59 *Nordic J. Int'l L* 287, 291 (1990).

²⁸ *See, e.g.* ICCPR, *supra* note __, art. 27.

groups from unwanted development by private parties, but also to consult with indigenous groups about the state's development plans that would affect them and about the groups' own independently determined development goals, and to ensure that they are able to participate in decision-making²⁹ Similarly, although less extensively, the Framework Convention requires states to “create the conditions necessary for the effective participation of persons belonging to national minorities in social, economic and cultural life and in public affairs, in particular those affecting them.”³⁰

This is a far more sophisticated vision of the relationship between indigenous groups and the state, and one that is in some ways far more demanding than a mere cession of limited autonomy. In particular, and as will be discussed at length later, these complex demands are also reflected in the claims received by national human rights institutions, and they require the state to develop fora for effective dialogue between the minority group and the state.

Finally, where a framework of minority rights has succeeded in taking root, the recharacterization of minority interests as legal rights has proven a powerful rhetorical and legal tool for minority groups. The resurgence of minority rights principles in recent years has permitted groups to move certain battles from the political arena (where they frequently lost) to the legal arena (where their record may improve), and to use this threatened change of venue as an additional bargaining chip in the political realm as well. It has also provided minority groups with a legally cognizable shield against human rights based attacks by the state. Instead of claiming their internal practices represent an extra-legal, cultural exception to legal human rights standards, they can now reify their cultural claim as a legal one, the human

²⁹ See ILO Treaty No. 169, *supra* note __, art. 6-7.

³⁰ See Framework Convention, *supra* note __, art. 15.

right to practice and preserve their culture.³¹ The trade-off is, as discussed above, that to make these claims legally cognizable in the current legal structures, they must be limited and narrowed. But in at least some cases, this trade-off may be worthwhile.

For human rights claims cut both ways: while I have thus far discussed only the ways in which minority groups use rights to pursue their agendas with the state, states also use human rights claims to contain and control minority groups. Communities may be perceived as challenging the liberal values promoted by human rights law, and state recognition of “cultural exceptions” to human rights guarantees or of some level of autonomy or self-government outside the scope of human rights guarantees may be regarded as “shield[ing] illiberal and undemocratic enclaves.”³² A minority community’s failure to adhere to human rights principles may serve as a point of criticism by the state, justifying interference with community norms or institutions.³³ Alternatively, community members may themselves turn to the state to enforce their rights.

Human rights guarantees thus present an acute catalyst of conflict between minority communities and the state, as well as a mechanism for channeling conflicts between minority groups and the state. Accordingly, the patterns of those conflicts in new democracies depends to some extent on the system of minority group protections the transitioning state adopts.

2. Democracy Theory

³¹ Concerning conflicts between human rights claims and culture, see Makau Mutua, *Savages, Victims and Saviors: The Metaphors of Human Rights*, 42 Harv. Int’l L. J. 201 (2001); Leti Volpp, *Feminism versus Multiculturalism*, 101 Colum. L. Rev. 1181, 1187 (2001); L. Amede Obiora, “*Supri, supri, supri, Oyibo?*” *An Interrogation of Gender Mainstreaming Deficits*, 29:2 Signs: Journal of Women in Culture and Society 649, 654 (2003).

³² James Tully, *Strange Multiplicity* 191 (1995) (criticizing this perception).

³³ See, e.g., Elizabeth Heger Boyle, *Female Genital Cutting* (2002).

Democracy theorists who focus on questions of minority rights offer a range of views about the proper place and scope of those rights.³⁴ For purposes of this discussion, there are three focal points on this spectrum that represent important touchstones for newly emerging democracies: traditional liberalism, liberal pluralism, and communitarianism.³⁵

On the one hand, liberal thinkers such as Chandran Kukathas and Jürgen Habermas argue that the core of legitimate democracy is individual, liberal rights. Traditional liberals contend that these rights adequately protect minority cultures, and that minority group claims that cannot be characterized as classic liberal, individual rights inevitably conflict with and diminish those individual rights in practice.³⁶ The United States has by and large adopted this approach, providing minorities with the full gamut of individual political and civil liberties including the right to be free from discrimination, and providing particular minority protections only through narrowly

³⁴ The writing on the place of minority group rights in the democratic state is only one branch, albeit a fairly discrete one, of the vast literature on minority and majority groups in the modern state. *See, e.g.*, Arendt Lijphart, *Democracy in Plural Societies* (1977); Ernst Gellner, *Nations and Nationalism* (1983); Donald Horowitz, *Ethnic Groups in Conflict* (1985); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991); Stephen Tierney, *Constitutional Law and National Pluralism* (2004).

³⁵ Surrounding these three focal points are numerous subtle distinctions and debates that I cannot explore here, in the interest of focusing on those aspects that are most crucial to my study. Several concerns that I do not discuss are the relative “thickness” or “thinness” of national and minority identities, the significance of other political values to this debate, and the contested definitions of virtually every crucial term. *See, e.g.*, *Multiculturalism* (ed. Amy Guttmann 1994) (essays including Charles Taylor, *The Politics of Recognition*, Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, and K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*).

³⁶ *See* Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM*, *supra* note __, at 113 (“A correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed. This does not require an alternative model that would correct the individualistic design of the system of rights through other normative perspectives. All that is required is the consistent actualization of the system of rights.”). Chandran Kukathas makes the more modest claim that while liberalism may not optimally protect minority interests, it nonetheless provides the best possibility for conflicting groups and individuals to co-exist by not promoting any individual or group notion of the good but merely “upholding the framework of law within which individuals and groups can function peacefully.” *See* Chandran Kukathas, *The Liberal Archipelago* 249 (2003) (hereafter “*Liberal Archipelago*”).

crafted exceptions granting autonomy for Native Americans and permitting racial distinctions to facilitate certain affirmative action programs.

In contrast, “liberal pluralists” such as Will Kymlicka and Charles Taylor argue that traditional theorists err by conceiving of the liberal state as culturally neutral, when it in fact possesses and enforces certain culturally specific characteristics (such as its choice of official language) on a multicultural polity.³⁷ Because individuals value their cultures and can exercise freedom of choice meaningfully only in the context of those cultures, individual autonomy requires that minority cultures be preserved. Accordingly, providing some additional, systematic protections for minority groups with other cultural characteristics will not necessarily conflict with, and will in fact often promote, core liberal values of justice and individual autonomy.³⁸

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

³⁷ The terms to be used in describing the plural communities within a state are many and contested. I am using the term “multicultural” here as the broadest of those terms, to encompass, many kinds of difference within a state. However, liberal writers more frequently deploy narrower terms such as “multinational,” “polynational,” “polyethnic,” and so on, to distinguish amongst communities as the basis and legitimacy of their claims for protection, and to describe the subset of groups for which they would endorse such protections. “Multiculturalism,” therefore, describes the total set of communities within the state, and not the subset(s) of groups for which one or another liberal thinker would endorse protections. See *Multicultural Citizenship*, *supra* note __, at 10.

³⁸ See *id.* at 75-84; Charles Taylor, *The Politics of Recognition*, in *Multiculturalism*, *supra* note __.

claims. The hard cases are those groups, claims, or protections that threaten to impinge on liberal values or that place liberal values in conflict with each other.³⁹

From either the traditional or the new perspective, however, liberals agree that a fundamental risk in recognizing minority group claims for cultural protections or self-government is that these communities will form illiberal enclaves that will threaten the state's essential character as a liberal democracy.⁴⁰ For liberals, then, the limits of the state's toleration of a minority community's peculiar qualities and practices is set by the group's illiberal tendencies.⁴¹ South Africa has adopted a version of the liberal pluralist approach. Its constitution protects minority languages, cultures and religions and recognizes the authority of tribal governments, but its constitutional court has consistently held that the constitution's individual liberties trump these minority group protections, so that for example traditional inheritance rules cannot be applied to disfavor women.⁴²

Communitarians such as James Tully argue that liberal values should be only one of many sets of values in a robust constitutional democracy.⁴³ Beginning with

³⁹ See Multicultural Citizenship, *supra* note __, at 75-84.

⁴⁰ See Multicultural Citizenship, *supra* note __, at 75. A second, inter-related risk is to the unity of the state. If the liberal democratic state is held together by a common faith in liberal democratic values, then the illiberal values of some communities undermines state unity. See Liberal Archipelago, *supra* note __, at 98.

⁴¹ This is, of course, not the end of the argument. For a discussion of the details of this ongoing debate between traditional liberals (Liberalism I) and new liberals (Liberalism II), see Tierney, *supra* note __, at 51-68. Kymlicka, Taylor and the rest disagree sharply not only on line-drawing, but also on vital questions of the basis for discerning the character of particular claims, whether some group and claims can call upon foundational principles of the liberal state to reconcile their claims with liberal ideals and compel their recognition, and whether it might in some instances be appropriate for liberal democratic states to recognize certain minority group claims in spite of the concomitant risk or reality of illiberality, but without reaching consensus on these issues. See Multicultural Citizenship 94-101; Chandran Kukathas, *Cultural Toleration, in Ethnicity and Group Rights 72-78* (comparing but not endorsing the views of John Rawls, Will Kymlicka and Deborah Fitzmaurice).

⁴² See S. AF. CONST.; Shibi case, 2004 CCT 49/03, (S. Af. Const. Ct. 2004).

⁴³ While Kymlicka and Taylor are at times identified as communitarians by traditional liberals, they straddle the gap between the traditional liberal and communitarian positions. The line I draw between liberal pluralists and communitarians is whether the theorist uses core liberal values as the ultimate test: liberal pluralists insist that minority communities must cede at least to certain core liberal values; communitarians do not. See Taylor, *supra* note __, at 60 ("Even pluralist models of liberalism "do call for the invariant defense of *certain* rights, of course. There would be no question of cultural differences determining the application of *habeas corpus*, for example." (emphasis in original)).

the two premises endorsed by liberal pluralists (that liberal constitutional states endorse a particular set of cultural values and that individuals perceive the value of their choices and exercise their autonomy within the cultural values established by their communities), Tully and other communitarians argue that constitutional democracy should not center on individual rights or on participation in a constitutional order that is preconceived as privileging a certain set of liberal rights. Rather, for a constitutional order to be legitimate, all the communities⁴⁴ within the state must be true constituents of the state, in the sense that their preferences as to how the state should be constituted and organized must be incorporated into the state order.⁴⁵ Inevitably, this will produce a non-uniform order, as communities will have different preferences.⁴⁶ Sanctifying liberal rights over other rights and interests preferred by minority communities thus undermines the legitimacy of the democracy for those communities.⁴⁷ For Tully and other communitarians, therefore, not liberal values but authenticity is the touchstone, and not tolerance, but incorporation (at least, to the extent desired by the community) is the goal.

However, since most individuals are members of multiple communities, and since each of those communities is likely to have at least slightly different preferences,⁴⁸ the difficulty for communitarians, as for liberals, is determining which communities to privilege. Because community values will inevitably and frequently come into conflict, particularly when extruded from the community and incorporated

⁴⁴ For a discussion of the competing definitions of community for purposes of communitarian theory, including geographical and kin communities, perceptions of the common good, and shared interests, *see* Liberal Archipelago, *supra* note __, at 168-78.

⁴⁵ “[C]ulture is an irreducible and constitutive aspect of politics. ... if the cultural ways of the citizens were recognized and taken into account in reaching an agreement on a form of constitutional association, the constitutional order, and the world of everyday politics it constitutes, would be just with respect to this dimension of politics. Since the diverse cultural ways of the citizens are excluded or assimilated, it is, to that extent, unjust.” TULLY, *supra* note __, at 5-6.

⁴⁶ *See id.* at 55-56.

⁴⁷ *See id.* at 86-89.

⁴⁸ *See* Liberal Archipelago, *supra* note __, at 177.

into the state as a whole, the hard cases, for communitarians, are those that require either/or, irreconcilable choices between community preferences that “conflict violently in practice.”⁴⁹ In so doing, communitarians use criteria such as authenticity and continuity of community traditions, criteria that overlap with liberal pluralist concerns, especially in so far as they tend to favor the groups also favored by the liberal pluralist typology, namely indigenous groups followed by other national minorities.⁵⁰ Ethiopia has adopted a version of the communitarian approach: recognized ethnic groups have the constitutional right to cultural protections, self-government and even secession, and the question of whether liberal rights also protected by the constitution must be enforced within self-governing communities has not yet been decided.⁵¹

As these theories are exported to transitioning states in the form of international pressure to ratify human rights and minority rights treaties and to include protections in their constitutions, most new democracies have adopted one or another of these basic approaches, at least formally. Both the state and its minority groups have begun exploring the opportunities these legal structures present for framing and pursuing their interests. In this conflicted context, national human rights institutions are positioned, if they wish, to play an active role.

B. National Human Rights Institutions and Minority Groups

1. What Are National Human Rights Institutions?

National human rights institutions are the latest tool to be touted by international bodies and funded by international donors for effective enforcement of human rights on the national level. As such, they represent another aspect of the ongoing effort to export human rights norms to transitioning states. At least on the

⁴⁹ TULLY, *supra* note __, at 6.

⁵⁰ *See id.* at 138.

⁵¹ *See* ETH. CONST., art. 39.

formal level, this effort has been successful: more states have established national human rights institutions in the last twenty years than in all the time before. Virtually every national human rights institution in Africa and Latin America has been established since 1985.⁵²

In essence, national human rights institutions are independent government agencies directed at human rights concerns. They are intended to complement the work of other government institutions such as courts, and of private institutions such as non-governmental organizations (“NGOs”), in investigating and redressing human rights abuses. They are designed to be highly accessible to the public by maintaining an open door policy for accepting complaints. They are also meant to be influential with the government, but not according to the benchmark that human rights advocates typically call upon, enforcement. Rather than enforcing human rights by ordering reforms as a court would do, national human rights institutions promote change by means of persuasion, and have no direct coercive powers.⁵³

Most national human rights institutions are organized as one of two major types, human rights commissions or ombudspersons. There are also numerous hybrids and variations on these central types, of which perhaps the most widespread is the office of the *defensores del pueblo*, a Central and South American variation on the ombudsperson.⁵⁴ The functions of national human rights institutions, however named and organized, typically include investigating possible human rights abuses either *sua*

⁵² See Lorena González Volio, *The Ombudsman Institution: The Latin American Experience* 5 (noting that the only ombudsman established in Latin America before 1990 was Guatemala’s in 1985, and that “the process of creating and incorporating the institution of the Ombudsman... arises in the nineties, when the so called ‘transition to democracy’ period began”); Mary Ellen Tsekos, *Human Rights Institutions in Africa*, 9 *Hum. Rts. Br.* 21, 21 (2002).

⁵³ See Office of the U.N. High Commissioner for Human Rights, *Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights* (1993), available at <http://www.unhcr.ch/html/menu6/2/fs19.htm> (last visited Jan. 25, 2005) (hereafter “UNHCR Fact Sheet”).

⁵⁴ See ICHRP report, *supra* note ___, at 4; *Building Democratic Institutions*, *supra* note __.

sponte or in response to complaints; issuing non-binding recommendations; organizing education, training and publicity programs; and reporting to national legislatures and international bodies.⁵⁵

The United Nations, the international community at large, and the academic literature on the subject of national human rights institutions have all tended to focus on national human rights commissions and to brush aside ombudspersons as subsidiary bodies that serve many of the same functions.⁵⁶ This has had two unfortunate results: first, a failure to notice the work being done by ombudspersons, especially on minority rights, that has important ramifications for the field (discussed in the next part); and also, a tendency to conflate the two bodies that overlooks substantial differences between them despite their overlapping roles. For although they share a common purpose and certain general attributes such as flexible, informal procedures, ombudspersons and human rights commissions have different histories and core functions. In particular, while human rights commissions often work on individual cases, they also investigate and make recommendations concerning systemic human rights violations on an institutional or national level.⁵⁷ In contrast, the ombudsperson's core function is not to analyze and comment on broad issues in

⁵⁵ See *Building Democratic Institutions*, *supra* note ____.

⁵⁶ See Marnie Lloyd & Alexander H.E. Morawa, Ombudspersons and Minority Rights, at 2-3, available at European Centre for Minority Issues website, www.ecmi.de (last viewed Jan. 25, 2005).

⁵⁷ Human rights commissions usually have jurisdiction over both government and private conduct. Linda Reif notes that human rights commissions may be better suited to address human rights complaints in states that have both institutions, because they can handle complaints "which arise in both the private and public spheres, typically enjoy a stronger arsenal of powers, are often directed to provide educational and promotional activities and employ human rights norms as an imperative aspect of their mandate." Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, in *The International Ombudsman Anthology*, 272 (ed. Linda C. Reif 1999) (hereafter "*Promotion*"). They are also more likely than ombudspersons to be empowered to advise the legislature on pending legislation or on ratification of or compliance with international human rights treaties. See Brice Dickson, *The Contribution of Human Rights Commissions to the Protection of Human Rights*, The Harry Street Lecture, University of Manchester (21 November 2002). Some states have established an individual commissioner who operates more like an ombudsperson than like a human rights commission, in spite of the title. See Mjemmas G.J. Kimweri, *The Effectiveness of an Executive Ombudsman*, in *The International Ombudsman Anthology*, *supra*, at 382-85 (Tanzanian Permanent Commission of Enquiry).

the abstract, but to resolve individual complaints. However, an ombudsperson may recognize systemic problems and recommend solutions that range from personal responses to individual petitioners to structural changes across government institutions. Its influence, like that of the human rights commission, therefore extends beyond the limits of the immediate case to the government and nation as a whole.⁵⁸

In spite of the shared name, these human rights commissions are different from the “truth commissions” and “human rights commissions” that transitioning governments sometimes establish to address the transitional justice problem of abuses by past regimes, such as the Truth and Reconciliation Commission in South Africa. Transitional justice-oriented truth and human rights commissions are temporary and typically have jurisdiction only over the prior government, not the present one. In contrast, national human rights institutions are permanent and have jurisdiction over the present government. As such, they serve different purposes: transitional justice commissions aim to account for the atrocities of the past and promote reconciliation in the present, while national human rights institutions are meant to call the current government to account in the present and promote better policies for the future.⁵⁹

The authority of national human rights institutions to remedy human rights violations usually extends only to investigation and recommendation and not to binding judgment or to direct enforcement of their recommendations. The primary

⁵⁸ The office of the ombudsman originated under the Swedish monarchy in the eighteenth century to investigate government maladministration and was gradually adopted by other states for this purpose. Accordingly, ombudspersons usually have jurisdiction only over government, not private, actions. As concern with human rights has grown, some ombudsperson’s offices have taken on investigation of government human rights violations under the umbrella of their general authority to investigate government misconduct. Recently, states have begun to establish ombudspersons with the specific mandate of human rights enforcement. See Lloyd & Morawa, *supra* note __; *Promotion*, *supra* note __, at 273-74 & 288-91.

⁵⁹ National human rights commissions are also different from the similarly named United Nations Human Rights Commission, which is an international body addressing human rights concerns worldwide, and from both international and national non-governmental organizations that may also have similar names. Because so many different kinds of institutions are referred to as “human rights commissions,” one can determine whether an organization is a national human rights institution only by looking at its mandate and organization, and not merely at its name.

tools used by these institutions to promote change are therefore direct mediation between the parties to resolve individual complaints, and publicity, reporting, and public shaming to promote changes in public policy. Some institutions do, however, have standing to bring disciplinary actions, lawsuits, or other proceedings against government officials and entities to remedy violations of the law, as does the Namibian Ombudsman.⁶⁰

On first consideration, these limits on judgment and enforcement seem to represent a disturbing trade-off between institutional effectiveness and states' willingness to establish human rights institutions in the first place.⁶¹ However, the trade-off is not so stark as it may seem. National human rights institutions operate in the context of other institutions that do have enforcement powers, such as the courts, and they are intended to supplement, not to replace, those institutions.⁶²

Such critiques also fail to recognize the inherent limits on the effectiveness of enforceable legal mechanisms: they are expensive, inaccessible and slow, and therefore often go unused. For everyday claims, the national human rights institution offers a swift means for an individual to get behind the walls of bureaucracy and have his complaint considered by the otherwise inaccessible officials who have the authority to remedy his concern. Similarly, in controversial, high profile cases,

⁶⁰ See Udo Kempf and Marco Mille, *The Role and Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note __, at 195, 217 (Appendix 3). This is particularly important in countries that limit standing to raise constitutional challenges to certain government officials. As Lloyd and Morawa note, this role is particularly vital in “countries in transition,” where many old laws and institutional practices may conflict with the new constitution and where there may be a lack of institutional traditions and practices to rectify the matter. See Lloyd & Morawa, *supra* note __ at 10.

⁶¹ This bears on the question often raised in human rights circles concerning the enforceability of human rights norms: whether unenforceable or unenforced norms are valuable even in the breach, or whether they are at times implemented even if unenforceable, and if so, why and how. See, e.g., Oona Hathaway, *Do Human Rights Treaties Work?*, 111 Yale L.J. 1935 (2002). My argument is one commonly although not universally endorsed by ombudspersons: that the lack of enforcement mechanisms makes these institutions complementary to and at times even more effective than courts and other binding means of enforcing human rights.

⁶² Also, obstruction of the ombudsperson or failure to follow her formal recommendation is a punishable offense in some states, even if the ombudsperson lacks enforcement power of her own See Lorena González Volio, *The Ombudsman Institution: The Latin American Experience* 24.

national human rights institutions have been at times arguably more effective precisely because their investigations do not present as direct and immediate a threat to governments as they would if their conclusions were enforceable.⁶³ National human rights institutions have in fact investigated controversial, high profile allegations of severe government abuse, and their conclusions and recommendations have revealed and challenged otherwise untouched and seemingly untouchable government policies and practices. It is then up to other forces in society to pick up the gauntlet thrown down by the national human rights institution, and to provide the pressure necessary to back the institution's call for change.⁶⁴ Thus, the appropriate comparison in many ordinary cases is not between the enforcement mechanisms available through a court and the lack of mechanisms available to the human rights institution, but between having human rights claims evaluated through some process, even if only advisory, or not having them addressed at all.

2. Minority-Directed Programs

Although national human rights institutions are well situated to play a complementary role to other state and non-governmental agencies by reaching out to vulnerable and underrepresented minority communities and by intervening in human rights based conflicts between minority groups and the state, they tend to be used in much more conservative and limited ways. I will begin by giving an overview of the minority-directed programs that do exist, and then turn to the legal and political reasons that national human rights institutions' involvement in minority issues tends to be limited. After considering and accounting for these limits, the experiences of institutions that have struggled with minority concerns expose issues that go to the

⁶³ But see Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 BOSTON UNIV. INT'L L.J. 1, 30-31 (2000).

⁶⁴ See ICHRP Report, *supra* note __, at 26 & 63 (Malaysia & Togo).

heart of the relationship between minority groups, human rights claims, and democracy. I will turn to those in part C.

In spite of the socio-political context of acute minority relations issues in transitioning states and a developing framework of minority rights as a legal context for human rights work, most national human rights institutions do not work on minority group issues as such. Indeed, my survey of the public reports, websites, and promotional materials of hundreds of institutions around the world found that only a few describe working on minority issues or with minority groups as being a priority in their work.⁶⁵ Corroborating the results of this general survey were my discussions with individual ombudspersons at a conference of the International Ombudsman Institute in 2004, which confirmed that only a limited number of those offices either had pursued work with minority groups or regarded it as a future priority to do so.⁶⁶

There are several identifiable trends amongst those institutions that do describe themselves as working with minority groups. First, there are striking regional differences. In Asia and Africa, where many states have an extreme diversity of ethnic groups and sharp divisions, there are very few reports of minority -directed programs of any kind.⁶⁷ Some Asian institutions have been noted for occasional high profile inquiries into riots or violent police abuse (or for their failure to inquire into such matters), and there has been far more focus on involvement in religious conflicts than ethnic ones.⁶⁸ In Africa, those programs that do exist come in two varieties: efforts to overcome problems of language and geography in highly linguistically

⁶⁵ There may of course be a gap between publicly reported activities and actual activities, but if so, then at a minimum these institutions do not view it as being to their advantage to advertise their work with minority groups.

⁶⁶ Proceedings of International Ombudsman Institute Quebec Conference (Sep. 7-9, 2004) (notes on file with author) (hereafter "IOI notes").

⁶⁷ Two unusual exceptions are South Africa's Commission for the Rights of Cultural, Religious and Linguistic Communities, see <http://www.crlcommission.org.za/index.html> and India's National Commission for Scheduled Castes and Scheduled Tribes, see <http://ncscst.nic.in/home.htm>.

⁶⁸ See, e.g., Shameem, *supra* note __, at 662.

divided and rural states, and efforts to discourage traditional practices that run afoul of human rights norms. However, reporting by these institutions is itself inconsistent.⁶⁹

In Mexico and Central and South America, a few more states reported at least some specialized programs and offices.⁷⁰ Without exception, these are devoted to indigenous groups: none report programs relating to other minority groups. However, upon investigation, only a few of these programs could be confirmed to be active.⁷¹ In Canada, Australia, and New Zealand there are offices, commissioners and programs devoted to indigenous groups, often on the provincial level, and these report substantially more activity than their Central and South American counterparts.⁷² National and regional human rights institutions in these states have also taken on high profile discrimination cases, and human rights commissions in Canada may be either exclusively or primarily devoted to anti-discrimination efforts.⁷³ In local and municipal institutions in the United States, with few exceptions, any programs directed at minority groups are focused solely upon anti-discrimination initiatives. The exceptions, as in the other American states and Australia and New Zealand, are for indigenous groups.⁷⁴

⁶⁹ The lack of empirical data about human rights practices in Africa has been noted by other scholars. See Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 Human Rts. Q. 838, 840 (2000). I found African institutions less likely to make information available over the internet, less likely to report regularly to regional and international institutions, and less likely to be the subject of scholarly reports, than European, American, and Australian institutions.

⁷⁰ Yes: Guatemala, Bolivia, Colombia, Peru, Venezuela Ecuador, Mexico No: Belize, Costa Rica, Honduras, Nicaragua, Panama, Argentina, Brazil, Chile, Guyana, Paraguay, Uruguay

⁷¹ Confirmed: Guatemala, Peru Venezuela, Mexico Not confirmed: El Salvador, Bolivia, Colombia, Ecuador

⁷² A prominent example is the Aboriginal and Torres Strait Islander Social Justice Commissioner in Australia. In these states, minority-directed work is frequently carried out on the regional or local level. See, e.g., Human Rights and Equal Opportunity Commission website, www.humanrights.gov.au/socialjustice/ (last visited Jan. 22, 2005).

⁷³ See David M. Tanovich, *Racial Profiling and Police Practice in Canada: E-racing Racial Profiling*, 41 Alberta L. Rev. 905, 908 (2004); Carlos Scott Lopez, *Australian Immigration Policy at the Centenary: The Quest for Control*, 18 Geo. Immig. L. J. 1 (2003).

⁷⁴ See Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 Berkeley J. Emp. & Labor L. 129 (2004). One exception is the Ombudsperson for American Indian Families in Minnesota, who works to ensure that social service agencies and officials follow the requirements of the Indian Child Welfare Act. See Ombudsperson for American Indian

In Europe, in contrast, programs and institutions with the sole mandate of addressing issues of race, ethnicity, and discrimination are rapidly expanding, driven by European Union mandates, and in particular by a Directive requiring member states to establish such institutions.⁷⁵ Finland, for example, has long had an ombudsperson for foreigners but recently expanded that office to serve all ethnic minorities in response to the EU Directive.⁷⁶ In addition, Germany has both a national and a Schleswig-Holstein regional commissioner for minorities;⁷⁷ Sweden has an ombudsman against ethnic discrimination;⁷⁸ the Czech Republic has a Council on National Minorities;⁷⁹ and Hungary has a Parliamentary Commissioner for National and Ethnic Minority Rights.⁸⁰

These trends present an interesting counterpoint to the overall pattern of the “boom in NHRIs in the 1980s and 1990s,” which “with a handful of exceptions... has occurred in the South.”⁸¹ The exceptions to this overall pattern are the new minority ombudsperson’s offices in Europe and the Commonwealth countries of Canada, Australia & New Zealand: the regions that I found to be relatively involved with minority rights.⁸²

Next, these regional differences correspond to some extent with the existence of regional legal frameworks encouraging certain sorts of protections. Africa and Asia both lack any enforceable regional framework for minority protections and national human rights institution involvement in these issues is correspondingly weak.

Families brochure (on file with author).

⁷⁵ See Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 13. (Official Journal L 180, 19/07/2000 P. 0022-0026).

⁷⁶ See EUMC Report, *supra* note __, at 41-44.

⁷⁷ See *id.* at 45-46.

⁷⁸ See *id.* at 46-48.

⁷⁹ See http://wtd.vlada.cz/files/rvk/rnm/zprava_mensiny_2001_en.pdf.

⁸⁰ See Lloyd & Morawa, *supra* note __, at 39.

⁸¹ ICHRP report, *supra* note __, at 65; see also Volio, *supra* note __, at 5.

⁸² See *id.*

In Mexico and Central and South America, where the only reported work with minority groups is solely with indigenous groups, there is some correlation between ratification of the ILO Convention No. 169 on indigenous peoples (a convention dominated by Latin American states) and the likelihood that a national human rights institution will report such work or have a program or office directed at indigenous groups.⁸³ While the convention is not enforced by punitive measures, the ILO does make general observations on states parties' implementation of the treaty.⁸⁴ Finally, in Europe, there is an EU directive mandating development of anti-racism agencies, punitive measures for enforcing the directive, and numerous regional bodies with an interest in minority issues. Correspondingly, states are rapidly adopting minority-directed programs.⁸⁵ The focus on indigenous groups in Canada, New Zealand and Australia and on anti-discrimination measures in the U.S. seem to be driven by domestic political realities, as there are no apparent regional legal regimes affecting their policies but significant internal political debate on these issues.⁸⁶

There are also trends in the content of minority-directed programs. Most have been focused on one of two issues: the accessibility of the institution's general services to minority groups, or anti-discrimination measures. Notably, both are issues that fit readily within the traditional liberal vision of minority rights, as discussed in

⁸³ Of the thirteen states in the region that have ratified the convention, eight reported some minority-directed programs, one did not, and there were three for which no information was available. Of the seven countries that have not ratified the convention, only one reported minority-directed programs, three did not, and there were three for which no information was available. The ILO Convention No. 169 on indigenous rights is dominated by central and south American states in two senses: the majority of states parties to the treaty are Central or South American (11 of 17 plus Mexico as #12 of 18), and more than half of the states in Central and South America are parties (12 of 20, or, counting Mexico, 11 of 21). See ILO website, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>, (last viewed Oct. 7, 2005).

⁸⁴ See ILO website, <http://www.ilo.org/ilolex/english/convdisp1.htm>, last viewed Feb. 25, 2004.

⁸⁵ See discussion at note __, *supra*. There are also European NGOs that support the development of minority national human rights institutions. See European Centre for Minority Issues, Minority Ombudsperson Project Network Conference, Federal Ministry of the Interior, Berlin, 16-17 October 2003, Conference Report (November 2003), available at ECMI website, www.ecmi.de

⁸⁶ Of course, these results do not indicate whether it is state interests that are driving the development of regional systems or vice versa. Once in place, however, regional enforcement mechanisms may create independent incentives for state behavior that to some extent take on a life of their own.

part A. (Of course, both are acceptable to, if insufficient for, liberal pluralists and communitarians as well.)

As to the first issue, a number of institutions have developed initiatives to increase awareness within the institutions of potential barriers to access for members of minority groups and to reduce or remove those barriers. So, for example, the national human rights commission in India, which has high rates of illiteracy among certain minority groups, has adopted informal procedures for accepting complaints rather than requiring complaints to be filed in writing.⁸⁷ Some institutions have undertaken publicity programs aimed at extending their reach beyond the urban centers into rural communities. The Ugandan Human Rights Commission has broadcast information over the radio in local languages in an effort to reach rural and illiterate segments of the population.⁸⁸ Representatives of the Mexican National Commission for Human Rights have visited some indigenous areas to solicit and accept complaints directly.⁸⁹

Another way of improving accessibility is to establish local and provincial offices. Doing so may have synergetic effects. At the most basic level, a single national office may be geographically inaccessible to most of the population, especially in states with substantial rural populations and poor transportation and communication.⁹⁰ In countries with numerous minority groups, local offices are better placed to provide services directed at the particular groups in their area. Whereas the national office of the Commission for Human Rights and Administrative Justice in Ghana accepts complaints only in the country's major languages, it hires

⁸⁷ See Sripati, *supra note* ___, at 20.

⁸⁸ See Uganda Human Rights Commission website, www.uhrc.org.

⁸⁹ See Jorge Madrazo, *New Policies on Human Rights in Mexico*, in *The International Ombudsman Anthology* 337, 351-52 (1999).

⁹⁰ See Afghan Independent Human Rights Commission website, www.aihrc.org.af; Zambian Human Rights Commission website, http://www.sahrc.org.za/afr_sec_main.htm.

speakers of local languages for its regional and district offices.⁹¹ Also, some institutions have hired local minority representatives for its staff or have given minority community leaders positions among the commission or ombudsperson officials.⁹²

At least one case study suggests that measures and programs specifically directed at local minority populations are at times effective not only because they are objectively more accessible but in part because they signal interest in and seriousness about addressing minority community concerns, establishing credibility with that community and increasing community members subjective willingness to approach the institution.⁹³ However, if not staffed with minority peoples or supported by the community, such outreach can breed suspicion on the basis of past experiences of discrimination.⁹⁴ And of course, such programs also run the risk of cabining minority concerns to only certain offices and officers, and reducing the accountability of the institution as a whole to minority groups.

Next, while many national human rights institutions may not make a priority of minority concerns or report programs directed at minority groups, few if any would exclude claims of affirmative government discrimination or oppression from their mandates, at least in principle (whereas other kinds of minority claims, such as those advocated by liberal pluralists and communitarians may or may not fall within individual institutions' mandates). If an institution does report work on substantive minority claims, it is most likely to be on discrimination issues. Amongst these institutions, there is a striking contrast between those that deal with minority issues

⁹¹ See Reif, *supra* note __, at 26.

⁹² See Stripati, *supra* note __, at 13.

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

⁹⁴ See *id.*; Kimm, *supra* note __, at 27.

primarily when high profile cases arise but are unresponsive to daily complaints, and those that are reported to work steadily on everyday claims. Carolyn Evans describes high profile investigations of violent conflicts targeting religious minorities by human rights commissions in the Philippines and India,⁹⁵ and other commentators also note a similar focus on high profile claims to the exclusion of daily concerns in the work done by other Asian institutions.⁹⁶

Apart from the issues of access and discrimination, a few national human rights institutions do address minority claims of the kind advocated in the new minority rights treaties and by liberal pluralists and communitarians: claims for protection of particular cultural rights, for example. However, such claims are pursued almost exclusively by specialized institutions whose core mandate is work with minority groups, and who are backed by a legal framework establishing those rights in national law. The Parliamentary Commissioner for the Rights of National and Ethnic Minorities in Hungary, for example, enforces the constitutionally established rights of national minorities to practice their language and culture.⁹⁷

In my discussions with officers of the Swedish and Hungarian minority ombudsman's offices, each reported a sharp division in their work between the claims brought by different minority groups. Although indigenous groups in Sweden were entitled to sweeping cultural protections, claims from these groups were rare. Instead, most claims were brought by members of immigrant groups concerning either discrimination or access to government social and economic benefits.⁹⁸ Similarly, the

⁹⁵ See Carolyn Evans, *Human Rights Commissions and Religious Conflict in the Asia-Pacific Region*, 53.3 Int'l & Comp. L. Q. 713, at text accompanying notes 73-102 (2004).

⁹⁶ See Shameem, *supra* note __, at 662 (Fiji Human Rights Commission); ICHRP report, *supra* note __, at 25 (Malaysian Komnas Ham).

⁹⁷ See IOI notes, *supra* note __. Hungary "recognizes certain minorities as constituent nationalities and gives them certain self-government rights," and in respect of these rights, the Commissioner works on new legislation on minority protections and monitors implementation, inconsistencies, & violations. See Lloyd & Morawa, *supra* note __, at 39.

⁹⁸ See Interview with Anna Theodora Gunnarsdottir and Nils-Olof Berggren, Parliamentary

Hungarian ombudsperson reported that his work was divided between the claims of groups recognized as “national minorities,” who have a long-standing connection to Hungary, are entitled to certain protections for language and culture, and represent roughly 25% of claims, and the Roma, who have no such protections, face severe discrimination, seek socio-economic benefits from the government, and file 75% of claims.⁹⁹

But minority-directed programs aimed at particular cultural practices are more likely to be targeting human rights violations within minority communities than defending minority interests against external threats. Ghana’s Commission for Human Rights and Administrative Justice has taken on controversial practices such as witchcraft accusations and *trokosi*, a form of forced labor and sex slavery.¹⁰⁰ The Mexican human rights commission has criticized tribal courts for failing to follow due process standards.¹⁰¹ Other commissions have challenged community practices such as child marriage and reviewed procedures in local and religious courts.¹⁰² Indeed, oversight of indigenous communities is the sole mandate of some institutions: the Métis Settlement Ombudsman in a Canadian regional government institution established in 2003 solely to hear complaints of maladministration and conflicts of interest against the General Council of the Métis Settlements, an indigenous community granted some rights of autonomy and self-government by the Alberta government.¹⁰³

Ombudsman’s Office of Sweden, at IOI Quebec Conference (Sep. 8, 2004) (notes on file with author) (hereafter “Gonnarsdottir & Berggren interview”).

⁹⁹ See IOI notes, *supra* note ____.

¹⁰⁰ See ICHRP Report, *supra* note ___, at 16-17.

¹⁰¹ See *id.*

¹⁰² See Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia’s Human Rights Commission*, 39 *Stan. J. Int’l L.* 59, 81 n. 182 (2003); Sripathi, *supra* note ____.

¹⁰³ See Métis Settlements Ombudsman, 1st Annual Report for the period April 1, 2003 to March 31, 2003, at 1 (on file with author) (hereafter “Métis report”); Métis Settlements General Council website, www.msgc.ca (last viewed Dec. 14, 2004); Catherine E. Bell, *Contemporary Métis Justice* (1999).

Finally, in at least a few cases, ombudspersons' offices have been established precisely to address acute ethnic tensions. In Kosovo, the OSCE established an ombudsperson's office in 1999 in the context of UN administration of the protectorate that maintains the forced peace between Serbs and Albanians there. In 2004, it created a Deputy Ombudsperson for minority communities to address the particular needs of the Serbs living separately in guarded enclaves.¹⁰⁴ In Bosnia & Herzegovina, the Dayton Accords mandated establishment of a Human Rights Commission made up of a Human Rights Ombudsman to investigate human rights complaints and a Human Rights Chamber to hear cases.¹⁰⁵ Northern Ireland is another example of this phenomenon.¹⁰⁶

But in many severely divided states, national human rights institutions seem to play no role in addressing minority concerns at all.¹⁰⁷ In Nigeria, for example, with its hundreds of ethnic groups and its notorious propensity for ethnic and religious conflict, the ombudsperson's office reports no efforts to either reach minority populations or work on minority issues, and while the National Human Rights Commission lists numerous themes and goals on its website, discrimination, ethnic conflict, and minority rights are not among them.¹⁰⁸ The Indonesian National Human Rights Commission has no resources directed to minority groups or concerns, nor even any branch offices to serve the numerous groups scattered along the nation's

¹⁰⁴ Interview with Legal Adviser, Kosovo Ombudsperson's office (June 7, 2004) (notes on file with author); *see also* Paul R. Williams, *supra* note __, at 403.

¹⁰⁵ *See* J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina*, 14 Int'l L. Perspectives 44, 45 (2004).

¹⁰⁶ *See* Bryan, *supra* note __, at 247.

¹⁰⁷ "Severely divided states" refers to states that are either complexly divided, with their population divided amongst many groups and no clear majority group, or that have strong and often violent conflicts between groups, or both. Complexly divided states tend to be in Africa & Asia and include Indonesia, Nepal, Nigeria, & Ethiopia, with many ethnic groups & languages. States with violent group conflicts include those of Eastern Europe, in addition to a number in Africa and Asia. I do not include in this group, for example, the states of the Americas, which tend to have a clear majority group, and where outbursts of group conflict tend to be regional or local in nature. *See generally* Horowitz, *supra* note __.

¹⁰⁸ *See* Public Complaints commission of Nigeria annual report 2003 (on file with author); Nigerian Human Rights Commission website, www.nigeriarights.org (last viewed Mar. 6, 2005).

vast archipelago.¹⁰⁹ The ethnic and religious divisions in Indonesia are of the utmost urgency, spurring not just political opposition and violent conflict, but even full scale war by separatist movements far from the capital. Nonetheless, the commission has been notoriously uninvolved in these concerns, such that activists in Irian Jaya, where the commission has at least carried out a few high profile investigations, regard it as essentially a “foreign institution.”¹¹⁰ Sudan has both an ombudsperson’s office and an advisory commission on human rights in Khartoum. These offices do not seem to have been available to the people of Darfur who claim that local police asked them for bribes and jailed them when they complained of others grazing on their land, events that were part of the build-up to the current violence there.¹¹¹

3. Crucial Factors Limiting Minority Group Programs

a. International and Regional Legal Regimes

If what transitioning states are looking for in creating national human rights institutions is to gain political capital with the United Nations and other international institutions as much as to make strides in promoting human rights, then it is telling that the U.N. benchmarks for the success of these institutions do not mention minority rights. In 1993, the UN General Assembly endorsed the Paris Principles, which set minimum standards for national human rights institutions’ functions, authority, resources, and independence from government influence.¹¹² The United Nations and other international organizations use the Principles as the primary test for certifying

¹⁰⁹ See ICHRP report, *supra* note __, at 28-29.

¹¹⁰ *Id.* at 33.

¹¹¹ See Ombudpersons links page, http://www.ombudsman.bc.ca/links/intl_ombuds/index.htm; Tim Judah, *The Stakes in Darfur*, NEW YORK REVIEW OF BOOKS 12 (Jan. 13, 2005).

¹¹² See Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Oct. 1991) (endorsed by UN Commission on Human Rights, resolution 1992/54 (March 1992) and by UN General Assembly, resolution A/RES/48/134 (Dec. 20, 1993) (hereafter “Paris Principles”). The United Nations has supported the development of national human rights institutions since the 1960s. It has sponsored a series of international meetings of representatives of national human rights institutions, and various guidelines and principles have emerged from these meetings, including the Paris Principles. See UNHCR Fact Sheet, *supra* note __.

agencies as national human rights institutions and for judging their competence and independence.¹¹³

The Paris Principles are not intended to and do not offer incentives for institutions to work closely with minority groups or on minority rights. In short, although the Principles do make reference to discrimination, pluralism, and “vulnerable groups,” their requirements can be met without any involvement in minority issues or with minority groups at all.¹¹⁴ Furthermore, UN assistance programs tend to be generic, untailed to particular countries, much less to work with particular minority groups.¹¹⁵ From the perspective of transitioning states’ interest in demonstrating measurable progress toward establishing independent, effective human rights institutions, therefore, the UN benchmarks give them little reason to invest in institutional capacity to address minority concerns. Indeed, to the contrary: in order to gain the hoped-for economic and political benefits for compliance with international norms, states must put the limited resources they are willing to allocate to national human rights institutions into the UN-identified agenda.

¹¹³ For example, compliance with the Principles is a prerequisite for participation in the Asia-Pacific Forum, a regional association of national human rights institutions. *See* Evans, *supra* note __, at text accompanying notes 10-12. Similarly, the National Human Rights Institution Forum uses the Paris Principles as the sole criterion for its accreditation ratings. *See* National Human Rights Institution Forum website, <http://www.nhri.net/default.asp?PID=276&DID=0> (last viewed Feb. 15, 2005). Scholars also treat the Principles as the first measure of a national human rights institution’s legitimacy, analyzing the structure of the institution against the Principles’ requirements. *See* Evans, *supra* note __, at text accompanying notes 8-60; Sripati, *supra* note __, at 10-13; *Building Democratic Institutions*, *supra* note __, at 4 & 24.

¹¹⁴ At first, it seems promising that the Principles require that the “pluralist representation of the social forces” of a state be represented in its national human rights institutions, but minority groups are not among the examples of the relevant “social forces” listed, which instead focus on representatives of segments of civil society. The Principles also suggest that human rights institutions should associate with NGOs that, among other things, work with vulnerable groups and that it should promote human rights by, among other things, publicizing efforts to end race discrimination. But these proposals each come as the last in a laundry list of possible subjects for publicity and association, and do not require the institutions to take any particular steps or to advance any programs of its own. *See* Paris Principles, *supra* note __. The Principles are a limited tool in other respects as well. *See* LINDA C. REIF, *THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 394 (2004). Case studies suggest that the Principles’ markers of independence do not necessarily correlate with effectiveness. *See* Evans, *supra* note __, at 713, fn. 33; ICHRP Report, *supra* note __, at 3.

¹¹⁵ *See* Tsekos, *supra* note __, at 22.

Recently, there have been indications of an increasing recognition of the relevance of minority group interests, both within the UN and at international meetings of national human rights institutions.¹¹⁶ In particular, some of the declarations that have emerged from these meetings have acknowledged the tensions between minority groups and human rights claims, by raising the issue of how and to what extent human rights should be adapted to local cultures, at times gingerly and at times with a sense of grievance against cultural imperialism, but without reaching any consensus on the question.¹¹⁷ These developments highlight another fundamental limitation of the Paris Principles: the document's approach is both formal and formulaic, taking the legal texts of human rights instruments as its foundation, treating the content of human rights as unproblematic, and viewing the promotion of human rights as a one-way transfer of these values from the UN system to receptive national governments. As such, it lacks any contextual framework acknowledging the variety of national and ethnic settings in which national human rights institutions operate or the potential for the institution to be caught in conflicts between human rights-defined interests.

In contrast, it is notable that the most dramatic shift toward minority concerns, the establishment of ombudspersons' offices for minority groups in Europe, has been driven by precisely the opposite legal reality: an EU directive on racial and ethnic discrimination issued in 2000 requires states to establish independent institutions to assist with complaints, carry out surveys, and provide reports and recommendations

¹¹⁶ See, e.g., Copenhagen Declaration, ¶¶ 1(b) & 3(b)-(d), (Apr. 13, 2002), available at <http://www.unhcr.ch/html/menu2/copendec.htm> (last visited May 10, 2004); UNHCR Fact Sheet, *supra* note __.

¹¹⁷ See Rabat Declaration, ¶¶ 6-8 (Apr. 15, 2000), available at www.unhcr.ch (last viewed May 13, 2004); Bangkok Declaration, ¶¶ 7-11 & 22-23 (Apr. 7, 1993), available at <http://www.unhcr.ch/html/menu5/wcbangk.htm#I> (last visited May 22, 2004).

on combating discrimination.¹¹⁸ This is not a mere suggestion to member states. States must report on their progress in implementing the directive at regular intervals, and they can ultimately be brought to the European Court of Justice and ordered to pay damages for failure to comply.¹¹⁹ In addition, the European Union has set high standards in minority protections for countries seeking entry to the Union. In order to gain the economic, political and social benefits of accession, those countries are meeting the EU standards both with substantive guarantees for their minorities and with human rights institutions designed to ensure them.¹²⁰

The influence of other regional institutions and systems, such as the Inter-American Human Rights system and the African Commission on Human Rights, upon the involvement of national human rights institutions in minority issues bears no comparison to the European Union. While these systems do promote some minority and indigenous rights in principle, they do not require that member states establish national human rights institutions to address these issues, much less enforce such requirements with punitive mechanisms.¹²¹

b. Limited Political Purposes and Resources

There are also a number of political and institutional reasons that a national human rights institution might not wish to involve itself with minority concerns. In

¹¹⁸ See Directive 2000/43/EC, *supra* note __, art. 13; see also Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303, 02/12/2000 P. 0016-0022); Migrants, minorities and legislation: Documenting legal measures and remedies against discrimination in 15 members states of the European Union, Report submitted by the International Centre for Migration Policy Development (ICMPD) on behalf of the European Centre on Racism and Xenophobia (EUMC) (December 2004) (hereafter “EUMC report”).

¹¹⁹ See Treaty Establishing the European Community, art. 226-28 (signed Mar. 25, 1957), available at <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm> (last viewed Mar. 6, 2005).

¹²⁰ See, “Copenhagen Criteria,” European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency, SN/180/1/93 Rev 1, at 13; Open Society Institute, Developments in the EU Accession Process, 2 European Yearbook on Minority Affairs 1 (2003).

¹²¹ See African Charter on Human Rights, art. 26 & 45; Inter-American Convention on Human Rights and Fundamental Freedoms. In Asia, the only regional support for the development of national human rights institutions is a voluntary association, the Asia-Pacific Forum. See Asia Pacific Forum website, www.asiapacificforum.com (last viewed Feb. 10, 2005).

some cases, the political purposes for establishing a national human rights institution has been to forestall criticism of human rights practices with a toothless institution, so that the last thing decision makers want is to make the institution more accessible or effective.¹²² While national human rights institutions are officially empowered to carry out investigations against their governments, some lack the institutional clout or resources to do so. A number of national human rights institutions do not exercise the far-reaching powers they possess on paper but limit their activities primarily to less controversial and less resource-intensive educational programs and public awareness campaigns.¹²³ Furthermore, an institution may face a truly daunting array of human rights abuses by its government, so that minority concerns, however serious and fundamental, may simply not be its highest priority. Even if such an institution is operating in good faith and receiving government cooperation, it may be still in the early stages of institution-building, lacking the capacity for extended projects or programs.¹²⁴

As one would expect, it is states with greater resources, both financial and political, that tend to have established more elaborate and extensive programs, including programs aimed at minority groups. Thus, for example, although Australia's indigenous population is relatively small, it has designated a human rights commissioner to promote the rights of its aboriginal people.¹²⁵ In contrast, in Malaysia, where society is polarized along ethno-religious lines and these differences are built in to the basic structures of government, the Malaysian Human Rights

¹²² See *Promotion*, *supra* note __, at 278; Whiting, *supra* note __, at 75 & 96 (Malaysia).

¹²³ The Benin Human Rights Commission, for example, as of 2000 had primarily carried out trainings and workshops. See Human Rights Watch Report, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001), available at <http://www.hrw.org/reports/2001/africa/contents.html> (last viewed Mar. 7, 2005) (hereafter "African HRC report").

¹²⁴ See Marten Oosting, *The Ombudsman and his Environment*, in *The International Ombudsman Anthology* 1, 8-9 (1999).

¹²⁵ See Australian Human Rights Commission website, www.hreoc.gov.au/social_justice/index.htm (last viewed Oct. 10, 2004).

Commission has no commissioner dedicated to these issues. Rather, it has kept silent when faced with complaints of infringement of religious rights, limiting itself to private hearings and occasional neutral statements urging inter-faith dialogue.¹²⁶ Indeed, in some cases there tends to be an inverse relationship at work: the more central and significant minority concerns are to a state, the more resources and political clout it would take to address them, and so the less likely they are to be addressed.¹²⁷

There are also reasons that are tied in to the nature of the minority community-state relationship and the relationship between minority and human rights. The national human rights institution is inherently a national, state entity. Although its mandate may be investigation of government abuse, it is nonetheless structured by and for the purposes of the government. As a political matter, the national human rights institution may perceive itself or may be perceived as being a part of the national government in a national – local conflict of the sort that drives many minority rights concerns. A national institution, located in the capital city and created by national authorities, may not have an understanding of or sympathy for minority views, particularly as such concerns are held by distant, rural populations and particularly as they implicate other government interests. By the nature of the appointment process, the members of national human rights institutions are likely to be urban political and social elites with development-oriented agendas that view minority concerns as ultimately subservient to the greater good of the state interest in economic and social progress. In short, the national human rights institution may well be a political or national agent – whether by political motive or merely as an effect of

¹²⁶ See Evans, *supra* note __, at text accompanying notes 61-72.

¹²⁷ The International Council on Human Rights Policy has also noted this dynamic in its review of the work of national human rights institutions in general. See ICHRP Report, *supra* note __, at 1.

its members, structure and overall design – rather than a neutral body in interactions with minority groups.

Finally, beyond these questions of institutional identity and political involvement, the institution may also face a conflict within its mandate to promote human rights. Minority claims may conflict with other human rights agendas. Neither the Paris Principles nor other aspects of the institution’s mandate direct it as to how to balance competing rights, or even seem to acknowledge that such conflicts might arise.

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

C. Implications for Democracy Theory of Minority Rights

National human rights institutions’ limited involvement in minority concerns can be explained at least in part by the failures of resources, of political will, or of relevant regional incentives discussed above. But this pattern may signal something else as well: that the current understandings of minority rights are not entirely applicable in the places they are being ignored. Echoing Leslye Obiora, perhaps “what is often mistaken for apathy might actually be the most poignant commentary on the limitations of the approach.”¹²⁸ At a minimum, this pattern ought to spur us to consider what limitations there may be on the direct transplantation of minority rights and democracy theory.

¹²⁸ See Obiora, *supra* note __, at 656.

In severely divided states, the relationships between ethnic and religious groups are fundamental to the nature and stability of the state. Accordingly, the decisions that a newly developing state makes about how to accommodate those groups in its legal and political system are among the most important for its success, and for its survival. But, as most severely divided states are only now in the process of democratic transition, theories of the role of minority rights in a democracy have been developed primarily in the context of longstanding liberal democracies that are less severely divided.¹²⁹ Although each of the theorists discussed in section A above came to different conclusions about the proper balance of liberal and minority rights within the state, all “took for granted” (as Kymlicka puts it) in staking their positions, that the state in question was a well-established liberal democracy and that the fundamental tension to be resolved in considering minority claims was that between those claims and the liberal values at the core of the state’s identity.¹³⁰

Do the theories formulated in these distant contexts provide a good framework for managing multiculturalism within new democracies? The theorists themselves offer only highly qualified responses to this question,¹³¹ and critics have pointed to extensive social, political, economic and historical differences as discrediting efforts to apply these theories out of their original context.¹³² Whether these theories are

¹²⁹ See Will Kymlicka & Magda Opalski, *Introduction*, in *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* 1, 1 (Will Kymlicka & Magda Opalski, eds. 2001) (hereafter “*Liberal Pluralism*”).

¹³⁰ Kymlicka, *Preface & Acknowledgments*, in *Liberal Pluralism*, *supra* note __, at xii (hereafter “*Preface*”).

¹³¹ See e.g., *Preface*, *supra* note __, at xii; Will Kymlicka, *Nation-Building & Minority Rights: Comparing Africa and the West*, in *Ethnicity and Democracy in Africa* 54, 54 (Bruce Berman, Dickson Eyoh & Will Kymlicka, eds. 2004) (hereafter “*Nation-Building*”).

¹³² See e.g., Will Kymlicka, *Reply and Conclusion*, in *Liberal Pluralism*, *supra* note __, at 347, 347-348 (summarizing Central and East European scholars’ critiques of his position, including concerns about the role of elites in defining minority interests, oppressive minorities, and risks to the process of democratic development); *Nation-Building*, *supra* note __, at 64 (considering African scholars’ critiques, including fundamentally different patterns of ethnic groups and interactions).

relevant to these new contexts remains an open question.¹³³ It is also a vital question, because these theories are being actively exported to new democracies, in the form to the treaties, constitutions, and EU obligations discussed above, and in the form of the national human rights institutions that are the subject of this article.¹³⁴

The experiences of national human rights institutions support the views of those who suggest that these theoretical conceptions of minority rights do not translate directly to new democracies, and particularly to severely divided ones. A common critique of these theories as applied to transitioning states and emerging democracies has been that because these groups take the characteristics of the liberal democratic state as a fixed point, their focus has been on the tension between accommodating minority groups and protecting liberal rights, and not on the tensions that minority claims present vis-à-vis other interests of the state.¹³⁵ The views and experiences of national human rights institutions suggest that, indeed, this focus has caused theorists to marginalize other concerns that are central to newly democratizing states. Minority rights are certainly a useful rhetorical and legal device for rebutting state intervention, just as human rights provide a useful rhetorical and legal device for a state looking for a reason to intervene in minority communities. But the experiences of national human rights institutions suggest that the “problem cases” that have always existed on the fringes of democratic theory and positive law are no longer the exception, but rather, are becoming the most important, significant and frequent minority claims that national human rights institutions face in reality.

1. Core Interests of the State

¹³³ See Kymlicka & Opalski, *supra* note __, at 1 (“Surprisingly, there has been very little written exploring this question.”); *Preface*, *supra* note __, at xv-xvi .

¹³⁴ See Kymlicka & Opalski, *supra* note __, at 3.

¹³⁵ See generally Liberal Pluralism, *supra* note __.

First, as suggested above, democracy theory overstates the extent to which liberal rights are the core interest that the state wishes to protect and with which it identifies. This became apparent at the International Ombudsman Institute meeting in September 2004, during a group discussion of the ombudsperson's proper role in promoting minority rights. While the discussion began with classic liberal restatements of minority interests as extensions of liberal interests ("the Ombudsman's traditional role of protecting citizens from excesses in government power means that we have particular responsibilities towards those who are vulnerable or marginalised"¹³⁶), it quickly shifted to other concerns: minorities' claims to socio-economic equity (from the Argentinean ombudsperson),¹³⁷ the role of immigration and international relations (from the Swedish and European ombudsmen),¹³⁸ and minorities' effect on national identity (from the Greek ombudsperson).¹³⁹

These varying concerns are not surprising, given the varying roles minorities have played in the lives of states, and the differences in self-perceptions of identity amongst these states. Governments in Central and East Europe tend to view minority issues as a national security concern more than as a threat to liberal values, in light of the violent inter-ethnic conflicts there.¹⁴⁰ In Africa, not only are national security and stability crucial issues, but few states enforce liberal rights consistently, and while ethnic communities flourish on the social level, in the political realm ethnicity most often is deployed as a form of patronage.¹⁴¹ The European Center on Racism and

¹³⁶ See Bruce Barbour, *The Ombudsman and Today's Demographic Realities* (on file with author); see also Dr. Jenö Kaltenbach, *Special protection requirement of minorities* (EOI-conference Budapest, 10 May 2004) (on file with author).

¹³⁷ See Dr. Jorge Luis Maiorano, *Workshop 2: Social Condition*, at 7-9 (on file with author).

¹³⁸ See IOI notes, *supra* note __ (panel session Sep. 7, 2004).

¹³⁹ See IOI notes, *supra* note __ (panel session Sep. 7, 2004).

¹⁴⁰ See *Western Political Theory*, *supra* note __, at 66-67.

¹⁴¹ See Dickson Eyoh, *Liberalization and the Politics of Difference in Cameroon*, in *Ethnicity and Democracy*, *supra* note __, at 96, 98-99; Peter Ekeh, *Individuals' Basic Security Needs and the Limits*

Xenophobia suggests that historical differences in patterns of immigration have shaped not only the distribution of minorities within states but also “public perceptions of their place in society and hence, public policies vis-à-vis these minorities.”¹⁴² Finally, while many new democracies have guaranteed liberal rights in principle, many are all too illiberal in practice.¹⁴³

Liberal and communitarian democratic theory’s misplaced assumption of and focus on the state’s liberal identity can be misleading when conflicts arise between minority groups and the state that are, at least ostensibly about liberal values. If applied uncritically, its principles may place too much credence in a state’s liberal rhetoric, mistaking talk for actual devotion to those rights, overestimating the extent to which the state actually protects liberal rights (especially vis-à-vis its minorities), and underestimating the extent to which the state is willing to use those rights as a weapon against minority groups without protecting them itself. In Mexico, case studies of interactions between several indigenous groups and the Mexican government illustrate these concerns. The Mexican government (and in at least one case, its national human rights commission as well) have criticized indigenous legal systems for failing to ensure due process guarantees in their internal legal systems. There is no doubt that in fact due process norms are not followed in the communities’ courts: they are employing their own standards and procedures for judgment that do not correspond to liberal ideals. But the Tlapanec, Tierra y Libertad and Zinacantán communities object to using the state’s legal system not only on grounds of autonomy or of cultural rights, but also because the Mexican government has itself failed to guarantee crucial elements of due process, such as providing translators for non-

of Democracy in Africa, in *Ethnicity and Democracy*, *supra* note __, at 22.

¹⁴² See EUMC report, *supra* note __, at 6.

¹⁴³ See Zakaria, *supra* note __.

Spanish speaking defendants from their communities.¹⁴⁴ While the Mexican government deploys the language of liberal rights in arguing that indigenous autonomy must be limited, it does so as a rhetorical tactic, inviting us to compare indigenous realities to liberal ideals rather than, as we should, to the realities of state interests.

As well as overestimating the importance of liberal values to the state, democracy theorists may also overestimate the risk of minorities creating “illiberal enclaves” within the state, in the sense of deliberately creating systemic inequalities within their communities. There is an intriguing pattern in the claims filed with certain Canadian regional institutions: while some human rights claims by tribal community members against tribal government institutions did concern systematic gender discrimination or other systemic problems, many complained of simple favoritism, nepotism, or abuse of power of the barest sort. For example, most of the formal complaints received by the Métis Settlement Ombudsman in 2003 regarding Métis Settlement leadership were such claims of nepotism, conflicts of interest, or other failures of professional conduct.¹⁴⁵ Similarly, while the New Brunswick Ombudsman did receive some complaints of discrimination against tribal leadership, many of its complaints concerned simple abuse of political authority to favor friends and disfavor rivals.¹⁴⁶ While such problems are obviously undesirable, they are neither inherent to minority systems nor different in kind than the problems that arise within liberal democratic systems.

¹⁴⁴ See Shannon Speed & Jane F. Collier, *Limiting Indigenous Autonomy in Chiapas, Mexico: The State Government’s Use of Human Rights* 22 *Human Rts. Q.* 877, 884-85 (2000); Martin Hébert & Caroline Aubry, *Linguistic Competence, Cultural Categories and Discrimination: Indigenous People before the Mexican Court System* 11 (forthcoming 2005).

¹⁴⁵ Métis Settlements Ombudsman Report 2003, *supra* note ___, at 10.

¹⁴⁶ See Williams, *supra* note ___, at 55-56;

Accordingly, theorists might also be misjudging the extent to which any human rights concerns that arise within minority communities will represent fundamental conflicts between liberal and minority values. Because nepotism and favoritism do not implicate deeply valued community principles or traditional practices, and indeed often violate community values and customs as well as human rights values and customs, these claims are likely to represent, not true clashes of values, but rather, the divergence of political reality from both sets of values, minority and liberal.¹⁴⁷

This is not to say of course that there is not a risk of fundamental conflicts between liberal and minority community values, for of course there are myriad examples of irreducible conflicts, the most commonly noted being entrenched gender discrimination.¹⁴⁸ The Canadian cases could prove to be exceptional. But they do raise the intriguing possibility that the traditional focus on liberal rights as the point of conflict between minority groups and the state may tempt us to look to fundamental differences between minority and liberal values for the cause of conflicts, rather than considering other possibilities.

2. Categories of Minority Groups

In addition to mischaracterizing the interest of the state as a predominantly liberal one, democracy theory places too much weight on the historicity and authenticity of the group's relation to the state as the basis for the legitimacy of its claims, and as the criterion for distinguishing between groups. In democratic theory and positive law, recognized minority groups fall into three major categories:

¹⁴⁷ In a similar vein, Makau wa Mutua argues that human rights violations by African state leaders often are not in pursuit of alternative visions of the good but represent mere abuses of power for power's sake or private benefit. See Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint*, 35 Va. J. Int'l L. 339, 374 (1995)

¹⁴⁸ Joan Kimm, *A Fatal Conjunction: Two Laws, Two Cultures* 18-19 (2004) (violence against women in Australian Aboriginal communities).

indigenous groups who were once hegemonic in their territory and who were displaced by the current state or its predecessor,¹⁴⁹ other long-standing “national minority” groups who have long co-existed within the state,¹⁵⁰ and new immigrant groups.¹⁵¹ The implication of this typology is that these differences in historical relationship are a good descriptor of the group’s interests vis-à-vis the state, a correspondingly good predictor of the nature of the group’s claims, and a principled basis for differential treatment by the state.¹⁵² This basic typology is also expressed in the treaties and constitutional protections for minority groups, and thus law and theory feed on and drive each other in framing these concerns.¹⁵³ National human rights institutions are, accordingly, also working with some version of this typology, as expressed by or modified in their state’s constitutions and treaty obligations.

¹⁴⁹ See discussion regarding the definition of the term “indigenous,” supra note __. Kymlicka treats indigenous groups as a subcategory of national minority groups, but I list them here as a separate category because they are treated separately by many other commentators and by international law, and because Kymlicka himself regards indigenous groups as having both unique claims and unique justifications for those claims, as compared to non-indigenous national minorities. See Will Kymlicka, *Western Political Theory and Ethnic Relations in Eastern Europe, in Liberal Pluralism*, supra note __, at 23-31 (hereafter “*Western Political Theory*”).

¹⁵⁰ While most writers would include as “national minorities” all long-standing minority groups within the state (as I describe it in the text), some would limit this group only to splinter groups associated with other states, e.g. Greeks but not Kurds in Turkey, and Hungarians but not Silesians in Poland. See Aukerman, supra note __, at 1027.

¹⁵¹ This group may be further subdivided, however, to reflect the differing claims of different kinds of immigrants. See *Nation-Building*, supra note __, at 59-61.

¹⁵² In brief, this typology focuses on distinctiveness, authenticity, continuity and consent as crucial characteristics determining the viability of claims for group recognition and rights. Indigenous groups are expected to present an identity and worldview that is comprehensively different than that of the state and to make claims focused on cultural protection through substantial territorial autonomy and control of traditional lands. The philosophical basis for their claim is supposed to be an authentic and continuous tradition that predates and survives the state and a lack of consent to be governed by the state. Other national minorities are anticipated to present an identity and culture that is distinct from the state’s, although not as different as indigenous groups, and to present claims primarily for protection of those distinct characteristics, and perhaps for some degree of territorial autonomy. The justification for their claims is also described as the authenticity and continuity of their distinctive tradition, but it is expected to be more limited in scope and more consonant with the state’s own traditions. Immigrants are acknowledged to present identities with a wide range of levels of difference in characteristics, but they are regarded as having abandoned claims to territorial autonomy and to a continuous cultural tradition by virtue of their decisions to migrate to other cultures. For a full introduction to the topic, see TIERNEY, supra note __; TULLY, supra note __; *Western Political Theory*, supra note __.

¹⁵³ See Andreas Føllesdal, *Minority Rights: A Liberal Contractualist Case*, in *Do We Need Minority Rights?* 59-60 (J. Räikkä ed. 1996).

No one has ever claimed that this typology is perfect; advocates have always acknowledged the existence of problem cases on the margins.¹⁵⁴ Nonetheless, the typology has persisted, perhaps as much because it is effective in limiting the groups that are entitled to rights on a basis that is difficult for them to manipulate (history), as because it is a useful or descriptive one.¹⁵⁵

But in new democracies and severely divided societies, the problem cases in this typology move from the margins to center stage: they are the majority of cases instead of the few. In some new democracies the kinds of groups that have always formed democratic theory's problem cases have been and continue to be more numerous and conflict-ridden than those in the established democracies where this typology was developed. As mentioned above, the Hungarian Ombudsman for Ethnic and National Minorities receives 75% of his claims from the Roma, who have long been considered a "problem case" for the typology, as they are not readily categorized as indigenous, national minorities or immigrants, nor do their claims readily fit the simple categories of non-discrimination, territorial autonomy, or purely cultural rights.¹⁵⁶

Furthermore, In many African and Asian states, many or all ethnic groups might equally lay claim to indigenous or national minority status. In such states, this characteristic provides no basis for distinguishing between, limiting, or even

¹⁵⁴ Some groups do not fit the categories neatly: African-Americans cannot readily be characterized either as national minorities or as immigrants. Other groups fit their category neatly in a formal sense, but the reality of their circumstances belies the core characteristics of the category nonetheless; for example, refugees, who have not chosen to abandon their own cultures and therefore do not lend themselves to the argument that they have consented to assimilation by voluntarily migrating.

¹⁵⁵ Mark Rosen also argues that a concern with limiting the number of beneficiaries underlies Kymlicka's distinction between national minorities and other groups in particular. See Mark D. Rosen, *Liberalism and Illiberalism*, 12 J. Contemp. L. Issues 803, 823 (2002).

¹⁵⁶ IOI notes, *supra* note __ (Sep. 7, 2004 panel discussion).

predicting the kinds of interests that a group will posit in its relationship to the state. Here the typology is simply irrelevant.¹⁵⁷

In severely divided societies, there are more likely to be groups with unquestionably venerable historicity and authenticity, but who nonetheless present problematic claims. For example, the position of the formerly dominant minorities in Eastern Europe vis-à-vis formerly dominated majorities defies the analysis of liberal and communitarian theory. In Kosovo, the ombudsperson's reference to "the minority" inevitably means reference to the Serbs, with whom the majority Kosovar Albanians were engaged in violent conflict only a few years ago, and who were themselves the majority only a few years ago.¹⁵⁸ Similarly, for the human rights institutions of the Baltic states, the minority is the Russian population, many of whom came to the region while it was under Soviet rule.¹⁵⁹ The claims of these once dominant national minorities to protection of the language and culture may be formally identical to those of other national minorities in other states, but the philosophical justifications for those claims and the political and social reaction that the ombudsperson's offices face in addressing them are quite different. For these severely and at times violently divided societies, the question is not whether these groups have maintained authentic and continuous traditions, but whether traditions that have been forcibly imposed by one group upon another can or should be secured thereafter.

Furthermore, it appears that the number of problem cases are increasing.

Ethnic identities persist even as internal cultural traditions are rapidly changing and

¹⁵⁷ Many have noted the limits on this typology, in particular, the notion that each category is truly descriptive only in a certain area of the world, so that groups in North and South America and Oceania most neatly fit the indigenous category, which is progressively less useful in Europe, Asia and Africa. See e.g., Aukerman, *supra* note __, at 1044-46.

¹⁵⁸ See Kosovo Ombudsman Annual Report 2003 (on file with author).

¹⁵⁹ See Ulziibayar Vangansuren, *The Institution of the Ombudsman in Former Communist Countries* (2002).

being reshaped by interaction with other groups and with international influences.¹⁶⁰ This phenomenon is of course not unique to severely divided societies. In Canada, the Métis have long presented a “problem case” in that their ethnic heritage is a mix of indigenous and immigrant peoples. Recently they have begun developing joint forms of governance and adjudication in cooperation with the regional Alberta government, based in part on their own customs and in part on the customs of the state.¹⁶¹ In Mexico, indigenous groups have formed new local legal and political systems that mix indigenous and non-indigenous forms of government.¹⁶² In Europe, political lines are shifting, and ombudspersons there are increasingly receiving claims from foreigners and migrants, seeking to define and make use of changes in their status as the EU consolidates, leaving them no longer immigrants, but not national minorities or indigenous groups either.¹⁶³ In complexly divided societies with hundreds of ethnic groups, and in transitioning states engaged in rapid processes of social and political change, these blended peoples and systems are becoming the norm, not the exception.

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

¹⁶⁰ See generally Donald Horowitz, *Ethnic Groups in Conflict* (1985).

¹⁶¹ See Métis Settlements Ombudsman, 1st Annual Report for the period April 1, 2003 to March 31, 2003, at 1 (on file with author) (hereafter “Métis report”); Métis Settlements General Council website, www.msgc.ca (last viewed Dec. 14, 2004); Catherine E. Bell, *Contemporary Métis Justice* (1999).

¹⁶² See Speed & Collier, *supra* note __, at 884-85; Hebert & Aubry, *supra* note __, at 1-3.

¹⁶³ See Gonnarsdottir & Berggren interview, *supra* note __.

3. Socio-economic Claims, Equity, and Limited Resources

Liberal and communitarian theorists may also be underestimating the importance of socio-economic concerns, claims for equity rather than equality, and limited resources in the minority – state struggle for power and control. First, some claims by minority groups against external authorities may be better understood as socio-economic claims or collective claims for substantive equity rather than liberal claims for autonomy or procedural equality. This is true, first of all, even in the states in which the theorists are based. In her case study of the New Brunswick Human Rights Commission, Shannon Williams was informed by local Native Americans that they were reluctant to pursue claims through the commission in part because they did not view investigation and remedying of their individual claims of discrimination against other individuals as addressing the systemic problems they observed:

“cases of discrimination [are] treated as isolated events and removed from the economic and social causes of inequity. As Aboriginal critics observe, the discrimination experienced by Native people is by its nature *social*, and is based on collective identities and status. Reluctance to pursue the occurrence of discrimination in broader social contexts owing to limited resources, narrow legislative mandates or lack of organization will contribute to the perception that human rights codes are impotent measures for achieving social justice.”¹⁶⁴

In accounts of human rights conflicts with minority groups in Africa, this disjunct between the socio-economic equity concerns of the minority group and the equality and freedom concerns of human rights advocates is even more pronounced.¹⁶⁵ In human rights activists’ descriptions of their efforts to raise concerns about unequal gender norms and harmful traditional practices within minority communities, repeatedly the women who are the members of those communities characterize their concerns first and foremost as demands for social and economic

¹⁶⁴ Williams, *supra* note __, at 126. Indeed, a number of the claims brought to the commission concerned basic living conditions and economic status rather than discrimination, which is the commission’s mandate. *See id.* at 51-77.

¹⁶⁵ *See* Ekoh, *supra* note __.

goods; and repeatedly, human rights activists brush aside those claims to emphasize instead the need for gender equality. In a particularly acute example of these fundamentally different conceptions of the good, Leti Volpp tells the story of filmmakers traveling in Africa to make a film opposing female genital cutting practices. While visiting a community, they asked a group of women about their feelings on the subject. In response, the women explained that what they really needed was a truck to carry their produce to the market.¹⁶⁶ This is not a story of a conflict between Western liberal values and minority cultural values (as female genital cutting is usually characterized), but of a clash between Western liberal values and minority socio-economic claims. Minority groups may not regard their concerns as cultural or liberal, but rather as a demand for equity, for a share of the tangible goods of society.¹⁶⁷

Liberal theorists' tendencies to emphasize the liberty and recognition aspects of minority claims and to minimize the socio-economic aspects may reflect those theorists' efforts to minimize the nature of the conflicts between minority claims and liberal rights, and thereby to provide for the maximum possible range of acceptable (to them) minority claims. As discussed above, states will generally recognize, and courts will generally enforce, only those minority rights that can be characterized as individual rights, not collective ones. The more a claim resembles a traditional liberal claim for freedom and procedural equality, rather than a socio-economic or group claim, the more likely the plaintiff is to be granted standing and the claim is to be

¹⁶⁶ Volpp, *supra* note __, at 1208-09.

¹⁶⁷ Interviewing women in Nigeria on behalf of the World Bank, Leslye Obiora recounts that many "seemed confounded by the conceptualization of gender *equality* in human rights discourses. ... they extolled *respect* as a more realistic paradigm for ordering specific social relations. ... educated, elite, and urban women were more inclined to subscribe to an equality-base discourse, while women in rural areas had more of a tendency to lament the paucity of resources. ... Arguably, the rural perspective suggests that it may be somewhat facile to quarrel over who does the dishes after dinner when dinner is a fast-disappearing routine in many rural households." Obiora, *supra* note __, at 652.

found justiciable. However, in cases where the essence of the claim is in fact collective or focused on equity, the trade-off for this justiciability is an essential mischaracterization of the nature of the claim itself.¹⁶⁸ Another trade-off is in the available remedy: the remedy for an individual discrimination claim is likely to be more limited than the remedy that would be necessary to redress a claim for collective socio-economic benefits.

Theorists also tend to give short shrift to the limits on state power and capacity that make effective enforcement of any rights, liberal or minority, a pipe dream for many new democracies. In some states, government infrastructure has not infiltrated very far beyond the capital city, and even liberal freedoms, well-established in principle, are at the whim of local officials. The lists of rights promised in the new minority treaties require programs that are well beyond the capacities of states with limited resources, and especially states with numerous disparate groups. For example, Adeno Addis notes that “many countries, especially developing countries, are faced not with two or three, but with dozens of languages. Under those circumstances, it is likely to be financially prohibitive and administratively chaotic to attempt to give equal status to all languages that are spoken in the polity.”¹⁶⁹ Again and again, national human rights institutions in transitioning states report a lack of the necessary funding and resources to perform their functions; frequently, they operate only in the capital city and not far beyond¹⁷⁰

¹⁶⁸ Reading the works of liberal pluralists such as Kymlicka, as well as advocates for indigenous communities such as James Anaya, it is striking that they struggle to characterize minority claims in such a way as to minimize the conflict they pose with liberal values. They are quite reluctant to acknowledge areas of irreducible conflict that would force an either/or choice between minority and liberal values. See Kymlicka, *Multicultural Citizenship*, *supra* note __; Anaya, *supra* note __.

¹⁶⁹ Adeno Addis, *On Human Diversity and the Limits of Toleration*, in *Ethnicity and Group Rights*, *supra*, at __, 139.

¹⁷⁰ Malawi, Tanzania, and Nepal are examples.

But the implications of these facts are more far reaching than simply a practical obstacle to rights enforcement. On the one hand, they mean that any set of rights supposedly guaranteed by the state may be utterly ephemeral, so that talking about a conflict, for example, between liberal rights and minority rights may be an entirely theoretical debate, the human rights equivalent of theological treatises on the number of angels that can dance on the head of a pin.

But beyond this, the state may not be in the position of having the power to grant or deny rights or autonomy to its minority community at all. Rather, minority communities in some states are in the position of de facto governing themselves, and the state may not have the capacity to challenge minority authority or to replace it with governance systems of its own.¹⁷¹ The issue of minority rights may arise only at the moment that the state gains enough power to challenge the status quo self-governance by minority groups and attempts to eliminate or reduce minority autonomy. This presents a very different context for considering minority claims and any challenges they pose to liberal rights or other state interests.

4. Criteria for Decision-making

While it may be possible to characterize conflicts between minority groups and the state in terms of liberal and minority rights, that does not necessarily mean that human rights analysis or norms will provide a basis for decision-making or distinguishing between claims. Because of all the gaps between liberal theory and the reality of severely divided new democracies discussed above, democratic theories of minority rights may not provide effective criteria for resolving those conflicts.

Even where a minority does not itself perceive its claims as being based in recognized rights, the group may be tempted to do so by the existence of human rights

¹⁷¹ This is the case, for example, in some areas of Ethiopia.

as an effective way of recharacterizing minority claims to make them cognizable in court or before human rights institutions. For example, the Northern Ireland Human Rights Commission was asked to help define standards for the parades that are a tradition of both the Protestant and Catholic communities and that frequently present a flashpoint for conflict. While originally, neither community construed its concerns as a human rights claim, now the issues are being redefined in human rights terms.¹⁷² But according to Dominic Bryan's case study, "what human rights approaches have been good at is holding the state accountable for the activities of the police and of its commissions and officials," but "human rights instruments are not nearly so effective in providing guidance for inter-communal disputes." Rather than providing factors for balancing the parties' respective interests and concerns, the introduction of human rights norms has merely encouraged government agencies to "couch... their decision in the language of rights" all the while "adopting a standardized boilerplate format for their determinations."¹⁷³ In this case at least, the addition of human rights standards has merely provided another gloss on the situation, rather than a principled basis for distinguishing acceptable from unacceptable parades.

As suggested above, democratic theories developed in well-established liberal democracies may emphasize factors that are tangential in severely divided or transitioning societies, factors such as the historicity of a group's claim or the potential conflict it presents with liberal values that the state itself may not effectively enforce. But if applying minority rights in the ways suggested by liberal and communitarian democratic theory misconstrues the crucial issues and interests at

¹⁷² See Bryan, *supra* note ___, at 241-42.

¹⁷³ See *id.* at 249.

stake, it may in turn merely complicate and obscure the conflict, rather than providing a principled basis for resolving it¹⁷⁴

D. What Role Could National Human Rights Institutions Play?

In part B, I discussed the pragmatic reasons that national human rights institutions have not been as involved as they could be in minority concerns, and in part C I suggested that their disinterest in some part also reflects the fact that minority interests do not fall neatly into the liberal and minority rights categories predicted by democracy theory and defined by positive law. But while democracy theory may have mistaken the nature of at least some minority claims in severely divided and transitioning states, national human rights institutions may nonetheless be able to effectively address and remedy those claims. Not only this, they may be able to play a role long promoted by democracy and human rights advocates, but ill defined by them: that of a forum for productive dialogue between minority groups and the state. I will first consider the role national human rights institutions might play in regard to minority groups generally, and then their role in regard to indigenous groups with their own legal and political systems.

1. Roles vis-à-vis Minority Groups Generally

By their nature, national human rights institutions are well designed to address at least some of the minority group concerns that do not fit the predicted mold. For example, Bruce Berman suggests that one of the fundamental obstacles to the development of effective democratic governance and inter-ethnic stability in Africa is that government bureaucracy functions according to destructive clientelism defined

¹⁷⁴ See also Sheridan Pauker, *Spraying First and Asking Questions Later*, 30 *Ecology L. Q.* 661, 667-68 (2003) (Colombian indigenous group's complaints regarding aerial herbicide spraying); Tenant & Turpel, *supra* note __, at 291 (Canadian indigenous group's complaints regarding Canadian Air Force base).

along ethnic lines.¹⁷⁵ Similarly, in the experience of ombudspersons who served indigenous communities, a large percentage of the complaints brought against community leadership concerned conflicts of interest and nepotism.¹⁷⁶ The ombudsperson, with her mandate of rooting out government maladministration and favoritism of every kind, is ideally suited to address such concerns.

However, the capacity of individual national human rights institutions to address the disparate demands of minority communities discussed above depends to a large degree on their similarly disparate structure and legal mandates.¹⁷⁷ Some unanticipated claims, like the above claims of corruption, will fall neatly into the ombudsperson's or commissioner's jurisdiction, while others, like the socio-economic claims discussed previously, will not.

But the gaps between experience and theory discussed above also suggest another, more systemic role for national human rights institutions: that of developing a better understanding of minority concerns and best practices principles for addressing them. As has been illustrated by the results of my study, when national human rights institutions are accessible to minority groups and receptive to their claims, they obtain a wealth of direct information about the groups' interests and concerns, including some that fall outside the typical understandings of minority group rights. However, this information is nowhere collected or considered, and so it has not been taken into account in formulating policy or theory on such rights.

¹⁷⁵ “[T]he state bureaucracy is a realm of nepotistic appropriation of office, ethnically biased distribution of patronage, extortion of bribes, and kick-backs and direct theft of public revenues.... democratic reforms in Africa cannot succeed, the bonds of ethnic communities cannot significantly relax and a civic politics of broader ties of cooperation cannot develop without a corresponding transformation of the bureaucratic apparatus.” Bruce Berman, *Ethnicity, Bureaucracy & Democracy: The Politics of Trust*, in EDIA, *supra* note __, at 38, 39.

¹⁷⁶ See discussion, *supra*, section C.1.

¹⁷⁷ See Kaltenbach, *supra* note __, at 1.

There is one institutional practice in particular that could serve as a resource for discovering and understanding minority concerns that are not currently addressed in minority rights law and theory: “good offices.” “Good offices” refers to a national human rights institution’s use of its contacts, influence and mediation experience to conciliate a claim that does not actually fall within the institution’s formal jurisdiction.¹⁷⁸ Good offices practices vary considerably between institutions: some institutions will offer to conciliate virtually any claim that comes in the door, whereas others stick closely to the terms of their mandate.¹⁷⁹ In New Brunswick, for example, where the human rights commission’s mandate is narrowly limited to discrimination and to events on non-tribal lands, one-third of cases were good offices cases, including complaints of political favoritism and discrimination against tribal leaders, as well as derogatory comments by public officials and the media, and other incidents falling outside the commission’s strictly defined jurisdiction.¹⁸⁰ The commission in Ghana also encourages its local offices to accept good offices cases.¹⁸¹ Where institutions do offer good offices services, a systematic evaluation of those cases might yield valuable information about local concerns.

In the same vein, because the resolutions reached by national human rights institutions are neither binding nor precedent-creating, they present an opportunity for experimentation with a range of solutions for minority group problems and for development of “best practices” guidelines. Because minority interests are, as discussed above, so relational and contextual, some trial and error is in fact likely to be necessary in national, regional and local contexts to find good solutions. As with

¹⁷⁸ If informal conciliation does not resolve the claim, then the institution must either step aside or refer the claim to the agency that does have jurisdiction: informal efforts do not obligate the institution to take further formal steps to follow up on the claim, and indeed, by the terms of its mandate it could not do so. See Williams, *supra* note __, at 51-57.

¹⁷⁹ See ICHRP report, *supra* note __.

¹⁸⁰ See *id.*

¹⁸¹ See ICHRP Report, *supra* note __, at 14-15.

the good offices cases generally, if information were collected and made available in a systematic way, national human rights institutions could serve as a laboratory for ideas that might ultimately percolate up to the national level or be adopted by institutions in other regions.

These possibilities offer a pragmatic approach to an ethereal concept long promoted by both democracy theorists and human rights advocates as a prescription for conflicts between minority groups and the state: dialogue. In this context, dialogue seems to mean all things to all people. Democracy theorists envision a fundamental constitutional negotiation of the essential nature of the relationship between minority groups and the state, along the lines of James Tully's proposal for a "post-imperial dialogue on the just constitution of culturally diverse societies"¹⁸² In the new minority rights treaties, dialogue is not the basis for establishing a just framework for the state but rather an iterative, ongoing process of consultation and participation in governance.¹⁸³ Others propose dialogue for the purpose of nation-building in severely divided societies. Adeno Addis suggests that "a genuine sense of shared identity, social integration, in multicultural and multiethnic societies will develop only through a process where minorities and majorities are linked in institutional dialogue."¹⁸⁴ Similarly, Leslye Obiora propose that "'dialogic democracy' – recognition of the authenticity of the other, whose views and ideas one is prepared to listen to and debate, as a mutual process – is the only alternative to violence in many areas of the social order where disengagement is no longer a feasible option."¹⁸⁵ But these

¹⁸² TULLY, *supra* note __, at 24; *see also* Multicultural Citizenship, *supra* note __, at 171 (liberal states' fundamental "relations between national groups should be determined by dialogue" rather than by forcible imposition of liberal values).

¹⁸³ *See* discussion *supra* section I.B.

¹⁸⁴ Addis, *supra* note __, at 130.

¹⁸⁵ Obiora, Supri, *supra* note __, at 660 (quoting Anthony Giddens, *Living in Post-traditional Society*, in *Reflexive Modernization* 56, 106 (Ulrich Beck et al., eds. 1994)); *see also* Ibhawoh, *supra* note __, at 854.

theorists do not suggest how these dialogues might take place, nor what particular characteristics would be necessary to provide an adequate forum for their envisioned dialogues.¹⁸⁶

Certainly human rights institutions present a forum for dialogue of some sort between minority groups and the state over human rights values. And if they were to establish a process of systemically collecting and considering the information they receive from minority claimants, this dialogue could become a multi-layered one, moving from the local level to the national and back again, and accreting mutual understanding over time. But can the sort of dialogue carried on in national human rights institutions achieve such lofty goals as nation-building, social integration, and constitutional negotiation?

In discussing the question of the ombudsperson's role vis-à-vis minority groups at the International Ombudsman Institute conference in Quebec last year, the participating ombudspersons considered that the terms of their interactions with minority groups were already set by external influences: the legal frameworks for their offices, and the constraints of institutional competence and credibility. A national human rights institution's mandate and its powers of investigation and reporting go more to enforcing known and understood legal rights than to defining those rights in the first place.¹⁸⁷ Where the basis for minority rights is limited, where the balance between minority rights, individual rights and state values is a hotly debated political question, and especially where there is of yet no established legal

¹⁸⁶ There are naysayers as well: Iris Young contends that multicultural participants in a dialogue cannot reach mutual understanding, while Chandran Kukathas expresses the concern that they will understand each other, and that understanding will breed dislike and conflict. See TULLY, *supra* note __, at 132-33 (quoting Young); Liberal Archipelago, *supra* note __, at 33.

¹⁸⁷ "An Ombudsman may protect only what is guaranteed by the legal system, but no Ombudsman may protect something that does not exist. And the rights of minorities were, for quite some time, not included in the list of internationally recognised human rights. This situation has changed materially only during the recent decade but the emancipation of the rights of minorities cannot be considered as fully resolved even today." Kaltenbach, *supra* note __, at 1.

framework for weighing this balance, involvement in these issues takes the institution well outside its usual activities and stretches its credibility and legitimacy both with the government and with the public.¹⁸⁸ In new democracies where rights are as yet ill defined, the national human rights institution may find itself playing this role, particularly through mechanisms like the good offices claims.¹⁸⁹ However, it is not clear that these institutions will, except at times by happenstance, have the legal and political resources to do so effectively. Furthermore, while the institution may have the authority to recommend change, it does not have the authority itself to enact that change either upon the law or the essential political structure of the state, and so it is not in a position to negotiate fundamental constitutional change of the sort envisioned by many democracy theorists for cross-cultural dialogue.

Due to these legal and institutional constraints, national human rights institutions are not well positioned to undertake the sort of “constitutional dialogue” advocated by some democracy theorists nor to address highly politicized and fundamental decisions about minority and majority interests. When minority interests strike at the core of a state’s identity and power relationships, a national human rights institution can never serve as more than a limited forum for dialogue.

But a national human rights institution may be well suited for productive dialogue in less fraught situations, where it has the flexibility and accessibility to explore minority interests and to accrete knowledge of them gradually over time. An institution that is receptive to minority claims is in a unique position, not only to address minority claims that lie beneath the surface of already identified minority interests and rights, but also to bring those claims up to the surface where they can be acknowledged and understood.

¹⁸⁸ See IOI notes, *supra* note __.

¹⁸⁹ See European Centre for Minority Issues, Minority Ombudsperson Project Network Conference Report (November 2003) at 19-20, available at ECMI website, www.ecmi.de.

2. Indigenous Communities and Legal Pluralism

Furthermore, because of their particular strengths and flexibility of procedures, national human rights institutions could also serve a productive role in addressing the interests of indigenous groups. For states within which indigenous groups govern themselves autonomously and maintain their own legal systems, the power balance between indigenous groups and the state may be a crucial and precarious one, especially if such groups make up a substantial portion of the population. These are therefore particularly acute examples of potential conflicts between minority and human rights. And when they interact with these groups, national human rights institutions face additional levels of complexity in dealing with what are in essence separate legal and political systems within the state.

It is important to acknowledge at the outset that indigenous communities and cultures themselves are not singular but multiple, and differ amongst each other as to values and practices as much as any one of them does to state structures. Bedouin blood feuds, for example, have little in common with Native American sentencing circles. Likewise, the state structures and cultures in which such communities act range from liberal democracies to authoritarian governments to failed states, and from states with strong national identities to sharply divided states to states in which disparate cultures rarely interact. Thus, it would be misleading to speak of conflicts between the state and indigenous cultures as if all such conflicts were of the same nature.

Not only this, indigenous cultures are not static but dynamic, and not necessarily isolationist but often interactive. Indeed, community laws and legal systems may not be ancient, customary, or based in tradition. The image (and even to some extent the legal definition) of indigenous peoples and their practices includes all

of these elements, and indigenous communities themselves may call on tradition or ancient origin as legitimizing their laws and practices, even when those laws and practices are of recent vintage. Both the state and the community may make use of this notion of tradition as a basis for legitimacy and recognition. Therefore, it is important to recognize that the tension between indigenous laws and state laws is not necessarily one between old and new, between customary and written, or between traditional and modern, but may be far more complex, reflecting the dynamic interactions between groups and systems.¹⁹⁰

In this sense, indigenous groups increasingly pose problem cases of the sort discussed in part C above. The Métis in Canada, as well as the Tlapanec and other indigenous peoples in Mexico, have formed legal and political systems that are neither strictly indigenous nor defined by the state, but a deliberate blending of state and community ideals and practices.¹⁹¹

The legal and political structures in these systems of legal pluralism also vary considerably, particularly in the level of mutual recognition and interactivity between indigenous and state systems. Indigenous communities may be organized into formal political structures or may operate more as social units than political ones. Community institutions may apply customary, religious, or other community-defined laws in place of or in addition to formal state law. Some states' constitutions permit their courts to recognize indigenous communities' legal decisions or apply some version of the community's laws. So, for example, the South African constitution affirms the legitimacy of tribal institutions and laws, the Ethiopian constitution permits the state to recognize religious courts, and the United States recognizes the

¹⁹⁰ See TULLY, *supra* note __; Ibhawoh, *supra* note __, at 841; Hébert & Aubry, *supra* note __ .

¹⁹¹ See Bell, *supra* note __; Hébert & Aubry, *supra* note __; Speed & Collier, *supra* note __

authority of tribal courts on Native American reservations.¹⁹² But community legal institutions need not be recognized by the state to function as the community's legal system.

Even though states do in some instances apply indigenous laws or recognize indigenous legal systems, precepts of constitutional supremacy might lead one to expect that constitutional norms, including human rights norms, would necessarily prevail over indigenous community law or practice. Certainly, some constitutions do expressly provide that customary practices must comply with constitutional norms, and some courts do subject indigenous laws to constitutional mandates in the face of constitutional silence.¹⁹³ But in other states, indigenous practices are themselves legitimized by the constitution, granting constitutional status to those practices and creating ambiguity about precedence. For example, in Ethiopia, the constitution recognizes the rights of its "Nations, Nationalities and Peoples" along with numerous individual rights and does not indicate which should prevail in case of a conflict.¹⁹⁴ Other states' constitutions expressly exempt traditional practices from certain constitutional norms such as anti-discrimination rights.¹⁹⁵ Within the United States, Supreme Court decisions have granted partial but not absolute sovereignty to tribal governments, and that sovereignty has at times been found to outweigh constitutional interests such as equal protection.¹⁹⁶ And of course, some constitutions and courts do not address the issue at all.

Furthermore, it is not just state policies toward indigenous legal systems that vary; the extent to which indigenous systems accept or reject the state's system, and

¹⁹² See SOUTH AF. CONST.; ETH. CONST.; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

¹⁹³ See Ibhawoh, *supra* note ___, at 848 (2000) (Ghana and Uganda).

¹⁹⁴ See ETH. CONST. art. 39.

¹⁹⁵ See ZIMB. CONST., art 23(3); see also Ibhawoh, *supra* note ___, at 843.

¹⁹⁶ See Thomas Biolsi, *Bringing the Law Back In: Legal Rights and the Regulation of Indian-White Relations on Rosebud Reservation*, 36:4 CURRENT ANTHRO. 543, 545 (1995).

even the extent to which they take account of it, also varies substantially. Some communities maintain jurisdiction over family and minor civil and criminal matters while ceding larger cases to the state.¹⁹⁷ Others claim jurisdiction over all issues, big or small.¹⁹⁸ And indigenous communities may govern areas that the state considers private, or vice versa.¹⁹⁹

In such contexts, minority group concerns will first be defined within the minority community itself in the context of the community's self-defined political and legal system. Similarly, state concerns with community practices will confront not merely a claimed cultural exception to human rights norms, but a separate legal and political system operating under different norms and, at least potentially, conceiving of the conflict in alternative legal and political terms. The systems may differ not only in their substantive rules, but also in their processes, and even in the underlying assumptions, cultural values, and symbols that each system deploys.²⁰⁰

Even where a state recognizes the indigenous system it is typically the community that must adapt to the state system in order to be heard. For example, indigenous claims to land must be proven according to state definitions of ownership (even if particularized to indigenous ownership), and in state institutions (land registration offices or courts) and by state processes, (formal presentation of evidence of ownership as defined by the state). Indigenous definitions, institutions, and processes will not stand, if opposed by others with state definitions, institutions and processes at their backs.²⁰¹

¹⁹⁷ See *id.* at 546.

¹⁹⁸ See Hébert & Aubry, *supra* note __ (Tlapanec community in Mexico).

¹⁹⁹ See Mark D. Rosen, Our Non-Uniform Constitution, 77 Tex. L. Rev. 1129, 1157 (1999) (discussing practice of "welfare checks" on U.S. Native American reservations).

²⁰⁰ See Joan Kimm, A Fatal Conjunction: Two Laws, Two Cultures 91-92 (2004).

²⁰¹ See, e.g., *Delgamuukw v. the Queen* (1991), discussed in TULLY, *supra* note __, at 132 (The Gitskan and Wet'suwet'en nations' claims for recognition of their territories were dismissed by a Canadian court because the evidence presented of ownership according to Aboriginal standards did not meet

But considering indigenous claims solely in state forums undercuts the group's ability to characterize its claim as it understands it and also undercuts the philosophical justifications for the state to recognize such claims in the first place. In addition, this will not satisfy those indigenous communities that claim from the state not only liberal ideals of tolerance and local autonomy, but also the communitarian ideals of participation as a constituent and of cultural survival not only as an isolated unit within the state but as an interactive, incorporated part of the state.

Requiring the indigenous community to frame its interests in the state's terms and pursue them through state processes and institutions also raises again the question of what is required for meaningful dialogue between the state and its communities. While many liberal theorists appear to endorse the notion that productive dialogue can be had on the state's terms, against the background of liberal institutions and values, some indigenous groups contend that their concerns are fundamentally misstated and misunderstood in this context.²⁰² Picking up this concern, communitarian commentators contend that "the dialogue must be one in which the participants are recognised and speak in their own languages and customary ways."²⁰³ Meanwhile, other theorists argue that there can be no intercultural understanding for exactly these reasons.²⁰⁴ Certainly the parties must agree upon some common forum to carry on a dialogue at all,²⁰⁵ and currently such dialogue is being carried out only in state-

Canadian requirements for proving title.)

²⁰² "The adjudicative mechanism proposed by the state, namely the domestic legal system, is inadequate. Within domestic legal systems, indigenous claims are divided and translated into categories that decontextualise and depoliticize them. Claims for political recognition become questions of minority rights, language rights, equality rights and education rights. Collective claims by indigenous peoples are read down to become individual claims by indigenous persons. In every case, concepts like justiciability and the separation of law and politics are used to purge these claims of any political content which is offensive to the state, or which challenges the notion that the state represents the population." C.C. Tenant and M.E. Turpel, *A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination*, 59 *Nordic J. Int'l L* 287, 291 (1990) (Innu people in Canada).

²⁰³ See TULLY, *supra* note __, at 24.

²⁰⁴ See discussion, *supra*, at text accompanying note __.

²⁰⁵ Adeno Addis raises a similar concern regarding choice of language: "How does the notion of

defined fora such as the courts and the national human rights institutions.²⁰⁶ Is there an alternative?

One possibility would be for the state to adapt to the community's system in certain contexts, either by participating in the community's cultural, legal, and political processes or by developing hybrid processes, rather than requiring the community to adapt to its own. This would permit the indigenous group to participate in defining the forum and the terms of discussion. Some groups such as the Métis have already demonstrated a willingness to accept some state involvement in their internal governance in return for the benefits of state recognition and tolerance.

As discussed above, national human rights institutions' capacity to serve as a forum for dialogue in the context of minority rights is limited in certain respects. But nonetheless, these institutions might be able to participate in community processes more readily than other state institutions could do. Because their procedures are more informal and flexible than those of courts, most have some freedom to innovate. An ombudsperson could conceivably appear before community courts or councils, or could adopt a community's arbitration practices when considering community complaints. At the same time, because national human rights institutions lack enforcement powers, their participation would not bind the state or pose a threat to its sovereignty.

Another relevant feature of human rights institutions is their focus on discussion and conciliation as a first approach to conflict. Although the extent to which indigenous groups rely on consensual systems for conflict resolution is often overstated, in at least some instances there may be commonalities between

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

²⁰⁶ See TULLY, *supra* note __; JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

institutions. Ombudspersons in places as disparate as Burkina Faso and Canada reported feeling a sense of compatibility between their techniques and local preferences for conciliatory approaches to conflict resolution.²⁰⁷ The indigenous assessment was more skeptical about the extent of the resemblance: “In order for the commission to serve Native people they have to understand Native people. They have to learn about Native cultures, traditions, and spirituality.”²⁰⁸

So far, only a few institutions have tried to apply this prescription. Even among institutions with programs or officers devoted to an indigenous group or groups, almost none have tried to participate in or incorporate indigenous practices in any way. The examples I found were scattered: an ombudsperson for American Indian Families in Minnesota engages in traditional prayer and rituals with her clients before beginning meetings;²⁰⁹ a local Argentinean ombudsperson’s office that works extensively with the indigenous Mapuche people held a workshop to train its employees in traditional Mapuche mediation techniques;²¹⁰ and the African Ombudsman Association discussed the topic of reclaiming traditional mediation practices at its 2003 annual meeting. In one case, it was not a human rights institution, but local police who adopted indigenous practices in an effort to bridge a divide between liberal rights, security concerns, and minority rights in addressing accusations of witchcraft and witch killings and trials.²¹¹

²⁰⁷ Ms. Von der Esch suggested that the use of prominent local leaders to head local offices and vigorous public education campaigns had also been crucial to success in Burkina Faso. See von der Esch correspondence, *supra* note ____.

²⁰⁸ Williams, *supra* note __, at 107-09.

²⁰⁹ Telephone conversation with Dawn Blanchard, Ombudsman for American Indian Families (Sep. 22, 2003) (notes on file with author).

²¹⁰ E-mail correspondence with Blanca Tirachini, Defensora del Pueblo de la ciudad de Neuquen, Argentina (May 16 & 19, 2003); with María Laura Cassiet, Defensor del Pueblo de la Nacion, Argentina (June 26-27, 2003); and with Marianne von der Esch, Head of International Division, The Parliamentary Ombudsmen, Sweden (May 21, 23 & 31, 2003) (hereafter “von der Esch correspondence”) (notes on file with author).

²¹¹ John and Jean Comaroff describe what they call “a small vanguard of diviner detectives” in a local police force:

However, pursuing this approach would prove problematic on levels from the most superficial to the most fundamental. First, this is not an easy task at a pragmatic level. If most human rights institutions have not mustered the will and resources to engage in simple outreach programs to minority groups, such as hiring staff who speak local languages, it is unlikely that they will organize themselves enough to master local legal systems. And even if undertaken in good faith, walking the tightrope of participating in community processes without becoming a part of them is likely to strain institutional capacity and credibility in all the ways discussed above.

Numerous authors have noted the difficulty of understanding the fundamental concepts of another legal system.²¹² Even if operating with the best of intentions, an outsider's perception of the significant aspects of another's system is likely to depend on her own interests in the system. Human rights advocates, alternative dispute resolution advocates, and others tend to selectively acknowledge and legitimize elements of indigenous legal processes that favor their projects, such as mediation practices, and ignore elements that would undermine their projects, such as corporal or capital punishment. They also tend to acknowledge and legitimize community values that align with their projects, such as respect for the environment, but to

“Described in the national media as ‘one of the few success stories in a police force that has almost collapsed under the strain of democracy,’ Gopane uses methods that require a high level of local knowledge. At relevant moments, he exchanges his police uniform for the paraphernalia of a traditional healer. In him, the forensic and the oracular, scientific investigation and social diagnostics, become one. ... While such efforts remain unorthodox and limited, they do seem to be spreading; the SAPS liaison officer in the Northwest Province, Patrick Asneng, told us that dealing with the occult has become part of the mundane work of policing in the countryside.” John Comaroff & Jean Comaroff, *Policing Culture, Cultural Policing*, 29 *Law & Soc. Inquiry* 513, 530-31 (2004)

²¹² See, e.g., Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 *Am. J. Comp. L.* 43 (1998). Concerning Malay customary law, Joseph Minattur asserts that “The only persons who can be expected to have a clear understanding and a proper appraisal of customary law are the traditional leaders of the community. They are interested in maintaining the norms of their community and to them should be instructed the administration of the customary law. They will know how to reinterpret it to keep pace with social changes, changes which their own community has accepted as being relevant to it.” See Joseph Minattur, *The Nature of Malay Customary Law*, in *FOLK LAW*, VOL. I, *supra* note ___, at 558.

declare the hegemony of human rights values when there is a conflict, as in the case of child marriage.

Beyond this, historically most efforts by states to incorporate indigenous legal systems have represented a mechanism for state hegemony over the community, rather than an attempt at true dialogue or genuine acceptance of community norms as constitutive of the state. The most well known examples are those of efforts by colonial states to codify their understanding of the customary law used by the peoples they colonized. This was problematic on several levels: first, the colonialists rarely got it right, second, they transplanted the customary law into the colonial system and process and thereby changed it, and third, they used this process as a means to implement a two-tier system of justice in which those they colonized invariably occupied the lower tier.²¹³ In worst case scenarios, the “customary law” system was not just as an incident of repression among others, but as an active part of the development of a whole repressive system, as in South Africa where “institutionalization of customary law was thus part of a process for redistributing power” during the colonial period in South Africa, “deceiv[ing] people into believing that law supported their interests.”²¹⁴ Colonial governments’ misapprehension of, mischaracterization of, and misuse of indigenous religious and community legal norms has been well documented across numerous settings and cultures.²¹⁵

Such problems have not been limited to colonial settings. Rather, efforts to import progressive values into local processes served to undermine both systems under the communist Derg government in Ethiopia. The Derg tried to make use of a local village council model to implement their own progressive rules on marriage, but

²¹³ See Martin Chanock, *Law, Custom and Social Order* (1985).

²¹⁴ See Robert J. Gordon, *The White Man’s Burden*, in *FOLK LAW*, VOL. I, *supra* note ___, at 367, 369-70.

²¹⁵ See e.g., M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975); Chanock, *supra* note ___.

the councils failed after a couple of years. From the state's perspective, the councils were problematic because they tended to function according to find ways to accommodate the formal rules to local preferences. From the community's perspective, the council's use of the formal rules undermined their authority, which stemmed from knowledge of and adherence to community practices.²¹⁶

By attempting to adapt or participate in indigenous legal systems, a national human rights institution risks creating “an illusion of popular justice” that “is not accountable via the usual democratic representative processes,”²¹⁷ It also risks serving as a mechanism for state oppression of indigenous groups, stirring up conflict by increased interaction, and undermining its own credibility, both with the indigenous group and with the majority. But there are ways of mitigating this risks. Of course, such efforts should be pursued only upon an expression of interest by the indigenous community. An indigenous community member or members might act as the community's representative within the institution. Depending upon community preferences for its level of involvement, an institution might keep itself apart from internal community systems but incorporate some aspects of the community systems into its practices, or alternatively, might appear as a representative of the state within the community system but make no effort to adapt community practices in its own work.

As it is, indigenous communities have no choice but to pursue their claims in state institutions, through state processes, according to the state's terms. Carefully constructed, an ombudsperson or national human rights commission might offer a forum for or participant in dialogue that allows at least some possibility of translation.

Conclusion

²¹⁶ Pankhurst, *supra* note __, in *LEGAL TRANSPLANTS* (Elisabetta Grande, ed.).

²¹⁷ See Gordon, *supra* note __, at 386.

A final anecdote concerning the Tlapanec community in Mexico, mentioned above, illustrates the complexities both of the relationships between minority groups and the state and of their deployment of human rights norms as a means of exercising power within those relationships. The Tlapanec community is an indigenous group in Mexico that has become dissatisfied with its experiences in the Mexican judicial system. Members of the community found the legal standards, processes, values, and language, alien and confusing. They also found the police attention to their area inadequate to maintain order. In response, they initiated a parallel judicial system, which operates according to community norms and in the Tlapanec language. The Mexican government views this as a challenge to its sovereignty.²¹⁸

Human rights claims are present on all sides of this conflict. The Tlapanec people claim violations of their due process rights by the state, because state trials are conducted in Spanish and they are not provided with translators. They also claim violations of their community justice norms: if an accused is imprisoned during vital agricultural seasons, not only the defendant but his family will suffer as a result. Finally, they claim these community rights to autonomy and self-determination authorize their development of their own system. The Mexican government claims that the Tlapanec legal process violates due process norms and exceeds the scope of the community's authority.²¹⁹

The Tlapanec creation of a new legal system is a direct challenge to the legitimacy of the Mexican government and its human rights agenda. It was developed by the community to meet its own needs, but is not a direct continuation of ancient practices. It is couched in part in terms of individual liberal rights, in part in terms of minority rights, and in part in terms of alternative community norms. It shifts the

²¹⁸ See Hébert & Aubry, *supra* note __ at 11.

²¹⁹ See *id.*

balance of power in the community's relationship with the national government by claiming functions the state views as its own.

But although Mexico's National Commission for Human Rights boasts an outreach program for indigenous groups, and although its constitution was amended in the 1990s to introduce indigenous rights, the Deputy Commissioner for Human Rights, a devoted advocate whom I met in Quebec, shook her head blankly when asked about the Tlapanec. She had never heard of them, and the Commission has to her knowledge played no role whatsoever in this classic conflict over minority rights.²²⁰

By their structure, mandates, and skills, national human rights institutions could play a role in mitigating these disputes in democracies new and old, but often, they do not. Lack of legal incentives, political will and resources all limit their involvement, as do misunderstandings of what is at stake, driven by distant democratic theory. There are some minority interests, especially those in highly conflict-ridden states or concerning highly politicized issues that a national human rights institution could never effectively take on. But there are others that these institutions are well suited to address.

Liberal and communitarian theorists have looked for centering principles to provide a fixed point to which disparate minority claims might relate and to serve as the philosophical core justifying consideration of their concerns. Minority demands, such as the Tlapanec's, for toleration of their cultural practices could be characterized, for example, as a group demand for liberty, for group freedom from state interference. This characterization is an appealing one on certain levels, for it frames the group's

²²⁰ See IOI notes, *supra* note __; Jorge Madrazo, *New Policies on Human Rights in Mexico: The National Commission for Human Rights 1988-1993*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note __, at 337, 338 & 352. The Commission also has studied social economic and political conditions through its "Program for Natives." Magdalena Aguilar Alvarez, *The Teaching, Learning and Training Process for Human Rights*, in *id.*.

demand in terms that resonate with liberal philosophy and can therefore be analyzed in traditional liberal terms. Demands for liberty are common currency in our courts and legislatures, and so these institutions feel themselves equipped to balance such claims with other concerns. In such a construction of the demand, in any given case, a group demand for liberty might stand in tension with an individual demand for liberty within the group or with the state's interest in promoting goals of equality or security. In this vein, Kymlicka and other liberal pluralists seek to define minority interests in terms of their relation to individual autonomy.

But while it may be appealing for these reasons to characterize minority and indigenous interests as being claims for liberty, they do not seem to fit the mold. Isaiah Berlin long ago argued that the desire for internal community autonomy “has little to do with the classical Western notion of liberty as limited only by the danger of doing harm to others.”²²¹ He characterized this instead as a desire for “recognition – of their class or nation, or colour or race – as an independent source of human activity, as an entity with a will of its own, intending to act in accordance with it (whether it is good, or legitimate or not), and not to be ruled, educated, guided.”²²² Rather than representing an increase in liberty amongst the group, this recognition of community existence and independence may well reduce the liberty of its members, who will to some extent be governed by this community identity – but who may prefer that identity and governance to non-recognition and liberty.²²³ And since Berlin, other efforts have been made to refine this notion of “recognition” or “belonging” and the tensions it presents with guaranteed liberty rights.²²⁴

²²¹ Isaiah Berlin, *The Search for Status*, reprinted in *The Power of Ideas* 195, 198 (ed. Henry Hardy 2000).

²²² *Id.* at 195.

²²³ *See id.* at 197.

²²⁴ *See* Fareed Zakaria, *The Future of Freedom* (2003).

Communitarians such as Tully have accordingly characterized minority claims as being alternative forms of self-rule.

In so doing, however, liberal and communitarian theorists have clung to the notion that minority concerns could be characterized in terms of some single unifying principle, even as they recognized the relational and disparate nature of those claims. Chandran Kukathas has cautioned against casting all minority group claims in the same mold, and the experiences and analysis of national human rights institutions suggest that this warning is correct.²²⁵

Indeed, one reason for the apparently diverse nature of minority rights and claims seems to be that they are to some degree not merely related to, but actually a projection of, the interests of the state. What the state and the majority understand to be “minority rights” is not the set of all interests that a minority groups claims, but rather, only the subset of those interests that do not happen, in their state, to coincide with those of the majority. This is true of the liberal approach as well as the others: minority interests in liberal values are not minority interests, merely ordinary ones. So to Kymlicka and Tully, living in a liberal democratic state that guarantees individual rights as a matter not only of course but of national identity, minority claims appear to be claims for the autonomy to pursue community-defined, at times illiberal values. But for other states with other concerns, minority claims resound differently, according to their own terms of power.

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

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

²²⁵ See Kukathas, *supra* note __, at 33-34.

and the ethnic affiliation of the majority is viewed implicitly or explicitly as representing the general interest.”²²⁶

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

²²⁶ Addis, *supra* note __, at 125.

Appendix: Methodology

This article is based on three lines of research: a qualitative study of the publicly available information about national human rights institutions worldwide; a review of case studies of individual national human rights institutions and indigenous communities; and interviews and participation in public discussion with individual ombudspersons.

As discussed in the introduction, the purpose of the tripartite approach was to balance the strengths and weaknesses of each research method and to use the data gathered in one line of research to catalyze the others. On its own, the data generated by a broad empirical study is inevitably unmoored from the social and political context that provides its meaning, but its results can nonetheless suggest trends and provide a context for understanding the significance of individual cases. Likewise, the otherwise anecdotal insights of individual cases can be measured against and grounded in the general findings of the empirical study. These cases also suggest crucial factors for determining which aspects of the empirical study deserve attention and provide a spot check for the trends suggested by that study. Finally, my conversations with ombudspersons and commissioners provided insight into and context for both modes of research and were also an excellent source of individual case information. I am grateful to all who generously shared their knowledge with me.

In the following sections, I describe the selection criteria and sources used for each of the three lines of research.

I. Database/Qualitative Study

The first line of research, a survey of publicly available information about national human rights institutions worldwide, is to my knowledge the first such study of its kind.

A. Selection criteria

1. All identified national human rights institutions;
2. Those local and regional institutions that report work with minority groups;
3. Those specialized institutions that have work with minority, ethnic or indigenous groups or on issues of discrimination and racism as their mandate.

The database includes information on all identified national human rights institutions, including ombudspersons, human rights commissions and hybrids of these institutions, whether they have done work with minority groups or not. It includes data only on those local and regional institutions for which I found some indication that they were in fact working with minority groups, and only on those specialized institutions that work with minority or ethnic groups or on issues of racism or discrimination.

I sought to identify national human rights institutions and the relevant specialized institutions by searching the records of international and regional organizations that work with such institutions, as well as through the International Ombudsman Institute, through scholarly studies of their work, and through individual contacts and searches of the internet. Because local and regional institutions are so numerous, I did not actively search them out, but rather, collected data on their work with minority groups as I came across it in other settings.

B. Sources

1. Primary sources

- a. National human rights institutions websites
- b. National human rights institutions reports
- c. National human rights institutions brochures and informational materials

- d. Direct correspondence with national human rights institution officials

2. Secondary sources

- a. International and regional non-governmental organization website
- b. International and regional non-governmental organization reports
- c. Scholarly books and articles
- d. News reporting

The database contains three basic types of information about the institutions, to the extent that I was able to find such information: contact information, its general functions and authority, and its work, if any, with minority groups. The first two types of information are included solely for background purposes and are not reported in full or for all institutions. Data on actual activities was not available for all identified institutions. Not all human rights institutions make public reports of their activities, and even amongst those that do, it can be difficult to find and obtain. Language barriers, for example, presented an obstacle, and there are disparities in the information reported. There may also of course be differences between actual activities and reported activities.

The database includes information on national human rights institutions' own public reporting of their work with minority groups, both on their websites and in their public reports and informational materials. The database also contains information from secondary sources: from the international and regional bodies that work with national human rights institutions, and from books, articles and reports discussing certain institutions and countries.

II. Case studies of national human rights institutions and minority groups

A. Selection criteria

- 1. Reliability. I gave preference to case studies with characteristics indicating reliability, such as the author's involvement in primary

research, availability of other reliable and relevant materials to confirm some aspects of the data or conclusions, contact with the author, and peer review..

2. Factual detail concerning the subject of the study and its political and social context.
3. Cross-disciplinary complementarity. I gave preference to case studies that offered insights from other relevant non-law fields, such as anthropology.
4. Consonance with the issues and themes raised by the other lines of research.

B. Sources

1. Published articles and books
2. Unpublished papers and doctoral dissertations

All cited case studies were undertaken by scholars or non-governmental organizations and focused either upon a particular national human rights institution, or upon a particular minority group, or both. I looked in particular for studies on human rights institutions known to work with minority groups or known to work in multi-ethnic areas.

III. Interviews and discussions with individual ombudspersons and commissioners

A. Selection criteria

1. Work with minority groups
2. Responsiveness
3. Available contacts and introductions

B. Sources

Many of the interviews and discussions cited in this article took place in person at the International Ombudsman Institute meeting in Quebec City, Quebec in September 2004. Other interchanges with ombudspersons and commissioners took place by phone and e-mail. I contacted ombudspersons and commissioners based on information indicating that they had worked actively with minority groups.