

Human Rights Law and the Demonization of Culture

(And Anthropology Along the Way)<sup>1</sup>

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A few weeks ago, I received a phone call from a prominent radio show asking if I would be willing to talk about the recent incident in Pakistan that resulted in the gang rape of a young woman, an assault apparently authorized by a local tribal council. Since I am working on human rights and violence against women, I was happy to explain my position that this was an inexcusable act, that many Pakistani feminists condemned the rape, but that it was probably connected to local political struggles and should not be seen as an expression of Pakistani “culture.” In fact, it was the local Islamic religious leader who first made the incident known to the world, according to news stories I had read. The interviewer was distressed. She wanted me to defend the value of respecting Pakistani culture at all costs, despite the sentence of rape. When I told her that I could not do that, she wanted to know if I knew of any other anthropologists who would. I could think of none, but I began to wonder what she thought about anthropologists. Anthropologists, apparently, made no moral judgments about “cultures” and failed to recognize the contestation and changes taking place within contemporary local communities around the world. This also led me to wonder how she imagined anthropologists thought about culture. She seemed to assume that anthropologists viewed culture as a coherent, static, and unchanging set of values. Apparently cultures have no contact with the expansion of capitalism, the arming of various groups by transnational superpowers using them for proxy wars, or the cultural possibilities of human rights as an emancipatory discourse. I found this interviewer’s view of culture wrong-headed and her opinion of anthropology discouraging.

But perhaps it was just one radio interviewer, I thought. However, a recent article in *Human Rights Quarterly* paints another odd portrait of anthropology and its

understanding of culture. In this piece, Karen Engle, a law professor, talks about the continuing “embarrassment” of anthropologists about the 1947 statement of the Executive Board of the American Anthropological Association which raised concerns about the Universal Declaration of Human Rights (2001: 536). Engle claims that the statement has caused the AAA “great shame” over the last fifty years (2001: 542). Anthropologists are embarrassed, she argues, because the statement asserted tolerance without limits. While many anthropologists now embrace human rights, they do so primarily in terms of the protection of culture.<sup>2</sup> She argues that the tensions over how to be a cultural relativist and still make overt political judgments that the 1947 Board confronted remain. She acknowledges that not all anthropologists think about culture this way, but suggests that many do, including those who produced the AAA statement. Relativism, as she describes it, is primarily about tolerance for differences and is incompatible with making any moral judgments about other societies.

But I think this incompatibility depends on how one theorizes culture. Thinking about culture as a homogenous, integrated, and consensual system means that it must be accepted or criticized as a whole. This article describes a more complex way of

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<sup>2</sup>The statement on Human Rights, adopted by the American Anthropological Association in 1999 and posted on the organization’s website, [www.aaanet.org](http://www.aaanet.org), states:

“People and groups have a generic right to realize their capacity for culture, and to produce, reproduce and change the conditions and forms of their physical, personal and social existence, so long as such activities do not diminish the same capacities of others. Anthropology as an academic discipline studies the bases and the forms of human diversity and unity; anthropology as a practice seeks to apply this knowledge to the solution of human problems.”

“As a professional organization of anthropologists, the AAA has long been, and should continue to be, concerned whenever human difference is made the basis for a denial of basic human rights, where “human” is understood in its full range of cultural, social, linguistic, psychological, and biological senses.”

understanding culture developed within anthropology that changes the terms of the relativism/universalism debate.

### The Relativist Critique and the Critique of Relativism

The Executive Board of the American Anthropological Association prepared a statement opposing the proposed Universal Declaration of Human Rights and submitted it to the UN Commission on Human Rights in 1947 (1947: 539-543). Written by leading members of the AAA, the statement saw the UDHR as a new form of imperialism. The authors asked, "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?" (1947: 539). It argues that ideas such as the "white man's burden" have justified controlling the affairs of millions of people all over the world and that "the history of the expansion of the western world has been marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established (1947: 541)." The statement was very much a defense of small, beleaguered communities made in the name of freedom, raised to the level of a universal value. It argued that "man is free only when he lives as his society defines freedom (1947: 543)." Thus, the Statement articulated the value of tolerance for difference and a critique of ethnocentrism along with the values of freedom and choice, values expressed in the UDHR. It is an assertion of moral values that includes tolerance for cultural difference as one of those values, not a denial of the ability to make moral judgments at all.

As Alison Renteln points out, the relativism of the statement is more about enculturation than about tolerance (1988). It argues that the value systems of a society are adopted by their members through a process of learning and socialization (1988: 62). The statement did not say anything goes, only that individuals become committed to their values through belonging to a social group and therefore cannot be judged by other standards. Her interpretation of relativism differs from Engle's reading of tolerance without limits.

Not all anthropologists agreed with the statement at the time. Julian Steward and H.G. Barnett objected not because they were appalled at tolerance without limits but were unhappy about the political nature of the statement for a value-free science like anthropology (Steward 1948: 351). But the major difference among the anthropologists who wrote the statement and those who debated it concerned what kind of society they were discussing. Those behind this statement, such as Melville Herskovitz, had studied small communities in colonized places, such as Africa and the Caribbean. They saw in the human rights approach a replay of earlier imperial efforts at transformation. The statement and its theory of cultural relativism referred to societies experiencing pressures to change under the influence of Euro-American expansion and colonialism (see Herskovitz 1972). In outlining his theory, Herskovitz draws on examples of villages in Africa while earlier Boasians tended to do research among small communities of Native Americans. Thus, the empirical ground for the relativist position was the colonized peoples in Africa and the United States.

Critics of the statement challenged its appropriateness for "civilized" nations. As Julian Steward pointed out, "If the plea that cultural values be respected means merely that

the primitive peoples, who are on the receiving end of civilizing influences, be treated with greater understanding and tolerance, there can be little objection to it (1948: 351)." But, he continues, does that mean we approve of the social caste system of India or the racial caste system of the United States? Or that we approve of the exploitation of primitive peoples through Euro-American economic imperialism? When the anthropological gaze shifted to modern states, there was clearly much to condemn. Indeed, anthropologists such as Franz Boas, Ruth Benedict and Margaret Mead working in the same tradition were quite ready to criticize their own society.

Tolerance for Nazi Germany was a particularly sticky point at the time. The statement itself obliquely alluded to this problem by claiming that in states that deny citizens the right of participation in their governments or seek to conquer weaker peoples, underlying cultural values may provide a brake on these activities. This does not resolve the problem of where the boundary should be drawn between tolerance and places where it is necessary to fight intolerance, but it does show that there was a clear recognition among anthropologists in the 1940s that tolerance for cultural difference could not be asserted to the exclusion of all other ethical concerns. The critical point is this: the anthropological position was not the defense of all cultural practices but a more nuanced recognition that tolerance of difference was one of several important ethical considerations, as well as one under siege at that historical moment. Indeed, the statement's cultural relativism is based on an ethical assertion of both freedom and respect for cultural difference.

Why does Engle describe the anthropological reaction to this statement as one of enduring embarrassment? Surely there is a legitimate basis for these concerns. Contemporary anthropology continues to be concerned about the desire of external

reform movements, whether generated by colonialism, globalization, or human rights reformers, to change cultural practices without sufficient respect for difference. This was a reasonable worry in 1947, still a deeply colonial era, as it is today under the pressures of globalizing capitalism. These political concerns are not a source of embarrassment to anthropology then or now. Nor, it seems, was the statement ever intended to say that all cultural differences must be tolerated, but that tolerance is a value along with others such as freedom.

Is anthropology being caricatured in these portrayals? There seems to be a misunderstanding in some parts of the media and the law about anthropology's emphasis on the importance of tolerance for cultural difference. I think that the misunderstanding grows out of erroneous ideas about the culture concept itself. If culture is thought of as a reified thing, as bounded and static, then cultural relativism means defending every practice and every belief at all costs. But this is not the way contemporary anthropologists think about culture. Indeed, Engle concludes that if anthropology saw culture as contested, hybridized, and dynamic, its difficulties with relativism would diminish. But, she argues that relativism remains entrenched in the AAA and concepts of hybridity and creolization have not entered the discourse of the AAA Committee on Human Rights (2001: 559).

#### Portrayals of Culture in Human Rights Documents on Women's Rights

Conceptions of culture as static tradition are fundamental to contemporary transnational human rights discourse. Political movements such as the fight against

female genital cutting/mutilation reinforce this notion of culture. This practice has mobilized enormous attention and concern in the global North as well as in parts of Africa. The North movement has capitalized on old and well-established tropes of traditional culture, as well as on conceptions of African savagery and Islamic anti-woman ideology. In addition, it offers a titillating opportunity to imagine African women's genitalia. While I certainly do not deny the physical pain and suffering this practice entails nor its role in the highly gendered ways women's sexuality is restricted and women's subordination ensured, I want to note the global preoccupation with this practice at the expense of many others. Unequal access to education and jobs, to clean water and adequate food, and to divorce and equal inheritance also burden African women. The struggle against FGM has been conceptualized as one against culture, or more specifically, against harmful traditional cultural practices. It has merged with critiques of dowry death in India, although this is quite a different situation since dowry killings are not an accepted cultural practice but offenses prohibited by law that occur after dowry agreements have broken down. Critiques of these region-specific anti-woman practices become part of a more general critique of cultural practices that harm women, while cultural practices that protect women receive far less attention. However, some legal scholars take a far more nuanced and thoughtful approach to understanding culture, such as Abdullahi An Na'im (eg., 1990; 1992). An Na'im seeks to integrate human rights and local cultural understandings rather than seeing them as oppositional.

But this perspective is exceptional in human rights discourse. Over the last two and a half years, I have been doing ethnographic research on the international human rights system and its approach to violence against women. This entails going to world

conferences such as Beijing Plus Five, to the annual meetings of two UN Commissions, the Commission on the Status of Women and the Human Rights Commission, and attending the twice-yearly meetings of the committee that monitors the major women's convention, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). I have talked at length to members of these bodies, to the experts on the CEDAW committee, to NGO activists who attend, and to government and NGO leaders in several Asia/Pacific countries about whether these UN documents and discussions matter to them and how they matter. I have read the major documents and observed the production of new documents.

Some of these documents are legally binding conventions ratified by individual countries, such as CEDAW, while others are policy documents to which signatory governments commit themselves in principle, such as the outcome statements of the Beijing Fourth World Conference on Women in 1995 and the Vienna Declaration of 1993. The CEDAW committee hears reports presented by the 170 countries that have ratified the convention and asks questions of government representatives concerning the extent of ratification, so that CEDAW hearings provide insight into both government perspectives and that of the global experts who make up the committee (see Merry 2003).

Overall, this is a very legalistic domain of activity. Although the NGOs bring a far more socially aware approach to problems such as women's inferior status than human rights lawyers do, much of the work of producing and refining documents has a very lawyerly quality to it (see Riles 2000). During sessions of document production, whether in global meetings such as Beijing Plus Five, technically a special session of the UN General Assembly, or in meetings to draft resolutions at the Human Rights

Commission (HRC) or the Commission on the Status of Women (CSW), representatives of the concerned nations, speaking as nations, propose language for the documents. For example, the chair of such sessions will call on someone as “Malaysia” or “India.” The proposed language is rarely accompanied by any justification for the change or any data that might address the issue under discussion. Instead, the process is one of reaching “agreed language” through compromises among various interest groups, constituted by groupings of countries that have a basically regional as well as economic flavor. For example, one of the groups is referred to as JUSCANZ and includes Japan, the USA, Canada, Australia, and New Zealand. Another is the Group of 77 plus China that incorporates well over 77 developing nations as well as China. Sentences and paragraphs for which there are competing versions are placed in brackets, listed according to the group of nations that has proposed it.

Document production consists of finding compromises among the alternative versions listed. In this situation, reverting to the language of an earlier document, on which consensus has already been achieved, provides a solution to intractable differences. Textual struggles occur around issues such as whether sexual orientation should be listed as one basis for discrimination against women or whether the effects of globalization and structural adjustment should be mentioned as a source of hardship for women. On the one hand, this process leads to bland and relatively convoluted texts, but on the other hand it is quite remarkable that representatives from countries all over the world are working to collaboratively produce a unified document concerning such contentious subjects as torture or the position of women (see Riles 2000). Many of the

debates about language involve significant substantive differences about issues such as the causes of poverty or the acceptability of same-sex relationships.

The documents generated at global conferences, from Commission meetings, as well as those from the CEDAW hearings and the general recommendations the CEDAW committee writes typically talk about culture as a barrier to progress. Culture is often equated to customs, traditions, and ancient practices. Documents concerning women are particularly likely to describe culture in these terms. When nationalist and religious fundamentalist leaders resist women's rights in the name of culture, they foster this critical stance toward culture by those who promote women's equality. At the same time, the critique of culture builds on imperial understandings of culture as belonging to the domain of the primitive or backward, in contrast to the civilization of the colonizer. Residues of this understanding of culture emerge in contemporary human rights law.

Many human rights documents, such as CEDAW, see culture as an obstacle to the human rights of women. The portrayal of culture as an obstacle to women's rights has been increasing over time. The text of CEDAW was completed in 1979. Its Article 5 on Sex Roles and Stereotyping calls on states parties to take all appropriate measures:

“a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (DAW 2000: 18)”

In this and many other documents concerning women's human rights, the demands for cultural change are unambiguous.

Moreover, policy documents and conventions frequently assert that customs or practices should not be used to deny women their rights. The Declaration on the Elimination of Violence against Women adopted unanimously by the General Assembly of the United Nations in 1993 takes this position. Although it has no binding force, this Declaration does have the moral force of world consensus (Coomaraswamy and Kios 1999: 182). The Declaration is a comprehensive document which defines violence against women broadly to include physical, sexual, and psychological harm or threats of harm in public or private life (Article 1). It prohibits invoking custom, tradition, or religious considerations to avoid its obligations and urges states to exercise “due diligence” to prevent, investigate, and punish acts of violence against women whether perpetrated by the state or private persons (Article 4; Van Bueren 1995: 753). The concept of culture is not discussed or developed, but seems to be the equivalent of traditions, customs, and religion.

Similarly, the 1993 Vienna Declaration stressed the importance of “the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism (Vienna Declaration and Platform for Action (A/conf.157/24/Part I: 19 , para. 38). This paragraph does not explicitly condemn such customs and practices, however. The 1995 Platform for Action from the Beijing Fourth World Conference on Women takes a stronger stand. It states: "Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and

society (United Nations 1995: Section D: 118, p. 75).” According to Strategic objective D.1, governments should: “Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence Against Women;” (Platform for Action D.1: 124 (a), p. 76). By urging governments to refrain from invoking culture, the Platform goes beyond the 1993 document that asks governments to reconcile conflicts between rights and culture.

The CEDAW committee has produced 24 general recommendations over the last twenty years to expand and interpret the meanings of the Convention itself. These recommendations are not legally binding but are part of the jurisprudence of the Convention. The commentaries they provide frequently describe culture as a barrier to women’s equality and the enjoyment of rights. General Recommendation 21 from 1994, for example, discusses marriage and the family. Article 3 asserts that CEDAW recognizes the inalienable rights of women but goes further than other conventions “by recognizing the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they lay in restricting the exercise of basic rights by women.” (United Nations Human Rights Website, Treaty Bodies Database, General Recommendations of CEDAW). With reference to Article 16 on the family, the commentary argues that polygamy is practiced in many countries and that this contravenes a woman’s right to equality with men. “The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary laws. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.”

(Commentary 14 under Article 16, General Recommendation 21). Here customary laws are described as responsible for the persistence of polygamy.

With reference to the reservations some countries lodge against basic parts of the convention, such as Article 2 which asserts non-discrimination as a principle and Article 16 which applies this principle to the family, the commentary again locates the obstacles in a mix of religious fundamentalism, tradition, and economic hardships while citing modernity as the force which counters this tendency:

“42. Many of these countries [with reservations] hold a belief in the patriarchal structure of a family which places a father, husband, or son in a favourable position. In some countries where fundamentalist or other extremist views or economic hardships have encouraged a return to old values and traditions, women’s place in the family has deteriorated sharply. In others, where it has been recognized that a modern society depends for its economic advance and for the general good of the community on involving all adults equally, regardless of gender, these taboos and reactionary or extremist ideas have progressively been discouraged (Commentary on Reservations, point 42, General Recommendation 21).”

While there is no doubt that cultural demands for women’s subordination have been made in the name of nationalism or religious fundamentalism, this text locates the source of oppression for women largely in the domain of beliefs and values. Thus, it reinforces the idea that it is culture that is subordinating women and modernity that frees them. That modernity is also a cultural system seems lost in this formulation. Culture is

relegated to the domain of the past, to religious extremism, and to irrational “taboos.” Its opposite is modernity and the norms of human rights.

The CEDAW committee takes a similar stance toward women’s political participation. In General Recommendation 23, from 1997, the commentary on Article 7 on political and public life states:

“10. In all nations, the most significant factors inhibiting women’s ability to participate in public life have been the cultural frameworks of values and religious beliefs, the lack of services and men’s failure to share the tasks associated with the organization of the household and with the care and raising of children. In all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.” (General Recommendation 23, Comment 10). While this attribution of cultural factors is undoubtedly accurate, again the responsibility is located in the domain of beliefs and values to the exclusion of political, economic, or structural factors.

Another manifestation of the understanding of culture prevalent in human rights law is the concept of harmful traditional practices. Originally developed to describe female genital mutilation, this term describes practices that have some cultural legitimacy yet are designated harmful to women, particularly to their health. In their discussion of traditional practices harmful to women, Coomaraswamy and Kios refer to cultural and traditional practices interchangeably (1999). Customs criticized as harmful traditional practices include *sati* in India (the immolation of a widow), female abortion and infanticide as a result of son preference, child marriage, arranged or forced marriage, polygamy, seclusion and veiling and food taboos for women. Female genital

mutilation/cutting, or FGM, represents the poster child for harmful traditional practices, the central issue around which the conception of harmful cultural practices or harmful traditional practices has coalesced (see Boyle 2002). In many ways, it defines the concept. It is a form of physical cutting that is widely seen as having harmful health consequences such as infections, painful urination and menstruation, difficulties in childbirth, and other complications. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Human Rights Commission created a Special Rapporteur on Traditional Practices Affecting the Health of Women and Children in 1989 (Report of the Special Rapporteur on Traditional Practices affecting the Health of Women and Children UN Doc E/CN.4/Sub.2/1990/44) and a Working Group on Traditional Practices as early as 1986 (Bernard 1996: 78). In 1990, the CEDAW Committee, being gravely concerned “that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices, such as female circumcision,” adopted a general recommendation (number 14) that suggested that states parties should take measures to eradicate the practice of female circumcision (Bernard 1996: 78). Thus, genital cutting became the type case of a practice justified by custom and culture and redefined as an act of violence and a breach of women’s human rights (Bernard 1996: 79). In this formulation, culture is the same as tradition and is juxtaposed to women’s human rights to equality. It is not surprising, given this evolving understanding of culture within human rights discourse, that cultural relativism is seen in such a negative light.

The idea that culture is a problem for human rights, that, for example, it stands as a barrier to women’s equality, is related to a more general tendency to culturalize

problems. This means that it is a way to interpret women's subordination in terms of cultural practices that suppress them rather than the economic or political problems their communities face (see Nader 1989; Abu-Lughod 2002). Blaming culture for the disadvantages faced by women, minorities, and other vulnerable groups is an appealing ideology for proponents of contemporary neoliberal globalization. It blames the havoc wreaked by expansive capitalism and global conflicts on the culture of the "other." This absolves the rich countries of responsibility for the suffering caused by these processes and blames local people, such as battering husbands, oppressive men who veil their wives, and knife-wielding fans of FGM, for the suffering. Yet, these practices are not necessarily ancient. Veiling or modest dress may be a contemporary effort to protect women in the face of the devastation of internal war and proxy wars between major powers while battering results from both patriarchal family authority and the political violence and chaos of war. The developed countries have political and economic incentives to insist on a cultural interpretation of women's subordination.

At the same time, this cultural theory also relegates societies that oppress women to an inferior status. When corporate executives in the US steal millions of dollars through accounting fraud, we do not critique American culture as a whole. We recognize that these actions come from the greed of a few along with sloppy institutional arrangements that allow them to get away with it. Similarly, the actions of a single tribal council in Pakistan should not indict the entire country. Although many communities do have practices and laws that subordinate women, these are neither homogeneous nor ancient. Pakistan as a "culture" can be indicted by this council's encouragement to rape

only if culture is understood as a homogenous entity whose rules evoke universal compliance.

What do anthropologists mean by culture?

Lawyers and journalists have sometimes misinterpreted anthropology's position about relativism and difference because they misunderstand anthropology's position about culture. A reified conception of culture is prevalent in popular culture and anthropologists are erroneously assumed to hold the same view. Claims to cultural relativism appear to be defenses of such holistic and static entities. To some extent, the popular conception of culture comes from older anthropological usages. For example, Talcott Parson's separation of values and social action, influential in the development of American cultural anthropology in the 1950s, promoted the idea that culture referred to the realm of ideas and values alone. The American cultural anthropology fostered at Harvard in mid-century saw values as the terrain of anthropology and social action as the space of sociology (Kuper 1999b). Parsons described culture in his 1951 *The Social System* in these terms: "Cultural objects are symbolic elements of the cultural tradition, ideas or beliefs, expressive symbols or value patterns." He continues, "A cultural system does not 'function' except as part of a concrete action system, it just 'is.'" (Kuper 1999b: 53)." This conception of culture sundered values and beliefs from institutions, practices, and political economy. Such a definition of culture makes it hard to mount an ethical critique of a culture since it is simply a system of values and beliefs. Thus, this understanding of culture contributed to the idea of cultural relativism as an inability to

judge another culture, since “culture” was understood only in terms of values, not practices. This separation between culture and action came under critique both by those who shifted from the study of the structure of enduring social groups to social organization and action, such as Frederik Barth (1959), and subsequently by the change in focus from values and beliefs to habits and practices (Bourdieu 1977; Ortner 1984).

Another conception of culture that contributed to the popular view was the Boasian view of culture as isolated and bounded rather than as permeable and shifting in response to historical processes. Franz Boas’s cultural anthropology was relativist, antagonistic to ideas of progress, and committed to seeing cultures as distinct and incommensurate ways of living (Kuper 1999a: 38-39). Boas’s influential students, including Ruth Benedict, Edward Sapir, and Alfred Kroeber, developed the concept of culture as an integrated whole consisting of ideas and values, expressed in symbols as religion and art (Kuper 1999b: 68). It was this notion of culture that formed the basis for the cultural relativism of the 1940s and its concern about human rights as a universalizing project, although I do not know if any of these anthropologists opposed the Universal Declaration. In many ways, this is the conception of culture that has crystallized within the human rights system. Yet, this conception did not prevent Boas and his students from criticizing the racism and colonialism and other flaws of the societies in which they lived.

Franz Boas brought a Germanic conception of culture to American cultural anthropology when he immigrated to the US and incorporated it in the cultural anthropology he developed in the early twentieth century. The German romantic conception developed in the nineteenth century in resistance to the claims to civilization made by England and France. In contrast to these societies, Germany claimed that it had

a distinct, spiritual essence or *Kultur* (Elias 1978 [1939]: 3-9). While civilization plays down the national differences between peoples and emphasizes what is common to all human beings, *Kultur* places more stress on national differences and particular identities of groups. Elias describes the universalizing claims of civilization as follows:

“It expresses the self-assurance of peoples whose national boundaries and national identity have for centuries been so fully established that they have ceased to be the subject of any particular discussion, peoples which have long expanded outside their borders and colonized beyond them (Elias 1978 [1939]: 5).”

Civilization describes the continually expanding colonial powers, while *Kultur* responds to the need for a nation to define itself, to constitute its boundaries, and to ask how it is different from other groups. It does not include the sense of constantly moving forward. The emphasis on *Kultur* in Germany thus provided a way of creating a national identity as separate and as a source of pride. The French emphasis on a transnational civilization was regarded in Germany as a threat to its distinctive national culture, an authentic and achieved culture different from the forms and outward show of the French-speaking elite (see Kuper 1999b: 31). Its study required examining folk tales and village life.

The conception of culture as *Volksgeist*, as a set of values and beliefs that makes a people or nation distinctive, is still powerful in the domain of international human rights. It appears in claims to indigenous sovereignty, religious nationalism, ethnonationalism, and a separate status for diasporic populations. It is the basis for the argument that human rights are a distinctly Western concept that ignores a country's distinctive spirit or system of values. This conception of culture is fundamental to

contemporary nationalism. As Benedict Anderson points out, the modern nation is an imagined community that shares features of race, religion, language, and culture (1983). Asserting a shared culture has been and still is a basic strategy of nation building. Political leaders recognize the effectiveness of claims to shared culture for consolidating political support and legitimacy. They often manipulate this rhetoric to advance their own power, despite the way these claims exacerbate conflict among ethnic and religious groups within nations. The idea of the nation as united by a shared culture has fomented nineteenth and twentieth-century practices of ethnic cleansing and the relocation of peoples across borders to achieve this imagined cultural homogeneity.

Political leaders often resist changes such as those promoted by human rights advocates in the name of an apparently threatened national, ethnic, or religious culture imagined as reified essence or tradition. For example, just before the 1993 Vienna Conference on Human Rights, the leaders of several Asian nations claimed that Asian values were distinct from the Western system of human rights and that the Western system was alien to them. Lee Kuan Yew of Singapore, with support from several other Asian leaders, argued that Asian values were more communitarian and less individualistic than Western human rights (see Bauer and Bell 1999: 3-23). The Asian regional preparatory meeting for the Vienna Conference on Human Rights adopted the Bangkok Declaration, which included the statement: “while human rights are universal in nature they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds” (Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, adopted 7 April 1993, UN

Doc A/Conf.157/ASRM/8-A/CONF.157/PC/59(1993):3 : 8). As Cerna and Wallace point out, this statement is in direct conflict with the idea of an international system of human rights, a conception which grew out of the Holocaust and the conviction that states' treatment of their citizens was no longer a purely domestic concern (1999: 628). According to the Charter of the United Nations, the fundamental freedoms of all humanity should be protected regardless of distinctions of race, sex, language, or religion (Cerna and Wallace 1999: 628; Charter of the United Nations, article 1, section 3, June 26, 1945). The Bangkok declaration challenged that universal application. Ironically, the Asian values argument builds on Orientalist notions of the dichotomous differences between a communitarian East and an individualistic West (Tatsuo 1999).

Contemporary anthropology uses a quite different conception of culture. Over the last two decades, anthropology has elaborated a conception of culture as unbounded, contested, and connected to relations of power. It does not consist only of beliefs and values but also practices, habits, and commonsensical ways of doing things. The contemporary anthropological understanding of culture envisions a far more fluid, contested, and changing set of values and practices than that provided by the idea of culture as tradition. Culture is the product of historical influences rather than evolutionary change. Its boundaries are fluid, meanings are contested, and meaning is produced by institutional arrangements and political economy. Culture is marked by hybridity and creolization rather than uniformity or consistency. Local systems are analyzed in the context of national and transnational processes and are understood as the result of particular historical trajectories. This is a more dynamic, agentic, and historicized way of understanding culture. For example, Comaroff and Comaroff

advocate moving away from the notion that culture is opposed to capitalism and instead emphasize the hybrid, dialectical, historically evanescent character of contemporary culture (1999: 295). They suggest interrogating the “*production*, in imaginative and material practice, of those compound political, economic, and cultural forms by means of which human beings *create* community and locality and identity, especially on evanescent terrains; by means of which, in the face of material and moral constraint, they *fabricate* social realities and power relations and impose themselves on their lived environments; by means of which space and time are made and remade, and the boundaries of the local and the global are actualized (1999: 295).” This conception emphasizes the active making of culture, society, and institutions and the grounding of this action in specific places and moments.

An example can illustrate such a complex understanding of culture. At a conference on culture and violence against women held in Sydney, Australia in 2002, representatives from an Australian Aboriginal group dealing with violence against women displayed a brochure they had developed for battered women that was richly decorated with the swirls and spots of Aboriginal art. They drew on the artistic traditions of Aboriginal peoples to tailor information about how to seek help for battering in a way that might appeal to other Aboriginal women. But this is not the only way to localize imported practices. Representatives from another Aboriginal group described their efforts to protect young Aboriginal men from harassment in the shopping malls in Sydney. They had developed a tee shirt. The back of the tee shirt listed the legal rights of people in public spaces while the front displayed several stylized faces, some apparently Aboriginal, and the phrase, “It’s public space, Get Outta My Face”

(presentation from Wirringa Baiya/Tranby Aboriginal Cooperative College, Feb. 22, 2002, Sydney). As the Aboriginal presenter pointed out, “get outta my face” is a phrase commonly used by young Aboriginal people and therefore the one the young people chose for the tee shirt. The words and images were not those of Aboriginal art but of African-Americans protesting racism. The young people, facing racism in Australia, chose a phrase from the transnational language of resistance. They localized their claims to rights with transnational images. These examples show the creativity and flexibility of culture in its mobilization by local activists and contradict claims about the persistence of an unchanging “traditional culture” among these indigenous peoples. Such processes of appropriating signs and sentiments are fundamental to the way culture works within contemporary globalization.

#### The General and the Particular

There are both institutional and ideological reasons why human rights bodies, despite their commitment to protecting cultural diversity, tend to ignore local cultural differences. Human rights treaty bodies that oversee compliance with treaties are faced with evaluating a large number of countries in a very short period of time. They are often unable and unwilling to appreciate the complexity and fluidity of particular situations. There is an inevitable tension between the general convention they are implementing as a multi-national body of experts and the particularities of each situation. They simply cannot become expert on every country given the scope and organization of work they

confront. Moreover, they are part of a transnational community of experts that moves around the globe rather than developing local forms of expertise.

Moreover, human rights lawyers and activists are ideologically committed to implementing universal standards rather than appreciating local differences. This is part of the rationality of law that shapes their practice. Since the goal is to apply this law to 170 diverse countries and thousands of local communities, the committee insists on conformity to its standards regardless of local conditions. When countries raise local cultural practices, it is often in order to justify their failure to abide by the terms of the treaty. It is understandable that making claims to the distinctive cultural features of local situations seems like an excuse and that the legalistic setting of treaty body hearings resists these claims.

Even within anthropological knowledge practices, it is hard to understand cultural activities in context and to see how the meaning and impact of a custom changes as the context shifts even though its name remains the same. For example, at a CEDAW hearing in 2002, the Fiji government report noted that the tendency to handle rape cases through the practice of *bulubulu* rather than the courts was undermining accountability for rape. The committee urged elimination of the custom. Yet, the situation is far more complicated. The Fijian Minister for Women who attended the CEDAW hearing told me in a subsequent interview in Fiji that *bulubulu* was fundamental to Fijian village life and could not be eliminated. The ethnographic literature shows that the Fijian custom of *bulubulu* emphasizes reconciliation and apology in conflicts within a village. In the past it was used to make peace between warring chiefs. As the cohesion of villages drops off with the move to cash employment and labor migration, the capacity of this practice to

impose pressure on an offender diminishes. Thus a process, which in the past might have obligated the offender to his kinsmen who performed the apology on his behalf, now has little impact. When a casual *bulubulu* replaces court procedures, a rapist can escape punishment. Of course, if the courts pay little attention to rape, an offender might be more sternly treated in a *bulubulu* process. It all depends on the particular situation.

Like the Aboriginal brochure and the tee shirt, this example shows how established cultural forms deployed in new situations take on new meanings. Many recent changes have made women more vulnerable to male authority. As Collier argues, societies that treated women as different from men but still worthy of respect in less capitalist eras may assign women less powerful positions as they become part of the cash economy (1997). Culture is not just the domain of beliefs and values, but also the product of institutional arrangements, political structures, and legal regulations. As these institutions change, so do beliefs, values, and practices.

The understanding of culture as opposed to modernity, and implicitly, to civilization and even to reason, is a creation of transnational elites, not local activists. Local activists tend to take a far more flexible view of culture. Although feminists have repeatedly criticized the use of culture as a justification for practices that subordinate or injure women, in recent years they have begun to examine how culture can contribute to enhancing women's rights. For example, the theme of the 2002 Sixteen Days of Activism Against Gender Violence, sponsored by the Center for Women's Global Leadership at Rutgers University is "Creating a culture that says no to violence against women." This campaign orchestrates events by over one thousand groups and individuals from over one hundred countries and is developed through a listserve of over

600 people and organizations. The campaign statement recognizes that culture has been used by individuals and institutions to support beliefs and institutions that legitimize and perpetuate violence against women, but notes that it is not static and that there are creative ways to challenge it. “It is important that we continue to critically explore and challenge the history and construction of claims that use culture as a justification for violence against women. We must also examine who has constructed or is constructing the cultural beliefs that legitimize violence against women and whose interests are served by these claims. We should question whose cultural views and values are being privileged and why” (email from [lmclarke@rci.retgers.edu](mailto:lmclarke@rci.retgers.edu) August 20, 2002: 2002 Campaign Announcement.)

### The Centrality of Culture to Human Rights Practice

Culture is as important in shaping human rights conferences as it is in structuring village mortuary rituals. Thinking about culture as local and unchanging implies that villages are full of culture but that there is no culture in the conference halls of New York and Geneva. However, UN meetings are deeply shaped by culture. The transnational elites who populate these halls think they are doing law but they are actually making culture. This is a culture of transnational modernity, one that specifies procedures for collaborative decision-making, conceptions of global social justice, and definitions of gender roles. In these settings, human rights lawyers talk about culture as tradition, static, old customs, and harmful, while they position themselves as representing

modernity and law, a culture-free zone. This is embedded in documents, commentaries, and interactions in international settings.

I think (a little speculatively) that the current demonization of culture, and to some extent anthropology and cultural relativism, is because the concept of culture at play in the 1940s is still the one in use within law.

The human rights legal system produces culture in three ways. First, it articulates general principles in a variety of kinds of documents that are the result of consensual processes. These documents define problems and articulate normative visions of a just society. Global conferences result in major policy statements while UN bodies and commission meetings produce law-like documents such as resolutions and conventions. When ratified by states, conventions are to be incorporated into state legal systems, although the extent to which this takes place varies greatly. The myriad transnational non-governmental organizations (NGOs) give these documents much of their life and power. NGOs play a central role in lobbying for particular phrases and words in these documents, do the research on which documents are constructed, publicize the completed documents, and pressure their governments to conform to them. NGOs work in collaboration with UN agencies to produce reports on human rights violations, encourage victims to complain to UN bodies, and provide services to local populations that increase their understanding of their human rights. NGO support is a critical feature of the way the human rights system operates. Keck and Sikkink's study of transnational NGOs shows the critical role they play in defining social problems, giving them names, and doing the research necessary to document their scope and severity (1998).

Second, the investigation of individual complaints and national practices by specially appointed individuals, expert groups, and working groups provides information on problems that warrant attention from the international bodies. Sometimes these reports articulate general principles as well. For example, the Human Rights Commission has appointed a Special Rapporteur on Violence Against Women whose position papers and investigative reports are widely quoted by other human rights activists. Again, human rights NGOs play critical roles in helping individuals complain, providing information to special investigators, and writing reports that expose the violations of various national governments.

Third, all six major human rights conventions hold regular hearings where they review the periodic reports from countries that have ratified the convention. This is the most law-like of all the human rights processes. Theoretically, a country that has ratified a treaty is obligated to incorporate its provisions into its national laws, although in practice the extent to which any country does so is highly variable. NGOs play a critical role in this process also. They produce alternative, or shadow, reports that parallel government reports, contribute to the process of report writing by the government, and publicize the proceedings and any criticisms by the committee.

These three processes are central to the knowledge practices of the human rights regime, - its technologies for fixing truth in universal and legalistic forms (see Riles 2000). Global law is produced as these documents are written, disseminated, and understood by local populations around the world. They provide a language of protest and reform that articulates with other discourses and is to some extent incorporated within local cultural understandings and contexts.

## Conclusions

To summarize my argument, when human rights lawyers talk about culture, they refer to it as traditional harmful practices, old customs, and sometimes, as ancient ways. They see themselves and their project as rooted in modernity and law and envision culture as the obstacle. Their tendency to see culture as a problem is enhanced by their commitment to a model of legal rationality, an idea that is incompatible with celebrating local cultural complexity. This understanding of culture is embedded in the conventions and policy documents, the wider jurisprudence of human rights, and in the discussions that take place in human rights forums. While there is recognition of the importance of cultural diversity and of responding to difference among cultures, the transnational modernity created in these human rights institutions is generally committed to promoting a universal system of norms and values. Culture emerges as the obstacle.

Ironically, this usage is quite similar to that developed within anthropology early in the twentieth century, although perhaps never in such a stark and reified way. It is this understanding of culture that is used by political and religious leaders who defend their oppressive practices in the name of culture. Nationalism requires the creation of a culturally homogeneous people, - a continuous effort to create the Germanic Kultur within territorial boundaries. At the same time, this conception of culture draws strength from the imperial legacy of conceptions of culture as primitive and backward in

opposition to civilization. Finally, the understanding of culture in human rights law has also been influenced by the relativism/universalism debate in which the form of culture defended by relativists is assumed to be the holistic, integrated, and bounded system of beliefs and values which once stood for culture within anthropology. Given this understanding of culture and its political meanings, it is not surprising that cultural relativism appears to be a retrograde position to human rights lawyers and those active within transnational modern arenas. Nor is it puzzling that they find anthropology irrelevant to these issues. But they are losing the advantages of adopting a more sophisticated anthropological understanding of culture.

I think human rights lawyers and journalists marginalize anthropology because they misunderstand culture. The holistic conception of culture provides no space for change, contestation, or the analysis of the links between power, practice, and values. Instead, it becomes a barrier to the reformist project of universal human rights. From the legal perspective on human rights, it is the texts, the documents, and compliance that matter. Universalism is essential while relativism is bad. There is a sense of moral certainty which taking account of culture disrupts. This means, however, that the moral principle of tolerance for difference is lost. As human rights law demonizes culture, it misunderstands anthropology as well.

The misreading of culture hinders the global spread and local appropriation of human rights concepts. Recognizing the extent to which the human rights project is itself a cultural one, and that it can build upon culture rather than only resist it, would foster its expansion and use by local activists. Such a reconceptualization would also distance human rights discourse from its reliance on a colonial-era opposition between civilization

and culture, the basis for the imperial civilizing mission. The conception of culture often seems heavy-handed to postcolonial countries faced with morally certain critiques of their practices.

Indeed, is this rush to certainty, to universalism, losing something? Is the deep critique of cultural relativism and the relocation of culture to the domain of harmful practices promoting a loss of tolerance and respect for cultural difference, the values that inspired the authors of the AAA statement? Local activists and NGOs are far less likely to think about culture in these terms than the denizens of international modernity. Instead, they focus on bringing human rights home, adapting them to local contexts and systems of meaning. A more sophisticated and dynamic understanding of culture would not only promote human rights activism, but also relocate anthropological theorizing to the center of these issues rather than to the margins where it has been banished.

#### References

- Abu-Lughod, Lila. 2002. "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others." *American Anthropologist* 104: 783-791.
- American Anthropological Association. 1947. "Statement on Human Rights." *American Anthropologist* 49: 539-543.
- Anderson, Benedict. 1983. *Imagined Communities*
- An-Na'im, Abdullahi Ahmed. 1990. "Problems of Universal Cultural Legitimacy for Human Rights." Pp. 331-368 in Human Rights in Africa: Cross-Cultural

- Perspectives. Abdullahi Ahmed An-Na'im and Francis Deng, Ed.  
Washington, D.C.: Brookings Institution.
- An-Na'im, Abdullahi Ahmed. 1992. Human Rights in Cross-Cultural Perspectives: A Quest for Consensus. Phila, PA: Univ. of Pennsylvania Press.
- Barnett, H.G. 1948. "On Science and Human Rights." *American Anthropologist* 50: 352-355.
- Barth, Frederik. 1959. Political Leadership Among the Swat Pathan. London: London School of Economics, Monograph no. 19.
- Bauer, Joanne R. and Daniel A. Bell. (eds.) 1999. The East Asian Challenge for Human Rights. London and New York: Cambridge University Press.
- Bernard, Desiree. 1996. "The Work of the Committee on the Elimination of Discrimination Against Women: Its Focus on Nationality, Custom, Culture and the Rights of the Girl-Child." Pp. 72-85 in Andrew Byrnes, Jane Connors, and Lum Bik (eds.) Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation. London: The Commonwealth Secretariat.
- Bourdieu, Pierre. 1977. *Outline of a Theory of Practice*. Cambridge: Cambridge University Press.
- Boyle, Elizabeth Heger. 2002. Female Genital Cutting: Cultural Conflict in the Global Community. Baltimore and London: Johns Hopkins University Press.
- Cerna, Christina M. and Jennifer C. Wallace. 1999. "Women and Culture." Pp. 623-651 in Women and International Human Rights Law, Vol. I. Kelly D. Askin and Dorean M. Koenig, eds. Ardsley, New York: Transnational Publishers.

- Collier, Jane Fishburne. 1997. From Duty to Desire: Remaking Families in a Spanish Village. Princeton: Princeton Univ.Press.
- Comaroff, Jean and John L. 1999. "Occult economies and the violence of abstraction: notes from the South African postcolony." American Ethnologist 26: 279-303.
- Coomaraswamy, Radhika and Lisa M. Kois. 1999. "Violence Against Women." Pp. 177-217 in Kelly D. Askin and Dorean M.Koenig, eds. Women and International Human Rights Law, Vol I. Ardsley, NY: Transnational Publishers.
- Elias, Norbert. 1978 [1939]. The Civilizing Process: The History of Manners and State Formation and Civilization. Trans. By Edmund Jephcott. Oxford: Blackwells.
- Engle, Karen. 2001. "From Skepticism to Embrace: Human Rights and the American Anthropological Association." *Human Rights Quarterly* 23: 536-560.
- Herskovitz, Melville J. 1972. Cultural Relativism: Perspectives in Cultural Pluralism. Ed. by Frances Herskovitz. New York: Random House.
- Keck, Margaret E. and Kathryn Sikkink. 1998. Activists Beyond Borders: Advocacy Networks in International Politics. Ithaca: Cornell Univ. Press.
- Kuper, Adam. 1999a. Among the Anthropologists: History and Context in Anthropology. London and New Brunswick, NJ: The Athlone Press.
- Kuper, Adam. 1999b. Culture: The Anthropologists' Account. Cambridge, MA: Harvard Univ. Press.

- Merry, Sally Engle. 2003. "A New Global Legality? Regulating Violence Against Women in the Human Rights System" *Law and Social Inquiry*
- Nader, Laura. 1989. "Orientalism, Occidentalism, and the Control of Women." Pp. 323-355 in Cultural Dynamics, Vol II. 3. Leiden: E.J.Brill.
- Ortner, Sherry. 1984. "Theory in Anthropology since the Sixties." *Comparative Studies in Society and History* 26: 126-66.
- Renteln, Alison Dundes. 1988. "Relativism and the Search for Human Rights." *American Anthropologist* 90: 56-73.
- Riles, Annelise. 2000. *The Network Inside Out*. Ann Arbor, MI: Univ. of Michigan Press.
- Steward, Julian H. 1948. "Comments on the Statement on Human Rights." *American Anthropologist* 50: 351- 352.
- United Nations. 1996. *The Beijing Declaration and The Platform for Action*. Fourth World Conference on Women, Beijing, China, 4-15 September 1995. New York: United Nations Department of Public Information.
- Van Bueren, Geraldine. 1995. "The International Protection of Family Members' Rights as the 21st Century Approaches." Human Rights Quarterly 17: 732-765.