



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 25 | Number 2

Article 1

3-1-2003

In Search of an International Human Right to Receive Information

Geoffrey A. Hoffman

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Geoffrey A. Hoffman, *In Search of an International Human Right to Receive Information*, 25 Loy. L.A. Int'l & Comp. L. Rev. 165 (2003).

Available at: <https://digitalcommons.lmu.edu/ilr/vol25/iss2/1>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

In Search of an International Human Right to Receive Information

GEOFFREY A. HOFFMAN*

I. INTRODUCTION

Access to information has become a necessity for all nations and individuals. A state or regime that bars access to information effectively controls the destiny of its people. This Article examines the international human right to receive information. This broadly construed right includes within its scope the right to obtain specific types of data (for example, health and reproductive information), as well as more general types of knowledge accessible through education, training, employment, or political participation. The right is especially important when considering the plight of women in certain parts of the world, whose access to these types of information is limited.

This Article explores how the fundamental human right to receive information is grounded in international law. This examination occurs within the context of a woman's right to receive reproductive health information and obtain educational, employment, and political opportunities. Necessarily, this task is complex because there are many types of information and numerous ways individuals and populations may gain access to it. Nevertheless, several well-entrenched international conventions and legal authorities support the fundamental right to receive

* J.D., Tulane Law School; A.B., Columbia University; Teaching Fellow and Instructor, Tulane Law School; previously, Visiting Assistant Professor, University of Illinois College of Law. The author wishes to thank Adeno Addis and Elizabeth Livingston de Calderon at Tulane, as well as Thomas Ginsburg at the University of Illinois, for reading a first-draft of this Article and making many helpful suggestions. The author would also like to thank Kara Thorvaldsen for her excellent research assistance, and Deanna Shumard for her secretarial assistance, and especially for re-typing the entire manuscript.

information. For example, the U.N. Charter binds a state that is a part of the U.N. system.¹ Even if the state does not belong to the U.N. system, it may also be bound by some provisions of the U.N. Charter.² A state is also legally bound by customary international law and any conventions or covenants that it has ratified.³ Yet, enforcing agreed-upon human rights remains problematic. Although claims and reporting procedures may produce some results, their effectiveness fails in other cases. Moreover, enforcement of the right with respect to private actors proves even more precarious.

After discussing relevant international legal documents and methods for their effective reporting and enforcement, the Article examines the principle of "cultural defense." The cultural defense principle highlights the basic tension between state sovereignty and national self-determination, on the one hand, and individual freedom and international human rights, on the other. For example, women's oppression often is premised on religious, cultural, or societal stigmas promoted by private parties. States may tacitly sanction violations or, in a practical sense, such infringements may be beyond the power of a particular state to control. In these cases, there may be only limited avenues available to effect change. The Article concludes with recommendations for stronger enforcement procedures and clearer guidelines to better protect and enforce an individual's right to receive information.⁴

1. See U.N. CHARTER arts. 2, 4, 6.

2. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)*, Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21). Non-member states are, for example, bound to abide by certain Security Council Resolutions adopted under Chapter VII of the U.N. Charter in response to another state's use or threat of force or aggression. See, e.g., *id.*

3. See Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055, 1060 (1945) (annexed to the U.N. Charter, listing international conventions and international custom among the various sources of international law).

4. I leave for future papers a discussion of certain "meta-questions," concerning the creation of new human rights. These questions include, for example: the underlying process and means of creating new human rights; the effects of such emerging rights on the enforcement of other rights and on the overall structure of international legal norms; and the arguments for and against a proliferation of new rights, as opposed to a core of well-entrenched and more widely-accepted ones. Of course, these questions depend upon answers to even more fundamental, philosophical questions relating to the very nature and possibility of human rights themselves. For purposes of this investigation, I take as axiomatic that human rights do exist and that new ones can be and are created within the context of the international legal community. For a sampling of the variety of discussions

II. INTERNATIONAL LEGAL STANDARDS SUPPORTING A RIGHT TO RECEIVE INFORMATION

In the search for legal authority to support the right to receive information, there are two principal and related modes of inquiry. The first asks whether there are any logically antecedent rights or general precepts which entail, give rise to, or necessitate the right to receive specific types of information, such as the right to freedom of expression, the right to nondiscrimination, the right to life, and the right to freedom of movement.⁵ The second approach involves a search for specific rights, explicitly framed in terms of providing women and others access to certain types of information.⁶ Examples of these include the right to education,

relating to these and other meta-issues, see, for example: ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES: 1993 (Stephen Shute & Susan Hurley, eds., 1993); Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1 (1999); ALFRED RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* (1997); STANLEY HOFFMANN, *DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS* (1981); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1981); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); JOHN RAWLS, *A THEORY OF JUSTICE* (1999); JOHN RAWLS, *THE LAW OF PEOPLES* (1999) (containing revised version of original article appearing in Shute & Hurley, *supra*).

5. This first approach is derived from the recognition among some international law practitioners and scholars of a "hierarchy of rights," the view that some rights are considered more basic and fundamental than others. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 155-56 (2d ed. 2002) (quoting Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 21 (1986)) [hereinafter STEINER & ALSTON (2d ed.)]; Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 461 (2001). This notion has come under fire especially by those who perceive a need in less developed nations, for example, for a prioritization of economic and social rights over the traditionally more valued civil and political ones. See *id.* n.211 (citing Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 469 (1983)).

6. The search for specific human rights, as discussed in detail *infra*, begins with a study of the *Universal Declaration of Human Rights*, G.A. Res. 217(III)(A), U.N. GAOR, 3d Sess., at 71 U.N. Doc. A/810 (1948) [hereinafter *UDHR*], and the International Covenant of Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*]. As noted by Professors Steiner and Alston, the provisions of the *UDHR*, while of great significance, are merely "hortatory and aspirational," while the *ICCPR* binds states parties according to the document's terms, subject of course to any reservations of the states. STEINER & ALSTON (2d ed.), *supra* note 5, at 142. As Professors Steiner and Alston further point out, "[m]any rights declared in the [*ICCPR*] closely resemble provisions of the [*UDHR*], although they are stated in considerably greater detail." *Id.* at 143.

the right to participate in a state's political processes, or the right to receive reproductive health information.⁷

The U.N. Charter and Universal Declaration of Human Rights⁸ (UDHR) refer to rights encompassed in the first category of analysis. The UDHR refers to more specific rights, amplifying some of the broad concepts espoused in the Charter. Additionally, the General Assembly, under the shadow of the U.N. Charter and UDHR, has adopted a number of conventions⁹ and covenants,¹⁰ which deal with the status of women, and refer to women's rights to obtain information¹¹ and educational opportunities.¹²

A. The U.N. Charter

The U.N. Charter begins by reaffirming fundamental human rights, based on "the dignity and worth of the human person" and "the equal rights of men and women."¹³ It is significant that the U.N. Charter does not purport to create new rights, but merely affirms pre-existing ones.¹⁴ The equality language in the preamble is echoed in Article 1, enumerating the United Nations' purposes, which include developing "friendly relations among nations based on respect for the principle of *equal rights* and self-determination of peoples."¹⁵ References to equal rights in Article 1 are general and gender-neutral, in contrast to the preamble's explicit mention of women.¹⁶

7. Part II's analysis seeks only to uncover the existence of rights related to access to information. The enforcement of such rights is addressed in Part V, *infra*.

8. *UDHR*, *supra* note 6, at 71; *see, e.g.* U.N. CHARTER art. 55.

9. *E.g.*, *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979), available at <http://www.un.org/Conferences/Women/PubInfo/Status/Scrn3.htm> (last visited Apr. 1, 2003) [hereinafter *CEDAW*]; *Convention on the Political Rights of Women*, *opened for signature* Dec. 20, 1952, T.S. No. 101; *Convention on the Nationality of Married Women*, *opened for signature* Jan. 29, 1957, <http://www.unhchr.ch/html/menu3/b/78.htm> (last visited Apr. 1, 2003); *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, *opened for signature* Nov. 7, 1962, <http://www.unhchr.ch/html/menu3/b/63.htm> (last visited Apr. 1, 2003).

10. *E.g.*, ICCPR, *supra* note 6; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*].

11. *See* ICCPR, *supra* note 6, art. 19.

12. *See* ICESCR *supra* note 10, art. 13.

13. U.N. CHARTER pmb. l.

14. *See id.*

15. *Id.* art. 1(2) (emphasis added).

16. *Id.*

Chapter IV of the U.N. Charter outlines the General Assembly's duties and responsibilities. Article 13 specifies that the General Assembly "shall initiate studies and make recommendations for the purpose of . . . promoting international co-operation in the economic, social, cultural, educational, and health fields."¹⁷ The General Assembly is charged with "assisting in the realization of human rights . . . for *all* without distinction as to race, *sex*, language, or religion."¹⁸ The Economic and Social Council, another body the U.N. Charter established, may also make recommendations in order to promote human rights "for all."¹⁹

While the U.N. Charter itself binds member states, its provisions are not specific enough to create legal obligations with respect to a state's enforcement of human rights. As one commentator noted, "the [U.N.] Charter did not provide, clearly and explicitly, that every State party to the [U.N.] Charter assumes legal obligations not to violate the human rights, or some human rights, of persons subject to its jurisdiction."²⁰

B. The United Nations' Universal Declaration of Human Rights

The UDHR particularly focuses on the general affirmations enumerated in the U.N. Charter. In keeping with its parent document, the UDHR provides for equal rights for "all human beings."²¹ Every person is entitled to these rights "without distinction of any kind," including gender-based distinctions.²² The UDHR's Article 7 further emphasizes this nondiscrimination principle, providing that everyone is "entitled without any discrimination to equal protection of the law."²³

The UDHR also contains provisions directly addressing women's access to education and employment. Article 13 provides for the right to freedom of movement and residence. Article 23 specifically enumerates the "right to work, [and] to free choice

17. *Id.* art. 13(1).

18. *Id.* art. 13(1)(b) (emphasis added).

19. *Id.* art. 62(2).

20. Louis Henkin, *International Law: Politics, Values and Functions*, in IV COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 215 (1989), reprinted in HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 122-23 (1996) [hereinafter STEINER & ALSTON (1st ed.)].

21. *UDHR*, *supra* note 6, art. 1.

22. *Id.* art. 2.

23. *Id.* art. 7.

employment.”²⁴ Article 27 ensures that “everyone has the right to freely participate in the cultural life of the community.”²⁵ Arguably, by denying available educational or employment opportunities to women, the State would effectively violate their right to freely participate in their communities. Finally, Article 26 gives “*everyone* the right to education,” specifically providing that “higher education *shall be* equally accessible to *all* on the basis of merit.”²⁶

Similar to the U.N. Charter’s limitations, the UDHR, by its very nature as a declaration, has been described as recommendatory, espousing the aspirations of states without binding them to specific obligations.²⁷ These documents, despite their apparent lack of binding authority, have played an important role as the impetus for the creation of an “International Bill of Rights.”²⁸

C. Covenants and Conventions Adopted by General Assembly

1. International Covenant on Civil and Political Rights (ICCPR)

The U.N. General Assembly adopted the ICCPR in 1966.²⁹ Ten years later, the ICCPR acquired the requisite number of signatures to enter into force.³⁰ The United States became a party in 1992, but the U.S. Senate was careful to qualify the country’s accession with several reservations and interpretative declarations.³¹ Some commentators, and eleven European states, maintain that these reservations are invalid, and, thus, the United States should not be a party to ICCPR.³² Additionally, women’s

24. *Id.* art. 23(1).

25. *Id.* art. 27(1).

26. *Id.* art. 26(1) (emphasis added).

27. STEINER & ALSTON (1st ed.), *supra* note 20, at 123–24.

28. The International Bill of Rights consists of the UDHR, ICCPR, and ICESCR. *See id.* at 117.

29. *See* ICCPR, *supra* note 6, at 171.

30. *See id.* at n.1.

31. *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOK. J. INT’L L. 277 (1995).

32. *Id.* at 277–78.

groups and scholars have criticized the ICCPR for its gender-neutral language and lack of sensitivity toward women's rights.³³

Despite these criticisms, the ICCPR contains several provisions supporting a woman's right to information. The ICCPR's preamble echoes the UDHR's language by invoking the U.N. Charter and recognizing the "inherent dignity and . . . the equal and inalienable rights of all members of the human family."³⁴ Article 2 provides that each state party should "respect and ensure" all the rights enumerated in the ICCPR,³⁵ and this should be accomplished "without distinction of any kind," including distinctions based upon sex.³⁶ Most importantly, Article 3 explicitly provides that "[t]he State Parties . . . undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."³⁷

The ICCPR contains an analogue to the U.S. Constitution's Equal Protection Clause. Article 26 states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law."³⁸ Discrimination based on sex is specifically prohibited.³⁹ Facially, this provision mandates equal treatment, yet, paradoxically, such "equality" may actually preserve an inherently discriminatory status quo. By not allowing for innovative measures such as affirmative action, the ICCPR seems to "replicate . . . familiar hierarchies."⁴⁰ These implicit hierarchies reinforce "abstract theory over concrete practice" and male domination over females.⁴¹

The ICCPR's articles relating to nondiscrimination provide the background for interpreting its provision on freedom of expression. Article 19 provides that "[e]veryone shall have the right to freedom of expression."⁴² Included within this right is "the freedom to *seek, receive and impart* information and ideas of

33. See, e.g., Barbara Stark, *The "Other" Half of the International Bill of Rights as a Postmodernist Feminist Text*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 19 (Dorinda G. Dallmeyer ed., 1993).

34. ICCPR, *supra* note 6, pmb1.

35. *Id.* art. 2.

36. *Id.*

37. *Id.* art. 3.

38. *Id.* art. 26.

39. *Id.*

40. Stark, *supra* note 33, at 20.

41. *Id.*

42. ICCPR, *supra* note 6, art. 19.

all kinds, regardless of frontiers.”⁴³ Certain restrictions, however, limit this freedom.⁴⁴ Such restrictions must be provided by law, necessary, and in furtherance of rights and reputations of other individuals, national security, or other public interest.⁴⁵ These loopholes, unfortunately, afford states great latitude in formulating justifications for silencing speech.

2. International Covenant on Economic, Social and Cultural Rights (ICESCR)

In contrast to the *negative* rights embraced by the ICCPR, the International Covenant on Economic, Social and Cultural Rights⁴⁶ enumerates a number of *affirmative* rights. Instead of proscribing a state's action (for example, against arbitrary detention or extrajudicial sentencing), affirmative or positive rights direct the state to provide certain substantive entitlements to the people (for example, education or health care). The ICESCR's provisions are couched in more contextual terms and address issues that traditionally have affected women.⁴⁷ This characteristic has led one commentator to conclude that the ICESCR in fact privileges women over men, thereby inverting or destabilizing the hierarchies implicit in the ICCPR.⁴⁸ The United States, perhaps for this very reason, has yet to ratify the ICESCR.⁴⁹ Such a treaty, according to American criticism, represents “foreign” (i.e., socialist) ideas about the meaning of rights.⁵⁰ In addition, such a treaty allegedly infringes on national sovereignty by addressing issues traditionally within the ambit of domestic authority.⁵¹

The ICESCR contains articles that provide a basis for, and give meaning to, the international human right to information. These provisions involve education, employment, and informational access. Article 3 covers all of the rights found in the

43. *Id.* art. 19(2) (emphasis added); see also Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, in *THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION*, 46 (Sandra Coliver ed. 1995) (quoting ICCPR, *supra* note 6, art. 19).

44. ICCPR, *supra* note 6, art. 19(3).

45. *Id.*

46. ICESCR, *supra* note 10.

47. See, e.g., ICESCR *supra* note 10, arts. 3, 6–7, 10–13.

48. Stark, *supra* note 33, at 20.

49. See *id.* at 19.

50. See *id.* at 23.

51. *Id.*

ICCPR and parallels the ICCPR's third article, providing that the states parties "undertake to ensure that the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in [the ICESCR]."52

ICESCR Article 6 provides that states parties "recognize the right to work."⁵³ This right includes "the right of *everyone* to the opportunity to gain his living by work which he freely chooses or accepts."⁵⁴ Moreover, the state is required "to take appropriate steps to safeguard this right."⁵⁵ These steps are enumerated in Article 6(2) and include "technical and vocational guidance and training programmes," as well as instituting "policies and techniques to achieve steady economic, social and cultural development."⁵⁶ Article 7, which also relates to employment, specifically provides for just working conditions, fair wages, equal opportunity for promotion, and reasonable limitation on working hours.⁵⁷

Article 13 provides for the right to education. This article, like Article 6, is intended to apply universally, and provides that states parties "recognize the right of everyone to education."⁵⁸ The provision does not simply state an abstract right, but further recognizes that "primary education shall be compulsory and available free to all,"⁵⁹ that "secondary education . . . shall be made generally available,"⁶⁰ and that "higher education shall be made equally accessible to all."⁶¹

ICESCR Article 13 also recognizes parents' right to "choose for their children schools, other than those established" by the state.⁶² These schools must conform to minimum educational standards and ensure that children receive "religious and moral" education in conformity with the parents' own convictions.⁶³ Despite the provision's language requiring minimum standards,

52. ICESCR *supra* note 10, art. 3.

53. *Id.* art. 6.

54. *Id.*

55. *Id.*

56. *Id.* art. 6(2).

57. *Id.* art. 7.

58. *Id.* art. 13(1).

59. *Id.* art. 13(2)(a).

60. *Id.* art. 13(2)(b).

61. *Id.* art. 13(2)(a).

62. *Id.* art. 13(3).

63. *Id.*

this additional parental right could conceivably undermine universal education, as schools run by nonstate actors and administered according to religious or moral laws may greatly risk promoting gender inequalities.

The ICESCR implicitly provides for a right to receive information within the context of its right to health. Article 12 directs member states to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁶⁴ States can protect this right by improving "all aspects of environmental and industrial hygiene,"⁶⁵ and through "the prevention, treatment and control of epidemic, endemic, occupational, and other diseases."⁶⁶ In order to achieve these steps, women must possess the right to receive information regarding their own general health, hygiene, and reproductive issues. Without this right, the ICESCR's guarantee of a right to health becomes devoid of meaning.

D. Specific Provisions in Regional Human Rights Instruments

Regional legal systems may offer a more effective forum than the larger international context to establish, develop, and implement a right to information.⁶⁷ This is particularly true in light of the unique characteristics of closely affiliated regional regimes. The violator-state is, theoretically, more likely to respond to pressure from neighboring states with which it shares economic interdependence. Countervailing factors, however, may militate against these considerations. For example, debates about women's rights often raise issues of cultural and religious values. Arguments against women's rights by religious groups and other nonstate actors may be more readily accepted by states whose populations include like-minded groups and individuals. The discussion below examines how the three regional systems have addressed (or failed to address) a right to information.

The European, Inter-American, and African regional systems have all adopted legal instruments affecting a right to information. Europe's primary human rights instrument, the Convention for the Protection of Human Rights and Fundamental Freedoms

64. *Id.* art. 12.

65. *Id.* art. 12(2)(b).

66. *Id.*

67. See *Twenty-Eighth Report of the Commission to Study the Organization of Peace*, at 15 (1980), reprinted in STEINER & ALSTON (2d ed.), *supra* note 5, at 783-84.

(European Convention),⁶⁸ entered into force in 1953. The Inter-American regime has embraced the American Declaration of the Rights and Duties of Man (American Declaration),⁶⁹ the American Convention on Human Rights (American Convention),⁷⁰ and the Charter of the Organization of American States (OAS Charter).⁷¹ More recently, the Organization of African Unity adopted the African Charter on Human Rights and People's Rights (African Charter) in 1986.⁷² These regional regimes, however, have not been particularly active in confronting and remedying human rights violations against women.⁷³

1. European regime

The European Convention guarantees the right to freedom of expression in Article 10, and is closely analogous to ICCPR's Article 19. State regulations, such as those controlling television broadcasting licensing, may limit this right, however.⁷⁴ The European Convention's Article 10 differs from its international counterpart in that the European instrument contains an expanded list of permissible state restrictions. The freedom of expression "may be subject to such formalities, conditions, restrictions or penalties as are proscribed by law and are necessary in a democratic society."⁷⁵ Article 10 explicitly enumerates a long list of legitimate interests upon which a state may base its restrictions. These interests include protecting national security, public

68. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*].

69. *American Declaration of the Rights and Duties*, O.A.S. Res. XXX (May 2, 1948) (adopted by the Ninth International Conference of American States), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 17 (1992) [hereinafter *American Declaration*].

70. American Convention on Human Rights, *opened for signature* Apr. 8, 1970, 1144 U.N.T.S. 123 [hereinafter *American Convention*].

71. Charter of the Organization of American States, *opened for signature* Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, *amended by* Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), *opened for signature* Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter *OAS Charter*].

72. African Charter on Human and People's Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/rev.5, 21 I.L.M. 58 (1982), <http://www1.umn.edu/humanrts/instreet/zlafchar.htm> (last visited Apr. 1, 2003) [hereinafter *African Charter*].

73. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 26, 55-56 (Rebecca J. Cook ed., 1994).

74. European Convention, *supra* note 68, art. 10(1).

75. *Id.* art. 10(2).

safety, public health and morals, confidential information, individuals' rights and reputations, and judicial authority and impartiality.⁷⁶

In *Open Door Counseling Ltd. v. Ireland*, the European Commission of Human Rights applied Article 10 to a woman's right to receive information about abortion services.⁷⁷ In 1992, the European Court of Human Rights affirmed the European Commission's decision.⁷⁸ *Open Door* was based on an injunction issued by the Supreme Court of Ireland, which prohibited certain companies from assisting pregnant women with traveling abroad for abortions.⁷⁹ The injunction also prohibited them from making travel arrangements or informing pregnant women of the identity, location, and the method of communication with a specified clinic.⁸⁰

With respect to the potential breach of Article 10, the European Commission began its analysis by noting that, if the injunction interfered with the applicants' freedom of expression, then the Commission would determine whether "that interference was prescribed by law."⁸¹ If the law did prescribe such interference, then the Commission would next determine "whether it was necessary in a democratic society to meet that aim, i.e., whether it corresponded to a pressing social need and was proportionate to the pursuit of the aim."⁸² The government argued that it was regulating the promotion of abortion as prescribed under domestic law. The applicants argued that they were only providing objective information on pregnancy matters vital to women's health.⁸³ At the crux of the decision is the Commission's determination that "[t]he present cases involve freedom to receive and impart information on a wider and more complex scale, involving not only the right to life of the unborn, but also women's health, pregnancy, family planning, and abortion."⁸⁴

76. *See id.*

77. *See Open Door Counseling Ltd. & Dublin Well Woman Centre Ltd. v. Ireland*, App. Nos. 14234/88 & 14235/88, 15 Eur. H.R. Rep. 244, 244 (1992).

78. *Id.* at 387-88.

79. *Id.* at 135.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 136.

84. *Id.*

After reviewing Irish criminal and common law, the European Commission found that the domestic law did prohibit procuring or attempting to procure an abortion.⁸⁵ It was not a criminal offense, however, to travel abroad to have an abortion.⁸⁶ The Commission found that applicant companies did not foresee that imparting information about legal activities would have constituted a breach of the Irish Constitution or prevailing domestic law.⁸⁷ Therefore, the Commission determined that the Irish Supreme Court's injunction violated the European Convention's Article 10 because it was not "prescribed by law."⁸⁸

The *Open Door* decision is significant because it applied the right to freedom of expression specifically to women in need of specialized health information. The European Commission dismissed Ireland's argument that the injunction was required, based on the right to life of the unborn or for the protection of public morals.⁸⁹ Consequently, in *Open Door*, the mere assertion of the right to life did not automatically trump freedom of expression. This distinction is especially important when applied to vulnerable subsections of society greatly in need of objective information as a basis for making future choices.

2. Inter-American regime

The American Convention's provisions relating to the right to freedom of expression appear all encompassing. Read literally, they are more expansive than Article 10 of the European Convention. The American Convention's Article 13 provides that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds."⁹⁰ In addition, the right "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability."⁹¹ Overall, this language appears dispositive on the issue of allowing women access to reproductive health information. A state, however, can always argue for the need to impose liability for the dissemination of such

85. *Id.*

86. *Id.*

87. *Id.* at 137.

88. *Id.*

89. *Id.* at 136-37.

90. American Convention, *supra* note 70, art. 13(1).

91. *Id.* art. 13(2).

information, as long as it can show a legitimate state interest.⁹² The imposition of penalties certainly would have a chilling effect on free speech.

Another potentially limiting provision of Article 13 deals with the advocacy of "war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person."⁹³ A group or entity (such as a government), could apply this provision to prohibit the dissemination of information relating to abortion, contraception, or other reproductive issues. The group could argue that such information infringes on the rights or reputations of others and that it represents advocacy of religious hatred, which incites illegal action. This sort of argument reveals how cultural or religious factions can turn a seemingly expansive provision into a powerful tool for suppressing unpopular speech.⁹⁴

The Inter-American regime, in contrast to the European Commission in *Open Door*, has not directly affirmed a woman's right to receive information.⁹⁵ An interesting parallel, however, can be drawn between *Open Door* and *Case 2141*,⁹⁶ which the Inter-American Commission on Human Rights decided in 1981. *Case 2141* involved allegations that the United States (specifically, the state of Massachusetts) had "violated an aborted male fetus'

92. These interests include respect for the rights or reputations of others, the protection of national security, public order, and public health or morals. *Id.*

93. *Id.* art. 13(5) (emphasis added).

94. Despite this danger, it should be noted that the Inter-American Court of Human Rights recently has shown its willingness to interpret Article 13 broadly, at least in the context of a case relating to prior censorship of a film with religious themes. See *The Last Temptation of Christ Case*, Judgment of February 5, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 73 (2001). In that case, the court held that Chile's prohibition of the film's exhibition violated Article 13 "because this article indicates that the exercise of freedom of thought and expression shall not be subject to prior censorship . . . [T]he aim of this provision is to protect and encourage access to information, ideas and artistic expressions of all types and to strengthen pluralist democracy. . . ." *Id.* The court further stated that "[t]he obligation not to interfere in the enjoyment of the right of access to information of all types extends to the 'circulation of information and the exhibition of artistic works that may not be approved personally by those who represent the authority of the State at a certain moment. . . ." *Id.*

95. See Richard J. Wilson, *Researching the Jurisprudence of the Inter-American Commission on Human Rights: A Litigator's Perspective*, 10 AM. J. INT'L L. & POL'Y 1 (1994) (referring to American Convention, *supra* note 70, at art. 13(1)).

96. *Case 2141*, Inter-Am. C.H.R. 25, OEA/ser.L/V/II.54, doc. 9 rev. 1 (1981).

'right to life' under Article 1 of the American Declaration."⁹⁷ In addition, the applicants argued that the state had breached of the American Convention's Article 4,⁹⁸ which provides that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception."⁹⁹ Furthermore, Article 1 of the American Declaration protects every human being's "right to life, liberty and security of his person."¹⁰⁰

The Inter-American Commission, relying on the *travaux preparatoires* behind the Declaration, rejected an interpretation of Article 1 that would have amounted to a restriction of *Roe v. Wade*.¹⁰¹ The Commission stated that it would be impossible to apply the international obligation to the United States, which had not accepted nor ratified it.¹⁰² While the United States has signed the American Declaration, it has yet to ratify the American Convention.¹⁰³ Thus, the full impact of *Case 2141* on future cases concerning the right to information regarding abortion and other such issues is unclear. The Commission could likely reach a different decision if it is faced with a state that has adopted the Convention.

3. African regime

The African Charter provides unequivocally in Article 9 that "[e]very individual shall have the right to receive information,"¹⁰⁴ and every individual has the right "to express and disseminate his opinions within the law."¹⁰⁵ The qualification that an individual is only guaranteed protection within the law, however, nullifies the protection. In the context of reproductive information, although the African Charter may provide a woman with "the right to receive information," in practice no one would dare provide her

97. Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L. L. 779, 811 (1990) (discussing Case 2141) [hereinafter Cook, *International Human Rights Law Concerning Women*].

98. *Id.*

99. American Convention, *supra* note 70, art. 4(1).

100. *American Declaration*, *supra* note 69, art. 1.

101. See Cook, *International Human Rights Law Concerning Women*, *supra* note 97, at 812.

102. *Id.* (dismissing the petitioner's claim).

103. See *id.* For listing of signatories and ratifications of the American Convention, see <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Apr. 1, 2003).

104. African Charter, *supra* note 72, art. 9.

105. *Id.*

with such information if prohibited by local law or community restrictions.

With respect to education, Article 17 provides that “[e]very individual shall have the right to education.”¹⁰⁶ Yet, the same article weighs this individual right against the collective right of the community by declaring that “[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”¹⁰⁷ Such juxtaposition sends the message that not only will education be circumscribed and fashioned according to religious and cultural values, but that the state itself will facilitate the implementation of those values.

E. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

In contrast to the above international and regional conventions, is the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),¹⁰⁸ which goes further by calling for a wide range of systemic changes relating to women’s status. States subject to CEDAW and nonstate actors both have the burden of bringing about these changes.¹⁰⁹ CEDAW also differs from earlier documents in the way it defines inequality. The definition includes both *de facto* and *de jure* discrimination.¹¹⁰ CEDAW contains several articles that focus on women’s access to various kinds of information. These provisions guarantee women’s rights relating to political participation,¹¹¹ education,¹¹² employment,¹¹³ and health care.¹¹⁴

1. CEDAW articles

CEDAW’s Article 10 sets forth the duties of states parties to “take all appropriate measures to eliminate discrimination against

106. *Id.* art. 17(1).

107. *Id.* art. 17(3).

108. *CEDAW, supra* note 9.

109. *See id.* art. 1; *see also* STEINER & ALSTON (2d ed.), *supra* note 5, at 179. The definition of “discrimination against women” in CEDAW article 1 is *not* limited to discrimination by state action and the definition is further expanded by directing attention to the restrictions which have the effect or purpose of causing such discrimination. *Id.*

110. *See CEDAW, supra* note 9, art. 1.

111. *Id.* art. 7.

112. *Id.* art. 10.

113. *Id.* art. 11.

114. *Id.* art. 12.

women . . . in the field of education.”¹¹⁵ The article discusses eight areas in which states must work to eliminate inequalities.¹¹⁶ These areas include providing access to curricula, scholarships, continuing education, and literacy programs.¹¹⁷ Article 10(h) explicitly provides for “[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”¹¹⁸

Article 10, in conjunction with Article 14, deals with “particular problems faced by rural women.”¹¹⁹ Specifically, CEDAW guarantees women in rural areas the right “to obtain all types of training and education, formal and nonformal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency.”¹²⁰ In addition, women are entitled to “participate in all community activities.”¹²¹

CEDAW also guarantees women’s access to information in the context of participation in the political structures of a state or community. Article 7(b) guarantees women the right to “participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.”¹²² Such participation would be impossible without giving women adequate information on which to base political choices. Significantly, the right extends to participation “in non-governmental organizations and associations concerned with the public and political life of the country.”¹²³

Access to information also plays a part in a woman’s right to employment, as guaranteed in CEDAW’s Article 11. Article 11(c) outlines the various rights, which include the “right to free choice of profession and employment . . . the right to receive vocational training and retraining, including apprenticeships . . . and recurrent training.”¹²⁴ Implicit in an individual’s right of access to

115. *Id.* art. 10.

116. *Id.* art. 10(a)–(h).

117. *Id.*

118. *Id.* art. 10(h).

119. *Id.* art. 14.

120. *Id.* art. 14(2)(d).

121. *Id.* art. 14(2)(f).

122. *Id.* art. 7(b).

123. *Id.* art. 7(c).

124. *Id.* art. 11(c).

information is freedom of choice. If a woman does not have the right to receive information about various options, then her inalienable right to work renders the right meaningless through the lack of free choice.

CEDAW's Article 12, as with *Open Door*,¹²⁵ addresses access to health care services and related information. Article 12 provides that states parties must take "all appropriate measures" to eliminate gender discrimination in the field of health care and, more specifically, family planning.¹²⁶ These measures ensure equality of access to such services. Paragraph 2 of Article 12 ensures women pregnancy services. The General Comment to this article further delineates state responsibility in this regard by requiring states to "make available information and education about medically approved and appropriate methods of family planning. Any laws which operate to restrict a woman's access to family planning *or any other medical services* . . . would be contrary to this article and consequently should be amended."¹²⁷

2. Reservations and associated criticism

Despite these expansive and detailed provisions, CEDAW is often criticized because it allows states parties to make reservations that do not bind them to its provisions.¹²⁸ Other concerns are CEDAW's weak enforcement mechanism and apparent lack of accountability attaching to states parties who violate the convention.¹²⁹ Finally, some feminist scholars do not think that CEDAW differs in any way from previous instruments.¹³⁰ Some contend that CEDAW is based "on the same limited approach" as other instruments in addressing gender inequality.¹³¹ The discrimination prohibited by CEDAW "is

125. See *Open Door*, *supra* note 77.

126. CEDAW, *supra* note 9, art. 12(1).

127. CEDAW General Recommendation No. 24 (General Comments); Women and Health Committee on the Elimination of Discrimination Against Women, 20th Sess., art. 12, U.N. Doc. A/54/38/Rev.1 ch. I (1999) (emphasis added).

128. See STEINER & ALSTON (2d ed.), *supra* note 5, at 441; Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 281-89 (1991).

129. See, e.g., Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 82 (1993).

130. Hilary Charlesworth, *What Are "Women's International Human Rights?"*, reprinted in HUMAN RIGHTS OF WOMEN 64 (Rebecca J. Cook ed. 1994).

131. *Id.*

confined to accepted human rights and fundamental freedoms.”¹³² Moreover, CEDAW “hurriedly” translated the Convention on the Elimination of All Forms of Racial Discrimination’s discrimination approach without questioning whether it was an appropriate mode.¹³³

CEDAW’s Article 28(2) allows for reservations which are not “incompatible with the object and purpose” of the Convention.¹³⁴ Many states have taken advantage of this provision by making sweeping reservations.¹³⁵ These reservations, declarations, and interpretations “become a part of that treaty and affect the treaty relations among the reserving state and other states parties.”¹³⁶ The traditional tolerance of reservations as a stimulus for state participation must be balanced against the principle that treaty obligations must be maintained (*pacta sunt servanda*).¹³⁷ At least twenty-three states parties to CEDAW have made a total of eighty-eight substantive reservations, which have drawn almost 100 objections by other states.¹³⁸ As one commentator opines, “[CEDAW] may face the paradox of maximizing its universal application at the cost of compromising its integrity.”¹³⁹

Several countries have made reservations to opt out of those obligations conflicting with their religious laws. Such reservations appear incompatible with CEDAW’s object and purpose.¹⁴⁰ For example, Bangladesh does not consider itself bound to provisions of Articles 2 (addressing all forms of discrimination against women), 13(a) (family benefits), 16(1)(c) (women’s status and during upon dissolution of marriage) and 16(1)(f) (adoption and guardianship of children), “as they conflict with Shari’a law based on Holy Koran and Sunna.”¹⁴¹ Egypt, Iraq, and Brazil have

132. *Id.*

133. *Id.* at 64–65 (citing Noreen Burrows, *International Law and Human Rights: The Case of Women’s Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 86–88 (T. Campbell, et al. eds. 1986)).

134. CEDAW, *supra* note 9, art. 28(2); see Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 644 (1990) [hereinafter Cook, *Reservations*].

135. See STEINER & ALSTON (2d ed.), *supra* note 5, at 439–44.

136. Cook, *Reservations*, *supra* note 134, at 651.

137. *Id.*

138. *Id.* at 644.

139. *Id.*

140. *Id.* at 648.

141. See STEINER & ALSTON (1st ed.), *supra* note 20, at 920–21; CEDAW, *supra* note 9, arts. 2, 13(a), 16(1)(c), 16(1)(f).

lodged similar reservations.¹⁴² While such reservations enable superficial participation in the regime CEDAW has established, they ultimately undermine the treaty's normative force, effective power, and legitimacy.

F. International Customary Law: An Argument for Universality

One source of international law is "international custom."¹⁴³ Such customary international law results from "a general and consistent practice of states followed by [states acting] from a sense of legal obligation [*opinio juris*]."¹⁴⁴ The International Court of Justice (ICJ) has held that such state practice must also be "widespread and representative" to be considered customary international law.¹⁴⁵

1. Sources of international customary law

There is a firm foundation for asserting that the prohibition of gender discrimination has emerged as a principle of customary international law. As discussed *supra*, the U.N. Charter, UDHR, ICCPR, ICESCR, and CEDAW all contain provisions prohibiting discrimination based on sex. In addition, many nations have domestic laws banning such discrimination.¹⁴⁶ The Comment to Section 702 of *Restatement (Third), The Foreign Relations Law of the United States* notes, "freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law."¹⁴⁷

The *Restatement's* Section 702 enumerates various state actions that constitute customary international human rights law violations. Although Section 702 does not explicitly enumerate gender discrimination or restrictions on the right to freedom of expression, Section 702(g) does recognize a violation if a state practices, encourages, or condones "a consistent pattern of gross

142. Cook, *Reservations*, *supra* note 134, at 687-88, 703; STEINER & ALSTON (2d ed.), *supra* note 5, at 442-44.

143. Statute of the International Court of Justice, *supra* note 3, art. 38(1)(b); *see also* LOUIS HENKIN, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 51-52 (3d ed. 1993).

144. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 102(2) (1986) [hereinafter RESTATEMENT (THIRD)].

145. *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

146. *See* RESTATEMENT (THIRD), *supra* note 144, § 702 cmt. 1.

147. *Id.*

violations of internationally recognized human rights.”¹⁴⁸ Moreover, the Comment to Section 702 provides that “human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.”¹⁴⁹

If widespread discrimination against women following the Taliban conquest of Kabul, Afghanistan had continued, it would have constituted “a consistent pattern of gross violations of internationally recognized human rights.”¹⁵⁰ Thousands of widows potentially would have starved because women were forbidden to work.¹⁵¹ Alternatively, if women had ventured out of the house, they have risked being attacked by Taliban authorities or others.¹⁵² If gender discrimination is contrary to customary international law, then there is a human right not to be subject to such discrimination. Moreover, the prohibition against gender discrimination may be based on general principles of law. As the ICJ Statute allows, “general principles of law recognized by civilized nations” are a valid source of international law.¹⁵³

2. Natural justice principles

Traditionally, general principles of law are logically necessary for legal systems to function properly.¹⁵⁴ A subcategory of these general principles, however, encompasses the prohibition against gender discrimination, and is based on “minimal standards of decency and respect for the individual human being.”¹⁵⁵ These general principles derive their legitimacy from the concept of *jus rationale*, or “natural justice.”¹⁵⁶ Many states resist recognizing concepts based on natural justice because such acknowledgment divorces evolution of the law from state practice. Nevertheless,

148. *Id.* § 702(g).

149. *Id.* § 702 cmt. a.

150. *Id.* § 702(g); see Anthony Spaeth, *A Peace that Terrifies: Tough Islamic Laws Rule in Afghanistan as the U.S., Russia and Pakistan Warily Eye the Fundamentalists*, TIME, Oct. 14, 1996, at 62; John F. Burns, *Kabul's Islamic Rulers Face Rivals' Guns and Growing Popular Discontent*, N.Y. TIMES, Oct. 22, 1996, at A14.

151. Spaeth, *supra* note 150, at 62.

152. *Id.*

153. Statute of the International Court of Justice, *supra* note 3, art. 38(c).

154. For example, *res judicata*, *pacta sunt servanda*, and *lex specialis* are such general principles.

155. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991), reprinted in STEINER & ALSTON (2d ed.), *supra* note 5, at 92.

156. HENKIN ET AL., *supra* note 143, at 109.

there is a solid line of opinion asserting that “international law must give effect to principles of natural justice.”¹⁵⁷ Gender discrimination contravenes such a general principle of natural justice, especially given the majority of states’ recognition (if not the practice) of the right.¹⁵⁸

III. U.N. REPORTING AND ENFORCEMENT MECHANISMS

A. U.N. Commission on Human Rights

In 1946, the U.N. Economic and Social Council (ECOSOC) established the U.N. Commission on Human Rights.¹⁵⁹ As Article 68 of the U.N. Charter commands, ECOSOC “shall set up commissions in economic and social fields and for the promotion of human rights.”¹⁶⁰ The Commission drafts and submits reports to ECOSOC.¹⁶¹ These reports are based on information derived from the Commission’s complaints procedure, which consists of three parts: (1) the 1235 Procedure, (2) the 1503 Procedure, and (3) thematic mechanisms.¹⁶² With the exception of the Special Rapporteur on Violence Against Women, these three avenues of reaching the Commission do not appear to directly address women’s human rights violations and the concomitant issues regarding the right to information. However, they may serve as a backdrop for comparing certain conventions¹⁶³ and implementing their specific provisions.

1. The 1235 procedure

In 1967, ECOSOC adopted Resolution 1235,¹⁶⁴ which provides the Commission authorization for “examin[ing] information relevant to gross violations of human rights and fundamental freedoms.”¹⁶⁵ This authorization specifically

157. *Id.* (quoting Judge Sir Gerald Fitzmaurice).

158. Despite the reservations, it is significant that, as of 1995, 144 states’ parties have signed CEDAW. See STEINER & ALSTON (1st ed.), *supra* note 20, at 122.

159. STEINER & ALSTON (2d ed.), *supra* note 5, at 138.

160. U.N. CHARTER art. 68 (emphasis added).

161. See STEINER & ALSTON (1st ed.), *supra* note 20, at 598.

162. See STEINER & ALSTON (2d ed.), *supra* note 5, at 611.

163. For example, ICCPR and CEDAW.

164. See E.S.C. Res. 1235 (XLII) (1967), *reprinted in* STEINER & ALSTON (1st ed.), *supra* note 20, at 389.

165. *Id.*

responds to South Africa's policy of apartheid.¹⁶⁶ The Commission, however, is not limited to studying apartheid or racial discrimination, as the resolution entitles the Commission to make a "thorough study of situations which reveal a consistent pattern of violations."¹⁶⁷ The Commission may discuss these reports at its annual public debate.¹⁶⁸

2. The 1503 procedure

In 1970, ECOSOC supplemented the public 1235 procedure by adopting a confidential complaints mechanism.¹⁶⁹ Resolution 1503 "[a]uthorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group."¹⁷⁰ This group is comprised of at most five members and meets privately once a year.¹⁷¹ The resolution's mandate is to draw the Sub-Commission's attention to "those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations if human rights and fundamental freedoms."¹⁷² The Sub-Commission will base its decision as to whether communications are admissible on previously set criteria.¹⁷³

3. Thematic mechanisms

During the 1980s and 1990s, the Commission set up thematic working groups that focused on a variety of human rights issues. These issues included "summary and arbitrary executions, torture, religious intolerance, mercenaries, sale of children, children in armed conflict, freedom of opinion and expression . . . violence against women . . . the right to education . . . extreme poverty . . . and the right to development."¹⁷⁴ Particularly relevant to an

166. *See id.*

167. *Id.*

168. *See id.*

169. *See* STEINER & ALSTON (1st ed.), *supra* note 20, at 376-77.

170. E.S.C. Res. 1503 (XLVIII) (1970), *reprinted in* STEINER & ALSTON (1st ed.), *supra* note 20, at 376.

171. *Id.*

172. *Id.*

173. *See* Sub-Commission Res. on Prevention of Discrimination & Protection of Minorities 1 (XXIV) (1971), *reprinted in* STEINER & ALSTON (1st ed.), *supra* note 20, at 378-79.

174. *See* STEINER & ALSTON (2d ed.), *supra* note 5, at 641. As Steiner and Alston point out, "[i]n 1985 there were three thematic mechanisms, in 1990 there were six, and in 1995 there were fourteen." *Id.*

inquiry regarding the human right to receive information are the working groups relating to religious intolerance, freedom of opinion and expression, the right to education, and violence against women.¹⁷⁵ In January 2002, Special Rapporteur Abid Hussain issued his report on freedom of expression and opinion to the Commission on Human Rights.¹⁷⁶ The report addresses current trends relating to violations of the rights to freedom of opinion and expression. These trends included “harm to media personnel and others—killings, attacks, threats, harassment; detention or arrest, bringing of charges, trial and sentencing; administrative and legal measures and repressive measures in connection with the media.”¹⁷⁷

Also in January 2002, Special Rapporteur Katarina Tomasevski, issued a report to the Commission.¹⁷⁸ Among the topics covered were:

[M]acroeconomic and education strategies under the rule of law -- debt relief and aid for education, boundaries between human rights law and trade law; monitoring progressive realization of the right to education - rights-based indicators, eradicating exclusion; the elimination of discrimination - gender, disability, difficulty, disadvantage; protecting human rights in education - applying human rights law throughout the process of education, combating human rights violations in education; education as a

175. See *Volume I: Thematic Mechanisms and Approaches*, FOR THE RECORD 2002: THE UN HUMAN RIGHTS SYSTEM, at <http://www.hri.ca/fortherecord2002/vol1/index.htm> (last visited Apr. 1, 2003).

176. See *Civil and Political Rights, Including the Question of Freedom of Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Report by Abid Hussain, U.N. ESCOR, Hum. Rts. Comm., 58th Sess., Agenda Item 11(c), U.N. Doc. E/CN.4/2002/75 (2002), available at <http://www.hri.ca/fortherecord2002/documentation/commission/e-cn4-2002-75.htm> (last visited Apr. 1, 2003).

177. *Freedom of Opinion and Expression: Commission on Human Rights, Report of the Special Rapporteur*, FOR THE RECORD 2002: THE UN HUMAN RIGHTS SYSTEM, at <http://www.hri.ca/fortherecord2002/vol1/opinionchr.htm> (last visited Apr. 1, 2003).

178. *Economic, Social, and Cultural Rights: Annual Report of the Special Rapporteur on the Right to Education*, Report by Katarina Tomasevski, U.N. ESCOR, Hum. Rts. Comm., 58th Sess., Agenda Item 10, U.N. Doc. E/CN.4/2002/60 (2002), available at <http://www.hri.ca/fortherecord2002/documentation/commission/e-cn4-2002-60.htm> (last visited Apr. 1, 2003).

keystone for self-sustaining livelihoods; the challenge of combating terrorism and preventing violence.¹⁷⁹

The formation of these special working groups and the efforts of the Special Rapporteurs' represent further evidence of the emerging human right to receive information.

B. U.N. Commission on the Status of Women

The Commission on the Status of Women (CSW) was formed in 1946 by the U.N. Economic and Social Council.¹⁸⁰ Among CSW's objectives are "to monitor the situation of women and promote their rights in all societies around the world."¹⁸¹ CSW develops reports and recommendations on issues affecting women and may call for immediate international action in situations where women's rights violations are ongoing or imminent.¹⁸² The CSW is comprised of forty-five members, elected for four-year terms.¹⁸³ The body meets at least eight days per year.¹⁸⁴

1. Women's education and training recommendations

CSW has promulgated policy recommendations and adopted draft decisions, draft resolutions, resolutions, and conclusions on the status of women.¹⁸⁵ During its fortieth session in 1996, for example, CSW adopted Resolution 40/9, which concerned implementing strategic objectives and action in the area of poverty.¹⁸⁶ In this resolution, CSW urged all governments to "develop and implement education, training and retraining policies for women and girls."¹⁸⁷ Also during its fortieth session, CSW commented on the 1996–2001 Proposed System-Wide

179. *Education: Commission on Human Rights, Report of the Special Rapporteur*, FOR THE RECORD 2002: THE UN HUMAN RIGHTS SYSTEM, at <http://www.hri.ca/fortherecord2002/vol1/educationchr.htm> (last visited Apr. 1, 2003).

180. *Commission on the Status of Women*, at <http://www.un.org/Conferences/Women/PubInfo/Status/Scrn5.htm> (Oct. 16, 2002).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. See e.g., *Report on the Fortieth Session*, U.N. ESCOR, Comm'n on the Status of Women, 40th Sess., Supp. 6, U.N. Doc. E/CN.6/1996/15 (1996), available at gopher://gopher.un.org/00/esc/cn6/1996/report/9613181E%09%09%2B (Mar. 11–22, 1996) [hereinafter *Report on the Fortieth Session*].

186. *Id.* at 31.

187. *Id.*

Medium-Term Plan for the Advancement of Women.¹⁸⁸ Specific comments related to women's education and training, wherein CSW recommended increasing the U.N. Secretariat's involvement, integrating life-long education, and promoting such programs at the national level.¹⁸⁹ Also of concern were appropriate support mechanisms for teaching in difficult or violent situations.¹⁹⁰

In CSW's forty-first session, the following year, the Commission submitted Agreed Conclusions, stating that "[t]here is wide consensus that education and training for girls and women, in particular, provides high social and economic returns and is a precondition for the empowerment of women. Education should be aimed at raising and promoting awareness of the rights of women as human rights."¹⁹¹ Subsequent CSW sessions have also addressed informational and educational issues. For example, in its forty-fifth session in 2001, CSW's Final Report concerned, *inter alia*, discrimination against women and girls in Afghanistan and detailed the situation relating to Palestinian women.¹⁹²

2. Freedom of expression and media education

In its Agreed Conclusion 1996/2, CSW discussed respect for women's human rights, specifically addressing freedom of expression.¹⁹³ Debated issues included "women's full enjoyment of freedom of expression, equal access to the media, balanced and diverse portrayals by the media of women and their multiple roles, and media information aimed at eliminating all forms of violence against women."¹⁹⁴ CSW reaffirmed that a woman's right to free expression is "a fundamental principle of the international community."¹⁹⁵ CSW also discussed the importance of media education, concluding that educating the illiterate and literate

188. *Id.* at 37.

189. *Id.* at 42.

190. *Id.* at 43.

191. *Report of the Forty-First Session*, U.N. ESCOR, Comm'n on the Status of Women, 41st Sess., U.N. Doc. E/1997/27 CSW (1997), available at <http://www.un.org/documents/ecosoc/cn6/1997/reporten/e1997-27edu.htm> (last modified Dec. 6, 1999).

192. *See Report of the Forty-Fifth Session*, U.N. ESCOR, Commission on the Status of Women, 45th Sess., U.N. Doc. E/CN.6/2001/14 (2001), <http://www.un.org/womenwatch/daw/csw/e2001-27.pdf> (last visited Apr. 1, 2003) (condemning "the continued restrictions on women's access to health care and systematic violation of human rights of women in Afghanistan").

193. *Report on the Fortieth Session*, *supra* note 185, at 11.

194. *Id.*

195. *Id.*

public through the media was an effective way to raise awareness concerning stereotyping and equality issues.¹⁹⁶

3. CSW's limitations

Although CSW may receive communications from individual women and groups concerned with discrimination against women, CSW does not take action on individual complaints.¹⁹⁷ Instead, as reported in a U.N. Fact Sheet on discrimination against women, CSW's "procedure aims to discern emerging trends and patterns of discrimination against women in order to develop policy recommendations aimed at solving widespread problems."¹⁹⁸ Such a procedure evinces a lack of individual attention and does not measure up to the mechanisms of the U.N. Human Rights Committee set up under the ICCPR.¹⁹⁹ In the realm of women's rights, this "enforcement" mechanism is better described as a generalized information and policy-making mechanism.

C. Human Rights Committee (ICCPR)

In addition to U.N. Charter bodies, such as the Human Rights Commission and CSW, multilateral conventions have formed other entities to enforce and implement human rights. One such treaty organ is the Human Rights Committee, established under ICCPR.²⁰⁰ The Committee is composed of eighteen members who are states parties' nationals and serve in their personal capacities.²⁰¹ The Human Rights Committee's composition is determined according to an "equitable geographical distribution" and represents the various legal systems and forms of civilization.²⁰²

An essential aspect of the Human Rights Committee's function is its state reporting process. ICCPR Article 40 directs states parties to submit reports on domestic measures that "give

196. *Id.*

197. See OFFICE OF HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 22, WORLD CAMPAIGN FOR HUMAN RIGHTS, DISCRIMINATION AGAINST WOMEN: THE CONVENTION AND COMMITTEE, at 45 (undated), available at <http://www.unhchr.ch/html/menu6/2/fs22.htm> (last visited Apr. 1, 2003) [hereinafter FACT SHEET NO. 22].

198. *Id.*

199. See *infra* Part V.(C).

200. See ICCPR, *supra* note 6, arts. 28–45.

201. See *id.* art. 28(2)–(3).

202. See *id.* art. 31.

effect” to rights contained in ICCPR.²⁰³ The Committee, in turn, must study the reports and then transmit its general comments to the states parties.²⁰⁴ The states parties, in response, may submit observations to the Committee regarding specific comments.²⁰⁵ The Human Rights Committee may consider individual complaints of violations, but only if the claimant is subject to the jurisdiction of a state that is a party to the ICCPR’s Optional Protocol.²⁰⁶

The Human Rights Committee, in its country-specific fashion, has inquired into human rights violations against women.²⁰⁷ For example, in its comments on Iran’s second periodic report, it addressed that country’s widespread discriminatory practices against women.²⁰⁸ The Committee observed “the persistence and extent of discrimination against women is incompatible” with the provision of ICCPR’s Article 3.²⁰⁹ Examples of Iran’s discriminatory practices included “punishment and harassment of women who do not conform with a strict dress code; the need for women to obtain their husband’s permission to leave home; [and] their exclusion from the magistracy.”²¹⁰ Such pronouncements by the Human Rights Committee support an assertion that similar restrictions, imposed by the Taliban (the previous rulers of Afghanistan), would also violate Article 3 of the ICCPR.²¹¹

D. Committee on the Elimination of Discrimination Against Women

CEDAW established the Committee on the Elimination of Discrimination against Women (CEDAW Committee) to

203. *Id.* art. 40(1).

204. *Id.* art. 40(4).

205. *Id.* art. 40(5).

206. *See id.*

207. *See, e.g., Report of Austria to Human Rights Committee, Second Periodic Report under Article 40 of Covenant*, U.N. ESCOR Hum. Rts. Comm., 43d Sess., Supp. No. 40, at 26, UN Doc. A/47/40 (1994), *reprinted in* STEINER & ALSTON (1st ed.), *supra* note 20, at 514–17 [hereinafter *Report of Austria to Human Rights Committee*]. Members of the Committee inquired into how the Austrian Constitution granted the rights of women to receive equal pay and what measures the country had enacted to promote women’s participation in society. *Id.* at 515. Also discussed was the proportion of women in educational institutions. *Id.*

208. *See Report of Iran to the Human Rights Committee, Second Periodic Report*, U.N. ESCOR, Hum. Rts. Comm., 1260th mtg., at para. 9, U.N. Doc. No. CCPR/C/79/Add.25 (1993), *reprinted in* STEINER & ALSTON (1st ed.), *supra* note 20, at 519.

209. *See id.*

210. *Id.*

211. *See infra* Part II(C)(1).

“consider . . . the progress made in the implementation of the present Convention.”²¹² The CEDAW Committee is composed of twenty-three “experts of high moral standing and competence in the field covered by” CEDAW.²¹³ Experts are elected by secret ballot and serve in their personal capacities, generally for four years.²¹⁴ The CEDAW Committee meets for only two weeks per year,²¹⁵ however, which is the shortest period for any such human rights committee.²¹⁶

1. CEDAW reports and recommendations

Under CEDAW’s Article 18, states parties are required to report on judicial, legislative, or other measures taken in accordance with CEDAW’s mandates.²¹⁷ The CEDAW Committee reviews these reports as part of its role as “a monitoring system to oversee the implementation” of CEDAW.²¹⁸ Under Article 21, after examining the reports, the CEDAW Committee may make recommendations and suggestions.²¹⁹ The CEDAW Committee also may invite U.N. agencies or Non-Governmental Organizations (NGOs) to submit reports.²²⁰

Despite Article 18’s state reporting requirement, there has been significant backlog in evaluating reports of the countries that have complied with the order, due to the fact that CEDAW rarely meets.²²¹ Furthermore, many countries periodically fail to submit reports.²²²

Instead of making recommendations directed toward specific states, the CEDAW Committee has offered only general

212. *CEDAW*, *supra* note 9, art. 17(1).

213. *Id.*

214. *See id.*, art. 17.

215. *Id.* art. 20(1).

216. Jennifer L. Ulrich, *Confronting Gender-Based Violence With International Instruments: Is a Solution to the Pandemic Within Reach?* 7 *IND. J. GLOBAL LEGAL STUD.* 629, 645 (2000).

217. *See CEDAW*, *supra* note 9, art. 18(1).

218. FACT SHEET NO. 22, *supra* note 197, at 36.

219. *CEDAW*, *supra* note 9, art. 21(1).

220. *Id.* art. 22.

221. Ulrich, *supra* note 216, at 644.

222. *Id.* at 645 (citing Marsha A. Freeman, *The Human Rights of Women Under the CEDAW Convention: Complexities and Opportunities of Compliance*, 91 *AM. SOC’Y INT’L L. PROC.* 378, 380–81 (1997), reporting that “as of late 1996, fifty-four initial reports, forty-two second periodic reports, fifty-one third periodic reports, and forty-four fourth periodic reports had not been submitted by Member States.”).

recommendations directed to all states parties.²²³ These recommendations relate to “steps which may be taken to fulfill [states’] obligations under the [CEDAW].”²²⁴ One criticism of this approach is that such broad recommendations make compliance extremely difficult to monitor.²²⁵ Also, such recommendations are not legally binding on states.²²⁶ A more effective approach would at a minimum encompass interpreting CEDAW’s individual articles. The CEDAW Committee’s authority in this regard, however, has been questioned.²²⁷

Nevertheless, the CEDAW Committee has authored general recommendations addressing substantive issues and interpreting specific CEDAW articles.²²⁸ Particularly relevant to the right to information is General Recommendation Number 15, from the CEDAW Committee’s ninth session, concerning the “avoidance of discrimination against women in national strategies for the prevention and control” of AIDS.²²⁹ The CEDAW Committee recommended that states intensify efforts to disseminate information regarding the risk of HIV infection and AIDS. The recommendation’s objective was to increase public awareness,²³⁰ to “ensure the active participation of women in primary health care and take measures to enhance their role as care providers, health workers, and educators.”²³¹ The CEDAW Committee also requested that states include in their reports information regarding the effect of AIDS on women and actions taken to cater to their needs.²³²

2. Proposals for improving CEDAW’s effectiveness

Unlike the Human Rights Committee’s individual claims procedure under the ICCPR, CEDAW’s reporting scheme is relatively weak.²³³ A plan for improving the CEDAW

223. See generally Ulrich, *supra* note 216, at 644–47 (discussing CEDAW’s limitations).

224. FACT SHEET NO. 22, *supra* note 197.

225. See *id.*

226. *Id.*

227. See *id.*

228. *Id.*

229. See *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 45th Sess., Supp. No. 38, at 81, U.N. Doc. A/45/38 (1990).

230. *Id.* at 82.

231. *Id.*

232. *Id.*

233. See FACT SHEET NO. 22, *supra* note 197, at 25–29.

Committee's work has been formulated, however, which includes expanding its information base, clarifying CEDAW's provisions, developing an effective monitoring system, and possibly introducing an individualized claims procedure.²³⁴ In 1993, the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action.²³⁵ In that document, the Conference recommended an optional protocol for CEDAW that would allow citizens to lodge complaints alleging violation of their rights set forth in the Convention.²³⁶

Resolution 40/8, adopted by the Commission on the Status of Women in 1996, requested the U.N. Secretary-General to invite states, NGOs, and intergovernmental organizations to submit their views on an optional protocol for CEDAW.²³⁷ The resolution also called for the Secretary-General to provide CSW with a comprehensive report detailing the states' views.²³⁸ CSW concluded Resolution 40/8 by recommending that the Economic and Social Council adopt its draft decision renewing the mandate for an open-ended working group to draft an optional protocol.²³⁹

In October 1999, the U.N. General Assembly adopted the recommended Optional Protocol to CEDAW and called upon states to become a party to the new instrument as soon as possible.²⁴⁰ The new Protocol contains two procedures. First, "communications procedure allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee."²⁴¹ Second, the "Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights. In either case, states must be party to the Convention and the Protocol. The Protocol also includes an opt-out clause, allowing states upon ratification or accession to declare

234. *See id.* at 29-33.

235. *Id.* at 32.

236. *Id.*

237. *Report on the Fortieth Session*, *supra* note 185, at 30.

238. *Id.* at 31.

239. *Id.*

240. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 54/4, U.N. GAOR, 54th Sess. 28th plen. mtg., at 2, U.N. Doc. A/54/L.4, (1999).

241. Press Release, Convention on the Elimination of all Forms of Discrimination Against Women, Optional Protocol Enters into Force 22 December 2000 (undated), at <http://www.un.org/womenwatch/daw/cedaw/protocol/index.html> (last visited Apr. 1, 2003).

that they do not accept the inquiry procedure.”²⁴² Reservations, however, may not be entered against the terms of the Protocol.²⁴³ As of January 16, 2003, there were seventy-five signatories and forty-nine parties who had ratified the Protocol.²⁴⁴

IV. IMPEDIMENTS TO EFFECTIVE ENFORCEMENT

A. Cultural and Religious Defenses

“Cultural relativism” has been defined as “the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.”²⁴⁵ Governments may invoke this position as a defense to their noncompliance with, or specialized interpretations of, human rights instruments.²⁴⁶ For example, Iran has argued that Islamic law governing marriage rights and the death penalty override international norms.²⁴⁷ Many states in Africa, South Asia, and the Middle East exclusively apply religious law in matters relating to personal status, disregarding internationally recognized norms of gender equality.²⁴⁸ Personal status laws relate to a wide variety of matters, including “marriage, divorce, child custody, maintenance, inheritance, succession, legal capacity, and the ownership of property.”²⁴⁹

1. Religion as a fundamental basis of human rights

The cultural relativist maintains that by imposing universal human rights from outside, a state infringes on freedom of religion and the right to self-determination.²⁵⁰ Scholars attempt to

242. *See id.*

243. *See id.*

244. See Division for the Advancement of Women, Signatures to and Ratifications of the Optional Protocol, <http://www.un.org/womenwatch/daw/cedaw/sigop.htm> (last visited Apr. 1, 2003).

245. Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 870 (1985).

246. *Id.* at 877.

247. Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 833 n.99 (1992) (citing U.N. GAOR 3d Comm., 37th Sess., 56th mtg. at 16, U.N. Doc. A/C.3/37/SR.56 (1982)).

248. *Id.* at 834-35.

249. *Id.*

250. *See Tesón, supra* note 245, at 881.

accommodate these arguments by resorting to compromise solutions. At the forefront of this movement is Abdullahi Ahmed An-Na'im.²⁵¹ He argues that the historical antecedents of Shari'a (Islamic law) are consistent with international human rights law.²⁵² Islamic reform, according to An-Na'im, must be based on the Qu'ran and Sunna, particularly because passages reflecting that basic human rights principles are a part of the primary sources of Islam.²⁵³ An Na'im states that such reforms "must be *sufficient* to resolve human rights problems with Shari'a while maintaining *legitimacy* from the Islamic point of view."²⁵⁴

As An-Na'im has argued for anchoring human rights to the foundations of Islam, Desmond Tutu has called for a connection between human rights and the principles of Christianity as found in the Bible.²⁵⁵ Among Tutu's primary assertions is that biblical teachings reinforce a "deep reverence for the sanctity of human life."²⁵⁶ Similarly, the Judaic tradition has been viewed as a source of fundamental and universal human rights.²⁵⁷ David Novak argues that despite the Judaism's focus on duties, rights and duties are correlative terms that depend on each other for meaning and content.²⁵⁸ Other commentators advocate a generalized "religious approach to . . . human rights."²⁵⁹

2. Balancing analysis

Another compromise solution for resolving conflicts between religion and gender equality may be achieved through a balancing analysis, which provides a framework for addressing such issues.²⁶⁰

251. See Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13 (1990) [hereinafter An-Na'im, *Human Rights*].

252. See *id.* at 47-48.

253. *Id.* at 46.

254. *Id.*

255. See Desmond M. Tutu, *Religious Human Rights and the Bible*, 10 EMORY INT'L L. REV. 63, 63-64 (1996).

256. *Id.* at 64.

257. See David Novak, *Religious Human Rights in the Judaic Tradition*, 10 EMORY INT'L L. REV. 69, 69 (1996).

258. See *id.*; see also Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987) (discussing the close connection between rights and duties in the Jewish tradition and arguing that the rights system is indifferent to ends that can lead to systemic incoherence).

259. See Martin E. Marty, *Religious Dimensions of Human Rights*, 10 EMORY INT'L L. REV. 97, 98 (1996) (emphasis omitted).

260. See Sullivan, *supra* note 247, at 821.

The first factor in this analysis is “the relationship between the specific equality right at issue and the overarching goal of gender equality.”²⁶¹ The second factor inquires into “the importance of the religious law or practice,” as viewed within the religious or belief system.²⁶² The third factor of the balancing analysis involves analyzing the degree of interference that the conflict engenders to other rights and interests.²⁶³ The fourth factor considers whether other human rights are implicated by the religious restriction.²⁶⁴

Any compromise under a balancing analysis, however, must account for sociological, political, and economic factors.²⁶⁵ These extrinsic considerations fundamentally affect the interplay between religion and women’s status and may represent the most resistant barriers to change. Other considerations include the potential impact of state power on the religious orthodoxy, “class distinctions among women within the same religious community,” and the distinction between rural versus urban women.²⁶⁶ With respect to Islam, the religion’s contrary effects in various countries complicate the analysis. In Saudi Arabia, for example, Islam has served as an impetus for challenging the dominant regime.²⁶⁷ In Pakistan, however, Islam has become a dominant theme in Pakistani politics.²⁶⁸

This search for a middle ground between strict universalism and cultural relativism is a worthwhile effort, particularly in fashioning a realistic solution for the conflict between religion and women’s rights. A woman’s status in any society is intertwined with the traditions, hierarchies, and beliefs of that community. To discard these connections and ignore their social importance may engender a reactionary movement within the community against the imposed values. Although humanitarian intervention is necessary in extreme cases of imminent or ongoing human rights abuses, such actions can only result in temporary solutions.

261. *Id.* at 821–22.

262. *Id.* at 822.

263. *Id.* at 822–23. This approach assesses the interference’s impact from both a religious and a nondiscriminatory point of view.

264. *Id.* at 823.

265. *See id.*; An-Na’im, *Human Rights*, *supra* note 251, at 25–36 (discussing how Islamization impacts human rights politically and sociologically).

266. Sullivan, *supra* note 247, at 823.

267. *See* An-Na’im, *Human Rights*, *supra* note 251, at 29 (discussing the 1979 seizure of the Great Mosque of Mecca and Shi’a riots in eastern Saudi Arabia).

268. *Id.* at 27.

Genuine reform is most likely to occur if the motivation for change comes from within the institutional structures and systems already in place.

B. *The Public-Private Dichotomy*

Another major impediment to the effective human rights enforcement occurs when private parties act with impunity within the borders of a state. The government may tolerate, condone, or even support the violations, claiming that it is unable to control private parties, or that its laws reach only public actors.²⁶⁹ A state may, however, genuinely seek to enforce gender equality and respect for an individual's right to information, but be precluded from doing so due to a weak government or demographic constraints.²⁷⁰ By extending state responsibility to private actors, however, the emerging international legal trend seeks to hold a state liable for both its acts and its omissions.²⁷¹

1. Difficulties in enforcing CEDAW provisions

In Article 2 of CEDAW, states parties agree "to take all appropriate measures to eliminate discrimination against women by *any person, organization or enterprise*"²⁷² and "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulation, *customs and practices* which constitute discrimination against women."²⁷³ Article 5 also obligates states "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 inferiority or the superiority of either of the sexes."²⁷⁴ A state that has ratified CEDAW is thus obligated to address private acts of gender discrimination, unless of course it has made a reservation respecting Article 2 and/or Article 5.²⁷⁵ Provisions such as these,

269. See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993), reprinted in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85, 100-01 (Rebecca J. Cook ed., 1994).

270. Cf. *id.* at 90 (stating that women's rights movements need the support of legislators and adjudicators in order to succeed).

271. See *id.* at 100-01.

272. CEDAW, *supra* note 9, art. 2(e) (emphasis added).

273. *Id.* (emphasis added).

274. *Id.* art. 5.

275. *Id.* arts. 2, 5.

however, are difficult to enforce and may be problematic when evaluating a state's attempts at implementation. The "all appropriate measures" standard is subject to interpretation and leaves open the possibility that widespread reform would be deemed inappropriate.

The private nature of many violations against women makes the public-private distinction particularly relevant for effectively enforcing women's rights. Examples of violations include domestic violence and female genital mutilation, in addition to restrictions imposed by cultural or religious laws. Except in rare circumstances,²⁷⁶ international law traditionally has not subjected individuals to liability.²⁷⁷ A private individual whose acts or omissions violate CEDAW, for example, bears no legal liability under the Convention.²⁷⁸ However, the state would be responsible for failing to punish or deter its national, and for not taking action to eliminate the systemic structures that facilitated the violation.²⁷⁹

2. Doctrine of state responsibility

Even if not a party to CEDAW, a state may be liable for human rights violations by private actors that occur within its territory. The doctrine of state responsibility holds that states may be liable for such acts under customary international law or under applicable human rights conventions.²⁸⁰ For example, in the *Velasquez-Rodriguez Case*,²⁸¹ the Inter-American Court of Human Rights applied the American Convention and found Honduras liable for an abduction and disappearance perpetrated

276. Examples include war crimes, crimes against humanity, piracy and genocide. See, e.g., *International Military Tribunal (Nuremberg) Judgment and Sentences*, 41 AM. J. INT'L L. 172, 172-75 (1946); see also *Mavromattis Palestine Concessions (Greece v. Great Britain)*, 1924 P.C.I.J. (ser. A), No. 2 at 11-12, reprinted in *BIBLIOGRAPHY ON THE INTERNATIONAL COURT INCLUDING THE PERMANENT COURT 1918-1964*, at 686 (J. Douma ed., 1966) (discussing when a claim of an individual becomes a matter of state responsibility).

277. *International Military Tribunal (Nuremberg) Judgment and Sentences*, supra note 276, at 220-21.

278. Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 228, 237 (Rebecca J. Cook ed., 1994).

279. See *id.*

280. Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 127 (1994) [hereinafter Cook, *State Responsibility*].

281. *Velasquez-Rodriguez Case*, Case 7920, Ser. C., No. 4, Inter-Am. C.H.R. 35, OEA/ser. L/V/III.19 doc. 13 (1988); reprinted in 28 I.L.M. 291 (1989), Inter-Am. C.H.R. (Ser. C) No. 4 (1988).

by nongovernmental actors.²⁸² The court specifically held that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State.”²⁸³ According to the court, the state’s responsibility was not predicated on the act itself,²⁸⁴ but instead was due to “the lack of due diligence to prevent the violation or to respond as required by the Convention.”²⁸⁵

The Velasquez-Rodriguez decision indicates that international tribunals will hold states responsible for private acts and impose liability when a state fails to investigate and remedy violations of international human rights law. Even so, the doctrine of state responsibility has significant limitations.²⁸⁶ The reservations attached to international conventions may circumscribe a state’s responsibility.²⁸⁷ In addition, the conventions themselves often have built-in limitations, such as ICCPR, which allows states parties to derogate from their obligations under the Covenant in times of public emergency.²⁸⁸ Finally, regarding the right to receive information and women’s rights, international legal tribunals may allow a state a “margin of appreciation” in evaluating that state’s compliance under a convention.²⁸⁹

C. Inadequate or Inconsistent Domestic Legislation

An individual may not have a private cause of action in domestic courts merely because her state has entered into an international agreement. If a treaty is not self-executing, domestic implementing legislation must be in place before a citizen can

282. *See id.* ¶ 148.

283. *Id.* ¶ 172.

284. *See id.*

285. *Id.*

286. *See Cook, State Responsibility, supra* note 280, at 172–74.

287. *Id.* at 172–73.

288. *See id.* at 172; *see also* ICCPR, *supra* note 6, art. 4(1).

289. Cook, *State Responsibility, supra* note 280, at 173. This is particularly true with respect to cracking down on restraints on freedom of expression. *See* Otto-Preminger-Institut v. Austria, 295-A Eur. Ct. H.R. (ser. A) (1994), *reprinted in* 15 HUMAN RIGHTS L. J. 371, 371–77 (1994) (holding that Austria’s seizure of film satirizing religious icons did not violate freedom of expression guaranteed in Article 10 of the European Convention); *see also* Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737, 759–60 (1976) (holding that no breach of Article 10 occurred when the United Kingdom seized sex education book).

enforce her rights at the national level.²⁹⁰ In the United States, for example, courts have consistently held that the U.N. Charter is not self-executing because its provisions "lack the mandatory quality of definiteness which would indicate intent to create justiciable rights in private persons immediately upon ratification."²⁹¹ However, if a state has ratified a treaty, but fails to enact implementing legislation, then it would violate international law and be subject to liability for breaching its treaty obligations.

By extension, states are generally obligated to conform their entire system of domestic laws to international law.²⁹² Traditional precepts and practices shape a community's social life, and may be even more important in the people's everyday lives than formalistic pronouncements of a legislature. Therefore, this responsibility extends not only to legislative enactments, but also to law derived from religious or customary sources.²⁹³ In the context of Islam, "local custom is assumed to be sanctioned by divine authority," so long as it does not contradict Shari'a.²⁹⁴

When legal rules, such as the Islamic notion of male guardianship,²⁹⁵ are so deeply entrenched in the social fabric of a nation, the possibility for changing them through international law's mechanisms and processes appears remote. The impact that a government can realistically have on religion and its influence is questionable, despite CEDAW arguably encompassing religious as well as secular state laws in its mandate to eliminate all forms of gender discrimination. The strict regimes in place at the local level

290. *Fuji v. California*, 242 P.2d 617, 620 (Cal. 1952).

291. *Fuji*, 242 P.2d at 621-22. U.S. courts have also rejected arguments that the U.N. Charter reflects customary law and therefore should be sufficient to support a cause of action. See *Weir v. Broadnax*, No. 89 Civ. 7446 (JFK), 1991 U.S. Dist. LEXIS 6164, at *7 (S.D.N.Y. May 6, 1990).

292. See Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, reprinted in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167 (Rebecca J. Cook ed., 1994) [hereinafter An-Na'im, *State Responsibility*]. This argument, while attractive, would be strongly resisted in the United States, where the courts and Constitution do not necessarily view international law as overriding national law. In fact, under the *lex posteriori* rule, a subsequent domestic statute trumps a prior treaty. RESTATEMENT (THIRD), *supra* note 144, § 115 (providing that "[a]n act of Congress supersedes an earlier rule of international law or a provision of an international agreement").

293. An-Na'im, *State Responsibility*, *supra* note 292, at 167.

294. *Id.* at 176.

295. For example, under family law in most Islamic countries, a husband is entitled to obedience from his wife, and he may prevent her from taking employment. See *id.* at 182.

determine relationships and enforce hierarchies within society.²⁹⁶ The legal structure often promotes an atmosphere that denies women information, thus depriving them of the freedom to make fundamental choices about their future.²⁹⁷

Pressure from other states may be one means of remedying an oppressive situation and communicating the international community's ire. Nevertheless, this pressure may not effectuate lasting change in states with a history of colonial domination, as outside responses would be perceived as impermissible intervention.²⁹⁸ The possibility for change may only be borne out of the willingness of individuals to engage in a cross-cultural dialogue.²⁹⁹ Learning about other cultures and different configurations of social interaction may embolden leaders to break repressive cycles. This could result in a connection between human rights and a society's basic framework for understanding the world.³⁰⁰

V. CONCLUSION

A multiplicity of legal instruments and emerging customary international law support a global human right to receive information. Despite these promising signs, the gap between the right's existence and its effective enforcement is wide. For example, impediments to CEDAW's implementation abound. Various countries' oppressive political regimes also hinder enforcement.

To promote the right to receive information the weak CEDAW Committee should be replaced with a stronger enforcement mechanism akin to ICCPR's Human Rights Committee. The Optional Protocol's adoption in 1999 is encouraging, as is the appointment of special rapporteurs and the formation of numerous working groups since the early 1990s. Despite the complaint procedures now in place, the more immediate and successful avenues for change may be found not in official mechanisms, but instead through the efforts of the media and the commitment and intercession of private parties. Today's

296. *See id.* at 181–82.

297. *See id.* at 180.

298. *See id.* at 179.

299. *See id.* at 174.

300. *See id.* at 171, 182–83 (concluding that reinterpreting Islamic scripture is essential to inculcate culture legitimacy of international human rights).

instantaneous communication often publicizes violations and has the potential to catalyze the international community to act. In the future, as the world becomes increasingly interdependent, a particular state's capacity for change may depend less upon its ideological assumptions and more upon its desire to be viewed as a legitimate and moral actor. Only through self-appraisal can change become a reality.