1996

It's Not a Cultural Thing: Disparate Domestic Enforcement of International Criminal Procedure Standards--A Comparison of the United States and Egypt

Sohail Mered

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol28/iss1/6

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
NOTES

IT'S NOT A CULTURAL THING: DISPARATE DOMESTIC ENFORCEMENT OF INTERNATIONAL CRIMINAL PROCEDURE STANDARDS — A COMPARISON OF THE UNITED STATES AND EGYPT

INTRODUCTION

THE OBJECT OF INTERNATIONAL LAW is the promotion of world order through the maintenance of peace and justice. Human rights law directly promotes the well-being and just treatment of individuals who comprise the world order. An internationalist's concern with achieving the goals of international law leads to an examination of certain human rights standards on criminal justice, the area where many violations of individual civil rights occur. This Note focuses on the pre-trial detention phase of the criminal procedure system as most violations of human rights which are basic to our human dignity occur during arbitrary and incommunicado detentions. Unchecked police control of this phase leads to violations of such basic human rights as freedom from torture, and thus compromises the integrity of a system which relies on its ability to promote justice. Egregious violations of human rights law on criminal procedure since the United Nations General Assembly (G.A.) adopted the Universal Declaration of Human Rights in 1948, occurring mostly in the non-Western world, prompt a re-examination of these international standards. These violations raise the obvious question: what are the reasons for the violations and for the existing disparity in adherence to the international norms between the West and the non-West?

The most common answer to the above question rejects international human rights law as exclusively Western and thus inapplicable outside the Western nations. Human rights scholars and practitioners are asking


2 “The West” refers to the industrialized nations of Western Europe and North America, and the ‘non-West’ to the developing nations, as well as Japan.
whether the violations are due to the fact that non-Western states cannot adhere to the standards because of cultural differences and different legal systems. This position has been encouraged by governments accused of violations, as it justifies and indeed excuses their violations. This Note advances the argument that the disparity in enforcement may be attributed to the difference in legal systems between many Western countries and non-Western countries. Part I briefly describes the governing international human rights standards on pre-trial detention, including the doctrine of derogability under a state of emergency. Part II analyzes the most common answer to the issue raised, which is referred to as the cultural relativist position on human rights. The analysis entails evaluating the universality of the standards, and critiquing the cultural relativist view of international human rights. This part concludes that the human rights standards on criminal procedure are universal. Part III compares the legal system and criminal procedures of the United States, a Western state that is held up as a model of enforcement of the criminal procedure standards, with those of Egypt, a non-Western state consistently accused of gross violations of the standards. Instead of resorting to a cultural relativist explanation of the disparity in the application of human rights law, Part III shows that the violations may be due to institutional factors such as

---


5 The United States and Egypt are representative of each category since 1) the major international instruments comprising the treaty law on human rights were arguably inspired in part by the U.S. Constitution, notably its Bill of Rights (the reference in scholarship to the “international Bill of Rights” and the similarity of the language of the instruments with that of the Bill of Rights is a reflection of that fact); and 2) Egypt has one of the oldest penal codes in the Arab world, which has served as a model for other Arab states in the development of their own legal systems. See Mahmoud M. Mustafa, *Principes de Droit Penal des Pays Arabes* [Principles of Penal Law of Arab Countries] 12, 15 (1972), and Egypt’s human rights record has been the focus of consistent attacks from international human rights watchdogs. See, e.g., Amnesty International U.S.A., *Egypt: Ten Years of Torture* (1991) (documenting human rights violations carried out by the Egyptian authorities) [hereinafter *Ten Years of Torture*].
the misallocation of power in the legal system and the professional training of the system's personnel, as well as a lack of resources, the under-development of legal civics, and internal threats to state security. Specific documented instances of violations in each country underline the argument that a misallocation of power in a legal system may explain abuses of state power and the resulting violations of human rights. The Conclusion proposes some solutions to closing the gap between human rights observance by mere enactment of domestic law, and more significant human rights observance by the actual enforcement of the domestic law.  

PART I: HUMAN RIGHTS STANDARDS

A. Overview of the Human Rights Standards on Criminal Procedure

This argument starts with a discussion of the basic human rights law governing criminal procedure standards with respect to pre-trial detention. The Universal Declaration, adopted by the U.N. General Assembly in 1948, first expressed the world's recognition that minimum uniform standards of criminal procedure should be enacted to safeguard all peoples' rights to human dignity. Although the Universal Declaration has no legally binding effect, it is nevertheless an authoritative expression of the world's view of the most basic individual rights and general principles of law. At the time of adoption, supporters viewed it as the founda-
tion for the subsequent international conventions on human rights that created legal obligations on their signatories. Article 5 of the Universal Declaration prohibits torture or “cruel, inhuman or degrading treatment or punishment,” and Article 9 prohibits, inter alia, arbitrary arrest and detention.

The International Covenant on Civil and Political Rights (ICCPR or Covenant), which was adopted by the General Assembly in 1966 and entered into force in 1976, and ratified by both the United States (1992) and Egypt (1982), is a binding agreement on its signatories. The Covenant is an effort to codify the general principles expressed in the Universal Declaration and the customary law. In that vein, the ICCPR provides mechanisms for the enforcement of the protected rights by establishing the Human Rights Committee, which has the authority to hear complaints by one state party against another state party for violations of the ICCPR. The Covenant also requires parties to provide


Universal Declaration, supra note 1, at art. 5.

Id. at art. 9.


The customary law is reflected in the Restatement (Third) of Foreign Relations Law of the United States § 702 (1987). The Restatement is regarded as persuasive authority of the general principles of law governing in the U.S. §702 on the customary international law of human rights states:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones...

(d) torture or other cruel, inhuman, or degrading treatment or punishment,

(e) prolonged arbitrary detention.

According to the Comments to this section, prohibited acts rise to the level of “state policy” when: “such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or punish the perpetrators.” Id.

International Covenant on Civil and Political Rights, supra note 13, at art. 2.
remedies in their domestic legislation for violations of their obligations under the ICCPR.\footnote{Id. at art. 2. Art. 2(3) provides: [e]ach State Party ... undertakes: (a) [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) [t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities.} Article 7 of the ICCPR proscribes, \textit{inter alia}, torture and other cruel and inhuman treatment,\footnote{Id. at art. 7.} while Article 9 proscribes arbitrary arrest and detention, requires prompt adjudication of criminal charges,\footnote{Id. at art. 9.} and creates an "enforceable right to compensation" for victims of unlawful arrests or detentions.\footnote{Id. at art. 10.} Article 10 further provides that imprisoned or detained persons "shall be treated with humanity and with respect to the inherent dignity of the human person."\footnote{Id. at art. 10.} Article 14 restates the right of a suspect to be informed promptly of the charge against him, to be tried without undue delay, and most significantly, \textit{to be informed} of his right to legal counsel.\footnote{Id. at art. 14.} Finally, Article 17 prohibits arbitrary or unlawful interference with privacy, family, or home.\footnote{Id. at art. 17.}

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the U.N. General Assembly on December 10, 1984, and entered into force on June 26, 1987 (the Convention Against Torture),\footnote{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, reprinted in J. Herman Burgers & Hans Danelius, \textit{THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT} (1988) [hereinafter Convention Against Torture].} is an attempt to "make more effective the struggle against torture . . . throughout the world."\footnote{Id. at 177 (pmbl).} Egypt acceded to the Convention in 1988,\footnote{Human Rights Watch, \textit{Behind Closed Doors: Torture and Detention in Egypt} 11 (1992).} but the Senate had yet to ratify it as of July 1994 due to a series of reservations submitted to it with the treaty.\footnote{U.S. Signs \textit{U.N. Convention Against Torture}, Dep't St. Bull., Aug., 1988, at 79.}
The Convention Against Torture defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity [emphasis added].

The Convention Against Torture obligates the parties to enact domestic legislation making torture a criminal offense (article 4) and sets out in more detail than the ICCPR the obligations of parties to prosecute torture crimes. Article 10 dictates that parties:

[E]nsure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

The Convention Against Torture also requires that victims have legal remedies under domestic legislation. The Convention creates enforcement mechanisms similar to those in the Covenant by setting up the Committee against Torture that has similar functions and authority with respect to state party violations as does the Human Rights Committee created by the Covenant.

B. Interpretation of Human Rights Law by the Human Rights Committee

An exposition of the governing international standards on human rights would be incomplete without a discussion of the interpretation of these standards by the relevant international body. Article 28 of the ICCPR established the Human Rights Committee as a permanent and independent human rights body to implement the ICCPR. The Commit-

---

30 Convention Against Torture art. 1, supra note 25, at 177.
31 Id. at 178 (art. 4).
32 Id. at 178-81 (arts. 4-16).
33 Id. at 180 (art. 10).
34 Id. at 181 (art. 14).
35 Id. at 182-87 (arts. 17-24).
36 International Covenant Civil and Political Rights, supra note 13, at art. 28.
The Committee was created when Article 28 entered into force on September 20, 1976. The Committee is charged with reviewing the human rights situation in each signatory state and monitoring the adherence to the standards of the ICCPR. The Committee is comprised of eighteen independent experts, elected for a term of four years at a meeting of state parties every two years. Members are elected on the basis of geographical representation with three members each from Africa, Asia, Latin America, and Eastern Europe; and six members from Western Europe and other geographical groups. The Committee meets three times a year for three weeks. The ICCPR entrusts the Committee with three main functions: 1) study the mandatory national reports submitted by the State parties on the measures they have taken to implement the ICCPR; 2) review of one State party’s complaint against another for violations of the Covenant and attempt to reach a “friendly solution of the matter;” and 3) under Article 5 of the Optional Protocol to the Covenant, review an individual complaint against a State party.

The role of the Committee is limited to establishing facts presented to it by the State parties and complaining individuals subject to the jurisdiction of a State party. The Committee relies on the State parties’ moral obligations to enforce the decisions of the Committee, and has neither legal power nor authority to enforce any decision against a State party. Members of the Committee have characterized the Committee as a judicial body, while others consider the Committee to be a supervisory body. It is clear, however, that although the Committee does not formally hand down judgments, its functions, such as reviewing annual reports and individual complaints of abuses, establishing facts and rendering comments, amount to quasi-judicial, as well as supervisory, functions.

38 International Covenant on Civil and Political Rights, supra note 13, at art. 40.
39 Article 28 provides that Committee members should have “recognized competence in the field of human rights, consideration being given to the usefulness of participation of some persons having legal experience.” The members need not be lawyers or judges, even though all have been to date. See DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 44 (1990).
40 Id. at 47.
41 International Covenant on Civil and Political Rights, supra note 13, at art. 40.
42 Id. at art. 41.
43 Id. at art. 5. U.N.Y.B., supra note 13, at 609.
44 WILLIAMS, supra note 37, at 12.
45 MCGOLDRICK, supra note 39, at 54.
In the cases brought to it by individuals, the Committee has interpreted torture, and "cruel, inhuman or degrading treatment or punishment" to be any treatment that deprives the detainee of his or her basic human dignity. The Committee has failed, however, to clearly define the meanings of cruel, inhuman, and degrading treatment or punishment and to distinguish between actions.\textsuperscript{46} Thus, critics have charged that the Committee's findings are arbitrary.\textsuperscript{47} The Committee created controversy when it refrained from using the term "torture" in some cases where the facts were similar to other cases where the actions were found to amount to torture. In \textit{Lanza v. Uruguay}, the victim was constantly blindfolded and subjected to mistreatment. The Committee found that the "treatment" of the victim was a violation of the Covenant, without characterizing under what type of prohibited treatment the actions fell. In a similar case, the Committee characterized the actions as "severe treatment."\textsuperscript{48} Yet another inconsistency emerged in \textit{Acosta v. Uruguay}, where the Committee found incommunicado detention (without any other evidence of mistreatment) to constitute torture within the meaning of Article 7 of the Covenant.\textsuperscript{49}

In summary, the Committee's view of what constitutes torture conforms to most lay people's conception of torture, and thus the findings and comments of the Committee are largely predictable. The legal significance of the terms, however, remains largely undefined. This vagueness can lead to problems in cases involving the lower end of the spectrum of ill-treatment.

\section*{C. Human Rights Standards under a State of Emergency}

The state of emergency currently in force in Egypt bears mention of human rights law under states of emergency. As discussed below, many of the Egyptian violations of human rights are occurring under the authority of the emergency laws enacted to silence political opposition.\textsuperscript{50} The human rights standards developed for nations at war or under a state of emergency differ slightly from the above standards, in that they allow for derogations from certain norms due to extraordinary circumstances. Emergency is defined in the ICCPR as a "public emergency which threatens the life of a nation."\textsuperscript{51} Although war is not explicitly men-

\textsuperscript{46} Id. at 370-71.
\textsuperscript{47} Id. at 371.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 370.
\textsuperscript{50} See discussion infra part III.A.2.
\textsuperscript{51} \textit{International Covenant on Civil and Political Rights}, supra note 13, at art. 4.
tioned because a U.N. instrument could not envisage war, war is generally seen as the greatest public emergency.\textsuperscript{52} "Life of a nation" is generally interpreted to mean the security and general welfare of the people.\textsuperscript{53} The instruments discussed above, however, make it clear that the right to be free from torture is non-derogable, even under a state of emergency. Article 4 of the ICCPR, which provides for the derogability of certain rights, exempts Article 7 on the right to be free from torture from the provision.\textsuperscript{54} Similarly, Article 2 of the Convention Against Torture states that "[n]o exceptional circumstances whatsoever, whether . . . internal political instability or any other public emergency, may be invoked as a justification of torture."\textsuperscript{55} The right to be free from arbitrary detention, however, is not exempted from derogability.

In studying and explaining the disparity of enforcement of human rights standards between a Western state and a non-Western state, it is imperative to understand the human rights standards on detention during a state of emergency. Many governments justify their violations of the standards by arguing that certain derogations from the standards are inevitable to fight the internal threats to the viability of their state and the security of their people.\textsuperscript{56} The only derogable standard, however, is the freedom from arbitrary detention. Freedom from torture, the standard commonly violated during arbitrary detention, however, is non-derogable. This juxtaposition raises the question of how a criminal justice system can insure that this fundamental right of individuals be protected under the most difficult circumstances such as states of emergency.

\textbf{PART II: UNIVERSALITY OF THE STANDARDS}

As stated in the preamble to the Universal Declaration: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."\textsuperscript{57} The preamble evidences the fact that the standards were developed to protect the most basic right to bodily integrity. The concept of human rights arose out of a belief by the world's decision-makers that there existed individual rights common to all peoples which deserved international protection in order to promote peace and justice in

\textsuperscript{52} JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 12 (1992).
\textsuperscript{53} Id. at 13.
\textsuperscript{54} International Covenant on Civil and Political Rights, supra note 13, at art. 4.
\textsuperscript{55} Convention Against Torture art. 2, supra note 25, at 178.
\textsuperscript{56} See HUMAN RIGHTS WATCH, supra note 27, at 10 (Egyptian government officials implying that the internal instability justifies derogation from human rights).
\textsuperscript{57} Universal Declaration, supra note 1, at pmbl.
the world. The legitimacy of these rights stemmed from their purported
universality.

Political leaders and scholars have attacked the legitimacy of these
international norms by challenging the universality of international human
rights and arguing that human rights violations in non-Western states are
inevitable because these rights are exclusively Western concepts. The
issue of whether international human rights norms were universal despite
their arguably Western formulation and origin monopolized the 1993
United Nations World Conference on Human Rights. The Conference
eventually reached a compromise declaration reaffirming the universality
of the international human rights standards, while recognizing that particu-
lar historical, religious, and cultural backgrounds should be "borne in
mind." Political leaders of non-Western states challenge the universality
of human rights as a defense when their state is cited for human rights
abuses. Western scholars advocate a culturally-based concept of human
rights in a well-meaning attempt to avoid cultural imperialism and neo-
colonialism; or in other words, to adhere to the currently trendy political
correctness movement. Some Westerners also adopt a cultural relativist
position with respect only to certain human rights, most notably, women's
rights.

As evidenced by the available literature on the topic, most of the
human rights debate on the issue of the universality of human rights
focuses on the international norms that can touch upon traditional social
customs (e.g., norms on women’s or children’s rights as they apply to
domestic laws on female circumcision). Human rights law applied to
practices that can be assigned to particular social or religious customs are
more prone to controversial interpretation as a "cultural practice," and

58 Mayer, supra note 4, at 315 (referring to the rejection by Iran's Ambassador to
the U.N. of international human rights prescribed in international instruments as contrary
to Islam); Samuel P. Huntington, The Clash of Civilizations?, FOREIGN AFF., Summer
1993, at 22 (arguing that the concept of human rights is exclusively Western).
59 Ibrahima Fall, The U-Word: Universality of Human Rights, UNESCO COURIER,
60 Id. See also Alan Riding, Human Rights: The West Gets Some Tough Questions,
N.Y. TIMES, June 20, 1993, §4 at 5.
61 Mayer, supra note 4, at 318.
62 See id. at 309, 383 (critiquing Huntington's article, The Clash of Civilizations?);
see generally Huntington, supra note 58.
63 See id. at 393-98 (recounting the denial by Canada of political asylum to a Saudi
Arabian woman who sought refuge from gender discrimination in violation of interna-
tional human rights law).
64 Anna Funder, De Minimis Non Curat Lex: The Clitoris, Culture and the Law, 3
TRANSNAT'L L. & CONTEMP. PROBS. 417 (1993);
thus one outside the scope of international human rights law. It is more
difficult for non-Western states, competing for Western aid conditioned in
part, or at least in theory, on democracy-building and a clean human
rights record, to argue that the purely political and civil rights are not
universal. Although the cultural relativists seldom attack criminal proce-
dural rights (e.g., right to be free from arbitrary detention), it is neverthe-
less important to the advocacy for more diligent enforcement of the
human rights law on criminal justice, to analyze and discount the cultural
relativist argument which pervades the international human rights debate.

The cultural relativist position fails in several ways. Most significant
and dangerous is the assumption by relativists that a culture is monolithic.
Their reliance on stereotypes of entire races, ethnicities, and religions
stems from that assumption.\(^6\) The result is an argument which must fail
because of its oversimplification. No culture can be viewed as a homoge-
neous grouping of people; nor can religion alone characterize a culture.
Relativists like to refer to the “Islamic culture,” thereby obliterating
significant cultural differences which exist among peoples from Morocco
to Indonesia (passing through some sub-Saharan African nations, such as
Nigeria).\(^6\) These cultural differences, due to the diversity of race, and
etnicity, as well as historical experience, all give insight into the way
these different states may behave. A simplistic scholarly argument which
conveniently overlooks intricacies and complexities necessarily raises
suspicions and destroys itself.

One of the clear implications of the cultural relativist position is that
standards less protective of individual rights apply to non-Western peo-
oples.\(^6\) The cultural relativist argument which justifies violations of
human rights by a non-Western state never advocates that more liberal
rights exist in that non-Western “culture.” The cultural relativist is an
apologist argument, apologizing for the “culture” which makes the viola-
tions inevitable. This implication is at least condescending, and at most
insulting. The implication is central to the Orientalist view of the Middle
East and Muslim world (or the “Orient”).\(^6\) Orientalism is a manifesta-
tion of cultural relativism as applied to an Arab and predominantly
Muslim culture. Orientalism embodies the European colonialist view of
the West as a civilizing force in the colonized world. Orientalist argu-
ments against the universality of international human rights actually mask

\(^{6}\) Mayer, supra note 4, at 381. See also Huntington, supra note 58, at 22.
\(^{6}\) One well-publicized example is Huntington’s The Clash of Civilizations? See
generally Huntington, supra note 58.
\(^{6}\) Funder, supra note 64, at 445.
\(^{6}\) For a compelling and comprehensive critique of Orientalist scholarship, see
EDWARD SAID, ORIENTALISM (1978).
a fear that the "Orientals" will succeed in securing their individual political rights, thus disturbing the world order so advantageous to the West.69

Relativists, notably non-Western scholars, argue that some violations of human rights are due to the fact that non-Western cultures value collective societal rights over individual rights. The concept of individual rights originated in Europe, and thus cannot be applied to the non-Western world. Conceding the point that the concept of individual rights as referred to in international instruments has Western origins, relativists have nevertheless failed to prove that non-Western cultures do not value individual rights as well. This argument assumes that the natural law ideals of Locke can only be referred to in those Western terms used in international conventions. The fact that some cultures value collective rights more than the West does not preclude the same cultures valuing the concepts embodied in the human rights which protect basic human dignity. When non-Westerners allude to the greater emphasis on group rights, they are referring to a greater consideration for units such as the family or the community.70 They have failed to prove, however, that the weaker emphasis on individualism in their society would permit a state to strip an individual of his or her civil rights. Relativists have yet to prove that the concepts are mutually exclusive.

In stereotyping entire peoples, and assuming a monolithic cultural thought, relativists fail to account for the dissenters in a society (or as relativists would characterize it, a culture), who are the intellectuals and the individuals who claim their human rights have been abused. Relativists discount the intellectual dissent as Westernized.71 The simplicity of this argument is intellectually dishonest. The entire intellectual voice of a country cannot be so flippantly ignored and discounted. It is the perfect argument from the relativists' point of view since the crux of

69 Mayer, supra note 4, at 380.
70 FUNDER, supra note 64, at 446-47. Most recently, the Michael Fay case prompted apologist commentators to note that Singapore's criminal laws promoted an Asian society's interest in order through a system which values collective rights over individual rights. See, e.g., John Hughes, A "Papa Knows Best" Approach to Order in Singapore, CHRISTIAN SCI. MONITOR, Apr. 21, 1994, at 19.
71 See ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 89, 92 (1990). Renteln dismisses non-Western intellectual conceptions of human rights which mirror international human rights because they emanate from the elite, and thus cannot be "authentic" without explaining her rationale. She states [at 89]: "Consulting jurisprudential and theological texts will surely paint a picture of moral standards, but they may be only the ideals of the elites. . . ." Id. at 89.
their position is that any Western idea is simply inapplicable to the non-West, so any non-Westerner who espouses ideas determined to be Western can be discounted as Westernized and thus irrelevant to the debate about his or her own culture. The intellectual elite in the West is regarded as the most eloquent representative of their societies. Relativists have offered no convincing argument why non-Western elites do not represent their societies. The only adequate retort to this dismissal of non-Western elites is to prove that the human rights are universal, and thus the intellectual dissenters are necessarily only espousing values of their own culture. At the 1993 U.N. World Conference on Human Rights, the Dalai Lama, leader of Tibetan Buddhism, stated that it was in "the inherent nature of all human beings to yearn for freedom, equality, and dignity."

A more peculiar aspect of the relativist position is the minimal importance it lends to the individual complainants from the non-Western world who claim their government has violated their human rights. The relativists fail to address the question of why there are individuals who complain if the rights allegedly violated are foreign to their cultural concepts. Individuals claim the rights they know are inalienable because they are human beings, regardless of their culture. These individual complainants cannot be dispensed as Westernized intellectuals. They are perhaps the most effective argument in support of the position that international human rights standards speak universally to all peoples.

It has become clear that non-Western regimes are using cultural relativism as a political shield against negative international public opinion, as well as domestic dissent stemming from their lack of political legitimacy. The enthusiastic support which scholars and practitioners, including non-Western intellectuals, extend to these oppressive regimes is alarming.

The right to be free from torture and like treatment, and to be free from arbitrary arrest and detention reach only the most fundamental interests in our bodily integrity and dignity. The values reflected by these standards have no cultural or religious boundaries. No culture or religion would reject these values as contrary to its customs or tenets. Indeed all religions teach the same fundamental tenets; to refrain from killing, for example. This tenet evidences the basic value in human life, reflected in the human rights to freedom from torture and capital punishment.

---

72 Mayer, supra note 4, at 379 (citing Raymond Whitaker, Vienna Gives Dalai Lama a Hero's Welcome, INDEPENDENT (London), June 16, 1993, at 12, who quoted the Dalai Lama).

73 See FUNDER, supra note 64, at 466.
The disparity in enforcement of international human rights law on criminal justice should not and cannot be attributed to the lack of universality of the international standards. An analysis and comparison of the legal structures of the criminal justice system of a non-Western state and a Western state may better explain the disparity in enforcement.

PART III: HUMAN RIGHTS LAW AS ENACTED AND ENFORCED IN THE UNITED STATES AND EGYPT — A COMPARISON OF SYSTEMS

A study of the human rights law discussed above, as enacted in the national law of the United States and Egypt will show that institutional factors such as the misallocation of power in the legal system and the professional training of the system's personnel; as well as a lack of resources, the under-development of legal civics, and internal threats to state security might explain the disparity in enforcement of human rights. The different allocation of power and authority to institutional and non-institutional actors and structures found in these two legal systems refute the cultural relativist argument that there are inherent cultural differences which prevent a non-Western state like Egypt from adhering to international human rights standards.

A. Human Rights Standards in Domestic Law

1. United States

   a. Human Rights Standards as Enacted in Domestic Law

   The U.S. Constitution protects individuals from arbitrary detention through the Fourth Amendment which states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ., and particularly describing the place to be searched, and the persons or things to be seized." The Sixth Amendment to the Constitution also protects the individual from prolonged pre-trial detention by guaranteeing the accused the right to a speedy trial. The U.S. Supreme Court has interpreted the Fourth Amendment requirement of reasonableness to mean that the judicial determination of probable cause which is required for the issuance of a warrant extends to the decision to detain a suspect before trial. The Fourth Amendment thus requires that there be a judicial determination of probable cause to detain the accused before trial. The Fourth Amend-

---

74 U.S. CONST. amend. IV.
75 U.S. CONST. amend. VI.
ment, however, does not require that the judicial determination be in the
form of an adversary proceeding, even though some states might enact
such criminal procedures.\textsuperscript{77} This Supreme Court interpretation of the
Fourth Amendment conforms to Article 9 of the Covenant, which requires
that the domestic law of the state parties provide for a prompt judicial
determination of the lawfulness of arrest and detention.\textsuperscript{78}

The Fourth Amendment constitutional requirement is enacted in part
through the Federal Bail Reform Act of 1984 (the "Act")\textsuperscript{79} which sets
the standard for pre-trial detention of persons accused of committing
certain serious felonies. The Act provides additional procedural safeguards
for defendants in pre-trial detention. Reflecting the Supreme Court's de-
cision in \textit{Gerstein v. Pugh},\textsuperscript{80} the Act requires a judicial determination of
the lawfulness of detention.\textsuperscript{81} The Act guarantees a suspect \textit{inter alia}
1) the right to an attorney at the detention hearing which is held immediate-
ly upon the suspect's first appearance before a judicial officer;\textsuperscript{82} 2) the
right to a lawyer at the detention hearing;\textsuperscript{83} and 3) the right to present
witnesses and other evidence.\textsuperscript{84} The Act ensures many procedural
protections of civil rights to the suspect which the state and the courts
must surpass before detaining him. The court must find by clear and
convincing evidence that the defendant either 1) poses a threat to the
safety of the community; or 2) poses a flight risk.\textsuperscript{85} In \textit{United States v.
Salerno},\textsuperscript{86} the Supreme Court held the Act to be constitutional, as con-
forming \textit{inter alia} to the substantive due process requirement of the Fifth
Amendment to the Constitution, because of the vast procedural safeguards
for the suspects' civil rights provided in the Act, and the legitimate
Congressional intent to protect the public from dangerous suspects (as
opposed to the unacceptable intent to punish suspects before trial).\textsuperscript{87}

The Federal Rules of Criminal Procedure\textsuperscript{88} (Federal Rules), which
are binding on federal courts, further embody the constitutional ideals of
criminal procedure law and prescribe the following procedure. At the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 123.
\item \textit{International Covenant on Civil and Political Rights, supra} note 13, at art. 9.
\item 18 U.S.C. §§ 3141-142 [hereinafter Bail Reform Act].
\item \textit{Gerstein v. Pugh}, 420 U.S. 103, 125 (1975).
\item \textit{Bail Reform Act, supra} note 79, § 3142(e).
\item \textit{Id.} § 3142(f).
\item \textit{Id.}
\item \textit{Id.} § 3142.
\item \textit{Id.} § 3142.
\item 481 U.S. 739 (1987).
\item \textit{Id.} at 751-2.
\item \textit{FED. R. CRIM. P.}
\end{enumerate}
\end{footnotesize}
“booking,” when the suspect is first arrested, the suspect is typically informed of the charge against him and allowed to make at least one phone call. If it is not a minor offense, the suspect will remain at the police station until he can be presented to a magistrate. During this detention, the police may conduct a post-arrest investigation, using the suspect as a source (e.g., putting him in a line-up for identification by witnesses), and questioning the suspect. During detention, the police reviews its decision to charge the suspect. The police can decide not to press charges. Otherwise, the police hand the case over to the prosecutor, who can either decide not to charge or continue to investigate by directing the officers who perform the actual investigation. Under Rule 5 of the Federal Rules, the police must present the suspect to a magistrate “without unnecessary delay” after arrest. This standard is determined by the circumstances of each case, but is generally held to be a maximum of forty-eight hours. The first appearance usually occurs within a few hours after arrest.

Upon arrest, the suspect must be informed of his rights to remain silent and to legal counsel. The Supreme Court held in *Miranda v. Arizona* that the Fifth Amendment required the use of procedural safeguards to protect the suspect from self-incrimination. Thus, before beginning an interrogation of a suspect, the police must inform the suspect of his right to remain silent, that any statement may be used as evidence against him, and that he has a right to legal counsel, either retained or court-appointed. These safeguards are now commonly known as the “Miranda warnings.” The police may not question a suspect who indicates that he does not wish to be interrogated. Evidence obtained in violation of these rights is inadmissible at trial.

If the suspect does not have counsel, the magistrate must determine whether he is indigent and then appoint counsel to him at the time of the

---

89 YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 22 (8th ed. 1990) [hereinafter KAMISAR].
90 FED. R. CRIM. P. 5(a).
91 Id. at Notes of Advisory Committee on Rules, Note to Subdivision (a); KAMISAR, supra note 89, at 26.
92 KAMISAR, supra note 89, at 26.
94 Id. at 443-44.
95 Id. at 444.
96 Id. at 443. The *Miranda* rule applies only when the defendant is in custody at the time of the interrogation. This rule thus raises several other issues such as what constitutes a “custodial interrogation.” See, e.g., Escobedo v. Illinois, 378 U.S. 478 (1964); Berkemer v. McCarty, 468 U.S. 420 (1984); Rhode Island v. Innis, 446 U.S. 291 (1980).
first appearance. Attorneys are provided to indigent defendants by 1) a state or county public defender service; 2) private attorneys, either selected by the judge from a list of available attorneys on an ad hoc basis, or by an administrator on the basis of guidelines; or 3) a law firm or non-profit organization (e.g., local bar association) who contracts with the state to provide representation to indigents.  

The Speedy Trial Act of 1974, implementing the Constitutional Sixth Amendment right to a speedy trial, also limits the duration of pre-trial detention by imposing time limits within which a criminal trial must begin after the filing of charges.

U.S. criminal procedure law incorporates the more objective institution of the judiciary in the criminal procedure process at the earliest possible stage in an attempt to avoid unchecked abuses of police or prosecutorial discretion. On the other hand, as will be shown below, Egyptian criminal procedure fails to provide such a procedural safeguard. As a result, the Egyptian criminal justice process is prone to unchecked police and prosecutorial abuse of the law. This type of structural difference in systems might explain the disparity in enforcement practices of international criminal procedure standards.

b. Human Rights Standards as Enforced in the Domestic Legal System

Although human rights organizations focus their attacks on the United States on capital punishment, particularly with respect to minors and mentally incompetent defendants, there have been documented cases of violations in the pre-trial detention stages of the criminal justice process. Following are only two examples of such cases:

1. In 1990, Amnesty International reported on several cases of systematic torture and otherwise ill-treatment of suspects in the Area 2 police station in Chicago, Illinois between 1972 and 1984. The allegations arose as a result of the lawsuit brought by one of the victims, Andrew Wilson, in 1989 for civil rights violations. Wilson was detained in 1982 on suspicion of murdering two Chicago police officers. During interrogation, he was beaten and kicked, was nearly suffocated by a plastic bag

---

97 Kamisar, supra note 89, at 27.
99 See discussion infra part III.A.2.
101 Miranda and subsequent cases are further evidence of the practice of police coercion of criminal suspects. See discussion supra Part III.A.1.a and note 96.
placed over his head, had a gun placed in his mouth, and was subjected to electric shock torture. The medical director of the hospital serving the Cook County jail inmates urged an investigation after examining Wilson. An investigation by the Chicago Police Department recommended that the complaint be dismissed as “not sustained.” The Illinois Supreme Court, however, found enough evidence to overturn Wilson’s conviction on the ground that his confession made in police custody may have been coerced. In Wilson’s civil rights suit against the police department, the jury found a de facto policy to ill-treat suspects of police officer killings. Wilson located more than twenty other suspects who alleged torture, and found that at least twelve of those filed complaints with the Chicago Police Department who dismissed every one of the complaints as “not sustained.”

2. The ethics scholar, Monroe Freedman, recently wrote about the case of Robert H., a defendant who spent six months in jail in Atlanta, without any formal charges being filed against him and without seeing either a judge or a lawyer. Under the threat of another year in jail if he did not confess, Robert H. pled guilty and was freed. He was in fact innocent of the drug offense. As Freedman writes, “The Hawkins case is . . . not unique. The administration of criminal justice in Atlanta and New York City would shame some of the despotic regimes that are regularly criticized in the State Department’s human rights reports.”

In the case of the violation of the human rights standard on arbitrary detention which occurred in Atlanta, the suspect was detained in violation of domestic and international law as a result of a breakdown in the normal criminal procedure process. Following his arrest, there was no appearance before a judicial officer, which led to the suspect being detained for six months without charges being filed against him. This prolonged detention without judicial intervention was a violation of Articles 9 and 14 of the ICCPR and the Fourth Amendment.

---

103 People v. Wilson, 506 N.E.2d 571, 576 (Ill. 1987).
104 AMNESTY INTERNATIONAL, supra note 102, at 1-2.
106 Id.
107 Id.
108 Id.
109 See generally supra part I.A.
110 International Covenant on Civil and Political Rights, supra note 13, at arts. 9 &
of the U.S. Constitution. This situation mirrors the cases of violations which occurred in Egypt, highlighted below. The requirement of promptly presenting a suspect to a court for a detention hearing introduces an independent and objective institution in the process precisely to avoid such abuses of police and prosecutorial power. The episode illustrates how an independent judiciary which plays an early role in the criminal procedure process is indispensable to protecting the rights of the suspect. In this case, the police and prosecution obviously abused their power and discretion to their fullest extent, unchecked by any other institution. Thus in Egypt, where the Code of Criminal Procedure allows a much longer detention without the mandatory appearance of the suspect before a court, the more rampant abuses which occur during detention can be expected.

2. Egypt

a. Human Rights Standards as Enacted in Domestic Law

Article 71 of the Constitution of Egypt guarantees the right of a suspect to be free from arbitrary arrest and detention. The suspect has the right to be informed promptly of the charges against him, as well as the right to communicate with "anyone as prescribed in the law," and to be brought to trial as soon as possible. Article 67 of the Egyptian Constitution states that every person accused of a crime must be provided with counsel for his defense. Article 42 prohibits "moral or physical harm" from being inflicted upon any person arrested or detained. Article 42 further mandates that "Any person arrested [or] detained... shall be treated in the manner concomitant with the preservation of his dignity." Although the word "torture" is not used, torture clearly falls within the prohibition of "physical harm" and would violate a person's "dignity." The Constitution further protects individuals from torture by providing that:

Any assault on individual freedom or on the inviolability of private

14.
111 See discussion supra part III.A.1.a.
112 See infra part III.A.2.b.
114 Id.
115 Id. at art. 67.
116 Id. at art. 42.
117 Id.
life... and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant a fair compensation to the victim of such an assault.\textsuperscript{118}

The Code of Criminal Procedure\textsuperscript{119} implements those constitutional rights as follows:

The police can hold a person suspected of committing a felony for up to twenty-four hours before presenting the case to a public prosecutor who then takes over the investigation.\textsuperscript{120} Unlike the U.S. prosecutor, the Egyptian public prosecutor is a judicial officer with a neutral role. The public prosecutor investigates the crime as a neutral investigator and represents the community interest.\textsuperscript{121} The public prosecutor then has four days to investigate and prepare the case. The prosecutor can have a series of extensions which can last up to ninety-six days.\textsuperscript{122} The suspect can thus be detained legally up to ninety-six days without seeing a judge. The suspect has the right to an attorney immediately upon arrest,\textsuperscript{123} but is reportedly never informed of his right to an attorney.\textsuperscript{124} He is similarly rarely informed of his right to remain silent.\textsuperscript{125} Persons suspected of committing misdemeanors can be detained only if the alleged offense is punishable by a minimum of three months imprisonment. Those persons have no right to counsel.\textsuperscript{126}

The political instability in Egypt has significantly altered the criminal procedure outlined above. Egypt has been under some type of state of exception since 1967, except between May, 1980 and October, 1981. Under the Nasser regime, arbitrary detention and torture were systematically used against the political opposition, particularly Communists and members of the Muslim Brotherhood party during the 1950s and 1960s.\textsuperscript{127} During his first few years in power in the early 1970s, Sadat introduced liberalization measures and released the Muslim Brotherhood

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{118}] Id. at art. 57.
\item[\textsuperscript{119}] CODE OF CRIMINAL procedure [C. CRIM. PROC.] (Egypt).
\item[\textsuperscript{120}] Id. at art 36.
\item[\textsuperscript{121}] Confidential source (on file with author).
\item[\textsuperscript{122}] CODE CIVIL [C. CIV.] arts. 201-203 (Fr.).
\item[\textsuperscript{123}] Id. at art. 141; EGYPT CONST. art. 67, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1991).
\item[\textsuperscript{124}] Confidential source (on file with author).
\item[\textsuperscript{125}] Id.
\item[\textsuperscript{126}] CODE OF CRIMINAL PROCEDURE, supra note 119, at art. 141.
\item[\textsuperscript{127}] KIRK J. BEATTIE, EGYPT DURING THE NASSER YEARS: IDEOLOGY, POLITICS, AND CIVIL SOCIETY 129-30 (1994).
\end{itemize}
\end{footnotesize}
members whom Nasser had jailed. Although some observers maintain that torture rarely occurred during the 1970s, Sadat nevertheless ruled Egypt under state of emergency measures for all but seventeen months of his presidency. Like Nasser, Sadat used arbitrary arrest and detention to shield his regime and policies from effective opposition. At the end of his presidency, Sadat responded to popular uprisings against his regime with repressive measures, such as mass arrests, increased press censorship, and the enactment of the most repressive emergency measure in January, 1977. Further political oppression followed President Sadat’s assassination by Muslim fundamentalist activists, in 1981.

The Emergency Law, which was declared in October 1981 after President Sadat’s assassination, has been in place continuously since then and was most recently renewed for a three-year term in April 1994 (the Law). It has significantly altered the criminal procedure law for persons suspected of activities against the public order and security. The Law targets members of political groups advocating an Islamic Egyptian state. The Emergency Law allows the soldiers and officers of the General Directorate for State Security Investigation (SSI), an arm of the Ministry of Interior, to arrest persons they suspect of carrying on activities against the public order, and detain them for up to four months. Most significantly, the Law allows for administrative as well as incommunicado detention, and also allows for civilians to be tried in military courts.

---

129 HUMAN RIGHTS WATCH, supra note 27, at 6.
130 RAYMOND WILLIAM BAKER, SADAT AND AFTER: STRUGGLES FOR EGYPT’S POLITICAL SOUL 60 (1990).
131 Id.
132 Id. The law “allowed a sentence of life imprisonment with hard labor for membership in a clandestine and armed organization hostile to the state, for participation in a damaging strike, or for planning or taking part in a demonstration that endangered public security.” Id. at 60-61.
133 HUMAN RIGHTS WATCH, supra note 27, at 6.
135 HUMAN RIGHTS WATCH, supra note 27, at 10-11.
137 Id.
b. Human Rights Standards as Enforced in the Domestic Legal System

The international community has increasingly attacked Egypt for gross human rights violations despite the fact that Egypt's Constitution and Code of Criminal Procedure conform to the human rights standards set out in the instruments discussed above. There is considerable and reliable evidence that Egypt is not fulfilling its international obligations in practice. The violations are occurring mostly in cases of persons arrested and detained under the Emergency Law.

The following are a few illustrative cases of documented torture. The claims of torture are supported by the courts' judgments to exclude the defendants' confessions as evidence because they were obtained under torture or other coercion, and the courts' awards of compensation for victims or their relatives. The courts apparently found that torture occurred and redress was warranted despite the perpetrators never being identified.

1. Basil Abd al-Muhsin Hammouda was arrested on September 26, 1985 when he was tracing the whereabouts of his father who had been arrested on political grounds. He was held in Qasr al-Nil police station in Cairo where he was tortured. He died three years later allegedly as a result of psychological effects of the torture he suffered. His father was awarded compensation by a court in 1989.

2. Hana Ali Farrag was a seventeen-year-old student when she was arrested in Minya in July, 1990. She recounted her experience to Amnesty International:

   They took me to the police station . . . . Three of them asked me where my brother was hiding. . . . I kept telling them I didn't know where he was. . . . I was swinging upside down from a bar under my knees and they hit the soles of my feet with a thick wooden stick, and kept repeating the same questions. My brother . . . was not wanted in connection with any offense, it was just the usual detention.

3. Dr. Mohammad Mandour, Head of Psychiatry at the Palestine Red Crescent Hospital in Cairo and a board member of the Egyptian Organization of Human Rights was arrested in 1991. They held him at the SSI Directorate in Lazoghly Square [Cairo]. He was told he was being held

---

138 The Amnesty Report does not specify the type of torture.
139 TEN YEARS OF TORTURE, supra note 5, at 4.
140 Id. at 5.
in administrative detention and that there was no charge against him. He was blindfolded and handcuffed with his hands in front of him for thirteen days. The handcuffs tightened with every movement, and consequently caused a partial loss of sensation in his thumb and left hand. He had no change of clothes during this time, and had access to water for ten days, but no soap. They applied electric shocks to sensitive parts of his body, and suspended him from his wrists with his feet still touching the ground for one day. They also struck him repeatedly.  

Political detainees who are charged and who claim to have been tortured may be examined by a forensic medical doctor from the Ministry of Justice at the request of the state prosecutor or the trial court. On the other hand, administrative detainees held without being charged or tried usually have no opportunity to submit a complaint about their treatment to the competent authorities. Many of the medical exams lose some of their usefulness because they are conducted long after the torture occurred, when the physical evidence of torture may have disappeared or faded. The state’s doctors nevertheless have confirmed many incidents of torture in their examination reports.  

The Egyptian government’s response has been a denial of all accusations, and the assertion that investigations of allegations of torture resulted in no finding of evidence of torture. The government also argues that human rights are observed in Egypt as evidenced by the Constitution and the Code of Criminal Procedure.

Similar to the U.S. incidents of abuses, the Egyptian incidents of violations suggest that prosecutorial authority should be checked by another branch of the state to prevent prosecutorial abuses of power. The international instruments, as well as the Egyptian Constitution and Code of Criminal Procedure, recognize that a suspect must be brought before a neutral judiciary to protect the suspect from likely abuses of power from the enforcement and investigatory branches of the legal system. These latter branches focus on law enforcement, and as such have different interests than the judiciary. The judiciary’s interest in the legal system is the application of law. The application of law requires the judiciary to balance the competing interests of law enforcement and individual liberty. The law recognizes that these competing interests must be represented equally in a criminal proceeding in order to achieve justice. Prolonged

---

141 Id. at 8.
142 Id. at 9-10.
143 HUMAN RIGHTS WATCH, supra note 27, at 116-17.
144 Id.
The outcome of a failure in the process is predictable, as is shown by the same outcome from the same breakdown in procedure in both the United States and Egypt.\textsuperscript{4}

One of the basic causes of the violations of human rights during preventive detention is a failure in the institutional allocation of power within the system. An explicit comparison of the U.S. and Egyptian systems will reveal further causes, such as a difference in the training and role of institutional and non-institutional actors. The comparison thus also leads to an evaluation of reform proposals which would minimize failures in the systems which cause human rights abuses.

B. \textit{Comparison of Legal Systems}

1. Institutional Structures of Legal Systems

A structural and functional comparison of the American and Egyptian systems will explain in part the disparity in each state's domestic enforcement of international human rights law. The comparison of the domestic law in each country highlights the fact that Egyptian criminal procedure law conforms in great part to the international human rights instruments which are binding on Egypt. Therefore, the solution to Egypt's egregious violations of international human rights lies not in a reform of its law, but in a reform of the structure of its legal system which would promote greater enforcement of existing Egyptian law, and thus further the integrity of the Egyptian legal system, as designed by the Egyptian Constitution.

The structural and functional comparison will focus on the following interrelated questions: 1) in what institution does which authority lie?; and 2) what are the functions of the personnel in the system?


\textsuperscript{146} \textit{International Covenant on Civil and Political Rights, supra} note 13, arts. 9 & 14.


\textsuperscript{148} \textit{International Covenant on Civil and Political Rights, supra} note 13, at art. 7.

\textsuperscript{149} See discussion \textit{supra} part III.A.1.b.
a. United States

At the federal level, the U.S. criminal justice system is separated into three functions which are each allocated to a separate branch of the state. The enforcement function belongs to the executive branch, through the Attorney-General and the Department of Justice. The courts, or judiciary branch, hold the responsibility of applying the law. Although the federal judges are nominated by the executive, their independence and objectivity is ensured in large part by their life appointment, as well as their confirmation by the legislative branch, the Senate. The law enforcement authorities, which include mostly the police and the Federal Bureau of Investigation (FBI) at the federal level, perform the investigatory function of the criminal prosecution process. The local police perform the preliminary stage of the investigation which leads to arrest, at its own discretion. Once the prosecutor decides to prosecute, the police continues the investigation at the direction of the prosecutor's office. The wide scope of the police function (most significantly, the police alone can elect to arrest someone and detain that person for up to forty-eight hours before a neutral judicial determination must be made of the legality of the arrest or detention) is checked by the independent judiciary.

Although the American prosecutor has arguably the most authority of prosecutors in any other system, there are less instances of unchecked prosecutorial abuse of discretion than would be expected given human nature, and the experiences of other systems. When prosecutors abuse their enforcement discretion which lead to violations of civil rights, the courts exercise their independent function of review of prosecutorial discretion.

b. Egypt

In Egypt, the Ministry of Justice, a member of the executive branch, oversees the judiciary (the courts) as well as the prosecutorial arm of the justice system, the niyaba. The authority to enforce and apply the law, therefore, lies with the executive branch. There is a concentration of power and authority in the legal system. This concentration of power

---

150 Other specialized law enforcement bodies such as the Drug Enforcement Agency or the Bureau of Alcohol Tobacco and Firearms will not be discussed.


raises the issue of whether there are institutional checks on abuses of power which are adequate to protect the defendants' rights, as well as serve the public's (or justice's) rights.

The experience of Egypt shows that any institutional checks are inadequate, and the state of emergency procedure further supports this observation. The Egyptian judiciary and the prosecutorial branch are now unable to function independently of the executive, as the President and the Ministry of Interior appear to exert overwhelming power over the office of the Prosecutor General as well as the courts. Thus, the practical operation of the Egyptian legal system is inconsistent with the system envisaged by the Constitution which states clearly in Article 65: "The independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties."155

There are ties between the niyaba and the SSI which compromise the independence of the prosecutorial branch. Increasing numbers of SSI officers become prosecutors after completing the Police College which grants them a law degree. Therefore, many prosecutors are charged with investigating the alleged violations of former colleagues.156 The Prosecutor General cannot be entirely independent as envisaged by the Constitution since he is appointed by the President. That fact alone cannot account for the lack of the prosecutorial independence since many systems of the world, such as the United States, charge the executive with selecting the head of the prosecutorial branch. The prosecutorial branch is necessarily an arm of the executive branch, and thus is subordinate to it, since its purpose is to carry out the executive's function of enforcing the law. In contrast to the U.S. Attorney General, who is expected to act independently, in Egypt, observers such as one former "high-ranking" officer in the Ministry of Interior state that: "The Prosecutor General must be submissive. If he doesn't walk in harmony with SSI, he will lose favor."159 To further compromise the independence of the prosecutorial branch, the current Prosecutor General is part of the state

---

154 See HUMAN RIGHTS WATCH, supra note 27, at 138.
155 EGYPT CONST., supra note 113, at art. 65.
156 HUMAN RIGHTS WATCH, supra note 26, at 138.
157 One structural characteristic that, in effect, requires the Attorney-General to act independently of the executive branch is the law that enables the Attorney-General to appoint an independent counsel to investigate executive branch violations of the law. 28 U.S.C. § 592(c)(1) (1994).
158 HUMAN RIGHTS WATCH, supra note 27, at 138.
159 Id.
security prosecutor's office.  After conducting an extensive investigation of human rights abuses in Egypt, concluded that "[t]he problem of the lack of independence permeates the prosecutor's office."  One Egyptian human rights monitor told Human Rights Watch: "[t]here is no tradition that a niyaba looks at himself as separate from the executive branch. The niyaba does not recognize himself as truly independent and he does not make trouble. If he makes trouble, he doesn't get ahead." One Egyptian journalist confirmed this opinion in an interview with Human Rights Watch: "Prosecutors have a deep relationship with the government. This is a possible defect." The structure of the legal system thus permits the executive to exercise control over all three functions in the administration of justice (investigation, enforcement, and application) because they are concentrated in one executive institution, the Ministry of Justice. Most significant is the executive's unchecked power over the prosecutorial branch of the system.

The structure of the system also makes the independence and objectivity of the judiciary difficult as most judges were previously niyaba, despite a law requiring that at least twenty-five percent of judges emanate from the private sector. It follows that judges are thus often adjudicating cases presented by their former colleagues. This situation can lead to favoritism instead of neutrality, as well as corruption in the extreme cases. The lack of investigation of allegations of torture and the nearly perfect conviction rate of political defendants support these assertions. Although the courts have repeatedly ordered the release of persons held arbitrarily by the SSI, have awarded compensation to victims of torture, and have excluded as evidence confessions proven to have been obtained under torture; another branch of the executive, (the Ministry of Interior and its police arm, the SSI,) has deceived the courts by detaining suspects incommunicado, and by falsifying records. Human Rights Watch has discovered evidence of numerous persons detained at police stations or SSI offices without any record of their stay. The SSI also routinely moves detainees from one location to another to maintain the incommunicado de-

160 Id. at 139.
161 Id.
162 Id.
163 Id.
164 Id.
165 Id.
166 Confidential source (on file with author).
167 HUMAN RIGHTS WATCH, supra note 27, at 133.
168 See id. at ch. 2.
tention. When records are kept, dates are apparently falsified. The Egyptian legal system is thus being compromised from within, by the institution designed to maintain its integrity, the executive branch.

2. Actors in Legal Systems

a. Institutional Actors

There are non-quantifiable variables which also affect the enforcement of human rights, such as the personnel in the legal system. Analyzing the institutional structure of a legal system clouds one of the key factors in a legal system's success: the people who fill the ranks of the system's institutions. Evaluating the personnel of a legal system on an empirical basis is difficult. In the review of a legal system, however, the evaluation of the personnel who perform the functions of the system is indispensable. As shown above, the personnel regularly violate the law and abuse the rights of suspects. Although structural reform can resolve some of the abuses by checking or eliminating the power and discretion of certain personnel, there are other factors which affect the personnel and which account for abuses, such as professional training and commitment of the personnel.

Fewer abuses by American personnel may be attributed to the increased emphasis of professionalism and ethics training in the U.S. The personnel filling the ranks of the criminal justice system have received professional ethics education, and are bound by a code of professional conduct. Arguably, such lawyers and judges will be less corruptible and more committed to upholding the ideals of the law than their Egyptian homologues who lack that specialized education and training.

The lack of sources on professionalism training of Egyptian lawyers leads to the conclusion that legal education and professional training in Egypt might be less focused on ethics and professionalism. This difference in training is undoubtedly due in part to the vast difference in financial resources available to the U.S. and Egyptian governments as well as their respective bar associations.

The limited resources of which the Egyptian state and the bar, however, cannot excuse all insufficiencies of the system. The U.S. experience of human rights violations due to failures in its system points to the fact that greater resources do not solve all problems. The resources must be allocated and expended efficiently. Targeting specific areas where

---

169 Id. at 65-66.
failures in procedural safeguards occur most often would be an efficient use of resources. This Note attempts to identify plausible areas in need of reform or development. Human rights advocates and the international community should study these areas in attempting to find solutions to human rights violations in the United States and Egypt.

b. Non-Institutional Actors

If there are inadequate institutional checks on abuses of power, non-institutional actors may counter those weaknesses in the system. The public, as an informed and educated actor, may play that role. In addition to the state or the bar, the media can also play a role in the system by acting as a mass educator on the legal system. The American public and media fulfill these roles. An informed public plays a significant role in the American system in checking abuses of power by the police, the prosecution or the courts. As a result of public legal education, the American suspect may be more likely to demand that the police read him or her the mandatory “Miranda rights,” or be less likely to volunteer information during an interrogation without counsel present. Although increased public legal education leads to an over-litigious society (such as the United States), public awareness of legal rights also translates into a more just criminal justice system for the American public by providing an additional check on police and prosecutorial discretion.

Although it is difficult to assess the extent of the legal education of the Egyptian public from the available source material, the information gathered implies that the Egyptian legal institutions have not focused on public legal education. Just as there might be less focus on ethics training for lawyers, there might be less focus on launching a mass public education campaign. Again, this difference in focus is due in part to a lack of resources. Thus, in an attempt to improve the criminal justice system in Egypt, this area is also worthy of targeted resources.

171 In recent years, Courtroom Television (Court T.V.) and Cable News Network (CNN) have contributed to the legal education of the U.S. public. See, e.g., Steven Brill, Reality Television: An Antidote to the Media Circus, LEGAL TIMES, July 25, 1994, at 20.

172 This is in contrast to the U.S. experience, where the American Bar Association organizes public legal education campaigns. See, e.g., C. Thomas Ross, Two Bicentennials: Making the 1980s a Decade of Constitutional Literacy, 68 A.B.A. J. 434 (April, 1982) (reporting on a major ABA-funded campaign to educate the American public about the Bill of Rights).
3. Internal Threat to Security of State

The serious threat to the viability of the Egyptian state which the ongoing fight between government forces and opposition Muslim fundamentalist groups pose has obviously compromised the legal system’s theoretical structure and foundations, as organized in Egyptian law. The threat facing Egypt is currently particular to many developing states, especially in predominantly Muslim states facing a rise in political Islamic movements, but not to any Western state. Freedom from torture, as a non-derogable right under international law, cannot be justified or contextualized. Freedom from arbitrary, incommunicado, and administrative detentions, however, are not mentioned in human rights instruments as non-derogable rights under a state of emergency. The problem cannot be ignored when reviewing a country’s human rights practices. Therefore, recommendations and solutions must include proposals to help the violating state with its real public security problems, without compromising individual rights. This necessary inclusion implies that human rights advocates should reevaluate their blanket policy of demanding cuts in Western aid to states guilty of violating human rights standards, and advocating international isolation of those countries.

CONCLUSION: PROPOSALS FOR INCREASED ENFORCEMENT OF HUMAN RIGHTS

Closing the gap between the text of the law and the application of that same law requires increased enforcement of the existing law, as well as a partial reform of the law. As shown above, systemic misapplication of the law suggests that the institutional structure of the system may need change. The cases of violations of human rights analyzed above reflect the fact that unchecked abuse of police and prosecutorial discretion

---

173 In addition to Egypt, Algeria, Libya, Morocco, Tunisia, and Turkey (to name only a few) are all facing varying degrees of armed political opposition based on Islamic ideologies. John Murray Brown, A Debut of Fire for Turkey’s Premier: First Woman PM Names Cabinet Amid Troubles at Home and Abroad, FIN. TIMES, July 6, 1993, at 3; Mark Nicholson, Tunisia Refines Battle Against Fundamentalists: The Government Continues its Assault on Islam Despite Rising Economic Pressures, FIN. TIMES, June 2, 1993, at 6; The Maghreb: How to Ride Islam’s Tiger, ECONOMIST, July 8, 1989, at 48.

account for the violations. Reform of Egyptian criminal procedure should focus on promoting and maintaining the independence and neutrality of the judiciary, and increasing the institutional checks on police and prosecutorial discretion. Human rights advocates should also focus on the areas mentioned above, such as 1) increased resources for professional training, 2) development of public legal education programs, and 3) Western economic aid targeted at alleviating the economic problems which ultimately cause the social instability in Egypt and other countries similarly situated.

The problem on which scholars studying the Egyptian criminal justice system have focused is the unification of all functions of the criminal justice system in one institution, the Ministry of Justice. The key structural reform to evaluate is the separation of functions, notably to reserve the function of applying the law to a neutral and independent judiciary, without interference from other branches.

The first reform of the Egyptian system should be to enforce the existing laws which are aimed at maintaining the independence and objectivity of the courts. One such law mandates that twenty-five percent of the judges come from outside the ranks of the prosecutorial branch, but is not enforced at all. As demonstrated above, an independent judiciary is key to the integrity of a criminal justice system. The lack of enforcement of this specific law might be linked to the perceived lack of professional training of lawyers in the private sector. This problem illustrates the thesis that a lack of resources is a factor which can explain the disparity in the enforcement of human rights norms. Effective structural reform should, therefore, be linked to a targeting of increased resources.

To increase the independence of the prosecutor general’s office from the executive, as well as the internal security forces, substantive legal reform should include a prohibition against appointing a prosecutor general with ties to the Ministry of Interior security forces or military branch. To further separate the enforcement branch from the military and internal security branches, SSI officers should not be conferred a law degree from the Police College. Lawyers should all receive the same education to ensure the same training and most importantly, the same emphasis on which principles the legal system is designed to protect. The Police College must emphasize the law enforcement aspect and the interests of the public, whereas universities must emphasize the interests of the suspects and defendants, thus providing a more balanced approach

---

175 See Mustafa, supra note 152, at 751.
176 Confidential source (on file with author).
to the law.

The human rights debate on widespread abuses is more focused on redefining the rights protected in order to accommodate violating states, than on analyzing why the violations occur despite the violating states fulfilling their international obligations in their domestic law. An analysis of the systems in which more of the violations occur show that violations may be decreased by certain structural and procedural changes in the legal systems, rather than by redefining the international standards.

Although it is easier to resolve the problem of human rights violations facing the international community by resorting to a cultural relativist analysis, this solution undermines and dilutes the international norms of human rights designed to protect our most fundamental right to human dignity. This focus on cultural explanation and perceived cultural differences in values, mostly advocated by Westerners, ultimately only quells the cries for help to the United Nations and Western governments from those individuals countries whose rights have been abused. The international community should heed the voices of dissenters whose rights have been egregiously violated and demand greater enforcement of international human rights norms from the violating states. This response would reflect the ideal of international human rights law, whereas the current trend to accommodate the political interests of the violating regimes completely undermines the authority of human rights law.

Sohail Mered*

---

* B.S.F.S., School of Foreign Service, Georgetown University 1990; J.D. Candidate, Case Western Reserve University School of Law 1996. The author thanks Professor Hiram E. Chodosh for his encouragement and dedicated guidance.