LABORATORY OF HUMAN RIGHTS: THE INTERNATIONAL HUMAN RIGHTS LAW SYSTEM THROUGH A FEDERALISM LENS

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ABSTRACT

This paper analyzes the international human rights legal system through a novel lens based on Justice Brandeis' 'laboratory of democracy' theory to prove the system is working as intended. International human rights law thrives in an ecosystem called the 'laboratory of human rights' which utilizes federalism principles to continuously advance universal human rights norms by harnessing cultural diversity to solve localized issues. This ecosystem came into existence through the UDHR which was created through multilateralism, or a democratization of international law, and granted an endowment of initial abstract universal baseline human rights to the global citizenry. Grassroots advocates experiment with these baseline universal norms by infusing culturally derived solutions which then advance either through the administrative state or judiciary at the State level. These experimentations may eventually advance up to the human rights treaty bodies which use their quasi-amendment making process, or General Comments, to interpret the experimentation into its relevant human rights treaty to create a new universal norm. The 'laboratory of human rights' process occurs with every Member State, but the United States provides an example where it engages implicitly in the process, even though recent Supreme Court jurisprudence and government officials maintain skepticism in the field of international human rights law.

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I. INTRODUCTION

During his tenure as Secretary General to the United Nations Dag Hammarskjold described the United Nations as an organization that, "was not created to take mankind to heaven, but to save humanity from hell."[1] This perception of the international legal order has been embraced by skeptics, but it teases out a successful aspect of the United Nations: its creation and advancement of international human rights law to protect humanity through economic and social security. President Roosevelt proposed economic and social human rights as a means of securing world peace which overlays the New Deal's objective of creating social safety nets at a domestic level; the scaling approach of transferring successful domestic human rights policies to global policy is the crux of this paper. International human rights are intended to act as a universal baseline protecting the most oppressed and marginalized populations; to determine human rights' efficacy we must look at how these treaties affect dissent of the State.[2] Scholars have empirical evidence finding, "even if a treaty doesn't prevent all human rights violations, it does reduce them."[3] This shows the current human rights law (HRL) system is working and, rather than a complete overhaul of the system, which would undermine the decades of progress made on international

1. Nick Bryant, *UN: Seventy years of changing the world*, BBC NEWS (Sept. 28, 2015), https://www.bbc.com/news/world-us-canada-34310354.

2. Emily Hencken Ritter, *Human rights treaties benefit the world's most oppressed*, VAND. UNIV. RSCH. NEWS (June 17, 2019), https://news.vanderbilt.edu/2019/06/17/human-rights-treaties-benefit-the-worlds-most-oppressed/.

3. *Id.*

HRL, only tweaks to the experimentation processes are needed. This experimentation process can be explained through the lens of Justice Brandeis' conception of the 'laboratory of democracy.'

The UN Charter was crafted and tempered in 1945 in San Francisco, at a time when States' territories were fractured and the horrors perpetrated by Nazi Germany were fully realized during the Allied Powers' liberation of concentration camps.[4] The horrors perpetrated by World War 2 and the Holocaust led directly to the creation of human rights law as a way to proactively secure peace through economic and social security under article 1 of the UN Charter.[5] Like he did with the New Deal in the United States to combat the Great Depression, President Roosevelt zealously promoted economic, social, political, cultural, and civil rights internationally to prevent a third World War.[6] While President Roosevelt passed away mere weeks before the signing of the UN Charter, his wife, Eleanor Roosevelt, ensured these same rights were soon codified in the International Bill of Rights.[7]

The Universal Declaration of Human Rights (UDHR) endowed human rights to the global citizenry irrespective of their sovereign ruler and bound States under customary law. The UDHR resembles the United States' Bill of Rights because it laid out a list of vague and broad rights. It differs because the US focuses on civil and political rights, whereas the UDHR includes Economic, Social, and Cultural (ESC) rights.[8] The UDHR started the 'laboratory of human rights' by establishing baseline universal norms through multilateralism, which now allows experimentation by advocates within sovereign states to address localized problems. Localized

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4. *Liberation of Nazi Camps*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, https://encyclopedia.ushmm.org/content/en/article/liberation-of-nazi-camps (last visited Oct. 12, 2024).

5. A "[p]urpose[] of the United Nations [is] . . . [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . " U.N. CHARTER art. 1, ¶ 3.

6. FDR's Four Freedoms Speech were the seeds that sowed the codification of human rights in international law today. *FDR and the Four Freedoms Speech*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY & MUSEUM, https://www.fdrlibrary.org/four-freedoms (last visited Oct. 12, 2024).

7. OHCHR, *International Bill of Human Rights: A brief history, and the two International Covenants*, https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights, (last visited Oct. 23. 2024)/.

8. *See generally* G.A. Res. 217A (III), *Universal Declaration of Human Rights* (Dec. 10, 1948), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf; The vagueness of the rights were intentional under the UDHR as the preamble acknowledge the malleability of the rights and the need, "to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction." *Id.* at preamble.

experimentation infuses universal baseline norms with cultural diversity to progress the baseline. This 'laboratory of human rights' approach to HRL mirrors the 'laboratory of democracy' theory induced by federalism.[9] Successful experimentation of rights and freedoms progress through the state and regional institutions up to treaty bodies, which legally codify the new baseline norm, binding it to all member States through multilateralism. This new baseline norm trickles down for localized advocacy and the experimentation process starts over, creating a cyclical ecosystem of HRL.

Multilateral human rights treaties are unique because they are ever evolving through an unentrenched amendment-making process called General Comments. These General Comments rely on States' practice and regional human rights courts jurisprudence which then synthesize norms into the lowest common cultural denominator.

Even with the success of international HRL mechanisms, there are several headwinds facing the development of HRL in today's increasingly authoritarian and isolationist world that threatens to stymie experimentation in the laboratory.[10] Scholars have argued that international HRL, "doesn't do much; we should face that fact and move on."[11] This assumes a more conducive international constitutional drafting process could occur, but constitution making is idiosyncratic and the post-WWII political atmosphere was humbling to even the largest of States. There is no guarantee a more conducive international constitution would be created, especially like the UN Charter which is tiered and allows for an efficient advancement of international HRL with the treaty bodies quasi-amendment making process. Additionally, cultural relativism has been used to deflect State responsibility for protecting an individual's fundamental human rights.[12] Cultural diversity should not be a roadblock for the advancement of human rights because the two are inherently intertwined. By viewing the development of

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9. Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit sums up 'laboratories of democracy' as, "American federalism allowed the states to serve as laboratories of innovation for protecting individual liberty and property rights." Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation*, AM. L. INST. (Dec. 22, 2021).

10. *See Amnesty researchers share their biggest human rights concerns in 2023-24*, AMNESTY INT'L (Apr. 24, 2024), https://www.amnesty.org/en/latest/campaigns/2024/04/amnesty-researchers-share-their-biggest-human-rights-concerns-in-2023-24/.

11. Eric Posner, *Have Human Rights Treaties Failed?: Human Rights Law Is Too Ambitious and Ambiguous*, NY TIMES ROOM FOR DEBATE, Dec. 28, 2014, https://www.nytimes.com/roomfordebate/2014/12/28/have-human-rights-treaties-failed.

12. LEA BRILMAYER & TIAN HUANG, *The Illogic Of Cultural Relativism In Global Human Rights Debate*, THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2014: VOLUME I, abstract (Giuliana Ziccardi Capaldo ed. Online Oxford Academic edn. 2015).

human rights through this quasi-federalism lens, the development of HRL can reconcile with the relativist view. Cultural diversity provides localized solutions to human rights violations where relevant stakeholders can use universal norms as a tool to adapt to their needs. A world where diverse cultures can flourish yet every individual may enjoy ever growing freedoms is a novel prospect and why this 'laboratory of human rights' approach should gain traction in how we view the development of HRL.

This article will start by analyzing the UN Charter's constitutional scheme. The first section will address the United Nation's quasi-federalism approach, the tiering of the UN Charter, and the unique nature of multilateral human rights treaties. The article will next dig into the relativism and universalist debate and why the two are reconcilable and interdependent for the advancement of HRL. The article will then turn to constructing the 'laboratory of human rights,' starting with the stakeholder's role in advocating and ending, or beginning, at the treaty bodies quasi-amendment making process of human rights treaties. The article will finally look at two case studies of experimentation that progressed through the 'laboratory of human rights:' Occupational Safety and Health rights and truth as an absolute defense, and the 'actual malice' standard as protections of speech.

II. THE UN CHARTER: A PERFECT CONSTITUTIONAL SCHEME?

A. The UN Charter and the 'international bill of rights' Constitutional Beginnings

1. The UN Charter

The UN Charter is the most comprehensive peace agreement created in human history.[13] The similarities between the UN Charter and the US Constitution are many, from the governmental functions to prioritization of human rights enshrined in their bill of rights. Both Constitutions harnessed the necessary constituent power and asserted that, "We the People" make, and break, these

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13. "[T]he United Nations has often been called upon to prevent disputes from escalating into war, or to help restore peace following the outbreak of armed conflict, and to promote lasting peace in societies emerging from wars." *Peace and Security*, GLOBAL ISSUES, https://www.un.org/en/global-issues/peace-and-security#:~:text=Since%20the%20UN's%20creation%20on,in%20societies%20emerging%20from%20wars, (last visited Oct. 24, 2024).

organizations through a democratic process.[14] The sociological harm caused by the Holocaust and the disrespect for treaties and sovereign borders perpetrated by the Axis Powers forced hegemonic and small states alike to voluntarily cede sovereign power to an international organization, UN charter, and to their own sovereign people through the endowment of rights in the UDHR.[15] The US Constitution, and subsequent Constitutions, derived their legitimacy through outward commitment to the 'law of nations' contrasted to the UN Charter which inversely derived its legitimacy through an inward social contract of the 'law of nations' between States and their citizens.[16]

The United States territory was not mired by the physical horrors of the war, so it invited international law scholars and diplomats to create the global legal think tank for synthesizing the New World Organization that would be created out of the ashes of the League of Nations and World War II.[17] During the signing of the UN Charter in San Francisco, President Truman stated,

> [t]he Constitution of my own country came from a Convention which—like this one—was made up of delegates with many different views. Like this Charter, our Constitution came from a free and sometimes bitter exchange of conflicting opinions. When it was adopted, no one regarded it as a perfect document. But it grew and developed and expanded. And upon it there was built a bigger, a better, a more perfect union.
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> This Charter, like our own Constitution, will be expanded and improved as time goes on. No one

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14. Bardo Fassbender tied the two Constitutions' operational constituencies together, "[o]bviously, this opening was modelled on the preamble of the Constitution of the United States ('We the People of the United States'). The Covenant of the League of Nations of 1919, by contrast, opened with the classical words of a treaty: 'The High Contracting Parties . . .'" BARDO FASSBENDER, CHAPTER 14 'WE THE PEOPLES OF THE UNITED NATIONS' CONSTITUENT POWER AND CONSTITUTIONAL FORM *in* INTERNATIONAL LAW *in* THE PARADOX IN CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Online Oxford Academic edn. 2008).

15. *Id.*

16. *See* Andrew Langer, *Guarding American Sovereignty: The United States Constitution and Its Protections Against World Government Control*, CONSTITUTING AMERICA (Aug. 18, 2022), https://constitutingamerica.org/90day-aer-guarding-american-sovereignty-the-united-states-constitution-and-its-protections-against-world-government-control-guest-essayist-andrew-langer/.

17. The Commission to Study the Organization of Peace was the leading NGO responsible for creating the United Nations and its ties to the US Government was immense, Robert P. Hillmann, *Quincy Wright and the Commission to Study the Organization of Peace*, 4 GLOBAL GOVERNANCE 485, 485-86 (1998), file:///C:/Users/nickl/Desktop/Hillmann-QuincyWrightCommission-1998.pdf.

> claims that it is now a final or a perfect instrument. It has not been poured into any fixed mold. Changing world conditions will require readjustments—but they will be the readjustments of peace and not of war.[18]

Truman discusses an ambitious unentrenched amendment making process for the Charter to secure peace; this malleability is exemplified in multilateralism which proceeded to create the core human rights treaties.

The UN Charter's constitution making process benefitted from a similar stable political environment as the United States Constitutional drafting process.[19] For the United States, a collective of relatively politically stable colonies brokered their Constitution, while for the United Nations, sovereign States came together to draft a similar peace treaty which required ratification from States recognized as equals for the first time in the international community. Both Constitutions articulated the equality of States and facilitated fundamental freedoms and human rights as core tenets within their documents.[20] The United States took advantage of federalism to create a binding Constitution which embraced comity among States, and the UN Charter proffered a newfound principle coined 'multilateralism,' which created the democratization of international law making through the equality of Member States.[21]

While it is true international customary norms existed before the drafting of the UN Charter, better known as the 'law of nations' at that time, customary norms were molded by hegemonic powers throughout history and lacked consolidation of laws and custom from every State and culture.[22] This idea of customary law through might plays into Bentham's criticism of the Roman code which is the origin of the 'law of nations,' "[w]ritten law is the law for civilized nations . . . [and] customary law, for brutes."[23] Multilateralism treaty ratification remedied this 'might is right' philosophy with the

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18. United Nations Conference on International Organization, Vol. I: General, at 715 (San Francisco 1945).

19. FASSBENDER, *supra* note 14.

20. *See generally* US CONST.; *see generally* UN CHARTER.

21. *Multilateralism, International Relations*, BRITANNICA, https://www.britannica.com/History-Society (last visited Nov. 14, 2024) ("Multilateralism has a long history, but it is principally associated with the era after World War II, during which there was a burgeoning of multilateral agreements led primarily by the United States").

22. *See generally* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUROPEAN J. OF INT'L L. (2005).

23. GEORGE C. CHRISTIE, PATRICK H. MARTIN, & ADAM J. MACLEOD, JURISPRUDENCE, TEXT AND READINGS ON THE PHILOSOPHY OF LAW 602 (West Academic 4th ed. 2020).

Charter and its most prolific document, the UDHR. The United Nations Economic and Social Council's first Secretary General ordered the compilation of human rights law from every member of the United Nations, representing a shift towards ascertaining a broader understanding of customary norms.[24] This was not possible prior to the federalism-like cooperation of Member States under one international organization. Once again the United States played a significant role in the inspiration for this approach with the cornerstone document of the UDHR, the "Statement on Essential Human Rights."[25] This document was created by the American Law Institute and derived from constitutions and customs from cultures around the world and consulted global international scholars with various cultural backgrounds.[26] This approach ushered a universalist approach into international law which embraced the notion of equality, not just for Member States, but all mankind.[27]

The UDHR acts as a manifesto which endows inalienable rights to the global citizenry and, while it maintains no enforcement mechanisms, it is recognized as customary international law. The multilateral human rights treaties took those endowment of rights and attached compliance mechanisms to them. While scholars are quick to criticize international HRL, it was no small feat for States to voluntarily grant an expansive endowment of rights to their people.

2. Tiering of the UN Charter: An Efficient Rights Amendment Making Process

The main difference between the two constitutions is the UN Charter effectively utilizes a tiered constitutional approach which entrenched the structure and functions of the United Nations principal organs, while the International Bill of Rights remains unentrenched and allows for simple amendment making to progress HRL.[28] This approach is radically different from the US Constitution's entrenched Bill of Rights, albeit the US Constitution only enumerates civil and political liberties in their bill of rights whereas the international bill of rights also guarantees ESC rights.

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24. UN ESCOR, E/RES/5(I), *Resolution on the establishment of a Commission on Human Rights with a Sub-Commission on the Status of Women* (Feb. 16, 1946).

25. *The Statement of Essential Human Rights*, ALI NEWS, Dec. 10, 2018, https://www.ali.org/news/articles/statement-essential-human-rights/.

26. *Id.*

27. *See id.*

28. *See* MILA VERSTEEG & EMILY ZACKIN, CONSTITUTIONS UNENTRENCHED: TOWARD AN ALTERNATIVE THEORY OF CONSTITUTIONAL DESIGN (Cambridge University Press Online 2016).

Constitutional entrenchment is intended to serve the Odyssey's proverbial goal of tying a government to the mast of their institutional ship and refraining from the temptation of self-serving desires.[29] Entrenchment becomes a problem when addressing the obligations and duties of the government to its people. The United States opted for entrenchment of these duties and obligations with the bill of rights and a cumbersome amendment-making process. The balancing of different Constitutional purposes has led scholars to argue for a tiered approach to the amendment-making process. This tiered approach should be adapted by future State constitution makers because it facilitates a robust rights program while maintaining democratic norms. Some argue international HRL, codified by the international bill of rights, is "too ambitious and ambiguous."[30] The United Nations' creation of international HRL through the international bill of rights received unanimous support, so it is confounding to argue why it seems too ambitious after nearly a century on the books. This argument falls into the pitfall that constitutions makers fall prey to: creating a rigid bill of rights that tend to be flouted anyway rather than focusing on rigid structuring of government institutions.

The UN Charter's functioning is entrenched and follows Madison's belief that a constitution must, "first enable the government to control the governed; and in the next place oblige it to control itself."[31] The UN Charter has maintained primacy for nearly a century in international law and bucks the trend that constitutions require frequent restructuring.[32] For our purposes the entrenchment of the functions of the UN Charter codified multilateralism in its system, which is necessary for international HRL to maintain universality.

The Charter is also unique because it entrenches human rights and fundamental freedoms as a core principle of the Charter under Article 1, but it does not lay out a specific process of how to protect those rights.[33] This intentional ambiguity was contested during the Charter drafting where some States wanted an International Bill of Rights attached to the Charter itself, analogous to the US Constitution. This would have made the rights resistant to amending much like in the United States where codification of future rights through formal amendment is unlikely, short of a

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29. *Id.*

30. Posner, *supra* note 11.

31. VERSTEEG ET AL., *supra* note 28. (quoting James Madison, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, THE FEDERALIST 51 (1788)).

32. *See id.*

33. UN CHARTER art. 1.

catalyst to break the political logjam. Instead, the International Bill of Rights was deferred to a later date where it again used multilateralism to create the UDHR and the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). These two treaties effectively legally bind the principles of the UDHR to States who ratify the treaties.

The multilateral human rights treaties are novel because they are ever evolving, embracing Truman's notion of a living international Constitution. At first glance, the International Bill of Rights, and seven other human rights treaties that make up the core human rights treaties, may seem entrenched, but they are not contractually based agreements in the traditional treaty sense. They allow for quasi-amendment making with relative ease as discussed below.

The ratification of the ICCPR and ICESCR was the epitome of States tying themselves to the mast and ensuring fundamental rights and freedoms to their own people. However, the articles within human rights treaties are vague with little to no meat on the bones. This would pose a problem for typical treaties which are static and fixed in nature, but the treaty bodies play a quasi-amendment making process through their role of creating interpretative General Comments. This is what makes the international bill of rights unentrenched.

International HRL is also unique because it legally binds States to one another by imposing obligations on the States to their citizens, a radical proposal when one stops to ponder. This shows the dynamic nature multilateralism human rights treaties have compared to traditional static treaties because the standards of decency are forever evolving as society changes and progresses.[34] Multilateralism must walk the tightrope between ascertaining political will to ensure States continue drafting HRL treaties and facilitating activism by the global citizenry which can bypass the State when the interest of the State and its sovereigns are not aligned. This is evident in the creation of the Convention Against Torture which, "owes its existence to the global mobilization of citizens. . . . HRL does not oppose powerful states against small states but rather opposes those holding power in the international community against a network of international solidarity."[35] The unentrenchment of rights through treaty bodies cannot be

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34. *See generally* Roper v. Simmons, 543 U.S. 551 (2005).

35. O. GLACIER, CHAPTER 5 HUMAN RIGHTS LAW AS A TOOL FOR INTERNATIONAL SOLIDARITY *in* UNIVERSAL RIGHTS, SYSTEMIC VIOLATIONS, AND CULTURAL RELATIVISM IN MOROCCO (online edn. 2013).

overstated as the most important aspect of international HRL and the laboratory.[36]

B. Human Rights Universalist v. Cultural Relativism

The 'laboratory of human rights' reconciles the relativist and universalist approaches because it requires both heterogeneity, which is the epitome of cultural diversity, and interdependence, or universal baseline norms.[37]

Cultural relativism is the process of viewing social and ethics norms from the cultural lens of which they are derived.[38] This approach, created by Franz Boas, was a tool used to combat ethnocentrism which proliferated because of colonialism.[39] Cultural relativism has been fruitful to the understanding of law because rather than passing judgments entrenched in improper biases, researchers now study the behaviors to better understand how and why cultures are diverse.[40] This can be best analogized to the marketplace of ideas for speech where diverse discourse is encouraged and the popular ideas make their way to the top.[41] Cultural diversity is necessary in our globalized society because it promotes peace and makes society a more interesting place to live.[42] Cultures have their own beliefs and interests which offer alternative ways of solving problems.[43] Cultural diversity is imperative to preserve because the United Nations asserts that a third of global conflicts have a cultural dimension to them.[44]

Additionally, cultural diversity is a phenomenon from an evolutionary adaptation to benefit human survival because of human's lack of genetic diversity.[45] Distinct cultural evolution outpaces biological evolution and humans now require cultural

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36. A strong entrenchment of institutional norms in domestic constitutions and monist adoption of international law would be the optimal Constitutional format.

37. Doni Gewirtzman, *Complex Experimental Federalism*, 63 BUFF. L. REV. 241, abstract (2015).

38. *Cultural Relativism*, CARNEGIE COUNCIL, https://www.carnegiecouncil.org/explore-engage/key-terms/cultural-relativism#:~:text=Cultural%20relativism%20is%20the%20view,structure%20relations%20within%20different%20societies (last visited Oct. 5, 2024).

39. Kendra Cherry, *Understanding Cultural Relativism and Its Importance*, VERYWELLMIND, July 6, 2023, https://www.verywellmind.com/understanding-cultural-relativism-7549709.

40. *Id.*

41. *See id.*; *see also* David Schultz, *Marketplace of Ideas*, FREE SPEECH CTR. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/marketplace-of-ideas/.

42. Rebecca Twose, *The Importance Of Cultural Diversity*, LANGUAGE INSIGHT, May 18, 2021, https://languageinsight.com/blog/2021/importance-cultural-diversity/.

43. *Id.*

44. *See id.*

45. R. A. Foley & M. Mirazón Lahr, *The evolution of the diversity of cultures*, NAT'L. CTR. FOR BIOTECH. INFO. (Online edn. 2011,

diversity for not only human flourishing, but survival.[46] The fact that, "[h]umans are genuinely unique in the rate at which they can generate differences between communities," exemplifies the need to maintain strong cultural diversity, however that does not mean that individuals are not transient between cultures.[47] Cultural diversity is a necessary survival mechanism because, "approximately 85 percent of the genetic variation observed in human populations occurs within, rather than between populations."[48] This means cultural diversity is more robust at solving natural emergencies compared to biological adaptation, further supporting the need of human rights experimentation by diverse cultures.

Universality in HRL can be described as: "human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics."[49] At this principle's core is the UDHR which is the cornerstone of today's human rights system.[50] These universalities in the UDHR act as baseline general principles of human rights.[51] The crux of the argument is there are no universal norms which may judge cultural norms.[52] This means to create a universal norm, it would have to overlay every culture and not infringe upon the values of any culture.[53] International HRL was born out of the horrors of the Holocaust which intended to eradicate an entire culture, so reconciling the universalist and relativist approach was paramount to the development of HRL.[54] The UN Charter succeeded in universally recognizing human rights and fundamental freedoms recognized by both the global citizenry and their governments.[55]

Ulf Johansson Dahre nails the political paradox of States acknowledging the universality of human rights being indivisible, interdependent, and interrelated while acknowledging the need for cultural respect because, "the significance of national and regional

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46. *Id.*
47. *Id.*
48. *Id.*
49. OHCHR, *Universality and diversity*, https://www.ohchr.org/en/special-procedures/sr-cultural-rights/universality-and-diversity (last visited May 5, 2024).
50. *Id.*
51. *Id.*
52. Cherry, *supra* note 39.
53. *Id.*
54. *Introduction to the Universal Declaration of Human Rights*, FACING HISTORY & OURSELVES, May 12, 2020, https://www.facinghistory.org/resource-library/introduction-universal-declaration-human-rights#:~:text=The%20horrors%20of%20World%20War,use%20of%20his%20own%20language.%22.
55. Ulf Johansson Dahre, *Searching for a middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights*, 21 INT'L. J. OF HUMAN RIGHTS 611 (2017).

particularities and various historical, cultural and religious backgrounds must be borne in mind."[56] This denotes the obligation governments play in advancing human rights while each right endowed by the UDHR is sovereign power ceded to their citizens. Dahre explains how cultural narratives adapt abstract universal rights language to fit their rights advancement in localized settings,

> Human rights are an open text used on the basis of the user's purposes. Rights content is constituted in social practice, in terms like 'we must stop illegal logging', and the cultural meaning local actors ascribe these rights. This two-sided process of understanding human rights occurs at three levels simultaneously. The fact that people act locally does not mean that the global level is insignificant. It just has a different meaning than we might imagine from an overall perspective of the UN, or the like. The airy and abstract principles have no obvious meaning or practical use in a local context, if they are not given a concrete framing and content.[57]

This relativistic universalism calibrates universal human rights with local cultural practices. Local adaptation of universal rights is a grassroots phenomenon that takes place where the individual's rights are anchored by the problems they are facing from the nation state. Pure relativists fail to acknowledge that discourse of universal human rights takes place between the Nation State and their citizenry, while pure universalists don't realize just because local actors aren't using their aspirational language, rights experimentation is still taking place.[58] This relativistic universalism is the experimentation in the 'laboratory' and requires a multi-prong approach: NGOs can help individuals realize rights and anthropologists study the localized application of these rights which they must articulate to international HRL mechanisms.

Nana Agyeman argues the universalist and relativist relationship is reconciled through a State's constitution making process.[59] They find constitutional rights are universal norms adapted to relativist rights by, "deliberating and voting over rights which are either materially human rights, or conceptually informed

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56. *Id.*
57. *Id.*
58. *Id.*
59. Nana Kwame Agyeman & Alfred Momodu, *Universal Human Rights 'versus' Cultural Relativism: The Mediating Role of Constitutional Rights*, 12 AFR. J. LEGAL STUD. 23, 45-46 (2019).

by human rights, and reengineering these rights into constitutional rights, the people of a constitution are able to relativise human rights to fit their peculiarities."[60] This is the first, or final, stage of the 'laboratory of human rights,' localizing an international human right with the cultural needs of the State creating a symbiotic relationship.[61] Agyeman and Momodu intuitively invoke the term 'symbiotic' arguing in passing that universal international human rights benefit from the localized 'relativisation' of rights as well,

> [p]aradoxically, whilst constitution makers are busy making universal ideals relative, they are . . . incorporating universalism into their national polity. . . . In so doing, cultural relativists contribute to the jurisprudential modes in international law through the knitting together of ideas and ideals. This is crucial given that the international human rights system is often criticised as overlooking inputs from non-western thought, philosophy, and values. . . . [W]e see a bridge that connects [universalism and relativism].[62]

They use the word paradox alluding to a linear process, not realizing the cyclical process of their 'relativisation' of rights, which emphasizes the localization of universal rights as both the end and beginning of the 'laboratory.' This 'relativisation' of rights supports the experimental nature of advancing universal rights through culturally diverse practices. The 'laboratory of human rights' solves a key issue of the 'relativisation' theory; codifying rights must undergo State constitutions amendment making processes which is traditionally difficult. Shifting this amendment making process to the international treaty bodies creates an expeditious advancement of HRL.

Finally, research must occur to find when a State is acting in a social and cultural context in their action on behalf of their sovereigns or if they are acting in a self-serving capacity under the guise of cultural diversity. There occur times throughout history where governments cleave themselves from their citizens' political will. In their criticism of the UDHR, the American Anthropological Association (AAA) acknowledged this paradox,

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60. *Id.*
61. *Id.*
62. *Id.*

> political systems exist that deny citizens the right of participation in their government, or seek to conquer weaker peoples. Underlying cultural values may be called on to bring the peoples of such states to a realization of the consequences of the acts of their governance must, and thus enforce a brake upon discrimination and conquest. For the political system of a people is only a small part of their local culture.[63]

This was known as the Nazi clause of the manifesto and the AAA acknowledged there is a point where a government may in fact be separated from its peoples' culture.[64] However, invoking Nazism created a perilously high threshold when this separation could occur. Citizens are traditionally the driver of cultural norms, and in these cases the State asserts themselves as the dictator of their citizens' cultural values. The days of anthropologists asserting that culture defines fundamental human freedoms and universal human rights as a way to blame local cultures and practices for oppression and inequality seems to be waning.[65] The reformed AAA declaration of 1999 stated, "The capacity for culture is tantamount to the capacity for humanity. Culture is the precondition for the realization of this capacity by individuals, and in turn depends on the cooperative efforts of individuals for its creation and reproduction."[66] It appears the AAA has come around to tethering cultural diversity and the preservation of humanity through human rights.

III. BACK TO THE "LABORATORY OF HUMAN RIGHTS"

Supreme Court Justice Louis D. Brandeis coined the phrase 'laboratory of democracy' in 1932 when he opined, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[67] The international HRL system is embraced by Member states both explicitly and implicitly. Multilateralism has proven to be an effective form of international federalism and is important because it created a social contract between States and

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63. Dahre, *supra* note 55.
64. *Id.*
65. *Id.*
66. *Id.* at 9.
67. Beth Noveck, *Open Government Laboratories of Democracy*, THE WHITE HOUSE PRESIDENT BARACK OBAMA, Nov. 19, 2009, https://obamawhitehouse.archives.gov/blog/2009/11/19/open-government-laboratories-democracy#:~:text=Brandeis%20wrote%20in%201932%2C%20%22that,and%20accountable%20government%20in%20history.

their citizens where rights could be advocated for at a localized level. The laboratory of human rights started with the initial endowment of universal rights in the UDHR. Successful experimentation advancing the UDHR's baseline ESC and civil and political rights could then matriculate up to the State government which, in turn, would be implemented throughout the country.[68] The administrative state is the branch of the State government best suited for scaling up ESC rights to a national level, whereas judiciaries are adept at inserting additional protections of citizens from their government in regards to civil and political rights. Regional human rights courts and U.N. agencies are pivotal in mining successful experimentations from domestic States. Finally, the treaty bodies may codify them into human rights law by infusing these experiments into human rights treaties through General Comments. These General Comments create a new baseline for the universal right which then precipitates to all Member States to start the experimentation process all over again at the local level by NGOs and other relevant stakeholders. States have implicitly engaged with the current international HRL system under this formula, but this approach to human rights law must be articulated for two reasons: 1. To preserve the current system because no two constitutions are the same and the international bill of rights synthesized an ideal system and 2. If advocates understand the 'laboratory' they can effectively advance their experimental rights.

A. The Initial Endowment of Rights

The UDHR officially launched international HRL; Ritter explains the importance of the endowment of rights bestowed by the UDHR as a bargaining mechanism,

> [t]reaties do more than just reduce repression, they also increase protest. . . . They create this expectation that the leader won't repress them if they come out to the streets and so people are demanding more. Treaties make it possible for people to ask for what they need and want—they actually change what people expect from their government.[69]

These bargaining endowments must be divided into two categories, absolute and baseline rights. Absolute rights are fully articulated at their conception, such as free expression or religion,

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68. See *id.*
69. Ritter, *supra* note 2.

and create an absolute sphere of protection around every individual. This sphere may be corroded by coercive action taken by the State reducing the size of the protective sphere.[70] Baseline rights are fundamentally not articulatable, such as the right to health and education, which are infinitely expanding due to human evolution.

B. Localized Experimentation of human rights

Local interpretation of universal norms is the starting point of the 'laboratory of human rights' because it negotiates universal and local values to address social, economic, cultural, and political problems faced by communities to pacifically compromise between the nation state and its citizenry. Dahre acknowledges the importance of localized experimentation for the 'laboratory of human rights' when he asserts, "[t]he solution is not to maintain a strictly principled stance on the content of human rights, but to see how they are used pragmatically in local social situations."[71]

The tension between the population and their government was unexpected by the, "[t]he architects of the Universal Declaration [who] believed that the state should be ultimately responsible for upholding human rights, and therefore that it would be governments who would lead the way on realizing them."[72] These architects, "envisioned a modern state that would be able to guarantee support to its citizens through social security, safety, and access to justice."[73] This tension is where critics of international HRL hang their hat. However, the 'laboratory of human rights' is a bottom-up approach where advocates first address local problems within communities. Grassroots activism takes the rights endowed by HRL and infuses their cultural flavor into them to better articulate them within their communities.[74] While the Aristotelian utopian state did not come to fruition through the UDHR, Eleanor

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70. Restrictions are levied on derogable rights and allowable under tests such as *Oakes* or the 'Margin of Appreciation' doctrine.

71. Dahre, *supra* note 55, at 29.

72. Gabriela Bucher, *Grassroots Activists Are Leading the Way on Human Rights*, THE FUND FOR GLOBAL HUMAN RIGHTS (Dec. 15, 2023), https://globalhumanrights.org/commentary/grassroots-activists-are-leading-the-way-on-human-rights/.

73. *Id.*

74.

> Such activism takes many forms. It is culturally, politically, and strategically diverse. Many activists may not identify explicitly with the language of the Universal Declaration of Human Rights . . . . However movements for social justice choose to frame their cause, the spirit of the Universal Declaration—that all people have the right to dignity, equality, and freedom—is embodied in their work.

Id.

Roosevelt was clear eyed on the peoples' role to advance, saying that "human rights [must] begin in 'small places, close to home.' These neighbourhoods, factories, and schools[ ]. . . are 'where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination."[75] Grassroots activism employing HRL is the most effective approach to advancing human rights because they build power in communities with small scale projects.[76] These activists, ranging from Black Lives Matter to the Great Wave Movement, "vary in their structure, their cultures, and their strategies. But they all share the resilience, courage, commitment, and vision to change the world."[77] Simply put, localized human rights defenders exemplify Justice Brandeis' and Eleanor Roosevelt's calls for experimentation to facilitate justice and equality.

Starting the advancement of human rights at the local level is necessary because it allows the citizenry to maintain their cultural diversity through self-determination which circumvents the state from dictating cultural values.[78] We can gather empirical evidence at the local level because modern anthropology has abandoned the outside approach through their study and has begun the process of conducting empirical research on human rights to contribute to local policy discussions.[79] While local people are the catalyst for experimentation, this exciting new approach to anthropology provides a way to analyze the interplay between cultural diversity and human rights and get successful experiments out of localized communities and into the State or International systems discussed below.

Unfortunately, bad actors realize the significance of this part of the 'laboratory of human rights' plays. The rise of authoritarianism has led to a direct targeting of local advocates through violence and the restriction of expression. The interaction between a strong democracy and robust human rights in a State is intuitive because democracy thrives on dissent which represents a well-protected minority.[80] The response must be for human rights defenders to

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75. *Id.*

76. *Grassroots Activism*, AMNESTY INTERNATIONAL USA, https://www.amnestyusa.org/get-involved/grassroots-activism/#:~:text=Grassroots%20activism%20begins%20when%20a,small%20to%20protect%20human%20rights (last visited Mar. 15, 2025).

77. Bucher, *supra* note 73.

78. *Grassroots Through the Years: Human Rights*, GRASSROOTS INTERNATIONAL (Aug. 2023), https://grassrootsonline.org/learning_hub/grassroots-through-the-years-human-rights/.

79. Dahre, *supra* note 55 at 14-15.

80. *US National Human Rights Cities Alliance*, https://wiki.humanrightscities.mayfirst.org/index.php?title=Main_Page (last visited Oct. 26, 2024).

flood the system with experimentation and create a proliferation of experiments that matriculate through the 'laboratory' leading to a successful democracy.[81] This is playing out in the creation of Human Rights Cities by municipalities which, "bring human rights to bear at home, drawing upon global human rights standards, institutions, and movements."[82] Many cities in the United States, like San Francisco, Pittsburgh, and Washington D.C., have embraced the human rights cities formula. This may seem like a novel approach to combat authoritarianism, but Hamilton and Madison understood the importance local communities played in combatting a tyrannical majority asserting, "the law of nations . . . is a proper object of municipal legislation."[83] Only time will tell whether the revitalization of democracy will dovetail with a proliferation of advancing human rights law by increased experimentation at the local level.[84]

C. States' Role in Human Rights Law

The State is the lynchpin between its citizens and the international community and has the most to gain, and lose, from facilitating a robust endowment of human rights. Hamilton and Madison emphasized the importance of the United States Congress not being ignorant of the 'law of nations.'[85] The founding fathers sought legitimacy in the international community with the US Constitution, and multilateralism sought legitimacy to the global citizenry through the International Bill of Rights. The equality of States through multilateralism requires comity of international human rights, something Justice Kennedy recognized when penning an opinion banning the child death penalty,

> [i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the

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81. *Id.*

82. *Id.*

83. THE FEDERALIST NO. 53 (Alexander Hamilton or James Madison).

84. Sarah Repucci & Amy Slipowitz, *Freedom in the World 2022, The Global Expansion of Authoritarian Rule,* FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule (last visited Nov. 14, 2024); This is a normative application which puts all human rights into the same bucket. An empirical study must be undertaken to better understand how different rights can be most effectively advocated at the local level.

85. THE FEDERALIST NO. 53 (Alexander Hamilton or James Madison), *supra* note 83.

> centrality of those same rights within our own heritage of freedom.[86]

Even with this optimism by the founding fathers, this level of the 'laboratory of human rights' is the most dubious to analyze because of differences in State constitutions and whether a State is monist or dualist when integrating international law. The United States has proven there are two reliable means by which human rights may pass from the local level to the international system and vice versa: through an independent judiciary or a robust administrative state. The United States federal government has operated in this capacity without explicitly stating its involvement in the 'laboratory of human rights.'

1. State Judiciaries Role in the Lab

Pluralism is the lifeblood of democracy, but it also always creates a minority whose rights must be protected to progress this system of government.[87] Facilitating those rights to the minority so a thriving democracy can occur is paradoxical because, "what distinguishes a tyranny of the majority from a genuine democracy is precisely pluralism. It's not majority-takes-all. It's the fact that there are anti-majoritarian institutions. Classically, that means an independent judiciary, . . . universities, and civil society institutions."[88] A strong independent judiciary is necessary to ensure the fox is not guarding the henhouse. Judiciaries are traditionally transparent and function as an explanatory tool between the citizens and their State as well as the state and international community.[89] This shows the judiciary's strength in protection of civil and political rights by articulating where legislators may levy restrictions of rights on the population. However, as shown in *Grootboom*, judiciaries are not adept at articulating how legislatures should enact ESC rights.[90] But *Grootboom* did exemplify there is some role for judiciaries in the

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86. Roper v. Simmons, 543 U.S. 551, 578 (2005).

87. Timothy Garton Ash, *Pluralism is the Lifeblood of a Genuine Democracy*, GEORGE W. BUSH PRESIDENTIAL LIBRARY (Feb. 23, 2021), https://www.bushcenter.org/publications/pluralism-is-the-lifeblood-of-a-genuine-democracy

88. *Id.*

89. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights, Comparative Experiences of Justiciability, Human Rights and Rule of Law Series: N0. 2, 16*, INTERNATIONAL COMMISSION OF JURISTS (2008) (quoting Bangalore Declaration and Plan of Action, para. 18(2), (1995)), https://www.icj.org/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf.

90. *See* Government of the Republic of South Africa and Others v Grootboom and Others [South Africa Constitutional Court] Oct. 4, 2000, 2001 (1) SA 46, https://www.saflii.org/za/cases/ZACC/2000/19.html.

advancement of ESC rights, which is to establish a crystallized baseline that has been ascertained in their State.[91] This narrative of ESC rights falls in line with the International Commission of Jurists' (ICJ) assertion that the judiciary maintains some role regarding ESC rights because,

> Specifying those aspects of economic, social and cultural rights which are more readily susceptible to legal enforcements requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation, to specify the conditions to be taken as complaints, to develop strategies for dealing with abuses and failures, and to provide legal vehicles, in appropriate cases, for securing the attainment of the objectives deemed desirable.[92]

The ICJ seemed to chastise countries for refusing to develop an avenue for justiciability of ESC rights because countries and scholars deem them undefinable which means legal theories and evolution have failed to happen at the same pace as civil and political rights.[93] However, recent jurisprudence of ESC rights around the world has started, "offering better criteria to further specify the content of ESC rights. Supreme court and lower court precedents regarding health, housing, consumer and environmental rights in many countries have begun to foster further litigation in these fields, which was unknown decades ago."[94] The criticism of ESC rights not being judicially manageable also fails to acknowledge that individual relief occurs through quasi-adjudication within the administrative state, which maintains primacy advancing ESC rights.

Additionally, the United States logjam of amendment making through a Constitutional process has given way to the Supreme Court engaging in quasi-amendment making, similar to the power granted to Regional Human Rights Courts.[95] Scholars criticize this power of the US Supreme Court, this same criticism is rarely levied against the Regional Human Rights Courts which adhere to *Stare Decisis* and progress human rights linearly contrasted to the recent

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91. *Id.*
92. International Commission of Jurists, *supra* note 89.
93. *Id.*
94. *Id.*
95. Nathan Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 (last visited Nov. 12, 2024).

retraction of rights in the US, as in *Dobbs*.[96] This quasi-amendment making by judiciaries is effective in layering additional civil and political rights because it is more robust than legislative law making.

2. Administrative State's Role in the Lab

Prior to the United States involvement in World War II, James Landis described Roosevelt's vision of the administrative state as, "our generation's answer to the inadequacy of the judicial and the legislative process."[97] Rahman believes the success of the United States administrative state is derived, "through the formalization of procedures in the Administrative Procedure Act . . . [and] the emphasis on norms of agency expertise."[98] It may also be responsible for the endowment of human rights granted to all mankind in the UDHR. Like international HRL's positive effect on global peace and security in the 20th century, "the project of twentieth-century administrative governance [i]s a normatively and constitutionally virtuous one."[99]

The administrative state is lauded as the principal governmental institution tasked with advancing 'baseline' rights including, "health and safety, opportunity, and social equality."[100] The United States administrative state's organic acts parallel ICESCR's treaty obligations, which the United States has failed to ratify.[101] The administrative state started with the US, but this branch of government has spread throughout the globe. The complex of structuring an administrative state to advance ESC rights requires decades and significant political capital including intimate involvement with localized social movements driven by NGOs, human rights defenders, and relevant stakeholders,

> unlike South Africa's People's Housing Process or Informal Settlement Upgrading Programme, Brazilian legislation allows slum dwellers to initiate slum-upgrading processes with the backing of administrative courts. Thailand has established an

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96. Seema Mohapatra, *An Era of Rights Retractions: Dobbs as a Case in Point*, 48 HUM. RTS. 4, 5 (2023).

97. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1671 (2018).

98 *Id.* at 1672.

99. *Id.* at 1678.

100. The administrative state continues to be the battlefield where ideological debate persists. *Civil Rights & The Administrative State*, PRRAC, https://www.prrac.org/civil-rights-the-administrative-state/ (last visited Nov. 8, 2024).

101. *Id.*

> independent housing agency that works with communities to upgrade housing according to a city-wide plan and matching funds. In their early years some Scandinavian social welfare States developed and funded aggressive social housing agencies. Fusing rights-based strategies with the emancipatory potential of community struggle and the flexible resources of State may be a more hopeful way forward.[102]

These countries take advantage of their administrative states by advancing a rights driven approach which avoids the coercive state down approach and adapt a community centric approach with localized advancement of rights.[103] This community centric approach provides evidence localized experimentation is occurring for HRL.

In the US, the "New Deal, the Great Society, and the Civil Rights Movement," are the cornerstone policies establishing organic acts proliferating the administrative state. The administrative state is more adept at advancing human rights than other branches; this institution has gone unnoticed ceding attention to, "classical constitutional theory, analysing institutions meant examining the role of constitutions, legislatures, the executive and judicial powers."[104] Following the success of the United States, Ignacio Boulin argued for strong administrative states in Latin America to advance human rights because,

> the administrative state marks the presence or absence of good governance and the enjoyment of, or absence of rights. For example, the realisation of the right to primary education (ICESCR, art. 13 and 14) depends on the specialised bureaucracies devoted to that mission. The right to adequate housing requires access to electricity and sanitised water (CEDAW, art. 14), which are both subject to regulations designed and enforced by administrative agencies. The right to health (ICESCR, art. 12) is built in large parts of the world upon public healthcare systems, which are organised by specialised bureaucracies.

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102. Malcolm Langford, CHAPTER 7 HOUSING RIGHTS LITIGATION GROOTBOOM AND BEYOND *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA SYMBOLS OR SUBSTANCE 222 (2015).

103. *Id.*

104. Ignacio Boulin, *Human Rights Law Should Meet the Administrative State*, OXFORD HUMAN RIGHTS HUB, Aug. 13, 2020, https://ohrh.law.ox.ac.uk/human-rights-law-should-meet-the-administrative-state/.

> Prisons, a widespread source of human rights violations in Latin America, are run by bureaucracies through administrative procedures.[105]

The administrative state's involvement in advancing human rights succeeds when it facilitates raising incremental baselines through quantitative processes, ideally by experts at the agency's helm.[106] An unnoticed symbiotic outcome of a strong administrative state and their advancement of human rights is that they entrench democracy.[107]

The baseline rights are not typically connotated with the government exercising their coercive power, but rather employing a benevolent power to promote individual flourishing. Adrian Vermule rebuts this benevolent assertion, arguing the Aristotelian administrative state is a tradeoff from privatized coercion,

> were not only worried about misrule by governmental officials. They were equally worried about "private" misrule—misrule effected through the self-interested or self-serving behavior of economic actors wielding and abusing power under the rules of the 18th-century common law of property, tort, and contract. The administrative state thus trades off governmental and "private" misrule.[108]

This shift is exemplified in the United States by a the post-*Lochner* era backlash but acknowledges advancing ESC rights may come at the cost of infringing on others' property rights. Even with this criticism, a robust administrative state that is tethered to stringent procedural processes, like the Administrative Procedure Act, is more adept to advancing baseline rights than an *ad hoc* fact specific approach in the form of judicial review.[109] Even with this criticism, Vermule states his support for an administrative state's advancement of rights with Madison's vexatious acknowledgment of the problem, "[I]n every political institution, a power to advance the

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105. *Id.*

106. *Id.*

107.

> A meritocratic bureaucracy provides greater democratic stability, strengthening the rule of law, which is a pillar of human rights. To set a final example, it has been argued that countries with solid administrative states have dealt better with the pandemic than those that have dismantled their administrative states.

Id.

108. Adrian Vermeule, *Optimal Abuse Of Power*, 109 NW. U. L. REV. 672, 673 (2015).

109. *Id.* at 682.

public happiness involves a discretion which may be misapplied and abused."[110] This vexation may be why the founding fathers abstained from enumerating baseline rights in the bill of rights and only entrenched absolute rights. The administrative state's quasi-adjudicative bodies have the ability to engage in active and ongoing supervision which dovetails with an agency's rulemaking function allowing for the incremental raising of baselines while still providing fair notice of their action, in contrast with a judiciary's reactive ability leading to muddled case law focused on an overreliance of facts.[111] This core difference exemplifies why judiciaries are better suited for adding protections to absolute rights because the ceiling of the right is well defined and a fact intensive investigation is necessary. Contrast this with a right dependent on incremental raising of baselines where concentrated agency power is better suited than a decentralized judiciary which may grant a baseline right to one individual and fail to grant the same right to a similarly situated individual.[112] The proliferation of democracy, administrative state, and ESC rights are all intertwined with their mainstay in governmental affairs rising from the ashes of World War II.[113] Forsyth leads the argument in intertwining the three concepts by asserting,

> the modern administrative state across the world reflects the view that it is the duty of government to provide remedies for social and economic evils of many kinds. This is in large measure the consequence of the growth of democracy; the enfranchised population can now make its wants known, and through the ballot box it had acquired the power to make the political system respond.[114]

Forsyth asserts these baseline rights are better suited for advancement in the political realm of legislators rather than the judiciary, but the political realm is subject to instability in democratic rule which is why administrative states must be entrusted and politically insulated to incrementally raise the

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110. *Id.* at 674 (quoting THE FEDERALIST NO. 41, at 252 (James Madison) (Signet Classic ed., 2003)).

111. *Id.* at 682.

112. Christopher Forsyth, Professor, Cambridge University, *Reconciling the protection of human rights with the principles of administrative law*, 1, 4-5 (Aug. 2009), https://www.venice.coe.int/sacjf/2009_08_BTW_Kasane/speeches/Forsyth_Administrative%20Law%20and%20Human%20Rights.pdf.

113. *Id.* at 2.

114. *Id.*

baseline rights.[115] Only the administrative state may fulfill Forsyth's assertion of the state taking, "care [of] its citizens from the cradle to the grave, to protect their environment, to educate them at all stages, to provide them with employment, training, houses, medical services, pensions, and, in the last resort, food, clothing, and shelter…"[116]

D. Regional human rights courts

While many skeptics of international human rights law would like to see an international court, it would create a lack of comity and fail to provide an incremental evolution of rights which regional human right courts provide. With the rise of authoritarianism creating feckless judiciaries which restrict rights, the regional human rights courts are the new beacons of human rights protections because,

> [n]o regional court has gone so far as to rule contrary to the express language of a treaty provision. The regional courts also have avoided regressive jurisprudence, avoiding imposing new restrictions on rights or rolling back guarantees. It is also notable that in no instance have the principles or the outcomes of cases been overturned by political bodies, although there has been an undeniable backlash against some judgments.[117]

The regional human rights courts power to progress international human rights law is derived from the vagueness in the human rights treaties which resemble organic acts because,

> [e]ach state may initially give effect to such norms, but regional human rights courts step in where there is disagreement, giving authoritative interpretation to the terms used in the absence of an agreed treaty definition. Courts and commentators contend that states' intent to allow for a dynamic interpretation is found in the use of "generic terms" in a treaty.[118]

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115. *Id.* at 1-2.
116. *Id.*
117. DINAH SHELTON, CHAPTER 4 - PERFORMANCE OF REGIONAL HUMAN RIGHTS COURTS, *in* THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS (Online Cambridge University Press 2018).
118. *Id.*

This resembles the delegation of authority from a legislature to an executive body in the creation of administrative agencies.[119] Also, like the executive branch's prosecutorial discretion, "the courts themselves determine which terms evolve in meaning, considering the context and the object and purpose of the agreement."[120]

The purpose of regional human rights courts is disputed; individuals believe it is to adjudicate violations of their rights from their sovereign whereas States believe it is to bring repressive regimes in line for egregious human rights violations.[121] The dual mandate of courts to address individual remedies and progress human rights varies between regional courts with the newly formed African Court favoring the evolution of HRL through remedies of state compliance.[122] Similar to the treaty bodies, this creates a quasi-amendment making process entrusted to regional human rights courts through their decisions. The inclusion of NGO *amici* and intervention of States allows for crystallization of a progressing baseline of treaty provisions, mirroring the General Comment making process of treaty bodies.[123] However, the International Law Commission realized the possible problem of regional human rights courts' potential to cleave regional HRL from international HRL, but solved this conundrum through the invocation of general principles,

> [a]ll courts are expected to decide cases in accordance with the law, developing and consistently applying basic principles and methodologies. For international tribunals these principles and methodologies should conform to general international law, to avoid contributing to concerns about the "fragmentation" of international law.[124]

This might be why regional human rights courts rely upon one another's jurisprudence and treaty bodies seem to pull directly from judiciary decisions when creating their treaty interpretation in General Comments, further supporting the laboratory.

Unlike the treaty bodies' creation of General Comments reliance through broad discretion of morality, the regional courts rely on a legally principled approach in their quasi-amendment making process relying on principles, 'like stability of the law, giving parties

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

a fair indication in advance of what behavior is required to conform to the norm, dictionary meaning, and general usage."[125] Different Courts rely on different legal principles like the European Court of Human Rights (ECtHR) relying on extrajudicial norms or the African Court taking a Scalia-driven textualist approach in progressing HRL.[126] These differing approaches add an extra layer of experimentation to human rights protections in the form of novel legal theories.

Regional human rights courts recognize their relevant Conventions, like the international bill of rights, have the status of 'living documents' maintaining a constitutional nature.[127] This living instrument approach allows regional human rights courts to expand rights, but also limit rights through the margin of appreciation doctrine employed by the ECtHR.[128] The broad discretion by regional human rights courts allows them to engage in quasi-amendment making of rights when interpreting human rights treaties. However, these judicial organs have less discretion in defining, interpreting, and progressing rights than treaty bodies because they are involved only when rights are alleged to have been violated.[129]

The regional human rights courts progression, and creation of human rights, resembles the elusive notion of substantive general principles, "[t]o the extent . . . over the role of regional human rights courts in filling in gaps in the law or advancing human rights through interpretation."[130] Regional Human Rights Courts have even raised the 'baseline' of positive human rights such as, "[t]he [Inter-American] Court . . . has indirectly addressed social and economic rights where these have been presented in the context of cases involving discrimination, indigenous peoples, and property."[131] The courts enhance their legitimacy by referencing their sister courts' jurisprudence and relying on tried and true Constitutional interpretation norms.[132] This shows the current notion of 'soft law' derived by General Comments and Regional Human Rights Court jurisprudence may actually be the elusive substantive general principle,

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125. *Id.*
126. *Id.*
127. *The Living Instrument & Margin of Appreciation Principles*, BRITISH INSTITUTE OF HUMAN RIGHTS, https://www.bihr.org.uk/get-informed/legislation-explainers/the-living-instrument-margin-of-appreciation-principles (last visited Nov. 1, 2024).
128. *Id.*
129. SHELTON, *supra* note 117.
130. *Id.*
131. *Id.*
132. *Id.*

> [t]he results often fill in gaps in the generally written provisions and allow for the development of new norms, using a variety of sources deemed relevant. According to the European Court, general principles of law may be sought in texts of universal and regional scope (not only human rights treaties), in the jurisprudence of international and domestic courts that apply these instruments…[133]

These substantive general principles can trickle down as the new universal baseline norms in domestic judicial decisions, through statutory or constitutional interpretation canons like the *Charming Betsy*.

The 'margin of appreciation' doctrine was developed by the ECtHR and is an attempt to reconcile diverse cultural traditions with a universal 'baseline' of human rights agreed upon by Member States.[134] The ECtHR asserted the margin of appreciation doctrine was necessary because the Convention, which relied on the international bill of rights, represents the lowest common denominator of human rights norms.[135] On its face this would complement the quasi-amendment making process envisaged by treaty bodies General Comments. However, this doctrine raises a question of the level of deference given to sovereign states by the ECtHR.[136] The Council of Europe argues the margin of appreciation doctrine acts as a check on the system of progressing human rights too quickly and subsequently eroding sovereignty, which they inappropriately intertwine with cultural diversity.[137] The Council of Europe seems to allude that the ECtHR adjudicates rights violations between a sovereign and its citizens, rather than obligations between Member States, but there is not absolute deference to national sovereignty.[138] The margin of appreciation attempts to act in tandem with the European consensus which is a self-regulating process of advancing 'baseline' rights through a comparative approach; the margin of appreciation is invoked when a lack of consensus occurs such as when ascertaining 'morals.'[139]

The margin of appreciation doctrine is problematic within the 'laboratory' and one remedy is placing an additional element on the

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133. *Id.*

134. *The Margin of Appreciation*, COUNCIL OF EUROPE, https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last visited Nov. 1, 2024).

135. *Id.*

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.*

proportionality test where States assert which cultural values they are advancing when limiting a human right. This would allow citizens bringing a claim to respond and show evidence whether it is a citizenry cultural value, or one being advanced purely by the State. Anthropology has shifted its purely relativistic approach to studying the interplay between cultural and human rights in an attempt to find the 'middle ground.'[140] The anthropological work being done to study the relationship between cultures and rights can play a practical legal role in adjudicating the 'margin of appreciation' doctrine.[141]

E. General Comments: the Apex of Progressing Universal Human Rights

Treaty bodies' tenuous relationship with State parties exemplifies these multilateral human right treaties still maintain a constitutional nature which has bound States to not only one another, but the people they govern.[142] Without these general comments furthering norm development of rights by raising universal baselines, the rights codified in articles of these treaties would remain abstract.[143] The development of human rights law by the treaty bodies through general comments has been well analyzed, but not through the lens of quasi-amendments.

The treaty bodies' impact relies on a paradoxical cycle of international and professional networks relying on the general comments to progress human rights law; these same networks provide the input for what the treaty bodies rely on for creation of the general comments.[144] Critics have claimed the general comments are legally non-binding, but then proceed to claim they clarify the obligations laid out by human rights treaties.[145] Clarification of rights is no less influential than additions of articles through an amendment making process. The articles in human rights treaties, namely the International Bill of Rights, are vague such as article 3 of the ICCPR, and provide large latitude for general comment interpretation.[146] Scholars describe the general comment phenomenon as quasi-legislative in nature, but they appear more quasi-amendment in nature because they fundamentally change the

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140. Dahre, *supra* note 55.

141. *Id.*

142. *See* Max Lesch & Nina Reiners, *Informal human rights law-making: How treaty bodies use 'General Comments' to develop international law, in* GLOBAL CONSTITUTIONALISM 378 (Online Cambridge University Press 2023).

143. *See id.*

144. *Id.*

145. *Id.*

146. *See id.*

particular treaty's object and purpose and obligations for States who are party to the treaty.[147] Max Lesch and Nina Reiner lay out the argument criticism of treaty bodies acting undemocratically as quasi-amendment makers,

> Formal approaches to law-making and delegated authority cannot explain their adoption and influence in the absence of a legally binding nature and regularized decision-making procedures, effectively omitting the role of states as the primary law-making actors in world politics. This delegation gap is not mitigated by the drafting process, in which the expert body alone – devoid of intergovernmental influences beyond mere consultation – decides on the adoption of General Comments.[148]

However, this analysis fails to acknowledge the legal authority administrative states have from organic acts created by legislatures; treaty bodies maintain this delegated power.[149] The treaty bodies are comprised of experts elected by State parties; critics point to their lack of oversight by inter-governmental organizations and ability to progress HRL.[150] However, the election process resembles the appointment process of cabinet officials in the United States who maintain a wide latitude of discretion of organic act interpretation in their administrative agencies once appointed.[151] This criticism of General Comments as undemocractic is also undermined by States' ability to withdraw from a human rights treaty whenever they wish.

Additionally, the General Comments, like US Supreme Court decisions, become global precedent because they, "become anchors in human rights discourse, the practice of other international organizations as well as regional and national judiciaries."[152] General comments mirror United States Supreme Court quasi-amendment making because, like the Congress, the multilateral treaty making process is logjammed. Both also function as a power broker granting rights to individuals or entitlements of power to States in its interpretations which progress bargaining in advocacy at local levels of government.[153] A key difference is the quasi-

147. *Id.*
148. *Id.* at 379.
149. *Id.* at 378.
150. *Id.* at 381.
151. *See* US CONST. art. II, §2.
152. LESCH & REINERS, *supra* note 142, at 381.
153. *Id.* at 391.

amendment making process is not defined in the US Constitution but granted through the Supreme Court themselves in *Marbury v. Madison*. This would likely be less prevalent if the amendment making process were not so entrenched.[154] Another key difference is General Comment interpretations are dedicated to the progression of rights adhering to a norm of *Stare Decisis*, and continuously advancing, unlike in the US Supreme Court.

Treaty bodies also function as a way for the global citizenry to bring human rights violations to light by bypassing repressive regimes.[155] Small states like Morocco worry about treaty bodies advancing hegemonic legal interpretation, "[h]owever, the first international surveillance mechanisms for the implementation of treaties and conventions related to the protection of fundamental rights exist because of the efforts of small states."[156] Implementation and surveillance mechanisms represent a geographically diverse coalition that holds accountable both hegemonic and small States as evidenced between the Committee on Tortures work done on both Morocco's and the United States' violations of the Convention Against Torture.[157]

General Comments' influence comes from their principled progression of a universal baseline because they either, "reflect and summarize the views already established by the treaty body . . . or they translate their existing jurisprudence into new or modified interpretations of the treaties they oversee…"[158] This exemplifies the apex nature of General Comments creating the updated 'baselines' for universal human rights.

IV. CASE STUDIES

A. Raising the Threshold for Baseline Rights

In the late nineteenth century, the Industrial Revolution ushered in an era of prosperity, along with an era of steep human suffering in the factories caused by unhealthy and dangerous working conditions.[159] In the United States, to respond to rampant incidents of workplace accidents and deaths, "In 1877, Massachusetts passed the first law addressing workplace safety, known as the Massachusetts Factory Safety Act."[160] Other states

154. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).
155. GLACIER, *supra* note 35, at 77.
156. *Id.* at 79.
157. *Id.* at 79-80.
158. LESCH & REINERS, *supra* note 142, at 383.
159. Dax F. Garza, P.C., *A Brief History of OSHA*, WORKPLACE ACCIDENTS, Sept. 12, 2024,https://www.daxgarzalaw.com/blog/workplace-accidents/history-of-osha/.
160. *Id.*

adopted similar protections which moderately improved factory conditions, but enforcement of the regulations were difficult and the dangers persisted.[161] In 1970, the codification of occupational health and safety rights culminated in the Occupational Safety and Health Act (OSH Act).[162] This act mandated countrywide,

> **Removing recognized serious hazards:** Employers must identify and eliminate potential hazardous conditions in the workplace... . **Warning employees of potential hazards:** Proper signage and communication about potential dangers are mandatory. . . . **Refusing to work under hazardous conditions:** Workers have the right to refuse unsafe work."[163]

This organic act was derived from Brandeis' federalism experimentation and created the first of its kind Occupation Health and Safety Administration, OSHA, to regulate workplace health and safety.[164] Since the United States' creation of OSHA, other countries have adopted agencies to oversee occupational health and safety such as EU-OSHA,[165] CCOHS,[166] and Japan's Occupational Safety and Health Law.[167]

General Comment No. 19, created by the Economic and Social Council, provided interpretation of ICESCR's article 7, relied on the United States' OSHact finding,

> States parties should adopt a national policy for the prevention of accidents and work-related health injury by minimizing hazards in the working environment and ensuring broad participation in the formulation, implementation and review of such a policy, in particular of workers, employers and their representative organizations.[168]

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Safety Regulations Around the World*, EUROPEAN UNION THE EUROPEAN AGENCY FOR SAFETY AND HEALTH, Apr. 13, 2018, https://capstonefire.com/2018/04/safety-regulations-around-the-world/.
166. *Id.*
167. *Occupational Health and Safety Regulations in Different Countries*, INTERNATIONAL SAFETY CONSULTANTS, https://www.internationalsafetyconsultants.com/occupational-health-and-safety-regulations-in-different-countries/ (last visited Oct. 25, 2024).
168. ECOSOC, E/C.12/GC/23, *General comment No. 23 on the right to just and favourable conditions of work (article 7),* at ¶ 25 (2016).

Previous leaders of the United States have asserted ICESCR's articles as aspirational goals, but the United States has engaged in *opinio juris* of these ESC rights through the administrative state.[169] While the tail wagged the dog prior to the endowment of rights through the UDHR, Ken Jacobs explains how the United States has implicitly engaged in the 'laboratory' with,

> a progressive vision of federalism, which uses the power of states and local government to expand rights and regulate business. Employment law in the United States, which regulates individual workplace rights, provides a clear example of how this can work. The federal government sets the floor. States or local governments can choose to regulate above that floor.[170]

Additionally, the United States supported the recent International Labour Organization that codified, "[a] safe and healthy working environment is a fundamental principle and right at work."[171] The ILO is a U.N. agency, which is mandated to set safety standards for governments to levy on employers, is bolstered by article 23 of the UDHR granting a right, "to just and favourable conditions of work."[172] The evolution from the right to healthy conditions at work in the UDHR through the creation of OSHA in the United States and proliferation of global OSH agencies to the raising of the baseline of the right to work in General Comment No. 23 shows the ability to incrementally raise the threshold of a baseline right globally while still maintaining cultural diversity. It seems U.N. agencies like ILO adopting, "codes of conduct, which are detailed technical guides on how to make workplaces safer and healthier. [Which] are widely used and have had a very positive effect," are more adept at raising the baseline human rights rather than regional human rights courts which take an individualized approach and could create a lack of comity disrupting the incremental approach of 'baseline' rights.[173]

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169. *A safe and healthy working environment is a fundamental principle and right at work*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/topics/safety-and-health-work/safe-and-healthy-working-environment-fundamental-principle-and-right-work (last visited Nov. 22, 2024).

170. K. Jacobs, R. Smith, & J. McBride, *State and Local Policies and Sectoral Labor Standards: From Individual Rights to Collective Power*, ILR REV. 1132 (2021).

171. *About the ILO*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/about-ilo (last visited Nov. 22, 2024).

172. UDHR at art. 23(1).

173. Lee Swepston, *Human Rights to Health and Safety at Work: The International Labor Organization*, O' NEILL INST., June 5, 2018, https://oneill.law.georgetown.edu/human-rights-to-health-and-safety-at-work-the-international-labor-organization/.

The baseline rights approach for OSH also provides a great case study on the importance a reliable judiciary must play in identifying a core level where governments may not engage in deregulation or legislative overhaul to abolish the crystallized 'baseline.' Lee Swepston acknowledged the danger of eroding a crystallized baseline because a government engages in ignoring their fiduciary responsibility to employees,

> OSH is the cutting edge of the protection of human rights for public health. Most of us spend the largest part of our lives at work, whether it is driving a truck or operating a machine . . . human rights [have] the most important and immediate impact on the most people . . . to go home from your work still having the use of your eyes, your hands, and your lungs.
>
> Current attempts to reduce regulation of businesses repeat failed approaches of the past, favoring self-regulation by employers, and are not simply unworkable – leading to serious infringements of a little-publicized but vital part of human rights.[174]

This assertion provides a unique argument that regulations providing protection of employee safety is just as imperative as caselaw advancing protections for absolute rights such as truth as an absolute defense or the 'actual malice' standard for protection against defamation laws which are explained in the next case study.

B. Protection for Absolute Rights

Article 19 of the ICCPR protects the right to free expression.[175] However, article 19(3) allows for States to impose restrictions on free expression to protect an individual's reputation, traditionally through defamation laws derived from the English common law.[176] The United States utilized these laws to stymie free expression criticizing governmental officials, but these laws were largely deemed unconstitutional through novel experimentation during the liberalization of free expression in the 1960s.[177] The Supreme Court

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174. *Id.*

175. *International Covenant on Civil and Political Rights* art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

176. *Id.*

177. *See generally* Rosario Soraide, *The "misuse" of the judicial system to attack freedom of expression: Trends Challenges and Responses*, UNESCO WORLD TRENDS IN FREEDOM OF EXPRESSION AND MEDIA DEVELOPMENT 1 (2022); New York Times Co. v. Sullivan, 376 U.S. 254, 262-63 (1964).

expanded expression in the landmark case *New York Times Co. v. Sullivan* which asserted truth as an absolute defense, imposing limitations on laws protecting a reputation, and there must be 'actual malice' for insults against public officials for a claim to succeed.[178] Subsequently, all three Regional Human rights Courts, the ECtHR, Inter-American, and African Court, ordered truth be an absolute defense and the 'actual malice' element apply in their criminal defamation jurisprudence.[179] Finally, the CCPR, treaty body for the ICCPR, published General Comment 34, interpreting a restriction on Member States under article 19(3), which included truth as an absolute defense to defamation where they asserted,

> [a]ll such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.[180]

This experimentation of free expression by the United States flowed up to the treaty body and demonstrates the creation of a new protection for a human right. Some countries still do not recognize truth as an absolute defense where reputations hold high importance, but the shift of defamation is broadly trending to a civil action from criminal law.[181] This shows the current human rights ecosystem has the potential to promote universality while still championing cultural diversity. Strategic litigators and human rights NGOs may now rely on this new interpretation of Article 19 of the ICCPR as a tool to advocate in localized settings to create new legal theories on reconciling truth with the importance of reputation in cultures who prioritize reputation. The 'actual malice' standard is also a significant tool, derived from a single US Supreme Court opinion that has been used to judicially combat authoritarian's implementation of seditious libel in post-colonial societies.[182] This exemplifies the ever progressing and adaptive nature of international human rights law.

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178. New York Times Co. v. Sullivan, 376 U.S. 254, 262-63 (1964).

179. *See* Soraide, *supra* note 177.

180. *Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, ¶ 47, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

181. *See* Soraide, *supra* note 177.

182. *See id.*

V. CONCLUSION

The 'laboratory of human rights' is an analytical approach that explains how international HRL is functioning as intended. The system harnesses the power of cultural diversity to advance universal norms, borrowing from Brandeis' federalism theory he coined the 'laboratory of democracy.' Culturally diverse stakeholders experiment by adapting universal norms to localized human rights violations which reconcile the relativist and universalist divide. Member States use their administrative states and judiciaries to scale up these localized experimentations which entrench these rights at the State level. Regional human rights courts may engage in quasi-amendment making by codifying rights adopted from the State level or infusing their own novel legal theories into their jurisprudence which other regional human rights mechanisms may adopt. Finally, treaty bodies act as the apex of the laboratory by harnessing the information of Member State and regional experimentations to synthesize new baseline universal norms. These new baseline norms are advanced in General Comments' interpretation of human rights articles which act as a legally binding 'amendment' to the multilateral treaties they are interpreting. This new universal norm begins the process anew for the experimentation process to restart at the local level, exemplifying the cyclical process of human rights advancement. This process is only possible through the UN Charter's Constitutional scheme which is a tiered structure that entrenched its governance functions but left its international Bill of Rights unentrenched for easier advancement as time marches on.