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# Redress: Rights and Other Remedies, A Comment on David Engel's Article on Rights Consciousness

ARZOO OSANLOO\*

## ABSTRACT

*In responding to David Engel's Article, this Comment analyzes how Engel situates contemporary perspectives on rights drawing from his research in Thailand. Engel shows how the discourse of rights carries with it meanings that have multiple and changing connotations and on-the-ground effects. Following on Engel's questions about how consciousness of rights spreads and takes shape in local contexts, this Comment calls for expanding the substantive and methodological bases for understanding the changing effects of rights discourses. This Comment suggests that a study of the broader social and political implications, including the costs, of rights discourses (internationally, nationally, and locally) permits greater substantive awareness of the changing social and political landscapes. This can only be done with the kind of on-the-ground longitudinal study that Engel has conducted.*

## INTRODUCTION: A MODEST INQUIRY

David Engel's thoughtful Article asks a modest question: Why do the ordinary people of Chiangmai, a province in northern Thailand, not use "rights talk"?

To answer this question, Engel leads us through the trajectory of Thailand's embrace of liberal rights from the end of the eighteenth century onward. Although still a kingdom, Thailand's constitution and formal legal codes suggest that the government has endowed its citizens with some rights. Yet, despite the positive rights afforded them, ordinary people have not embraced the language of rights in all matters.

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It is through a discussion of the United Nations Convention on the Rights of the Child (CRC) that Engel engages with the meaning of rights consciousness. Trying to make sense of the deteriorating state of a poster depicting the rights of the child, Engel muses over whether the poor state of the poster is a metaphor for the state of rights in Chiangmai. Against the backdrop of a rich history of and engagement with liberal state building and rights consciousness, it seems odd that such a prominent symbol of the international rights of children would be left in such shambles. But given the recent uptick of the post-coup government, it is possible that there is something more than what meets the eye. What does the state of the poster say about the state of rights?

Engel then provides a vivid portrayal of the history and social landscape of rights consciousness in a village in Thailand's Chiangmai province. His focus is on personal injury because it is a subject matter that does not predetermine a legalistic or rights-based discourse. Engel situates contemporary perspectives on rights while raising a number of questions about how consciousness about rights spreads and becomes embedded in local contexts, signifying a specific kind of engagement with the state, the self, and conflict resolution. Once this engagement with rights is understood within the particularities of its context, rights consciousness emerges as something different and contingent as it is enmeshed in, and then refracted through local cultural ethics, signifiers, and processes.

Engel's Article makes a further point. The question he poses is not only a substantive one; it is also methodological. Engel reflects on the methods that researchers employ to best capture, understand, and explain the cultural life of rights in a context where it appears that despite acceding to international treaties on human rights, like the CRC, rights talk is not part of the discourse of everyday life among ordinary people.

From the standpoint of the scholar-researcher, vertical and horizontal perspectives on rights consciousness offer two seemingly distinct methodological approaches for understanding and communicating to the scholarly community how we assess and evaluate others' appreciation for the liberal values of which rights are a part. Engel characterizes the vertical and horizontal approaches along with their limitations. The vertical approach attempts to account for "the transnational flow of liberal legal norms, institutions, and practices" at local levels.<sup>1</sup> One of the main limitations of the vertical perspective,

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1. David M. Engel, *Vertical and Horizontal Perspectives on Rights Consciousness*, 19 IND. J. GLOBAL LEGAL STUD. 423, 433-35 (2012).

Engel notes, is that it assumes an increase in the role of law in such societies and a sort of passive acceptance of the new framework without attention to nuance, whether it is the embrace or rejection of the transnational legal order.<sup>2</sup> The horizontal approach to rights consciousness would help address some of the shortcomings of the vertical approach by measuring whether, and to what extent, individuals and groups in local contexts have actually integrated or otherwise adopted rights-based practices—whether they have attained a rights-based “subjectivity.”<sup>3</sup>

Throughout, Engel’s Article shows that these discourses about rights are not growing out of a vacuum nor are they neutral, universal signifiers. Instead, we learn about the effects of rights consciousness and what it means as it is woven through the fabric of a local Thai village. The discourse of rights carries with it meanings that have multiple, perhaps even shifting, connotations, and on-the-ground effects.

#### I. INTERNATIONAL RIGHTS DISCOURSE AND STATE/HEGEMONY-BUILDING

The CRC provides an important point of departure for this discussion. It is one of the most recent legal documents to be ratified by the Thai government. As an international convention, the CRC permits outside assessments by the international community of a nation-state—a limit on sovereignty, to be sure.

The CRC requires certain behavior, permits an international committee to observe and evaluate, and compels action on the part of states in their adherence to international standards.<sup>4</sup> There is, moreover, a hegemonic component to entering into the “community” of nation-states and ratifying U.N. treaty documents. What is the role of transnational players in the local context?

Here, it is not solely the question of consciousness that concerns us, but something deeper, which I think Engel’s Article subtly raises. Treaties like the CRC call for the legitimation of a certain form of

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2. *Id.* at 435.

3. *See id.* at 445; Sally E. Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006).

4. U.N. Convention on the Rights of the Child (1989). UN General Assembly Document A/RES/44/25. The Convention on the Rights of the Child requires all parties to the treaty to observe the rights of children as set forth in its forty-five articles. The CRC compels state parties to protect children, to create the conditions for their security and welfare, and to act with attention to their best interests in all domains of life. Articles 43 and 44 set forth the reporting and enforcement mechanisms to which state parties bind themselves. These include submitting bi-annual reports to the Committee on the Rights of the Child and permitting relevant U.N. agencies to offer to participate in implementation.

personhood—the atomized citizen who is endowed with rights. Through the lessons of international conventions, we know that those rights entail negative freedoms, or rights to be free from certain kinds of treatment by states, as well as positive freedoms, or rights to certain protections and entitlements. These rights-based conventions further entrench the state as the organizational beacon for all societies.

Critiques of rights abound, from materialists, legal realists, and theorists of social mobilization.<sup>5</sup> But Engel highlights another critique in noting the lack of rights talk among his Thai interlocutors. He shows that the liberal assumptions that Western scholars possess about rights discourses, or even rights consciousness, may themselves be sites worthy of critical examination. During the same time that critiques of rights were emerging in Western contexts, post-colonial scholars noted certain problems with rights discourse in newly independent states where the very discourse formerly used to justify colonialism was then used to support the cause of individual freedom and independence.<sup>6</sup> Immanuel Wallerstein highlighted the clear contradictions embedded in rights discourse, especially in the discourse of international human rights.<sup>7</sup>

Scholars of human rights sharpened these critiques with more nuanced studies of broad meanings and political implications of international human rights advocacy. In her analysis of the debate in anthropological circles over support for the Universal Declaration of Human Rights, Karen Engle notes the possible limitations of rights.<sup>8</sup> Mark Goodale argues for a critical, anthropological approach to human rights, by engaging with rights as a domain of knowledge production and moral practice globally.<sup>9</sup> In that vein, anthropologist Harri Englund showed that human rights activists' use of discourses of freedom and rights helped spread neoliberal governance, and further entrenched both social and structural inequality.<sup>10</sup> Additionally, Mark Mazower and

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5. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

6. John Comaroff, *The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity*, in IDENTITIES, POLITICS, AND RIGHTS 193-236 (Austin Sarat & Thomas R. Kearns eds., 1995).

7. See generally Immanuel Wallerstein, *The Insurmountable Contradictions of Liberalism: Human Rights and the Rights of Peoples in the Geoculture of the Modern World-System*, 94 S. ATLANTIC Q. 1161 (1995).

8. See Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536, 536-37 (2001).

9. See Mark Goodale, *Introduction to HUMAN RIGHTS: AN ANTHROPOLOGICAL READER* 1, 1-19 (Mark Goodale, ed., 2009).

10. See generally HARRI ENGLUND, *PRISONERS OF FREEDOM: HUMAN RIGHTS AND THE AFRICAN POOR* (2006).

Sam Moyn brought deepened critical understandings of human rights by shedding light on the broader historical considerations that existed at the time of the Declaration's drafting.<sup>11</sup> For Moyn, it was the Cold War, and for Mazower, it was the legacy of the failure of the League of Nations and the inability to protect minority, as opposed to individual, rights.<sup>12</sup>

Indeed Engel's vivid portrayal of the Thai village and of its engagement—or lack thereof—with the CRC and rights discourses more broadly calls into question the decontextualized and depoliticized notion of rights-based interventionism currently being celebrated among some legal scholars and rights activists as “humanity's law.”<sup>13</sup> In non-Western, post-imperialist contexts such “humanitarianism” may appear simply as a form of neo-colonial liberalism with a twenty-first century imprint to a cross-section of inhabitants of these so-called liberated spaces.

## II. POLITICS OF RIGHTS: FROM THE TOP DOWN

The liberal language of rights presupposes societies with atomized, individuated contractors free to make deals, and configures a neutral, representative, and centralized government that will verify, correct, and enforce those contracts optimally made by parties with equal bargaining power. As such, in some non-Western contexts, rights discourses are potentially tainted by the adverse social implications of individualism. As Engel points out, however, this possible stigma does not necessarily mean that the ideas communicated in the CRC poster in Chiangmai are not transmitted.<sup>14</sup> It is likely that such ideas have comparisons or equivalencies that can be expressed locally, but with the imprint of the specific rights discourse, indigenous traditions are also forever changed. As others have already pointed out, rights are intersubjective.<sup>15</sup> They take on forms that make sense in local contexts, and they give new meaning to local avenues of making claims or seeking redress.

Citing Sally Merry's notion of “vernacularization,” Engel concurs with the point that norms presented in documents like the CRC may

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11. See generally Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 HIST. J. 379, 379-98 (2004); SAM MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 44-83 (2010).

12. Mazower argues that the Universal Declaration of Human Rights was actually a step back from the more powerful vision of minority rights presented in the Covenant of the League of Nations. See generally Mazower, *supra* note 11.

13. See, e.g., RUTI G. TEITEL, *HUMANITY'S LAW* (2011).

14. Engel, *supra* note 1, at 441.

15. Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 HUM. RTS. Q. 286, 290 (1996).

indeed develop their own localized meaning and authority, especially among the elites who use them.<sup>16</sup> The issue for Engel, however, is whether these frameworks for understanding will allow scholars to break through from the rights consciousness of elites to the on-the-ground effects of rights activism on the consciousness of “ordinary” people. One point that needs further clarification and exploration, however, is Engel’s definition of ordinary people. Although starting from different disciplinary concerns, Seyla Benhabib invokes liberal political theories to make a point similar to Merry’s. While disputing the charge that the discourse of human rights is the tool of neo-colonial interventionism, Benhabib also appears to claim that it is the ordinary people who begin to employ rights discursively.<sup>17</sup> Benhabib distinguishes between a concept (such as fairness or equality) and its conception, which is framed through a broader set of moral and political principles. She observes that transnational human rights norms possess concepts (such as the right to life and liberty) that are important for their normative conceptualizations in local contexts. For Benhabib, this localization occurs through the “jurisgenerative effect” of law and human rights.<sup>18</sup> By “jurisgenerativity,” Benhabib refers to “the law’s capacity to create a normative universe of meaning that can often escape the ‘provenance of formal lawmaking’ to expand the meaning and reach of law itself.”<sup>19</sup> Her claim is that one of the “jurisgenerative” effects of human rights treaties is that they allow new actors—minorities—“to enter the public sphere, to develop new vocabularies of public claimmaking, and to anticipate new forms of justice to come.”<sup>20</sup> The new forms of justice emerge through processes she calls “democratic iterations,” or the “complex processes by which public argument, deliberation, and exchange” take place on the ground; it is through these processes that human rights claims are “contested and contextualized” and then transformed, but with the transnational normative concept in place.<sup>21</sup> The jurisgenerative power of rights, then, permits new actors to enter fields of contestation and fosters new vocabularies of claim-making in sites that are themselves changing. It remains to be seen whether Benhabib’s new actors are similarly situated, relative to Engel’s ordinary people.

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16. Engel, *supra* note 1, at 447.

17. See SEYLA BENHABIB, *DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES* 118 (2011).

18. *Id.* at 15.

19. *Id.* (referencing “jurisgenerativity” as a term coined in Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983)).

20. *Id.*

21. *Id.* at 129.

### III. RIGHTS DISCOURSES IN SHIFTING POLITICAL AND SOCIAL TERRAIN: FROM THE BOTTOM UP

Individuals themselves are ever-changing, as Engel indicates, but so too are the political landscapes of rights.<sup>22</sup> This is where the vertical approach to rights consciousness can be supplemented with the horizontal approach. But through the story of Buajan, Engel goes beyond a mere context-based horizontal approach.<sup>23</sup> His approach is a long-term longitudinal study that allows him to take into consideration the political and social shifts over time and to account for how they affect vernacularization or jurisgenerativity of rights. Engel's description of Buajan's story of injury and recovery changed after his return to meet her ten years later and captures elements of rights consciousness that cannot be measured otherwise. He shows that rights consciousness emerges in a mobile field of changing political, economic, social, and ethical contexts that must also be integrated into the discussion.<sup>24</sup> A political climate that once saw rights as the appropriate measure of state and social relations may now have shifted to a different view. In this context, rights may carry a different meaning in post-coup Thailand. This is the case in my own area of research: women's rights in Iran.

Throughout the 1979 Iranian Revolution, the Iran-Iraq war, and the post-revolutionary state's domestic and foreign relations, one discourse framed the Islamic Republic's broader discursive modes: anti-imperialism. Conservative revolutionaries argued that the imperialist aims of would-be colonial states included the propagation of a rights consciousness that had led women, among others, to see themselves as individuals apart from the family and broader social relations. Social relations were severed when the individual possessed an independent relationship to the state; this is what a purely rights-based society offered. With their relationship to the state unmediated by other social relations, individuals would no longer owe reciprocal duties to family members or to other networks of social relations. Conservatives argued that this would lead to the deterioration of the social moral order. Thus, the revolutionary aim of improving society through the rehabilitation of women was part of the anti-imperialist tone of the revolution. It situated women's roles and status as central to post-revolutionary state-building processes. The focus was on relational identity, of women as mothers, wives, sisters, and daughters, as opposed to individuals with rights to use as claims against and protections from states.

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22. See Engel, *supra* note 1, at 426.

23. *Id.* at 439-42.

24. *Id.*



While this agenda initially unified many revolutionaries and eventual leaders, it also engendered subsequent compromises to improve women's lives. These compromises have resulted in strategic shifts in the language of the revolution, citizens' claims for equity and redress, especially those of women, and even formations of the state.

In the ensuing years, Iran's blended Islamic and civil institutions produced a new form of rights talk, now seemingly re-legitimated in the post-revolutionary era, recognizing the twin pillars of the revolution: Islam and republicanism. The period from 1997 to 2005, in particular, motivated a vocal women's movement to seek redress for grievances in the form of rights, but now a hybrid notion of rights informed by both civil legality and Islamic principles.<sup>25</sup> Over the years, however, activists' emphasis on rights has been plagued by setbacks, and has fueled a backlash which culminated in the 2009 clashes with state forces over suspected irregularities in the presidential elections held in June of that year.

Thus, in Iran today, we see a shift away from rights talk that was reintegrated into the public discourse of citizenship and entitlement from late 1990s to early 2000s, what some today refer to as the "reform period." Inasmuch as the former president Khatami supported legal consciousness, his adversaries criticized and moved away from this language to a language of status.<sup>26</sup> Status, in the Iranian context once again emphasizes relational identities—mother, wife, daughter, or sister—over individualistic ones.

Here, it may also be productive to consider the nature of the dispute, the limits of certain forms of dispute resolution, and the kinds of complainants that various disputes and methods of resolution produce. Of course when rights are championed, whether they are women's or children's rights, they can be appealing to individuals, but they also alienate these individuals from group membership, in family and other social networks. Some kinds of disputes may be more favorably disposed to nonadversarial reconciliation efforts. In family disputes, as opposed to other, formal, civil disputes, such as those involving employment discrimination, the adversarial method may not provide the most fruitful manner of adjudication.<sup>27</sup> In these contexts, material concerns may be negotiated in different processes, drawing not only from

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25. See generally ARZOO OSANLOO, *THE POLITICS OF WOMEN'S RIGHTS IN IRAN* (2009).

26. See generally Arzoo Osanloo, *What a Focus on 'Family' Means in Iran's Contemporary Political Discourse*, in *ISLAMIC FAMILY LAW IN MIDDLE EAST AND NORTH AFRICA* 51 (Maaike Voorhoeve ed., 2012).

27. In Iran, parties to a divorce action are now required to enter mediation prior to an adversarial hearing in family court. Iranian Family Protection Act, Article 26 (amended August 2011).

contract, but also perhaps, social and relational obligations. The women I interviewed in Iran who were in troubled family relationships often appealed simultaneously to legal remedies and also to affective possibilities, such as conscience (*vojhdan*). “How can your conscience permit you to do this?” one interlocutor exclaimed to her husband when he refused to meet her demands for economic support.<sup>28</sup> Affective appeals and binding legal remedies are often layered upon one another in such situations. The sterile scenario of two adversarial parties on opposite sides of a courtroom rarely hold true for disputing parties anywhere in the world, as Engel also points out.<sup>29</sup>

Tightly woven and concentrated social arrangements may both show the limits of rights discourses in some conflicts and provide different forms of resolution. These social arrangements, once unraveled, may also reveal limits of a uniquely rights-based approach.

The term “rights” itself carries different meanings for Iranian women in different political settings (the revolution, war with Iraq), personal settings (marriage, divorce), and spatial settings (moving to and from work). Thus, I endeavored to understand rights-practices and claims through their discursive contexts by investigating the dialogical sites, or spaces, in which the discursive object (in this case, women’s rights or human rights) had meaning for the individuals who took up the term. By tracing discussions of law taking place within these sites, I sought to uncover the political connections between governance and rights. Tracing these connections in the post-revolutionary era allowed me to argue that knowledge about rights in Iran is dynamic, intersubjective, and relational, while it is also politicized by state institutions.

The issues being litigated, moreover, may not be remedied by rights claims and court orders, even despite judicial decrees. Taking again the example of women in marriage or familial disputes, through my research, I learned that it is not the case that women do not employ rights discourses, but rather that they use a hybrid discourse to make claims that situate the individual both in relation to the state and also within an array of social relations—what I have suggested elsewhere as being “Islamic-civil” rights talk.<sup>30</sup>

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28. In fact, in this context, women have limited legal remedies for maintenance after divorce and a broad appeal to conscience is among an array of tools women use to gain remedies where rights may be absent or ineffectual. See Iranian Civil Code on Marriage and Divorce, Book 7, Chapter 8, Section 2, Articles 1120 – 1157.

29. Engel, *supra* note 1, at 429.

30. See generally Arzoo Osanloo, *Islamic-Civil “Rights Talk”: Women, Subjectivity and Law in Iranian Family Court*, 33 AM. ETHNOLOGIST 191, 191–209 (2006) (referring to Islamic-civil rights talk, which is the hybrid nature of law and legal discourse in Iran

Others may avoid making use of the courts even when they are available because the move to an official judicial arena could damage certain familial relationships that may be far more productive and fulfilling than obtaining a divorce order from a judge and going to live alone in a single-unit apartment somewhere in the city. Living apart from social networks could render oneself socially mute and invisible, resulting in a sort of self-banishment.

Perhaps this is the time to reappraise Sir Henry Maine's evolutionist assumptions about society's movement from status to contract.<sup>31</sup> Rather, it is time to consider a new space for status claims to emerge in an increasingly interdependent world where states do not offer all the services and protections that groups and individuals need. For, despite Maine's predictions to the contrary, the state and contractual relations do not always triumph over kinship relations and status.

#### IV. SUBJECTIVITY AND RIGHTS

Another fruitful way of appraising this venue for rights may involve looking beyond or more deeply than the conscious or unconscious appeal to rights, and instead considering an embodied practice of social interaction by examining subjectivity. While Engel mentions subjectivity in a quote from Sally Merry,<sup>32</sup> it appears that he is using it interchangeably with consciousness. Perhaps there is some useful purpose served in distinguishing the two.

By subjectivity, what I refer to is the formation of the self through the social, economic, and political conditions that make it possible. As Engel's Article moves away from the static construction of rights consciousness and is careful to note its contingency and temporality over time, I wonder, then, if what he is describing is not something closer to what Biehl, Goode, and Kleinman refer to as "inner life processes and affective states," part of their description of subjectivity in their essay in a recent book on the subject.<sup>33</sup>

In my own work, I have referred to subjectivity as the production of the self.<sup>34</sup> In order to examine subjectivity, I needed to be aware of, and

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today, drawing both from the domain of republican liberal formalism and Islamic principles).

31. See generally HENRY SUMNER MAINE, *ANCIENT LAW* (Peter Smith ed., 1970) (1861).

32. Engel, *supra* note 1, at 447.

33. João Biehl, Byron Goode & Arthur Kleinman, *Introduction: Rethinking Subjectivity*, in *SUBJECTIVITY: ETHNOGRAPHIC INVESTIGATION* 1, 6 (João Biehl, Byron Goode & Arthur Kleinman eds., 2007).

34. Osanloo, *supra* note 30, at 204, note 14.

understand thoroughly, both Iranian women's sense of self and the ideological conditions that make self-formations and expressions possible in the Islamic Republic today. In order to do that, I explored the sites of rights production as among the hegemonic sites that required historical analysis. Family courts were among the sites visited. During this process, I was able to engage with the relational subject who emerges through and in concert with numerous and uneven conditions on the ground. This made it possible for me to see that rights talk was itself contingent in the sense that certain sites were amenable to claim making in terms of rights, while others were not.<sup>35</sup>

A focus on subjectivity or subject-making allowed me to conduct a more subtle study of self-making through rights talk, because while rights are communicated, they are also learned and expressed through fields of power relations, and they become part of a mindset and daily discipline that transcends language claims and court filings.

#### CONCLUSION

David Engel's thought-provoking Article raises many interesting issues through a seemingly humble, but somewhat loaded, question. We learn that rights consciousness may not be the only reserve of redress for ordinary people in a small village. Rights carry with them meanings that, when expressed, may transform those rights into context-bound claims which may not always serve the needs of the interested parties. Sometimes, especially in small communities with deeply-embedded social relations, broader needs such as reconciliation overtake individual compensation, which is the kind of claim served by individuated rights talk in many contexts. Here, Engel has revealed two key points about redress: first, that ethics and peace of mind, as in Buajan's need for forgiveness and reconciliation, are better served by communal relationship-building as opposed to individual claim making; and second, to capture such nuances in dispute resolution, it is necessary to employ multiple research methods, the vertical and horizontal approaches, while taking a long view of the road upon which interlocutors journey toward their rights. This methodology enables the researcher to account for, highlight, and explain the twists and turns on their many avenues to restitution and remedy.

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35. See OSANLOO, *supra* note 25.

