
PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS LAW AND TRADITIONALISM

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Introduction

The place that human rights occupies in national and international discourse has been hard fought for over the past five decades. Now, it is safe to predict that governments' agendas at national, regional and global levels will include human rights in domestic and foreign bilateral and multilateral matters, whether involving economic assistance, diplomacy, trade, or military assistance. Human rights is an evolving system that has increasingly become integral to today's global affairs. At the same time, human rights continues to reflect the value system that more than five decades ago was instrumental in generating the promotion and protection of human rights. Within the evolving human rights system, the seminal notion of each human being's entitlement to equal rights is based on the fact that he or she has been born – nothing more than that, and nothing less.¹ The system's mechanisms and procedures keep pace with political developments. As a result, while the human rights value system maintains its integrity, the mechanisms and procedures bear less resemblance to those of fifty years ago.

This article first considers the foundations of the human rights system enshrined

in the United Nations Charter of 1945² and the Universal Declaration of Human Rights of 1948.³ It then touches on examples of practical questions of implementation of human rights via the treaty-based committee system, and ends by surveying problematic questions of universality of rights in relation to cultural relativism and traditionalism.

Human Rights in Context

Today, human rights looks back on five decades of successes and failures. The system has developed often useful but often futile implementation methods, and broad dissemination of human rights goes on alongside widespread censorship. Overwhelming numbers of people in every corner of the globe each day suffer violations of basic rights — the right to be secure from torture and other maltreatment, the right to an adequate diet and to health care, the right to protection of the right to think and speak. Indeed, a deep-seated right that is basic to all those rights — the right to learn that everyone has rights — represents perhaps the most deep-seated contradiction of all. Despite the current Decade of Human Rights Education⁴, education on human rights con-

tinues to exist more in theory than in practice. Recognition of the urgent need for human rights education was expressed recently by a distinguished Indonesian who stated firmly:

"The Indonesian government will relentlessly continue to pursue political reforms, so that the people will know their rights and exercise them with confidence that they will be respected and protected. Knowing and exercising their rights, they can more actively participate in the decision-making process that affects their lives."⁵

Too often, still, when governments meet internally or internationally to conduct their business, human rights is a requisite but ineffectual term of reference. Its usage is too often invoked in terms of moral propriety alone – and at that point, too often the discourse ends, before the legally-binding nature of international human rights obligations is invoked. The problem with calling upon morality only, to improve human rights, without invoking the other half of the equation: "International Human Rights Law," is that (as we see daily from egregious human rights violations in many places) not all international actors are driven by moral concerns. States that ignore legal obligations which they as sovereign states have voluntarily undertaken, must be reminded of those obligations. They must be reminded that supporting human rights is not a matter of morality alone, but of legal responsibility by virtue of their membership in the United Nations. Each state that decides to become a member of the UN⁶ ratifies the UN Charter, which is a multilateral treaty. Each member state is subse-

quently required to uphold the Charter in its totality, including the specific human rights duties. The Article 1 (3) of the UN Charter states:

The Purposes of the United Nations are: ... to 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;..."

The Charter and the International Bill of Human Rights

There is a new relationship between the individual and the state, which traces back to the Charter. The opening words of the Charter, which gave formal and authoritative expression to human rights at the end of World War II, offer an innovative if not revolutionary idea: "*We the peoples of the United Nations...*" The words "We the peoples" might lead one to believe that it was the peoples of the United Nations who were the creators of the Charter when in fact, it was the governments of a relatively small number of sovereign states – fifty-one, in fact – who were members of the United Nations at the time that the Charter entered into force. The Charter imperiously offers the notion of the sovereignty of peoples in a document that in fact honors and ensures the sovereignty of the state. To what extent that might in time raise questions about the absolute nature of state sovereignty was not clarified at that juncture, nor, following recent

international actions in places like Kosovo, do the parameters of state sovereignty stand clearly defined today.

Defining and understanding the term "Human Rights" begins with the basic authority that resides in the Charter. At that early stage of the international human rights regime, the drafters of the Charter faced historic responsibility in creating protections for human beings against the power of the state. The Charter drafters took into consideration proposals submitted by that new phenomenon in the UN system, Non-Governmental Organizations (NGOs)⁷, who proposed incorporating an International Bill of Human Rights. Instead, however, creation of the International Bill of Human Rights was left to the Commission on Human Rights which began its functions in 1947 with Eleanor Roosevelt as the first Chair.⁸ The International Bill of Human Rights now consists of the Universal Declaration of Human Rights and the two International Covenants, one on Economic, Social and Cultural Rights, and one on Civil and Political Rights together with its Optional Protocol.

The adoption of the Declaration in 1948 was a paradigm shift of the highest order. It led to a hitherto undreamed-of status for the individual human being, in a world where governments customarily reign unquestioned and unassailable. Achieving agreement among nation-states to the notion of human beings as subjects, and not as before merely as objects of international law, constituted a preliminary inroad on the notion of the supremacy of states. Had states actively perceived the shift implicit in the Declaration's creation as a potential challenge to their supremacy, the Declaration might never have seen the light of day.

The Universal Declaration of Human Rights is a resolution of the UN General Assembly, and as such does not automatically acquire binding legal force in international law. According to the Preamble, the Declaration serves as 'a common standard of achievement' to which all may aspire. During the post-colonial period, many new nations emerging into full statehood incorporated the Declaration's human rights principles and language in their Constitutions, laws and statutes, thus enhancing the breadth and depth of the Declaration's authority. Fortunately for the development of human rights, the creation of the Universal Declaration occurred in the early period of the cold war; a few years delay might have given the Declaration little chance of adoption by the General Assembly.⁹ Indeed, were it not for the sense of shame that enveloped the globe after the Holocaust, international human rights law might have emerged as little more than the voice of the global society's conscience, rather than the equally if not more important legal framework for a world-wide human rights regime.¹⁰

The Soviet bloc at that time gave top priority to economic, social and cultural rights, based on the position that unless the basic human needs of food and shelter were met, all other rights could not be enjoyed. The Western industrialized states accorded first priority to civil and political rights, considering that the most basic human needs could not exist in the absence of the right to think, speak and act freely and in safety. Thus, hampered by the *realpolitik* of the cold war and the ideological rivalry that prevailed, and forced to disregard the illogic of disconnecting civil and political rights from economic, social and cultural rights, the General As-

sembly carried out the division of the Declaration's identified rights into two separate treaties. The two human rights Covenants were drawn up as fully binding multilateral treaties, in force for all UN member states who ratify them. It was therefore not until 1976 that the two Human Rights Covenants entered into force as fully binding multilateral treaties, nearly three decades after the Declaration's adoption.¹¹

The Universal Declaration of Human Rights is widely thought of as the heart of the international human rights system and is undoubtedly the best known and most popular of human rights instruments around the globe. The Declaration succeeded in putting into simple and easily understood language what is meant by the term "Human Rights." It is widely accepted as an authoritative interpretation of the human rights clauses of the UN Charter. And over time, as national judicial decisions have cited to the Declaration, and as it has been acknowledged by or incorporated into a wide range of international documents, its principles have been elevated with considerable authority to the status of customary international law. The notion that the Declaration may now be considered binding on all states appears to have achieved widespread acceptance not only among legal scholars but increasingly through the statements of international conferences, through state practice, and by court decisions. The Declaration was intended to become, and has indeed become, the touchstone of the body of law and norms on human rights everywhere in the world.¹²

Implementation Mechanisms

From among the wide range of in-

ternational human rights treaties now in force, this article looks briefly at six treaties in particular. Each of these treaties establishes its own committee, and requires states that ratify the treaty to submit its report on implementation to the respective committee.

The six treaties are:

1. International Covenant on Economic, Social and Cultural Rights¹³
2. International Covenant on Civil and Political Rights¹⁴
3. International Convention on the Elimination of All Forms of Racial Discrimination¹⁵
4. Convention on the Elimination of All Forms of Discrimination Against Women¹⁶
5. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment¹⁷
6. Convention on the Rights of the Child¹⁸

Each treaty specifies the requirements of states parties' compliance and reporting. The logistics vary in detail from treaty to treaty but overall are similar. In each case, the committee receiving a state party's report on implementation examines whether compliance has been carried out and if so, whether it has been accomplished through legislative, judicial, administrative or other means. The committee is free to comment, and committees' comments are sometimes quite forceful. On some occasions, the committee has been instrumental in persuading a government to improve its implementation. Since the UN committees have limited power, and because the preferred collaborative approach in the human rights field is towards collegial rather than confrontational modalities,

ties, the committee offers its assistance in helping governments achieve more complete realization of the spirit as well as the letter of the treaty in question.

The Universality of the Declaration

The basic tenet of the Universal Declaration is apparent: the universality of rights. In the post-colonial period, some emerging nations raised arguments against the fundamental principle of universality, and claimed the superiority of tradition and culture over rights, especially when principles of universality were not in conformity with the identified norms of traditional culture. By that reckoning, human rights was perceived as a Western construct, and neither natural to nor integral in other cultures. Since many of the present non-Western member states had not been members of the UN in 1948 and had had no voice in adoption of the Declaration, some held that the principles it laid out should not be applicable to their society.

Another argument emanating from less-developed countries made the case that countries engaged in the process of modernization should not be required to uphold their citizens' civil and political rights during that critical period, regardless of treaty-based obligations. Leadership in less-developed countries rejected the notion of monitoring or oversight of human rights practices in their countries. They called nonetheless for continuation of development assistance without conditionality, a position that is emblematic of the traditionalist approach which held that human rights should not be subjected to scrutiny by those holding the purse strings. However, it was and arguably continues to be in

large measure the selfsame economic and political elites in third world countries who argue strongly outside their countries for cultural traditionalism, while in their home countries, those same leaders often savagely cut down what political scientist Jack Donnelly termed the "inconvenient local customs."¹⁰ Those same elites who may stand to benefit most from an unchanging political/economic structure at home may tend to argue most strongly for a benign view of the cultural past and heritage. It would appear that some members of those elites stand to benefit from entrenched structures that they have helped develop at home, all within the confines of a traditional cultural heritage that they themselves have defined or re-defined.

Universal Cultural Legitimacy and Traditionalism

Every human being has the right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights are not however unlimited. The right to culture is ethically limited at the point at which it infringes on another's human rights. Cultural rights are not meant to be invoked or interpreted in such a way as to justify any act leading to the denial or violation of others' human rights. Claiming cultural tradition as an excuse to violate or deny human rights is an abuse of the right to culture; e.g., slavery is outside cultural legitimacy, as are torture, genocide, and discrimination.

Traditional culture is not a substitute for human rights. It is a cultural context in which human rights are established. There is an increasing need to emphasize the common core values shared by all cultures. On

the other hand, universalism does not imply an 'all or nothing' approach between local culture and international human rights standards. Rather, the approach seeks to achieve a moral and political overlapping consensus among the major cultural traditions of the world. Traditional culture is not a substitute for human rights; traditional culture forms a cultural context in which human rights must be established, integrated, promoted and protected. Why not draw on traditional cultural values to reinforce the application of and relevance of universal human rights? That would place emphasis on the common, core values shared by all cultures: the value of life, social order, and protection from arbitrary rule. Traditional cultures should be approached and recognized as partners to promote greater respect for and observance of human rights. Drawing on compatible practices and common values from traditional cultures would enhance and advance human rights promotion and protection. As UN Secretary-General Kofi Annan has stated, "...[h]uman rights are foreign to no culture and native to all nations."²⁰

Cultures are normally more pluralistic than monistic. The assumption in some quarters that culture is an unchanging, unique and encapsulated whole is in many cases a self-serving view. Change is natural and inevitable. Customs are not immutably fixed. Culture is not static. It varies with time, geography, and population. It is affected by social and political change. The nature of each society's culture can differ from individual to individual, and from subgroup to subgroup. "Culture" is often composed of different "subcultures" that may or may not conform to the expectations and norms of the broader society. Cultural relativism tends

to assume that the identified culture of the past, perhaps considered as the original custom of that group or society, is permanent and unchanging. Those promulgating the original culture and those arguing for its purity and intact quality today may indeed be those who choose what is meant by a cultural practice.

How, indeed, can universal human rights exist in a culturally diverse world? Is a global culture inevitable? How might a global culture emerge based on and guided by human dignity and tolerance? From contemporary scholars such as Sudanese Muslim Abdullahi An-Na'im,²¹ comes a profound understanding of universal cultural legitimacy and enlightened interpretations of rights that expand the scope and quality of the dialogue. Along with striving for a "cultural legitimacy of human rights standards," scholars explore the possibilities of cultural reinterpretation and reconstruction through internal cultural discourse and cross-cultural dialogue. Rather than an all-or-nothing approach, we can seek a moral and political "overlapping consensus" that enhances the universal legitimacy of human rights with due respect for tradition and culture. For universality to have meaning to people living in non-Western societies, the need is for universal rights to come from within and emanate from the group's own belief system.

In recent years, a tendency has been evident in strands of Western thinking to accept, along with responsibility for having been instrumental in propounding universality, a certain degree of guilt for so-called 'cultural imperialism.' Rightly or wrongly accused, Western states along with many from other regions argued that the concept of universality is self-evidently a necessary one in the

UN human rights system. A benchmark on this question was established at the UN World Conference on Human Rights in Vienna in 1993.²² At that moment in time, an organized assault was made on universality by less-developed countries led by China, Syria and Iran, and including Singapore, Malaysia, Indonesia, Yemen, Vietnam and Cuba. That was the culmination of cultural relativist anti-universalist arguments that had been growing since the 1960s and 70s, when colonial holdings were shed in the so-called Third World. Those less-developed countries put forward a view of "identity politics" based largely on cultural resistance to the West and the establishment of an alternative discourse to Western imperialism. The anti-universalist argument developed in such a way as to diminish the responsibility of less-developed countries to uphold civil and political rights while in the process of modernization and further, to reject any surveillance, monitoring, or other form of oversight by industrialized countries. In a diplomatic counter to accusations of anti-universality, Indonesia's Foreign Minister Ali M. Alatas spoke out in Vienna against use of "some nebulous notion of 'cultural relativism' as a basis for human rights." The then UN Secretary-General Boutros Boutros-Ghali noted at the Vienna conference that "some countries use the human rights debate as an instrument of national policy."²³ The Conference's final document, the Vienna Declaration and Programme of Action, stated unequivocally that "the universal nature of these rights and freedoms is beyond question."²⁴

Universal human rights does not impose or indeed favor any single cultural standard, but rather one legal standard of minimum protection necessary for human

dignity. In the end, we are not merely appraising whether states adhere to or violate the various international human rights laws. We are examining whether modern states adhere to the values that they claim are inherent in their own cultures. Is the modern state exploiting the language of cultural relativism in order to justify and rationalize repressive actions by its own governing elites to consolidate political power? Non-western states have often trampled on their traditional cultures and values while speaking in the name of a distinctive cultural legacy. Asian countries that argue for cultural distinctiveness and that accuse the west of ethnocentrism are often in reality engaging in repression that is not grounded in their culture. The elites in such countries erect facades behind which they may be free to continue to pursue state terrorism and repression without oversight or monitoring from external forces. Such practices do not find their roots in the cultural traditions of those countries.

Universality is an absolute, if we are not to risk losing the entire corpus of treaty law and customary law arrived at over the past fifty years. Cultural relativism is also an absolute, expressing deeply-held beliefs and feelings of peoples of the world. Despite this seeming oxymoron, both absolutist views need to complement and harmonize with each other while maintaining respect for the full integrity of each position. Absolutisms are in that way tempered with sensitivity to and appreciation for the values of the other.

Traditional culture is not a substitute for human rights: traditional culture forms a cultural context in which human rights must be established, integrated, promoted and protected. How better to advance human rights than to draw on traditional cultural values to

reinforce the application of universal human rights? That would mean emphasizing the common, core values shared by all cultures: the value of life, social order, and protection from arbitrary rule. Traditional cultures need to be approached and recognized as partners to promote greater respect for and observance of human rights. Drawing on compatible practices and common values from traditional cultures is a way towards enhancing and advancing human rights promotion and protection.

Conclusion

International human rights law is a relatively recent addition to the world's combined theoretical and practical resources on behalf of the rights of the human being. Human rights at both the academic and the advocacy levels were not in place from the seventeenth century into the twentieth century, throughout decades of the Westphalian model of international relations.²⁵ Since its inception in the post-1945 period, international human rights law has succeeded in laying out more humane aspirations, norms, and binding legal obligations as agreed by the world community. Careful attention must be paid to distinguishing hard fought-for human rights from rhetoric about human rights, international discourse about human rights, and political maneuvering using human rights language, which weaken the progress being made towards fuller human rights. "Rights are the common ground on which our arguments can begin."²⁶

Catatan

¹ *Universal Declaration of Human Rights*; adopted by the United Nations General Assembly 10 December 1948, UN GA resolution 217A (III), UN Doc. A/810 at 71 (1948), Article 1 - "All human beings are born free and equal in dignity and rights..."

² *Charter of the United Nations*; signed 26 June 1945; entered into force 24 October 1945, 59 Stat. 1031, T.S. No. 993.

³ As each country becomes a member of the United Nations, it automatically adheres to the Universal Declaration of Human Rights, a resolution enshrined in the legislative history of the UN General Assembly.

⁴ "United Nations Decade for Human Rights Education, 1995-2004;" Resolution adopted by the General Assembly, A/RES/49/184, 6 March 1995.

⁵ Consul-General Susanto Prio Utomo delivered an address at the Indonesian Consulate on the fifty-fifth anniversary of Indonesia's independence, August 2000.

⁶ Today the UN has 189 member states.

⁷ Forty-two NGOs were present, including the American Jewish Committee, the Anti-Slavery Society, the NAACP, and the Federal Council for the Churches of Christ. They impressed U.S. Secretary of State Edward Stettinius with the importance of human rights. See Felice Gaer, "Reality Check: Human Rights NGOs Confront Governments at the UN," Weiss & Gordenker (Editors), *NGOs, The UN and Global Governance*, (Boulder, CO.: Lynne Rienner Publishers, 1996).

⁸ *UN Charter*, Article 68: "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." Eleanor Roosevelt, René Cassin of France, and Charles Malik of Lebanon, members of the first Commission on Human Rights, co-drafted the Universal Declaration of Human Rights for presentation to the General Assembly, where it was adopted on 10 December 1948.

⁹ In 1948, the UN consisted of fifty-six member states. The vote on the Universal Declaration of Human Rights in the General Assembly was 48 yes, 0 no, and 8 abstentions: South Africa, the Soviet Union, Ukrainian SSR, Yugoslavia, Byelorussian SSR, Czechoslovakia, Poland, and Saudi Arabia (which

withheld approval on the basis of the stated right to change religion).

¹⁰ Five years after adoption of the Declaration, the incoming U.S. Secretary of State John Foster Dulles proclaimed that the U.S. "would not become a party to any human rights treaty approved by the United Nations," and considered human rights as "a tedious obstacle to the pursuit of great power politics." Michael Ignatieff *Human Rights: The Midlife Crisis*, (New York: New York Review of Books, May 20, 1999).

¹¹ As of writing, more than 160 of the 189 member states of the UN have ratified each of the two Covenants.

¹² Beth Andrus, *The Universal Declaration of Human Rights* (New York: AIUSA Legal Support Network, New York, 1988). See, also Ashbjorn Eide, et al. (Editors), *The Universal Declaration of Human Rights: A Commentary* (New York: Oxford University Press, 1993).

¹³ *UN GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49*, entered into force 23 March 1976.

¹⁴ *UN GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52*, entered into force 23 March 1976.

¹⁵ *UN GA res. 2106A (XX), 20 UN GAOR Supp. (No. 14)*, entered into force 4 January 1969.

¹⁶ *UN GA res. 34/180, UN Doc. A/RES/34/180* (1980), entered into force 3 September 1981.

¹⁷ *UN GA res. 46 (XXXIX), 39 UN GAOR Supp. (No. 51) at 1977*, entered into force 26 June 1987.

¹⁸ *UN GA RES. 44/25, 28 I.L.M. 1448* (1989), 20 November 1989, entered into force 2 September 1990.

¹⁹ Jack Donnelly, *International Human Rights*, (Boulder, CO.: Westview Press, 1993). See, also, Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca, N.Y.: Cornell University Press, 1989).

²⁰ Address of the UN Secretary-General on the 50th anniversary of the Universal Declaration of Human Rights at the UN, New York.

²¹ Abdullahi Ahmed An-Na'im (Editor), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, 1992. See also, Moahmoud Mohamed Taha, *The Second Message of Islam*, translated by Abdullahi Ahmed An-Na'im, (Syracuse, N.T.: Syracuse University Press, 1987). See also, Ann Elizabeth Mayer, *Islam Human Rights: Tradition and Politics*, (Boulder, CO.: Westview Press, 1995).

²² *UN World Conference on Human Rights, Vienna*, 14 - 25 June 1993. See also, *Bangkok NGO Declaration on Human Rights*, 27 March 1993 (pursuant to GA Resolution 46/116 of 1993). See also, "Bangkok

Declaration" of Ministers of Asian States, Bangkok 29 March-2 April 1993, which "stress[es] the universality, objectivity and non-selectivity of all human rights..." and that "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."

²³ Quoted in article: "U.S., in Defining 'Rights,' Insists on Single Standard," *New York Times*, 15 June 1993.

²⁴ World Conference on Human Rights, *The Vienna Declaration and Programme of Action A/CONF.157/23*, 12 July 1993., Article I.

²⁵ The Westphalia Peace Treaty of 1648 marked the change from empires to nation states.

²⁶ Review of books on human rights by Michael Ignatieff, *Human Rights: The Midlife Crisis*, (New York: New York Review of Books, May 20, 1999). Ignatieff reviewed ten books on human rights on topics including the evolution of human rights (Paul Gordon Lauren), NGOs (William Korey), religion and human rights (Gustafson and Juviler), persecution of Christians (Nina Shea), the U.S.A. (Amnesty International USA), genocide and mass violence (Martha Minow), and war crimes (Aryeh Neier).

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