

UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL DIVERSITY¹ A PERSPECTIVE²

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The quiet of the grave is not suited for the development of thought. What is true of scholarship in general is also true for the particular branch of scholarship that deals with human rights.³

1. UNIVERSALITY OF HUMAN RIGHTS

1.1 WHO PROCLAIMS UNIVERSALITY? HOW IS UNIVERSALITY DETERMINED?

This speech is an attempt to offer á perspective, given the particular circumstances⁴ that moulded my thinking. I will sketch the background and confine myself to the unfolding South African scene. The problem, which I will not try and resolve today, is that the different regions in the world and some commentators, also in South Africa, hold firm views.⁵

1 This speech was delivered on two occasions; at an International Symposium on “Oriental Culture and Human Rights Development” sponsored by the China Society of Human Rights Studies and the China Foundation for Human Rights Development in Beijing (29-31 October 2002) and a Colloquium on “Politics, Socio-economic issues and Culture in Constitutional Adjudication” organised by the Faculty of Law of the PU for CHE and sponsored by the Konrad-Adenauer-Stiftung in Rosebank (16 November 2002).

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3 Baehr PR “Controversies in the Current Human Rights Debate” *Human Rights Review* Vol. 2 Issue 1 October-December 2000, 7.

4 I am indebted to the South African constitutional negotiators of the nineties and colleagues at the South African Human Rights Commission (hereinafter the SAHRC) who introduced me to and also enlightened my thinking on this matter.

5 Stemmet A “Walking the tightrope: the diplomacy of human rights” *Acta Academica* 2002 34(2) 79 illustrates the emotional undertones of the debate by quoting the former British Foreign Secretary Robin Cook: “Do African mothers not weep when their sons or daughters are killed or maimed by agents of repressive rule? Are not African fathers saddened when their children are unjustly jailed or tortured?”

Universal human rights imply inclusiveness because it reflects our “common humanity”.⁶ This is determined and refined through interpretation and application by humankind at particular moments in time and history. Universality is much more than the determination by a majority at a particular moment because universal human rights “are the rights of all persons in the world”.⁷

Nothing precludes an organisation or institution, international or national, to set human rights standards that should apply within that organisation. The result, if it is not a consensus position, often leads to the dissatisfaction of those who do not agree with the majority. It means that those who are in disagreement have to convince fellow participants otherwise or abide by the rules and the standards set by the majority. On the other hand, if there is disagreement, the majority cannot proclaim “universality of human rights” because there is majority support for their particular point of view. An organisation does not proclaim universality of human rights, nor is it proclaimed by a group of nations; it is much more than majority positions. A distinction is drawn between universality of human rights and the standards set by a particular organisation. Those who have to uphold the standards set by human rights bodies must ensure that the members of that organisation own them.

Whether particular human rights standards are in harmony with the core of universal human rights, namely human dignity and equality will always be a matter for debate.

1.2 UNITED NATIONS SYSTEM

1.2.1 UNITED NATIONS CHARTER

The international human rights movement is grounded in the United Nations. The United Nations Charter stated without specification, but in clear terms that

6 Tharoor S “Are Human Rights Universal?” *New Internationalist* Mar 2001 Issue 332.

its founding members and presumably all future members should uphold and promote human rights.

We the peoples of the United Nations ... reaffirm faith in fundamental rights, in dignity and the worth of the human person, in the equal rights of men and women of nations large and small ...⁸

This is trite. I am not aware of any state trying to qualify or entering a reservation when joining the United Nations system.

1.2.2 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The Human Rights Commission, formed by the United Nations, under the stewardship of Eleanor Roosevelt was charged with the responsibility of giving content to the human rights provisions of the United Nations Charter.⁹ After years of debate and negotiations the General Assembly of the United Nations accepted the UDHR without any dissenting votes.¹⁰

The broad language of the UDHR was criticised. The Third World later began to criticise it because it was a Western product lead by the United States and a few declining colonial powers, the American Right criticised it because it was not specific enough, remembering that Stalin¹¹ had originally approved it. Others claimed that the main achievement of the UDHR is that it has removed the individual from the total control of the state. Although it did not create legal obligations it provided moral and political guidelines for what was to follow.¹²

7 Brems E *Human Rights: Universality and Diversity* (2001) 4.

8 Preamble to the United Nations Charter.

9 "The initiative for the UDHR came about as a reaction to World War II. First, Hitler had shown that a country which violates human rights at home may eventually violate human rights overseas, and so it was necessary to deal with such threats immediately. Also the Allied countries were embarrassed that none of them had complained officially between January 1933 (when Hitler came to power) and September 1939 (the onset of World War II) about the treatment of the Jews. Suter K "The Fiftieth Anniversary of the Declaration of Human Rights" *Contemporary Review*, Dec 98, Vol.273 Issue 1595, 281.

10 South Africa abstained with seven others.

11 USSR ultimately abstained.

12 Abrams E "Human Rights and Mrs. Roosevelt" *First Things: A Monthly Journal of Religion & Public Life* Jun/Jul 2001 Issue 114, 44.

The UDHR became a source of international law and action of the United Nations.¹³

This Declaration was not accidentally called “universal” and not “international”. The intention was to “proclaim equal rights for all members of the human family”. An “international” Declaration would come about by virtue of an agreement reached by governments representing their states and adopted in the General Assembly of the United Nations.¹⁴

1.2.3 WORLD CONFERENCES

During two world conferences the importance of the UDHR and during the second conference universality of human rights were considered.

1.2.3.1 TEHERAN (1968)

The proclamation of Teheran proclaimed that:¹⁵

The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community. (Emphasis added).

The silence regarding cultural and regional particularities of human rights is an indication that the universality of human rights which was taken for granted has now become “a hot topic of debate”.¹⁶ The approach of the wealthier nations, Europe and America in particular, to link economic relations and the provision of humanitarian aid to a country’s human rights record have contributed to this controversy. “This has led to the perception that human

13 Espiell HG “Universality of Human Rights and Cultural Diversity” *International Social Science Journal* Dec 98 Vol. 50 Issue 158, 526-536.

14 Abrams (see n 9 above) 45.

15 Paragraph 2.

16 Brems (see n 7 above) 22.

rights standards are being imposed by the North on poverty-stricken or war-torn countries of the South”.¹⁷

1.2.3.2 VIENNA (1993)

The Vienna Declaration and Plan of action was specific:¹⁸

- The universal nature of these rights and freedoms is beyond question...¹⁹
- All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.²⁰ (Emphasis added).

These provisions of the Vienna Declaration lead to the following conclusions:²¹

- Dignity is the common basis of all human rights;
- Human rights are universal;
- There is room for national and regional particularities given the political realities we have to contend with. This however has to be interpreted and construed taking into account the “object and purpose” of the Final Act of the Vienna Conference.

17 Sane P “Human Rights and the Clash of cultures” *New Perspectives Quarterly*, Summer 93 Vol. 10 Issue 3, 27.

18 This was the result of 180 states and hundreds of NGO’s participating and working through the results of three regional conferences.

19 Paragraph 1.

20 Paragraph 5.

21 Espiell (see n 13 above).

2. CULTURAL DIVERSITY

2.1 WHAT DOES THIS MEAN?

The UDHR did not go, nor should it have gone into the question of how cultural diversity impacts on human rights, its nature content and limits.²² The question therefore remains how does cultural diversity effect the kernel of human rights?

Tharoor argues that:²³

The basic problem with cultural relativism is that it subsumes all members of a society under a framework they may prefer to disavow. If dissenters within each culture are free to opt and to assert their individual rights - for example, Muslim women in my country, India, have the right not to marry under Muslim Personal Law – then it is different story. (Emphasis added).²⁴

It is widely conceded that universality of human rights does not mean uniformity of human rights, in fact, diversity adds to the universal understanding of human rights.²⁵ Human rights derive from the mere fact that we are human and owe no allegiance to a particular government or a specific legal code.²⁶

Culture is constantly evolving and responding to internal and external stimuli. There is nothing sacrosanct about culture. Societies often outgrow and then reject behavioural patterns within a particular culture.²⁷ That is the reason why

22 Espiell (see n 13 above).

23 Tharoor (see n 6 above).

24 "There are fifty Muslim states in the world, with a variety of legal and political systems, and there is no single body, political or religious, that speaks for the Muslim world as a whole." Halliday F "Relativism and Universalism in Human Rights: the Case of the Islamic Middle East" *Policial Studies* (1995), XLIII, 155

25 Espiell (see n 13 above), Brems (see n 7 above) 14.

26 Tharoor (see n 6 above).

27 Tharoor (see n 6 above).

slavery is not acceptable anymore or women now have the right to vote in Switzerland, something that was inconceivable thirty years ago.²⁸

International human rights standards evolve from universal rights. Within each country, these standards are internalised by that country's history and tradition.²⁹ The manner in which these rights are limited through application and interpretation gives content to universal rights.³⁰ Cultural diversity does not necessarily undermine universal human rights; in fact it could enhance it. Whether the limitations flowing from cultural diversity obliterate or provide content to the right have to be considered on a case by case basis.

3. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

3.1 BACKGROUND

The initial debates about the desirability of regional human rights systems have now been settled. There is a common understanding that regional systems of human rights could contribute to the promotion of human rights globally.³¹ The African Charter on Human and Peoples' Rights proudly takes its place in this international array of international instruments.

There were two opposite motivations for the creation of the ACHPR:³²

- African states did not want to stay behind in the global movement towards human rights.
- There was a desire to affirm the African identity within universal human rights.

28 Tharoor (see n 6 above), Sen A "Democracy as a Universal Value" *Journal of Democracy* 10.3 (1999) 3-17.

29 "You cannot impose the model of a 'modern' nation-state cutting across tribal boundaries and conventions on your country, appoint a president and an ambassador to the United Nations, and then argue that tribal traditions should be applied to judge the human rights conduct of the resulting modern state." Tharoor S "Are Human Rights Universal?" *World Policy Journal*, Winter 99/2000, Vol.16, Issue 4.

30 Tharoor (see n 6 above).

31 Weston BH, *et al*, "Regional Human Rights Regimes: A Comparison and Appraisal" *Vanderbilt Journal Transitional Law* 1987, 589.

When the experts met to draft the ACHPR in Dakar³³ the then Senegalese President Leopold Sedar Senghor cautioned them not to draft a charter of “The Right of the African Man”.³⁴ The “principle of universality” should be respected without losing sight of the African values of civilisation and the real needs³⁵ of Africa.

The ACHPR is not merely a charter on human rights but a charter also on “peoples’ rights. It was the intention to make a statement in support of these rights. It also lists individual duties.”³⁶

3.2 PRACTICE

Brems argues that in the African context, cultural elements are often chosen to serve “political and economic needs” which are not of a cultural kind.³⁷ Penna and Campbell goes further and bluntly states that “apologists and supporters of authoritarian regimes have tried to dress oppression in traditional attire to make it palatable”. This they claim is an abuse of tradition.³⁸

32 Brems (see n 7 above) 92.

33 28 November 1979.

34 Brems (see n 7 above) 93.

35 Brems *ibid*, is of the view that this refers to “the situation of underdevelopment which leads to an attachment to economic, social and cultural rights, to collective rights, and in particular to the right to development.”

36 Brems (see n 7 above) 97.

37 Brems (see n 7 above) 181.

38 Penna DR & Campbell P “Human Rights and Culture: Beyond Universality and Relativism” *Third World Quarterly*, Mar 98 Vol.19 Issue 1, 7.

4. A SOUTH AFRICAN PERSPECTIVE

4.1 THE CONSTITUTIONAL FRAMEWORK

4.1.1 FOUNDING PRINCIPLES

The international community, without exception, was united in its condemnation of apartheid. Differences existed about the manner it should be brought to an end. The standards set for the condemnation and the subsequent system to replace apartheid with was the UDHR and the so-called International Bill of Rights.³⁹

When the South African constitutional negotiators mapped out the road forward they agreed that “everyone shall enjoy all universally accepted fundamental rights”.⁴⁰ It was clear that they had ALL the internationally accepted human rights and not only the favourite rights of any particular grouping around the negotiating table in mind. This inclusive and all embracing approach provided the security the different negotiators needed to convince their widely divergent constituencies that South Africa belong to “those that live in it”,⁴¹ regardless of culture, religion, race or political persuasion. There would be a home for all.

The initial excitement about the idea of a new dawn was followed by hard negotiations. Giving content to universal human rights, specifically South African content, was easier said than done. The proverbial expression, “heaven lies in the principle, the devil is in the detail” received new meaning for the South African negotiators during this period.

The negotiators, determined not to be deterred by deadlocks and obstacles, were always optimistically pressing ahead in search for alternative formulations and approaches, always in step with universal human rights.

39 Baehr (see n 3) 24.

40 Principle Schedule 4, Act 200 of 1993.

41 Preamble of the Freedom Charter, adopted by the Congress of the People in 1955.

Their tireless efforts must be symbolic of Sen's comments years later when he stated that the rise of democracy was the most important thing that happened in the twentieth century.⁴² Espiell remarks that the end of apartheid was an important step towards the widespread acceptance of universally human rights.⁴³

4.1.2 CONSTITUTIONAL PROVISIONS

The following constitutional provisions are relevant for this discussion:

- The Constitution⁴⁴ sets out to heal the divisions of the past, and establish a society based on democratic values, social justice and to build a united South Africa.⁴⁵ The core values - are human dignity, the achievement of equality and the advancement of human rights and freedoms.⁴⁶
- There are eleven official languages. All these languages must enjoy "parity of esteem and must be treated equally".⁴⁷ There is a constitutional commitment to advance the use and status of the indigenous languages.⁴⁸
- When exercising the right to participate in the cultural life of one's choice, it should be done in a manner consistent with the Bill of Rights.⁴⁹ Cultural, religious or linguistic communities may not be denied the right to enjoy or form associations provided it is not inconsistent with the provisions of the Bill of Rights.⁵⁰
- None of the rights mentioned are absolute and can only be limited⁵¹ and suspended⁵² if certain preconditions are met. Limitations follow after

42 Sen (see n 28 above), makes a thought provoking comment – a country does not have to be "fit for democracy" but "has to become fit through democracy".

43 Espiell (see n 13 above).

44 Act 108 Of 1996 (hereinafter "The Constitution").

45 Preamble of The Constitution.

46 Section 1 of The Constitution.

47 Section 6(4) of The Constitution.

48 Section 6(2) of The Constitution.

49 Section 30 of The Constitution.

50 Section 31 of The Constitution.

serious debates and are only permitted if the Constitutional Court is convinced that they are *inter alia* “reasonable and justifiable”. The core of the right must remain in spite of the permissible limitation. Some rights, such as human dignity and the right to life are never susceptible to suspension; others may be suspended only when certain dire circumstances prevail.

- When interpreting the Bill of Rights, the values that underpin the Bill of Rights, “human dignity, equality and freedom” must be promoted. In the process of interpretation international law “must” be considered and foreign law “may be considered.”⁵³

4.1.3 THE REAL WORLD

Recently, much to my surprise, I was asked to defend certain constitutional provisions and the work of the SAHRC. Proponents of the cultural argument stated that human rights are important, but then continue to argue that their cultural practices should be left alone. Presumably culture to them, is on a higher plane than constitutionally enshrined human rights. Some Afrikaners as well as some traditional leaders promote these arguments in South Africa.

During an inquiry into initiation practices at academic institutions and a subsequent preliminary inquiry into cultural initiations both Afrikaners and traditional leaders claimed that the SAHRC did not understand their culture. The SAHRC found that the initiation practices, as currently performed, violated the spirit of dignity, equality and freedom on which the Constitution was founded. The many other cases relating to religion, marriage such as the women’s position during *lobola* negotiations, the *twala* custom, the customary law principle of [male] primogeniture, *isipandla* and *mogaga* practices could be cited as examples. A complaint regarding religious holidays was also lodged, the argument being that our public holiday calendar favours the

51 Section 36 of The Constitution.

52 Section 37 of The Constitution.

53 Section 39(1) of The constitution.

Christian Religion and that the existing Christian holidays should therefore be removed as public holidays – this matter is still debated within the SAHRC. The findings of the SAHRC in the other matters have always been to denounce superiority and dominance of an individual or group over the other. The advancement of freedom to take one's own decision or act on one's own behalf have often been met with outspoken resistance by those that advance traditional or cultural thinking.⁵⁴

This begs the question – are some practitioners of culture the first among equals or are they just equal. Putting it differently – are we only paying lip service to the equality provisions in the constitution when they work in our favour? Do we only respect the constitution when we are demanding rights but conveniently forget the provisions of the constitution when we have to uphold the rights of others? There is most definitely room to practice ones culture but it has to enhance the dignity, freedom and equality of every individual, this includes the most vulnerable among us – women, children and the aged.

I was recently confronted with the argument that I preach the Constitution as if it is the only truth but do not understand African family tradition. The male is the head of the household and only he can decide and speak on behalf of the women and children in his care. Afrikaners have also advanced this argument in this as well as others contexts – in some Afrikaner churches females still can not become priests.

The constitutional provision is clear – one may enjoy and practice one's culture and religion but this must be done in harmony with our constitution.⁵⁵ Our culture has to be practised within this framework and those who have to promote respect for the constitution must interpret cultural practices and apply the constitution without fear or favour.

5. CONCLUSION

54 Section 30 of The Constitution.

The issues are not as clear-cut as some cultural practitioner's claim. The world has changed and so has the South African society. Culture is constantly evolving and responding to internal and external stimuli. Societies often outgrow and then reject behavioural patterns within a particular society. This is the reason why women have the right to vote in Switzerland, something that was inconceivable thirty years ago and women don't go with hats to Afrikaner churches anymore. Women are nowadays often the heads of households, the sole breadwinners, caring for children and taking important decisions on behalf of those in her care.

The final word has not been spoken on this topic in South Africa. We continue to give life and content to universal human rights in a society referred to by Desmond Tutu⁵⁶ as "our rainbow nation". The diversity and the divisions of the past often threaten to pull us apart but time and again we realise that it is our "common humanity" as contained in universal human rights and embedded in our Constitution, that bind us together. We can now revisit the practices of our cultures, often in agony, realising that human dignity⁵⁷ has to be given a special meaning in the times we are living. Balancing cultural practice and constitutional values is done in a spirit of respect, the one is not subservient to the other, but everybody realising that this Constitution strives to do justice to everybody's aspirations without diminishing the dignity of anybody.

Let us not forget the words of warning of Leopold Senghor as mentioned earlier – the African Charter of Human and Peoples' Rights is not a charter of "The Right of African Man" but one that encapsulates African values and also upholds universal principles. These sentiments are firmly grounded in our Constitution where cultural practice could be enjoyed keeping in mind the dignity and equality of everybody.

55 Section 30 of The Constitution.

56 Former Nobel laureate.

57 Venter F "The Impact of Human Rights on South African Society" unpublished speech delivered at?

The SAHRC intends to keep an open mind on these matters and will judge each case on its own merits. Human dignity has to be given a special meaning in the times we are living, remembering that scholars have argued convincingly that "... there may be conceptions of human dignity that are distinctly African ..." and not an invention of Europe and America.⁵⁸ Balancing cultural practice and constitutional values is done in a spirit of respect; the one is not subservient to the other, but realising that our constitution strives to do justice to everybody's aspirations without diminishing the dignity of anybody. Sometimes the results cause discomfort. This is however the nature of a constitutional dispensation and human rights discourse. The challenge is to promote harmony in our diverse society – we have to unite in our diversity – *Xe e Xlara Xe*.⁵⁹

Kofi Annan is correct: "We can love what we are, without hating what – and who – we are not".⁶⁰

58 Nhlapo T in Mamdani M (ed) *Beyond Rights Talk and Culture Talk* (2000) 147, Bennett TW *Human Rights and African Customary Law* (1995) 5.

59 Inscription on South Africa's Coat of Arms. XXX

60 Kofi Annan "We can love what we are, without hating – and who – we are not", Nobel Lecture 10 December 2001.
<http://www.un.org/News/Press/docs/2001/sgsm8071.doc.htm>.