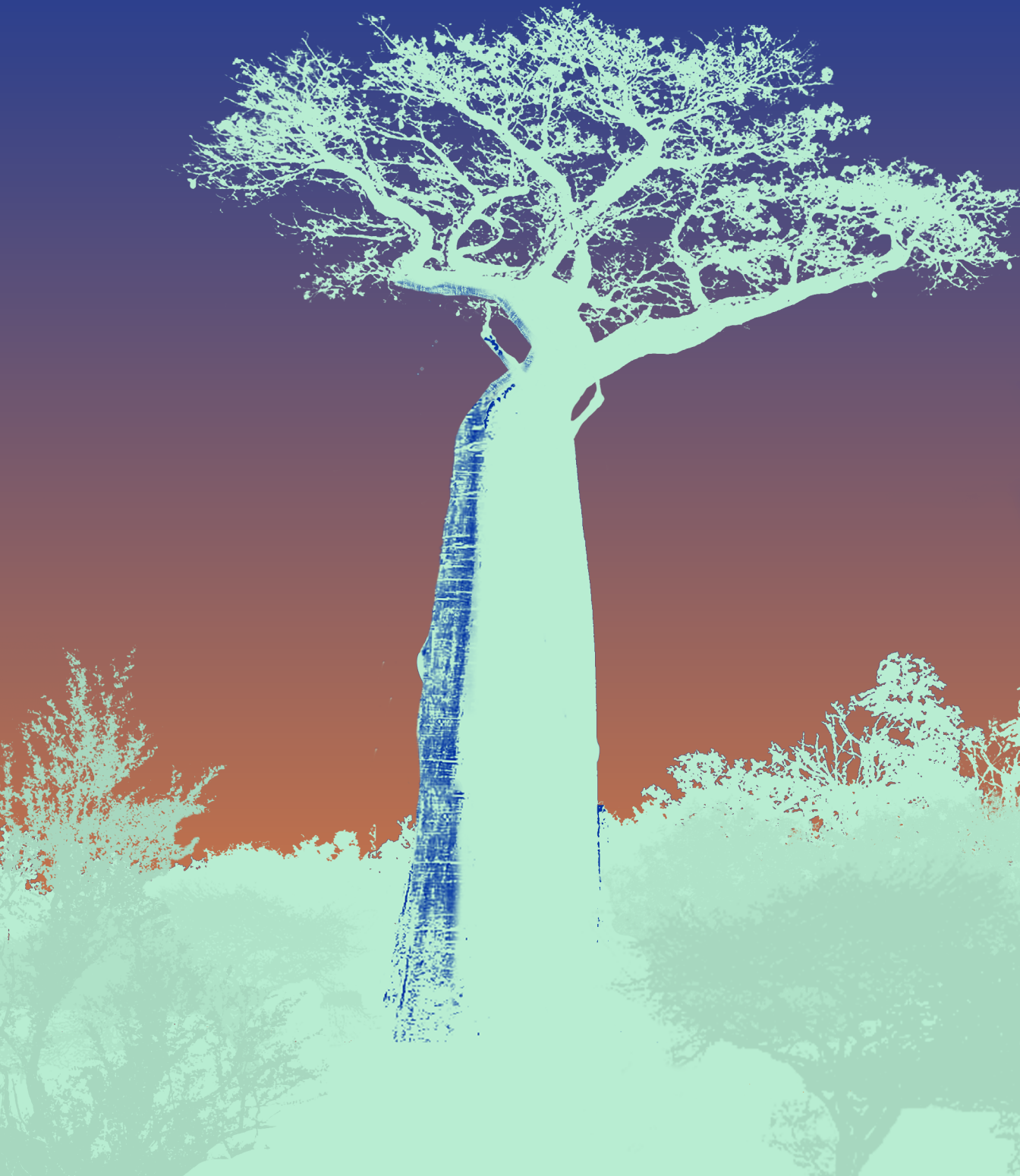


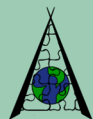
# CROSS-CULTURAL HUMAN RIGHTS REVIEW

VOLUME 1, SPECIAL ISSUE: UDHR, DECEMBER 2019



ISSN: 2666-366X (Print)  
EISSN: 2666-3678 (Online)

[cchrreview.org/specialissue-udhr](http://cchrreview.org/specialissue-udhr)

CROSS-CULTURAL  
HUMAN RIGHTS REVIEW

## Managerial Board

**Wim Janse (Editor-in-Chief)**, *Vrije Universiteit Amsterdam*  
**Serges Djouyou Kamba (Deputy Editor-in-Chief)**, *University of South Africa*  
**CHANG Jian (Deputy Editor-in-Chief)**, *Nankai University*  
**Vivian O.F. Aiyedogbon (Managing Editor)**, *Vrije Universiteit Amsterdam/Utrecht University*  
**Julie A. Fraser (Book Review Editor)**, *Utrecht University*

## Advisory Board

**LU Haina**, *Renmin University of China*  
**Makau W. Mutua**, *University at Buffalo*  
**Sindile A. Ngubane-Mokiwa**, *University of South Africa*  
**QI Yanping**, *Shandong University*  
**ZHANG Yonghe**, *Human Rights Institute of Southwest University of Political Science and Law*

## Editorial Board

**CHEN Youwu**, *Guangzhou University*  
**Vusi Gumede**, *The Thabo Mbeki African Leadership Institute*  
**Seth D. Kaplan**, *John Hopkins University*  
**LIU Huawen**, *Chinese Academy of Social Sciences*  
**LU Zhian**, *Fudan University*  
**MAO Junxiang**, *Central South University*  
**Edith Phaswana**, *The Thabo Mbeki African Leadership Institute*  
**Alison Dundes Renteln**, *University of Southern California*  
**WANG Xigen**, *Wuhan University*  
**Wouter G. Werner**, *Vrije Universiteit Amsterdam*  
**ZHANG Wei**, *China University of Political Science and Law*

## Communications

**Sarah W. Njoroge**, *Vrije Universiteit Amsterdam*

*The Cross-cultural Human Rights Review (CCHRR) is a peer-reviewed periodical devoted to cross-cultural human rights studies. It contains articles in this field as well as in other specialized related areas. It aims to broaden the discourse within the field of human rights and produce stimulating research, by providing a platform for dialogue on the diverse cultural understandings and protection of human rights. In this respect, publications focus not only on law, but on how human rights are implemented through social institutions. The CCHRR is a significant contribution to the discussion and dissemination of new and crucial scholarship on cross-cultural approaches to human rights.*

*The articles and other material contained in the CCHRR reflect the views of their authors and do not necessarily coincide with those of either the Editor-in-Chief, Deputy Editor-in-Chiefs, Managing Editor, the Book Review Editor, the Advisory Board, the Editorial Board or Communications.*

## Copyright and Permissions

© The Author(s) (2019). Published by Cross-cultural Human Rights Review. All rights reserved. No part of the content of this Review may be reproduced, stored, or distributed in any form without written permission from

the Cross-cultural Human Rights Review. For permissions please email: [CCHRR.frt@vu.nl](mailto:CCHRR.frt@vu.nl)

All contents within this issue are published and distributed in accordance with the Review's policy on 'Ethics and Disclosure' online at [www.cchrreview.org](http://www.cchrreview.org) Please visit for more information.

*Disclaimer:* The Cross-cultural Human Rights Review, authors, editors, and boards will not accept any legal responsibility or liability for any errors or omissions made in this publication. Statements of fact or opinions in the articles and book reviews in the Cross-cultural Human Rights Review are those of the respective authors and contributors and not of the Cross-cultural Human Rights Review. The Cross-cultural Human Rights Review makes no warranty, implied, or expressed, with regards to the material herein contained, and assumes no responsibility for the views expressed by the authors.

## Subscriptions

The Cross-cultural Human Rights Review publishes on an open access basis. The content herein is freely available online with no subscription fee or article-pay-to view fee or any other form of access fee or any publication embargo being applied. No entity, person, or body is authorized to reproduce, store, or distribute the contents herein for a fee. For more information please email: [CCHRR.frt@vu.nl](mailto:CCHRR.frt@vu.nl)

The Cross-cultural Human Rights Review **mailing address** is:

Cross-cultural Human Rights Review  
Vrije Universiteit Amsterdam  
Faculty of Religion and Theology  
De Boelelaan 1101  
1081 HV Amsterdam  
The Netherlands

For **free access** to the **contents within this issue** please visit the CCHRR website: <https://www.cchrreview.org>

Identifiers of the Cross-cultural Human Rights Review:  
online ISSN: 2666-3678 | print ISSN: 2666-366x

## Advertisement Policy

The Cross-Cultural Human Rights Review does not display advertisements. However, it does recognize and display links of affiliates, these include, but are not limited to, research institutions and non-governmental organizations. For enquiries please email: [CCHRR.frt@vu.nl](mailto:CCHRR.frt@vu.nl)

## TABLE OF CONTENTS

---

### Editorial

- CCHRR December 2019 'A Spark within the Human Rights Discourse' 1  
*Vivian Aiyedogbon, Wim Janse*

### Articles

#### Examining the Drafting History of the UDHR

- Universalism and the Universal Declaration: Recovering the Drafters' Flexible Vision 4  
*Seth D. Kaplan*
- Christian and Confucian Rapprochement in the UDHR Debate 35  
*Sumner B. Twiss*

#### Influence of UDHR in the Years After Its Publication

- Article 29(1) of the Universal Declaration of Human Rights: Reflection on Drafting, Sources and Influences 53  
*Junxiang Mao, Xi Sheng*
- "In Spirit of Brotherhood": The Principle of Fraternity Between Rights and Duties. A Reflection Since the Universal Declaration of Human Rights 81  
*Israel Moura Barroso*

---

## Significance of the UDHR

- 70 Years After: Reflections on the Significance of the Universal Declaration of Human Rights for Women's Rights in Africa 105  
*Larissa Heüer*

- Freedom from Fear: Has it Faded since the UDHR? On the Approaches of Europe and China 130  
*Chao Jing*

## The Future of the UDHR

- What is Wrong with Media Freedom as a Human Right in Africa Today? 153  
*Khanyile Mlotshwa*

- What is Next for Human Rights after 70 Years? Human Rights 'From Below' in 'Little Mogadishu' 177  
*Willem J.E. Jansen*

## Book Reviews

- Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013) 350 pp. ISBN 9781139237161 (online) 201  
*Stacey Links*

- Su Li (Author), Zhang Yongle, and Daniel A. Bell (eds.), Edmund Ryden (Translator), *The Constitution of Ancient China* (Princeton University Press, 2018) 16-210 pp. ISBN 9780691171593 (online) 205  
*Cong-rui Qiao*

- William D. Davies and Stanley Dubinsky, *Language Conflict and Language Rights: Ethnolinguistic Perspectives on Human Conflict* (Cambridge University Press, 2018) 425 pp. ISBN 9781107606586 (softcover) 209  
*Adina-Loredana Nistor*

## **CCHRR EDITORIAL DECEMBER 2019: ‘A Spark within the Human Rights Discourse’**

We are proud to present the first issue of the new *Cross-cultural Human Rights Review*. This multidisciplinary peer-reviewed international review aims to fill a gap. The cross-cultural approach of human rights is a rather new branch of learning. In simple terms, by cross-cultural approach we mean the following. We engage with discourses on human rights found within the context of different countries and cultures. The authors, editors, and boards of the *Cross-cultural Human Rights Review* (CCHRR), attempt to position themselves within these contexts and look from new, and sometimes opposite perspectives to *what is thought* to be human rights in mainstream discourses. Such assertion does not reject the tremendous work which has been done and that is happening now within the field of human rights. However, the CCHRR recognises that there is more than one way of understanding what is human rights and it provides a platform where this can be voiced.

Strikingly, the CCHRR has emerged at a time, where there is a rise in decolonial studies and voices on human rights. One example is the recent expert seminar with keynote address by Professor Abdullahi Ahmed An-Na'im on 'Decolonizing Human Rights,' organised jointly by the Cross-cultural Human Rights Centre and Vrije Universiteit Amsterdam, in May 2018. This challenged the extent that a consensus on the universality of human rights exists within the Universal Declaration of Human Rights (UDHR), which he noted reflects a liberal interpretation. Whilst this might seem ironic, given that the theme of this publication is based on the 70<sup>th</sup> anniversary of the UDHR, the underlying objective of Professor An-Na'im's presentation still resonates with our work. This he summarised in one key question: what is missing in human rights? His answer rightly pointed to what was crucial about this question, that he himself could not answer this, and nor can we, who are writing this editorial. Rather, voices which *should have* and *did not*, and (we add) *still do not* have a say in what is human rights must be given the chance to answer what is missing in human rights. It is these answers which the CCHRR brings.

The review provides the opportunity for scholars from the 'Global South' to bridge this question with scholars from the 'Global North', through publications. An excerpt from our 2018 Mission Statement is apt in demonstrating just how far-reaching this is:

‘[The CCHRR aims] to facilitate a proper universal exchange of views... Broadening the discourse on human rights means that our focus will not only be on law but also on how human rights are implemented through social institutions – i.e., through cultural norms and moral rules, in particular relating to religion, family, governance, education, and the economy, which are at the core of society. In this sense, the review will build necessary lines of communication between the Global South and the North’.<sup>1</sup>

Considering this, the Review facilitates a platform for dialoguing between these varying views. It must be emphasised that the objective is not to seek an agreement on human rights, but rather, as stated, to dialogue. It is through this that the Review hopes, first, to answer burning questions on the broader discourses within human rights. Secondly, to build understanding amongst stakeholders in different regions of the world on the diverse perspectives within the field of human rights. Thirdly, to deconstruct the ‘other’ when thinking about human rights in the ‘Global South’. We put forward the question: can human rights truly exist outside the cross-cultural? Bearing this in mind, the CCHRR does not shy away from contentious, challenging, and thought-provoking scholarship. In exchange, the CCHRR aims to cause moments of self-reflection, development of cultural sensitivity, and recognising the need for inclusivity within its readers and audiences. Such conditions of thought are crucial in any pluri-ethnic, multicultural, and multifaith society, which we see in many regions in the world. Thus, the CCHRR hopes to achieve dialoguing on three levels: between the diverging and diverse discourses within human rights; internally within readers and audiences of the Review; and in lived experiences.

The theme of this issue, the 70th anniversary of the UDHR, is particularly telling of the strong statement which the CCHRR wishes to make at its beginning. That is, we are looking back to the 70th anniversary of the UDHR in order to look towards the future of human rights. As a document that has stood the test of time, shaping human rights laws and policies around the world, it is worthy of study. More importantly, it would be a serious setback to cross over this 70th year threshold without examining how cross-cultural approaches have been necessary in building human rights protection in different contexts and will also be necessary in sustaining the future of human rights. The issue is split into four subthemes: the drafting history of UDHR; its influence in the years after its publication; its significance; and the future of the UDHR. The diversity in scholarship is demonstrated by the varied topics under discussion including, for example, the principle of fraternity, African women’s rights, media rights in Africa, and freedom from fear in China. It is also reflected in the background of our authors, who hail from different corners of world, and range in levels of seniority within their respective profession. The first issue

---

<sup>1</sup> Cross-cultural Human Rights Review, <https://www.cchrreview.org/scope> [Last accessed 28/11/2019].



proves to be a monumental step in the direction of the CCHRR’s aim to broaden the discourse on human rights.

Finally, as to the Review’s future trajectory: this can be summarised through its aims. This includes to highlight underrepresented voices and make scholarship particularly from the Global South more accessible. It will continue providing access to publications on human rights which may not reflect the status quo, as well as opportunities for publication for rising scholars. It will build a global platform for open discussions and debates. The CCHRR is also taking a more interactive and sustainable approach to scholarship, through the various activities on its website, such as blogs, features, and our social media platforms. Through this it hopes to ensure that ideas published within the Review are sustained beyond their publication date. In so doing, it will build more sustainable relationships with those who participate in the Review. Overall, it is our ambition to contribute a more global approach to the human rights discourse. This is represented by the CCHRR logo – a tent with space for diverse components and for the whole – and its motto, to ‘include all nations in the human rights dialogue’.

Thanks for getting involved!

*Wim Janse, Editor-in-Chief\**

*Vivian Aiyedogbon, Managing Editor\**

---

\* *Professor of Religion and Public Policy, Vrije Universiteit Amsterdam. Email contact: [w.janse@vu.nl](mailto:w.janse@vu.nl)*

\* *Researcher and Junior Lecturer on Public International Law, Vrije Universiteit Amsterdam/ Utrecht University. Email contact: [v.o.f.aiyedogbon@vu.nl](mailto:v.o.f.aiyedogbon@vu.nl)*

# **Examining the Drafting History of the UDHR**



## UNIVERSALISM AND THE UNIVERSAL DECLARATION: RECOVERING THE DRAFTERS' FLEXIBLE VISION

SETH D. KAPLAN\*

### ABSTRACT

*The Universal Declaration of Human Rights (UDHR) offers a roadmap for facing current challenges to the human rights movement and for building a consensus around basic, or primary, rights. The UDHR reflected a cross-cultural, cross-political consensus, synthesizing diverse ideas about rights, varying conceptions of personhood and duties, and multiple modes of implementation. It allowed for rights ideals to be understood across societies with significantly different value systems. Such flexibility is critical today if human rights are to retain their legitimacy in an increasingly diverse and multi-polar world—a world in which consensus will be the only way to achieve progress.*

### KEY WORDS

Universal Declaration; Consensus; Rights; Treaties, Jacques Maritain, Eleanor Roosevelt, Peng-chun Chang

---

\* Seth D. Kaplan, a Lecturer in the Paul H. Nitze School of Advanced International Studies (SAIS) at Johns Hopkins University, is the author of *Human Rights in Thick and Thin Societies: Universality Without Uniformity* (Cambridge, 2018). Email: [seth@sethkaplan.org](mailto:seth@sethkaplan.org)

\*\* I am indebted to Mary Ann Glendon of Harvard University and Tom Zwart of Utrecht University for their contribution to the conceptualization of the ideas here, and to Richard Shweder of the University of Chicago for his willingness to discuss and provide feedback on them. I am grateful to Michael Walzer of the Institute for Advanced Study and Bill Galston of the Brookings Institution for sharing their insights and scholarship during the development and refinement of the concepts.

## 1. INTRODUCTION: THE UDHR AS A ROADMAP

Human rights have grown increasingly divisive in recent years. African countries have pushed back against what they see as overly Western interpretations of some rights, such as those involving retributive justice. They argue that insufficient attention to local context has in some cases made it harder to resolve conflicts, remove dictators, and reconcile groups in places such as Uganda, Sudan, and Libya. Asian countries have pushed back against individualistic understandings of rights, arguing that they are entitled to prioritize the communitarian aspects of their cultures and developmental policies of their states. And more religious states—such as those in the Middle East—have pushed back against what they perceive as overly secular interpretations, arguing that human rights agreements are legal, not moral commitments. Meanwhile, challenges to human rights have been emerging in liberal democracies from several directions: in academia, consensus on human rights' objectives is fracturing; religious minorities complain their religious practice is being curtailed when rights clash; and various interest groups are using rights talk to advance their interests and views (e.g., corporations), exacerbating partisan cleavages.

Are these disputes simply the symptoms of a world that is increasingly multi-polar and ideologically divided or have the methods of human rights promotion brought them on? There was once a broader cross-cultural, cross-political consensus on human rights and the need for a flexible yet universal approach. The Universal Declaration of Human Rights (UDHR), a product of extensive negotiations, became the foundation for much of the post-1945 codification of human rights. Many international treaties are based on the Declaration, and many state constitutions make use of it in some form.<sup>1</sup>

---

<sup>1</sup> Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Georgia Journal of International and Comparative Law 287, 289; Gordon Brown (ed), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book 2016).

Yet, as much as it is praised and venerated, the Universal Declaration is rarely studied as a roadmap for how to interpret and implement human rights. This is unfortunate, as the questions the drafters of the UDHR had to face are remarkably similar to the questions we face today. How can any rights be deemed universal in a world of great cultural and political diversity? What is the role of society, the state, and international bodies in implementing those rights? How much scope should countries offer minority groups to diverge from majoritarian concepts about rights? What happens when one fundamental right clashes with another?

Revisiting the Universal Declaration offers a chance to understand how these challenges were addressed—and how the Declaration gained such support across cultures—something human rights struggles to achieve at times today. The drafters of the document built a complex framework that was *both* universal and flexible in order to address precisely these kinds of disagreements. It was formulated to comfortably operate across societies even if they had significantly different value systems. This essay explores how ideas from around the world were synthesized, how the question of foundations was addressed, and what margin of appreciation for implementation was allowed before turning to the role of government and society. It concludes by arguing that only a return to the basics as articulated in the Universal Declaration can restore the legitimacy of human rights across cultures and belief systems.

## 2. THE UDHR: A COMPOSITE SYNTHESIS

The UDHR's framers achieved a distinctive synthesis, developing the document over two years with remarkably little disagreement regarding the basic substance despite wrangling about specifics. The final product combined many elements, connected to and interdependent with each other, greater as a whole than a simple sum of the individual components.<sup>2</sup> Some elements focus on the individual, others on community and society. Some focus on freedom, others on solidarity and duty. The vision of liberty

---

<sup>2</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) xx.

is inseparable from the call for social responsibility.<sup>3</sup> Influenced by a combination of sociocentric (mostly from Latin America and Europe) and individualistic concepts (from the Anglo-American tradition), and gaining support from a wide assortment of European, Middle Eastern, Latin American, Asian, communist, capitalist, developed, and developing countries, the framers believed, as Mary Ann Glendon argues in her popular study of the UDHR, that the Declaration

“achieved a distinctive synthesis of previous thinking about rights and duties. After canvassing sources from North and South, East and West, they believed they had found a core of principles so basic that no nation would wish openly to disavow them. They wove those principles into a unified document.”<sup>4</sup>

Although far from a perfect integration of views from every part of the world—especially given that large sections of the globe were still colonized at the time—the United Nations’ Commission on Human Rights, which drew up the initial draft, did include people from a broad range of different cultural, religious, economic, and political systems. While some scholars, most notably Abdullahi Ahmed An-Na’im, argue that a certain Western perspective and set of norms were overemphasized at the beginning<sup>5</sup>—at the expense of non-Western and religious perspectives—others, such as

---

<sup>3</sup> *ibid* xviii.

<sup>4</sup> *ibid*.

<sup>5</sup> See, for instance, Abdullahi Ahmed An-Na’im’s publications on the subject. “Given the historical context within which the present standards have been formulated, it was unavoidable that they were initially based on Western cultural and philosophical assumptions ... formative Western impact continues to influence the conception and implementation of human rights throughout the world.” An-Na’im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania 1992) 428. Elsewhere, he argues that since the fifty-one original members of the United Nations, only three were African (Egypt, Ethiopia, Liberia), and eight were Asian, and that these were mainly authoritarian, while the vast majority of states were still colonized by the West, few non-Western states actually participated in drafting the UDHR and the formative early stages of the two covenants. The only two non-Western representatives on the drafting committee were both educated in the US. Moreover the “representatives” were more reflective of Western cultural perspectives, and the laws related to the UDHR were not adopted by the public in most countries but by a small clique of Westernized lawyers, bureaucrats, and

Mary Ann Glendon, disagree. Individuals from a diverse set of countries, including France, Chile, Lebanon, pre-communist China, the USSR, Canada, and the United States played prominent roles in the debates. The result was a more sociocentric document than would have been possible if only Europeans and Americans were present. The document itself was influenced more by the dignitarian rights tradition of Latin America and continental Europe than by the more individualistic Anglo-American rights tradition, at least partly because this was necessary to gain acceptance in Asia and Africa.<sup>6</sup> The former emphasizes social institutions such as the family and community and sees rights both as having clear limits and as being accompanied by responsibilities to other citizens and the state.<sup>7</sup>

The major players shaping the original document—including Peng-chun Chang (張彭春), Charles Malik, René Cassin, and Eleanor Roosevelt—were universalists but not homogenizers. They believed they had adopted a pluralistic document that was flexible enough to respond to different needs in terms of emphasis and implementation, but was not malleable enough such that none of the basic rights would become eclipsed or subordinated for the sake of others.<sup>8</sup>

Lebanon's representative at the United Nations, Charles Malik, who served as Rapporteur for the Commission on Human Rights in 1947 and 1948 and played a critical role in shepherding the document through the General Assembly afterwards (when he was President of the Economic and Social Council), encapsulated the diverse

---

intellectuals. See An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in An-Na'im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990). Makau Mutua is even more critical of how Western the UDHR is. See Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

<sup>6</sup> Glendon (n 2) 227.

<sup>7</sup> *ibid.*

<sup>8</sup> Glendon (n 2) 232. "One of the most common and unfortunate misunderstandings today involves the notion that the Declaration was meant to impose a single model of right conduct rather than to provide a common standard that can be brought to life in different cultures in a legitimate variety of ways. This confusion has fostered suspicion of the Universal Declaration in many quarters, and lends credibility to the charge of Western cultural imperialism so often leveled against the entire human rights movement." Glendon (n 2) xviii.

influences on the Declaration in his speech urging acceptance. Directing his arguments to the public and posterity as much as to his fellow delegates, Malik said that the UDHR was “a composite synthesis of all these outlooks and movements and of much Oriental and Latin American wisdom. Such a synthesis has never occurred before in history.”<sup>9</sup> He pointed to different parts of the document as examples to show where Latin America, India, the United Kingdom, the United States, the Soviet Union, China, France, and other countries had contributed.<sup>10</sup>

The diverse origin of the Declaration’s values is perhaps best represented by the presence of the Chinese concept of “two-man mindedness”—a rather unwieldy literal translation—or, in its Westernized translation, “consciousness of one’s fellow man.” Proposed by Chang, and based on the core Confucian ethic *rén* (仁),<sup>11</sup> this way of thinking—embodied in the ability to see things from another’s perspective as well as one’s own—permeates the document.<sup>12</sup> It appears, at Chang’s insistence, in Article 1 as “conscience” and “the spirit of brotherhood.”<sup>13</sup> It appears elsewhere in various

---

<sup>9</sup> Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1999) 73 Notre Dame LR 1153, 1161-1162.

<sup>10</sup> *ibid.*

<sup>11</sup> *Rén* (仁) is the foundational virtue of Confucianism, characterizing the ideal behavior and bearing that a human should exhibit in order for a community to flourish. This means being able to see things from another people’s perspective and doing what is best for them with that perspective in mind. In *Analects* 6.30, Confucius explains this by saying that “benevolence is a matter of going on to establish other people because one seeks to establish oneself, and of bringing other people to perfection because one desires perfection for oneself.” It can be roughly translated as “humaneness,” “benevolence,” “human connectedness,” or “comprehensive virtue.” Encyclopædia Britannica (2015) *ren* <[www.britannica.com/topic/ren](http://www.britannica.com/topic/ren)>; Kurtis Hagen, ‘Confucian Key Terms: *Ren* 仁’ (SUNY Plattsburgh Website, August 2007) <[http://faculty.plattsburgh.edu/kurtis.hagen/keyterms\\_ren.html](http://faculty.plattsburgh.edu/kurtis.hagen/keyterms_ren.html)>.

<sup>12</sup> Glendon (n 2) 142, 228; Tore Lindholm, ‘Article 1’ in Guðmundur Alfreðsson & Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 41, 43; 鞠成伟 /Ju Chengwei, ‘儒家思想对世界新人权理论的贡献: 从张彭春对《世界人权宣言》订立的贡献出发 / The Contribution of Confucianism on the World’s New Human Rights Thinking: Zhang Pengchun’s Contribution to the “Universal Declaration”’ (2011) 环球法律评论 / 33 Global LR 141, 141-149.

<sup>13</sup> Sumner Twiss, ‘Confucian Contributions to the Universal Declaration of Human Rights: A Historical and Philosophical Perspective’ in Arvind Sharma (ed), *The World’s Religions: A Contemporary Reader* (Minneapolis: Fortress Press 2010) 102, 111.

attempts to prevent the document from becoming a source of selfishness or self-centeredness.<sup>14</sup> In the Chinese version of the UDHR, which has equal status with the English and French versions, the emphasis is even greater because the original Confucian concepts are better articulated.<sup>15</sup> The term “conscience” in Article 1, for instance, is replaced by *liangxin* (良心)<sup>16</sup>, which has a close historical association with *rén* and means the “innate goodness” (first character) of the “mind/heart” (second character); it thus conveys a much stronger sense of what makes a person moral than the original.<sup>17</sup> As Chang argued during one of the General Assembly debates,

“The aim of the United Nations was not to ensure the selfish gains of the individual but to try and increase man’s moral stature. It was necessary to proclaim the duties of the individual, for it was a consciousness of his duties which enabled man to reach a high moral standard.”<sup>18</sup>

Chang’s emphasis on Confucian ideas about the moral capacity of human beings, the importance of community, and the need to be conscious of others prevented the UDHR from becoming an overly Western document.<sup>19</sup> It also shows an alternative way, in addition to the liberal modern way, that human rights could be developed under the UDHR. Such a framework would emphasize interrelatedness and humanism more

---

<sup>14</sup> *ibid* 111-112.

<sup>15</sup> United Nations General Assembly, ‘Universal Declaration of Human Rights’ adopted 10 December 1948, GA Res 217A (III), UN Doc A/RES/3/217A (1948). Chinese version available at <[www.un.org/zh/documents/udhr/](http://www.un.org/zh/documents/udhr/)>.

<sup>16</sup> The other two usages of conscience in the English version (in the preamble and in Article 18) are translated differently because the meaning is different.

<sup>17</sup> Lydia H Liu, ‘Shadows of Universalism: The Untold Story of Human Rights around 1948’ (2014) 40 *Critical Inquiry* 385, 413.

<sup>18</sup> Third Social and Humanitarian Committee of the UN General Assembly (95<sup>th</sup> meeting) ‘Draft International Declaration of Human Rights (E/800) (continued)’ Summ. Rec., UNGA 3d Sess., 87 (6 October 1948).

<sup>19</sup> Pierre-Étienne Will provides a balanced assessment of the overall Chinese contribution to the UDHR. Will, ‘La contribution chinoise à la Déclaration universelle des droits de l’homme / The Chinese Contribution to the Universal Declaration of Human Rights, 1947-48: A Re-examination’ in Will and Mireille Delmas-Marty (eds), *La Chine et la Démocratie: Tradition, Droit, Institutions* (Fayard 2007) 297.



than autonomy and individualism, seeking to contribute to every person's moral growth and maturation rather than only protecting their rights. Such an approach would emphasize the "human" in human rights more than the "rights." The best parts of Confucian family relationship ethics and private morality could be expanded for use with strangers—and thus society as a whole—and public morality. Roles, and the responsibilities and duties they entail, would matter more than rights.<sup>20</sup>

Though the UDHR's drafters agreed on foundational ideals, there were clearly divergent cultural conceptions of human rights that remained unreconciled at the time of drafting. Some of the fault lines and debates have continued down to the present. Arab states challenged the right to change one's religion. Communist countries were opposed to the prevalence of civil liberties.<sup>21</sup> These two sets of disagreements played a large role in seven of the eight abstentions at the time of passage.<sup>22</sup> Outside the United Nations, there was opposition from some religious conservatives, who disliked a number of clauses and the lack of a religious basis; economic conservatives, who disliked the document's myriad employment and social rights; anthropologists, who did not think any set of rights could truly be universal; and non-Westerners, who believed that the document was too steeped in Western values and norms.<sup>23</sup>

The drafters went out of their way to balance civil, cultural, economic, political, and social rights, and in Articles 28 to 30 they expressly referenced duties and an international order for realization of the rights. Their nuanced approach produced a special document that "continues to be a classical instrument and a possible bridge,

---

<sup>20</sup> Twiss (n 13) 110-114; Henry Rosemont, Jr, 'Rights-bearing Individuals and Role-bearing Persons' in Mary I Bockover (ed), *Rules, Rituals, and Responsibilities: Essays Dedicated to Herbert Fingarette* (Open Court 1991); Tom Zwart, 'Re-rooting International Human Rights By Revisiting the Universal Declaration of Human Rights' unpublished draft, 5-7; Liu (n 17) 404-417.

<sup>21</sup> Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (Sage Publications 1990) 30.

<sup>22</sup> South Africa was the other.

<sup>23</sup> Joseph Prabhu discusses three of the four categories (religious groups, anthropologists, and those outside the West) in Prabhu, 'Human Rights And Cross-Cultural Dialogue' (*Religion and Culture Web Forum*, The Martin Marty Centre, University of Chicago Divinity School April 2006).

currently and in the future, between different points of view.”<sup>24</sup> They expected the Declaration’s fertile principles to be interpreted in a variety of legitimate ways, and they anticipated that each country would provide experiences and ideas for others to learn from. The document thus provides ample leeway for different ways of imagining, prioritizing, and interpreting the rights included.<sup>25</sup> Jacques Maritain, who played a crucial role in the lead up to the drafting of the Universal Declaration, explained that this would allow “different kinds of music” to be “played on the same keyboard.”<sup>26</sup>

The framers would thus generally be receptive to societies framing and prioritizing rights differently as long as they kept the minimum standards introduced in the Declaration. But Western human rights organizations have often been critical of approaches taken by non-Western societies. The 2012 ASEAN Human Rights Declaration is an interesting example. It contains all the civil and political rights that similar documents elsewhere had, and includes a wide range of economic, social, and cultural rights as well as innovative provisions related to AIDS sufferers, childbearing mothers, human trafficking, vulnerable groups, and children, yet it has been critiqued by organizations such as Amnesty International, the International Commission of Jurists, the UN High Commissioner for Human Rights, and the US State Department because of sections related to implementation that have a regional flavor.<sup>27</sup> Objections

---

<sup>24</sup> Guðmundur Alfreðsson and Asbjørn Eide, ‘Introduction’ in Alfreðsson and Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) xxix.

<sup>25</sup> Glendon (n 2) 230.

<sup>26</sup> Jacques Maritain, ‘Introduction’ in UNESCO (ed), *Human Rights: Comments and Interpretations, A Symposium* (Columbia 1949) 15-16.

<sup>27</sup> Amnesty International, ‘Postpone Deeply Flawed ASEAN Human Rights Declaration’ Press Release (5 November 2012) <<https://www.amnesty.org/en/press-releases/2012/11/postpone-deeply-flawed-asean-human-rights-declaration/>>; International Commission of Jurists, ‘ICJ Condemns Fatally Flawed ASEAN Human Rights Declaration’ Press Release (19 November 2012) <<http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/>>; United Nations Office of the High Commissioner for Human Rights, ‘Pillay Encourages ASEAN to Ensure Human Rights Declaration is Implemented in Accordance with International Obligations’ News Release (19 November 2012) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12809&LangID=E>>; US State

center on the ASEAN Declaration's emphasis that rights must be balanced with duties, and that realization of rights have to take into account the local political and cultural context. But it is these aspects which are most likely to increase the Declaration's legitimacy—and thus the chance that it will be embraced locally.<sup>28</sup>

The framers of the UDHR were able to achieve broad consensus because they crafted a flexible legal document that everyone—whether from Western, non-Western, secular, or religious societies—could accept<sup>29</sup> and that everyone could believe was morally important according to local values systems. The advancement of human rights, after all, depends much more on moral authority than on legal commitments written on pieces of paper. Universal commitments must allow each culture to flourish as it might see fit. The drafters of the UDHR knew that, as Malik put it, human rights would only be realized when they were defended in each country “in the mind and the will of the people,” as reflected in national and local laws, and, above all, social practices.<sup>30</sup>

In order to maximize the reach of their creation, the drafters used easy-to-understand language, kept the length short<sup>31</sup>, changed “international” in the title to “universal,”<sup>32</sup> and avoided issues that would in any way be controversial.<sup>33</sup> They also put people and their social institutions front and center, rarely mentioning the state.

---

Department, ‘ASEAN Declaration on Human Rights’ Press Statement (20 November 2012)

<<http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm>>.

<sup>28</sup> Tom Zwart, ‘Safeguarding the Universal Acceptance of Human Rights Through the Receptor Approach’ (2014) 36 Human Rights Quarterly 898, 902-903; Association of Southeast Asian Nations (ASEAN), ‘ASEAN Human Rights Declaration’ (18 November 2012) <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>>.

<sup>29</sup> The eight countries that did not formally accede abstained rather than opposed the document.

<sup>30</sup> Mary Ann Glendon and Elliott Abrams, ‘Reflections on the UDHR’ (1998) 82 First Things 23, 25.

<sup>31</sup> William A Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge 2013) 161; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 33-34.

<sup>32</sup> Morsink (n 31) 324.

<sup>33</sup> Zwart (n 20) 3-4.

They understood that ultimately the success of their endeavor depended on inspiring change in how people treated each other—in their relationships—across society.

### 3. DIFFERENT FOUNDATIONS

The UDHR, like all international treaties, was a product of intense bargaining, compromise, and pragmatism, producing ambiguity at times instead of precise definitions. In the end, the UDHR could pass precisely because it avoided controversial issues (such as abortion) and because it employed general or vague phrases instead of very specific wording. The delegates could agree to disagree on the basis, use limiting clauses, and balance cross-cutting arguments.<sup>34</sup> The goal was to develop a “big tent” that could encompass a wide variety of value systems; calls were repeatedly made to draft a document that would be acceptable to all member states.<sup>35</sup>

Although it promoted a common position, the UDHR stood upon very different philosophical foundations and was to be articulated differently in dissimilar parts of the world.<sup>36</sup> Indeed if not for the acceptance of different foundations and interpretations, it is unlikely that the original UDHR—and subsequent human rights documents—would have been accepted at all. As Jacques Maritain has often been quoted, “Yes, we agree about the rights, but on condition no one asks us why.”<sup>37</sup>

The drafters understood, as René Cassin, the French delegate on the Commission, argued, that they needed to develop a document “that did not require the Commission

---

<sup>34</sup> Åshild Samnøy, ‘The Origins of the Universal Declaration of Human Rights’ in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 14-20.

<sup>35</sup> Maritain (n 26) 9-17; Zwart (n 20) 1 and 5.

<sup>36</sup> For an overview of the debates related to the theories behind, justifications for, and definitions of human rights, see Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315.

<sup>37</sup> See, for instance, Jeffrey Flynn, ‘Rethinking Human Rights: Multiple Foundations and Intercultural Dialogue’ (Third Berlin Roundtable on Transnationality: Reframing Human Rights, Berlin, Germany, 3-7 October 2005); Glendon (n 2) 77; Maritain (n 26) 10-11.

to take sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights.”<sup>38</sup>

The result was an agreement on basic principles—laid out in the Preamble, Proclamation, and first two Articles—but not the reasons for them. It was a genuine “overlapping consensus,” in the sense that Charles Taylor meant when he used this term in his writing on human rights a few decades later.<sup>39</sup> Taylor, professor emeritus of political science and philosophy at McGill University, has argued that this type of agreement is the only way to achieve an “unforced consensus” on “certain norms of conduct” across the world today.<sup>40</sup>

The seven paragraphs of the Preamble, setting out the reasons for the Declaration, and Articles 1 and 2 of the thirty-article Declaration, with their principles of dignity, liberty, equality, and brotherhood, show both the multiple foundations of the Declaration as well as the composite nature of its core values.<sup>41</sup> Rejecting attempts to build a religious or natural rights foundation, the drafters used a combination of moral and historical rationales for human rights<sup>42</sup> to produce “a more complex, more realistic, and more ‘open-ended’ scheme.”<sup>43</sup> Any normative tradition that embodies—or can be made to embody—human rights can thus be used as a basis.<sup>44</sup>

---

<sup>38</sup> Glendon (n 2) 68.

<sup>39</sup> Charles Taylor, ‘A World Consensus on Human Rights?’ (1996) 43 Dissent 15.

<sup>40</sup> See Charles Taylor, ‘Conditions of an Unforced Consensus on Human Rights’ in Joanne Bauer and Daniel Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge 1999) 124.

<sup>41</sup> These provide, as Tore Lindholm writes in the *UDHR-CSA*, a “thin, but indispensable normative basis through which the representatives of a plurality of religions, moral traditions, and ideologies may establish not only a political compromise, but also a non-exclusive and stable moral agreement on human rights.” Tore Lindholm, ‘Article 1’ in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 62.

<sup>42</sup> Tore Lindholm, ‘Prospects for Research on the Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism’ in An-Na’im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990) 399.

<sup>43</sup> Lindholm (n 41) 63.

<sup>44</sup> Lindholm (n 42) 399.

The diverse foundations were seen as an asset during the drafting process. As Malik proclaimed in his speech to the General Assembly, the plurality of views was a strength, not a weakness. It resulted in a document built on a “firm international basis wherein no regional philosophy or way of life was permitted to prevail.”<sup>45</sup> After all, a human rights regime could not do without foundations altogether, and a strong grounding in the internal logic of each particular culture was essential to gaining universal moral authority and legitimacy. Indeed, Amy Gutmann has argued, plural foundations make a human rights regime more broadly acceptable than a single foundation.<sup>46</sup>

As reflected in the political process that both gave birth to and shaped the UDHR—and subsequent international agreements—it is better to see human rights as a practical matter involving politics than one deriving from any abstract conception of human nature or reason.<sup>47</sup> Indeed, as William Twining, a leading scholar on international jurisprudence, writes, “nearly all human rights law is the result of hard-won political consensus and compromise at particular moments in time.”<sup>48</sup> By accepting that people around the world “adhere to a plurality of more or less rival comprehensive normative traditions,” the UDHR’s framers could come up with a document that is “both conceptually coherent and politically sustainable across moral divides.”<sup>49</sup>

Many Western theorists, such as Jack Donnelly and Johannes Morsink,<sup>50</sup> and activists, such as the major human rights organizations, assume that human rights are a

---

<sup>45</sup> Glendon (n 2) 165.

<sup>46</sup> Amy Gutmann, ‘Introduction’ in Michael Ignatieff and Amy Gutmann (ed), *Human Rights as Politics and Idolatry* (Princeton 2003) xviii and xxii.

<sup>47</sup> Flynn (n 37).

<sup>48</sup> “That history is a complex story of reaction to particular contingencies, genuine idealism, opportunism, protracted negotiation (not always unpressured), compromise, adjustment, and power politics.” William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge 2008) 180.

<sup>49</sup> Lindholm (n 41) 69.

<sup>50</sup> Lindholm (n 42) 397-398; Jack Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76 *The American Political Science Review* 303; Donnelly, ‘Human Rights as Natural Rights’ (1982) 4 *Human Rights Quarterly* 391; Johannes Morsink,

contemporary version of natural rights. This is based on what Twining calls the misconception that human rights as a legal regime “can and should be founded on a coherent philosophy or ideology”—on the straightforward embodiment of moral universalism.<sup>51</sup> Natural law theorists take rights to be self-evident, and see them as rigid elements that are unchanging across different contexts, situations, and time. But conflicts inevitably occur over which right(s) should be prioritized and whether competing moral matrices have legitimacy.<sup>52</sup>

Underlying the presumption of universality for natural rights is the belief that all people think in the same fashion. While all human beings tend to have a psychological predisposition to generalize from their own experience, Western philosophers, as Alison Renteln argues, “in particular seem to be prone to projecting their moral categories on others. As a consequence, the presumption of universality is deeply ingrained in Western moral philosophy.”<sup>53</sup> For such people, any disagreement calls into question one’s moral reasoning, leading to the dismissal of alternative patterns of thought from the beginning.<sup>54</sup>

As the drafters understood and cultural psychologists would later prove, different parts of the world have legitimately different moral priorities and ways of living the good life. Richard Shweder, the founder of the field of cultural psychology, explains, “Society is connected to natural moral law, but there are several natural moral worlds. The problem we face, as children and as adults, is that, at any point in time, we can reason and live in only one moral world.”<sup>55</sup> Recognizing the existence of multiple moral matrices is the first step to dialogue and cooperation on human rights issues.

---

‘The Philosophy of the Universal Declaration’ (1984) 6 Human Rights Quarterly 409. Donnelly has grown more flexible over time. His recent work shows greater scope for cultural adaptation than his earlier work.

<sup>51</sup> Twining (n 48) 180.

<sup>52</sup> Robert Licht, ‘Introduction’ in Licht (ed), *Old Rights and New* (The AEI Press 1993) 14; William Galston, ‘Between Philosophy and History: The Evolution of Rights in American Thought’ in Licht (ed), 67-68.

<sup>53</sup> Renteln (n 21) 49.

<sup>54</sup> *ibid* 50-51.

<sup>55</sup> Richard Shweder, ‘In Defense of Moral Realism: Reply to Gabennesch’ (December 1990) 61 Child Development 2066.



#### 4. FLEXIBLE INTERPRETATION

Such flexibility is especially important if human rights are to retain their legitimacy in an increasingly diverse and multi-polar world<sup>56</sup>—when consensus will be the only way to achieve progress. As Tore Lindholm argues in *Human Rights in Cross-Cultural Perspectives*,

“In the years to come some of the most crucial intellectual, moral, and ideological battles about human rights issues may well turn on their cross-cultural intelligibility and justifiability. The open-ended mix of moral and sociohistorical rationales for human rights commitments prefigured by Article I and the Preamble may be employed, I would argue, to enhance the cross-cultural legitimacy of human rights.”<sup>57</sup>

At the same time, the UDHR contains exceptions to this flexibility for a narrow core of “primary rights” that were tightly written so as to allow little scope for variation. They include protections for freedom of religion and conscience and prohibitions of torture, enslavement, degrading punishment; retroactive penal measures; and other grave violations of human dignity made non-derogable under the International Covenant on Civil and Political Rights.<sup>58</sup> This suggests that although all rights in the UDHR are important and need to be upheld, there was universal agreement that a few have priority. The drafters saw limits to flexibility on these specific issues. The UDHR

---

<sup>56</sup> For more on the philosophical understandings and theories that broaden the scope and interpretations of human rights (and thus make them more flexible to fit into thick contexts), see Allen Buchanan, ‘The Egalitarianism of Human Rights’ (2010) 120 *Ethics* 679; Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ in Claudio Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer 2012); Rainer Forst, ‘The Basic Right to Justification: Toward a Constructivist Conception of Human Rights’ (1999) 6 *Constellations* 35; Rainer Forst, ‘The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach’ (2010) 120 *Ethics* 711.

<sup>57</sup> Lindholm (n 42) 399.

<sup>58</sup> Glendon (n 2) 230.

shows less agreement on how to order the remaining rights, which may be emphasized differently across cultures.

This has significant implications when distinguishing the relative importance of two or more human rights in practical situations. For instance, in the ongoing debates over circumcision in Europe, there are conflicts between the right to practice religion and the right to physical integrity; and between the right of parents to determine how to raise their children versus the right of children to be free to determine their own future.<sup>59</sup> Such disagreements touch upon different conceptions of state responsibility for upholding human rights as well as both differences between religious and secular morality and between modern (individualist with universal claims) and postmodern (multicultural and connected to intersectional claims) discourses on human rights.<sup>60</sup> If secular modernist claims tend to downplay the rights of religious minorities, do multicultural postmodern claims provide scope for them (and thus rituals like circumcision)? Postmodern claims may be increasingly incompatible with the modernist view of moral universality, but tension among competing rights will not diminish. In many post-conflict countries—especially within Africa—there are clashes between retributive justice for criminals that focuses on upholding the law and restorative justice that focuses on peacemaking, healing, and restoring social harmony. For all their similarities, even the United States and Europe have differences in how they interpret and implement human rights: gun rights, religious freedom, property rights, and freedom of speech are all greater in the United States; social and economic

---

<sup>59</sup> Children's rights were not emphasized in the UDHR but in some later documents, such as the Convention on the Rights of the Child. In general, there are two different viewpoints "as to who holds the supreme right over a child. In one view, the state has the primary obligation of shaping children as future citizens, a key value underpinning the European liberal state. In the second view, guaranteeing the religious life of the child, including through circumcision, is the parents' responsibility, that they have an inviolable right to choose the future path of their child." Even within the West, there are differences. Parental autonomy and religious freedom are more highly valued in the US than Europe. Dov Maimon and Nadia Ellis, *The Circumcision Crisis: Challenges for European and World Jewry* (The Jewish People Policy Institute 2012) 7-8, <<http://jppi.org.il/news/117/58/The-Circumcision-Crisis/>>.

<sup>60</sup> *ibid* 7-10.

rights are greater in Europe. Parts of the former employ the death penalty; the latter finds it inhumane and inconceivable in a developed, rights-based society.<sup>61</sup>

Developments since 1948 reveal that different societies—and sometimes different groups within a given society—want to express themselves with different rights that were not included in the original UDHR (or subsequent documents). These include protections for the elderly, women’s reproductive rights, euthanasia, and LGBTQ persons. Some of these new rights are not fully accepted even within Western societies.

## 5. FLEXIBLE IMPLEMENTATION

This flexibility in interpretation is paralleled in how the drafters viewed implementation. It was understood that each country’s circumstances would dictate how they would fulfill their requirements.<sup>62</sup> Developing countries would have different resources than developed countries. Communist states would emphasize different priorities than capitalist ones. Muslim states would have certain requirements that differed from Western states. Each part of the world would have its particular concerns. As Article 22 of the original Declaration declared, the UDHR would be put into practice “in accordance with the organization and resources of each State.”<sup>63</sup>

In order to sidestep many of the inevitable disputes over the relative responsibilities of international bodies, national and local governments, and civil society when it came to human rights, the framers of the UDHR took a pragmatic approach that today would be called subsidiarity.<sup>64</sup> Subsidiarity emphasizes the

---

<sup>61</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1991) 1-12, 37, 40, 71, 149, and 161.

<sup>62</sup> Glendon (n 2) 115-116.

<sup>63</sup> UN General Assembly (n 15).

<sup>64</sup> The principle is implicit both in the UDHR when it calls on “every individual and organ of society” to promote human rights and in statements Roosevelt and Cassin made, but the term “subsidiarity” did not explicitly enter human rights law until somewhat later. The best discussion is in Paolo G Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law* 38.

primacy of the lowest level of implementation that can do the job, reserving national or international actors for situations where smaller entities are incapable of addressing the issues adequately.

Although national governments have the ultimate obligation to fulfill their human rights commitments, any group in society—including the market, social networks, communities, families, and individuals—can play the leading role in advancing human rights.<sup>65</sup> It is noteworthy that the UN itself repeatedly acts as if non-state actors and context matter, such as when it passes resolutions like the “Declaration on Human Rights Defenders,” which puts “Individuals, Groups and Organs of Society” at the center of the process to advance human rights.<sup>66</sup> Indeed, given the failures of the state-centric approach in so many areas of human rights—and the importance of social norms, relationships, and morality to promoting rights, it is appropriate that the Proclamation clause of the UDHR calls on “every organ of society” to promote recognition and observance of human rights.<sup>67</sup>

As with other major human rights documents, the UDHR mandates a certain result—though without a clear definition or threshold at times—and it provides great flexibility in how it is achieved.<sup>68</sup> And, while states need to take immediate steps

---

<sup>65</sup> Bård Anders Andreassen, ‘Article 22’ in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 484-485; Thandabantu Nhlapo, ‘The African Customary Law of Marriage and the Rights Conundrum’ in Mahmood Mamdani (ed), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (Palgrave Macmillan 2000); Josiah Cobbah, ‘African Values and the Human Rights Debate: An African Perspective’ (1987) 9 *Human Rights Quarterly* 320; Lakshman Marasinghe, ‘Traditional Conceptions of Human Rights in Africa’ in Claude Welch, Jr and Ronald Meltzer (eds), *Human Rights and Development in Africa* (SUNY Press 1984) 33.

<sup>66</sup> UN General Assembly, ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’ adopted 3 August 1999, G.A. Res. 144, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/144, <<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>>.

<sup>67</sup> Douglas Donoho, ‘Human Rights Enforcement in the Twenty-First Century’ (2006) 35 *Georgia Journal of International & Comparative Law* 1; UN General Assembly (n 66).

<sup>68</sup> Andreassen (n 65) 484-485.

toward the desired result, it is understood that full realization may take time.<sup>69</sup> There is a crucial distinction in international law between agreeing to fulfill certain standards and implementing them. While states must meet the obligations they sign up to, they have the freedom to determine how.<sup>70</sup> Moreover, as Twining writes, “conceptions of law that are confined to state law leave out too many significant phenomena that deserve to be included in a total picture of law from a global perspective.” He argues that “ideas (including rules)” and “institutionalized social practices (involving actual behavior and attitudes as well as ideas)” need to be included.<sup>71</sup>

International human rights agreements have repeatedly recognized that different countries have different ways of implementing commitments. For instance, in the International Covenant on Civil and Political Rights, Article 2.2 obligates states parties “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” The clause “laws or other measures” clearly recognizes that some countries will use non-state measures—such as social institutions—to promote human rights.<sup>72</sup> “Furthermore, the Covenant does not require the contracting states to grant individual enforceable rights to those who are under their jurisdiction.”<sup>73</sup> They are thus allowed to use other arrangements—such as those based on communal ties, religion, and social duties—to fulfill their obligations.<sup>74</sup> The principle of “progressive realization,” which is recognized explicitly in the International Covenant on Economic, Social and Cultural Rights—and implicitly elsewhere—also allows states to take their contexts into account when implementing human rights. As

---

<sup>69</sup> *ibid* 486.

<sup>70</sup> Zwart, (n 28) 900; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel 2005) 103; O Schachter, ‘The Obligation to Implement the Covenant in Domestic Law’ in Louis Henkin (ed), *The International Bill of Rights* (Columbia 1981); Donoho (n 67).

<sup>71</sup> Twining (n 48)180.

<sup>72</sup> UN General Assembly, ‘International Covenant on Civil and Political Rights’ adopted 16 December 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., vol. 999, 171, U.N. Doc. A/6316, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

<sup>73</sup> Tom Zwart, ‘Balancing Yin and Yang in the International Human Rights Debate’ in *Collected Papers of the Sixth Beijing Forum on Human Rights* (China Society for Human Rights Studies 2013) 410.

<sup>74</sup> Zwart (n 73) 410, 414.

Article 2 of the ICESCR affirms, each State Party should “take steps ... with a view to achieving progressively the full realization of the rights.”<sup>75</sup> Outside of a set of core obligations, some rights may be more difficult for some countries to attain; they may provide a temporarily lower level of protection as long as they are working toward full realization.<sup>76</sup>

The drafting and adoption of regional documents such as the African Charter on Human and People’s Rights (ACHPR), the ASEAN Human Rights Declaration (AHRD), American Convention on Human Rights, and the European Convention of Human Rights (ECHR) all reflect the understanding that context matters. The preamble of the ACHPR, for instance, states that it “Tak[es] into consideration the virtues of [states’] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.”<sup>77</sup> Similarly, the AHRD states (Article 7) that “the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”<sup>78</sup> The 1993 Vienna Declaration and Programme of Action similarly makes clear “the significance of national and regional particularities and various historical, cultural and religious backgrounds” to implementation.<sup>79</sup>

Even the European human rights protection system, easily the most developed international human rights judicial protection system, allows a significant degree of flexibility at times with regard to local context. Encompassing forty-seven countries, and considerable historical, religious, ideological, and cultural differences, it has

---

<sup>75</sup> UN General Assembly (n 72).

<sup>76</sup> Eva Brems, ‘Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam’ (2004) 5 Human Rights Review 13-14.

<sup>77</sup> Organization of African Unity (OAU), ‘African Charter on Human and Peoples’ Rights (“Banjul Charter”)’ 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <<http://www.achpr.org/instruments/achpr/#preamble>>.

<sup>78</sup> Association of Southeast Asian Nations (n 28).

<sup>79</sup> UN General Assembly, ‘Vienna Declaration and Programme of Action’ adopted 12 July 1993, A/CONF.157/23, <<https://www.refworld.org/docid/3ae6b39ec.html>>.

uniquely been able—through the European Court of Human Rights (ECtHR)<sup>80</sup>—to develop a sophisticated set of legal techniques for managing the tensions between culture and human rights standards. The “margin of appreciation” doctrine, its main instrument for doing this, allows the ECtHR to provide greater or lesser flexibility to countries to restrict or limit a particular right agreed to in an international agreement—in Europe’s case, the European Convention on Human Rights—depending on the issues involved. A wide margin of appreciation means that the same facts can lead to two different interpretations in two different countries even though the same standard is being applied (i.e., in one country the facts yield a rights violation but in another they yield a legitimate restriction of the right). If only a narrow margin is applied, this is unlikely.<sup>81</sup> The court can thus take into account different contexts and concerns while giving states some discretion when they want to limit particular rights in order to advance the national interest or protect other rights.<sup>82</sup> As the Council of Europe, of which the ECtHR is a part, explains,

“Given the diverse cultural and legal traditions embraced by each Member State, it was difficult to identify uniform European standards of human rights.... The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States.”<sup>83</sup>

---

<sup>80</sup> I say “uniquely” because there is no other similar supranational institution.

<sup>81</sup> Eva Brems, ‘The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe’ in David Forsythe and Patrice McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press 2003) 81-82. The Court often states that the “margin will vary according to the nature of the Convention right in issue, its importance for the individual, and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.” Ingrid Leijten, ‘The Strasbourg Margin of Appreciation: What’s in a Name?’ (*Leiden Law Blog* 8 April 2014) Leiden Law School, Leiden University, <<http://leidenlawblog.nl/articles/the-strasbourg-margin-of-appreciation-whats-in-a-name>>.

<sup>82</sup> Eva Brems, (n 81) 14.

<sup>83</sup> Council of Europe Lisbon Network, ‘The Margin of Appreciation’ <[http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)>.



## 6. PERSONHOOD, STATE, AND SOCIETY

The UDHR presents a vision of personhood that is in some ways more aligned with Southern and religious concern about social context and institutions than with contemporary Western and secular emphasis on the individual. The Declaration uses the word “person” to emphasize the social dimension of personhood, recognizing, as Lebanon’s Charles Malik put it, that “There are no Robinson Crusoes.”<sup>84</sup> The term “person” stands in contrast to an “individual” who is “an isolated knot; a person is the entire fabric around that knot, woven from the total fabric.”<sup>85</sup>

The Declaration envisions each person—the “everyone” mentioned throughout the document—as being constituted by and through a variety of relationships. The most important of these are specifically named: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order.<sup>86</sup> Such relationships are to be grounded, as the Declaration recognizes in its prologue, in an understanding of people as both individual and social, and, as it exhorts in Article 1, “in a spirit of brotherhood.”<sup>87</sup>

Such concerns echo throughout the structure of the document. The general principles proclaimed in the first two articles encompass dignity, liberty, equality, and brotherhood. The main body (articles 3 through 27) provides for four sets of rights: those related to the individual (3-11); those related to how individuals relate to each other and to groups (12-17); those related to spiritual, public, and political concerns (18-21); and those related to economic, social, and cultural rights (22-27).<sup>88</sup> These emphasize the importance of traditional institutions such as the family, as the “natural and

---

<sup>84</sup> Glendon (n 2) 42.

<sup>85</sup> R Panikkar and R Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 30 *Diogenes* 90.

<sup>86</sup> Glendon (n 2) 227.

<sup>87</sup> *ibid* 175.

<sup>88</sup> *ibid* 172-174; Marc Agi, *René Cassin: Fantassin des Droits de l’Homme/Rene Cassin: Footsoldier of Human Rights* (Plon 1979) 317.

fundamental group unit of society” (article 16), religion, and marriage.<sup>89</sup> The last section (articles 28-30) concludes by linking the person to society, and placing the rights within the context of limits, duties, and the order in which they must be realized.<sup>90</sup> It argues that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (article 28) and that “Everyone has duties to the community in which alone the free and full development of his personality is possible” (article 29).<sup>91</sup>

Different societies prioritize differently the role of social institutions and government in promoting the human good, with some emphasizing the former and others the latter. However, after analyzing the differences along this spectrum, Morsink concludes that for religion and education, the UDHR circumscribes the state’s role in “delivery of the human good.”<sup>92</sup> It assumes that societies contain many social institutions essential to advancing human wellbeing, and that any human rights regime and role for the state must therefore be limited whenever possible.

This emphasis on social institutions and a limited role for the state is especially evident in Article 18,<sup>93</sup> which gives everyone not only the right to freedom of thought, conscience and religion, but also the “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” It also appears in the sections dealing with family (Article 16) and education (Article 26). The state is only mentioned twice as an active actor, once for the protection of family (Article 16) and once for cooperating with other countries to create a world order able to see the rights outlined realized (Article 22).<sup>94</sup>

---

<sup>89</sup> Tom Zwart, ‘Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach’ (2012) 34 Human Rights Quarterly 553.

<sup>90</sup> Glendon (n 2) 172-174.

<sup>91</sup> UN General Assembly (n 15).

<sup>92</sup> Morsink (n 31) 259.

<sup>93</sup> *ibid* 259-260.

<sup>94</sup> *ibid* 239.

## 7. THE IMPORTANCE OF DUTIES

The role of duties in the Declaration warrants closer consideration as another aspect of its flexibility. In Article 1, the “foundation and cornerstone of the entire Declaration,”<sup>95</sup> there is, according to Chang, “a happy balance” between “the broad statement of rights in the first sentence and the implication of duties in the second,”<sup>96</sup> indicating that each is meant to be kept as a distinct concern and not conflated.<sup>97</sup> Article 29, one of the three articles at the end of the Declaration that provide the pediment which binds the structure together in Cassin’s overall design, acts as a general limiting provision. It states (in 29.1) that “Everyone has duties to the community in which alone the free and full development of his personality is possible.”

The addition of the word “alone” takes the Declaration further away from individualism. This amounts, as Morsink explains,

“to the announcement of an organic connection between the individual and the community to which he or she owes duties, not unlike Confucius would have had it ... [As such, it] may well be the most important single word in the entire document, for it helps us answer the charge that the rights set forth in the Declaration create egotistic individuals who are not closely tied to their respective communities.... solidarity and mutuality [are a] ... part of the possession of every human right.”<sup>98</sup>

Article 29 also makes clear (in 29.2) that an individual’s rights can be limited by the “rights and freedoms of others and ... the just requirements of morality, public order, and the general welfare in a democratic society.”

The UDHR outlines, according to Morsink, five different communities towards which an individual has duties<sup>99</sup> and which “contribute to the free and full development

---

<sup>95</sup> Lindholm (n 41) 58.

<sup>96</sup> *ibid* 54 and 62.

<sup>97</sup> *ibid* 62.

<sup>98</sup> Morsink (n 31) 246 and 248.

<sup>99</sup> *ibid* 241.

of the human person.”<sup>100</sup> “The first group, which the drafters of the Declaration were especially solicitous of,” is the family, the place where morality, values, and beliefs are first learned.<sup>101</sup> Next in importance “must surely rank religious and educational communities.”<sup>102</sup> The different communities to which an individual is attached “spread themselves out in concentric circles of communities from the individual and his or her immediate community of birth and growth” in the first paragraph of Article 29 all the way through to the world community in the third paragraph, with many intermediate groups playing a role.<sup>103</sup>

Many delegates emphasized the importance of duties in the debates that yielded the document. Brazil’s De Athayde, for instance, told the Third Committee (covering social, humanitarian, and cultural affairs), which reviewed the draft prepared by the Commission,

“It was impossible to draw up a declaration of rights without proclaiming the duties implicit in the concept of freedom which made it possible to set up a peaceful and democratic society. Article 27 [which later became Article 29] was of great importance because without such a provision all freedom might lead to anarchy and tyranny.”<sup>104</sup>

Duties are also a common part of regional documents, supporting their importance in the UDHR. Part I of the ACHPR is entitled “Rights and Duties.” A whole chapter (2) is dedicated to them.<sup>105</sup> Article 6 of the AHRD states that “The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.”<sup>106</sup> Duties also receive recognition in the ACHR, which declares that (Article 32.1) “Every person has responsibilities to his family, his

---

<sup>100</sup> *ibid* 258.

<sup>101</sup> *ibid* 241.

<sup>102</sup> *ibid* 241.

<sup>103</sup> *ibid* 241.

<sup>104</sup> *ibid* 249.

<sup>105</sup> Organization of African Unity (n 77).

<sup>106</sup> Association of Southeast Asian Nations (n 28).

community, and mankind” and (32.2) “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”<sup>107</sup> Even the ECHR makes clear (10.2) that the exercise of rights

“since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary ... in the interests of national security ... the prevention of disorder or crime, for the protection of health or morals...”<sup>108</sup>

## 8. INTERDEPENDENCE AND INDIVISIBILITY OF RIGHTS

The framers took enormous care to ensure that the UDHR would be read as an integrated document. The UDHR articulates a set of rights that are connected to—even interdependent with—each other. Freedom links to solidarity. Rights imply responsibilities. Institutions matter. Each of the ideas balances against the others as part of a larger whole. As such, the Declaration does not see the specific rights as items to be isolated from the others and propagated on their own.<sup>109</sup>

The body of principles is meant to be read as an integrated whole, indivisible, interdependent, and interrelated, with an organic unity.<sup>110</sup> As Morsink points out,

“the drafters wanted the readers of the Declaration to interpret each article in light of the others. Most of them believed that the exact place of an article was not crucial to its meaning since it needed to be interpreted in the context of the

---

<sup>107</sup> Organization of American States (OAS), ‘Pact of San Jose, Costa Rica’ 22 November 1969, American Convention on Human Rights, <[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)>.

<sup>108</sup> Council of Europe, ‘European Convention for the Protection of Human Rights and Fundamental Freedoms,’ as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, <[http://www.hrcr.org/docs/Eur\\_Convention/euroconv3.html](http://www.hrcr.org/docs/Eur_Convention/euroconv3.html)>.

<sup>109</sup> David Blackenhorn, *The Future of Marriage* (Encounter 2007) 182.

<sup>110</sup> Asbjørn Eide, ‘Article 28,’ in Guðmundur Alfreðsson and Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Springer 1999) 606.

whole anyway. This organic character of the text applies both to how it grew to be what it now is, as well as to a deeper interconnectedness of all the articles.”<sup>111</sup>

Indeed, as Glendon and others argue, one of the surest ways to misconstrue—or misuse—human rights is to think that any particular right is absolute, or that all the diverse rights can ever wholly be in harmony with each other. On the contrary, every distinct right must have certain limitations and boundaries and exist within a community of other rights that often conflict with each other for it to have any real meaning. There is no clear blueprint for how to deal with conflicts of this nature. Communities balance the weight of claims of one right versus another—recognizing that no particular right has preponderance over all the rest—before determining the best course of action.<sup>112</sup> Clashes of rights are not contests where a winner takes all—as is often the case today—but rather occasions for interpreting them in such a way as to give as much protection as possible to each, while never subordinating any right completely to another. Indeed, the Declaration makes it clear that everyone’s rights are importantly dependent on respect for the rights of others, on the rule of law, and on a healthy civil society.

### 9. MINIMUM STANDARDS, NOT MORAL IMPERATIVES

The flexibility that the UDHR and subsequent human rights agreements provide for each society to prioritize and interpret human rights commitments show that the authors of these documents do not presume a uniform moral matrix across countries. While they seek to promote minimum universal standards throughout the world, they do not uphold one universal value system. As such, the agreements that are legal documents, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, only need to be fulfilled; they are not binding commitments to a particular way of life. The UDHR is

---

<sup>111</sup> Morsink (n 31) 232.

<sup>112</sup> Glendon (n 61) x; Glendon (n 2) 239; Blankenhorn (n 109) 187-188 and 302; Lindholm (n 42) 422 (footnote 17).

not legally binding at all, as it was a UN resolution not a treaty; it only has influence by galvanizing popular support and this requires building on local value systems.

Table 1 compares how societies that place a stronger emphasis on religion or community than the individual, which make up the great majority outside the West; societies that place the main emphasis on the individual, which are mainly in the West; and the Declaration advance human rights. As outlined above, the UDHR tilts toward a larger role for society (and its moral influence) and a limited role for the state and legal regime in enforcing human rights rules. This is clear from the differing attitudes towards the treaties, implementation, role of the state, traditions, religion, and so forth. In the traditional view, culture and social institutions are seen as important launching pads for human rights protection and promotion.

**Table 1: Comparing Traditional, Individualist, and UDHR Views of Human Rights**

<b>Attitudes Towards</b>	<b>Traditional View (Emphasis on Social Interdependence)</b>	<b>Individualist View (Emphasis on Personal Autonomy)</b>	<b>The UDHR</b>
Foundations	Depends on context; often only positive law	Natural rights	Various; agree to disagree
Treaties	Legal commitments	Moral imperatives	Minimum standards
Flexibility of implementation	Extensive	Limited	Extensive



Duties	Important; linked to rights	Not emphasized	Important; balanced to some extent with rights
Role of the state	Important but limited	Very important	Needed; does not act alone
Social institutions	Foundational and crucial	Secondary; not highly appreciated	Primary
Traditions	To be cherished and protected; part of identity	To be minimized or adapted to new norms	To be respected
Religion	Very important; part of identity; basis for human dignity	Not important; only freedom of conscience warrants protection	Important; in need of protection
Differences across cultures	Natural; essential	Limited	Natural; to be expected and respected
Conflicting rights	Common; different contexts, different weighting	Not so common because hierarchy of values	To be expected
Individual relationship with society	Interdependent with others; connection	Autonomous of society; consumption	Part of society; collaboration

While the UDHR says “all members of the human family” have “inalienable rights” due to their “inherent dignity”—a reflection of the cross-cultural consensus on minimum standards embedded within the document—human rights obligations are best understood as binding on states not because they flow from a particular philosophy,

belief system, etc. but because they are rooted in positive (human-made) law. They are legal commitments resulting from the treaties that have been ratified, and they do not presume any particular ordering of rights except for the few primary rights mentioned above; any particular way of implementing the rights; or any particular lifestyle.<sup>113</sup> On the contrary, they are designed (except for the few primary rights) to be flexibly interpreted and implemented across cultures.<sup>114</sup>

Of course, states can refuse to sign or even opt out of agreements that they have previously agreed to (because human rights are positive not natural law). The United States, for instance, has never ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two most important follow-on agreements to the UDHR, even though 169 countries have.<sup>115</sup> Nor has it ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) even though all but eight countries—189 in all—have.<sup>116</sup> A number of African countries have threatened to leave the Rome Statute, which established the International Criminal Court, because of what they perceive as bias in its functioning. As of 2018 all but one of its eleven investigations have been in Africa. Many countries commit to treaties but with reservations. Over sixty have ratified CEDAW but with certain declarations, reservations, and objections.<sup>117</sup> However, the strong international consensus on the importance of human rights—whatever the disagreements over implementation—provides ample external and internal pressure on the great majority of countries to join and, at least at the rhetorical level, support major human rights treaties. Virtually all

---

<sup>113</sup> Twining (n 48) 180.

<sup>114</sup> Jerome Shestack, 'The Philosophic Foundations of Human Rights,' (1998) 20 Human Rights Quarterly 201, 209.

<sup>115</sup> The US signed the ICESCR in 1977. UN General Assembly (n 72). Status, <[https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty)> accessed 19 December 2018.

<sup>116</sup> The US signed the CEDAW in 1980. UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination against Women' ch. IV, 8 (1979) 1249 U.N.T.S. 13. Status, <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en)> accessed 19 December 2018.

<sup>117</sup> UN General Assembly (n 116).

countries accept the authority of the UDHR. As of late 2018, an average of 90.5 percent (178 out of 197) had ratified the six core international human rights treaties (which cover civil and political rights; economic, social, and cultural rights; racial discrimination; women; torture; and children).<sup>118</sup> As such, even states that have often showed little regard for human rights—such as Syria—sign, ratify, and accede to many agreements and do their best to show the world that they are actually following them—even if the reality is substantially different.<sup>119</sup>

Despite these qualifications and reservations, many prominent human rights organizations believe that the international agreements bind signatories to a number of prescribed values centered on autonomy and choice. The strong emphasis on the individual in Western thought—especially pronounced since the 1960s—accentuates this perspective and leads to an underemphasis on the social context, the role of institutions, and the relationship between the rights articulated in the original Declaration. This has significantly contributed to the differing perceptions on implementation that exist between Western governments (and human rights organizations) and non-Western actors who have broader concerns involving the needs of community and religion.<sup>120</sup>

Part of the problem is that the history of how the UDHR was developed and the intention of its drafters is not widely known. There was a large gap between when it was written and passed by the United Nations (1947–48) and when it started to be actively used by the human rights movement in the late 1960s. The architects of the Declaration, who came from all over the world, passed from the scene before the UDHR's major promoters, which came from only one part of the world, were firmly established. Glendon describes how major human rights organizations presume an

---

<sup>118</sup> Jack Donnelly and Daniel Whelan, *International Human Rights* (Routledge 2018); Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 288. Ratification data is available at <<http://indicators.ohchr.org/>>.

<sup>119</sup> University of Minnesota, 'Ratification of International Human Rights Treaties – Syria' (Human Rights Library Website) <<http://www1.umn.edu/humanrts/research/ratification-syria.html>> accessed on 24 August 2015.

<sup>120</sup> Glendon (n 2) xix-xx and 228-230.

understanding of rights that stems from the American judicial rights revolution of the 1950s and 1960s. She argues, “The Declaration itself began to be widely, almost universally, read in the way that Americans read the Bill of Rights, that is, as a string of essentially separate guarantees. Alas, that misreading of the Declaration not only distorts its sense, but facilitates its misuse.”<sup>121</sup>

## 10. CONCLUSION: A RETURN TO BASICS

The human rights field is limited in its current orientation by a discourse shaped by Western values and institutions. While such an outlook could be sustained in a unipolar world, it is unsustainable in a multipolar world. Countries in Asia, Africa, the Middle East, and Latin America have fewer and fewer reasons to accept ideas and concepts that do not reflect their own values and moral matrices. Human rights will only survive in this new era if they do so—if they are genuinely universal, reflecting the ideals and beliefs of all peoples. The Universal Declaration was designed for just such a world, incorporating and balancing ideas from different places in a way that was flexible and universal. A restoration of the vision of its drafters—a return to basics—is essential if human rights are to be as powerful a force in this century as they were in the last.

While some will claim that the flexible universalist approach recommended here would be ineffective to check, or even provide a license for, rights abuses, the reverse is true. A modest and pluralistic approach to bringing rights to life will gain far wider support than overly ambitious top-down approaches.

In fact, flexible universalism ought to reorient the international human rights field towards a less controversial, yet arguably more ambitious new goal: the systematic elimination of a narrow set of evils for which a broad consensus exists across all societies. The bedrock of this group would be the handful of rights prioritized and given little scope for flexibility by the drafters of the Declaration. The list, which could be augmented through negotiations, would include protections against genocide;

---

<sup>121</sup> Glendon and Abrams (n 30) 25.

slavery; torture; cruel, inhuman or degrading treatment or punishment; retroactive penal measures; deportation or forcible transfer of population; discrimination based on race, color, sex, language, religion, nationality or social origin; and protection for freedom of conscience and religion.

This “return to basics” has the potential to gain support from a wide set of people who normally are far apart in their philosophical and cultural outlooks. It would not end debates over rights—these are inevitable—but would reduce attacks on and strengthen the legitimacy of the universal human rights idea.

To truly rehabilitate the human rights ideal, both state and non-state mechanisms to implement rights need to be strengthened. It is not the absence of laws that most oppress the poor and marginalized in many places, but the everyday violence, discrimination, and corruption that they experience in spite of what the law says. No system of rules and norms can depend solely on treaties, laws, and the force of the state if it is to be effective. Only a popular culture of human rights—a culture fostered by the strong political backing and financial resources of indigenous middle classes, diasporas, and powerful regional actors, and encompassing religious actors and even those that sometimes object to some aspects of human rights can make this possible.<sup>122</sup>

Ultimately, successful human rights promotion depends on attention to the attitudes, ideas, values, relationships, and institutions within which individuals, families, and communities are embedded. As Eleanor Roosevelt put it, documents expressing ideals “carry no weight unless the people know them, unless the people understand them, unless the people demand that they be lived.”<sup>123</sup> And these, as she

---

<sup>122</sup> David Forsythe, *Human Rights in International Relations* (4<sup>th</sup> edn Cambridge 2017).

<sup>123</sup> Eleanor Roosevelt, ‘Making Human Rights Come Alive’ in Allida M Black (ed), *What I Hope to Leave Behind: The Essential Essays of Eleanor Roosevelt* (Carlson 1995) 559. Also see the advice Roosevelt gives on how to “know the Declaration” in an interview with Howard Langer on the record, *Roosevelt, Human Rights: A Documentary on the United Nations Declaration of Human Rights* (Folkways Records 1958) <[www.folkways.si.edu/eleanorroosevelt/a-documentary-on-the-united-nations-declaration-of-human-rights/world-history/album/smithsonian](http://www.folkways.si.edu/eleanorroosevelt/a-documentary-on-the-united-nations-declaration-of-human-rights/world-history/album/smithsonian)>. These sources appear in Glendon (n 2) xix and footnote on 243-244.

said in one of her last speeches at the UN, depend on implementation in lots and lots of “small places.”<sup>124</sup>

---

<sup>124</sup> Eleanor Roosevelt, Remarks at presentation of booklet on human rights, *In Your Hands*, to the United Nations Commission on Human Rights, United Nations, New York, 27 March 1958. United Nations typescript of statements at presentation (microfilm).

## CHRISTIAN AND CONFUCIAN RAPPROCHEMENT IN THE UDHR DEBATE

SUMNER B. TWISS\*

### ABSTRACT

*This article considers Christian and Confucian civilizational-philosophical perspectives and their encounter in 1947-48 when the Universal Declaration of Human Rights (UDHR) was drafted, debated, and adopted. I focus on the Third Committee's Christian and Confucian civilizational points of view through protagonists such as the Christian delegates of Brazil and the Netherlands, and the Confucian Chinese delegate Peng-chun Chang. This aspect of the debate invokes issues of ontology, epistemology, and ethics that are reflective of different civilizational views, but also includes similarities regarding the philosophical underpinnings of the UDHR—namely, a moral ontological basis for human rights, an epistemic moral dimension of reason and conscience (or heart-mind), a tight correlation of duties and rights, and a social conception of the person. These similarities create a normative moral bridge between two civilizational perspectives.*

### KEYWORDS

Christian Ethics; Confucian Ethics; P.C. Chang; Comparative Ethics; Universal Declaration of Human Rights; Human Rights and Duties; Moral Conscience; *Ren*

---

\* Sumner B. Twiss is the Distinguished Professor of Human Rights, Ethics, and Religion at Florida State University, where he holds a joint appointment between the Department of Religion and the Center for the Advancement of Human Rights, and he is also Professor Emeritus of Religious Studies at Brown University, where he served on the faculty for thirty years and as department chair for twelve years.  
Email: [STwiss@admin.fsu.edu](mailto:STwiss@admin.fsu.edu)



## 1. INTRODUCTION

In this brief paper, I want to discuss two civilizational-philosophical perspectives—Christian and Confucian--and their encounter in 1947-48 when the Universal Declaration of Human Rights (UDHR) was drafted, debated, and adopted. Although I have published previously on these two perspectives, I have not explicitly and systematically compared and contrasted them.<sup>1</sup> Thus, I focus my attention here largely on those parts of the debate of the Third Committee explicitly involving the Christian and Confucian civilizational points of view.<sup>2</sup> The principal protagonists in this aspect of the debate were, on the Christian side, the delegates of Brazil and the Netherlands

---

**\*\*** My thanks to an anonymous reviewer of an earlier draft of this essay and to my research assistant Nathan Moats. The original version of this paper was presented as a keynote speech to the Academic Conference to Commemorate the 70<sup>th</sup> Anniversary of the Universal Declaration of Human Rights, Centre for the Study of Human Rights, Nankai University, Tianjin, China, October 11, 2018, and is going to be published in Chinese by the Centre in a special volume edited by its Director Jian Chang. My gratitude to Professor Chang for giving me permission to publish this English language version

<sup>1</sup> See, for example, Sumner B. Twiss, "Theology, Tolerance, and Two Declarations of Human Rights: An Interrogative Comparison" in Frances S. Adeney and Arvind Sharma (eds.), *Christianity and Human Rights: Influences and Issues* (SUNY Press, 2007), 55; "Confucian Contributions to the Universal Declaration of Human Rights: A Historical and Philosophical Perspective," in Arvind Sharma (ed.), *The World's Religions After September 11, Vol. 2: Religion and Human Rights* (Praeger/Greenwood, 2009), 153.

<sup>2</sup> The "Third Committee" is shorthand for the Third Social and Humanitarian Committee of the United Nations General Assembly, which met and debated the UDHR draft, September-December 1948, in Paris. The record of its deliberations was published in *Official Records of the Third Session of the General Assembly, Part I, Social, Humanitarian, and Cultural Questions, THIRD COMMITTEE, Summary Record of Meetings 21 September—8 December, 1948 with Annexes* (United Nations, 1948). It should be noted that this record is a historical summary of the proceedings, not necessarily a precise word-for-word transcription of quotations from speakers. Prior to the debate, the declaration was drafted by a subcommittee of the Commission on Human Rights and then approved by that Commission for forwarding to the Third Committee's Commission on Human Rights and then approved by that Commission for forwarding to the Third Committee as a whole for discussion and action. After the latter's debate, emendation, and vote—article by article (including the preamble)—the draft declaration was then forwarded to the full UN General Assembly for its formal action.

(together with other Latin American countries and their delegates), and, on the Confucian side, the Chinese delegate Peng-chun Chang,<sup>3</sup> who was often supported by other delegates from countries as wide-ranging as India, Chile, the U.S.S.R., the U.K., and the U.S. What is interesting about this dimension of the debate is that it invokes issues of ontology, epistemology, and ethics that are clearly reflective of different civilizational-philosophical views, and yet, in the end, these views can be seen to agree on a number of points about the philosophical basis of the UDHR. In my previous publications on this general topic, I focused on specific articles of the declaration—article by article—but here, rather than focusing on the articles per se, I want to reconstruct the general positions—Christian and Confucian—that appear to be operative. In what follows, I will not cite the names of particular delegates but rather the countries they represent, except for Chang, who was the only Chinese delegate who actively took part in the debate, a fact clearly indicated in the historical summary record of the debate proceedings.

I might begin by noting that the delegates themselves were well aware of the civilizational-philosophical differences that they represented (and, indeed, in many cases, they specifically identified the dominant religious backgrounds of their respective countries). For example, the Saudi delegate “called attention to the fact [from his point of view] that the declaration was based largely on Western patterns of culture, which were frequently at variance with the patterns of culture of Eastern states. That did not mean, however, that the declaration went counter to the latter, even if it did not conform to them”.<sup>4</sup> The Chilean delegate, after indicating that his delegation, “shared, in the main, the views of other Latin-American delegations, having been nurtured in the

---

<sup>3</sup> P.C. Chang served as China’s Chief Delegate at the initial organizational meetings of the UN in London and New York at the conclusion of the Second World War. He was appointed Resident Chief Delegate to the UN Social and Economic Council, serving in that role from 1945 to 1952. In 1947-48, he was a member and Vice-Chairman of the UN Commission on Human Rights, which was chaired by Eleanor Roosevelt, and during that period he also served as a member of the Commission’s drafting subcommittee. In 1948, Chang also headed the Chinese delegation to the UN’s Geneva Conference on Freedom of Information. For further information about Chang, see footnote 15 below.

<sup>4</sup> *Third Committee*, 49.

same traditions [e.g., Roman Catholicism],” went on to state that “in preparing a declaration... which would meet the frequently divergent views of fifty-eight states, [i]t had been necessary to reconcile the different ideologies... the differences between the economic and social rights recognized by Christian Western civilization and those recognized by the Oriental civilizations”.<sup>5</sup> For his part, and strikingly, the Chinese delegate (Chang) introduced an additional moderating tone by claiming that “In the eighteenth century, when progressive ideas with respect to human rights had been first put forward in Europe, translations of Chinese philosophers had been known to and had inspired... thinkers... in their humanistic revolt against feudalistic conceptions” and that “Chinese ideas had been intermingled with European thought and sentiment on human rights at the time when that subject had been first speculated upon in modern Europe”.<sup>6</sup>

## 2. CHRISTIAN PERSPECTIVE

### 2.1. ILLUSTRATIVE PASSAGES

Having thus set the stage for our inquiry, what exactly was the Christian civilizational position, and how was it argued? Here we need to be aware of some representative claims and interventions in the debate if only to lend confidence that my reconstruction of the general position is plausibly accurate. Brazil, for example, claimed that “In order to safeguard the rights it proclaimed, the declaration... should include, in the preamble, a reference to God as the absolute origin of the rights of man,” followed by its specific proposal to amend the second sentence of Article 1 so that it would read, “Created in the image and likeness of God, they [all human beings] are endowed with reason and conscience”.<sup>7</sup> Argentina contended that “To say that men were created in the image and

---

<sup>5</sup> *Third Committee*, 49.

<sup>6</sup> *Third Committee*, 48.

<sup>7</sup> *Third Committee*, 55. This was (and is) the “foundational” article of the UDHR. The text of the article finally adopted reads as follows: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

likeness of God... gave man the inspiration he needed to follow in the paths of peace... guided in its pursuits by evangelical principles. It could properly be said that the Ten Commandments were the first declaration of human rights," and further that "the reference to God... would give to Article 1 [and the declaration as a whole] an element of universality, a breath of the divine".<sup>8</sup> For its part, Bolivia claimed that "the idea of God was not a debatable theological doctrine, but a positive reality... [and therefore] the most realistic basis...[for] the Declaration of Human Rights".<sup>9</sup> Columbia contended that "men were of spiritual origin" and that this irrefutable fact grounded "human equality... at a deeper level"; further, "Western thought would never break away from its high spiritual ideals and adhere to... principles which sought to demolish the soul and destroy idealism".<sup>10</sup>

The Netherlands "affirmed the relation existing between the Creator and man, stated the latter's origin and referred to his destiny"; and, moreover, "to fulfill his destiny, man must comply with the many obligations towards his Creator, his fellow human beings, society...It was precisely in order to enable him to fulfill his obligations that man possessed inherent and inalienable rights".<sup>11</sup> Brazil, in a further intervention, claimed that "The origin of the concept of rights and freedoms was to be found in the conscience" and that "from time immemorial, man had been attempting to set out his thoughts [about such matters] and that effort would not have been made had he not been of divine origin".<sup>12</sup> Furthermore, the Brazilian delegate contended, reference to being created in God's image "would have the effect of relating the declaration to the human conscience and...that was the element which bound people together".<sup>13</sup> And,

---

<sup>8</sup> *Third Committee*, 109. In connection with these commandments, the Belgian delegate elsewhere observed that "In dealing with [the] subject [of duties towards his neighbor, his family, or himself], mankind had as yet been unable to improve upon the precept underlying the Ten Commandments: 'Thou shalt love thy neighbor as thyself'" *Third Committee*, 49.

<sup>9</sup> *Third Committee*, 773.

<sup>10</sup> *Third Committee*, 112.

<sup>11</sup> *Third Committee*, 755-757.

<sup>12</sup> *Third Committee*, 766.

<sup>13</sup> *Third Committee*, 766.

for a final example, the Belgian delegate claimed that he “was personally inclined to favor [the Netherlands’ position] because it provided the idea of the equality of man with perhaps the only possible ultimate argument and would thus strengthen the declaration,” not to mention giving it an appropriate “solemnity”.<sup>14</sup> It should be noted that while he personally supported the theological views of the Netherlands delegation, this Belgian delegate did not officially support the inclusion of theological language within the draft declaration.

## 2.2. RECONSTRUCTION

Now, what exactly are we to make of these myriad claims? The first point to observe is that all of these claims are broadly theistic ones that attempt to ground human rights in one way or another in the notion of humans being created by God in his image. There is no reference to specifically Christological beliefs. The second point to observe is that these delegates appear to represent different sorts of Christian traditions; though most of the delegations appear to represent predominantly Catholic countries, it is certainly arguable that Protestant denominations are historically particularly important in the Netherlands. I think if we stand back from these claims—and I have cited only a representative sample—and reflect on them, we can discern a coherent argumentative position that goes somewhat as follows:

(1) Human rights, dignity, and equality require the strongest possible or ultimate grounding.

(2) That grounding is to be found in the notion that God created all persons in his image and likeness.

(3) Being thus created, all humankind equally has a moral nature that includes both inherent obligations (to the Creator, other persons, and society as a whole) and inherent and inalienable rights, which are needed to fulfill those obligations properly.

---

<sup>14</sup> *Third Committee*, 760.

(4) These moral obligations and rights are epistemically discernible by means of human conscience and reason, with some of the obligations being specified in the biblical Ten Commandments and the rights being specified in the UDHR itself.

What is interesting about this position is that it has both moral-ontological and moral-epistemic components. What is also interesting about the position is that it coordinates both obligations and rights; indeed, more properly speaking, it claims that human rights are prerequisite for being able to fulfill one's moral obligations. Its advocates clearly think that human beings, universally and equally, have dignity in their ontological moral nature and that this truth can be known by natural means (human reason and conscience), which are part of their created endowment.

### 3. CONFUCIAN PERSPECTIVE

What might be the Confucian alternative—represented by P.C. Chang—to this position? In reconstructing this alternative perspective, we need to be ever alert to the facts that Chang was a consummate mediator of “difference” and that, although thoroughly steeped and raised in Confucian thought, he was also trained in the West for his higher education and was not beyond slipping into the debate Confucian ideas by employing Western idioms to communicate his points to the other delegates.<sup>15</sup> We have already

---

<sup>15</sup> Chang was born and raised in Tientsin, China, graduating from Nankai Middle School in 1906 and from Bao-Ding Deng School (high school) in 1910. Supported by the U.S. Boxer Rebellion Indemnity Fund, he attended Clark University (Worcester, Massachusetts), 1910-1913, graduating with a B.A. in just three years. Chang then pursued graduate studies at Columbia University, 1913-1915, taking two masters degrees in 1915, one in philosophy from the Graduate School and the other in education from the College of Education, and in 1922 he completed his Ph.D. in education. He then returned to China and up-graded Tsingshua School (Beijing) to a college in 1923, serving as its Dean until 1926. In 1926, he returned to Nankai, becoming the Principal of Nankai Middle School and simultaneously served as Professor of Philosophy at Nankai University, until 1937. During his career, Chang authored three books—one on Chinese education and two on Chinese history and culture—editing yet another on Chinese culture, writing a number of original plays, and directing numerous play productions in China, the U.S., and Soviet Russia. Chang's governmental and diplomatic career began in 1937, when he was appointed by the Chinese government to pursue anti-Japanese propaganda activities in Europe and America. He was a

seen some hint of this strategy in his claim that, in their early European origins, human rights were shaped by Chinese ideas. Let us now consider some of his other claims, indicating, where appropriate, their Confucian elements.

### 3.1. ILLUSTRATIVE PASSAGES

At the very outset of the Third Committee's debate, Chang emphasized what he called "the human aspect of human rights," which he elaborated as follows:

"A human being had to be constantly conscious of other men, in whose society he lived. A lengthy process of education was required before men and women realized the full value and obligations of the rights... in the declaration; it was only when that stage had been achieved that those rights could be realized in practice...the declaration...[was]...to serve as a basis and a program for the humanization of man".<sup>16</sup>

It is difficult to miss the fact that this passage appears to recapitulate Confucius's idea of moral cultivation as involving "help[ing] others to take their stand in so far as [one] himself wishes to take his stand" and thus becoming humane or humanized.<sup>17</sup> Later, in supporting Article 1, Chang claimed that

---

member of the People's Political Council, in 1938-39, and then served successively as an ambassador to Turkey, 1940-42, and Chile, 1942-45, prior to his posts at the UN. For further information about and analysis of Chang's background, including his propensity to use Confucian ideas and texts in other venues earlier to and concurrent with his membership on the Commission on Human Rights, see my article, "Confucian Contributions to the UDHR," cited above. See also Pinghua Sun, *Historic Achievement of a Common Standard: Pengchun Chang and the Universal Declaration of Human Rights* (Singapore: Springer, 2018), which discusses some of my work on Chang.

<sup>16</sup> *Third Committee*, 48.

<sup>17</sup> The edition of the Analects used is: Confucius, *The Analects*. D.C. Lau (trans.), (Penguin Books, 1979) VI.30.



“A happy balance was struck by the broad statement of rights in the first sentence and the implication of duties [“acting in the spirit of brotherhood”] in the second...moreover, the various rights [throughout the declaration] would appear more selfish if they were not preceded by the reference to ‘a spirit of brotherhood’...Statements of rights and duties should form an integral part of the declaration”.<sup>18</sup>

In opposing the insertion of any theological ideas—either directly or by implication—Chang appealed to conscience in the sense of equity when he reminded the other more theologically minded delegates that the Chinese

“population had ideals and traditions different from those of the Christian West. Those ideals included good manners, decorum, propriety, and consideration for others. Yet, although Chinese culture attached the greatest importance to manners as a part of ethics...[he]...would refrain from proposing that mention of them should be made in the declaration. He hoped that his colleagues would show equal consideration and withdraw some of the amendments...which raised metaphysical problems”.<sup>19</sup>

Yet, subsequently, Chang could not help but observe, “to act towards one another in a spirit of brotherhood...was perfectly consistent with the Chinese attitude towards manners and the importance of kindly and considerate treatment of others. It was only when man’s social behavior rose to that level that he was truly human”.<sup>20</sup> Again, it is difficult to overlook the fact that in these passages Chang is speaking of classical Confucian virtues (e.g., humaneness, propriety), ritual forms (i.e., *li*), and self-cultivation in becoming truly human.

As the debate over the inclusion of theological references in the declaration continued, Chang made the extraordinary proposal that “the basic text of Article 1...would be acceptable if it were understood on the basis of eighteenth century [European] philosophy,” and he elaborated as follows:

---

<sup>18</sup> *Third Committee*, 98.

<sup>19</sup> *Third Committee*, 98.

<sup>20</sup> *Third Committee*, 99.

“That philosophy was based on the innate goodness of man. Other schools of thought had said that man’s nature was neutral and could be made good or bad, or again that his nature was all bad. The eighteenth century thinkers...had realized that although man was largely animal, there was a part of him which distinguished him from animals. That part was the real man and was good, and that part should therefore be given greater importance. There was no contradiction between the eighteenth century idea of the goodness of man’s essential nature and the idea of a soul given to man by God, for the concept of God laid particular stress on the human as opposed to the animal, part of man’s nature...[He therefore]...urged that the Committee should not debate the question of the nature of man again and should build on the work of the eighteenth century philosophers...using ‘human beings’ to refer to the non-animal part of man”.<sup>21</sup>

Once again, though he is apparently invoking only the thought of European philosophers here, Chang is clearly referring to the Confucian thought of Mencius to make his case.

Consider, for example, with respect to the preceding passage about theories of human nature, a parallel passage from Mencius:

“Kao Tzu said, ‘There is neither good nor bad in human nature,’ but others say, ‘Human nature can become good or it can become bad.’...Then there are others who say, ‘There are those who are good by nature and there are those who are bad by nature.’...Now you [Mencius] say human nature is good. Does this mean that all the others are mistaken?...[to which Mencius replies] As far as what is genuinely in him is concerned, a man is capable of becoming good...That is what I mean by good. As for his becoming bad, that is not the fault of his native endowment”.<sup>22</sup>

Consider also, with respect to the “parts” of man, this illustrative passage from Mencius:

“The parts of the person differ in value and importance. Never harm the parts of greater importance, for the sake of those of smaller importance...He who nurtures the parts of

---

<sup>21</sup> *Third Committee*, 113-114.

<sup>22</sup> The edition of Mencius used is: Mencius, *Mencius*. D.C. Lau (trans.), (Penguin Books, 1970) VI.A.6.

smaller importance is a small man; he who nurtures the parts of greater importance is a great man...A man who cares only about food and drink is despised by others because he takes care of the parts of smaller importance to the detriment of the parts of greater importance".<sup>23</sup>

And, finally, with respect to failing to nurture one's greater or good parts (seeds of virtue and goodness), Mencius had earlier written,

"If this dissipation happens repeatedly," then a person "will no longer be able to preserve what was originally in him, and when that happens, the man is not far removed from an animal...But can that be what a man is genuinely like? Hence, given the right nourishment there is nothing that will not grow...Confucius said, 'Hold on to it and it will remain'...It is perhaps to the [moral] heart this refers".<sup>24</sup>

I think that these parallel passages from Mencius make it clear that Chang was using the idiom of eighteenth-century European philosophy to articulate what were fundamentally Confucian concepts.

To see how Chang further developed this position, we need to consider his equally extraordinary intervention into the contentious debate over the meaning and implications of the freedom of conscience and religion.<sup>25</sup> My interest here is not in the specifics of the debate itself but rather what Chang said in his own intervention. First, he defended the necessity of protecting freedom of belief, thought, and conscience by

---

<sup>23</sup> *Mencius*, VI.A.14.

<sup>24</sup> *Mencius*, VI.A.8.

<sup>25</sup> Here I am referring to the UDHR's Article 18 (numbered Article 16 at the time of the debate), the final text of which reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance." The controversy over this article was initiated by the Saudi delegate, who objected to the inclusion of the "freedom to change his religion or belief" for reasons of seeming to encourage activities of proselytism as well as being offensive to certain variants of Islamic belief and practice. This particular controversy eventually carried over to the floor of the UN General Assembly during its formal consideration and adoption of the UDHR.

claiming “the inviolability of that profound part” of human nature.<sup>26</sup> Second, he went on to inform the other delegates about “how the Chinese approached the religious problem”.<sup>27</sup> In this approach, Chang claimed that Chinese philosophy “considered man’s actions more important than metaphysics,” that “the art of living” had priority over religious speculation, and that “the best way for man to testify to [his ultimate beliefs]...was to give proof of an exemplary attitude in this world,” which included “pluralistic tolerance manifesting itself in every sphere of thought, conscience and religion” and which was properly based on “benevolence and justice”.<sup>28</sup> The latter two values, of course, are the cardinal Confucian virtues of *ren* and *yi*, and it appears significant that Chang singles them out for mention.

### 3.2. RECONSTRUCTION

So, in summary, in his interventions, Chang views rights and obligations as intrinsically co-related in a proper program of humanization; invokes Confucian virtues and rites in counterpoise to theological concepts; uses the language of “man’s innate goodness” to distinguish human nature from that of other animals; identifies the cardinal Confucian virtues of benevolence and justice as the basis for the art of living; and posits that conscience and religion constitute a normatively inviolable part of all human beings. It appears, therefore, that, so far, Chang’s position can be appropriately formulated as follows:

- (1) Inherent in humankind is the potential for moral goodness as represented by the roots or seeds of the virtues of humaneness, justice, propriety, and discernment.
- (2) Developing this moral potential requires a sustained program of humanization involving constant awareness of others in one’s thought and action.
- (3) In order to actualize this program, people must recognize the integral relationship between rights and duties in the art of living.

---

<sup>26</sup> *Third Committee*, 398.

<sup>27</sup> *Third Committee*, 398.

<sup>28</sup> *Third Committee*, 398.

The moral ontology of this position should be obvious: our human nature is inherently moral. In order to get at its epistemic aspect, however, I need to invoke another element of Chang's contribution to the UDHR not explicitly discussed in the Third Committee's debate. The historical fact is that Chang was intimately involved in the prior drafting phase of the UDHR, and, in that role, he recommended that the declaration's first article include reference to not only "reason" but also "two-men-mindedness" (his own English translation of *ren*), because in his view human rights and moral duties are discerned by reason in tandem with a basic human capacity for sympathy and compassion that motivates acting in the spirit of brotherhood.<sup>29</sup> At this point, one could plausibly argue that Chang's vision here represents the Mencian notion of the heart-mind, which is a complex moral capacity with affective, conative, and epistemic aspects all combined into one. At the suggestion of two other members of the drafting committee, the term "conscience" was substituted for "two-men-mindedness" (a cumbersome phrase), with the understanding that it represented a moral "knowing-with" (which need not exclude an affective and motivational dimension) common to all human beings. Thus, was the Mencian, or more broadly Confucian, heart-mind embodied in the formulation that "all human beings are endowed with reason and conscience." Although for Confucians, including Chang himself, the heart-mind is more than epistemic, it also performs that function. So, I propose to supplement Chang's position sketched above with:

(4) Humankind's moral potential and the requirements of humanization are known by "reason and conscience" (the heart-mind).

As a consequence of this addendum, then, Chang's full position has both moral ontological and epistemic dimensions.

---

<sup>29</sup> Although I have discussed this contribution in a number of places, the more extensive one is Sumner B. Twiss, "P. C. Chang, Freedom of Conscience and Religion, and the Declaration of Human Rights," in Arvind Sharma (ed.), *The World's Religions after September 11*, Vol. 3: *The Interfaith Dimension* (Praeger: Greenwood, 2009), 175. In this article, I point out that, for Mencius, the virtue of *ren* or humaneness taken alone often symbolized or stood in for the whole heart-mind.

It is likely that some commentators would dispute my reconstruction of Chang's position on the ground that his attempt to insert *ren* into Article 1 was severely undermined by being reinterpreted (even mistranslated) by the terms "conscience" and "spirit of brotherhood." Sinkwan Cheng, for example, pointedly claims that "*ren*...disappeared completely and was replaced by Western concepts" wholly inadequate to the task of true "humanization" (to use Chang's own phrase).<sup>30</sup> Cheng further claims that "the communal foundation of *ren* is immediately distorted by the solitary character of the 'inner voice of conscience' of the Western ethico-political subject" and that "the Western notions of 'conscience' and 'brotherhood' are simply too passive compared to the ethical duties enjoined by *ren*".<sup>31</sup> While I have sympathy for Cheng's contention that *ren* could have been more forcefully and straightforwardly featured by using the Chinese term or the language of "co-humanity," "humaneness," or "compassion," Cheng's views on this matter are apparently not shared by other commentators.

For example, as recently argued by Hans Roth, P. C. Chang was engaged in a project of *bricolage* in the effort to bring together different ethical traditions on a consensus for the humanization of the modern world.<sup>32</sup> And Roth further points out that "the spirit of brotherhood does connote an attitude of kindness and sympathy towards others," while also maintaining that "conscience" is used "to emphasize not merely human beings' cognitive capacity but also their socio-emotional skills and capacity to see things from other people's perspective".<sup>33</sup> Here I would add that the term "conscience" has had many nuances over the centuries, and one used in the 18<sup>th</sup> century (the Western philosophical period favored by Chang) was the idea of moral sentiment understood as the moral capacity to know the good and to be motivated by

---

<sup>30</sup> Sinkwan Cheng, "Translation, Power Hierarchy, and the Globalization of the Concept 'Human Rights': Potential Contributions From Confucianism Missed by the UDHR," *The Age of Human Rights Journal* 4 (June 2015):1; quotations from 9, 24.

<sup>31</sup> Cheng, 24.

<sup>32</sup> Hans Ingvar Roth, *P. C. Chang and the Universal Declaration of Human Rights* (Philadelphia: University of Pennsylvania Press, 2016; English translation, 2018), 217.

<sup>33</sup> Roth, 211-213.

fellow-feeling and compassion for others, not unlike Mencius's notion of heart-mind connoting a nexus of cognitive, affective, conative, and inclinational aspects. As argued by Roth, Chang therefore had some grounds for accepting the term "conscience"—namely that it "conveys the sense of having been brought up in a manner respectful of other people's welfare" and that "its opposite term is a person entirely lacking in empathy who has no feelings of obligation toward fellow human beings".<sup>34</sup> I think that these grounds apply equally to the language of "spirit of brotherhood" and that Chang's invocation of *ren* and acceptance of such alternative language may be the product of his effort to build normative bridges between moral traditions.

#### 4. CONCLUSION

Clearly, the Christian-Western and the Confucian civilizational differences are profound—for example, there is a Creator God in the former but not in the latter. Nonetheless, it is also important to realize that there are equally profound similarities or at least parallels between the two positions; for example, (1) both propound a moral ontological basis for human rights; (2) both have an epistemic moral dimension of reason and conscience (or heart-mind); and (3) both tightly correlate duties and rights, seeing these categories as integrally related. And, as an implication of this latter point, (4) both appear to subscribe to a social conception of the person, quite unlike the radically autonomous, individualistic, exclusively self-interested, and asocial notion of the person commonly associated with neo-economic liberalism and often falsely ascribed to the UDHR. I need to discuss some of these points in a bit more detail, so as to be properly understood. For example, with reference to suggesting a parallel moral ontological basis for human rights in the two civilizational perspectives, I do not intend to claim that the entire Confucian tradition thus grounds human rights—or even that the concept of human rights is indigenous to it—but only that in Chang's interpretation of the tradition, the notion of human moral nature grounds such rights.

---

<sup>34</sup> Roth, 213.



With respect to the third and fourth points in particular, considerable clarification is called for. When I speak of the tight correlation of duties and rights, I am referring to something other than the notion that states have obligations to see to it that these rights are satisfied; that is, the delegates—on both civilizational sides—meant something more than this state-centric thesis when it came to discussing human duties and human rights, in light of humankind's moral nature.<sup>35</sup> To provide a sense of this “more,” let me cite just two examples from delegates representing, so to speak, the two civilizational perspectives discussed in this paper.

After recalling that “it was especially important to defend the individual against the State”—by ensuring that states fulfill their correlative obligations to respect and defend human rights—the Cuban delegate went on to say,

“the individual should also be reminded that he was a member of society, and that he must affirm his right to be deemed a human being by clearly recognizing the duties which were corollaries of his rights...the declaration ought to proclaim that idea...That solemn declaration of social solidarity would be a safeguard against...exaggerated individualism which had done so much ill”.<sup>36</sup>

A “thick” sense of correlativity of rights and duties is clearly being invoked in order to make the point that persons are inherently social by nature and in that capacity have moral obligations to others within their communities.

For his part, Chang had earlier made a similar point when saying

“that ethical considerations should play a greater part in the discussion. The question was not purely political. The aim of the United Nations was not to ensure the selfish gains of the individual but to try and increase man’s moral stature. It was necessary to

---

<sup>35</sup> I am indebted to my good colleague, Jonathan Chan (Hong Kong Baptist University), for goading me to clarify this point. I am also grateful to him for his critical comments on other aspects of this essay.

<sup>36</sup> *Third Committee*, 656.

proclaim the duties of the individual for it was a consciousness of his duties, which enabled man to reach a high moral standard".<sup>37</sup>

Here Chang appears to be making a point similar to that of the Cuban delegate: namely, beyond those state obligations to ensure, protect, and advance human rights, all persons themselves in virtue of their social nature have moral obligations to others that they must fulfill in order to live up to their implicit moral destiny, and, as we have seen, he elsewhere claims that human rights are needed in order for people to fulfill this destiny.

The Third Committee expressly refused to adopt a theistically-grounded moral ontology for the UDHR on the grounds, for example, that doing so would be parochial and ethnocentric, unacceptable to many of the world's peoples and cultures, and border on religious intolerance of contrary views.<sup>38</sup> By the same token, however, in speaking of inherent human dignity, rights, and equality, and in acknowledging the sociality of the person, the Committee arguably came close to adopting a moral ontology, not unlike that of Chang.<sup>39</sup> Moreover, the epistemology of the declaration—contrary to the view that it was no more than a pragmatic agreement on certain norms—also involved a fundamental appeal to, or invocation of, conscientious moral discernment.<sup>40</sup> According to my reconstruction, then, the philosophical basis of the UDHR more closely approximates Chang's Confucian position than the Christian-inspired Western one. Or

---

<sup>37</sup> *Third Committee*, 87. Interestingly, immediately after Chang's intervention, the historical record indicates that the Cuban delegate "thanked the Chinese representative for raising the level of the debate by his last intervention...related to the duties of the individual", *Third Committee*, 87.

<sup>38</sup> For further discussion of this refusal and the reason for it, see my "Theology, Tolerance, and Two Declaration," previously cited.

<sup>39</sup> This is my way of interpreting what Johannes Morsink has called the UDHR's "metaphysics of inherence"; see his *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, 2009), ch. 1, and his earlier *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999), ch. 8.

<sup>40</sup> Here I am fundamentally correcting the limited, myopic, and purely "pragmatic interpretation" that I once argued in Sumner B. Twiss, "A Constructive Framework for Discussing Confucianism and Human Rights," in Wm. Theodore de Mary and Tu Weiming (eds.), *Confucianism and Human Rights* (Columbia University Press, 1998), 27.

better put, the Third Committee delegates—prompted in part by Chang—imbedded a philosophical basis for the declaration that was compatible with both Confucian and Western views on the points indicated, thus creating a normative moral bridge between two civilizational perspectives.<sup>41</sup>

---

<sup>41</sup> I discuss this normative moral bridge in moral detail in Sumner B. Twiss, “Confucian Ethics, Concept-Clusters, and Human Rights, in Marthe Chandler and Ronnie Littlejohn (eds.), *Polishing the Chinese Mirror: Essays in Honor of Henry Rosemont, Jr.*, ACPA Series of Chinese and Comparative Philosophy (Global Scholarly Publications, 2008), 50.

# **Influence of UDHR in the Years After Its Publication**

## ARTICLE 29(1) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: REFLECTION ON DRAFTING, SOURCES AND INFLUENCES

JUNXIANG MAO\*, XI SHENG\*\*

### ABSTRACT

*Individual duties to the community were discussed throughout the various drafting stages of the Universal Declaration of Human Rights (UDHR). Its final incorporation into the UDHR through Article 29(1), indicates the conceptual consensus of the international community on this issue at that time. We found that representative philosophical theories of the East and the West, and world's major religious cultures emphasize on individual duties to the community. Legal provisions in trans-regional legal sources follow suit. Article 29(1) the UDHR, though indirectly, continues to exert important normative influences on domestic constitutions and human rights instruments. The recognition of individual duties to the community as protected under Article 29(1) clearly demonstrate the cross-cultural nature of the UDHR. Therefore, an integral understanding of the UDHR requires further exploration of the value of this provision.*

### KEYWORDS

Individual Duties to the Community; Drafting History; Philosophical Foundations; Legal Sources; Normative Influences

---

\* Professor of Law School and Executive Director of Human Rights Center at Central South University, China.  
Email: [tangmao200304@sina.com](mailto:tangmao200304@sina.com)

\*\* Research Fellow at the Human Rights Center at Central South University.  
Email: [1135081517@qq.com](mailto:1135081517@qq.com)

\*\*\* We are especially grateful for the funding of Program of National Social Science Foundation of China (Grant No. 17BFX150).

## 1. INTRODUCTION

On 10 December 1948, the Universal Declaration of Human Rights (hereafter "the UDHR") was adopted by the United Nations General Assembly resolution 217(III) at its 3rd session in Paris. Drafted by representatives from different regions and with various cultural backgrounds, the UDHR is a normative document that embeds cross-cultural human rights notions. Among them, in the drafting process of Article 29(1), Western countries such as the US, UK, Canada, Australia, New Zealand, and non-Western countries such as China, Lebanon, Uruguay, Cuba, Egypt, participated in the process and raised suggestions on the drafts.

Despite some divergences on the wording of Article 29(1), the clause concerning 'individual duties to the community' was finally incorporated into the UDHR. We propose that, "individual duties to the community", is a general phrase, transformed from the "social duties" in the preliminary draft<sup>1</sup> of the UDHR submitted by Humphrey. Whilst the UDHR did not specify the type of duties, according to earlier drafts of the UDHR, we can indicate that the drafters aimed to impose social duties on everyone.<sup>2</sup> That is, a just share of responsibility and common sacrifices as may contribute to the common good, so as to enable all men to develop their physical, mental and moral personality. These duties include but are not limited to obedience to law, exercise of a useful activity, and the acceptance of the burden and sacrifices demanded for the common good.

Furthermore, the use of the term "duty" has subtle but essential differences to "responsibility" and "obligation". According to the Oxford Advanced Learner's English-Chinese Dictionary, duty means "something that you feel [you] have to do because it is your moral or legal responsibility".<sup>3</sup> Responsibility means "a duty to deal with or take care of sb/sth, so that you may be blamed if sth goes wrong; a duty to help or to take care of sb because of your job, position, ect".<sup>4</sup> Obligation contains two

---

<sup>1</sup> Draft Outline of International Bill of Rights, E/CN.4/AC.1/3, 4 June 1947,4; Report of the drafting committee to the commission on human rights, suggestions submitted by the representative of France for articles of the international declaration of human rights, E/CN.4/21, 1 July 1947, 51.

<sup>2</sup> Report of the drafting committee to the commission on human rights, E/CN.4/21, 1 July 1947, 9, 51.

<sup>3</sup> *Oxford Advanced Learner's English-Chinese Dictionary (7th edition)* (The Commercial Press and Oxford University Press 2009) 625.

<sup>4</sup> *Ibid* at 1699.

meanings of “the state of being forced to do sth because it is your duty, or because of a law, ect.; something which you must do because you have promised, because of a law, ect.”<sup>5</sup> It can be seen that “duty” holds moral and legal requirements; “responsibility” is mainly a moral requirement; and “obligation” corresponds to rights legally and is compulsory and binding. With regards to Article 29(1) of the UDHR, individual duties to the community are duties that are imposed on individuals to guarantee the full exercise of rights and freedoms in their dealing with their relationship with others and the community they are a part of. Once individual duties to the community are completely excluded, it is easy to cause excessive demand for rights, which has been demonstrated in modern society.

Nevertheless, it remains that the reasons for divergences on the wording of Article 29(1) were due to worries that the clause may help to prevent the expanded exercise of individual rights and may be easily abused in limiting individual rights. The final adoption of this clause reflects its crucial position within the ‘rights-centered’ time period of 1948, and the consensus among countries. In addition, the ordering of this ‘individual duties to the community’ clause after all the clauses centred on individual rights in the UDHR, reflects the logic of states. That is, the substantial influence a clause concerning ‘individual duties owed to the community’ may have on rights-centred clauses. Thus, this indicates that the status and role of the ‘individual duties to the community’ clause, stipulated in Article 29(1) cannot be ignored.

Therefore, in order to understand the UDHR in an integral sense an examination of Article 29(1) must not be excluded. However, we find that after 70 years of the UDHR’s adoption, the fact that the individual duties to the community clause and its meaning are neglected intentionally or unintentionally in today’s society is quite inconsistent with the important role it plays in the UDHR. The United Nations Human Rights Council adopted 1092 resolutions altogether from the 1st to the 41st regular session, among them 800 are thematic resolutions. The most frequently adopted resolutions focused on the various rights, such as the right to development; the right to food; human rights and international solidarity; the human rights to safe drinking water and sanitation; enhancement of international cooperation in the field of human rights; human rights and unilateral coercive. Strikingly, there are

---

<sup>5</sup> Ibid at 1373.



none within the resolutions which mainly focuses on individual duties to the community. In addition, there are pertinent academic researches on UDHR clauses including, Article 4 involving modern slavery;<sup>6</sup> Article 8 to 11 involving fair trial;<sup>7</sup> Article 12 involving the right to privacy;<sup>8</sup> Article 18 involving religious freedom;<sup>9</sup> Article 25 involving the right to health;<sup>10</sup> Article 26 involving the right to education;<sup>11</sup> and Article 28 involving social and international order.<sup>12</sup> There are also researchers who pay heed to the role of the UDHR at its 70<sup>th</sup> year, in terms of the protection of children's rights<sup>13</sup> and indigenous rights,<sup>14</sup> yet still, there appears to be a dearth of in-depth discussion on Article 29(1). The social disorder and governance deficits in many

---

<sup>6</sup> Sands, Matthew, 'UDHR and Modern Slavery: Exploring the Challenges of Fulfilling the Universal Promise to End Slavery in All Its Forms' [2019] Political Quarterly. <This paper is just published online, early access: <https://doi.org/10.1111/1467-923X.12712>> accessed 20 October 2019.

<sup>7</sup> Weissbrodt, D., Hallendorff, M., 'Travaux Préparatoires of the fair trial provisions - Articles 8 to 11 - of the Universal Declaration of Human Rights' [1999] 21(4) Human Rights Quarterly 1061.

<sup>8</sup> Lorna Woods, 'Digital Privacy and Article 12 of the Universal Declaration of Human Rights' [2019] Political Quarterly <This paper is just published online, early access: [http://apps.webofknowledge.com/full\\_record.do?product=UA&search\\_mode=GeneralSearch&qid=3&SID=6FpDIC6OH3opSmuJPQS&page=1&doc=1](http://apps.webofknowledge.com/full_record.do?product=UA&search_mode=GeneralSearch&qid=3&SID=6FpDIC6OH3opSmuJPQS&page=1&doc=1)> accessed 20 October 2019.

<sup>9</sup> Ismailee, Sania, 'Religious Freedom and the Universal Declaration of Human Rights' [2019] 20(2) Human Rights Review 257; Moyn, Samuel, 'The Universal Declaration of Human Rights and the Challenge of Religion' [2018] 60(2) Journal of Church and State 325; Hodge, David R., 'Advocating for the forgotten human right - Article 18 of the Universal Declaration of Human Rights - religious freedom' [2006] 49(4) International Social Work 431.

<sup>10</sup> Pillay, Navanethem, 'Right to health and the Universal Declaration of Human Rights' [2008] 372(9655) LANCET 2005; Ayotte, B L, 'Forging the link between health and human rights: celebrating over 50 years of the Universal Declaration of Human Rights' [1999] 22(2) The Journal of ambulatory care management 66; Annas, GJ, 'Human rights and health - The universal declaration of human rights at 50' [1998] 339(24) New England Journal of Medicine 1778.

<sup>11</sup> Lapa, Fernanda Brandao; Silva, Gusso; Luana de Carvalho; de Souza, Sirlei, 'Human Rights to education (article 26 in the UDHR): challenges to implement Human Rights education in Brazil' [2018] (39) Dialogo 119.

<sup>12</sup> Saunders, Natasha, 'Beyond asylum claims: refugee protest, responsibility, and Article 28 of the Universal Declaration of Human Rights' [2018] 22(7) International Journal of Human Rights 847.

<sup>13</sup> Lee-Koo, Katrina, 'The Universal Declaration of Human Rights at 70: children's rights, Australian Journal of International Affairs' [2019] 73(4) Australian Journal of International Affairs 326.

<sup>14</sup> Synot, Eddie, 'The Universal Declaration of Human Rights at 70: Indigenous rights and the Uluru Statement from the Heart' [2019] 173(4) Australian Journal of International Affairs 320.

countries today caused by mere self-seeking values, while evading social duties, also alert us that we should not ignore this issue concerning individual duties to the community.

In view of the above fact, we cannot help but wonder whether the neglect of individual duties to the community deviates from the drafters' vision of the UDHR? Is the formulation of the individual duties to the community clause only a claim of a certain culture or a universal claim of multiculturalism? Do the individual duties to the community clause reflect merely the proposition before the formulation of the UDHR, or is it a consensus that should have been upheld in the 70 years of the UDHR. We believe that since Article 29(1) is an integral part of the UDHR, discussion on this clause is thus an indispensable work so as to understand the UDHR and its cross-cultural nature holistically.

## **2. DRAFTING HISTORY OF ARTICLE 29(1) OF THE UDHR**

From the preparatory stage, the drafting of the UDHR was conducted in nearly a span of three years, from 1946-1948. The Commission on Human Rights, the Drafting Committee and its working group played a key role in the drafting process. The content of the individual duties to the community in Article 29(1) was thus formulated under continuous revision.

### **2.1. THE FIRST SESSION OF THE COMMISSION ON HUMAN RIGHTS**

In February 1947, in accordance with a decision from the first session of the Commission on Human Rights, a group (the Drafting Committee) consisting of Eleanor Roosevelt, Pen-Chun Chang and Charles Malik, began drafting the International Bill of Human Rights. With assistance of the UN Secretariat, the task of formulating a preliminary draft was given to John Humphrey, Director of the UN Secretariat's Division for Human Rights.<sup>15</sup> The Secretariat then formulated the preliminary draft, 'Draft Outline of International Bill of Rights', and submitted it to the Commission. This Draft contains a preamble and eighty articles outlining

---

<sup>15</sup> Drafting of the Universal Declaration of Human Rights  
<<http://research.un.org/en/undhr/draftingcommittee>> accessed 2 May 2019.

individual human rights. Among them, the preamble states in paragraph 2 that “man does not have rights only; he owes duties to the society of which he forms part”.<sup>16</sup> Article 1 also states:

"Every one owes a duty of loyalty to his state and to the (international society) United Nations. He must accept his just share of responsibility for the performance of such social duties and his share of such common sacrifices as may contribute to the common good."<sup>17</sup>

In addition, Article 1 of the Plan of the Draft Outline of an International Bill of Rights submitted to the Commission prepared by the Secretariat during the first session also deals with the "Duties towards Society".<sup>18</sup> The preliminary draft prepared by Humphrey was the first formal version of the UDHR and reflected that the Drafting Committee has already taken heed of incorporating individual duties to the community into the UDHR from the very beginning.

During the first session of the Commission on Human Rights, the representative of the United Kingdom in the Human Rights Commission, Lord Dukeston, proposed a draft International Bill of Human Rights in a form of a legal instrument, in his letter to the Secretary-General of the United Nations. The British draft referred to individual duties to the community in paragraph 3: "Whereas all men are members of communities and as such have the duty to respect the rights of their fellow men equally with their own."<sup>19</sup> The United States also suggested redrafting Article 2 of the preliminary draft, as:

“Duty of the individual towards other individual: The state is created by the people for the promotion of their welfare and the protection of their mutual rights. In the exercise of his rights everyone is limited by the rights of others. The states may impose only such limitations on such rights as are compatible with the freedom and welfare of all.”<sup>20</sup>

---

<sup>16</sup> Draft Outline of International Bill of Rights (n.1) at 2.

<sup>17</sup> Ibid at 4.

<sup>18</sup> Plan of the Draft Outline of an International Bill of Rights, E/CN.4/AC.1/3/ADD.2, 6 September 1947, 2.

<sup>19</sup> Text of Letter from Lord Dukeston, the United Kingdom Representative on the Human Right Commission, to the Secretary-General of the United Nations, E/CN.4/AC.1/4, 5 June 1947, 5.

<sup>20</sup> United States Suggestions for Redrafts of Certain Articles in the Draft Outline, E/CN.4/AC.1/8, 11

Furthermore, the United States also emphasized individual duties to others indirectly from the perspective of rights limitation.

At this session the Drafting Committee established a temporary working group to suggest a logical rearrangement and re-draft of the articles of the Draft Outline supplied by the Secretariat. Within the temporary working group, the task of re-drafting a declaration based upon the draft outline of the Secretariat was given to René Cassin (France). Cassin's draft contained a preamble and forty-four articles, among them, Articles 1, 2, 3 and 4 deal with individual social duties and rights limitations based on his/her family or social membership.<sup>21</sup> For example, Article 3 states:

"As human beings cannot live and achieve their object without the help and support of society, each man owes to society fundamental duties which are: obedience to law, exercise of a useful activity, acceptance of the burden and sacrifices demanded for the common good."<sup>22</sup>

The Drafting Committee examined and further revised Cassin's draft. It was agreed that where more than one view was expressed, all alternatives would on request be included.<sup>23</sup> After detailed consideration and revision of Cassin's draft, the Drafting Committee provided two alternatives for Article 2, 3 and 4 in terms of Cassin's draft. The first alternative was to retain but revise Cassin's draft (three articles), to stipulate respectively as

"Article 2: The object of society is to afford each of its member's equal opportunity for the full development of his spirit, mind and body.

Article 3: As human beings cannot live and develop themselves without the help and support of society, each one owes to society fundamental duties which are: obedience

---

June 1947, 1. Later, The United States reviewed this suggestion to delete the last sentence, United States Reviewed Suggestions for Redrafts of Certain Articles in the Draft Outline, E/CN.4/AC.1/8/Rev.1, 19 June 1947, 1.

<sup>21</sup> Report of the drafting committee to the commission on human rights, suggestions submitted by the representative of France for articles of the international declaration of human rights (The English text is an official translation of the Articles suggested by Professor Cassin, the Drafting Committee did not work from this text but from a rough translation), E/CN.4/21, 1 July 1947, 51.

<sup>22</sup> Ibid at 51.

<sup>23</sup> Ibid at 5.

to law, exercise of a useful activity, willing acceptance of obligations and sacrifices demanded for common good.

Article 4: In the exercise of his rights, everyone is limited by the rights of others."

The second alternative was to roll the above three articles into one article (Article 2), which states as: "These rights are limited only by the equal rights of others. Man also owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom."<sup>24</sup>

## 2.2. THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS

During the second session the Commission on Human Rights set up three separate working groups to consider, respectively, the Declaration, the Convention or Conventions, and the Implementation aspects.<sup>25</sup> In the Draft Articles for the International Declaration of Human Rights contained in the second session report, it stated

"Article 2: In exercise of his rights everyone is limited by the rights of others and by the just requirements of the democratic State. The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom."<sup>26</sup>

Comments were also raised on Draft Article 2. For example, the representative of China suggested the following: "In the exercise of these rights everyone shall respect the rights of others and comply with the just requirements of the democratic State".<sup>27</sup> In a slightly different way, the representative of the United Kingdom held that the States should not be regarded as limiting the rights of individuals but as promoting the rights of all. He proposed the following alternative text, which he requested it be

---

<sup>24</sup> Report of the drafting committee to the commission on human rights, suggestions of the drafting committee for articles of an international declaration on human rights, Annex F, E/CN.4/21, 1 July 1947, 73.

<sup>25</sup> Drafting of the Universal Declaration of Human Rights <<http://research.un.org/en/undhr/chr/2>> accessed 18 November 2019).

<sup>26</sup> Report to the Economic and Social Council on the 2nd Session of the Commission, E/600(SUPP), 1 January 1948, 17.

<sup>27</sup> Ibid at 22.

placed on record: "In the exercise of his rights everyone must recognize the rights of others and his obligation to society so that all may develop their spirit, mind and body in wider freedom".<sup>28</sup> The representative of the United States preferred the following text: "The full exercise of these rights requires recognition of the rights of others and protection by the law of the freedom, general welfare and security of all."<sup>29</sup> Alternatively, the representative of Uruguay proposed that the adopted clause be replaced by another provision which provides for the deprivation and limitation of rights, specifying the juridical acts required for this purpose, which, in principle, must be the law, and the reasons on which these acts must be based: public order and the security of the States; normal development of social life; harmonious exercise of all rights.<sup>30</sup> From these various comments raised by representatives, it can be seen that these countries all recognized the limited nature of rights and individual duties to others or the community. Despite that, these representatives diverged on the wording of the draft article and did not draw a harsh line between the rights limitation and individual duties.

The Draft Article 2 concerning individual duties to the community was not examined nor revised in the second session of Drafting Committee, despite some countries' comments and suggestions. As for the Brazilian government, they argued that, "Attention should be paid to the duties that correspond to the rights. This relation has been emphasized in juridical doctrine and in the most advanced legislations."<sup>31</sup> That "all should act toward one another like brothers" - or, at least, in a fraternal spirit should be added in Article 2. The text would thus become complete, as the exercise of rights were limited not only by the rights of others but also by this duty of fraternity.<sup>32</sup> While the United Kingdom further proposed that "it would be preferable if the order of Articles 2 and 3 were reversed",<sup>33</sup> New Zealand's government

---

<sup>28</sup> Report to the Economic and Social Council on the 2nd Session of the Commission (n.26) at 22.

<sup>29</sup> Ibid at 22.

<sup>30</sup> Ibid at 22-23.

<sup>31</sup> Comments from governments on the draft international declaration on human rights, draft international covenant on human rights and the question of implementation, communication received from Brazil, E/CN.4/82/Add.2, 22 April 1948, 2.

<sup>32</sup> Ibid at 3.

<sup>33</sup> Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Communication

submitted its revision of the Draft International Declaration on Human Rights and revised the individual duty clauses in Article 1 as

"1. All men are born free, equal in dignity and rights as human beings, endowed with reason and conscience, and bound in duty to one another as brothers. 2. All men are brothers of communities and as such have the duty to respect the rights of their fellow men equally with their own. 3. The just claims of the state, which all men are under a duty to accept, must not prejudice the respect of man's right to freedom and equality before the law and the safeguard of human rights, which are primary and abiding conditions of all just government."<sup>34</sup>

The Chinese delegation also submitted a Draft International Declaration on Human Rights which contains ten articles, among them, Article X states:

"Every person is entitled to the human rights and fundamental freedoms set forth in this declaration without distinction as to race, sex, language or religion. The exercise of these rights requires recognition of the rights of others and the just requirement of the community in which he resides."<sup>35</sup>

Although divergences between countries on individual duties to the community were still not eliminated at this stage, these countries did share some common ideas on the scope of rights and recognized in varying forms that individuals carry duties to the community.

### 2.3. THE THIRD SESSION OF THE COMMISSION ON HUMAN RIGHTS

The third session of the Commission on Human Rights based its work on the report of the second session of the Drafting Committee. The individual duties clause was examined and a re-drafted Declaration was adopted by the Commission. In this new draft, the original Article 2 dealing with individual duties to the community and rights

---

received from the United Kingdom, E/CN.4/82/ADD.9, 10 May 1948, 3.

<sup>34</sup> Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation: Communication received from New Zealand, E/CN.4/82/ADD.12, 03 June 1948, 24.

<sup>35</sup> Draft International Declaration of Human Rights Submitted by the Chinese Delegation: E/CN.4/AC.1/18, 03/05 May 1948, 1.



limitation was rearranged as Article 27 and transformed into two paragraphs:

"1. Everyone has duties to the community which enables him freely to develop his personality. 2. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, public order and general welfare in a democratic society."<sup>36</sup>

It is worth noting that prior to the adoption of the re-drafted declaration, some sub-committees submitted reports to the Commission on Human Rights and proposed suggestions in regard to the original Article 2. For example, in the report of the sub-committee consisting of the representatives from Australia, China, France, Lebanon, India and the United Kingdom, they suggested Article 2 to be stated as

"1. Everyone has duties to the community which enables him freely to develop his personality. 2. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of general welfare in a democratic society."<sup>37</sup>

In addition, in the report of the sub-committee consisting of the representatives from Egypt, France, United Kingdom and Union of Soviet Socialist Republics, they re-examined Article 2 and suggested it to be stated as

"In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, of general welfare and of public order in a democratic society."<sup>38</sup>

Consequently, the re-drafted Article 27 was an integration of the two sub-committees' suggestions. It was further a reflection of the growing compromise in the divergences

---

<sup>36</sup> Report of the third session of the commission on human rights, E/800, 28 June 1948. 11.

<sup>37</sup> Report of the Sub-Committee Consisting of the Representatives of Australia, China, France, Lebanon, India and the United Kingdom on Article 2 of the Draft International Declaration on Human Rights: E/CN.4/111, 07 June 1948, 1.

<sup>38</sup> Report of the committee consisting of the representative of Egypt, France, United Kingdom and Union of Soviet Socialist Republics on re-examination of article 2, paragraph 2, of the draft international declaration on human rights, E/CN.4/141, 15 June 1948, 1.

on the formation of individual duties seen in Draft Article 2. This is for example demonstrated with the inclusion of general welfare and democratic society, which implicitly recognizes the different societal values and social systems of the States involved in forming the clause.

#### 2.4. THE THIRD SESSION OF THE GENERAL ASSEMBLY

During the third session of the General Assembly, some countries continued to raise proposals on the order and form of the Draft articles. Cuba submitted proposals to reorder the articles and suggested Article 2 to deal with "Fundamental Rights" and Article 26 to deal with "Extent of Rights".<sup>39</sup> Moreover, Cuba suggested to insert Article 1 in the preamble, worded within 6 paragraphs and place them before the right provisions. Among them, paragraph 2 should be stated as

"Respect for the rights of all requires that each shall do his duty. In all human activity, both social and political, rights and duties are indissolubly linked with one another. While rights enhance individual freedom, duties express the dignity of that freedom".<sup>40</sup>

Egypt also suggested "the Third Committee decides that the Declaration of human Rights shall deal both with human rights and with the duties corresponding thereto".<sup>41</sup> Apart from the above suggestions, France proposed to insert Article 27 between Article 2 and 3 and held the view that "it is essential that the social framework in which man lives and the limitations on his rights should appear in the first group of general theses, before enumeration of the rights themselves".<sup>42</sup> France also amended paragraphs 1 as: "Everyone who has the right freely to develop his personality has

---

<sup>39</sup> Draft Universal Declaration of Human Rights: Proposal Concerning the Order of the Articles of the (Draft Declaration)/Cuba: A/C.3/SC.4/8/REV.1, 3 December 1948, 1.

<sup>40</sup> Draft International Declaration of Human Rights: Recapitulation of Amendments to Article 1 of the Draft Declaration (E/800), A/C.3/243, 7 October 1948, 1-2.

<sup>41</sup> Draft International Declaration of Human Rights: Proposal/Egypt, A/C.3/222, 5 October 1948, 1.

<sup>42</sup> Draft International Declaration of Human Rights: Amendments to the Draft Declaration (E/800)/France, A/C.3/244, 08 October 1948, 1.

duties to the community”.<sup>43</sup> During this period, both Cuba and Egypt pointed out the inextricable link between rights and duties, which is an important theoretical basis for emphasizing individual duties to the community.

## 2.5. THE THIRD COMMITTEE’S REVIEW AND THE GENERAL ASSEMBLY’S ADOPTION

At its 142nd meeting on 24 September 1948, the General Assembly submitted the Draft International Declaration of Human Rights to the Third Committee. The Third Committee set up a Sub-Committee composed by eleven representatives from Australia, Belgium, China, Cuba, Ecuador, France, Lebanon, Poland, Union of Soviet Socialist Republic, United Kingdom and United States to review the draft for consistency of language and style.<sup>44</sup> At its first meeting, after hearing statements by the representatives from China, Cuba and Ecuador on the general structure of the Declaration and the order of the articles, the Sub-committee proceeded to a detailed examination and study of the Declaration article by article. As a result of this examination and study, and subject to the reservations indicated both regarding the text of certain articles and the question of order and arrangement, the Sub-Committee decided to recommend to the Third Committee the examined and studied ‘Draft Universal Declaration of Human Rights’.<sup>45</sup> The draft was adopted as Declaration with 29 votes in favor, none opposed and seven abstentions. The Third Committee report was considered in plenary meetings on 9 and 10 December 1948. The representative of Poland requested a separate vote on the Preamble and on each article.<sup>46</sup>

On 10 December 1948 the UDHR was adopted as Resolution 217(III) with 48 votes in favor, and 8 abstentions.<sup>47</sup> In the report submitted by the Third Committee, due to the additional articles, the original Article 27 concerning individual duties to the community and rights limitations was re-ordered as Article 30. In the final voted

---

<sup>43</sup> Draft International Declaration of Human Rights: Proposed Amendments to Articles 27 and 28/France: A/C.3/345, 17 November 1948, 1.

<sup>44</sup> Report of Sub-Committee 4 of the 3rd Committee/Submitted by Alan S. Watt (Australia), Rapporteur: A/C.3/400, 4 December 1948, 1.

<sup>45</sup> Ibid at 2.

<sup>46</sup> Drafting of the Universal Declaration of Human Rights <<http://research.un.org/en/undhr/ga/plenary>> accessed 1 May 2019.

<sup>47</sup> The 183rd meeting of the General Assembly, A/PV.18, 10 December 1948, 317.

and adopted Declaration, the additional Article 3 in the report of the Third Committee was incorporated into Article 2 after being modified. After the modification of the specific wording of paragraph 2 and 3, Article 30 finally was adopted by the Sub-Committee as the final text of Article 29 of the UDHR, and the first paragraph concerning individual duties to the community states:

"Everyone has duties to the community in which alone the free and full development of his personality is possible".<sup>48</sup>

### **3. ARTICLE 29(1) OF THE UDHR: PHILOSOPHICAL FOUNDATIONS AND TRANS-REGIONAL LEGAL SOURCES ON INDIVIDUAL DUTIES TO THE COMMUNITY**

#### **3.1. CROSS-CULTURAL PHILOSOPHICAL FOUNDATIONS OF INDIVIDUAL DUTIES**

Visions of human rights are complex and profound. It tends to strike at our very core and force us to critically examine ourselves as human beings: to explore our nature, to consider what it means to be fully human, to wrestle with how we ought to relate to others in society as a whole, and to assess our own values and deeds in response to those who suffer abuse.<sup>49</sup> We can find traces of Article 29(1) of the UDHR concerning individual duties to the community in various societies. Human rights culture is usually embodied in the political philosophy and religious philosophy of different societies. It is also reflected in the legal documents of certain societies in modern times. Analysis on philosophical foundations and legal sources may be conducive to justifying a cross-cultural basis for the provision of individual duties to the community. To this end, it is necessary for us to conduct a brief examination of philosophical theories relating to individual duties to the community, and to reveal the already existing consensus of countries with differing cultural backgrounds and legal traditions on such concept.

---

<sup>48</sup> Report of the 3rd Committee, Draft International Declaration of Human Rights, A/777, 7 December 1948, p7. International Bill of Human Rights: a Universal Declaration of Human Rights, A/RES/217(III), 10 December 1948, 76,77.

<sup>49</sup> Paul Gordon Lauren, *The Evolution of International Human Rights* (University of Pennsylvania Press 2003) 5.

Natural law theory is one of the most profound and long-lasting theoretical basis of the Western human rights notions.<sup>50</sup> It contains a wide range of moral arguments for individual duties. Thinkers in classical natural law period and Middle Ages discussed natural law always in a moral condition.<sup>51</sup> They first placed people in community or social groups in which they lived, and distinguished natural rights from the overall background of the community.<sup>52</sup> The individuals' rights must always conform to the "good" of the community and thus such rights can be natural and just.<sup>53</sup> Most of the early philosophical theories of natural law of the Stoics founded after Aristotle, focused on universal responsibilities and obligations, not just on individual rights. They believed that the

"laws of nature provided the principles of reason and equality that governed the entire universe, including the ethical rules of mutual respect for moral equality. Roman Stoic philosophers contended that these laws of nature provided rational and egalitarian principles governing the entire universe. They entailed ethical rules such as the obligation to respect one another as moral equals."<sup>54</sup>

In addition, the Stoics advocates to achieve personal happiness and harmonious relationship with others through self-restrain. This thought of self-restrain featuring fatalism comes directly from the views of Weltvernunft.<sup>55</sup> These views require people to treat others in a humane manner, to stand aloof to secular interests, and to strictly discipline personal will so as to cultivate a persevering will and a sense of natural duty to be devoted to duty.<sup>56</sup>

In addition, traditional Western philosophical theories also contain theories on 'conscience', concerning the cognition of good and evil and the moral judgment of self-behavior. Conscience is not moral in itself; however, conscience is linked to morality by its functioning outward. It is the motive mechanism of the generation of

---

<sup>50</sup> Jianlin Shen, *The Evolvement of Natural Law Theory: Tracing the Western Mainstream View on Human Rights to its Source* (Social Science Academic Press (China) 2005) 5.

<sup>51</sup> Xianming Xu, *Principle of Human Rights Law* (China University of Political Science and Law Press (China) 2008) 8.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Paul Gordon Lauren (n.49) at 13-14.

<sup>55</sup> Jianlin Shen (n.50) at 53.

<sup>56</sup> Ibid.

moral.<sup>57</sup> Based on the cognition and judgment of our own behavior, coupled with this close connection with moral, conscience also exerts positive influences on us to avoid behaviors that are unfavorable to the community or others, which is actually intriguing for understanding the individual duties to the community. According to Hegel, as a real thing, conscience is a self-regulation that seeks self-conscious good and duty.<sup>58</sup> Consequently, Hegel defines the conscience through the ideals of freedom, good and duty; thus conscience is the self-consciousness of duties and in this sense, we may expect that performing duties is no longer a burden of freedom but a practical action to guarantee freedom.

The sympathy and compassion of individuals toward others, responsibility ethics, and self-examination in interaction with others are advocated within Chinese Confucian Philosophy. Such philosophy embodies 'moral emotions' towards others, and in this way encourages individuals to perform duties to the community. "Benevolence" in Confucian philosophical ethics is such a moral emotion. As Peng-Chun Chang elaborated in the drafting stage of the UDHR, "benevolence" is a person (when s/he is in need) that can feel that others have the same needs as themselves, and when they are in the exercise of rights, they can take into account that others have the same rights.<sup>59</sup> In addition, Confucius proposed that we should be severe with ourselves and lenient to others, this can dissolve resentment.<sup>60</sup> Such approach to responsibility ethics in Confucianism is an important ethical norm instructing on how to act in one's relationship with others. In China, this traditional virtue-resource is pivotal in guiding the performance of duties within communities.<sup>61</sup>

Consequently, representative philosophical theories of the East and the West pay attention to individual's duties to the community and others. The world's major religious cultures (such as Christianity, Islamic and Buddhism) also emphasize on individual duties to the community and others. Paul Gordon Lauren states,

---

<sup>57</sup> Daixing Tang, 'The Generating Thinking of Conscience: A Virtue Research from another Perspective' [2015] (2) *Morality and Civilization* 14-15.

<sup>58</sup> Hegel, *Elements of the Philosophy of Right* (The Commercial Press (China) 1961) 139.

<sup>59</sup> Chung-Shu Lo, *Human Rights in the Chinese Tradition*, in UNESCO (eds), *Human Rights: Comments and Interpretations* (Columbia University Press 1949) 186-187.

<sup>60</sup> *The Analects of Confucius: Wei Linggong*. (《论语•卫灵公》).

<sup>61</sup> Keguo Tu, 'The Dual Structure of Confucian Responsibility Ethics Subjects' [2018] (4) *History of Chinese Philosophy* 27.

“Despite their many differences, complex contradictions, internal paradoxes, cultural variations, and susceptibility to conflicting interpretation, reinterpretation, and argumentation, all of the great religious traditions share a universal dissatisfaction with the world as it is and a determination to make it as it ought to be. They do this by addressing the value and the dignity of human life, and, consequently, the duties toward those who suffer.”<sup>62</sup>

Judaism and Christianity emphasize the “love” and the “keeper” role to others.<sup>63</sup> Buddhism instructs disciples to practice “righteousness” and “good deeds”.<sup>64</sup> Islam teaches the love and help to vulnerable groups in the community.<sup>65</sup> All of these are asking individuals to be detached from self-centeredness, to be friendly to others, and to consider the rights-needs of others equally. This is quite similar to the “benevolence” in Chinese traditional Confucian ethics and is also the driving force for individuals to fulfill their duties to the community.

### 3.2. TRANS-REGIONAL LEGAL SOURCES OF INDIVIDUAL DUTIES TO THE COMMUNITY

It is worth initially noting that although many constitutions and regional, international human rights instruments contain duty provisions, not all these provisions can be regarded as derived from Article 29(1). Since Article 29(1) aims to protect rights rather than restrict rights, we do not regard those duty provisions that merely aims to restrict rights as the legal sources of Article 29(1). Based on the purpose of the UDHR,<sup>66</sup> two standards can be derived concerning whether a law, provision, or other norm, can be considered an “individual duty to the community clause” within the ambit of Article 29(1). First, the duties entailed promote the social order on which rights rely. The fulfillment of individual duties is the basis for the forming of the social

---

<sup>62</sup> Paul Gordon Lauren (n.49) at 6.

<sup>63</sup> Thomas Paine, *The Rights of Man* (Heritage Press 1961 ed.) 114; Paul Gordon Lauren, *The Evolution of International Human Rights* (University of Pennsylvania Press 2003) 8; New Testament, Matthew 5:44, New Testament, Corinthians 13 : 4; New Testament, Romans 13:8.

<sup>64</sup> Tenzin Gyatso, *Ocean of Wisdom* (Clear Light, 1989)13; See also Paul Gordon Lauren (n.49) at 7; *The Eight-Fold Path*; *The Ten Good Deeds*.

<sup>65</sup> Quran, translated by Ma Jian, (China Social Science Press, 1981) chapter 17, section 26 and chapter 9, section 60.

<sup>66</sup> The preamble of the Universal Declaration of Human Rights.



order, and a good social order is a condition for the realization of rights, which is further supported by Article 28 of the UDHR.<sup>67</sup> Second, individual duties should not be used to suppress or even deny rights, but to promote the enjoyment of rights and create a good social environment for the enjoyment of rights. This has been confirmed by Article 29(1) of the UDHR which specifies, "...the community in which alone the free and full development of his personality is possible". Thus, within social relations, individual rights and duties are inseparable, and should be developed in a balance. Consequently, those duty provisions that suppress or even deny rights in the name of duties to the community can never be regarded as legal sources of Article 29(1) of the UDHR.

We can find pertinent provisions in some domestic laws that can be seen as legal sources for individual duties to the community. These duty provisions satisfy the above two standards, they are conducive in forming the social order and promoting the enjoyment of individual rights. For example, Article 4 of the French Declaration of the Rights of Man and of Citizens stipulates that

"Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."<sup>68</sup>

Similarly, the Constitution of the Kingdom of the Netherlands adopted on March 29, 1814, although not clearly stipulated as individual rights and responsibilities are indivisible, states in the first chapter that certain rights shall be enjoyed "without prejudice to his *responsibility* under the law" [authors emphasis].<sup>69</sup> These include, the right to profess freely his religion or belief in Article 6, the right to publish thoughts or opinion through the press in Article 7 and the right of assembly and demonstration in Article 9. Another example is Chapter 10 of the 1936 Constitution of the Union of Soviet Socialist Republics which especially stipulates the "Fundamental rights and duties of citizens". Article 130 states: "It is the duty of every citizen of the U.S.S.R. to

---

<sup>67</sup> Article 28 of the UDHR states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

<sup>68</sup> French Declaration of the Rights of Man and of Citizens 1789, Article 4.

<sup>69</sup> Constitution of the Kingdom of the Netherlands 1814, Article 6, Article 7 and Article 9.

abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labor discipline, honestly to perform public duties, and to respect the rules of socialist intercourse". Articles 131 to 133 specify the duties of every citizen to safeguard and strengthen public, socialist property, to subject to universal military service and to defend the fatherland.<sup>70</sup>

The Declaration on the Rights and Duties of the Americans more clearly reflects the two standards we proposed. As early as the drafting stage of the UDHR, the delegation of Chile submitted the Draft declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee, to the First Session of the General Assembly. Among them, Article XIX clearly specifies the correlation of rights and duties: "Rights and duties are correlative, and the duty to respect the rights of others at all times as a restriction upon the arbitrary exercise of rights". Article XIV and Article XVI also deals with the duty to work and the duty to the maintenance of social security respectively.<sup>71</sup> The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States on June 2, 1948, directly emphasized that rights and duties are inseparable. Although the duty clauses are still distinctly less than the right clauses, it is clear that the Declaration tried to balance the development of rights and duties. Paragraph 2 in the preamble specifies that: "The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are inter-related in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty". The preamble paragraphs 4~6 also mention that it is the duty of man to serve the spirit and with all his strength and resources, to preserve, practice, and foster culture by every means within his power and always to hold morality and good manners in high respect and so on.<sup>72</sup>

---

<sup>70</sup> Constitution of the Union of Soviet Socialist Republics 1936, Information from the site of the Faculty of History of Moscow State University < <http://www.hist.msu.ru> URL > accessed 18 May 2019, translated from: КОНСТИТУЦИЯ СОЮЗА СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ РЕСПУБЛИК Утверждена Чрезвычайным VIII съездом Советов Союза ССР 5 декабря 1936 года., Информация с сайта Исторический Факультет МГУ.

<sup>71</sup> Draft Declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee, E/CN.4/2, 8 January 1947, 8-10.

<sup>72</sup> The American Declaration of the Rights and Duties of Man, paragraph 4~6 of the preamble, 2 June 1948.

In addition, the Declaration also provides for the duties of every person in the enjoyment of rights in specific provisions. The "scope of the rights of man" in Article XXVII, states "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy". Although this article does not directly stipulate individual's duties to the community, it involves the relationship between individuals' rights and the rights of others and the just demands of society. It was further mirrored in the drafting process of the UDHR, as seen above. More importantly, Articles XXIX to XXXVIII of Chapter 2 directly outline individual duties. Among them, Article XXIX sets out duties in a general manner: "Duties to society: It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality". Article XXX to Article XXXVIII provide for specific individual duties toward children and parents, to receive instruction, to vote, to obey the law, to serve the community and the nation, with respect to social security and welfare, to pay taxes, to work and to refrain from political activities in a foreign country.<sup>73</sup>

Although limited to a comparison between Western European countries, former socialist countries and the Americas, it can be seen that despite differences in the legislative models and the wording of provisions, and regions of the world, all have legislative practices that emphasize individual duties to the community to varying degrees. These provisions demonstrate legal sources for individual duties to the community, especially with regards to the possible influence of the Declaration on the Rights and Duties of the Americans on Article 29(1) of the UDHR.

#### **4. THE NORMATIVE INFLUENCES OF ARTICLE 29(1) OF THE UDHR**

##### **4.1. PROVISIONS ON INDIVIDUAL DUTIES AND RESPONSIBILITIES IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS**

##### ***4.1.1 Provisions on Individual Duties and Responsibilities in International Human Rights Instruments***

The duty clauses in international human rights instruments reflect the direct influence of Article 29(1) of the UDHR. The ICCPR and the ICESCR, declaring "in accordance

---

<sup>73</sup> American Declaration on the Rights and Duties of Man, E/CN.4/122, 10 June 1948.

with the Universal Declaration of Human Rights”, both underline in the last sentence of the preamble that “... realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”. However, there is little mention of individual duties in the text of the two covenants. Only Article 19(3) of the ICCPR concerning the right to freedom of expression provides that “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary...”. On December 4, 1986, the United Nations General Assembly adopted the Declaration on the Right to Development by resolution 41/128, which in its preamble considers the UDHR and recognizes the ICCPR and ICESCR. Article 2, paragraph 2 of the Declaration then states:

“All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.”<sup>74</sup>

This duty provision is quite similar to that of the Article 29(1) of the UDHR, they both seek to fully respect the right and freedoms of all human beings and ensure the free and complete development of the personality of all human beings. This close relation may, at least to some extent, reflect the influence of the UDHR to the Declaration.

The United Nations General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms by resolution 53/144 on 9 December 1998. In this Declaration, the General Assembly, reaffirming the UDHR and the International Covenants, recognized “the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels.”<sup>75</sup> It is noteworthy that Article 18(1) 1 of the Declaration stipulates

---

<sup>74</sup> Declaration on the Right to Development, A/RES/41/128, 4 August 1968.

<sup>75</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General

that: "Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible."<sup>76</sup> This paragraph concerning individual duties to the community is identical to that of the UDHR in terms of the wording, which only add the individual duties "within" the community. This can be regarded as a direct influence of Article 29(1) of the UDHR on international human rights instruments.

#### ***4.1.2 Provisions on Individual Duties and responsibilities in Regional Human Rights Instruments***

Europe has a long-standing individual-centered tradition with rights orientation ideology. However, the European Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950 provides for freedom of expression for everyone in Article 10 and at the same time paragraph 2 emphasizes that: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...". It means that the exercise of rights and freedoms must be subject to necessary limitations due to individuals' duties and responsibilities. Such limitations are also provided in the freedom to manifest one's religion or belief, freedom of peaceful assembly and freedom of association of the convention. Although the European Convention does not explicitly stipulate that it is due to the individuals' duties and responsibilities that these two types of rights are so restricted, such restrictions are in reality themselves the embodiment of individual duties and responsibilities.

Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms, which rarely involves individual duties and responsibilities, the American Convention on Human Rights adopted in 1969 specifies "Personal responsibility" in Chapter V. Article 32 states "Relationship between Duties and Rights: 1. Every person has responsibilities to his family, his community, and mankind". Article 32 requires the exercise of rights to be restricted based on the duties carried by every person and the content of the duties are to respect the rights of others,

---

Assembly Fifty-three Session, A/RES/53/144, 9 December 1998.

<sup>76</sup> Ibid.

the security of all, and the just demands of the general welfare. Although there is only Article 32 in the whole chapter, it clearly stated the relationship between duties and rights, specified the duties of every person to his family, his community and even mankind. This is more comprehensive and wide-ranging than that of the UDHR and could arguably be seen as a development of Article 29(1) in a normative sense.

The African Charter on Human and Peoples' Rights adopted in 1981 is comparatively the most prominent regional human rights instruments that highlights the balance of rights and duties. The Charter stipulates "Rights and Duties" in the first part and provides 3 articles in chapter II to deal with "Duties". Among them, Article 27 states: "1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community". Article 28 deals with individual's duty to respect and consider his fellow beings and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. Article 29 specifies eight detailed individual duties, including the duty to preserve the harmonious development of the family; to serve his national community; to preserve the security of the State; to preserve and strengthen the national independence and the territorial integrity of his country; to pay taxes; to preserve and strengthen positive African cultural values; and to contribute to the promotion and achievement of African unity.<sup>77</sup> These duty clauses in the African Charter are obviously more detailed and specific than that of the European Convention and the American Convention. A legislative model combining general provisions with specific provisions is adopted in the African Charter, emphasizing the consistency and balanced development of rights and duties. The general provision of Article 27 of the Charter on individual duties is a reflection of African countries' basic standpoints on human rights; it also arguably presents the profound normative influence of the individual duties to the community in Article 29(1) of the UDHR on this human rights instrument in the African region.

Moreover, there are also some articles in other regional human rights instruments which refer to individual duties. Although the Arab Charter of Human Rights does not mention individual duties, the Cairo Declaration on Islamic Human Rights issued by the member states of the Organization of the Islamic Conference in

---

<sup>77</sup> African Charter on Human and Peoples' Rights 1981, Article 29  
<<http://hrlibrary.umn.edu/instree/z1afchar.htm>> accessed 18 November 2019.



1990 contains the content of obligations and responsibilities. It states in Article 1, paragraph 1 that: "All men are equal in terms of basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations..."

On November 18, 2012, the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration was signed by the ten Heads of State/Government of the Member States of the ASEAN. General principle 6 of the Declaration states that "The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives...". The first sentence of this principle emphasizes the balance of individual rights and duties and requires individuals to assume horizontal duties so as to respect the rights of others. This is closely related to the traditional cultural notion of the relationship between individuals and the community in ASEAN member states,<sup>78</sup> and is also in line with the spirit of the UDHR that every person should perform his duties to the community.

International and regional human rights instruments recognize individual duties to the community. This indicates that dealing with the relationship of rights and duties is a shared human rights notion worldwide. Of course, the content of the duty clauses in the various regional human rights instruments vary and are shaped by the political, historical, cultural and religious background of the region. Apart from the general and specific provisions of individual duties in the African Charter on Human and Peoples' Rights, most regional human rights instruments, like Article 29(1), tend to state individual duties in general terms without listing them all. However, it should not be forgotten that in the former drafts of the UDHR, the provisions concerning individual duties or duties to the community are not only explicitly referred to in the preamble, but also stipulated in several specific rights. For example, in the preliminary draft prepared by Humphrey, Article 8 states "...a man may be required to perform his just share of any public service that is equally incumbent upon all, and his right to a livelihood is conditioned by his duty to work...". Article 18 states: "There exists a duty toward society to present information and news in a fair and impartial manner"; Article 37 states: "Every one has the right and duty to

---

<sup>78</sup> Junxiang Mao, Shufeng Dang, 'New Trends in Human Rights Protection in Asian Region: An Analysis on the ASEAN Human Rights Declaration' [2014] (3) *Western Law Review* 109-110.



perform socially useful work".<sup>79</sup> In the redrafted Declaration by Cassin, Article 35 in Chapter 8 "Social, Economic and Cultural Rights" states: "All persons have the right and duty to do work useful to society and to develop their personality fully".<sup>80</sup> However, the UDHR ultimately adopted one general provision on individual duties to the community in Article 29(1), "there are no detailed lists of individual duties as the American Declaration of the Rights and Duties of Man, but just emphasizes the individual duties to the community".<sup>81</sup> The international human rights instruments thereafter may have been influenced by the UDHR to some extent, thus being the reason that they are neither too detailed, nor do they provide specific arrangements for individual duties to the community.

#### 4.2. PROVISIONS ON INDIVIDUAL DUTIES AND RESPONSIBILITIES IN DOMESTIC CONSTITUTIONS

According to the statistics of 156 constitutions in the world, 79.49% of them stipulated rights and duties in the same chapter.<sup>82</sup> Constitutions of many countries around the world adopted the provisions of the UDHR verbatim or refer to the UDHR.<sup>83</sup> The UDHR became important for countries to take into account when formulating or amending their constitutions. After its adoption, we find the presence of duty provisions in some constitutions. Although, we do not claim to have concrete information to prove that the inclusion of duty provisions in constitutions were directly influenced by the UDHR, we argue that it is indirectly linked. As Chinese Former Foreign Minister Qian Qichen's noted, the UDHR is

"the first international instruments that systematically proposed the specific content of respecting and protecting the fundamental human rights. Despite its historical

---

<sup>79</sup> Draft Outline of International Bill of Rights (n.1) at 4, 6, 14.

<sup>80</sup> Report of the drafting committee to the commission on human rights, E/CN.4/21, 1 July 1947, 61.

<sup>81</sup> Junxiang Mao, *Study on Limitation Clauses of International Conventions on Human Rights* (Law Press (China) 2011) 22.

<sup>82</sup> Yong Li, Qinghua Jiang, *On the Constitutional Obligation of Citizens — —Based on the Balance Spirit of the Constitution* (Shandong People's Publishing House (China) 2008) 116.

<sup>83</sup> Hannum, 'The UDHR in National and International Law' [1995-1996] (25) Georgia Journal of International and Comparative Law 287.

limitations, it has had profound impact on and played a positive role in the development of post-war international human rights activities."<sup>84</sup>

Consequently, the duty provisions seen in constitutions, after the adoption of the UDHR, can at least prove that countries recognized individual duties rather than deny it. However, whether such recognition is a reflection or continuation of a country's cultural tradition, or implementation of Article 29(1) of the UDHR, is debatable and worthy of consideration in future research.

Consider, the 1982 Constitution of the People's Republic of China, for example, deals with "The Fundamental Rights and Duties of Citizens" in Chapter II. Article 33 stipulates that every citizen is entitled to perform the duties prescribed by the Constitution and other laws. Article 42, 46, 49, 52, 54, 55 and 56 provide a series of civic duties as to work, receive education, practice family planning and rear children and support parents, safeguard the unification of the country and the unity of all its nationalities, safeguard the security, honor and interests of the motherland, perform military service and join the militia in accordance with law and pay taxes in accordance with law.<sup>85</sup> Additionally, the Constitution of the Socialist Republic of Vietnam, another example, adopted in 1992 also involves "Fundamental Rights and Duties of the Citizen" in Chapter 5. Article 51 states as "The citizen's rights are inseparable from his duties. The State guarantees the rights of the citizen; the citizen must fulfill his duties to the State and society...".<sup>86</sup> Article 55, 59, 61, 64, 77, 78, 80 are also clauses concerning fundamental duties of citizens, for example, the duty to work, receive education, observe all regulations on disease prevention and public hygiene, bring up their children into good citizens and respect and look after their parents and grandparents, join in the all-people national defense, respect and protect the property

---

<sup>84</sup> Chinese Former Foreign Minister Qian Qichen's speech at the 43rd session of the UN General Assembly < <http://www.china.com.cn/ch-book/cenquna/cenquan10.htm> > accessed 20 October.

<sup>85</sup> Constitution of the People's Republic of China (Amendment on March 14 2004) <[http://english.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474982987458.htm](http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm)> accessed 2 May 2019.

<sup>86</sup> Constitution of the Socialist Republic of Vietnam 1992 <<http://www.asianlii.org/vn/legis/const/1992/1.html#C005>> accessed 20 October 2019.

of the State and the public interest and pay taxes and perform public-interest labor according to the provision of law.<sup>87</sup>

Although these examples are largely limited to the Asian region, where a large emphasis is placed on the community within their culture, civic duty clauses are not limited to just countries within these regions. Whilst, civic duty clauses in domestic law differs from Article 29(1) of the UDHR in its legislative model and its wording, the essence of these provisions remain the same. They all recognize that rights should be accompanied by duties, and that rights and duties are inseparable. Arguably, after the adoption of the UDHR, Article 29(1) makes it a reasonable arrangement for domestic law to stipulate civic duties that are in accordance with the spirit of the UDHR. These duty clauses in domestic laws after the UDHR, at least to some extent, can allow us to consider the importance of Article 29(1) in countries' formulating or amending their constitutions.

## 5. CONCLUSION: HOW SHOULD WE COMMEMORATE THE UDHR?

The purpose of the UDHR is to promote respect for rights and freedoms of all peoples, so it is not uncommon to see evaluations of the UDHR from rights-centered perspective. We also support the international community's high evaluation of the historical significance and achievements of the UDHR on protection and promotion of human rights. However, much more is needed on evaluating the UDHR from different perspectives. Mary Ann Glendon pointed out that: "The popular cafeteria approach to the Declaration's rights inevitably means that the devices that were supposed to support the integrity of the document would be ignored".<sup>88</sup> Indeed, many focus on the rights-centered clauses in the UDHR and their normative meanings from the perspective of respecting, promoting and realizing human rights.

Yet, it is important to recall the intention of the original drafters of the UDHR, as done within this article. From the drafting history of the UDHR, in particular the drafting history of Article 29(1), it is clear that individual duties to the community was thought necessary for the protection of rights. This indicates that the drafters of the

---

<sup>87</sup> Constitution of the Socialist Republic of Vietnam 1992

<<http://www.asianlii.org/vn/legis/const/1992/1.html#C005>> accessed 2 May 2019.

<sup>88</sup> Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' [1997-1998] (73) Notre Dame Law Review 1153-1177.

UDHR the protection of individual rights was a simultaneous with exhorting every person to assume corresponding duties to their community. The drafters of the UDHR remind of us that we should address the relationship between individuals and the community (1), the expansion individual rights should not be unrestrained so as to cause excessive demands on the community and nature (2). This is the premise for maintaining a harmonious community.

The cross-cultural philosophical foundations and the trans-regional legal sources that support ensuring the individual duties to the community further shows the role Article 29(1) plays in validating the UDHR as a cross-cultural international instrument concerning both rights and duties. Moreover, through our analysis, it is demonstrated that individual duties to the community is not unique to a certain region or country, but is universal, being incorporated into many constitutions and regional human rights instruments in Europe, America, Asia and Africa.

In other words, individual duties to the community have remained a cross-cultural consensus for 70 years since the adoption of the UDHR. More academic research should give attention to further exploration of the value of Article 29(1) of the UDHR in today's society. With the hope that this done, we then can claim that we understand the UDHR from an integral perspective.

## **“IN SPIRIT OF BROTHERHOOD”: THE PRINCIPLE OF FRATERNITY BETWEEN RIGHTS AND DUTIES. A REFLECTION SINCE THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

ISRAEL MOURA BARROSO\*

### **ABSTRACT**

*This article points to the importance of rescuing the principle of fraternity in order to add a new perspective to the debate on the universality of human rights. Drawing on the multicultural conception of human rights by Sousa Santos and on other studies about the idea of fraternity, we first analyze how fraternity was present in the discussions of the preparatory works on the Universal Declaration of Human Rights; and then how it is envisaged in political and religious documents on rights. We argue that the principle of fraternity, on the one side, relates to the sense of duties and responsibilities the individual has towards a community. On the other side, the openness of the principle itself allows the concept to be pushed beyond its application in an identified local community. For this reason, we conclude that the principle of fraternity is well equipped to allow for cross-cultural dialogues to occur in the international arena on the issue of human rights.*

### **KEYWORDS**

Fraternity; Human Rights; Cross-cultural Dialogue; Community; Universalism; Rights and Duties

---

\* PhD candidate at the Institute of Law, Politics and Development at Sant'Anna School of Advanced Studies, Pisa, Italy.  
Email: [i.barroso@sssup.it](mailto:i.barroso@sssup.it)

## 1. INTRODUCTION

In June 1946, the UN Economic and Social Council established the Commission on Human Rights, granting it the task of preparing what was initially conceived as an International Bill of Rights. One year later, the Committee constituted by the Commission to draft the Universal Declaration of Human Rights (UDHR), chaired by Eleanor Roosevelt, received one of its first major theoretical challenges, coming from the Executive board of the American Anthropological Association (AAA).

According to the anthropologists, respect for the culture of different human groups was equally important as respect for the personality of the individual as such and his right to its fullest development as a member of his society. Starting from this assertion, they considered that the problem for the Commission was “to formulate a statement of human rights that [would] do more than just phrase respect for the individual as an individual” and which should “also take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound.”<sup>1</sup> The AAA’s statement introduced *cultural relativism* on the discussion about human rights. This form of relativism is not the only one existent, and must not be confused with *moral relativism*. The former, however, is probably the most commonly used to oppose universalist claims.<sup>2</sup>

The aim of this paper is to present the idea of *fraternity*, to which the first article of the UDHR makes reference, as a cross-cultural principle able to give a new perspective to the philosophical debate on the universality of human rights. Starting from the paradigmatic AAA’s statement to the Commission allows us to consider the main issues present in that debate from a historical perspective. In fact, many of the concerns that would inform it in the years and decades to come were already present in the discussions held during the preparatory works of the UDHR, in which the AAA’s statement is inserted.<sup>3</sup> Understanding those issues through a historical perspective enables us, in turn, to better grasp the difficulties the language of human rights still faces in our days when trying to cope with cultural differences. Of course,

---

<sup>1</sup> American Anthropological Association, ‘Statement on Human Rights’ (1947) AMERICAN ANTHROPOLOGIST 539.

<sup>2</sup> Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 HRQ 281, 293.

<sup>3</sup> Marcello Flores, *Storia dei Diritti Umani* (1st edn, Il Mulino 2008) 219.

concepts such as *multiculturalism*, *interculturalism* and even *cosmo-culturalism*, to name but a few to which the discussion on human rights are linked today, had their appearance in much more recent times than those years following the Second World War. They have irrupted in spaces of discussion (academic as well as political ones) mainly in the last decades.<sup>4</sup> However, the claims of universality on the one side and of relativity on the other have always accompanied them, and are often at the core of the interruption of dialogue between actors who appeal to one or another to defend their views.

In the first part of the article, we first offer a brief overview of the philosophical questions around universalism that are at stake in the international discussion of human rights, starting from the AAA’s statement and the critiques moved towards its cultural form of relativism. We then introduce the cross-cultural perspective as a useful and necessary tool for fostering the dialogue around human rights without this entailing a denial of the critiques that see them as a western concept. As we shall see, the cross-cultural view, with its openness to the idea of *otherness*, creates a better possibility of dialogue between different cultures. Nevertheless, it still lacks a solid principle to which we can appeal when trying to build a consensus on rights that are interpreted differently due to the different background cultures of people who are supposed to “live” those rights.

In the second part, we delve into the concept of fraternity, an idea that has been given little attention in political theory, especially when compared to the two other

---

<sup>4</sup> Stuart Hall states that the word “multiculturalism” has at least two different connotations: one which identifies it as a descriptive process of social characteristics and problems of governance presented by any society in which different cultural communities coexist and try to build a life in common, while retaining some of their “original” identity. The second refers to the strategies and policies adopted to govern or manage problems of diversity and multiplicity generated by those multicultural societies. [See Stuart Hall, *Da diáspora: Identidades e Mediações Culturais* (tr. Marina de Souza, 1<sup>st</sup> edn, Editora UFMG, 2003)]. The term has, nevertheless, been subject to criticism by authors who accuse it of being a Eurocentric concept, part of the cultural logic of multinational capitalism [see Slavoj Žižek, “Multiculturalismo, o la lógica cultural del capitalismo multinacional” in Eduardo Grüner (ed.), *Estudios culturales. Reflexiones sobre el multiculturalismo* (tr. Gustavo Macri, 1<sup>st</sup> edn, Paidós, 2003)] or of falling into relativism and promoting separatist and segregationist policies [see Néstor García Canclini, *Diferentes, desiguales y desconectados. Mapas de la interculturalidad*. (1<sup>st</sup> edn, Gedisa, 2004)]. Although offering different reasons why the term multiculturalism should be avoided, both the above-mentioned authors prefer the term “interculturalism”.



“founding” principles of modernity – those of *Liberty* and *Equality*, the other two ideas “encapsulated” in the French revolutionary motto.<sup>5</sup> A thorough analysis of the idea expressed by the word “fraternity” is beyond the limits of this article. Such an analysis could be done from different perspectives – philosophical, juridical, anthropological, and theological, for instance – and many authors, mainly in Italy and in Latin America, especially in Argentina and Brazil, have been conducting studies about the concept from those different areas of enquiry. Drawing on some of those studies, our scope is that of making a historical overview to see how the idea of fraternity is present in different international documents (mainly declarations and charters) on human rights, starting from the UDHR. The central question can be put as follows: could the idea of fraternity be used as an inspirational principle *within* the lexicon of human rights so that it would be the propeller of solidaristic policies and agreements among international actors whose dialogue is often halted due to the difficulty of reconciling universalist and relativist claims?

In the first section, we see how the idea of fraternity entered in the UDHR by observing the preparatory works of the declaration. The discussions held during those preparatory works are very relevant to our enquiry, since they are the first historical example of a truly cross-cultural dialogue among actors who considered the possibility of stating the existence of universal rights. From this analysis emerges the association of the concept of fraternity to the idea of *duties*, on the one hand, and to the sense of *community*, on the other hand. This approximation is further deepened in other documents of less universal reach (such as regional declarations or charters). We devote the second section to an overview of some of those documents.

These analysis lead us to argue, in the conclusions, that the idea of *fraternity* may be understood as a cross-cultural principle (that is, one that has resonance to all political-, culture- and religion-informed views) that reveals to be essential in making effective the universalization of the language of human rights. In order to do that, however, it must accomplish three different tasks. First, it has to be stripped out of its possible reductive interpretations. Second, the approximation of the idea of fraternity to the language of duties and responsibilities, perhaps even more to that of rights, but necessarily connected to it, must be highlighted. Third, its identification with the

---

<sup>5</sup> Antonio Maria Baggio (ed.), *O Princípio Esquecido* (tr. Durval Cordas, Iolanda Gaspar, José Maria de Almeida, 1st edn, Cidade Nova 2007); Antoni Domènech, *El eclipse de la fraternidad. Una revisión republicana de la tradición socialista* (1st edn, Ed. Crítica, 2004).



sense of community, instead of being a hindrance to the building of a consensus about universal human rights, shall be seen as an opportunity for a more practical understanding of the abstract idea of “human family” present in the preamble of the UDHR.

## 2. A DILEMMA FACED BY HUMAN RIGHTS

### 2.1. UNIVERSAL PRETENSIONS VS. RELATIVIST CLAIMS

There are two possible ways to oppose universalist claims within the framework of cultural relativism, both of them can be found in the AAA’s statement. The first one is philosophical: according to the Association, no data could support the assertion of a universal set of substantive rights: “Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.”<sup>6</sup> To put it in a straightforward manner: the list of universal human rights set forth by the UN Commission was nothing more than a product of the West (European countries and the US). This could make room for the contestation of this new language of rights by non-western cultures.

The second way of contesting the universality of human rights is connected to the philosophical one, but has a more practical appeal: being a western concept, human rights may be used to serve to imperialist purposes. This concern is found in the AAA statement through the example of historical cases. For instance, it was thanks to the neglect of the relativity of standards and values according to each culture that disastrous doctrines such as that of the “white man’s burden” were born, leading to economic exploitation and the denial to the local communities of the right to control their own affairs. All of this had been rationalized by deeming the colonized peoples “culturally inferior”. This proved the necessity to respect cultural differences since individual freedom cannot be achieved without the freedom of the group to which the individual belongs.<sup>7</sup> This concern, although anchored in historical examples, had a strong contemporary appeal, since it was addressed to a newly formed United

---

<sup>6</sup> American Anthropological Association (n 1) 542.

<sup>7</sup> See Marcello Flores (n 3) 219.

Nations that until that point had not been able to openly question the colonial practice of European states still in place, mainly in Africa and in Asia.

Notwithstanding the importance of the critiques moved by the American anthropologists in their statement to the UN, their philosophical argument was, according to Donnelly,<sup>8</sup> very dubious. This was due to the fact that their insistence on the necessity of avoiding a hegemonic imposition of Western value models was accompanied by a de-historicized vision in which cultures were depicted as immobile and in which “tradition” could stand for stable and shared “values”. Moreover, the flaw in the philosophical argumentation points also to some serious risks concerning very practical issues: if we follow coherently the relativist proposition and stress it to its last consequences, than intolerant, even genocidal cultures are as defensible as tolerant ones. In fact, on which ground could we challenge a culture that says that other cultures are inferior? Paradoxically, the relativist claim could prevent the use of human rights as a standard from which to criticize and to contest colonialist and imperialist practices of western states themselves. As put by Francescomaria Tedesco:

“In some intellectual spheres, and quite extensively, it has become almost a commonplace that - I say this in a rather simplistic way - being 'in favor' of human rights means being in favor of United States' imperialism. However, this intellectual habitus, which often takes root in the field of thought that one would like to 'criticize', does not realize that being in favor of human rights today cannot but mean to be 'against' the attitude that the United States holds in the matter of human rights, both on its own territory and outside it. In other words (...) defending the language of human rights as instruments of resistance to oppression today means defending them also 'against' the hegemonic and unipolar attitude of the United States.”<sup>9</sup>

Tedesco does not exclude that human rights can be a means of ‘colonization’ by the great powers, but he consider this to be an instrumental use of them. It is thus necessary to protect human rights from this interpretation so that they can be turned *against* that oppressive use.

If we criticize the relativist position as expressed by the AAA, are we then obliged to embrace the universalist conception of human rights? Even if we were to avoid the many distinctions among universalist claims,<sup>10</sup> we would still be left with

---

<sup>8</sup> Jack Donnelly (n 2) 295.

<sup>9</sup> Francescomaria Tedesco, *Diritti Umani e Relativismo* (1st edn, Laterza 2009) 65.

<sup>10</sup> For a resume of them, see Donnelly (n 2).

the question about which rights are universal. More specifically, why should we consider universal the list of rights presented in the UDHR? If the answer is to be in history – the act of ignoring those rights had led the world to face a devastating and calamitous war – then we might accept the relativity of such rights, represented by their “westernness”. A possible answer is to claim that human rights are found in virtually all cultures across time and space – they are cross-cultural. But would this mean to deny their historicity? If we consider that to be the case, it would seem then that the human rights’ language faces a dilemma: if they are universal *because* cross-cultural, then they are also a-historical; yet, if they are historical, then they are also relative.

We could be led to think that, at the basis of this dilemma, is the search for the fundament of human rights, or of a particular list of rights that could be considered to be universal because recognized cross-culturally. But if we go on through this debate we are not taken so far. The search for such a fundament raises the question on where is it to be found. Is it in nature? Is it in God, religion or revelation?

Norberto Bobbio offered a critique on the search for the ultimate (and extra juridical) fundament of human rights that argues for its abandon, focusing instead on the much more important theme of the *consensus* around them.<sup>11</sup> This was also the prevalent position of the members of the Commission that had the task of writing the Universal Declaration. But if we abandon completely the perspective of the fundament to focus only on the consensus around rights that are declared to be universal, we are taken back to the previous discussion and the dilemma it presents. For instance: if a certain state violates a right (one that is considered to be a human right by other states) of one of its citizens, or a group of them, and it does so in the name of culture or tradition, how could it be blamed, reprimanded or condemned? When there is no consensus, there must be some kind of ultimate reason for claiming that there are *some* rights that must be universally respected.

## 2.2. THE CROSS-CULTURAL PERSPECTIVE

The difficulty the language of human rights faces is further complicated when the word “globalization” enters the discussion. Sousa Santos identifies four types of globalization: *globalized localism*, a process through which a given local phenomenon

---

<sup>11</sup> Norberto Bobbio, *L'Età dei Diritti* (4th edn, Einaudi 1992).

is successfully globalized; *localized globalism*, the specific impact of transnational practices and imperatives on local conditions; *cosmopolitanism*, which stands for cross-border solidarity among those excluded by the hegemonic globalization; and the *common heritage of humankind*, encompassing questions of sustainability and environment, that must be administered by trustees of the international community on behalf of present and future generations.<sup>12</sup> The first two are what Sousa Santos calls “globalizations from above”, whereas the last two are “globalizations from below”. For the author, “as long as human rights are conceived of as universal, they will operate as a globalised localism, a form of globalization from above”.<sup>13</sup> Human rights, conceptualized in this way, will always be an instrument of the “clash of civilizations”<sup>14</sup> paradigm, well resumed by the phrase “the West and the rest”.<sup>15</sup> To operate as a counterhegemonic form of globalization and be the propeller of progressive politics without false universalist pretensions, human rights must be reconceptualized as *multicultural*.

For Sousa Santos, therefore, the discourse on human rights must react to the false premises of both universalism *and* pure relativism. He then proposes the adoption of cross-cultural dialogues to distinguish progressive politics from regressive ones. Such cross-cultural dialogues must be conducted under a perspective of *diatopical hermeneutics*, which “requires the production of a collective and participatory knowledge based on equal cognitive and emotional exchanges”.<sup>16</sup> This would allow for people engaged in the dialogue as if with one foot in a culture and the other in another one, searching for spaces of contact that link both (or as many as they may be) of them.

Sousa Santos’ diatopical hermeneutics should not be understood as the *overlapping consensus* of John Rawls’ Political Liberalism,<sup>17</sup> for Rawls’ liberal neutrality avoids the challenge posed by the coexistence of diverse ways of reasoning based on cultural or identity-informed views. Rather, it connects to Seyla Benhabib’s proposal

---

<sup>12</sup> Sousa Santos, ‘Toward a Multicultural Conception of Human Rights’ in HERNÁNDEZ-TRUYOL (ed), *Moral Imperialism. A Critical Anthology* (New York University Press 2002), 42-43.

<sup>13</sup> Ibid, 44.

<sup>14</sup> Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (1<sup>st</sup> edn, Simon & Schuster 1996).

<sup>15</sup> See, for example, Niall Ferguson, *Civilization: the West and the Rest* (2<sup>nd</sup> edn, Penguin Books, 2012).

<sup>16</sup> Sousa Santos (n 12) 48.

<sup>17</sup> John Rawls, *Political Liberalism* (1st edn, Harvard University Press 1993).

of a kind of deliberation which engages the plurality of cultures that are present in a given society in an open, free and egalitarian public discussion.<sup>18</sup> It is a method of conversation grounded on a *narrative* and *dialogical* understanding of culture<sup>19</sup> capable of fostering a historical awareness which would reveal to be very useful in the pursuit of a just society. Benhabib and other authors<sup>20</sup> advocate for the adoption of public deliberative spaces in which the plurality of cultures is fully considered and are part of the political exercise, but their focus of analysis is the *local* reality. In a certain sense, Sousa Santos’ spaces of interaction are the international step of such a conception of public deliberation.

However, Sousa Santos does not explain how this dialogue can occur. He analyzes the conditions under which it can happen – conditions that vary across time and space – but these are mostly *preconditions*, contextual procedural orientations and cross-cultural imperatives which must be accepted by all groups that participate to the dialogue. But how then do we engage different cultures in a dialogue? Must there be a common ground around which to structure it? If so, this common ground arguably cannot be provided by human rights themselves, since they are the main object of the dispute. In this way, we are taken to discuss about something that *informs* human rights’ language and that could provide for a consensus about it. The challenge, considering what has been pointed out, is that this consensus should avoid appealing to a metaphysical nature while still allowing for “comprehensive doctrines” to inform the different positions of the participants; it should also not claim to be universalist in an a-historical way, and still be able to be recognized as part of the history of different cultures, peoples and communities. In other words, the search is for a concept or idea that can be found in virtually all (or as many as possible) cultures to be used *within* the already consolidated language of human rights as a bridge to foster a cross-cultural dialogue of the kind envisaged by Sousa Santos. In the next part, we shall see whether the idea of *fraternity* can be this bridge-principle.

---

<sup>18</sup> Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (1<sup>st</sup> edn, Princeton University 2002).

<sup>19</sup> Gerd Baumann, *The Multicultural Riddle. Rethinking National, Ethnic, and Religious Identities* (1<sup>st</sup> edn, Routledge 1999).

<sup>20</sup> Michael Sandel, *Justice: What’s the Right Thing To Do?* (1<sup>st</sup> edn, Farrar, Straus and Giroux 2009); Amartya Sen, *The Idea of Justice* (1<sup>st</sup> edn, Allen Lane 2009).

### 3. FRATERNITY AS A CROSS-CULTURAL PRINCIPLE

Since the 1980s, there have been a vast number of studies and publications around the importance of restating fraternity as a political category.<sup>21</sup> Some of the questions these different studies generally share are related to the analysis of the historical evolution and practical realization of the other two principles, with *liberty* encompassing the struggle for political rights, and *equality* epitomizing the claims for social and economic rights.

According to Antonio Maria Baggio,<sup>22</sup> liberty and equality – the other two principles usually considered the founding principles of modernity along with fraternity – saw an evolution that enabled them to become authentic political categories, capable of manifesting both as constitutional principles and as motivational ideas of political movements. The idea of fraternity (the third principle), on the other hand, did not share the same destiny. In fact, liberty and equality are respectively the inspirational ideas behind the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic, Social and Cultural Rights), the two first international treaties on Human Rights containing binding commitments, adopted by the UN General Assembly in 1966. But to some authors, it was precisely the contrast between opposing conceptions of the world what prevented the adoption of a singular binding treaty already in 1948, with solid guarantee mechanisms which would ensure protection of human rights in all the countries that would have signed it.<sup>23</sup> Even in the post Cold-war context, the tension is still strong through the paradigms of *recognition* and *redistribution*, as the debate around the concept of multiculturalism demonstrates.<sup>24</sup> Baggio asks whether the problematic realization of those principles, even within the developed democratic countries, but especially in the relation *between* countries, could not be due to the abandon of the idea of *fraternity* in its most universal interpretation.<sup>25</sup>

---

<sup>21</sup> Mona Ouzouf, *L'Homme Régénéré* (1st edn, Gallimard 1989) ; Michel Borgetto, *La notion de fraternité en droit public français. Le passé, le présent et l'avenir de la solidarité* (1st edn, Librairie Générale de Droit et de Jurisprudence 1993) ; Antonio Maria Baggio (n 5) ; Antoni Doménech (n 5).

<sup>22</sup> Antonio Maria Baggio, 'A redescoberta da fraternidade na época do "terceiro 1789"' in *O Princípio Esquecido*, 19.

<sup>23</sup> See, for instance, Salvatore Zappalà, *La Tutela Internazionale dei Diritti Umani* (1st edn, Il Mulino 2011) 26.

<sup>24</sup> Maria Laura Lanzillo, *Il Multiculturalismo* (1st edn, Laterza 2005).

<sup>25</sup> Antonio Maria Baggio, 'A redescoberta da fraternidade na época do "terceiro 1789"', p. 19.



Filippo Pizzolato demonstrates how the idealistic inspirations of a philosophical nature of the principle of fraternity are consistent with an internationalist vocation of the same principle and indeed support this opening movement. According to him, especially in the historical conditions of contemporaneity, the re-proposition of fraternity cannot but assume the relevant meaning of extending the values of solidarity and horizontal care beyond the threshold of the state boundary.<sup>26</sup> This is also the position of Marco Aquini,<sup>27</sup> for whom, in the current globalization scenario, characterized by a great number of actors who play significant roles in the realization of human rights, especially in the economic and social field, the idea of fraternity allows us to face problems from a non-particularist or nationalist perspective, in view of the fact that every problem as well as every solution has links of fraternal interdependence with other peoples. It is therefore necessary to analyze whether and to what extent this principle has been incorporated into the international order. We shall begin this search by analyzing the discussions held during the preparatory works of the UDHR.

### 3.1. FRATERNITY IN THE UNIVERSAL DECLARATION

The specific reference to fraternity in art. 1 of the Declaration is decisively linked to the contribution of the French jurist René Cassin. To him, it was necessary to accentuate the connection between the idea of fraternity and that of *duties*. In an original formulation elaborated by him, this dimension of duties or obligations of fraternity was very explicit: “les êtres humains, tous membres de la même famille, sont libres, égaux en dignité et en droits et *doivent se regarder comme des frères* ».<sup>28</sup> The sense of fraternity in the Declaration can be grasped more precisely by acknowledging two important and interrelated issues: first, this dimension of duties as inter-individual responsibility is deepened and seriously taken into consideration. Second, the use of the term “humanity”, in the document, makes reference to components of a “same family”.

---

<sup>26</sup> Filippo Pizzolato, ‘Fraternità (principio di)’ in AA.VV. *Digesto Delle Discipline Pubblicistiche* (5th ed. Utet Giuridica 2012).

<sup>27</sup> Marco Aquini, ‘Fraternidade e Direitos Humanos’ in Antonio Maria Baggio (n 5) 141.

<sup>28</sup> Quoted in Filippo Pizzolato (n 26) 393.



The works conducted on the writing of Article 1 of the Declaration provide a good example of those issues. The draft submitted by a working group of the Drafting Committee in June 1947 stated in its first chapter:

“All men are brothers. Being endowed with reason, members of one family, they are free and possess equal dignity and rights.”<sup>29</sup>

At its meeting on 8 December 1947, the Commission set up three working groups to consider, respectively, the Declaration of Human Rights, the Convention (or Conventions) and the Implementation aspects. The working group responsible for considering the Declaration, in its report to the Commission on Human Rights, presented two different suggestions for Article 1. The first one was the text suggested by the Philippines, and stated:

“All men are brothers. Being endowed with reason and conscience, they are free and possess equal dignity and rights.”

The French suggestion read:

“All men are born free, and equal in dignity and rights, and shall regard each other as brothers.”

Carlos Romulo, the representative for the Philippines, and René Cassin, the representative for France, submitted then a new joint text, and Eleanor Roosevelt, who chaired the working group, read out the Article for adoption in the following form:

“All men are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another like brothers.”<sup>30</sup>

The text approved in December 1948 has as its first chapter the following lines:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>31</sup>

---

<sup>29</sup> Document E/CN.4/AC.1/11 <<https://undocs.org/E/CN.4/AC.1/W.1>> Accessed 5 May 2019.

<sup>30</sup> Document E/CN.4/95 <[https://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/CN.4/95](https://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/95)> Accessed 8 May 2019.

<sup>31</sup> Art.1, *Universal Declaration of Human Rights* <<https://www.un.org/en/universal-declaration-human-rights/>> Accessed 8 May 2019.

There are some interesting remarks that can be made when comparing those three extracts, having in mind the cross-cultural dialogue environment of the Commission and the issues that relate to the idea of fraternity, as mentioned previously. First of all, some of the concepts present in the final version of the Declaration can be found already in its first draft. Its authorship is attributed to René Cassin, but there had been important contributions by Lebanese philosopher and diplomat Charles Habib Malik and by Chinese philosopher, diplomat and playwright Peng-chun Chang.<sup>32</sup> To Malik we owe the insertion of the words “endowed with reason”, present already in the first draft of the article. Chang added “and conscience” to it, as we can see from the second version of the text. It was also Chang who insisted on the removal of the allusion to nature that appeared in the joint proposal by Romulo and Cassin. That reference to nature had been thought by the two representatives as a way of responding to the necessity of indicating the origins of both reason and conscience without having to adhere to a religious view.<sup>33</sup> For Chang, that allusion should be eliminated in the name of universalism, just as all references to God.

There have been some interesting modifications regarding the idea of fraternity, through the different texts proposed. The first versions start by affirming that “all men are brothers”. This suggests the understanding of the human condition as “members of one family”, as we can read in the very first version (this reference was further moved to the preamble). But the most interesting remark is that, from the French version presented to the Commission, the idea of “brotherhood” is moved to the end of the paragraph and presented as a *duty*. It ceases to be the first fundament of the rights and becomes the way through which those rights are fulfilled. Interestingly enough, it was following an observation from the Soviet representative Alexander Bogomolov that Cassin decided to present “brotherhood” as connected to a duty. This was accompanied by the suggestion from Eleanor Roosevelt to place the conditions of freedom and equality of all men at the beginning.

A final and very important modification was the substitution of masculine terms for generic ones. This was a result of the observations done by the “Commission on

---

<sup>32</sup> For the examination of the preparatory work, we rely mainly on Asbjorn Eide (ed.), *The Universal Declaration of Human Rights: A Commentary* (1<sup>st</sup> edn, Oxford University Press, Scandinavian University Press 1992).

<sup>33</sup> See Aquini (n 27) 132.

the Status of Woman".<sup>34</sup> However, it is difficult to explain why, despite the replacing of "men" by "human beings", the expression "as brothers" was substituted by "in a spirit of brotherhood" instead of using the word "fraternity", in the English version.<sup>35</sup>

The text, this way, went through an interesting operation: *liberty* and *equality* became the ultimate reason why the rights presented in the declaration must be respected. Furthermore *because* human beings are free and equal in dignity and rights, they must act towards one another *as* brothers and sisters. What is being recognized in the first place is their condition of freedom and of equality in dignity and rights, not their "brotherhood"; yet, if people do not act fraternally towards one another, this would mean they do not recognize that same condition of freedom and equality. It is through the idea of fraternity *in practice* that people can exercise their being free and equal. Or, to put it in another way, it is the principle of fraternity that inspires actions that enable human beings to enjoy the rights that stem from the other two principles of liberty and equality.

But what does it mean to act "in a spirit of fraternity"? If we consider the great care in the use of all terms present in the text of the works of the Commission, we are taken to argue that it certainly did not intend to add that sentence in an abstract fashion. The effort is thus to see how it translates into concrete endeavors envisaged by the same Declaration. The point of connection is the Article 29, about the duties of the person towards the community.

"(1) Everyone has duties to the community in which alone the free and full development of his personality is possible."<sup>36</sup>

The connection between the reference to fraternity in art. 1 and the rule of art. 29 is due not only to some vague assonances of the same conceptual horizon, but it is

---

<sup>34</sup> Official record E/615 <[https://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/615](https://www.un.org/en/ga/search/view_doc.asp?symbol=E/615)> Access 8 May 2019.

<sup>35</sup> There is an important gender critique towards the using of the word "fraternity", even when it is used instead of the more explicitly masculine "brotherhood". Although we do not deal with this issue in this paper, a brief statement to cope with this relevant observation is necessary, at least in order to justify the rescuing of "fraternity" rather than arguing for the use of, for example, "solidarity". In our view, the use of solidarity would move the reflection in another direction, since it does not have the same cross-cultural appeal the term fraternity has, and which will be further discussed.

<sup>36</sup> Art. 29, *Universal Declaration of Human Rights* <<https://www.un.org/en/universal-declaration-human-rights/>> Accessed 8 May 2019.

attested by the preparatory works of the Declaration.<sup>37</sup> It is not by chance that, also in the formulation of art. 29, Cassin's contribution was fundamental. His original plan even foresaw that the Declaration stated in art. 3 that

“as human beings cannot live and develop themselves without the help and support of society, each one owes to society fundamental duties which are: obedience to law, exercise of a useful activity, willing acceptance of obligations and sacrifices demanded for the common good”.<sup>38</sup>

According to Aquini,<sup>39</sup> the use of the term *community* in article 29 indicates the Commission had taken distance from a vision that identified duties as owed only before the State. This was, first, due to the fact that a prescription of this type was considered a task of the national constitution of each country, but also because there are duties that are exercised in spheres in which the State does not interfere or should interfere as little as possible, such as the family sphere, civil associations, religious communities, indigenous communities, and so on.

“In the Declaration, the principle of fraternity is colored by a dimension of duty that involves the responsibility of the person, since it comes as a consequence of the recognition of the structurally relational condition of the development of human personality. In the drafts of the articles prepared by Cassin, precisely this constitutive link between the individual (the person) and society lies at the conceptual origin of the recognition of fraternity and, at the same time, of the close relationship that is established between rights and duties. The latter are, moreover, understood in a horizontal and inter-individual meaning.”<sup>40</sup>

### 3.2. THE SPIRIT OF FRATERNITY ACROSS CULTURES

Following both Aquini's and Pizzolato's arguments, we could say that, by drawing attention to the community and the full realization of the personality of the individual within it, and also to the duties and responsibilities of the individual before it, the Declaration opens a fruitful dialogue with cultures that value in their tradition the role

---

<sup>37</sup> Filippo Pizzolato (n 26) 394.

<sup>38</sup> Document E/CN.4/AC.1/W.1 <<https://undocs.org/E/CN.4/AC.1/W.1>> Access 07 May 2019.

<sup>39</sup> Marco Aquini (n 27) 134.

<sup>40</sup> Filippo Pizzolato (n 26) 394.

of the social context in which each individual is inserted and the endeavors he/she has towards his/her fellows. But it does it without identifying itself with visions that annul the individual personality. What is relevant to stress, for our purposes, is that the principle that allows for this dialogue to occur, or at least that facilitates it, is that of fraternity.

In fact, we can see the echo of this reasoning in many different traditions. In the encyclical “*Pacem in Terris*” of 1963, Pope John XXIII states:

“In human society one man's natural right gives rise to a corresponding duty in other men; the duty, that is, of recognizing and respecting that right. Every basic human right draws its authoritative force from the natural law, which confers it and attaches to it its respective duty. Hence, to claim one's rights and ignore one's duties, or only half fulfill them, is like building a house with one hand and tearing it down with the other.”<sup>41</sup>

We can find a correspondence between this Christian vision and the one expressed by Mahatma Gandhi in his answer to the enquiry promoted by Unesco in 1947.<sup>42</sup> Gandhi stated that “all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world”.<sup>43</sup> The idea that to every right corresponds a duty was also present in the answer given by another Hindu thinker, S. V. Puntambekar, to the same inquiry by Unesco. Puntambekar considered there were ten essential human liberties. Half of them were social liberties or promises, and the other half were individual liberties. To each of them corresponded one virtue, or duty.<sup>44</sup>

Going outside the framework of the United Nations and the works surrounding the drafting of the UDHR, we can find the link between the idea of fraternity and of duties in other official documents. The American Declaration of the Rights and Duties of Man, also known as the Bogota Declaration, was the world's first international

---

<sup>41</sup> John XXIII, *Pacem in Terris* (1<sup>st</sup> published 1963) < [http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem.html](http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html) > Access 8 May 2019.

<sup>42</sup> This enquiry, carried out during the preparation of the UDHR, was a contribution of the United Nations Educational, Scientific and Cultural Organisation (Unesco) to the discussions about the theoretical problems raised and faced by the Declaration. Unesco circulated a questionnaire among various thinkers of member states of the organization and asked them to give their opinions as experts.

<sup>43</sup> Mahatma Gandhi, ‘A Letter addressed to the Director general of UNESCO’ in Unesco, *Human Rights. Comments and Interpretations . A symposium* (Allan Wingate 1949) 18.

<sup>44</sup> Ibid. 197.

human rights instrument of a general nature, actually predating the Universal Declaration of Human Rights by less than a year. It states in its preamble that

"All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another (...) The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty."<sup>45</sup>

It is interesting to note that in this document, the connection between fraternity and duties is even more explicit than in the UDHR (exemplified by a verb that expresses a duty – "[all men] *should* conduct themselves as brothers one to another"), echoing some of the initial versions of the UN Declaration, as we saw.

Strictly speaking, this instrument, being a declaration, is not a legally binding treaty. However, it is considered by both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights as a source of binding international obligations for the Organization of the American States (OAS)' members (even to those states, such as Canada, Cuba and the United States, that did not ratify the American Convention on Human Rights, in force since July 1978).

The idea of fraternity is present also in the Arab world and in the African continent, where the cultural horizon represented by European concepts can face more resistance when compared to the Americas. In the Preamble of the Arab Charter of Human Rights we find explicit reference to "the eternal principles of brotherhood and equality among all human beings which were firmly established by the Islamic Shari'a and the other divinely-revealed religions".<sup>46</sup> For Bedjaoui, fraternity is, among the values, "la chose plus partagée dans le monde musulman".<sup>47</sup>

The intercultural relevance of fraternity is also confirmed by the African Charter on Human and Peoples' Rights (1981). Although this document does not provide for an explicit mention of the fraternity itself, it is inspired by an idea of solidarity which,

---

<sup>45</sup> Preamble, *American Declaration of the Rights and Duties of Man* < <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> > Access 8 May 2019.

<sup>46</sup> Preamble, *Arab Charter of Human Rights* < <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf> > Access 8 May 2019.

<sup>47</sup> Mohammed Bedjaoui, 'La "fraternité", concept moral ou principe juridique?', *3rd Congress of ACCPUF*. < [https://www.accpuf.org/images/pdf/publications/actes\\_des\\_congres/c3/I-INTRO/introduction.pdf](https://www.accpuf.org/images/pdf/publications/actes_des_congres/c3/I-INTRO/introduction.pdf) > Access 8 May 2019.

as it binds the members of a community and the different communities among them, seems fully consistent with that principle. It is again Bedjauoi who considers that, in Africa, "la fraternité est liée à la quintessence de la nature humaine".<sup>48</sup>

The idea of fraternity has a strong resonance in the concept of Ubuntu. This concept comes from sub-Saharan Africa and expresses the awareness of an individual who defines himself by the human context in which he lives and by his relations with others. According to a common definition, ubuntu would translate as "I am, because we are". In fact, the word ubuntu is part of the Zulu phrase "Umuntu ngumuntu ngabantu", which literally means that a person is a person through other people.<sup>49</sup> Ghanaian scholar and religious Noah Dzobo, giving an ontological precedence to "we", defined African communitarian ethics as "we are, therefore I am; and because I am then we are."<sup>50</sup>

Although it could be deemed a somewhat nebulous concept, identified with an abstract idea of "common humanity", it had a very practical political influence in recent times, having inspired the policy of national reconciliation implemented by President Nelson Mandela after the end of the apartheid regime in South Africa.

According to Congolese philosopher Jean Bosco Kashindi, the fact that Ubuntu was taken to the political arena in South Africa to help rethinking South African identity demonstrates that identity is a key aspect of the Ubuntu philosophy.<sup>51</sup> In fact, it was necessary to move from the conception of separate 'citizens' behind the ideology of racial segregation to invent an inclusive South African identity; it was thus necessary to "create" a new conception of South African citizenship. In this, all the colors, all cultures, all nationalistic narratives (Afrikaans, British, Zulu, Xhosa, Tswana, etc.) that made up South Africa were to fit. The philosophy of Ubuntu helped to operate a shift in the conception of identity - from "I am because you are not" (excluding conception, typical from western way of reasoning) to "I am because we are, and given that we are then I am" (inclusive conception).<sup>52</sup>

---

<sup>48</sup> Ibid.

<sup>49</sup> Christian B. N. Gade *The historical development of the written discourses on ubuntu*, (2011) 30(3) South African Journal of Philosophy 303, 329.

<sup>50</sup> For an approach to these postulates of African ethics, see Michael Onyebuchi Eze, *Intellectual history in contemporary South Africa* (1<sup>st</sup> edn, MacMillan, 2010) pp. 94-95.

<sup>51</sup> Jean Bosco Kashindi, "Ubuntu and the African Decolonization: The South African case". In Fernanda Frizzo Bragato, Lewis R. Gordon. (eds.), *Geopolitics and Decolonization*. (1<sup>edn.</sup>, Rowman Littlefield, 2018) 65, 76.

<sup>52</sup> Ibid, p. 75.



The main modern proponent of ubuntu philosophy is Archbishop Desmond Tutu. In his book "No Future Without Forgiveness", he describes a person with ubuntu as "open and available to others", because he is aware of "belonging to something bigger". This person knows her actions will have consequences for others, hence the invitation to act and behave well.

The philosophy of Ubuntu reveals to be very close to the idea of fraternity, for its dialogical understanding of identities and its connection with the sense of duties. Pizzolato states:

"The centrality of fraternity in Africa seems to be linked to a cultural component, rooted in that continent, aimed at enhancing the community dimension of human existence and promoting the idea of collective rights, even more than individual ones. This solidaristic dimension of the community as something that flows below institutional mediation, within personal ties, is often referred by jurists, social scientists or philosophers in Europe who theorize the need for European countries to rediscover it. It has been argued, in fact, that in order to legalize fraternity, it must be linked to the concrete fabric of relationships in a community."<sup>53</sup>

However, this entails two serious risks. The first one, connected in general terms to the critique that liberals move to the communitarian perspective, is that to put the community before the individual may devalue the latter to the point that he may lose his personal autonomy, therefore being risked is an essential (human) right. The second risk is that the solidaristic dimension can be confined to a single community, which could also choose not to care about the fates of other communities. This would be to deny the universalist potential of fraternity.

Although those risks have to be seriously taken into consideration, to quickly associate them with the concept of fraternity envisaged by the UDHR and the other declarations of rights mentioned above is misleading. Firstly, the kind of fraternity aspired by the UDHR is an inclusive one, differently from the exclusive kind of fraternity of those who consider it to exist only within a specific group (be it defined in terms of nationality, religion, ethnicity, gender or any other form of defining a group). It is not only opened to the universal, but it is universal per se. Secondly, it is through the universality of the principle (the spirit of *fraternité* among all human beings) and its connection to the idea that everyone has duties towards one another,

---

<sup>53</sup> Filippo Pizzolato (n 26) 397.

that it may be translated into solidaristic practices in the community where one belongs or happens to live in.

It is important to highlight what is at the core of this argument to avoid what could be a common misunderstanding. To be sure, the sense of community to which article 29 of the UDHR makes reference does not automatically set the basis for a cross-cultural dialogue, even when a certain kind of fraternity is invoked.<sup>54</sup> However, despite all doubts and critiques the Declaration may receive because of the term “Universal”, the combined reading of articles 1 and 29 makes possible for a dialogue to occur *between* the culture that produced the UHDR<sup>55</sup> and other cultures with a strong sense of duties and responsibilities towards the community. The Declaration, fruit of a western tradition of individual rights which evolved from the previous centuries, opens itself to a dialogue with cultures that rather emphasize the *duties* each one has toward the members of his/her own community; at the same time, it goes beyond a certain traditional view of the duties directed only toward those of *my own* community by appealing to a fraternity among *all* human beings. This is not an invention of the Declaration, since this understanding of universal duties is also present in other cultures, as we saw in the previous section. But is exactly the idea of fraternity which makes possible the approximation of the language of rights with that

---

<sup>54</sup> It may actually be quite the opposite – as it has been, many times throughout History – if the idea behind the use of the word “fraternity” is a closed and exclusive one. People can appeal to a fraternity among those they consider to be part of their community to justify exclusion, marginalization and violence against the non-brother. This is clear, for example, in a vision of community strongly based on nationality, in which the “other” – the foreigner, the immigrant, the non-national, is almost, if not entirely, seen as an enemy. In the best of cases, he is someone to avoid; in the worst, someone to be fought. In both, there is absolutely no dialogue nor overture to it, because the idea of fraternity extinguishes itself anytime I encounter someone who is born outside the borders that I consider to be the basis of my community. Another example is the religious-informed view of community. In this case, the national borders may count little, but the apparent broader sense of community is jeopardized inasmuch as I consider only those who share my faith and beliefs as worthy to be called brothers and sisters.

<sup>55</sup> Here, we talk about “the” culture that produced the UHDR as being the “western” culture in a general sense, notwithstanding the contributions of different traditions and cultural views to its composition as seen in the previous section. The emphasis is in the fact that it is a declaration of *rights*, and as such it can be placed along a tradition that had produced other important documents, such as the English *Bill of Rights* of 1689, the American Declaration of Independence of 1776, and the French Declaration of the Rights of Man and of the Citizen of 1789, this last one already having universal appeal. For a discussion about the historicity of the idea of universality of Human Rights in the western tradition, see Lynn Hunt, *Inventing Human Rights: A History* (1<sup>st</sup> edn, W. W. Norton & Co., 2007).

of duties, in the first place, and that opens the latter to a universal dimension, in a second moment.

The most recent illustration of this idea in the form an official document is provided by the "Document on Human Fraternity for World Peace and Living Together", signed on February 4, 2019 by Pope Francis and the Grand Imam of Al-Azhar Ahmad Al-Tayyeb during the apostolic journey of the former to the United Arab Emirates. In the document we read that "the concept of *citizenship* is based on the equality of rights and duties, under which all enjoy justice". It declares "the adoption of a culture of dialogue as the path; mutual cooperation as the code of conduct; reciprocal understanding as the method and standard" for reaching a peaceful living together. And it does it in the name, among others, "of *human fraternity* that embraces all human beings, unites them and renders them equal; in the name of this *fraternity* torn apart by policies of extremism and division, by systems of unrestrained profit or by hateful ideological tendencies that manipulate the actions and the future of men and women".<sup>56</sup>

We see thus that fraternity is being used in this document as the key principle around which to build a culture of dialogue. Yet, not just any kind of fraternity; it is a universal, inclusive use of the concept, which goes as far as to identify itself with the claim for *full citizenship* to all human beings living in a specific society, rejecting the discriminatory use of the term *minorities*, "which engenders feelings of isolation and inferiority" and "paves the way for hostility and discord".<sup>57</sup>

For Vincenzo Buonomo, from a practical point of view, the idea of fraternity could transform the international dimension by operating a shift in it: from a place of "necessary" coexistence between States, the international sphere becomes the place of coexistence between entities (the States themselves, which are the first subjects of the international community) that carry the claims of their peoples and individuals. In this sense, those subjects (the States) would still maintain the characteristic of independence and sovereignty, while also continuing to pursue, through their apparatuses, the common good of their peoples. But they would be also called to act in such a way they would not consider only their sovereign space. Rather, by means

---

<sup>56</sup> *A Document on Human Fraternity for World Peace and Living Together* (published 2019) < [http://w2.vatican.va/content/francesco/en/travels/2019/outside/documents/papa-francesco\\_20190204\\_documento-fratellanza-umana.html](http://w2.vatican.va/content/francesco/en/travels/2019/outside/documents/papa-francesco_20190204_documento-fratellanza-umana.html) > Access 30 August 2019. Italics in the original.

<sup>57</sup> Ibid. Access 19 October 2019.

of this geographical space and the populations living in it, they would act in order to construct the common good of the "subject-humanity". Finally, the legal-institutional dimension of the State, which establishes it as a subject of international law, would assume its true instrumental function: it would thus guarantee not only singular interests but also general ones, since each community of persons present in a territory, thanks to the bond of fraternity, is part of the one subject - humanity.<sup>58</sup>

"From another point of view, if this model is framed in the categories of the general theory of Law, it has as an essential feature that of aspiring necessarily to the approximation between the vertical and the horizontal dimension of the international relations. It aims, therefore, that the institutional aspect is placed next to the relational one, in a kind of governability practiced through the rules."<sup>59</sup>

For Buonomo, this is a vision that moves away from an abstract internationalism or a certain version of universalism, like the one represented by globalization, since it does not annul individual identities, but values them without stressing dangerous individualisms, merging them into a unity .

"The image that emerges is that of the relationship that exists in every society between the individual dimension and the community dimension, distinct from one another, but interdependent."<sup>60</sup>

#### 4. CONCLUSIONS

Where does all of this take us? The first point to stress is this: the cross-cultural dialogues structured under the methodology of the diatopical hermeneutics proposed by Sousa Santos could be inspired by a principle that has resonance to all cultures. The second is that due to the connections that the concept of fraternity presents with ideas and philosophies of non-western cultures, it may be such a principle, despite the fact that the *word* fraternity is deeply connected to western culture and history.

---

<sup>58</sup> Vincenzo Buonomo, 'Vínculos Relacionais e modelo de fraternidade no direito da Comunidade Internacional' in Antonio Maria Baggio, *O Princípio Esquecido vol. 2. Exigências, Recursos e Definições da Fraternidade na Política*. (Tr. Durval Cordas, Luciano Menezes Reis, 1st edn, Cidade Nova 2009) 165.

<sup>59</sup> Ibid. 166.

<sup>60</sup> Ibid.

This raises an important observation: fraternity must not be just another product of globalization. As a matter of fact, the latter may even constitute an antithesis of the former, precisely because it may designate the phenomenon of extension of a vision of the world (not only in the cultural sphere, but in the economic and political ones as well) to the whole planet.<sup>61</sup> For Pasquale Ferrara, the principle of fraternity should avoid being both a form of “democratic globalism” (to which the principle of *liberty* is better associated), and of “global democracy”, (more easily linked to the historical vicissitudes of the principle of *equality*), if it is not to be a form of *globalized localism*. Rather, it should present itself as a point of connection between different cultures who, each through their own lexicon and through their own practices, make reference to “subject-humanity”. If stripped out of its possible reductive interpretations (of the exclusivist forms of living and practicing fraternity), the principle could become essential not only to make effective the universalization of liberty and equality, as Baggio already suggested,<sup>62</sup> but also to foster the dialogue among actors who appeal either to universality or to relativism of rights to defend their claims.

This can come through two operations that occur between the concept of fraternity and the established vocabulary of human rights. The first one is the approximation of the idea of fraternity to the language of duties and responsibilities, which is present in many traditions of thought, perhaps more than the language of natural rights. The second one is its approximation to the concept of community. These two points are deeply related: the adoption of the idea that individuals have duties towards one another (they may act “in spirit of brotherhood”, as read in the UDHR) can be of a high importance when trying to address issues that require a concerted effort of the *international community* such as, for example, climate change and the questions regarding sustainability. In order to do this, the link between fraternity and community may prove to be efficient. On the one hand, the endeavors each individual has towards one another can find a better and clearer “applicability” in a contextual situation like that of the community he/she lives in, due to the sense of “belonging” and proximity it entails. This is the perspective found in art. 29 of the UDHR. On the other hand, the openness of the concept of fraternity (inasmuch as that of ubuntu, for instance) makes possible for it to go beyond the limits commonly

---

<sup>61</sup> See Pasquale Ferrara, ‘A Fraternidade na Teoria Política Internacional’ in Antonio Maria Baggio (n 5) 157.

<sup>62</sup> Antonio Maria Baggio, ‘A redescoberta da fraternidade na época do “terceiro 1789”’, 22.

identified with local communities. Its appeal to a sense of proximity to someone I *know* may have an impact on the way I consider myself to have duties and obligations towards the distant one: even if I don't really know who is far away from me – I may not even know my neighbor – I reasonably know my *brothers* and *sisters*. This is the idea of the belonging to the “human family” present in the Preamble of the UDHR.

It is thus by recognizing itself in the *particular* that fraternity can identify with *universal* issues and try to more efficiently foster shared norms and rules that may have impact in all contexts.

# **Significance of the UDHR**



## 70 YEARS AFTER: REFLECTIONS ON THE SIGNIFICANCE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS FOR WOMEN'S RIGHTS IN AFRICA

LARISSA HEÜER\*

### ABSTRACT

*The purpose of this article is to explore the significance of the Universal Declaration of Human Rights for women's rights in Africa. In this regard, the following questions are addressed: (i) to what extent is the Universal Declaration of Human Rights relevant for the interpretation of women's rights in the African region considering the creation of binding treaties such as the Convention on the Elimination of all Forms of Discrimination against Women, the African Charter on Human and People's Rights, and its Protocol on the Rights of Women in Africa; and (ii) and how can the future role of the Universal Declaration of Human Rights be assessed in the light of these developments. It is concluded that the Declaration is of substantial relevance for women's rights in Africa and will continue to provide a foundation for the development of subsequent human and women's rights instruments.*

### KEYWORDS

UDHR; Women's Rights; Universality Debate; CEDAW; African Human Rights System; African Charter; Maputo Protocol

---

\* Larissa Heüer is a doctoral candidate at the Centre for Human Rights, Faculty of Law, University of Pretoria (South Africa).

Email: [larissa.heuer@up.ac.za](mailto:larissa.heuer@up.ac.za)

\*\* The author wishes to thank Dr Ciara O'Connell for her valuable contributions as well as the Centre's research group for their helpful comments.

## 1. INTRODUCTION

The purpose of this article is to explore the significance of the Universal Declaration of Human Rights<sup>1</sup> (hereafter UDHR or the Declaration) for women's rights in Africa. Falling into the African Women's Decade (2010 – 2020), the Declaration's 70<sup>th</sup> anniversary presents an opportunity for retrospection and reorientation. Whilst contestations surrounding the universalism of human rights have dominated academic discourses, an assessment of the Declaration's significance for women's rights, especially African women's rights, has been neglected. To fill the gap in the literature, the article addresses, first, the extent as to which the Declaration is relevant for the interpretation and application of women's rights in Africa and, secondly, how the future role of the UDHR can be assessed in the light of subsequent human and women's rights instruments. The approach of tracing the UDHR in formal law is motivated by debates relating to the Declaration's status as a 'paper tiger', its lack of enforceability and relevance in the struggle for women's rights.<sup>2</sup>

The article commences with an overview of the drafting process of the UDHR incorporating historical and contemporary, mostly feminist, critiques thereof. Embedded in a feminist legal perspective, the objective of the article is to establish if and how the Declaration has been referenced in international treaties and case law relevant to women's rights in Africa. To this end, the research draws upon the textual analysis of subsequent human rights treaties and documented court cases to establish links and trace references. Therefore, the next section discusses subsequent human rights treaties namely the Convention on the Elimination of all Forms of Discrimination against Women<sup>3</sup> (hereafter CEDAW or the Convention), the African Charter on Human and People's Rights<sup>4</sup> (hereafter ACHPR or the African Charter), and its Protocol on the

---

<sup>1</sup> Universal Declaration of Human Rights (UDHR) 1948.

<sup>2</sup> '70th Anniversary of the Universal Declaration of Human Rights' (UN Office of the High Commissioner for Human Rights, 6 December 2018); TJ Coles, 'Paper promises: the Universal Declaration of Human Rights at 70' (New Internationalist, 10 December 2018) <<https://newint.org/features/2018/12/10/paper-promises-universal-declaration-human-rights-70>> accessed 30 October 2019.

<sup>3</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979.

<sup>4</sup> African Charter on Human and Peoples' Rights (ACHPR) 1986.

Rights of Women in Africa<sup>5</sup> (hereafter Maputo Protocol). Next, several court cases from the African region are analysed with regards to references to the Declaration and their relevance for women's rights in Africa.

Although globally, all women experience oppression due to the underlying bias and gendered nature of most societies in which men have privileges over women, many African women face distinct issues that further vary within different local contexts.<sup>6</sup> Throughout this article, the term 'African women' is used. African women are women who were born, raised and/or live on the African continent. This is not to neglect the differences between women in Africa or to speak to African women as a whole, but to emphasise the shared oppression that many women in the African region experience. Culture and customs greatly vary from region to region, country to country, even within the context of a country. However, in the words of Adeoye Akinola, 'there are certain belief systems that run through most African communities, such as the denial of women's land rights and the patriarchal nature of societies' which are addressed in the course of the paper.<sup>7</sup>

African women continue to face discrimination and inequality due to patriarchal attitudes and legal frameworks which limit their access to education, oppress their participation in political and public life, exclude them from the possession of property and restrict women's agency when it comes to their sexual and reproductive health.<sup>8</sup> However, in contrast to the dominant understanding of African women as victims of their environment, women's rights movements and civil society organisations have successfully challenged discriminatory laws which were considered beyond the reach of women's rights litigation.

---

<sup>5</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) 2005.

<sup>6</sup> Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 *Journal of African Law* 39; Sylvia Bawa, 'Women's Rights and Culture in Africa: A Dialogue with Global Patriarchal Traditions' (2012) 33 *Canadian Journal of Development Studies* 90.

<sup>7</sup> Adeoye O Akinola, 'Women, Culture and Africa's Land Reform Agenda' (2018) 9 *Frontiers in Psychology* 2234.

<sup>8</sup> Ssenyonjo (n 7); Bawa (n 7); Akinola (n 6); J Oloka-Onyango and Sylvia Tamale, "'The Personal Is Political,'" or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 691; Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005); Emmanuelle Bouilly, Ophélie Rillon and Hannah Cross, 'African Women's Struggles in a Gender Perspective' (2016) 43 *Review of African Political Economy* 338.

Based on a discussion of the findings, it is concluded that, due to its flexibility to be applied in various cultural contexts and its ability to be combined with other human rights instruments, the Universal Declaration of Human Rights is and will continue to be of substantial relevance for women's rights in Africa and for the development of subsequent human and women's rights instruments.

## 2. CHALLENGES TO THE UNIVERSAL RELEVANCE OF HUMAN RIGHTS

At the risk of stirring up old debates, this section briefly addresses some of the challenges to the universal relevance of the Declaration. In addition to the general critique of its universality, the debate was gradually developed and expanded by, for example feminist, especially African feminist, and TWAIL scholarship challenging the Declaration's applicability to non-Western contexts and consideration for women's realities.<sup>9</sup> The contribution of this article does not lie in readdressing or reconciling these critiques but it is necessary to ground and frame the research in the respective theoretical framework. Besides, with the continuous development and expansion of the human rights regime, a revaluation of old debates might bring new insights, especially when it comes to the significance of the Declaration for women's rights in Africa vis-à-vis the development of subsequent human and women's rights instruments.

Back in 1948, the adoption of the Universal Declaration of Human Rights was a major attempt to create a universally shared and accepted human rights framework. Based on the assumption of universality, "human rights must not only be universal in scope (that is, they apply to all human beings), but the underlying values must be universally shared".<sup>10</sup> However, it is often argued that the human rights standards set by the UN originate from a Western or rather Eurocentric<sup>11</sup> individual libertarian

---

<sup>9</sup> For further discussion on the universalism/cultural relativism debate and contesting views on culture and women's right, see, for example, Rodolfo Stavenhagen, *Peasants, Culture and Indigenous Peoples* (4th edn, Springer 2013); Bas de Gaay Fortman, 'Minority Rights: A Major Misconception?' (2011) 33 *Human Rights Quarterly* 265; Abdullahi Ahmed An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992); Mosope Fagbongbe, 'The Future of Women's Rights from a TWAIL Perspective' (2008) 10 *International Community Law Review* 401.

<sup>10</sup> Stavenhagen (n 9).

<sup>11</sup> The terms 'Western' and 'Eurocentric' are used interchangeably to describe the shared understanding of the concept of human rights in mainly Europe, North America, New Zealand, and Australia. This is

perspective and exclude differing moral systems and ways of communal life.<sup>12</sup> Thus, human rights claims have to be communicated as per the dominant Western culture that does not necessarily accommodate non-Western value systems.<sup>13</sup> Feminist critiques built on this argument and added that the UDHR was not only born out of a Western but also a patriarchal and highly gendered environment. The lack of provisions concerning women's rights and the lack of gender perspective makes it problematic for women to address uniquely female issues, for example, maternal health, as they have to be communicated according to the dominant 'malestream'<sup>14</sup> discourse.<sup>15</sup> This can be even more complicated for African women as they have to formulate their claims within a Eurocentric 'whitestream'<sup>16</sup> and a patriarchal 'malestream' human rights system which does not take into consideration their lived experiences and the various systems of oppression.<sup>17</sup>

African feminist scholars have repeatedly criticised the exploitation of the universality debate by African leaders and law-makers to subordinate and silence women's rights movements in Africa in the name of culture and tradition.<sup>18</sup> The origins of the UDHR are often traced to documents such as the Magna Carter, the English Bill of Rights, the French Declaration of the Rights of Man and Citizen and the works of intellectuals and philosophers such as Rousseau, Locke, and Kant, but it cannot be

---

not to imply that there are no ideological differences across these regions, but to acknowledge the similarities within their dominant human rights discourses.

<sup>12</sup> Bawa (n 7); Stavenhagen (n 9); de Gaay Fortman (n 9).

<sup>13</sup> de Gaay Fortman (n 9).

<sup>14</sup> The term 'malestream' was coined by Mary O'Brien to describe how male-dominated perspectives and realities are applied to women, but neglect the structural inequality that women are exposed to because of their sex and gender; see *The politics of reproduction* (Routledge & Kegan Paul 1983).

<sup>15</sup> Rebecca J Cook, 'Women's International Human Rights Law: The Way Forward' (1993) 15 Human Rights Quarterly 230.

<sup>16</sup> The term 'whitestream' reflects the sentiments of 'malestream' with regards to the dominance of Western and Eurocentric experiences and was coined by Claude Denis in 1997; see *We are not you: First nations and Canadian modernity* (Broadview Press).

<sup>17</sup> Oloka-Onyango and Tamale (n 8); Rachel Murray, 'A Feminist Perspective on Reform of the African Human Rights System' [2001] African Human Rights Law Journal 205.

<sup>18</sup> Sylvia Tamale, 'Gender Trauma in Africa: Enhancing Women's Links to Resources' (2004) 48 Journal of African Law 50; Banda (n 8); Bawa (n 7).

dismissed that similar and even older documented and undocumented discourses existed in various cultures all over the world that addressed the concept of human rights and dignity.<sup>19</sup> Kalny argues that “it is not human rights itself which are ‘Western’, but that dominant forms of perception and the construction of the history of human rights are based on Western and especially Eurocentric predilections”.<sup>20</sup> Bawa further remarks that the opposition to anything Western implies a homogenous African culture with a commonly shared value system.<sup>21</sup> An assertion which obscures the major differences in practices and traditions that exist and have historically existed within the region.<sup>22</sup>

In a recent publication, Adami readdresses the role of non-Western and female delegates in the drafting process of the UDHR in order to reconcile the issues surrounding the Declaration’s universality.<sup>23</sup> Hansa Mehta and Lakshmi Menon from India had a great influence on the wording of the UDHR. Mehta, a member of the UN Human Rights Commission from 1947 to 1948, was credited with changing Article 1 of the Declaration to ‘[a]ll human beings are born free and equal’ instead of ‘[a]ll *men* are born free and equal’, [emphasis added]. Additionally, Menon insisted on the mention of ‘the equal rights of men and women’ in the Preamble.<sup>24</sup> In spite of the importance of these amendments, women’s contributions to the drafting process of the UDHR were limited. Therefore, many issues that only or disproportionally affect women remained unaddressed. There is no mention of sexual and gender-based violence, discriminatory customary practices of inheritance, forced marriage and divorce, issues that are not only relevant to women on the African continent.<sup>25</sup>

---

<sup>19</sup> Eva Kalny, ‘Against Superciliousness. Revisiting the Debate 60 Years after the Adoption of the Universal Declaration of Human Rights’ (2009) 29 *Critique of Anthropology* 37.

<sup>20</sup> Ibid 372.

<sup>21</sup> Bawa (n 7) 94.

<sup>22</sup> Ibid.

<sup>23</sup> Rebecca Adami, *Women and the Universal Declaration of Human Rights* (Routledge 2018).

<sup>24</sup> ‘Women Who Shaped the Universal Declaration’ (*United Nations*) <<https://www.un.org/en/events/humanrightsday/women-who-shaped-the-universal-declaration.shtml>> accessed 1 April 2019; ‘The Role of Women in Shaping the Universal Declaration of Human Rights’ (*UN Human Rights Office of the High Commissioner*) <<https://www.ohchr.org/EN/NewsEvents/Pages/TheRoleWomenShapingUDHR.aspx>> accessed 1 April 2019; Kalny (n 19).

<sup>25</sup> Banda (n 8); Cook (n 15).



With this criticism in mind, the Convention on the Elimination of all Forms of Discrimination against Women, the African Charter on Human and People's Rights, and the Maputo Protocol are discussed in the following section. A better understanding of these human rights treaties is necessary to assess the Declaration's influence on their making and application with regards to women's rights in Africa. The assumption is that while the UDHR offers a normative foundation, it is the subsequent development of human and women's rights instruments which allows for advocacy both internationally and regionally.<sup>26</sup> This is not to demonstrate the universality of the Declaration but aims at illustrating the extent of its relevance for women's rights in Africa and to assess its future role.

### **3. THE UDHR ON PAPER – REFERENCES IN CEDAW, THE AFRICAN CHARTER, AND THE MAPUTO PROTOCOL**

The treaties discussed in this section have been chosen for three reasons, firstly, based on their relevance for women's rights in the African human rights system, secondly, for their textual references to the Declaration and, thirdly, for their enforceability by treaty bodies and in courts. CEDAW is the first comprehensive women's rights treaty by the UN and has been ratified by 51 of the 55 AU member states. The African Charter is the fundamental human rights instrument in the African region, which, together with its Protocol on the Rights of Women, provides an elaborate framework for the protection and promotion of women's rights in Africa. Arguably, several other examples could be examined, however, due to the focus of this article, the analysis is limited to the instruments as stated.<sup>27</sup>

---

<sup>26</sup> Brooke A Ackerly, 'Women's Human Rights Activists as Cross-Cultural Theorists' (2001) 3 International Feminist Journal of Politics 311.

<sup>27</sup> Other international and regional human rights instruments of importance for the advancement of women's rights include but are not limited to Security Council Resolution 1325, the Beijing Platform for Action and the Millennium Development Goals resulting from the Millennium Declaration and the Sustainable Development Goals as part of the 2030 Agenda for Sustainable Development as well as the Solemn Declaration on Gender Equality in Africa and the 2009 African Gender Policy by the AU. Sub-regional African human rights instruments worth mentioning are the SADC Protocol on Gender and Development (2008), the COMESA Gender Policy (2002), the Great Lakes Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (2008), and the East African Community Gender and Community Development Framework (2006).



### 3.1. CEDAW – TRANSLATING HUMAN RIGHTS INTO WOMEN’S RIGHTS

In response to the lack of gender perspective in the Universal Declaration of Human Rights, the UN adopted CEDAW in 1979.<sup>28</sup> In its Preamble, it is noted “that despite these various instruments [resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women] extensive discrimination against women continues to exist”<sup>29</sup>. CEDAW acknowledges that the Universal Declaration of Human Rights confirms the formal equality of all human beings without distinction of any kind, but, at the same time, underlines the need for substantive equality<sup>30</sup> and enforceable measures to protect and promote the human rights of women.

CEDAW identifies the underlying reasons for women’s ongoing discrimination and displays a nuanced understanding of gender prejudices, structural inequality and the obstacles to social change.<sup>31</sup> The denial of the right to be free from discrimination based on sex is a legacy of patriarchal structures and gendered hierarchies which, historically, did not consider women equal to men. In contrast to the Declaration, CEDAW’s wording explicitly refers to discrimination against women and not only to discrimination based on sex. Besides, CEDAW covers direct as well as indirect discrimination, which means that laws or practices that do not intend to have a discriminating effect, yet negatively affect women, must be amended as well.<sup>32</sup> Thus,

---

<sup>28</sup> CEDAW was preceded by the Convention on the Political Rights of Women in 1953 and the Declaration on the Elimination of Discrimination against Women in 1967 which set the foundation for a comprehensive women’s rights treaty.

<sup>29</sup> CEDAW (n 3) Preamble.

<sup>30</sup> In the words of Sandra Fredman, substantive equality should be understood as a multi-dimensional concept with the aim to ‘to address stigma, stereotyping, prejudice and violence; enhance voice and participation; and accommodate difference and achieve structural change’ to benefit disadvantaged, marginalised and oppressed social groups such as women; see ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712.

<sup>31</sup> CEDAW (n 3) art 5(a); Claude Welch, ‘Human Rights and African Women: A Comparison of Protection under Two Major Treaties’ (1993) 15 *Human Rights Quarterly* 549.

<sup>32</sup> Andrew Byrnes, ‘The Convention on the Elimination of All Forms of Discrimination against Women’ in Wolfgang Benedek, Esther Mayambala Kisaakye and Gerd Oberleitner (eds), *The Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002).

CEDAW continuously reminds State Parties to “implement the principles set forth in the Declaration [...] and, for that purpose, to adopt the measures required”<sup>33</sup> further introducing ‘temporary special measures aimed at accelerating de facto equality between men and women’.<sup>34</sup>

Nonetheless, many gaps remain in the Convention's provisions especially when it comes to sexual and reproductive health rights. While CEDAW mentions the right to health care and the right to education on health and sexual and reproductive rights, it does not refer to abortion.<sup>35</sup> Besides, there is no specific article on sexual and gender-based violence against women, a failure that the Committee has tried to rectify with General Recommendation 19.<sup>36</sup> Another point of criticism is the lack of an intersectional approach<sup>37</sup> when it comes to discrimination against women.<sup>38</sup> Except for Article 14, which focuses on the rights and protection of rural women, it is only subsequent recommendations that take into account the particular problems faced by women in armed conflict, asylum-seeking women and so forth.<sup>39</sup> Although general recommendations are not binding on State Parties they still serve as interpretive guidelines and can put pressure on State Parties.<sup>40</sup> They serve as important mechanisms to expand on the provisions in CEDAW and for the Committee to advance the women's rights framework.

---

<sup>33</sup> CEDAW (n 3) Preamble.

<sup>34</sup> Ibid art 4(1); CEDAW General Recommendation 25.

<sup>35</sup> CEDAW (n 3) arts 10(h), 12.

<sup>36</sup> CEDAW General Recommendation 19.

<sup>37</sup> In the late 1980s and early 1990s, African-American feminist scholars such as Collins and Crenshaw started to draw attention on the intersection of black women's economic, social and political position with their race, gender and class, which is especially helpful when it comes to many women of colour both from the African continent and elsewhere; see PH Collins, *Black Feminist Thought : Knowledge, Consciousness, and the Politics of Empowerment* (Routledge 1990); K Crenshaw, ‘Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’ (1989) University of Chicago Legal Forum 139; K Crenshaw, ‘Mapping the margins: Intersectionality, identity politics, and violence against women of colour’ (1991) 43 Stanford Law Review 1241.

<sup>38</sup> Johanna E Bond, ‘CEDAW in Sub-Saharan Africa: Lessons in Implementation’ (2014) Michigan State Law Review 241.

<sup>39</sup> CEDAW General Recommendation 14, 17, 26, 30, 32.

<sup>40</sup> Byrnes (n 32).

Ultimately, CEDAW has filled a critical gap in the UN system with regards to women's rights and provided a much-needed foundation for the ongoing development of the women's rights discourse. Yet, when it comes to women's rights in Africa, CEDAW loses some of its leverage due to its failure to acknowledge that with differing cultural contexts come differing human rights issues.<sup>41</sup> For example, traditional and customary laws of land succession and patrilineal systems of inheritance tend to exclude many African women and render them dependent on male family members.<sup>42</sup> A 2018 Working Paper by the World Bank Group found that women are significantly less likely to own property in terms of land and housing based on data from 28 sub-Saharan African countries.<sup>43</sup> The report established a correlation between higher ownership rates and legal frameworks that protect the property rights of women further showing that the gender gap in property ownership is larger in rural areas.<sup>44</sup> However, Cheryl Doss et al. claim that 'many oft-cited statements about women's land-ownership are gross oversimplifications and are not substantiated by any available data', although the study does not challenge the understanding that women generally own significantly less land than men.<sup>45</sup> The inability of CEDAW to capture and cater to such cultural differences and issues has created a normative gap and has seemingly left especially African women behind.<sup>46</sup>

### 3.2. THE AFRICAN CHARTER – THE REGION'S TAKE ON HUMAN RIGHTS

The African Charter on Human and Peoples' Rights is the region's human rights treaty and operates within the specific geographic and cultural framework.<sup>47</sup> The Charter is

---

<sup>41</sup> Bond (n 38).

<sup>42</sup> Tamale (n 18); Akinola (n 6).

<sup>43</sup> Isis Gaddis, Rahul Lahoti and Wenjie Li, 'Gender Gaps in Property Ownership in Sub-Saharan Africa' (World Bank Group 2018) Policy Research Working Paper 8573.

<sup>44</sup> Ibid.

<sup>45</sup> Cheryl Doss and others, 'Gender Inequalities in Ownership and Control of Land in Africa: Myth and Reality' (2015) 46 *Agricultural Economics* 403.

<sup>46</sup> Jing Geng, 'The Maputo Protocol and the Reconciliation of Gender and Culture in Africa' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019).

<sup>47</sup> Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 *Human Rights Quarterly* 838; Bawa (n 7).

unique in the way it promotes the rights of the individual bearing in mind the communitarian nature of African societies by outlining the duties of the individual towards their community.<sup>48</sup> However, the Charter only briefly addresses the human rights of women. Article 18(3) is the only provision that directly refers to women calling for the “elimination of every discrimination against women” further requiring state parties to ‘ensure the protection of the rights of women and the child as stipulated in international declarations and conventions’.<sup>49</sup> With regards to these international declarations and conventions, the African Charter shows its affirmation of the Universal Declaration of Human Rights in the Preamble and in Article 60 stating that the African Commission “shall draw inspiration from international law on human and people’s rights from the provision of [...] the Universal Declaration of Human Rights”<sup>50</sup>, amongst others, and recognises the role model function of the Declaration for the human rights framework in the African region.<sup>51</sup>

According to feminist critiques, the lack of women-related provisions is a sign of the same underlying patriarchal thinking that influenced the drafting of the UDHR and renders women’s needs and grievances invisible.<sup>52</sup> Moreover, it is important to note that the rights of women are only mentioned in connection with the rights of the child, therefore, in the context of the family, as mothers and caregivers, which limits the potential of the Charter to address women’s rights in general and outside the family context.<sup>53</sup> Additionally, Judge Ouguergouz criticises the lack of provisions regarding the right to privacy, the right to vote in regular elections, equal protection for le-

---

<sup>48</sup> ACHPR (n 4) arts 27, 29; Makau Wa Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 *Virginia Journal of International Law* 339; Bawa (n 7).

<sup>49</sup> ACHPR (n 4) art 18(3).

<sup>50</sup> Ibid art 60.

<sup>51</sup> B Obinna Okere, ‘The Protection of Human Rights in Africa and the African Charter on Human and People’s Rights: A Comparative Analysis with the European and American Systems’ (1984) 6 *Human Rights Quarterly* 141.

<sup>52</sup> Bawa (n 7); Ssenyonjo (n 7).

<sup>53</sup> Geng (n 46); Nadine Puechguirbal, ‘Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents’ (2010) 17 *International Peacekeeping* 172.

gitimate and natural children and the right to marriage with full consent of both parties - rights that disproportionally affect women.<sup>54</sup> Also, with respect to nationality and citizenship laws there is no provision to address the fact that in many countries, women are not able to pass on their nationality onto their children.<sup>55</sup>

As a result, African women's groups and civil society organisations noted that despite the widespread ratification of the Charter and CEDAW, discrimination of women continued to prevail on the continent. The existing provisions did not seem to be able to grasp the realities of African women.<sup>56</sup> Hence, in 1995, the former Organisation of African Unity initiated a process for the drafting of a protocol to the African Charter to address the rights of women in Africa.<sup>57</sup> After eight years of combined efforts, the Protocol was adopted in 2003, came into effect in 2005, and is a beacon of women's mobilisation in politics and law-making on the continent.

### 3.3. INTEGRATING WOMEN'S RIGHTS INTO THE AFRICAN HUMAN RIGHTS SYSTEM - THE MAPUTO PROTOCOL

The African Charter offers an extensive framework for the protection and promotion of human rights in Africa. Yet, it is the Maputo Protocol that has translated these rights into women's rights and through which African women have demonstrated their agency. Apart from the Charter, the Maputo Protocol acknowledges the importance of the Universal Declaration of Human Rights noting that "women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights".<sup>58</sup> However, similar to CEDAW, the Protocol further states that

---

<sup>54</sup> Judge Fatsah Ouguergouz, 'The African Charter on Human and People's Rights. A Living and Evolving Instrument for the Promotion and Protection of Human Rights in Africa' (Speech for the celebration of the 30th anniversary of the African Charter, Banjul, 2011).

<sup>55</sup> As an example case, see *Unity Dow v Attorney General of Botswana* (1992) 103 ILR 128.

<sup>56</sup> Fareda Banda, 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force' (2006) 50 *Journal of African Law* 72.

<sup>57</sup> Geng (n 46).

<sup>58</sup> Maputo Protocol (n 5) Preamble.

“despite the ratification of the African Charter on Human and People's Rights and other international human rights instruments by the majority of state parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices”.<sup>59</sup>

In this regard, the Protocol requires State Parties to integrate a gender perspective in their policies, domestic legislation, and other activities to ensure that women's interests and needs are represented and catered for. As with CEDAW, the Maputo Protocol further encourages the implementation of temporary special measures in “areas where discrimination against women in law and in fact continues to exist”.<sup>60</sup> However, in contrast to CEDAW, Banda argues that the Maputo Protocol has been successful in mediating between the principles of non-discrimination and equality and cultural practices in Africa which often seem irreconcilable.<sup>61</sup> For example, the Maputo Protocol advocates for the eradication of polygamy, yet, at the same time, acknowledges polygamy as a widespread occurrence on the African continent. Although the rights of women in such relationships are respected and protected, there is a clear tendency towards monogamy as “the preferred form of marriage”.<sup>62</sup> Also, when it comes to health and reproductive rights, the severity of the HIV/AIDS epidemic in the African region is taken into consideration.<sup>63</sup> Aside from that, the Maputo Protocol is the only human rights instrument that explicitly mentions the right to medical abortion in cases of rape, incest and where the continued pregnancy endangers the life of the mother, and the right to protection from harmful practices such as FGM.<sup>64</sup>

Moreover, again in contrast to CEDAW, the Maputo Protocol defines intersectional forms of discrimination affecting for example refugee women, elderly women, widows, and women with disabilities.<sup>65</sup> The further inclusion of the girl child in the Protocol is particularly relevant considering that discrimination against women does not only start with adulthood. Girls drop out of school more often than boys due to

---

<sup>59</sup> Ibid Preamble.

<sup>60</sup> Ibid art 2(1)(d).

<sup>61</sup> Banda (n 8).

<sup>62</sup> Maputo Protocol (n 7) art 6(c).

<sup>63</sup> Ibid art 14(1)(d), (e).

<sup>64</sup> Ibid art 14(2)(c).

<sup>65</sup> Ibid arts 1(k), 22, 23.

numerous reasons, such as child marriage; teenage pregnancies, to assist in the household and look after younger siblings; to support their families financially through work; or because parents can only afford for some of their children, preferably boys, to get an education.<sup>66</sup> Another contemporary example of the structural inequality that disadvantages women and girls in Africa is the so called Mobile Gender Gap.<sup>67</sup> Seven out of ten online mobile users on the continent are men and only two out of three women own a cell phone.<sup>68</sup> Out of the two women with a cell phone only one uses mobile data on a regular basis. As one of several potential reasons for this, women's lack of education in terms of literacy and digital skills is mentioned.<sup>69</sup>

As with CEDAW and the African Charter, many issues remain and will still emerge as time progresses. Already, criticism of the Protocol comes from various sides: Scholars such as Davis have written that the language used in the Protocol creates an 'over-specificity' which might exclude certain groups of women from the protection through the Protocol and at the same time deter countries from signing and ratifying the treaty.<sup>70</sup> Comments by, for example, Pope Benedict XVI have confirmed this prediction when he referred to Article 14 and its provisions on abortion as an attack on life and urged African leaders to reject the Protocol.<sup>71</sup> Also, when it comes to the ratification and implementation of the Maputo Protocol, 13 AU member states

---

<sup>66</sup> 'Girls' education. Gender equality in education benefits every child' (UNICEF)

<<https://www.unicef.org/education/girls-education>> accessed 30 October 2019; Stephanie Thomson, '1 in 10 girls in Africa will drop out of school for this reason' (World Economic Forum, 9 December 2015) <<https://www.weforum.org/agenda/2015/12/1-in-10-girls-in-africa-will-drop-out-of-school-for-this-reason/>> accessed 30 October 2019; Dorota Gierycz, 'Human Rights of Women at the Fiftieth Anniversary of the United Nations' in Wolfgang Benedek, Esther Mayambala Kisaakye and Gerd Oberleitner (eds), *The Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002).

<sup>67</sup> Silja Fröhlich, 'Africa's Mobile Gender Gap: Millions of African Women Still Offline' *Deutsche Welle* (9 August 2019) <<https://www.dw.com/en/africas-mobile-gender-gap-millions-of-african-women-still-offline/a-49969106>> accessed 11 October 2019.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid; see also Oreoluwa Somolu, "'Telling Our Own Stories": African Women Blogging for Social Change' (2007) 15 *Gender & Development* 477.

<sup>70</sup> Kristin Davis, 'The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination' (2009) 42 *Vanderbilt Journal of Transnational Law* 949.

<sup>71</sup> 'The fight against the Maputo Protocol' (The Maputo Protocol. A clear and Present Danger) <<https://maputoprotocol.com/the-fight-against-the-maputo-protocol>> accessed 30 October 2019.



have yet to ratify the treaty and it might be too early to predict the future impact of the Protocol. It was only in 2017 that an international human rights body, namely the Economic Community of West African States (hereafter ECOWAS) Court of Justice, first applied the Protocol's provisions and in 2018 the Protocol was first applied by the African Court on Human and Peoples' Rights. Amongst others, these two cases will be discussed in the following with regard to their references to the Universal Declaration of Human Rights.

#### 4. THE UDHR IN COURT – SELECTED CASES ON WOMEN'S RIGHTS FROM THE AFRICAN REGION

The following cases have been selected to illustrate the work of international treaty bodies and courts such as the ECOWAS Court of Justice and the African Commission when it comes to women's rights on the continent.<sup>72</sup> At the expense of a lengthy introduction and examination of the cases, the analyses are limited to a focus on references to the Universal Declaration of Human Rights to assess the extent to which the Declaration is relevant for the interpretation of women's rights in the African region. The section starts with *Koraou v The Republic of Niger*<sup>73</sup>, in which the court decided in favour of a woman who had been sold to an older man as a servant and concubine when she was twelve years old. The *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*<sup>74</sup> is a case about sexual and gender-based violence in which women journalists, who had participated in political protests, were violated and sexually assaulted. Lastly, *Dorothy Njemanze and 3 others v The Federal Republic of Nigeria*<sup>75</sup> is discussed, a case that dealt with the unlawful abduction and detention of four women and their assault by state officials.

---

<sup>72</sup> Other cases of interest are *JAO v. NA* (2013); *Centre for Rights Education and Awareness & another v. Speaker of National Assembly & Others* (2017); *CMN v. AWM* (2013), and *Kishindo v. Kishindo* (2014).

<sup>73</sup> *Koraou v Niger*, Merits, Suit No ECW/CCJ/APP/08/08, Judgment No ECW/CCJ/JUD/06/08, IHRL 3115 (ECOWAS 2008), 27th October 2008, Economic Community of West African States [ECOWAS].

<sup>74</sup> *Egyptian Initiative for Personal Rights and Interights v Egypt*, Merits, Communication No 323/06, IHRL 3805 (ACHPR 2011), 12th December 2011, African Commission on Human and Peoples' Rights [ACHPR].

<sup>75</sup> *Dorothy Njemanze and 3 others v The Federal Republic of Nigeria* ECW/CCJ/JUD/08/17.

#### 4.1. KORAOU V NIGER

In 1996, the plaintiff, in this case, was sold to an older man as part of a practice called *Wahiya* which allows older men, so-called masters, to buy younger girls to serve them as domestic servants and to engage in sexual relations.<sup>76</sup> The plaintiff served in the household for nine years during which four children were born as the result of forced sexual relations.<sup>77</sup> In 2008, the plaintiff was released from the services and decided to leave the house of her former master.<sup>78</sup> Yet, he refused to let her go stating that while she was no longer his servant, she was still his wife and had to stay with him.<sup>79</sup> The plaintiff eventually succeeded in leaving the house and brought her case before various civil and customary tribunals to no success.<sup>80</sup> On account of this, she submitted her case to the ECOWAS Court of Justice.

Consequently, the plaintiff sued the Republic of Niger for violating Articles 1, 2, 3, 5, 6, and 18 (3) of the African Charter, further requesting Niger to introduce new legislation to protect women from slavery, forced marriage, discriminatory divorce customs, and to provide her with compensation.<sup>81</sup> In its analysis, the Court repeatedly referred to the Universal Declaration based on the plaintiff's arguments on discrimination and equality before the law, stating that the non-discrimination principle derives from Article 1 of the UDHR and that it is this principle "that allows for a definition in the field of equality".<sup>82</sup>

In conclusion, the Court held that Niger was responsible under both international and national law for human rights violations against the plaintiff based on slavery and the inaction of state authorities to provide the plaintiff with assistance.<sup>83</sup> Ad-

---

<sup>76</sup> *Koraou v Niger* (n 73) Presentation of the fact and procedure para 9.

<sup>77</sup> *Ibid* para 12.

<sup>78</sup> *Ibid* para 14

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* paras 15 – 27.

<sup>81</sup> *Ibid* para 28.

<sup>82</sup> *Ibid* Consideration of the parties' pleas-in-law para 64.

<sup>83</sup> *Ibid* On merits para 2.

ditional references were made to CEDAW albeit without mentioning specific provisions.<sup>84</sup> The Court subsequently outlawed the *Wahiya* practice because it excludes women “of the equal dignity recognised to all citizens”.<sup>85</sup>

#### 4.2. EGYPTIAN INITIATIVE V EGYPT

In this case, the plaintiffs were several female journalists who had been insulted, violated, and sexually assaulted during political protests in Cairo in 2005.<sup>86</sup> The perpetrators were state officials who were actively involved in the attacks as well as passive bystanders, who had neglected their mandate to protect the women under attack.<sup>87</sup> The affected women complained with the Public Prosecution Office after which they were harassed and threatened by government officials to withdraw their cases.<sup>88</sup> The local prosecution office decided not to investigate on behalf of the victims and the women's appeal on this decision was dismissed.<sup>89</sup>

After having exhausted the local remedies, the women turned to the African Commission and based their cases on the violations of their rights as per articles 1, 2, 3, 5, 7(1)(a), 9(2), 16, 18(3), and 26 of the African Charter.<sup>90</sup>

In its judgement, the Commission observed that the Respondent State was in violation of all of the above articles except Articles 7(1)(a) and 16(2) and that the treatment of the women was not justifiable. Based on Articles 2 and 18(3), the Commission found that the violations against the victims were perpetrated because of their gender and constituted acts of sexual and gender-based violence. The Court underlined their decision with references to other human rights instruments including Articles 1(f) and (j) of the Maputo Protocol,<sup>91</sup> Articles 1 and 4(c) of CEDAW,<sup>92</sup> and Articles 19 and 25 of

---

<sup>84</sup> Ibid For these reasons.

<sup>85</sup> Ibid Consequently para 2.

<sup>86</sup> *Egyptian Initiative v Egypt* (n 74) paras 3 – 12, 14 – 15, 17 – 20.

<sup>87</sup> Ibid paras 3 – 6, 11, 18.

<sup>88</sup> Ibid paras 13, 16, 20.

<sup>89</sup> Ibid paras 7 – 8, 13, 16, 21 – 22.

<sup>90</sup> Ibid paras 21 – 23.

<sup>91</sup> Ibid paras 87, 121.

<sup>92</sup> Ibid paras 88, 89, 122, 123, 165.

the Universal Declaration of Human Rights.<sup>93</sup> In paragraphs 244 and 262 the Court emphasised that the right to freedom of expression and the right to health have been acknowledged under the UDHR further stressing that “everyone” has these rights.<sup>94</sup>

Concluding, the Commission urged Egypt to provide compensation for the victims and to ensure that similar cases are adequately investigated and prosecuted by the authorities.

#### 4.3. NJEMANZE V THE FEDERAL REPUBLIC OF NIGERIA

In this case, the plaintiffs were four Nigerian women who challenged their unlawful detention and mistreatment by Nigerian state authorities who had accused them of being sex workers, because they were out at night.<sup>95</sup> The plaintiffs lodged numerous complaints with the Commissioner of Police, the Public Complaints Commission, the National Human Rights Commission, and other Law Enforcement Agencies which were dismissed.<sup>96</sup>

The ECOWAS Court found that the treatment of the women constituted gender discrimination and sexual and gender-based violence; and they criticised the failure of the Nigerian state to investigate and prosecute the violations of the plaintiffs’ rights. The Court decided in favour of the women based on Articles 1, 2, 3, 5, and 18(3) of the African Charter and Articles 2, 3, 4(1), and (2), 5, 8 and 25 of the Maputo Protocol.<sup>97</sup> The judgement was based on various other human rights instruments such as CEDAW and the UDHR. Concerning the UDHR, the Court defined that the treatment of the plaintiffs constituted gender-based discrimination, cruel, inhuman, and degrading treatment contrary to Articles 1, 2, 5, and 7.<sup>98</sup> Also, the failure of the Respondent State to investigate the plaintiffs’ complaints and to provide redress was considered to violate Article 8 of the UDHR.<sup>99</sup>

---

<sup>93</sup> Ibid paras 244, 262.

<sup>94</sup> Ibid.

<sup>95</sup> *Njemanze v Nigeria* (n 75) 18, 36 – 37.

<sup>96</sup> Ibid paras 5, 7, 8

<sup>97</sup> Ibid 41.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

In closing, the Court noted the failure of the Respondent State to fulfil its international obligations and awarded the plaintiffs with monetary compensation.

#### 4.4. DISCUSSION OF CASES

Although the number of cases addressed in this article is limited, their analysis has given an idea of the extent to which the Universal Declaration of Human Rights is relevant for the interpretation of women's rights in Africa today. Previously, CEDAW, the African Charter, and the Maputo Protocol have shown continuous references to the Declaration. This goes hand in hand with the findings from the court cases, in which all judgements referred to the Declaration amongst other human and women's rights instruments.

However, the provisions of the Declaration brought forward in support of the alleged violations under review often did not mirror the actual charges. In *Koraou v Niger*, the main focus and significance of the case lay on the aspect of slavery and on the eradication of *Wahiya* as a practice and form of slavery that exploits and oppresses women based on the African Charter, the 1926 Slavery Convention, the European Convention of Human Rights, the American Convention of Human Rights, the ICCPR and the Nigerian criminal code.<sup>100</sup> The prohibition of slavery is not only enshrined in Article 4 of the UDHR, it is a fundamental principle of international law and qualifies as *jus cogens*. The Court could have further elaborated on the connection between gender inequality, discrimination and this particular form of slavery, also under consideration of the provisions of the UDHR, but only mentioned the Declaration with regard to its guidance in the field of equality. Essentially, the reference to the UDHR was used to frame the case within a broader discourse on equality but not to advance the Court's slavery jurisprudence.

For the *Egyptian Initiative v Egypt* case, further provisions of the UDHR could have been submitted, for example, Articles 2, 4, 5, and 6. Yet, only Articles 19 and 25 made it into the African Commission's reasoning. Considering the violations experienced by the plaintiffs, it is questionable to focus on the Declaration's provisions on the right to freedom of expression and the right to health only. The analysis by the Commission was mainly under the African Charter but heavily influenced by

---

<sup>100</sup> *Koraou v Niger* (n 73) paras 72, 74, 75.

CEDAW and the Maputo Protocol, although the Protocol had neither been signed nor ratified at the time. Therefore, it seems as if the Declaration was added to magnify the scope of the violations to the advantage of the applicants where the other treaties lacked content.

In *Njemanze v Nigeria* the Court recognised the violation of rights of the women because they were not sex workers and therefore should not have been abused and arrested. However, in the spirit of the UDHR, the Court should have reasoned that, no matter the women's status, they should not have been subjected to the treatment they received. It is questionable that the Court would have made the same decision and referred to the Declaration if the women had indeed been sex workers. In the light of this, the influence and significance of the Declaration on case law seems limited. At the same time, however, applicants continuously base their cases on the provisions of the UDHR and so do the courts in their decisions.

While the Declaration as a non-binding instrument is not vital to the decision-making, it seems to be an integral part in the making of human rights jurisdiction. However, in 2018, the African Court on Human and Peoples' Rights made a landmark decision based on the violations of the Maputo Protocol which did not feature the Declaration at all.<sup>101</sup> Human rights organisations had brought the case before the Court challenging Mali's 2011 Family Code. The Family Code in question allegedly neglected Mali's obligation to eliminate traditional practices and conduct harmful to the rights of women and children as it violated the minimum age of marriage for girls, the right to consent to marriage and the right to inheritance.<sup>102</sup> The Court found that Mali had indeed violated Articles 2, 5, 6(a) and (b) and 21 of the Maputo Protocol further adding that the Family Code violated the right to non-discrimination as set out in CEDAW<sup>103</sup> and the African Charter on the Rights and Welfare of the Child.<sup>104</sup> In its decision, the Court ordered Mali to amend the law and to comply with its state party obligations under the respective human rights instruments.<sup>105</sup> Striking, in this case, is

---

<sup>101</sup> *Association Pour Le Progres Et La Defense Des Droits Des Femmes Maliennes (APDF) & The Institute for Human Rights & Development in Africa (IHRDA) v. Republic of Mali*, 2018 (African Court of Human and Peoples' Rights).

<sup>102</sup> Ibid 14 – 24.

<sup>103</sup> CEDAW (n 3) arts 5(a), 16(1)(b).

<sup>104</sup> African Charter on the Rights and Welfare of the Child 1999 arts 1(3), 2, 3, 4, 21.

<sup>105</sup> *APDF & IHRDA v Mali* (n 101) 28-29.

the absence of any references to the UDHR to underline the Court's reasoning or to strengthen the decision in comparison to the previously discussed cases. The Court confidently built on the Maputo Protocol, the Children's Charter and CEDAW as the primary legal sources without the need to frame the case within the broader context of the Universal Declaration of Human Rights.

To be efficient in the protection and promotion of women's rights in Africa, the human rights regime should be able to override powerful states and non-state actors and hold perpetrators who violate human rights accountable. Human rights treaties such as CEDAW, the African Charter, and the Maputo Protocol are supposed to do just that. However, although the Malian case has shown a strong focus on these treaties, at the expense of the UDHR, their application in the previously discussed cases has varied. While the Maputo Protocol was critical in *Njemanze v Nigeria*, it has only been mentioned as a supportive reference in *Egyptian Initiative v Egypt*. CEDAW is only mentioned as an interpretative guideline of secondary importance albeit referred to consistently in all cases. Yet, this should not be seen as a disadvantage. The Maputo Protocol and CEDAW encourage the use of and supplementation through "more conducive"<sup>106</sup> and "more favourable"<sup>107</sup> human rights frameworks when it comes to the protection and promotion of women's rights. Similarly, the African Charter allows the use of numerous human rights instruments to be utilised in favour of its provisions which creates the potential for powerful combinations to protect and promote women's rights in Africa.<sup>108</sup> In all cases, the state under scrutiny was a State Party to several binding and non-binding human rights instruments. This enabled the plaintiffs to utilise a broad framework of complementary provisions to build and strengthen their cases and allowed for choice regarding the treaty body or court with the highest chances for success.

---

<sup>106</sup> CEDAW (n 3) art 23.

<sup>107</sup> Maputo Protocol (n 7) art 1.

<sup>108</sup> Ssenyonjo (n 7).



## 5. THE FUTURE ROLE OF THE UDHR FOR WOMEN'S RIGHTS IN AFRICA AND CONCLUDING REMARKS

The purpose of this article was to explore the significance of the Universal Declaration of Human Rights for women's rights in Africa 70 years after its adoption. To this end, the article assessed the Declaration's relevance for the interpretation of women's rights in Africa through a textual analysis of subsequent human and women's rights treaties and court cases. Considering the findings, the Declaration's relevance for women's rights in Africa, however irregular and sparse, cannot be denied. Even in the Malian case, in which the Court did not refer to the Declaration, it relied on CEDAW and the Maputo Protocol which both cite the UDHR in its texts. In other words, the Declaration has not become redundant nor has it been replaced, but it lives on through these treaties.

Contrary to the concerns of the marginalisation of women's rights, the combination of various human and women's rights instruments has further been an asset for women's rights activists and advocates in African courts. Also, considering that not all states diligently sign and ratify every newly adopted human rights treaty, the UDHR serves as an important backup declaration. It is beyond the scope of this article to examine why states commit to some human rights instruments and not to others or only ratify under reservations, however, the phenomenon of 'forum- and provision-shopping' lends even more significance to the UDHR as a fundamental guideline and guarantee of basic principles of human rights that cannot be limited through reservations.<sup>109</sup>

Besides, the UDHR is not only of importance in the international human rights system, but also in the domestic context of African States. Many African Constitutions are built on international human rights law and need to be applied with respect to the UDHR.<sup>110</sup> The Constitution of Burundi states in Article 19 that the

---

<sup>109</sup> Linda M Keller, 'The Impact of State Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' [2014] Michigan State Law Review 309; Ssenyonjo (n 7); Banda (n 8); Oloka-Onyango and Tamale (n 8).

<sup>110</sup> Hurst Hannum, 'The UDHR in National and International Law' (1998) 3 Health and Human Rights 144; Ibhawoh (n 47).

“rights and duties proclaimed and guaranteed, between others, by the Universal Declaration of Human Rights, the International Pacts related to human rights, the African Charter of human and community rights, the Convention on the elimination of all forms of discrimination at towards women [...] are an integral part of the Constitution of the Republic of Burundi”.<sup>111</sup>

In *Ephraim v Pastory*<sup>112</sup> the Tanzanian High Court cited the Declaration in its judgement and decided in favour of a woman who challenged the discriminatory customary practices of her clan regarding land inheritance and ownership. The High Court held that the custom was discriminatory and violated women's property rights and that according to Article 13(4) of the Bill of Rights in the Tanzanian Constitution, discrimination against women was prohibited.<sup>113</sup> The Court further argued that the Universal Declaration of Human Rights was a fundamental part of the Tanzanian Constitution as stated in Article 9(1)(f) and therefore important for the interpretation of domestic constitutional and statutory provisions.<sup>114</sup>

Despite the criticism of the Declaration as Western and patriarchal, it has proven to be a flexible moulding tool for the subsequent making of human and women's rights instruments within the African region and worldwide.<sup>115</sup> The UDHR is not only continuously referenced in international and African human rights texts, but also by international and regional treaty bodies, courts and movements. There seems to be “a set of core human rights to which all humanity aspires”<sup>116</sup> which has played an important role when it comes to women's rights in Africa.<sup>117</sup> The further development of human and women's rights treaties within and from particular geographic and cultural contexts has created a human rights framework that allows for cross-cultural interaction and influences the continuous reinterpretation and reinforcement of the Declaration. Thus, due to its flexibility in interpretation and its ability to be combined with other human rights instruments, the strength of the human rights

---

<sup>111</sup> Constitution of the Republic of Burundi 2005 art 19.

<sup>112</sup> *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990).

<sup>113</sup> Ibid paras 5, 10.

<sup>114</sup> Ibid para 10.

<sup>115</sup> Hannum (n 110).

<sup>116</sup> Ibhawoh (n 47) 838.

<sup>117</sup> An-Na'im (n 9); Oloka-Onyango and Tamale (n 8); Bawa (n 7).

framework lies in its diversity and compatibility, the Declaration will continue to provide a foundation for both activism as well as the development of other women's rights frameworks.

African women's rights movements and activists together with transnational coalitions have realised this potential and draw from a variety of options to shape their socio-economic and cultural environment as well as to apply pressure through political and legal means. As could be seen at the example of the drafting process of the Maputo Protocol, African women and feminist activists have successfully built alliances and lobbied legal and political systems to influence public agendas.<sup>118</sup> In *Koraou v Niger*, a coalition of lawyers from various countries such as Nigeria, Senegal and the United Kingdom acted a counsel and organisations such as Anti-Slavery International and the Nigerian Anti-Slavery Organisation Timidra cooperated to support the applicant under the guidance of Interights, the International Centre for the Legal Protection of Human Rights. In the Egyptian case, an international coalition of the Egyptian Initiative for Personal Rights and Interights, again, represented the applicants. In *Njemanze v Nigeria*, an initiative by the Institute for Human Rights and Development in Africa, the Alliances for Africa, the Nigerian Women Trust Fund and a local law firm filed the case before the Court with further support from the Open Society Initiative for West Africa.

However, coalitions and initiatives can be of a limited lifetime due to loss of momentum or a lack of resources or political will. Therefore, it is even more important that human rights instruments such as the Universal Declaration of Human Rights exist and continue to create spaces for civil society and legal initiative to develop and grow. Also, considering the lack of knowledge and awareness of the plethora of human rights instruments by the public, in the case of many African women due to a lack of education and access to information, and due to a lack of publicity and marketing on behalf of the organisations and treaty bodies, it can be an intricate task to navigate the human rights framework. Yet, there is a growing confidence among African women when it comes to claiming their rights and the Universal Declaration often serves as a widely known reference and grassroots organising tool due to its 70 years of existence.

---

<sup>118</sup> Bouilly, Rillon and Cross (n 8).

As for the limitations of this research and its focus on the discussed international and regional human rights treaties, the *Travaux Préparatoires* could have been taken into consideration with regard to the influence of the Declaration during the drafting processes. *Travaux Préparatoires* are the official documentation of the negotiations and discussions during the drafting process and may be considered when interpreting and applying treaty provisions. Other suggestions for further research can be made concerning the Declaration's impact on sub-regional human rights instruments, constitutional provisions, and other domestic legislation. A more specific and in-depth focus can assist in achieving a better understanding of the relevance and future role of the UDHR for women's rights in Africa.

Moreover, despite its feminist perspective, a shortcoming of the article is that it perpetuates the conservative understanding of women pervasive in international law.<sup>119</sup> The focus on textual references to the UDHR in human rights texts and court cases did not allow examining how certain groups of women such as sex workers<sup>120</sup> or transgender women are excluded and silenced through the use of particular language. These issues are not only controversial within the African context but are complex and would require a more focused inquiry. In general, further research is necessary to assess how stereotyping language removes whole groups of women, who do not fit certain gender roles, from the women's rights framework and leaves them vulnerable to human rights violations.

Nevertheless, the research here presents a balanced optimism of the influence of the Universal Declaration of Human Rights in formal human rights laws and their application within the African region for the protection of the rights of African Women. It is apt to conclude that, the Declaration's continued relevance in outlining and securing these rights is crucial.

---

<sup>119</sup> Puechguirbal (n 53); Misbah Sabohi, Saghir Maher and Shafiqul Hassan, 'Feminist Perspective of International Law and Its Effect on International Courts and Tribunals' (2019) 22 *Journal of Legal, Ethical and Regulatory Issues* 1544.

<sup>120</sup> Ciara O'Connell, 'Reconceptualising the First African Women's Protocol Case to Work for All Women' (2019) 19 *African Human Rights Law Journal* 510.

## **FREEDOM FROM FEAR: HAS IT FADED SINCE THE UDHR? ON THE APPROACHES OF EUROPE AND CHINA**

**CHAO JING\***

### **ABSTRACT**

*The famous “Four Freedoms” were included in the preamble of the Universal Declaration of Human Rights (UDHR) around 70 years ago. Whilst freedom of speech and belief, and freedom from want have been further implemented afterwards, this seems not the case with freedom from fear. In the human rights discourse, freedom from fear has faded since its inclusion in the UDHR. European countries take the approach in reflecting it as primarily public interests in security, which often conflicts with human rights. China adopts, although not completely, a different approach, where it is reflected as both public interests in security and as a human right. However, the approaches within Europe and of China, both encounter challenges. This article argues that despite their different cultures and histories, Europe and China can mutually benefit from each other’s approaches.*

### **KEYWORDS**

Freedom from fear; security; public interests; human rights; Europe; China

---

\* Chao Jing, PhD Candidate of Human Rights, International and European Law, Faculty of Law, Economics and Governance, Utrecht University, 3584BH Utrecht, The Netherlands.

Email: [c.jing@uu.nl](mailto:c.jing@uu.nl)

\*\* The paper is sponsored by the China Scholarship Council programme.

\*\*\*With great thanks to editors for their much-appreciated linguistic check.

## 1. INTRODUCTION

Freedom from fear, along with the three other essential freedoms, was addressed by the then US President Franklin Roosevelt,<sup>1</sup> and later enshrined in the preamble of the Universal Declaration of Human Rights (hereinafter UDHR) in 1948.<sup>2</sup> When first addressed in 1941, the term “freedom from fear” demonstrated a clear connection with the Second World War. At the time France had already fallen into the hand of Nazi Germany, and the UK was mostly struggling alone on the continent. On the other hand, the US was physically outside the battlefield, being dominated by the “American First Movement” and isolationism.<sup>3</sup>

Peace, during that time, became a primary concern among the people. It was in this context Roosevelt made his annual address to Congress, articulating the Four Freedoms – freedom of speech, freedom of worship, freedom from want, and freedom from fear.<sup>4</sup> These freedoms attempted to provide some shared values or a blueprint of the future world that would be accepted by people from all nations.<sup>5</sup>

After the War, the Four Freedoms did not descend into an empty promise. As the fundamental “freedoms”, their inherent linguistic connections with “human rights” allowed them, as a whole or separately, to be reiterated as well as reflected by various human rights instruments. However, among the Four Freedoms, freedom from fear has not been translated into human rights treaties as perfectly or directly as others did.<sup>6</sup> Rather it surfaces as an underlying concept of some human rights or is transformed into public interests for purposes of (national) security.

---

<sup>1</sup> Franklin D. Roosevelt, ‘The Four Freedoms’ (*Voices of Democracy*, 6 January 1941) <[www.voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/](http://www.voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/)> accessed 6 April 2019.

<sup>2</sup> United Nations, Universal Declaration of Human Rights 1948, A/RES/217(III).

<sup>3</sup> See Office of the Historian, Bureau of Public Affairs, United States Department of State, ‘American Isolationism in the 1930s’ <<https://history.state.gov/milestones/1937-1945/american-isolationism>> accessed 1 August 2019. See also Robert Longley, ‘America First — 1940s Style’ (25 May 2019) <<https://www.thoughtco.com/america-first-1940s-style-4126686>> accessed 1 August 2019.

<sup>4</sup> Franklin D. Roosevelt (n 1).

<sup>5</sup> William J. Vanden Heuvel, ‘The Four Freedoms’ in Stuart Murray and James McCabe, *Norman Rockwell’s Four Freedoms: Images That Inspire a Nation* (Berkshire House 1993) 108.

<sup>6</sup> James Spigelman AC, ‘The Forgotten Freedom: Freedom from Fear’ (2010) 59(3) *The International and Comparative Law Quarterly* 543, 545.

This article employs a comparative methodology, relying on a historical and legal analysis in the context of human rights. Such analysis is conducted on the basis of relevant international human rights instruments and domestic legislations, as well as caselaw. This article intends to answer the question on how freedom from fear is reflected in human rights discourses, and to what extent it has faded within human rights. In this manner, the Section 2 addresses the origin of freedom from fear within the context of disarmament. It then moves on to argue that freedom from fear effectively means freedom from violence and aggression generally. Given the lack of human rights instruments and provisions directly addressing this, it is argued that freedom from fear has somewhat faded within the human rights discourse. Section 3 and 4 both provide an analysis on the approach of Europe and China, with regards to freedom from fear, respectively. It is within their specific context that translation of freedom from fear into public interests in security becomes clearer, and the challenges which follow. This raises question as how to reconcile freedom from fear with human rights. Even though China's broader definition of the right to life, which includes physical security offers an opportunity of rethinking freedom from fear within human rights, the prevalence of its national security policies raises further difficulties. In conclusion, this article argues that, freedom from fear, although faded, still strives in approaches of China and Europe. Nevertheless, both demonstrate that protecting freedom from fear either as a human right or public interests in security, requires ensuring that the primary object of protection – people – are not undermined during this process.

## **2. FREEDOM FROM FEAR: FROM DISARMAMENT TO HUMAN RIGHTS, HAS IT FADED?**

Fear refers to subjective and psychological features. It is not fear itself which the freedom aims to dispel, but those incidents causing this state of emotion. Within Roosevelt's 1941 speech, the need for freedom from fear was mentioned in the context of incidents caused by war.<sup>7</sup> In this sense, freedom from fear defined a

---

<sup>7</sup> Roosevelt addressed the freedom from fear in his speech as,



demand from the people for world peace and protection from aggression and violence, seen in the context of war.

Freedom from fear should, first and foremost, be understood within the scope of Roosevelt's attention on "a world-wide reduction of armaments".<sup>8</sup> That is, freedom from fear is linked to facilitating disarmament. An extreme interpretation of this notion would mean that, if all nations reduced their armament to the extent that no one was ever able to take aggression against another, then peace would ultimately prevail. However, it is too idealistic to expect a State to completely give up its own arms. Consider, the arms race which occurred during the Cold War, which posed an overwhelming risk to world peace, in the breakdown of international relations.

Nevertheless, substantial progress has been seen in the area of disarmament over the years. The United Nations (hereinafter UN), has played a key role in this process, given that "peace and security" is one of its three founding pillars. Such achievements in disarmament is seen especially concerning nuclear weapons.<sup>9</sup> For instance, the Treaty on the Non-Proliferation of Nuclear Weapons entered into force in 1970, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction in 1975.<sup>10</sup> Weapons of mass destruction, including nuclear, biological and chemical weapons as well as missiles, continue to be of primary concerns for disarmament.<sup>11</sup>

With the institutionalisation of the UN charter, the influence of freedom from fear, emerges in the prohibition States' resorting to warfare in international relations.<sup>12</sup> Adopting a pragmatic approach, the drafters of the UN Charter, moved

---

The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.

<sup>8</sup> Ibid.

<sup>9</sup> United Nations, *The United Nations and Disarmament Yearbook 1945-1970* (United Nations 1970) VI.

<sup>10</sup> See Disarmament Treaties Database <<http://disarmament.un.org/treaties/>> accessed 6 April 2019.

<sup>11</sup> United Nations Office for Disarmament Affairs <<https://www.un.org/disarmament/about/>> accessed 6 April 2019.

<sup>12</sup> Article 2 (4) of the Charter of the United Nations reads as follows,

away from disarmament in the language of its provision, and rather focused on deterring the use of force.<sup>13</sup> This is crucial as deciding otherwise may have undermined securing this freedom effectively. The UN Charter stipulates only two exceptional circumstances within which the use of force can be resorted to.<sup>14</sup> According to Article 42, an exception is given in the case of the Security Council, under whose authorisation military enforcement action can be taken to maintain or restore international peace and security.<sup>15</sup> The other exception is in Article 51, which allows use of force for States' self-defence when facing an armed attack from others.<sup>16</sup> However, in practice, these legal mechanisms are not immune from challenges. Several wars have started without the Security Council's authorisation and outside the scope of Article 51. In such cases States have provided only a rather indirect link with their "self-defence" characteristics. For instance, the Iraq War, initiated in 2003 by the United States-led coalition, was not authorised by the Security Council, and its contentious argument based on self-defence have faced much scrutiny.<sup>17</sup>

Whilst, in Roosevelt's original formulation in 1941, freedom from fear was mostly "a notion of arms control",<sup>18</sup> however, linguistically speaking, a "freedom" has inherent connections with human rights. Shortly after the establishment of the UN, the UDHR was drafted and then published. The Four Freedoms are enshrined in its preamble, as well as repeated in the International Covenant on Civil and

---

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

<sup>13</sup> Mark R. Shulman, 'The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity' (2008) 77 Fordham Law Review 555, 571.

<sup>14</sup> Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford 2015) 473.

<sup>15</sup> United Nation Security Council <<https://www.un.org/securitycouncil/>> accessed 6 April 2019. See also Article 42 of the Charter of the United Nations.

<sup>16</sup> This exception is stipulated by Article 51 of the Charter of the United Nations.

<sup>17</sup> Gerry Simpson, 'The War in Iraq and International Law' (2005) 6 Melbourne Journal of International Law 167. See also David Krieger, 'The War in Iraq as Illegal and Illegitimate' (2006) *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges*.

<sup>18</sup> Mark R. Shulman (n 13), 560.

Political Rights<sup>19</sup> (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>20</sup> (hereinafter IESCR). Among the Four Freedoms, the first two – freedom of speech and freedom of belief – are reflected directly by provisions respectively, not only in the UDHR, but the ICCPR and the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>21</sup> (hereinafter ECHR). For instance, freedom of expression is provided by Article 19 of the ICCPR and Article 10 of the ECHR, and freedom of belief by Article 18 and Article 9, respectively. As to the freedom from want, it has been distributed through several articles of the UDHR, and also specifically, to a Covenant – IESCR. Freedom from fear, on the other hand, surprisingly suffered a dissimilar lack of direct translation into human rights provisions and instruments. The meaning of freedom from fear, being derived from context of war, has strong links with ensuring the protection of people against aggression and violence. Consequently, the absence of a specific right that guarantees protection from any form of violence generally, such as a possible right to physical security, is striking. Instead, freedom from fear, surfaces only as an underlying concept related to different human rights provisions. Its most present manifestation is in the context of public interests affecting national security.

The text of UDHR contains provisions bearing relation to freedom from fear. Article 28 provides for a right to “a social and international order”,<sup>22</sup> which conveys the “world peace” aspect of freedom from fear mentioned in above. However, such a right has not been enumerated in other human rights treaties. Article 3 states, “everyone has the right to life, liberty and security of person”. The right to life is protected by ICCPR and ECHR.<sup>23</sup> The right focuses on the arbitrary deprivation of life by the authorities rather than third parties such as terrorist groups.<sup>24</sup> One of its

---

<sup>19</sup> United Nations, International Covenant on Civil and Political Rights 1966, A/RES/2200A(XXI).

<sup>20</sup> United Nations, International Covenant on Economic, Social and Cultural Rights 1966, A/RES/2200A(XXI).

<sup>21</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

<sup>22</sup> Article 28 of the UDHR reads as, “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

<sup>23</sup> Article 6 of the ICCPR and Article 2 of the ECHR.

<sup>24</sup> Human Rights Committee, ‘General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life’ 2018, CCPR/C/GC/36. In certain occasions,

main concerns is the restriction and abolishment of the death penalty. The right to liberty and security can be found in Article 9 of the ICCPR and Article 5 of the ECHR.<sup>25</sup> The right should be read as a whole,<sup>26</sup> “security of person” thus means protections against arbitrary interference with liberty.<sup>27</sup> This fails to address freedom from fear as protection against aggression and violence.

Article 5 of the UDHR, however, reads that, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The prohibition of torture is widely accepted as a basic, non-derogable right, and is provided in Article 7 of the ICCPR and Article 3 of the ECHR, as well as a specific treaty, that is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>28</sup> Its main concerns are on the authorities’ treatment towards, especially, suspects, detainees, criminals and other individuals who are physically under control of the authorities.<sup>29</sup> Whilst this does directly, engage with violence, its scope is limited to torture, which begs the question of how are other forms of violence and aggression addressed?

Bearing this in mind, I propose that freedom from fear faded within the discourse on human rights. By this, I mean that international human rights treaties do not provide for comprehensive right to physical security, which otherwise would better reflect the freedom from fear. The rights which do attempt to address freedom from fear lack primarily in two ways. First, it tackles mainly the interference and violation from authorities but not from private parties. Second, it focuses only on some forms of violence such as those causing death or torture. It is in this sense that freedom from fear has faded after the UDHR.

---

the authorities are under positive obligations to protect the individual from the criminal acts. See Council of Europe, ‘Guide on Article 2 of the European Convention on Human Rights’ 2019, para. 17.

<sup>25</sup> The right to security is always provided together with right to liberty in both ICCPR and ECHR.

<sup>26</sup> *East African Asians v the United Kingdom* (1978) 13 DR 5, paras. 219-220.

<sup>27</sup> *A., B., C., D., E., F., G., H. and I. v. Federal Republic of Germany* (1976) 7 DR 8, p. 26. See also *Bozano v. France*, 18 December 1986, Series A no. 111, pp. 18-19.

<sup>28</sup> United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, A/RES/39/46.

<sup>29</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel 2005) 157-58.

### 3. EUROPE'S APPROACH TO FREEDOM FROM FEAR: PUBLIC INTERESTS IN SECURITY

The ECHR is recognised as the first step on the collective enforcement of the UDHR. Its initial proposed draft was inspired by the Declaration, from its content to its form. The former French Minister Pierre-Henri Teitgen<sup>30</sup> made it clear that the draft, "as far as possible", had been based on the UDHR.<sup>31</sup> This is not the case for its preface. Since the very beginning of the drafting stages, the Four Freedoms were not mentioned, and in final the text of the UDHR it was omitted.<sup>32</sup>

However, the issue concerning freedom from aggression or violence inevitably arose. Freedom from fear was transformed into public interests in security, such as national security and public safety. These public interests share the same purpose with freedom from fear, which is protecting people against violence, disorder, and crimes. However, such public interests in security often conflicts with human rights. This begs the question as to how both can be reconciled.

#### 3.1. SECURITY AGAINST HUMAN RIGHTS

The text of the ECHR demonstrates that European countries' approach to security focuses on public interests. The people's security is closely linked with theories on the State's origin, the ideas of which have been concluded by John Locke in his *social contract* theory. A political association, such as the government, is established on the basis of a primary aim – preserving people's liberty, property, and security. Security forms part of a government's duty to the community and it is a shared interest, rather than a right entitled to by each member of the community.<sup>33</sup> Furthermore, a public interest does not necessarily conflict with the individual's own interests, in

---

<sup>30</sup> Pierre-Henri Teitgen was the French representative in Consultative Assembly of the Council of Europe, who, with other representatives, initially put forward the very first draft Convention to the Assembly for reference, and later played a crucial role in the drafting process as the Rapporteur appointed by the Committee on Legal and Administrative Questions.

<sup>31</sup> *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff Publishers 1975) Volume 1, 266-68.

<sup>32</sup> James Spigelman AC (n 6), 544.

<sup>33</sup> John Locke, 'Of the ends of political society and government', in *Two Treatises of Government* (1689).

that being a member of the community, the person himself receives individual benefits. Due to public interests in the ECHR functioning as justifications for reducing rights protections, European countries are inclined to viewing security issues as external to human rights. In addition, such understanding is significantly amplified by the fact that protecting security is a power wielded by the authorities. Therefore, under the ECHR, the relation between security and human rights takes on the direct appearance as binary oppositions.

Through the mechanism provided by the ECHR, apart from making reservations when acceding it, restrictions and derogations on certain human rights are the only legal basis available to weigh the interests of security. Taking national security for instance, it is listed in Article 6, 8, 10, 11, Article 2 of Protocol 4, and Article 1 of Protocol 7 under the Convention; and Article 15 provides derogations in time of emergency. As a principle, invoking restrictions or derogations out of concerns for security should be an exceptional situation.

To avoid the public interests always prevailing over individual rights, the European Court of Human Rights (hereinafter ECtHR, or the Court) has developed a three-layered requirement. This requirement limits authorities' discretion in cases where they intend to restrict rights, on the basis of *legality*, *legitimacy*, and *necessity*.<sup>34</sup> With regards to *legitimacy*, only the excuses exhaustively listed within a provision can be invoked to rationalise limitations to the respective right. Such excuses are as follows, for purposes of "national security", "economic well-being of the country", "territorial integrity", "public safety", "public order", and "prevention of disorder or crime".<sup>35</sup> The *legality* requirement assesses the quality of the law in terms of *accessibility* and *foreseeability*. In practice, *accessibility* is usually satisfied by the publication of the law. It can be provided in the form of both *lex specialis* and (certain provisions) in *lex generalis*. On the other hand, *foreseeability* demands a more

---

<sup>34</sup> Stefan Sottiaux, *Terrorism and the Limitation of Rights – The ECHR and the US Constitution* (Hart Publishing 2008), 42.

<sup>35</sup> Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2018), 307-308.



substantive assessment.<sup>36</sup> In connection with national or public security offences, it requires acknowledging “what acts and omissions will make [one] criminally liable”, what would be the adverse consequences of such action.<sup>37</sup> The requirement of *necessity* is usually assessed on two criteria. These are, first, weighing the various conflicting interest, and then the legitimacy of measures taken in relation to the aim sought.<sup>38</sup> The balancing exercise in the former concerns interests at stake, which usually involves a public interest, on one hand, and an individual’s human right, on the other. As a bottom line, the Court has maintained that the very essence of the right shall not be damaged by protecting public interests. With regards to the latter, the focus is on the *proportionality* between the means and ends.<sup>39</sup> When reviewing the *necessity* requirement in caselaw, national security is often seen as a rather paramount public interest, leaving authorities a wide discretion. For instance, in *Leander v. Sweden* case, when assessing the *necessity* of secret surveillance, the Court noted the importance of the public interest at stake. It ultimately held that the authorities should have discretion over evaluating threats to national security and adopting different methods to combat such threats.<sup>40</sup>

Derogation, provided by Article 15, is another permissible option for a State limiting its protection of human rights in the face of security concerns. The requirements for invoking it follow a similar pattern to the restrictions on rights identified above, with the exception that derogations are applied only in more serious situations.<sup>41</sup> Such situations concern military security, territorial security,

---

<sup>36</sup> Pernilla Nordvall, ‘Flexible Foreseeability – A Human Rights Rule of Law Perspective on Interferences with the Right to Peaceful Protest through Vague Law’ (2016) Graduate Thesis Master of Laws Program, 38-41.

<sup>37</sup> See, for instance, *Novikova and Others v. Russia*, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, §125, ECHR 2016; *Protopapa v. Turkey*, no. 16084/90, §97, ECHR 2009.

<sup>38</sup> Fan Jizeng, ‘Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights’ (2016) 16(1) Journal of Human Rights 46.

<sup>39</sup> Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 (5) The Modern Law Review 671, 679.

<sup>40</sup> *Leander v. Sweden*, 26 March 1987, § 59, Series A no. 116.

<sup>41</sup> Aly Mokhtar, ‘Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights’ (2007) 8 (1) The International Journal of Human Rights 65, 66-70.



sovereignty security, political security, and security of citizens, which are all essential elements of national security. As to the conditions under which Article 15 on *derogations* applies, the former European Commission of Human Rights has stated that,<sup>42</sup>

- It must be actual or imminent;
- Its effects must involve the whole nation;
- The continuance of the organised life of the community must be threatened; and
- The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

Through rights restriction and derogations, it becomes clear, that freedom from fear manifests in the human rights discourse in Europe, as a public interest in security concern. Strikingly, the focus on security challenges the extent of human rights protection, and increasingly so in the rise of terrorist attacks.

### 3.2. TERRORISM & NATIONAL SECURITY: CHALLENGES TO HUMAN RIGHTS

Terrorism is more frequently treated as a threat to national security. For instance, due to the 2015's jihadist atrocities, France declared and then extended a state of emergency (*état d'urgence*).<sup>43</sup> Terrorism can be defined, regardless of its motivations, as "the disproportionate use of violence, applied with the specific intent to cause terror and intimidation amongst parts or the whole of a population".<sup>44</sup> This "disproportionate use of violence" with unpredictable characters, amplified by its

---

<sup>42</sup> *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12, p. 70, § 153.

<sup>43</sup> Council of Europe, 'Declaration from the Permanent Representative of France' (*Council of Europe*, 22 July 2016)

<[http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=N5hF4XrW](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW)> accessed 29 August 2019.

<sup>44</sup> Anna Oehmichen, *Terrorism and Anti-terror Legislation - the Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Intersentia 2009) 127.

expanding network, triggers the mechanism of fear in terms of psychology. Security, despite being public interests, becomes much more personal in this context,<sup>45</sup> making it seem as though a choice must be made between security and human rights.

Once a case is identified or reasonably presumed as terrorism-related, it usually implies increasing scrutiny of intelligence services, broad authorisation for police investigations, and aggravated sanctions.<sup>46</sup> In terms of counter-terrorism strategies, proactive measures against terrorist attacks have been attached critical importance, considering people's lives are at stake. Such measures including secret surveillance are caught between security and human rights.<sup>47</sup> In applying three-layer test in the restriction of rights noticeable differences has been noted in the approach of the Court. Whilst the three-layer *test* is normally used to ensure that public interests prevailing over human rights is exceptional, in such cases, concerning national security, the criterion of "exceptionalness" is significantly reduced.

The *legitimacy* layer, in most circumstances, is assessed so briefly that it reiterates either some detailed facts of the case, or merely cites arguments from the Governments.<sup>48</sup> Under this part of the assessment, the authorities seem to be handed a considerably wider discretion when national security is at stake.<sup>49</sup> This is because the Court is often ready to accept the State's judgement on its own national affairs, except in cases where the applicants make arguments on the legitimate aim, or where the government fails to provide more specific information, and simply rely on

---

<sup>45</sup> Ronald Dworkin, 'Terror & the Attack on Civil Liberties' (2003) 50 (17) New York Review of Books 37.

<sup>46</sup> Anna Oehmichen (n 44), 350-351.

<sup>47</sup> Paul Bernal, 'Data Gathering, Surveillance and Human Rights: Recasting the Debate' (2016) 1 (2) Journal of Cyber Policy 243.

<sup>48</sup> The exceptions do exist. For instance, in the case of *C.G. and others v. Bulgaria*, the Court held that the applicant's involvement in the unlawful trafficking of narcotic drugs in concert with some Bulgarian nationals did not pose a threat to national security. See *C.G. and others v. Bulgaria*, no. 1365/07, §43, ECHR 2008. Occasionally, the government did not even invoke any specific legitimate aim, and it was the Court who proposed them. But its analysis was also succinct. For example, *Ciubotaru v. Moldova*, no. 27138/04, ECHR 2010.

<sup>49</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 205.

stating that the issue concerns counter-terrorism. With regards to the requirement of *legality*, the criteria of *accessibility* and *foreseeability* are often overlooked, given the difficulty in identifying a precise law. Instead, the requirement turns on whether the law provides adequate guarantees against abuse of power.<sup>50</sup> The requirement of providing safeguards against abuse plays an important role especially when a rather wide discretion is given to authorities. Such safeguards consist of substantive and procedural arrangements.

The substantive aspect is a “corollary” of the *foreseeability* test. This requires authorities to clarify the scope of their discretion so that they cannot apply it in an arbitrary way. In the Courts caselaw, the legislations concerned are required to indicate the scope of such discretion and the manner of its exercise.<sup>51</sup> This is of particular importance when powers are exercised in secret by the authorities. For example, the interception regimes are required to incorporate, among other minimum safeguards, a limit on the duration of such measures.<sup>52</sup> The procedural safeguards are commonly required during the decision-making phase, as well as, afterwards. In general, there should be procedural arrangements to prevent decisions from being made arbitrarily, and judicial remedies available to the persons concerned. In connection with national security, while the arrangements of procedural guarantees do not regularly invoke disputes in caselaw, it has been attached particular importance when the authorities exercise their powers in secret.<sup>53</sup> For instance, in the context of secret surveillance, both external supervision when making decisions, and judicial remedies that are available to the individuals, are always under detailed scrutiny by the Court, in order to assess whether the law provides sufficient safeguards against abuse of power.

---

<sup>50</sup> Antonella Galetta, Paul De Hert, ‘Complementing the Surveillance Law Principles of the ECtHR with its Environmental Law Principles: An Integrated Technology Approach to a Human Rights Framework for Surveillance’ (2014) 10 (1) Utrecht Law Review 55, 67.

<sup>51</sup> See, for instance, *Roman Zakharov v. Russia*, no. 47143/06, § 230, ECHR 2015; *Malone v. the United Kingdom*, 2 August 1984, § 68, Series A no. 82; *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Huwig v. France*, 24 April 1990, § 29, Series A no. 176-B; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 94, ECHR 2006-XI.

<sup>52</sup> See, for instance, *Centrum För Rättvisa v. Sweden*, no. 35252/08, §103, ECHR 2018.

<sup>53</sup> Eliza Watt, ‘The Right to Privacy and the Future of Mass Surveillance’ (2017) 21 (7) The International Journal of Human Rights 773, 779.

On the assessment of *necessity*, it has been accepted, in general terms, that terrorism nowadays does pose a growing challenge to the security of a State. Most of the popular counter-terrorism measures, such as secret surveillance programmes, are not identified as interference that would automatically extinguish the very essence of the individual's privacy and confidentiality rights in their correspondence. This is supported by the very fact that the duration and scope of the interception have been provided for in legislations, as required by the *legality* layer. Considering, the *proportionality* of the means and ends, it is often not too difficult to demonstrate how the measures in question appropriate meet the aim of counterterrorism.<sup>54</sup> The focus then usually turns on whether there are less intrusive means to achieve such purpose. In *Ürper and Others v. Turkey* case, the requirement of adopting a less-intrusive measure played a deceive role in the Court's judgment. The Court held that it might be reasonable to confiscate those newspaper issues that contain terrorist propaganda, but it was found disproportionate when future publication of entire periodicals was also banned.<sup>55</sup> The latter was an unnecessary intrusive measure.

In conclusion, terrorism cases call in to question the effectiveness of the three-layer test to protecting individuals' rights from being arbitrarily or severely restricted. This makes it difficult to ensure that public interest in security prevailing over human rights is exceptional. Although, one justification could be that terrorism appropriately fits within the 'exceptional'; this still, however, does not overshadow the need to ensure proper safeguards are put in place. Indeed, we see that the three-layer test, as a mechanism testing reasonableness, has gradually been replaced by a system of safeguards against abuse of power.<sup>56</sup> Through this case study on terrorism, it can be seen that under the framework of human rights, freedom from fear in the form of public interest in national security, acts counterintuitively to the protection of rights.

---

<sup>54</sup> Common sense can sometimes be resorted to. For instance, see *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, §314, ECHR 2018.

<sup>55</sup> *Ürper and Others v. Turkey*, nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, §§37-44, ECHR 2009.

<sup>56</sup> Paul De Hert, 'Balancing Security and Liberty and Liberty within the European Human Rights Framework – A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11' (2005) 1 (1) *Utrecht Law Review* 37, 72.

## 4. CHINA'S APPROACH TO FREEDOM FROM FEAR: GOING BEYOND PUBLIC INTERESTS IN SECURITY

### 4.1. FREEDOM FROM FEAR AS A HUMAN RIGHT – RIGHT TO LIFE

As discussed in *Section 2*, the fading of “freedom from fear” means that it has merely survived as an underlying concept in other human rights, or that it has been transformed through notions such as public interests in security. Whilst in Europe, freedom from fear is approached primarily as public interests in security, China addresses this freedom differently, focusing mainly on human rights. Although, there is an absence of an actual “right to physical security”, a number of provisions in Chinese law more closely link with the protection within freedom from fear against aggression and violence, more generally.

To begin with, I propose the three following criteria as indicators which can helpfully determine whether a human right recognises freedom from fear. The first concerns its content. The essence of such a right is that the individual is free from various harm, ranging from military aggression to physical violence. The second requirement concerns the horizontal effect. That is, such aggression or violence may be committed by those outside State authorities, including organisations and individuals. Thirdly, such right must also call for State's positive obligations. Authorities' that abstain from interference cannot properly protect individuals from violence and aggression, consequently a more active engagement is necessitated in such cases. This is all the more so as modern doctrine no longer emphasises the division between the first and second generation of human rights.<sup>57</sup> The consensus has been reached that the former, civil and political rights, also imposes positive obligations on the State. Such change is well reflected and confirmed by treaties' interpretation and practice.<sup>58</sup> I must concede at this point that this article does not answer all questions concerning these criteria, but seeing its application within the

---

<sup>57</sup> Patrick Macklem, 'Human Rights in International Law: Three Generations or One?' (2015) 3 *London Review of International Law* 61.

<sup>58</sup> For example, the General Comment on Article 6 of the ICCPR, see Human Rights Committee (n 24). See also *Kaya v. Turkey*, no. 22729/93, ECHR 1998.

context of China will arguably make clearer how freedom from fear can effectively be used within the field of human rights to better protect people.

The third aspect of these criteria which imposes positive obligation, strike as the most contentious. However, before addressing China's approach, it may prove helpful to set out how positive obligations, especially with regards to protection against physical violence, are commonplace within European discourse on human rights. The right to life, under article 2 of the ECHR, is a relevant example here. The ECtHR has broadened the protection of this right, through the horizontal effect and concept of positive obligations.<sup>59</sup> To protect life from dangers emanating from persons and entities, the Court imposes a due diligence obligation on States. This requires first, that the State put in place effective laws criminalising the offence, mechanisms and machinery for its enforcement as well.<sup>60</sup> Secondly, States must put in place preventative measures, a reasonable burden exists on States where, threats to the victim's life are real and immediate; and such threats have been known, or ought to be known, to the authorities.<sup>61</sup> This criteria crucially places positive obligations on States to protect individuals against third parties,<sup>62</sup> although its most frequent application is seen in cases on domestic violence,<sup>63</sup> rather than that of terrorism or organised crime for example. Thirdly, the State needs to carry out an effective investigation into the alleged death,<sup>64</sup> this is also required under Article 13, which protects the right to an effective remedy.

---

<sup>59</sup> Jean François and Akandji Kombe, 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights' (2007) <<https://rm.coe.int/168007ff4d>> accessed 8 August 2019.

<sup>60</sup> *Osman v. the United Kingdom*, 28 October 1998, §115, Reports of Judgement and Decisions 1998-VIII.

<sup>61</sup> Jean François and Akandji Kombe (n 59), 25-26.

<sup>62</sup> Most cases are from Turkey, concerning a widespread practice in its south-eastern region of murdering persons suspected of belonging to the Partiya Karkerên Kurdistan (PKK). For instance, *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, ECHR 2000, and *Mahmut Kaya v. Turkey*, no. 22535/93, ECHR 2000.

<sup>63</sup> Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection', (2010) 8(2) *Northwestern Journal of International Human Rights* 190, 200-15.

<sup>64</sup> *Ergi v. Turkey*, 28 July 1998, §85, Reports of Judgement and Decisions 1998-IV.

The content of Article 6 of ICCPR, on the right to life, has been interpreted along similar lines as Article 2 of the ECHR. In its recent General Comment on the right to life issued last year, the Human Rights Committee<sup>65</sup> not only adheres to the due diligence doctrine from the ECtHR,<sup>66</sup> but also specifically points to its application to the “terrorist attacks”,<sup>67</sup> “organised crime”,<sup>68</sup> and even “deprivation of life by other States”.<sup>69</sup> In spite of not ratifying the Covenant yet, China, as a signatory party, is obliged to “refrain from acts which would defeat its object and purpose”.<sup>70</sup> More importantly, Chinese authorities have repeated on several occasions that they continue to steadily pursue administrative and legislative reforms in preparation for ratifying the ICCPR.<sup>71</sup> Although China does not have a human rights act, its understanding of the right to life is not as dissimilar to that of Human Rights Committee. Chinese scholars accept the definition of right to life as being that, no one shall be arbitrarily deprived of his life.<sup>72</sup> They concur, that such right places both negative and positive obligations on the State for protection of the individual and of people.<sup>73</sup>

In terms of protective legal framework, this is enacted in both private and public law.<sup>74</sup> In the draft of the Civil Code, the right to life is seen as deriving from

---

<sup>65</sup> Human Rights Committee is the treaty body of the ICCPR.

<sup>66</sup> Human Rights Committee (n 24), para. 7.

<sup>67</sup> Ibid. para. 20.

<sup>68</sup> Ibid. para. 21.

<sup>69</sup> Ibid. para. 22.

<sup>70</sup> Article 18 (1) of the Vienna Convention on the Law of Treaties. See also Xu Jintang, ‘Several Questions about Treaties’ Implementation’ (2014) 3 Chinese Review of International Law 69, 77-78.

<sup>71</sup> National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution, A/HRC/WG. 6/17/CHN/1(2013), para. 7.

<sup>72</sup> Liu Liantai, ‘Comparison between International Bill of Human Rights and China’s Constitution’ (1999) 5 Journal of Zhejiang Provincial Party School 84, 86.

<sup>73</sup> Feng Yanting, ‘The right to life in China: From the Perspective of Article 6 of the ICCPR’ (2011) 4 Legal System and Society 268, 268. See also Qiao Shuzhen, ‘The Right to Life in Constitution’ (2018) 6 Journal of Henan University of Science & Technology (Social Science) 101, 101.

<sup>74</sup> Chen Modi, ‘Analysis of Current Study on Constitutional Protection of Right to Life’ (2019) 5 Legality Vision 235, 235.



people's dignity and personality,<sup>75</sup> being listed along with a right to health. Article 783 of the draft Code provides, "Natural persons enjoy the right to life and have the right to preserve the security and dignity of their lives. The right to life of others must not be violated by any organization or individual."<sup>76</sup> The victim is entitled to demand the cessation of infringement, elimination of danger, as well as compensation.<sup>77</sup> Considering that the Chinese Constitution does not provide a right to life, the theoretical significance of the provision in the Civil Code is that it confirms the moral value of the right to life, apart from providing a horizontal application. However, considering that the Civil Code is merely private law, this still questions the extent to which the right to life is entrenched a higher value within the Chinese legal system. For this reason, scholars have called for addressing the absence of such right in the Constitution,<sup>78</sup> and so that China remains in compliance with the ICCPR.<sup>79</sup> With regards to public law, the Criminal Law and Criminal Procedure Law play a leading role in protecting the right to life of the citizens. The offences against an individual's life and physical integrity will be prosecuted by the authorities.<sup>80</sup>

The key point concerning Chinese law is that physical security is seen in the context of protecting life, as opposed to just liberty. For this reason, the concept of freedom from fear is properly married to the rights discourse in China. By specifically stipulating security, it facilitates the capacity of this right to encompass the general aggression and violence, freedom from fear was initially created to address. In China's approach, the right to life moves past focus on authorities which is seen in the European context and the ICCPR, and rather identifies more directly that threats or dangers to one's physical security can be caused by anyone. We

---

<sup>75</sup> Wang Liming, 'Highlights and Improvements of Personality Rights in the Draft Civil Code' (2019) 1 *China Law Review* 96.

<sup>76</sup> Standing Committee of the National People's Congress (NPC), 'Civil Code Part on Personality Rights (Second Deliberation Draft)', Article 783.

<sup>77</sup> *Ibid.* See also Article 15 of the Tort Law.

<sup>78</sup> Feng Yanting (n 73), 269. See also Shangguan Peiliang, 'How to Incorporate Right to Life into the Constitution' (2008) 5 *People's Congress Studying* 27; Shangguan Peiliang, 'The Constitution should Stipulate the Right to Life' (2003) 4 *Legal Forum* 100.

<sup>79</sup> Liu Liantai (n 72), 86.

<sup>80</sup> For instance, Chapter IV stipulates the crimes of homicide and body injury.

should recall that all human rights are “indivisible”, “interdependent”, and “interrelated”.<sup>81</sup> The right to life in the context of China also provides a more holistic mechanism by which to address a number of issues. This broader scope attached to the right is exactly why freedom from fear has been translated into the right to life in the Chinese context.

#### 4.2. FREEDOM FROM FEAR AS PUBLIC INTERESTS IN SECURITY

In the context of Chinese law, public interests, in spite of being expressed in various terms, refers to those basic interests shared by the majority.<sup>82</sup> As discussed in the last section, since each individual is entitled to be free from physical harm, security issues are among such basic interests that are shared by the majority. It is usually reflected in terms of “public safety”, “public order”, “social security order”, “social stability” or “national security”.<sup>83</sup> Different to the approach adopted by Europe, in China, security, as a public interest, takes precedence over human rights.

Article 51 of the Constitution is commonly seen as the general provision regulating the relations between the individual’s rights and public interests. It reads as follows, “Citizens of the People’s Republic of China, in exercising their freedoms and rights, shall not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens.”<sup>84</sup> The interests “of the state”, “of society”, and “of the collective” are normally concluded as the public interests by scholars.<sup>85</sup> Xian Xinhua and Wu Qingshan, by comparing

---

<sup>81</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action 1993, A/CONF.157/23, para. 5.

<sup>82</sup> Zheng Yongliu, ‘The Text and Interpretation of Public Interests in China’s Public Laws’ in Zheng Yongliu and Zhu Qingyu, *Public Interests in Chinese Law* (Peking University Press 2014), 12.

<sup>83</sup> Such expressions can be found, *inter alia*, in the Constitution, National Security Law, Counterterrorism Law, and Public Security Administration Punishments Law. In these legislations, security serves as a public interest need to be protected.

<sup>84</sup> National People’s Congress of China, Constitution of the People’s Republic of China (2018 Amendment) <<http://en.pkulaw.cn/display.aspx?cgid=311950&lib=law>> accessed 29 November 2019.

<sup>85</sup> For example, Wang Jinwen, ‘Interpreting and Applying Limitation Clauses’ Functions on Protecting Fundamental Constitutional Rights: How to Confirm and Protect the Emerging Rights’ (2018) 5 ECUPL Journal 88, 91. See also Zheng Yongliu (n 82), 11.

European countries' provisions,<sup>86</sup> hold that Article 51 implies that "public interests not being undermined" is a general principle or request for the individual to exercise his rights.<sup>87</sup> A substantial difference with Europe's approach in public interest is that rights restriction, within China's Constitution, does not require the application of *legality* or *necessity* criteria to justify limitations on the respective right.<sup>88</sup> In other words, the approach of China can be understood as, under no circumstances shall the public interests be infringed by one's exercising his rights. Such an understanding should not be totally unexpected in the context of China, taking into account the principle of communitarianism. The primacy of public interests reached a peak during the planned economy era of China (1957-1978). During this period, while the focus was put on its reconciliation with individual rights, it was often achieved in practice by the latter yielding to the interests of - collective, society, and State's - the public interests.<sup>89</sup> Since introducing the market economy 1979, this has had a substantial impact on the relations between personal and public interests. The importance of individual interests has been attached to its role in economic development.<sup>90</sup> In this sense, the primacy of public interests has dwindled, and is

---

<sup>86</sup> Especially the Article 19 of the Basic Law for Germany, which reads as follows,

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

<sup>87</sup> For example, Xian Xinhua and Wu Qingshan, 'Reconstructing the Limitation Clauses of China's Constitution from Article 51' (2017) 1 Journal of Xiangtan University (Philosophy and Social Sciences) 25, 27.

<sup>88</sup> Shi Wenlong, 'The Development of Right Limitations Mechanism in China: Comparative Study on Article 51 of China's Constitution and Article 19 of Germany's Basic Law' (2014) 5 Journal of Comparative Law 161, 163.

<sup>89</sup> Shi Wenlong, 'The Limitations and Regulations on Limitations of Exercising Rights: The Study on Article 51 of China's Constitution' (2013) 7 Political Science and Law 67, 69.

<sup>90</sup> Shi Wenlong (n 83), 70-71.

dwindling, as China moves to protect personal economic interests. One of the remarkable changes this has triggered in recent years is the reform to the judicial system.<sup>91</sup> This focused on strengthening the independence and impartiality of the courts. For instance, the judicial system will take charge in managing its own personnel, finance, and property, with an aim to reduce possible pressure from local government. Furthermore, due to the introduction of the “case-filing register system”, access to the court is also significantly being promoted.<sup>92</sup> However, whilst the 1979’s Reform and Opening-up Policy had the effect that economic growth was seen as a “cure-all” for all problems in China,<sup>93</sup> security still served as a vital prerequisite of this priority.

More recently, China has made a dramatic turn on its policy on national security under the heading, *a holistic approach to national security*.<sup>94</sup> This approach particularly determines and concludes 12 aspects of national security. This includes, security of people; political security; territorial security; military security; economic security; cultural security; society security; technological security; cybersecurity; ecological security; resource security; and nuclear security. Followed by this, a series of legislations have been passed, with an aim to construct a national security legal architecture. However, some of these legislations have received heavy criticisms from non-governmental organisations and other States,<sup>95</sup> due to its unbalanced

---

<sup>91</sup> The State Council Information Office, ‘New Progress in the Judicial Protection of Human Rights in China’ (*The State Council Information Office*, June 2016)  
<[http://english.www.gov.cn/archive/white\\_paper/2016/09/12/content\\_281475440241794.htm](http://english.www.gov.cn/archive/white_paper/2016/09/12/content_281475440241794.htm)> accessed 27 August 2019.

<sup>92</sup> Supreme People's Court of the People's Republic of China, ‘White Paper on Judicial Reform of Chinese Courts (2013-2018)’ (2019) <<http://www.court.gov.cn/zixun-xiangqing-144192.html>> accessed 27 August 2019.

<sup>93</sup> Zhou Zunyou, *Balancing Security and Liberty – Counter-Terrorism Legislation in Germany and China* (Duncker & Humblot 2014) 135.

<sup>94</sup> Global Times, ‘Xi stresses importance of security’ (*Global Times*, 16 April 2014),  
<<http://www.globaltimes.cn/content/854853.shtml>> accessed 23 April 2019.

<sup>95</sup> For example, Samantha Hoffman and Elsa Kania, ‘Huawei and the Ambiguity of China’s Intelligence and Counter-espionage Laws’ (*Australian Strategic Policy Institute*, 13 September 2018)  
<<https://www.aspistrategist.org.au/huawei-and-the-ambiguity-of-chinas-intelligence-and-counter-espionage-laws/>> accessed 21 August 2019. See also Arjun Kharpal, ‘Huawei Says it Would Never Hand Data to China’s Government. Experts Say it Wouldn’t Have A Choice’ (CNBC, 4 March 2019)

preference for security over human rights. The primacy of security reflected in the Chinese approach does raise increasing human rights concerns for the of abuse of power. Consequently, it is argued that legislations which intend to legitimise used of broad discretion by State authorities to protect people's right to life and ensure public security, must be reconciled with strong substantive and procedural arrangements.

Regarding the Chinese approach, freedom from fear is demonstrated as a human right and as public interests in security. By doing so, this shows a legal and political preference for protecting one's physical security. On one hand, the right to life is regarded as encompassing the protection of broader acts of aggression and violence. It is also seen as the prerequisite to the enjoyment of other human rights listed in the UDHR, ICCPR, IESCR, and other conventions. On the other hand, the primacy of public interests has a profound impact on China's law, economic development and its implementation. Whilst China's human rights approach to freedom from fear differs to that of Europe, their approach in terms of security largely coincides in both its form and challenges.

## 5. CONCLUSION

After the adoption of the UDHR, freedom from fear has faded noticeably in the context of human rights in Europe. Instead, it has been reflected as public interests in security, serving as legitimate excuses for reducing human rights. Terrorism and the fear it brings along with it has granted much weight to security considerations, challenging the reconciliation between public interests and human rights. On the other hand, due to the understanding of its importance as a human right and public interest, preferences are usually given to security concerns in the approach adopted by China. However, a pragmatic balance between security and human rights is urgently required. In spite of departing from different points, both Europe and China face the same question, how can freedom from fear be reconciled with human rights?

---

<<https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html>> accessed 21 August 2019.

Even though Chinese and European society are rooted in different cultures and histories, it is possible, or maybe inevitable, for them to work towards a community of a shared future for mankind.<sup>96</sup> Given the strained relations between security and human rights faced by both China and European nations, they can possibly learn from each other. Europe may benefit from a broader approach to the right to life, as seen in the context of China. Thus, freedom from fear should not only be seen as public interests in security, but a human right.<sup>97</sup> With regards to China, since there is increasing attention on legislations which provide scope for authorities' abuse of power, it is important to include effect human rights safeguards into the national and public security regime. The national security legislations of China serve as the *legality* basis to balance security and human rights. Nevertheless, State measures will not necessarily be legitimate just because they have legal bases in domestic law. In order to protect human rights, the State should promote considering the *necessity* of their decisions and conduct. Among others, procedural safeguards against abuse of power may serve as an ideal compromise between the sensitiveness of security and advocate for human rights. To be specific, such safeguards are required to prevent decisions from being made arbitrarily and ensure that judicial remedies are available to the persons concerned.

More than 70 years ago, a world in which people would enjoy freedom from fear, along with other freedoms, was recognised by the UDHR as "the highest aspiration of the common people". The approaches adopted by China and Europe in the protection of freedom from fear, demonstrates that though there is much work to be done, this aspiration continues to thrive.

---

<sup>96</sup> China Daily, 'Work Together to Build a Community of Shared Future for Mankind', (*China Daily*, 18 January 2017) < <http://language.chinadaily.com.cn/a/201701/19/WS5b20d22ba31001b82572148f.html>> accessed 21 April 2019.

<sup>97</sup> Zhou Zunyou (n 93), 129. See also See Alex P. Schmid, 'Prevention of Terrorism: Towards a Multi-pronged Approach', in Tore Bjørgo (ed), *Root Causes of Terrorism: Myths, Reality and Ways Forward* (Routledge 2005) 223.

# **The Future of the UDHR**



## WHAT IS WRONG WITH MEDIA FREEDOM AS A HUMAN RIGHT IN AFRICA TODAY?

KHANYILE MLOTSHWA \*

### ABSTRACT

*The Universal Declaration of Human Rights (UDHR) of 1949, in its article 19, effectively sets press freedom and media freedom as human rights. This raises two challenges. First, is the contest in the Global South on claims of universalism surrounding human rights. Second, is the question of access to the media in unequal countries like Zimbabwe and South Africa and what that means for the role of the media (representation) and media freedom. These challenges are articulated by the question of 'the human' as it arises in modernity and feeds into 'the human' in human rights, and the subject of media freedom. Located within the anti-colonial, that is an articulation of postcolonial and decolonial theoretical perspectives, and using the idea of media freedom in Zimbabwe and South Africa, I argue that both the concepts of human rights and media freedom must be indigenised.*

### KEYWORDS

Access; Decolonial; Human rights; Media freedom; Postcolonial; Representation; Universalism

---

\* PhD candidate at the Centre for Communication, Media & Society at University of KwaZulu-Natal, Pietermaritzburg campus, South Africa.  
Email: [khanyilemlotshwa@gmail.com](mailto:khanyilemlotshwa@gmail.com)

## 1. INTRODUCTION

The Universal Declaration of Human Rights (UDHR) of 1949 states in its article 19 that, “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Clothed in the language of natural rights, the idea that human rights are natural to the human being, the UDHR in this article effectively sets media freedom as a human right available to all people because they are human.<sup>1</sup> From the vantage point of most of the formerly colonised Global South, this is problematic. Specifically, for Zimbabwe and South Africa, as postcolonial and post-apartheid countries, claims of the universality of human rights ignores the huge levels of inequality characterising these societies because of their history. Ignoring inequality becomes even more problematic in the case of the media where the media are highly commercialised and large portions of the population cannot still access the media. The claims to the universality of human rights, in a largely postcolonial continent like Africa, are problematic because the question of the human, that have been historically debated and debatable, are still not settled.<sup>2</sup> The idea of media freedom as a human right is therefore problematic and raises a number of challenges.<sup>3</sup>

Located within the anti-colonial, that is, postcolonial and decolonial theoretical perspectives, and using the idea of media freedom in Zimbabwe and South Africa as an entry point, this paper argues that both the concepts of human rights and media freedom in Africa, must be decolonised. This is keeping in mind that, even though problematic, both the concept of media freedom and human rights are useful even in a postcolonial or decolonial era.<sup>4</sup> In as far as they are important but inadequate, in the Global South, the concepts of human rights and press freedom must be considered ‘under erasure’.<sup>5</sup> Imagined within a Western and modernist context, human rights

---

<sup>1</sup> Parekh Serena, Hannah Arendt and the Challenge of modernity: A phenomenology of human rights (Routledge 2008).

<sup>2</sup> Maldonado-Torres Nelson, “On the Coloniality of Human Rights” (2017) (114) *Revista Crítica de Ciências Sociais* 117.

<sup>3</sup> Langford Malcolm, “Critiques of human rights” (2018) (14) *Annual Review of Law and Social Science* 69; Maldonado-Torres Nelson (n.2) at 117; Suarez-Krabble Julia, “Race, social struggles, and ‘human’ rights: Contributions from the Global South” (2013) (6) *Journal of Critical Globalisation Studies* 78.

<sup>4</sup> *Ibid.* (n.2) at 114; Golder Ben, “Beyond redemption? Problematising the critique of human rights in contemporary international legal thought” (2014) 2 (1) *London Review of International Law* 77.

<sup>5</sup> Watson Heather, Wood-Harper Trevor and Wood Bob “Interpreting methodology under erasure: Between theory and practice” (1995) 8 (4) *System Practice* 441.

are individualised yet for Africans, the communal is what is central to public life. This means that media freedom in Africa has become a privilege of the rich elites who can own or control media. The Western idea of human rights has always emphasised journalist as the central subjects of media freedom. In a continent where the communal comes before the individual, this conceptualisation raises challenges in that it excludes large numbers of people who make up the citizenry of Africa.<sup>6</sup>

In this paper, I seek to problematize the idea of media freedom as a human right<sup>7</sup> by taking the debates around media freedom, some of which have been taking place for a long time now in media studies, on a postcolonial and decolonial rethinking. The paper is organised in such a way that I start by discussing the pitfalls of thinking of media freedom as a human right. Here, I focus on the universalising tendencies of human rights and the questions around (media) access and how this is problematic in thinking about media freedom as a human right. In the second section, I discuss a decolonial vision of media freedom. Here, I draw on the work of various postcolonial and decolonial theorists and scholars to articulate an anti-colonial vision of media freedom as a human right that starts with decolonising the idea of the human.<sup>8</sup> In the last section, I discuss the trajectory and limits of thinking about media freedom as human rights in South Africa and Zimbabwe.

---

<sup>6</sup> Jose Alhaji, "Press freedom in Africa" (1975) 74 (296) *African Affairs* 255; Bourgault Louise, "Press Freedom in Africa: A Cultural Analysis" (1993) 17 (2) *Journal of Communication Inquiry* 69.

<sup>7</sup> Federation of African Journalists (FAJ), *Press Freedom 2010* (FAJ Headquarters 2010); Freedom House, *Press Freedom's Dark Horizon: Freedom of the press 2017* (Freedom House 2017).

<sup>8</sup> Fanon Frantz, *The wretched of the earth* (Grove Press 1963); Wynter Sylvia, "Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, after Man, Its Overrepresentation-An Argument" (2003) 3 (3) *The New Centennial Review* 257; Mignolo Walter, "Delinking: The rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality" (2007) 21 (2 – 3) *Cultural Studies* 449; Mignolo Walter, "Who Speaks for the 'Human' in Human Rights?" (2009) 5(1) *Human Rights in Latin American and Iberian Cultures* 7.

## 2. PITFALLS: FREEDOM OF EXPRESSION AS A HUMAN RIGHT

In article 19 of the UDHR, freedom of expression, including media freedom, is thought of as a human right, is problematic at least at two levels. First, universalising press freedom as a human right ignores inequalities and the implications in terms of access to communication resources. This is in every sense of access, including the physical access to tools of communication and having skills and the cognitive capacity to use the accessed media.<sup>9</sup> Second, thinking of media freedom as a human right means that it inherits all the challenges associated with human rights. So long as there are cost issues involved in people's access to the media, media freedom cannot be regarded as universal and a human right available to all people just because they are human. This is further complicated by postcolonial and decolonial thinkers who note that 'the human' in human rights as conceived in Western thought is not the same 'human' that the UDHR expects to be the subject of human rights in formerly colonised countries. These points shall be further argued in this section of the article.

### 2.1. ACCESS

In universalising press freedom as a human right, the UDHR overlooks issues of access. At a time when we are in the information age, access has come to be considered from a digital media perspective. It has been argued that, first, access refers to such varied experiences as accessing an e-mail or accessing a place, and in that same sense accessibility has come to border on the ease of access, affordability in terms of finance and the user-friendliness of media systems, among other issues.<sup>10</sup> In reference to the increased accessibility of the internet, education, media production tools, and even academic work, access refers to "an expanded availability of a particular valued

---

<sup>9</sup> Moyo Last, "The digital divide: Scarcity, inequality and conflict" (122) in Creeber Glen and Martin Royston *Digital cultures: Understanding new media* (McGraw Hill/Open University Press 2009); Ellcessor Elizabeth, *Restricted access: Media, disability and the politics of participation* (New York University Press 2016).

<sup>10</sup> Moyo Last (n.9) at 122; Ellcessor Elizabeth (n.9); Robinson Laura, Cotton Shelia, Ono Hiroshi, Quan-Haase Anabel, Mesch Gustavo, Chen Wenhong, Schulz Jeremy, Hale Timothy, and Stern Michael, "Digital inequalities and why they matter" (2015) 18 (5) *Information, Communication & Society* 569.; Wei Lu and Hindman Douglas Blanks, "Does the Digital Divide Matter More? Comparing the Effects of New Media and Old Media Use on the Education-Based Knowledge Gap" (2011) 14 (2) *Mass Communication and Society* 216.; Goedhart Nicole, Broerse Jacqueline, Kattouw Rolinka, and Dedding Christine "Just having a computer doesn't make sense': The digital divide from the perspective of mothers with a low socio-economic position" (2019) 21(11-12) *New Media and Society* 2347.

resource”.<sup>11</sup> However, Ellcessor warns that access in new media studies has remained largely unexamined allowing it to constrain civic, cultural, and technological possibilities.<sup>12</sup> Second, it is problematic that access is spoken about as “something that can be possessed or “had”.<sup>13</sup> It has been argued that thinking about new media in a positivist manner has led to the under-theorisation of access. As a result it has not been conceived as relational, unstable and entangled in the inequalities that define modern social systems, that could be both empowering and exploitative.<sup>14</sup> The larger problem in this is the over optimism that creates the impression that access is always a good thing offering increased participation in the media: “This is a world in which, theoretically, anyone can potentially be heard, transform the status quo, and build upon the work of others outside of longstanding social and political hierarchies”.<sup>15</sup> This is the view synonymous, especially, with the new media enthusiasts: those who rushed to celebrate the power of the new media in the Arab Spring overlooking social conditions and the idea that the media are always tools embedded in society.

For those enthusiastic about digital media, media technologies are extending ‘the means of production,’ broadly defined to include means of social reproduction, to as many people as possible.<sup>16</sup> However, it has been argued that the benefits of these technologies are “not flowing evenly and smoothly ... within countries or across the world”.<sup>17</sup> The idea of the digital divide refers to the unequal distribution of Internet access across the world and within countries.<sup>18</sup> Moyo notes that the unequal ownership and access of media technologies affects the balance in terms of access to information.<sup>19</sup> It is usually disadvantaged communities, within nations, and poor countries, within the context of the global economy, that are always marginalised in

---

<sup>11</sup> Ellcessor Elizabeth (n.9); See also van Deursen Alexander and van Dijk Jan, “The first-level digital divide shifts from inequalities in physical access to inequalities in material access” (2019) 21 (2) *New Media & Society* 354.

<sup>12</sup> *Ibid* at 7.

<sup>13</sup> *Ibid* at 7.

<sup>14</sup> Moyo Last (n.9) at 122; *Ibid* at 7.

<sup>15</sup> *Ibid* at 7.

<sup>16</sup> Atton Chris, “Reshaping Social Movement Media for a New Millennium” (2003) 2 (1) *Social Movement Studies* 3.; Boulianne Shelley “Social media use and participation: a meta-analysis of current research” (2015) 18 (5) *Information, Communication & Society* 524.

<sup>17</sup> Hassan Robert, *Media, Politics and the Network Society* (Open University Press 2004).

<sup>18</sup> Moyo Last (n.9) at 122.

<sup>19</sup> *Ibid* at 123.

terms of this access.<sup>20</sup> Arguing that the issue of access goes beyond the ownership of digital gadgets, Norris proffers a typology of types of the digital divide that include the geographic divide, social divide and democratic divide.<sup>21</sup> Moyo contends that these “provide a framework in which the intricate connections of access, literacy, content, language, gender, race and age in the digital age can be examined in detail”.<sup>22</sup>

In his later work on the digital divide, Moyo expands the understanding of the digital divide beyond issues of access to the information technology equipment into a decolonial theoretical space.<sup>23</sup> Moyo argues that, “the digital divide must also be about the problems that are embedded in access and how that access reproduces, reconfigures, and perpetuates other social inequalities”.<sup>24</sup> He emphasises that this view resonates “profoundly with the social experiences of internet users and non-users from Africa and the Global South”.<sup>25</sup> Arguing for a decolonial reading of the internet, Moyo posits that, for the Global South, the challenges around access or lack of it are entangled in the long history of colonialism – including the colonial present – that has fostered inequalities between the South and the North.<sup>26</sup> This is a view in line with the decolonial approach that rejects the idea that “Africa can only be used as an experimental base for Eurocentric theories”.<sup>27</sup>

## 2.2. THE COLONIALITY OF THE UNIVERSAL

Thinking of press freedom as a human right means that press freedom inherits all the challenges associated with human rights. The biggest challenge with human rights has been that, they are promoted as universal around the globe regardless of the differences in the cultures and the histories of countries around the world.<sup>28</sup> Langlois

---

<sup>20</sup> Ibid at 123.

<sup>21</sup> Norris Pippa, *Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide* (3 – 25) (Cambridge University Press 2001)

<sup>22</sup> Moyo Last (n.9).

<sup>23</sup> Moyo Last, “Rethinking the information society: A decolonial and border gnosis of the digital divide in Africa and the Global South” (133) in Ragnedda Massimo and Muschert Glen *Theorizing the digital divides* (Routledge 2018).

<sup>24</sup> Ibid at 133.

<sup>25</sup> Ibid at 133.

<sup>26</sup> Ibid at 133.

<sup>27</sup> Mutsvairo Bruce, *The Palgrave handbook of media and communication research in Africa* (4) (Palgrave Macmillan 2018).

<sup>28</sup> Barreto Jose-Manuel, “Epistemologies of the South and human rights: Santos and the quest for global and cognitive justice” (2014) 21 (2) *Indiana Journal of Global Legal Studies* 395; Barreto Jose-Manuel, “Decolonial strategies and dialogue in the human rights field: A manifesto” (2012) 3 (1) *Transnational*

notes that, after the Second World War, “the Rights of Man, an idea unfashionable for some time, became Human Rights”.<sup>29</sup> It is their beginning as a preserve for white males that makes many people, especially in the Global South, suspicious of human rights as universal. Critics point to the silence around a grisly history of modernity, and its attendant racism; and the reality that human rights, in the contemporary world, are still racialized. It has been argued that the UDHR still bears the traces of the language of the rights of Man and Citizens of 1789, documents that did not consider black people as humans also entitled to human rights.<sup>30</sup> The French constituent assembly promulgated the Rights of Man and Citizens, at the height of the Haiti Revolution of between 1781 and 1804, but completely refused to consider the revolting black slaves as humans.<sup>31</sup> The issue of ‘the human’ in human rights as universal is discussed in detail in the next paragraphs. According to de Man, the universalism claims are the most attacked aspect of human rights.<sup>32</sup> He notes that, “this critique holds that human rights, as contained in the UDHR, dictates liberal, Western values, and no space is allowed for ‘multi-culturalism’, ‘relativism’, or ‘contextualism’”.<sup>33</sup>

While de Man notes well that the idea of human rights has clashed with “traditional practices, beliefs and religions” across the world, he argues that they should still be considered as universal and accepted.<sup>34</sup> de Man’s argument is that just because values such as justice, also arise out of Enlightenment and seems to be accepted in the Global South, human rights should be accepted as well.<sup>35</sup> Here de man ignores the fact that the debate around human rights is equally a debate around justice

---

Legal Theory 1; Parekh Serena (n.1); Griffin James, *On human rights* (Oxford University Press 2008); Mutua Makau, *Human rights: A political and cultural critique* (University of Pennsylvania Press 2002).

<sup>29</sup> Langlois Anthony, “Human rights and modern liberalism: A critique” (2003) (51) *Political Studies* 509.

<sup>30</sup> Barreto Jose-Manuel (n.28); Griffin James (n.28); Parekh Serena (n.1).

<sup>31</sup> Popkin Jeremy, *A conscience history of the Haitian revolution* (Blackwell Publishing 2012); Dubois Laurent *Avengers and the new world: The story of the Haitian revolution* (The Belknap Press 2004); James Cyril and Lionel Robert, *The black Jacobians: Toussaint L’Ouverture and the San Domingo revolution* (Vintage Books 1989).

<sup>32</sup> de Man Annile, “Critiques of the human rights framework as the foundation of a human-rights-based approach to development” (2018) 43 (1) *Journal of Juridical Science* 84.

<sup>33</sup> *Ibid* at 89.

<sup>34</sup> *Ibid* at 90.

<sup>35</sup> *Ibid* at 90.



in the Global South. Importantly, de Man does not follow the decolonial debate on modernity to the dark place it leads to, especially where universalism is criticised for smoothing over the genocides around the colonial projects around the world.<sup>36</sup>

The history of human rights is such that they arise after the Second World War, specifically after the Nazi holocaust against Jews.<sup>37</sup> Critical scholars locate the holocaust in the trajectory of modernity, capitalism and the colonial project around the world. In *Discourse on Colonialism*, Aime Cesaire notes that the holocaust and Nazi anti-Semitism was a “terrific boomerang effect” where colonial methods and concepts returned to European soil.<sup>38</sup> This is after they were tested in Africa. Ciccariello-Maher notes that in this critique, Cesaire aims, not necessarily on “Hitler and Hitlerism,” but more centrally to the humanistic, Christians, and other bourgeois.<sup>39</sup> For decolonial scholars, it is, therefore, important to face off this history, to “confront head-on the broadest parameters according to which that past is structured: the colonial enterprise”.<sup>40</sup> What is at issue here is “the “constitutive” role of colonialism and racism for the development of global capitalism”.<sup>41</sup> In other words, what is at stake here is the role of race as a structuring logic in modernity, including the discourse of human rights. In that “the global modern, colonial, capitalist order [has] been constituted on the basis of non-recognition” of other races, it is imperative to address “the underlying coloniality of modernity itself, capitalism included”.<sup>42</sup> Parekh notes that human rights, with their roots in the 17<sup>th</sup> and 18<sup>th</sup> centuries, emerge in the context of the rise of modernity.<sup>43</sup> In the Global South, human rights, as currently constituted, and arising out of the history of modernity, cannot be accepted without acknowledging how, in its history to date, the same modernity has regarded people in the Global South as not human. Even liberal Europeans looked away when the colonial project decimated Africans, Arabs and Asians, only to act “shocked by Nazism”.<sup>44</sup> For most in the Global South, Hitler is not “a new kind of barbarism” in

---

<sup>36</sup> Melber Henning, “Explorations into modernity, colonialism and genocide: Revisiting the past in the present” (2017) 49 (1) *Acta Academica* 39.

<sup>37</sup> Levy Daniel and Sznajder Natan, “The institutionalization of cosmopolitan morality: the Holocaust and human rights” (2004) 3 (2) *Journal of Human Rights* 143.

<sup>38</sup> Cesaire Aime, *Discourse on Colonialism*, (Monthly Review Press 1995).

<sup>39</sup> Ciccariello-Maher George, “Decolonising theory from within or without” (2016) 23 (1) *Constellation* 133.

<sup>40</sup> *Ibid* at 135.

<sup>41</sup> *Ibid* at 135.

<sup>42</sup> *Ibid* at 135.

<sup>43</sup> Parekh Serena (n.1).

<sup>44</sup> Ciccariello-Maher George (n.39) at 133 – 134.

the trajectory of modernity, because “at the end of capitalism . . . there is Hitler”.<sup>45</sup> Ciccariello-Maher posits that Césaire would argue that Hitler is “barbarism yes, new no”.<sup>46</sup> In South Africa, for example, where the colonial and apartheid racism is still visible in the inequalities that riddle the young democracy, speaking about media freedom as human rights, raises a huge responsibility to acknowledging the problems around human rights and that they cannot be universal in a one size fits all approach.

Located in the idea of the universalism of Europe’s historical experience, as built on the idea of progress, the discourse of human rights ignores “the intimate linkage between anti-Semitism and colonial brutality” and writes a large number of the world’s people out of history.<sup>47</sup> It is also telling that human rights emerges out of the debris of the Second World War and not the horrors of slavery and colonialism. In grounding its distinctive approach to normativity on the idea of historical progress, Western critical theory is seen as looking away from Europe’s colonial sins. The challenge here lies not only in the “developmentalist, progressive reading of history” that views the West as “more enlightened or more developed” than the rest of the world, but more so in the “so-called civilizing mission of the West”.<sup>48</sup> It is the ‘civilizing mission’ discourse that was used to justify colonialism and imperialism. Today this civilising mission by Western countries is seen in interventions in the Global South in the name of protecting human rights. Allen notes that this civilizing mission discourse informs “the informal imperialism or neocolonialism of the current world economic, legal, and political order”.<sup>49</sup> This is clear in how Western countries relate to their former colonies, and even in the way that politics is conducted in Africa, where Western democracy and other such sensibilities are hegemonic.<sup>50</sup>

The concerns about the colonality of human rights, therefore, is based on the fact that Western critical theory, even when it is critical of modernity and “in light of its practical-political emancipatory aim”, as in the case of the Frankfurt School, fails or

---

<sup>45</sup> Césaire Aimé (n.38) at 37.

<sup>46</sup> Ciccariello-Maher George (n.39) at 134.

<sup>47</sup> Ibid at 134.

<sup>48</sup> Allen Amy, *The end of progress: Decolonising the normative foundations of critical theory* (3) (Columbia University Press 2016).

<sup>49</sup> Ibid at 3.

<sup>50</sup> Crawford Gordon and Lynch Gabrielle *Democratisation in Africa: Challenges and prospects* (Routledge, 2012).; Smith Rose Joy “Revisiting liberal democratic universalism: a critical rhetoric of the liberal democratic world order” (2016) (2) *Glocalism: Journal of Culture, Politics and Innovation* 1.

refuses “to engage substantively” with non-Western critical theory in postcolonial and decolonial theory”.<sup>51</sup> The problem is in how critical theorists “ground their conceptions of normativity” where “ideas of historical progress and sociocultural learning and development figure prominently”.<sup>52</sup> For some postcolonial and decolonial critics, the silence on the ‘colonial wound’ is not a mere coincidence or an oversight but motivated silence and a false universalism.<sup>53</sup> Said calls this a “blithe universalism” that “assume[s] and incorporate[s] the inequality of races, the subordination of inferior cultures, the acquiescence of those who, in Marx’s words, cannot represent themselves and therefore must be represented by others,” connecting European culture to European imperialism as a political project.<sup>54</sup> The language of universalism, progress and development is the language of oppression and domination for the majority of the world’s population.<sup>55</sup>

The language of progress and development, as grounded in Europe’s historical experience, is an obstacle to a new humanism that might ground human rights afresh allowing for their decolonial revision. Always in search of a new humanism, Fanon points out that his teacher, Aime Cesaire, once reminded him that “When you hear someone insulting the Jews, pay attention; he is talking about you”.<sup>56</sup> Ciccariello-Maher notes that, Fanon raises this not necessarily because an anti-Semite is a negrophobe but because “what unites the two is a denigration of the human”.<sup>57</sup> Dussel has pointed out how colonialism has a specific relationship to difference whereby the coloniser devoured the colonised (as the other) and constructed himself as rationale and sovereign such that in the long duree of the Enlightenment history, “the modern ego cogito was anticipated by more than a century by the practical, Spanish Portuguese ego conquiro (I conquer) that imposed its will (the first modern “will-to-power”) on the indigenous populations of the Americas”.<sup>58</sup> Here Descartes’ I think, therefore I am turns into ‘I conquer, therefore, I am’.<sup>59</sup> To argue for the

---

<sup>51</sup> Allen Amy (n.48) at xiv.

<sup>52</sup> Ibid at xiv – xv.

<sup>53</sup> Said Edward, *Culture and Imperialism* (Vintage 1993); Allen Amy (n.48).

<sup>54</sup> Said Edward (n.53) at 278.

<sup>55</sup> Allen Amy (n.48) at 3; Tully James, *Public Philosophy in a New Key*, vol. 2, *Imperialism and Civic Freedom* (Cambridge University Press 2008); Tully James, “Political Philosophy as a Critical Activity” (2002) 30 (4) *Political Theory* 533.

<sup>56</sup> Frantz Fanon, *Black Skin, White Masks* (Grove Press, 2008), 101.

<sup>57</sup> Ciccariello-Maher George (n.39) at 134.

<sup>58</sup> Dussel Enrique, “Europe, Modernity, and Eurocentrism” (2000) (1) *Nepantla: Views from the South* 471.

<sup>59</sup> Ndlovu-Gatsheni Sabelo, “Why decoloniality in the 21<sup>st</sup> century?” (2013) (48) *The Thinker* 10.

coloniality of the idea of human rights as currently constituted, and by extension the coloniality of press freedom as human rights, is therefore to “dig deeper and to press harder” with the search for human freedom and emancipation and an articulation of a new humanism.<sup>60</sup> This is the task we turn to in the next section.

### 3. TOWARDS A DECOLONIAL IDEA OF MEDIA FREEDOM

Following Wynter and Fanon, Maldonado-Torres notes that the limits to the hegemonic liberal and neoliberal visions of human freedom and liberation is that they are built on conceptions of subjectivity rooted in coloniality.<sup>61</sup> Illustrating this thesis, in the context of the human rights discourse, he points out that the idea of the human, as a universal subject figure, is itself riddled with and limited by coloniality. In the West, the human appears as a figure separated from the divine through a secular-line and through racialized constructs where an “onto-Manichean colonial line” separates the human and the barbarian.<sup>62</sup> After an engagement with the coloniality of the concept of human rights in the preceding section, it can be argued that, in postcolonial countries, like Zimbabwe and South Africa, to talk of press freedom as human right outside “a decolonization of the concept of the human” is to fall into a trap.<sup>63</sup> I should define postcolonial and decolonial theoretical concepts and justify their articulation in talking about a new human subject and a new idea of human rights.

Those who have been called decolonial theorists and have embraced the challenge of confronting the continued coloniality especially under the modern liberal order (neoliberalism), insist that decoloniality is not postcolonialism.<sup>64</sup> However, in the task of articulating a new idea of human rights, I locate my argument in the intersection and point of convergence between postcolonialism and decoloniality as

---

<sup>60</sup> Ciccariello-Maher George (n.39) at 135.

<sup>61</sup> Wynter Sylvia (n.8) at 257; Fanon Frantz (n.8); Maldonado-Torres Nelson “On Coloniality of Being: Contributions to the Development of a Concept” (2007) 21 (2 – 3) *Cultural Studies* 240; Maldonado-Torres Nelson (n.2) at 117.

<sup>62</sup> Maldonado-Torres Nelson (n.2) at 117.

<sup>63</sup> Maldonado-Torres Nelson (n.2) at 117; Ndlovu-Gatsheni Sabelo (n.59) at 10.

<sup>64</sup> Maldonado-Torres Nelson (n.2) at 117; Ndlovu-Gatsheni Sabelo (n.59) at 10.

anti-colonial theoretical postures.<sup>65</sup> Hall defines the postcolonial as the conjectural moment “in which both the crisis of the uncompleted struggle for ‘decolonisation’ and the crisis of the ‘post-independence’ state are deeply inscribed”.<sup>66</sup> While emphasising that coloniality is different from colonialism, Maldonado-Torres defines it as “long standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations”.<sup>67</sup> In another elaboration, coloniality is characterised as “a leitmotif of global imperial designs [...] the invisible vampirism of technologies of imperialism and colonial matrices of power that continue to exist in the minds, lives, languages, dreams, imaginations, and epistemologies of modern subjects in Africa and the entire Global South”.<sup>68</sup> It is clear that the way Hall thinks about the endurance of colonialism in the postcolonial moment is not different from the emphasis that Maldonado-Torres and Ndlovu-Gatsheni make about coloniality as born out of colonialism and modernity.<sup>69</sup>

Press freedom in most of Africa, like in most postcolonial spaces, is still thought of in the liberal sense. White, firmly locates journalists at the centre of press freedom, referring to press freedom as “editorial and journalistic freedom” that allows the media to fulfil the normative expectation of setting “the agenda for debating the national development goals”.<sup>70</sup> Reference to ‘national development goals’ expose his liberal locus of enunciation. He notes that there should be assumption that the media have the editorial capacity and leadership to set the agenda, and that, as part of the civil society, they have “the vision,” “the will” and “the unity” to push for these developmental goals.<sup>71</sup> This conceptualisation of the media and media freedom, and what it can do, is based on the liberal normative expectations of the media. The liberal normative expectations of the media include the watchdog role, the informational role, and the entertainment role, among others. What is assumed and taken for

---

<sup>65</sup> Asher Kiran, “Spivak and Rivera Cusicanqui on the Dilemmas of Representation in Postcolonial and Decolonial Feminisms” (2017) 43 (3) *Feminist Studies* 512; Bhabra Gurinder, “Postcolonial and decolonial dialogues” (2014) 17 (2) *Postcolonial Studies* 115.

<sup>66</sup> Hall Stuart, “When was ‘the Post-colonial’? Thinking at the Limit” (224) Chambers Ian and Curti Lidia *The Post-colonial Question* (Routledge 1996).

<sup>67</sup> Mignolo Walter (2007) (n.8) at 243.

<sup>68</sup> Ndlovu-Gatsheni Sabelo (n.59) at 11.

<sup>69</sup> Hall Stuart (n.66) at 242; Maldonado-Torres Nelson (n.61) at 240; Ndlovu-Gatsheni Sabelo (n.59) at 10.

<sup>70</sup> White Robert, “Editorial: Is there progress in media freedom in Africa?” (2011) 4 (2) *African Communication Research* 221.

<sup>71</sup> *Ibid* at 221.

granted is that the media operate in a “free market” where there is no connection between it (the media) and politics, and there is minimal government intervention in the market, in general, and in the media, specifically. This conceptualisation of press freedom links to the false claim that human rights are apolitical. The liberal tradition in Africa has been characterised by an emphasis on the private ownership of media relying heavily on advertisements and sales.<sup>72</sup> In Zimbabwe, even where the print media are owned by the government, they still operate and compete in the (free) market for sales and for advertising. In South Africa, the print media are mostly private and therefore firmly located in the market and the market logic.

According to Raejmaekers and Maesele, the liberal model, “conceives society as a complex of competing groups and interests, in which power is fragmented and widely diffused”.<sup>73</sup> In this imagined liberal democratic context, “the main goals of media are checking on the government and informing and representing the people”.<sup>74</sup> According to Curran and Seaton, in the liberal perspective, it is argued that the freedom to publish in the context of a free market allows for a diversity of viewpoints making the press a representative institution.<sup>75</sup> This view is limited in that it only focuses on the government as the only possible threat to press freedom and ignores two points. First, it ignores those times when the government becomes the enabler and supporter of the media for the benefit of the wide spectrum of society.<sup>76</sup> In South Africa, a few media conglomerates dominate the media space and those that dominate the print media space also have a huge footprint in the digital space. In Zimbabwe, the biggest media organisation in print media – the Zimbabwe Newspapers (Zimpapers) – which has seen to it that relatively poor people have access to information is 80 percent owned by the government. Second, this view ignores those times when the market – that is businesses and other commercial interests – become a

---

<sup>72</sup> Heath Carla, “Negotiating Broadcasting Policy: Civil Society and Civic Discourse in Ghana” (1999) 61 (6) International Communication Gazette 511.

<sup>73</sup> Raejmaekers Danielle and Maesele Pieter, “Media, pluralism and democracy: What’s in a name?” (2015) 37 (7) Media, Culture and Society 1044.

<sup>74</sup> Ibid at 1044.

<sup>75</sup> Curran James and Seaton Jean, *Power without responsibility: The press and broadcasting in Britain* (Routledge 2009).

<sup>76</sup> Mlotshwa Khanyile, “In the Service of Press Freedom or the Imperial Agenda? Negotiating Repression and Coloniality in Zimbabwean Journalism” (2019) 14 (1) Westminster Papers in Communication and Culture 35 - 36.

threat to media freedom. As is discussed in the next section, there are a numerous such cases when the media conduct becomes questionable.<sup>77</sup>

To imagine a decolonial press freedom is to think beyond the current liberal rooted conceptions of media freedom. Importantly, it is to displace the market and put people at the centre of the equation. This entails not thinking about the journalist, or media workers, as Leviathan figures but as Gramsci's organic intellectuals. To Gramsci, organic intellectuals, are located within the socio-economic structure of their society.<sup>78</sup> He argues that:

"Every social group, coming into existence on the original terrain of an essential function in the world of economic production, creates together with itself, organically, one or more strata of intellectuals which give it homogeneity and an awareness of its own function not only in the economic but also in the social and political fields".<sup>79</sup>

Nothing sets these intellectuals apart from their society or community. The journalist, as an organic intellectual, would be expected to be located within his community. A decolonial conceptualisation of press freedom, requires us to think in the indigenous sense of *umuntu ngumuntu ngabantu* (I am because of other people).<sup>80</sup> It is this realisation of interconnectedness and the acceptance by journalists and political leaders alike that their fate is tied to the fate of the broader society that should encourage a new, decolonial media politics.

Media scholars, mostly in Southern Africa, have argued for an *Ubuntu* based media ethics.<sup>81</sup> Ubuntu is a communitarian ethical framework that can be linked to Nguni cultures of Southern Africa, but can be traced in many cultures in the continent of Africa, and offers "another view of truth, justice, and authority based on collective consciousness"<sup>82</sup>. As has been alluded to in the paragraph above, it is based on the idea that one's humanity is affirmed by another's humanity. This then means that, beyond raising the need for people to build each other's humanity and maintain it, the collective matters more than the individual. However, there are problematic ways in

---

<sup>77</sup> Mlotshwa Khanyile (n.76) at 35 – 36.

<sup>78</sup> Gramsci Antonio, *Selections from Prison Notebooks* (Lawrence and Wishart 1971).

<sup>79</sup> *Ibid* at 113.

<sup>80</sup> Worthington Nancy, "Gender discourse and Ubuntu media philosophy" (2011) 12 (5) *Journalism Studies* 608; Rao Shakuntala and Wasserman Herman, "Global media ethics revisited: A postcolonial critique" (2007) 3 (1) *Global Media and Communication* 29; Christians Clifford, "Ubuntu and communitarianism in media ethics" (2004) 25 (2) *Ecquid Novi: African Journalism Studies* 235.

<sup>81</sup> Worthington Nancy (n.80) at 608; Rao Shakuntala and Wasserman Herman (n.80) at 29; Christians Clifford (n.80) at 235.

<sup>82</sup> Rao Shakuntala and Wasserman Herman (n.80) at 40.



which this ethical framework is mobilised into social theory, in general, and media theory, in particular. First, for some scholars, Ubuntu is appropriated and made to fit into an already existing centuries old Western framework of ethical thinking.<sup>83</sup> For Christian, the question is on what Ubuntu can contribute to “global media ethics”.<sup>84</sup> In a sense, there already exists a universal ethical framework and there is no denying that it is based on the centuries long Western history. Ubuntu, therefore, should make itself ‘useful’ and contribute to this global media ethics. To his credit, Christian (2007) does grapple with the question of the universalism of ethics. The second problem with the way Ubuntu is being mobilised in media studies is the way that colonialism is completely ignored or is thought of in the context of Africa’s intellectual heritage. Thinking of Ubuntu as a possible postcolonial media ethical framework, depending on what definition of postcolonial is deployed, has the implication of wiping out a long history of the centuries old ethical value. If postcolonial is thought of in terms of the time that comes after colonisation has ended, the challenge is that the sudden appearance of Ubuntu at this time creates the impression that it is as young, less than four decades in both Zimbabwe and South Africa. Ubuntu is as old as the human race in Africa as it has been the guiding ethical framework or way of being human. While Ubuntu offers an important and possible decolonial ethical framework, care must be taken in how it is mobilised lest it ends up trapped in deeper coloniality than we seek to escape.

#### **4. STRUGGLES OVER MEDIA FREEDOM IN ZIMBABWE AND SOUTH AFRICA**

In this section, I discuss existing cases where questions of media freedom have arisen in South Africa and Zimbabwe. I discuss these cases focusing on what they mean for the broader debates on media freedom as a human right.

##### **4.1. SOUTH AFRICA**

In its history of the liberation struggle, led by the African National Congress (ANC), South Africa emerges as a constitutional democracy with socialist leanings. Even the

---

<sup>83</sup> Christians Clifford (n.80) at 235.

<sup>84</sup> Ibid at 62.

rhetoric of the country's rulers evoking the liberation history and how the ANC movement has fought for the complete liberation of all the people adds to that impression. However, in practise and reality, South Africa is a liberal, and even capitalist, country where the majority, mostly black people, live under unequal conditions characterised by high levels of poverty.<sup>85</sup>

A 1999 inquiry into racism in the media by the South African Human Rights Commission (SAHRC) concluded that the media in the country, "reflect a persistent pattern of racist expressions, [...], persistent racist stereotypes, racial insensitivity" and that South African media "can be characterised as racist institutions".<sup>86</sup> This raised a lot of debate in academic circles with leading academics arguing that the research was flawed.<sup>87</sup> However, these academics also pointed out that the shortcomings of the SAHRC research did not mean that the media in South Africa are not racist. Some scholars go further to point out how the media in South Africa have actively deployed elaborate discursive strategies to deny its racism.<sup>88</sup> This racism can be traced back to findings of the Truth and Reconciliation Commission (TRC) that in the pre-1994 period, the media colluded with the apartheid system. It is this history and the current set up of the media industry, which like the whole economy favour white capital, that inform calls for media transformation in the country.<sup>89</sup>

The question of media freedom gains a certain clarity and urgency where the media, located in a country that is still dealing with its racist (apartheid) past, have been seen to pick the colour of the political ecology around them. South Africa is a country where millions of black people live under the most ideal constitution, especially with its bill of rights, yet suffer under the tyranny of the market (and the political leadership) that enforces neoliberal policies that have increased the gap

---

<sup>85</sup> Seekings Jeremy and Nattrass Nicoli, *Class, Race and inequality in South Africa* (Yale University Press, 2005).; Ozler Berk, "Not Separate, Not Equal: Poverty and Inequality in Post-apartheid South Africa" (2007) 55 (3) *Economic Development and Cultural Change* 487.

<sup>86</sup> South African Human Rights Commission (SAHRC), *Faultlines: Inquiry into Racism in the Media* (89) (SAHRC 2000).

<sup>87</sup> Berger Guy, "Problematizing race for journalists: Critical reflections on South African Human Rights Commission inquiry into media racism" (2001) 15 (1 – 2) *Critical Arts* 69; Tomaselli Keyan, "Faulty Faultlines: Racism in the South African media" (2000) *Ecquid Novi: African Journalism Studies* 157.

<sup>88</sup> Durrheim Kevin, Quayle Michael, Whitehead Kevin and Kriel Anita, "Denying racism: Discursive strategies used by the South African media" (2005) 19 (1 – 2) *Critical Arts* 167; Wasserman Herman, "'We are not like that': Denial of racism in the Afrikaans press in South Africa" (2010) 36 (1) *Communicatio: South African Journal for Communication Theory and Research* 20.

<sup>89</sup> Tomaselli Keyan (n.57) at 157; Berger Guy (n.57) at 69; Boloka Gibson and Krabill Ron. "Calling the glass half full: a response to Berger's 'Towards an analysis of the South African media and transformation, 1994- 1999'" (2000) (43) *Transformation* 75.

between the rich and the poor. Media freedom in such a scenario is thought of in terms of ownership, as something to have. The rich can speak of media freedom, but the poor cannot think of media freedom before they have a plate of food on their table. The South African courts are full of cases where rich people have sued each other for defamation and for the abuse against their freedom, around freedom of expression and the media. What becomes clear in those cases is that media freedom is a privilege of the few rich and powerful, those who, to use Habermas' metaphor, are in the public sphere.<sup>90</sup> Like in most African countries, the new media technologies have been seen as affording ordinary people a chance to enter into the "public sphere" and the media ecology. However, the cost of data bundles remains a barrier to entry for most people. Even the ruling party, ANC, has joined the third biggest opposition party, the Economic Freedom Front (EFF) to argue that data must fall. How this will contribute to the expansion and actual 'universalisation' of media freedom to the broader population remains to be seen because, as previously argued, access to communication infrastructures is not what access is solely about. In a country that is struggling with a lot of challenges, as a result of the apartheid policies, there are a lot of issues that impact on media access and resultantly, questions of media freedom.

The racism of the media in South Africa can be regarded as its birth mark. The first newspapers in South Africa, *Cape Town Gazette* and *African Advertiser*, were published on 16 August 1800 by George Yonge, Alexander Walker and John Robertson, described as "renowned for being corrupt slave dealers".<sup>91</sup> Although newspapers in South Africa have developed as anti-status quo institutions that fought the governing powers relentlessly, two points have to be raised here. First, for a media whose founding moment is at the hands of not just slave dealers, but corrupt slave dealers, people for whom black bodies were *thingfied* objects<sup>92</sup> to be bought and sold in a market, questions of representation as tied to media freedom, are important. We will return to this point shortly. Second, race as a structuring logic, world over and in South Africa, has meant that no matter how the media under apartheid saw themselves as fighting a good fight against authorities, they still remained blind to the

---

<sup>90</sup> Habermas Jurgen, "The Public Sphere: An Encyclopedia Article" (1964/1974) (3) New German Critique 55.

<sup>91</sup> Wigston David, "A History of South African Media" (3) Fourie Pieter Media Studies: Media History, Media and Society (Juta and Company 2007).

<sup>92</sup> Fanon Frantz (n.8).

suffering of the indigenous people. If they were practising freedom, of any kind, that freedom still remained freedom for a select few, who can claim it as a privilege of their skin.

Issues of representation are central to questions of media freedom. For the majority of the people, their relationship, and therefore access to the media, can be regarded in terms of how they see themselves as 'represented' in the media. I use the concept of 'representation' in Hall's constructivist sense where it is seen as the production of meaning that links thoughts with language to refer to the 'real' or imagined world of objects, people or events.<sup>93</sup> Further, in the constructionist approach to representation in the media, neither the things themselves nor the author can fix meaning, but it is argued, "we construct meaning, using representational systems – concepts and signs".<sup>94</sup> As a social space, the media are central to the construction of identities and belonging,<sup>95</sup> and in democratic discourse this is linked to issues of citizenship. Citizenship is the identity – and the rights and responsibilities linked to it – as a result of belonging to the community of the nation. Representation in the media is therefore implicated in the distribution of social power in that what people get (out of politics) is linked to how they are seen.<sup>96</sup> Thinking about this, brings us to the question of what media freedom does. In the context of representation, and what the media does, is a political question that links the media to the broader politics of society. The question of media freedom, then does not arise as a right, but an ethical responsibility.

#### 4.2. ZIMBABWE

There have been numerous cases that illustrate the question of media freedom in Zimbabwe's postcolonial history. Zimbabwe's case could be materially different to that of South Africa, but the conceptualisation of media freedom is similarly constructed on liberal ideology. Similar to South Africa, this narrow conceptualisation of media freedom closes out a large number of people, however, here it is not on the basis of race. In Zimbabwe, it could be the case of class, where the media is available

---

<sup>93</sup> Hall Stuart, *Representation: Cultural representations and signifying practices* (3) (SAGE 1997).

<sup>94</sup> *Ibid* at 11.

<sup>95</sup> Cottle Simon, *Ethnic Minorities and the Media: Changing Cultural Boundaries* (2) (Open University Press/McGraw Hill Education 2000).

<sup>96</sup> Karppinen Kari, "Media and the Paradoxes of Pluralism" (27 - 28) in Hesmondhalgh David and Toynbee Jason *The Media and Social Theory* (Routledge 2008).

or accessible to the rich elites who include the ruling and the business class. Zimbabwe has a situation where the ruling elite are also the business class.

The process of and eventual effecting of the Access to Information and Protection of Privacy (AIPPA) law carved a discursive space that essentially became a battlefield over press freedom in Zimbabwe. AIPPA is a law that was promulgated in 2002 aimed at facilitating the media's access to information held by public bodies. It was meant to be a comprehensive law aimed at mostly the media. According to the Act, amended in 2003 and 2005, the piece of legislation is meant to:

“To provide members of the public with a right of access to records and information held by public bodies; to make public bodies accountable by giving the public a right to request correction of misrepresented personal information; to prevent the unauthorised collection, use or disclosure of personal information by public bodies; to protect personal privacy; to provide for the regulation of the mass media; to establish a Media and Information Commission and to provide for matters connected therewith or incidental to the foregoing.”<sup>97</sup>

The Act has, however raised a lot of debate in Zimbabwe with some people, especially in the civil society, arguing that it is part of Zimbabwe's draconian media laws. Due to this contest around the law, it is not surprising that a year after it was promulgated, the law was amended in respect of the definition of mass media services and the meaning of journalistic abuses. In 2005, the piece of media legislation was amended with regard to the imprisonment of journalists.

At the time of its promulgation in 2002, the then minister of information, Professor. Jonathan Moyo, as the promoter of the bill in parliament came under pressure. The chairperson of the parliamentary legal committee, Dr. Edison Zvobgo, excoriated the minister as desiring Zimbabweans to ask for permission from him to speak and described the bill as “the most calculated and determined assault on our (constitutional) liberties, in the 20 years I served as Cabinet Minister”.<sup>98</sup> Considering that Dr. Zvobgo was part of the ruling elite, when he talks about “our (constitutional) liberties,” it is ambiguous if at all he is referring to poor Zimbabweans as well or is talking about the ruling elite who have always had access to the media and therefore can speak of media freedom. Most people in the private press, have in hindsight,

---

<sup>97</sup> Access to Information and Protection of Privacy Act (AIPPA) as amended 2008, preamble.

<sup>98</sup> Article 19/Misa-Zimbabwe, The Access to Information and Protection of Privacy Act: Two Years On (3) (Article 19 and Misa-Zimbabwe 2004).

described Professor Moyo as responsible for AIPPA even though the minister has pointed out that there are people who draft these laws in the government bureaucracy. In that this charge against him is extended to the excesses of the Zanu PF government, as if he was prime minister, the principles around critiquing AIPPA, which should be rightly pegged on the question of media freedom, are sometimes lost.<sup>99</sup>

To his credit, the former minister rightly points out that at that time the media was not regulated leaving it to be exposed to a raft of other laws that were indeed draconian like the then Law and Order maintenance Act (LOMA) (changed to the Public Order Security Act (POSA), and the Official Secrets Act (OSA).<sup>100</sup> The media was also doing nothing towards self-regulation. In a sense, the media, as an industry and a referring to a body of journalists, have always sat and waited to be given media freedom by the government on a platter. Here, media freedom is seen as a gift from the rulers. It is years after AIPPA that the media industry set up the Voluntary Media Council of Zimbabwe (VMCZ), an organisation whose media activism is centred on self-regulation.<sup>101</sup> Importantly, there has always been questions around the funding of the VMCZ, whether it is funded by journalists by themselves making it a 'journalists' initiative' or it is donor funded raising questions around influence. If the press freedom agenda in Zimbabwe is donor funded, as asserted by its critics such as the government, it would be fair that the calls for a specifically liberal and western modelled media freedom in Zimbabwe are subjected to a decolonial and political economy scrutiny.<sup>102</sup>

What is important to discuss here is how the AIPPA, although limited as well in that it is imagined in the context of the liberal ideology, sought to promote a certain kind of media freedom that is located in the entirety of the society and not narrowed down to journalists, media workers, media owners and their elite partners like the country's rulers. In that, the Act attempts a balancing act by seeking to protect members of the public from excesses of the media, on one hand, while facilitating easy access to information held by public bodies, on the other hand, is never appreciated. However, what is problematic here is that even AIPPA is thinking in individualist terms, which leaves such an important extension of media freedom still vulnerable to

---

<sup>99</sup> Mlotshwa Khanyile (n.76) at 33.

<sup>100</sup> Feltoe Geoff, A guide to media law in Zimbabwe (Legal Resource Foundation of Zimbabwe, 2002).; Limpitlaw Justine, Media law handbook for Southern Africa Volume 2 (Konrad-Adenauer-Stiftung Regional Media Programme, 2013), 603 - 689.

<sup>101</sup> The Soulbeat Africa Network, "Voluntary Media Council of Zimbabwe (VMCZ)" (March 2011) (available in: <https://www.comminit.com/africa/content/voluntary-media-council-zimbabwe-vmcz-1>, Accessed 30 October 2019).

<sup>102</sup> Mlotshwa Khanyile (n.76) at 33.

appropriation by the society's elites. However, to take media freedom out of the narrow idea that it belongs to those who own media gadgets or the printing press<sup>103</sup> is laudable.

Former Zimbabwean president, Robert Mugabe, has never hidden his hatred of the conduct of the civil society in the country – the Non-Governmental Organisations (NGOs), the Church, and importantly the media – whom he has accused of over-reliance on the West for not only funding but ideological content as well.<sup>104</sup> Mugabe has accused local journalists of publishing falsehoods and fabrications in the service of their Western masters.<sup>105</sup> More importantly, playing his politics on the global stage, where he has seen his role as fighting imperialism, Mugabe has focused his rhetoric on the Western media. In August 2007, while addressing a high-level conference on poverty reduction in Malaysia, Mugabe took a swipe at journalists for tarnishing the image of Zimbabwe:

“The press and journalists, are they driven by the sense of honesty and objectivity all the time? [...] Or are they swayed from objectivity and truth by certain notions arising from their own subjective views? [...] I say that in the light of reports quite often deliberately intended to tarnish and deceive. Should the journalists really indulge in what they know to be misleading stories, and therefore stories that go against objectivity and the truth?”<sup>106</sup>

Although conceived in liberal terms that positions objectivity at the centre of normative expectations about media conduct, Mugabe offers a critique that speaks to the ethical conduct of the media in the coverage of their communities and ‘other’ communities in the case of international media. Mugabe’s reference to ‘objectivity’

---

<sup>103</sup> Liebling Abbott Joseph, *The wayward pressman* (Greenwood Press 1972).

<sup>104</sup> Mail & Guardian Staff Reporter, “Mugabe takes aim at Western media” (13 September 2007) (Available in <https://mg.co.za/article/2007-09-13-mugabe-takes-aim-at-western-media>, accessed 30 October 2019).

<sup>105</sup> Aljazeera, “Zimbabwe: Mugabe's Media Legacy” (3 September 2017) (Available in <https://www.aljazeera.com/programmes/listeningpost/2017/09/zimbabwe-mugabe-media-legacy-170903085037600.html>, accessed on 30 October 2019).

<sup>106</sup> Studio 7, “Mugabe criticizes the media for ‘tarnishing’ Zimbabwe’s image” (6 August 2007) (Available at: <https://www.voazimbabwe.com/a/a-13-56-74-2007-08-06-voa62-68993032/1456452.html>, accessed 23 March 2019).



and 'truth' is what Zelizer calls the god terms.<sup>107</sup> This is despite that objectivity and truthfulness have long been exposed to be part of the discursive myths of liberal journalism.<sup>108</sup> For Mugabe, as self-confessed enemy of liberalism and an anti-colonial fighter, evoking these god terms could be rhetorical and aimed at outfoxing the (international) media within their own arguments. In the same Studio 7 report, the Media Institute of Southern Africa (MISA) director, Rashweat Mukundu, does not respond to the questions around "truth" and "objectivity" that Mugabe raises but plays politics by being dismissive arguing that this was characteristic of the Zimbabwean president reflecting his "disregard for the important role played by the media".<sup>109</sup> The claims of the media to media freedom are always predicated on this important role that it plays. However, when subjected to thorough scrutiny the role that the media actually plays is obverse to its claims. It has been noted that the media no longer comforts those in pain, and pain those who are comfortable, as it has always claimed.<sup>110</sup>

## 5. CONCLUSION

The idea of human rights, and by extension media freedom, is a valid and useful idea even for postcolonial societies like Zimbabwe and South Africa. However, as has been argued in the two case studies, the idea of press freedom in these countries becomes problematic when it is imagined as universal. Although both South Africa and Zimbabwe are postcolonial countries, they have had different historical experiences from each other and with the West. South Africa as a country is a postapartheid country with a racist legacy institutionalised in the both the colonial and the apartheid periods. This racist legacy continues into the present period where poverty and inequalities divide people into black and white races. According to former president, Thabo Mbeki, postapartheid South Africa, is divided into two nations and:

"One of the nations is white, relatively prosperous regardless of gender or geographic dispersal – it has ready access to a developed economy, physical,

---

<sup>107</sup> Zelizer Barbie, "When facts, truth, and reality are God-terms: on journalism's uneasy place in cultural studies" (2004) 1 (1) Communication and Critical/Cultural Studies 100.

<sup>108</sup> Kaplan Richard, *Politics and the American Press: The Rise of Objectivity, 1865–1920* (Cambridge University Press 2002); Schudson Michael, "The Sociology of News Production" (7) Berkowitz Daniel *Social Meaning of News: A Text-Reader* (Sage 1997).

<sup>109</sup> Studio 7 (n.106).

<sup>110</sup> Richardson John, *Newspapers: An Approach from Critical Discourse Analysis* (Palgrave Macmillan 2007).

educational communication and other infrastructure [...] (The other is black) And this nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure – it has virtually no possibility to exercise what in reality amongst a theoretical right to equal opportunity, with that right being equal within this black nation only to the extent that it is equally incapable of realisation.”<sup>111</sup>

As already alluded to in the Thabo Mbeki quote above, for the media, and for media freedom, the implications of the inequality that is the reality of South Africa's postapartheid moment is that for a long time black people hardly owned or controlled the media, as means of production, and a large number of people have no access to quality media products such as are offered by the satellite provider, Multichoice. Black people's access to the media as symbolic resources in postapartheid South Africa is greatly constrained by poverty and the resultant need to prioritise what they buy with the little money they can get. This can be understood through an appreciation of the history of the country and the history of the country's media.

Compared to South Africa, Zimbabwe is a former settler colony as well, but has a short history of attempting to confront the colonial arrangement of the media and the economy through a raft of, at times controversial, legal instruments. In the early years of independence in the 1980s, the new black government bought shares from the leading newspaper company, the Rhodesian Printing Press, to create the Zimbabwe Newspapers (Zimpapers). The new ruling elites argued that as the people's government they owned the shares of Zimpapers on behalf of the people and that their efforts were aimed at making the media accessible to the large majority of the nation. However, what remains problematic here is that the Zimpapers was run like a usual corporate, listed on the stock exchange, and that meant its products were accessible at a cost. How the government's ownership of Zimpapers facilitated the majority of the people's access to the media remained an ideal. The debate around the AIPPA law is another example of how, unlike their South African counterparts, the Zimbabwean government has tended to play a big role in the media circles. The

---

<sup>111</sup> Thabo Mbeki quoted in Jadoo Yadhana, "SA a country of two nations – Mbeki" (Citizen, 16 March 2016) < <https://citizen.co.za/news/south-africa/1036768/sa-the-country-of-two-nations-mbeki/>> Accessed 26 October 2019.

government said the law was meant to make information held by public bodies accessible to the media, and to facilitate the registration of journalists and media houses so that there is accountability in the media industry. In the final analysis, AIPPA can be best understood in the context of laws meant to indigenise the ownership of the economy. AIPPA was meant to 'indigenise', (by reigning in on it), the operations of the media industry, which the government characterised as an enemy of the people's revolution. For the government, the media in Zimbabwe could not behave like the media in the West all in the name of press freedom as there had to be a fine balance between freedom and responsibility.

The concept of Ubuntu, although there are challenges around how it is embraced bordering on appropriation, proffers an important window for rethinking human rights and press freedom in both Zimbabwe and South Africa, and other Global South spaces. In that its emphasis on the idea that 'I am because you are' it calls for the need to balance freedom to self-create one's humanity with the responsibility to create and preserve other people's humanity. In media practice, this is a balance between freedom and responsibility, freedom to gather and report news and responsibility to respect and protect other people's privacy, identities and cultures. To avoid the simplistic appropriation of Ubuntu, its adoption as an ethical bedrock of a new media practice, calls for a decolonial re-articulation of human rights and media freedom as historicised phenomenon. This is a re-imagining of human rights and press freedom as not universal and for all time, but as necessarily created by communities in the historical context, in this case, of the postcolonial moment.

## WHAT IS NEXT FOR HUMAN RIGHTS AFTER 70 YEARS? HUMAN RIGHTS 'FROM BELOW' IN 'LITTLE MOGADISHU'

WILLEM J.E. JANSEN\*

### ABSTRACT

*This paper focuses on how human rights can be relevant in the local-urban, cross-cultural and interreligious context of 'Little Mogadishu' in Kenya. By defining human rights in terms of human dignity-based human rights culture, moral-spiritual values at a grass roots level can complement international legal standards 'from above'. By doing so, we can address the question of the cross-cultural applicability of these ostensibly "universal" standards. Human dignity-based human rights start 'from below' in the estate of Eastleigh, Nairobi (Kenya). In Eastleigh or 'Little Mogadishu', on account of the many Somalis residing there, Christian and Muslim paralegals as members of human rights civil society organisations in general, and Faith-based Organisations in particular, shape the human rights culture on the ground. Vernacularisation of human rights in a local-urban context such as that of 'Little Mogadishu' is, therefore, what is next for the Universal Declaration of Human Rights after its first 70 years.*

### KEYWORDS

Human Rights Culture; Human Dignity; Kenya; Eastleigh; Interreligious Community

---

\* Willem Jansen is the Programme Coordinator of the International Organisation Initiatives of Change, and Chaplain at the International Institute of Social Studies in The Hague, Erasmus University Rotterdam, The Netherlands. He was a lecturer at St Paul's University, Limuru, Kenya, for the MA Programme Islam and Christian-Muslim Relations (ICMR), from 2009-2014.

\*\*This article is built on my PhD thesis, *Human Dignity and Diapraxis in 'Little Mogadishu': Human Rights Culture in the Interreligious Context of Kenya*, unpublished dissertation, Tilburg University, 2018.

Email: [willem.jansen@iofc.nl](mailto:willem.jansen@iofc.nl)

## 1. INTRODUCTION

In the Foreword of the *UN 70<sup>th</sup> Anniversary Commemorative Edition: Universal Declaration of Human Rights*, former UN Secretary-General Ban Ki-moon writes: 'The Universal Declaration of Human Rights remains as relevant today as it was on the day it was adopted. I hope you will make it a part of your life'.<sup>1</sup> There is something deeply attractive about the idea underlying universal rights that any person anywhere has an inherent dignity irrespective of citizenship, gender, religion, etcetera. This idea was, indeed, as relevant in 1948 as it is in 2019. The *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna on 25 June 1993*, stated that 'All human rights are universal, indivisible and interdependent and interrelated'. Yet, 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.<sup>2</sup>

This article discusses the relationship between human rights as international legal standards and their interpretation and translation in local contexts. Human rights law is widened by defining human rights in terms of culture. The term human rights culture describes a 'culture of human rights contained in declarations of human rights, hence the totality of beliefs, principles and values underlying these, and respect for that culture'.<sup>3</sup> The article focuses in particular on the underlying value of human dignity. The concept of human dignity-based human rights culture will be introduced as the linking pin between international human rights 'from above' and urban-local human rights principles and beliefs 'from below'. The article builds on arguments and concepts that navigate between human rights 'from above' and 'from below'.<sup>4</sup> This

---

<sup>1</sup> Universal Declaration of Human Rights, UN 70th Anniversary Commemorative Edition (2015) <<https://www.unaa.org.au/wp-content/uploads/2015/07/UDHR-English-Version.pdf>> .

<sup>2</sup> Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 <<https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> .

<sup>3</sup> Johannes van der Ven, Jaco Dreyer, Hendrik Pieterse (Eds), *Is there a God of Human Rights? The Complex Relationship between Human Rights and Religion: A South African Case* (Brill Leiden/Boston 2004) 82.

<sup>4</sup> Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) *Metaphilosophy*; Bonny Ibhawoh, *Human Rights in Africa: New Approaches to African History* (Cambridge University 2018); Jim Ife, *Human Rights from Below: Achieving Rights through Community Development* (Cambridge University 2012); Makau Mutua, *Human Rights Standards, Hegemony, Law, and Politics* (New York University Press 2016); Sally Engle Merry, 'Transnational

article focuses on the dignity and rights of refugees, including un-accompanied minors in Eastleigh, a neighbourhood of Nairobi (Kenya). The social institutions that are relevant to human rights culture in terms of human rights violations at the grass roots will be analysed, rather than investigating human rights international and national conventions and treaties.

In some public discourses in the global South the Universal Declaration of Human Rights (UDHR) represents an abstract Western secular, individualistic, primarily legal document that is less relevant for the non-Western world, where spirituality and religion matter in most people's daily lives.<sup>5</sup> In African contexts, religious values also cannot be avoided in the discourse on what such a human rights culture contains. Stephen Ellis and Gerrie Ter Haar have defined religion in the context of sub-Saharan Africa 'as belief in the existence of an invisible world, distinct but not separate from the visible one, that is home to spiritual beings with effective powers over the material world'.<sup>6</sup> On an African urban-local, cross-cultural level, international human rights and religion in terms of moral-spiritual values are not always necessarily strange bedfellows.

Can the alleged "universal" legal standards of the UDHR be applicable in a cross-cultural and interreligious local setting such as Eastleigh? From the 2000s onwards, Eastleigh has attracted a number of researchers, investigating its history, its urban refugee issue, its social and economic developments and religious practices.<sup>7</sup> In Eastleigh, I conducted an empirical case study (2009-2014) in search of human rights culture 'from below'. During a mapping exercise (November 2012-February 2013), as a part of Participatory Action Research (PAR), data have been collected about issues of social justice, economic and labour rights through questionnaires and through street

---

Human Rights and Local Activism: Mapping the Middle' (2006) 108(1), AA; Tom Zwart, 'Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach' (2012) Human Rights Quarterly 34.

<sup>5</sup> Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press 2006) 126; Abamfo Atiemo, *Religion and the Inculturation of Human Rights in Ghana* (Bloomsbury 2013) 4; Philomena Njeri Mwaura, 'Civic Drive Change, Spirituality, Religion and Faith' in Alan Fowler and Kees Biekart (eds) *Civic driven Change: Citizen's Imagination in Action* (Institute of Social Studies The Hague 2008). 2; Zwart, *ibid.*, 556.

<sup>6</sup> Stephan Ellis and Gerrie Ter Haar, 'Religion and Politics: Taking African Epistemologies Seriously' (2007) 45(3) *Journal of Modern African Studies* 387.

<sup>7</sup> Neil Carrier, *Little Mogadishu: Eastleigh, Nairobi Global Somali Hub* (Hurst & Company 2016) 18.

interviews by Muslim and Christian students. We mapped the numerous social institutions, and civil society organisations, including Faith-based Organisations (FBOs).<sup>8</sup> Human rights culture appears not to 'exist' in explicit international legal terms, but one that 'happens' as a constructive process with a prominent role for the members of FBOs.

The article advances in four sections. Section 2 will highlight the academic discourse on the shades and features of human dignity, the legal and moral sides of human rights, and the role of religion. It discusses how international human rights treaties are complemented by a human rights culture, including the pre-legal, moral idea of dignity that is often framed in a religious idiom. In section 3, Kenya's socio-political developments are highlighted with regard to refugees' rights since the early 1990s. The case study of Nairobi's estate of Eastleigh will analyse its context while focusing on social institutions, including networks of Christian and Muslim paralegals and Faith-based Organisations. Section 4 contains some concluding remarks.

## 2. DIGNITY-BASED HUMAN RIGHTS CULTURE

In its preamble, the UDHR presupposes 'the inherent dignity...of all members of the human family' and speaks of the 'dignity and worth of the human person'.<sup>9</sup> The Vienna Declaration and Programme of Action (1993) reaffirms human dignity by insisting that 'all human rights derive from the dignity and worth inherent in the human person'.<sup>10</sup> The African Charter on Human and Peoples' Rights states that 'fundamental human rights stem from the attributes of human beings' upon which 'the essential rights of man' are based.<sup>11</sup> In terms of dignity and human attributes, Martha Nussbaum's exploration of the concept of dignity is helpful because of its applicability in intercultural and interreligious contexts. She has related dignity to the Aristotelian notion that there is something 'wonderful and wonder inspiring' in complex forms of human nature.

---

<sup>8</sup> Christopher Peter, Joseph Wandera and Willem Jansen, *Mapping Eastleigh for Christian-Muslim Relations* (Krapf Publishers) 2013.

<sup>9</sup> See note 1.

<sup>10</sup> See note 2.

<sup>11</sup> African Charter on Human and Peoples' Rights (1991) AI.



“The idea of dignity has broad cross-cultural resonance and intuitive power. We can think of it as the idea that lies at the heart of tragic artworks, in whatever culture... For we see a human being as having worth as an end, a kind of awe-inspiring something...with strong incentives for protecting that in persons that fills us with awe”.<sup>12</sup>

This description still leaves us with the question of what the ‘awe-inspiring something’ of the human being actually means. Gerrie ter Haar has emphasized ‘the importance for all of us, in and outside the Western world, of considering the fundamental question that underlies all human rights thought: what is a human being?’<sup>13</sup> According to Ter Haar, the ‘human’ dimension of the concept is often disregarded in the human rights discourse. For many people in the world ‘the spiritual dimension is an essential part of the human condition’, which means that the religious and spiritual aspects cannot be ignored in debates about human rights and dignity.<sup>14</sup> In many African texts, for instance, ‘dignity’ is discussed in the context of the sometimes overused concept of *ubuntu*. It refers to meanings such as ‘humanness’ or ‘person’ often with communitarian and religious connotations: “I am because you are and that a person is a person because of other people. (...) Ubuntu refers to the search for the Godhead within us. If we act accordingly, we will find that everybody else is the reflection and expression of this Godhead’.<sup>15</sup>

In some non-Western contexts, such as in Kenya, respecting the autonomy of the individual other is probably not enough. African texts addressing human dignity and rights often assume that it is by virtue of having a “divine spark” that human beings have a dignity that is capable of grounding human rights.<sup>16</sup> Makau Mutua

---

<sup>12</sup> Martha Nussbaum in Rutger Claassen, ‘Human Dignity in the Capability Approach’ in Marcus Düwell (et al.) *The Cambridge Handbook of Human Dignity, Interdisciplinary Perspectives* (Cambridge University Press, 2014) 245.

<sup>13</sup> Gerrie ter Haar and James Busuttil (eds) *The Freedom to do God’s Will: Religious Fundamentalism and Social Change* (Routledge 2003) 90.

<sup>14</sup> Gerrie ter Haar (2011), ‘Religion and Human Rights: Searching for Common Ground’ in Gerrie ter Haar (ed.) *Religion and Development, Ways of Transforming the World* (Hurst & Company) 305.

<sup>15</sup> Pitika Ntuli, ‘Personhood, An African Perspective’ in Thandabatu Nhlapo, Emma Arogundade, and Harry Garuba (eds), *African Culture, Human Rights and Modern Constitutionalism* (University of Cape Town 2013) xii, xiii.

<sup>16</sup> Thaddeus Metz, ‘Dignity in the Ubuntu Tradition’ in Düwell (et al.) *ibid.*, 312.

refers to human beings in terms of dignity, 'inner worth' and the philosophy of ubuntu:

"Human dignity, unlike human rights, is not just a language of legal rights, but a concept that encompasses empathy, hospitality, and the inner worth of human beings. It is akin to the philosophy of *ubuntu*, a term from Bantu languages of Africa which refers to human-ness. In this context, new social movements for new and emerging rights have arisen".<sup>17</sup>

Mutua states that 'social movements for new and emerging rights' are needed in the light of the colonial subtext, and in terms of his 'savage-victims-saviour' (SVS) metaphor, that is still very much alive in the contemporary human rights movement.<sup>18</sup> He has therefore advocated the genuine cross-contamination of cultures to create 'a new multicultural human rights corpus' (...) '[T]he imposition of the current dogma of human rights on non-European societies flies in the face of conceptions of human dignity, and rejects the contributions of other cultures in efforts to create a universal corpus of human rights'.<sup>19</sup> Mutua, however, has observed a change in 'the given credence to human rights as a historical continuum of the civilizing mission of Eurocentrism'. He states:

"To be sure, 2015 is not 1948. A lot has changed in the world of human rights. The normative character of the human rights corpus is now slowly being transformed into a more inclusive dogma. But this transformation is not deep enough. For example, as a secular enlightenment project, the human rights movement still does not know how to relate to Islamic societies, that is, how to understand and work with their views about the relationship between state and religion or their understanding of gender (...) Can this change come from the top, that is, the West, where the traditional human rights movement has its most ardent supporters and defenders? Or will it be initiated from below, the South, where the grassroots, on-the ground work is being done?"<sup>20</sup>

Thus, in order to reach such 'a more inclusive dogma' from below, human rights should not only be framed in a legal rights theory, but also initiated 'from below' in local practices. Van der Ven has defined human rights in terms of human rights culture, containing human rights documents, including the totality of beliefs,

---

<sup>17</sup> Mutua (2016) 140.

<sup>18</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia Press 2002) 27.

<sup>19</sup> *Ibid.*, 8.

<sup>20</sup> Mutua (2016) 179, 180.

principles and values underlying these, and respect for that culture.<sup>21</sup> Human rights culture does respect the UDHR and all its subsequent international covenants and treaties. However, in this definition the scope of human rights in the sense of a strictly legal instrument is widened by relating it to its underlying values. By broadening human rights to include human rights culture, the risk of ‘juridification’<sup>22</sup> of human rights is avoided. Or, in the words of Annelise Riles, human rights have to be freed from the ‘iron cage of legal instrumentalism’.<sup>23</sup> According to Johannes Morsink, ‘We must follow the lead of the Declaration’s drafters and liberate the idea of human rights from the realm of the political and juridical, which is where contemporary theorists have imprisoned it’.<sup>24</sup> At the start of the drafting of the UDHR in 1945, the Catholic philosopher Jacques Maritain had claimed that the composers, who were from very diverse cultural and religious backgrounds, ‘agree about rights but on the condition that no one asks why’.<sup>25</sup> Habermas rephrases Maritain’s words in terms of human dignity: ‘[e]veryone could agree that human dignity was central, but not why and how’.<sup>26</sup>

According to Van der Ven, the UDHR as a basic text on human rights is a pragmatic text, which is not foundational but deliberately leaves the establishment of such a foundation open. The 1948 declaration, for instance, contains no reference to God whatsoever, nor to natural law or natural rights, nor to any worldview or even philosophy. The UDHR is a “foundation-open” text (a *begründungsoffen* text).<sup>27</sup> It is a document open to a multiplicity of foundations, including religious ones. The UDHR is characterised by a pragmatic common denominator: to reach agreement so as to do what needed to be done.<sup>28</sup> According to Michael Ignatieff, there is a deliberative

---

<sup>21</sup> Van der Ven (et al.) (2004) 82.

<sup>22</sup> Gerrie ter Haar, *Religion and Development, Ways of Transforming the World* (London Hurts & Company 2011) 305.

<sup>23</sup> Annelise Riles, ‘Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage’ (2006) 108(1) AI 52.

<sup>24</sup> Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Pennsylvania Press 2009) 53.

<sup>25</sup> John Witte, ‘Religious Sources and Dimensions of Rights’ in Govert Buijs (et al.) in *Risky Liaisons, Democracy and Religion: Reflections and Case Studies* (VU University Press 2012) 346.

<sup>26</sup> Habermas (2010) 467.

<sup>27</sup> Van der Ven (et al.) (2004) 185.

<sup>28</sup> Johannes van der Ven, *Human Rights or Religious Rules? Empirical Research in Religion and Human Rights* (1) (Brill Leiden 2010) 166.

silence at the heart of human rights culture: 'Pragmatic silence on ultimate questions has made it easier for a global human rights culture to emerge'.<sup>29</sup> Cross-cultural communication about what human rights mean thus, already started with the drafting of the UDHR project in 1945 and continues to be an essential part of the ongoing universalising process.

Although the UDHR can be considered as positive law, human rights culture also includes the moral idea of human dignity. Arguably human dignity precedes such legal document by many centuries and can be found in distinct cultures and religions. In the context of Africa, the moral idea of human dignity is often framed in a religious language. In the context of Ghana, for instance, Kwame Gyekye stated:

"The general African belief that human beings are created by God – that they are children of God – most probably lies at the basis of values attached to humanity and the unity by African people. And, their having a speck of the divine nature (i.e. soul) in them constitutes all human beings into one universal family of human kind".<sup>30</sup>

In the case study of Eastleigh, I questioned whether the concept of human rights and dignity can travel in cross-cultural and interreligious practices of Christian and Muslim communities. Abdullahi Ahmed An-Na'im, for instance, contends 'that it is only when we make religion and human rights synonymous in the thinking, feeling, motivation and action of given constituencies that we can have a global human rights culture'.<sup>31</sup> An-Na'im's view that religious believers must be understood in their own terms if religion is to become a source of inspiration rather than an obstacle to promoting a culture of human rights, applies probably to all religious traditions. The Ghanaian scholar of religion, Abamfo Atiemo also searches for 'a justifiable basis for universal human rights in local cultures'.<sup>32</sup> He describes human rights as 'dream values' that need to be 'inculturated' in various local cultures.<sup>33</sup> Through a dialectical relationship between human rights values and local cultures 'a modest spread of human rights culture' has been facilitated.<sup>34</sup> In the South African context, Bonny Ibhawoh refers to 'a uniquely South African human rights culture founded on

<sup>29</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University 2009) 95.

<sup>30</sup> Kwame Gyekye, *African Cultural Values: An Introduction* (Sankofa Publishing Company, 2002) 24.

<sup>31</sup> Abdullahi Ahmed An-Na'im in Ter Haar (ed.) (2011) 299, 300.

<sup>32</sup> Atiemo (2013) 30.

<sup>33</sup> Ibid., 53.

<sup>34</sup> Ibid., 198, 199.

universal and local cultural norms'.<sup>35</sup> Social and political developments in the post-apartheid era have included efforts to localise and indigenise human rights norms. Ibhawoh describes the process by which human rights norms become grounded in local contexts as 'the notion of vernacularizing human rights.'<sup>36</sup>

Benedict Anderson developed this concept of 'vernacularisation' in order to explain the process of deviation from Latin language in local European languages during the 19<sup>th</sup> Century, and as part of a liberating movement in European regions.<sup>37</sup> Sally Engle Merry applied the concept of vernacularisation in the context of human rights as 'an analytical framework for studying the localization of human rights...As ideas from transnational sources travel to small communities, they are typically vernacularized, or adapted to local institutions and meanings'.<sup>38</sup> According to Merry,

'Human rights language is similarly extracted from the universal and adapted to national and local communities....A key dimension of the process of vernacularization is the people of the middle: those who translate the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation.'<sup>39</sup>

Intermediaries such as NGO participants, community leaders and human rights activists, according to Merry, 'play a critical role in translating ideas from the global arena down and from local arenas up'.<sup>40</sup>

How can global international norms be translated 'from local arenas up', while tying these norms to urban-local contexts? In what way can international human rights be 'vernacularised', translated and interpreted, in the moral-spiritual, cross-cultural context of Eastleigh? Prominent human rights scholar Tom Zwart has developed the idea of the 'receptor approach', in order to bridge international human rights standards and local cultural diversity.<sup>41</sup> The receptor approach 'assumes that

---

<sup>35</sup> Ibhawoh (2018) 231.

<sup>36</sup> Ibid., 225.

<sup>37</sup> Benedict Anderson, 'Imagined Communities: Reflections on the Origin and Spread of Nationalism' (Verso, 1991); Obinna Okafor and Eddie Krooneman, Vernacularization of Universal Human Rights, A Step towards realizing Human Rights in the Local Setting (Wageningen University, 2011).

<sup>38</sup> Merry (2006) 39.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid., 38.

<sup>41</sup> Zwart (2012) 548.

the culture and the social institutions of Eastern and Southern countries can actually contribute to meeting international human rights obligations'.<sup>42</sup> Human rights obligations that countries have ratified, may not compromise such obligations unilaterally by invoking local cultural values,<sup>43</sup> but should implement them 'diligently and in good faith'.<sup>44</sup> Furthermore, according to Zwart, 'states are encouraged to rely as much as possible on their own culture and social institutions at their implementation stage to enable them to fulfil their treaty obligations fully'.<sup>45</sup> Religion, family, law, self-help, and education are examples of such social institutions.

The receptor approach, assumes that international human rights law does not have a monopoly, but every value system has 'its own inner logic and is aimed at its own conceptualization of fairness and human dignity'.<sup>46</sup> The receptor approach, therefore, provides 'an ethnography of social institutions that are in place in any given society to achieve fairness and human dignity'.<sup>47</sup> According to Zwart, 'in many African societies, which are communal in nature, substantial cultural texture is provided by non-legal social institutions like community, duties, and religion'.<sup>48</sup> Whereas western scholars often tend to overlook or avoid religion, 'in Africa, religion serves as an important receptor for human rights'.<sup>49</sup> To summarise the aim of the receptor approach, according to Zwart:

"Many African cultures have always had a rich indigenous set of human rights practices, based on notions like family, religion and doing good to others. Where they exist, instead of ignoring these local notions of human rights, or replacing them by Western centred concepts, international human rights experts should identify them, incorporate them and build on them."<sup>50</sup>

---

<sup>42</sup> Zwart (2012) 547.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 553.

<sup>47</sup> Ibid., 554.

<sup>48</sup> Ibid., 549.

<sup>49</sup> Ibid., 556.

<sup>50</sup> Tom Zwart, 'Relying on Africa's Strengths in the Area of Human Rights: The Receptor Approach' in Thandabatu Nhlapo, Emma Arogundade, and Harry Garuba (eds), *African Culture, Human Rights and Modern Constitutionalism* (University of Cape Town 2013) 13.

In the light of this study on human dignity-based human rights culture, the receptor approach provides an ethnography of social institutions such as community and religion in places like Eastleigh, and in order to achieve human dignity. It gives 'cultural texture' to non-legal social institutions like Eastleigh's civil society, including its Faith-based Organisations. Without denying international and national legal obligations and treaties, members of human rights organisations in Eastleigh construct a human rights culture that is built on local notions of human dignity in terms of *ubuntu*, community and religion. The receptor approach gives pride of place to religion as a receptor for human rights. It thus acknowledges home-grown local values, including dignity, community and religion, underlying the legal, international human rights treaties.

Furthermore, Jürgen Habermas has described human rights as 'Janus-faced': one side facing morality, the other facing law.<sup>51</sup> By connecting the concept of human rights with human dignity, Habermas has kept sight of the moral side of human rights law. Historically, Habermas argues, violations of human dignity in the real world have always been a motivating source for devising a constitutional project.<sup>52</sup> The notion of human dignity therefore serves as a 'linking pin' or 'conceptual hinge' that makes possible the 'improbable synthesis' between morality and positive law.<sup>53</sup> In Habermas's words:

"I present some legal reasons in support of the claim that 'human dignity' is not merely a classificatory expression, an empty placeholder, as it were, that lumps a multiplicity of different phenomena together but the moral 'source' from which all the basic rights derive their meaning (...) The origin of human rights in the moral notion of human dignity explains the explosive political force of a concrete utopia."<sup>54</sup>

Local contexts matter for human rights culture. Habermas has stressed 'the catalytic role' of human rights as the modern idea of what human rights actually mean in distinct contexts.<sup>55</sup> According to him, specific violations of human dignity – such as those experienced by marginalised social classes, discriminated minorities, illegal immigrants, and asylum-seekers – make the meaning of human dignity apparent and

---

<sup>51</sup> Habermas (2010) 470.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid. See also Jeffrey Flynn, 'Reframing the Intercultural Dialogue on Human Rights, A Philosophical Approach' (Routledge 2014) 99-109.

<sup>54</sup> Habermas, *ibid.*

<sup>55</sup> Flynn (2014) 105.



therefore manifest the need for specific rights.<sup>56</sup> The groups mentioned by Habermas are all represented in the specific society of Eastleigh, to be introduced shortly. He argues that '[i]n the light of such specific challenges, different aspects of the meaning of human dignity emerge from the plethora of experiences of what it means to be humiliated and be deeply hurt'.<sup>57</sup>

In Habermas's view, the concept of human dignity encompasses a genuinely constructive bottom-up process. Human dignity is not an ultimate value from which the concept of human rights is derived, but a key concept for understanding the dynamic process of social struggles through which the moral content of human rights is generated and continues to expand. Habermas, therefore, uses the concept of dignity in a way that connects it with specific struggles for human rights. What human rights share with other moral norms is their rather abstract character and thus the fact that they need to be interpreted in specific cases and local contexts. As Michael Ignatieff has vigorously stated, '[h]uman rights has gone global by going local, empowering the powerless, giving voice to the voiceless'.<sup>58</sup>

In the same vein, Australian scholar Jim Ife speaks of the culture of human rights. According to him, human rights are contextual, dynamic and firmly grounded in lived experience. Human rights culture involves not just the passing of legislation, but has the potential for spreading the responsibility for human rights in the society as a whole 'and for giving more people a sense of agency when it comes to human rights protection and realisation'.<sup>59</sup> In Ife's interpretation, human right culture is coming 'from below' as opposed to verdicts of international human rights courts and other related institutions 'from above'. Whereas international human rights treaties can offer the necessary legal framework, human rights culture actually becomes relevant in concrete cases of violations, such as in Eastleigh. In the words of Ibhawoh, 'Securing local legitimacy is therefore crucial to prospects of human rights promotion and protection in Africa. Human right norms are likely to be more effective and relevant when they are intelligible in local idiom and vernacular'.<sup>60</sup> Before I introduce the local shades and features of human rights culture in Eastleigh, Nairobi, I describe

---

<sup>56</sup> Habermas (2010) 467.

<sup>57</sup> Habermas, *ibid.*, 467, 468.

<sup>58</sup> Ignatieff (2009) 70.

<sup>59</sup> Ife (2012) 76, 77.

<sup>60</sup> Ibhawoh (2018) 234.

the wider context of Kenya in the light of its commitment to international and national human rights standards.

### 3. HUMAN RIGHTS CULTURE IN LITTLE MOGADISHU

#### 3.1. CONTEXTUALISING REFUGEE ISSUES IN RECENT KENYAN HISTORY

The year 1991 was crucial for Kenya's internal political system. Section 2A of the Constitution, which prohibited a multiparty state, was repealed, enabling other socio-political parties to participate in public discourse. The rise of pro-change movements was facilitated by emergent economic and geopolitical realities as a result of the end of the Cold War. Human rights organisations, religious bodies and other civil society organisations now openly rebuked the government for human rights abuses.<sup>61</sup> According to Mutua, it was 'not until the 1990s that civil society, and in particular human rights NGOs, became a serious feature of the political landscape in East Africa (...) The whittling away of absolute state power (...) created the political space necessary for the establishment of human rights groups'.<sup>62</sup> In the early stages of Kenya's civil society in the 1990s, 'human rights groups and governance groups, including faith-based organisations played the most prominent role in expanding the democratic space'.<sup>63</sup> During the same period, Kenyan authorities appeared to be alarmed by the scale of the influx of immigrants from the surrounding countries.

The year 1991, in particular, was a watershed in Kenya's approach to refugees. The end of the Cold War had caused political upheaval in the region.<sup>64</sup> Political turmoil in the (as yet undivided) Sudan, Ethiopia and later Burundi, Rwanda and the Democratic Republic of Congo (DRC) caused many people to flee to neighbouring Kenya.<sup>65</sup> Before 1989, refugees came by their thousands, after 1991 they came by their

---

<sup>61</sup> Arye Oded, *Islam & Politics in Kenya* (Lynn Rienne Publishers, London 2000) 73.

<sup>62</sup> Makau Mutua, *Human Rights NGOs in East Africa: Political and Normative Tensions* (Fountain Publishers Kampala 2009) 18.

<sup>63</sup> Wanjiku Miano in Makau, *ibid.*, 221.

<sup>64</sup> Idil Lambo, 'In the shelter of each other: notions of home and belonging amongst Somali Refugees in Nairobi', (UNHCR, *New Issues in Refugee Research*, May 2012) 3.

<sup>65</sup> Sara Pavanello, Samir Elhawary and Sara Pantuliano, 'Hidden and exposed: Urban refugees in Nairobi, Kenya' (HPG Working Paper, March 2010) 13.

hundreds of thousands, mostly originating from the Horn of Africa.<sup>66</sup> These numbers were beyond the government's capacity to accommodate refugees properly. Kenya even seemed at risk of collapsing under the huge burden. In sum, '[I]f the pre-1991 refugee regime in Kenya can be characterized as generous and hospitable, with emphasis on local integration, the post-1991 regime has been inhospitable, characterized by growing levels of xenophobia, denial of basic refugee rights and few opportunities for local integration'.<sup>67</sup>

Kenya has become a signatory to conventions and treaties dealing with refugees and their protection. In 2006, the government of Kenya passed the Kenyan Refugee Act, implementing the 1951 United Nations Convention Related to the Status of Refugees, the 1967 Protocol, the 1969 OAU Convention, governing the Specific Aspects of Refugee Problems in Africa, and the Children's Act (2001). The Kenyan Refugee Act (2006)<sup>68</sup> enshrines the state's international legal obligations regarding asylum seekers and refugees, including un-accompanied minors. The new Kenyan constitution of 2010 includes key provisions of the UDHR and is a foundational document for the protection of rights. International law as well as Kenyan criminal law, prohibit arbitrary detention of refugees. According to the International Covenant on Civil and Political Rights (ICCPR, art. 9), 'detention before trial shall be the exception rather than the rule'. According to the constitution, all people who find themselves on Kenyan territory, including refugees and asylum seekers, without discrimination on the grounds of national origin or other status, are entitled to:

1. protection of their physical integrity, freedom from all forms of inhuman and degrading treatment or punishment;
2. freedom from arbitrary arrest and detention; and,
3. protection from arbitrary interference with property and privacy.<sup>69</sup>

---

<sup>66</sup> Jennifer Hyndman and Bo Victor Nyland (1998) 10 (1,2) 'UNHCR and the Status of Prima Facie Refugees in Kenya' in *International Journal of Refugee Law* 29.

<sup>67</sup> Elizabeth Campbell (2005) 'Formalizing the Informal Economy: Somali Refugee and Migrant Trade Networks in Nairobi' *GCIM* 4, 5.

<sup>68</sup> Pavanello (2010) 15; 'Information for Refugees and Asylum-seekers in Nairobi' (UNHCR, March 2012) 40- 43; 'Refugees' Handbook 2013' (Kituo cha Sheria) 11-25.

<sup>69</sup> 'The Constitution of Kenya 2010', Kituo Cha Sheria (2013) 40, 41.

In the light of these national and international covenants and treaties, Eastleigh at first sight seems to demonstrate the bankruptcy of human rights legislation in Kenya. This is mostly regarding recent human rights violations arising from police and military forces in countering terrorism<sup>70</sup> on the one hand, and the plight of refugees on the other. Arguably, the statements of John Wagacha and John Guiney stand, in that the,

“dearth of information and research about urban refugees and the inadequacy of the forums through which these refugees can voice their problems and concerns create a dangerous scenario for them. They frequently face insecurity and human rights abuse while living with their basic needs unmet”.<sup>71</sup>

How can Kenya as a signatory of international human rights treaties, translate the human rights imperative appropriately into a local-urban context of Eastleigh and what possible role can civil societal institutions play?

### 3.2. CASE STUDY OF EASTLEIGH

Eastleigh, with its approximately 300,000 inhabitants<sup>72</sup> is located east of the city. Eastleigh is now one of the biggest hubs in East Africa, with more than 6.000 shops, in over 40 shopping malls in addition to hundreds of small businesses of hawkers. Many of the kiosks and malls, decorated with Islamic religious expressions and names, are owned and operated primarily by Somalis. Eastleigh or *Islia* as Somalis themselves refer to it, obtained the nickname ‘Little Mogadishu’ because it is a dislocated proxy seat of the government of Somalia, and due to the number of Kenyan Somalis and Somalis living in the area.<sup>73</sup> However, Eastleigh is more diverse as its nickname Little Mogadishu suggests. Islam is a factor here as it is in Somalia, but also Christian organisations and churches are scattered far and wide over Eastleigh. Meru and Kikuyu Kenyans residing there are predominantly Christian as are people coming from countries such as South-Sudan, Ethiopia and the Great Lake area. Though the name Little Mogadishu seems misleading and even dangerous, as it denies Eastleigh’s

---

<sup>70</sup> Human Rights Watch, (May 2013) ‘You Are All Terrorists, Kenyan Police Abuse of Refugees in Nairobi’.

<sup>71</sup> John Wagacha and John Guiney, ‘The Plight of Urban Refugees in Nairobi’ in David Hollenbach in *Refugee Rights, Ethics, Advocacy and Africa* (Georgetown University Press 2008) 94, 95.

<sup>72</sup> Cf. Carrier, *ibid.*, 54.

<sup>73</sup> *Ibid.*, 16.

super-diverse ethnoscape, in some ways it is an appropriate name, since economically and socially Eastleigh does function as 'a Little Mogadishu', subsuming much activity that would previously have been centred in Mogadishu itself.

Eastleigh has been transformed in recent history by distinct waves of immigration from all Kenya's surrounding countries, in particular from Somalia. The neighbourhood has faced several stages in its recent migrant history. Already in 1920, under the protection of the colonial power, Somalis started their businesses alongside the Asians and Europeans in Nairobi.<sup>74</sup> During the 1940s Kenyan families were allowed to join their men, husbands and fathers in Eastleigh who had previously worked there as bachelors for the colonial power.<sup>75</sup> At the independence of Kenya in 1963, segregation of residential space along ethnic lines was abolished and Kenyans from villages and rural areas moved to Eastleigh and settled there.<sup>76</sup> In 1991 the Somali President Siad Barre was overthrown.<sup>77</sup> Civil war broke out in this country in the Horn of Africa. Wealthy Somalis as well as refugees started fleeing to the 'green pastures'<sup>78</sup> of Eastleigh as a commercial hub, a residential area or transit zone. The former Dutch liberal parliamentarian of Somali decent Ayaan Hirsi Ali, for instance, lived in Eastleigh while she was in transition from Mogadishu to The Netherlands,<sup>79</sup> before ultimately moving to the USA. Thus, since the 1990s, for the third time, Eastleigh has become an immigrant quarter and a place of transition.

In October 2011, for the first time since its independence, Kenya intervened in a neighbouring country, launching an attack on the *al-qa'ida*-linked *al-shabāb* movement, under the name *Linda Nchi* ('Defend the Nation', in Ki-Swahili).<sup>80</sup> Besides being a place of refuge and relatively safe haven for refugees after the 1991 Somali war, Eastleigh became a hiding place for this movement. Assistant Minister of Internal Security, Orwa Ojode, linked the attacks to Eastleigh by describing *al-shabāb* 'as [a] big animal with the tail in Somalia and the head of the animal in Eastleigh'.<sup>81</sup> After the attack by

---

<sup>74</sup> Ibid., 39.

<sup>75</sup> Ibid., 44.

<sup>76</sup> Ibid., 27.

<sup>77</sup> Anna Jacobsen, *Making Moral Worlds: Individual and Social Processes of Meaning-Making in a Somali Diaspora* (Washington University 2011) 61.

<sup>78</sup> Carrier (2016) 135.

<sup>79</sup> Ayaan Hirsi Ali, *Infidel, My Life* (Cox & Wyman 2008) 62, 146.

<sup>80</sup> HRW (May 2013).

<sup>81</sup> Carrier (2016) 227.

*al-shabāb* at Westgate shopping mall, in September 2013, the Somali community in Eastleigh was collectively punished for adhering to a religion from which they derive dignity in difficult times.<sup>82</sup> After a major operation by Kenyan authorities called *Usalama Watch* (Ki-Swahili 'Restore Peace'), which started in April 2014, the estate has come under heavy surveillance in the context of 'Kenya's war on terror'.<sup>83</sup> As a consequence, the inhabitants of Eastleigh, primarily its most vulnerable refugee population, were paying a high price in terms of infringements of their human dignity for atrocities committed by terrorists. A report by Human Rights Watch (HRW, May 2013) entitled "You Are All Terrorists", Kenyan Police Abuse of Refugees in Nairobi' has recorded details of human rights abuses carried out during this raid, some of them 'amounting to torture'.<sup>84</sup>

Here, in Habermas's terminology, the meaning of human dignity emerges from experiences of what it means to be humiliated and can provide the motivating source for a constitutional project. The pragmatic common denominator of human rights cross-cultural activism emerges from imagined empathy for the angst the suffering residents of Eastleigh live in. In light of Merry's concept of the vernacularisation, human rights organisations have to translate the discourses and practices from the arena of international law and legal institutions to the specific situation of suffering and violation, such as in Eastleigh. In terms of the receptor approach, the next section discusses whether Eastleigh's social institutions, including FBOs can bridge the divide between international human rights treaties and local cultural diversity.

### 3.3. HUMAN DIGNITY-BASED HUMAN RIGHTS CULTURE IN 'LITTLE MOGADISHU'

In the case study of Eastleigh, there is a divide between the ratification of formal international and national legal treaties on the one hand, and incidents of human rights violations on the ground on the other hand. Eastleigh's civil society, including numerous Non-Governmental Organisations (NGOs), Community-Based Organisations (CBOs) and Faith-Based Organisations (FBOs), promotes human rights dignity without trying to address legal structures in the first place. To the people of Eastleigh, official legal structures and institutions appear untrustworthy and time-

---

<sup>82</sup> Ibrahim Abditifal, Kenya's 'Little Mogadishu' Fears Backlash <<http://www.bbc.co.uk/go/em/fr/-/news/world-africa-24222756>> .

<sup>83</sup> Carrier (2016) 20.

<sup>84</sup> HRW (2013) 2.



consuming in their proceedings. In some cases, Eastleigh's residents cannot afford to wait for legal specialists to solve human rights violations. The plight of residents in Eastleigh makes human rights practitioners eager to look for alternatives to the formal justice system. The result of this odd situation is an omnipresent network of *pro bono* trained voluntary paralegals that circumvents the official legal route. Especially the paralegals' pragmatic approach to human rights is based on moral-spiritual claims rather than on constitutional or international legal standards.

The organisation Kituo cha Sheria, Centre for Legal Empowerment (Kituo), for instance, is involved in the training of paralegals in Eastleigh.

"Kituo cha Sheria is a human rights Non Governmental Organization which was established in 1973 with the view to empowering the poor and marginalized people to effectively access justice and realize their human and peoples' rights. Kituo offers its services through advocacy, networking, lobbying, legal aid, legal education, representation and research".<sup>85</sup>

Kituo received serious resistance from the government when it began formulating a policy on paralegal training and practices, but later the government changed its position to one of appreciation.<sup>86</sup> Kituo sponsors forty Community Justice Centres under the umbrella of the Kamakunji Community-based Organisations Network, a network of paralegals that solve legal issues locally.<sup>87</sup> Kituo also set up an Urban Refugee Intervention Programme (URIP) office to assist refugees in Eastleigh and announced its presence on local radio stations, in the mosques, and during public meetings, *barazas*, in Eastleigh.<sup>88</sup> In 2007, Kituo in partnership with the UNHCR, opened the Forced Migration Programme to exclusively serve refugees and asylum seekers.<sup>89</sup> In 2011, Kituo embarked on a new project called Nairobi Urban Refugee Rights Integration Activities (NURRIA).<sup>90</sup> NURRIA is a project of Kituo in cooperation with the International Rescue Committee (IRC). IRC was founded in 1933, originally

---

<sup>85</sup> Kituo Cha Sheria, *Refugees' Handbook* 2013, 1; see also Mutua (2009) 19; HRW (2013) 51.

<sup>86</sup> Bard Andreassen and Tiberius Barasa, 'Kenya, Civic Action from Confrontation to Collaboration?' in Bard Andreasse and Gordon Crawford (eds), *Human Rights, Power and Civic Action, Comparative Analyses for Human Rights in Developing Countries* (Routledge 2012) 64.

<sup>87</sup> *Ibid.*, 80.

<sup>88</sup> *Ibid.*, 68, 69.

<sup>89</sup> Kituo Cha Sheria 2013, iii.

<sup>90</sup> *Ibid.*



based on the idea of physicist, humanitarian, and refugee Albert Einstein,<sup>91</sup> it is in this context ‘committed to freedom, human dignity and self-reliance’<sup>92</sup> of refugees and vulnerable Kenyans in Eastleigh.

When in December 2012, the Department of Refugees Affairs (DRA) for reasons of security ordered all urban refugees back to the refugee camps, Kituo came to defend Eastleigh’s refugees.<sup>93</sup> In January 2013, Kituo successfully filed a petition based on ‘Kenya’s obligations under the 1951 Refugee Convention, the 1969 Refugee Convention of the Organisation of African Unity (now the African Union), and freedom of movement rights under Kenya’s 2006 Refugee Act’, requesting the High Court of Kenya to quash the directive that had implemented the forced relocation plan.<sup>94</sup> In the light of the Kenyan Constitution (2010), the judge averred that the DRA directive,

“threatens the right and fundamental freedoms of the petitioners and other refugees residing in urban areas and is a violation of the freedom of movement under Article 39, the right to dignity under Article 28 and the right to fair and administrative action under Article 47 (1), and violates the State’s responsibility towards persons in vulnerable situations to Article 21 (3)”.<sup>95</sup>

Such concepts as ‘the right to dignity’ and ‘the State’s responsibility towards persons in vulnerable situations’, found within the court judgment, strikingly demonstrates a dignity-based human rights culture. It further embodies Habermas’ ‘linking pin’, for the purposes of the residents of Eastleigh. By using the language of dignity, it was able to connect human rights as international law to the local experiences of Eastleigh’s residents, who experienced humiliation and for them moral violations.

There are a number of social institutions, through which the local human dignity-based human rights culture in Eastleigh, can be “mapped”, as suggested by the receptor approach. Eastleigh’s Fellowship Centre, for instance, is a CBO that operates locally within the wider USA-based Mennonite Central Committee (MCC)’s

---

<sup>91</sup> ‘Albert Einstein and the Birth of the International Rescue Committee’ <<https://www.rescue.org/article/albert-einstein-and-the-birth-international-rescue-committee>>

<sup>92</sup> Leaflet IRC, found at IRC office in Eastleigh, 13 September 2013.

<sup>93</sup> Carrier (2016) 230.

<sup>94</sup> HRW (2013) 51.

<sup>95</sup> Carrier, 230.

'holistic approach to basic rights'.<sup>96</sup> It works with a human rights legal approach, but focuses on 'the grass roots development of greater social justice, human dignity, and local ownership'.<sup>97</sup> Given the significance of religion to the majority of its inhabitants, there have been Muslim and Christian paralegals and FBO's working within the community, long before the first non-governmental organisations entered this community. FBOs, present in the veins of Eastleigh society, bring human rights into the homes of families and at places of worship. During the year, and especially at the occasion of religious rituals and festivals, the less fortunate in Eastleigh are provided with basic amenities such as food, drugs and primal education. In the midst of Eastleigh's often poor socio-economic circumstances, such charity, places of shelters at the religious premises, and self-help groups, demonstrates that FBO's offer solace and meet the basic human needs of refugees and migrants in transition.

As members of the FBOs, Muslim and Christian paralegals bear witness to their respective religions when counterbalancing frequent violations of human dignity on the ground. Pro bono trained Muslim and Christian paralegals assist members of their respective constituencies of the Mosque or the Church, and of the affiliated organisations, by preventing and resolving their most pressing justice problems. Consider, for instance, Muslim Family Law-related issues such as marriage, divorce, and inheritance, in such cases the paralegals referred to Islamic Law (shari'ah). Furthermore, Muslim refugee paralegals often grounded their human rights praxis on the traditions of the Prophet Mohammad's life (sira), whereas Christian paralegals would base their commitment to human dignity on Catholic social teachings, and on general Christian ethics, using Biblical images such as 'the Good Samaritan'.

In this regard, the receptor approach is particularly promising as it focuses on social institutions like religion, community, and law, that are in place in Eastleigh, in order to achieve human dignity. According to Zwart, 'to map the human rights performance of a particular state, ethnographic research will be more important than legal analysis. The receptor approach relies on social research methods, like consensus analysis, to identify socio-cultural arrangements that promote and protect human rights'.<sup>98</sup> In the ethnographic case study of Eastleigh, Muslim and Christian paralegals

---

<sup>96</sup> Susan Dicklitch and Herbert Rice (2004) 14(5) 'The Mennonite Central Committee (MCC) and Faith-Based NGO Aid to Africa' in *Development in Practice* 660.

<sup>97</sup> Ibid.

<sup>98</sup> Zwart (2012) 557.

as members of social institutions, including FBOs, often appear to have reached a consensus to use the local vernacular of their respective moral-spiritual sources in order to further human dignity-based human rights culture.

Given that, as Ife proposes, human rights ‘from below’ is a human rights culture firmly grounded in lived experience,<sup>99</sup> Mama Fatuma Goodwill Children’s Home, an orphanage, provides an exceptional example of this. In the 1960s, this former *madrassah* (Arab. ‘school’) became a home. Orphaned children from Kenya’s neighbouring countries are referred to the home as ‘unaccompanied minors’ by the United Nations High Commissioner for Refugees (UNHCR).<sup>100</sup> The orphans are protected under the human rights-based, Kenyan’s Children’s Act of 2001, a national law regulating the organisations policy, in matters of admittance, internal governance, services and external relations.<sup>101</sup> The Home respects children without regard to their religious and cultural backgrounds. It works in the spirit of the United Nations Convention of the Rights of the Child (UNCRC) and it is a member of the National Council for Children’s Services (NCCS). In the Home, which operates under a joint Muslim-Christian management, one can find stickers on the children’s wardrobes with texts such as ‘Children’s Rights are Human Rights’. The Home is active in four categories of children rights, the right to survival (food, clothing and shelter); non-discrimination and development (education, vocational training, and spiritual nourishment); protection (health services, prevention of harmful practices, counselling); and, participation (children clubs, sport and recreational activities).<sup>102</sup> The beneficiaries of the programmes are Muslims from the environs of Eastleigh; and unaccompanied minors from Kenya’s surrounding countries, sent there via the UNHRC, and from mainly Christian backgrounds.

Mama Fatuma Goodwill Children’s Home sets a clear example on how international human rights norms are translated and interpreted in local-urban context of Eastleigh; and therefore, on how the management of the Orphanage is ‘vernacularizing human rights’ in *Islīi*.<sup>103</sup> International human rights treaties, such as the UNHRC, the UNCRC, and the Kenyan national NCCS and Children’s Act 2001

---

<sup>99</sup> Ife (2012) 76, 77.

<sup>100</sup> See <<http://mamafatumas.org/>> .

<sup>101</sup> Ibid.

<sup>102</sup> Leaflet of the Home found at the reception (16 November 2013).

<sup>103</sup> Ibhawoh (2018) 225.

'from above', are interpreted in the cross-cultural, interreligious setting of this local-urban social institution 'from below'. In the Home, human rights are 'inculturated' in Eastleigh's urban-local context. By broadening human rights to include the concept of human rights culture, the strictly legal instrument is widened by relating it to underlying spiritual beliefs, principles and religious values of the members of this FBO.

In terms of the receptor approach, through social institutions 'local texture' is given to international human rights law. According to Zwart, '[l]aw does not enjoy a monopoly'.<sup>104</sup> Every society and value system can remain loyal to its own convictions and its own conceptualisation of human dignity.<sup>105</sup> Human rights practices in Eastleigh, based on notions like family, religion and doing good to others, appear to be building blocks for international human rights. As Zwart rightly states, '[w]here they exist, instead of ignoring local notions of human rights, or replacing them by Western concepts, international human rights experts should identify them, incorporate them and build on them'.<sup>106</sup> In this way, human rights culture can add socio-ethical, even moral-spiritual values to international law proper, such as 'ubuntu', 'hospitality', 'empathy', 'spiritual nourishment', and 'inner worth'.

In the context of Eastleigh's civil society, comprising of NGOs, CBOs, and FBO's, moral-spiritual values such as 'doing good to others' and religion are significant building blocks of human dignity-based human rights culture. In line with An-Na'im, religion in Eastleigh is a source of inspiration for promoting a human rights culture.<sup>107</sup> As discussed above, Maritain, Ignatieff, and Habermas, however, have preferred a more pragmatic, neutral approach to the foundation of human rights.<sup>108</sup> Van der Ven states that the UDHR is a "*begründungsoffen*", foundation-open text, leaving the document open to a multiplicity of foundations, including religious ones, 'to reach agreement so as to do what needed to be done'.<sup>109</sup> In this pragmatic vein, the best way forward, would be to agree that human dignity is key to the ongoing cross-

---

<sup>104</sup> Zwart (2012) 546.

<sup>105</sup> Ibid., 552, 553.

<sup>106</sup> Zwart (2013) 13.

<sup>107</sup> An-Na'im (2011) 300.

<sup>108</sup> Witte (2012) 346; Habermas (2010) 467; Ignatieff (2009) 95.

<sup>109</sup> Van der Ven (2010) 166.

cultural and interreligious dialogue on what home-grown human rights culture entails in contexts such as that of Little Mogadishu.

#### 4. CONCLUDING REMARKS

The definition of human rights in terms of human dignity-based human rights culture introduces a localised perspective 'from below' and allows for home-grown translations of international human rights laws and other related institutions 'from above'. Human rights declarations from above and its underlying moral-spiritual values on the ground should go hand in hand. A focus on human rights culture from below can help to map concrete violations of human dignity. Human dignity is the 'linking pin' between morality and human rights as law. Human rights culture, therefore, can be translated into concrete terms at the everyday micro-level, such as the day-to-day lives and practices of Eastleigh's residents. Whereas international human rights treaties can offer the necessary overall legal framework, human rights culture actually becomes relevant in concrete cases of human rights violations on the ground.

On the one hand Eastleigh is deeply associated with social marginality and refugees, on the other hand, it represents a thriving global hub of trade. In Eastleigh a thriving human rights culture consisting of numerous national and international human rights organisations including Faith-based Organisations (FBOs) exist. Actual legal assistance and advocacy work on behalf of the refugees in particular, appear to be mainly organised by Christian and Muslim paralegals as members of human rights NGOs and FBO's. These FBOs in Eastleigh shows an implicit and explicit cross-cultural, local-urban human rights culture.

In Eastleigh, there is an identifiable localised human rights culture that 'happens' contextually and across cultural and religious lines. Here, respect for human rights culture can even offer a methodological structure for difficult but necessary cross-cultural dialogue on human rights. In the African interreligious context of 'Little Mogadishu', human dignity-based human rights culture matters. Human right norms in Eastleigh are relevant and effective when they are intelligible in local idiom, such as in the vernacular of *Islii*. In this context, human rights culture includes positive legal standards as well as moral-spiritual values.

'Vernacularisation', 'inculturation', and 'the receptor approach' of human rights 'from below' are, therefore, what is next for universal human rights after its first 70 years.

The process of universalising human rights from below may actually start in places such as Eastleigh; or in the words of Mutua, as he sets the human rights agenda for the future:

“National NGOs have an obligation to cultivate, inspire, and support the rise of small-scale NGOs at the village and town levels to focus on particularized and highly localized concerns. This is one way in which human rights can become the people's zeitgeist [*sic*]. The most humble forums are the crucibles in which a lasting human rights culture can be grown. The lessons gained from this interpenetration – of local, national, and universal – must inform the future of standard setting and the work of rectifying institutional weaknesses in implementation.”<sup>110</sup>

---

<sup>110</sup> Mutua (2016) 142, 143.

---

## BOOK REVIEW

### Stacey Links<sup>\*</sup>

**Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013) 350 pp. ISBN 9781139237161 (online)**

*Cross-cultural Human Rights Review* (2019) Vol.1:1 pp. 201-204

ISSN: 2666-3678 (Online) 2666-366X (Print)

For permissions please email: [CCHRR.frt@vu.nl](mailto:CCHRR.frt@vu.nl)

---

As the successor to ‘The Power of Human Rights’ (1999), ‘The Persistent Power of Human Rights’ (2013) has become a seminal book on human rights in international relations. Published in 2013, it remains the perennial framework through which state compliance with international human rights norms and law is understood. As a result, it frequently informs human rights and foreign policy directives, reflecting its continued significance in the quest to protect human rights universally.

From an International Relations theoretical perspective, the book adopts a traditional constructivist stance that views compliance to international human rights norms as a function of state socialization. The premise is that commitment (i.e. ratification of international human rights treaties) is less of an indicator of the support of human rights than compliance – (i.e. norm abiding behaviour). This distinction holds that while a state may have ratified a given human rights treaty, internalisation or the acceptance of that particular right is not a given. The authors argue that this gap explains the continued abuse of human rights despite their recognition through treaty ratification. In particular, the ‘Persistent Power of Human Rights’ focuses on how human rights norms are internalised by international actors through a process of socialisation. Socialisation is said to occur through a variety of mechanisms such as pressure, persuasion (dialogue), and capacity building. The book details how both state and non-state actors participate in the process of human rights protection from ‘commitment to compliance’ through socialisation. In so doing, it contributes to understanding how human rights ‘work’ in practice.

---

<sup>\*</sup> Post-doc researcher with Leiden University, The Netherlands.

Email: [s.links@hum.leidenuniv.nl](mailto:s.links@hum.leidenuniv.nl)



On a state level the authors identify the degree of statehood, regime type, and capacity building notable variables in achieving compliant behaviour. States – such as China – are argued to provide a particular challenge to compliance, however, are amenable to behavioural change through dialogue. The United States is also covered to reflect how ‘punishment’ mechanisms are limited in bringing about desired change. States with limited institutional capacity on the other hand, or those struggling with conflict, are argued to possess limited capacity to protect and enforce human rights. While the cases covered reflect the importance of context in devising compliance strategies, the book stops at statehood, regime type, and capacity as variables for consideration. The book also gives due regard to the influence of non-state actors in effectuating human rights protection. In these cases, domestic (i.e. sub-state) mechanisms are noted as particularly important to engendering both positive and negative change (p. 94). Furthermore, non-state actors such as businesses are highlighted as frequent spoilers to achieving compliance.

In covering a wide range of cases, the book addresses the complexities of actors and factors that have a bearing on compliance. The vast coverage of the book reflects the variety of variables and outcomes that are at play in bringing about compliance. This is summed up in the concluding remark that ‘there is no simple recipe for generic human rights change’ (p. 294). Despite this acknowledgement, the book is not an evident plea for context-specific approaches to compliance. Thus, while the ‘big’ trends of pressure, persuasion, and capacity building are investigated, the success of these mechanisms as contingent on context is not explicitly underscored. For example, an aspect that little mention is made of is culture in relation to compliance. One mention is made of cultural values (p. 36), and cultural rights also receive a single mention (p. 92). While the chapter on social mechanisms covers a range of variables - culture does not feature. Given the variables of statehood, regime type, and capacity, it would have been valuable to also understand the case for the ‘cultural’. Considering the continued contestation of culture and human rights, particularly in an increasingly interconnected yet diverse world, a more thorough consideration of the ‘cultural variable’ would have been enriching.

While the book does not have a dedicated chapter to the issue of culture, the idea of private wrongs is arguably connected to it. Chapter 14 by Alison Brysk discusses the ability of human rights to change ‘private wrongs’ (p. 259). These wrongs are identified as occurring at the sub-state level – as a result of insufficient state commitment to a particular right. Issues discussed relate to gender, with a focus on female genital mutilation or cutting, however, an

explicit reference to culture is not made despite its obvious relevance. With regard to compliance, while Brysk recognises that 'compliance is not equivalent to legal enforcement,' she notes 'external formal standard(s)' as a potential way to address or redress, in this case, 'sharia law' (p. 262). It would seem that Brysk locates compliance outside of cultural forces, making the discussion of culture even more pertinent. Whether or not Brysk regards culture as an impediment to human rights compliance and/or a vehicle for human rights protection is unclear. In this regard, a cross-cultural perspective would have been valuable in articulating how compliance can or cannot be brought about within the confines of cultural institutions themselves.

The use of a cross-cultural perspective would additionally enrich the book's analysis of compliance indicators. Dai's chapter briefly touches on the issue of indicators, however, it remains more focused on the issue of the 'compliance gap' i.e. the rate of ratification vs change in practice, as opposed to the reliability and validity of current indicators. It would be interesting to investigate how and whether current indicators for compliance are adept at capturing the nuances of cultural variance i.e. either how culture can be a vehicle for compliance or not. This criticism does not go to the book itself but rather to the broader conceptual issue of how compliance is measured, namely that they are a-cultural.

The result is that of all the intervening variables to affect compliance, Risse *et al* - like most of compliance literature - do not consider the 'translatability' or 'different faces' of rights across cultures as a factor for consideration. In particular, while culture is often thought of as a barrier to human rights compliance, the inverse, namely, culture as a vehicle for human rights protection is ignored. Consequently, within the 'persistent power of human rights', compliance looks a particular way that reproduces a largely decontextualised or a-cultural assessment of how rights are being (or can be) protected the world over. A cross-cultural perspective would therefore shed light on how compliance can and inevitably will (some would argue should) look different across diverse societies for human rights to enjoy universality.

Considering the rapidly changing international environment, the issue of compliance remains as relevant as ever. Despite these changes the book of Risse *et al* remains a fundamental contribution to the issue of compliance in international human rights. For anyone interested in how human rights are understood to operate on an international level, the Persistent Power of Human Rights provides exemplary insights. Considering the cultural variance in the cases that the book deals with, insights from cross-cultural scholarship on the

Stacey Links

issue of international compliance would be a particularly enriching contribution.

---

## BOOK REVIEW

**QIAO Cong-rui\***

**Su Li (Author), Zhang Yongle, and Daniel A. Bell (eds.), Edmund Ryden (Translator), *The Constitution of Ancient China* (Princeton University Press, 2018) 16-210 pp. ISBN 9780691171593 (online)**

*Cross-cultural Human Rights Review* (2019) Vol.1:1 pp. 205-208

ISSN: 2666-3678 (Online) 2666-366X (Print)

For permissions please email: [CCHRR.frt@vu.nl](mailto:CCHRR.frt@vu.nl)

---

It is widely accepted that holding the exercise of government powers accountable to a State's constitution necessitates the protection of human rights and fundamental freedoms.<sup>1</sup> This has rendered constitutional studies popular with human rights and democratic movements burgeoning since the 1990s.<sup>2</sup> Meanwhile, public interest in the emerging powers have been growing as a result of the latter's rising economic and geopolitical preponderance. In this context, China's governance norms and practices are developing into a focus of academic inquiries across the globe.

Among the relevant studies, a recent book stands out by Professor Zhu Suli (pen-named Su Li), an influential Chinese jurist: *The Constitution of Ancient China*. This book contains nine chapters, five being the author's introduction, three topic-specific analyses and response to his critics, and the remaining four being others' critiques. In this review of that book, I focus on Su Li's own contribution, first introducing his non-conventional approach to the constitution, and then explaining how it illuminates constitutional aspects of ancient China. Finally, I briefly comment on the book's limitations.

---

\* Post-doc researcher with Free University Amsterdam, The Netherlands.

Email: [c.qiao@vu.nl](mailto:c.qiao@vu.nl)

<sup>1</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR): *Human Rights and Constitution Making*, page 4, published in 2018, accessed via: [https://www.ohchr.org/Documents/Publications/ConstitutionMaking\\_EN.pdf](https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf).

<sup>2</sup> Michel Rosenfeld and András Sajó (eds.) *The Oxford handbook of Comparative Constitutional Law* (2012 OUP), pp. 81-82.

## **WHAT DOES THE BOOK OFFER?**

First and foremost, the book proffers a shift in perspectives for analysing constitutions. Most of us perceive the concept ‘constitution’ in a narrow sense, associating it with constitutional law or a constitutional text. In contrast, the book starts with its literal meaning — the process of *constituting* something, and treats the constitution as “a whole series of basic institutions and practices” that are necessary to form and maintain a State (pp. 19 and 28). In this light, the book delves into recurrent practices of major Chinese dynasties (usually lasting for over two hundred years). Its’ approach rectifies the stance of seeing a constitution as a set of basic norms upon which a State is founded and which regulates the exercise of State powers. The latter is not necessarily incorrect, but it inaccurately simplifies the intricate trajectory of maintaining a State.

Second, the book details three factors essential to the constitution of ancient China as a State (between circa. 1000 B.C. and the late 19th century): 1) the geopolitical basis; 2) standardized written and spoken Chinese; and 3) the exam-based selection of government officials. These are addressed in turn below.

### **1. GEOPOLITICAL BASIS: THE CENTRE-PERIPHERY BALANCE**

What characterizes China’s governance culture *vis-à-vis* that of other major civilizations? This question is addressed in the context of what the book calls ‘a large State’. It was China’s enormous territorial size that restricted its early governments (contemporaneous with ancient city-states of Greece) from opting for oligarchy or limited democracy (p. 28). Although there is neither a sensible delimitation of the borders of the first three dynasties in China, nor a reliable estimate of their populations, the area and inhabitants in those times already exceeded those of the 13 colonies that formed the US in the 18th century (p. 34). By the 19th century, China encompassed an area of 13 million square kilometers and had a population of 450 million (p. 35).

So, how did China’s governments maintain such a large State? It was not through the military supremacy of the central ruler. For example, the Macedonian Empire created by Alexander the Great straddled the Eurasian landmass and North Africa, but split into several parts after Alexander’s death and “never again appeared in history” (p. 38). It was also not the product of “a wide and fertile land. Continental Africa is much greater and naturally richer than the plains of East Asia,” (p. 38) yet it has never given rise to a State comparable to China’s Han or Tang Empires. It was, rather, thanks to a system

of commanderies (higher local administration accountable to the central government) and counties (lower local administration accountable to the commandery) under which local executive and military heads were directly appointed by the central government (and could be removed in the same way at any time (p. 46)), that ancient China became a huge yet long-lived State.

## **2. AGENCY BASIS: UNIFIED WRITTEN AND STANDARDISED SPOKEN CHINESE**

The second factor essential to the constitution of ancient China as a State relates to integrating social-political elites in order to support a centralized governance framework. In that process, what mattered most was how accurately central commands were communicated to local agents (p. 69). To that end, a unified script system (written Chinese) and standardised spoken Chinese were needed to form a functional bureaucracy. Standardised spoken Chinese (among the bureaucracy and social elites in particular) helped to prevent particularism or separatism of numerous linguistic communities across the territory (p. 83). Furthermore, unified written Chinese was much more economical and effective for disseminating central decisions and documenting local records (pp. 68-72). More importantly, these mechanisms reduced the cost of training people to learn and apply the State's authoritative texts, which the book describes as enhancing the availability of technical bureaucrats (pp. 72, 75, 93).

## **3. EXAM-BASED SELECTION OF GOVERNMENT OFFICIALS: RATIONALISATION OF GOVERNANCE PRACTICES**

The third factor essential to the constitution of ancient China as a State explains how China differed from ancient city-states in Greece or modern nation-states in the West in organizing its ruling meritocracy. With a large territory and considerable local variations, central authorities needed to keep many considerations in mind when choosing and promoting government officials, and, most importantly, selecting candidates through a rational system (pp. 100-101). China's ancient politico-cultural elites (or what the book calls the 'scholar-officials') came from countless locales and excelled through a series of highly selective screening procedures. These procedures normally consisted of village-, county-, and commandery-level exams, as well as the Capital exam where the monarch posed questions to final candidates and assessed their

performance. This selection system made scholar-officials belong “not only to their local villages and clans...but also to a nationwide cultural and political community,” which supported a centralized governance framework (p. 102).

### **WHAT IS MISSING?**

The book chooses, however, not to cover some constitutional issues important to ancient China, including the role of the monarchy and Confucianism (p. 29). While this is reasonable as every study has to balance depth against width, it is regrettable. Downplaying the practices of monarchs and the applications of Confucianism is rather unfortunate, given their significance for legitimizing central authorities and checking and balancing local powers. Furthermore, the book sometimes addresses only principle and neglects practice. For example, in explaining the basic feature of the system of commanderies and counties, it reads that “it was forbidden to serve in one’s native district and to remain in any one post for a long time... In this way, ... government appointees had little interest in forming a tight network of personal relationships in their jurisdictions during their time in office” (p. 46). This explanation seems fallacious as in much of the ancient history, local corruption was rampant. What the appointment procedure meant to achieve was hindered by the fact that local elites had strong incentives to align with their governors (wherever they were born) through bribery and coercion.

### **CONCLUSION**

Although the People’s Republic of China was founded in 1949 on the basis of what is now thought to be a provisional constitution, China as a State was virtually formed throughout history (pp. 18-19). Since the 1990s, China has played an increasingly important role in the international human rights system that, in turn, changed the geo-political context for China’s constitutional norms and practices. For instance, China adopted several reforms in the 2000s that were unprecedented in its history; notably, a clause that “the State shall respect and protect human rights” was added to the Constitution in 2004 and a national regulation on disclosing government records came into force in 2008. I hope that readers of this review will feel motivated to look through Su Li’s book and be inspired to take into account China’s geopolitical considerations and practicalities when analysing the form and substance of China’s contemporary constitutional reforms.



---

## BOOK REVIEW

**Adina-Loredana Nistor\***

**William D. Davies and Stanley Dubinsky, *Language Conflict and Language Rights: Ethnolinguistic Perspectives on Human Conflict* (Cambridge University Press, 2018) 425 pp. ISBN 9781107606586 (softcover)**

*Cross-cultural Human Rights Review* (2019) Vol.1:1 pp. 209-212

ISSN: 2666-3678 (Online) 2666-366X (Print)

For permissions please email: [CCHRR.frt@vu.nl](mailto:CCHRR.frt@vu.nl)

---

Davies and Dubinsky's book excellently unpacks the complexity of the concept of *language* both as private *property*, intimately linked with the notion of identity (social, cultural, political), but also as a public *property* (the world's right to a diversity of languages). Often treated as a given, the fact that "all humans are born as linguistic equals" (p.1) and with the capacity to learn the language of the community in which they are brought up, is a *right* that encounters numerous challenges in practice. What differentiates one language from another? What differentiates a dialect from a language? Who recognizes them as such and what are the implications of such decisions? Is the protection of a language in the interest of those speaking it - even when the decision is made by the non-speakers? Or is it in the interest of the world to protect the idea of global diversity? These are just a few of the questions that this book raises and addresses.

Divided in four distinct parts, each containing several sections, the book discusses how language has the power to be a common denominator or a source of discord and a tool of oppression. Each part of the book is followed by a "Further Reading and Resources" section which is very useful for the interested reader. The first two parts extensively go into what is understood as language - from sounds to words and their structure, grammar, and language variations (dialects) - to the meaning of language in the context of defining personal, cultural, and national identity. The authors discuss differences between speech and written language, what sets them apart, and the

---

\* PhD Candidate, Faculty of Law, University of Groningen, The Netherlands.

Email: [a.nistor@rug.nl](mailto:a.nistor@rug.nl)

distinctions between the objective property of sounds and the mental perceptions and representations of these sounds.

Language is described as an organic construct that is under continuous metamorphoses. Changes in the environment naturally lead to changes in vocabulary, as words are introduced to describe the “new reality” and those that are outlived are abandoned. When words are borrowed from other languages, their transformation can be radical: they undergo a linguistic process through which letters are added, switched or replaced in order to “naturalise” them to the adopting language. The book abounds with examples that help the reader who may be unfamiliar with linguistics to get a clearer understanding of the issues presented. For instance, the authors explain the process of adopting the English word “strike” into Japanese, a language where words do not begin with a mouthful of consonants. In order to accommodate this foreign linguistic object, vowels are added after the “potentially offending consonant” (p. 28). The newly birthed word is “sutoraiki/u”, which is unrecognizable to English speakers. What is interesting is that borrowing a commodity as abstract as words is not only a cultural transfer, but a political act as well. In certain “countries and cultures, lexical borrowing is deemed a threat to the integrity of the indigenous or national language, and it is heartily and officially resisted” (p.32). This is a great point, which is illustrated by the situation in France and Quebec, where borrowing words from English is constantly rejected, and keeping the original terminology in French is a constant struggle for what is perceived as the preservation of identity.

The second part of the book dedicates a section to framing language rights in the context of human rights, thus bridging the transition to the next two parts of the book, which deal with conflict. The authors note that what gives rise to conflict often has to do with cultural differences playing out in a shared space (p.161). Most times, conflict unravels as power leaves no room for equal rights within a society, where the dominant group asserts its position, its identity, and its privileges through imposing constraints on other group(s), through explicit or unstated restrictions on “movement, access, participation in the economy and social life and so on.” (p.161). The authors note that while conflicts in general are not about language per se, “language has been and continues to be a powerful tool (or weapon) in the arsenal of control” (p.162). This section underlines the fact that while the link between language and the issue of human rights may appear as evident, it continues to be controversial. At the one extreme, there is the position that individuals can and should be able to use the language they want, in any given circumstance. At the opposite pole,

some view the idea of treating language as a human right as erroneous since it does not account for the tensions that can rise between balancing individual and collective rights. At the individual level, the right to choose whatever language a person wants includes the right to not speak the language of the broader group that the individual is part of, thus raising the possibility of threatening the integrity of the larger group. Furthermore, because languages organically develop over time and because they can contain numerous dialects, this gives rise to the argument that they cannot and should not be treated as static units. The authors address the challenges that arise from learning and using a minority language and which may potentially deprive such speakers of what is offered in the language of the majority.

Nonetheless, the section itself seems too brief. Given the books' title and focus, the reader could expect it to be developed as the core theoretical framework for the broader discussion, or a more thorough analysis of the language/human rights dynamic. While this part summarizes the way in which language rights are codified in law and how identity is shaped by the politics of private versus public interests, it does not delve much into issues such as why conflicts determined by language divergences start in the first place, and how they evolve in the context of a multiplicity of power dynamics. As it is presented in the book, conflict is understood as emerging at the intersection of territorial possession, the composition of different human populations, and the role of politics and power. The book does, however, lay the ground for further research into such topical matters in an engaging and well-informed way.

In its third part, the book identifies five major conflict categories and details them by specific examples: 1) indigenous minorities (cases: Sámi in Norway, Ainu in Japan, American Indians in the US); 2) geopolitical minorities (cases: Hungarians in Slovakia, Hispanics in the Southwestern US, Kurds in Turkey); 3) minorities of migration (cases: Roma in Europe, Koreans in Japan, Puerto Ricans in the US); 4) intra-linguistic (dialectal) minorities (cases: Okinawans in Japan, African American English in the US); and 5) competition for linguistic dominance (cases: Flemish versus Walloons in Belgium, Tamils versus Sinhalese in Sri Lanka, French versus English in Canada). While the individual examples are very instructive and help describe the dynamics at stake, they are slightly too brief to properly unpack the similarities and differences of conflicts in countries that share comparable histories. The nuances are therefore insufficiently explored and, while the typology of the

conflicts is interesting, in-depth analysis that would explain the different outcomes is wanting.

The discussion would have benefitted from further linking parts one and two of the book with parts three and four. While the book engages in an informed and interesting way with a fascinating and underexplored topic - and while it is beautifully written - it reads like two separate manuscripts that have been merged, but which do not sufficiently address one another. For the reader who expects an in-depth analysis on why, how, and to what effect language and human rights intersect, the descriptive typological approach might deliver the feeling of an unfulfilled promise. Nevertheless, the book offers extremely valuable insights and provides a worthy starting point for further exploration.



### **Aims and Scope**

The Cross-cultural Human Rights Review (CCHRR) is a peer-reviewed periodical, devoted to cross-cultural human rights studies. The review aims make the debate on human rights that is currently being conducted in the ‘Global South’, accessible to a Northern audience, in order to facilitate a proper universal exchange of views. We strive for the accessibility of scholarship by ensuring that papers are free to view, publishing papers which are at the fringe of society, and providing opportunities to rising scholars. Our aim in broadening the discourse on human rights means that our focus will not only be on law but also on how human rights are implemented through social institutions – i.e., through cultural norms and moral rules, in particular relating to religion, family, governance, education, and the economy, which are at the core of society. In this sense, the review will build necessary lines of communication between the Global South and the North.

### **Wider Community**

The CCHRR aims at becoming an unrivalled resource for the subject both in the major research libraries of the world and in the private collections of professors and scholars. With an international circulation, the CCHRR will provide its readers with articles in English, and the translation of abstracts into Chinese, French and Spanish. Frequent theme issues will allow deeper, cutting-edge discussion of selected topics. The Review offers you an easy way to stay on top of your discipline.

### **Instructions for Authors**

The CCHRR only publishes papers which are of high-quality standard. All papers must follow our stylesheet in order to be approved for publication.

We apply a double-blinded peer-review process to ensure the independence and integrity of our publication process, and we are guided by our “Ethics and Disclosure” policy.

For more information about how to publish with the CCHRR and on our “Ethics and Disclosure” policy please visit our website: [www.cchrreview.org](http://www.cchrreview.org)