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Universal Human Rights and Cultural Relativism: A Marriage of Inconvenience

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Prologue

The recent death of the traditional ruler of Lagos, Nigeria, created a high-enough level of anxiety amongst the city's inhabitants that the state's governor was compelled to impose a dusk-to-dawn curfew; never mind that the demised ruler had only nominal powers. The problem was the anticipated return of the ancient practice of human sacrifice that served as homage to fallen rulers. The victims, usually young men in their prime, are indiscriminately kidnapped from the streets, killed and buried with the dead ruler. Although this practice was formally abolished in the late nineteenth century, the residents of Lagos have good reasons to be apprehensive, for when a similar ruler, the Oba of Benin, died a few years ago in a city about two hundred miles removed from Lagos, people went missing, and remain so.¹

A few hundred miles to the west of Lagos is Ghana. There, in the early 1950s, a peasant stole a pair of earrings; she was caught, prosecuted and sentenced by the customary court of "Priests." Her sentence was plain enough to her and others similarly situated: she must surrender her first female child to the "High Priest" who would in turn put the child to use as he sees fit.

Furthermore, the first female child of her offsprings must suffer the same fate in perpetuity. Thus, as of 1997 the High Priest, then in his eighties, had in his possession ten young women of childbearing age to do as he pleased. When interviewed on television about this practice, the Priest's countenance was clearly one of contentment, as indeed it would be for a man in his position.²

Soon after the 1990 Gulf War that expelled Iraqi forces from Kuwait, journalists observed a common practice that would have been scandalous in pre-war Kuwait. Prior to the war, wives in this predominantly Islamic country, were conditioned to walk a few steps behind their husbands; a hand-in-hand leisure stroll in public was out of the question. This practice changed after the war; for a few months immediately after the end of hostilities, wives were observed walking a couple of steps ahead of their husbands, not behind. But why? The answer soon came; the country was still littered with landmines and unexploded ordinance. A precious husband could indeed be seriously injured or worse, killed if he insists on abiding by the old custom of 'husbands first.'

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But these are traditions, and to a determined cultural relativist they are yet alternate examples of societal peculiarities or cultural observances that deserve certain degree of deference in human rights discourse, or mankind runs the risk of losing its cultural identity, or worse, succumb to the universal imposition of Western hegemony.

Introduction

Modern human rights activism, while remarkably successful in many areas of relevance, is needlessly burdened by the presumed absence of a coherent and sustainable theoretical foundation on which to erect the principles of rights that would have both universal appeal and acceptance.³ In substance, detractors and well-meaning proponents propound that the notion of universal human rights is flawed for two principal reasons: (1) it is based on western democratic ideals of individual rights and freedom, and thus inappropriately hegemonic, and disrespectful of other cultures; (2) the primary ground on which rights advocates have based their demands – human dignity, is not justifiable except on religious basis.⁴ The former, forcefully advanced by cultural relativists, is more serious and remains attractive to significant audiences in both developed and third-world nations.

This essay adopts the view that certain human rights are primary and fundamental, and may be universalized only through a particularized conception of natural law. Furthermore, once such rights have attained near universal acceptance, either in law or in practice, no ontological justification is needed for their being, and may not be detracted from regardless of the kind of society or culture in which they first gained prominence. However, some human rights, as currently formulated and because of their ‘secondary’ nature, must be allowed considerable time to become malleable to domestic practices, and even then may never enjoy universal acceptance in a specific form. More on this view, and the case of the woman of Malian origin,⁵ in due course.

Universal Human Rights and Cultural Relativism

Striped to its bare essentials, the primary objective of human rights is to confer on individuals a certain degree of dignity that enables free exercise of will, to engage in meaningful and sustaining relationships, to be free from harm, and to enjoy the freedom to pursue objectives that would enhance personal welfare without subjection to the indignity of physical and spiritual domination. This ‘certain degree of dignity’ properly stems from a sense of morality.⁶ Put succinctly, human rights are ‘the equal and inalienable rights, in the strong sense of entitlements that ground particularly powerful claims against the state, that each person has simply as a human being.’⁷ But these ideals are decidedly liberal and western in origin, and owe significant intellectual debt to the seminal and revolutionary ideas contained in such documents as the American Declaration of independence of 1776, and the French Declaration of the Rights of Man and of the Citizen of 1789. Collectively, these documents formed ‘the cornerstone of the political thinking of the nineteenth and twentieth century liberalism and progressivism.’⁸ Indeed, the modern human rights regime may be rightfully categorized as an attempt to universalize the political and socio-economic liberal versions of rights. A glimpse of the Universal Declaration of Human Rights provides ample evidence for this claim. In parts of its preambles, it states:

Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom..... proclaims [T]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations.⁹

Undoubtedly, some human rights require relevant legal and social institutions to be meaningful and

effective. Thus, countries previously within the sphere of influence of the erstwhile Soviet Union may find the argument for human rights vacuous since they lacked the requisite background and instrumentalities necessary for modern human rights regimes. But this is not to say that because these countries are wanting in the essential social institutions, they are therefore undeserving of the benefits of human rights. To the contrary, it is in these countries, more than anywhere else (except for the totalitarian regimes in Africa, Asia, and Latin America) that human rights law can produce significant immediate benefits, and create long-term conditions for social and economic growth. Fernando Teson makes this point quite eloquently when he propounds that “it is perfectly legitimate for a Westerner to advocate universal human rights and to discuss the possibilities for their protection worldwide. Human rights are about protection of people’s lives, safety, and individual freedom. They are a supreme universal value in the sense that most people, deprived of these protections, want to have them regardless of the culture in which they live.”¹⁰ The point to be emphasized is that certain human rights are primary and fundamental, thus regardless of where their articulation hails from, their value remains universal and independent of cultural observances. The source of these rights, says Donnelly, “is man’s moral nature ... Human rights are needed not for life but for a life of dignity, that is, for a life worthy of a human being. Human rights arise from the inherent dignity of the human person.”¹¹

This justification for human rights seems sensible, at least to one with liberal sensibilities; but rights advocates around the world continue to face daunting challenges that question the theoretical justification for universal human rights. These challenges come in the form of group rights, national sovereignty, cultural, and religious autonomy. This variety of claims underscores the philosophical doctrine of cultural relativism,¹² a doctrine that informs the strongly held conviction amongst its apologists that foreign actors should never interfere with purely domestic matters. This,

of course, is based on the well-established norm of state sovereignty, and the philosophical supposition that only the ‘natives’ can solve problems pertinent to a culture. Thus, cultural relativism, in its complete sense, is often used to support the position that a particular articulation of human rights, even those of the most basic of rights, may be incompatible with cultural observances of other societies, and hence unacceptable.¹³

Cultural relativists are quick to point out that the notion of rights are universal; however, its articulation and practice vary and rightfully so amongst different cultures.¹⁴ Every society, they assert, has a different idea of what constitutes ideal human rights, and that such ideal does not have to be consistent with those held in western democracies, and espoused by the United Nations. This position is succinctly and forcefully stated in a recent critique of human rights in Africa: “For countries that have not known peace, stability, or progress since their contact with the forces of Western imperialism, civil and political rights have no meaning.”¹⁵

And herein lies the essence of the current debate; on the one hand rights advocates assert that human rights should be universal, and that all cultures are ultimately malleable to the liberal interpretation of rights; on the other hand cultural relativists insist that universalizing the concept of rights as articulated by rights advocates will be tantamount to a western hegemony, and a delegitimization of other cultures.¹⁶ They argue that different societies should be allowed to define and promulgate rights to the extent that their cultures permit. Both sides make compelling arguments, but they confuse the issues; primarily because they fail to identify the source of human rights.

A Confusion of Natural Law and Positive Law

In human rights discuss, two kinds of law have always been invoked to lend credence to the various propositions adduced by the principals:

positive law and natural law. Positive law, in its popular apprehension, is the sort that different jurisdictions enact to govern conduct, and enforced by the police and the judiciary. But these laws are relevant only to the affairs of citizens within a particular jurisdiction, and as such are not human rights. Thus, as a citizen of the US I can point to the Bill of Rights as the basis for my claims or rights; but those who live in Columbia or Nigeria where there are no such enforceable constitutional guarantees to protect them will have no use for rights based on positive laws that do not transcend jurisdictional boundaries. A different sort of law is therefore needed to overcome this difficulty. And herein lies the source of tension between rights advocates and cultural relativists – a misidentification of the proper source of human rights.

Natural law, in a special apprehension, provides a set of general moral standards on which claims, immunities, and liberties may be based without the constraints of jurisdictional limitations. These moral standards must necessarily be universal and independent of culture, religion, and nationality. Thus, it must be the case that a particular version of natural law must inform the claim of universal human rights. For if humans have rights by virtue of their humanity, it must be the case that there exists a general moral standard that is universally accepted, the particularities of its manifestations or understanding in different cultural settings notwithstanding. Thus, if 'one happens to be the citizen of a tyrannical regime, while still deeply regrettable, no longer leaves one without intellectual resource because the heart of the natural perspective is precisely the assertion of universal right against local custom.'¹⁷ This is what gives natural law its special advantage over positive law as a source of human rights.

The Malian Woman

The case of the woman of Malian origin sentenced to prison in France for genital mutilation falls squarely within the debate between rights advocates and cultural relativists.¹⁸ In 1999, a French woman of Malian descent circumcised her

female child in strict observance of her native culture. She was prosecuted and convicted for female genital mutilation. This case clearly illustrates the kind of difficulties that rights advocates must overcome in their quest to universalize basic notions of human rights. In this case the rights of the child were indeed abridged because the mother's act occurred in a country that provides constitutional protection against nonconsensual physical mutilation. However, if the act had occurred in Mali, the Malians would think nothing of it because it is sanctioned by cultural observances. While the mother meant no harm to the child she, nonetheless, violated the rights of her daughter as articulated by the positive laws of France. Unquestionably, there are basic human rights, such as the right to be secure in person, and freedom from civil, political and religious subjugation, that must enjoy the international status of *jus cogens*, regardless of domestic cultural observances. But all rights are not equal, thus, there are some rights that are essentially secondary in the ranks of necessities, such as the right to economic sufficiency, and education. These secondary rights may be made subservient or malleable to particular cultures and confined to domestic jurisdictions without significant risk of depreciation.

Genital mutilation, however, comes with a high risk of physical endangerment, and must be strongly condemned and discouraged. But it is the outcome of the powerful tradition of circumcision that permeates most of Africa, and some religious observances. While Westerners may find this practice abhorrent, it remains a right of passage for many, hence the need to seek the most effective approach to curb its practice is imperative, but this approach must at once be sensitive to culture, and religious practices. A starting point in this campaign should be the enlistment of national governments in countries where circumcision is prevalent; such enlistment is critical for the simple reason that national governments have the capacity to carry 'carrots' or wield the 'stick.' The 'stick', however, must always be the last resort in all human rights discourse. This should be

followed by a concerted effort to educate the relevant population and people in responsible offices, such as traditional and spiritual leaders, on the health risks of circumcision, and the attendant inhumane treatment to recipients. If this fails, then an alternative ritual that approximates the same need may be adduced; and with patience, the old practice of genital mutilation may gradually fade away. Criminal sanction cannot be a viable solution in this case, for it fails to address the fundamental reasons for the practice; and unless those reasons are properly addressed, the practice will continue, albeit out of public view, even with the prospect of severe sanctions.

Conclusion

While the ideals of human rights are admittedly Western and liberal in inclination, their substantive values and usefulness are not limited to societies that espouse Western ideas, but are rather just as meaningful and useful to non-Western societies. The common bond of humanity makes these ideals non-parochial, and imbues them with universal qualities. But in order for this observation to have universal appeal, human rights must be understood to derive from a particularized apprehension of natural law, and requires the existence of essential social institutions commonly found in civilizations with liberal sensibilities. The fact that individual rights and freedom were first comprehensively articulated and formalized as principles of governance and conduct by Western societies is not enough to make them objectionable to other cultures as long as experience has shown them to be salutary to individual welfare and societal progress. By way of example, the idea that man can fly, and hence the invention of modern air travel, is of Western origin. The benefits from air travel are unquestionable; should non-Westerners now refuse to fly because the idea and the subsequent invention are Western? Are we also to reject the global use of modern Western medicine because they may be incompatible with traditional observances in other cultures? For now, a contemplation of these questions will do; perhaps, but let Roberta Cohen's words be the last:

To adequately promote human rights, a careful study of the attitudes, beliefs, institutions and practices of the different ...cultures is indispensable in order to find ways in which local precepts can be applied to reinforce international human rights standards. The reconciliation of international human rights standard with local cultural values will not undermine or weaken international norms. Rather, it will enrich and reinforce them. Cultural diversity has proved an asset to the development of universal norms. Moreover, worldwide support for human rights is likely to endure if human rights draw on elements from all cultural traditions.¹⁹

Notes

¹ See African Report, March, 2003. This practice stands in sharp contrast to what many Africanists have written to demonstrate that African cultural traditions are quite malleable to human rights. They point to consensual politics as a demonstration of Africans' willingness to participate in grassroots democracy. See the work by Roberta Cohen, *Human Rights in Africa: Cross-cultural Perspective*; *Human Rights Quarterly*, May 1993 v15 n2 p 459-461. Equally shocking to the senses is the revelation in Reza Afshari's essay, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*; *Human Rights Quarterly*, May 1994 v16, n2 p235-276.

² Nothing more disturbing than the image, now often with me, of prison guards of the Islamic Republic of Iran raping a very young woman before her execution in their perverted, patriarchal imagination, the Islamist executioners were resolving God's dilemma in the case of an "enemy of Isla" who happened to be a virgin (it is believed that virgins go to heaven); Afshari, *Ibid.*

³ A television news program on world culture; US TV Discovery Channel, 1997.

⁴ See generally, Henry Steiner, and Philip Alston, *International Human Rights in Context*; Oxford Univ. Press, 2000.

⁵ See generally Michael Freeman, *The Philosophical Foundations of Human Rights*; *Human Rights Quarterly*, Aug., 1994, Vol. 16, n3, p

451-514. Also see the work by Rhoda Howard and Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*; *The American Political Science Review*, Vol. 80 Issue 3, Sept. 1986, P 801-817. In this work they argued that the effective exercise of human rights depends on a liberal regime that may be articulated in different forms 'but only within a relatively narrow range of variation, and that human rights standards are based on a distinctive substantive concept of human dignity.

' Their opening remarks, and hence the thrust of their argument is that some of the authors in the field tend to confuse human rights with human dignity. *Ibid.*

⁵ See UN Doc. E/CN.4/Sub.2/1999

⁶ See generally, Rhoda Howard, *Cultural Absolutism and the Nostalgia for Community*; *Human Rights Quarterly*, May, 1993, Vol. 15, n2 p315-338.

⁷ *Supra* at note 4.

⁸ See Chris Brown, *Universal Human Rights: A Critique*; in Dunne and Wheeler, *Human Rights in Global Politics*, p. 105, University of Oxford Press, 1998.

⁹ See Universal declaration of Human Rights; G.A. res. 217A (III), UN Doc. A/810 at 71 (1948).

¹⁰ See Fernando R. Teson, *International Human Rights and Cultural Relativism*; *Virginia Journal of International Law*, 25 (Summer, 1984): 870.

¹¹ See Jack Donnelly, *Universal Human Rights in Theory and Practice*; Cornell University Press, 1989, P44. A similar but a more powerful expression is made by T.H. Tawney: "The essence of all morality is this: to believe that every human being is of infinite importance, and therefore that no consideration of expediency can justify the oppression of one by another. But to believe this it is necessary to believe in God." The same insightful statement on this issue can be glimpsed from that made by Ronald Dworkin : "We almost all accept... that human life in all its forms is sacred... For some of us, this is a matter of religious faith, for other, of secular but deep philosophical belief."

¹² *Supra* at note 10.

¹³ See A. Belden Fields, and Wolf-Dieter Narr, *Human Rights as a Holistic Concept*; *Human Rights Quarterly*, Feb., 1992, Vol. 14, n1 p1-20. But also see Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1985. Here Dworkin articulates the standards by which a national government can be judged on its human rights record: 'Government must treat those it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Governments must not only treat people with concern and respect but with equal concern and respect. It must not distribute goods or opportunity unequally on the ground that some citizens are entitled to more because they are worthy of more concern.' *Ibid.* Donnelly and Howard expanded on this by insisting that states must treat individuals as both political and moral equals. But such equality should not be equated to a right to equal share of social resources; only the right to be treated with equal respect and concern matters. *Supra* at note 4.

¹⁴ *Ibid.*

¹⁵ See Julius O. Ihonvbere, *Underdevelopment and Human Rights Violations in Africa*; in *Emerging Human Rights: The African Political Economy Context*, eds. George W. Shepard, Jr. and Mark Anikpo; New York: Greenwood Press, 1990, P57. In this regard, Roberta Cohen, in *Human Rights in Africa: Cross-cultural Perspective*, *supra* at note 1, asked: "Why is African Human Rights record so bad?" She points to explanations often given; that Africa's colonial heritage has a lot to do with it. Here, it is argued that colonial rule in the continent weakened or destroyed customary constraints on human rights abuses, and instead replaced them with autocratic governments that had little or no regard for human rights. For while the colonial ruler introduced democratic forms of government in the continent before handing power to Africans, they did not practice democracy in Africa, thus Africans had no real

experience with democracy. They were ruled instead through

'security police, and the practice of preventive detention, and other means of dealing with political opponents.' Ibid.

¹⁶Supra at note 6.

¹⁷See Chris Brown; *Universal Human rights: A critique*; in Dunne and Wheeler, *Human Rights in Global Politics*, p103-27. Oxford University Press, 1998. In this work Brown makes the case that rights based on positive law may be necessary in order to argue that a particular social institution is not functioning the way it should but that such right losses its effectiveness when the social institution is functioning the way it was intended, but the intention is repressive. Thus he writes 'Positive legal rights provide no basis for an argument that the whole way of life of the society in which they exist may be oppressive, because, by definition, they are based on that way of life. To exercise a critique at this level it is necessary to bring to bear the natural law position that general

moral standards exist independently of the practices of any particular society.' Ibid.

¹⁸Supra at note 5. But is there anything to point to that makes female circumcision any more brutal and 'uncivilized' than that practiced on males? Or is the primary reason for female circumcision the source of the outcry? It is a commonly held belief in developing nations of Africa that uncircumcised females tend to be more sexually active, and that circumcision tends to subdue this tendency.

¹⁹See the work by Roberta Cohen, *Human Rights in Africa: Cross-cultural Perspective*; *Human Rights Quarterly*, May 1993 v15 n2 p 459-461. Cohen states the case that the 'personalist' form of government that pervades much of the developing countries of Africa encourages the concentration of power in one ruler regardless of the pretensions to democracy. The resulting consequence of this practice is that the rule of law is rendered useless, thus the social institutions in place to protect individual and group rights retain only nominal powers. Ibid.



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