

ABDULLAHI AHMED AN-NA'IM

Universality of Human Rights: Mediating Paradox to Enhance Practice

1. Introduction

For the purposes of theoretical analysis, the challenges facing the universality of human rights can be seen as conceptual and political. The first set of challenges relates to the theoretical viability of the idea of universal human rights norms in view of the realities of permanent and profound cultural difference among human societies. The basic questions here include: what does universality mean, on whose terms, and how to articulate specific standards? This is what I call the paradox of universality. Political challenges relate to possibilities of consistent and principled application of human rights standards in view of the realities of power relations within and among societies: how to generate and sustain the political will and necessary resources for systematic implementation of human rights norms? This political challenge can be called the paradox of self-regulation by the state, namely, how can states be expected to protect human rights against themselves? In this paper, I will argue that addressing the first set of challenges is in fact necessary for addressing the second. In other words, mediating the paradox of universality will in fact redress the paradox of self-regulation by the state. In particular, I will argue that enhancing the cultural legitimacy of human rights within various societies is necessary for generating the political will to implement these norms.

The role of culture I am discussing here is relevant to all human rights norms, and not limited to specific issues that are often associated with claims of cultural relativism, like female genital cuttings or so-called 'honor killings'. These issues are often cast in terms of a confrontation between chauvinistic assertions of Western perceptions of rights as the established norm of universality of human rights to which all societies have to conform, and non-Western resistance to cultural imperialism. Instead of pursuing this

simplistic and unproductive confrontation between 'the West' and 'the Rest', I will attempt to reframe the issue in terms of mediation of paradox in order to enhance the prospects of implementation of human rights norms throughout the world. The proposed mediation, I will argue, is helpful in addressing the underlying concerns of both sides of that confrontation. This approach is necessary, I suggest, in dealing with all human rights issues, whether their association with culture is commonly acknowledged, like female genital cuttings and honor killings, or not so apparent, like the scope of freedom of expression and liberal relativism regarding economic, social and cultural rights, as I will illustrate later.

My working definition of culture is that of the UNESCO Universal Declaration on Cultural Diversity of 2001 (UDCD), namely, that

culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, *lifestyles, ways of living together, value systems, traditions and beliefs* (emphasis added).

As the emphasized phrase clearly shows, it is simply not possible to conceive of human rights or expect those norms to command respect and compliance in any society without taking the culture of that society into account. At the same time, I am also in agreement with Article 4 of UDCD, that "[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."

The question then is how to take culture seriously without allowing it to be manipulated to justify or rationalize human rights violations? This is a difficult task because the ruling and other elites who make this claim do so because they find it appealing to their constituencies. We must therefore understand the rationale of that appeal and have an effective response to it if we are to expect the binding authority of human rights to be taken seriously by the people concerned. In terms of the above-quoted UDCD definition of culture, human rights are unlikely to work effectively until they are integrated into the "lifestyles, ways of living together, value systems traditions and beliefs" of all peoples around the world. But that should not mean conceding whatever elites claim in the name of culture because, as I will discuss later, all cultures are dynamics and constantly evolving in response to both external and internal factors and influences.

The premise of my analysis is that the legitimacy of human rights in various cultural traditions is necessary for both the theoretical universality and practical efficacy of these international norms. People must believe the concept of human rights and its normative content to be valid from their own cultural perspective if they are to struggle for the practical implementation of these rights. This view is in fact required by the principle of universality itself; namely, that people cannot be bound by norms they do not freely accept. Respect for the human dignity and collective self-determination as foundations

for the concept of universal human rights require the effective participation of all human beings in defining and protecting human rights norms. What I call the paradox of universality is how can universal acceptance be achieved in a world of permanent and profound cultural diversity among and within human societies? As I have argued and tried with colleagues to demonstrate in detail for many years, this paradox can be mediated through the promotion of an 'overlapping consensus' among different cultural traditions through internal discourse within cultures, and cross-cultural dialogue about what is due to human beings by virtue of their humanity.¹

By overlapping consensus I mean agreement on human rights principles despite our disagreement as to why each of us comes to this common ground. In practice, the process of promoting this necessary overlapping consensus should begin with the UDHR, and build on existing human rights treaties and institutions at the global and regional level. But that should not mean taking any conception or norms as final and conclusive to the exclusion of possibilities of further development and evolution out of the experiences and priorities of peoples in all parts of the world. The Charter of the United Nations initiated the modern human rights paradigm, but it did not eliminate the consequences of colonialism and hegemony of Western powers over the peoples of Africa, Asia and Latin America. With its emphasis on formal sovereignty and territorial integrity, the UN Charter could neither by itself achieve those broader objectives for various countries, nor secure internal self-determination for marginalized communities within national boundaries. When colonized peoples were eventually able to participate in the human rights process as a result of decolonization and subsequent developments, they had to do that on the basis of the assumptions and framework that were already established by Western powers. This is not to deny or underestimate the value of the contributions of the peoples of developing countries to making the UDHR more truly universal now than it was in 1948. On the contrary, my objective is to affirm the value of those developments and build on them to further enhance the effective participation of all peoples in the definition and implementation of human rights.

For this multifaceted participation to be productive, culture must be understood to be dynamic, contestable and constantly evolving in response to internal and external factors and actors. It is critically important, however, that such internal transformation of each culture should be sought through its own frame of reference and institutional resources. In other words, cultures are constantly changing in response to a variety of challenges, but that

¹ See, e.g., A. A. An-Na'im (Ed.), *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (1992); A. A. An-Na'im (Ed.), *Cultural Transformation and Human Rights in Africa* (2002); and A. A. An-Na'im (Ed.), *Human Rights Under African Constitutions: Realizing the Promise for Ourselves* (2003); and 'Area Expressions' and the *Universality of Human Rights: Mediating a Contingent Relationship*, in D. P. Forsythe & P. C. McMahon (Eds.), *Diversity and Human Rights I* (2003).

happens internally within the culture, and not through external imposition. This approach also rejects the claims of local elites to monopolize cultural authority within their communities because the same principles of human dignity and self-determination that oppose external hegemony also reject internal domination. These processes of transformation operate within the same culture as well as in its relationship with other cultures, but differences in power relations within the same community and in its relations with other communities tend to influence the outcome of contestation initiatives. For example, the ability of women to challenge oppressive gender relations within their communities is proportionate to their economic autonomy, social and political power. To change outcomes in gender relations one must therefore confront the underlying imbalance in power relations, instead of relying on the rhetorical force of international human rights as if that can work on its own. The moral and political force of human rights is indeed useful, but only through the mobilization and action of human beings in their communities, which must take due account of the realities of power relations within the community.

Another aspect of the proposed approach is to de-emphasize the dichotomy between internal and external influence in order to enable those who are contesting oppressive aspects of their own culture to draw on alliances with external actors. Accordingly, all human rights advocates anywhere in the world are entitled and obliged to support these rights in other societies, subjected to two requirements of all participants in these initiatives:

- 1) To act with sensitivity and respect for the integrity of other cultures because resistance to external pressure on human rights issues is often a reflection of traditional resentments of the missionary zeal and cultural imperialism that were used by European powers earlier to justify colonialism. Taking a patronizing position of moral superiority in telling others what to do is not only counter-productive because people will resist in any way they can when they feel they are being dictated to by others, but also inconsistent with respect for human dignity which is the underlying rationale of the human rights concept itself.
- 2) To apply the same standards in openly and consistently criticizing their own societies and allies, thereby avoiding the charge of applying 'double standards'. Unfortunately, a lot of hard work in building confidence and trust across cultural boundaries can be seriously undermined by such reckless practices. A most egregious recent example of this is the militaristic response of the United States to the terrorist atrocities of 9/11, especially the invasion of Iraq, practices of secret detention and torture, and illegal transfer of suspects across international borders. These and other travesties of justice and the rule of law on a global scale seriously undermined the standing of international law itself, and diminished

international cooperation in the protection of human rights everywhere. In my view, the consequent mistrust of the motivation of major powers enabled the Government of Sudan to resist international pressure over its atrocities in Dar Fur. It is simply untenable for the international community to condone violations of international law and human rights by the United States and its allies and then attempt to invoke the same principles against the Government of Sudan.

To emphasize in conclusion of this introduction, I am not suggesting that cultural factors are the only source of all difficulties in the application of human rights norms, or that taking culture into account would suddenly resolve all issues, but I do believe that there is always a cultural dimension to both difficulties and solutions. Since the dynamic relationship between culture and human rights is part of the source of some tensions with human rights it must also be a resource for the mediation of those tensions in practice. In order to offer some practical strategies for this mediation, I will begin by discussing the two-fold paradox of universality of human rights and self-regulation by the state to highlight the critical role of culture in the mediation of these tensions. Moreover, I will explain the methodology of internal discourse and cross-cultural dialogue as a practical and realistic approach to mediating serious disagreements about the universality principle or some specific human right norms.

The premise of the proposed approach is that the opponents of universality of human rights have a point that should be *taken seriously but not totally conceded* to the extent of defeating the possibility of the universality of human rights. Those critics are right in observing that the notion of universally valid and applicable norms is paradoxical, but they are wrong in concluding that the effort to establish and implement universal human rights norms should be abandoned for that reason alone. The challenge for the proponents of the universality of human rights is to develop and implement effective strategies for overcoming that difficulty. To respond to this challenge, we should first clarify the following difficulty in order to propose a viable methodology for addressing the issue.

2. The Paradox of Universality and Relativity

The term human rights is often used in popular discourse to refer to notions of freedom and social justice in general, but in fact this concept signifies a particular view of claims of freedom and justice as legal entitlements which are due to all human beings, without distinction on such grounds as race, sex (gender), or religion. While the initial formulation of human rights, as proclaimed in the Universal Declaration of 1948 and developed in subsequent treaties and institutions, was based on the experiences of Western societies

that does not necessarily mean that the concept or those formulations are necessarily alien or irrelevant to non-Western societies. The premise of the whole project is that it is about the rights of human beings as such, everywhere, and not only of people of 'the West'. In fact, as clearly confirmed by the frequent endorsement of the Universal Declaration in national constitutions and regional treaties like the 1981 African Charter of Peoples' and Human Rights, the concept of universal human rights has already transcended the limitations of its initial formulations. Nevertheless, this view is by no means universally accepted, even among Western societies as I will highlight later. This issue is often discussed in terms of a binary of universality and relativity, as if one has to either fully accept or completely reject the universality of a presumably a set concept and exhaustive list of human rights. On one side of this purported dichotomy are countries which claim cultural relativity or contextual specificity in rejecting or qualifying certain human rights norms, while those which fully accept the universality of all human rights, are on the other side.

Upon reflection, however, it is clear that this binary view is false and misleading because all countries have a mixed record on the issue, whether in theory or practice. A binary view is false, I believe, in assuming that human rights can either be culturally and contextually neutral, or that a conception of these rights emerging within one culture or context can be imposed on other cultures. It is true that universal rights are necessary for ensuring equal respect for human dignity throughout the world, but these norms can not be imagined or understood in the abstract, without reference to the concrete daily experience of the people who are entitled to them. A binary view is misleading in implying a 'clash of civilizations' between 'the West' that is unanimously supportive of universal human rights versus the rest of humanity who are opposed to those rights. In reality, some people of all societies throughout the world accept the universality of human rights, while others in the same societies reject this view. Nevertheless, there is a need for global consensus on universal human rights because it is not realistic to assume that all societies are able to devise and effectively implement their own conception of rights, freely and with equal participation of all members of each community. The reality of human experience has shown, especially in situations of extreme oppression and violence, that ruling elites often control and manipulate that process to protect their own privilege and power. This reality emphasizes the need for universal rights, but does not resolve the problem of how to come to agreement about those rights.

By the 'paradox of the universality' I mean given the cultural foundation of all normative systems, on the one hand, and the permanent cultural diversity of the world, on the other- how can we determine universally valid human rights standards that are acceptable to all societies regardless of cultural and contextual difference? The basic difficulty here is that any approach to

locating the foundation or source of the universality of human rights simply begs the question or postpone it, rather than resolving it for all perspectives.² For instance, one can say that all human rights emanate from a particular philosophical or religious premise about human nature, social life, and so forth. But this simply re-frames the question in terms of which premise to select, why, and to what end? To assert that these rights are necessary for protecting human dignity or satisfying certain basic needs presupposes a universally accepted conception of human dignity and its implications, or agreement on basic needs and the manner of their satisfaction. For instance, all human beings need food and shelter, yet liberal culture/ideology tends to assert that these needs should be realized through the political process. That view tends to focus on civil and political rights, like freedom of speech and association, to ensure the fairness and inclusivity of the political process, trusting that the ultimate outcome will provide for other basic human needs. Those who hold the opposite view insist on acknowledging of basic needs like food and shelter, which they rank as matters of higher priority than civil and political rights. Instead of prioritizing one set of human rights over another I hold all human rights to be equal and interdependent. But the point here is that there are, and will continue to be, significant differences about how to identify and define human rights norms. Again, to take a positivistic view of human rights, as whatever states decide them to be through international treaties and national law simply leaves the matter to the culturally and ideologically determined biases, interests and choices of the elite who control the state.

The difficulty of finding a universally accepted foundation of universal rights was clear to some observers even before the United Nations' Human Rights Commission finished the draft of the Universal Declaration of Human Rights. In 1947, the Commission received a long memorandum from the American Anthropological Association (AAA) cautioning against the dangers of ethnocentrism, the tendency to regard one's own culture as superior to those of other cultures.³ Since standards and values are relative to the culture from which they derive, any attempt to formulate norms that are based on the beliefs or moral code of one culture to that extent detracts from the applicability of the Declaration to humanity as a whole. Even those who accept the idea of the universality of human rights as a legal entitlement of every human being will probably continue to have significant differences about the actual content and implementation of these rights. But if the cultural/contextual sources or foundations of human rights are necessarily multiple and diverse, how can the rights so determined be universal?

² For a brief review of controversies over possible justifications for the foundational assertion of Art. 1 of the Universal Declaration that all human beings are born free and equal in dignity and rights, etc., see T. Lindholm, *Article 1: A New Beginning*, in A. Eide et al. (Eds.), *The Universal Declaration of Human Rights, A Commentary* 31 (1992).

³ American Anthropological Association, *Statement on Human Rights*, 49 *American Anthropologist* 539 (1947).

In attempting to address this dilemma, the AAA statement of June 1999 affirmed that cultural or other differences between human societies should not be used as a pretext for justifying human rights violations. But the problem with this view is that it assumes or presupposes the existence of a clearly identified and accepted set of human rights in the first place whose violation cannot be justified by invoking human difference. In an effort to anticipate objections to the circular logic of this view, the 1999 AAA declaration concludes by cautioning against equating or limiting human rights to "the abstract legal uniformity of Western tradition," and emphasizes the need to keep the concept open to additional and new perspectives by asserting that:

The AAA definition thus reflects a commitment to human rights consistent with international principles but not limited by them. Human rights are not a static concept. Our understanding of human rights is constantly evolving as we come to know more about the human condition. It is therefore incumbent on anthropologists to be involved in the debate on enlarging our understanding of human rights on the basis of anthropological knowledge and research.⁴

I agree with this evolving view of human rights, but do not see how that can resolve the basic tension between ethnocentricity and universality of standards that are now or in the future proclaimed as universal human rights. The phrases 'our understanding' and 'we come to know' in the above quotation may include members of the AAA who supported the adoption of this statement, but not those members who opposed it, and certainly not all Americans. It is good that the training and professional orientation of anthropologists may enable many of them to be sensitive to the risks of ethnocentricity, but that does not necessarily qualify or authorize them to speak for all views on human rights in their own culture, let alone in other cultures.

Another aspect of the universality quandary can be appreciated in relation to what might be called the paradox of state self-regulation in the human rights field. The Charter of the United Nations and the UDHR had to strike a balance between the need for international supervision and respect for national sovereignty and exclusive domestic jurisdiction of nation states. On the one hand, these founding documents sought to universalize certain notions of fundamental rights as binding under international law while, on the other hand, leaving the application of these rights on the ground to the agency of the state. The question here is can we expect state officials to enforce human rights limitations on their own powers, or to hold themselves accountable for violations of these rights? The reality of this paradox of self-regulation by the state means that redressing the underlying causes of violations, as well as providing effective remedy for individual violations, requires the mobilization of the maximum possible degree of political will at the local, national and international level. That political will is unlikely to emerge and be maintained

⁴ American Anthropological Association, *Declaration on Anthropology and Human Rights*, available at <http://www.aaanet.org/stmnts/humanrts.htm>, viewed 7 October 2007.

if human rights are perceived to be lacking cultural legitimacy or contextual viability. This is as true of Western countries as it is of non-Western countries, as I will show later.

In this regard, it is important to emphasize the persistence of some Western governments to assert chauvinistic notion of national sovereignty is in fact as relativist as similar claims by non-Western countries like China or Iran. For example, the United States is notorious for seeking to fashion international human rights treaties to fit its own ideological views and social institutions during the drafting process, only to refuse to ratify and incorporate those treaties into its domestic law for application within the country itself. This is true from the 1948 Genocide Convention, which took the United States more than forty years to ratify, and only subject to reservations, to the 1989 Covenant on the Rights of the Child, which is now ratified by every country in the world except the United States and Somalia. Since Somalia has had no government since 1992, the government of the United States stands completely alone in refusing to ratify this Convention. This position is particularly damaging for the universality of human rights because other relativists can cite it as justification for their own positions, at a time when the United States is dominating international relations and exercising excessive influence on the domestic policies of weaker and poorer countries. To say that the United States need not ratify because it already upholds a higher standard than is required by human rights treaties is both incoherent and condescending. If the United States is already in conformity, why not ratify these treaties in order to have the moral standing to challenge other countries when they refuse to ratify or fail to implement? In challenge other countries to do what it is not willing to do itself, the United States is asserting its moral superiority, without being willing to submit to the same standards of verification of compliance that apply to other countries.

3. Mediating the Contingent Universality of Human Rights

In light of the preceding remarks, it is clear that all societies need to engage in constant negotiation about which claims to accept as human rights, and how they can be implemented in practice. In other words, agreement on the concept and normative content of the universality of these rights is to evolve and be constructed overtime, and not proclaimed once and for all. This negotiation should, by definition, include the widest possible range of perspectives and priorities of different human societies for the outcome to be accepted as truly universal. To avoid the appropriation of the collective voice of a culture by its political leaders or some other elite group, such negotiation must take place within each culture, as well as between cultures. The object of this internal discourse within cultures, and cross-dialogue among them, is to promote an

overlapping consensus over the meaning and implications of the universality of human rights. While internal discourse seeks to promote consensus within a society or community over human rights norms and their underlying values within a particular society, cross-cultural dialogue attempts to achieve the same among different societies and communities.⁵

To suggest this apparently long-term approach does not mean that the articulation and implementation of all human rights should wait until consensus is achieved on any of them. In fact, the protection of certain rights, like freedom of speech and the right to education is necessary for internal discourse and cross-cultural dialogue to be possible and effective. The point is to work with the existing level of acceptance and implementation of human rights in order to expand and enhance consensus on the validity and practical application of all human rights, including possibilities of evolving new rights in the future.

However, since the proposed discourse and dialogue does not happen in a vacuum, these processes must take into account contextual factors, such as differentials in power relations among different participants in internal discourse within cultures, as well as in dialogue between them. Accordingly, to enhance the ability of cross-cultural dialogue to contribute to the acceptance of the universality of human rights, the impact of persistent and growing global differentials in power relation and material conditions between Western and non-Western societies and cultures must somehow be redressed. As noted earlier with reference to the aftermath of 9/11, the context of discourse and dialogue also include events and developments that affect the rule of law in international relations as the essential pre-request condition for any possibility of acceptance and protection of universal standards of human rights anywhere in the world today.

It is therefore necessary to understand and act upon the profoundly political nature of the whole project. The normative formulation and practical application of the universality of human rights presupposes the political will to allocate the necessary resources and take appropriate administrative or judicial action, including making hard choices in cases of apparent conflict with other national priorities or concerns, and so forth. Therefore, the critical question is how to generate and sustain the necessary political will to respect and protect these rights in different societies, over time. So far, too much emphasis has been placed on a narrow, state-centric, legalistic, and reactive approach to international human rights standards that also presupposes certain institutional and material resources that many not exist in many parts of the world. By 'state-centric and legalistic' I mean the tendency to perceive

⁵ See, e.g., A. A. An-Na'im, *Cultural Transformation and Normative Consensus on the Best Interest of the Child*, 8 *International Journal of Law and the Family* 62 (1994). Also published in P. Alston (Ed.), *The Best Interest of the Child: Reconciling Culture and Human Rights* 62 (1994).

the legitimacy and authority of human rights standards as founded on the legal obligation of states under international law. Following this approach, advocates of these rights tend to focus on the technical definition of discrete or isolated rights and pursue specific remedies for individual violations through judicial or administrative remedies. Such a reactive, individualized response not only requires developed and settled institutional and human resources, but is also unable to cope with massive violations or addressing underlying causes of human rights violations. Individualized case-by-case remedies should therefore be supplemented by proactive strategies to preempt violations and address the underlying structural and cultural/contextual causes.

For our purposes here, there are two aspects to these two proactive strategies, one internal to the particular community, and the other external, relating to its relationship with other communities or constituencies. On the internal front, advocates of universality must be able to use whatever arguments are likely to be persuasive to the specific community, or able to address their apprehensions and concerns, in relation to whatever frame of reference that is accepted by that community as authoritative or applicable. The objective here is *persuasion*, by showing people how human rights norms 'make sense' in their own daily lives, without being too threatening for them to accept. It is to be expected that oppressive regimes will continue trying to justify human rights violations in the name of law and order, upholding social morality, economic development and other pretexts. The question is therefore whether the arguments human rights advocates can make are capable of overriding such objections by appealing to more fundamental or widely held values, or capable of building alliances to overcome such objections, rather than expecting their view to be acceptable to all.

The external dimension relates to conditions or circumstances that are likely to influence the persuasiveness of the human rights view in the internal debate. For instance, a community's perception of how seriously others take human rights claims will influence their own attitudes and responses. That is why perceptions of 'double standards' in the human rights policies are so damaging to the universality of these rights. In my view, the failure of some countries to consistently respect human rights in their own policies does not justify violations by other countries, but it is unfortunately true that some people tend to draw that conclusion.

The sort of negotiation I am calling for can be seen in recent experiences of European countries with the doctrine of 'margin of appreciation', which permits some discretion in the definition and implementation of human rights due to cultural and contextual factors. The underlying rationale of this doctrine is that universality does not mean total uniformity, without regard to the specificity of the situation where the issue arises.⁶ In this way, holding that the same norms should prevail everywhere in the world does not preclude

⁶ E. Brems, Human Rights: Universality and Diversity 357-422 (2001).

accommodation of diversity in the way these standards are realized in specific situations, through interpretation, balancing and enforcement. The rationale of the 'margin of appreciation' doctrine may apply more strongly in relation to significantly different parts of the world. But even within a relatively homogenous region like Europe, universality cannot mean total uniformity. It may be necessary to devise safeguards against abuse or distortion of the rationale of the doctrine. For instance, Eva Berms has argued that the European Court of Human Rights should reduce the scope of the margin of appreciation when certain core aspects of a right are concerned. In her view, since all rights can be conceived as having a core and a periphery, the further an element is removed from the core, the more room for diversity. From this perspective, the universality of human rights is undermined by contextual diversity of interpretation regarding the core of a right, but not if they pertain only to peripheral elements of the right.⁷

In view of this doctrine and its rationale, it is remarkable that it is not seen as relevant or applicable to minority cultures within a country, like the situation of European Muslims in France, the Netherlands or Denmark. For example, while it is commonly conceded that freedom of expression cannot be absolute, there is little agreement on the appropriate limits of this human right. But such differences exist within cultures as well as between cultures; and tend to change over time, as can be seen in the case of pornography or blasphemy. Moreover, other factors can influence the terms or outcome of debates about freedom of expression. This point may seem to be more obvious in relation to African and Islamic societies,⁸ but it is equally true of other parts of the world. Thus, it seems to me, the controversies about the cartoons in Denmark and the headscarf in France, for instance, reflected anxieties about immigration and cultural identity for European societies, and not only among Muslim minorities. Recollections of colonial relations and resentment of post-colonial hegemonies, concerns about terrorism and Turkish membership in the European Unions, and many other factors are relevant and often culturally defined.

Understanding the cultural and contextual dimensions of the debate can help us understand and better respond to these issues. For example, peaceful protest against the Danish cartoons of the Prophet Muhammad should be seen as an effort to define the right and its appropriate limitations, and not denial of freedom of expressions to others. Affirming this view of the situation would help both sides of that issue to come to a mutually acceptable resolution, as

⁷ E. Berms, *The Margin of Appreciation Doctrine of the European Court of Human Rights*, in D. P. Forsythe & P. C. McMahon (Eds.), *Human Rights and Diversity: Area Studies Revisited* 81 (2003).

⁸ See, e.g. A. A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 10 *Emory International Law Review* 29 (1997).

Muslims would feel that their objections were taken into consideration and the Danish public opinion would not feel threatened by immigrant Muslims dictating to them what to do.

To conclude this theoretical discussion, and turn to some thematic illustrations of my approach, I would emphasize that the universality of human rights and their cultural/contextual expressions can be compatible, and even mutually supportive, but this process should not be assumed to necessarily yield a predetermined or inevitable meaning and content of universality of human rights. These two dimensions can either be mutually supportive or not, depending on how various actors perceive the issue and respond to them in specific situations. In other words, the universality of human rights should be seen as a *product of a process*, rather than an established 'given' concept and specific predetermined normative content to be discovered or proclaimed through international declarations and rendered legally binding through treaties. In fact, the idea of 'discovery' or 'proclamation' itself implies a process, which requires certain actors, context, and other conditions that are conducive to its success. If this is true, understanding the meaning and implications of the universality of human rights calls for an examination of the nature of that process, the role of the actors and context, and other relevant conditions. The proponents of universality need to understand the nature and dynamics of this process in order to develop appropriate strategies for achieving their objectives, instead of expecting affirmation of universality to emerge as simply 'self-evident' or the inevitable outcome of national politics and/or international relations. This approach might be clarified by the following examples.

4. Thematic Illustrations

As emphasized from the start, culture is relevant to the concept of universality of human rights itself, as well as to the definition and practical implementation of every human right norm. Moreover, culture is relevant in these ways to the full range of human rights norms, like freedom of expression, fair trial and rights to education and health, and not only some set or group of rights and not others. To illustrate this point, I will first consider the case of economic, social and cultural rights (ESCR) as human rights. The second illustration will be so-called 'crimes of honor', which are more commonly associated with 'cultural relativism'.

5. Liberal Relativism About Economic, Social and Cultural Rights

In focusing on Western liberal cultural/ideological attitudes regarding ESCR, I am not implying that other parts of the world are better in the protection of human rights in general, or in this field in particular. Rather, the example is chosen to clarify a particular dimension of the relationship between culture and human rights that is not commonly acknowledged in public discourse or examined in scholarly studies of the subject. The factual basis of this illustration is that Western countries have not shown consistent acceptance of the universality of human rights in their own national policies regarding ESCR. The point I am making here is that it is not enough to provide for the services and benefits covered by these rights through the normal political and legal processes of each country because the essence of the universality of human rights is to safeguard such entitlements against the contingencies of politics. To the extent that they do in fact respect and protect ESCR, Western countries have nothing to fear from accepting those rights as human rights. Conversely, such acceptance is necessary whenever those rights are not sufficiently respected in the manner and to the extent required by international human rights standards. Equally important for our purpose here is that Western acceptance of the human rights status of ESCR is necessary for upholding the universality principle regarding all human rights throughout the world.

Regarding the subject of this paper in particular, the main point I am emphasizing is that Western ambivalence about the human rights status of ESCR is in fact as cultural (including ideological in this case) as issues commonly cited as examples of cultural relativism like female genital cuttings or honor killings. Because of its emphasis on individual autonomy and private property, liberal ideology/culture finds it difficult to conceive of ESCR as having the same human rights standing as civil and political rights like freedom of speech or opinion and belief. Liberals may see their views about ESCR as obviously valid to every reasonable person, but that is exactly how ideological or cultural relativism works everywhere. In other words, liberal societies tend to resist accepting ESCR as human rights for the same reason some Islamic societies resist women's rights or so-called 'Asian values' challenge to civil rights in the name of religious or regional ideology or culture. The difference is therefore not in the nature of the cultural/ideological/contextual challenge to the universality of all human rights, but in assumptions about Western 'authorship' of the concept and content of human rights. That is, failure to see the similarity among such Western and non-Western relativists claims contributes to perpetuating the myth that human rights are naturally Western (and therefore fully accepted and implemented by Western countries), while the rest of the world struggles with accepting some of these rights in principle, let alone implementing them. In my view, it is necessary to clearly identify and

confront Western cultural relativism about ESCR to emphasize that the human rights challenge faces all societies. I will now briefly clarify and elaborate on this view.⁹

The essential purpose of human rights is to ensure the effective protection of certain fundamental entitlements for all human beings, everywhere, without distinction on such grounds as race, sex, or religion. In other words, the rationale is to ensure the protection of human rights even in countries where they are not provided for as fundamental constitutional rights precisely in order to *safeguard them from the contingencies of the national political and administrative processes*. As global experience has repeatedly shown, states cannot be trusted to respect and protect the inherent human dignity of all those who are subject to their jurisdiction. The United Nations sought to establish a set of *universal standards* in this regard. According to the Preamble of the Universal Declaration of Human Rights (UDHR), these standards are supposed to be "a common standard of achievement for all peoples and all nations." What does this mean, and how is it to be achieved in practice?

The tension between this idea and the principle and practice of national sovereignty require these standards to be acknowledged as the product of international agreement. Moreover, the implied threat of overriding national sovereignty would neither be plausible or acceptable without the promise of international cooperation in the protection of human rights. The claim of the international community to act as arbiter in safeguarding certain minimum standards in this regard is not credible without the corresponding commitment of its members to encourage and support each other in the process. This is particularly critical in view of significant differences in the degree of political will, and gross differentials in institutional capacity and material resources for the implementation of these rights in different parts of the world.

Accordingly, the distinguishing features of human rights for our purpose here are *universal recognition* of the same rights and *international cooperation* in their implementation. From this perspective, I suggest that the term 'human rights' applies to national constitutional and legal protection of these rights, or their implementation as a matter of national policy, only when that is done in furtherance of the international obligations of the state. Otherwise, the concept will lose its essential function of securing these rights against the contingencies of national politics. It is true that human rights cannot be respected and protected in the daily lives of individuals and communities except through the incorporation of international obligations into national law and policy. But if the protection of any entitlement at the national level is separated from international human rights standards, the advantage of international

⁹ The following review is based on my article *To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights*, in Y. Ghai & J. Cottrell (Eds.), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* 7 (2004).

supervision is lost. The national protection of rights without recognition of an international obligation to do so can easily slide back into denial of some of those rights in the name of upholding the democratic principle of majority rule, including effecting constitutional amendments, if necessary.

In this light, even the highest level of provision for education, health care, social security, for instance should not be accepted as compliance with international human rights standards if that state refuses to acknowledge the human rights status of ESCR. This distinction, I suggest, is critical for the coherence and integrity of the human rights idea for two reasons. First, the issue is whether the government of the day should exercise exclusive discretion in deciding which services to provide, for whom, and on which terms, or be bound by some external criteria which apply everywhere regardless of considerations of ideology or political expediency. The *added value* of the human rights idea is to provide an internationally agreed frame of reference to the normal course of ideological, cultural or political struggles over power and resources in domestic politics and foreign policy. Second, a commitment to providing these services as a matter of international human rights obligation should extend beyond a state's commitment to the well-being of its own citizens to all human beings everywhere. Since human rights are for all human beings, not only the citizens of one state or another, the measure of commitment of any state to these rights should be willingness to support their implementation everywhere and not only within its own domestic jurisdiction. I am not at all suggesting that human rights are the only approach to good domestic social policy or humane foreign relations. Indeed, over time it may prove to be an ineffective or counter-productive approach on either or both counts. Rather, my point is to clarify the meaning and implications of a human rights approach as such in order to assess its utility and efficacy.

The formative dominance of liberal perceptions and hierarchy of human rights has been used to support the claim that West European and North American societies fully accept the universality of human rights, while other societies are hampered by cultural, ideological or contextual limitations in this regard. Consequently, the theory and practice of human rights as determined by those societies is taken by some leaders of developing countries as the only model of how these rights are to be defined and implemented everywhere. However, upon taking the full range of human rights as equally universal and indivisible, one can see that West European and North American societies too have their cultural, ideological or contextual problems. Compare, for example, the status of ESCR with that of civil and political rights under the European system. Whereas the latter set of rights has received strong articulation and juridical development within the European system, ESCR have been relegated to non-binding charters and optional protocols.¹⁰ The contrast is

¹⁰ See, generally, e.g., D. Harris & J. Darcy, *The European Social Charter* (2001).

more significant because the members of this system already have the material resources and institutional capacity to implement ESCR.

What is really at issue about ESCR is whether human rights are limited to conservative liberal notions of restraints on the powers of the state, or should also include affirmative obligations to provide for certain vital interests of persons and communities. The principle of non-discrimination, even when viewed in terms of effect or outcome has nothing to say about the affirmative obligation of the state to provide for vital services or resources for the disadvantaged or under-privileged segments of the population. In other words, are human rights only for those who have the material, educational and other resources needed to effectively exercise their rights, or should they also be available to those who are unable to do so? If it is the former, then ESCR are not human rights at all. In that case, one should speak of the 'universalization' of liberal notions of civil and political rights, not of *human* rights that are accepted by all the ideological and cultural traditions of the world. But if human rights are to be genuinely universal they must include ESCR and that cannot be without international supervision of the performance of the normal political and administrative process in this regard. It is true that the set of human rights we now call ESCR need further development, more precise definition and implementation mechanisms, but this will not happen until we accept that these are in fact human rights.

The solution I propose for liberal relativism about ESCR is to affirm the full human rights quality of ESCR by abandoning any classification of human rights, and approach the implementation of each specific right on its own terms, instead of limiting it to what is deemed appropriate for one purported class of rights or another. In particular, I believe that it is critical to challenge the assumption that the implementation of ESCR should be confined to the realm of social policy and administrative processes of governments because these rights do not fit the model of judicial enforcement developed for specific civil and political rights. To leave the matter to the unfettered discretion of governments, however democratic they may be, without any possibility of judicial guidance and supervision, defeats the whole purpose of recognizing ESCR as international human rights.

6. Crimes of Honor

Crimes as such are not human rights violations when committed by private persons and not state actors. However, violence against women in particular can constitute human rights violations when the state fails to protect women against this 'gender-based' violence, or to prosecute offenders or implement other necessary policies because that would constitute discrimination on grounds of sex. The following discussion of so-called 'crimes of honor' is

intended to demonstrate the cultural dimension of this phenomenon which affects the response of state officials as well as the perpetrators. In other words, it is the cultural underpinnings of this crime that makes it a human rights violation because it contributes to official failure to protect victims and prosecute offenders.¹¹

What distinguishes 'crimes of honor' from other violent crimes is that they are usually perpetrated against women by close relatives for allegations of sexual impropriety in the name of protecting or upholding the honor of the family. As documented in studies of this phenomenon in Turkey,¹² the decision to kill the woman is made in a family meeting that also designates a young man within the family, usually a brother or cousin of the victim, to carry out the crime. By their very nature and alleged rationale, therefore, these crimes arise out of a *collective deliberate decision that is to be executed in public, or at least publicized* for the purported purpose to be achieved. What does this collective, deliberate and public nature of the crime mean for the responsibility of the family and community at large? How can the prosecution and punishment of the immediate perpetrator be appropriate or sufficient where so many others are responsible for instigating or condoning the crime, and perpetuating a social and cultural system that 'demands' the offering of such human sacrifice? Other questions arising out of the nature and context of 'crimes of honor' include whose honor is at issue here, and why are women killed in the name of protecting it? Another set of questions is whether these crimes constitute human rights violations, and what practical difference can such a characterization make? In other words, what distinguishes these crimes from other crimes from a human rights point of view, and what does this mean for strategies for combating them?

Underlying these and related questions is concern about the limitations of an exclusively state-centric approach in this regard. That is, to affirm that the state has the legal obligation to protect the bodily integrity of potential victims and to punish perpetrators of 'crimes of honor', whether as human rights violations or not, does not necessarily mean that the state is willing and able to discharge this obligation. This is particularly true when state actors are not only facing strong and deeply entrenched cultural opposition in this regard, but are themselves sympathetic or indifferent to the moral outrage of these crimes. Another concern relates to the methods and costs/risks of state

¹¹ The following review is based on my chapter *The Role of 'Community Discourse' in Combating 'Crimes of Honor': Preliminary Assessment and Prospects*, in L. Welchman & S. Hossain (Eds.), "Honor": Crimes, Paradigms, and Violence Against Women 64 (2006).

¹² M. Faraç, *Töre Kışkıncında Kadın* (Women Under the Pressure of the Customs) (1998); A. Duzkan & F. Kocalı, *An Honor Killing: She Fled, Her Throat Was Cut*, in P. Ilkkaracan (Ed.), *Women and Sexuality in Muslim Societies* 381 (2000); and A. A. An-Na'im, *The Role of 'Community Discourse' in Combating 'Crimes of Honor': Preliminary Assessment and Prospects*, in L. Welchman & S. Hossain (Eds.), "Honor": Crimes, Paradigms, and Violence Against Women 64 (2006).

interventions in the realm of family and community. For example, is it safe to assume that state interventions at that level are going to be effective in combating 'crimes of honor'? How can one ensure that the power to take such intrusive measures will not be abused for other purposes?

The cultural dimension of crimes of honor raise the question of the role of family and community in regulating sexuality. But the discriminatory concern that makes these crimes human rights violations is that this regulatory role of family and community is limited only to women while men are as responsible for any perceived violation of sexual morality, if not more than women. But acknowledging and condemning this discrimination does not address the underlying question whether the family and community have a role in regulating the sexual behavior of their members. If they do, consequent questions would include, for instance, what factors and processes determine or affect the way that role is played in different contexts, and what methods of social control are available to the family and community, especially during periods of transition and crisis. How are such methods to be judged, by whom and for what purposes?

Regardless of one's personal views about the extent and manner it is performed in any given setting or time, families and communities do have a role to play in regulating the sexual behavior of their members in every human society throughout history. While the scope and methods of doing this varies from one community to another, and over time within the same community, I believe that social life itself would not be possible without the regulation of sexuality. Unless one wishes to argue that this is not, or should not be, true anywhere in the world today, the question is one about the scope and manner of regulation, rather than a choice between regulation and no regulation at all.

The basic and most enduring regulation of sexuality happens through the organization of the family and community at the collective level, and through early socialization of children at the individual level. Both aspects are re-enforced in a variety of ways, including action by the state through the legal regulation of marriage and sexual conduct, education, and even taxation and provision of social services. Common experience, I believe, indicates not only that these processes work effectively in the vast majority of cases, but also that families and communities adapt their norms and processes to changing conditions over time. It is also clear to me that both the effective regulation of sexuality and adaptations of its norms and processes occur in subtle, spontaneous and unconscious ways. In this light, 'crimes of honor' are a manifestation of the *failure or inadequacy* of familial and communal regulation of sexuality, rather than an indication that such regulation happens only in societies where these crimes are committed and not in others societies. But as already emphasized, the serious problem with these crimes is that they represent a violent and discriminatory response to the failure or inadequacy of traditional mechanisms for the regulation of sexuality. In other words, these

crimes should be combated as excessive and violent methods of regulation of sexuality that usually target women alone, though men are at least as responsible for the transgression as women.

While it is imperative to challenge this state of affairs, I think it is counterproductive to suggest that the family and community have no right to regulate sexuality at all. Even the appearance of suggesting that will undermine the credibility of any effort to combat 'crimes of honor', thereby rendering the women of communities implicated in such practices even more vulnerable to violence in the name of protecting honor than they are at present. The emphasis must therefore be on why violence against women, or men for that matter, is never justified as a response to sexual impropriety, without appearing to imply that abandoning all forms or degrees of regulation of sexuality is the alternative. It is therefore wise to present opposition to 'crimes of honor' explicitly in these terms to avoid any risk of undermining their efforts by allowing supporters of the practice to misrepresent the position of its opponents as promoting sexual promiscuity and license.

A more liberal view of personal autonomy and sexual freedom than that accepted by the communities where 'crimes of honor' occur may be supported by current international standards of human rights. But it is also possible, in my view, to oppose these crimes as human rights violations without necessarily arguing for a more liberal view of a community's approach to the regulation of sexuality as such. That is, one can object to 'crimes of honor' from a human rights point of view because they are excessively violent and discriminatory against women, without necessarily arguing that the community's view of sexual propriety is itself objectionable from a human rights perspective. Although these two positions are not mutually exclusive, I am more concerned here with the view that 'crimes of honor' *can* constitute human rights violations, even if one accepts the community's position on the regulation of sexuality in general.

Generally speaking, human rights are by definition intended to protect people against excess or abuse of the powers of the state, and can therefore be violated only by those who act on behalf of the state or under color of its authority or approval. Consequently, crimes like homicide are not human rights violations unless committed by agents of the state, or with their approval. This point is usually made in relation to acts of violence against women like 'crimes of honor' in terms of the distinction between the public domain of state action and the private domain of the family and community. In my view, however, the state should be held accountable for its failure to act with 'due diligence' in combating violence against women within the private domain of family and community. From this perspective, the state is responsible for its failure to effectively prosecute and punish those who perpetrate violence against women in the private domain, though their crimes cannot be attributed to the state as such. At the same time, this should not mean repudiating the distinction between the public and private domains because once the state is

allowed to act within the private domain; it will probably abuse that power to violate human rights instead of protecting them. The question is therefore how can the state and civil society actors combat crimes of honor without abusing that power of intervention in the private domain of family and community?

Another challenge is that exclusive reliance on the state-centric approach tends to be *reactive* to already committed violations by the action or omission of officials of the state, rather than *proactive* to pre-empt their happening in the first place. This approach can also be problematic because it tends to be slow, costly and generally inappropriate for the task at hand. In view of the severe resource limitations of developing countries that might enable state agencies and officials to provide emergency housing, employment or social security for victims, it is more likely that women who are vulnerable to violence from members of their own families will be placed in so-called 'protective custody' to ensure their immediate physical safety. What human quality of life would women in that position have, and who is to protect them from abuse by custodial officials? While appreciating these and other challenges, it is clear to me that certain aspects of crimes of honor do constitute human rights violations. In the more immediate sense, the persistence of these crimes indicates a failure of the state to protect the lives and bodily integrity of women, including the provision of effective remedies against these crimes. More broadly, 'crimes of honor' signify deep-rooted, multifaceted and endemic discrimination against women, which the state is obliged to redress under Article 5 (a) of the International Convention for the Elimination of All Forms of Discrimination Against Women of 1979, which provides:

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

However, it is also clear to me that exclusive reliance on a human rights approach may be counterproductive in some situations. In other words, a human rights approach is relevant to combating 'crimes of honor', as a matter of principle as well as for tactical reasons, but should only be seen as one option among others, or as an element of a broader strategy, rather than the only possible and effective approach. I would therefore argue that it is necessary to combat crimes of honor at a cultural/religious level to support the effective application of a human rights approach itself, in addition to implementing other strategies for combating crime of honor. I would therefore conclude that the primary role in combating these crimes is that of local constituencies instead of relying on foreign pressure on the government of the country where these crimes occur. It is also clear to me that local constituencies cannot be developed and supported without a strategic long term engagement in internal discourse within the communities about specific concerns like 'crimes of honor', in its

broader context of gender power relations within the family and community. All aspects of this process must necessarily be understood and applied with due regard to local context and all relevant factors and considerations.

In conclusion, the cultural dimension of crimes of honor can best be addressed through an internal discourse within communities as an essential element in a range of possible strategies to combat crimes of honor. By 'discourse' I mean the widest possible range, variety and accessibility of activities and opportunities for discussion and reflection about all aspects of 'crimes of honor' within the community, at every level, public and private. This approach does not in any way condone or seek to justify these heinous crimes, and is not claimed to be the sole or primary means of combating them. Rather, it is simply a matter of exploring every possibility of preempting the occurrence of these crimes in the first place, as well as effectively holding all those responsible accountable for their actions. The premise here is that transforming family and community attitudes towards these crimes through an internal discourse within the community would contribute to eliminating these crimes by addressing their underlying causes, in addition to prompting and supporting state officials and institutions in holding individual perpetrators and their supports accountable for their actions.

This approach is in fact an *essential component* of several complementary strategies for combating crimes of honor. Though it is never sufficient by itself in either preventing these crimes or punishing their perpetrators, community discourse against 'crimes of honor' can be an effective means of denying those who commit or condone such crimes family and community sympathy and support. Such an internal discourse can also play a critical role in the socialization of children into totally rejecting any alleged rationale for these crimes. At another level, community discourse is necessary for generating and sustaining the political will to allocate resources and implement policies for combating 'crimes of honor', punishing perpetrators, and deny them any moral or material benefit from their crimes. It is also necessary for transforming the institutional culture and priorities of policy makers, police, public prosecutors, judges, prison officials and other authorities concerned with the incidence and consequences of these crimes. It is true that the state has the primary responsibility for combating 'crimes of honor'. But whatever the state can or is expected to do (such as implementing administrative measures to prevent the commission of these crimes, effective investigation and prosecution of perpetrators, rehabilitation of and support for victims) is ultimately dependent on how to motivate and support officials, or pressure them if necessary, to act accordingly. Understanding the basic nature of 'crimes of honor' and their context, the motivation of perpetrators and their supporters, the role of the family and community, and whatever else influences the behavior of state officials and institutions regarding all aspects of this phenomenon, all of this is necessary for implementing viable strategies of prevention, protection of potential victims and accountability of perpetrators.