

STRENGTHENING THE UNIVERSALITY OF HUMAN RIGHTS IN PRAXIS

FORTALECENDO A UNIVERSALIDADE DOS DIREITOS HUMANOS NA PRÁXIS

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Abstract: In conceptual terms, human rights laws are universal in nature but whether they are really universal in practice is a research question. A small piece of this paper covers the historical debates on the understanding and implementation of universalism in western philosophical order and the fundamental problems associated with Asian discursive practices. In the case of the latter, due to regional relativism, the western version of universalism cannot be put to practice, as evident in the critique from several Asian countries of what they regarded as western values expressed in the Universal Declaration of human rights, 1948. When it comes to India, it is a known fact that it is a country rich with diversity, deep cultural values and multitudinous ethnicities. Against this diversity, the concept of universalism loses firm ground and other factors overpower. All these cultural differences, historical developments and evolving conceptualisations of human rights gradually lead

to an Indian interpretation and understanding in the expanse of human rights. An overview of the shaping of human rights as a concept and praxis would reveal how momentous changes have been taking place through judicial intervention and global world watch. This paper captures the trajectory of expansion in the field of human rights and implementation mechanisms through judicial intervention and activism to attain the values of universalism in the national and International legal framework.

Keywords: Universalism. Human rights. Discourse. Tradition. Cultural practices. Cultural relativism.

Resumo: Em termos conceituais, as leis de direitos humanos são de natureza universal, mas se elas são realmente universais na prática é uma questão de pesquisa. Uma pequena parte deste artigo abrange os debates históricos sobre a compreensão e implementação do universalismo na ordem filosófica ocidental e os problemas fundamentais associados às práticas discursivas asiáticas. No caso deste último, devido ao relativismo regional, a versão ocidental do universalismo não pode ser posta em prática, como evidenciado na crítica de vários países asiáticos ao que consideravam valores ocidentais expressos na Declaração Universal dos Direitos Humanos, de 1948. Quando se trata da Índia, é um fato conhecido que é um país rico em diversidade, valores culturais profundos e etnias multitudinárias. Contra essa diversidade, o conceito de universalismo perde terreno firme e outros fatores dominam. Todas essas diferenças culturais, desenvolvimentos históricos e conceituações em evolução dos direitos humanos gradualmente levam a uma interpretação e compreensão indiana na expansão dos direitos humanos. Uma visão geral da formação dos direitos humanos como conceito e práxis revelaria como mudanças importantes têm ocorrido por meio da intervenção judicial e da vigilância mundial global. Este artigo capta a trajetória de expansão no campo dos direitos humanos e dos mecanismos de implementação por meio da intervenção judicial e do ativismo para alcançar os valores do universalismo no arcabouço jurídico nacional e internacional.

Palavras-chave: Universalismo. Direitos humanos. Discurso. Tradição. Práticas culturais. Relativismo cultural.

Introduction

Certain postulates have ushered into our consciousness that human rights are universal, indivisible and indefinite. Article 1 of the Universal Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights,” (UDHR, 1948) and Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The real assessment arises in context of implementation, where every country has its own value system and cultural integration. Against this diversity, the concept of universalism fades and other factors overpower. This provides a broad rubric, wherein gets juxtaposed a nuanced spectrum of rights, in all its complexity and variety.

The UDHR’s principles are accepted by almost every state, and the six-core international human rights treaties that elaborate the rights enshrined in UDHR have a ratification rate of over 86 percent. The universality of fundamental human rights is now accepted widely (Donnelly, 1984) with the primary exception of strict cultural relativists (Lakatos, 2018) Addressing the question of universality, former UN High Commissioner for Human Rights Navanethem Pillay stated in 2009, “While the promotion and implementation of human rights standards demand an awareness of context, the universality of the essential values and aspirations embodied in these commitments is beyond doubt.” She also said, “The truth is that the Declaration is not merely congruent with some customs and foreign to other cultures; speaking to our common humanity, it drew its principles from many diverse traditions and made them more robust through a uniform codification” (Pillay, 2009). The values underlying human rights are recognised in nearly all societies, in the form of moral aspirations.

Universalism has been faced with several criticisms, including that it “completely denies that the existing universal standards may be themselves culturally specific and allied to dominant regimes of power” (Otto, 1997). Some cultural relativists state that to allow international human rights norms to supersede cultural and other forms of relativism is to violate state sovereignty (Musalo, 2015) even though state sovereignty is itself a universal principle, autonomy and local self-determination, and that they impose absolutism and are ethnocentric, even posing fears of neo-imperialism. While looking at the work of several scholars a different idea and positions coming from a nihilist, who opined that deliberate theorists find human rights beyond political and legal dependence (Dembour, 2006). Rather, they compare them with religion, stating that it is

a universal notion existing outside the context of morality, law and politics. Due to the fact that human rights are perceived as something secular, deliberate school of thought subjects this conception to adoration rather than practice.

However, these views are not only misinformed, but also dangerous, as political leaders often use the relativism defence against external interference where human rights violations are occurring, in order to preserve the status quo for promoting their own interests. Cultural relativists assert that there are no universal rules, and yet insist on universal tolerance of cultural practices. The term “culture” is broadly used by relativists. Practices with no importance or valid purpose are often enabled by the use of relativism. Universalist scholars reject the idea that something rooted in tradition justifies its acceptance as desirable or ethically valid (Halliday, 1995) The UN Human Rights Commission stated in 1989 that culture-based violence must be combatted by States, more so where it is being disguised as religious or cultural practice (UNHRC, 1989). Persistence of customs does not mean they are consented to by a majority of the adherents, who might simply be tolerating certain cultural norms and traditions. Moreover, culture is not a static concept; it evolves with the level of socioeconomic development.

At the 73rd session of the UN General Assembly, the Special Rapporteur in the field of cultural rights said that States are not absolved from their human rights obligations by invoking relativist arguments and “sensitivities.” She laid emphasis on the danger of a relativist approach; in that it does not use culture to reinforce rights but to the contrary stifles them. She made an important point: cultural diversity is distinct from cultural relativism. Cultural diversity and universal human rights are in fact compatible (Nussbaum, 1992) and mutually reinforcing.

Besides relativists, religious fundamentalists and postmodernists oppose the idea of universality. One of the reasons of the emergence of such opposition was cultural evolutionism, which posits that human societies progress from primitiveness to modernity, a standard based on Western values (Kronenberg, 1984). However, universalism, per se, is not a concept exclusive to the West. In fact, many Western States themselves rejected the legal concept of international human rights as it contradicted a principle of more importance to them, that of the sovereignty of the state (Varenes, 2006), a good case in point being the US, which has not ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on this ground (Schalatek, 2019).

Radical forms of both universalism and relativism are harmful to the cause if it is not based on the findings of ground reality. It has been observed that the notion of the universality of human rights is greatly discussed by people holding certain degrees of power and those of a higher social

rank, as Former Secretary General of the UN Kofi Annan stated in 1997, “No single model of human rights, Western or other, represents a blueprint for all states.” When we say that human rights are universal, we mean that most societies and cultures around the world have practiced them for most of their history, and that they exist independent of practices, morality, or law. World War II brought the realisation that people needed to be protected from the state, and even in the modern state and economy, threats to human dignity are universal. Human rights are the tool of preference to limit excessive state power.

The idea of universality does not propose homogeneity and cannot be equated with conformity; it promotes diversity in cultural practices. Although universalism implies a commonality of some moral requirements for everyone, it does not imply that all of us have a moral requirement to “be” the same, or to discourage cultural diversity and integrity. It does not rule out tolerance, but posits just the opposite (Tilley, 2000). Respect for the individual is not automatically at the expense of the group. Additionally, universal human rights standards’ interpretation and application can vary according to cultural norms and standards. The first operative paragraph of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, states that “the universal nature of [human] rights and freedoms is beyond question.” However, in paragraph 5, it states that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind,” leaving up to the State to interpret and secure compliance with rights (Rodley, 2018) Relativists’ argument that human rights are not observed worldwide as they only incorporate Western ideas is hence rendered untenable.

By arguing that universalists are ethnocentric in the sense that the principles they propound are bound to be culturally biased, relativists project their own cultural determinism, according to which all of our perceptions and beliefs are culturally conditioned so much so that it is impossible for us to have any unbiased thoughts, choices and inferences (Sumner, 1906). It can be said that even the leaders in Africa and the Middle East are perpetuating ethnocentrism, by perpetuating the idea that female genital mutilation is a necessary, and even ethical, practice.

Relativism can be equated to nihilism in the sense that it does not believe in fundamental values and principles. Consider this: how can an individual deny the universality of beliefs and values such as the unacceptability of torture and slavery?

People have been adapting and assimilating into different cultures for time immemorial, so no culture is as unintelligible to others as it is made out to be. As mentioned earlier, relativism is based on a static conception of culture. It tries to justify dysfunctional beliefs and customs,

overemphasises group rights over that of the individual (disregarding and repressing marginalised members of the group, like women), and presents a siloed view (forces to abandon meaningful discussions about other cultures).

Methodology

It is purely doctrinal research which is a combination of qualitative research and quantitative research as for certain portion of the research will rely on relevant historical/archival data. Several policy documents are reviewed pertaining to south Asian countries and their practices pertaining to their culture relativism shadowing the concept of universality of human rights. The research is dependent on the primary and secondary source of data, where primary source will be the policy documents of various countries and secondary data will be the books and article analysis on the subject matter stated above. Research design will be descriptive and analytical in nature.

Cultural integration and Asian values : A Discussion

To dive deep into this discourse of regional integration and the principle of universality, one has to trace back to history and examine, as an illustration, Indian history, which reveals that many political leaders and prominent scholars, such as Emperor Ashoka (304 BC), who accepted Buddhism in the later part of his life, and Mughal Emperor Akbar (1542), who advocated for equality and tolerance towards different religious philosophies, allowed free dialogue over such issues. Similar notions are debated in the Mahabharata, an ancient Hindu epic (Sen, 1998). On reflection, however, and without the slightest intention of challenging the aspiration of universality, which is characteristic of human rights philosophy, the question asked does raise certain doubts: is not the literature (Charles, 2010) Vedic text and philosophies of modern jurists reshape the concept of universality and which also slowly and steadily is moving towards universal acceptance but in its own course. Also, are not all these cultural differences, historical texts and modern conceptualisation of human rights leading to Indian enlightenment in the area of human rights and gradually changes are being made through judicial intervention and global world watch.

India is a country of diversity and culture is in sync with the day-to-day activities. If we call for the notion of universalism to be mandated, it has to be looked from the lenses of ethnicity and cultural practices. The international human rights movement has tried to escape its culture-specific origin by basing its morality on universal claims (Peereboom, 2000) from the apparent definition

of human rights in the UDHR, the International Covenant on Civil and Political Rights (ICCPR, 1976) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976), which came in to support the underlying philosophy, but the notion of universality has still been a matter of contemporary debate.

In 1947, a number of scholars expected that a generalised human rights regime could run into difficulties involving cultural differences. The American Anthropological Society presented this concern to the UN Commission on Human Rights while the foundational international legal instrument, the UDHR, was being drafted (Blackburn, 2011) and argued for the relativity of values and standards to the culture that they derive from. The society asserted that the UDHR could not be framed with only Western European and American values in view. It stated, “man is free only when he lives as his society defines freedom.”

Some disagreements on universality come from the fact that Allied powers and their allies adopted international human rights instruments in 1948, with Asian, African and Latin American countries “represented” by colonial powers (Goel, 2010). As these States were not involved in drafting most of the international bill of rights (Steiner, 2008) they viewed it as ethnocentric and alien to their cultures. This is also the reason behind the emergence of regional human rights mechanisms (Dhaliwal, 2011).

In 1948, in the process of drawing up of the UDHR, UNESCO prepared lists of basic rights and values representing diverse cultures. Representing China, Chung Shu-Lo said that “[t]he basic ethical concept of Chinese social political relations is the fulfilment of the duty to one's neighbour, rather than the claiming of rights.” The 1982 Chinese Constitution also affirmed the principle of subordination of individual rights in favour of societal interests. Mahatma Gandhi also laid emphasis on the need to view rights in relation to duties, besides several Latin American and continental European thinkers. UNESCO found that the lists were largely similar. It concluded that certain rights can be viewed by all cultures as inherent in the human nature.

At the World Conference on Human Rights in Vienna in June 1993 (hereinafter, “the World Conference”), a critique emerged from several Asian countries of what they regarded as Western values expressed in the 1948 Declaration. The Declaration stated that “all human rights are universal, indivisible, interdependent and interrelated.” Consequently, it becomes the responsibility of States, irrespective of their political, economic and cultural systems, to encourage and defend all human rights and fundamental freedoms. However, the Asian countries were concerned that the significance of national and regional particularities and numerous historic, cultural and religious norms would be subsumed in universalism.

The Asian values approach generally represents the view that “Asian value do not regard Individual freedom to be an important aspect of human life in the way it is regarded in the west. The effect of culture on human rights, where culture acts as a shield against the application of human rights, was mainly discussed in the World Conference by several East Asian nations. Mr. Wong Kan Sang, representing Singapore as foreign minister, stated:

“Human rights do not exist in abstract and morally pristine universe. The ideals of human rights are compelling because this is an imperfect world and we must strive to make it better. There are no human rights for heaven, but precisely because this is an imperfect world making progress on human rights will be marked by ambiguity, compromise and contradiction.”

It was not just Singapore that realised the influence of diversity on the implementation of human rights. China also laid stress upon the notion on regional differences in values, including the concept that in China and elsewhere one difference surely exists, that “individuals must put state first before their own.” This interpretation of human rights is surely influenced by the Confucian philosophy of duties before rights prevailing in China since long. Many thinkers also believe that the collective admiration of Asian values among governments in Asia is an artificial construct, because Asia, after all, is simply an earthly appearance, and a poorly demarcated one as well. Growing debate suggests that there is an array of cultural beliefs existing in Asia and the values within that sphere of geography differ from each other, as much as with any Western value structure.

From a practical viewpoint, the argument in favour of Asian values inclines to be as much about development as about cultural integration and sovereignty. A major point in support states that developing countries often cannot afford to implement norms of human rights, since the major task which comes in the way is of nation-building and boosting economic development. Former Prime Minister of India Indira Gandhi, in her speech at the 1972 UN Conference on the Environment (Chasek, 2020) underlined the importance of economic growth over attempting to secure the environment, and to reach those sustainable development goals, a country like India had to straighten up its priorities on many fronts due to its burgeoning population and low economic growth.

There is also the argument that authoritarianism is more effective in sponsoring development and financial growth compared to countries that have liberal regimes (Tharoor, 1999). This notion is affirmed by China’s model of stupendous growth in the last ten years. This is the basis behind the Asian values logic which attributes the trade and industrial growth of Southeast Asia to the Confucian principle of respect, command and reverence for authority. The

real dispute is slightly more obscure than that, because the partial postponement of human rights values is also depicted as the loss of few for the benefit of many, where it has been projected as the actions which are majorly for the betterment of the State and eventually for individuals.

Breaking the Theories of Universality

Jack Donnelly stated that the level of development and political history of a State imposes priorities on it. For example, China, due to its history, has given greater attention to duties than to rights and to the group than to the individual. The Asian values conception focuses on duties to State, rather than rights, as rights are dependent on the fulfilment of duties, an ideology also shared by Soviet bloc countries. While the West focused on civil and political rights (as seen by the US having ratified the ICCPR and not the ICESCR), the socialist world focused on economic, social and cultural rights (as seen by China having ratified only the ICESCR and not the ICCPR).

We can always attempt to multi-culturalise the body of human rights by, for instance, balancing individual and group rights, relating rights to duties, giving more importance to economic and social rights as well as addressing the role of economic systems in the human rights corpus. After all, human rights arose and continue to develop with socio-economic progress.

The extent to which variability in implementing human rights standards occurs, and the resulting effect, is to be seen in order to determine whether we should be tolerant of a practice. In determining defensibility, it is also to be seen whether the particular practice is actually rooted in culture. If traditions are “unusually objectionable,” they do not deserve to be accepted by outsiders. Donnelly cites anti-Semitism and untouchability as examples. Gender-based violence, for instance, is also indefensible, as it is not rooted in culture, even though it continues. Cultural arguments against basic personal rights, which are enshrined in Article 3 to 11 of the UDHR and are connected to basic human dignity, are indefensible. The “inherent dignity of the human person” is also recognised in the ICCPR and the ICESCR. This protects from claims of moral imperialism and neo-colonial concerns, and also ensures that egregious violations of human rights are not tolerated.

We can simply not allow a radical relativist approach to prevail, as status-based, or stratified, societies do not have a concept of being “human,” and consequently do not consider that certain rights are afforded to everyone simply by virtue of being human.

Donnelly also posed the question of whether individual self-determination should prevail over community (or local) self-determination in the matter of universal rights. To this, Rhoda Howard’s suggestions include a choice to “opt out” of traditional practices (Howard, 1982) and

when that choice threatens the traditional system, such as in the case of individual ownership in a society that values group ownership, adherents of new and old values must be separated. However, such a solution is not feasible where harmful practices are being continued.

There are multiple groups posing challenges to the universality of human rights, including Asian and Islamic governments, which reject universalism especially when it relates to women's rights: many of the so-called Third World countries wishing to avoid scrutiny of their treatment of citizens; newly organised indigenous groups' organisers seeking legitimacy; social scientists and philosophers looking for a sounder justification of universalism; persons who see human rights as nothing more than an extension of the Western sphere of influence, and value human "diversity"; and, those who fear that universalism encourages unwarranted interference with other cultures. They fail to note that cultures do not collapse by taking down harmful practices, and that there is no single culture in a country.

These groups seek the subordination of universal rights to local cultures and religions. They maintain their own perceptions of cultural values and norms supporting their interests, deeming them to be the only valid views (pick and choose from views, and discarding those not supporting their interests). As an example, it is observed by ethnographers that men, dominating the power structure of most stratified, or hierarchical, societies, have picked and chosen from ancient customs, based on their convenience and to maintain the status quo of the subordination of women.

On the subject of harmful practices that are justified by groups in the name of culture, it is to be asked whether a member of the group is adhering to such a practice voluntarily, and if so, does that make the practice justifiable? If consented to, is that consent legitimate, voluntary and informed? Are they only following a custom because they have no other option? Could such a practice be rejected, or are the adherents bound? Is a practice justifiable if it is supported by most members of the group? Is the invocation of an ancient custom sufficient to legitimise the practice? These are all important questions that must be raised.

In judging another culture there is the risk of appearing ethnocentric, but it is to be done anyway in the face of brutality so as to not condone abuses, as relativists end up doing. The authors are in support of the dialogical approach, as it advances universal human rights while also preserving cultural differences, as long as they do not cause any harm to individuals. It allows for a wider applicability of human rights laws in differing cultures, going beyond mere tolerance

(Healy, 2005). This is also the idea forwarded by Donnelly in his intermediate concept of relative universalism.

Cultural relativism and gender-based violence: Impact and result

Worldwide, while some States are taking measures to eliminate harmful practices perpetuated in the name of culture, others continue to justify such abuses. This is the reason we must seek to achieve the universality of human rights.

Gender-based violence is pervasive in many parts of the world, and some forms are unfortunately culturally tolerated and defended. While domestic violence is unfortunately still common around the world, it continues to be defended in some places in the name of culture. In Nigeria, wife battering, or violence against a wife or partner, is accepted as a constituent of the culture (Rotimi, 2007).

Turkey recently withdrew from the Council of Europe Convention on preventing and combating violence against women and domestic violence, or Istanbul Convention, even as it has a high rate of femicide. As a justification of the withdrawal, the Directorate of Communications communicated that the convention's original objective had been side-tracked as it was "hijacked by a group of people attempting to normalize homosexuality – which is incompatible with Türkiye's social and family values."

Kenya, one of the 31 countries where FGM is concentrated, but which has criminalised the practice, the High Court recently ruled against allowing female genital mutilation (FGM) for consenting adults. One of the petitioner's arguments was that women in communities that practice FGM are subjected to state-sanctioned harassment, arguing that the Act outlawing the harmful practice violated the constitution "by limiting women's choice and right to uphold and respect their culture..." While the court admitted that FGM was a central part of some cultures in Kenya, it weighed this against medical evidence pointing to serious ill effects on women's health. The court ultimately found that the right related to culture can be limited. Importantly, it also stated that women are "as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent" (Yadav, 2021). FGM is carried out on girls as young as in their infancy. How can a person consent at that age, and how can a person who has not consented to a harmful practice be forced to undergo it in the name of culture? Even in the case of women, we will never know if women consent to such a practice, because the existence of these practices as cultural norms mean it is severely underreported. It is to protect such individuals that we argue for the universality of human rights.

Research in Nigeria's Upper Nile state found that there is a deeply-rooted and internalised individual acceptance by women and girls of sexual violence, with its presence in their life as a cultural practice (Rivelli, 2015). Even while accepting that violence has been committed against her, a woman may not perceive herself to be a victim of such violence,(IOM, 2020) and "people will not report it, if people don't look at it as a crime."

The Istanbul Convention requires its State parties to ensure that justifications of "culture, custom, religion, tradition or so-called 'honour'" cannot be used to defend in criminal proceedings. Additionally, to prevent and protect, State parties must promote "changes in the social and cultural patterns of behaviour of women and men with a view to eradicating customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men." More States, including those outside Europe, should sign and ratify the convention.

CEDAW is subject to a number of reservations based on cultural relativism. As most countries have ratified CEDAW, even as it is subject to the largest number of reservations among human rights treaties, with a number of reservations based on cultural relativism, it should be amended to include violence against women and girls (Baldez, 2018).

Conclusion

It is, first and foremost, imperative to underline the universality of human rights, but it is not to suggest that our understanding of human rights should surpass all thinkable, logical, religious, and cultural differences to represent a magical amalgamation of the world's moral and philosophical systems. Relatively, it is sufficient that they do not principally challenge the ideologies and aspirations of any society, and that they reflect our shared humanity. As we consider our differences, we must also look at similarities. Most essentially, human rights are derived from the sheer fact of being born as a human and they are not the gift of a specific regime or legislative statute. But the standards of such universal principles trickling from Western countries can become the reality only when applied by countries within their own legal systems through efforts by government and legislative bodies. The major task is to work towards the "indigenization" of human rights, and their proclamation should be within the purview of each country's traditions and history.

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