

**UNIVERSAL HUMAN RIGHTS STANDARDS IN A MULTI-
CULTURAL WORLD: Cultural Relativism, A Challenge to
the Realisation of Universal Human Rights, especially those of
Women.**

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I recommend that the directed research essay prepared under my supervision by Sekelebaka Muwamba entitled:

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.....

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*Universal Human Rights Standards in a Multi-Cultural World: Cultural Relativism,
A Challenge to the Realisation of Universal Human Rights, especially those of
Women.*

By

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*Being a dissertation submitted in partial fulfillment of the requirement for a
Bachelors of Laws Degree at the University of Zambia*

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May, 2000.

QUOTATIONS

"There is neither Jew nor Greek, there is neither Bond nor free, there is neither male nor female: for ye are one in Christ Jesus."

Galatians 3: 28.

Yet, for most women, the reality is:

"Wife beating is an accepted custom... We are wasting time debating the issue"

Comment made by Parliamentarian during floor debates on wife battering in Papua Guinea (Wife Beating, 1987).

"A wife married is like a pony bought, I'll ride her and whip her as I like."

Chinese proverb (Croll, 1980).

*Breast Bruised, Brains battered,
Skin scarred, soul shattered,
Can't scream – neighbours stare,
Cry for help – no one's there.*

Stanza from a poem by Nenna Nehru, 'A Battered Indian Woman' (APDC, 1989).

"The Child is sexually aggressive"

Justification given by a judge in British Columbia, Canada, for suspending the sentence of a 33-year-old man who had sexually assaulted a 3-year-old girl (Canada, House of Commons 1991).

"Are you a virgin? If you are not a virgin, why do you complain? This is normal"

Response by the assistant to the public prosecutor in Peru when nursing a student, Betty Fernandez, reported being sexually molested by police officers while in custody (Kirk 1993).

Preface

This present study is a recognition of the important place that human rights have come to occupy in both national and international affairs. Indeed the Preamble of the Universal Declaration of Human Rights has echoed that the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

International human instruments proclaim universal standards against which every member country of United Nations can be judged in its treatment of its citizens with respect to issues of human rights. This proclamation is, however, not without challenge; one of the challenges posed to it is culture. It has been argued that there can never be legitimate universal standards for judging all nations in the face of cultural diversity. Indeed the multiplicity of cultures cannot be denied. But the aim of human rights is not to disrupt the diversity of cultures. The concept of human rights is in way a unifying factor whilst preserving differences. It is premised on the recognition of the inherent dignity of all human beings; and this being the case, no society can deny the fact that the concept of human dignity is constant in all cultures and thus, human rights can be assimilated by diverse cultures without disrupting or disorienting those cultures.

The argument that the human rights norms, being a Western concept, can never have application in other societies is without base. There is a certain core about human rights that runs constant through all cultures, for instance, the right to life, freedom from torture, freedom from slave-like practices and genocide. With respect to other rights, states have latitude to make adjustments without necessarily eroding people of their dignity.

Currently in Zambia we are witnessing a lot of commitment in the area of human rights especially on the part of the Non-Governmental Organisations. But whilst significant changes are beginning to occur, we still have a long way to go. Basic human rights elude most of the greater part of our population, particularly those in rural areas, and especially women and Children. Although the present study focuses on women it must be conceived as a representative study of how culture can be used to defend practices, which in fact amount to human rights violations. The choice of study was prompted by the fact that women are the most vulnerable group to the vices of culture and also, to show that the violations of the rights of women in effect affects not only them, but the national at large – women are also a vital part of any society's progressive existence. As my wise granny father always tells me, "Educate a Women and You Have Educated a Nation".

We have reached a point where almost all alternatives in achieving human rights have been put forward and perhaps exhausted. Clearly then, what we now need are people, both in government and civil society circles, with a real commitment and desire to bring about change; people who are going to be moved by genuine compassion when they see the desperate condition of most of the people for whom violations of their rights is the only life they have known. The last thing we need are people who are merely interested in donor money when they form their NGOs and definitely, not government officers who want to play politics with the issue of human rights oblivious to the suffering of the masses. The need for human rights is real and we need genuine changes to be brought about.

Lusaka: University of Zambia, May 2000.

S. Muwamba

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S. Muwamba.

CHAPTER ONE

INTRODUCTION

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by rule of law, ...

Whereas member States have pledged themselves to achieve, in co-operation with the United Nations, the respect for and observance of human and fundamental freedoms, ...

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common Standard of achievement for all peoples and all nations...

CHAPTER ONE

INTRODUCTION

What are human rights? And why do we need them?

Human rights most fully understood involve not static property, something possessed, but rather a behavioural process.¹ “At its most basic level, a human right is a safeguard prerogative granted because a person is alive. This means that any human being granted personhood has the right by virtue of species membership.”² And according to David Forsythe, “If one has a human right, one is entitled to make a claim that an authority, or some part of society, do - or refrains from doing – something that affects significantly one’s human dignity.”³

Simply put, human rights are the rights that one has simply by virtue of being human. Human rights are universal and inalienable; universal because they are held by all human beings irrespective of any rights or duties individuals may (or may not) have as citizens, members of families, workers, or part of any public or private association. They are inalienable because they cannot be renounced, lost, or forfeited.

It is clear from the foregoing that every human being has human rights by virtue of being human and that they are held equally by all. Yet in reality not all people enjoy all human rights, and let alone, enjoy them equally. Culture is one basis on which some members of a community are denied their human rights. While human rights proponents assert that the human rights norms proclaimed in international human rights instruments are universal and should apply to all, regardless of their cultural background, others- cultural relativists- hold that this is not possible owing to our differences in culture. Hence the universalist-cultural relativist debate.

Fundamental to this debate is the contention, by cultural relativists, that human rights cannot be universal because they originate from the West. To impose on Third World

societies the human rights norms contained in international documents is, according to this perspective, “moral chauvinism and ethnocentric bias.”⁴ Human rights instruments accordingly, reflect Western values and to introduce them in “other societies from which they did not originally arise would do serious and irreparable damage to those cultures.”⁵

Cultural relativists tend to endorse the idea that values and principles are culture-bound and that there are no universals. In chapter two, it will be noted that some scholars have asserted that, if taken to its extreme, cultural relativism threatens to break up the very basis on which the system of international human is premised. Chapter three will be a continuation of this debate: it focus on miscellaneous issues with regard to universalism and relativism debate. Among the issues to be discussed include: the assertions of those who endorse a mediating positions between the two extremes, that is, the universalists and cultural relativists; arguments for a cross-cultural approach to issues of human rights and also some excerpts from the debate concerning, in particular, China and then West. All these will help us appreciate the profound effect that the relativistic approach has on the realization of universal human rights.

In chapter one the writer traces the historical development of the current system of international human rights. Two years ago, as the world stood poised on the threshold of a new Century, people all over the world celebrated the 50th anniversary of the Universal Declaration of Human Rights (UDHR). There was cause to celebrate since, prior to 1945, how individual states treated their citizens was a matter solely within their domestic jurisdictions and was not the concern of other states. The international community lacked any systematic mechanism for dealing with human rights issues; in the set up of the international system as it was then, states lacked the power to investigate other states since, all states were considered to be sovereign and equal. During the period in question therefore, many instances of human rights violations went unchecked by the international community precisely because of the absence of a legitimate mandate on the part of the latter to interfere in the countries of perpetrators of egregious human rights violations.

The establishment of the United Nations, thus came as a source of hope or a light at the end of the tunnel, for many people all over the world. The UN has the mandate to deal with human rights issues in the jurisdictions of the member states. Through the Economic and Social Council (ECOSOC), the United Nations is kept informed on issues of human rights. To give effect to its aspirations, the UN General Assembly, on 10th December, 1948, unanimously adopted the UDHR in which is elaborated a number of minimum standards to which UN members are expected to conform in the treatment of their subjects.

In chapter four the study discusses the status of women in the Zambian cultural context. The focus here will be on women in their private life because, as we will see, most women are relegated to the private sphere and this is where the most extensive violations of their rights take place. Women, therefore, afford the best case study with regard to culture and it how affects the realisation of universal human rights. The discussion will be set against the background of the Conventions on the Elimination of All Forms of Discrimination (hereinafter referred to as CEDAW or the Women's Convention) as an international human rights document proclaiming standards which all states parties must aspire to attain in the area of women's human rights.

Presently, there is no significant disagreement at governmental level as to the existence of the rights contained in international instruments. This is seen from the participation of member states of the United Nations in its activities concerning human rights. On the other hand, disagreement among these states manifests itself in the form of reservations that they make to human rights instruments. The right to make reservations is one of the incidents of state sovereignty and equality of states before international law. With regard to the CEDAW, it was noted that:

This far reaching instrument, however, has been saddled with reservations, (the majority of which undermine its very purpose)... As of June 20, 1994, 40 of the 133 ratifying states had made 91 reservations, most of them on religious or cultural grounds, seriously weakening the conceptual framework of the Convention.⁶

It is evident from the foregoing that an earnest pursuit of human rights should not overlook or oversimplify the effect that culture has on such an undertaking. Culture is definitely a

significant element if, on its basis, people are denied their human rights; if in its name, grave traditional/cultural practices like female genital mutilation are defended.

Why human rights anyway? The United Nations, after the holocaust of the Second World War, committed itself to the achievement of the following ideals: peace, freedom, justice, and development. There was then, and there still is, a recognition of the fundamental relationship between human rights (which are supposed to enhance one's quality of dignity) and those ideals which the United Nations set as its objectives. The aspirations proclaimed in the Universal Declaration of Human Rights, a result of the United Nations' work and a cornerstone of the entire lot of human rights instruments, promises a better world. The well-being of the individual contributes to a better nation and ultimately to a better world. The attainment of a better world is thus intertwined with the well-being of the individual.

Efforts to place human rights on the international agenda have a long history but still; we have a long way to go before the aspirations expressed in the Universal Declaration finally become a reality. A reality in the sense that every individual in the world is afforded basic human rights. Amidst so much disagreement and obstacles in the attainment of universal human rights, the Universal Declaration is, as someone wrote, "an expression of global hope for millions of our fellow men and women for whom attainment of universal human rights is a goal and not yet an existing reality."⁷

This study is a recognition of the fundamental role played by human rights in enhancing human dignity and consequently, contributing to a better world. It is an appeal to all, an attempt to stir the hearts of men and women who are in a position to bring about change, that as they undertake to do so - to achieve the aspirations in the Universal Declaration - they must do so with an earnest commitment and a real desire to make human rights a reality for all.

This paper is a modest attempt to shed light on the subject under consideration. A comprehensive discussion in this regard is futile since, human rights is a vast and dynamic discipline and is becoming more so by the day. As aptly pointed out by someone,

There is no theory, and especially no macrotheory, for understanding the interrelations of human rights in all its dimensions, and there never will be. There is no computer or no mathematical formula that can encompass the complex political process central to the recognition and implementation of human rights norms on a global scale, and there never will be.⁸

Lastly, the fifth and final chapter in this study contains concluding remarks and recommendations.

Endnotes

¹ David P Forsythe, **Internationalisation of Human Rights** (Massachusetts / Toronto: Lexington Books, 1991), p. 1.

² Ronald Cohen, 'Endless Teardrops: Prolegomena to the Study Of Human Right,' in Ronald Cohen, Goran Hyden and Winton P. Nagan, editors, **Human Rights and Governance in Africa**, (Gainesville: University Press of Florida, 1993), p.4.

³ David P. Forsythe, *op cit.*, p1.

⁴ As quoted from Ann Elizabeth Mayer, **Islam and Human Rights: Tradition and Politics** (Boulder and San Francisco: Westview Press/London: Pinter Printers, 1995) p.8.

⁵ Jack Donnelly and Rhoda E. Howard, editors, **International Handbook of Human Rights** (New York: Greenwood Press, 1987) p.19.

⁶ Julie Peters & Andrea Wolper, editors, **Women's Rights, Human Rights: International Feminist Perspective** (New and York. London: Routledge, 1995) p.38.

⁷ Peter Davies, **Human Rights**, (New York. and London: Routledge, 1988), p. vii.

⁸ David P. Forsythe, *op cit.*, p.190.

CHAPTER TWO

HUMAN RIGHTS IN HISTORICAL PERSPECTIVE

Horrors and tyranny are certainly not new in human history. The difference is that today there is a new parameter for assessing them: breach of this or that human right. This is an indubitable advance. The international community can look anew at what is happening and make judgments that formerly applied only at a national level. It can condemn, denounce or commend.

Antonio Casse (1994).

CHAPTER TWO

HUMAN RIGHTS IN HISTORICAL PERSPECTIVE

A.) INTRODUCTION

This chapter focuses on the evolution of the current system of international protection of human rights.

The protection of human rights at both national and international level are intimately connected if not symbiotic¹. International mechanisms operate to reinforce domestic protection of human rights and to provide redress when the domestic system fails to or is found wanting. This supplement by the international law flows from the fact that all international instruments require states' domestic constitutional systems to provide adequate redress for those whose rights have been violated. Thus it is only when those states' own internal protective systems falter or where, in extreme cases, they are non-existent, that international mechanisms for securing human rights come into play.

FROM ANTIQUITY TO THE PRE-SECOND WORLD WAR ERA

Although it is possible to point to a number of treaties or agreements concerning humanitarian issues before the Second World War, it is only possible to speak of the advent of systematic human rights protection within the international system after the Second World War. Nonetheless, it is evident that international protection of human rights has its origins in domestic efforts to find means of curtailing the excesses of arbitrary state power. Thus to focus on the relationship between citizen and authority, or between citizen and society is hardly novel; touching as it does on a central question of human existence, it has been much discussed.

The notion of human rights was first discussed by poets, philosophers and thinkers in antiquity, especially in ancient Greece and in Europe generally during the middle ages. The ancient Greeks and the Romans were particularly interested in the notion of human rights. The three most prominent scholars to make a study of the subject were the Dutch jurist, Hugo Grotius, commonly known as the father of international law, the poet and author John Milton and the philosopher, John Locke. While there was some implementation of fundamental rights in Greek and Roman policy, much (if not most) of the discourse was relegated to the private sphere-to halls of learning and monasteries. Thus, whereas there was intellectual consideration of personal rights in Western history, this was decidedly different from consistent application of rights in public policy.²

In ancient times the legal codes did not deal specifically with the issue of human rights as we know it today. In the year 1188 we have one of the first documented 'human rights codes' promulgated during the reign of King Alfonso IX. The Cortes (parliament) of the kingdom of Leon (part of what is today Spain) received a confirmation from the king, in which, inter alia, he conceded a series of rights. Examples of the rights proclaimed were the right of an accused to a proper trial, the right to the inviolability of human life, the right to a home, the right to property and the right to be known and respected as a human being³. King Andrew II of Hungary promulgated a similar code in 1222 and gave a number of guarantees, among which was that no nobleman would be punished unless he was first given a fair trial that was conformed to accepted judicial procedure at the time.⁴ However, it must be noted that in both cases, these 'rights' applied mainly to the nobility and not to the peasantry or other classes of the time.

The famous Magna Carta signed in 1215 at Runnymede, England showing a linkage between rights of persons (at least of property owning males) and public affairs, also fell short of being an all-inclusive charter of human rights covering all members of the English society. However, one of the clauses was significant; it was the earliest documented reference, however remote, to the idea of individual freedom. The clause in question stated, inter alia, as follows: "That no freeman shall be taken or imprisonedexiled or in

any way destroyed except by the lawful judgment of his peers and according to the law of the land'(clause 39).”⁵

Three important revolutions gave strong impetus to the development of human rights, namely, the English, French and American revolutions. In England, in the 17th Century, two documents were promulgated which gave its citizens their rights. These were the English Petition of Rights, 1628, and the English Bill of Rights, 1689, which was the outcome of the struggle of parliament against the arbitrary rule of the Stuart monarchs.

According to the Marxist analysis the Glorious Revolution of 1688 and the Bill which institutionalised it, was a bourgeois revolution: it simply confirmed the ascendancy of the gentry and the merchant class over the monarch⁶. Whig⁷ historians, however, saw the Bill as the triumph of liberty over despotism and the protection of Englishmen (women had little say in the matter) from absolutist and arbitrary government⁸. There is merit in both views, in that, the Bill of Rights not only secured the interests of the bourgeoisie, it also dealt with certain matters having the characteristic of ‘human rights’, although they were not referred to as such at the time.

Further still, while the ‘human rights’ of the Bill of Rights might seem slight and biased towards a particular class of citizens, nevertheless, the whole context of the instrument was of fundamental importance, since it sought to replace the vagaries and excesses of arbitrary monarchical absolutism with parliamentary constitutional legitimacy⁹.

In addition the English Bill of Rights was the model upon which other very important human rights documents were based. These were the American Declaration of Independence, 1776; the Virginia Declaration, 1776; and the American Bill of Rights of 1791. In fact the American Bill of Rights in many ways follows the exact text of the original English Bill of Rights¹⁰. Apart from the English Bill of Rights, a number of French thinkers and philosophers of the enlightenment also had a great influence upon the construction of the now famous American Bill of Rights.

It is evident from the aforementioned that, the experience of the English Revolution and various philosophical and theoretical attempts to justify it, did not escape the awareness of the leaders of Britain's rebellious North American colonies. The American Founding Fathers seeking to disengage the colonies from British rule sought justification in the social contract and the natural rights theory of John Locke and the French philosophes. In the American Declaration of Independence (1776) these ideas are clearly set out in the words of its drafter, Thomas Jefferson, as follows:

“We hold these truths to be self evident that all men are created equal, that they are endowed by their creator with certain unalienable rights that among them are life, liberty and the pursuit of happiness.....”¹¹

These high sounding ideas, sufficient as they are for a declaration of independence, were clearly inadequate as a catalogue of individual rights which the state was obliged to protect. Thus the Virginia Declaration of Rights of 1776, drafted by George Mason and which predated the Declaration of Independence by a month, included specific liberties from state interference. The Virginia Declaration influenced drafters of the US constitution who included the protection of minimum rights found in the Declaration. However, it was only in 1791 that the United States adopted a Bill of Rights containing a list of guaranteed rights.

The 18th Century post-independence constitutional settlement of the United States had a profound influence in the subsequent revolutionary struggles, notably France, where the United States experience directly affected the revolution against 'ancien regimes'. As was earlier noted, the French philosophes influenced the American Revolution. The influence was reciprocal-events in America gave the French encouragement, and in 1789, France produced its own Declaration of the Rights of Man and of the Citizen. The aftermath settlement of the French Revolution reflects the social contract and the natural theories of John Locke and the French philosophes, Montesquieu and Rousseau.

From the French Declaration it is perfectly apparent that government is a necessary evil, and that as little of it as possible is desirable. Further, that true happiness is to be found in

individual liberty which is the product of the 'natural inalienable and sacred rights of man.' The Declaration provides that the 'aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are Liberty, Property, Safety and Resistance to Oppression.' Article 4 goes on to say that,

Liberty consists in being able to do anything that does not harm others of society than those that ensure to the other members of society the enjoyment of the same rights. These bounds may be determined only by law.¹²

The aforementioned documents had a profound effect on the political events through out the world in the 19th and 20th Centuries. Most major constitutions in Europe America, Asia, Africa and the Caribbean followed the example of the US constitution and France by adopting bills of rights in their respective constitutions.

Although the origins of human rights law can be traced to the revolutionary constitutionalism of the 17th and 18th Centuries, it was only after the Second World War that one can speak of an interest by the international community to promote and protect such rights through the mechanism of international law. Before the post World War II period, the international community lacked the necessary political will to undertake the appropriate action; and also, the structure of international law itself which focused principally on the state as sole subjects of international law, was one of its main impediments to the advancement in this field.

During this period, international relations were organised on the principle of sovereignty and states were the principal actors on the international scene. States were thus sovereign, and subject to no higher political authority. The duty correlative to the right of sovereignty is nonintervention, the obligation not to interfere in matters that are essentially within domestic jurisdiction of sovereign states.¹³ Thus human rights, which typically involve a state's treatment of its own citizens in its territory, were traditionally seen as just such a matter falling within the purview of domestic jurisdiction.

In this situation individuals, like other non-state entities, and, as some scholars argue, were merely objects of the international system. States might adopt rules for the benefit of individuals, but such rules conferred neither substantive rights on those individuals nor were they enforceable by any procedural mechanism. However, there was a slight difference in the case of aliens in foreign lands where a state of which the alien was a national could, under international law, bring a claim against the delinquent host state. It has been argued, however, that the main purpose of such a state claims was not necessarily to seek redress for the injured citizen; rather, it was to vindicate the rights of the state which had been indirectly injured by the mistreatment of its own national.¹⁴

Notwithstanding the position of aliens in International Law, the general proposition remains that before the advent of the United Nations Charter, individuals remained essentially at the disposal of their rulers, an alleged exception to this was the so-called right of humanitarian intervention¹⁵. Humanitarian attitudes towards human rights violations have forced the signing of a number of treaties to safeguard the rights of the individual against the arbitrary action by the state or other political/administrative authorities. Humanitarianism has had a strong influence in forcing those states that treated their people in such a way as to 'to deny their fundamental human rights and to shock the conscience of mankind'¹⁶ to change their attitudes and their actions.

A claimed right of humanitarian intervention was invoked by a number of Great powers to prevent the persecution of minorities and there are many documented cases of arbitrary action by states to this effect. The year 1827 presents one of the first documented humanitarian intervention. In that year the Ottoman Empire was the subject of intervention by the combined forces of France, Russia and Great Britain. This intervention was precipitated by the constant and cruel abuses of the Turks against the Greeks- it culminated in Greece gaining independence from Turkey in 1830. Generally, intervention forced Turkey to end its persecution of Christians in the Slavic countries that were under its rule. In the early part of the 20th Century such an intervention is seen again where the Western Powers exerted pressure on the Russian government to stop the persecution of Jewish citizens in Romania. With the advent of UN Charter, intervention cannot be done without

the express approval of the UN Security Council. Thus, intervention can longer be under taken on an arbitrary basis; it has to been put under some form of international control and acknowledged as a tenet on international law.

Here one can also point to a number of major treaties, very important to the issue of human rights, in the area of slave trade. In 1814 the Paris Treaty (between Britain and France) was the first to condemn the practice of slavery and prohibited the slave trade on a universal basis, but the task was not easy. In subsequent year -1815, 1822,1885, and 1890 - attempts were made in treaties to fight the slave trade and to stop the practice of slavery, it was only in 1926 that the League of Nations adopted the Convention to Suppress the Slave Trade and Slavery. Under this Convention the contracting parties undertook to do all in their power to suppress the slave trade and to bring about total abolition of all forms of slavery. At present the Convention remains the basic international instrument prohibiting the practice of slavery under the auspices of the UN.

Another major achievement that received international attention was in the area of war in the second half of the 19th Century. Two Swiss citizens, Henri Dunant and General Dufour, are credited with the bringing about of the Geneva Convention of 1864, relating to acceptable practices in the conduct of war. Further, they were also instrumental in the creation of the International Committee of the Red Cross which was establishment in Geneva in 1864. The work of the Red Cross has continued throughout two world wars and beyond, and, it has sponsored a number of Conventions which, apart from dealing with the status and treatment of combatants, also provides for the treatment of civilian populations during times of war. In addition such Conventions also limit the method by which wars may be waged. A notable example of such a Convention is the Declaration of St. Petersburg in 1968; it clearly stated that everything possible should be done to avert war, but that, should war be inevitable, it should be conducted within the constraints of civilised behaviour and be compatible with the laws of humanity.¹⁷ This was the start of the movement towards the establishment of a humanitarian law of war. After the Second World War Conventions were signed in Geneva with a view to alleviating the suffering of war victims, particularly at the end of the war.

The League of Nations, an international organisation established at the end of the First World War, began with the treaties drawn up at the Paris Conference (Treaty of Versailles) in 1919. Its aim was to provide a system of ensuring peace and security, and facilitating international co-operation. The founding document, the Covenant, made no provision for the protection of human rights but only committed member states to work towards certain humanitarian objectives. The Covenant provided:

- a) For fair treatment of women and children in labour practice;
- b) For the fair and humane treatment of subjects in the colonies;
- c) For the supervisory role of the League in stamping out traffic in women and children; and
- d) That the League was responsible for the preventing and controlling diseases on the international level.

The creation of the League of Nations mandate system put former colonies of the defeated Axis Powers of Germany and Turkey under the control of victorious Powers. The latter were held accountable to the League for the well being of the citizens in the mandated territories. The fact that the countries concerned were responsible to the international community was in itself significant, as shown by the controversial mandate given to South Africa over the former German colon of South West Africa, now Namibia.

The creation of the International Labour Organisation was another significant consequence of the Treaty of Versailles (1919). The ILO was a result of Allied Powers' concerns about the social justice and standards of treatment of industrial workers which had largely been prompted by the Bolshevik Revolution of 1917. One of the distinguishing features of the ILO was that it was not a purely governmental body but included representatives from employer groups as well as workers.

The ILO has been a prominent promoter of human rights in the field of labour relations and related rights such as conditions of work, remuneration, child and forced labour, the

provision of holidays and social security, discrimination and trade union rights, and it has sponsored over 150 conventions to that effect.

In the post World War II era the ILO remained a powerful agency of the UN in the field of industrial relations and, today, the ILO is a major actor in combating discriminatory practices in work places; it ranks among the most important institutions although its work seldom attracts the attention it deserves.¹⁸

C.) THE POST SECOND WORLD WAR ERA.

At this point the paper will consider the evolution of human rights during the post- Second World War period. It was only after the cataclysmic events of World War II that international human rights law began to develop in a coherent and recognisable way. As one scholar writes, “a problem often becomes the subject of international action only after a dramatic event crystallizes awareness. For example, the discovery of the Antarctic ozone hole contributed significantly to the recent upsurge of international environment action. The catalyst that made human rights a issue of world politics was the Holocaust, the systematic murder of millions of innocent civilians by the Germany soldiers during the Second World War.”¹⁹

Any positive effects attributable to the League of Nations, the ILO and other institutions in the pre-Second World War era were completely undone by the rise of fascism predominantly in Italy and national socialism (Nazism) in Germany. This was a retrogressive period for human rights, and the totalitarian regimes under Benito Mussolini (Italy) and Adolf Hitler (Germany) brought on the Second World War.

The atrocities of the Nazis against their own people in Germany and against those in its conquered territories created such revulsion, that even before the end of the war, the Allies determined that the post war settlement should include a commitment to the protection of human rights. To this end a series of important declarations, statements and proclamations were issued by a number of Allied Powers. For example, on the 14th of August 1941, the

Atlantic Charter was signed by Britain and the United States, followed by the UN Declaration to which all the Allied Powers were signatories (1st January, 1942). In this Declaration, the Allies undertook to preserve human rights and justice, adding that these would be included in the major peace aims of the Allies. This was seen as a necessary prerequisite to the creation of a just and stable international order under the auspices of the United Nations Organisation.

When World War II ended, the Allied Powers -the United States, Britain, France, and the Soviet Union- created the International Tribunal at Nuremberg to try Nazi war criminals. A significant factor on the establishment of the Tribunal was the fact that it could try crimes against peace, crimes of war and most important, crimes against humanity.

Further, apart from laying down the important principle that no person is forced to obey a command that in itself violates civilised conduct and accepted values and morals common to all mankind, it also established the basic principle that how a state treated its citizens was now a legitimate matter of international concern.²⁰ The General Assembly of the UN accepted and underwrote the principle according to which the Nuremberg Trials (1945-1946) were conducted.

The Charter of the UN, adopted in 1945 after the San Francisco Conference, contains a number of clauses, which affirm the positive stance of the world community on the issue of human rights. The preamble of the Charter reaffirmed the "faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small.....promoting and encouraging respect for human rights and assisting in the realisation of human rights and fundamental freedoms."²¹

According to two articles in the Charter (Articles 55 and 56), that members pledge themselves to take joint and separate action in the co-operation with the United Nations in the attainment of universal respect for the human rights and other fundamental freedoms for all mankind without reference to race, sex, colour, or creed religion or language. In

Article 1 the Charter included, as one of its purposes, the promoting of respect for human rights and fundamental freedoms for all.

Alongside reaffirming such faith in human rights, the Charter in Article 2(7) also reaffirmed the principle of non intervention by the Organisation in matters essentially within domestic jurisdiction of the member states, and thus, appearing to preclude international intervention in the field of human rights.²²

With respect to the above, two arguments have emerged as regards the legal implication of a member state which violates a clause in the Charter dealing with human rights. On one hand, some legal authorities argue that the protection of human rights is the responsibility of individual member states, and further, that the signing of the UN Charter by member states does not put them under any legal obligation to protect human rights. On the other hand, it is argued that members of the UN do, in fact, have a legal obligation to protect human rights and that the domestic jurisdiction clause is of no effect since human rights is an international issue and not within the exclusive purview of domestic interest.

The vagueness of the domestic clause has not, however, prevented the UN from investigating, assessing and then taking action against human rights violations. An illustration here being the imposition by the UN of economic, diplomatic, sports and other sanctions leveled at South Africa.²³ Further, several Eastern countries have been investigated for violations of human rights, inter alia, of using forced labour and violating the right to peaceful assembly by trade union organisation.²⁴

There had been a proposal to incorporate a list of rights in the Charter during its drafting, but this was defeated. Nevertheless, the increase in incidents of human rights violations prompted several UN members to press for an international bill of rights, to supplement or replace the human rights proviso in the Charter. A positive step in this regard has been the creation of the Commission on Human Rights (CHR), a subsidiary body of UN's Economic and Social Council (ECOSOC)²⁵. The CHR was entrusted with the task of preparing

documentation and researching international treaties for dealing with problems related to human rights and the violations thereof.

It was decided by the Commission that the catalogue of rights should take the form of a resolution of the UN General Assembly. The major advantage of a declaration in the form of resolution was that it would not be legally binding but would, in the words of Eleanor Roosevelt, the chairman of the CHR, proclaim 'a common standard of achievement for all the peoples and all the nations.'²⁶ On the 10th of December 1948, the UN General Assembly unanimously adopted the Universal Declaration of Human Rights. A dispute had rocked the CHR as to the relationship between the civil and political rights on one hand and economic and social rights on the other hand and, also over the appropriate means of implementation, supervision and protection. Finally two separate covenants were drafted and gave treaty effect to the rights in the Universal Declaration. The two covenants are: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, social and Cultural Rights (ICESCR), both of 1966 and which entered into force in 1976.

The salient differences between the two Covenants is that, with regard to the ICCPR protecting rights will be ensured immediately by a states party while, with regard to the ICESCR, implementation of these rights is progressive in accordance with specific programmes in the individual states.²⁷ Further more, of particular significance is that the ICCPR established the Human Rights Committee (HRC) to supervise and implement the Covenant and to provide by means of an optional protocol a mechanism by which individuals may petition the HRC. With regard to the ICESCR, the function of supervision is consigned to the political body of the UN, the ECOSOC.

Attached to the ICCPR are two protocols, the 1966 Optional Protocol and the 1989 Second Optional Protocol. The two protocols, together with the 1948 Declaration, the ICCPR and the ICESCR make up what is known today as the International Bill of Rights. Apart from the two Covenants and, notwithstanding the difficulties of establishing the universal system for promoting and protecting human rights, the UN undertook programmes to draft legally

binding instruments to deal with specific aspects on human rights. Examples include, the Convention on Prevention and Punishment of the Crime of Genocide (1948); International Convention on the Elimination of Racial Discrimination (1965); Convention on the Elimination of All Forms of Discrimination Against Women (1979).

Another matter that deserves mention here is the number of institutional measures and initiatives taken by the UN in order to protect human rights. ECOSOC in particular has established procedures under Resolution 1503 and 1235 by which gross violations of human rights by particular **states** may be investigated.

D.) CONCLUSION.

This chapter has traced the evolution of human rights from antiquity through the two world wars and to the present, where the UN, through its various organs and specialised bodies, is the key player in the issue of human rights on the international stage. It is clear from the foregoing discussion that the human rights concept has its genesis in Western history. This fact, as shall be seen in chapters three and four, underlies the debate on the universalistic versus the cultural relativistic character of human rights. The core of the contest, is whether the range of international human rights, with their peculiar origin in Western history and culture, can be of universal validity and application to the various cultures the world over? As one has aptly observed,²⁸

Observers from different regions and cultures can agree that the human rights movement, with respect to its language of rights and the civil and political rights it declares, stems principally from the liberal tradition of Western thought. That observation lies at the core of argument by states from non-Western parts of the world that some basic provisions in the instruments like UDHR or ICCPR are inappropriate and inapplicable to their circumstances. Those instruments, the argument goes, purport to give a genuinely universal expression to certain tenets of liberal political culture. But those tenets stem from and should be applied only in to states within this Western tradition.

It is evident that so much effort has been directed toward the achievement of universal human rights. The attainment of common principles embraced by all peoples of different cultures and backgrounds in the world. The late Andrei Sakharov, father of the Soviet H-bomb and leading crusader for human rights, aptly put the provocative view of the ultimate potential of human rights as follows:

The global character of human rights is particularly important. (Its) ideology is probably the only one that can be combined with such diverse ideologies as communism, social democracy, religion, technocracy, and those that are national and indigenous. It can be a foothold for those who do not wish to be aligned with the theoretical intricacies of dogmas, and who have tired of the abundance of ideologies, none of which had brought mankind simple happiness. The defence of human rights is a clear path toward the unification of peoples in our turbulent world, and a path toward the relief of suffering.²⁹

The next two chapters focus on the universalism and cultural relativism debate. The fourth chapter will also consider some contributions that have been made to the debate toward a cross-cultural approach in search of a representative universal system of human rights.

Endnotes

¹ Scott Davidson, **Human Rights** (Buckingham and Philadelphia: Open University Press, 1993), p. i.

² David P. Forsythe,

³ Lorenzo Togni, **The Struggle for Human Rights: An International and South Africa Perspective** (Juta & Co. Ltd., 1994), p.3.

⁴ *Ibid.*

⁵ Scott Davidson, *op cit.*, p. 2.

⁶ K. Marx and F. Engels, '***The Communist Manifesto***' as quoted in Scott Davidson, *op cit.*, p.2.

⁷ That is to say, a member of the British political party of the 18th and early 19th Centuries which supported the power of parliament and wanted to limit royal power, and later became the Liberal Party.

⁸ Scott Davidson, *op cit.*, p.2.

⁹ *Ibid*, p. 3.

¹⁰ Lorenzo Togni, *op cit.*, 4.

¹¹ As quoted in Scott Davidson, *op cit.*, p.2.

¹² *Ibid*, p. 3.

¹³ Jack Donnelly, **International Human Rights** (Westview Press, 1998), p.3.

¹⁴ Scott Davidson, *op cit.*, p. 8.

¹⁵ It is doubtful if such a right existed; if it did, it was largely used by powerful states seeking to expand their political influence.

¹⁶ The phrase is that of Sir Hersch Lauterpaccht, as quoted in Scott Davidson, *op cit.*, p.8.

¹⁷ Lorenzo Togni, *op cit.*, p.7.

¹⁸ As per Scott Davidson, *op cit.*, p.9.

¹⁹ Jack Donnelly, *op cit.*, p. 4.

²⁰ Scott Davidson, *op cit.*, p.12.

²¹ See preamble of the **United Nations Charter**.

²² *Ibid.*

²³ Lorenzo, *op cit.*, p.10.

²⁴ *Ibid.*

²⁵ The ECOSOC falls under the General Assembly of the United Nations, a body responsible for guaranteeing human rights. In cases where human rights violations are such that peace and security of the world are threatened, the United Nations Security Council has jurisdiction and can move for effective intervention in the situation. In many respects, however, it is the ECOSOC, which deals with the bulk of assessing human rights situations. Apart from the CHR there is a Commission on the Status of Women and, it is through these two bodies that a number of human rights issues have been studied.

²⁶ As quoted in Scott Davidson, *op cit.*, p.13.

²⁷ See Articles 2 of both the ICCPR and ICESR.

²⁸ Henry J. Steiner and Philip Alston, **International Human Rights in Context: Law, Politics, Morals** (Oxford: Clarendon Press, 1994), p. 187.

²⁹ David P. Forsythe, *op cit.*, p. 26.

CHAPTER THREE

ARE HUMAN RIGHTS EVERYWHERE THE SAME?: UNIVERSALISM VERSUS CULTURAL RELATIVISM - PART

I.

The Universal Declaration is not a tablet Moses brought down from the mountain. It was drafted by mortals. All international norms must evolve through continuing debate among the different points of view if consensus is to be maintained.

Bilhari Kausikan

CHAPTER THREE

ARE HUMAN RIGHTS EVERYWHERE THE SAME?: UNIVERSALISM VERSUS CULTURAL RELATIVISM.

One of the intense debates in human rights movements involves the 'universal' or 'relative' character related to the 'absolute' or 'contingent' character of the rights declared.¹ The contest between universalism and cultural relativism is not a novel one. It has taken on renewed vigour in the light of the human rights movements' erosion of notions of sovereignty, domestic jurisdiction, and cultural autonomy that in an earlier period had enjoyed greater strength.²

Such debates, before the coming to an end of the cold war, were dominantly between the Communist World (and their sympathisers) and the Western democracies. The latter charged the Communist countries with violating many basic rights, particularly those of a civil and political character. The Communist World responded both by charging the West with the violation of the more important economic and social rights, and by asserting that the political and ideological structures of Communist states pointed toward a different understanding of rights.

The debate died more or less together with the Soviet Union. Today, it continues in a different form, often in a North-South or (West-East) framework, or in a religious (West-Islam) framework, or more broadly, between developing (Third World) and developed (Western-Northern) countries. It also includes non-state actors such as indigenous peoples. The current state of affairs on the international stage presents a very big challenge to the ongoing pursuit of human rights. Diana Ayton-Shenker recaptures the situation in the following words:

The end of the cold war has created a series of tentative attempts to define "a new order." So far, the only certainty is that the international community has entered a period of tremendous global transition that, at least for the time being, has created more social problems than solutions.

morals, law, custom and any other capabilities and habits acquired by a man as a member of society".⁷

There are diverse definitions of cultures as they are diverse cultures. The above, however, suffices to give us an understanding of what culture is. Defined thus, it is not surprising that culture has had a profound impact on the universalism and relativism debate. In these debates, the term culture is often employed in a broad and diffuse way that may go beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures.

The debate follows no simple route; it is open to a range of views and strategies. But the starting point, normally, is the various international instruments on human rights, which declare their contents to be universal. The landmark instrument in this regard being the Universal Declaration of Human Rights of 1948. The Declaration and the various other international human rights instruments that are in existence speak in universal terms: 'everyone' has the to liberty, 'all persons' are entitled to equal protection, 'no one' shall be subjected to torture, 'every one has the right to an adequate standard of living. These instruments and their pretensions to universality, as a relativist would say, may suggest nothing so strongly as the arrogance or 'cultural imperialism of the West, given the latter's urge to view its own forms an beliefs as universal, and to attempt to universalise them.'⁸

On one extreme end of the debate, those who advocate for cultural relativism claim that rights and rules about morality are encoded in and thus depend on cultural context; that all truth and goodness is relative to particular cultures. Cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Katherine Brennan describes cultural relativism, in its simplest form, as the "theory that there is infinite cultural diversity and that all cultural practices are equally valid."⁹ There are no absolutes upon which to judge one practice against another because, in the words of one scholar, "the principle that we may use for judging behaviour or anything else are relative to that culture in which we are raised."¹⁰

This view of cultural practices calls into question the legitimacy of the human rights theory, which purports to establish principles for judging the conduct of all cultures. A strong relativistic position attaches an important consequence to the diversity inherent in cultures. According to this position, 'no transcendent or transnational ideas of right can be found or agreed upon, and hence that no culture (whether or not in the guise of enforcing international human rights) is justified in attempting to impose on others what must be understood as its own ideas.'¹¹

Clearly, in its strongest form, cultural relativism contradicts a basic premise of the human rights movement. Some human rights proponents assert that the increased acceptance of cultural relativism offer a growing threat to the validity of the current international human rights system. Ayton-shenker put it this way:¹²

Taken to its extreme, this relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the decades. If cultural tradition alone govern state compliance with international standards, then widespread disregard, abuse and violation would be given legitimacy...by rejecting or disregarding their legal obligation to promote and protect universal human rights, states advocating cultural relativism will raise their own cultural norms and peculiarities above international law and standards.

On the other end of the debate the partisans of universality assert that human rights are, and must be the same everywhere. Universalism, which draws from natural law tradition in Western jurisprudence, is the theory that there exist some set standards, which all cultures espouse. These universal principles transcend cultural differences and serve as an authority for adopting international human rights. This theory is based on the assumptions that all cultures value the protection of human dignity and that they would establish similar minimum standards for protecting their individual members. In the words of Katherine Brennan:

The official doctrine underlying the current international human rights system is that the instruments which make up developing international human rights law enumerates these universal minimum standards. If at least some of the rights enumerated by the U.N human rights instruments are universal, that core of rights

would provide a standard against which cultural practices could legitimately be judged. Consequently, there has been a rather urgent search by some human rights scholars for this set of universal principles.¹³

In addition to the cultural relativists who argue for disparate local standards of correct behaviour and those supporting human rights standards, there are those who take a mediating or synthetic position- advocates of a weak cultural relativism. Proponents of this view argue in favour of universal rights but acknowledge that 'some concessions should be made to particular cultural differences or that the interpretation or implementation of the universal principles'¹⁴

One of the arguments advanced by cultural relativists is that the contemporary movement in support of international human rights constitutes cultural imperialism. They criticise the current international human rights system because, in its search for potential human rights violations, it looks at cultural practices which have been condoned for centuries by the societies which engage in them. To them cultural practices have a legitimate function indigenous to the culture and that judging these practices according to international norms imposes outside values upon the society. Their argument is that states like Saudi Arabia, for instance do not and will not accept the notion of human rights because it contradicts their cultural (including religious) heritage. States like Saudi Arabia object to many of the rights now internationally recognised, such as freedom of religion, freedom from sexual discrimination and freedom to participate politically.¹⁵ These observers conclude that universal human rights are inappropriate for a multicultural world; 'whether these cultural relativists feel any unease when Saudi Arabia stones a woman to death for adultery is a matter not of record.'¹⁶

The opposite side of the debate refute the contention that human rights movements equates to cultural imperialism, supporters of this view being mostly lawyers and political scientists. The advocates of this view acknowledge the Western origin of both the notion and practice of human rights but note that other ideas who have their origin in the West have been voluntarily, even enthusiastically, accepted by non-Western parties. For example, both the idea of nation-state and its accompanying idea of national sovereignty

were Western in intellectual origin and politico-legal practice, and both became universally accepted (with minor and usually temporary exceptions).¹⁷ Forsythe has pointed out that, even those who endorse Marxism as universal would make the same argument, and they would note the examples of China, Korea, and Vietnam as non-Western states that vigorously endorsed a version of Marxism even though Marx was German, lived in the United Kingdom, and was propelled to write as he did because of the Western industrial revolution. Clearly, Forsythe continues, an idea can prove universally valid as a perceived response to social need, through global and voluntary acceptance, although emanating from a particular place and time.¹⁸

Virtually all non-Western states have become members of the UN and have embraced its Charter (a treaty) with its human rights provisions. Further these states have given voting or verbal endorsement to the UDHR (a General Assembly resolution translating the generalities of the Charter into relatively more precise principles pertaining to human rights). All states parties to the UN Charter (in effect a global constitution) have embraced it in its entirety and non of the states has made reservation against its human rights provisions. Only eight out of fifty-five states abstained on the 1948 vote in favor of the UDHR, and some of those abstainers, like the Soviet Union and its former European allies, changed their position in the 1980s and endorsed the Declaration.¹⁹

Furthermore, many non-Western states have written human rights provisions into their national constitution. There is no evidence that these non-Western national constitutions endorsing internationally recognised rights were the product of Western pressure²⁰. Cultural influence, it has been said, even via colonialism, is not the same as cultural imperialism. In light of the above, the advocates of this view have concluded that all what has just been said militates against the charge of cultural relativism. In the words of Ayton:

Universal human rights do not impose one cultural standard, but rather one legal standard of minimum protection necessary for human dignity. As a legal standard adopted through the United Nations, universal human rights represent the hard-won consensus of the international community, not the cultural imperialism of any particular region or set of traditions.

Like most areas of international law, universal human rights are a modern achievement, new to all cultures. Human rights are neither representative of, nor oriented toward, one culture to the exclusion of others. Universal human rights reflect the dynamic, coordinated efforts of the international community to achieve and advance a common standard and international system of law to protect human dignity.²¹

The notion of human dignity is one that is much discussed in the human rights movement. Rhoda Howard defines human dignity as ‘the particular cultural understanding of the inner moral worth of the human person and his or her proper political relations with society.’²² It has been submitted, however, that the concept of human rights is just one of the many ways by which human dignity can be protected and promoted. Both universalists and cultural relativists generally agree that all cultures value human dignity, but the latter maintain that, whilst the West uses an individualistic approach to protect that dignity, non- Western societies do not. They argue that in some non-Western societies, the dignity of the individual is preserved through his or her membership to the community, while in others it is preserved through fulfillment of prescribed duties. If then these societies have adequate internal systems for protecting their own members, human rights instruments are unnecessary and irrelevant. Thus to judge cultural practices against international norms is inappropriate and accordingly impose external values on those cultures.

Protecting human rights through claims or entitlements against the state has its origin, as already noted, in Western thought. In this sense, there is only one conception of rights and that is Western. Other cultures and religions dealt with human dignity in the sense of human or social justice, but they did so for the most part through ideas and devices other than personal rights. For instance in Islamic culture, both the Koran and Sharia (a legal code derived from the religious precepts of the Koran) contain passages about tolerance between persons. But this tolerance is mandated as a rule of Allah and his Prophet; persons have the duty to implement the standard. This says nothing about personal rights to receiving correct treatment.²³ The Chinese-Confucian culture affords another illustration. There are, in this culture, precepts about duties of the wise ruler to his subjects, but this is far from a situation where subjects have personal rights in order to retrain or commission the ruler.²⁴

Whilst, as shall be seen shortly, universalists argue that human dignity can only be realised through the notion of human rights, some scholars, for instance, Oscar Schachter, have submitted that respect for human rights may be realised in other ways than by asserting claims of right.

In many cases, the application of a 'rights approach' to affronts to dignity would raise questions involving existing basic rights such as free speech. In other cases, respect for dignity may be more appropriately and effectively attained through social processes such as education, material benefits, political leadership.

These observations indicate that the idea of human dignity has a wide range of applications outside of the sphere of human rights. It is therefore of some importance to treat it as a distinct subject and to consider ways that respect for dignity can be fostered through public and private agencies.²⁵

It is often asserted that individual rights, as a Western invention is inappropriate for non-individualistic cultures, an argument heard frequently with regard to the extended (or communal) family orientation of African culture and other non-Western societies. This argument claims that human rights are irrelevant to these societies, since they are grounded in individual claims against the state or society, while people in these states do not view themselves as individuals. For instance, several spokesmen have forcefully advanced the argument in relation to Africans that the latter do not possess an individualistic psychology.²⁶

Fasil Nahum, for example, argues: "African humanism does not alienate the individual by seeing him as an entity all by himself, having an existence more or less independent of society...The individual does not stand in contradistinction to society but as part of it. Neither should he be considered as alienated from and at war with society." Similarly Asmaron Legresse claims that "no aspect of Western civilisation makes an African more uncomfortable than the concept of the socialised individual whose private wars against society are celebrated." Benoit Ngom further contends that Africans have no notion of private (individual) life; even lovemaking has a ritualised, public nature to it. Olusola Ojo agrees that "the Africans assume harmony, not divergence of interests...and are more inclined to think of their obligations to other members of society rather than their claims against them."

Is the argument that individual human rights are unsuited for non-Western states so crucial to the people living in non-Western societies that to introduce them (human rights) there will totally disorient these people and throw their lives in chaos? Proponents for universal human rights argue that this is not true: that cultures are not static but change over time and as people interact. Whilst recognising the fundamental role that culture plays in the life of people, they assert that all societies have been incorporated into states. Howard and Donnelly²⁷ have said that the processes sometimes called “Modernisation” or “Westernisation” are now universal. As a result, almost everywhere in the world there are people who think of themselves and define themselves as individuals, and who objectively think of themselves as individuals, although the process of individuation has proceeded further in some countries (for example the United States) than in others, like China and Japan. It cannot be denied that in times past there have been societies in which to use the term “individual” would be inappropriate. Nor is it being argued that modern societies are somehow morally ‘better’ than pre-modern societies but rather, it is being said that like it or not, all countries are now significantly modernised.

The situation of Amazonian Indians illustrates the impact of the state on the lives of people it governs. The Amazonian who lived, until very recently in their own small, isolated, and homogeneous communities, were ignored by the larger Brazilian State. But in the 1990s, when the state began to “open up” the Amazon for its mineral and other natural wealth, officially sanctioned (or at least tolerated) mass murders of the Amazonian natives began. However pristine and pure a traditional culture might seem, in the late twentieth Century it is extremely vulnerable to the deprivations of larger political entities. The individual within his own culture might base his everyday life on system of reciprocal privileges and responsibilities with his kinsmen or fellow villagers; but his day-to-day life can quickly be ended once the state in legal charge of his society takes an interest.²⁸

Many human rights advocates have stated that the communal argument for protecting human dignity is not justified in this age. The discussion that follows will consider some of their arguments. The adherents to this view have forcefully advanced the arguments in favour of the imperative need for individual rights in the contemporary world, as if to

emphasise to the opposite side that their arguments are futile; that the cultural practices which they so often raise to defend their position has since ceased to exist.

In the Third World today, more than often we see dual societies and a patchwork practices that seek to accommodate seemingly irreconcilable old and new ways. Rather than the persistence of traditional culture in the face of modern intrusions or even the development of syncretic cultures and values, we usually see instead a disruptive and incomplete westernisation, cultural confusion or the enthusiastic embrace of “modern” practices and values. In other words, the traditional culture advanced to justify cultural relativism far too often no longer exists.

Therefore, while recognising the legitimate claims of self-determination and cultural relativism, we must be alert to cynical manipulations of a dying, lost, or even mythical cultural past. We must not be misled by the complaints of the inappropriateness of “western human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous cultures; communitarian rhetoric too often cloaks the depredations of corrupt and often Westernised” or deracinated elites.

Arguments of cultural relativism are often too far often made by economic and political elites that have long since left traditional culture behind. While this may represent a fundamentally admirable effort to retain or recapture cherished traditional values, it is at least ironic to see largely Westernised elites warning against what they have adopted.²⁹

In traditional cultures - at least the sorts of traditional cultures that would readily justify cultural deviations from international human rights standards – people are not victims of the arbitrary decisions of rulers whose principal claim to power is their control of modern instruments of force and administration. In traditional cultures, communal customs and practices usually provide each person with a place in society and a certain amount of dignity and protection. Furthermore, there usually are well-established reciprocal bonds between rulers and ruled, between rich and poor...³⁰

And according to Yash Ghai, in *‘Human Rights and Governance: the Asian Debate’*:³¹

A final point is the contradiction between claims of a consensus and harmonious society, and the extensive arming of the state apparatus. The persuasive use of draconian legislation like administrative detention, disestablishment societies, press censorship, and sedition, belies claims to respect alternative views, promote a

dialogue, and seek consensus. The contemporary State intolerance of opposition is inconsistent with traditional communal values and processes.

To the Universalists then, all countries have now evolved into nation-states and have undergone the process of individuation. Human rights, observes Howard, is a modern concept now universally applicable in principle because of the social evolution of the entire world toward state societies. The concept of human rights springs from modern human thought about the nature of justice; it does not spring from an anthropologically based consensus about values, needs, or desires of human beings. This concept also represents a 'radical departure from many status-based, nonegalitarian, and hierarchical societies of the past and present...'³²

Someone has asserted that to the extent that non-Western states have embraced the Western model of the state, 'the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the West have become equally relevant in the other parts of the world.'³³ And the contemporary world the individual is now living in has become as complex as its division of labour: "ethnically heterogeneous, stratified by the class, and erosive traditional status, age and sex ranking. In such an environment, the individual begins to rely less on his primary group and far more on the secondary groups, characterised not by affection or kin ties but by commonality of purpose. New kinds of communities, formed by choice rather than by accident of birth, arise in modern cities."³⁴

The world community has become integrated with the development of various modes of communication. People, more than before, have access to information; as they interact with one another, they influence each other ways of living. It is thus difficult to imagine a culture that has remained untouched by the wind of change. As someone has pointed out, the spread of mass media and education makes it extremely difficult for repressive governments to cut off their citizens from the rest of the world.³⁵

There has been a revolution of moral expectation as well. The world over, individuals have higher expectations of their rights. They expect to be not only wealthier, but freer. It is not outside agitators who caused revolutions in such poor countries as Nicaragua, or unrest in wealthier repressive countries such as Poland. It is the creation of one international community of modern men and women who are increasingly capable, however poor or oppressed they are, of recognising the roots of oppression-the state. The free communication of ideas is as threatening to ruling groups as the free commerce of guns.

The modern individual exists. And it is the modern individual who needs human rights.³⁶

The underlying premise of the foregoing arguments by universalists is that the communal oriented approach towards the protection of human dignity is not sufficient where the individual had to face the state. "The protection of human dignity in communal societies is not based on any ideas of the inalienable *right* of the *physical*, *socially equal* human being against the claims of family, community, or state. They are based on the opposite, that is, the *alienable privileges* of *socially unequal* beings, considered to embody gradations of humanness according to socially defined status categories entitled to different degrees of respect."³⁷ Further, it has been said that communal oriented protection of rights cannot give people the quality of human dignity that can only be realised through personal rights. In the words of one scholar:

But what is important is the modern power of the state, or perhaps the majority of society, which needs restraining and commissioning by means of personal rights. One can agree that traditional African culture is less individualistic than in the West while also noting that the extended family structure in Africa has proved powerless to prevent systematic and extensive abuse by national rulers. The extended family has not prevented attempts at genocide between ethnic groups in Rwanda and Burundi. An African's willingness to provide temporary relief to distant cousins in distress is a poor substitute for personal, legal mandates on governing authority or on powerful ethnic groups. One has only to look at the poor quality of human dignity across Africa, despite the continuation of family and ethnic-tribal allegiances- indeed because of the continuation of these allegiances in conjunction with powerful national rulers – to see the need for internationally recognised human rights there. Similar arguments could be made about the nonindividualistic Asian societies. Personal rights can be seen as a valid response to a contemporary world.³⁸

Still on the importance of human rights in a modern state, the following sentiments were expressed by some participants in the colloquy organised by the Council of Europe in co-operation with the International Institute of Human Rights which drew participants from different walks of life. The aim of the colloquy was to consider the universality of human rights based on the knowledge and experience of the hundreds participants coming from different 'worlds' or 'backgrounds.' The participants included judges, attorneys, lawyers, professions, politician philosophers, sociologists, doctors, scientists and representatives from international organisations. The sentiments expressed reflect the arguments in the preceding discussion on the imperative need for human rights in the contemporary world.

In the introductory report Regunandan Swarup Pathak (New Delhi) stated: "Man's physical and moral existence be made secure from universal invasion by the power and authority of society, and a just system of the fulfillment of his needs be ensured. Defined thus, there is reason to believe that the ideal will be acceptable in all societies."³⁹ From the panel, Keba Mbaye (The Hague) said: "in conclusion it must be admitted that the only really effective control system are judicial control systems."⁴⁰ And per Christian Tomnschat (Bonn) "I would caution against labeling too spontaneously and too skillfully anything that seems to be desirable as a "right". Law is a social system with its inherent restrictions. It cannot secure the spiritual well being of a human person."⁴¹

Finally it important to note that the preceding contest on the universalism and cultural relativism debate on human rights is not exhaustive. The discussion does, however, give us idea of some of the challenges confronting the ongoing quest for universally accepted human rights. On a concluding note, here is an observation in Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), at 94:⁴²

It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from the perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are

human rights and not dependent on the fact that states, or groups of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.

Endnotes

¹ Henry J. Steiner and Philip Alston, *op cit.*, p 192.

² *ibid.*

³ Diana Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity,' United Nations Background Note: Published by the United Nations Department of Public Information (1995), p. 1.

⁴ *Ibid.*, pp. 1-2.

⁵ Alison Dundes Renteln, as quoted in *Human Rights Quarterly: A Comparative and International Journal of Social Sciences, Humanities, and Law* vol. 13, No. 1, (Feb, 1991) p. 148.

⁶ Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy' in Abdullahi Ahmed An-Na'im and Francis M. Deng, editors, Human Rights in Africa: Cross-Cultural Perspectives (Washington D.C: The Brookings Institution, 1990) p. 334.

⁷ David L. Sills, editor, International Encyclopedia of the Social Sciences, vol. 3 (Macmillan Company & Free Press, 1968) p.543.

⁸ Henry J. Steiner et Philip Alton, *op. Cit.*, p. 193.

⁹ Katherine Brennan, Note, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study,' in Frank Newman and David Weissbrodt, International Human Rights: Law Policy, And Process, 2nd edn., (Cincinnati, Ohio: Anderson Publishing Co., 1997) p. 677.

¹⁰ Quoted in *Ibid.*

¹¹ Henry J. Steiner and Philip Alston, *op. Cit.*, p. 193.

¹² Diana Ayton-Shenker, *op. Cit.*, p. 2.

¹³ Katherine Brennan, *op. Cit.*, p.678.

¹⁴ Davidson P. Forsythe, The Internationalisation of Human Rights (Massachusetts/Toronto: Lexington Books, 1991) p.13.

¹⁴ *Ibid.*, p.3.

¹⁵ *Ibid.*, p. 3.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p.4.

¹⁸ *Ibid.*

¹⁹ *ibid.*

²⁰ *Ibid.*

²¹ Diana Ayton-Shenker, *op. Cit.*, p.4.

²² Rhoda E. Howard, 'Dignity, Community, and Human Rights' in Henry J. Steiner and Philip Alston, *op cit.*, p.222.

²³ David P. Forsythe, *op. Cit.*, p. 2.

²⁴ *Ibid.*

²⁵ Oscar Schachter, 'Human Dignity as a Normative Concept' in Henry J. Steiner and Philip Alston, *op cit.*, p. 225.

²⁶ Rhoda E. Howard in Abdullahi Ahmed An-Na'im and Francis editors, *op. Cit.*, p.162.

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- ²⁷ Jack Donnelly and Rhoda E. Howard, editors, **International Handbook of Human Rights** (New York: Greenwood, Press, 1987) p.16.
- ²⁸ *ibid.*, p. 15.
- ²⁹ Jack Donnelly, '***Universal Human rights In Theory And Practice***,' in Henry J. Steiner et Philip Alston, *op. Cit.*, pp. 239-240
- ³⁰ Jack Donnelly, '***Cultural Relativism and Universal Human Rights***,' in Frank Newman and David Weissbrodt. *Op. Cit.*, p. 679.
- ³¹ In Henry J. Steiner and Philip Alston, *op cit.*, p.138.
- ³² Rhoda E Howard in Henry J. Steiner and Philip Alston, *ibid*, 221.
- ³³ As qouted in Issa G. Shivji, **The Concept of Human Rights In Africa** (London: Codesria Books Series, 1989) p. 11.
- ³⁴ Jack Donnelly et Rhoda E. Howard, *op. Cit.*, pp.16-17.
- ³⁵ *ibid.*, p. 18.
- ³⁶ *ibid.*
- ³⁷ Rhoda Howard, '***Dignity, Community, And Human Rights***,' in Henry Steiner et Philip Alston, *op. Cit.*, p.221.
- ³⁸ David P. Forsythe, *op cit.*, p. 5.
- ³⁹ **Human Rights Law Journal**, Vol.12: No. 6-7, 1991, p.2.
- ⁴⁰ *Ibid.*
- ⁴¹ *Ibid.*
- ⁴² In Henry J. Steiner and Philip Alston, *op cit.*, pp.219-220.

CHAPTER FOUR

ARE HUMAN RIGHTS EVERYWHERE THE SAME?: UNIVERSALISM VERSUS CULTURAL RELATIVISM.

*The quest for human rights ...is thus a perpetual conquest, a product of the struggles and beliefs of all men,
but particularly, those of the victims"*

Mohammed Bedjaom, The Hague.

CHAPTER FOUR

ARE HUMAN RIGHTS EVERYWHERE THE SAME?: UNIVERSALISM AND CULTURAL RELATIVISM.

This chapter a focus on miscellaneous issues that contributes to a better and broader understanding of the universalist-cultural relativistic debate. It helps one to be able to know whether the arguments advanced in favour of either side are really legitimate; and whether they can really form the basis on which to either deny or afford people their human rights. The issues discussed here include, what is sometimes called weak cultural relativism. The proponents of this position adopt a mediating stance between the two extreme ends discussed in the preceding chapter. They recognise that 'some concessions should be made to particular cultural differences or that cultural differences will affect the interpretation and implementation of the universal principles.'¹ Secondly what some scholars have said with regard to a cross-cultural approach to human rights has been touched on. Finally, the discussion will go specific and focus on what the Republic of China has to say in relation to this debate. Most of the arguments advanced, in favour of cultural relativism in the respect, are also advanced by other Third World States.

The chapter will also consider some of the contributions that have been made by advocates of a cross-cultural approach to universal human rights. These men and women, while recognising the need for a universally accepted concept of human rights, they maintain that the current system of international human rights is not universally representative. As one writes:

The concern for human right is a recognition that this is an interdependent world. A consciousness of what has been unfortunately termed "the other" (who is to determine who is not an 'other'?) is being created that acknowledges the need for

shared standards of human dignity and rights for all people. Yet how and on whose terms these peoples are perceived, how their rights and wrongs are determined and how they are so judged, is still very much open for debate, especially within the United Nations.²

Virtually all states today have embraced - in speech if not indeed- the human rights standards enunciated in the Universal Declaration of Human Rights and the International Human Rights Covenants, notwithstanding the striking and profound international differences in ideology, levels and styles of economic development, and patterns of political evolution.³ And through a lot of effort, largely attributable to the ongoing work of the United Nations, the universality of human rights has been clearly established in international law. The United Nations Charter proclaims that human rights are for “all without distinction” and further commits the United Nations and all member states to take action promoting “universal respect for, and observance of, human rights and fundamental freedoms”. As Charles Norchi points out the Universal Declaration “represents a broader consensus on human dignity than does any single culture or tradition.”⁴

The United Nations, particularly the General Assembly is responsible for the achievements in human rights standard-setting. This body is an assembly of nearly every state in the international community, and is a uniquely representative body authorised to address and advance the protection of human rights. As such, ‘it serves as an excellent indicator of international consensus on human rights.’⁵

Notwithstanding what the aforesaid, the question is, can the norms proclaimed by international human rights be said to have universal validity and applicability, given the pluralistic world that we live in? Writers like Howard, Donnelly and Ayton-shenker have asserted that these principles are universal and that variations in particular cultural contexts may only be permitted in as far as they do not violate or infringe on other universally proclaimed human rights.

According to Donnelly, while he recognises that human rights have not been part of most cultural traditions, or even the western tradition until recently, ‘there is a striking similarity

in many of the basic values that today are sought to be protected through human rights.⁶ This becomes particularly true when these values are expressed in relatively general terms. Life, social order, protection from arbitrary rule, prohibition of inhuman and degrading treatment, the guarantee of a place in the life of the community, and access to an equitable share of the means of subsistence are central moral aspirations in nearly all cultures. In Donnelly's words, "this fundamental unity in the midst of otherwise bewildering diversity suggests a certain core of 'human nature'-for all its undeniable variability, and despite our inability to express that core in the language of science. And if human nature is relatively universal, then basic human rights must at least initially be assumed to be similarly universal...."⁷

Donnelly has proposed the following test for assessing claims of cultural relativism:

Rights are formulated with certain basic violations, or threats to human dignity, in mind. Therefore, the easiest way to overcome the presumption of universality for a widely recognized human right is to demonstrate either that the anticipated violation is not standard in that society, that the value is (justifiably) not considered basic in that society, or that it is protected by an alternative mechanism. In other words, one would have to show that the underlying cultural vision of human nature or society is both morally defensible and incompatible with the implementation of the universal human right in question. I would argue that such a test can be met only rarely today, and that permissible exceptions usually are relatively minor and generally consistent with the basic thrust of the Universal Declaration.⁸

For example, it is hard to imagine cultural arguments against recognition of the basic personal rights of Articles 3 through 11 (of the Universal Declaration of Human Rights).⁹ In fact, as Donnelly writes, he is "tempted to say that conceptions of human nature or society incompatible with such rights would be almost by definition indefensible; at least, such rights come very close to being fully universal."

He goes on to state that civil rights like freedom of conscience, speech, association would be a bit more relative; as they assume the existence and a positive evaluation of relatively autonomous individuals, they are of questionable applicability in strong traditional communities. In such communities, however, they would rarely be at issue. If traditional

practices truly are based on and protect culturally accepted conceptions of human dignity, then members of such a community simply will not have the desire or need to claim such civil rights. But in the more typical contemporary case, in which the relatively autonomous individual faces the modern state, they would seem to be close to universal rights; it is hard to imagine a defensible modern conception of human dignity that did not include at least most of these rights.¹⁰

Furthermore Donnelly identifies some rights in the Declaration that are best viewed as interpretations and, in his words, 'subject to much greater cultural relativity'. For example the rights of free and full consent of intending spouses not only reflects a specific interpretation of marriage, but an interpretation that is of relatively recent origin and by no means universal today even in the West. He notes, however, that the right, that is, the right to give full and free consent, [Article 16 (2)] is subordinate to the basic right to marry and found a family. Furthermore, that some traditional customs, such as bride price, provide alternative protection for women, and a sort of indirect conditionality to marriage that addresses at least some of the underlying concern of Article 16 (2). Donnelly asserts that such factors make it much easier to accept cultural relativity with regard to this right. In his words,

Such cases, however, are the exception rather than the rule. And if my arguments above are correct, we can justifiably insist on some form of weak cultural relativism; that is, on a fundamental universality of basic human rights, tempered by a recognition of the possible need for limited cultural variations. Basic human rights are, to use appropriately paradoxical phrase, relatively universal.¹¹

In the preceding chapter, we saw that cultural relativists argue that human rights are a "Western construct with limited [universal] applicability". Howard and Donnelly in *International Handbook of Human Rights* discuss how, cultural relativism, as applied to human rights has failed to grasp the nature of culture¹². They identify a number of erroneous assumptions that underlie this viewpoint:

A final assumption of the cultural relativist view that human rights is of cultural practices are neutral in their impact on different individuals and groups. Yet very few social practises, whether cultural or otherwise, distribute the same benefits to

each member of the group. In considering any cultural practice it is useful to ask, who benefits from its retention?

Thus the notion that human rights cannot be applied across cultures violates both the principle of human rights and its practise. Human rights mean precisely that: rights held by virtue of being human. Human rights do not mean human dignity, nor do they represent the sum total of personal resources (material, moral, or spiritual) that an individual might hold. Cultural variations that do not violate basic human rights undoubtedly enrich the world. But to permit the interests of the powerful to masquerade behind spurious defenses of cultural relativity is merely to lessen the chance that the victims of the policies will be able to complain. In the modern world, concepts such as cultural relativity, which deny to individuals the moral right to make comparisons and to insist on universal standards of right and wrong, are happily adopted by those who control the state.¹³

According to Ayton-Shenker, there is international consensus over the current human rights movement. That this consensus is embodied in the language of the Universal Declaration itself. The universal nature of human rights is literally written into the title of the Universal Declaration for Human Rights (UDHR). Its preamble proclaims the declaration as a “common standard of achievement for all peoples all nations”. And as recently as June 1993, the UN World Conference in Human Rights in Austria, echoed this in the Vienna Declaration and Programme of Action¹⁴ which repeats the same language to reaffirm the status of the Universal Declaration as a “common standard” for everyone. The Vienna Declaration continues to reinforce the universality of human rights, stating that “All human rights are universal, indivisible and interdependent and interrelated”. It also asserted that the protection and promotion of human rights is the “first responsibility” of all governments.

In its first paragraph, the Vienna Declaration States that “ the universal nature” of all human rights and fundamental freedoms is ‘beyond question.’ The unquestionable universality of human rights is presented in the context of the reaffirmation of the obligation of states to promote and protect human rights. According to Ayton-shenker:¹⁵

The legal obligation for all is reaffirmed for all states to promote “universal respect for, and observance and protection of, all human rights and freedoms for all”....

Not selective, not relative, but universal respect, observance and protection. Furthermore, the obligation is established for all states, in accordance with the Charter of the United Nations and other instruments of human rights and international law. No state is exempt from this obligation. All member states of the United Nations have a legal obligation to promote and protect human rights, regardless of particular cultural perspectives. Universal human rights promotion and protection are asserted in the Vienna Declaration as the “first responsibility” of all governments.

One of the fundamental rules of international law is the principle of non discrimination. Everyone is entitled to human rights who discrimination of any kind. It follows that human rights are for all human beings, regardless of “race, colour sex, language, religion, political and other opinion, national or social origin, property, birth or other status”. Thus everyone in every culture is entitled to human rights and denial on the ground of culture distinction is discrimination. ‘Human rights are the birthright of every person. If a state dismisses universal human rights on the basis of cultural relativism, then rights would be denied to the persons living under that State’s authority. The denial or abuse of human rights is wrong, regardless of the violator’s culture.’¹⁶

From the process of standard-setting human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity. “The flexibility of human rights to be relevant to diverse cultures is facilitated by the establishment of minimum standards and the incorporation of cultural rights.”¹⁷ The instruments of human rights establish minimum standards; and within this framework, states have maximum room for cultural variations without diluting or compromising the minimum standards of human rights established by law. In Ayton-Shenker’s words: these minimum standards are in fact high, requiring from the state a very high level of performance in the field of human rights.¹⁸

The Vienna Declaration recognised the role which culture plays in the pursuit of promoting and protecting human rights. The Declaration stipulates that “the significance of national and regional particularities and various historical, cultural and religious background must be borne in mind.”¹⁹ However, states are obligated to promote and protect human rights regardless of their cultural systems. “While its importance is recognised, cultural consideration in no way diminishes states’ human rights obligation.”²⁰

Most directly, human rights facilitate respect and protection of cultural diversity and integrity, through the establishment of cultural rights embodied in instruments of human rights law. These include: the International Bill of Rights; the Convention on the Rights of the Child; the International Convention on the Elimination of All Form of Racial Discrimination; the Declaration and Racial Prejudice; the declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief; the Declaration on the Principles of International Cultural cooperation; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; the Declaration on the Right to Development; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and the ILO Convention No. 169 on the Rights of Indigenous and Tribal peoples.

Human rights which relate to cultural diversity and integrity encompass a wide range of protections, including: the right to cultural participation; the right to enjoy the arts; conservation, development and diffusion of culture; protection of cultural heritage; freedom for creative activity; protection of persons belonging to ethnic, religious or linguistic minorities; freedom of assembly and association; the right to education; freedom of thought, conscience or religion; freedom of opinion and expression; and the principle of non-discrimination.

One of the rights recognised in international human rights instruments is the right to culture.²¹ This right is compatible with another similarly recognised right; the right to self-determination. However the premise on which universal human rights stand seem to contradict the very rights it purports to proclaim. One of the underlying premises of human rights is intervention in situations exhibiting gross violations of human rights. Is this not interference with people's rights to self-determination. One author put it this way:

One persuasive argument for cultural relativism is the preservation of difference, surely among the important values expressed by human rights movements. Of course there must be limits to that argument so that in certain circumstances international human rights prevail-at the extreme, over the "differences" expressed by the Nazis or Stalinists. In more typical divergences from international norms, such as forms of gender discrimination enforced by a state, perhaps the international community should defer to that state when, say, people in it including those apparently harmed by the norm or practise in question prefer that way of life. Is this not simply a matter of allowing people to choose for themselves by engaging in self-determination, another deep human rights seated value?²²

Every human being has the right to culture, including the rights to enjoy and development cultural life and identity. But, as Ayton-Shenker points out, cultural rights are not unlimited. The right to culture is limited at the point it infringes another human right. No right can be used at the expense or destruction of another, in accordance with international law. There must, then, be harmony between the various values protected by human rights. The right to culture and self-determination may only be allowed in so far as they enhance the basic values of human rights. In the words of Ayton-Shenker:

This means that cultural rights cannot be invoked or interpreted in such a way as to justify any act leading to the denial or violation of other human rights and fundamental freedom. As such, claiming cultural relativism as an excuse to violate or deny human rights is an abuse of the rights to culture. There are legitimate, substantive limitations on cultural practices, even on well-entrenched traditions. For example no culture today can legitimately claim a right to practise slavery. Despite its practise in many cultures throughout history, slavery today cannot be considered legitimate, legal, or part of a cultural legacy entitled to protection in any way. To the contrary, all forms of slavery, including contemporary slavery-like practices, are a gross violation of human rights under international law.²³

Similarly, cultural rights do not justify torture, murder, genocide, discrimination on the grounds of sex, race, language, or religion, or violation of any of the other universal human and fundamental freedoms established in international law. Any attempts to justify such violations on the basis of culture have no validity under international law.

As Jack Donnelly has said, ‘while recognising the legitimate claims to self-determination and cultural relativism, we must be alert to cynical manipulations of a dying, lost, or even mythical past’. And as per Jeanne Hersch: “history has shown that every culture is capable of fanaticism when it falls back on violence to compensate for its own lack of depth, its inability to see that it does not possess the sole and complete truth.”²⁴

In chapter two, we noted some of the arguments that cultural relativists advance against universal human rights. They assert that traditional culture is sufficient for the protection of human rights, and therefore universal human rights are not necessary. Further, they argue that universal human rights can be intrusive and disruptive to traditional protection of human life, dignity, liberty and security. On the contrary, as Ayton-Shenker argues, traditional culture should be seen as cultural context in which human rights must be

protected, established, integrated, promoted and protected. Human rights, she says, must be approached in a way that is meaningful and relevant in diverse cultural contexts.

If, like the cultural relativists argue, tradition culture protects some form of human dignity, then in effect does provide such protection then, human rights by definition would be compatible with traditional culture, posing no threat to the traditional cultural. As Howard said,²⁵ Africa protected a system of obligations and privileges based on ascribed statuses, not a system of human rights to which one was entitled merely by virtue of being human. As such 'the cultures and values characteristic of indigenous African societies do not negate the need for rights in Africa.' Thus these communal-oriented practices do not mean that human rights are irrelevant to Africa. Rather they mean that the communal concept of social justice has many elements that can buttress a human rights-based approach, and can be adapted to enable the individual to make enforceable claim against the state in newly emergent, often politically and economically abusive African societies.²⁶

As such, the traditional culture can absorb and apply human rights, and the governing state should be in a better position not only to ratify, but to effectively and fully implement the international standards. In the words of Ayton-Shenker:

Rather than limit human rights to suit a given culture, why not draw on traditional cultural values to reinforce the application and relevance of universal human rights? There is an increased need to emphasize the common, core values shared by all cultures: the value of life, social order and protection from arbitrary rule. These basic values are embodied in human rights. Traditional cultures should be approached and recognized as partners to promote greater respect for and observance of human rights. Drawing on compatible practices and common values from traditional cultures would enhance and advance human rights promotion and protection. This approach not only encourages greater tolerance, mutual respect and understanding, but also fosters more effective international cooperation for human rights.²⁷

Greater understanding of the ways in which traditional cultures protect the well-being of their people would illuminate the common foundation of human dignity on which human rights promotion and protection stand. This insight would enable human rights advocacy to assert the cultural relevance, as well as the legal obligation, of universal human rights in diverse cultural contexts. Recognition and

appreciation of particular cultural contexts would serve to facilitate, rather than reduce, human rights respect and observance.

Working in this way with particular cultures inherently recognizes cultural integrity and diversity, without compromising or diluting the unquestionably universal standard of human rights. Such an approach is essential to ensure that the future will be guided above all by human rights, non-discrimination, tolerance, and cultural pluralism.

Whilst scholars like Donnelly, Howard, Ayton-Shenker and many others human rights activists have endorsed the universality of the current system of international human rights; many others have asserted that the current system of human rights is not universally representative, given the world of diversity in which we live in They argue that there is need for a cross-cultural approach to human rights, if human rights are expected to have any significance in this contemporary age. For instance, according to Abdullahi Ahmed An-na'im, the current system of human rights lacks 'cultural legitimacy':

It is commonplace now to decry the unacceptable discrepancy between the theory and practise of human rights despite the existence of elaborate and enlightened international standards of human rights for several decades, and despite the rhetoric of strong commitment to these standards by governments, which are often supported in or pressured into such commitment by an increasing number of non-governmental organisations and groups, we continue to witness gross violations of human rights in all parts of the world. If we are to reduce the unacceptable discrepancy and promote and ensure greater respect of the full range of human rights throughout the world, then we must understand and combat not only the immediate causes of the discrepancy but also factors that contribute to it.²⁸

...

Whatever the reason one accepts as the cause of the discrepancy between the theory and practise of human rights, a more positive element needs to be injected into the reform process if this discrepancy is to be reduced. The cultural legitimacy of the full range of human rights must be developed- that concern for human rights as they figure in the standards of many different cultures should be enhanced.²⁹

...

The basic premise of this chapter views culture broadly, as the context within which human rights have to be specified and realised. Despite the initial lack or inadequacy of concern with universal cultural legitimacy during the formulation

and adoption of international standards of human rights, and despite the inadequacy of subsequent efforts to supplement that initial deficiency, those standards of human rights remained to be improved rather than abandoned.

...

It is not too late to correct the situation the situation by undertaking cross-cultural work to provide the necessary internal legitimacy for human rights standards. The golden rule is the need for the relativist sensitivity in developing universal standards...The inherent dignity and integrity of the human person, taken as the fundamental underlying value of all human rights, can be extended beyond barriers of sex, race, religion and so on, through the principle of reciprocity – namely, that one should concede to others what one claims for oneself. Thus the full range of human rights can gain cultural legitimacy everywhere in the world.³⁰

And Richard Schwartz, also in search for a cross-cultural approach to the issue of human rights, wrote :

“We seem to have entered an era in which people in every country, and every continent, are searching for a valid concept of human rights.

...

It is especially appropriate now that we try to understand how to move toward universal human rights. We are living at one of those junctures of history when a unique new culture, a world culture, is in the making (among the signs of an emerging culture are the convergent characteristics of “individual modernisation”). To maintain stability and humanity, world society must incorporate in its intrinsic cultural foundation the fundamental principles of human rights. If it does not, future generations may be forced to choose between chaos and authoritarian control.

Formal declarations, though important, will not suffice to establish universal human rights. Legal systems cannot regulate societies unless the laws are supported by cultural norms. We must therefore address the question: how can the peoples of the contemporary world, so diverse in their cultures arrive at a normative consensus that favours Universal human rights in an emerging world order?

If human rights are to play a central role in the new world culture, those of us who favour that development should try to determine what paths will take us in that direction.³¹

The following discussion centres on the contemporary debate between the West and Some Asians countries, in particular, the United States and the Peoples’ Republic of China.³² The debate, again, stems from the latter’s dissatisfaction with a West-oriented

interpretation of universal human rights. The debate is an illustration of the non-Western World dissatisfaction over the current system of international human rights. The primary context of the debate today would be between the West and a.) Islamic States and b.) a number of East Asian states intent on economic development. The present arguments hinge on the second category and the various spokesmen for it have made a sustained and serious contribution to the debate.

In a White Paper, '*Asia's Different Standard*',³³ Bilhari Kausikan argues that the diversity of cultural traditions, political structures, and the levels of development will make it difficult, if not impossible to define a single distinctive and coherent human rights regime that can encompass the vast region from Japan to Burma, with its Confucianist, Buddhist, Islamic, and Hindu traditions. Nonetheless, the movement toward such a goal is likely to continue. What is clear is that there is a general discontent throughout the region with a purely Western interpretation of human rights. The further development of human rights there will be shaped primarily by internal developments, but pressure will continue to come from the United States and Europe.³⁴

...

But efforts to promote human rights in Asia must also reckon with the altered distribution of power in the post-Cold War world. Power, especially economic power, has been diffused. For the last decades, most of the East and Southern Asia has experienced strong economic growth and will probably keep growing faster than other regions well into the century. Of course, the economic growth has not been even. The United States and Europe are still major markets for almost all East and Southeast Asian countries, many of whom remain aid recipients. But Western leverage over East and Southeast Asia has been greatly reduced. The countries in the region are reacting accordingly. East and Southeast Asia are now significant actors in the World Economy. There is far less scope for conditionally and sanctions to force compliance with human rights. The region is an expanding market for the West.³⁵

For the first time since the Universal Declaration was adopted in 1948, countries not thoroughly steeped in Judeo-Christian and natural law tradition are in first rank: that unprecedented situation will define the new international politics of human rights. It will also multiply the occasions for conflict. In the process will the human rights dialogue between the West and East and Southeast Asia become a dialogue of the deaf, with each side proclaiming its superior virtue without advancing the common interests of human humanity? Or can it be a genuine and fruitful dialogue, expanding and deepening consensus? The latter outcome will require finding a balance between a pretentious and unrealistic universalism and a paralysing cultural relativism. The myth of universality of all human rights is harmful if it masks the

real gap that exists between Asian and Western perceptions of human rights. The gap will not be bridged if it is denied.

There has been a tendency since 1989 to draw parallels between developments in the Third World and those in Eastern Europe and former USSR, measuring all states by advance of what the West regard as “democracy.” That value-laden term, itself is susceptible to multiple interpretations, but usually understood by the Western human rights activists and the media as the establishment of political institutions and practises akin to those existing in the United States.

But the Western approach is ideological, not empirical. The West needs its myths; missionary zeal to whip the heathen along the path of righteousness and remake the world on its own image is deeply ingrained in Western (especially American) political culture. It is understandable the Western human rights advocates choose to interpret reality in the way they believe helps their cause most.³⁶

...

The hard core of human rights that are truly universal is smaller than many in the West are wont to pretend. Forty-five years after the Universal Declaration was adopted, many of its 30 articles are still subject to debate over the interpretation and application – not just between Asia and the West, but within the West itself. Not every one of the 50 states of the United States would apply the provisions of the Universal declaration the same way. It is not only pretentious but wrong to insist that everything has been settled once and forever.

The Asian record of economic success is a powerful claim that cannot be easily dismissed. Both the West and Asia can agree that values and institutions are important determinants of development. But what institutions and which values? The individualistic ethos of the West or the communitarian tradition of Asia? The consensus-seeking approach of East and Southeast Asia or the adversarial institutions of the West?³⁷

Future approaches on human rights will have to be formulated with greater nuance and precision. It makes a great deal of difference if the West insists on humane standards of behaviour by vigorously protesting genocide, murder torture, or slavery. Here there is a clear consensus on the core of international law that does not admit of derogations on any grounds. The West has a legitimate right and moral duty to promote those core human rights, even if it is tempered by limited influence. But if the West objects to say, capital punishment, detention without trial, or curbs on press freedoms, it should recognise that it does so in a context where the international law is less definitive and open to interpretation and where there is room for further elaboration through debate. The West will have to accept that no universal consensus may be possible and that states can legitimately agree to

disagree without being guilty of sinister designs or bad faith. Trying to impose pet Western definitions of 'freedom; and 'democracy' is an incitement to destructive conflict, best foregone in the interest of promoting real human rights.

The international law on human rights provides a useful, relatively precise, and common frame for the human rights dialogue between the West and the East. It helps prevent; 'human rights' from becoming a mere catchphrase for whatever actions the West finds contrary to its preferences or too alien to comprehend. But the interpretation, and elaboration of the international law on human rights is unavoidably political. Yet it is only through the thickets of compromise, contradiction, and ambiguity that further progress on human rights can be made. Those in the West concerned about human rights in the East and Southeast Asia, therefore, must be asked a simple question: do you ultimately want to do good, or merely posture to make yourselves feel good.³⁸

The government of the Peoples' Republic of China released a White Paper, *'Human Rights in China.'*³⁹ It represents the most official statement made on human rights by the government on human rights issues. According to that Paper, China pays attention to the issue of the right to development. China believes that as history develops, the concept and connotation of human rights also develops constantly. It echoes the argument by Third World countries that to peoples of developing countries, the most urgent rights are still the right to subsistence and the right to economic, social and cultural development. Therefore, attention should first be given to the right to development.

The above assertions are in obvious conflict with the premise that underlies the Universal Declaration, that all rights are equal-that is, political and civil rights on hand and economic, social, and cultural rights on the other. And as Vojin Dimitrijevic (Belgrade), one of the participants at the colloquy, observed, "I think this should be noted and it should be noted that even civil and political rights are a necessary basis for economic development."⁴⁰ The following are some excerpts from the paper:⁴¹ The following are some excerpts from the White Paper:

Over a long period in the United Nations activities in the human rights field, China has firmly opposed to any country making the issue of human rights to sell its own values, ideology, political standards and modes of development, and to any country interfering in the international affairs of other countries on the pretext of human rights, the internal affairs of other countries in particular, and so hurting the

sovereignty and dignity of many developing countries. Together with other developing countries, China has waged a resolute struggle against all such acts of interference, and upheld justice by speaking out from a sense of fairness. China has always maintained that human rights are essentially matters within domestic jurisdiction of a country.

Respect for each country's sovereignty and non-interference in internal affairs are inversely recognised principles of international law, which are applicable to all fields of international relations, and of course applicable to the field of human rights as well.⁴² Using the human rights issue for the political purpose of imposing the ideology of one country on another is no longer a question of human rights, but a manifestation of power politics in the form of interference in the internal affairs of other countries. Such abnormal practice in international human rights activities must be eliminated.

China is in favour of strengthening international cooperation of human rights in the realm of human rights on the basis of mutual understanding and seeking a common ground while maintaining differences. However no country in its real effort to realise and protect human rights can take a route that is divorced from its history and economic, political and cultural realities. It is neither proper nor feasible for any country to judge other countries by the yardstick of its own mode or to impose its own mode on others. Therefore, the purpose of international protection of human rights and related activities should be to promote normal cooperation in the international field of human rights and international harmony, mutual understanding and mutual respect. Consideration should be given to the differing views on human rights held by countries with different political, economic and social systems, as well as different historical, religious and cultural backgrounds. International human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and promotion of understanding.

China has always held that to effect international protection of human rights, the international community should interfere with and stop acts that endanger world peace and security, such as gross human rights violations caused by colonialism, racism, foreign aggression and occupation, as well as apartheid, racial discrimination, genocide, slave trade and serious violations of human rights by international terrorist organisations.

Interference in other countries' internal affairs and pushing power politics on the pretext of human rights are obstructing the realisation of human rights and fundamental freedoms.

The position of Asian states on the issue of human rights is also reflected in the Bangkok Governmental Declaration which was the culmination of a preparatory regional meeting held prior to the Second World Conference on Human Rights, (Vienna, June, 1993).⁴³ In that

Declaration, the participating states emphasised “the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of states, and the non-use of human rights as an instrument of political pressure.” Despite their affirmation of the universality of human rights and the fact that no violations could be justified paragraph 7, these states in, Paragraph 8, went on to assert that human “rights must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and historical, cultural and religious backgrounds.”

It is interesting to note the provisions of the Bangkok NGO Declaration on Human Rights, also an outcome of a preparatory meeting, held by Asia-Pacific Human Rights non-governmental organisations. The Bangkok NGO Declaration provided as follows in paragraph 1:

Universality. We learn from different cultures in a pluralistic perspective.. Universal human rights are rooted in many cultures. We affirm the basis of universality of human rights, which afford protection to all of humanity. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women’s rights must not be tolerated. *As rights are of universal concern and are universal in value, the advocacy of human cannot be considered to be an encroachment upon national sovereignty.*⁴⁴

If people from one region can have different approaches to the issue of human rights such as above then it goes to prove what human rights activists have echoed. In most cases than not, the argument advanced by governments against international human rights is just a façade to escape censure from the international community. The defense of cultural relativism to universal human rights is advanced by the ‘elite’ who, if anything are removed from the culture they are so eager to rely on. Surely if universal rights were inappropriate in their cultures, it would be the outcry of every person in those particular societies. Further, it proves what has been said that it is normally the ‘oppressed who do not speak against human rights’ because they stand to benefit from them. As someone has pointed out:⁴⁵

It is easy to believe that there is a distinct approach to human rights because some leaders speak as if they represent the whole continent when they make pronouncements on human rights. This view is reinforced because they claim that there are based on perspectives which emerge from the Asian culture or religion or Asian realities.

...

Perceptions of human rights are reflective of social and class positions in society. What conveys an apparent picture of a uniform Asian perspective on human rights is it is the perspective that of a particular group, that of the ruling elites, which gets international attention. What unite these elites is their notion of governance and the expediency of their rule. For the most part, the political systems they represent are no open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and occasional repression. It is their views which are given wide publicity domestically and internationally.

We noted in the foregoing passages that virtually all states are party to the United Nations and that none of them has made any reservation with regard to the human rights provisions of the UN Charter. On the face of it human rights do really seem to be universal. It is an undeniable fact that there is great human rights abuse all over the world. Where does the real solution lie? How long are our leaders going to turn a blind eye to egregious violations of the rights of the majority of people; the real people who really need the rights which the leaders are using as a tool of power politics?

The values proclaimed in international human rights instruments are doubtless good; they are able to give quality to human dignity if faithfully implemented. Further, the standards proclaimed are minimum standards with states being room for cultural variations. Is the fact that human rights have their origin in the West so fundamental as to justify denial of such rights to some people in dire need of them, in the name of culture?

Endnotes

¹ David P. Forythe, **Internationalisation of Human Rights** (Massachusetts and Toronto: Lexington Books, 1991), p.13.

² Jennifer Schirmer, in **Human Rights Quarterly**, Vol. 3, No 1 (Feb., 1991), P. 147.

- ³ Jack Donnelly in Frank Newman et David Weissbrodt, *op. Cit.*, P.679.
- ⁴ As quoted in Diana Ayton-Shenker, **The Challenge of Human Rights and Cultural Diversity**, United Nations Background Note: Published by the United Nations Department of Public Information, (1995), p.2.
- ⁵ Diana Ayton-Shenker, *op. Cit.*, P. 3.
- ⁶ Jack Donnelly in Frank Newman and David Weissbrodt, **International Human Rights: Law, Policy and Process**, 2nd edn., (Cincinnati, Ohio: Anderson Publishing Co.,1997), p.679.
- ⁷ *Ibid*, p. 679.
- ⁸ Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in Abdullahi Ahmed An-Na'im and Francis M. Deng, editors, **Human Rights in Africa: Cross-Cultural Perspectives** (Washington D C: The Brookings Institution, 1990), p.342.
- ⁹ The article referred to in the main text provide for the following right: article 3: everyone has the right to life, liberty and security of person; article 4: no one shall be held in slavery or servitude; article 5 no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; article 6: everyone has the right to recognition as a person before the law; article 7:all are equal before the law and are entitled without any discrimination to equal protection of the law; article 8: everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law; article 9: no one shall be subjected to arbitrary arrest, detention or exile; article 10: everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him; and lastly, article 11 stipulates that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the necessary guarantees for his defence.
- ¹⁰ Jack Donnelly in Frank Newman and David Weissbrodt, *op cit.*, p.680.
- ¹¹ *Ibid*.
- ¹² Jack Donnelly and Rhoda E. Howard, editors, **International Handbook of Human Rights** (New York: Greenwood Press, 1987), pp.19-20
- ¹³ *Ibid*.
- ¹⁴ As stated in Diana Ayton-Shenker, *op cit.*, p. 3
- ¹⁵ *Ibid*.
- ¹⁶ *Ibid*, pp. 3-4.
- ¹⁷ *Ibid*, .4.
- ¹⁸ *Ibid*.
- ¹⁹ **Vienna Declaration** (June, 1993) in paragraph 8.
- ²⁰ *Ibid*, pp.4-5.
- ²¹ For instance, the Universal Declaration of Human Rights provides in article 27 that "everyone has the right freely to participate in the cultural life of the community..."; article 15 of the International Covenant on Economic, Social and Cultural Rights provides that the "States Parties shall recognise the right of everyone to take part in cultural life"; and article 5 (e) (vi) provides for the right to equal participation in cultural activities.
- ²² As quoted from Henry J. Steiner and Philip Alston, **International Human Rights in Context: Laws, Politics, Morals** (Oxford: Clarendon Press, 1996), p.220.
- ²³ Diana Ayton-Shenker, *op cit.*, p. 5.
- ²⁴ **Human Rights Journal**, vol. 12, *op cit*.
- ²⁵ Rhoda E. Howard, 'Group Versus Individual Identity' in Abdullahi Ahmed An-na'im and Francis M. Deng, *op cit.*, p.167.
- ²⁶ *Ibid*, p.168.
- ²⁷ *Op cit.*, pp.5-6.
- ²⁸ In Abdullahi Ahmed An- Na'im, in Abdullahi Ahmed An-Na'im and Francis M. Deng, *op cit.*, p.331.
- ²⁹ *Ibid*, p.332.
- ³⁰ *Ibid*, pp.366-367.
- ³¹ 'Human Rights in an Evolving World Culture' in Abdullahi Ahmed An-na'im, *ibid*, pp. 368-369.
- ³² In Henry J. Steiner and Philip Alston, *op cit.*, p.226.
- ³³ *Ibid*.
- ³⁴ *Ibid*, p.227.
- ³⁵ *Ibid*, p.228.

³⁶ *Ibid*, pp. 228-229.

³⁷ *Ibid*, pp. 229-230.

³⁸ *Ibid*, p. 231.

³⁹ In Henry J. Steiner and Philip Alston, *ibid*, p. 233.

⁴⁰ **Human Rights Law Journal** vol. 12, *op cit.*, p. 2.

⁴¹ In Henry J. Steiner and Philip Alston, *op cit.*, pp. 233-234.

⁴² Article 3 (7) of the Charter of United Nations stipulates nothing contained in the Charter shall authorize the United Nations to intervene in matters essentially within the jurisdiction of any state.

⁴³ *Ibid*, p. 235.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, pp. 236-237.

CHAPTER FIVE

WOMEN'S RIGHTS AND CULTURAL/TRADITIONAL PRACTICES AND VALUES: THE CASE FOR ZAMBIA.

“The concept of human rights, like all vibrant visions, is not static or the property of any one group; rather, its meaning expands as people reconceive of their needs and hopes in relation to it ... The specific experiences of women must be added to traditional approaches to human rights in order to transform the concept and practice of human rights in our culture so that it takes better account of women's rights

Charlotte, ‘Women's Rights as Human Rights’. ¹

“CEDAW was important in bringing women in the” rights talk” arena.... Once your government has sighed, it's a social contract that they are making with the women in the country... [I]t gives you that tool, that leverage to say ok, this is the normative context within which women's status has to be dealt with – and it's a human rights document, so automatically you are in the basket of human rights

Clarke, 10/22/93

CHAPTER FIVE

WOMEN'S RIGHTS AND CULTURAL/TRADITIONAL PRACTICES AND VALUES: THE CASE FOR ZAMBIA

A.) INTRODUCTION.

The present chapter will discuss how women in Zambia are affected by prevalent cultural practices and values in the enjoyment of their rights. In this regard, the discussion will centre on the Convention on the Elimination of All Forms Discrimination against Women (hereinafter referred to as CEDAW), as an instrument proclaiming universal human rights standards to which national standards are expected to approximate.

This study is not necessarily one on women as a gender. But rather, it should be seen as a representative study of how culture affects the enjoyment of human rights generally. The choice to focus on this category of the human family was made compelling because of the innumerable atrocities inflicted on girls and women every day, in virtually every country. Most of these atrocities are perpetrated in the name of culture. And coupled with this, is the fact that the very attempt to fight for equality between men and women is resisted and denounced 'as being subversive to the natural order of society and incompatible with religious values'² by most people, especially men.

Women's rights are violated in both the private and public spheres. Consequently, most often than not, women do not enjoy the same rights as men in these spheres of human existence. Such violations of women's rights may be sanctioned by society, made into law or simply tolerated. Either way, under democracy and dictatorship, in times of war and times of peace, women's human rights are violated daily and often systematically.³

Most women are relegated to the private sphere and this is where they suffer the most extensive abuse of their human rights. As someone said, “perhaps the most obvious expressions of structural inequality between the sexes is the universal pattern of male [violence] against women particularly in the context of intimate, familial roles of lovers, spouses, fathers and brothers. This is a pattern which is unhindered by class, education, creed, culture or race.”⁴ And as per Arati Rao,

No social group has suffered greater violations of its human rights in the name of culture than women. Regardless of the particular forms that it takes in different societies, the concept of culture in the modern state circumscribes women’s lives in deeply symbolic as well as immediately real ways. Historically, women have been regarded as the repositories, guardians, and transmitters of culture; women represent the reproduction of the community. Women are usually the primary caregivers in the family and therefore the earliest inculcators of culture to the child. Through their clothing and demeanor, women and girls become visible and vulnerable embodiments of cultural symbols and codes.⁵

The rationale given most often for the denial of human rights to this half of the world’s population is the preservation of family and culture. But preservation of family and culture, it has been argued, need not and should not be pursued at the expense of the human rights of any particular group. The sad state of affairs though, is that culture has always been, and still is, being evoked in defence of even the most egregious violations of the rights of women, for instance, female genital mutilation (or female circumcision as it is sometimes called). The primary identification of women with the family and home, in a problematic separation of ‘public’ and ‘private’ spheres of existence, contributes to her secondary status in the very realm where her future is debated and even decided.⁶

And as per Hilary Charlesworth ⁷, in the primary subjects of international law – nation-states, and increasing, international organisations – the invisibility of women is striking. Power structures within governments are overwhelmingly masculine: very few states have women in significant positions of power, and even those states that do, the numbers are extremely small. With regard to women in the public sphere, one scholar noted:

For women 'public' arena consists of firstly: the community, i.e. religious, ethnic, and traditional authority structures that set, interpret and perpetrate value systems and cultural norms; institutions of learning; the work place and the street. Then women encounter the state and its organs, especially the justice and health system. All these arenas are sites of male oppressions and control which oblige them to depend on their men folk for guidance and protection and paradoxically conspires to keep women and children in their place i.e. subordinate and dependent upon men.⁸

Not surprisingly, this division of society into private and public sectors has come under attack by many scholars. According to one publication, "the false dualisation of society into the private i.e. female/domestic and the public i.e. male/social has facilitated the entrenchment and resilience of gender discrimination worldwide⁹. Furthermore the publication observed that, "as the human rights and human development implications of the linkages between the private and public spheres become clearer however, the premise for dichotomy – patriarchy, and therefore the subordinate of women – is losing credibility. There is a new consciousness which has climaxed in the international slogan, 'women's rights are human rights.'

And Julie Mertus in an article, '*State Discriminatory Family Law and Customary Law*,' writes:

The mythical haven of the nuclear family plays an important role in many societies; this unit, characterised by a legally married adult man and woman accompanied by children, floats in a separate, 'private' sphere informed by religious, culture, and tradition, free from the governmental interference. Under the cloak of the separate sphere ideology, states maintain that they are incapable of dealing with domestic violence, child brides, and other inequalities in marriage. The private life of the family must be respected, states argue, and government must stay out. Yet, "far from being an enclave, the family is vulnerable to the state, and the laws and social policies that impinge on it and intrudes upon the notion of separate spheres." The state, however, only intrudes upon family life to the extent that such interventions serve larger political and social goals.¹⁰

In concluding Julie article she notes that women organizing to combat problems of inequality, discrimination, abuses, etc encounter a dilemma, for, "torn between political expediency and justice, states will never choose justice until they are pressured into believing that justice is politically expedient."¹¹

It is plausible then to argue that the attitude that states have taken with regard to the private/public dichotomy has had a significant influence on the traditional approach to the issue of human rights. Sentiments have been expressed to the effect that traditional international human rights formulations are based on a 'normative' male models, and applied to women as an afterthought. "The delineations of human rights, it would seem, deals with the state agents acting in behalf (or against) a polity largely defined by men."¹²

And as per Tukiya Kankasa-Mabula:¹³

One problem is that women's rights have not been viewed by the world community as human rights. One need only look at the reservations registered against the Women's Convention to realise that there is no international shame in the subordination of and discrimination against women. Discrimination of women is simply rationalised as culture, religion, or ethnicity. The whole general attitude and marginalisation of women's rights even in the United Nations system testifies to this reality. While in the 'main stream' it is viewed as almost barbaric to violate human rights, there does not seem to be the same view when the violation of human rights of women is concerned. There has been very little outcry from the international community in respect to the widespread abuse of women's human rights around the world. Men have not yet reached the stage where they feel ashamed of the way they treat women.

The violations of human rights of women in the public sphere of their lives is deeply rooted in the private sphere of their lives. The public sphere reflects, replicates, and reinforces the social hierarchy in the private sphere. According to the World Bank:

A variety of mechanisms from oral traditions to formal educational and legal systems, define standards of acceptable behaviour for men and women. These standards are learned from an early age in the family and reinforced by peer pressure, community, institutions, and the mass media. In many societies children learn that males are dominant and that [violence] is an acceptable means of resolving conflict. Women, as mothers and mothers-in-law, unwittingly perpetrate [violence] by socialising girls to accept male dominance by acquiescing throughout life to male demands.

Mothers teach their daughters to accept the roles that society assigns them, and they punish 'deviant' behaviour to ensure their sexual and social acceptance.¹⁴

As a result of the foregoing discussion, the writer found it compelling to focus on the rights of women in the private sphere. The writer argues that it is only after the inequalities and tolerance of such inequalities in society are eliminated from the private sphere that we can begin to see significant results in the on going quest for the enjoyment of human rights by all, on the basis of equality. As one aptly observed:

What is crucial to the total eradication of [violence] against women is the commitment of government to take responsibility for the necessary social change and development that must take root at community level to alter the public's tolerance and therefore acquiescence in [violence] against women.¹⁵

Consequently the present chapter will not discuss the human rights position of women in their public life. In this regard, the writer will not consider, for instance, issues like changing and retention of nationality; employment; health care and economic and social life. Although education is normally included in the public category, it will be considered here, for as will become evident, the government has now recognised the importance of investing in the education of girls and women. Further the government has acknowledged that traditional practices and values present a major constraint to the realization of equality in educational opportunities between boys and girls, which traditions can best be examined in the context of the private sphere. This applies to reproductive rights and related issues as well, which will also be discussed in this chapter. In this regard, the writer will focus on cultural/traditional practices and values that impede on the advancement of girls and women in these areas.

B.) THE CASE FOR ZAMBIA.

The CEDAW-like all other multilateral human rights treaties-is premised on the precept of nondiscrimination. The States Parties to CEDAW recognise the fact that the Universal Declaration of Human Rights affirms the principle of inadmissibility of discrimination and proclaims that all human beings are born equal in dignity; that every one is entitled to all

rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.¹⁶

This means that, according to international human rights law no one, not even women, should be denied their human rights. Yet reality show a different picture; women's freedom, dignity and equality are persistently compromised by law, and by custom in ways that men's are not. The essence of human rights as Marsha A. Freeman notes, is respect for human dignity and human capacity to make responsible choices, regardless of gender or geography.¹⁷ With regard to capacity to make choices, it suffices to mention that in many countries and cultures, adult women still are not seen as people with full capacity to make responsible decisions. They remain legal minors, unable to own property, obtain credit on their own, or make legally effective decisions affecting their children, such as consent to medical procedures.¹⁸

According to the *Women's Watch*,¹⁹ in an article entitled: '*Women, Children and Human Rights*,' the CEDAW "identifies a group of rights that, if fully realised, would universally redefine how human beings relate to each other. If discrimination against women were truly and entirely eliminated, relationships between women and men would no longer be defined by stereotypical thinking and unequal power relationships.

B.1) WOMEN AND MARRIAGE.

In Zambia we have a dual legal system, consisting of customary law and the general law based on English law. However this dual legal system exists only in relation to personal law, and then only in matters regarding marriage, rights in land, succession and inheritance.²⁰ In this regard customary law operates side by side with the general received law for indigenous Zambians. A Zambian can thus choose to marry under the Marriage Act²¹ or customary law. In the case of one marrying under customary law, the law applicable will be customary law whilst in matters of public law, all Zambians are governed by the general law.

Under customary law women are considered as perpetual minors in several respects. With regard to marriage, a woman must obtain the consent of her relatives to contract a valid customary marriage, regardless of her age. Most traditional practices relating to how women are given in marriage mirror their lack of consent. For instance, in Tongaland there is no concept of proposing a girl (though some people have maintained that the practice is now obsolete); a man intending to marry would send four to five capable and strong men to grab the woman he has decided to make his bride. The woman is not expected to refuse; she cannot find solace in her family because she later sees it as a source of wealth, that is, in terms of how much wealthier the family will be with regard to the cows paid as a result.

The requirement for the payment of bride-price (or *lobola*, as it is known in local languages) to validate a customary marriage also underlies women's positions as minors. The very fact that the bride-price has to be paid to the girls' parents or guardians means that they must give consent to the marriage; they will obviously not accept bride-price for a marriage they do not approve of. Under customary law then, women are discriminated against in denying them the right and chance to marry men of their choice. With regard to consent when entering into marriage, the CEDAW provides that "men and women shall have, on the basis of equality, the same right to enter into marriage; the same right to freely to choose a spouse and enter into marriage with their free and full consent".²²

The practice of paying bride-price also undermines the status of women in relation to divorce. In most tribes, bride-price must be repaid to the husband by the woman's relatives upon the dissolution of the marriage. This means that not only is a woman required to seek the consent of her parents or guardians before marriage but, also that, consent must be sought even when she wants to have the marriage dissolved. This clearly shows that a customary marriage is a contract between the spouses' relatives as well as the spouses themselves. It is possible that the parents may refuse to pay back the *lobola* for whatever reason and, in some cases, they may be too poor to afford it. The women's relatives in such a situation continue to regard as still subsisting such a marriage, to the detriment of the woman

In a nutshell, divorce under customary law can be effectively obtained only with the consent of the woman's parents or guardians. This discriminates against women in that it denies them the right to terminate a marriage on the basis of exercise of a free will. In this regard, article 16 (c) of CEDAW provides that "women and men shall have, on the basis of equality, the same right and responsibilities during marriage and at its dissolution." And article 23 of the ICCPR, 1966, stipulates that: "states parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its at dissolution."

A marriage contracted under customary law is potentially polygamous. This means that a husband can marry more than one wife with or without the consent of the other wife or wives, if he chooses to. Polygamous marriages further undermine the status of women in marriages. There is usually little or no regard for women in such marriages. Women are seen as a some form of property and love is normally absent from such unions. Discussing a similar practice in Iran, Akran Mirhosseini, writes:

Men, who may be polygamous, are permitted to have up to four wives and unlimited number of concubines. A married woman must be at all times willing to meet her husband's sexual needs, and if she refuses, she loses the rights to shelter, food and clothing.²³

Also, perhaps because of polygamy, the wife has no right of action against a woman who commits adultery with her husband, while damages are available to the husband against a man who commits adultery with his wife.²⁴ This therefore results in inequality between married men and women in their obligation with regard to each other's consortium. This is against the spirit of article 16 which aims at eliminating inequality in the institution of marriage. For instance, article 16 (c) [already referred to above], provides for the enjoyment of the same rights and responsibility during marriage, on the basis of equality.

The practice of polygamy and the way in which society accepts the promiscuity of men, places women in a vulnerable position to diseases like AIDS and, thus, denies them the enjoyment of good health, an internationally recognised condition which is linked to the enjoyment of other human rights.²⁵ Further more, it denies them the very basis on which

The rationale for this practice is that the sister to the deceased has to safeguard and perpetuate the wealth left by her sister.³⁰

B.2) WOMEN AND HEALTH.

We now turn to consider women and their health. As earlier noted in one of the foregoing paragraphs, the focus of the present discussion is not on the public sphere of women's lives. With regard to women and their health, it is not centered on, for instance, issues provided for in article 12 of CEDAW, which imposes a duty, on states parties to take "appropriate measures to eliminate discrimination against women in the field of health care service, including those related to family planning." Rather, the focus is on patterns of behaviour in the private sphere that affect women's health and related rights.

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.³¹ Women have the right to the enjoyment of the highest attainable standards of physical and mental health. The enjoyment of this right is vital to their life and well-being and, their ability to participate in all areas of public and private life. Good health is essential to leading a productive and fulfilling life and, the right of all women to control aspects of their health, in particular their own fertility, is basic to their empowerment.³² However, the right to control, especially the reproductive aspect of their lives, eludes most women. Discriminatory social practices, negative attitudes towards women and girls and the limited power over that many girls and women have over their sexual and reproductive lives, are some of the factors contributing to that state of affairs. As Lori L. Heise noted:

Many women limit their use of contraceptives out of fear of male reprisals. Men in many cultures reject birth control because they think it signifies a woman's intention to be unfaithful (based on the logic that protection against pregnancy allows a woman to be promiscuous). And where fathering children is a sign of virility, a woman's request to use birth control may be interpreted as an affront to his masculinity.³³

And according to Mere N. Kisekka:

Women have internalised the ethic of nobility in suffering such that pain and discomfort emanating from their reproductive and sexual roles are accepted as the very essence of womanhood...social stigma and hence the culture of silence (are) attached to sexual and reproductive problems, the geneses of which are invariably perceived to be women.³⁴

Reproductive health as been defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health, therefore, implies that people are able to have a satisfying and safe sex life; and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

Bearing in mind the definition of reproductive health, reproductive rights embrace certain human rights that are already recognised in national laws, international documents and other consensus documents. And according to one publication, "women's reproductive rights have finally been recognised as part of other human rights that are already guaranteed in several international treaties. These rights include: the rights to life, liberty, and security; and that right to be free from gender discrimination; the rights to health, reproductive health, and family planning; the rights to modify customary practices that discriminate against women; the rights not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment; the rights to enjoy scientific progress and consent to experiment."³⁵

"These rights rest on the recognition of the basic right of all that couples and individuals should decide freely and responsibly the number, spacing and timing of their children and to have information and means to do so, and the right to attain the highest standard of sexual reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents."³⁶

And according to Rebecca J. Cook:

Of the human rights to which women are entitled, the right to whose observance is frequently the precondition to the enjoyment of others is the right to reproductive self-determination. This transcends the right to reproductive health and to reproductive health care and the right to sexual non-discrimination. It concerns the fundamental principle of respect for "the inherent dignity and ...the equal and inalienable rights of members of the human family," which the Universal Declaration observes to be the foundation of freedom, justice, and peace in the world.³⁷

Thus human rights of women include their right to have control over and, decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. And if equal relations between men and women in matters of sexuality and reproduction, including full respect for the integrity of the person is to be achieved, then mutual respect, consent and shared responsibility for sex behaviour and its consequences should form the basis of such relationships.

B.3) VIOLENCE. AGAINST WOMEN

An issue that is closely related to the health, and reproductive health and rights of women, is that of violence against women. Under this head of 'Violence against Women,' the writer will discuss domestic violence, female genital mutilation and preferential treatment for boys (or violence due preference for males).

Women in Zambia, like most others all over the world, are victims of innumerable kinds of violence. The Declaration on the Elimination of All Violence Against Women (DEVAW)³⁸ is an affirmation that "violence against women constitute a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of these rights and freedoms."³⁹ According to article of the DEVAW, the term 'violence against women' means "any acts of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or private life."

And article 2 provides that violence against women shall be understood to encompass, but not limited to, the following:

- a.) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence to exploitation;
- b.) Physical, sexually and psychological violence occurring within the general community, including rape, sexual harassment, and intimidation at work, in education institutions and elsewhere, trafficking in women and forced prostitution;
- c.) Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.

The Women's Convention does not explicitly make mention of violence against women. However, since its entry into force in 1981, violence against women in both the private and public sphere has emerged as one of the most pressing issues to be addressed by the international community. Moreover, owing to the efforts of activists, the United Nations adopted the DEVAW (already referred to above), in 1993.

Violence against women throughout the life cycle derives essentially from cultural patterns, in particular, the harmful effect of certain traditional customary practices and all acts of extremism linked to race, sex, language or religion that perpetrate the lower status accorded to women in the family, work place, the community and society.⁴⁰ And not surprisingly, violence against women can impede their ability to protect themselves from HIV and other sexually transmitted diseases (STDs). Violence can increase a women's risk through non consensual sex or by limiting her willingness or ability to get her partner to use a form of protection during sexual intercourse.

Domestic violence against women and children all over the world occur with such alarming frequency. Despite this state of affairs, however, domestic violence was not recognised as a human rights violation partly because it occurs in the privacy of the home and family relations. Further, it is a problem that has been largely invisible due to the fact that many

women victims are reluctant to speak because of shame, or fear of further violence or because they believe it is a normal and acceptable part of married life.

This state of affairs can largely be attributed, more than to anything else, to cultural patterns of behaviour in our Zambian society. Most times than not, premarital teachings emphasise the fact that it is a noble virtue of a women not to scream or let the neighbours or relatives know that they have been battered by their husbands. And also it is a common belief that if a man beats a woman, it means that he loves her.

Further still, in most cases women are beaten over very flimsy reasons and in others, men feel they have to assert their masculinity by battering their spouses. Most states do not have laws dealing with domestic violence as a specific offence. Perhaps one could argue that this can be attributed to the common cultural values that exist in all societies with respect to the inferior position that women have been given throughout human history. *Obviously such a background had a profound effect on the men who deliberated on traditional international human rights issues.*

With regard to Zambia, while some people have argued that the current Penal Code adequately provide against domestic violence, others have said that there is need to enact a specific law dealing with the problem. Alternatively others have submitted that women in *this regard can be protected within the framework of the existing law; what is needed is just to stiffen the penalty if battering or assault is perpetrated against women.*

In a nutshell it suffices to say that domestic violence from time immemorial has been taken as a normal way of things, not only in Zambia but also over the world. For instance, in Brazil, until 1991, for example, wife killings were considered to be noncriminal "honor killings"; just in one year, nearly 800 husbands killed their wives.⁴¹

Another case of violence is that which is due to preference for male children to be sons. This has negative consequences for girl-children including higher rates of mortality, nutritional deprivation, little access to education or health care, and child marriages. This

practice of giving preference to sons is prevalent in varying degrees, in many societies in the world. The main reasons for preferring boys are cultural and economic. In Zambia, like in most other societies, the family name is carried on by male children; and hence this preference. Again among some tribes, or in most households, male members of the family eat the best part of the food while the women share the left over.

One result of preference for male children is that girl-children are pushed in to early marriages. This practice has very profound effects on girl-children; it deprives them of a chance for self-realisation and self-advancement in life. This practice also has a profound effect on their health. When girls get married early, say between the ages of 11-13 years old, and start having children, the results can be fatal. Giving birth at that age can permanently injure the mother's health; and the maternal mortality rate for girls aged 11-13 is 3 times greater than of women 20-24 years old.⁴² And according to the 1986 Report on the United Nations Working Group, son preference when accompanied by neglect and discrimination towards girls "leads to serious health consequences which account for between 500,000 and 1 million deaths among female children.

Lastly under this head of 'Violence against Women' the writer will discuss the practice of female genital mutilation (also known as female circumcision). United Nations Agencies have successfully put female genital mutilation (FGM) on women's health and human rights agenda as a health hazard and a form of violence. Although FGM is not practiced in Zambia (though some people talked to on the subject seemed to believe that female circumcision is still practiced, to a very lesser extent, among some tribes) the writer found it compelling to discuss it because it represents an extreme instance of how women suffer human rights violations in the name of culture. It is an extreme effort common to societies and the world to suppress women's sexuality, ensure their subjugation, and control their reproductive function⁴³. FGM brings to the surface the urgency of the problem that violations of women's rights all over the world present and the need to remedy this state of affairs. Further FGM illustrates how people can stubbornly cling to their traditional practices no matter how repulsive and repugnant this may seem to the outsiders. As one wrote, "the practice of FGM is deeply engrained in some local and national traditions of

feminity. This makes it a very complex for human activists, as many of the “victims” do not see themselves as such.⁴⁴

FGM is a collective name given to several different traditional practices that involve the cutting of female genitals. Presently FGM is reportedly practiced in at least twenty-six African countries, among few groups in Asia, and (increasingly) among immigrant populations in North and South America, Australia, and Europe.⁴⁵ The age at which circumcision is performed varies from a few days old, as in Ethiopia, to seven years old in Egypt and adolescence in West Africa.

Often this practice is performed by old women of the village or traditional birth attendants. In those cases anesthetics, sterilised instruments and disinfectants are seldom used, and the practice presents high health hazards.⁴⁶ The victims of FGM – women and girls – experience pain, trauma, and (frequently) severe physical problems, such as bleeding, or even death⁴⁷. Long-term physical complications are numerous; and there appear to be substantial psychological effects on the women’s self images and sexual lives. In concluding her article, Female Genital Mutilation, Nahid Tuobia writes: “If women are to be considered as equal and responsible members of society, no aspect of their physical, psychological, or sexual integrity can be compromised”⁴⁸

According to the 1991 United Nations Report, among the reasons presented for maintaining the practice are religion, custom, decreasing women’s sexual desires, hygiene, aesthetics, facility of sexual relations and fertility. Many women believe that as good Muslims they have to undergo the operation, even if it is not mentioned in the Koran and has been condemned by prominent religious leaders. To be clean, proper and fit for marriage, circumcision is often a precondition.⁴⁹

The other reason often given is that this practice establishes a sense of belonging. For instance⁵⁰, in Sierra Leone and Liberia, girls 12 and 13 years old undergo an initiation rite by an older woman, who teaches them how to be good wives and co-wives, how to use herbal medicines and the secrets of the women’s society. The initiation also involves the

ritual of circumcision. After the initiation, the girls are accepted as full members of society and eligible for marriage. An uninitiated girl is not ready for marriage.

B.4) WOMEN AND PROPERTY OWNERSHIP.

Property grabbing is yet another traditional practice that has human rights implications for a Zambian woman. "Property grabbing is a situation where the deceased relatives or customary law claimants (other than the deceased children) seek to inherit the deceased's property and without, at the same time, accepting the collateral customary duties and responsibilities associated with the deceased's role as husband, father and breadwinner of household. Property grabbing also signifies the often disorderly and violent manner in which the deceased's relatives conduct themselves when taking away the deceased's property."⁵¹

Under section 4 (1) of the Intestate Succession Act,⁵² "a person dies intestate if at the time of his death he has not made a will disposing of his estate." Subsection (2) goes further to state that "a person who dies leaving a will disposing of part of his estate has died intestate in respect of the un disposed part of the estate. The Intestate Act identifies certain kinds of property that does not form part of the estate and, hence, not subject to distribution."⁵³ Thus if the deceased's relatives take away this property from the widow and her children, it amounts to property grabbing. Another scenario of property grabbing is where that part of the estate which is due to the widow and her children is diverted to undeserving relatives by the administrator.

Women and men alike are involved in this practice of property grabbing, which they perpetrate in the name of culture and tradition. There is a belief that is held by most people that all property in the marital home belong to the husband. Perhaps one of the reasons why this is so is because the man is usually the head of the house, and most often than not, when he marries, the woman moves into his house. As far as the relatives are concerned, she brought nothing in the house and thus she is not entitled to any property when the

husband dies. This is usually the case even if the wife works and actually contributed to the acquiring of the property. The communal oriented character of our families can also be said to contribute to the phenomenon of grabbing property. There is normally this notion that a marriage not necessarily between the two married individuals; when a woman gets married, she is 'married' to her husband as well as his entire family. And in most such cases, the husband's relatives continue to have a profound influence on how he manages his familial affairs.

Thus the relatives of a recently deceased husband will descend on the widow and remove all property and possessions, regardless of how it was acquired, leaving her destitute. Shamelessly in most cases they do not take responsibility over the children. And in some cases relatives from rural areas even go to an extent of grabbing electrical appliances!

Yet an individual's right to property is among the fundamental human rights bestowed on a human being. To his end, the Universal Declaration of Human Rights in article 17 (1) provides that "everyone has a right to own property alone as well as in association with others." And clause (2) of the same article provides that "no one shall be arbitrarily deprived of his property." Thus the grabbing of property, which is not subject to distribution under the Intestate Succession Act, from those rightfully entitled to it, becomes an arbitral deprivation of property and therefore, a violation of human rights.

B.5) WOMEN AND EDUCATION.

The final issue that we will consider in this chapter is women in the area of education. According to one publication,

"Zambian women are more likely than men to be poor and poorly educated. The annual income of female-headed households is less than half of those headed by males. Women tend to be involved in low-income economic activities, mainly small-scale market trading and agriculture. They have little or no access to credit or financing. 50 percent of females are illiterate compared to 35 percent of males. The proportion of women in positions of authority that involve decision-making remains minimal. Even in primary school teaching, a traditionally female

profession, only 314 of the 3,549 primary schools are headed by women which is less than 10 percent.⁵⁴

The girl child of today, as someone noted, is the woman of tomorrow.

The skills and energy of the girl child are vital for full attainment of the goals of equality, development and peace. For the girl-child to develop her full potential she needs to be nurtured in an enabling environment, where her spiritual, intellectual and material needs for survival, protection and development are met and her equal rights safeguarded. If women are to be equal partners with men, in every aspect of life and development, now is the time to recognise the human dignity and worth of the girl child and to ensure the full enjoyment of her human rights and fundamental freedoms.⁵⁵

Yet occurrences in real life indicate that girls begin to experience discrimination and violence at the earliest stages of life which unabated continue throughout their lives. Girls, as compared to boys often have less access to education, among other things.

Major international documents like the Universal Declaration of Human Rights, (UDHR) the International Covenant on Economic, Social and Cultural Rights, (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination, (ICERD); the Convention on the Rights of the Child, (CRC); and the Convention Against Discrimination in Education, (CDE) help to safeguard women/girls' rights to learn. In particular, the UDHR, article 26 (2); ICESCR, article 13 (1); CRC, article 29 (1) (b) and CDE article 5 (1) (a) provide that education shall be directed towards the full development of the human being and an increasing respect for human rights. This necessarily entails that education, both formal and informal, is key to the achievement of the enjoyment of human rights for both women and men on the basis of equality.

However, even after the passage of 50 year since the UNHR stated that everyone has the rights to education, access to education continue to elude most girls and women. Discrimination in girls' access to education persists in many areas owing to customary attitudes, early marriages and pregnancies, inadequate and gender-biased teaching and educational materials, sexual harassment and lack of adequate physical and otherwise

accessible schooling facilities.⁵⁶ The culturally accepted image of Zambian girl-child is of a passive, submissive person who remains in the background, the first to serve, and the last to speak.

The Zambian girl-child is socialised to look after others, especially through the care of children and service to adults; the boy-child is socialised to look after himself, largely in the company of his age mates. Much of the young girls' life is spent in the vicinity of the home, much of the boys' is spent roaming about. This leads to a quiet, caring, somewhat submissive disposition in girls, and to an adventurous, aggressive, attention-seeking disposition in boys. The major burden of household chores and responsibilities falls on the girl. These activities take most time and are more tiring than those entrusted to the boy. They reinforce the girl's image of herself as one who is supposed to serve males and adults. The socialisation process transmits values and attitudes that cast women and girls in subordinate roles, defining them primarily as child-bearers and child-rearers.

The view is widely held in Zambia that a woman is not an independent human being, but is one who must by nature depend on a man and serve a man. Her role is a subservient one – to meet the physical, psychological, economic and sexual needs of a man, to be obedient to him and to show him unquestioning loyalty, to bear and rear his children and to arrange for his comfort. This view is shared by men and women alike. In relation to the girl-child it leads to the attitude that essentially a girl is a wife-in-waiting. Hence her most important task during childhood is to learn what is needed to be a good wife and good mother.⁵⁷

What has just been stated above best describes how a woman in the Zambian society is generally viewed and it best describes the position to which women are relegated to in all those aspects of life, which have been considered under the various heads above.

Coming to the present discussion the result of the above cultural attitudes is that a girl is generally relegated to the kitchen. The kitchen is essentially where her place is; she must stay at home to look after her siblings and help with the household chores. In cases when she receives her education, this does not free her from household chores before and after she gets back from school. In most families, priority would rather be given to the boy-child than to the girl-child. And most often than not, this done at the expense of the girl-child. For instance most families would decide to give a girl in marriage to generate income to send the boy-child to school.

This also brings in the issue of early or child marriages where girls are, for the reason just states above, or after they fail their examination, pushed in marriages. In these cases the age of a man is immaterial; as long as he is able to pay the bride-price. Someone interviewed on the subject said that girls are usually married off to men much older than them; they are subjected to these men's old-fashioned way of thinking. To men who have exhausted their thinking abilities and all they ever cling to is their ancient values to guide their lives. Early marriage deprives the girl-child of a lot of opportunities in life, it deprives her of her childhood, self-determination, self-realisation - it dashes her dreams.

With regard to marital age, the CEDAW provides in article 16 that: "the betrothal and marriage of a child shall have no legal effect. And all necessary action, including legislation shall be taken to specify a minimum age for marriage and make the registration of marriages in an official registry compulsory." One may argue that the Marriage Act regulates such matters. But this law is inadequate; it exclusively applies to statutory marriages and leaves unregulated, customary unions. And if anything, the Marriage Act does not prohibit child marriages but merely requires in section 17, either party to an intended marriage who is under the age of 21 years, to have the written consent of the parents or guardians, as the case may be.

Early marriages are also a health hazard for the girl-child as was seen above when discussing preference for male children under the head of 'Violence against Women.' Again if there are limited finances to send children to school, most families would rather give priority to male children. Yet education is a human right to which both male and female children are equally entitled.

C.) CONCLUSION

This chapter is but a modest attempt of the topic under consideration. A detailed consideration of specific cultural/traditional practices and values of all the tribes in Zambia is, without doubt, an awesome task and, one that is beyond the scope of the present study. Accordingly, focus was on general cultural patterns of behaviour rather than on specific

cultural practices and values. And again the discussion was centered on the private sphere, the choice of which was made compelling by, as stated earlier, the innumerable atrocities that women suffer in this sphere.

What becomes apparently evident in all the instances considered above is the fact that women are generally seen as being inferior to men; a fact that is both men and women alike and have come to live with. Yet, according to international human rights law, all such practices amount to the denial of human rights to women. Most cultural practices deny women their inherent dignity, the very basis for the enjoyment of all human rights.

This is not to say that all aspects of the Zambian culture/tradition are retrogressive; obviously there certain positive aspects, those which are in harmony with international human rights standards, and these should be encouraged. The focus of international human rights law is on the elimination of those negative practices that deny women the enjoyment of rights on the basis of equality with men. Further the present chapter brings to lights the fact that the cultural relativistic approach to human rights if taken too far ultimately results in adverse denial to women of their rights. We thus see culture as a challenge to the implementation of international human rights. As one observed:

We have now entered an era in which the move towards the recognition of universal rights, in particular as appertaining to hitherto oppressed groups such as women and children, is encountering head-on an ideology which holds that traditional communities and cultures be allowed to retain their identities-and be encouraged to prosper.

If human rights are to be a reality for every one there is need for a progressive compromise between the two extremes-the universalistic and cultural relativistic positions. The issues raised in the debate must transcend the level of being matters that merely exercise our intellects, and focus on real and practical solutions that are going to contribute to better world where everyone is afforded their basic human rights.

Endnotes.

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- ² Ann Elizabeth Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience', in *ibid*, p. 183.
- ³ Julie Peters and Andrea Wolper, *op cit*, p.1.
- ⁴ A commonwealth Annotated Bibliography on Violence against Women, Women's and Youth Affairs Division, Commonwealth Secretariat, Marlborough House Pall Mall, London SW 1P 9SAX, July, 1995, p.8
- ⁵ Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse', in Julie Peters and Andrea Wolper, *op cit.*, p. 169.
- ⁶ *Ibid*.
- ⁷ Human Rights as Men's Rights, in Julie Peters and Andrea Wolper, *op cit.*, p.104.
- ⁸ Annotated Bibliography on Violence Against Women, *op cit.*, p. 18.
- ⁹ *Ibid*, p.8.
- ¹⁰ Julie Mertus, State Discriminatory Family Law and Customary Abuses, in Julie Peters et al, editors, *op cit.*, p.135.
- ¹¹ *Ibid*, p. 143.
- ¹² Julie Peters and Andrea Wolper, *op. cit*, p.2.
- ¹³ 'The Enforcement of Human Rights of Zambian Women: Sara Longwe v. International Hotel Revisited', Zambia Law Journal, vol.21-24, (Lusaka: University of Zambia Press, 1989-1992) pp.43-44.
- ¹⁴ Annotated Bibliography on Violence against Women, *op. cit*, p.18.
- ¹⁵ *Ibid*. p.9.
- ¹⁶ Preamble, of the Convention on the Elimination of All Forms of Discrimination against Women.
- ¹⁷ *Op cit.*, p. 149.
- ¹⁸ *Ibid*, p. 150.
- ¹⁹ Vol. 12 Nos. 1 & 2, December 1998.
- ²⁰ C N Himonga, K A Turner, C S Beyani, 'An Outline of the Legal Status of Women in Zambia', in Julie Stewart and Alice Armstrong, editors, The Legal Situation of Women in Southern Africa (Harare: University of Zimbabwe Publications, 1990) p.139.
- ²¹ Chapter 50 of the Laws of Zambia.
- ²² See article 16; and article 16 (1) (b) of the Universal Declaration of Human Rights states, "marriage shall be entered into only with the free and full consent of the intending spouses; see also article 10 of the International Covenant on Economic, Social, and Cultural Rights, 1966; and article 23 of the International on Civil and Political Rights, 1966.
- ²³ 'After the Revolution: Violations of Women's Human Rights in Iran' in *op cit*, p. 73.
- ²⁴ C N Himonga, K A Turner and C S Beyani, *op cit*, p. 150.
- ²⁵ Article 12 of the International Covenant on Economic, Social and Cultural Rights, for instance provides for such a right.
- ²⁶ *Ibid*.
- ²⁷ *Ibid*.
- ²⁸ Rights of Women: A Guide to the Most Important United Nations Treaties on Women, (New York: International Women's Tribune Centre, 1998) p. 38.
- ²⁹ As narrated by some people interviewed on the subject.
- ³⁰ *Ibid*.
- ³¹ Platform for Action and the Beijing Declaration, Fourth World Conference on Women, China 4-15 September (New York: Department of Public Information, U N, 1996.) p. 56.
- ³² *Ibid*, p. 57.
- ³³ Lori L. Heise, Freedom Close to Home: 'The Impact of Violence Against Women in Reproductive Health' in Julie Peters and Andrea Wolper, *op cit*, p. 242; also in Lori L. Heise with Jacqueline Pitangny and Adrienne Germain, 'Violence Against Women: The Hidden Burden', 255 World Bank Discussion Papers, *op cit*, p.26.
- ³⁴ In Ruth Dixon-Mueller and Judith Wasserheit, 'The Culture Of Silence – Reproductive Tract Infections Among in the Third World', International Women's Health coalition, in Gender and Development in

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³⁵ **Rights of Women: A Guide to the Most Important United Nations Treaties on Women's Human Rights**, *op cit*, p. 67.

³⁶ **Platform for Action and the Beijing Declaration**, *op cit*, pp.58-59.

³⁷ **International Human rights and Women's Reproductive Health**, in Julie Peters et al, *op cit*, p. 271.

³⁸ Adopted by the General Assembly of the United Nations, resolution 48/104 of 20th December, 1993.

³⁹ Para.5 of DEVAW.

⁴⁰ **Platform for Action and the Beijing Declaration**, *op cit*, p. 75.

⁴¹ Julie Mertus, '**State Discriminatory Family Law and Customary Abuses**' in Julie Peters and Andrea Wolper, *op cit*, p.140.

⁴² **United Nations Focus: 'Women'** U N Department of Public Information, DP1/1188, Feb. 1992. p. 2.

⁴³ Nahid Toubia, '**Female Genital Mutilation**' in Julie Peters and Andrea Wolper, *op cit*, p. 221.

⁴⁴ **Rights of Women: A Guide to the Most Important United Nations Treaties on Women's Human Rights**, *op cit*, p.64.

⁴⁵ *Ibid.*

⁴⁶ **United Nations Focus: 'Women'**, *op cit*, p.2.

⁴⁷ *Ibid.*

⁴⁸ *Ibid*, p. 235.

⁴⁹ **United Nations Focus: 'Women'**, *op cit*, p. 2.

⁵⁰ *Ibid.*

⁵¹ Palan C. Musonda, '**Human Rights Violations: A Case Study of Women's Rights in Zambia**,' a paper presented in partial fulfillment of the examination requirement for the degree of bachelor of law of the University of Zambia, Nov., 1994, p.54.

⁵² Chapter 59 of the Laws of Zambia.

⁵³ Section 8 provides that " notwithstanding section 5 where the intestate in the case of a monogamous marriage is survived by a spouse or both, the spouse or child or both of them, as the case may be, shall be entitled equally and absolutely to the personal chattels of the intestate. Section 10 states that, notwithstanding section 5 where the intestate is survived by more than one widow or child from any of them, each widow or her child or both of them shall be entitled a) absolutely to the homestead property of the intestate; b) in equal shares to the common property of the intestate. Common property in relation to a polygamous means all personal chattels of the deceased which were used in common by him, his wives and children of every house hold to which the deceased was connected by his marriage, not being household property. Homestead, in relation to polygamous marriage means all personal chattels of the deceased and used by him, his wife and children of a particular household to which the deceased was connected by his marriage, not being common property.

⁵⁴ '**Girl Child Education in Zambia**' (Booklet), in a briefing kit on girls' education in Zambia entitled **Girl Child Education in Zambia**, compiled by the Ministry of Education of the Republic of Zambia in conjunction with UNICEF: May, 1998, p.2.

⁵⁵ **Platform for Action**, *op cit*, pp. 29-30.

⁵⁶ *Ibid*, p. 47.

⁵⁷ **Girl Child Education in Zambia**, (Booklet), p.3.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

Recognition of cultural diversity and respect for human rights sometimes entails a contradiction and require difficult choices. However, this potential for conflict should not be exaggerated. More often that not the tension between tradition and human rights can be creative, leading us certainly to reassess the validity and value of certain traditions, but also to avoid the absolutism and orthodoxy which sometimes characterises human rights discourse. Traditional practices can sometimes reveal more than one way to vindicate a right.

William Duncan¹

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS.

The first chapter traced the historical development of the current system of international human rights. Human rights have become broadly important in contemporary international relations. Today human rights occupy a senior place in the modern political and social agenda of the United Nations. Efforts to shape a system of collective security and collective peace keeping marked the aftermath of a world ravaged by two world wars.

The Universal Declaration of Human Rights, unanimously adopted by the UN General Assembly on December, 10 1948 represents a milestone in the history of mankind. It is a cornerstone on which the present system of the international human rights rests. Indeed, international standards in the field of human rights are manifold and proliferating rapidly.

The vision displayed by drafters of the UDHR was without parallel. Yet their hopes are gradually becoming a reality. Today, two covenants and some fifty international instruments covering all aspects of human endeavour have developed out of that original document and the specific legal obligations have been added to its primarily moral character. A universal culture of human rights is now blossoming and the human rights message is spreading worldwide.²

Without the Declaration we would lack any acceptable set of principles against which national policies and performances could now be weighed. Countries have committed themselves though, in varying degrees, to the practical attainment of the principles enshrined in the international human rights instruments pioneered by the UDHR. This can be attributed to the fact that there is no longer any significant disagreement at government levels over the existence of such legal rights; it is the content and extent of these, which is the subject of disagreement. Such disagreement manifests itself in the form of reservations.

Among all the human rights treaties, the CEDAW together with the Convention on the Rights of the Child have the highest number of ratifications and the highest number of reservations. Apparently governments find the basic principles politically irresistible, but they fear the fundamental change that would result from full, unreserved compliance.³

This is not surprising for women and children are the most vulnerable groups to human rights violations in the name of culture. And consequently, there is a heavier duty on states to transform cultural patterns of behaviour to afford these groups their human rights.

In chapter two and three, this study focused on the universality or relativist character of human rights. From the debate we can conclude that there are basically two positions that we can take on human rights: simply put, the universality position entails that "all members of the human family" share the same inalienable rights. This means that the international community has the right to judge, by reference to the international standards, the way states treat their own citizens and that states must reform their constitutions and laws where necessary to bring them into conformity with the international norms. Accordingly all human beings are entitled to the right set forth in international human rights instruments such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.

Cultural relativists on the other hand argue that members of one society may not legitimately condemn the practices of societies with different traditions. Further, relativists deny the existence of valid external critiques of culturally-based practices and claim that there can be no legitimate cross-cultural standards for evaluating the treatment of the rights issues.

Chapter four was a discussion of the status of women in the Zambian cultural context. It was evident from that chapter that most patterns of behavior that is sanctioned by society as 'normal' actually amount to a violation of women's rights. We saw how that girls and

women suffer the most extensive violations of their rights in the name of culture and how that this mostly happens in the private sphere of their lives.

Consequently, the impact that culture has on people and also the challenge that it poses to the international system of human rights cannot be ignored. The World Health Organisation (WHO), for instance has reiterated that traditional practices of societies “are closely linked with the living conditions of people and their beliefs and priorities.”⁴ And according to An-Naim, traditional values of any society are significant because, whilst “cultural legitimacy may not be the sole or even primary determinant of compliance with human rights standards, it is ...an extremely significant one.”⁵

As we noted in one of the preceding chapters, culture is a source of a great deal of self-determination, expression and a sense of belonging; it determines how we define and express ourselves. It is thus easy to see why relativists argue that there cannot be universal standards for judging human conduct. Therefore, if international human rights are to be more than a universal symbol then disputes over the universal or relative nature of human rights need urgent resolution. Urgent resolution because, the relativist approach to issue of human rights calls in question the legitimacy of the human rights theory which purports to establish universal principles for judging the conducts of all cultures. As stated in chapter two “taken to its extreme, this relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the decades”.⁶

It is now evident that the world community cannot sit back and let 50 years of effort dedicated to the building of an international system of human rights be wasted. We have reached a point in human history where the world over has come recognise the fundamental importance of human rights in maintaining global peace and security. At national level, “concern for human rights is intertwined with concern for states security, economic health and a sound environment,”⁷ which ultimately contributes to a better world.

International human rights law focuses on the elimination of negative aspects of traditions. In this we see the role of international human rights as seeking to protect and preserve traditional values consistent with the human rights of the individual, whilst prohibiting those that are inconsistent with human rights norms. States have no trouble with the cultural/traditional norms that are consistent with human rights; the problem is with those that come in sharp conflict with international set standards. Although states can make concessions in its application of certain rights, it has no legitimate justification for violating its citizens' human rights in the name of preserving culture. To better appreciate this fact, it is necessary to state some fundamental truths about culture *vis a vis* the concept of human rights.

One thing that can be said about culture is that it is not static. Culture, like an individual, is said to be adaptive. It evolves and embraces new ideas and is not "frozen in time somewhere in the darkness of the Middle Ages," as some may want to believe. Even though elements of culture have a strong hold on people's psychics, cultures can and do change. Individuals are actors who can influence their own fate, even if their range of choice is circumscribed by the prevailing social structure, culture or ideology.⁸

The adaptive nature of culture is even more evident in the present age than ever before. The world has and is still undergoing a revolution in almost every area of human endeavour. Those ancient cultural/traditional values and practices that once were a source of cohesion for societies most have since broken down. As was aptly stated by Donnelly, "while recognizing the legitimate claims of self-determination and cultural relativism, we must be alert to cynical manipulations of a lost, or even mythical past."⁹

One of the fundamental changes that have occurred is the evolution of the entire world into nation states with its consequent process of individuation. And as Donnelly stated, "the modern individual exists, and it is this modern individual who needs human rights".¹⁰ The corollary of this process is that, the social setting, that is to say, the communal arrangement in most African societies has broken down. For instance, the urbanisation process has overtaken the social set up which supported the traditional system of succession and

inheritance. Like one noted, "under present day customary practice, the relatives of a recently deceased husband will descend on the widow to remove all property leaving her destitute. The practice is dependent on traditionally unknown notions of private property. The private property to be talked about was a few personal effects. The widow was not left a destitute as is the case now."¹¹

A woman who is a victim of property grabbing can but find refuge in the state machinery; the latter is thus obligated to take measures to afford such women protection. The best way to do this in a modern state is to ensure enforceable rights against the perpetrator of such acts. Again the practice where a wife is 'inherited' by the deceased's relatives - and hence the role of such deceased husband taken over and the widow not left destitute - has become obsolete in the face of diseases like AIDS and the like. In the face all these developments it is a states responsibility to afford such a woman protection. To the extent that non-Western states have embraced the Western model of the state, "the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the West have become equally relevant in the other parts of the world."¹²

Another point is that culture is a source of a great deal of identity. The result of this is that, first, people do not want to give up certain practices, even very extreme ones like female genital mutilation (FGM), for fear of losing their culture and hence their identity. So those wanting to bring about change in such societies must take heed lest their efforts create a backlash in favour of the targeted traditional practices. It has been submitted that unguided or patronising interference from outsiders can create such a backlash. According to Tuobia, writing on FGM, said: "To understand why many women defend a practice that risks their health and damages their sexuality, we have to understand that even the most highly educated individuals become defensive when they feel their culture and personal identity are being attacked."¹³ It important in considering how to best eliminate negative cultural practices, while preserving tradition, to involve people concerned in eradicating it. Not all aspects of the Zambian culture are negative; there are some positive aspects that must be encouraged and from which other cultures may do well to learn.

Secondly, the underlying consequence of culture being a source of identity is that this works to deny most actors in such cultural and traditional practices a chance or opportunity to make choices; a moral right to make comparisons and to insist on universal standards of right and wrong. “The individual’s and place in society are engrained in him/her mind and body by a variety of tradition methods. The fact remains that the process of upbringing and initiation which leads to integration within the community can be difficult and painful.”¹⁴ Further such practices are imposed on the most vulnerable members of society. For instance, as Toubia wrote:

Female genital mutilation is performed mainly on children without their consent. The conflict of feelings in the child prior to her operation must be considerable. On one hand, there is the desire to please parents, and grandparents, and relatives by doing something that is highly valued and approved of. Before the event, there is the desire to be “normal”—that is, to be like other members of society, particularly the peer group. This feeling is juxtaposed to the girl’s expectation of pain, the stories of suffering, and the sheer terror of hearing the screaming of other children being circumcised. Finally there is the experience itself: being held down by force while part of the body is cut off.¹⁵

In an interview Dr. Chanda, a lecturer at the University of Zambia, said that culture should not override the obligations that a state has to ensure its citizens human rights contained in international human rights instruments. That there is no justification for a state in invoking culture as a defence against human rights violations. Whether such a state ratified the said instruments under pressure from the international community is immaterial; it has to bear the consequences of such ratification. Writing on the same issue, Katherine Brennan notes:

If they have ratified human rights instruments based on this theory of individual rights, these states have participated voluntarily in the UN process and have obligated themselves to protecting these rights. Countries that participate willingly in the UN process and ratify human rights treaties cannot claim to be exempt from standards to which they have voluntarily subjected themselves.¹⁶

While ratification of human rights instruments is a significant step, it is not an end in itself. States are obligated under international law to take further measures to afford their citizens

the rights contained in such documents. One way of doing this is by enacting international human rights into domestic law and repealing any existing laws which conflict with international human rights standards. It is a settled principle of international law that states are the primary implementers of the rights and obligations imposed by international conventions and treaties. Treaties will only have legal effect to the extent that they are implemented by domestic law since courts will only apply domestic (except may be with regard to those states with a monolist legal system). States are thus obligated to ensure an effective protection of these rights to their citizens with the corollary system of effective remedies. For as one noted:

Where remedies do exist on the international sphere, it is a cardinal principle that domestic remedies first be exhausted before one can have access to international remedies. Therefore, one first has to cross the domestic barrier. International remedies are only open for those whose claims cannot be vindicated at the national level. International norms, therefore, are largely reduced to the role setting standards and as aids in interpretation of domestic remedy mechanism and domestic law. Thus, in order for one to have an effective remedy, one must look to the domestic sphere.¹⁷

It is a sad state of affairs that the current legal system in Zambia does not adequately protect the rights of women; there is need for the government to take measures that will ensure that private actors are held responsible for violations of women's rights in the private sphere. One of the key issues with which activists and international have grappled with is how to hold states responsible for human abuses perpetrated not by the state itself but by private actors. One approach is that states responsibility for human rights violations should not be confined to violations that result from the action of the state and its officials or agents, but also include those that result from state's inaction.¹⁸ According to this *argument where states have, for instance, not taken measures to combat domestic violence, they should be held internationally accountable.*

In this regard the CEDAW [articles 1, 2 (e) and (f), and 5], together with other international human rights documents, bar violations by private actors. For instance, article 2 (e) states that States Parties undertake to take all appropriate to eliminate discrimination against women by any person, organisation or enterprise; in article 2 (f), to take all appropriate

measures, including legislation, to modify or abolish existing laws, religion, customs and practices which constitute discrimination against women. Article 5 obligates states to take measures to eliminate social and cultural practices that constitute discrimination or perpetrate stereotyped gender roles.

In the preceding chapters we saw how women are mostly relegated to the private sphere and how that the most extensive violations of their rights take place in this sphere. There is need therefore for the Zambian government to take measure to redress the situation. The amendment of the constitution is long overdue to provide for the justiciability of violations by private individuals, organisations and enterprises. As one noted in an article, 'Zambia's Protection of Rights Behind International Standards,' colonial laws still regulate human rights in Zambia and is need of urgent revision.¹⁹ The bill of rights only provides for civil and political rights and omits the protection of human rights in the private sphere; and also does not make economic, cultural and social justiciable..

The Constitution of Zambia in article 23 rather sanctions human rights violations by private entities. Subject to certain exceptions article 23 prohibits enactment of laws whose provisions discriminate in themselves or in their effect. However the following laws, *inter alia*, may be discriminatory: with respect to adoption, marriage, divorce, burial, devolution of property on death or other or other application of customary law.²⁰ The permission of discrimination in the above areas is problematic for the human rights of women, whose most instances of denial of their rights, as already noted elsewhere in this study, fall in the private sphere.

The case of *Sara Logwe v. Intercontinental Hotel*²¹ popularly applauded as the first women's human rights case to come before the courts of Zambia, clearly illustrates the doom of a legal system with no mechanism for the protection of human rights abuses occasioned in the private sphere. In that case the Hotel Intercontinental refused the petitioner entry to one of the bars, Luangwa Bar, on the grounds that she was unaccompanied female. On the other hand, male guests and visitors at the Hotel did not need female accompaniment in order to be admitted into the said Bar.

The petitioner brought the case under articles 11 and 23 of the constitution of Zambia and, in supported of her case, the petitioner also cited relevant international instruments. As someone observed, although favourably decided for the petitioner, the *Longwe case* raises many disquieting issues of relevance to the enforcement of the human rights of Zambian women but which issues were not resolved satisfactorily by the court.²²

The *Longwe case* demonstrates the need to transform the internationally proclaimed human rights norms contained in documents that Zambia has ratified, into domestic law. Although favourably decided, the case was unable to rely on the Zambian constitution anti-discrimination clause, although it was essentially a case of gender-specific discrimination. The judge in Sara Longwe had to follow a protracted line of argument in order to find that the Hotel was a public place. A major issue raised by the case was the justiciability of violations between private persons, organisations and enterprises. This is the most common type of violations of human rights of women.²³

One result of transforming international norms into domestic law is that this also calls for the repealing and enacting of appropriate legislation in those aspects of family and personal law that are susceptible to human rights violations. For instance, the present laws dealing with intestate succession and also the protection of domestic violence within the current penal laws is inadequate. With regard to the Intestate Act, the language used is gender insensitive. It is based on the assumption that men are the only ones who can own property; and, therefore, that women cannot own property and thus cannot bequeath property to their spouses or children; there is need to repeal this Act to make it catch up with the currently changing circumstances around where we are seeing an emergence of enterprising women, as the world slowly begins to afford them equal opportunities and their human rights. Notwithstanding the above, this piece of legislation can be commended as an attempt to ameliorate the abuses inherent in the traditional practices of property grabbing and also recognising the prevalence of polygamous marriages which forms part of the Zambian cultural setting.

In light of the foregoing, it is evident that Zambia needs to take appropriate measures to address the issues alluded to above, and also many others, which currently impede the

realisation of human rights for everyone. Although legal action is significant in the realization of human rights, by itself it cannot bring about this change. Information about and knowledge of human rights is also very cardinal. Human rights for all means introducing a totally different value-laden system to societies who have different values from time immemorial. Information is cardinal because the concept of human rights seeks to change those cultural values that are deeply rooted in the minds of people who practice them. Again, although these values may seem backward to outsiders, they are an integral part of the way of life of the people who practice them.

Societies over the world and to varying degrees adhere to cultural values and practices that relegate women to an inferior or subordinate position, and most of these values come into conflict with internationally recognised standards of what treatment should be properly accorded to women in any given society. Thus, information or education about human rights and what they are and what they actually seek to achieve is essential. It is a key player in integrating human rights values into citizens' everyday life, so that from then on everyone is capable of becoming informed defenders of these values. Like someone wrote:

Indeed, the entire human rights instruments and the complex machinery of implementation would be of little worth if men and women and the world were unaware of their existence. Knowledge of human rights and fundamental freedoms is accordingly an indispensable step to ensure progress in human rights. Information is perhaps the key element, which will make it possible to move from past achievements toward universal implementation of human rights instruments.²⁴

And according to Cook:

Rights are worth very little to [women] where there are no corresponding duties on the part of government, organisations, and individuals to respect those rights. Violations will go unrecognized and unremedied where there is no understanding of those or no legal services to advocate for those remedies.²⁵

However a human rights culture need not only be inculcated into the minds of citizens at every level of society, states officials too need to be conversant with human rights. The government has an obligation to disseminate information about human rights to its citizens

and also to facilitate such dissemination by private actors, notably Non Governmental Organisations (NGOs). This can be achieved in various ways.

Providing community-based education is one way of doing this. Far too many children in Zambia are not getting any opportunity to enroll in schools. Community schools are emerging as a major provider of education in Zambia. The Zambia Secretariat was established in 1997 to assist NGOs. Local authorities, churches and communities to develop community-based approaches to meet the learning needs of out of school children. Thus community-based schools can play a key role in inculcating a human rights culture in such children who attend community schools. The discipline of human rights can be one of the subjects in the curriculum of these schools. With regard to the latter, the government should also ensure that all educational institutions, whether private or public, redefine their curricula to include human rights.

In fact the governance recently stated in the Governance Document its intention to enhance the capacity of the Curriculum Development Centre (Ministry of Education), to review education materials that disadvantage the girl-child.²⁶ The government has recognised that stereotyping the girl-child in education materials disadvantages the girl-child. In any case the elimination of acts that stereotypes the girl is one of the obligations imposed on states; that is, to take measures to remove from all teaching materials stereotypes (article 10 of CEDAW). Further states parties are obligated to ensure an educational system that is directed towards the respect of human rights as recognised in international human documents: UDHR, article 26 (2); ICESCR, article 31 (1); CRC, article 29 (1) (b); and CDE 5 (1) (a). The CRC, for instance, provides:

The education of the child shall be directed to the development of the respect for human rights and fundamental freedoms, and for the principles enshrined in the charter of the United Nations.

Another way of increasing public awareness of human rights is through conducting campaigns which can be conducted via the media, that is to say, television, radio, newspapers. Community which are be established in Zambia should be encouraged; also

community newspapers and these can disseminate information about human rights in languages commonly spoken within these communities. Sketches and plays are also other means of achieving public awareness. There is also need for a continual expansion of national infrastructure for the protection and promotion of human rights. For instance, the Permanent Human Rights Commission, which was established in 1996 need to be extended to other parts of the country; and its effectiveness, must be enhanced

The significance that must be attached to general awareness of the aim of human rights is brought to bear when one considers the issue of enforcement of women's rights in Zambia, especially with regard to domestic violence. Police attitudes mirrors these attitudes prevalent in societies since these people are an integral part of societies. The attitude here being referred to is that which relegates women to a subordinate or inferior position. Such attitudes have a profound effect on the role of the police in executing the law; and also on officers of the judiciary. The government acknowledged this when it stated:

However it is important to note, that law enforcement systems and institutions are composed and managed by individuals and persons with personal backgrounds, upbringing, beliefs, personal views, which may influence the way they carry out their law enforcement tasks. It is an accepted fact that although law enforcement officers in Zambia carry out their duties in accordance with existing laws, policy, guidelines, regulations and instructions of their senior officers, there are some who fail to adhere to laid down rules and procedures during law enforcement.²⁷

The situation is further compounded by the fact that the police force is male dominated. Most of the high-ranking officials are males. Such a scenario is fatal to the enforcement of women's rights because the police officers are obviously going to be influenced by prevalent cultural attitudes in society when dealing with cases of human rights violations in relation to women.

Despite what has been said above, not every aspect about the Zambia human rights situation is all bleak; there are positive developments that have been taking root and are aimed at improving the human situation in our country. One of the things that can be pointed to in this regard is the establishment of the Permanent Human rights

Commission and the Victim Support. the former was mandated to investigate human rights violations; investigate any maladministration of justice; and propose measures to prevent human rights abuse²⁸. The latter was established to handle cases involving, for instance, domestic violence, child abuse and the like. the government also has established a Gender in Development Department Division at Cabinet Office and has recently adopted a National Gender Policy.

Further significant changes have also taken place with regard to the girl-child education, the government has acknowledged the fact that Zambia' culture and tradition had hindered female participation and advancement in various aspects of human life endeavours. The government notes that education is no exception to this trend; in this regard, a boy-child is favoured whilst a girl-child is groomed at an early age for marriage.²⁹ Zambia is taking steps to address this situation. In 1996, the Ministry of Education adopted the National Education Policy, 'Educating Our Future', which provides a framework for promoting gender equality. Through PAGE, the Programme for the Advancement of Girls' Education, the Ministry is making efforts to improve education for all children, especially girls. Through this Programme, the Zambian government is committed to making schools girl friendly. According to an introductory note in the briefing kit on Girls Education in Zambia.³⁰

The Republic of Zambia recognises the need to tackle the girl-child education issue within the larger context of providing quality education for all school-aged children, both boys and girls. The process involves identification of factors affecting all children and those affecting girls only. To this end, the government has embarked upon specific actions aimed at supporting successful strategies for increasing access, retention, and enhancing achievement especially in mathematics and science for girls.

The government has further embarked on the building and strengthening of partnerships among governments, NGOs, communities, parents and the donor community. Partnership building is imperative for the achievement of Education For All and to increase access and retention of girls in schools. While working on maximisation and efficiency in the use of national and local resources, the Government is working closely with all partners in education to facilitate increased flow of external resources for girls' education. Zambia encourages the coming

together of the public and private sectors and recognises the role of NGOs in accelerating female education.

Other positive actions that can be pointed to in the area of education is: affirmative action in terms of low cut off for girls at grade 7 and 9; girls are now accepted at technical secondary schools which before were only for boys; the school curriculum is now gender neutral.³¹ Again, 25 percent of government are reserved for female students and the 75 percent are granted on the basis of open competition.³²

The other thing that can be mentioned here is Zambia's participation at the international level. For instance, Zambia signed the Southern Africa Development Community (SADC) Gender and Development Declaration in 1997, which solidified the Beijing Platform for Action at the regional level. And further Zambia, together with 155 other nations, signed a commitment to support national development efforts through education at the 1996 World Conference on Education for All, held in Jomtien, Thailand. Within the framework of the 1989 Convention on the Rights of the Child, the Jomtien Conference pledged to promote the rights of every individual to education, a right that provides the basis for life long fulfillment. The Conference outlined the strategies to significantly increase education opportunities for those with no access to basic education and literacy.

The efforts being made by the civil society also deserves to be commended. The NGOs have done, are still doing, a lot in sensitising the general population about their human rights. Further most of the community schools that have been established in Zambia are supported by NGOs such as Zambia Open Community Schools (ZOCs), Reformed Church of Zambia, CARE International, Zambia Red Cross, World Vision International and a host of others. The Zambia Community Schools Secretariat was set up in 1997 with UNICEF assistance, to form an umbrella organisation for all community schools in Zambia. These community schools, as of 1998, catered for over 20,000 children of which the majority are girls. For most people, especially men, this whole idea about human rights of women is nonsensical. They argue that all this current talk on the issue of women's rights is unnecessary; for them there is nothing wrong with things as they are. For them there is nothing amiss with the inferior position given to women in society – a woman's place,

more than anywhere else, is essentially the kitchen. However, on a brighter note, the government has realised that no society or country can hope to succeed in any area of human endeavour if half the population of its human resources is excluded from participation in its affairs³³. Gender permeates all aspects of human development and, because of this, it must be addressed systematically and constantly. It imperative that both the state and civil society take up the reigns and begin forceful campaign.

In this regard the government recognised that women's rights are human rights and that women's worth' and dignity should be reinforced with various legal protection and enabling policies such as the reform of the legal system to outlaw discrimination in employment, education, family affairs, land rights, credit services and other entitlements. Further the government has recognised the need to take affirmative action or positive discrimination. The government has also gone further to acknowledge that:

The issue of gender in relation to democracy if of utmost importance. The recognition and acceptance of the importance of each individual's role (be it a woman, man, girl or boy) in the development of society and enhancement of good governance is unquestionable. It is however, a pity that Zambia's past did not emphasise or pronounce this key element to development, and neither was it ingrained as an essential element of democracy.³⁴

We noted earlier how that information or knowledge is crucial to the realization of human rights for all. In this regard the greatest investment that a developing country like Zambia can make is in the education of a girl-child. Indeed the government has recognised that girls' education is a major determinant and indicator of Zambia' development. And to the president and chief economist of the World Bank, "an extensive body of research has convinced me that once all the benefits are recognised, investment in the education of girls may well be the highest return on investment available in the developing world."³⁵ And according to another publication:

Such discrimination (i.e. in education) is not only harmful to women but to society at large. Many studies prove the economic and social benefits of women's education, showing clearly that it: it enhances women's (and hence the country's) productivity; increases women's employment opportunities and other earning potential; reduces infant and child mortality; increases life expectancy for the whole

family; reduces fertility rates; reduces maternal mortality rates; improves health for the whole family and enables women to efficiently manage natural resources.

With education, women feel less isolated and their self-confidence improves, enabling them to contribute more fully to their families and society. Educating girls increases the likelihood that, when they grow up and marry, their children, particularly their daughters will enroll and stay in school. It thus a critical factor in breaking the various multigenerational cycle of poor health, low education opportunities, low income, low self-esteem, high fertility rates and poor overall child health.³⁶

Notwithstanding government' increased impetus in addressing the imbalance between men and women recently, a great deal is needed to be done in the eradication of negative cultural attitudes that work against women. in the enjoyment of their rights. For as the government has acknowledged, changing deep-rooted attitudes is a very difficult task that needs persuasive dissuasion.³⁷ The government has also acknowledged the significant disparities that exist in the provision of equal opportunities to woman as due to the existence of some traditional practices which have acted as obstacles to the advancement of women; and also laws that discriminate against women. Non-domestication of international covenants such as CEDAW to which Zambia is a party, has also been identified as an obstacle to the advancement of human rights.³⁸

It is evident from the discussion in this and the previous chapter, that culture cannot be exclusively used as a basis for protecting human rights. A lot of abuses have occurred under the guise of preserving culture. There is a certainly a core to the human rights concept that runs constant across diverse cultures, though other human rights can be subject to certain variation within a particular cultural context without fundamentally affecting the dignity and worth of the human person.

And according to Ayton Shenker³⁹, universal human rights do not impose one cultural standard, but rather on legal standard of minimum protection necessary for human dignity. As a legal standard adopted through the United Nations, universal human rights represent the hard won consensus of the international community, not the cultural imperialism of any particular religion or set of traditions.

It is argued also that human rights are modern achievement new to all cultures, the only difference being that in some cultures this assimilation of human rights into their societies, occurred earlier than in others. It is true to state that universal human rights at present reflect the dynamic, coordinated efforts of the international community to achieve and advance a common standard and international system on law to protect human dignity. Most countries (mostly from the Third World) who never participated in the drafting of the first fundamental human rights are now doing so by acceding to the already existing human rights instruments, and taking part in drawing up new ones in response to ever the changing needs of the world community.

Finally as we undertake every effort to achieve human rights for everyone, we must strive to make them a reality for all. We must never lose sight of the simple fact that every human being is born of a mother, that this is a common condition of all men and that we cannot ignore this primary universality of man which underlies the oneness of the human race, and implies the corollary that there is a nature proper to man and identical in all men.⁴⁰

There is nothing in the concept of dignity that is based on a particular cultural context. It is a principal constant found in all humanity. To this effect, the UDHR recognises the "inherent dignity and the equal and inalienable rights of all members of the human family" as the foundation of freedom, justice, and peace in the world.⁴¹

Further, there are some human violations that are an affront to human dignity no matter which cultural context one examines them from. For instance, a group's culture is not likely to be destroyed if say, torture, slavery, genocide, cruel punishments are eliminated, political prisoners are released, political dissent is permitted, and programs to combat hunger and illiteracy instituted⁴². The cultural contextual in which one is born should not be used as the basis of denying them choices they would have otherwise made, had they been aware of the existence of other alternatives. No one should be denied his or her right to self-determination on the basis of culture; we do not choose to be born where we are. If

one were to be asked to choose where they would like to be born, no doubt, they would pick a society which respects human dignity and affords its members their basic human rights.

On a concluding note:

When it comes to human rights the features of men and women who have been tortured – and all of us have known such people – or starving or oppressed children, provide a measure of that necessity, of the urgency of their demands. That is the genuine face of human rights. It is by contemplating human rights victims, those men, women and children, that non-governmental organisations bring us back, so to speak, from the realm of ideas to our harsh and, sometimes cruel world, as it really is. What we really need in the matter of human rights, is not so much speeches and colloquies as action and dedication, not so much philosophers, jurists, or ministers, as militants.⁴³

Endnotes.

- ¹ 'Children's Rights, Cultural Diversity and Private International Law', in Gillian Douglas and Leslie Sebba, editors, **Children's Rights and Traditions Values** (Aldershot: Ashgate Publishing Co., 1998.) p. 31.
- ² Peters Davies, editor., **Human Rights** (New York: London: Routledge, 1988.) p. ix.
- ³ 'Women, Children, and Human Rights', **The Women's watch**, Vol. 12. Nos.1 & 2, p. 1.
- ⁴ Gillian Douglas & Leslie Sebba, (editors), *op cit.*, p. 16.
- ⁵ *Ibid*, pp. 16-17.
- ⁶ See Chapter three, Diana Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity', **United Nations Background Note**: Published by the United Nations Department of Public Information (1995), p. 1.
- ⁷ David P. Forsythe, Internationalisation of Human Rights, (Lexington: 1991.) p.191.
- ⁸ Jack Donnelly & Rhonda Howard, editors, International Hand Book of Human Rights, (New York. West Port. Connecticut: Greenwood Press, 1987) p.19.
- ⁹ Chapter three, p.40, ante.
- ¹⁰ Chapter two, p.28, ante.
- ¹¹ Workshop Report on, 'One Year After Beijing: Bringing Beijing to Northern Province', Oct., 29th –30th 1996, p.6.
- ¹² *Ibid*, p. 27.
- ¹³ Nahid Toubia, 'Female Genital Mutilation', in Julie Peters and Andrea, editors, *op cit.*, p.232.
- ¹⁴ **United Nations Focus**: 'Women' department of Public Information, DPI/118, Feb. 1992, p.3.
- ¹⁵ Nahid Toubia, *op cit.*, p.233.
- ¹⁶ 'The Influence of Cultural Relativism on International Human Rights: Female Circumcision as a Case Study' in Frank Newman & David Weissbrodt, **International Human Rights: Law, Policy, and Process**, 2nd edition, (Cincinnati, Ohio: Anderson Publishing, 19-), p. 678.
- ¹⁷ 'The Enforcement of Human Rights of Zambian Women: Sara Longwe v. Intercontinental Hotel Revisited', **Zambia Law Journal**: Vol. 21-24, 1989-92, p. 44.
- ¹⁸ 'Rights of Women: A guide to the Important United Nations Treaties on Women's Human Rights' (New York: International Women's Tribune Centre, 1998) p.163.

- ¹⁹ **The Monitor**, December. 10, 1998, p. 2.
- ²⁰ Article 23 (4) (c) and (d) of the Constitution of Zambia, cap 1 of the laws of Zambia.
- ²¹ 1992/HP/765.
- ²² Tukiya Kankansa-Mabula, *The Enforcement of Human of Women in Zambia*, *op cit*, p.32.
- ²³ *Ibid*, p. 46.
- ²⁴ Price Sadruddin Agkhan, '*Forty Years Gone and So Much Left To Do*', in Peter Davies, editor, *op cit.*, p. 155.
- ²⁵ Rebecca J. Cook, '*Human Rights and Women's Reproductive Health*', in Julie Peters and Andrea, editors, *op cit.*, p.270.
- ²⁶ **Governance: National Capacity Building Programme for Good Governance in Zambia**, April 12, 1999, p. 112.
- ²⁷ *Ibid*, p.14.
- ²⁸ *Ibid*, p. 11.
- ²⁹ *Ibid*, p.25.
- ³⁰ A Briefing Kit on Girls Education in Zambia prepared by the Ministry of Education in conjunction with UNICEF, May 1998.
- ³¹ Governance Document, *op cit*, p.26.
- ³² **Girl Child Education in Zambia** (Booklet) p. 3.
- ³³ Governance Document, *op cit*, 13.
- ³⁴ *Ibid*, p 25.
- ³⁵ **Girl Child Education in Zambia** (Booklet), p.4.
- ³⁶ Rights of Women: A Guide to the Most Important United Nations Treaties on Women's Rights, *op cit*, pp.30-31.
- ³⁷ Governance Document, p. 25.
- ³⁸ *Ibid*, 87.
- ³⁹ See Chapter three, Diana Ayton-Shenker, *op cit.*, p.4.
- ⁴⁰ As quoted from Michelo Hansugule, '*Fifty Years of Human Rights: The Case of Southern Africa*', **The Monitor Special**, Dec 10, 1998, p.1.
- ⁴¹ Paragraph of the Preamble.
- ⁴² J. Nickel, '*Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human*' Rights, in Frank Newman & David Weissbrodt, **International Human Rights: Law, Policy, and Process** (Cincinnati: Anderson Publishing Co., 1990), pp. 355-356.
- ⁴³ Robert Badinter (Paris), **Human Rights Law Journal**, 1991: vol. 12, No. 6-7 p.2.

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 18. **Workshop Report** on '*One Year After Beijing: Bringing Beijing to Northern Province*' Oct. 29th-30th, 1996.