

# Cultural Diversity in International Law

BY HILARY CHARLESWORTH

How does international human rights law respond to the phenomenon of cultural diversity? Can we respect culture and protect rights at the same time? The international community is made up of myriad cultures and traditions and so the issue is a very live one.

In international human rights law, the issue of cultural diversity has two distinct aspects. The first is the issue of cultural diversity at the international level: can international human rights law claim to be truly universal? When the Universal Declaration of Human Rights (UDHR) was adopted fifty years ago, the UN had only 56 member states. It was by and large a Western club, with very few Asian or African members. During the drafting of the UDHR, there was no discussion at all about whether the values enshrined in the Declaration were culturally specific. The description 'universal' was seen as uncontroversial, a statement of fact, and the drafters of the UDHR, a committee chaired by Eleanor Roosevelt, mainly drew inspiration from Western sources and concepts in their work.

Today, the UN has 185 member states, the majority of which are non-Western. These states are extremely wary of any signs of what they perceive to be neo-colonialism in the form of the imposition of Western culture and values. The area of human rights has understandably been a major battlefield in this context because of its assumption that there are rights that attach to people everywhere simply by virtue of their humanity.

Asian and African states, in particular, have argued that the UN human rights system focuses on rights that are built on a very Western, limited notion. For example, they have been critical of the priority given to the individual's needs and rights, arguing that the rights of the community are often more important. They have also been critical of the empha-

sis placed by Western countries on civil and political rights – such as the right to freedom of speech and assembly – at the expense of economic and social rights – such as the right to food and the right to housing.

For example, in our region, Dr Mahathir of Malaysia has argued that the UDHR should be redrafted to take ‘Asian values’ into account. He has described the notion of human rights as a vehicle for the re-imposition of colonialism on developing countries. So too, the permanent secretary of the Ministry of Foreign Affairs in Singapore, Kishore Mahbubani, has linked the collapse of the West’s economic and social structures to the West’s decadence, which he in turn connected to an over-emphasis on human rights.<sup>1</sup>

The debate between the ‘universalists’ and the ‘cultural relativists’ is sometimes based on inaccurate understanding of each other’s position. Western understanding of human rights is not inevitably individualistic – indeed there is an important tradition of communitarianism in Western philosophy. At the same time, ‘Asian’ values are not completely communal by any means. An example of this is the priority given to the idea of entrepreneurship, which celebrates individualism, in many Asian societies.<sup>2</sup>

Professor Yash Ghai has pointed out that, in the Asian context, rejection of human rights principles typically comes from governments seeking to justify repressive practices rather than promoting social practices. Minorities and human rights organisations within Asian states generally see international human rights standards as important benchmarks to assess government practices.

Indeed, Dr Mahathir’s former deputy, Anwar Ibrahim, has said:

If we in Asia wish to speak credibly of Asian values, we too must be prepared to champion those ideals which are universal and belong to humanity as a whole. It is altogether shameful, if ingenious, to cite Asian values as an excuse for autocratic practices and denial of basic rights and civil liberties ... It is true that Asians place greater emphasis on order and social stability. But it is certainly wrong to regard society as a kind of false god upon whose altar the individual must constantly be sacrificed.

The issue of cultural diversity at an international level has involved much rhetoric and absorbed much diplomatic energy, but it is worth noting that, in practice, all 185 members of the UN are parties to at least one

human rights treaty. They were also able to finally agree at the Vienna Conference on Human Rights in 1993 that 'the universal nature of [international human rights law] is beyond question.' The Vienna Declaration stated that:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

It has been pointed out that both the universalists and cultural relativists have many assumptions in common – particularly about the value of 'human dignity'<sup>3</sup> – and useful attempts to formulate pluralist approaches to human rights have been made, particularly by anthropologists.<sup>4</sup>

This first debate over cultural diversity has essentially been one between different states. A second aspect of the debate over cultural diversity in human rights law takes place within national societies. This debate is over the rights of culturally distinct communities to retain their own traditions and culture: to what extent do ethnic or religious minorities within a particular state have the right to maintain their particularity?

I use the term 'culture' here to mean (in Clifford Geertz' words) 'an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions ... by means of which men communicate, perpetuate, and develop their knowledge about and attitudes towards life.'<sup>5</sup> Of course 'culture' is never internally homogenous. It is continually contested and negotiated.<sup>6</sup>

International human rights law provides some protection for minority groups. For example, article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

What does this right actually mean? The interpretation of article 27 by the Human Rights Committee, which monitors the implementation of the

ICCPR, has been relatively expansive. The Committee has adopted an 'objective' test to decide whether ethnic, religious or linguistic minorities exist, refusing to accept individual States' assessment of this issue. It has stated that 'the survival and continued development of the cultural, religious and social identity of minorities ... [enriches] the fabric of society as a whole.'

The Committee has decided that article 27 imposes a positive obligation of protection of minorities in order that the identity of a minority is preserved and that its members can enjoy and develop their culture and language.<sup>7</sup> It has also endorsed the notion of special treatment for minorities if it is aimed at correcting conditions that impair the enjoyment of the rights in article 27.

In 1992, the UN General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>8</sup> This document emphasises that States must take affirmative steps to ensure the rights of minorities to their particular identity. The Declaration requires States:

to take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where ... contrary to international standards.

From these standards, it can be argued that depriving a person of the cultural context that provides the environment in which autonomy and independence may develop is a violation of human dignity.<sup>9</sup>

Another relevant provision for the issue of cultural diversity within national societies is the right to self-determination. The centrality of this right to the international legal order is signified by the fact that it is set out in article 1 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

A third set of human rights norms that are relevant to cultural difference within states are those relating to equality and non-discrimination. The Convention on the Elimination of All Forms of Racial Discrimination of 1966 deals with this right in detail. The more general right to non-discrimination is set out in article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour ... or other status.

So, in summary, while the international community has been relatively wary of conceding that cultural differences on the international level can undermine the universality of human rights norms, it has shown considerable respect for cultural diversity *within* nation states.

Thus far I have used the terms 'culture' and 'cultural diversity' as if they were unproblematic, neutral terms. Of course, the definition of 'culture' is a highly political and contentious one – who defines 'culture', and who benefits from it?

A case study of women's rights in international law shows how problematic the category can be. Claims of women's rights are often countered by counter claims of religious and cultural rights. For example, we can see this in the striking number of reservations made to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on the basis of respect for religion. Another example is the response (made by the Catholic Church and Islam in particular) in some of the global conferences in the 1990s, particularly in Cairo in 1994 and in Beijing in 1995.

At the UN Conference on Population and Development (UNCPD), the Catholic and Islamic religious traditions strenuously opposed placing women's health, reproduction and sexuality within a human rights framework. Because the UN conferences work on a consensus principle, the coalition was able to delay agreement on a text until very late in the conference. The coalition resisted the definition of the notion of reproductive health to include sexual health, 'the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted disease.' This text was finally accepted, with strong reservations made by Catholic and Islamic states.<sup>10</sup>

But the Holy See and Islamic states managed to undermine this apparent advance at the next international summit, the Copenhagen Summit on Social Development. Unusually, and at the insistence of the Holy See and Islamic states, the Copenhagen Platform for Action refers to reservations made to the UNCPD documents, which gives them renewed status. A statement in a draft of the official Beijing conference document that reaffirmed commitments made about women in earlier summit documents, especially at UNCPD, was vigorously contested by the Holy See. The Holy See was also active in ensuring that parts of the official documents containing references to reproductive health, fertility control and sex education, all endorsed at the UNCPD, remained in square brackets during the negotiations for both Copenhagen and Beijing, indicating lack of consensus on their adoption.<sup>11</sup> In the end, however, the UNCPD wording was preserved.

A particular concern of Islamic states has been the issue of the universality of human rights. After much debate and controversy, the Vienna Second World Conference on Human Rights in 1993 affirmed that human rights were universal, indivisible, inter-dependent and inter-related, and that 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'<sup>12</sup> At the 1994 UNCPD, Islamic states were successful in watering down the Vienna language by inserting a rather contradictory clause stating that implementation of the document should both be in conformity with universally recognised human rights but also 'should be consistent with full respect for the various religions and ethical values and cultural backgrounds' of nations.<sup>13</sup> Islamic states also revived this debate in the context of women's rights at Beijing. Although the Vienna language was eventually included in the preamble to the Beijing Platform, on the table until the very last moments of the official Conference was a proposal to insert a footnote to the effect that different cultural and religious traditions were relevant in implementing the human rights of women. The footnote did not make its way into the final document, apparently as a trade-off for the exclusion of any reference to women's right to freedom of sexual orientation.<sup>14</sup>

There are signs of the success of Islamic lobbying at Beijing in the official documents. For example, the Beijing Platform for Action acknowledges women's right to inherit property, but because of resistance by some sub-Saharan and Islamic states, not the right to inherit in equal shares to

men. The signs of the failure of the religious lobbying are evident in the reservations made to the Platform, for example the Holy See and some Catholic and Islamic states rejected the idea of a woman's right to control her sexuality (para 97) and they also rejected the call to review punitive laws for women who had had illegal abortions (para 107 (k)).

The role of the Holy See and Islamic countries was not unremittingly negative at Beijing. Indeed, Professor Mary Ann Glendon, the leader of the Holy See's delegation, supported many aspects of the Beijing Platform for Action, for example recognising the economic value of women's work in the home. My point is rather that the Catholic and Islamic delegations were interested in limited notions of the rights of women that involved no rethinking of religious traditions.

The reservations made by Islamic states to the Convention on the Elimination of All Forms of Discrimination against Women are another manifestation of the tension between human rights and religious traditions. The Cairo Declaration on Human Rights in Islam states that women are equal to men in dignity, but not in rights. Unlike the Holy See, many Islamic states have become a party to the Women's Convention. However they have lodged formal statements of reservation to the treaty.<sup>15</sup> Typical of these reservations is that of Egypt. With respect to article 16 of the Women's Convention, which requires that states observe equality between men and women in all matters concerning marriage and family relations, Egypt's reservation states that this matter must be subject to Islamic *Shari'a* law.

Some states have made even more sweeping reservations. For example, the Maldives' reservation commits it to comply with the Convention's provisions 'except those which the Government may consider contradictory to the principles of the Islamic Shari'a upon which the laws and the traditions of the Maldives is founded.' Moreover, the reservation goes on to say 'the Republic of Maldives does not see itself bound by any provisions of the Convention which obliges it to change its Constitutions and laws in any manner'. While there is little question that this type of reservation is invalid under international law because it undermines the object and purpose of the treaty, there are no satisfactory mechanisms in international law to challenge reservations adequately.<sup>16</sup> A number of states have objected to the reservations,<sup>17</sup> but the objections have been rejected by the Islamic states as a form of religious intolerance.<sup>18</sup> Thus Islamic states are still considered parties to the Women's Convention although they have rejected the equality provisions that are at its heart. Many other countries have made reservations to the Women's Convention, but the Islamic res-

ervations, along with the Israeli, Indian and UK reservations, that protect the laws of religious communities, are the only ones based on religious grounds.

So, in the context of women's rights, major religious traditions have regarded human rights as a sort of Trojan Horse, with a belly full of subversive values. Why do women's rights pose so many problems for religions? Such traditions are an important part of the life of human society. They sustain both spiritual and temporal hierarchies. At the same time, they have contributed to and reinforced the historic relegation of women to the sphere of home, hearth and family, and women's traditional exclusion from the public sphere of the economy, political life and power. The idea of separate spheres based on gender is accompanied by a common image of womanhood presented in the texts of all major religions: it is integrally connected to motherhood, submission, sacrifice and duty – being a woman entails obedience, not only to God, but to fathers, husbands and other male family members. Indeed there are many passages in the Bible, the *Qur'an* and the sacred texts of Hinduism and Buddhism that explicitly present women as the property of men.<sup>19</sup>

In other words, the major religious traditions operate with asymmetric accounts of manhood and womanhood. This is rationalised not as inequality as such, but as based on a type of 'separate but equal' doctrine. Women may have similar moral and spiritual worth to men, but their life work is fundamentally different. This is why the Catholic Church has found the issue of women's ordination so difficult: priesthood is simply not within the province of womanhood. Similarly, in orthodox Judaism, women are disqualified from being rabbis and performing most public functions.<sup>20</sup> In Islam, a verse of the *Qur'an* declares that men have *qawama* [guardianship and authority] over women because of the physical advantage men have over women and because men spend their property in supporting women.<sup>21</sup> The *Shari'a* interpretation of this verse is that men as a group are guardians of and superior to women as a group and the men of a particular family are the guardians of and superior to the women of that family. An associated principle is that of *al-hijab*, or the wearing of the veil, symbolising the assignment of women to the private domestic sphere. Women also have much fewer rights than men in family and inheritance law.<sup>22</sup> Attempts by scholars to reinterpret religious texts to eradicate the asymmetry have had little apparent impact on actual religious practices. The problem with a 'separate but equal' approach, as we have learned from the experience of segregation in the United States and that of apartheid in South Africa, is that the promise of equality is illusory if



groups are running different races, or assigned to different spheres. There is no meaningful equality in denying women the status of being a priest, rabbi or mullah.

Given the fundamental inequality between women and men on which the major religious traditions operate, it is small wonder the international law of human rights which regards sex and gender as irrelevant to rights poses a great challenge to those traditions. The challenge has not been taken up in any meaningful way: unfortunately the approach seems to be to resist engagement and dialogue and to work hard to undermine many women's rights at the international level. In this way, the transformative possibilities of human rights law are being squandered.

The failure to come to grips with human rights law is also evident in local contexts. For example, in Australia many religious institutions lobbied successfully to gain exemption from the state and federal laws prohibiting sex discrimination. Thus the Sex Discrimination Act specifically excludes from its provisions sex discrimination in the ordination or appointment of priests and ministers or members of a religious order (sec 37 (a)) and 'any ... act or practice established for religious purposes, where the act or practice conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of followers of that religion.' (sec 37 (d)). If the Churches had lobbied to be exempted from race discrimination laws, it would have been regarded as quite unacceptable by their members and by the community generally. There is no principled reason why the religious exemption from sex discrimination laws is not similarly problematic.

Second, religious traditions must be prepared to interpret their sacred texts and traditions in ways that are consistent with the protection of human rights – developing a 'human rights hermeneutic'.<sup>23</sup> In some contexts, this has already proved possible – for example, at the Second Vatican Council the Catholic Church adopted a *Declaration on Human Freedom* which vindicated the right of people to freely choose their own conscientious religious beliefs, although the right had been denied for centuries by the Church. In the context of Islam, the Sudanese jurist, Abdullahi An-Na'im, has described a process of reinterpretation of the sources of Islamic tradition in a way that both preserves legitimacy and is consistent with human rights norms. He has argued that we need to understand that religious traditions reflect a historically conditioned interpretation of scripture, influenced by social, economic and political circumstances.<sup>24</sup> For example, with respect to the strictures on the role of women in the *Shari'a*, we need to note that equality between women and men at the

time of the development of the *Shari'a* in the Middle East would have been inconceivable. By analysing the *Shari'a* principle of *qawama*, the guardianship and authority of men over women, it can be seen to be based on assumptions that have little relevance today – that men are stronger than women and that men financially support women. The principle, An-Na'im has suggested, should not therefore retain its legitimacy. A similar analysis could apply to the scriptures of Christianity that are used to justify the exclusion of women from the priesthood.<sup>25</sup>

A human rights approach indicates that it is important to pay attention to the political uses of claims of religious culture. We need to ask whose culture is being invoked, what the status of the interpreter is, in whose name the argument is advanced, and who the primary beneficiaries are.<sup>26</sup> An-Na'im has observed that Islamic governments, when pressured to observe Islam, 'have tended to enunciate policies that have a differential impact upon the weaker elements of society [particularly women and minorities]'.<sup>27</sup> So too, Ann Mayer has noted the tendency in Islamic states to use Islam as an interchangeable rationale with 'the rule of law', 'public order and morality' and 'state policy' to suppress any activism by women.<sup>28</sup> A good example of this was a 1997 statement of the Muslim Governor of Kandahar, a province of Afghanistan, rejecting attempts by the Grameen Bank of Bangladesh to lend money to rural women to start their own businesses. He was quoted as saying that '[t]he motive of the bank was to lead Moslems away from Islam and to promote shamelessness among women.'<sup>29</sup>

A human rights approach also requires a close analysis of the invocation of religion by the Holy See in its international lobbying against certain women's rights. Whose interests are served by arguments based on religion and who comes out on top? At the international level religious traditions are used in a complex way to preserve the power of men. The appeal to the sanctity of religion is considerably reduced if it is the case that it is being used to bolster the existing distribution of power and privilege.<sup>30</sup>

## Notes

- 1 Mahbubani, K., "The Dangers of Decadence: What the West can Teach the Rest", *Foreign Affairs*, Vol. 72, 1993, p. 10.
- 2 Toope, S., "Cultural Diversity and Human Rights", *McGill Law Journal*, Vol. 42, 1997, pp. 182-3.

## Cultural Diversity in International Law

- 3 Cheah, P., "Posit(ion)ing Human Rights in the Current Global Conjecture", *Public Culture*, Vol. 9, 1997, p. 244.
- 4 See Messer, E., "Pluralist Approaches to Human Rights", *Journal of Anthropological Research*, Vol. 53, 1997, p. 293.
- 5 Geertz, C., *Interpretation of Culture*, 1973, p. 89.
- 6 Tully, J., *Strange Multiplicity*, 1995, p. 11.
- 7 Human Rights Committee, General Comment 23, 1994.
- 8 A/RES/47/135, 18 December 1992.
- 9 Anghie, A., "Human Rights and Cultural Identity: New Hope for Ethnic Peace?", *Harvard International Law Journal*, Vol. 33, 1992, p. 350.
- 10 See Charlesworth, H., "Women as Sherpas: Are Global Summits Useful for Women?", *Feminist Studies*, Vol. 22, 1996, pp. 542-3.
- 11 See Haslegrave, M. and Havard, J., "Women's Right to Health and The Beijing Platform for Action: The Retreat from Cairo?" *Health and Human Rights* Vol. 1, 1995, p. 461.
- 12 Vienna Declaration, para. 3.
- 13 *Ibid.*, Chapeau to Chapter II.
- 14 Otto, D., "Holding Up Half the Sky, But For Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women", *Australian Feminist Law Journal*, Vol. 6, 1996, pp. 25-6.
- 15 For the text of reservations see <http://www.un.org/womenwatch/daw/>. For a discussion of the issue of reservations in the context of the Women's Convention see Cook, R., "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, Vol. 30, 1990, pp. 673-8.
- 16 See generally Simma, B., "Reservations to Human Rights Treaties - Some Recent Developments" in Hafner, G., et al eds, *Liber Amicorum Professor Seidl-Hohenveldern - in honour of his 80th birthday*, 1998, p.659.
- 17 See Austria, Canada, Denmark, Finland, Portugal and Sweden. The objections can be found at <http://www.un.org/womenwatch/daw/>
- 18 Mayer, A., "Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle East Experience" in Wolper, A. & Peters, J. eds, *Women's Rights, Human Rights*, 1995, p. 178.
- 19 Howland, C., "The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter", *Columbia Journal of Transnational Law*, Vol. 35, 1997, p. 282.
- 20 Sahlev, C., "Women in Israel: Fighting Tradition" in Wolper, A., & Peters, J. eds, *Women's Rights, Human Rights*, 1995, pp. 91-2.
- 21 An-Na'im, A., in Wolper, A., & Peters, J. eds, *Women's Rights, Human Rights*, 1995, p. 37.
- 22 *Ibid.*, p. 34.
- 23 *Ibid.*, pp. 15-16.
- 24 *Ibid.*, pp. 46-7.
- 25 See Fiorenza, E., *In Memory of Her: A Feminist Theological Reconstruction of Christian Origins*, 1983; Countryman, L. W., "The good news about women and men" in

Cultural Diversity in International Law

Holloway, R. ed., *Who Needs Feminism? Men Respond to Sexism in the Church*, 1991, p. 11.

26 Rao, A., "The Politics of Gender and Culture in International Human Rights Discourse" in Wolper, A. & Peters, J. eds, *Women's Rights, Human Rights*, 1995, p. 174.

27 An-Na'im, A., *supra* note 21 p. 26.

28 Mayer, A., *supra* note 18, p. 182.

29 *The Bulletin*, 23 September 1997.

30 Mayer, A., *supra* note 18, p. 185.