

Article

**Toward a New Human Rights Paradigm:  
Integrating Hitherto Neglected Traditional  
Values into the Corpus of Human Rights and the  
Legitimacy Question**

Dr. Obiajulu Nnamuchi\*

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*The U.N. Human Rights Council recently passed a resolution on “traditional values of humankind” as a vehicle for “promoting human rights and fundamental freedoms.” It sounds innocuous, but its implications are ominous. Indeed, it is an immediate threat to the rights of many vulnerable groups – including women and lesbian, gay, bi-sexual and transgender (LGBT) people. And it flies in the face of the founding principles of universality and indivisibility enshrined in the Universal Declaration of Human Rights.*

- Graeme Reid

*We think that no state or group of states has the right to monopolize interpretation of human rights regulations. Attempts to advance one-dimensional interpretation under the guise of the versatile standard perilously tell on people’s attitude to the mere concept of human rights making it foreign for entire communities and population strata. On the other hand, human rights doctrine will only benefit if it absorbs elements of different cultures.*

–Russia, Ministry of Foreign Affairs

*[T]he protection and promotion of diversity and equality between nations and cultures were the prerequisites for genuine harmony in the relations between civilizations and within any society of our time. The world was interdependent but not homogenous. There was no country or civilization where freedoms, human rights and equality were not of major importance, but there were different perceptions of these issues.*

–Natalia Narochinskaya, President, Institute for Democracy and Cooperation (Paris Office)

### Abstract

*The vitriolic nature of the attack unleashed at the on-going debate at the United Nations Human Rights Council (UNHRC) on integrating theretofore neglected traditional values into the corpus of human rights hardly elicits surprise. The attack reflects quite strongly the age-long divide regarding the appropriate conceptualization of human rights – as universal or culture-specific. Deniers of universality have long maintained that because certain worldviews were not taken into account in formulating and framing foundational human rights instruments, to ascribe universality to norms resulting from such process is wrong on several fronts. Although this position raises a number of important concerns for which unraveling, exploration, and resolution are necessary for legitimizing the universality of human rights, they have largely been ignored, particularly at the international policy- and law-making fora. That is, until now. This latest development (extant UNHRC debate) raises a number of questions with significant implications for the future of global human rights protection. The most critical of these questions –and also the subject of this paper – centers on whether the integration of hitherto neglected traditional values would add legitimacy to the claim of universality of human rights.*

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## **Toward a New Human Rights Paradigm: Integrating Hitherto Neglected Traditional Values into the Corpus of Human Rights and the Legitimacy Question**

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Dr. Obiajulu Nnamuchi

### **I. Introduction and preliminary background**

The controversy currently embroiling the United Nations (UN) Human Rights Council (UNHRC or Council) has its origin in a document produced at the conclusion of the second UN-sponsored global conference on human rights in 1993.<sup>1</sup> The very first substantive provision of the “Vienna Declaration and Programme of Action” (Vienna Declaration) was a reaffirmation of the commitment of participating nations to promote universal respect for and observance of all human rights in accordance with the UN Charter and other human rights instruments.<sup>2</sup> Although in agreement that the “universal nature of these rights and freedoms is beyond question,” the countries went further to stipulate that “[i]n this framework, enhancement of international cooperation in the field of human rights

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\* LL.B. (Awka), LL.M. (Notre Dame), LL.M. (Toronto), M.A. (Louisville), LL.M. (Lund), S.J.D. (Loyola, Chicago), Assistant Professor of Law, University of Nigeria; President - and Chief Consultant, Centre for Health, Bioethics and Human Rights (CHBHR) Enugu, Nigeria. To my human rights brethren whose encouragement sustains the intellectual curiosity as well as AdaObi Nnamuchi, my able assistant, I remain eternally grateful. All errors and omissions remain my sole responsibility.

<sup>1</sup> World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24 at 20 (July 12, 1993). The first world conference on human rights, known simply as the International Conference on Human Rights, was held in Teheran, Iran, in 1968 as part of the activities to mark the twentieth anniversary of the Universal Declaration of Human Rights. The outcome of that conference was the adoption of the International Conference on Human Rights, April 22 – May 13, 1968, *Proclamation of Teheran*, U.N. Doc. A/CONF. 32/41 at 3 (1968).

<sup>2</sup> *Vienna Declaration and Programme of Action*, *id.* Part 1, ¶1.

is essential.”<sup>3</sup> This “international cooperation” was sought to be achieved by the global community through a subsequent UNHRC Resolution on “Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind,” adopted as a “Follow-Up to and Implementation of the Vienna Declaration and Programme of Action,”<sup>4</sup> and which made the following request of the UN High Commissioner for Human Rights:

[T]o convene, in 2010, a workshop for an exchange of views on how a better understanding of traditional values of humankind underpinning international human rights norms and standards can contribute to the promotion and protection of human rights and fundamental freedoms, with the participation of representatives from all interested States, regional organizations, national human rights institutions and civil society, as well as experts selected with due consideration given to the appropriate representation of different civilizations and legal systems.<sup>5</sup>

In compliance with this request, the UN High Commissioner for Human Rights hosted a workshop on traditional values and human rights on October 4, 2010.<sup>6</sup> The workshop, which was held in Geneva, Switzerland, attracted the participation of experts from a wide range of cultures, civilizations and legal systems as well as country representatives, scholars, and a host of other stakeholders, including non-governmental organizations.<sup>7</sup> The participants’ charge was quite clear, to have a dialogue on “how a better understanding of

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<sup>3</sup> *Id.*

<sup>4</sup> Human Rights Council Res. 12/21, Follow up to and Implementation of the Vienna Declaration and Programme of Action, 12th Session, A/HRC/RES/12/21 (October 12, 2009) [hereinafter HRC 12/21].

<sup>5</sup> *Id.* at ¶ 1.

<sup>6</sup> Human Rights Council Res. 16/37, Workshop on Traditional Values of Humankind, Follow-up and implementation of the Vienna Declaration and , A/HRC/16/37 (Dec. 13, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-37.pdf> [hereinafter HRC 16/37].

<sup>7</sup> *Id.* at Summary.

traditional values . . . underpinning international human rights norms and standards” in different societies can aid in human rights promotion and protection.<sup>8</sup> A subsequent UNHRC Resolution ratified the holding of the workshop.<sup>9</sup>

In her opening address at the workshop, the South African-born UN High Commissioner for Human Rights, Navanethem Pillay, was unequivocal about the task at hand, namely, exploring “traditional values underpinning human rights”, which she describes as not including the entire corpus of traditional values but only those “in line with human rights.”<sup>10</sup> As for those traditional values that are inconsistent with the universal appeal and authority of human rights, she urged that they should be jettisoned.<sup>11</sup> She was, however, not canvassing outright and unreflective rejection of obnoxious and repugnant traditional values; instead, her perspective was that the decision to reject traditional values should directly result from careful deliberation informed by their juxtaposition against those values that have been recognized as promotive of human rights. “Understanding the common normative underpinnings of both sides of that equation” she concludes, “was important for more effective human rights promotion, and, ultimately, more humane societies.”<sup>12</sup>

The Executive Director of the United Nations Population Fund (UNFPA), Thoraya Ahmed Obaid, a national of Saudi Arabia delivered a remarkable keynote address mirroring the views of the UN High Commissioner for Human Rights.<sup>13</sup> Her address stresses the need for cross-cultural enrichment of human rights through genuine interrogation and integration of relevant traditional values, whilst weeding out negative ones.<sup>14</sup> In her view, the path forward for human rights must involve a clear identification, contestation, negotiation and eventual reconciliation of cultural values and beliefs

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<sup>8</sup> *Id.* at ¶ 1.

<sup>9</sup> Human Rights Council Res. 16/3, Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind, 16th Session, A/HRC/RES/16/3 (April 8, 2011) [hereinafter HRC 16/3].

<sup>10</sup> HRC 16/37, *supra* note 6 at ¶ 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at ¶ 6.

<sup>14</sup> *Id.* at ¶ ¶ 7 – 8.

from within the affected communities.<sup>15</sup> Underlying persistent violation of human rights, particularly those that are products of cultural beliefs and practices, she forcefully explains, is inattention to this precept.<sup>16</sup> Achieving reversal thereof, in the sense of stemming culture-triggered infringement upon human rights, must involve “listening and promoting dialogue within communities”<sup>17</sup> and cannot be the result of imposition by external forces.<sup>18</sup> The workshop, involving participants from a wide array of cultures and civilizations, many of them struggling with reconciling their traditional values with the dictates of international human rights norms, clearly instantiates a forum for promoting the kind of community dialogue envisioned by the UNFPA Director.

In a more assertive tone, a civil society organization leader, Natalia Narochnitskaya, seeks to place all cultures on an equal pedestal in terms of their potential contribution to human rights protection.<sup>19</sup> At the root of respect for and observance of human rights in all cultures, Western world included, is tradition.<sup>20</sup> The normative basis of human rights in countries in the West is the Greco-Christian concept of natural law, which Narochnitskaya projects as representative of a particular traditional value system.<sup>21</sup> Narochnitskaya contends that even the Universal Declaration of Human Rights (UDHR)<sup>22</sup> and the European Convention on Human Rights and Fundamental Freedoms, typically referred to as the “European Convention on Human Rights” (ECHR)<sup>23</sup> were anchored

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<sup>15</sup> *Id.* at ¶ 6.

<sup>16</sup> *Id.* at ¶ 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at ¶ 8; *see also id.* at ¶ 25 (recalling the concern of a delegate that universality of human rights is subject to constructions placed upon it by different peoples and that these different constructions must be taken into consideration to prevent the imposition of “a particular ethnocentric standard on the rest of the world . . .”).

<sup>19</sup> Narochnitskaya is the President of the Institute for Democracy and Cooperation (Paris Office). *See* HRC 16/37, *supra* note 6 at ¶ 9.

<sup>20</sup> *Id.* at ¶ 10.

<sup>21</sup> *Id.*

<sup>22</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948), at art. 1, 15.

<sup>23</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

on “values that were deeply rooted in tradition.”<sup>24</sup> Anchoring human rights to traditional values provides a deeply grounded conviction for compliance with resulting legal obligations as opposed to compliance generated by fear of penal sanctions. This is a reason Narochnitskaya endorses the on-going UNHRC dialogue on the interface between human rights and traditional values.<sup>25</sup>

The most provocative contribution, by far, came from Joseph Prabhu, a philosophy professor from the United States.<sup>26</sup> Relying on Mahatma Gandhi’s conviction that there are multiple ways universality of human rights might be conceived, Prabhu postulates that intercultural dialogue on the constitutive elements of human rights is essential in order to prevent imposition of one ethnocentric standard on the rest of humanity.<sup>27</sup> By interrogating all value systems on the basis of equal standing and resisting the temptation to privilege one over the other, ideas gleaned from one could be used to correct, improve, and strengthen the other.<sup>28</sup> The kind of model that would actualize the desired purpose is one that attempts:

[N]either to transcend cultural differences nor to solve them by making one culture superior to others, but rather to take the other cultures seriously and attempt an open-minded, meaning-and-truth-seeking dialogue.<sup>29</sup>

This means that future development of human rights must be engineered away from its “original Western-oriented” roots to incorporate other traditions, as each of these traditions “might have something to contribute to the development of a global human rights culture.”<sup>30</sup> China shares this view.<sup>31</sup> Its position was unmistakably

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<sup>24</sup> HRC 16/37, *supra* note 6 at ¶ 10; *see also* ¶ 21 (noting a claim by the Representative of Cuba that “since every legal system drew on customs and traditions, it was essential that traditions and the realities of peoples be taken into account” in further development of international law relating to human rights.).

<sup>25</sup> *Id.* at ¶ 11.

<sup>26</sup> *Id.* at ¶ 25.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at ¶ 26.

<sup>30</sup> *Id.* at ¶ 27.

clear; and that is, the concept of human rights is not an exclusive monopoly of a few countries but is part of the traditional value system of every country.<sup>32</sup>

The major Western powers at the workshop – the United States and the European Union – veered in a different direction.<sup>33</sup> The United States representative was troubled by the notion of “traditional values” as a relevant factor in human rights promotion and protection.<sup>34</sup> The concept of “traditional values” is alien to human rights and could detrimentally impact the observance of the universal principles already endorsed by international human rights law.<sup>35</sup> There is no universally agreed definition of the term “traditional values” and this renders the concept so vague and imprecise as to be capable of being used to legitimize human rights abuses.<sup>36</sup> For these reasons, the United States would continue to support extant framework and oppose attempts to use allegiance to “traditional values” as a subterfuge for violation of human rights law.<sup>37</sup> Similarly, Belgium (representing the European Union) was critical of the notion of “traditional values” due to what it characterizes as its negative connotation, susceptibility to broad interpretation, and likelihood of undermining the principles enshrined in international human rights instruments.<sup>38</sup> Only when traditional values are enriching of human rights do they deserve some consideration, otherwise they should be discarded.<sup>39</sup>

The preceding paragraphs have a specific aim: to demonstrate high-level polarity of views regarding the place of cultural or traditional values in global human rights discourse. Many of these views obviously stand in sharp contrast to one another. One camp recognizes that the current incarnation of human rights is unapologetically rooted in tradition – that of the West; yet, Western representatives (the United States and Europe) had no trouble

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<sup>31</sup> *Id.* at ¶ 61.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at ¶¶ 42, 60.

<sup>34</sup> *Id.* at ¶ 42.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at ¶ 60.

<sup>39</sup> *Id.*



castigating and denouncing traditional values as appropriate considerations in formulating human rights. To so attack tradition, notwithstanding the grounding of extant human rights framework on Judeo-Christian tradition of Europe and North America, seems quite difficult to decipher. But the attack is inexplicable on the basis of ignorance; instead, it reflects something much more disconcerting. Historically, perhaps as relics of colonial imperialism, ideas or practices rooted in traditional values of non-Western societies have always been regarded as suspect –in some cases these traditional ideas and practices are considered automatic candidates for inquisition. This attitude raises two critical questions. First, is international human rights law, as represented in extant international human rights instruments, sufficient to respond to the wellbeing of all people regardless of their geographical or cultural location? Second, are human rights universal in the sense that human rights speak to fundamental values shared by all humanity?

Until recently, the response to both questions has almost always been uniformly affirmative. But dissenting voices are gradually emerging, challenging this dominant position and demanding a rethinking on the subject:

What is at stake . . . is often the very legitimacy of human rights talk in the international arena. If human rights necessarily rest on a moral or metaphysical foundation that is not in any meaningful sense universal or publicly defensible in the international arena, if human rights are based on exclusively Eurocentric ideas, as many critics have . . . claimed, and these Eurocentric ideas are biased against non-Western countries and culture, then the political legitimacy of human rights talk, human rights covenants, and human rights enforcement is called into question.<sup>40</sup>

Dissenting voices are becoming stronger, urging the integration of traditional values that were neglected in the development of human

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<sup>40</sup> Amy Gutmann, *Introduction*, in MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* vii, xvii (2001).

rights. A Russian Foreign Ministry statement powerfully captures this dissent:

[H]uman rights must serve the instrument of consolidation . . . the Human Rights Council, acting in a cooperative spirit, must use comprehensive approaches and focus on searching for certain solutions intended to ensure true omnitude of human rights. One of such decisions is strengthening understanding of interconnection between human rights and traditional values of the mankind.<sup>41</sup>

Remarkably, the division at the Council adopted a familiar path: nations that have historically dominated and sculpted the global architecture of human rights (Western liberal societies) defend the *status quo* in contradistinction to the position advanced by emerging nations (mostly developing countries) whose worldviews had little or no influence in the development of human rights. Further evidence of this gulf is apparent at the UNHRC in the vote authorizing the UN High Commissioner for Human Rights to convene the “traditional values” workshop mentioned previously.<sup>42</sup> Virtually all the participating developing countries, including Russia and China, voted in favor of the workshop; whereas most Western nations, including the United States, United Kingdom, France and Belgium, were in opposition.<sup>43</sup> The bitter divide is captured in the final tally of the vote: 26 countries voted in support of convening the workshop<sup>44</sup> whereas 21 either voted against convening the workshop or abstained

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<sup>41</sup> The Ministry of Foreign Affairs of the Russian Federation, Press Release About the UN Human Rights Council Adopting Russian Resolution Draft “Encouraging Human Rights and Main Human Freedoms through Deeper Understanding of Traditional Mankind Values: Best Practice” (Sept. 27, 2012), *available at* [http://www.mid.ru/brp\\_4.nsf/newsline0/735D5EA855B1525944257A8A0028F44](http://www.mid.ru/brp_4.nsf/newsline0/735D5EA855B1525944257A8A0028F44).

<sup>42</sup> HRC 16/37, *supra* note 6.

<sup>43</sup> HRC 12/21, *supra* note 4.

<sup>44</sup> The countries include Angola, Bahrain, Bangladesh, Bolivia, Burkina Faso, Cameroon, China, Cuba, Djibouti, Egypt, Gabon, India, Indonesia, Jordan, Kyrgyzstan, Madagascar, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, and Zambia; *Id.*

from voting.<sup>45</sup> This voting pattern was repeated in a subsequent Resolution adopted in welcoming the report of the UN High Commissioner for Human Rights, which contained the summary of the workshop's deliberations.<sup>46</sup>

This paper consists of five sections. Following this introduction, Part I demonstrates the conceptual amorphousness and fluidity of human rights. Part I's major thesis is that many of the rights currently recognized as fundamental were previously subjects of very intense controversy. The section argues that human rights are still evolving and, as such, there is nothing odd about integrating traditional values into human rights as part of the evolutionary process. Part II pursues this theme further by questioning universalist and relativist doctrines of human rights. It projects homosexuality as demonstrative of the fundamental and irreconcilable chasm between moral universalism and relativism, and shows how this impacts universality credentials of extant human rights regime. Part III demonstrates the futility of forcing compliance with the dictates of legal regimes that stray from the traditional values of the target population. This section relies on female circumcision or female genital ritual (FGR) in proof of this point. The conclusion –Part IV – is that despite the best efforts of the UNHRC and its Advisory Committee, the universality foundation of the current human rights regime remains a legitimate moral and legal question.

## II. Conceptual challenges

The maxim “one man's meat is another man's poison” is starkly illustrated by the event of July 4, 1776.<sup>47</sup> Although the American Declaration of Independence is historically revered as a

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<sup>45</sup> The opposing nations consist of Belgium, Chile, France, Hungary, Italy, Japan, Mauritius, Mexico, Netherlands, Norway, Republic of Korea, Slovakia, Slovenia, United Kingdom of Great Britain and Northern Ireland, and United States of America, while Argentina, Bosnia and Herzegovina, Brazil, Ghana, Ukraine, and Uruguay abstained. *Id.*

<sup>46</sup> HRC 16/3, *supra* note 9.

<sup>47</sup> For the full text of the Declaration of Independence, see The Declaration of Independence: A Transcription, *available at* [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html) (last visited Jan. 28, 2013).

milestone in the development of human rights, at the time the Continental Congress (comprising the original thirteen colonies that formed the United States of America) adopted the Declaration, there was no global unanimity as to the legitimacy of the human rights claimed by the founding fathers. The thirteen colonies, already at war with Great Britain for over a year, used the Declaration to justify their rejection of British imperial authority in preference to self-governance:

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 these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>48</sup>

At issue was the power (or legitimacy thereof) of the British Parliament to legislate, particularly on tax matters, for territories, such as the United States, that had their own legislatures. Did Thomas Jefferson and the rest of the founding fathers or, indeed, the citizenry possess the power they claimed for themselves, namely: “That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it”? Yes, historians record that on that historic day, as the Declaration was being read, church bells were ringing throughout the territories, echoing the people’s unanimous ratification of the solemn proclamation. But not everyone shared this sentiment. King George III and Prime Minister Lord North, in particular, had other ideas. In their view, and this represented the mainstream thinking in Great

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<sup>48</sup> *Id.*

Britain at the time, Parliament was supreme throughout the British empire, its legislation was constitutional and not subject to challenge by any of the colonies. There was no right to unilateral declaration of independence inhering in colonial territories.

Nonetheless, even at that time, this right – to self-determination or independence (as claimed by the founding fathers) – was a core human right, as subsequently proved by its codification nearly two hundred years later in the International Bill of Rights –the UDHR,<sup>49</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>50</sup> and International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>51</sup> And yet during the American Revolutionary War of the latter half of eighteenth century (1775–1783), this critical foundational human right was violently denounced by Great Britain.

This anecdote is an illustration of the divergent and often conflicting understandings and constructions that have always characterized human rights. Employing the United States and the United Kingdom for this purpose, perhaps the two closest allies in contemporary times, was not inadvertent; instead, the idea was to point out that although since the end of World War both countries have almost always stood together on the issue of human rights, at one time, they had a fundamental disagreement as to the meaning of what is now considered a basic tenet of human rights. Eighteenth Century United States was mostly populated by people whose ancestry is European (largely Great Britain); yet, despite these sociocultural and other affinities, they shared no common understanding of the concept of self-determination and the bastion of fundamental entitlements flowing from it. If, as has been observed, conceptions of human rights are dependent upon each society's "historical, cultural, and ideological underpinnings," and people who share common background were irreconcilably at odds over a basic

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<sup>49</sup> UDHR, *supra* note 22, at art. 1, 15.

<sup>50</sup> International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407.

<sup>51</sup> International Covenant on Economic, Social, and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3.

human right,<sup>52</sup> then, there is cause to worry about people in distant lands, particularly from non-Western traditions, who are being called upon to submit to ideas that have been crafted and ratified by Western powers as binding norms of international human rights law but which, in no way, reflect their own realities. This is problematic on several levels.

For analytical purposes, let us use Africa as representative of traditional societies and compare Africa's basic concept of human rights to that of the Western world.<sup>53</sup> The objective is to examine the core beliefs and praxis in both systems as a means of determining whether one has been relegated to the background in the development of human rights and if so, whether universality is a worthy appellation to a result that evolved from such process. In other words, lurking behind this comparative analysis is the question whether human rights could justifiably be said to have common meaning or foundation and, thus, universal validity or application? A plurality of African scholars would unhesitatingly return a negative verdict. In fact, many perceive extant international human rights framework, completely divorced from contribution of substantive ideas from traditional societies, as a brazen Western imposition of their vision of human rights on the rest of humanity. But that is not all. As African anthropologist Asmarom Legesse painstakingly elucidates:

Their [Western world] offense is simply the fact that they are still engaged in a civilizing mission vis-à-vis the rest of mankind. They still define the problem of human rights as one of lack of proper political education in the underdeveloped world. They have

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<sup>52</sup> Peter Schwab & Adamantia Pollis, *Preface*, in TOWARD A HUMAN RIGHTS FRAMEWORK vii (Peter Schwab & Adamantia Pollis, eds., 1982).

<sup>53</sup> The choice of Africa as a worthwhile proxy is based on its embodiment of a feature that is shared by all traditional societies. It has been suggested that despite their differences, third world nations uniformly conceive of themselves primarily in terms of their group identity. Individuals are defined in terms of the kinship system (clan, village, tribe and so forth) and never as "an autonomous individual possessed of inherent, inalienable rights . . ." See Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, in TOWARD A HUMAN RIGHTS FRAMEWORK, *supra* note 52, at 1, 16.

already succeeded in writing most of their values and code of ethics into the Universal Declaration [of Human Rights]. Hence, the human rights movement faces the danger of becoming an instrument of cultural imperialism. To the extent that the West fails to realize that other cultural traditions may be as deeply committed to rights, although approaching it from a different ethical perspective, to that extent the movement rests on false premises and tends to legitimize the behavior it seeks to eradicate.<sup>54</sup>

Whilst most Western scholars might be uncomfortable with the tone of this characterization, its basic claim (supplantation of traditional or African conception of human rights with one grounded in the ontology and epistemology of Western industrial civilization) is evidently non-contestable. Consequently, the need to make amends is becoming increasingly appreciated. Philosopher Lewis Hinchman's incisive essay was underscored by his "concern that the doctrine of human rights may imperceptibly degenerate into empty rhetoric unless it can be given a rational foundation in a more encompassing theory of man and nature."<sup>55</sup> By "a more encompassing theory," Hinchman intends an exodus from the parochialism of "West is right" to a more cosmopolitan attitude, a kind of doctrinal enlargement, that readily admits the utility of hitherto neglected views, particularly from non-Western ontological frameworks, to continued evolution of human rights.

Empirically sound evidence showing that each culture maintains a distinct (in some material respect) conception of human rights is visible in State and regional practices. When African experts gathered in Dakar, Senegal in 1979, to prepare the draft of an African legal framework on human rights, their charge was straightforwardly Africentric: "to prepare an African human rights instrument based

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<sup>54</sup> Asmarom Legesse, *Human Rights in African Political Culture*, in KENNETH W. THOMPSON, ED., *THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY* 130 (1980).

<sup>55</sup> Lewis P. Hinchman, *The Origins of Human Rights: A Hegelian Perspective* 37 *WESTERN POL.* Q. 7, 8 (1984).

upon an African legal philosophy and responsive to African needs.”<sup>56</sup> The experts wanted a legal regime that unambiguously reflected an “African conception of human rights.”<sup>57</sup> With such a succinctly defined mandate, it stands to reason that the resulting draft would be a peculiarly African human rights charter that is clearly distinctive from, and uneclipsed by, alien human rights conceptualization. The preambular provisions of the African Charter on Human and Peoples’ Rights make it quite explicit that the document has been formulated by “[t]aking into consideration the virtues of [the] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.”<sup>58</sup>

Indeed, the Charter is suffused with values that reflect quite clearly the worldview and cosmology of African traditional communities. A notable instance is the declaration that “the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.”<sup>59</sup> Everyone owes these duties, specified in Chapter II of the Charter, to their family, society, and the State, as well as to other legally recognized communities and the international community.<sup>60</sup> The African concept of duty as correlative to human rights is an important contribution to the development of international human rights law that parallels the American human rights system.<sup>61</sup> It is also reflective of its

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<sup>56</sup> Yougindra Khushalani, *Human Rights in Africa and Asia* 4 HUM. RTS. L. J. 436 (1983), cited in James Silk, *Traditional Culture and the Prospect for Human Rights in Africa*, in ABDULLAHI AHMED AN-NA’IM & FRANCIS M. DENG, EDS., HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 290, 308 (1990).

<sup>57</sup> EI-Obaid Ahmed EI-Obaid & Kwadwo Appiagyei-Atua, *Human Rights in Africa – A New Perspective on Linking the Past to the Present* 41 MCGILL L. J. 819, 836 (1996) (quoting Amnesty International, *The Organization of African Unity and Human Rights*, AI Index IOR 03/04/87 (June 30, 1991), at 8.).

<sup>58</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5.

<sup>59</sup> *Id.* at pmb.

<sup>60</sup> *Id.* at art. 27(1).

<sup>61</sup> Contrary to widespread representations in human rights literature, the African Human Rights System was not the originator of the concept of duty as an essential component of human rights. Often lost in the analysis of the African Charter and its contribution to human rights development is the fact that the



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concept of duty as integral to human rights protection is not unique to Africa. The idea traverses most, if not all, traditional societies. In fact, in the negotiations leading to the adoption of the American Declaration of the Rights and Duties of Man, traditional societies of Latin America were able to persuade its northern neighbors to incorporate duties as indispensable to the enjoyment of the rights specified in the Declaration. The Declaration's two chapters were split between human rights (chapter I) and associated duties (chapter II). *See* the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). There has been a tendency to approach the Declaration as other declarations in international law, as having no binding legal effect. But this is wrong. The normative status of the provisions of the Declaration is atypical. The instrument, unlike other declarations, proclaims binding legal obligations for States Parties to the Organization of American States. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989), particularly ¶¶ 42 – 47, Judgment *available at* [http://www1.umn.edu/humanrts/iachr/b\\_11\\_4j.htm](http://www1.umn.edu/humanrts/iachr/b_11_4j.htm) (accessed May 15, 2013). The advisory opinion of the Inter-American Court of Human Rights was quite illuminating:

The General Assembly of the Organization has . . . repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS . . . Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter . . . Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

The Court concludes:

For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS

sociopolitical and moral epistemology and its concept of justice. Unpacking the African concept of justice requires a great deal of understanding of how Africans perceive man, his role in society and the obligations associated with membership of the community. It touches on the foundation of African morality.

African ethics, no doubt, is boldly communitarian. The basic social unit in an African society is the community whose good, as conceived by them, incorporates those of its individual members. In African ontology, a person or personhood is defined in terms of affinity to family, clan, village and so forth, to which the individual owes his existence. This affinity or relationship not only gives individuals their identities but also structures their very existence. Noted African philosopher John Mbiti explains:

Only in terms of other people does the individual become conscious of his own being, his own duties, his privileges and responsibilities towards himself and towards other people. When he suffers, he does not suffer alone but with his corporate group: when he rejoices, he rejoices not alone but with his kinsmen, his neighbours and his relatives . . . Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: "I am, because we are; and since we are therefore I am." This is the cardinal point in the understanding of the African view of man.<sup>62</sup>

This means, in essence, that Africans typically think of societal needs as definitive of their being and existence. There are, of course,

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under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto. *That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above. (Emphasis supplied).*

<sup>62</sup> JOHN S. MBITI, AFRICAN RELIGIONS AND PHILOSOPHY 108 -109 (1969).

individually centered desires and aspirations but they are inextricably woven with one another and collapsed into that of the broader group to which he or she belongs. In this dynamic, “the reality of the communal world takes precedence over the reality of individual life histories whatever these may be,”<sup>63</sup> a reason “group rights” are “stressed over individual rights.”<sup>64</sup> In these societies, individual rights, either of civil and political (CIPO) rights or economic, social and cultural (ECOSOC) rights nature, are generally seen as aberrations,<sup>65</sup> underscoring Legesse’s observation that had Africans authored the UDHR, “they might have ranked the rights of communities above those of individuals.”<sup>66</sup>

Moral decision-making and actions are constructed within group or collective platforms. Determination as to the appropriateness or rightness of an action is predicated on whether the conduct in question strengthens or damages the stability and cohesion of the community. Unlike people in other parts of the world, for Africans, asserting one’s rights as an individual “would be unthinkable;” such actions are seen as tantamount to undercutting “their dignity as group members.”<sup>67</sup> This is the reason maxims such as “my business is nobody else’s business” is alien to Africa’s communitarian orientation. In fact, the reverse is true and uniformly accepted and imbedded in social structures throughout the region.

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<sup>63</sup> Ifeanyi A. Menkiti, *Person and Community in African Traditional Thought*, in RICHARD A. WRIGHT, ED., *AFRICAN PHILOSOPHY: AN INTRODUCTION* 157 (1979).

<sup>64</sup> Rhoda E. Howard, *Group versus Individual Identity in the African Human Rights Debate on Human Rights*, in AN-NA’IM & DENG, *supra* note 56, at 161.

<sup>65</sup> J. M. Zvogbo, *A Third World View*, in DONALD P. KOMMERS & GILBERT D. LOESCHER EDS., *HUMAN RIGHTS AND AMERICAN FOREIGN POLICY* 92 -103 (1979).

<sup>66</sup> Legesse, *supra* note 54 at 128; *see also* Virginia A. Leary, *The Effect of Western Perspectives on International Human Rights*, in AN-NA’IM & DENG, *supra* note 56, at 20 (reporting that of the seven principal drafters of the UDHR five are Westerners and two are non-Westerners who were educated in the West: René Cassin (France), John P. Humphrey (Canada), Eleanor Roosevelt (United States), Hernán Santa Cruz (Chile), Charles Malik (Lebanon) P.C. Chang (China) and Fernand Dehousse (Belgium)).

<sup>67</sup> Howard, *supra* note 64, at 166.

Two important cases decided by the United States Supreme Court are demonstrative of this point, namely, *Griswold v. Connecticut* (which held, for the first time, that marital privacy regarding use of contraceptives is a constitutionally protected right)<sup>68</sup> and *Lawrence v. Texas* (establishing, again for the first time, the right to consensual homosexual sex as a constitutional right encapsulated within the right to privacy).<sup>69</sup> Had these cases been decided in a communal setting, the operational prism being that of communities insulated from the assault of Western modernity, the result would have certainly been different. The reason is because the ethics of communitarianism prescribes that “your business is my business” and vice versa, and this powerfully dilutes the force of privacy in individual lives. It would be odd in these societies to defend allegations of what is generally perceived as a wrongdoing on the basis of one’s self-contrived privacy interests. This underscores the uncompromising resistance, as shown subsequently, by the representative of traditional societies to homosexual and sexual/reproductive rights agenda of powerful forces at the UN. Not that privacy is unknown in traditional societies; instead, the point is that in such societies, the line between “my business” and “your business” is indelibly blurred. Indeed, in Africa, even love making and associated privileges are not matters exclusively within the private domains of the individuals concerned.<sup>70</sup>

The sketch of communal life we just painted sharply contrasts with Western thought. The basic unit of society is not the community but the individual. The individual is seen as “an isolated and autonomous” being whose actions are guided primarily by self-preservation.<sup>71</sup> Under this construct, individuals are not submerged in the community; instead, and this is the key, each person retains an independent existence, free of encumbrance or imposition of communal expectations. In this universe:

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<sup>68</sup> 381 U.S. 479, 485 – 486 (1965).

<sup>69</sup> 539 U.S. 558, 578 (2003).

<sup>70</sup> Benoit Ngom, *Reflexions sur la Notion de Droits*, in Howard, *supra* note 64, at 162.

<sup>71</sup> TOWARD A HUMAN RIGHTS FRAMEWORK, *supra* note 52, at 7.

[P]ersonhood seeks to protect the freedom of individuals to define themselves in contradistinction to the value of the society in which they happen to live. The premise of such freedom is an individualistic understanding of human self-definition: a conception of self-definition as something that persons are, and should be, able to do *apart from society*.<sup>72</sup> (*Emphasis supplied*).

Writing from an African perspective, Legesse observes:

In the liberal democracies of the Western World the ultimate repository of rights is the human person. The individual is held in a virtually sacralized position. There is a perpetual, and in our view obsessive, concern with the dignity of the individual, his worth, personal autonomy and property.<sup>73</sup>

These postulations sharply contrast with a communitarian justice system that is “rooted not in individual claims against the state, but in the physical and psychic security of group membership.”<sup>74</sup> To be sure, there is concern for communal well-being in Western liberal tradition, but such concern readily yields to individual goals where the two conflict. In other words, perception of individual goods as inextricably linked with that of the community is absent under this framework. Morality is constructed within this abstraction or detached position of self-interest, a reason the principle of autonomy is more a feature of individualistic societies than communalism. Reflecting on this emphasis on individual, as opposed to group or communal, rights makes it easy to understand the privacy guarantees recognized in the cases previously mentioned. This philosophic divide is at the root of the gulf in human rights protection in different parts of the world.

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<sup>72</sup> MADELEINE SCHACHTER, INFORMATIONAL AND DECISIONAL PRIVACY 783 (2003).

<sup>73</sup> Legesse, *supra* note 54, at 124.

<sup>74</sup> Howard, *supra* note 64, at 166.

A cursory look at regional human rights instruments reveals that each regime has charted its own distinctive course, addressing concerns and manifesting orientations shared by the people whose conduct it seeks to regulate. The first legally-binding human rights framework, the ECHR, is a great instantiation.<sup>75</sup> Understanding the Eurocentric nature of the ECHR requires examination of the history of the instrument. One of the stated purposes of the Council of Europe, under whose aegis the ECHR was drafted, was “to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.”<sup>76</sup> Contracting States Parties recognized that operationalizing this purpose necessitates setting up an appropriate legal framework and institutionalization of implementing organs or bodies –a recognition that impelled the adoption of, *inter alia*, the ECHR in 1950. The preamble notes “the maintenance and further realization of Human Rights and Fundamental Freedoms” as one of the means of attaining the objectives of the Council of Europe.<sup>77</sup> This leaves the nature of human rights aimed to be protected by the Convention undefined. Is it the type enshrined in the UDHR (inclusive of ECOSOC rights) or some other (narrower or broader) formulation? These are very critical concerns.

States Parties to the ECHR expressed the profound belief that fundamental freedoms are the foundation of justice and global peace and best maintained by an effective political democracy and “a common understanding and observance of the Human Rights upon which they depend.”<sup>78</sup> They avowedly acknowledged that Europeans are “likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law” and resolved “to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.”<sup>79</sup> The use of the term “certain of the Rights” of the UDHR was not happenstance. Rather, it reflects quite

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<sup>75</sup> ECHR, *supra* note 23.

<sup>76</sup> Statute of the Council of Europe art. 1, ETS No. 001 (August 3, 1949), available at [conventions.coe.int/Treaty/en/Treaties/Html/001.htm](http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm).

<sup>77</sup> ECHR, *supra* note 23, at pmb1., ¶3.

<sup>78</sup> *Id.* ¶ 4 (*italics* supplied).

<sup>79</sup> *Id.* ¶ 5 (*italics* supplied).

explicitly an indication that not all human rights will be accorded recognition, only those that are consistent with European beliefs and cultural heritage. There is no doubt, as legal scholar James Hart explains, that the reference in the Preamble to Europe's "common heritage of political traditions, ideals, freedom and the rule of law . . ." was an explicit indication "that one of the ECHR's intentions is to delineate and embody the political and ethical culture of Western Europe" and, presumably, not that of any other peoples.<sup>80</sup> To this extent, therefore, one could rightly characterize the ECHR as the first treaty-based challenge to the universality of human rights.

The UDHR accords recognition to CIPO as well as ECOSOC rights. Some of the rights the Declaration embodies include freedom from discrimination,<sup>81</sup> right to life, liberty and security of the person;<sup>82</sup> right to free speech;<sup>83</sup> right to health;<sup>84</sup> and, right to education,<sup>85</sup> to name a few. These rights were intended by the General Assembly of the UN to serve "as a common standard of achievement for all peoples and all nations" and requires "every individual and every organ of society . . . to secure their universal and effective recognition and observance . . ."<sup>86</sup> By "common standard," the General Assembly signals its intention that global unity would characterize the internalization and operationalization of the Declaration, underscoring its projection of "a common understanding of these rights and freedoms" as being "of the greatest importance for the full realization of this pledge" by member nations of the UN.<sup>87</sup>

Despite these provisions, which can be construed –and rightly so– as the first positivist appeal to universalize human rights, both doctrinally as well as in practice, Europe (a major influence during the negotiations that crystallized to the adoption of the UDHR) chose a different route to operationalize human rights in its territory,

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<sup>80</sup> James W. Hart, *The European Human Rights System* 102 L. LIBRARY J. 533, 538 (2010).

<sup>81</sup> UDHR, *supra* note 22, at art. 2.

<sup>82</sup> *Id.* at art. 3.

<sup>83</sup> *Id.* at art. 19.

<sup>84</sup> *Id.* at art. 25.

<sup>85</sup> *Id.* at art. 26.

<sup>86</sup> *Id.* at pmb.

<sup>87</sup> *Id.* ¶ 7.

informed by shared (traditional) values in the region. In this context, the ECHR can be summed up as a “charter on CIPO rights,” a view that readily finds justification in the Convention’s implicit denial of ECOSOC rights. Although Europe’s decision to accord recognition to one genre of human rights can be assailed on a variety of grounds, one thing is undeniable: 1950 Europe conceptualized human rights as non-inclusive of ECOSOC rights. This apathy toward ECOSOC rights, explains political scientist Adamantia Pollis, stems from the European notion of the role of the state in the life of individuals as not inclusive of supplying the kinds of needs ECOSOC rights protect.<sup>88</sup> This view flourished in that region for over a decade after the adoption of the ECHR— that is, until the European Social Charter came into being.<sup>89</sup> The Charter consists of a number of ECOSOC rights such as the right to work<sup>90</sup> and the right of mothers and children to social and economic protection.<sup>91</sup>

The point of the preceding discussion is to demonstrate the conceptual challenges, the amorphousness, and the fluidity of human rights. Theoretical postulations and political posturing, regardless of packaging, are quite often at variance with practice. The idea of immutability of human rights is useful largely as a theoretical concept; in reality, it is nothing short of a pragmatic fiction. For example, despite attempts at their rehabilitation, neither the United States Bill of Rights (1789) nor the French Declaration of the Rights of Man and Citizen (1789) is truly a human rights charter. If not for anything else, the human rights they proclaimed were reserved for certain, not all, *Homo sapiens* in the respective territories.<sup>92</sup> The fact

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<sup>88</sup> TOWARD A HUMAN RIGHTS FRAMEWORK, *supra* note 52, at 8.

<sup>89</sup> European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, E.T.S. No. 35, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>.

<sup>90</sup> *Id.* at art. 1.

<sup>91</sup> *Id.* at art. 17.

<sup>92</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857), for instance, held that African-Americans were not citizens and, therefore, lack legal standing to sue in federal court. Since they are not citizens, they are not, as in France, entitled to human rights. *See also Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld racial segregation. It was not until December 18, 1865 that slavery was abolished by virtue of the ratification by the required three-quarters of the states of the Thirteenth Amendment to the United States Constitution. *See also* TOWARD A HUMAN RIGHTS FRAMEWORK, *supra* note 52 at 1, 4 (noting that liberal theory denies autonomy to individuals deemed not to be in possession of “the rational



that the most basic element of human rights –universality –was lacking in these documents had zero effect on their projection as legitimate human rights instruments. No serious human rights scholar today would defend this blatant, but deliberate, omission.<sup>93</sup>

Journeying to contemporary times, the European human rights system's metamorphosis, from originally singling out CIPO rights as worthy of recognition, to subsequently broadening the umbrella to incorporate ECOSOC rights should be seen as an evolutionary process in human rights thinking in that part of the world. Is the evolution continuing or can it be held to have reached its penultimate maturation? The answer crucially hinges on who you ask. Defenders of the African Charter's three-genre (CIPO, ECOSOC and solidarity/third generation) rights system might hold out hope that a future human rights treaty in Europe would, following Africa's model, incorporate solidarity/third generation rights (rights to development, peace and to a healthy environment, for instance) within its arsenal of rights.<sup>94</sup> On the other hand, Europeans might be resistant, dismissing such hopes as ill-founded, wishful thinking –a third world fantasy, so to say, since claims regarding these rights are still ubiquitously mired in controversy.<sup>95</sup>

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faculties necessary for autonomy and the exercise of individual rights” such as slaves, women and children). Until quite recently, most Western countries denied women equal right with men.

<sup>93</sup> The truth is that what we have today (the panoply of rights) bears no semblance to the original conception. Not only were the entitlements inherent in John Locke's idea of natural justice restricted to life, liberty and property, he limited right holders to “propertied Christian men,” excluding everyone else. See JACK DONNELLY, HUMAN RIGHTS IN THEORY AND PRACTICE 60 (2003). For centuries, the political map of Europe accurately reflected this thinking, a thinking that survived largely because of its perfect harmony and alignment with prevailing traditional mores at the time.

<sup>94</sup> The African Charter, *supra* note 58, at art(s) 22 – 24.

<sup>95</sup> The literature on this genre of rights is vast and growing, but see in particular: Karel Vasak, *A 30-year Struggle*, THE UNESCO COURIER, 29 (Nov. 1977); Karel Vasak, *Pour une troisième génération des droits de l'homme*, in CHRISTOPHE SWINARSKI ED., STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 837 (1984); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?* 33 RUTGERS L. REV. 435 (1981); Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?* 29 NETH. INT'L L. REV. 307 (1982); Roland Y. Rich, *The Right to Development as an Emerging*

Who is right and who is wrong? The difficulty in arriving at a generally acceptable answer to this question critically illustrates the need for further dialogue on the multicultural roots of human rights.

### III. Universalism v. relativism: homosexuality as a proxy

The “traditional values resolution” is the latest in a series of resolutions that edge the Human Rights Council closer to a relativist position on human rights. If we continue to go down this path then everything is potentially relative and determined by vague concepts such as culture and tradition. For those who are seen to exist outside the neatly defined parameters of culture, this is especially troubling.

–Graeme Reid

There seems to be some consensus . . . that the concept of human rights as generally understood is historically a Western concept. The more troubling questions facing Westerners and non-Westerners alike pertain to whether contemporary international human rights instruments, given their Western biases, can be said to apply to peoples from non-Western cultures.

– Josiah Cobbah

Is moral (or cultural) relativism, the idea that morality is culture-specific or culture-contextual, a phony concept? The response to the question, again, depends on who you ask. For its proponents, the concept represents the only legitimate explanation of the variegated ways in which people in different communities or cultures think of moral issues, the implication being that people in one culture are decidedly not in a position to pass moral judgment on a different one. There is, in other words, no universal moral truth –

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*Human Right*, 23 VA. J. INT'L L. 287 (1983); Carl Wellman, *Solidarity, the Individual and. Human Rights* 22 HUM. RTS. Q. 639 (2000).

morality acquires its color or context via cultural values. Ever since anthropologists bestowed intellectual legitimacy on cultural relativism (although the idea itself is originally a philosophical doctrine), it has been the subject of scathing attacks –which is not quite surprising since it challenges extant orthodoxy. This is how anthropologist John R. Cole sees it:

Cultural relativism . . . is the idea that one culture is not superior to and should not judge others. It may be the single most influential anthropological precept . . . . To relativists, Western society, American politics and capitalism, and Judeo-Christian ideas of morality are not absolute or perfect any more than is New Guinea tribal life. To people committed to absolute standards defined by the will of God (or nature), relativism is a humbling, subversive doctrine. It removes an individual's group from the pinnacle of culture, just as evolution's demonstration that people are simply one more variety of animals removes humans from the other center of life.<sup>96</sup>

Casting relativism as a “subversive doctrine” is one that readily appeals to absolutists. The reason is simple. Human beings, intellectually astute or otherwise, tend to arrogate primacy to their individual circumstances, whatever these may be. In Christianity, as in Islam, members of one sect or denomination tend to see the rest as inferior, confident that their doctrinal peculiarities provide the only “true” path to God and eternity. Yet, in the vast majority of cases, the faithful did not choose their religion, not to mention their sect. The choice was made by their parents even before they were born. One becomes a Shiite Muslim or Roman Catholic, not as a consequence of some autonomous intellectually-informed analysis, but owing to an amalgamation of circumstances, revolving primarily on circumstances of birth and other socioeconomic and political dynamics. One achieves membership of this or that sect because the

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<sup>96</sup> John R. Cole, *Scopes and Beyond: Antievolutionalism and American Culture*, in LAURIE GODFREY, ED., *SCIENTISTS CONFRONT CREATIONISM*, 27 (1983); JOHN COOK, *MORALITY AND CULTURAL DIFFERENCES* 3 (1999).

individual's parents made the choice, long before the person became capable of independent decision-making. These circumstances become the cradle of the individual's moral orientation, his source of moral truth –a “high horse,” so to say, from which he confidently judges conflicting moral standards as inferior and in need of modification to suit his standards. A great illustration is a speech from the floor of the United States House of Representative a few years ago. Speaking in support of expelling a congressman from Massachusetts who had permitted homosexual activities in his home, William Dannemeyer, Congressman from California, intoned the views of most of his colleagues:

The Judeo-Christian ethic on which this Nation was founded says very clearly that there are fixed standards which God gave to man to govern people in any society. The philosophy of moral relativism, on the other hand, says that there are no standards, that man himself is capable of establishing any rule at any time . . . do anything you want so long as the perception is that you are not harming anybody else.<sup>97</sup>

Implicit in this statement is that, as far as Representative Dannemeyer is concerned, Judeo-Christian morality is the only standard against which human conduct should be assessed. It would not matter to him a bit if homosexual life is permissible under some other moral regimes. Dannemeyer and others of Judeo-Christian orientation would use their own standard to judge the actions of everyone else, even if those other people do not profess belief in a Judeo-Christian God. Whilst the congressman is at liberty to cling on to that belief, he steps into a murky zone when he asserts that relativists have no standards, implying that anything goes in those societies. This claim is simply untenable. Moral relativism embodies rules that prescribe standards, some of which have a longer genealogy than Judeo-Christian ethics. There seems to be only one difference, the point of reference on which these moral standards are

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<sup>97</sup> Congressional Record, H-5634, July 26, 1990, cited in JOHN COOK, MORALITY AND CULTURAL DIFFERENCES 4 (1999).

anchored –on Abrahamic God or on some other supernatural being or framework. Absolutists are not persuaded.

Philosopher John W. Cook argues that conflicts regarding moral issues are not produced by the fact that the claimants are operating from different moral perspectives or principles; rather, at least one of the parties lacks what he terms “a sufficiently developed moral consciousness.”<sup>98</sup> One is said to lack sufficiently developed moral consciousness when that person fails to honestly and carefully reflect on moral matters.<sup>99</sup> Such persons are not morally thoughtful or insightful, and the difference between them and others cannot be explained on the basis of a clash of principles; the difference arises, instead, in the ways they “think about matters, in how earnestly, honestly, and diligently they think.”<sup>100</sup> In other words, an earnest, honest and diligent reflection on moral matters will inevitably lead to universal truths as to what is right or wrong. That is, regardless of geography, philosophic or cultural background, anyone that thinks in the manner prescribed by Cook will invariably arrive at the same conclusion. This is a contestable claim.

Perhaps, it could be said that the result of such reflection would be the same for people operating from the same moral horizon but certainly not for everyone. Thoughts and actions are produced, shaped and influenced by individual circumstances, the totality of one’s history and experiences. This is the reason one is more likely to find congruence of opinion regarding any moral issue amongst people that share some affinities, be it religion, culture or geography. For philosopher Tristram Engelhardt, there are two major competing moral standards, one articulated by believers in God and another by those that do not hold the same belief, a dichotomy he describes as Christian morality versus secular morality:<sup>101</sup> “[f]or secular morality . . . , there is no equivalent of a God’s-eye perspective, a non-socio-historically-conditioned standard to warrant particular moral content as canonical;” their morality is “supported by nothing more than clusters of intuitions sustained by various narratives, all floating

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<sup>98</sup> COOK, *supra* note 96, at 117.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 117.

<sup>101</sup> See generally H. TRISTRAM ENGELHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* (1996).

within the horizon of the finite and the immanent.”<sup>102</sup> Because the source of moral authority differs, there are inevitably different moral standards claimed as valid by each group. As to why this is important, Engelhardt further elucidates:

Among the consequences of this state of affairs is that the persistence of Christianity, or at least traditional Christianity, constitutes not just a cultural, but a political provocation to the now-dominant, secular culture and the secular state . . . [T]his is the case not only because the content of traditional Christianity morality . . . is in conflict with the content of secular morality . . . , but also because traditional Christianity has foundations that transcend the bounds of secular moral discourse and make it incapable of compromise within the secular politically rational. Claims by traditional Christianity of a transcendent ground for its morality . . . constitute for the secular culture and the secular state a disturbing fundamentalism.<sup>103</sup>

Evidence of this perpetual friction between secular and Christian moralities can be found in such thorny issues as abortion, physician-assisted suicide, euthanasia and homosexuality, each of which is supported by the former but condemned by the latter.<sup>104</sup> The point, then, is that holding that human beings are products of their environments is really an admission of the obvious, that it is one's

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<sup>102</sup> H. Tristram Engelhardt, Jr., *Secular Morality after Foundations: Moral Pluralism, Christianity, and the Culture Wars*, 5 (Working Papers of the Centre for Advanced Study in Bioethics Münster 2012/38), available at [http://www.uni-muenster.de/imperia/md/content/kfg-normenbegrueundung/intern/publikationen/\\_fellows/38\\_engelhardt\\_-\\_secular\\_morality\\_after\\_foundations.pdf](http://www.uni-muenster.de/imperia/md/content/kfg-normenbegrueundung/intern/publikationen/_fellows/38_engelhardt_-_secular_morality_after_foundations.pdf).

<sup>103</sup> *Id.* at 5.

<sup>104</sup> Note that although physician-assisted suicide and euthanasia are related, they are distinct. In the former, the physician is not an active participant – he merely provides the means or the information, leaving the actual act (ending life) to be performed by the patient whereas in the latter, the physician actually performs the act.

individual circumstances and societal influence that structure and condition the individual's life, including his moral worldview, not the postulation espoused by Cook. So, how do we reconcile relativist and absolutist claims in order to produce a truly universal human rights regime?

An apt way to begin discussion on the universality of human rights is to note, with some caution, a number of key statements in a paper whose professed aim was "to direct [human rights scholars] along a cross-cultural path" – that is, I think, a path to proper contextualization, understanding and operationalization of human rights.<sup>105</sup>

In December 1948, at a time when most of the population of Africa south of the Sahara was still under colonial domination, a General Assembly dominated by the Western world adopted a Universal Declaration of Human Rights at the United Nations. There is no doubt that the Declaration was a product of Western liberal ideology.<sup>106</sup>

The paper continues:

It is usually argued that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights together constitute an International Bill of Rights. If these international norms constitute customary international law then they bind people of all cultures.<sup>107</sup>

The question, then, becomes, should they? Perhaps, a few of the rights might appeal to all persons and all cultures, such as the right to life, whereas others might be contested. Even prior to this recent

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<sup>105</sup> Josiah A. M. Cobbah, *African Values and the Human Rights Debate* 9 HUM. RTS. Q. 309, 310 (1987).

<sup>106</sup> *Id.* at 316.

<sup>107</sup> *Id.*

attempt at dialogue on the content of human rights, there has always been disagreement at the international level as to what constitute “true” human rights. The so-called “negative” and “positive” rights’ dichotomization reflected in the bifurcation of human rights into the ICCPR (dealing with the former genre of rights) and the ICESCR (enshrining the former) speaks quite ably to the disparate understanding of human rights in the Western world versus the communist bloc countries led by now-defunct Soviet Union. Although, at the time of negotiating the terms of these treaties, Western European nations were united against according recognition to ECOSOC rights as human rights, they have since had a rethinking on the subject.

Could this attitudinal shift be linked to a new awakening, a kind of sociopolitical evolution in the region? Otherwise, how does one explain the new role of the State as a more committed partner in attending to the ECOSOC rights of the citizenry? Perhaps so, after all, as an astute observer helpfully puts it, “cultures can and do change; indeed, change is part of their nature as they are, above all, social creations.”<sup>108</sup> Europe is not immune to cultural impermanence, neither are other regions. Regarding ECOSOC rights, Europe’s realization of what some may describe as the “folly of its ways” is demonstrated, as documented previously, by their adoption of the European Social Charter in 1961,<sup>109</sup> proving that human rights, much like tradition and culture on which it depends for its legitimacy, is not static. Like culture, human rights “is in constant flux, adapting and reforming” to changing circumstances.<sup>110</sup> In other words, “there is nothing inevitable or sacrosanct about human rights” that would make it aloof to changes in interpretations or practices necessitated by genuine human needs or concerns.<sup>111</sup> There are, of course, scholars who would squabble over this claim, trumpeting the reverse. For their benefit, we seek insight from the on-going debate at the UN regarding homosexuality as a human right.

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<sup>108</sup> Howard, *supra* note 64, at 172.

<sup>109</sup> European Social Charter, *supra* note 89.

<sup>110</sup> Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement, WHO, 1-2 (1997), *available at* [apps.who.int/iris/handle/10665/41903](https://apps.who.int/iris/handle/10665/41903).

<sup>111</sup> Hinchman, *supra* note 55, at 8.



In a recently published paper, this author describes a hitherto condemned and criminalized<sup>112</sup> sexual practice as an instance of an emerging (albeit disputed) human right, the ascendancy or triumph of secular humanism over religious morality:

Historically, sexual intercourse was constructed as exclusive prerogative of a man and a woman. Sex between individuals of the same sex was considered immoral, perverse and against the laws of nature, and prohibited at the pain of harsh criminal penalties, calculated to deter the conduct, especially between males. Sodomy, derived from Ecclesiastical Latin *peccatum Sodomiticum* (Sin of Sodom), was condemned by all the world's major religions . . . With shifting morality, however, the religiously embedded foundation of this injunction has rapidly

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<sup>112</sup> See VA. CODE § 18.2-361 Crimes against Nature; penalty:

- A. If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony, except as provided in subsection B.
- B. Any person who carnally knows by the anus or by or with the mouth his daughter or granddaughter, son or grandson, brother or sister, or father or mother shall be guilty of a Class 5 felony. However, if a parent or grandparent commits any such act with his child or grandchild and such child or grandchild is at least thirteen but less than eighteen years of age at the time of the offense, such parent or grandparent shall be guilty of a Class 3 felony.

Richard Cornish was executed in 1624 in Virginia, the first person in the United States to suffer capital punishment for sodomy. See BETH MARSCHAK & ALEX LORCH, *LESBIAN AND GAY RICHMOND (IMAGES OF AMERICA: VIRGINIA)* 9 (2008); see also *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), which upheld the law. See *Sodomy Laws: Virginia, GAY AND LESBIAN ARCHIVES OF THE PACIFIC NORTHWEST*, <http://www.glapn.org/sodomylaws/usa/virginia/virginia.htm> (last visited June 29, 2013).

weakened, and attitudes are beginning to soften, particularly in Europe and the North America.<sup>113</sup>

To illustrate this shifting attitude, the paper points to the 2003 ordination of Gene Robinson, an openly gay man, as the Bishop of New Hampshire, by a major Christian denomination (the Episcopal or Anglican church). Continuing, the paper cautions:

As the cloak of deviancy is surreptitiously stripped off homosexuality by the protestant churches in the United States, so also is the connotation of iniquity with which gay sex was once associated in secular world being eroded. *Lawrence v. Texas* is a landmark case in the annals of American constitutional law . . . For the first time ever, the United States Supreme Court held that private sexual intercourse between two consenting gay men is a constitutionally protected liberty under the due process clause of the Fourteenth Amendment, explicitly overruling *Bowers v. Hardwick*, where the Court had earlier denied constitutional protection to exactly the same conduct. . . . Howsoever one reads the judgment, it is fairly apparent that what was once profane and perverse is gradually and steadily sauntering into the American mainstream.<sup>114</sup>

This seems to be the point Hinchman was making in asserting that the “position of an ‘immoralist’ such as Thrasymachus in Plato’s *Republic* ” is not only “always a possibility” but “indeed may even now represent the “true” opinions of more than a few Americans” and, if I may add, many others in different parts of the world.<sup>115</sup> Translation: what was considered loathsome, immoral, or even criminal in yesteryears might become tomorrow’s human rights.

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<sup>113</sup> Obiajulu Nnamuchi, *Hands Off My Pudendum: A Critique of Human Rights Approach to Female Genital Ritual*, 15 QUINNIPIAC HEALTH L. J. 243, 281-82 (2012).

<sup>114</sup> *Id.* at 282.

<sup>115</sup> Hinchman, *supra* note 55, at 8.

Homosexuality is an appropriate subject for evaluating claims relating to the universality of human rights for a number of reasons. Not only is it a topical issue – and this is very crucial – but it also reveals also most vividly the sharp distinctions in value systems even amongst people from within the same geographic locality. The gay rights activist Graeme Reid was indeed right, “sexuality [has] become one of the fissures with the U.N. Human Rights Council and beyond –an ongoing battle around . . . the rights of LGBT people.”<sup>116</sup> Although Reid apparently disagrees with a recent description by Russian Foreign Minister Sergei Lavrov of LGBT rights as “nothing but an outside “appendage to the universal values,”<sup>117</sup> in so stating, Lavrov was speaking for most of his countrymen. Value systems are undeniably offshoots of cultural orientations, and the orientations themselves often differ as a result of disparate affiliations, some of them religious, others secularly driven.

Although each country retains a dominant value system or some form of common morality that undergirds national actions, it is incorrect to claim homogeneity (in ideas or attitudes, for instance) amongst the various sub-units that make up the whole. In practice, minority views are usually wrapped up in some sort of democratic garb and fused with the views of the majority in order to come up with a single national platform. The reach of this democratic process varies depending on the sensitivity of the subject in question and the underlying values. Homosexuality, again, is quite illustrative. We begin from internal (within national boundaries) dissent and extend our analysis globally.

Since slavery, there has not been an issue that has been as divisive in the United States as homosexuality and its place in national life. The issue has pitted different segments of the country against each other – the Northern part of the country against the South, conservative Christians against progressive ones, political conservatives against liberals (left-leaning political views) and so forth. Nine out of the fifty states (in addition to Washington D.C)

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<sup>116</sup> Graeme Reid, *Traditional Values' Code for Human Rights Abuse?* CNN.COM Oct. 17, 2012, available at <http://globalpublicsquare.blogs.cnn.com/2012/10/17/traditional-values-code-for-human-rights-abuse/> (last visited August 15, 2013).

<sup>117</sup> *Id.*

that comprise the Union recognize same-sex or homosexual/lesbian marriage.<sup>118</sup> It is striking that the vast majority of states in which the imprimatur of law has been bestowed upon same-sex marriage are located mainly in the Northeast corner of the United States, the mostly liberal (secular) part of the country. This is no coincidence. It signifies, quite strongly, the relationship between traditional values and human rights or, to put it more precisely, the role of tradition and culture in the politics of homosexual agenda. This is explicative of Southern states' (otherwise known as the "Bible belt") aloofness or imperviousness to this development.<sup>119</sup> While secular morality, visibly evident in liberal states in the Northeast and Northwest, is welcoming of all forms of "alternative lifestyles," the Bible belt states frown upon non-heterosexual relationships as incompatible with their Christian-centered ethics. A Pew Research Center survey published in November 2012 documents that, in contrast to trends in other regions, the majority of the residents of Southern states resolutely oppose the measure.<sup>120</sup> For instance, 56% of the people in Alabama, Kentucky, Louisiana, Oklahoma and Texas oppose same-sex marriage and only about 35% favor it.<sup>121</sup>

Even amongst people sharing the same faith, other non-religious values might operate to shape their views regarding human rights. Aside from the previously discussed ordination of a gay

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<sup>118</sup> *Marriage Center*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/marriage-center> (last visited Aug. 15, 2013) (The states include Connecticut, Maryland, Washington, Iowa, Vermont, New Hampshire, Maine, Massachusetts and New York).

<sup>119</sup> David Osborne & Stephen Foley, *Barack Obama Defies Bible Belt with Support for Gay Marriage*, THE INDEPENDENT, May 10, 2012, <http://www.independent.co.uk/news/world/americas/barack-obama-defies-bible-belt-with-support-for-gay-marriage-7729226.html> (quoting President Obama: "[a]ll the so-called 'Bible Belt' states in the south-eastern US have now taken similar steps; 29 US states have passed constitutional amendments barring same-sex marriage.").

<sup>120</sup> *Behind Gay Marriage Momentum, Regional Gaps Persist: Two-to-One Support in New England, Opposition in South*, PEW RESEARCH CENTER, Nov. 9, 2012, <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/>.

<sup>121</sup> *Id.*

Bishop in New Hampshire,<sup>122</sup> this is further exemplified by the controversy that greeted the blessing of same-sex unions in Vancouver, Canada<sup>123</sup> as well as the church leadership in England's support for the ordination of gay bishops.<sup>124</sup> This support, according to reports, is "likely to reignite one of the Anglican community's most bitter internal debates."<sup>125</sup> Quite unsurprisingly, evangelical (conservative) Anglicans wasted no time in voicing their disapproval.<sup>126</sup> While the Anglican Communion in England and the Episcopal Church in North America (both with liberals at the helm) saw nothing inimical with permitting homosexuals to occupy leadership positions in the church, their more conservative doctrinally astute brethren in distant lands, including Africa, Asia and South America, are adamant in their resistance, believing that homosexuality is irredeemably irreconcilable with their articles of faith. How does one reconcile this divergence in moral thought amongst adherents of the same faith? Or, rather, what is responsible for the divergence?

The simple response is that although adherents of the Anglican faith are, at least in theory, doctrinally homogenous, the extent to which the shared doctrine is internalized is highly dependent on the prevailing extra-religious mores in individual societies. Call it civilization or anything else, but the fact remains that secularism has eaten deep into the fabric of religious institutions in the Western world, particularly Europe. Self-idolatry, the inevitable result of unbridled permissiveness, what some people refer to as "moral decadence," has its consequences. Consider these facts: in 1910, 66.3% of the world's Christians were Europeans; nonetheless, by 2010, the number plunged to 25.9%, a decline of more than 50%.<sup>127</sup> Although a number of reasons could be advanced

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<sup>122</sup> Laurie Goldstein, *First Openly Gay Episcopal Bishop to Retire*, N. Y. TIMES, (Nov. 6, 2010), <http://www.nytimes.com/2010/11/07/us/07bishop.html>.

<sup>123</sup> Atila S. Guimarães, *Anti-Anglo Anglican 'Church'*, Sept. 2, 2003, [http://www.traditioninaction.org/HotTopics/b01sCrisis\\_AntiAnglo.html](http://www.traditioninaction.org/HotTopics/b01sCrisis_AntiAnglo.html).

<sup>124</sup> Peter Walker, *Church of England Rules Gay Men in Civil Partnerships can Become Bishops*, GUARDIAN, Jan. 4 2013, <http://www.guardian.co.uk/world/2013/jan/04/church-of-england-gay-bishops>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Global Christianity: A Report on the Size and Distribution*

in explanation of this reversal in the fortunes of the church in Europe, one thing is quite undeniable: what is being experienced, howsoever exotic the terminology, is nothing short of “chickens coming home to roost,” a bountiful harvest, reaping the fruits of the triumph of secular humanism over traditional values – the “connivance at individualism and hedonism on the scale of society and state and ultimately on the scale of the whole humanity.”<sup>128</sup>

Stepping aside from North America and Europe reveals something quite remarkably different. Conservatism, the near-universal adherence to traditional values, takes center stage most glaringly in the churches, and this is the reason several Bishops, most notably Peter Akinyola, the Archbishop of Lagos and then Primate of the Nigeria Anglican Communion, held nothing back in lashing out against what he perceives as the Western Anglican Communion Church’s unapologetic slide toward Gomorrah: “This is an attack on the Church of God —a Satanic attack on God's Church.”<sup>129</sup> A statement at a 2007 award ceremony lauding the Primate for demonstrating an “uncommon initiative, drive and . . . leadership” was quite explicit, “[c]alled a bigot by some in the Anglican Church, his attitudes nevertheless represent a deep-rooted conservative tradition in African Christianity that is flourishing and growing.”<sup>130</sup> Yes, the Primate may be demonized as a bigot in some quarters but he remains undeterred. His resolutely unyielding stance strongly reflects the doctrine of the church as understood, practiced and propagated by the flock under his shepherdship. And here is the uncanny paradox: in contrast to steadily declining pews in Europe

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*of the World’s Christian Population*, PEW RESEARCH CENTER<sup>15</sup> (2011), [http://www.pewforum.org/uploadedFiles/Topics/Religious\\_Affiliation/Christian/Christianity-fullreport-web.pdf](http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Christian/Christianity-fullreport-web.pdf).

<sup>128</sup> RUSS. ORTHODOX CHURCH, *Statement by Communication Service of Moscow Patriarchate Department for External Church Relations on recent changes in family laws in France and Great Britain*, (March 5 2013), <https://mospat.ru/en/2013/03/05/news82106/>.

<sup>129</sup> Philip Jenkins, *Why all Anglican Eyes in London are Nervously Fixed on a Powerful African Archbishop*, THE ATLANTIC MONTHLY (Nov. 2003) <http://www.theatlantic.com/past/docs/issues/2003/11/jenkins.htm>.

<sup>130</sup> ALL AFRICA GLOBAL MEDIA, *National Champions, World Class Brands* (Jan. 5, 2007), available at <http://sip-trunking.tmcnet.com/news/2007/01/05/2216957.htm>.

and North America, sub-Saharan Africa's share of global Christian population continues to witness an astronomical upswing, jolting from 1.4% in 1910 to 23.6% in 2010,<sup>131</sup> with most of the new converts residing in the embattled Primate's homeland, Nigeria.<sup>132</sup>

Outside the realm of Christian ecumenism, the controversy shows no sign of abating, particularly at the intergovernmental level. A stark illustration is a report presented by the UN Special Rapporteur on the Right to Education, Vernor Muñoz, to the UN General Assembly in 2010.<sup>133</sup> Hostility to the Report centered on, *inter alia*, the Rapporteur's explicit references to, and reliance on, the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity<sup>134</sup> as setting a human rights standard.<sup>135</sup> On this critical point, most of the members of the Third Committee of the General Assembly completely disagreed. Apart from criticizing him for "indulging in a twisted interpretation" of the statements of treaty-monitoring bodies, the vast majority of States distanced themselves from his claim that sexual education is a human right.<sup>136</sup> African, Islamic, Arab and Caribbean States of the Third Committee voted to reject the Report.<sup>137</sup> Even the EU was of the opinion that although comprehensive sexual education was indispensable to the enjoyment of a wide range of other human rights, it was wrong to regard it as a human right.<sup>138</sup> The United States also opposed the notion of according human right status to sexual education.<sup>139</sup> A statement attributed to the representative of Malawi (on behalf of African

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<sup>131</sup> *Global Christianity*, *supra* note 127, at 9.

<sup>132</sup> *Id.* at 74.

<sup>133</sup> U.N. Secretary-General, *Report of the United Nations Special Rapporteur on the Right to Education*, UN Doc. A/65/162 (July 23, 2010).

<sup>134</sup> See YOGYAKARTA PRINCIPLES, <http://www.yogyakartaprinciples.org> (last visited Aug. 15, 2013).

<sup>135</sup> Report of the United Nations Special Rapporteur on the Right to Education, *supra* note 133, at ¶¶ 23, 67.

<sup>136</sup> INT'L SERVICE FOR HUMAN RIGHTS [ISHR], *Majority of GA Third Committee Unable to Accept Report on the Human Right to Sexual Education* (Oct. 26, 2010), <http://www.ishr.ch/archive-general-assembly/933-majority-of-ga-third-committee-unable-to-accept-report-on-the-human-right-to-sexual-education>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

Group) captures the sentiment of most States. The representative charges that the Special Rapporteur:

[H]ad sought to: over-step the terms of his mandate; introduce ‘controversial concepts’ that were not recognized under international law; create new human rights; relied on information from non-credible sources that was not verified; failed to incorporate information provided by Member States; selectively quoted from the work of the treaty bodies in a manner that distorted their views; and sought to propagate controversial principles (the Yogyakarta Principles) that were not endorsed at the international level. Each of these criticisms was in contravention of the Code of Conduct and if left unchecked, would undermine the entire system of special procedures.<sup>140</sup>

It is striking that only a handful of States (Canada, Costa Rica, Liechtenstein, Norway, and Sweden) endorsed the Report. The question, then, becomes: has anything changed since 2010 when the Report of the Special Rapporteur was overwhelmingly rejected at the intergovernmental level? Hardly. A Report of the Office of the United Nations High Commissioner for Human Rights titled “*Technical Guidance on the Application of a Human Rights-Based Approach to the Implementation of Policies and Programmes to Reduce Preventable Maternal Morbidity and Mortality*” presented two years later suffered similar fate.<sup>141</sup> A claim in the Report that “human rights law includes fundamental commitments of States to

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<sup>140</sup> *Id.*; see also Press Release, Twenty-Six Years After UN Treaty Aimed at Absolute Prohibition of Torture Adopted, U.N. Press Release SHC/3987 (Oct. 25 2010) <http://www.un.org/News/Press/docs/2010/gashc3987.doc.htm> (crediting this statement to the Caribbean Community (CARICOM): we “wish to put on record our strong disapproval of this attempt by the Special Rapporteur to create a new right within the universally established right to education, far exceeding his mandate.”).

<sup>141</sup> UN High Commissioner for Human Rights, *Technical Guidance on the Application of a Human Rights-Based Approach to the Implementation of Policies and Programmes to Reduce Preventable Maternal Morbidity and Mortality*, UN Doc. A/HRC/21/22 (July 2, 2012).



enable women to survive pregnancy and childbirth as part of their enjoyment of sexual and reproductive health rights . . .”<sup>142</sup> was roundly rejected by a group of Arab, Islamic, and African States on the ground that “no international consensus on sexual rights” exists.<sup>143</sup>

Recall that in 2008, France, in league with an assorted mix of countries (Argentina, Brazil, Gabon, Japan and Norway) successfully brought a Declaration on Human Rights and Sexual Orientation and Gender Identity before the 63rd session of the General Assembly of the UN.<sup>144</sup> Drafted in response to what the sponsors saw as rising discrimination against individuals based on their sexual orientation,<sup>145</sup> the Declaration seeks to outlaw death penalty, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment and so forth as punishment for homosexuality.<sup>146</sup> In what seemed like a Goliath versus Goliath affair, the initiative had large cohorts of supporters (66 States) and substantial opposition (60 States, led by Syria).<sup>147</sup> A statement from the latter camp casts the measure as “attempts to create ‘new rights’ or ‘new standards,’ by misinterpreting the Universal Declaration and other international treaties as inclusive of notions that were never articulated nor agreed to by the general membership,” a situation that risks “seriously jeopardiz[ing] the entire international human rights framework.”<sup>148</sup>

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<sup>142</sup> ISHR, *supra* note 136, at ¶ 8.

<sup>143</sup> Human Rights Monitor Quarterly, *Human Rights Council Worrying Signs of Regression at 21<sup>st</sup> Session* Issue 4, 2012, at 6.

<sup>144</sup> *Sexual Orientation and Gender Identity*, FRANCE AT THE UNITED NATIONS, <http://www.franceonu.org/france-at-the-united-nations/thematic-files/rule-of-law-human-rights/sexual-orientation-and-gender/article/sexual-orientation-and-gender> (last visited Aug. 15, 2013).

<sup>145</sup> Annex to the Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations Addressed to the President of the General Assembly (Dec. 22, 2008).

<sup>146</sup> *Id.*

<sup>147</sup> Patrick Worsnip, *U.N. Divided Over Gay Rights Declaration*, REUTERS (Dec 18, 2008), <http://www.reuters.com/article/2008/12/18/us-un-homosexuality-idUSTRE4BH7EW20081218>.

<sup>148</sup> *Id.*

The acrimony translates essentially to saying homosexuality is not a human right.

To conclude this section, we consider a criticism by a leading LGBT activist of what he perceives as a “pernicious development” – a reference to anti-homosexual laws that have recently been, or on the precipice of being, enacted by a number of Eastern European countries.<sup>149</sup> Graeme Reid faults these statutes for not only conflating homosexuality with pedophilia but for also “creating distorted perceptions about social equality of traditional and non-traditional family relationships.”<sup>150</sup> To the extent that Reid argues against lumping pedophiles together with homosexuals, he is completely right. Because the two are clearly distinguishable, painting them with one large brush is indefensible. Nonetheless, what the activist fails to realize, and this is a very serious omission on his part, is that what he calls “distorted perceptions” is not really seen as such by the vast majority of the people in the countries whose statutory frameworks he vociferously maligns. In fact, for those opposed to the homosexual agenda, any attempt to place homosexual relationships on the same social scale as traditional types is seen as a threat to community cohesion and a distortion of social equilibrium with grave consequences. And this is the reason for their resistance. In fact, the vast majority of Russians, three-quarters, equates homosexuality to illness or considers it an aberration.<sup>151</sup> In apparent disagreement, Reid argues that traditional values are neither “inherently and invariably good” nor “positive and affirming.”<sup>152</sup> Ostensibly oblivious to what the defenders of traditional values are thinking, he proceeds to describe his clamor for homosexual equality as reflecting “universal core values, which transcend differences in culture, religion and tradition.”<sup>153</sup> This is obviously a wildly spurious claim.

The fact that these laws were approved by the population in these countries (by virtue of enactment by democratically-elected

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<sup>149</sup> Reid, *supra* note 116.

<sup>150</sup> *Id.*

<sup>151</sup> *Q&A: Gay rights in Russia*, BBC NEWS (Aug. 9, 2013) <http://www.bbc.co.uk/news/world-europe-23604142>.

<sup>152</sup> Reid, *supra* note 116.

<sup>153</sup> *Id.*

legislative bodies) is an incontrovertible repudiation of the universality of the right Reid seems to claim. Moreover, an official statement recently released by the Russian Orthodox Church, to which the vast majority of residents of the countries under assault belong, warns against misrepresentation of the voice of the people:

The legalization of same-sex unions is another step towards an attempt to give an absolutely new meaning to marriage and the family . . . In the countries which have embarked on the path of a radical revision of traditional family ethics, this process has resulted in a demographic crisis which is growing from year to year. The revision of fundamental norms of family law on which the human community has been built for centuries and which are preserved as before in the moral code of major world religions is a path leading to the self-liquidation of whole nations.<sup>154</sup>

Would Reid and his supporters share this perspective? The answer must be no. So, what to do? A resolution might arise from a diligent and honest search for consensus on the universality of human rights.

#### **IV. Why incorporating traditional values is critical: the case of female genital ritual**

The preceding sections, although tending to validate the critical relationship between traditional values and human rights, have been constructed within the contours of current realities at the UN. In this section, we examine a topic on which a lot of ink has been spilled, a movement to force population-wide attitudinal changes, even though the changes sought are sharply dichotomous from, and in fact destructive of, the culture in targeted countries. The woeful failure of statutory frameworks and international law to

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<sup>154</sup> Russian Orthodox Church, *Statement by Communication Service of Moscow Patriarchate Department for External Church Relations on recent changes in family laws in France and Great Britain* (March 5, 2013), <https://mospat.ru/en/2013/03/05/news82106/>

extirpate female genital ritual (FGR) (also called female genital cutting or female circumcision) is a great lesson in anthropo-legal scholarship. The very few published works that are elucidatory of this failure are important resources for experts charged with advising the UNHRC on the role of traditional values in future development of human rights.

Different people might project different reasons as explicatory of this failure but the most critical, by far, rests on the perceived disdain for the cultural sensibilities of the practitioners, utter disrespect for traditional values underpinning the practice. What the abolition bandwagon does not seem to appreciate is that human rights, regardless of locus, do not exist in vacuum. This is pragmatism, not theoretical postulation. To survive, to gain legitimacy in the sense of being internalized (compliance borne out of a sense of belief in the legitimacy of the law in question and not out of coercion or impelled by fear of criminal sanction), human rights must be anchored on a strong foundation, some value system – a key ingredient of normative legitimacy. Undergirding a community's value system is its tradition or culture. This much is incontrovertible. Difficulty arises when the culture or tradition in question is claimed by the so-called primitive societies. Such claims are almost always dismissed as ungrounded in reason, at least not the kind of reason that is conducive to human rights. But the question is: whose human rights? If, as has been argued, human rights are a "cultural artifact," constructed within the boundaries of a particular value system,<sup>155</sup> then the current practice of ignoring some cultures but embracing others, depending on their regions of origin or people affected, cannot be justified. It is in this context that opposition to the current process at the UNHRC should be explored.

As evident in the introductory section, this paper originates out of a deeply troubling concern for the growing attack against the on-going process of integrating traditional values into the corpus of global human rights. As in years past, the position espoused by the United States and Europe is seen in many quarters, especially in mainstream scholarship, as representative of the "correct" path, irrespective of the numerical strength of States in the opposition

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<sup>155</sup> Stephen J. Toope, *Cultural Diversity and Human Rights* 42 MCGILL L.J. 169, 177 (1997).

camp or even the cogency of their stance. Apart from being dubbed a vague concept,<sup>156</sup> it is claimed that:

Traditional values often impose patriarchal, mono-cultural norms that discriminate against minority and marginali[z]ed individuals, be they indigenous people, persons with a disability, individuals with a non-conforming gender identity, or religious minorities.<sup>157</sup>

This claim is contestable. First, it is overly broad; not all traditional values are oppressive. Second, the claim implicitly denies the origin of human rights: traditional values. Legal scholar Stephen J. Toope posits, “it is helpful to admit frankly that the language of [human] rights is Western in its philosophical roots.”<sup>158</sup> These “roots,” to be sure, are quintessentially bold offshoots of European traditional values, having as its goal the promotion of “human freedom and the desire to promote physical, intellectual and spiritual development.”<sup>159</sup> From its earliest beginning, the root of respect for and observance of human rights in every society, Western world included, was tradition, whether religiously imbedded or rooted in secular humanism.<sup>160</sup> In the realm of human rights, the operative value system was Judeo-Christian, the dominant religious worldview in both Europe and in North America, the regions from which the world received human rights.

Are religion and tradition not close cultural kin? The world’s major religions aspire to dominate the lives of practitioners by commanding complete submission to their rules and precepts; that is, unreserved obedience to one’s religious traditions. The Holy texts, be it the Bible or the Qur’an, are, in fact, compilations of rules of conduct as transmitted by messengers of God, books of traditional

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<sup>156</sup> HRC 16/37, *supra* note 6, at ¶ 42.

<sup>157</sup> *Human Rights Council must take an Unequivocal Stand against Traditional Values*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS, (March 18, 2013) <http://www.ishr.ch/council/376-council/1478-human-rights-council-must-take-an-unequivocal-stand-against-traditional-values>.

<sup>158</sup> Toope, *supra* note 155, at 184.

<sup>159</sup> *Id.*

<sup>160</sup> HRC 16/37, *supra* note 6, at ¶ 10.

rules to be observed in order to become eligible for the rewards and promises of the text. Moral excellence in Islamic faith is attained when one is able to channel one's intellectual resources toward ensuring conformity with God's commandments as revealed in the Qur'an.<sup>161</sup> In fact, "Islam" has been equated to "a way of life" which "provides guidance in all spheres of a person's life, be they individual or collective."<sup>162</sup>

Islam is used in the preceding paragraph to emphasize only the central place of tradition or culture in people's lives, not Islam's universal acceptance as worthy of providing support for human rights. In short, Islamic traditions are held to the same disdainful standard as others of non-Western origin. The "West is right" mindset majestically reigns supreme, even in human rights theory and practice. Development economist William Easterly describes this mindset as the "West's self-pleasing fantasy that "we" were the chosen ones to save the Rest."<sup>163</sup> To save the rest of humanity, Easterly explains, the West must project the rest of the world as a "blank state –without any meaningful history or institutions of its own –upon which the West could inscribe its superior ideals."<sup>164</sup> Sharing this view is a recent work, which asserts:

Evidence of this racial superciliousness and Eurocentrism abound, and understanding its historical, philosophical and ideological underpinnings is crucial to proper contextualization of Western opposition to cultural expressions that insufficiently measure up to what they conceive as proper ethical orientation. It boils down to how one culture perceives the "other."<sup>165</sup>

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<sup>161</sup> AZAM BEG, ISLAM THE WAY OF LIFE: A BRIEF INTRODUCTION 1 (2005), available at <http://www.scholaris.com/islam/learning/PDF/IslamTheWayOfLife.pdf>.

<sup>162</sup> *Id.*

<sup>163</sup> WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD 23 (2006).

<sup>164</sup> *Id.*

<sup>165</sup> Obiajulu Nnamuchi, *The Goose and the Gander: A Jurisprudential Defense of Medicalization of Female*

To be sure, the way one culture sees the “other” has significant ramification for human rights. The author continues:

Indeed, it is this sort of mindset that informs widespread dismissive attitude of Western commentators (and their governments) of the claim that the wants of women and girls in FGR-practicing communities are at variance with the solutions they propagate. As in the colonial days, they “know better.”<sup>166</sup>

Rationales undergirding FGR are many and varied.<sup>167</sup> Some justify the procedure as religiously ordained, whereas others justify it on the basis of chastity, cleanliness and aesthetic of the vagina and surrounding areas.<sup>168</sup> Yet, others justify the practice as a cultural edict. Although several authors have disputed these benefits, their conclusions were based on second-hand information, regurgitations of individuals lacking personal experience of, or intimate familiarity with, the cultural rite. It was not until 2001 that a publication by anthropologist Rogaia Mustafa Abusharaf unearthed the views of women in the Sudan about FGR<sup>169</sup> who have personal experience of the practice in a study designed to provide “an understanding of the ritual as presented in women’s own words, which reflect their own truths.”<sup>170</sup> But despite the testimonies of these women, explaining the metaphysical underpinnings of their belief and, hence, support for continuation of the practice, the current global coalition remains undeterred in their bid to extirpate the practice.

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*Genital Ritual*, J. MED. & L. (forthcoming, 2013).

<sup>166</sup> *Id.*

<sup>167</sup> Obiajulu Nnamuchi, *Harm or Benefit? Hate or Affection? Is Parental Consent to Female Genital Ritual Ever Defensible?* 8 J. HEALTH & BIOMEDICAL L. 377, 403 – 16 (2013).

<sup>168</sup> *Id.*

<sup>169</sup> Rogaia Mustafa Abusharaf, *Virtuous Cuts: Female Genital Circumcision in an African Ontology* 12 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 112, 121 – 35 (2001).

<sup>170</sup> *Id.* at 122.

When in 1996 the United States Congress decided to outlaw FGR, not even a single woman from the immigrant community was invited to testify; yet, it was *their* culture that was under assault by the lawmakers. Quite unsurprisingly, the law that resulted from this flawed process, Criminalization of Female Genital Mutilation Act,<sup>171</sup> made no provision for the special circumstances of adults who might wish to partake in the cultural rite. Unconcerned about agency and autonomy, implicit in adulthood, the statute fails to disaggregate women from children; meaning that reflectively and autonomously expressed preferences of competent rational adults are immaterial to a finding of culpability under this particular statutory framework.<sup>172</sup> Yet, as human rights scholar Michael Ignatieff ably notes, “[b]ecause the very purpose of rights language is to protect and enhance individual agency, human rights advocates must, if they are to avoid contradicting their own principles, respect autonomy of those agents” for whose protection they purport to act.<sup>173</sup> Yes, the lawmakers would attempt to justify the statute as protecting the human rights of women in “barbaric” cultures; nonetheless, when fully examined, the law would be seen to do very little. What human rights apologists succeed in doing, in cases such as the one under consideration, is violating the human rights of the very people they purport to protect.<sup>174</sup>

In reality, what such legislative frameworks wound up achieving is placing women “between the deep sea and the devil;” that is, comply with the law and risk alienation from their community or defy the law and face the wrath of the criminal justice system. As to whether this is really the best way to promote the human rights of women in FGR-practicing communities, political scientist Amy Gutmann explains, “oppressed women typically want their rights as

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<sup>171</sup> Pub. L. No. 104-208, § 645, 110 Stat. 3009-708, (1996) (codified as amended at 18 U.S.C. § 116).

<sup>172</sup> Nnamuchi, *Hands Off My Pudendum*, *supra* note 113, at 271 (commenting, in relation to this genre of legal frameworks, “[t]his is a startling development in international legal discourse as never before has consent, in respect to competent adults, been dismissed as irrelevant to the question of culpability”); *see also* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 107 – 31 (1995).

<sup>173</sup> MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 18 (2001).

<sup>174</sup> Nnamuchi, *Hands Off My Pudendum*, *supra* note 114, at 243.



individuals to be secured within their own culture, not at the expense of exile from their culture, or the destruction of what they and others take to be valuable about their culture.”<sup>175</sup> Moreover, as anthropologist Carlos Sulkin admonishes, in dealing with an unfamiliar cultural practice, efforts should be directed toward soliciting the views of the people themselves, what they “say and do” about the particular practice in question whilst avoiding a “know it all” condemnatory attitude.<sup>176</sup> But that was not the path the United States and indeed the vast majority of FGR-criminalizing nations chose. Blanket prohibition seems to be the order of the day.

The difficulty with this kind of legal framework –that is, one that is insensitive to the cultural underpinnings of the prohibited conduct –is that it achieves little, if anything at all. Proof is the woeful failure of anti-FGR legal regimes to stamp out the practice. For instance, anthropologist Michelle Johnson reports that in response to a threat to ban FGR, women in the town of Mansoa, Guinea Bissau, organized what she describes as “the largest girls’ initiation ceremony in the history of the Oio region” of the country.<sup>177</sup> In fact, rather than retreat *en masse* from the practice, as envisaged by activists, there is evidence that even in communities which traditionally did not practice FGR, girls are voluntarily electing to be circumcised, in apparent imitation of their neighbors and defiance of what they perceive as unjustified meddling in their affairs by foreigners.<sup>178</sup> There are several other instances of defiance

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<sup>175</sup> Gutmann, *supra* note 40, at xxi.

<sup>176</sup> Carlos D. Londoño Sulkin, *Anthropology, Liberalism and Female Genital Cutting*, 25 ANTHROPOLOGICAL TODAY 17, 19 (2009); see also Nancy Scheper-Hughes, *Virgin Territory: The Male Discovery of the Clitoris*, 5 MEDICAL ANTHROPOLOGY Q. 25, 26 (1991).

<sup>177</sup> Michelle C. Johnson, *Becoming a Muslim, Becoming a Person: Female “Circumcision,” Religious Identity, and Personhood in Guinea Bissau*, in FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY AND CHANGE 215, 231 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000).

<sup>178</sup> Lori Leonard, *Adopting Female “Circumcision” in Southern Chad: The Experience of Myabé*, in FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY AND CHANGE 167, 184 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000) (finding that although women in Myabé (Southeastern Chad) are volunteering to be circumcised, their culture does not require the procedure as a prerequisite for marriage and neither is there any evidence that men prefer circumcised women.).

against the ban of FGR.<sup>179</sup> They bear no repeating here; but it suffices to add that widespread resistance to anti-FGR legislative frameworks is a natural consequence of the conflict between culture and law – a legal regime that came into existence without input from the primarily affected population. This is an alien imposition, to say the least. Yet, as observed nearly three decades ago, “[f]or any law to grow and be productive, it must be rooted in the culture and tradition as well as the realities of the people for whom it is made.”<sup>180</sup> In this conflict, the congenital defective nature of the law guarantees its failure to impact the population in the manner envisaged.

## V. Conclusion: toward a new human rights paradigm

Let us assume that the year was 1945, instead of 2013, with the vast majority of the States now averse to the legitimacy of homosexual rights and sexual/reproductive rights agenda still asphyxiating under colonial subjugation. France was able to persuade other Western powers at the negotiating table to approve a treaty institutionalizing these rights, to adopt some framework akin to the Yogyakarta Principles (in the case of homosexuality).<sup>181</sup> The Holy See is subdued. Then fast forward to 2013. By this time, third world countries have been granted political independence, coincidentally by France and its allies. Traditional values hold sway in these newly independent nations. They are given a list of human rights they are to observe, rights which, they are informed, represent universal values. As proof of this universality, a treaty adopted by an international body, namely, the UN, recognizing these rights, is tendered. Their non-participation in the negotiations leading up to the adoption of the treaty, they are told, is immaterial. Their argument that some of the provisions of the treaty are inconsistent with their moral epistemology is equally muted. Stunned, they wonder amongst

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<sup>179</sup> Nnamuchi, *Harm or Benefit?*, *supra* note 167, at 256-57.

<sup>180</sup> G.O. Olusanya, *African Charter on Human and Peoples' Rights, History and Development*, Paper Presented at the Seminar Marking the Centenary of Legal Profession in Nigeria, Lagos, Feb. 21, 1986, *cited* in Olusola Ojo, *Understanding Human Rights in Africa*, Paper Presented at the Preparatory Conference on Human Rights: Individual Rights or Collective Rights, University of Limburg, Maastricht, Netherlands, Sept. 18–20, 1987, 10.

<sup>181</sup> Yogyakarta Principles, *supra* note 134.

themselves about the moral authority of such treaty or the legitimacy of the rights they purportedly protect.<sup>182</sup> In a sense, this is the concern or objection, even if not couched in these terms, which the 2009 Russian-sponsored resolution (A/HRC/RES/12/21), which triggered the current process at the UNHRC, seeks to raise.<sup>183</sup>

Homosexuality is used in this paper as a proxy for a larger issue, namely, how to negotiate and resolve clash of values underlying human rights. Homosexuality was chosen, amongst many other contentious right-based claims, not on account of any distinguishing peculiarity or characteristic, except that activists, by incessantly juxtaposing homosexual agenda against traditional values, made it an unavoidable analytical issue. For this reason alone, it would have been intellectually impossible to do justice to the subject of this paper without considerable attention to claims associated with homosexual agenda. Moreover, homosexual rights advocates have been wildly successful in casting opposing voices as primordial brutes, intent on denying what they project as legitimate claims of human rights. By comparing homosexuals to slaves, for instance, this group seeks to push traditionalists into a corner of non-redemption, as defenders of the indefensible. As morally outrageous as it is to deliberately confuse the current status of homosexuals with hundreds of years of systematic lynching, murder, rape, propertization and other dehumanizing treatment meted out to a select group of people simply as a result of their skin color, the message has gained formidable traction amongst a wide array of people, including, quite paradoxically, those whose forebears perished at the temple of slavery. These bogus claims need to be checked. Humanity gains nothing when novel claims are stamped with the imprimatur of rights based upon false assumptions and spuriously wild conjectures.

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<sup>182</sup> Although not new, this question continues to dog human rights. Virginia E. Leary asks, rather rhetorically, given the “preponderant Western influence on the philosophy and language of the [UDHR], must we renounce its pretensions to universality?” See Virginia E. Leary, *The Effect of Western Perspectives on International Human Rights*, in AN-NA'IM & DENG, *supra* note 56, at 22.

<sup>183</sup> HRC Res. 12/21, *supra* note 4.

There is a reason *Dred Scott v. John FA Sandford*, which held that African-Americans, whether free or slave, could never become citizens of the United States, remains, by far, the worst decision in the archives of the United States constitutional law.<sup>184</sup> For the benefit of revisionist historians, we may do well to recall the imperial words of Chief Justice Taney:

They [slaves] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.<sup>185</sup>

The key words are that slaves in America “had no rights which the white man,” or anyone else for that matter, was under obligation to respect. Can the same be said of homosexuals today? Has any scholar of note, or even a serious political figure, ever invoked culture or traditional value as a basis for commodifying gay men or lesbians?

So, what is the purpose of this unwarranted comparison, the attempt to link homosexuality with slavery? The answer seems fairly obvious: to mute opposition (explaining unreflective ascription of homophobic, gay-bashing and intolerant impulses to those in the opposition).<sup>186</sup> No one wishes to be seen as being in the same camp as slave owners. A spokesperson puts it this way:

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<sup>184</sup> 60 U.S. 393(1857).

<sup>185</sup> *Id.* at 407.

<sup>186</sup> A Federal Radio Corporation of Nigeria (FRCN) broadcast of July 5, 2013 (7AM News Commentary) suggests boycotting of countries that have legalized same-sex marriage. This is a reflection of popular opinion in Nigeria but would, of course, be condemned in countries against which the FRCN commentary was directed.

There is no doubt that governments will continue to use traditional values as a way of justifying human rights abuses, particularly against the most marginal and vulnerable members of society. But it will be a sad day for the United Nations if human rights abusers are able to turn to a “traditional values” resolution to back up their spurious claims.<sup>187</sup>

Elsewhere, this author opines:

[I]n secular morality (as opposed to religious/Christian morality) or as a matter of human rights *stricto sensu*, even in absence of legislative or judicial [authority], the right to follow one’s sexual preferences cannot be abridged unless operationalizing the right detrimentally impacts the right of another person.<sup>188</sup>

But postulating that the right is claimable does not mean that those who believe that such operationalization would be deleterious upon their own rights should not be able to put forth their objections. Demanding that human rights be subjected to considerations rooted in the tradition and culture of various societies that comprise the global community, as espoused by the resolution that set the current process at the UNHRC in motion, is not the same as a concerted effort by concerned nations to stymie human rights. To the contrary, it is the human right to voice opposition to the “attack on traditional values” that is in danger.<sup>189</sup>

Consider this illustration. In a move described as a “truly shocking extra-constitutional power grab” and a “defection of duty,” President Barrack Obama, in 2011, ordered his Attorney General not

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<sup>187</sup> Reid, *supra* note 116.

<sup>188</sup> Nnamuchi, *Hands Off My Pudendum*, *supra* note 113, at 283.

<sup>189</sup> Bret Hayworth, *Bishop: Gay Ruling an Attack on Traditional Values*, SIOUX CITY JOURNAL.COM, April 3, 2009, available at [http://siouxcityjournal.com/blogs/politically\\_speaking/bishop-gay-ruling-an-attack-on-traditional-values/article\\_e93a5c32-8a3b-5ad0-930f-227d399f79eb.html](http://siouxcityjournal.com/blogs/politically_speaking/bishop-gay-ruling-an-attack-on-traditional-values/article_e93a5c32-8a3b-5ad0-930f-227d399f79eb.html).

to defend the Defense of Marriage Act (DOMA),<sup>190</sup> which defines marriage as excluding same-sex union. His action, grounded in the belief that the statute is unconstitutional, effectively silenced the voice of millions of traditional value-oriented Americans who were represented by Congress, which passed the statute.<sup>191</sup> Shocking or not, the President has been chided by some and lauded by others, which adds nothing really new to the debate. But, more to the point, Obama's action reflects his own ideological-driven left-leaning value system, his personal conviction and moral epistemology, which, on all grounds, considers DOMA offensive. And this too was manifested in *United States v. Edith Windsor*, a case that challenged the constitutionality of §3 of DOMA.<sup>192</sup>

Obviously, for legal scholars, the critical point of the decision, handed down on June 26, 2013, is the abrogation of §3 of DOMA as unconstitutional; but the decision is significant in another important respect. A sharply divided court speaks to different conceptualizations of human rights, informed by individual beliefs or value systems of the justices of the highest court in the land.<sup>193</sup> The history of DOMA, a widely popular legislation supported by 85

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<sup>190</sup> The Defense of Marriage Act (DOMA), Pub.L. 104–199, 110 Stat. 2419, codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

<sup>191</sup> Jan Crawford, Obama Administration Decision to not Defend Defense of Marriage Act will Trigger Heated Political Battle, CBS NEWS, Feb. 23, 2011, available at [http://www.cbsnews.com/8301-504564\\_162-20035495-504564.html](http://www.cbsnews.com/8301-504564_162-20035495-504564.html).

<sup>192</sup> *United States v. Windsor*, 570 U. S. \_\_\_\_ (2013) (Slip Op. 12-307). Section §3 of DOMA provides as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U. S. C. §7.

<sup>193</sup> All the five liberal justices, two of whom were appointed by Obama, voted to strike down the traditional family value-oriented statute (Sonia Sotomayor, Stephen G. Breyer, Elena Kagan, Anthony Kennedy and Ruth Bader Ginsburg) in contrast to the four conservatives on the Court (Chief Justice John Roberts, Samuel A. Alito, Antonin Scalia and Clarence Thomas ) that filed a scathing dissent to the majority opinion.

senators and 342 representatives,<sup>194</sup> is quite revealing as to what the statute expresses: “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>195</sup> But the gentlemen in

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<sup>194</sup> United States v. Windsor, 570 U.S. \_\_\_\_ (2013) (Slip Op. 12-307)(Roberts, C.J. dissenting).

<sup>195</sup> H. R. Rep. No.104-664, at 16 (1996). Evidently, the plaintiff and the majority of the Justices of the United States Supreme Court think of morality in starkly different terms, a point underscored in Justice Scalia’s dissent. Following a thorough chastisement of the majority for embarking upon what he equates to chasing a constitutional shadow, Justice Scalia zeroes in on a key finding that he argues would have justified the majority opinion – a finding “that same-sex marriage is ‘deeply rooted in this Nation’s history and tradition.’” See United States v. Windsor, 570 U.S. \_\_\_\_ (2013) (Slip Op. 12-307)(Scalia J., dissenting). Yet, the majority made no such finding. They could not, regardless of their best efforts. Equating the majority ruling to a declaration of “open season on any law that (in the opinion of the law’s opponents and any panel of like-minded federal judges) can be characterized as mean-spirited,” the Justice expresses alarm at the conclusion of the majority “that the only motive for [DOMA] was the “bare . . . desire to harm a politically unpopular group,” and its claim that DOMA’s supporters “acted with *malice*—with the ‘purpose’ . . . ‘to disparage and to injure’ same-sex couples . . . to ‘demean’ . . . to ‘impose inequality,’ . . . to ‘impose . . . a stigma’ . . . to deny people ‘equal dignity’ . . . to brand gay people as ‘unworthy,’ . . . and to ‘*humiliat[e]*’ their children.” *Id.* at 19. That liberal Justices in the court would unflinchingly throw judicial temperament (restraint in choice of language) to the wind, in castigating the United States Congress and the Presidency in these vile terms, speaks to the vitriolic nature of the debate surrounding the place of homosexuality, same-sex marriage and other atypical lifestyles in contemporary world. Justice Scalia describes the action as demeaning to the judicial branch. *Id.* at 21. He continues:

Laying such a charge against them [Congress and Presidency] should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the “arguments put forward” by the Act’s [DOMA’s] defenders, and does not even trouble to paraphrase or describe them. . . I imagine that this is because it is harder to maintain the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them *Id.* at 19.

black robes (at least the majority) know better, or so they think, explaining why *Windsor*, much like the major powers at the UN, has succeeded in opening a new frontier of controversy in traditional values and, what some might call, “new-age” human rights. At stake is the precise limit or boundary of human rights, the process that would determine them, and who ultimately determines them.

This author believes that there is an important place for traditional values in future development of human rights, not just the culture of a select few countries but from all parts and corners of the globe. This should not be interpreted to imply advocacy for indiscriminate embrace of all traditional values; rather, every nation should be allowed to project its values and let the propriety or legitimacy of each claim as worthy of anchoring human rights be debated in an open forum. This has been termed a “cross-cultural fertilization of ideas.”<sup>196</sup> As evident from the discussion in the preceding sections, human rights – both in theory and practice – reflect quite strongly the worldviews of a particular segment of the human population. Yet, for the ascription of universality, which human rights depend upon for their legitimacy, worldviews from non-Western nations need not be brushed aside. This has been the main argument of this paper.

There is no question that non-compatibility of prescriptions of human rights with traditional values of many societies is at the root of claims of violations of these same rights by authorities charged with protecting them. Cobbah was quite on point: what is counted today as human rights violation in Africa is, in reality, the unavoidable consequence of supplanting African communal lifestyle with Western liberalism. “In other words,” he posits, “we may be seeing these abuses” precisely “because we are attempting too hard to make Westerners out of Africans.”<sup>197</sup> To put it differently, because the standards against which these countries are judged have nothing to do with their value system or moral ontology, it is the

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Even as stunned supporters of DOMA weigh the impact of this decision, think tanks are already busy, strategizing on a reversal of the decision. The status of traditional values, once cherished throughout the land, faces an uncertain future in the United States as in several other countries.

<sup>196</sup> Cobbah, *supra* note 105, at 310.

<sup>197</sup> *Id.*



imposition, bereft at its core of the people's cultural experiences, which is the culprit.<sup>198</sup> Human rights scholar Abdullahi An-Na'im seems to validate this point in arguing that the "difficulties in implementing established human rights effectively, and in recognizing other claims and interests as human rights and implementing them also, derive from insufficiency of cultural support for the particular right or claim."<sup>199</sup> Conscious that recognition of a particular claim as a human right in a formal instrument, regardless of its nature, imbues no cultural legitimacy to the claim, An-Na'im notes that the "process through which the current international human rights standards were formulated and adopted did not address issues of cultural legitimacy in relation to most of the cultural traditions of the world."<sup>200</sup>

The importance of these concerns derives from the reality that the goal of human rights law is to elicit behavior change or modification from individuals as well as authorities in a manner that leads to the realization of the good of all. Unless this goal is actualized, all efforts at national, regional or international levels in the human rights field amount to naught. An illustration was given earlier with the current global effort at criminalization of FGR. As previously explained, although ostensibly packaged as completely grounded in protecting the human rights of women in affected countries, the effort has had negligible impact. The reason is not far-fetched: prohibition is simply contrary to the ways of life of the target population, creating an irreconcilable conflict between functioning normative standards and alien imposition. Thus, because FGR is perceived as a prescription of culture and religion, an ineliminable part of the people's identity, efforts at compelling abandonment have fallen by the wayside.<sup>201</sup> A recent paper puts it this way:

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<sup>198</sup> See Olusanya, *supra* note 180; see also Schwartz, *supra* note 57, at 369 (arguing that it is futile to attempt to force change in human conduct through the instrumentality of law that is alien to the cultural norms of the people).

<sup>199</sup> Abdullahi Ahmed An-Na'im, *Problems of Universal Cultural Legitimacy for Human Rights*, in AN-NA'IM & DENG, *supra* note 56, at 331, 333.

<sup>200</sup> *Id.*

<sup>201</sup> Lynn Thomas, "Ngaitana (I Will Circumcise Myself)": Lessons from Colonial Campaigns to Ban Excision in Meru, Kenya, in FEMALE CIRCUMCISION IN AFRICA, *supra* note 177, at 129 (explaining how, in defiance of a 1956 law

“[b]ecause such laws are not home-grown (but rather sponsored by, and packaged under the auspices of, foreign organizations or governments) and, perhaps most damaging, sharply conflict with the ideals and expectations of the people whose conducts are targeted, most [of these] legislative frameworks suffer congenital defect from which they never recover.<sup>202</sup>”

This is the fate of legal regimes, human rights-oriented or not, that came into being without sufficient consideration of the cultural sensibilities of the people concerned. As recent experiences clearly highlight, co-opting important cultural or religious figures in the community into the scheme, are no game-changers. In Iraqi Kurdistan, FGR remains prevalent, despite the promulgation of a prohibitory statute in August 2011, and subsequent issuance of fatwa, under the hand of 33 imams and scholars in that region, denouncing FGR as non-Islamic.<sup>203</sup> These efforts are congenitally defective because by seeking to undermine the community’s sociopolitical and economic equilibrium, particularly by forcibly negating extant moral standards, they rob themselves of the most decisive element needed for compliance: cultural legitimacy.<sup>204</sup> The reality is that lack of “concern for human rights as they figure in the standards of many different cultures” (which produces laws that are

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which outlawed clitoridectomy in Meru (Kenya), a large contingent of adolescent girls in the community decided to circumcise themselves notwithstanding the risk of punishment); see also Michelle C. Johnson, *Becoming a Muslim, Becoming a Person: Female “Circumcision,” Religious Identity, and Personhood in Guinea Bissau*, in *FEMALE CIRCUMCISION IN AFRICA*, *supra* note 177, at 231 (reporting that in response to a threat to ban FGR in Guinea Bissau, women in the town of Mansoa organized what she describes as “the largest girls’ initiation ceremony in the history of the Oio region”).

<sup>202</sup> Nnamuchi, *Harm or Benefit?*, *supra* note 167, at n.256.

<sup>203</sup> HUMAN RIGHTS WATCH, *WORLD REPORT 2013: EVENTS OF 2012*, 24 (2013).

<sup>204</sup> For a comprehensive account of the interface between cultural legitimacy and human rights, see AN-NA’IM & DENG, *supra* note 56, at 331 – 67.

not culturally legitimate) is at the root of the wide discrepancy between human rights theory and practice.<sup>205</sup>

There is often a temptation (and this must be resisted) to rely on isolated instances as evidence that such frameworks have the desired effect on the targeted conduct. But even if such claims can be substantiated, that really does not say anything about the legitimacy of such laws. The relevant question is whether “individuals merely comply to the imperatives of their situation or whether they conform, having internalized the values and behavioral requisites of the prevailing order.”<sup>206</sup> In any event, compliance by individuals, “while believing that their human rights or their sense of dignity is being,” eroded, is not unheard of.<sup>207</sup> Many decrees in a military dictatorship, for instance, fall within this genre of laws. Despite all these odd cases, the norm is that a legal regime, which is culturally illegitimate (in the sense of being inconsistent with prevailing mores), much like an unjust law, lacks moral authority to compel compliance, the reason for the inevitable fatality of such regimes.<sup>208</sup> This has been the position of people questioning the universality credentials of international human rights law including the sponsors of the on-going process at the UNHRC:

The “international bill of human rights” is hailed as reflecting a world-wide consensus on the nature and substance of human rights. It is a deceptively false consensus. Ratification of the various covenants and conventions, frequently with exceptions, is an assertion of membership in the world community and not a commitment to the implementation of these rights or to their legitimacy. . . . The absence of a genuine consensus on human rights necessitates

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<sup>205</sup> *Id.* at 332.

<sup>206</sup> TOWARD A HUMAN RIGHTS FRAMEWORK, *supra* note 52, at 23 (describing Nicholas P. Pollis’ conformity compliance index); Nicholas P. Pollis, *Conformity, Compliance and Human Rights* 3 HUMAN RIGHTS Q. 93-105 (1981).

<sup>207</sup> *Id.*

<sup>208</sup> AN-NA’IM & DENG, *supra* note 56, at 333 (arguing that the challenges faced in implementing established human rights are the result of “insufficiency of cultural support for the particular right or claim.”).

rethinking and a search for new foundations for the construction of a reconstituted human rights theory.<sup>209</sup>

Even if in truth, as the final report of the Advisory Committee of the UNHRC seemingly suggests, “multiplicity of origin of human rights could be detected in reading the articles of the [UDHR],” this fact does not end the inquiry.<sup>210</sup> Multiple origins, without more, does not confer legitimacy. At any rate, the word “multiplicity” does not mean the same thing as “universality.” Thus, although countries that were represented at the negotiations leading up to the adoption of the UDHR in 1948 might be tempted to make such connection, their views do not reflect the position of a legion of other countries that had no representation at the negotiation table. This explains the dissenting voices of scholars such as Legesse, Cobbah and others examined above. The question then becomes, does the final report sufficiently address the concern of these scholars, the concern that underscored the process that triggered the advisory opinion? Hardly. On the key question, regarding the relationship between human rights and traditional values, the report may be summed up as saying that traditional values that are consistent with the goal of protecting and promoting human rights (which the Committee describes as positive) should be reinforced and negative ones discarded.<sup>211</sup> This conclusion raises more questions than answers. Who determines which values are positive or negative? According to what parameters? How is the UDHR an acceptable standard against which to assess traditional values when many countries never voted in support of the regime?

Aside from these concerns, there are more specific practical problems. Again, we use homosexuality as an illustration. How does the conclusion of the Advisory Committee address the controversy surrounding gay “rights” such as same-sex marriage, which is

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<sup>209</sup> Adamantia Polis & Peter Schwab, *Introduction*, in ADAMANTIA POLIS & PETER SCHWAB HUMAN RIGHTS: NEW PERSPECTIVES, NEW REALITIES 1, 15 (2000).

<sup>210</sup> UNHRC, Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind, ¶ 33, 22nd Sess., A/HRC/22/71 (Dec. 6, 2012).

<sup>211</sup> *Id.* at ¶¶ 46, 80.

generally opposed in non-Western societies, including Russia, but approved in many countries in the West? What do you say to people in traditional societies, for instance those embracing Judeo-Christian morality, which regards homosexual coitus as an abomination? How does one define a family? Is it consistent with human rights to define family as Olga Batalina, the deputy head of the Committee on Family, Women and Children at the Russian Parliament, does: “a family is a marriage between a man and a woman with children, preferably at least three”?<sup>212</sup> Batalina’s definition is, of course, rooted in the Russian Orthodox Church, to which President Vladimir Putin is said to be increasingly turning and “integrating its rhetoric of traditional values” into governance of the country.<sup>213</sup> But, then, an irresistibly astute follow-up question would relate to how this definition squares up with the *Windsor* case previously examined or the general attitude toward homosexuals in the West?

Insight is provided by the reaction to a recently adopted legislation in Russia prohibiting the spread of propaganda of “nontraditional sexual relations” amongst minors.<sup>214</sup> The law defines homosexual propaganda as anything “aimed at the formation of nontraditional sexual behavior” and imposes stiff penalty upon violators, up to \$150 on individuals and up to \$30,000 for companies, including media organizations.<sup>215</sup> Associated Press reports that “[w]hile the law provoked a backlash in the West, where protesters called for a boycott of Russian vodka in gay bars across North America, it has stirred little contention in Russia.”<sup>216</sup> A poll conducted in May by the independent Levada's Center found that an overwhelming majority of Russians, 78 percent, consider homosexuality either “licentiousness” or “a sickness or result of some psychological trauma.”<sup>217</sup> This is a far cry from the perception of homosexuality in Western countries. Translation, a wide gulf

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<sup>212</sup> *Russian Politician behind Anti-Gay Law Champions President Putin's Conservative Cause*, ASSOCIATED PRESS (Aug. 9, 2013), available at <http://www.foxnews.com/world/2013/08/09/russian-politician-behind-anti-gay-law-champions-president-putin-conservative/>.

<sup>213</sup> *Id.*

<sup>214</sup> ASSOCIATED PRESS, *supra* note 212.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

exists between both worlds; and, as yet, there is no indication that even with the best effort of the Advisory Committee of the UNHRC, the gap has been or would be bridged any time soon. So, what to do? We must go back to the drawing board. Bridging this increasingly expanding world of differences must persist along the line of “constant dialogue between different countries and peoples”<sup>218</sup> on which values should or should not form the foundation of human rights. In the end, the undeniable truth remains that so long as we are talking about values that will guide all mankind, an indispensable feature of “any system of ideas that claims to be universalistic” is that it “must contain critical elements in its fabric that are avowedly of African, Latin American or Asian derivative.”<sup>219</sup> Any suggestion to the contrary seems grossly untenable.

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<sup>218</sup> UNHRC, *supra* note 210, ¶ 80.

<sup>219</sup> Legesse, *supra* note 54, at 123; *see also* Toope, *supra* note 156, at 184 (advising that “[i]f we are to succeed in bridging the so-called clash of cultures, it will also be important to listen to diverse voices within Asian, African and Western societies. We need to put ourselves in positions where the plurality of perspectives can be heard. No society has a completely homogenous philosophical tradition.”).