



Application of human rights to intestate succession: The conflict of approaches

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Abstract

Beyond the nature of rights, a more fundamental conflict germane to this study centers on the approach to recognition and enforcement of rights. The question is whether rights should be enforceable to the individual in the same way in every contexts or whether enforcement can be influenced or affected by local circumstances and structures. The first approach underpins the doctrine of universality of human rights. The second accommodates the impact that cultural structures may have on rights application to individuals-cultural relativism. The first approach is an individual-based approach and targets the individual as the object of protection while the second allows protection through institutions and broader contexts of which an individual may be a component.

Keywords: human, succession, beyond, fundamental

1. Introduction

According to the Advisory Council on International Affairs, this issue embraces a number of interrelated questions. Such questions include whether human rights norms formulated at the international level since 1948 are universally valid and to what extent should the cultural settings affect the way in which they are upheld by states around the world? ^[1]. The Council noted the dynamism in culture and reasoned that one driver of the advocacy for cultural relativism is the cultural heterogeneity that characterizes the world. It stated: Like other norms and values, human rights are an expression of a culture and are dynamic in nature. Culture concerns people's behaviour as members of a group. A society's norms and values are part of its culture. No society is culturally homogeneous, and there may be considerable cultural differences within states. As societies become more complex internal cultural differences increase. At the same time, as societies come into closer contact with one another, cultural differences between them become more apparent ^[2]. Ezeilo notes that this controversy seems to be hinged on individual rights versus collective rights ^[3]. She adds that western feminists support the universality of human rights while their counterparts in Africa have reservations based on certain lived experiences namely: colonialism, neo-colonialism and displacement in the world economic order ^[4]. This disposition is driven by such factors as the woman not being an autonomous entity, African values, the extended

Family system, marriages and commensalisms ^[5]. Because these ideals are projected by proponents of cultural relativism, its critics seem to suggest that the proponents present the "group-oriented, consensual and redistribute value system [as] the only value system" for the "uniquely African model of human rights ^[6]. One important ramification of cultural relativism is that "violations of women's rights are justified on cultural differences and particularities ^[7]."

Ramcharan's answer to the first part of the question posed by the Advisory Council above is in the affirmative. He is of the view that the interaction of civilizations and learning from one another resulted in the development of such concepts as dignity, law, freedom, equality, liberty and rights over time. He asserts that the Universal Declaration of Human Rights had a universal flavor because it drew upon intellectual well-springs of Africa, the Americas, Asia and Europe ^[8].

2. The legal and conceptual underpinnings

Further, since the Declaration has been re-endorsed in international and regional treaties and in authoritative policy pronouncements by governments and peoples of all regions of the world, the universality of the Declaration is unassailable ^[9]. However, he admits that the debate about "the content of particular rights and the need for change" is a legitimate debate and that cultural diversity "might

¹ The Human Rights Committee of the Advisory Council on International Affairs, Report on Universality of Human Rights and Cultural Diversity" No. 4 (26 June 1998), 8 available at <https://www.google.com/search?client=firefox-b-d&q=Human+Right+Committee+of+the+Advisory+Council+on+international+affairs+-+Report+on+Universality+of+Human+Rights+and+Cultural+diversity> accessed 3 December 2018.

² The Human Rights Committee of the Advisory Council on International Affairs, Report on Universality of Human Rights and Cultural Diversity (26 June 1998), 9

³ Ezeilo (n 14) 16

⁴ Ezeilo, (n 14) 16

⁵ Ezeilo (n 14) 16-17

⁶ Rhoda Howard *Human Rights in Commonwealth Africa* (Totowa N.J: Rowman & Littlefield, 1986) cited in Ezeilo (n 14) 17

⁷ Ezeilo (n 14) 18

⁸ In an attempt to debunk the view that the Universal Declaration of Human Rights is a western construct, Ramcharan provides evidence of widespread participation by many countries as well as consultation of Constitutions of 55 countries. Even though these included Egypt, Ethiopia, Liberia and South Africa, the Declaration was adopted at a time when most African states were colonies of western powers. Interestingly, the African Charter of Human and Peoples' Rights which he considers as one "regional affirmation of universality" was adopted in 1981!, the Arab Charter on Human Rights in 1994; Cairo Declaration on Human Rights in Islam in 1990

⁹ Ramcharan (n 16) 423

influence the mode and manner of their application in the context of particular societies. Nonetheless, he believes that the universality of core human rights is quite compatible with cultural diversity^[10]. He proposed an “irrefutable democratic test that confirms the concept of the universality of rights.”

Just ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved? Would you like to live freely or in bondage? Would you like to have a say in how you are governed? If there is any critic of universality who would argue that an individual would choose execution to life, and bondage or serfdom to freedom, let him or her come forth. The democratic test of universality is in our view, the basis for its strongest affirmation^[11].

This so-called democratic test takes an over-simplistic view of the contexts in which rights may be asserted or exercised. What is torture, enslavement, freedom or bondage is relative to contexts. Conscientious objectors to war would rather be killed than take up arms. A wife’s submission to her husband in an African cultural setting may be regarded as enslavement elsewhere. A father’s discipline of his children in some zones may be viewed as torture in some other places. A community’s performance of marriage or burial rites may be seen as bondage by persons who live where such enactments are odd. Some religious observances may be revolting in certain human rights quarters. The examples are an avalanche and the simple questions posed by Ramcharan do not capture the realities relating to application of human rights. Selebi’s rejection of the concept of relativism is that it denies the universality of the concept of human rights and because it deprives the human right’s concept of the potential benefit of the diversity of cultural values around the world^[12]. While he points out that human rights are based on the universality of the dignity of all human being by virtue of their humanity, his allusion to the position of western colonies during the adoption of the Universal Declaration of Human Rights indeed questions the universality of the Declaration. He notes that peoples under colonial domination at the time “are fully entitled to feel resentment that their great and ancient empires voted for the declaration and then applied it imperfectly or not at all in their dependencies^[13].” In other words, the colonialists supported relativism at the time so that they did not view the norms adopted in the Declaration as fully applicable in the context of colonialism. Nonetheless, Selebi’s argument for universality lies in the fact that even though values, mores, norms and principles of human dignity differ from one society or culture to another, they are at the core of each society and culture^[14]. Xintang advocates respect for the principle of universality concerning human rights laid down by the international community since recognition of human rights has a positive bearing on the progress on human society^[15]. He however

Argues that the principle must be combined with concrete situations in different countries. He asserts that Due to different historical backgrounds, cultural traditions and social and economic levels of development, countries are different in implementing the principle in terms of content and forms, approaches and steps. For many developing countries, the focus is the right to subsistence, the right of development and various economic, social and cultural rights.... If one is unprejudiced, one can easily understand one argument: one can enjoy human rights only after one manages to live on^[16].

To him therefore, it will be out of place if one country or several countries act as permanent guard of human rights, supervising and attacking other countries which can only be watched with no right of speech^[17]. Short’s endorsement of universality springs from the fact that the UDHR unites traditions of political thought from different eras and links all rights – civil and political, economic social and cultural – as indivisible and inter-dependent^[18]. She points out that political ideologies and structures can easily affect these Ideals thereby questioning the seriousness of the universality principle in the mindset of nations^[19]. This is in addition to the deficiencies in the protection of even civil and political rights exemplified in the persistence of death penalty and the suppression of labour rights in many countries^[20]. Abu-Zayd adopts a practical approach to the issue. He proposes that proper question in relation to the universality of human rights should be why these *universal* human rights are not universally accepted and implemented and not whether or not human rights are universal. Approaching the matter from an Islamic perspective, he asserts that most muslims are reluctant to accept contemporary modernity “on the grounds that most of its values contradict Islamic values or that they rather stem from human legislation while Islamic values are originated in divine revelation^[21].” He therefore contends that the problem of universality is a socio-cultural and political one. Because modernity was introduced to Muslims mainly through colonization, the image of the west and accordingly of modernity, was always and still is, perplexed: It is that of the colonizer and the master, the enemy and the teacher.... In this context, modernity is desired because it is practical, but rejected because it represents threat to traditional identity.... All the political regimes in the Muslim world, on the other hand seem to enjoy a mutilated modernity i.e. modernity without rationality.... In this copy of modernity, individualism is always considered as threat to the community’s solidarity.... There were two options: first, to claim the humanistic heritage of the Western colonizer at

¹⁶ *ibid*

¹⁷ *Ibid*, 431

¹⁸ C Short ‘Without Social Justice No Progress in Human Rights’ [1998] (4) *Debate- How Universal are Human Rights* 431

¹⁹ She uses the example of the cold war to illustrate this. While the west criticized the suppression of dissidents and lack of political freedom in Soviet Bloc countries, the East pointed to unemployment and inequality in the capitalist world. And both sides turned an equally blind eye to human rights abuses in their client states. Incidentally this affected the approach to the International Covenant on Human Rights which was intended to give legal effect to the Declaration. It had to be split into two on the insistence of the United States who did not want to see the same force given to the implementation of economic and social rights: Short (n 111) 431-432

²⁰ *Ibid*, 433

²¹ Nasr Abu-Zayd “The Concept of Human Rights, the Process of Modernization and the Politics of Western Domination” [1998] (4) *Debate – How Universal are Human Rights?* 434

¹⁰ *ibid*

¹¹ *Ibid*

¹² Jacob Selebi “Towards the End of the Universality Debate” [1998] (4) *Debate –How Universal are Human Rights?* 428

¹³ *Ibid*, 429

¹⁴ *Ibid*, 430

¹⁵ W Xintang ‘The Universality of the Principle and the Importance of Different Contexts’ [1998] (4) *Debate –How Universal are Human Rights?* 430

the risk of losing unity, second, to carefully safeguard a sense of unity in the face of the colonizer by clinging to the past, favouring the tradition of ta 'a obedience and foreclosing all Western innovation except for importing technology^[22].

He concludes that even though human rights are absolutely universal as model, principle and ideal, in reality things are different because the world is yet to attain that level of universality. Ebtekar adds a sobering thought: the widespread abrogation of human rights occurring in various parts of the world, the neglect of human rights instruments and the incompetence in confronting or even condemning these events leaves serious doubts about the nature of these rights and their application.

According to Howson, all relativisms have two basic features in common: (i) that one thing – moral values, knowledge, Meaning-is relative to a particular framework (e.g. individual subject, a culture, an era, or a language). (ii) they deny that any standpoint is uniquely privileged over all others. Cultural relativism is associated with a general tolerance and respect for difference which refers to the idea that cultural context is critical to an understanding of people's values, beliefs and practices^[23]. According to Li, the logic that sustains a commitment to cultural relativism is itself based on a claim that it is relative to local (western) criteria and begs the question: given the cultural differences in the world how is it feasible to motivate compliance and implement ethical norms such as human rights?^[24] Johnson adds that in that situation, cultural relativism is seen to have an ethical dimension (moral relativism) that neutralizes people's ability to criticize the beliefs and practices of other cultures^[25]. A fundamental view in cultural relativism in the application of human rights is that researchers cannot really understand social practices, ideas and beliefs unless they look at and immerse themselves in the contexts in which they naturally occur^[26]. These prevailing cultural frameworks and how they are expressed often construct people's sense of reality. And because it encourages tolerance of difference, Nafisi cautions that it can neutralize political action by discouraging criticism of practices that are different from those associated with the culture that the potential critic inhabits^[27]. Nonetheless, Howson gives a cogent example of the dilemma and paints an interesting picture of the impact of cultural relativism in the application of so-called universal human rights standards

Female circumcision [is] frequently condemned by western commentators as a barbaric, patriarchal practice. On the one hand, female circumcision is understood as a symbolic practice that signals a right of passage embedded culturally salient idioms of purity, embodiment, sexuality and fertility while on the other, it is viewed by many westerners as a

Human rights transgression.... If female circumcision is viewed in its own, locally contextualized terms, then it is difficult to criticize the practice as unethical, because what is ethical in a western context is not necessarily understood as ethical in another, non-western context. Moreover, an extension of this argument is that when westerners criticize practices such as female circumcision, they do so not through any universal standards of morality or understandings of pain and suffering, but through a particular, local cultural framework (i.e. western) that universalizes experience and standardizes what is considered right and what is not; that views its reaction as universally rational when, in the framework of cultural relativism, it is in fact particular and local^[28].

She concludes that cultural relativism needs to be seen "as a methodological position that explains the practices and ideas of other cultures within the terms of their own cosmologies without necessarily sanctioning them^[29]." Earlier, Kluckhohn actually saw cultural relativity as a comparative method that provides a scientific means of discovering absolute morals. He reasons that "if all surviving societies have found it necessary to impose some of the same restrictions upon the behaviour of their members, this makes an argument that these aspects of the moral code are indispensable^[30]." He thought that the appropriateness of any positive or negative custom must be evaluated with regard to how this habit fits with other group habits. Along similar lines, Li argues that it is possible to adopt a cultural relativist stance without abandoning a commitment to the idea of universal standards or human rights^[31]. Benedict had earlier noted that any understanding of the totality of humanity must be based on as wide and varied a sample of individual cultures as possible. She argued that "it is only by appreciating a culture that is profoundly different from our own that we can realize the extent to which our own beliefs and activities are culture-bound, rather than natural or universal^[32]." Reintein concurs. She argues that in order to understand the principle of cultural relativism, people must understand the extent to which principle is based on enculturation-the idea that people unconsciously acquire the categories and standards of their culture. Her thinking is that the use of cultural relativism in debates of rights and morals does not require a relativist to sacrifice his or her values but it does require anyone engaged in a consideration of rights and morals to reflect on how their own enculturation (his own ethnocentric standards) has shaped their views. Consequently, any condemnation of another may be a form of cultural imperialism^[33]. Nonetheless conservatives consider cultural relativism as a negative influence on "intellectual thought" and see it as representing a "shift

²² Ibid, 436

²³ Alexandria Howson 'Cultural Relativism' [2009] *EBSCO Research Starters*, 1

²⁴ X Li 'A Cultural Critique of Cultural Relativism' [2007] (66) (1) *American Journal of Economics and Sociology* 151-171

²⁵ TH Johnson 'Cultural Relativism: Interpretations of a Concept' [2007] (80)(3) *Anthropological Quarterly* 791-802

²⁶ Howson (n 116) 3

²⁷ A Nafisi "Liberal Education and the Republic of the Imagination" [2006] (92)(3) *Liberal Education*: 6-13; also see, J Rachels "The Challenge of Cultural Relativism" in J. Rachels (ed) *The Elements of Moral Philosophy* (New York: McGraw-Hill 1993), 22-36 to the same effect

²⁸ Howson (n 116) 4

²⁹ Howson, (n 116) 4; originally, cultural relativism was understood as a "doctrine, or position than as a method." As a consequence, people misinterpreted cultural relativism to mean that all cultures are both separate and equal and that all value systems, however different, are equally valid. (See, G Marcus & MMJ Fisher *Anthropology as a Cultural Critique: The Experiment Moment in the Human Sciences* (Chicago: University of Chicago Press) 1. In other words, there are no absolute or universal moral standards.

³⁰ C Kluckhohn *Mirror for Man* [1944] cited in C Rosado "Cultural Relativism" available at https://www.andrew.cmu.edu/course/80-241/guided_inquiries/articles/cultural_rel.html accessed 5 December 2018

³¹ Li (n 117) 153

³² Ruth Benedict *Pattern of Culture* (Boston: Houghton Mifflin, 1934) 3

³³ A Reintein 'Relativism and the Search for Human Rights' [1988] (90)(1) *American Anthropologist* 56-72

away from objective, identifiable standards as the measure for all truth-claims^[34].”

Commission of Human Rights of the United Nations in preparing the Universal Declaration of Human Right noted the relevance of cultural relativism:

he problem is thus to formulate a statement of human rights that will do more than phrase respect for the individual as individual. It must also take into full account the individual as a member of a social group of which he is part, whose sanctioned modes of life shape his behaviour and with whose fate his own is thus inextricably bound. The bulk of this statement emphasizes concern that the Declaration of Human Rights was being prepared primarily by people from Western societies, and would express values that, far from being universal, are really Western: Today the problem is complicated by the fact that the Declaration must be of world-wide applicability. It must embrace and recognize the validity of many different ways of life. It will not be convincing to the Indonesian, the African, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast numbers of human beings^[35].

It has been said that cultural relativism can be criticized on both empirical and normative grounds.

Relativism tends to exaggerate the differences between cultures. Although superficially there are indeed great differences, there are striking similarities when it comes to fundamental principles. For example, all religions, philosophies and cultures condemn murder, theft, torture and deceit, and all acknowledge people's right to food or health.... No matter how worthy relativistic appeals for tolerance may be, an approach based entirely on the premise 'when in Rome, do as the Romans do' -which is where cultural relativism often leads- is hardly an attractive prospect. The moral humility advocated by cultural relativists all too often results in a moral paralysis which makes it impossible to pass critical judgement on situations and developments in other cultures. To take just one example, acceptance of discrimination against women because it is part of the tradition within a particular culture is too high a price to pay for relativism. Tolerance ends where other people's intolerance begins^[36].

Nonetheless, the Council admitted that the rejection of the ultimate implications of relativism does not mean that cultural uniformity should be the goal. Instead it is possible to strengthen human rights formulation by utilizing the positive aspects of cultural diversity. It advocated an "intercultural context", shared principles which can serve as the universal core of the human rights philosophy^[37]. For the Council there was no question about universal acceptance human rights norms as was evident in, for

Example, the World Conference on Human Rights in Vienna in 1993^[38]. The Vienna Declaration and Programme of Action^[39] stated that Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments^[40] All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms^[41].

The only problems encountered by the international community have been interpretation and application at the national level, and how to supervise compliance effectively^[42].

3. Conclusion

It can be seen from the above discourse that the views are diversified and argument on both sides is strong. The study is of the view that it is possible to isolate the positives of both doctrine and apply them in the interstate succession context. An effective legal regime is one that consists of living laws – that is to say, laws that the people to whom it will apply are ready to imbibe its tenets because it sits well with them. A law that will be ignored, rejected, disobeyed and ultimately disregarded is not a living law. One factor that may lead to this type of outcome is when laws do not capture the socio-cultural and economic aspirations of the populace. Criminal law found an easy way to enforce compliance by resort to punitive measures and sanctions such as fines, imprisonment and mandatory labour – nonetheless, it is yet to find a way to eradicate crime and criminal conduct! On the other hand, private law in Nigeria, particularly aspects that affect the day-to-day lives of a people and the way they conduct their social lives, has often accommodated the input of social norms and cultural structures because it is often within these contexts that individuals conduct their affairs. Some cogent examples include the constitutional retention of customary and Islamic law marriages, the continued preservation of customary law land tenure systems despite the enactment of various laws regulating land transactions generally and the acceptance of elements of patriarchy and paternity in the provisions of various laws in Nigeria. Where these arrangements are truncated by legal regime, it is possible that laws will fail to regulate people's lives. Finally, while it is true that human rights advocacy performs the vital function of checking abuses within these contexts, it is not true that there are no

³⁴ Howson, (n 116) 4

³⁵ *Executive Board American Anthropological Association* "Statement on Human Rights" [1947] (49)(1) *American Anthropologist* 539-543

³⁶ The Human Rights Committee of the Advisory Council on International Affairs *Report on Universality of Human Rights and Cultural Diversity* (26 June 1998), 10

³⁷ *Ibid*

³⁸ The conference was attended by more than 170 states. They agreed on a statement (in the Declaration and Plan of Action) that "the universal nature of human rights is beyond question". They also agreed that all human rights are universal, indivisible, interdependent and interrelated and enjoins all states regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms.

³⁹ Endorsed by General Assembly Resolution 48/121 - A/CONF.157/23, 20 December 1993

⁴⁰ *Ibid* para. 1

⁴¹ *Ibid*, para. 5

⁴² The Human Rights Committee of the Advisory Council on International Affairs *Report on Universality of Human Rights and Cultural Diversity* (26 June 1998), 13

formal and informal judicial and quasi-judicial platforms for seeking redress within these contexts ^[43].

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8. In an attempt to debunk the view that the Universal Declaration of Human Rights is a western construct, Ram charan provides evidence of widespread participation by many countries as well as consultation of Constitutions of 55 countries. Even though these included Egypt, Ethiopia, Liberia and South Africa, the Declaration was adopted at a time when most African states were colonies of western powers. Interestingly, the African Charter of Human and Peoples' Rights which he considers as one "regional affirmation of universality" was adopted in 1981!, the Arab Charter on Human Rights in 1994; Cairo Declaration on Human Rights in Islam in, 1990.
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10. *ibid*
11. *Ibid*
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13. *Ibid*, 429
14. *Ibid*, 430
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16. *ibid*
17. *Ibid*, 431
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19. She uses the example of the cold war to illustrate this. While the west criticized the suppression of dissidents and lack of political freedom in Soviet Bloc countries, the East pointed to unemployment and inequality in the capitalist world. And both sides turned an equally blind eye to human rights abuses in their client states. Incidentally this affected the approach to the International Covenant on Human Rights which was intended to give legal effect to the Declaration. It had to be split into two on the insistence of the United States who did not want to see the same force given to the implementation of economic and social rights: Short. 111:431-432
20. *Ibid*, 433.
21. Nasr Abu-Zayd "The Concept of Human Rights, the Process of Modernization and the Politics of Western Domination" Debate – How Universal are Human Rights. 1998; 4:434
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⁴³ Roseline Omoye Ehiemua "Trends in Informal Justice System in Nigeria: Lessons from Traditional Palace Court's Trials in Ekpoma and Uromi of Nigeria" [2016-2017] (17)(1) *University of Benin Law Journal* 20; Anthony Afe Asekhauno, Innocent Omofuma Olumese and Kingsley Ufuoma Omoyibo "African Jurisprudence: the Law as a Complement to Public Morality among the *Afemai-Esan* of Nigeria" [2016-2017] (17)(1) *University of Benin Law Journal* 43

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