

UNIVERSALISM AND THE UNIVERSAL DECLARATION: RECOVERING THE DRAFTERS' FLEXIBLE VISION

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ABSTRACT

The Universal Declaration of Human Rights (UDHR) offers a roadmap for facing current challenges to the human rights movement and for building a consensus around basic, or primary, rights. The UDHR reflected a cross-cultural, cross-political consensus, synthesizing diverse ideas about rights, varying conceptions of personhood and duties, and multiple modes of implementation. It allowed for rights ideals to be understood across societies with significantly different value systems. Such flexibility is critical today if human rights are to retain their legitimacy in an increasingly diverse and multi-polar world—a world in which consensus will be the only way to achieve progress.

KEY WORDS

Universal Declaration; Consensus; Rights; Treaties, Jacques Maritain, Eleanor Roosevelt, Peng-chun Chang

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1. INTRODUCTION: THE UDHR AS A ROADMAP

Human rights have grown increasingly divisive in recent years. African countries have pushed back against what they see as overly Western interpretations of some rights, such as those involving retributive justice. They argue that insufficient attention to local context has in some cases made it harder to resolve conflicts, remove dictators, and reconcile groups in places such as Uganda, Sudan, and Libya. Asian countries have pushed back against individualistic understandings of rights, arguing that they are entitled to prioritize the communitarian aspects of their cultures and developmental policies of their states. And more religious states—such as those in the Middle East—have pushed back against what they perceive as overly secular interpretations, arguing that human rights agreements are legal, not moral commitments. Meanwhile, challenges to human rights have been emerging in liberal democracies from several directions: in academia, consensus on human rights' objectives is fracturing; religious minorities complain their religious practice is being curtailed when rights clash; and various interest groups are using rights talk to advance their interests and views (e.g., corporations), exacerbating partisan cleavages.

Are these disputes simply the symptoms of a world that is increasingly multi-polar and ideologically divided or have the methods of human rights promotion brought them on? There was once a broader cross-cultural, cross-political consensus on human rights and the need for a flexible yet universal approach. The Universal Declaration of Human Rights (UDHR), a product of extensive negotiations, became the foundation for much of the post-1945 codification of human rights. Many international treaties are based on the Declaration, and many state constitutions make use of it in some form.¹

¹ Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 287, 289; Gordon Brown (ed), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book 2016).

Yet, as much as it is praised and venerated, the Universal Declaration is rarely studied as a roadmap for how to interpret and implement human rights. This is unfortunate, as the questions the drafters of the UDHR had to face are remarkably similar to the questions we face today. How can any rights be deemed universal in a world of great cultural and political diversity? What is the role of society, the state, and international bodies in implementing those rights? How much scope should countries offer minority groups to diverge from majoritarian concepts about rights? What happens when one fundamental right clashes with another?

Revisiting the Universal Declaration offers a chance to understand how these challenges were addressed—and how the Declaration gained such support across cultures—something human rights struggles to achieve at times today. The drafters of the document built a complex framework that was *both* universal and flexible in order to address precisely these kinds of disagreements. It was formulated to comfortably operate across societies even if they had significantly different value systems. This essay explores how ideas from around the world were synthesized, how the question of foundations was addressed, and what margin of appreciation for implementation was allowed before turning to the role of government and society. It concludes by arguing that only a return to the basics as articulated in the Universal Declaration can restore the legitimacy of human rights across cultures and belief systems.

2. THE UDHR: A COMPOSITE SYNTHESIS

The UDHR's framers achieved a distinctive synthesis, developing the document over two years with remarkably little disagreement regarding the basic substance despite wrangling about specifics. The final product combined many elements, connected to and interdependent with each other, greater as a whole than a simple sum of the individual components.² Some elements focus on the individual, others on community and society. Some focus on freedom, others on solidarity and duty. The vision of liberty

² Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) xx.

is inseparable from the call for social responsibility.³ Influenced by a combination of sociocentric (mostly from Latin America and Europe) and individualistic concepts (from the Anglo-American tradition), and gaining support from a wide assortment of European, Middle Eastern, Latin American, Asian, communist, capitalist, developed, and developing countries, the framers believed, as Mary Ann Glendon argues in her popular study of the UDHR, that the Declaration

“achieved a distinctive synthesis of previous thinking about rights and duties. After canvassing sources from North and South, East and West, they believed they had found a core of principles so basic that no nation would wish openly to disavow them. They wove those principles into a unified document.”⁴

Although far from a perfect integration of views from every part of the world—especially given that large sections of the globe were still colonized at the time—the United Nations’ Commission on Human Rights, which drew up the initial draft, did include people from a broad range of different cultural, religious, economic, and political systems. While some scholars, most notably Abdullahi Ahmed An-Na’im, argue that a certain Western perspective and set of norms were overemphasized at the beginning⁵—at the expense of non-Western and religious perspectives—others, such as

³ *ibid* xviii.

⁴ *ibid*.

⁵ See, for instance, Abdullahi Ahmed An-Na’im’s publications on the subject. “Given the historical context within which the present standards have been formulated, it was unavoidable that they were initially based on Western cultural and philosophical assumptions ... formative Western impact continues to influence the conception and implementation of human rights throughout the world.” An-Na’im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania 1992) 428. Elsewhere, he argues that since the fifty-one original members of the United Nations, only three were African (Egypt, Ethiopia, Liberia), and eight were Asian, and that these were mainly authoritarian, while the vast majority of states were still colonized by the West, few non-Western states actually participated in drafting the UDHR and the formative early stages of the two covenants. The only two non-Western representatives on the drafting committee were both educated in the US. Moreover the “representatives” were more reflective of Western cultural perspectives, and the laws related to the UDHR were not adopted by the public in most countries but by a small clique of Westernized lawyers, bureaucrats, and

Mary Ann Glendon, disagree. Individuals from a diverse set of countries, including France, Chile, Lebanon, pre-communist China, the USSR, Canada, and the United States played prominent roles in the debates. The result was a more sociocentric document than would have been possible if only Europeans and Americans were present. The document itself was influenced more by the dignitarian rights tradition of Latin America and continental Europe than by the more individualistic Anglo-American rights tradition, at least partly because this was necessary to gain acceptance in Asia and Africa.⁶ The former emphasizes social institutions such as the family and community and sees rights both as having clear limits and as being accompanied by responsibilities to other citizens and the state.⁷

The major players shaping the original document—including Peng-chun Chang (張彭春), Charles Malik, René Cassin, and Eleanor Roosevelt—were universalists but not homogenizers. They believed they had adopted a pluralistic document that was flexible enough to respond to different needs in terms of emphasis and implementation, but was not malleable enough such that none of the basic rights would become eclipsed or subordinated for the sake of others.⁸

Lebanon's representative at the United Nations, Charles Malik, who served as Rapporteur for the Commission on Human Rights in 1947 and 1948 and played a critical role in shepherding the document through the General Assembly afterwards (when he was President of the Economic and Social Council), encapsulated the diverse

intellectuals. See An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in An-Na'im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990). Makau Mutua is even more critical of how Western the UDHR is. See Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

⁶ Glendon (n 2) 227.

⁷ *ibid.*

⁸ Glendon (n 2) 232. "One of the most common and unfortunate misunderstandings today involves the notion that the Declaration was meant to impose a single model of right conduct rather than to provide a common standard that can be brought to life in different cultures in a legitimate variety of ways. This confusion has fostered suspicion of the Universal Declaration in many quarters, and lends credibility to the charge of Western cultural imperialism so often leveled against the entire human rights movement." Glendon (n 2) xviii.

influences on the Declaration in his speech urging acceptance. Directing his arguments to the public and posterity as much as to his fellow delegates, Malik said that the UDHR was “a composite synthesis of all these outlooks and movements and of much Oriental and Latin American wisdom. Such a synthesis has never occurred before in history.”⁹ He pointed to different parts of the document as examples to show where Latin America, India, the United Kingdom, the United States, the Soviet Union, China, France, and other countries had contributed.¹⁰

The diverse origin of the Declaration’s values is perhaps best represented by the presence of the Chinese concept of “two-man mindedness”—a rather unwieldy literal translation—or, in its Westernized translation, “consciousness of one’s fellow man.” Proposed by Chang, and based on the core Confucian ethic *rén* (仁),¹¹ this way of thinking—embodied in the ability to see things from another’s perspective as well as one’s own—permeates the document.¹² It appears, at Chang’s insistence, in Article 1 as “conscience” and “the spirit of brotherhood.”¹³ It appears elsewhere in various

⁹ Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1999) 73 Notre Dame LR 1153, 1161-1162.

¹⁰ *ibid.*

¹¹ *Rén* (仁) is the foundational virtue of Confucianism, characterizing the ideal behavior and bearing that a human should exhibit in order for a community to flourish. This means being able to see things from another people’s perspective and doing what is best for them with that perspective in mind. In *Analects* 6.30, Confucius explains this by saying that “benevolence is a matter of going on to establish other people because one seeks to establish oneself, and of bringing other people to perfection because one desires perfection for oneself.” It can be roughly translated as “humaneness,” “benevolence,” “human connectedness,” or “comprehensive virtue.” Encyclopædia Britannica (2015) *ren* <www.britannica.com/topic/ren>; Kurtis Hagen, ‘Confucian Key Terms: *Ren* 仁’ (SUNY Plattsburgh Website, August 2007) <http://faculty.plattsburgh.edu/kurtis.hagen/keyterms_ren.html>.

¹² Glendon (n 2) 142, 228; Tore Lindholm, ‘Article 1’ in Guðmundur Alfreðsson & Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 41, 43; 鞠成伟 /Ju Chengwei, ‘儒家思想对世界新人权理论的贡献: 从张彭春对《世界人权宣言》订立的贡献出发 / The Contribution of Confucianism on the World’s New Human Rights Thinking: Zhang Pengchun’s Contribution to the “Universal Declaration”’ (2011) 环球法律评论 / 33 Global LR 141, 141-149.

¹³ Sumner Twiss, ‘Confucian Contributions to the Universal Declaration of Human Rights: A Historical and Philosophical Perspective’ in Arvind Sharma (ed), *The World’s Religions: A Contemporary Reader* (Minneapolis: Fortress Press 2010) 102, 111.

attempts to prevent the document from becoming a source of selfishness or self-centeredness.¹⁴ In the Chinese version of the UDHR, which has equal status with the English and French versions, the emphasis is even greater because the original Confucian concepts are better articulated.¹⁵ The term “conscience” in Article 1, for instance, is replaced by *liangxin* (良心)¹⁶, which has a close historical association with *ren* and means the “innate goodness” (first character) of the “mind/heart” (second character); it thus conveys a much stronger sense of what makes a person moral than the original.¹⁷ As Chang argued during one of the General Assembly debates,

“The aim of the United Nations was not to ensure the selfish gains of the individual but to try and increase man’s moral stature. It was necessary to proclaim the duties of the individual, for it was a consciousness of his duties which enabled man to reach a high moral standard.”¹⁸

Chang’s emphasis on Confucian ideas about the moral capacity of human beings, the importance of community, and the need to be conscious of others prevented the UDHR from becoming an overly Western document.¹⁹ It also shows an alternative way, in addition to the liberal modern way, that human rights could be developed under the UDHR. Such a framework would emphasize interrelatedness and humanism more

¹⁴ *ibid* 111-112.

¹⁵ United Nations General Assembly, ‘Universal Declaration of Human Rights’ adopted 10 December 1948, GA Res 217A (III), UN Doc A/RES/3/217A (1948). Chinese version available at <www.un.org/zh/documents/udhr/>.

¹⁶ The other two usages of conscience in the English version (in the preamble and in Article 18) are translated differently because the meaning is different.

¹⁷ Lydia H Liu, ‘Shadows of Universalism: The Untold Story of Human Rights around 1948’ (2014) 40 *Critical Inquiry* 385, 413.

¹⁸ Third Social and Humanitarian Committee of the UN General Assembly (95th meeting) ‘Draft International Declaration of Human Rights (E/800) (continued)’ Summ. Rec., UNGA 3d Sess., 87 (6 October 1948).

¹⁹ Pierre-Étienne Will provides a balanced assessment of the overall Chinese contribution to the UDHR. Will, ‘*La contribution chinoise à la Déclaration universelle des droits de l’homme / The Chinese Contribution to the Universal Declaration of Human Rights, 1947-48: A Re-examination*’ in Will and Mireille Delmas-Marty (eds), *La Chine et la Démocratie: Tradition, Droit, Institutions* (Fayard 2007) 297.

than autonomy and individualism, seeking to contribute to every person's moral growth and maturation rather than only protecting their rights. Such an approach would emphasize the "human" in human rights more than the "rights." The best parts of Confucian family relationship ethics and private morality could be expanded for use with strangers—and thus society as a whole—and public morality. Roles, and the responsibilities and duties they entail, would matter more than rights.²⁰

Though the UDHR's drafters agreed on foundational ideals, there were clearly divergent cultural conceptions of human rights that remained unreconciled at the time of drafting. Some of the fault lines and debates have continued down to the present. Arab states challenged the right to change one's religion. Communist countries were opposed to the prevalence of civil liberties.²¹ These two sets of disagreements played a large role in seven of the eight abstentions at the time of passage.²² Outside the United Nations, there was opposition from some religious conservatives, who disliked a number of clauses and the lack of a religious basis; economic conservatives, who disliked the document's myriad employment and social rights; anthropologists, who did not think any set of rights could truly be universal; and non-Westerners, who believed that the document was too steeped in Western values and norms.²³

The drafters went out of their way to balance civil, cultural, economic, political, and social rights, and in Articles 28 to 30 they expressly referenced duties and an international order for realization of the rights. Their nuanced approach produced a special document that "continues to be a classical instrument and a possible bridge,

²⁰ Twiss (n 13) 110-114; Henry Rosemont, Jr, 'Rights-bearing Individuals and Role-bearing Persons' in Mary I Bockover (ed), *Rules, Rituals, and Responsibilities: Essays Dedicated to Herbert Fingarette* (Open Court 1991); Tom Zwart, 'Re-rooting International Human Rights By Revisiting the Universal Declaration of Human Rights' unpublished draft, 5-7; Liu (n 17) 404-417.

²¹ Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (Sage Publications 1990) 30.

²² South Africa was the other.

²³ Joseph Prabhu discusses three of the four categories (religious groups, anthropologists, and those outside the West) in Prabhu, 'Human Rights And Cross-Cultural Dialogue' (*Religion and Culture Web Forum*, The Martin Marty Centre, University of Chicago Divinity School April 2006).

currently and in the future, between different points of view.”²⁴ They expected the Declaration’s fertile principles to be interpreted in a variety of legitimate ways, and they anticipated that each country would provide experiences and ideas for others to learn from. The document thus provides ample leeway for different ways of imagining, prioritizing, and interpreting the rights included.²⁵ Jacques Maritain, who played a crucial role in the lead up to the drafting of the Universal Declaration, explained that this would allow “different kinds of music” to be “played on the same keyboard.”²⁶

The framers would thus generally be receptive to societies framing and prioritizing rights differently as long as they kept the minimum standards introduced in the Declaration. But Western human rights organizations have often been critical of approaches taken by non-Western societies. The 2012 ASEAN Human Rights Declaration is an interesting example. It contains all the civil and political rights that similar documents elsewhere had, and includes a wide range of economic, social, and cultural rights as well as innovative provisions related to AIDS sufferers, childbearing mothers, human trafficking, vulnerable groups, and children, yet it has been critiqued by organizations such as Amnesty International, the International Commission of Jurists, the UN High Commissioner for Human Rights, and the US State Department because of sections related to implementation that have a regional flavor.²⁷ Objections

²⁴ Guðmundur Alfreðsson and Asbjørn Eide, ‘Introduction’ in Alfreðsson and Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) xxix.

²⁵ Glendon (n 2) 230.

²⁶ Jacques Maritain, ‘Introduction’ in UNESCO (ed), *Human Rights: Comments and Interpretations, A Symposium* (Columbia 1949) 15-16.

²⁷ Amnesty International, ‘Postpone Deeply Flawed ASEAN Human Rights Declaration’ Press Release (5 November 2012) <<https://www.amnesty.org/en/press-releases/2012/11/postpone-deeply-flawed-asean-human-rights-declaration/>>; International Commission of Jurists, ‘ICJ Condemns Fatally Flawed ASEAN Human Rights Declaration’ Press Release (19 November 2012) <<http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/>>; United Nations Office of the High Commissioner for Human Rights, ‘Pillay Encourages ASEAN to Ensure Human Rights Declaration is Implemented in Accordance with International Obligations’ News Release (19 November 2012) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12809&LangID=E>>; US State

center on the ASEAN Declaration's emphasis that rights must be balanced with duties, and that realization of rights have to take into account the local political and cultural context. But it is these aspects which are most likely to increase the Declaration's legitimacy—and thus the chance that it will be embraced locally.²⁸

The framers of the UDHR were able to achieve broad consensus because they crafted a flexible legal document that everyone—whether from Western, non-Western, secular, or religious societies—could accept²⁹ and that everyone could believe was morally important according to local values systems. The advancement of human rights, after all, depends much more on moral authority than on legal commitments written on pieces of paper. Universal commitments must allow each culture to flourish as it might see fit. The drafters of the UDHR knew that, as Malik put it, human rights would only be realized when they were defended in each country “in the mind and the will of the people,” as reflected in national and local laws, and, above all, social practices.³⁰

In order to maximize the reach of their creation, the drafters used easy-to-understand language, kept the length short³¹, changed “international” in the title to “universal,”³² and avoided issues that would in any way be controversial.³³ They also put people and their social institutions front and center, rarely mentioning the state.

Department, 'ASEAN Declaration on Human Rights' Press Statement (20 November 2012)

<<http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm>>.

²⁸ Tom Zwart, 'Safeguarding the Universal Acceptance of Human Rights Through the Receptor Approach' (2014) 36 *Human Rights Quarterly* 898, 902-903; Association of Southeast Asian Nations (ASEAN), 'ASEAN Human Rights Declaration' (18 November 2012) <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>>.

²⁹ The eight countries that did not formally accede abstained rather than opposed the document.

³⁰ Mary Ann Glendon and Elliott Abrams, 'Reflections on the UDHR' (1998) 82 *First Things* 23, 25.

³¹ William A Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge 2013) 161; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 33-34.

³² Morsink (n 31) 324.

³³ Zwart (n 20) 3-4.

They understood that ultimately the success of their endeavor depended on inspiring change in how people treated each other—in their relationships—across society.

3. DIFFERENT FOUNDATIONS

The UDHR, like all international treaties, was a product of intense bargaining, compromise, and pragmatism, producing ambiguity at times instead of precise definitions. In the end, the UDHR could pass precisely because it avoided controversial issues (such as abortion) and because it employed general or vague phrases instead of very specific wording. The delegates could agree to disagree on the basis, use limiting clauses, and balance cross-cutting arguments.³⁴ The goal was to develop a “big tent” that could encompass a wide variety of value systems; calls were repeatedly made to draft a document that would be acceptable to all member states.³⁵

Although it promoted a common position, the UDHR stood upon very different philosophical foundations and was to be articulated differently in dissimilar parts of the world.³⁶ Indeed if not for the acceptance of different foundations and interpretations, it is unlikely that the original UDHR—and subsequent human rights documents—would have been accepted at all. As Jacques Maritain has often been quoted, “Yes, we agree about the rights, but on condition no one asks us why.”³⁷

The drafters understood, as René Cassin, the French delegate on the Commission, argued, that they needed to develop a document “that did not require the Commission

³⁴ Åshild Samnøy, ‘The Origins of the Universal Declaration of Human Rights’ in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 14-20.

³⁵ Maritain (n 26) 9-17; Zwart (n 20) 1 and 5.

³⁶ For an overview of the debates related to the theories behind, justifications for, and definitions of human rights, see Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315.

³⁷ See, for instance, Jeffrey Flynn, ‘Rethinking Human Rights: Multiple Foundations and Intercultural Dialogue’ (Third Berlin Roundtable on Transnationality: Reframing Human Rights, Berlin, Germany, 3-7 October 2005); Glendon (n 2) 77; Maritain (n 26) 10-11.

to take sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights.”³⁸

The result was an agreement on basic principles—laid out in the Preamble, Proclamation, and first two Articles—but not the reasons for them. It was a genuine “overlapping consensus,” in the sense that Charles Taylor meant when he used this term in his writing on human rights a few decades later.³⁹ Taylor, professor emeritus of political science and philosophy at McGill University, has argued that this type of agreement is the only way to achieve an “unforced consensus” on “certain norms of conduct” across the world today.⁴⁰

The seven paragraphs of the Preamble, setting out the reasons for the Declaration, and Articles 1 and 2 of the thirty-article Declaration, with their principles of dignity, liberty, equality, and brotherhood, show both the multiple foundations of the Declaration as well as the composite nature of its core values.⁴¹ Rejecting attempts to build a religious or natural rights foundation, the drafters used a combination of moral and historical rationales for human rights⁴² to produce “a more complex, more realistic, and more ‘open-ended’ scheme.”⁴³ Any normative tradition that embodies—or can be made to embody—human rights can thus be used as a basis.⁴⁴

³⁸ Glendon (n 2) 68.

³⁹ Charles Taylor, ‘A World Consensus on Human Rights?’ (1996) 43 *Dissent* 15.

⁴⁰ See Charles Taylor, ‘Conditions of an Unforced Consensus on Human Rights’ in Joanne Bauer and Daniel Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge 1999) 124.

⁴¹ These provide, as Tore Lindholm writes in the *UDHR-CSA*, a “thin, but indispensable normative basis through which the representatives of a plurality of religions, moral traditions, and ideologies may establish not only a political compromise, but also a non-exclusive and stable moral agreement on human rights.” Tore Lindholm, ‘Article 1’ in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 62.

⁴² Tore Lindholm, ‘Prospects for Research on the Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism’ in An-Na’im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990) 399.

⁴³ Lindholm (n 41) 63.

⁴⁴ Lindholm (n 42) 399.

The diverse foundations were seen as an asset during the drafting process. As Malik proclaimed in his speech to the General Assembly, the plurality of views was a strength, not a weakness. It resulted in a document built on a “firm international basis wherein no regional philosophy or way of life was permitted to prevail.”⁴⁵ After all, a human rights regime could not do without foundations altogether, and a strong grounding in the internal logic of each particular culture was essential to gaining universal moral authority and legitimacy. Indeed, Amy Gutmann has argued, plural foundations make a human rights regime more broadly acceptable than a single foundation.⁴⁶

As reflected in the political process that both gave birth to and shaped the UDHR—and subsequent international agreements—it is better to see human rights as a practical matter involving politics than one deriving from any abstract conception of human nature or reason.⁴⁷ Indeed, as William Twining, a leading scholar on international jurisprudence, writes, “nearly all human rights law is the result of hard-won political consensus and compromise at particular moments in time.”⁴⁸ By accepting that people around the world “adhere to a plurality of more or less rival comprehensive normative traditions,” the UDHR’s framers could come up with a document that is “both conceptually coherent and politically sustainable across moral divides.”⁴⁹

Many Western theorists, such as Jack Donnelly and Johannes Morsink,⁵⁰ and activists, such as the major human rights organizations, assume that human rights are a

⁴⁵ Glendon (n 2) 165.

⁴⁶ Amy Gutmann, ‘Introduction’ in Michael Ignatieff and Amy Gutmann (ed), *Human Rights as Politics and Idolatry* (Princeton 2003) xviii and xxii.

⁴⁷ Flynn (n 37).

⁴⁸ “That history is a complex story of reaction to particular contingencies, genuine idealism, opportunism, protracted negotiation (not always unpressured), compromise, adjustment, and power politics.” William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge 2008) 180.

⁴⁹ Lindholm (n 41) 69.

⁵⁰ Lindholm (n 42) 397-398; Jack Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76 *The American Political Science Review* 303; Donnelly, ‘Human Rights as Natural Rights’ (1982) 4 *Human Rights Quarterly* 391; Johannes Morsink,

contemporary version of natural rights. This is based on what Twining calls the misconception that human rights as a legal regime “can and should be founded on a coherent philosophy or ideology”—on the straightforward embodiment of moral universalism.⁵¹ Natural law theorists take rights to be self-evident, and see them as rigid elements that are unchanging across different contexts, situations, and time. But conflicts inevitably occur over which right(s) should be prioritized and whether competing moral matrices have legitimacy.⁵²

Underlying the presumption of universality for natural rights is the belief that all people think in the same fashion. While all human beings tend to have a psychological predisposition to generalize from their own experience, Western philosophers, as Alison Renteln argues, “in particular seem to be prone to projecting their moral categories on others. As a consequence, the presumption of universality is deeply ingrained in Western moral philosophy.”⁵³ For such people, any disagreement calls into question one’s moral reasoning, leading to the dismissal of alternative patterns of thought from the beginning.⁵⁴

As the drafters understood and cultural psychologists would later prove, different parts of the world have legitimately different moral priorities and ways of living the good life. Richard Shweder, the founder of the field of cultural psychology, explains, “Society is connected to natural moral law, but there are several natural moral worlds. The problem we face, as children and as adults, is that, at any point in time, we can reason and live in only one moral world.”⁵⁵ Recognizing the existence of multiple moral matrices is the first step to dialogue and cooperation on human rights issues.

‘The Philosophy of the Universal Declaration’ (1984) 6 *Human Rights Quarterly* 409. Donnelly has grown more flexible over time. His recent work shows greater scope for cultural adaptation than his earlier work.

⁵¹ Twining (n 48) 180.

⁵² Robert Licht, ‘Introduction’ in Licht (ed), *Old Rights and New* (The AEI Press 1993) 14; William Galston, ‘Between Philosophy and History: The Evolution of Rights in American Thought’ in Licht (ed), 67-68.

⁵³ Renteln (n 21) 49.

⁵⁴ *ibid* 50-51.

⁵⁵ Richard Shweder, ‘In Defense of Moral Realism: Reply to Gabennesch’ (December 1990) 61 *Child Development* 2066.

4. FLEXIBLE INTERPRETATION

Such flexibility is especially important if human rights are to retain their legitimacy in an increasingly diverse and multi-polar world⁵⁶—when consensus will be the only way to achieve progress. As Tore Lindholm argues in *Human Rights in Cross-Cultural Perspectives*,

“In the years to come some of the most crucial intellectual, moral, and ideological battles about human rights issues may well turn on their cross-cultural intelligibility and justifiability. The open-ended mix of moral and sociohistorical rationales for human rights commitments prefigured by Article I and the Preamble may be employed, I would argue, to enhance the cross-cultural legitimacy of human rights.”⁵⁷

At the same time, the UDHR contains exceptions to this flexibility for a narrow core of “primary rights” that were tightly written so as to allow little scope for variation. They include protections for freedom of religion and conscience and prohibitions of torture, enslavement, degrading punishment; retroactive penal measures; and other grave violations of human dignity made non-derogable under the International Covenant on Civil and Political Rights.⁵⁸ This suggests that although all rights in the UDHR are important and need to be upheld, there was universal agreement that a few have priority. The drafters saw limits to flexibility on these specific issues. The UDHR

⁵⁶ For more on the philosophical understandings and theories that broaden the scope and interpretations of human rights (and thus make them more flexible to fit into thick contexts), see Allen Buchanan, ‘The Egalitarianism of Human Rights’ (2010) 120 *Ethics* 679; Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ in Claudio Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer 2012); Rainer Forst, ‘The Basic Right to Justification: Toward a Constructivist Conception of Human Rights’ (1999) 6 *Constellations* 35; Rainer Forst, ‘The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach’ (2010) 120 *Ethics* 711.

⁵⁷ Lindholm (n 42) 399.

⁵⁸ Glendon (n 2) 230.

shows less agreement on how to order the remaining rights, which may be emphasized differently across cultures.

This has significant implications when distinguishing the relative importance of two or more human rights in practical situations. For instance, in the ongoing debates over circumcision in Europe, there are conflicts between the right to practice religion and the right to physical integrity; and between the right of parents to determine how to raise their children versus the right of children to be free to determine their own future.⁵⁹ Such disagreements touch upon different conceptions of state responsibility for upholding human rights as well as both differences between religious and secular morality and between modern (individualist with universal claims) and postmodern (multicultural and connected to intersectional claims) discourses on human rights.⁶⁰ If secular modernist claims tend to downplay the rights of religious minorities, do multicultural postmodern claims provide scope for them (and thus rituals like circumcision)? Postmodern claims may be increasingly incompatible with the modernist view of moral universality, but tension among competing rights will not diminish. In many post-conflict countries—especially within Africa—there are clashes between retributive justice for criminals that focuses on upholding the law and restorative justice that focuses on peacemaking, healing, and restoring social harmony. For all their similarities, even the United States and Europe have differences in how they interpret and implement human rights: gun rights, religious freedom, property rights, and freedom of speech are all greater in the United States; social and economic

⁵⁹ Children's rights were not emphasized in the UDHR but in some later documents, such as the Convention on the Rights of the Child. In general, there are two different viewpoints "as to who holds the supreme right over a child. In one view, the state has the primary obligation of shaping children as future citizens, a key value underpinning the European liberal state. In the second view, guaranteeing the religious life of the child, including through circumcision, is the parents' responsibility, that they have an inviolable right to choose the future path of their child." Even within the West, there are differences. Parental autonomy and religious freedom are more highly valued in the US than Europe. Dov Maimon and Nadia Ellis, *The Circumcision Crisis: Challenges for European and World Jewry* (The Jewish People Policy Institute 2012) 7-8, <<http://jppi.org.il/news/117/58/The-Circumcision-Crisis/>>.

⁶⁰ *ibid* 7-10.

rights are greater in Europe. Parts of the former employ the death penalty; the latter finds it inhumane and inconceivable in a developed, rights-based society.⁶¹

Developments since 1948 reveal that different societies—and sometimes different groups within a given society—want to express themselves with different rights that were not included in the original UDHR (or subsequent documents). These include protections for the elderly, women’s reproductive rights, euthanasia, and LGBTQ persons. Some of these new rights are not fully accepted even within Western societies.

5. FLEXIBLE IMPLEMENTATION

This flexibility in interpretation is paralleled in how the drafters viewed implementation. It was understood that each country’s circumstances would dictate how they would fulfill their requirements.⁶² Developing countries would have different resources than developed countries. Communist states would emphasize different priorities than capitalist ones. Muslim states would have certain requirements that differed from Western states. Each part of the world would have its particular concerns. As Article 22 of the original Declaration declared, the UDHR would be put into practice “in accordance with the organization and resources of each State.”⁶³

In order to sidestep many of the inevitable disputes over the relative responsibilities of international bodies, national and local governments, and civil society when it came to human rights, the framers of the UDHR took a pragmatic approach that today would be called subsidiarity.⁶⁴ Subsidiarity emphasizes the

⁶¹ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1991) 1-12, 37, 40, 71, 149, and 161.

⁶² Glendon (n 2) 115-116.

⁶³ UN General Assembly (n 15).

⁶⁴ The principle is implicit both in the UDHR when it calls on “every individual and organ of society” to promote human rights and in statements Roosevelt and Cassin made, but the term “subsidiarity” did not explicitly enter human rights law until somewhat later. The best discussion is in Paolo G Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law* 38.

primacy of the lowest level of implementation that can do the job, reserving national or international actors for situations where smaller entities are incapable of addressing the issues adequately.

Although national governments have the ultimate obligation to fulfill their human rights commitments, any group in society—including the market, social networks, communities, families, and individuals—can play the leading role in advancing human rights.⁶⁵ It is noteworthy that the UN itself repeatedly acts as if non-state actors and context matter, such as when it passes resolutions like the “Declaration on Human Rights Defenders,” which puts “Individuals, Groups and Organs of Society” at the center of the process to advance human rights.⁶⁶ Indeed, given the failures of the state-centric approach in so many areas of human rights—and the importance of social norms, relationships, and morality to promoting rights, it is appropriate that the Proclamation clause of the UDHR calls on “every organ of society” to promote recognition and observance of human rights.⁶⁷

As with other major human rights documents, the UDHR mandates a certain result—though without a clear definition or threshold at times—and it provides great flexibility in how it is achieved.⁶⁸ And, while states need to take immediate steps

⁶⁵ Bård Anders Andreassen, ‘Article 22’ in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 484-485; Thandabantu Nhlapo, ‘The African Customary Law of Marriage and the Rights Conundrum’ in Mahmood Mamdani (ed), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (Palgrave Macmillan 2000); Josiah Cobbah, ‘African Values and the Human Rights Debate: An African Perspective’ (1987) 9 *Human Rights Quarterly* 320; Lakshman Marasinghe, ‘Traditional Conceptions of Human Rights in Africa’ in Claude Welch, Jr and Ronald Meltzer (eds), *Human Rights and Development in Africa* (SUNY Press 1984) 33.

⁶⁶ UN General Assembly, ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’ adopted 3 August 1999, G.A. Res. 144, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/144, <<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>>.

⁶⁷ Douglas Donoho, ‘Human Rights Enforcement in the Twenty-First Century’ (2006) 35 *Georgia Journal of International & Comparative Law* 1; UN General Assembly (n 66).

⁶⁸ Andreassen (n 65) 484-485.

toward the desired result, it is understood that full realization may take time.⁶⁹ There is a crucial distinction in international law between agreeing to fulfill certain standards and implementing them. While states must meet the obligations they sign up to, they have the freedom to determine how.⁷⁰ Moreover, as Twining writes, “conceptions of law that are confined to state law leave out too many significant phenomena that deserve to be included in a total picture of law from a global perspective.” He argues that “ideas (including rules)” and “institutionalized social practices (involving actual behavior and attitudes as well as ideas)” need to be included.⁷¹

International human rights agreements have repeatedly recognized that different countries have different ways of implementing commitments. For instance, in the International Covenant on Civil and Political Rights, Article 2.2 obligates states parties “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” The clause “laws or other measures” clearly recognizes that some countries will use non-state measures—such as social institutions—to promote human rights.⁷² “Furthermore, the Covenant does not require the contracting states to grant individual enforceable rights to those who are under their jurisdiction.”⁷³ They are thus allowed to use other arrangements—such as those based on communal ties, religion, and social duties—to fulfill their obligations.⁷⁴ The principle of “progressive realization,” which is recognized explicitly in the International Covenant on Economic, Social and Cultural Rights—and implicitly elsewhere—also allows states to take their contexts into account when implementing human rights. As

⁶⁹ *ibid* 486.

⁷⁰ Zwart, (n 28) 900; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel 2005) 103; O Schachter, ‘The Obligation to Implement the Covenant in Domestic Law’ in Louis Henkin (ed), *The International Bill of Rights* (Columbia 1981); Donoho (n 67).

⁷¹ Twining (n 48)180.

⁷² UN General Assembly, ‘International Covenant on Civil and Political Rights’ adopted 16 December 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., vol. 999, 171, U.N. Doc. A/6316, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.asp>>.

⁷³ Tom Zwart, ‘Balancing Yin and Yang in the International Human Rights Debate’ in *Collected Papers of the Sixth Beijing Forum on Human Rights* (China Society for Human Rights Studies 2013) 410.

⁷⁴ Zwart (n 73) 410, 414.

Article 2 of the ICESCR affirms, each State Party should “take steps ... with a view to achieving progressively the full realization of the rights.”⁷⁵ Outside of a set of core obligations, some rights may be more difficult for some countries to attain; they may provide a temporarily lower level of protection as long as they are working toward full realization.⁷⁶

The drafting and adoption of regional documents such as the African Charter on Human and People’s Rights (ACHPR), the ASEAN Human Rights Declaration (AHRD), American Convention on Human Rights, and the European Convention of Human Rights (ECHR) all reflect the understanding that context matters. The preamble of the ACHPR, for instance, states that it “Tak[es] into consideration the virtues of [states’] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.”⁷⁷ Similarly, the AHRD states (Article 7) that “the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”⁷⁸ The 1993 Vienna Declaration and Programme of Action similarly makes clear “the significance of national and regional particularities and various historical, cultural and religious backgrounds” to implementation.⁷⁹

Even the European human rights protection system, easily the most developed international human rights judicial protection system, allows a significant degree of flexibility at times with regard to local context. Encompassing forty-seven countries, and considerable historical, religious, ideological, and cultural differences, it has

⁷⁵ UN General Assembly (n 72).

⁷⁶ Eva Brems, ‘Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam’ (2004) 5 Human Rights Review 13-14.

⁷⁷ Organization of African Unity (OAU), ‘African Charter on Human and Peoples’ Rights (“Banjul Charter”)’ 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <<http://www.achpr.org/instruments/achpr/#preamble>>.

⁷⁸ Association of Southeast Asian Nations (n 28).

⁷⁹ UN General Assembly, ‘Vienna Declaration and Programme of Action’ adopted 12 July 1993, A/CONF.157/23, <<https://www.refworld.org/docid/3ae6b39ec.html>>.

uniquely been able—through the European Court of Human Rights (ECtHR)⁸⁰—to develop a sophisticated set of legal techniques for managing the tensions between culture and human rights standards. The “margin of appreciation” doctrine, its main instrument for doing this, allows the ECtHR to provide greater or lesser flexibility to countries to restrict or limit a particular right agreed to in an international agreement—in Europe’s case, the European Convention on Human Rights—depending on the issues involved. A wide margin of appreciation means that the same facts can lead to two different interpretations in two different countries even though the same standard is being applied (i.e., in one country the facts yield a rights violation but in another they yield a legitimate restriction of the right). If only a narrow margin is applied, this is unlikely.⁸¹ The court can thus take into account different contexts and concerns while giving states some discretion when they want to limit particular rights in order to advance the national interest or protect other rights.⁸² As the Council of Europe, of which the ECtHR is a part, explains,

“Given the diverse cultural and legal traditions embraced by each Member State, it was difficult to identify uniform European standards of human rights.... The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States.”⁸³

⁸⁰ I say “uniquely” because there is no other similar supranational institution.

⁸¹ Eva Brems, ‘The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe’ in David Forsythe and Patrice McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press 2003) 81-82. The Court often states that the “margin will vary according to the nature of the Convention right in issue, its importance for the individual, and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.” Ingrid Leijten, ‘The Strasbourg Margin of Appreciation: What’s in a Name?’ (*Leiden Law Blog* 8 April 2014) Leiden Law School, Leiden University, <<http://leidenlawblog.nl/articles/the-strasbourg-margin-of-appreciation-whats-in-a-name>>.

⁸² Eva Brems, (n 81) 14.

⁸³ Council of Europe Lisbon Network, ‘The Margin of Appreciation’ <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp>.

6. PERSONHOOD, STATE, AND SOCIETY

The UDHR presents a vision of personhood that is in some ways more aligned with Southern and religious concern about social context and institutions than with contemporary Western and secular emphasis on the individual. The Declaration uses the word “person” to emphasize the social dimension of personhood, recognizing, as Lebanon’s Charles Malik put it, that “There are no Robinson Crusoes.”⁸⁴ The term “person” stands in contrast to an “individual” who is “an isolated knot; a person is the entire fabric around that knot, woven from the total fabric.”⁸⁵

The Declaration envisions each person—the “everyone” mentioned throughout the document—as being constituted by and through a variety of relationships. The most important of these are specifically named: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order.⁸⁶ Such relationships are to be grounded, as the Declaration recognizes in its prologue, in an understanding of people as both individual and social, and, as it exhorts in Article 1, “in a spirit of brotherhood.”⁸⁷

Such concerns echo throughout the structure of the document. The general principles proclaimed in the first two articles encompass dignity, liberty, equality, and brotherhood. The main body (articles 3 through 27) provides for four sets of rights: those related to the individual (3-11); those related to how individuals relate to each other and to groups (12-17); those related to spiritual, public, and political concerns (18-21); and those related to economic, social, and cultural rights (22-27).⁸⁸ These emphasize the importance of traditional institutions such as the family, as the “natural and

⁸⁴ Glendon (n 2) 42.

⁸⁵ R Panikkar and R Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 30 *Diogenes* 90.

⁸⁶ Glendon (n 2) 227.

⁸⁷ *ibid* 175.

⁸⁸ *ibid* 172-174; Marc Agi, *René Cassin: Fantassin des Droits de l’Homme/Rene Cassin: Footsoldier of Human Rights* (Plon 1979) 317.

fundamental group unit of society” (article 16), religion, and marriage.⁸⁹ The last section (articles 28-30) concludes by linking the person to society, and placing the rights within the context of limits, duties, and the order in which they must be realized.⁹⁰ It argues that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (article 28) and that “Everyone has duties to the community in which alone the free and full development of his personality is possible” (article 29).⁹¹

Different societies prioritize differently the role of social institutions and government in promoting the human good, with some emphasizing the former and others the latter. However, after analyzing the differences along this spectrum, Morsink concludes that for religion and education, the UDHR circumscribes the state’s role in “delivery of the human good.”⁹² It assumes that societies contain many social institutions essential to advancing human wellbeing, and that any human rights regime and role for the state must therefore be limited whenever possible.

This emphasis on social institutions and a limited role for the state is especially evident in Article 18,⁹³ which gives everyone not only the right to freedom of thought, conscience and religion, but also the “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” It also appears in the sections dealing with family (Article 16) and education (Article 26). The state is only mentioned twice as an active actor, once for the protection of family (Article 16) and once for cooperating with other countries to create a world order able to see the rights outlined realized (Article 22).⁹⁴

⁸⁹ Tom Zwart, ‘Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach’ (2012) 34 Human Rights Quarterly 553.

⁹⁰ Glendon (n 2) 172-174.

⁹¹ UN General Assembly (n 15).

⁹² Morsink (n 31) 259.

⁹³ *ibid* 259-260.

⁹⁴ *ibid* 239.

7. THE IMPORTANCE OF DUTIES

The role of duties in the Declaration warrants closer consideration as another aspect of its flexibility. In Article 1, the “foundation and cornerstone of the entire Declaration,”⁹⁵ there is, according to Chang, “a happy balance” between “the broad statement of rights in the first sentence and the implication of duties in the second,”⁹⁶ indicating that each is meant to be kept as a distinct concern and not conflated.⁹⁷ Article 29, one of the three articles at the end of the Declaration that provide the pediment which binds the structure together in Cassin’s overall design, acts as a general limiting provision. It states (in 29.1) that “Everyone has duties to the community in which alone the free and full development of his personality is possible.”

The addition of the word “alone” takes the Declaration further away from individualism. This amounts, as Morsink explains,

“to the announcement of an organic connection between the individual and the community to which he or she owes duties, not unlike Confucius would have had it ... [As such, it] may well be the most important single word in the entire document, for it helps us answer the charge that the rights set forth in the Declaration create egotistic individuals who are not closely tied to their respective communities.... solidarity and mutuality [are a] ... part of the possession of every human right.”⁹⁸

Article 29 also makes clear (in 29.2) that an individual’s rights can be limited by the “rights and freedoms of others and ... the just requirements of morality, public order, and the general welfare in a democratic society.”

The UDHR outlines, according to Morsink, five different communities towards which an individual has duties⁹⁹ and which “contribute to the free and full development

⁹⁵ Lindholm (n 41) 58.

⁹⁶ *ibid* 54 and 62.

⁹⁷ *ibid* 62.

⁹⁸ Morsink (n 31) 246 and 248.

⁹⁹ *ibid* 241.

of the human person.”¹⁰⁰ “The first group, which the drafters of the Declaration were especially solicitous of,” is the family, the place where morality, values, and beliefs are first learned.¹⁰¹ Next in importance “must surely rank religious and educational communities.”¹⁰² The different communities to which an individual is attached “spread themselves out in concentric circles of communities from the individual and his or her immediate community of birth and growth” in the first paragraph of Article 29 all the way through to the world community in the third paragraph, with many intermediate groups playing a role.¹⁰³

Many delegates emphasized the importance of duties in the debates that yielded the document. Brazil’s De Athayde, for instance, told the Third Committee (covering social, humanitarian, and cultural affairs), which reviewed the draft prepared by the Commission,

“It was impossible to draw up a declaration of rights without proclaiming the duties implicit in the concept of freedom which made it possible to set up a peaceful and democratic society. Article 27 [which later became Article 29] was of great importance because without such a provision all freedom might lead to anarchy and tyranny.”¹⁰⁴

Duties are also a common part of regional documents, supporting their importance in the UDHR. Part I of the ACHPR is entitled “Rights and Duties.” A whole chapter (2) is dedicated to them.¹⁰⁵ Article 6 of the AHRD states that “The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.”¹⁰⁶ Duties also receive recognition in the ACHR, which declares that (Article 32.1) “Every person has responsibilities to his family, his

¹⁰⁰ *ibid* 258.

¹⁰¹ *ibid* 241.

¹⁰² *ibid* 241.

¹⁰³ *ibid* 241.

¹⁰⁴ *ibid* 249.

¹⁰⁵ Organization of African Unity (n 77).

¹⁰⁶ Association of Southeast Asian Nations (n 28).

community, and mankind” and (32.2) “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”¹⁰⁷ Even the ECHR makes clear (10.2) that the exercise of rights

“since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary ... in the interests of national security ... the prevention of disorder or crime, for the protection of health or morals...”¹⁰⁸

8. INTERDEPENDENCE AND INDIVISIBILITY OF RIGHTS

The framers took enormous care to ensure that the UDHR would be read as an integrated document. The UDHR articulates a set of rights that are connected to—even interdependent with—each other. Freedom links to solidarity. Rights imply responsibilities. Institutions matter. Each of the ideas balances against the others as part of a larger whole. As such, the Declaration does not see the specific rights as items to be isolated from the others and propagated on their own.¹⁰⁹

The body of principles is meant to be read as an integrated whole, indivisible, interdependent, and interrelated, with an organic unity.¹¹⁰ As Morsink points out,

“the drafters wanted the readers of the Declaration to interpret each article in light of the others. Most of them believed that the exact place of an article was not crucial to its meaning since it needed to be interpreted in the context of the

¹⁰⁷ Organization of American States (OAS), ‘Pact of San Jose, Costa Rica’ 22 November 1969, American Convention on Human Rights, <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>.

¹⁰⁸ Council of Europe, ‘European Convention for the Protection of Human Rights and Fundamental Freedoms,’ as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, <http://www.hrcr.org/docs/Eur_Convention/euroconv3.html>.

¹⁰⁹ David Blackenhorn, *The Future of Marriage* (Encounter 2007) 182.

¹¹⁰ Asbjørn Eide, ‘Article 28,’ in Guðmundur Alfreðsson and Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Springer 1999) 606.

whole anyway. This organic character of the text applies both to how it grew to be what it now is, as well as to a deeper interconnectedness of all the articles.”¹¹¹

Indeed, as Glendon and others argue, one of the surest ways to misconstrue—or misuse—human rights is to think that any particular right is absolute, or that all the diverse rights can ever wholly be in harmony with each other. On the contrary, every distinct right must have certain limitations and boundaries and exist within a community of other rights that often conflict with each other for it to have any real meaning. There is no clear blueprint for how to deal with conflicts of this nature. Communities balance the weight of claims of one right versus another—recognizing that no particular right has preponderance over all the rest—before determining the best course of action.¹¹² Clashes of rights are not contests where a winner takes all—as is often the case today—but rather occasions for interpreting them in such a way as to give as much protection as possible to each, while never subordinating any right completely to another. Indeed, the Declaration makes it clear that everyone’s rights are importantly dependent on respect for the rights of others, on the rule of law, and on a healthy civil society.

9. MINIMUM STANDARDS, NOT MORAL IMPERATIVES

The flexibility that the UDHR and subsequent human rights agreements provide for each society to prioritize and interpret human rights commitments show that the authors of these documents do not presume a uniform moral matrix across countries. While they seek to promote minimum universal standards throughout the world, they do not uphold one universal value system. As such, the agreements that are legal documents, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, only need to be fulfilled; they are not binding commitments to a particular way of life. The UDHR is

¹¹¹ Morsink (n 31) 232.

¹¹² Glendon (n 61) x; Glendon (n 2) 239; Blankenhorn (n 109) 187-188 and 302; Lindholm (n 42) 422 (footnote 17).

not legally binding at all, as it was a UN resolution not a treaty; it only has influence by galvanizing popular support and this requires building on local value systems.

Table 1 compares how societies that place a stronger emphasis on religion or community than the individual, which make up the great majority outside the West; societies that place the main emphasis on the individual, which are mainly in the West; and the Declaration advance human rights. As outlined above, the UDHR tilts toward a larger role for society (and its moral influence) and a limited role for the state and legal regime in enforcing human rights rules. This is clear from the differing attitudes towards the treaties, implementation, role of the state, traditions, religion, and so forth. In the traditional view, culture and social institutions are seen as important launching pads for human rights protection and promotion.

Table 1: Comparing Traditional, Individualist, and UDHR Views of Human Rights

Attitudes Towards	Traditional View (Emphasis on Social Interdependence)	Individualist View (Emphasis on Personal Autonomy)	The UDHR
Foundations	Depends on context; often only positive law	Natural rights	Various; agree to disagree
Treaties	Legal commitments	Moral imperatives	Minimum standards
Flexibility of implementation	Extensive	Limited	Extensive

Universalism and the Universal Declaration

Duties	Important; linked to rights	Not emphasized	Important; balanced to some extent with rights
Role of the state	Important but limited	Very important	Needed; does not act alone
Social institutions	Foundational and crucial	Secondary; not highly appreciated	Primary
Traditions	To be cherished and protected; part of identity	To be minimized or adapted to new norms	To be respected
Religion	Very important; part of identity; basis for human dignity	Not important; only freedom of conscience warrants protection	Important; in need of protection
Differences across cultures	Natural; essential	Limited	Natural; to be expected and respected
Conflicting rights	Common; different contexts, different weighting	Not so common because hierarchy of values	To be expected
Individual relationship with society	Interdependent with others; connection	Autonomous of society; consumption	Part of society; collaboration

While the UDHR says “all members of the human family” have “inalienable rights” due to their “inherent dignity”—a reflection of the cross-cultural consensus on minimum standards embedded within the document—human rights obligations are best understood as binding on states not because they flow from a particular philosophy,

belief system, etc. but because they are rooted in positive (human-made) law. They are legal commitments resulting from the treaties that have been ratified, and they do not presume any particular ordering of rights except for the few primary rights mentioned above; any particular way of implementing the rights; or any particular lifestyle.¹¹³ On the contrary, they are designed (except for the few primary rights) to be flexibly interpreted and implemented across cultures.¹¹⁴

Of course, states can refuse to sign or even opt out of agreements that they have previously agreed to (because human rights are positive not natural law). The United States, for instance, has never ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two most important follow-on agreements to the UDHR, even though 169 countries have.¹¹⁵ Nor has it ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) even though all but eight countries—189 in all—have.¹¹⁶ A number of African countries have threatened to leave the Rome Statute, which established the International Criminal Court, because of what they perceive as bias in its functioning. As of 2018 all but one of its eleven investigations have been in Africa. Many countries commit to treaties but with reservations. Over sixty have ratified CEDAW but with certain declarations, reservations, and objections.¹¹⁷ However, the strong international consensus on the importance of human rights—whatever the disagreements over implementation—provides ample external and internal pressure on the great majority of countries to join and, at least at the rhetorical level, support major human rights treaties. Virtually all

¹¹³ Twining (n 48) 180.

¹¹⁴ Jerome Shestack, 'The Philosophic Foundations of Human Rights,' (1998) 20 Human Rights Quarterly 201, 209.

¹¹⁵ The US signed the ICESCR in 1977. UN General Assembly (n 72). Status, <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty> accessed 19 December 2018.

¹¹⁶ The US signed the CEDAW in 1980. UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination against Women' ch. IV, 8 (1979) 1249 U.N.T.S. 13. Status, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 19 December 2018.

¹¹⁷ UN General Assembly (n 116).

countries accept the authority of the UDHR. As of late 2018, an average of 90.5 percent (178 out of 197) had ratified the six core international human rights treaties (which cover civil and political rights; economic, social, and cultural rights; racial discrimination; women; torture; and children).¹¹⁸ As such, even states that have often showed little regard for human rights—such as Syria—sign, ratify, and accede to many agreements and do their best to show the world that they are actually following them—even if the reality is substantially different.¹¹⁹

Despite these qualifications and reservations, many prominent human rights organizations believe that the international agreements bind signatories to a number of prescribed values centered on autonomy and choice. The strong emphasis on the individual in Western thought—especially pronounced since the 1960s—accentuates this perspective and leads to an underemphasis on the social context, the role of institutions, and the relationship between the rights articulated in the original Declaration. This has significantly contributed to the differing perceptions on implementation that exist between Western governments (and human rights organizations) and non-Western actors who have broader concerns involving the needs of community and religion.¹²⁰

Part of the problem is that the history of how the UDHR was developed and the intention of its drafters is not widely known. There was a large gap between when it was written and passed by the United Nations (1947–48) and when it started to be actively used by the human rights movement in the late 1960s. The architects of the Declaration, who came from all over the world, passed from the scene before the UDHR's major promoters, which came from only one part of the world, were firmly established. Glendon describes how major human rights organizations presume an

¹¹⁸ Jack Donnelly and Daniel Whelan, *International Human Rights* (Routledge 2018); Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 288. Ratification data is available at <<http://indicators.ohchr.org/>>.

¹¹⁹ University of Minnesota, 'Ratification of International Human Rights Treaties – Syria' (Human Rights Library Website) <<http://www1.umn.edu/humanrts/research/ratification-syria.html>> accessed on 24 August 2015.

¹²⁰ Glendon (n 2) xix-xx and 228-230.

understanding of rights that stems from the American judicial rights revolution of the 1950s and 1960s. She argues, “The Declaration itself began to be widely, almost universally, read in the way that Americans read the Bill of Rights, that is, as a string of essentially separate guarantees. Alas, that misreading of the Declaration not only distorts its sense, but facilitates its misuse.”¹²¹

10. CONCLUSION: A RETURN TO BASICS

The human rights field is limited in its current orientation by a discourse shaped by Western values and institutions. While such an outlook could be sustained in a unipolar world, it is unsustainable in a multipolar world. Countries in Asia, Africa, the Middle East, and Latin America have fewer and fewer reasons to accept ideas and concepts that do not reflect their own values and moral matrices. Human rights will only survive in this new era if they do so—if they are genuinely universal, reflecting the ideals and beliefs of all peoples. The Universal Declaration was designed for just such a world, incorporating and balancing ideas from different places in a way that was flexible and universal. A restoration of the vision of its drafters—a return to basics—is essential if human rights are to be as powerful a force in this century as they were in the last.

While some will claim that the flexible universalist approach recommended here would be ineffective to check, or even provide a license for, rights abuses, the reverse is true. A modest and pluralistic approach to bringing rights to life will gain far wider support than overly ambitious top-down approaches.

In fact, flexible universalism ought to reorient the international human rights field towards a less controversial, yet arguably more ambitious new goal: the systematic elimination of a narrow set of evils for which a broad consensus exists across all societies. The bedrock of this group would be the handful of rights prioritized and given little scope for flexibility by the drafters of the Declaration. The list, which could be augmented through negotiations, would include protections against genocide;

¹²¹ Glendon and Abrams (n 30) 25.

slavery; torture; cruel, inhuman or degrading treatment or punishment; retroactive penal measures; deportation or forcible transfer of population; discrimination based on race, color, sex, language, religion, nationality or social origin; and protection for freedom of conscience and religion.

This “return to basics” has the potential to gain support from a wide set of people who normally are far apart in their philosophical and cultural outlooks. It would not end debates over rights—these are inevitable—but would reduce attacks on and strengthen the legitimacy of the universal human rights idea.

To truly rehabilitate the human rights ideal, both state and non-state mechanisms to implement rights need to be strengthened. It is not the absence of laws that most oppress the poor and marginalized in many places, but the everyday violence, discrimination, and corruption that they experience in spite of what the law says. No system of rules and norms can depend solely on treaties, laws, and the force of the state if it is to be effective. Only a popular culture of human rights—a culture fostered by the strong political backing and financial resources of indigenous middle classes, diasporas, and powerful regional actors, and encompassing religious actors and even those that sometimes object to some aspects of human rights can make this possible.¹²²

Ultimately, successful human rights promotion depends on attention to the attitudes, ideas, values, relationships, and institutions within which individuals, families, and communities are embedded. As Eleanor Roosevelt put it, documents expressing ideals “carry no weight unless the people know them, unless the people understand them, unless the people demand that they be lived.”¹²³ And these, as she

¹²² David Forsythe, *Human Rights in International Relations* (4th edn Cambridge 2017).

¹²³ Eleanor Roosevelt, ‘Making Human Rights Come Alive’ in Allida M Black (ed), *What I Hope to Leave Behind: The Essential Essays of Eleanor Roosevelt* (Carlson 1995) 559. Also see the advice Roosevelt gives on how to “know the Declaration” in an interview with Howard Langer on the record, *Roosevelt, Human Rights: A Documentary on the United Nations Declaration of Human Rights* (Folkways Records 1958) <www.folkways.si.edu/eleanorroosevelt/a-documentary-on-the-united-nations-declaration-of-human-rights/world-history/album/smithsonian>. These sources appear in Glendon (n 2) xix and footnote on 243-244.

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said in one of her last speeches at the UN, depend on implementation in lots and lots of “small places.”¹²⁴

¹²⁴ Eleanor Roosevelt, Remarks at presentation of booklet on human rights, *In Your Hands*, to the United Nations Commission on Human Rights, United Nations, New York, 27 March 1958. United Nations typescript of statements at presentation (microfilm).