

Human Rights and Diverse Societies

Human Rights and Diverse Societies:
Challenges and Possibilities

Edited by

François Crépeau and Colleen Sheppard

**CAMBRIDGE
SCHOLARS**

P U B L I S H I N G

Human Rights and Diverse Societies: Challenges and Possibilities,
Edited by François Crépeau and Colleen Sheppard

This book first published 2013

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Copyright © 2013 by François Crépeau, Colleen Sheppard and contributors

All rights for this book reserved. No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the copyright owner.

ISBN (10): 1-4438-5137-X, ISBN (13): 978-1-4438-5137-4

TABLE OF CONTENTS

Acknowledgements	vii
Introduction	1
Human Rights and Diverse Societies: Challenges and Possibilities <i>François Crépeau and Colleen Sheppard</i>	
Part I: Reflections on Human Rights Discourse in Diverse Societies	
Chapter One.....	9
Universality and Diversity <i>Peter Leuprecht</i>	
Chapter Two	17
Human Rights: A Fragile Hegemony <i>Boaventura de Sousa Santos</i>	
Chapter Three	27
Critical Engagement with Human Rights Discourse <i>Colleen Sheppard</i>	
Part II: Post-colonial Theory and Human Rights	
Chapter Four	41
The Challenge of Democracy in Divided Societies of the Post-Colonial World <i>Ranabir Samaddar</i>	
Chapter Five	63
Human Rights, Settler Colonialism and the Problem of Universality <i>Isabel Altamirano-Jimenez</i>	
Chapter Six	79
Muslim Women's Equality in India: Applying a Human Rights Framework <i>Vrinda Narain</i>	

Part III: Changing Societies, State Institutions and Human Rights

Chapter Seven.....	109
Canada's Clash of Culturalisms	
<i>Pearl Eliadis</i>	
Chapter Eight.....	129
Russia's Evolution and Human Rights Changes since 1991	
<i>Anna Sevortian</i>	
Chapter Nine.....	147
Between Compliance and Resistance: Education for Peace in Israeli Public Schools	
<i>Yossi Yonah</i>	
Chapter Ten,	165
National Human Rights Institutions and Diversity	
<i>Joris de Bres</i>	

Part IV: "Othering" and Emerging Human Rights Challenges in a Global and Interconnected World

Chapter Eleven	177
Is Otherness a Question of Security or a Question of Freedom?	
<i>Didier Bigo</i>	
Chapter Twelve	201
Protecting Migrants' Rights: Undocumented Migrants as Local Citizens	
<i>François Crépeau</i>	
Contributors.....	213

ACKNOWLEDGEMENTS

Advancing human rights while celebrating the diversity of cultures, communities and traditions is a complex and dynamic task. This book owes its origins to the Echenberg Global Conference on Human Rights and Diverse Societies, organized by the McGill Centre for Human Rights and Legal Pluralism in October 2010. As an international conference, it brought together diverse scholars, judges, politicians, policy makers, journalists, students and members of civil society. The conference examined a wide range of issues, including policies and practices of multiculturalism, human rights concepts and discourse, religious and cultural diversity, individual and collective rights and new approaches to governance. This book project includes contributions from a number of the conference speakers who work in diverse institutional, practical and scholarly contexts on these critical issues.

Accordingly, we wish to extend our sincere thanks to the Echenberg Family Foundation and its founders, Penny and Gordon Echenberg, whose commitment and generosity made possible the convening of the global conference. We also wish to express our appreciation to Dean Daniel Jutras of the Faculty of Law, McGill University for his continued support for human rights education and community outreach. We are also deeply indebted to Dr. Nandini Ramanujam, Executive Director of the Centre for Human Rights and Legal Pluralism, who played a central role in organizing the Echenberg Global Conference on Human Rights and Diverse Societies and worked closely with us in advancing this book project.

The book could not have been completed without the dedicated and professional assistance of Bethany Hastie, a doctoral candidate and O'Brien Fellow at the Centre for Human Rights and Legal Pluralism and Faculty of Law of McGill University. We also wish to extend our gratitude to Dia Dabby, a doctoral candidate at the Faculty of Law, McGill University; Stephanie Hachez, Aisenstadt Fellow (2012)(B.C.L. Student, Université de Montréal); and, Cécile Capela-Laborde, Aisenstadt Fellow (2013) (B.C.L.-LL.B. student, Faculty of Law, McGill University), for their excellent and dedicated research and editorial assistance in the completion of this project. We also wish to acknowledge permission to

reprint chapters 6 and 12 provided by the *Human Rights Quarterly* and *Inroads* respectively.

The cover artwork was done by Wendy Sheppard of Cobourg, Ontario (Canada) specifically for the book and celebrates the theme of diversity and the human condition. We wish to thank her for generously sharing her artwork with us.

We view this book as part of an ongoing societal engagement to explore new ways of respecting the diversity of humankind, safeguarding the protection of collective identities and honouring our normative commitments to human rights.

Colleen Sheppard & François Crépeau
Montreal, Quebec
October 2013

INTRODUCTION

HUMAN RIGHTS AND DIVERSE SOCIETIES: CHALLENGES AND POSSIBILITIES

FRANÇOIS CRÉPEAU AND COLLEEN SHEPPARD

This book addresses the timely and important question of how to understand human rights in a world of increasing diversity. It has always been a challenge to reconcile the differences that exist between and within societies and to work towards peaceful coexistence. The effects of globalization and the increasing mobility of persons and peoples have further deepened and multiplied the sites of interaction between different cultures, religions and ethnicities. These changes have been a source of enrichment, as multiculturalism, interculturalism and diversity permeate our daily lives. Yet, they have also revealed important societal cleavages, different conceptualizations of human rights and divergent values and beliefs about moral, ethical, cultural and religious issues. In societies characterized by diverse social, ethnic, religious and cultural communities, it becomes critical to examine how to reconcile the tensions between respect for group-based identities and differences, the robust protections of individual rights and freedoms and the maintenance of community solidarity and social cohesion. It is these tensions, mediated through debates about the interaction between human rights and diversity that this book addresses.

Over sixty years after the *Universal Declaration of Human Rights*, it has been widely observed that ‘human rights’ resonate differently in various settings. The mainstream narrative of the universality of human rights has been challenged in the face of increasingly diverse societies. Thus, questions recur regarding the global and localized application of human rights standards in diverse societies. In thinking about diversity, moreover, it is important to recognize that it refers not only to ethno-national or religious considerations and contradictions, but also to post-colonial environments where linguistic, cultural and group-based differences endure sometimes in the face of changed structural and institutional

settings. In eschewing any simple reconciliation of human rights and universalism, this book aspires to identify alternative frameworks that can facilitate the conceptualization of, and help find solutions to, the complex global human rights issues in diverse societies. In engaging with both the theoretical perspectives that question the ‘universality’ of human rights as well as assessing the practicality of diverse applications of human rights, this collection of essays explores how human rights can be employed to empower historically excluded/marginalized groups. It also examines how human rights can be invoked to further social inclusion. The essays reveal that the claim for universality of human rights is aspirational, but complicated by the need to apply human rights in diverse (and diversifying) societies. Taking diversity into account in thinking about the universal aspirations of human rights protection requires us to reframe the question. Rather than asking whether human rights are universal, we need to ask how the universal principles underlying human rights are practically and tangibly realized in diverse contexts and communities.

This book emerged out of an international conference on human rights and diverse societies, which attracted scholars and activists from around the world to discuss complex issues linked to human rights and social diversity. Despite the vast array of panel topics on issues from education to national security, a number of common themes emerged, creating a collective conversation about human rights in an increasingly diverse world. Recurrent themes included: the adequacy of our current conceptual human rights frameworks; the role of context in defining, implementing, problematizing and enforcing human rights; the power of narratives to untangle the complexities of the nuanced issues at the core of human rights realities; and the struggle to ascribe meaning to commonly-used amorphous concepts, such as human dignity, inequality, hatred, intolerance and exclusion. The panels also queried whether the entrenched dichotomies between universality and particularity, global and local, modern and traditional, developed and developing, religious and secular, and reality and rhetoric have been, can be or should be challenged and reframed in the human rights context.

Among the many themes explored at the conference, the need for dialogue amongst and within societies was prevalent. A culture of dialogue aimed at facilitating understanding and building new, harmonious frameworks for promoting human rights within and across societies is a necessary and important step in advancing human rights in today’s pluralistic world. This book, therefore, seeks to contribute to this new culture of dialogue and to continue the conversations started during the conference. It endeavours to bring together various perspectives and ideas

on the new world of human rights, to challenge assumptions and propose new ways to understand human rights in an increasingly pluralistic world.

Part I of the book begins with some preliminary reflections on human rights discourse in diverse societies. The chapters address questions such as: to what extent are human rights universal? How do diverse societies around the world conceptualize human rights and deal with the implementation of human rights policies and norms? What alternative frameworks exist that could facilitate the conceptualization of and help find solutions to global human rights issues? In Chapter 1, Peter Leuprecht probes the meaning of ‘universality’ vis-à-vis human rights. While discussing the challenges of conceptualizing human rights as universal and indivisible, Leuprecht posits the idea of a dialogic “alliance of civilizations.” Rejecting the idea that human rights are a Western-crafted concept, Leuprecht explores the ways in which there is a common understanding of human rights across societies. In Chapter 2, Boaventura de Sousa Santos examines the “fragile hegemony” of human rights discourse, and critiques dominant conceptions of human rights as decontextualized, monolithic and imbued with a linear triumphalism. Thus, he argues for the development of a counter-hegemonic conception of human rights that could subvert the hegemonic vision and resonate with the needs of those who have been dispossessed of power and marginalized in our global world. In Chapter 3, Colleen Sheppard also examines the importance of engaging with human rights discourse, while critiquing it. She acknowledges the positive and normative significance of human rights globally, yet emphasizes the need to be vigilant in ensuring that human rights discourse goes beyond rhetoric to improve the lives of individuals and communities. She further argues for a critical analysis of the terminology of human rights law, and an unpacking of the ideological underpinnings of the language used to describe human rights issues and struggles. Both the substantive and procedural dimensions of human rights enforcement also require critical reflection, to ensure that current categories and processes for redressing rights violations do not limit our abilities to forge new categories and innovative approaches. This first part of the book, therefore, provides insights into the importance of human rights discourse, while emphasizing that its power to advance social justice depends on our continued ability to re-imagine and recreate its meanings to address the global challenges of a changing world.

Part II explores the intersection of human rights and post-colonial theory. The experience of colonization has created additional tensions for post-colonial societies striving to preserve culture while also advancing human rights. In Chapter 4, drawing on case studies from India and South

Asia, Ranabir Samaddar examines the challenge of democratisation in post-colonial countries where societies remain divided. He highlights the critical need to build effective and functioning democracies in pluralistic societies rather than focusing on individual human rights. In this regard, Samaddar emphasizes the need to go beyond a mechanical adoption of representative democracy, and instead calls for a creative federalization of politics through a dialogic culture and emphasis on justice as much as rights.

Despite the advancement of human rights, significant tensions remain in terms of understanding how women's human rights are advanced or inhibited by particular cultural, religious and community practices around the world. In Chapter 5, Isabel Altamirano-Jimenez engages critically with these themes, using settler-colonialism as a framework to interrogate Indigenous women's rights. She maintains that inherent in the idea of universal human rights is a rejection of otherness and a tendency to rely on human rights as a tool to entrench racial and gender marginalization. Through this critical lens, Altamirano-Jimenez examines the violation of Indigenous women's rights. Chapter 6 also explores the intersection of women's rights and human rights; however, Vrinda Narain suggests that human rights frameworks have the potential to alleviate gender discrimination for women in marginalized communities. In particular, she uses a human rights framework as an analytical tool to challenge Muslim women's exclusion from equal citizenship in India, examining the disparity of protection provided under the *Indian Constitution* and the religious-based family law system as case examples.

Part III highlights the role of state-based institutions in advancing human rights, including governmental human rights institutions and educational institutions. One theme that emerges in this part is the complexities of asserting national identity in the face of internal diversity and societal transitions. In Chapter 7, Canadian human rights lawyer, Pearl Eliadis examines the idea of "super-culturalism," which she argues has been relied upon to assert the pre-eminence of a majority group and its cultural preferences. Focusing on Quebec, this chapter critically evaluates the politicization of "super values" and their implications for access to public services and human rights for minority groups, arguing for an increased focus on equality rights in the on-going debate surrounding pluralism and diversity. Struggling with similar issues, but in a very different geo-political and legal context, in Chapter 8, Anna Sevortian examines post-Soviet Russia and its struggles to recognize and respect diversity. This chapter touches on many aspects of the changing nature of diversity in today's Russia – ethnic, economic, and lifestyle – and their

connection to significant human rights challenges. In Chapter 9, Yossi Yonah examines the role of education both as a contributing factor to social exclusion of minority populations, and also as a key site to effect change. He analyses the challenges associated with Israel's political development towards national patriotism, and the resulting polarization of politics, identity and social inclusion, particularly in relation to Arab minorities. In Chapter 10, New Zealand Race Relations Commissioner Joris de Bres explores the use of National Human Rights institutions as a local partner for United Nations bodies to promote and monitor compliance with international human rights standards. Drawing on the New Zealand Human Rights Commission as a case study, this chapter examines the ability of such institutions to engage effectively with issues such as race relations, cultural diversity and indigenous rights, and the potential of human rights commissions to contribute to harmonious relations in diverse societies.

The concluding section of the book, Part IV challenges us to think about emerging problems of "othering," social exclusion and human rights violations in a global, interconnected and mobile world. In Chapter 11, Didier Bigo critiques national security policies for having engendered human rights violations, particularly in the wake of 9/11. Chapter 12 tackles the issue of mistreatment and social exclusion linked to irregular migration—a critical human rights issue for States. Irregular migrants are increasingly subject to inhumane treatment. François Crépeau, UN Special Rapporteur on the Rights of Migrants, argues for a more humane approach to irregular migration in which the rights of migrants are secured and promoted. He further maintains that we need to re-conceptualize conceptions of citizenship and residency if we are to afford and recognize every person's right to human dignity. The promotion and protection of migrants' rights and how they compare to the rights of citizens is an important new frontier in the development of human rights policies globally.

Through critical reflection and a reexamination of the concepts, categories, institutions and frontiers of human rights, this book contributes to an ongoing dialogue about human rights discourse and theory. Yet beyond its contribution to scholarly debates, it is our hope that this book will contribute to the development of concrete, tangible and institutional strategies for advancing the protection of human rights in diverse societies.

PART I

REFLECTIONS ON HUMAN RIGHTS DISCOURSE IN DIVERSE SOCIETIES

CHAPTER ONE

UNIVERSALITY AND DIVERSITY

PETER LEUPRECHT

The issue of universality, one of the three “pillars” of the human rights edifice, remains a contentious and contested ideal. In this chapter, I examine the concept of universality of human rights and then indicate three possible ways of advancing towards universal application of those rights.

Universality

The 1948 Declaration of Human Rights is called “universal.” It addresses itself to every state and to every person. It strongly affirms the equal dignity of all human beings – the foundation of the whole human rights edifice. Since they are based on this fundamental principle, human rights are, of necessity, universal, valid for all human beings, the same rights for all; otherwise, they would not merit their name.

However, the truth is that human rights, proclaimed as universal, are far from being universally practiced and applied. According to the Preamble of the Universal Declaration, they are “a common standard of achievement for all peoples and all nations.” Even, as such, they are not accepted by all governments and political leaders of the world. Some of them dispute the universality of human rights; according to them, different political, social, cultural and religious contexts give rise to different, but equally valid conceptions of human rights. Kofi Annan has, in my view rightly, stated that:

[I]t was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.

Nevertheless, it must be admitted, on the one hand, that universality remains a difficult philosophical issue and, on the other hand, that the

universal realization of human rights is an ambitious and rather elusive goal. In the *annus mirabilis* of 1989, the Council of Europe organized an important international colloquy on “Universality of human rights in a pluralistic world” (1990). Several of the speakers, especially the great African lawyer Kéba Mbaye, aptly referred to “the difficult advance of human rights towards universality” (Council of Europe 1990, 68). At the same colloquy, Kéba Mbaye stated that “universality implies diversity” (1990, 67) and in his final report Robert Badinter emphasized that “human rights can only flourish if they make allowance for cultural diversity” (Council of Europe 1990, 170).

I have found general discussions on the universality of human rights sometimes interesting, but often extremely theoretical and far removed from reality. The picture looks quite different if one takes specific rights, e.g. the right to life, freedom of expression or the right to food, and considers whether these are universal. I would add that during my years as Special Representative of the UN Secretary General for human rights in Cambodia, I had numerous occasions to discuss those rights with oppressed and poor people. I was struck by the way in which they, in particular women, powerfully put their problems in terms of human rights. Not once was I told these rights were “Western” and irrelevant to them; not on a single occasion did my interlocutors refer to “Asian values” as opposed to human rights.

Universality – One of the Three Pillars of the Human Rights Edifice

Three pillars support the structure gradually erected since World War II by the international community for the protection and promotion of human rights: universality, indivisibility and solidarity (Leuprecht 1997, 135).

Universality of human rights is the logical and inescapable consequence of the fundamental principle of the equal dignity of all human beings. It means: human rights for all, the same rights for all. It is essential to see and apply this principle in connection with that of the **indivisibility** of human rights, as was rightly stressed by the Vienna World Conference on Human Rights in 1993. Human rights form an indivisible whole, whether they be civil, political, economic, social or cultural rights. Only if the human being is guaranteed all these rights can he or she live in dignity. Indivisibility means: all human rights. Taken together, the two principles mean: all human rights for all. Admittedly, this is an extremely exacting goal.

The third pillar, frequently forgotten or neglected, is that of **solidarity**. The realization of universal and indivisible human rights will be extremely difficult or even impossible in a society that does not practice solidarity, in which every member defends his or her rights and forgets those of the others. Human rights are not only the rights of each and every one of us; they are also and above all the rights of others. The way in which we perceive, approach and meet the other will have a strong, positive or negative, impact on his or her enjoyment of human rights. Particularly in Western societies, it seems essential to transcend an essentially egoistic, individualistic and acquisitive approach to human rights. Solidarity in the defence and promotion of human rights must be practiced at the domestic and at the international level. The international community is responsible for the joint and collective protection of those rights.

Three Possible Ways of Advancing Towards Universal Application of Human Rights

1. Challenging the Predominant Western View of the History of Human Rights

The concept and term of “human rights” is historically young. It is true that it arose in the West, in the late 18th century. However, many of the fundamental underlying ideas have been present long before in different cultures and civilizations, particularly the ideas of reason, justice, dignity and recognition of, and caring for, the human being. Certain Western countries like to describe themselves as the birthplace (“la patrie”) of human rights. There is also a lot of talk about the Christian or Judeo-Christian roots of human rights. At the same time, according to stereotypes and clichés prevailing in the West, non-Western cultures and civilizations are perceived as strange, so “other,” and according to some, the very idea of human rights is alien to them. It is essential to overcome Western parochialism, often paired with a high degree of arrogance and superiority complex.

It is worthwhile to look thoroughly into non-Western cultures and civilizations, e.g. ancient China and Islam (Leuprecht 2012). Humaneness, harmony and the idea of caring for fellow human beings and their suffering occupy a central place in the thinking of Confucius and Mencius. I agree with Louis Henkin, according to whom “there is no intrinsic tension between Confucianism and human rights” (1998, 313). Heiner Roetz regards the ethics of Confucius as a promising basis for the development of a human rights concept (2004, 109). He perceives the

Confucian ethical and political tradition as a precursor of human rights (2004, 115). According to him, the Chinese cultural tradition does not provide a convincing argument against the recognition of human rights, but can on the contrary foster it (1998, 192).

As far as Islam is concerned, simplistic minds are inclined to consider it as the natural and eternal enemy of human rights. The reality is, of course, much more complex. In fact, Islam has never been monolithic. On the contrary, it has a long history of doctrinal and cultural pluralism (Arkoun 2006, 23) and of tolerance of diversity (Bulliet 1996, 180). The “golden age” of Islam, in what we call the Middle Ages, is a particularly rich and fascinating period of Muslim history. It was a period of tremendous intellectual blossoming; at the time, the Muslim world was the first and not the third world, remarkably advanced in science, medicine and philosophy – far ahead of “Christian” Europe. Three outstanding thinkers seem particularly relevant: Avicenna (Ibn Sina), Averroes (Ibn Rushd) and Ibn Khaldun. They are representative of a world of humanism, rationality, moderation and tolerance, of a humanist, enlightened, rational and open Islam, quite different from certain caricatures of Islam presented in the West and from contemporary fundamentalist versions of Islam, which Mohammed Arkoun rightly qualifies as “explicitly anti-humanist” (2006, 22). The above-mentioned thinkers share a strong faith in the human being and human reason; they prove that the exercise of autonomous reason is perfectly possible in an Islamic environment, especially by means of *ijtihad*, personal judgment or personal effort of interpretation. They show an attachment to both religion and responsible human freedom. Unfortunately, Mohammed Arkoun seems to be right in asserting that from the 13th/14th to the 19th century, there has been a regression and a “dogmatic closure” in Islamic thought (2006, 144). However, it should be noted that since the beginning of the 20th century, advocates of Muslim reformism have been trying to resume, and to build upon, the great philosophical tradition of the golden age of Islam. At the above-mentioned Council of Europe Colloquy, Abdelwahab Boudhiba rightly stated:

[C]ontrary to what is occasionally claimed without any evidence,...Islam is no stranger to the development of the doctrine of human rights – even less is it its enemy” (Council of Europe 1990, 31).

In 16th century Spain, well before the great human rights proclamations of the Enlightenment, the “discovery” not only of America, but also of the “other”, the “Indian”, provoked a great debate that raised fundamental questions about colonialism and the human nature, the dignity and the

rights of that “other,” the “Indian.” Bartolomé de Las Casas in particular documented and denounced the crimes of the colonizers, courageously challenged prevailing doctrines and practices, rejected the argument of the superiority of European culture and vigorously asserted the equal dignity of the “other,” the “Indian.” It could be said that Las Casas “discovered” human rights through meeting the “other,” the “indio.”

2. Being Aware of Western Incoherence and Selectivity

One of the most shocking examples of past Western incoherence is the fact that countries that issued great human rights proclamations at the same time continued the practice of slavery. A more recent example is that of the “colonial clause” of the European Convention of Human Rights. In accordance with Article 1 of the Convention, “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms” enshrined in the Convention. This is the fundamental principle of the universal application of the Convention *ratione personae*; the Convention does not limit itself to guaranteeing the rights of Europeans, but sets up a European regional system for the protection of universal human rights. However, Article 56 on the territorial application of the Convention stipulates:

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall...extend to all or any of the territories for whose international relations it is responsible...
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

The incoherence is flagrant: the rights are secured to everyone under the jurisdiction of the Contracting States, but not, or at least not automatically, to those in the colonial territories. The drafters of the Convention were not unaware of this contradiction. On a proposal by Léopold Senghor, the Parliamentary Assembly of the Council of Europe voted in favour of the deletion of this provision,¹ but the Committee of Ministers decided to maintain it.

Nowadays, the “colonial clause” of the European Convention of Human Rights is practically irrelevant; however, its very existence is a striking example of European incoherence. Others could be added; I’ll limit myself to one: Article 16 of the European Convention which allows the Contracting States to impose restrictions of the political activity of aliens. The notion of “alien” really does not have its place in the

Convention; nobody should be an alien in the land of human rights. Like Article 56, Article 16 runs counter to the basic principle enshrined in Article 1 of the Convention. It is a stain on the European Convention. However, all attempts to remove or amend it have been unsuccessful.

In spite of their declarations in favour of the indivisibility of human rights, Western countries in fact frequently practice their divisibility. Economic, social and cultural rights are far from enjoying the same degree of protection as civil and political rights. Canada is a telling example for the “failed promise” of economic, social and cultural rights; the Committee for Economic, Social and Cultural Rights which supervises the implementation of the Covenant concerning those rights has repeatedly criticized the fact that they have in fact been downgraded to simple policy objectives.

3. Opening up to the Other and Otherness

The statements by Kéba Mbaye and Robert Badinter, quoted above rightly, emphasized the need for reconciling universality and diversity. Accepting diversity, accepting the other and otherness, and “meeting the other’s face” (to borrow from Emmanuel Lévinas (1991, 220)) is not a matter of course. For long periods of history, diversity has been perceived as a threat, a challenge or nuisance, and an obstacle in the way of racially, ethnically, culturally, linguistically or religiously homogeneous states and societies. Homogeneity was perceived and pursued as a prevailing objective. In Europe, from the late 18th to the first half of the 20th century, ethnocentric nationalism had a profound negative impact on the perception of diversity as well as on the situation of minorities and colonized and indigenous peoples. Although in the last fifty years there has been considerable progress with regard to the recognition of the value of diversity in domestic and international law, the forces hostile to diversity have not vanished. In spite of decolonization, imperialism, including cultural imperialism, has by no means disappeared. Edward Said has persuasively shown the centrality of imperialist thought in modern Western culture (1993). The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is an important step forward. However, it has been strongly rejected by the United States of America.

For an Intercultural Dialogue that includes Human Rights

Accepting diversity is an urgent necessity in the world in which we live. This need is recognized by international institutions and by men and women all over the world who are working for an “alliance of civilizations” and for dialogue among cultures and religions, thus countering the sinister prophecies of an inevitable “clash of civilizations” (Huntington 1996). Kofi Annan stressed the need of the dialogue of civilizations in these terms:

The need for dialogue among civilizations is as old as civilization itself. But today, the need is more acute than ever. Individuals who live in fear and lack of comprehension of other cultures are more likely to resort to acts of hatred, violence and destruction against a perceived “enemy.” Those who are exposed to the cultures of others and learn about them through communication across cultural divides are more likely to see diversity as a strength and celebrate it as a gift (Aboulmagd et al. 2001, 11).

A meaningful intercultural dialogue should include the essential issues of human rights. Whilst defending the universality of human rights, I believe that one can get to human rights by different ways and that the different cultures and civilizations of the world can and should contribute to the “common understanding” of human rights to which the Preamble of the Universal Declaration refers. The Western concept of human rights is certainly not the only valid one, Western practice even less.

References

- Arkoun, Mohammed. 2006. *Humanisme et islam. Combats et propositions*. Paris : Vrin.
- Bulliet, Richard W. 1996. “The Individual in Islamic Society.” In *Religious Diversity and Human Rights*, edited by Irene Bloom, J. Paul Martin, and Wayne L. Proudfoot, 175-192. New York: Columbia University Press.
- Aboulmagd, A. Kamal, Lourdes Arizpe, Hanan Ashrawi, Ruth Cardoso, Jacques Delors, Leslie Gelb, Nadine Gordimer, El Hassan bin Talal, Sergey Kapitza, Hayao Kawai, Tommy Koh, Hans Küng, Graça Machel, Giandomenico Picco, Amartya Sen, Song Jian, Dick Spring, Tu Weiming, Richard von Weizsäcker and Javad Zarif. 2001. *Crossing the Divide: Dialogue among Civilizations*. South Orange: School of Diplomacy and International Relations.

- Henkin, Louis. 1998. "Epilogue: Confucianism, Human Rights and 'Cultural Relativism.'" In *Confucianism and Human Rights*, edited by William Theodore de Bary and Tu Weiming, 308-314. New York: Columbia University Press.
- Huntington, Samuel P. 1996. *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster.
- Leuprecht, Peter. 1997. "General Course. Human Rights in the New Europe." In *Collected Courses of the Academy of European Law*, Vol. V, Book 2, edited by the Academy of European Law, 135-191. Dordrecht: Kluwer Academic Publishing.
- . 2012. *Reason, Justice and Dignity. A Journey to Some Unexplored Sources of Human Rights*. Martinus Nijhoff Publishers, Leiden-Boston.
- Lévinas, Emmanuel. 1991. *Entre Nous. Dialogue sur le penser-à-l'autre*. Paris : Grasset.
- Recommendation No. 24 of the Assembly (25 August 1950).
- Roetz, Heiner. 1998. "Chancen und Probleme einer Reformulierung und Neubegründung der Menschenrechte auf Basis der konfuzianischen Ethik." In *Menschenrechte und Gemeinsinn – westlicher und östlicher Weg? Ergebnisse und Beiträge der Internationalen Expertentagung der Hermann und Marianne Straniak-Stiftung*, edited by Walter Schweidler, 189-208. Weingarten: Academia Verlag Sankt Augustin.
- . 2004. "Menschenrechte in China. Ein Problem der Kultur?" In *Das Recht, Rechte zu haben. Menschenrechte und Weltreligionen*, edited by Monika Rappenecker, 105-125. Freiburg: Tagungsberichte der Katholischen Akademie der Erzdiözese Freiburg.
- Said, Edward. 1993. *Culture and Imperialism*. New York: Vintage Books.
- Universality of Human Rights in a Pluralistic World. 1990. *Proceedings of the Colloquy organized by the Council of Europe in cooperation with the International Institute of Human Rights*. Strasbourg 17-19 April 1989. Council of Europe: N. P. Engel, Publisher.

Notes

¹ Cf. Recommendation No. 24 of the Assembly (25 August 1950). Adopted by 46 votes to 37. Cf. *Recueil des Travaux Préparatoires de la Convention européenne des Droits de l'Homme*, vol. V, p. 192.

CHAPTER TWO

HUMAN RIGHTS: A FRAGILE HEGEMONY

BOAVENTURA DE SOUSA SANTOS

There is no question today about the hegemony of human rights as the discourse of human dignity. Nonetheless, such hegemony faces a disturbing reality. The large majority of the world population is not the subject of human rights. They are rather the object of human rights discourses. The question is, then, whether human rights are efficacious in helping the struggles of the excluded, the exploited, and the discriminated against, or whether, on the contrary, they make them more difficult. In other words, is the hegemony claimed by human rights today the outcome of a historical victory, or rather of a historical defeat? Regardless of the reply given to the previous questions, the truth is that, since they are the hegemonic discourse of human dignity, human rights are insurmountable. This explains why oppressed social groups cannot help but ask the following question: even if human rights are part of the selfsame hegemony that consolidates and legitimates their oppression, could they be used to subvert it? In other words, could human rights be used in a counter-hegemonic way? If so, how? These two questions lead on to two others. Why is there so much unjust human suffering that is not considered a violation of human rights? What other discourses of human dignity are there in the world and to what extent are they compatible with human rights discourses?

The search for a counter-hegemonic conception of human rights must start from a hermeneutics of suspicion regarding human rights as they are conventionally understood and sustained, that is to say, concerning such conceptions of human rights as more closely related to their Western, liberal matrix.¹ The hermeneutics of suspicion I propose is very much indebted to Ernest Bloch (1995 [1947]), as when he wonders about the reasons why, from the eighteenth century onwards, the concept of utopia as an emancipatory political measure was gradually superseded and

replaced by the concept of rights. Why was the concept of utopia less successful than the concept of law and rights as a discourse of social emancipation?²

We must begin by acknowledging that law and rights have a double genealogy in western modernity. On the one hand, they have an abyssal genealogy. I understand the dominant versions of western modernity as constructed on the basis of an abyssal thinking that divided the world sharply between metropolitan and colonial societies (Santos, 2007b). The division was such that the realities and practices existing on the other side of the line, i.e. in the colonies, could not possibly challenge the universality of the theories and practices in force on this side of the line. As such, they were made invisible. As a discourse of emancipation, human rights were historically meant to prevail only on this side of the abyssal line, i.e. in the metropolitan societies. It has been my contention that this abyssal line, which produces radical exclusions, far from being eliminated with the end of historical colonialism, still continues to be there by other means (neo-colonialism, racism, xenophobia, permanent state of exception in dealing with terrorists, undocumented migrant workers or asylum seekers). International law and mainstream human rights doctrines have been used to guarantee such continuity. But, on the other hand, law and rights have a revolutionary genealogy on this side of the line. Both the American Revolution and the French Revolution were fought in the name of law and rights. Ernest Bloch maintains that the superiority of the concept of law and rights has a lot to do with bourgeois individualism. The bourgeois society then emerging had already conquered economic hegemony and was fighting for political hegemony, soon to be consolidated by the American and French Revolutions. The concept of law and rights fitted perfectly the emergent bourgeois individualism inherent both to liberal theory and to capitalism. It is, therefore, easy to conclude that the hegemony enjoyed by human rights has very deep roots, and that its trajectory has been a linear path towards the consecration of human rights as the ruling principles of a just society. This idea of a long established consensus manifests itself in various ways, each one of them residing in an illusion. Because they are widely shared, such illusions constitute the common sense of conventional human rights. I distinguish four illusions: teleology, triumphalism, de-contextualization, and monolithism.

The teleological illusion consists in reading history backwards. Starting from the consensus existing today about human rights and the unconditional good it entails, and reading the past history as a linear path towards such a result. The choice of precursors is crucial in this respect.

As Moyn comments: "these are usable pasts: the construction of precursors after the fact" (2010: 12). Such an illusion prevents us from seeing that at any given historical moment different ideas of human dignity and social emancipation were in competition, and that the victory of human rights is a contingent result that can be explained *à posteriori*, but could not have been deterministically foreseen. The historical victory of human rights made possible that the same actions which, according to other conceptions of human dignity, would be considered actions of oppression and domination, were reconfigured as actions of emancipation and liberation if carried out in the name of human rights.

Related to the teleological illusion is the illusion of triumphalism, the notion that the victory of human rights is an unconditional human good. It takes for granted that all the other grammars of human dignity that have competed with the human rights were inherently inferior in ethical and political terms. This Darwinian notion does not take into account a decisive feature of hegemonic Western modernity; indeed, its true historical genius, namely the way it has managed to supplement the force of the ideas that serve its purposes with the military force which, supposedly at the service of the ideas, is actually served by them. We need, therefore, to evaluate critically the grounds for the alleged ethical and political superiority of human rights. The ideals of national liberation – socialism, communism, revolution, nationalism – constituted alternative grammars of human dignity; at certain moments, they were even the dominant ones. Suffice it to think that the twentieth century national liberation movements against colonialism, like the socialist and communist movements, did not invoke the human rights grammar to justify their causes and struggles.³ That the other grammars and discourses of emancipation have been defeated by human rights discourses should only be considered inherently positive if it could be demonstrated that human rights, while a discourse of human emancipation, have a superior merit for reasons other than the fact that they have emerged as the winners. Until then, the triumph of human rights may be considered by some as progress and a historical victory, and by others as retrogression, a historical defeat.

This precaution helps us to face the third illusion: de-contextualization. It is generally acknowledged that human rights as an emancipatory discourse have their origin in eighteenth century Enlightenment, the French Revolution, and the American Revolution. What is seldom mentioned, however, is that since then and until today, human rights have been used in very distinct contexts and with contradictory objectives. In the eighteenth century, for instance, human rights were the main language

of the ongoing revolutionary processes. But they were also used to legitimate practices that we would consider oppressive if not altogether counter-revolutionary. When Napoleon arrived in Egypt in 1798, this is how he explained his actions to the Egyptians: "People of Egypt: you will be told by our enemies, that I am come to destroy your religion. Believe them not. Tell them that I am come to restore your rights, punish your usurpers, and raise the true worship of Mahomet."⁴ And thus was the invasion of Egypt legitimated by the invaders. The same could be said of Robespierre who fostered Terror during the French Revolution in the name of piety and human rights.⁵ After the 1848 revolutions, human rights were no longer part of the revolution imaginary and became rather hostile to any idea of a revolutionary change of the society. But the same hypocrisy (I would call it constitutive) of invoking human rights to legitimate practices that may be considered violations of human rights continued throughout the past century and a half and is perhaps more evident today than ever. From the mid-nineteenth century onwards, human rights talk was separated from the revolutionary tradition, and began to be conceived of as a grammar of depoliticized social change, a kind of anti-politics. At best, human rights were subsumed in State law as the State assumed the monopoly of the production of law and administration of justice. This is why the Russian Revolution, unlike the French and American Revolutions, was carried out, not in the name of law, but against law (Santos, 1995: 104-107). Gradually, the predominant discourse of human rights became the discourse of the human dignity consonant with liberal politics, capitalist development and its different metamorphoses (liberal, social-democratic, neoliberal, dependent, Fordist, post-Fordist, peripheral Fordist, corporative, state capitalism) and colonialism (neocolonialism, internal colonialism, racism, slave-like labor, xenophobia, etc.). And so we must bear in mind that the selfsame human rights discourse had many very different meanings in different historical contexts, having legitimated both revolutionary and counter-revolutionary practices. Today, we cannot be even sure if present-day human rights are a legacy of the modern revolutions, or of their ruins, if they have behind them a revolutionary, emancipatory energy, or counter-revolutionary energy.

The fourth illusion is monolithism. I elaborate on it here in greater detail having in mind the main theme of this book. The illusion consists in denying or minimizing the tensions and even internal contradictions of the theories of human rights. Suffice it to remember that the French Revolution's Declaration of the Rights of Man is ambivalent as it speaks of the rights of *man* and of the *citizen*. These two words are not there by chance. From the very beginning, human rights foster ambiguity by

creating belongingness to two different collective identities. One of them is supposedly a totally inclusive collectivity, humanity, hence human rights. The other is a much more restrictive collectivity, the collectivity of the citizens of a given State. This tension has troubled human rights ever since. The goal of the adoption of international declarations and of regimes and international institutions of human rights was to guarantee minimal dignity to individuals whenever their rights as members of a political collectivity did not exist or were violated. In the course of the past two hundred years, human rights were gradually incorporated into the Constitutions and were re-conceptualized as rights of citizenship, directly guaranteed by the State and adjudicated by the courts: civic, political, social, economic, and cultural rights. But the truth is that the effective, ample protection of citizenship rights has always been precarious in the large majority of countries. Human rights have been invoked mainly in situations of erosion or particularly serious violation of citizenship rights.⁶ Human rights emerge as the lowest threshold of inclusion, a descending movement from the dense community of citizens to the diluted community of humanity.

The other tension illustrating the illusory nature of monolithism is the tension between individual and collective rights. The United Nations Universal Declaration of Human Rights, last century's first major universal declaration, to be followed by several others, recognizes only two lawful subjects: the individual and the State. Peoples are only recognized to the extent that they become States. When the Declaration was adopted, it should be noted, there were many peoples, nations, and communities that had no State. Thus, from the point of view of the epistemologies of the South, the Declaration cannot but be deemed colonialist (Burke, 2010; Terretta, 2012). When we speak of equality before the law, we must bear in mind that, when the Declaration was written, individuals from vast regions of the world were not equal before the law because they were subjected to collective domination, and under collective domination individual rights provide no protection. At a time of bourgeois individualism, the Declaration could not take this into account. This was a time when sexism was part of common sense, sexual orientation was taboo, class domination was each country's internal affair, and colonialism was still strong as an historical agent, in spite of the drawback of Indian independence. As time went by, sexism, colonialism, and the crassest forms of class domination came to be acknowledged as giving rise to violations of human rights. In the 1960s, anti-colonial struggles were adopted by the Declaration and became part of UN affairs. However, as it was understood at the time, self-determination concerned

peoples subjected to European colonialism alone. Self-determination thus understood left many peoples subjected to internal colonization, indigenous peoples being the paramount example. More than thirty years had to go by before the right of indigenous peoples to self-determination was recognized in the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007.⁷ Lengthy negotiations were needed before the International Labour Organization approved Convention 169 regarding indigenous and tribal peoples. Gradually, these documents became part of the legislation of different countries.

Since collective rights are not part of the original canon of human rights, the tension between individual and collective rights results from the historical struggle of the social groups which, being excluded or discriminated against as groups, could not be adequately protected under individual human rights. The struggles of women, indigenous peoples, afro-descendants, victims of racism, gays, lesbians, and religious minorities marked the past fifty years of the recognition of collective rights, a recognition that has been always highly contested and always on the verge of being reverted. There is necessarily no contradiction between individual and collective rights, if for nothing else because there are many kinds of collective rights. For instance, we can distinguish two kinds of collective rights, primary and derivative. We speak of derivative collective rights when the workers organize themselves in unions and confer upon them the right to represent them in negotiations with the employers. We speak of primary collective rights when a community of individuals has rights other than the rights of their organization, or renounce their individual rights on behalf of the rights of the community. These rights, in turn, may be exerted in two ways. The large majority of them are exerted individually, as when a Sikh policeman wears the turban, an Islamic female doctor wears the hijab, or when a member of an inferior caste in India, a Brazilian afro-descendant or indigene takes advantage of affirmative action provided in their communities. But there are rights that can only be exerted collectively, such as the right to self-determination. Collective rights are there to eliminate or abate the insecurity and injustice suffered by individuals that are discriminated against as the systematic victims of oppression just for being who and what they are, and not for doing what they do. Only very slowly have collective rights become part of the political agenda, whether national or international. At any rate, the contradiction or tension vis-à-vis more individualistic conceptions of human rights is always there.⁸