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CONCILIATIVE NEED FOR HARMFUL CONSEQUENCES OF RELATIVIST CLAIMS IN RELATION TO UNIVERSAL HUMAN RIGHTS

(Evrensel İnsan Haklarına Yönelik Görecelilik Taleplerinin Zararlı Sonuçları Sebebiyle Duyulan Uzlaşı İhtiyacı)

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ÖZET

Anlamlar, değerler ve sınırlar kültürden kültüre farklılık gösterir. Fakat Uluslararası Hukuk bireylerin haklarına ilişkin taleplere karşı daha duyarlı hale geldikçe, bu inisiyatif aynı zamanda coğrafi ve kültürel tikellikleri yansıtan belli devlet uygulamalarına bir meydan okuma anlamını taşır.

Bu çalışmada genellik ve görecelilik anlayışlarının temel argümanları incelenmeye çalışılacak, bundan sonra görecelilik anlayışının kötüye kullanımına karşı, insan haklarının özünün korunması vurgulanırken her iki düşünce tarzını kabul edilebilir bir düzen içinde uzlaştırma anlayışıyla, alınabilecek önlemler önerilecektir.

Anahtar kelimeler: Evrensel İnsan Hakları, Kültürel Çeşitlilik/Çoğulculuk, Kültürel Görecelilik, Etik, Kültürlerarası Yaklaşım, Takdir Yetkisi, Uzlaşı

ABSTRACT

The meanings, the values and the limits changes from culture to culture. But as the international law becomes more responsive to the demands for rights of individual, this initiative also means a challenge to the validity of certain state practices re¬flecting geographical and cultural particularities.

In this paper, it will be tried to observe basic claims of both universality and relativism, after that what preventions can be taken to provide the misuse of relativism will be suggested, in the manner of reconciling both ways of thinking in an acceptable order while emphasizing on preventing the core of human rights.

Keywords: Universal Human Rights, Cultural Diversity, Cultural Relativism, Morality, Cross-Cultural Approach, Margin of Appreciation, Conciliation

INTRODUCTION:

Is Cultural Diversity an excuse for violating Human Rights? This is not a simple yes or no question. One can find examples for both yes and no answers. The diagnostic question here is why violators need an excuse? Or are the explanations can be qualified as excuses?

The fact that this question shows us, even the violators or the states which do something which are qualified by universal majority as illegitimate -it depends on how one evaluates them- need explanations for some behaviours. This shows us the fact that there's a common acceptation about the existence of universal human rights through the world.

This acceptance leads us towards another question. If most of the world accepts that common human rights exists universally then what are relativists and universalists arguing so much about? The answer is "interpretation". More broadly, the meanings, the values and the limits changes from culture to culture. But as the international law becomes more responsive to the demands for rights of individual, this initiative also means a challenge to the validity of certain state practices reflecting geographical and cultural particularities.[1]

Also the increasing membership of the international community, increases the diversity of interests which causes the need for certainty and the need increases with the "dynamic and changing nature" of the subject of human rights.[2]

While trying to provide that certainty, insisting on defining absolute limits for both definitions and interpretations causes another danger which means denying the most important factor of "universal human rights" which is already in that phrase as "universal". This insistence means denying different cultural experiences, acceptances, interests etc. And this denial causes cultures' denial of the universality of Human Rights. The implementation of human rights does not have to be wholly indifferent to particular differences which are common moral and social norms within a state. Some variation is essentially needed, because the efficiency of international human rights law depends on a "process of interaction, interpretation, and internalization of international norms."[3]

In a different view it is hard to deny that sometimes absolute universality of human rights may cause violation of cultural human rights too. Broadly at times, violence should be

[1] Fernando R. Teson 'International Human Rights and Cultural Relativism' in M. Addo, 'International Law of Human Rights' (Ashgate 2006) 73.
[2] Michael K. Addo, 'The Legal Nature of International Human Rights' (Martinus Nijhoff 2010) 179.
[3] Harold Hongju Koh, 'Why Do Nations Obey International Law?' [1997] 106 YALE L.J. 2599, 2603.

used to deter, terminate, or punish violations of these norms. Holy wars and 'humanitarian intervention" rest on common ground in their justification of the use of violence to vindicate norms of human behavior.[4] Another example is the Danish cartoon affair in 2006, which demonstrates the tension between freedom of religion and freedom of expression.[5] In this example both freedoms are also universal but when observed, absolute freedom of expression obviously violates the right to enjoy religion which is prior to freedom of expression according to the cultural view. This example brings us to another principle. The limit of a freedom is another freedom's borders.

In this paper, it will be tried to observe basic claims of both universality and relativism, after that what preventions can be taken to provide the misuse of relativism will be suggested, in the manner of reconciling both ways of thinking in an acceptable order while emphasizing on preventing the core of human rights.

CULTURAL RELATIVISM:

"Cultural relativism" is not a a legal term. Actually it belongs to anthropology and moral philosophy[6] where anthropologists have long recognizes that divergent cultural and political traditions result in equally divergent social values and diverse approaches toward morality and law.[7]

As a result cultural relativism is a doctrine that is strongly supported by notions of communal autonomy and self-determination.[8] Relativists claim that substantive human rights standards vary among different cultures and necessarily reflect national particularities. What may be regarded as a human rights violation in one society may properly be considered lawful in another. Even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.[9]

[4] Robert D. Sloane, 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights' [2001] 34 Vand. J. Transnatl. L. 527, 560.
[5] Yvonne Donders, 'Do cultural diversity and human rights make a good match?' available at http://ssrn.com/abstract=1715050 [accessed 19 October 2011]
[6] F.R.Teson, Ibid. 74.
[7] D. Lee Donoho, 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards' [1990-1991] 27 Stan. J. Int'l L. 345, 348.
[8] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' in M. Addo, 'International Law of Human Rights' (Ashgate 2006) 173.
[9] F.R.Teson, Ibid.. 75.

Donnelly, theoretically divides relativism into two types as strong and weak cultural relativism by referring that strong and weak are relative terms referring to the extent of cultural variation permitted. The strong type of relativism holds that human rights are culturally determined, so definition of universal standards cannot be applicable for all cultural backgrounds. The weak type, admits that some human rights standards are universally applicable and holds that culture may be an important source of the validity of a moral right or rule.[10]

Basic Claims of Cultural Relativism:

The first claim is that the certain general human rights such as religious freedom or political participation "are inappropriate in certain cultural or political contexts" with suggestion of the existence, application, and meaning of human rights should be dependent upon national conditions. For example, in Islamic states which haven't got a secular regime and completely implement the official Islamic Law Concept called Sheriah, religious freedom is considered incompatible with Islamic law –for only muslim people-.[11]

Second, even if an abstract human right is appropriate to a culture, its specific content and application depend primarily upon the cultural and political circumstances of that society. Fundamental values such as justice, liberty, equality, and freedom from want mean markedly different things depending upon one's cultural and political assumptions.[12]

Another important claim of relativists supports that each culture has it's own conception of human rights which is based upon its cultural preferences and political ideology. Western societies consider human rights to be individualistic, adversarial, justiciable, and inalienable, while human rights in the Asian, African, and Hindu traditions may not encompass any of these characteristics. For example, in response to the critics of birth control policy, Chinese government clarifies that such policy that based on "collective welfare" is not violation of human rights.[13]

UNIVERSALITY:

Universality is best defined in the Preamble to the Universal Declaration of Human Rights (UDHR), which proclaims the declaration to be a: Common standard of achievement

[10] J. Donnelly, Ibid. 174,175.
[11] D. Lee Donoho, Ibid. 353.
[12] Ibid 354.
[13] Ibid.

for all peoples and all nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.[14]

Universalism generally holds that there is an underlying human unity which entitles all individuals, regardless of their cultural or regional antecedents, to certain basic minimal rights, known as human rights.[15] Whereas, radical universalism on the other hand, holds that culture is irrelevant to the validity of moral rights and rules which are universally valid.

Donnelly summarizes the doctrine of the Universalist approach with the following conclusions: All humans have rights by virtue of their humanity, A person's right cannot be conditioned by gender or national or ethnic origin, Human rights exist universally as the highest moral rights, so no right can be subordinated to another person, or to an institution.[16]

LEGAL FRAMEWORK:

The 'Vienna Declaration and Programme of Action'. Paragraph 3 states that:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[17]

Flexibility of universal human rights and its possible relevance to diverse cultures can be facilitated by the establishment of minimum standards. Within this framework, states have maximum room for cultural variation without violating the minimum standards of human rights established by law.[18]

The Vienna Declaration may be seen, as a reconcilation attempt among competing motivations. It essentially directs international institutions to interpret the specific meaning of rights in ways that allow diversity, self-governance, and autonomy, while maintaining core,

[14] UN General Assembly Resolution 217A (III) 1948.
[15] Elizabeth M Zechenter 'In the Name of Culture Cultural Relativism and the Abuse of the Individual'
[16] J. Donnelly, Ibid. 192.
[17] United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (Part I) (1993), para 5.
[18] Diana Ayton-Shenker 'The Challenge of Human Rights and Cultural Diversity United Nations Background note, available at www.un.org [accessed 15 Feb. 2008].

universal human rights values. With the exception of core rights, such as those relating to the physical integrity of the individual, there may be little or no room for variation. For other rights, there may be little actual consensus over their specific meaning and significant potential for variations that nevertheless preserve core universal values."[19]

Article 4 of ICESCR, gives states the possibility to limit the enjoyment of the rights in the Covenant, but only on the condition that these limitations are:

"determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

This limitation clause is not meant to provide states with a simple excuse not to implement the provisions of the ICESCR. Limitations may not be in contradiction with the nature of the rights in the Covenant, otherwise the provisions would no longer have any value and substance.[20]

Also in Article 29(2) of the UDHR, in which it is stated:

"…in the exercise of his rights and freedoms, everyone shall be subject to only such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Whether or not a limitation of cultural rights by law is justified depends on the actual circumstances. On the one hand, the phrase ''for the general welfare'' is vague, possibly allowing states to abuse it to justify certain cutbacks. On the other hand, the unlimited exercise of cultural rights should not seriously endanger the rights of others or of society as a whole. For example, freedom of expression can be limited in that creative expressions should not harm the cultural life of society as a whole or that of specific groups, such as children. The right to take part in cultural life can be limited in cases where cultural activities use racist or discriminatory expressions.[21]

In Graz Declaration on Principles of Human Rights Education and Human Security paragraph 12 the same point of view is confirmed as: "A key challenge for the future of Human Rights Education and Learning is to enhance the universality of human rights by rooting these rights in different cultural traditions, taking into consideration the cultural diversity of communities and societies. However, cultural diversity must not be used to justify

[19] D. Lee Donoho, 'Autonomy, Self-Governance, And The Margin Of Appreciatıon: Developing A Jurisprudence Of Diversity Within Universal Human Rights', [2001] 15 Emory Int'l L. Rev. 391, 421.
[20] Y. Donders, Ibid. 17.
[21] Ibid.

or excuse discrimination or violations of human rights obligations."[22] And as in the Universal Declaration on Cultural Diversity by UNESCO article 4 stated: "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."[23]

The common shortcoming of all contexts or definitions of legal framework is vagueness. This diagnosis leads us to the first problem: How should the conciliative interpretation be done without touching the core of Human Rights.?

CROSS CULTURAL APPROACH:

The cross-cultural approach is a strategy which first identifies the sub-significances of cultures and then search for common points which make them functioning together in a process of mutual dialogue.

The first part of this strategy is a process of self-examination in which each cultural tradition, appreciating its own shortcomings, reconsiders it's common narratives with a new and modern way of interpretation of its norms and values so that peoples of diverse cultural traditions can agree on the meaning, scope, and methods of implementing these rights.[24]

The second part of the strategy is thus based on active cooperation between cultural traditions. It presupposes recognition of difference -which is a consequence of first part of the strategy- and a need to work towards a common ground concerning the meaning and implementation of human rights standards. This recognition also consequently sets a secure platform for the external dialogue. It's pre-supposed that this dialogue should encourage good will, mutual respect, and equality with other cultural traditions."[25]

[22] Graz Declaration on Principles of Human Rights Education and Human Security, By 5th Ministerial Meeting of the Human Security Network Graz, 8 – 10 May 2003.
[23] Universal Declaration on Cultural Diversity by UNESCO, Adopted by the 31st Session of the General Conference of UNESCO PARIS, 2 NOVEMBER 2001.
[24] Michael K. Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' [August 2010] 3 Human Rights Quarterly, Volume 32, 601, 610.
[25] Ibid. 611.

In this context we come-across to the institutions which are named as treaty-based institutions of the United Nations which provide promising opportunities to mediate the tension between universality and diversity in the manner of cross-cultural approach.

Institutions such as the Human Rights Committee (HRC) necessarily engage in a significant amount of interpretive activity while pursuing their mandate to monitor the implementation of rights by state parties. Typically called "committees" and composed of experts selected by the state parties, which are limited in their powers and mandate.

In general, a committee's monitoring work is conducted by reviewing state parties' own self-serving reports regarding implementation and releasing "general comments". Some of the committees, most notably the HRC, also engage in quasi-judicial activities.[26]

The state reporting process has some clear potential for progressively developing state consensus over the specific meaning of rights. For example, a committee's dialogue with state party representatives often reflects the committee's understanding of the specific content of rights, as states are pressed to explain practices and the committee makes specific suggestions for improvement. In this sense, review of state reports should provide a forum for the expression and consideration of diversity in the development of universal rights. Also General Comments have some potential for mediating between the competing goals of universality and diversity by providing directions regarding committee views on the meaning of certain important provisions.[27]

Last but not least, the state reporting process and the general comments allow the expression of various interpretations of rights that may slowly inch the international community toward some common understandings.[28]

In this process also the Quasi-judicial activities make precious contributions. In these processes the decision maker is called upon to give the abstract right a specific meaning that will resolve the concrete dispute between the government and claimant, while inevitably balancing a mixture of competing interests. By such concrete cases the quasi-judicial activities have great potential for giving shape and specific content to the meaning of rights and for developing standards by which to evaluate critical competing interests.[29]

[26] D. Lee Donoho, Ibid. 436.
[27] Ibid. 437.
[28] Ibid. 438.
[29] Ibid. 439.

FOCUSING ON CONSEQUENCES:

Former U.N. Secretary-General Kofi Annan accurately points out for need to an urgent solution as: "It is never the people who complain of human rights as a Western or Northern imposition. It is too often their leaders who do so **....** You do not need to explain the meaning of human rights to an Asian mother or an African father whose son or daughter has been tortured or killed. They understand it-tragically-far better than we ever will."[30] Indeed the victims have no interest in theoretical arguments. The essential need is an urgent solution.

In accordance with Mr. Annan's view 'alleviating human suffering and victimization' Richard Falk focuses on a conciliative idea which is a rather simple but an effective aim.[31]

Falk, suggests primarily to identify practices that have "intolerable" effects. This approach focuses on the potentially "intolerable" or harmful effects of specific cultural precepts and practices which differentiates it from the major community at the same time which are incompatible with human rights standards.[32] This way, it is possible to reconcile the objectives of the human rights movement in its appreciation of culture while at the same time ready to challenge precepts and practices that do not match with the core of human rights.[33]

Falk recommends responding to the intolerable aspects of culture, by taking "opportunities to discuss what is intolerable".[34] Which we see again their most obvious practical examples in "national periodic reports" which are required by treaty-based bodies.

Of course, with it's common points with cross-cultural dialog it is not a new idea but the genuine part of Falk's suggestion is the focus of it. When the international community changes their focus from defending their ideal boundaries to protecting their people's dignity as human beings the dialog may be easier to construct.

For example, the work of the U.N. Commission on Human Rights (CHR) demonstrates that all member states condemn obvious violations of physical integrity such as torture, disappearance or summary execution. Similar consensus has emerged over egregious

[30] Kofi Annan, Press Release, 'Ignorance, not Knowledge... Makes Enemies of Man,' Secretary-General Tells Communications Conference at Aspen Institute (Oct. 20, 1997).
[31] Richard Falk, 'Cultural Foundations for the International Protection of Human Rights, in Human Rights in Africa: Cross-Cultural Perspectives' eds. Abdulahi A. An-Naim & Francis Dengeds,(1990 Washington, D.C.: Brookings Institution) 45.
[32] Ibid. 46-49.
[33] M. K. Addo, Ibid. 625.
[34] R. Falk, Ibid. 59.

practices involving physical violence against civilians during armed conflict, including ethnic cleansing, genocide, and other war crimes.[35]

MARGIN OF APPRECIATION:

It is a common mistake which leads the argument in a misunderstanding path is separating "universal" claims from "relativist" claims sharply. There are usually intersections which both thoughts share. In this context it will be a useful conciliation technique to investigate in each case, what degree of cultural or domestic variation remains consistent with international human rights norms. This notion finds its expression in the European human rights system's doctrine of a "margin of appreciation." In the *Handyside Case,* the European Court of Human Rights observed that:[36]

"it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals **....** By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements ... to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[37]

Another example is the Tyrer case[38] how the ECtHR deal with "margin of appreciation" which the court measured if the corporal punishment was necessary to maintain law and order and consequently ran afoul of the convention.

The basis of the "margin of appreciation" principle rests upon the primacy of national implementation of rights and the notion that state authorities are often better situated to judge local conditions and the various public interests which compete with the claims of individuals. When a state's choices fall within a range of acceptable alternatives, the ECHR will uphold the state's actions as being within its so-called "margin of appreciation." The importance of the right and the consequences of the state's conduct for the individual are also important factors in determining how wide the margin of appreciation should be in any particular case.[39]

The doctrine is frequently invoked when the ECHR is evaluating the scope of personal liberties under Articles 8 through 11. These articles, dealing with personal liberties, including

[35] D. Lee Donoho, Ibid. 435.
[36] R. D. Sloane, Ibid. 527.
[37] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976), Para 48.
[38] Tyrer v. the United Kingdom 26 Eur. Ct. H.R. (ser. A) (1978).
[39] D. Lee Donoho, Ibid. 452, 453.

freedom of speech, religion, family life, and privacy, expressly allow for limitations on those rights in order to protect certain categories of public interests where "necessary in a democratic society."[40] As in Article 8:

"necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[40] D. Lee Donoho, Ibid. 454.

CONCLUSION

Culture is something which develops and changes with time. It is not static, but dynamic; it is not a product, but a process. Also it has both an objective and a subjective dimension. While the objective dimension is generated with visible characteristics such as language, religion, or customs, the subjective dimension can be observed in shared attitudes and ways of thinking, feeling and acting.[41] In other words culture affects even shapes an individual in multiple ways. In Michael Reisman's words "not because other groups . . . are more complex than ours, but because our own so profoundly shape us, at levels of consciousness so deep that we are often unaware of it."[42] Thus denial of cultural particularities also means denial of individualities taking the sense of belonging which cultures provide to it's members.

Also cultures have deep differences when compared to each other. Because their main factors are differ. Consequently rights have different implications among different peoples depending upon their particular political, religious, social, and cultural orientations.[43]

But culture is not necessarily a positive value always. It may also harm people. There exist cultural practices, that are questionable from a human rights perspective.[44] As such, culture concerns the human dignity, this is where human rights, broadly international law of human rights, come into play.

To be international, law needs efficiency, to be efficient the consensus is needed. So the answer of the first question in this paper is "yes, cultural diversity is used as an excuse for human rights" but "at times". On the other hand the contrary is possible too. "Human rights are used as an excuse for violating cultural diversity and intervention for self-autonomy" but "at times".

Right questions are essential to see the problem obviously which is essential to make an exact diagnosis. The right question here is "how can the two ideas reconciled without touching the core of human rights, in other words human dignity?"

To make a fair reconciliation the first step is identifying the borders. What is the core of human rights? How can it be defined conciliatively? The international community found a very useful method for this issue. Monitoring system treaty-based bodies are working in a

[41] Y. Donders, Ibid. 16.
[42] W. Michael Reisman, Law In Brief Encounters, (Yale University Press 1999) 153.
[43] D. Lee Donoho, Ibid.392 2001.
[44] Y. Donders, Ibid. 16.

useful way to accomplish this purpose. Such monitoring is important as not only should it improve the implementation of the rights, but it also determines the scope of the provisions and limitations.[45] The need here is effectiveness. It is also seemed that the system is in a search for reform to supply effectiveness. In this purpose it will be a useful suggestion to provide more independency to these bodies. For example not appointing, choosing the head of the committees universally, as choosing the general-secretary of the U.N. Giving the bodies an independent budget and secretary will increase their independency and even without binding decisions the bodies will be more effective and prestigious with an award of efficiency.

After identifying the boundaries there is a need to find objective criterias for interpreting with preserving the same respect for cultural diversities as universal claims. It seems a fair strategy to study more on the idea of "margin of appreciation". Especially the criterias of "necessity" and "maintaining the social orders" seems brilliant conclusions for conciliation. Also these criterias have shortcomings but with time they hopefully will also establish the right balance.

In this context the framework of human rights, with its system of limitations based on the principles of equality, non-discrimination, as well as the rights of others, seems that will be helpful to safeguard cultural diversity from being misused with a right way of conciliative interpretation for the protection of cultural practices that infringe upon human rights.[46]

[45] Ibid.
[46] Ibid.

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