

UNIVERSALIDAD DE LOS DERECHOS HUMANOS EN LA TEORÍA Y LA
PRÁCTICA

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Me alegra mucho estar aquí con los alumnos, en el Instituto y con viejos amigos, como Juan Méndez, Roberto Cuéllar y Diego García Sayán. De ahora en adelante voy a hablar en inglés con toda confianza en mis intérpretes.

I should say that I was one to stay within very sensibly -- thirty minutes which I must to do -- because if I refuse to, this little machine produces an enormous siren that will frighten us all, and worst still just as at the end of march opera Don Giovanni or don Juan, a great statue will walk into the room, approach me take my hand and pull down me into the inferno. So, I should watch this very carefully.

I must say that after hearing Juan Mendez complete talk, I intended to say -- estoy de acuerdo -- and sit down. Would be the completion of an excellent brief of the entire talk.

We both talking, as you know, about the same broad topic, the idea of universalism in human rights, and I think it is an excellent opportunity for me and I hope for you, to hear two somewhat different perspectives on that issue. My categories are a bit different, and a lot of sentiments are very similar or identical, but I hope I will not simply repeating or putting things in a somewhat different context.

Universalism is I think, one of the most outstanding, provocative and the basic aspects of the human rights movement. That extraordinary movement that took hold after World War II, actually started during the war with Nuremberg and with the Charter of the UN and with the Universal Declaration of Human Rights in 1948.

Why is the idea of the universality so contentious? Let me suggest three brief responses at start and then go on to the substance of my talk.

The human rights movement as you well know, some of you before you came here and all of you after the two weeks of the Institute course. The human rights movement represented a very deep challenge that I would not under estimate today,

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to a lot of traditional ideas of how States function in the international political and legal system that grew up in the mid XVII Century. International law by definition, compromises, constrains the freedom of will or so call sovereignty of States. It must the whole idea of international law is to create that minimum of order classically, that would enable States to coexist. So whether we talk to ambassadorial amunities or whether we talk of the law of the sea, or what was said on the treaties or what develops through the customary law, was meant precisely to limit state action, talk to us on surround, agreements must be followed. Of course, enforcement is wick and remains wick in many respects, but what it is the idea behind the entire enterprise. And yet, the human rights movement, post World War II, when far beyond simply building on the erosions of sovereignty that had taking place through a variety of treaties and in many aspects of customary law over the preceding centuries. It reached as you know, extraordinarily deeply and took along a even more political character because it started to regulate its ideal said international law must regulate how States treats itself. That is an extraordinary link. Other extraordinary link which perhaps it grander for me, being few decades older than you, because unaware of the period this idea was simply harassing, almost unthinkable. So that it now reaches into how your countries treat you and my country treats me, and it reaches to the most political, the most culturally sensitive, the most structural aspects of the society that affects things as fundamental, and this fundamentally thought over as power – who yields power, who exercises this power, who imposes this continuous problems of the human societies and human nature.

So, this went much further, both in terms of the breath of the enterprise, how much of human rights law have broadly reach well beyond, physical insecurity or physical infringement, all the way to speech and political participation and equal protection, and the whole set of norms that really determine much of the character of the society. South Africa was transformed totally, simply by the application of those norms, the equal protection norm through this recent period of transition.

So, one response to this extraordinary contraction of sovereignty or so called domestic jurisdiction, expressed in the universality of human rights, has been precisely the attempt to pull back from this universality, and say no, you cannot do this to me, I am separate sovereign country and I have my own culture, and universality must recognize each limits and allowed me to go my way. So in this sense you can see the assaults of universality as a playing out in a different idiom, in a different language with a different sets of concepts of the ancient and continuing struggle between sovereignty and international regulation between domestic jurisdiction and human rights.

Secondly, it is an import theme in the human rights movement which in a sense argues against the very universality that it proclaims. In that theme, it is the theme of diversity for human rights never meant to impose a particularly uniformity on any one – either within a given State or surely not among States and cultures. As you may know, Article 27 of the International Covenant on Civil and Political Rights, celebrates this diversity, by giving each of us a right in communion with others to speak our language, to practice our own religion, to maintain our own culture, if we are minority communities within a State. I would say, the recognition of difference, the respect for difference; the ability to live in peace with difference is perhaps the cardinal idea of the entire human rights movement. Think of how much blood shade at hearing to that ideal, would have saved over centuries and centuries.

Finally the legacy of western colonialism and western hegemony, western power over the rest of the world. Could not help but be there subliminally, unconsciously as people looked other corpus which Juan Mendez has so indicated, seen by many to have its origins in the political theories, philosophies on developing political cultures of the West.

So these are the three reason why universality, as inevitable, as I think it was brought inevitably numbers of the challenges to it.

I am going to sketch briefly, as time marches on, some historical reason why this universality I think had to be. Let me start with some historical reasons and then

briefly touch, because I think Juan Mendez treated this quite adequately on the philosophical foundations.

Imagine going back to what to me, its simply part of my late childhood in early at lessons and to you it is practically ancient history, World War II. Imagine going back to 1940's as the war came to an end, a war which had from the west point of view two dominant aggressors, Nazi Germany and the military Japan, not within one culture, two radically diverse cultures, two radically different geography, so it was a world war, not original war. So at the end of the war as the UN Charter and as the Human Rights document said, one of the great purposes of these documents was to end the scorch of war, to end the horrors and the agony of war, and the ending had to be global, it would not do contain war simply within Europe between France and Germany or in Central or South America between any of the warring couples that have been on war over the last several decades over this century. It have to had a global reach to be effective because particularly with the advance technology that it is not localization of a war at all, a war that reaches a certain seriousness.

Immediately you wish to speak to a set of aspirations that would respond to this idea, curbing war everywhere enhance implicitly human rights which was seeing as an instrument of curbing war had to be universal.

The implicit theory which perhaps must of here share, is that countries which really observe human rights internally, are much apt to go to war internationally against similar countries. They may well go to war in one or other way, before the UN probabitions of pre-emptively against an aggressor but against each other, history has shown much rarely.

So observing human rights served everyone practical desire to be free of being attacked or free of being brought into bloody conflict; free of repeating of course horrors like the holocaust whether or not they had or whether or not in the future might have international consequences as we have seen in the Rwanda very clearly how ineffective the west have been, it became an international matter, it could not be left along. The same of course in the former Yugoslavia.

Furthermore, after World War II, I think there was a reaction against a lot of the corrosion of values that had taken place earlier, through movements in my own country such as Legal Realism; very vital movements in political and legal thought, but they were corrosive movements, they ate away at a lot of church and deep beliefs. They would on my mind enormously illuminating and enable us to shake a whole apparatus of conceptions which less reveal the world to us that insecure the world furnished. Nevertheless in this process they necessarily had a critical and destructive reach, and after all the destruction and horror in humanity of World War II, it was felt as it was a time for affirmation of values, for the return of values that could be seen as fundamental, essential and shared, again the universality idea.

Finally as Juan Mendez has mentioned, the treaties themselves have built the system where from the start meant to be universal. The Charter is the fountainhead of its own, had whatever forty five of votes for, well then consisted of about fifty States, contrasted with about 185 today – quite a difference, and then of course the Human Rights Covenants themselves, which took a long time to become effective, reached out world wide. This aspiration, in the early 40's started before the regional systems such as the Inter-American System or the European System, had yet being unrealized.

Let me talk briefly of some other aspects, I noted that Juan Mendez has covered. Say just this about the very deep postulates in the human rights system. They are very brief, people didn't waste lots of time trying to come to agreement in the preambles to the Universal Declaration, or to the two basic Covenants, about the different philosophical, political, moral sources for these norms. You never could have gotten to any where, wouldn't be a Tower of Babel of justifications and arguments that would lead to the same dispersion of the Tower of Babel actually did. So instead you would be very terse, (?) you use just a few phrases such as postulating the equal human dignity of all persons. Most cultures could in one way or another pick up on that, but some could not – all human beings were not equal, my own country had legal segregation at that time in many of our

schools and other systems. So none of us was above strong criticism and none of us should I should say remain above strong criticism today. These very deep postulates, which I think remain and for me continue to have a naturalist base. A base in something very deep within me but I cannot adequately express by making an elaborate philosophical argument on one or other time. These very deep postulates try to reduce all of us in these documents simply to a capacity of a character as a human being period. We will purge of all our identities; gender disappeared, particularly as we move to the Women's Convention or years later to supplement the earlier Conventions. Gender was meant to be irrelevant to opportunity, to treatment, the biological differences remain but that should have no social consequence beyond the inevitable minimum. The same could be said for race; the same could be said for religion; the same indeed in my country in various respects can be said for age, which was gradually made insufficient criteria for acting adversely to various people but I must add something which as the years go on I personally become more grateful for.

So we have all this purging of our individual identities, and there are a few special categories left in these instruments to separate from each other, one is children. There is a special Convention on Children, although children are treated identically within that category, they are not distinguished by race, religion, language, gender, etc. So in this purge forms, strict of all our identities, nationality, geographical, the universality is implicit and inevitable – they all go together in a complementary way. Finally, I would say that are very rhetoric of right, the language of rights which is familiar to the West, they grows out of the West, was unfamiliar rhetoric or was unfamiliar rhetoric to much perhaps of the world. It doesn't mean as once my dad suggested, that the values expressed through rights; the rules and standards that are put in the form of rights – every one has the right to a fair trial; no one shall be tortured; everyone has the right to be treated equally; to associate to others, to vote – it doesn't mean that some of these ideas are as expressed as phony in other civilizations and cultures, but they are not expressed through this language of rights;

they are expressed through other languages or perhaps obligation, duty and so on. They have other accounts in different cosmologies, in different religious systems and so on.

So rights implicitly, as it grew up in the West had this universalizing idea – everyone has a right or none has the right not to be treated in such and such manner. Hence again, purge to all identities this course that does spread.

I think will not talk of the part Juan Mendez speech, the different ways in which the West tried to defend itself, particularly the West against challenges to universality.

I will move immediately to the notion of what I mean by the very deep challenges to this universal system.

I don't mean genocide, I don't mean rampage or systematic torture. I don't mean systematic disappearances by governments, a practice that unfortunately started in Latin America and even more unfortunately has now spread to many other parts of the world. I treat these not as contentious parts of the human rights system; no one justifies them as a matter of norms, as a matter of rules of what it's right – countries do them and they are the horrible instances of violations that we have seen over the last fifty years of the human rights movements. But they are violations pure and simple, they are not put forth as challenges to the idea of universality. The problem has indicated that is the problem of enforcement, the problem of a weak and irrational world that simply have not gathered and may never gather the political will to act when necessary against certain times of depressions and violations.

So, I am not talking about that, what I am talking about, and I am not talking about different ways of implementing a particular standard, such as the standard of everyone is entitled to a fair trial where you understand the criminal charges against you or you have the opportunity to defend yourself. There is no culture which will quarrel with that idea on an abstract level, which will try to justify hiding from you the offenses of which you are accused. The problems come with the level of implementation and I don't treat as challenges to the human rights system the fact that a jury, in my country, which is a Constitutional right for Americans it is not a

requirement for other countries. Or the pre-cause examination to which we are all are entitled, takes particular forms in my country but very different forms in yours, which may be everybody is good or better, serving the goal of a fair trial. That is another area where differences in implementation in realizing rights are necessarily in the tackle rights but simply different cultural ways of going about realizing Coven shared values.

So, what am I then talking about? I am talking about the concept departures from the universal system which other countries try to justify in norms in the terms. They try to say, this or that should not be required by universal human rights because Of course, they may back the position of and do usually do with behavior. So is this kind of challenge to the idea or to the justifications for universality, that I am talking about here.

Let me give you the briefest of schema to suggest what I have on mind and to simplify a great deal, take the basic human rights covenants or the Universal Declaration and break them in into five parts, or one might say that the basic, if we start let say with physical security, the protection of our physical security – no torture, no arbitrary arrest, no disappearances, and so on, no country formally quarrels with those rules, many violate them, we know that, systematic violators through our this continent – no one justifies this normally. I would not say those are challenges to human rights in my sense of violations. Again a fair trial as I indicated, very few will say, we do not believe in fair trials, we believe in not allowing the defendant the right to defend themselves – doesn't make any sense, would not have any appeal, many deny fair trials because they are violations and not quarrels.

Our next category, a third would have to do with equal protection and there starts to get complex. No one today justifies racism; not country today – apartheid was the last hold out in South Africa – would stand and say – we believe based on the Bible or based on whatever, that whites are superior to blacks or yellows are superior to oranges, or what ever it may be, no, they would say there is racial equality, many States still deny it but the norm is agreed upon. This of course is true also for many

other parts of the equal protection laws. It is not entirely true with respect to religion, within the Islam, the other people of the book, Christians and Jews, go together with the Islam of course, work out of the same Abraham, Abraham a tradition, or will treat other religions within their own doctrines or in some different ways so it is to incapacity one for being the ruler of an Islamic State, or being subjective to particular taxes or rules. So there you find a justification for difference within our own religious traditional culture, we are entitled, we ought to treat certain people differently.

By the same token, most important today among these different distinctions is women – and I see a fair number in this audience – in fact there is not aspect of the entire human rights movement which is a stoning of success and a stoning on indication of how much the West, let alone the rest of the world has move in recent years as gender equality in the different Conventions that have advance it, to the point where if you look back at the signing of the UN Charter in 1945, which said there should be no discrimination on grounds of sex. It seems to abide that every country that signed that Charter such as my own, was engaged in a monstrous lie, at least retrospectively, because if we look back to the situations of women in our countries in 1945, we were in consistent in systematic violation of any equal protection norm. That to me, incidentally it is prove not only on how this movement has the capacity to grow as it now is with respect to say, gay and lesbian rights, but this movement cannot pretend to capture once and for all what is a human right and what it is not. Even over the last 50 years, we have seen so much dramatic change in the conception of rights in my country, in Western cultures, in other cultures as well.

As we move to equal protection, there is much more normative diversity as we move to rights of advocacy and association, including the right to personal ties to advocate to others that their leave their religion and become yours. Again, great differences among countries who consider associations to be often dangerous and destabilizing up to lead to ethnic conflict who considered a lot of advocacy such as hate speech

or other kind of speech to be very dangerous, much less protection of speech than in my country. Again, real diversity of use, challenging the premise of universality.

Finally the third part of my schema, political participation itself, promised to the American Convention as well as the Universal Declaration and the International Covenants. Think of how many countries in the world have systems that have honest elections with integrity today, allowing freedom of speech and association before the election with certainty that the military will not step in to pick the winner out if the military doesn't like the winner, and so on, and so for. Shortly not the majority of the world, yet there is a fundamental human rights norms. Great diversity still as we look at China, as we look at Singapore, I take that as an agreement incidentally. As we took all these countries all of them have their great differences.

What I am discussing then, are the various challenges at this level of norms, and I suggest that while we have these challenges, I think I should in the time remaining speak about some of the fundamental challenges that have been made and how we might respond to them.

I think that we can take the greatest challenges to universality, as we look back over the last fifty years, to come up on us in a few special fields, particularly in a few fields and for them seem to be very related to me that fields that reach so deeply into our lives, and so deeply into religious and moral culture. So they deal with gender or sex, they deal with sexuality, they deal with family three very related conceptions – gender, sexuality and family, and they are very deep even within my own country the cultural divided with respect of abortion is overwhelming and the cultural battles are even fought over the last twenty, thirty or forty years with respect to the changing nature of the family have been enormous the struggle over gay and lesbian rights, in my own country it is a very good indication of that. Traditional values, god, family, loyalty, all of the ideas that we are very familiar with, challenge by developing trends, by new advocacy, by developing perceptions of how people should interrelate. So that really has been one strong area for many part of the world, would take a look and say at least Europe in the West, in parts perhaps of Latin America, and say –

look what your freedoms have brought you, look what your treasured human rights have done, they turned you into a nation of desperately immoral people with your pornography, with your sexual licentiousness, with your unmarried mothers, with your desperate alone children, so on and so for. Some of the big criticism of the West with respect to this fact that we many of us can be even if we are sympathetic to the human rights movements. So that is one very large area. I would say another has been the issue of political participation, that precisely where power is most significant who controls the reins of government. The human rights movement has its deepest bite into another culture. A dictator, an authoritarian ruler, a military ruler, a military hunter can agree to many human rights norms and still retain power. He may agree the torture should stop, and not may haped to a bit, because it is easier to control the scent in your culture by torturing, but you will be able to hold on to power without torture as many dictators in one or another face of their reign have. But you had hold of your power if there are elections. The idea of picking the rascals out having periodical elections it is too much of a threat if the elections are genuine, if there is to be party pluralism, diversity and me competing with you for the vote from the people. So this has been the strongest knot for authoritarian regimes to crack. If you look at the positions taken today by say the People's Republic of China, many other States, Burma, certainly Singapore in some aspects, the Congo, Zaire perhaps the Congo to come, and Kenya, the many problems you had in your Latin American countries, we know the resistance to political participation and to the vote in some many parts in the world, the Middle East of course, the same phenomena. So these are the serious areas where the cultural relativism crisis has coming most.

Sympathetic to what Juan Mendez said, I should say that in many of these instances I think with respect to gender, sexuality and family, where you speaking of to aspects of the culture, because very deep and they are not created by and impose by the State, I can see the real dilemma , it is a real and painful dilemma often, universalism in changing very deep believes and very deep culture.

I think is much harder to see that, when you have authoritarian regimes justifying themselves on the ground and in our culture we rule differently, but in our culture people prefer authority, they prefer to be told what to do; they don't want to choose our traditions stresses ideas like duty. I think there, as Juan Mendez suggested cultural relativism is often use as an apology for wanting to hold on to power. And I would say one more thing about it. I think we use this language of cultural relativism frequently where it doesn't belong, because many of these countries I think they are saying something different. They I are not stating necessarily, but we always want to be a military dictatorship, or we always want to be the vanguard of the proletariat or we always want to be a theocracy run by priest, not allowing popular expression of the vote. They may be saying in numbers of these cultures, as may be the case in China or in Singapore – give us time, we are trying to modernize as West modernize, we cannot do it overnight , we can not through everything open at once, so it is a matter of adjusting overtime, rather than for challenging this principles. Maybe someday these principles will be adequate and fine for our countries and our cultures, but we cannot do it overnight and after all the West democracy develops slowly over several century, we are not precisely saying – but not expect us to change from one day to the next. So maybe more a temporal than a cultural issue. Finally, I want to leave you with few thoughts, I think that statue is dragging me down to hell incidentally, but I am thirty two minutes and I am going to take two more.

I want to give you some thoughts I must to start to think about. How do I decide. How should you decide. What ought to be universal. What simply must be universal, and what are you allow as a justify relativist defense. A justify desertion by another culture but it should not doing the way these instruments say, because these instruments are specific in many respect, more of the western than the universal culture. We might ask the following questions. Is the practice involved condemned by an increasingly large consensus among countries? If many countries go very many different ways, if gender discrimination for example, as we understand it today, were practiced severely in three quarters in the countries of the world, and

one quarter said – well, we think is wrong. It is very hard to argue for the universality of that position in a convincing way. But if you see a trend developing such as country after country moves in the direction of the human rights instruments and you see more and more recognition of values like gender equality, then it becomes I think more and more difficult to justify a smaller group of States or very distinctive culture which holds to its own practices. I would say the same for the growth of democracy. As you see more and more countries moving to some form of political participation, it becomes more and more difficult for authoritarian regimes to claim that their traditions speak to a party and not to democracy.

Again I would say if you find within a culture a group that we believe to be hurt by its practices, and that group seems in some way to accept the practices on the bases of religion, then we have less mandate I would say, to interfere. But there is a great problem as to how we know when a group we think to be oppressed is oppressed, how do they have to be advised to make a choice, how do we get advise and different ideas to them. So there are few thoughts, and not easy questions as we suggested at all.

I will leave with just two notions. First I suggested earlier, the West should recognize that itself doesn't have an iron hold on what the rights are. The West, as I indicated has change so much when you think of it even over fifty years, let along two hundred years of its history. In may country we have slavery, the women have no vote, the suffrage was limited to people with property, we come through stoning changes over two centuries of our history even the fifty years of the human rights movement. This evolves, it's changing, it is an ongoing discovery of the changing human spirit. So a little modesty on our part, the West part, we don't have everything tightly in hand to which other must agree. I think very salutary. Certainly on issue of free speech, the relation of church and State, so many issues are opened for negotiation and honest discussion among different people rather than laying down the law.

Secondly, I think is very important to suggest that there is no pure universality or pure cultural relativism. Our notions of what is universal are so tempered influence

by other cultures, and today there are so few pure different cultures that can speak to their own particularity. We all have been influenced by each other, and the notion of the cultural purity, that holds off the whole rest of the world and holds the culture to where it was, fifty or five hundred years ago, compulsory holds people within it, it is to me a violations of the deepest aspiration of human rights. We grown through interchange, a promise of the human right system is that all cultures and civilizations grow through intercourse with others. We learn from difference and in this sense, we must be respectful of diversity, we must I think insist of those fundamentals of universal human rights that holds us and the world open for change.

Thank you.