# HUMAN RIGHTS AND IDENTITY — HUMAN IDENTITIES AND RIGHTS*

**Roderick A. Macdonald** is F.R. Scott Professor of Constitutional and Public Law, McGill University, and President of the Royal Society of Canada. He was founding President of the Law Commission of Canada (1997-2000) and is author over 200 scholarly articles.

ABSTRACT

The 60th Anniversary of the Universal Declaration of Human Rights is an occasion both to assess the symbolic significance of the document and to explore its meaning for Canadians. Too much contemporary reflection on the Declaration implicitly presumes that it is meant for foreign countries and that its message is not powerfully relevant for Canada. This brief essay uses five vignettes of the past few years as reminders that we should not be so quick to dismiss the Declaration's message for our own practices.

The burden of legal philosophy is to propound universal truths. To do so requires philosophers to abstract from the complex, diverse, messy world in which real people lead real lives, and in which tyranny, slavery, inequality and injustice are everyday experiences. By contrast, the burden of the sociology of law is to explore how human societies function and to draw appropriate distinctions between what may look like identical situations. For better or for worse, most law teaching, and for that matter most theorizing about human rights by professors, lawyers and judges, approximate the philosophical rather than the sociological viewpoint. Indeed, the topic I am meant to address—"Human Rights and Identity"—and the title of this Symposium—a celebration of the *60th Anniversary of the Universal Declaration of Human Rights*—reveal the tendency.

Let me straightaway register a counterpoint. In my research in constitutional and administrative law over the past 35 years, I have found nothing but plurality and diversity. For this reason, I have inversed the theme that has been offered to me, emphasizing instead particularity over universals, and on-the-ground practices over abstract declarations.

I'd like to introduce my point by calling forth what has been described by many critics as the "best first sentence in western literature". That sentence is:

> *All happy families are happy alike; all unhappy families are unhappy in their own way.*

So begins Leo Tolstoy's *Anna Karenina*. To me the opening of *Anna Karenina* reveals a meta-fact about human beings, about human society and about human institutions—except that I believe that Tolstoy got the formula exactly backwards. In my experience all *unhappy* families are unhappy alike, and all *happy* families are happy in their own way. Happy families that reflect on their happiness, it seems to me, realize that there is no formula for happiness. Happiness results from attending to the specific features of a relationship, the specific character and personality of each member of the family, and the specific circumstances within which the family finds itself.

By contrast, unhappy families that reflect on their unhappiness are wont to seek some recipe, some distilled wisdom of the ages that can be expressed in a universal formula to ensure their happiness. For members of such families, happiness is not something that demands an investment of emotional energy, a humility about one's own circumstances, and an ongoing quest for grace that fails as often as it succeeds. No, for them, happiness is the necessary outcome of adhering to an apparently proven and if possible, memorizable, mantra.

*Roderick A. Macdonald, F.R. Scott Professor of Constitutional and Public Law, McGill University. I should like to thank my colleagues, François Crépeau and Robert Leckey, and my doctoral student Tom McMorrow, for their insightful comments on an earlier draft of this essay.

As meditation on the human condition, the inversed form of Tolstoy's epigram may be deployed to guide reflection upon "all things human" and, in particular, "human justice." The transposition would then come out something like this:

> *All happy experiences of human rights are happy in their own way, and all unhappy experiences of human rights are unhappy alike.*

My goal in this short essay is to tease out the implications of this revised epigram for reflection about human rights—not in some far off locale "in need of guidance"—but right here in Canada. When we celebrate the 60th anniversary of the *Universal Declaration of Human Rights*, what exactly are we celebrating? In more ways than one, we are celebrating the kind of abstraction against which we should be on guard. Consider, for example, what is so special about 60 years, as opposed to 59 years or 61 years. Is not our fixation on round numbers to which we have ascribed something transcendent (in the instance, a diamond jubilee) an example of the pernicious urge to universalizable abstractions? Furthermore, there is a substantial literature contesting the usefulness of a document that purports to state "universal human rights" as an inventory of abstract propositions. I do not propose to revisit these critiques of legal abstraction here. They are useful in pointing to on-the-ground issues to which we should attend whenever international norm entrepreneurs seek to homogenize social diversity. But, abstract declarations of rights are not without their value. That is, contemporary critiques often miss this point because they fail to account for the symbolic importance of "human rights" as a way of talking about and emphasizing the dignity of human beings and the dignity of diverse human identities.

I am sceptical that much is to be gained from taking a simple Manichean or dualist "yeah-boo" approach to the idea of universal human rights. The world we now inhabit is not the world of 1948, either in form or in substance. The increasing scope and scale of interpersonal and intergroup interaction across social, religious and cultural boundaries means that the world in shrinking in ways scarcely imaginable half a century ago. Transfers of ideas, institutions and values are creating a new, dare I say multi-centred, dialogue about the human condition; we may be forging a global commons but it is a richly textured, richly coloured and multivariate commons. In addition, we are witnessing a greatly increased capacity of organized interests (be these in the form of the State, private militias, the mafia, multi-national corporations, international trade unions and NGOs) to impose their will on others. In combination with the incredible effectiveness of weapons of violence and oppression (notably those associated with the arms trade), the resources now wielded by organized interests threatens the always fragile processes and institutions through which law may discipline power.

Once we acknowledge the scope of transnational interaction and recognize the challenge that cross-border violence and oppression by non-governmental forces poses for State-based legal institutions, we begin to see how these manifold centres of power threaten human rights in ways that States do not. In my view, the traditional conception of law as being exclusively linked to the political State and as consisting of a set of rules hierarchically arranged in a single system lacks the normative purchase to rein in both State and non-State human rights abusers. I suggest, in counterpart to this monistic, Statist vision of law, a "legal pluralistic" conception of the legal endeavour. "Legal pluralism" foregrounds four key ideas: (1) in any given environment, several legal orders are in direct competition for authority; (2) each of these legal orders is self-legitimating—it does not derive its legitimacy from another legal order; (3) the State legal order may not in fact be the most powerful legal order in a given environment; and (4) the trajectory of legal rules among these various legal orders is bi-directional: sometimes, the rules of the State legal order (including any rules that may derive from international instruments) penetrate into the legal systems of non-State actors; sometimes the rules of non-State legal orders (especially those that would offend accepted notions of due process) are imported into State legal systems (Macdonald, 1996, 2007).

What might legal pluralism theory have to contribute to our understanding of human rights? Does thinking about law as a complex set of interacting legal systems even within a single State assist us to address the contemporary critiques of universal human rights discourse and to recast the contribution that human rights declarations can make to human flourishing? Recall my inversion of Tolstoy's epigram. States that respect human rights realize that there is no one formula for achieving this state of grace. Only by attending to the specific features of the official legal system actually in place, only by attending to the specific features of the diverse legal systems that are in competition with it, and only by attending to the specific contextual circumstances that the State legal system is called upon to regulate can the contingency of success be managed. Not only are the universal mantras so familiar to in human rights law too abstract to provide workable guidance for States in this governance project, they often require conduct that many States under economic and political stress are simply incapable of achieving.

To explore the legal pluralist hypothesis in action, I'd like to offer five vignettes about human rights as lived

today in Canada. I use these vignettes to illustrate *our* arrogance in holding other States to account for their failure to live up to our understanding of the principles of the *Universal Declaration* (while failing to do so in myriad ways ourselves), and to ground my plea for a more variegated appreciation of the means by which States might seek to live by its counsel.

**I. A grounded culture of human rights?** Let me begin by reflecting on the different resources at our disposal for promoting a culture of human rights, and how we might use them. Do the abstract categories of legal declarations of rights provide useful purchase in the everyday lives of officials and citizens? When we think of our most effective compasses for orienting reflection about the human condition, law rarely ranks at the top of the list. What, we might ask, is the relative contribution of the Parable of the Good Samaritan, Gabrielle Roy's *Bonheur d'occasion*, Mark Twain's *Huckleberry Finn*, Victor Hugo's *Les misérables*, James Agee's *Now Let us Praise Famous Men*, the movies *Goin' Down the Road* and *Lives of Others*, and the Range's 1986 pop-music classic *"The way it is"* to our understanding of identity and human dignity? I believe that we might best celebrate the *Universal Declaration* by imagining the destroyed or compromised lives that have been evoked by our cultural artefacts. Much more than abstract texts, the judgements of courts, and the speculations of legal philosophers and lawyers, these grounded, contextual evocations of the human aspiration to interpersonal justice confront us with our social pathologies. No doubt, these contextual evocations can be read as vehicles of some universal insight. But they speak powerfully mainly because they speak locally, in local idiom, to local concerns. When I talk of cultural resources in different media, I do not mean subway advertizing posters celebrating ethnic or religious diversity. Propaganda, like law, forecloses self-examination. Literature, theatre, music, art, and dance, by contrast, compel self-examination precisely because they directly invite performance by the reader, listener, watcher and audience. Our challenge as human rights proselytizers is to use these cultural resources to best effect locally, while inviting others to use their own analogous resources to promote a culture of human rights. A legal pluralist analysis takes on the Statist assumption that official documents are the primary drivers of a cultural practice of human rights.

**II. Human rights as the problem of the foreign other?** Before adopting a censorial attitude towards various State practices, we should ask whether we are trapped by a structure of thinking that imagines human rights only as the response to the foreign other, and that leads us to remain silent and unmoved when the other is among us. Consider the case of human rights as a matter of humanitarian regard for the plight of refugees. A refugee is as equally a refugee when he or she shows up "at our gates" or "at our embassy", as when in an internment camp in Darfur. The humanitarian regard applies just as forcefully in both cases. Moreover, not all refugees are from abroad. We might ask whether there is a significant difference between the experiences of internal and external migrants. Do issues of social exclusion apply in the same way to Bangladeshi immigrants in Toronto and to Gaspésiens in Montreal? To Mexican agricultural workers in B.C. and to Newfoundlanders working in Alberta's tar sands? To undocumented refugee Filipino domestic workers Saskatoon and to Inuit peoples in Winnipeg? Typically, the internal migrant—the Gaspésien, the Newfoundlander, but not the Inuit—is afforded recognition as a full member of the host political community, but receives few or no social services meant explicitly to foster participation in the new socio-cultural community; typically, the external immigrant—the Bangladeshi, the Mexican, the Filipino—receives a number of social services but is denied the recognition. To imagine that the issue of identity recognition applies only to the external immigrant misses the point. Social exclusion is a human rights issue regardless of ethnicity, religion, place of origin, citizenship, or other marker of identity. This exclusion is not overcome by legal definition. It resides in attitudes and a failure to provide the services needed to actually achieve law's promises. Until we, as citizens of a politically stable country with vast economic resources, are prepared to address basic issues of social exclusion in our own communities, it lies ill in our mouths to decry other less-endowed States for their failure to do so. A legal pluralist analysis cautions us not to over-rely on nationalism /citizenship political markers in deciding what constitutes a human rights issue.

**III. The excluded other among us?** We Canadians in Quebec also like to impose on others, in the manner of the *Universal Declaration*, a particular version of human rights virtue. We take for granted that, by virtue of our two wonderful *Charters of Rights and Freedoms*, we are fully compliant with the norms we mandate for others. And yet, in action, the record does not look so good. Take, for example, the *Code de vie* of the Municipality of Hérouxville. This *Code de vie* purported to set out the basic values of Hérouxville and to formalize behavioural norms for its residents. Unsurprisingly, the litany of rules included in the *Code de vie* tracked the list of incidents reported in the popular press where courts, administrative agencies, municipalities, school commissions, and private institutions like the YMCA, soccer leagues or commercial sugar shacks adjusted their practices at the request of a religious or cultural group. In each case, the Hérouxville prescriptions directly sought to contest the

decision taken, to proscribe any such adjustments for the future, and to reaffirm the *status quo ante* as non-negotiable (Hérouxville, 2007). Were it not meant to be serious, the *Code de vie* could be seen simply as a modern day version of Merle Haggard's famous song "Okie from Muskogee", which notoriously opens: "We don't smoke marijuana in Muskogee, We don't take our trips on LSD, We don't burn our drafts cards down on main street, 'Cause we like livin' right an' bein' free." (Haggard, 1969). Whether the last line was intended by the singers as ironic remains an open question; in Hérouxville, the affirmation of "freedom" under the *Code de vie* would be taken as self-evident. Some may say that the norms of the *Code de vie*, as the legislative enactments of a municipality, are *ultra vires,* and that this proves the force of documents like our *Charters of Rights and Freedoms* that instantiate the *Universal Declaration*. I, like the Bouchard-Taylor Commission, take the opposite view (Bouchard-Taylor, 2008). The *Code de vie* reveals that xenophobia is, in practice, closer to expressions of official law than to the high-sounding universals of our *Charters of Rights and Freedoms*. A legal pluralist analysis enables us to see the ways in which many of our own normative systems fail to meet the human rights standards we impose on others.

**IV. Human rights as social and political practice?** We may also wish to inquire into the manner in which the aspirations of the *Universal Declaration* are inscribed in our social, political and constitutional practices. Does our politics truly reflect us? In December 2008 we witnessed what some have called a "constitutional crisis" in which different constellations of federal political parties sought to have the Governor-General exercise her prerogative powers in a particular way. Media coverage was extensive during the event, and yet in the programmes I watched on three different television networks, every single media interviewer, and every single "expert" commentator was a white male professor of at least 50 years of age, and most were over 60. Moreover, all four leaders of the political parties jockeying for position were of the identical demographic. Here we have a representation of democratic politics in a Canada committed to the values of the *Universal Declaration*, in which every media, academic and political player—with the sole exception of the person who actually possessed the authority to exercise the relevant discretion—was from a demographic that comprised at best 10%–12% of the Canadian population. This is hardly a sterling international advertisement for how Canada puts universal human rights principles into practice. If we adopt a legal pluralist analysis we can take on the assumption that the existence of representative institutions automatically ensures true representation, an apparent precondition for a State's commendation as a respecter of human rights.

**V. Human rights and multiple identities?** The interplay of universal norms and particular identities is becoming increasingly complex as we come to a better understanding of human psychology. Today we recognize that people use identities not just to isolate themselves from others, but also to claim relationships. Consequently, the meaning of identity is now quite removed from the list of 14 markers of invidious discrimination identified by *Human Rights Codes* and a far cry from the historic analytical triptych of gender, race and class. To be a vegetarian, a vegan or a tea-totaller is to claim a particular space more important for many than gender; to adopt a libertarian political stance, or to be a Marxist, or in Quebec to be a separatist, is to make a powerful identity claim. Yet it is important not to overstate the extent to which people can 'choose' any of these identities. However much Felix Leclerc may consider herself to be a female, hispanophone, lesbian, vegan dancer of sub-Saharan African ancestry, it is difficult for others not to see him as a male, francophone, heterosexual, *Québécois de souche, poutine*-loving, singer. Moreover, were Felix Leclerc to make such claims, it would be obvious that he was mobilizing certain acknowledged identity categories to present himself to others. Whether those who also make such identity claims recognize him as one of them and whether those who disparage such identities will visit disadvantage upon him cannot be known in advance (Macdonald, 2003). For Canada's self-positioning in discussions of human rights, it is paradoxical that, on the one hand, we continue to expand our list of protected identity claims while simultaneously denying that identity involves a complicated interplay between self-ascription and other-ascription, and on the other hand, we fail to do much about basic exclusions like socio-economic class that we have long recognized. Human rights cannot be reduced to a bourgeois flavour-of-the-month that bears little connection to foundational generic exclusions or to individualized perceptions of particular mis—or non-recognition. A legal pluralist analysis reveals the dangers of our assumption that legislative categories can exhaustively capture the diversity of human identities.

In presenting these five vignettes of failed human rights practice in Canada, I am not making the claim that the *Universal Declaration* is a flawed instrument because of its "universalizing" Western imperialism. Nor should I be taken as arguing a strong version of the "cultural defense" to legitimate egregious practices. Cultural relativism is undeniable, but simply because it may be invoked particularistically does not mean that it must always trump norms set out in the *Universal Declaration*. The point can be made allegorically. The injunction "render unto Caesar that which is Caesar's and render unto God that which is God's" reminds us

that our lives are lived in multiple normative universes. Whether "Caesar" is a Roman emperor in 0009 or a political State in 2009, and whether "God" is a Supreme Being or an aspiration to human justice expressed in a *Universal Declaration,* matters little. Moreover, cultural relativism enables us to see, by attending to all aspects and all artefacts of a given culture (including our own), how people instantiate the norms of the *Universal Declaration* in their everyday practices.

Many theories of human rights today presuppose that the idea of "law" is itself relatively uncontroversial: law is a phenomenon that is just "out there", represented in canonical texts enacted or adopted by States. I dissent, on two accounts. To begin, law is a label we attach to a set of human phenomena. Before we apply the word law, there are just data in the world. Through our labeling, we interpret human phenomena as "law" rather than as something else. Second, we often forgot that every conception of law is a simplification of a complex web of human engagement. We deploy assumptions, protocols and stipulations to identify, to simplify and to frame issues that we have decided are properly those of law.

It follows that any discussion of human rights implies not only the framing of the inquiry in relation to the *Universal Declaration*, but also in respect of any claim to cultural specificity. In the lens of legal pluralism, one no longer imagines the inquiry as merely opposing "universal western law" to "local culture". The query is rather about competing legal orders. We need to ask: What is the meaning for citizens of "universal" western law, both as concerns its rationalistic aspirations and its actual outcomes in decisions by official institutions in the West? In like manner we also need to ask: What is the meaning of indigenous local law, both as concerns its actual practices and outcomes in decisions by official institutions and the rationalistic aspirations which it implies? If we are to truly celebrate the 60th anniversary of the *Universal Declaration* we can no longer smugly characterize as *human rights unhappiness* the textual failure of other States to adopt by the *Universal Declaration*, while ignoring their local on-the-ground practices and indigenous critiques of other practices that reflect the *Declaration's* aspirations. And, if we are to truly celebrate the 60th anniversary of the *Universal Declaration* we can no longer excuse our own humanitarian failures by pointing to universal formulas for *human rights happiness* that we adopt, and ignoring the specific practices in the particular contexts of everyday human experience that testify to these failures.

## REFERENCES

Bouchard-Taylor, 2008—*Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles* (Quebec : Éditeur officiel, 2008)

Haggard, 1969—Okie from Muskogee, composed by Merle Haggard and Roy Edward Burris, 1969

Hérouxville, 2007—http://municipalite.herouxville.qc.ca/normes.pdf (accessed January 15, 2009)

Macdonald, 1996—R.A. Macdonald, "Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in J.G. Belley, ed., *Le droit soluble [:] Contributions québécoises à l'étude l'internormativité* (Paris: Librairie générale de droit et de jurisprudence, 1996) at 233-272

Macdonald, 2003—R.A. Macdonald, 'The Legal Mediation of Social Diversity' in A. Gagnon, et al. eds., *The Conditions of Diversity in Multinational Democracies* (Montreal, QC: Institute for Research on Public Policy, 2003) 85-111

Macdonald, 2007—R.A. Macdonald, "Here, There … and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in N. Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain—Études offertes à Jacques Vanderlinden* (Montreal: Éditions Yvon Blais, 2006) at 381-413