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Citation for published version (APA):

Donders, Y. M., & Vleugel, V. (2013). *The Receptor Approach: A New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart's Article in HRQ*. (Amsterdam Law School Legal Studies Research Paper; No. 2013-64). Amsterdam: Amsterdam Center for International Law, University of Amsterdam.

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UNIVERSITY OF AMSTERDAM

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THE BLOCK OR OLD WINE IN NEW BAGS? A COMMENTARY ON
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Amsterdam Law School Legal Studies Research Paper No. 2013-64

Amsterdam Center for International Law No. 2013-25



Amsterdam Center for International Law
University of Amsterdam



RESEARCH PAPER SERIES

INTERFACES Research Paper 04 (2013), ACIL 2013-25

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Cite as: INTERFACES Research Paper 04 (2013), ACIL 2013-25,
available at www.acil.uva.nl and [SSRN](http://ssrn.com)

Forthcoming in: 36 *Human Rights Quarterly* (2014)

The Research Project on Interfaces Between National and International Legal Orders (INTERFACES) is hosted by the [Amsterdam Center for International Law](http://www.acil.uva.nl) (ACIL) of the University of Amsterdam.

The Receptor Approach: a New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart's Article in HRQ.

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Introduction

In his article in the HRQ³, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, Professor Tom Zwart introduces what he calls an alternative view on the implementation of international human rights, the receptor approach. This approach assumes that "especially in Eastern and Southern states, international human rights obligations can be implemented more fully through local social institutions."⁴ The receptor approach could thereby "...foster the cultural legitimacy of international human rights standards."⁵ Zwart's article and introduction of the receptor approach are a welcome and remarkable contribution to the on-going discussion on the implementation of international human rights standards and the role of cultural communities and institutions in this regard. However, the present authors are not convinced of the usefulness of and need for the receptor approach. In our view, the receptor approach does not add much new to the existing international human rights framework and that where there may be interesting entry points, Zwart's argumentation is not always clear.

The universalism-relativism debate

Zwart places the receptor approach within the larger framework of the, as he calls it, "...adversarial debate on universalism and cultural relativism" where "international human rights and local culture are often regarded as being diametrically opposed".⁶ In our view, the 'adversarial debate' on universalism and cultural relativism is no longer that adversarial. It is broadly agreed that human rights and cultural diversity have a mutually interdependent and beneficial relationship. Moving away from the deadlock between universalism and cultural relativism, the idea has taken hold that respect for cultural diversity can very well be consistent with the notion of the universality of human rights. Cultural relativism, in the sense of asking for respect for cultural diversity, not of merely challenging the legitimacy of international human rights norms as such, and universality do not have to mutually exclude each other. The dichotomy can be overcome by making a distinction between formal universality and substantive universality, between universality of application and universality of implementation and between universality of the subjects (beneficiaries) and universality of the norms (content).⁷

The idea that human rights should be universally enjoyed – by all persons on the basis of equality – is not very controversial. In general, formal universality, or the universality of the subjects of human rights, does not present many problems. No one will argue that some people in the world do not have human rights at all. International human rights instruments clearly endorse the universality of the subjects of human rights: human rights should be enjoyed by all persons on the basis of equality. The universality of the normative *content* of human rights and the

universality of the *implementation* of human rights are more subject of debate. It is, however, broadly agreed now that the universal value and application of human rights do not necessarily imply the *uniform implementation* of these rights.⁸ Donnelly has called this the 'relative universality of human rights', arguing that "universal human rights, properly understood, leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity".⁹ Brems speaks of 'inclusive universality', pleading for more openness to cultural differences and for the accommodation of some cultural claims in a flexible and dynamic human rights system.¹⁰ An-Na'im focuses on enhancing the universal legitimacy of human rights by internal cultural discourse and external cross-cultural dialogue.¹¹ Kinley argues that 'human rights are inherently pluralistic', even though international human rights law, with its system of obligations and instructions and its institutionalised dispute settlement regimes, may give an impression of rigidity.¹²

Zwart on the contrary claims that by promoting the Western view on human rights serving as a model, "the universalism ambition becomes a push for uniformity."¹³ In our view, the international human rights system does not support such a push. At the end of his article, Zwart also concedes that "the receptor approach does not constitute the first attempt to reconcile international human rights and local culture."¹⁴ In our view, these reconciling theories are now the rule, not the exception.

Premises and assumptions of the receptor approach

Zwart explains that the receptor approach is based on two premises. The first one is that “states are bound by the obligations laid down in the human rights treaties which they have ratified” and the second is that “...states are encouraged to rely as much as possible on their own culture and social institutions at the implementation stage to enable them to fulfill their treaty obligations fully”.¹⁵ So far, we agree; few would not endorse these starting points. As such, they are not new nor revolutionary.

Then Zwart discusses two assumptions in order to explain the duties of states to implement human rights obligations. We cite them here to make sure we do not wrongly rephrase his words. “The first assumption is that human rights treaties need to be implemented by according enforceable rights to individuals and by relying on law. The second assumption is that international human rights law requires states in the East and the global South to give up their traditions and institutions to make way for the Western values and institutions that are supposed to underlie human rights.”¹⁶ We disagree with both assumptions and moreover, it seems that Zwart himself at some points invalidates them, even though they form the basis of the receptor approach.

International human rights treaties are *not* exclusively to be implemented by laws and legally enforceable individual rights. Treaty implementation also requires *other* measures. As Zwart himself indicates, Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR), for instance, refers to “laws or other measures” to give effect to the rights in the treaty.¹⁷ Zwart further correctly points out that “if a state chooses to implement a human rights provision through a social arrangement

other than rights it is not failing its duties, but using one of several legitimate courses of action open to it".¹⁸ Furthermore, the implementation of international human rights law is not only about individual enforceable rights. Several human rights instruments, for instance the International Covenant on Economic, Social and Cultural Rights, are drafted in more programmatic terms. These instruments show that these rights apply and need to be implemented by States, but that at the same time not all of them are fully legally enforceable.¹⁹

Zwart, moreover, seems to be making an argument for the use of 'other measures' *instead of* 'legal measures'. He writes that "[t]he question thus begged is whether international law and human rights treaties require implementation through taking legal steps or conferring enforceable rights, or whether states parties may rely on other social arrangements *instead*" (emphasis added).²⁰ In our view, it is not 'either-or': both legal and non-legal measures are required to implement human rights standards properly. While legal measures alone may not suffice in order to effectively implement human rights, nor will 'other measures' if taken exclusively.

As regards the second assumption, international human rights law does *not* require states in the East and South to give up their traditions and institutions to make way for the Western values and institutions. Nowhere in the treaties or the supervisory system can evidence be found of this statement. In fact, the treaties as well as the supervisory bodies leave ample space for diversity.²¹ Zwart himself also nuances this assumption by stating that "nowhere in the treaties does it say that human rights are the prerogative of modern states and, therefore, that signatory states with traditional

societies should modernize by embracing rational secularism.”²² In short, the assumptions underlying the receptor approach seem to be incorrect and nuanced even by Zwart himself. This leaves this approach with a very unsound basis.

The West against the rest

The second assumption shows another critical point in the article: the gross generalizations and over-simplifications. Zwart writes about ‘Western’, ‘Non-Western’, ‘Eastern’, ‘Northern’ and ‘Southern’ as if these are homogeneous entities, which, of course, they are not. Such simplifications ignore the diversity of cultures within the West, East, North and South.

Zwart moreover creates a rather strict distinction between (African and Asian) societies that revolve around the family and community, and (Western) societies “where individuals serve their own interests by claiming rights”.²³ Zwart persists here in the kind of stereotyping of all inhabitants of non-Western geographical regions that Howard has observed as denying “the individuality of members of these societies.”²⁴ She argues that “when the people who comprise these (...) cultures are considered not real individuals with their own needs, wants and desires (...), then their human rights can go unheeded.”²⁵

Furthermore, his arguments about the role of communities in the human rights discourse and the issue of individually enforceable rights could be nuanced. Although most human rights in international legal instruments are formulated in individual

terms, the international human rights system is not blind for the importance of groups and communities. The incorporation of collective rights and individual duties in the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the recently adopted ASEAN Declaration on Human Rights shows that the human rights system has incorporated so-called 'Non-Western' values in legal instruments.²⁶ Again, however, Zwart also seems to refute his own statement by arguing that international human rights instruments indeed already recognize the importance of the community for the individual, referring in the text to the Covenant (whereas the footnote refers to the UDHR) recognizing institutions such as the family, religion and marriage.²⁷

As regards the emphasis on individual enforceable rights, which Zwart considers a Western liberal approach, it could be noted that other regions in the world have also embraced individual enforceable rights in their human rights instruments and their supervisory mechanisms, for instance the African human rights system and the Inter-American human rights system. And the fact that individuals submit their complaints on alleged human rights violations to these judicial and quasi-judicial bodies at regional and international level proves that they have faith in such a system.

The receptor approach: for whom?

Although Zwart at the end of his article states that the receptor approach will "appeal to societies with rich cultural traditions", and to "those who favour a strong and

effective international human rights regime”, it remains unclear who is being addressed. Who should use or apply the receptor approach?

Since the receptor approach is about implementing human rights obligations, it seems that it is addressed to States. It should be mentioned that Zwart has successfully plugged the receptor approach with the previous Dutch Minister of Foreign Affairs.²⁸ This would presume that the receptor approach is addressed to Western states to be used in their human rights foreign policy towards non-western states. This has led to a critical report on the receptor approach by the independent Dutch Advisory Council on International Affairs.²⁹ The Council also maintained that “...taking account of the local human rights context is hardly a new concept” and that the international community has always endorsed other approaches than law and compliance. Moreover, referring to its own work, it reaffirmed that universality of human rights does not imply uniformity of their implementation.³⁰ The Council makes another important point when it argues that “excessive emphasis on the receptor approach could cause human rights policy to focus too strongly on local culture and traditional social institutions, which could marginalise victims of human rights violations involving traditional cultural practices.”³¹ Howard expressed similar fears that “nostalgia for community harbors a romantic tendency to ignore or disguise the many repressive and harmful effects (from a human rights perspective) of communitarian societies. (...) It (...) forgets that collectivities can be highly oppressive social entities.”³²

This point can be illustrated by using several of Zwart's own examples. One of his examples to show the importance of cultural institutions in the implementation of human rights concerns the practice of female genital mutilation (FGM). Zwart promotes a so-called pledge society as an effective remedy to eradicate FGM. He explains that "the practice can be abandoned if the parents of boys pledge that their sons will only marry uncircumcised young women, as a result of which parents of girls can safely pledge not to circumcise their daughters".³³ Such initiatives are extremely important and ought to be welcomed, but what happens to the daughter whose parents are unwilling to participate in such a pledge? What are her options? Zwart argues that in some countries statutory bans of FGM exist, but that they are not enforced "for fear of alienating powerful players."³⁴ But is the purpose of human rights not exactly to protect the individual against such 'powerful players'?

Zwart also elaborates on the *Gacaca* courts as a good example of the receptor approach.³⁵ After the genocide the Rwandese government decided to introduce a new type of *Gacaca* court in order to try the vast number of suspects. These new courts were modelled on the traditional ones, and, while still engaged in settling disputes within local communities and achieving reconciliation, entrusted with the responsibility of determining individual guilt and applying a state-imposed, coercive punishment.³⁶ These *Gacaca* courts may be a good example of a home-grown and culturally grounded solution, but they are not without downsides. It has been argued that the *Gacaca* courts are not able to meet minimum fair trial standards. Neighbours are trying neighbours, which seriously compromises the impartiality of the procedures. Equality of arms is not sufficiently guaranteed in terms of notification of

charges against suspects and time to prepare a case. There is no right to legal assistance. Victims are not adequately protected when testifying. The presumption of innocence is compromised, with too much emphasis being placed on confessions. There is no possibility of appeal.³⁷ In other words, fundamental individual rights are being sacrificed for 'the greater good' (i.e. the community). Is this than just bad luck for the innocents who are convicted?

One could also argue that the receptor approach is to be followed by supervisory bodies, such as the UN treaty bodies and regional human rights courts, that have the task to assess the implementation by states of their obligations following from the treaty provisions. However, we can safely state that the receptor approach will be nothing new to them. Treaty bodies in their dialogue with States parties do not exclusively focus on legal means, but pay ample attention to all different means of implementation. And, although the States are the main addressees of the obligations following from human rights treaties, the treaty bodies also address the role of non-State actors in the implementation of human rights, for instance of civil society organisations, national human rights institutions and ombudsmen. The role and importance of the family are also often addressed.³⁸

This multidimensional approach is also reflected in the framework of indicators being developed by the UN Office of the High Commissioner for Human Rights (OHCHR). These indicators should help States to implement their obligations and monitoring bodies to better supervise that process. The framework is composed of *structural*, *process* and *outcome* indicators for monitoring human rights at country level.³⁹

These indicators include legal commitments and acceptance of international human rights standards (structural indicators), as well as measures taken and policies developed to meet the obligations that flow from the standards (process indicators) and the results of those efforts (outcome indicators). The indicators reaffirm that legal means are not sufficient, but need to be followed by (non-legal) measures and policies and that not only state actors are involved in this process.

Conclusion: no new kid on the block

With the receptor approach, Zwart has revived the important debate on the universality of human rights and the place of cultural or local context in the implementation of these rights. His ideas on the receptor approach were indeed adopted by the former Minister of Foreign Affairs of the Netherlands, which received criticism in the Parliament and by others.⁴⁰ With his article in the HRQ, Zwart has also sought the academic debate, which allowed us to reflect on the receptor approach and its foundations. The receptor approach, in demanding to take the local context into account in which human rights are to be implemented and in valuing the role of cultural institutions in this process, is a good idea. But, in our view, it is not new. It is perhaps old wine in new bags, or “a new term for an old idea”.⁴¹ Moreover, it should be treated with care, not to lose sight of the potential negative aspects of cultural approaches. An all-inclusive approach, including legal means and supervision, as well as non-legal means and policies and including not only State actors but also non-State actors, including civil society organisations and cultural institutions, is

perhaps an ideal in today's world, but it remains the best way to advance human rights for all.

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³ Tom Zwart, 'Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach', *Human Rights Quarterly*, Volume 34, No. 2, May 2012, pp. 546-569.

⁴ *Ibid.*, p. 546.

⁵ *Ibid.*, p. 547.

⁶ *Ibid.*, p. 547.

⁷ Yvonne Donders, 'Human Rights: Eye for Cultural Diversity', Inaugural Lecture at University of Amsterdam, 29 June 2012: http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf, p. 7.

⁸ AIV advisory report no. 63: *Universality of Human Rights: Principles, Practice and Prospects*, The Hague, November 2008. The European Court of Human Rights has also adopted this approach by stating that, while the purpose of the European Convention on Human Rights was to lay down international standards, 'this does not mean that absolute uniformity is required'. See ECtHR, *Sunday Times v. United Kingdom*, Appl. No. 13166/87, decision of 26 November 1991, para. 61.

⁹ Jack Donnelly, 'The Relative Universality of Human Rights', *Human Rights Quarterly* 29, 2007, pp. 281-306, at 281 and 300. Interestingly, Zwart refers to an earlier article by Donnelly in order to prove the existence of the adversarial debate. Zwart, *supra* note 3, p. 547.

¹⁰ Eva Brems, 'Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam', *Human Rights Review*, Vol. 5, No. 3, April-June 2004, pp. 5-21, at 11-12; Eva Brems, 'Reconciling Universality and Diversity in International Human Rights Law', in: Andras Sajó (ed.), *Human Rights with Modesty: the Problem of Universalism*, Koninklijke Brill, 2004, pp. 213-230, at 223-225.

¹¹ Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, Pennsylvania, 1991, pp. 4-5.

¹² David Kinley, 'Bendable Rules: The Development Implications of Human Rights Pluralism', in: B. Tamanaha, C. Sage and M. Woolcock (eds.), *Legal Pluralism and Development – Scholars and Practitioners in Dialogue*, CUP, 2012, pp. 50-51.

¹³ Zwart, *supra* note 3, p. 552.

¹⁴ *Ibid.*, p. 564.

¹⁵ *Ibid.*, p. 547.

¹⁶ *Ibid.*, p. 548.

¹⁷ *Ibid.*, p. 550. The Human Rights Committee (HRC) and other treaty bodies have also stated that other means are necessary for full treaty implementation. See HRC General Comment No. 3 (1981): "The Committee notes that article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient." See, also Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 (1990): "The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be 'all appropriate means, including particularly the adoption of legislative measures'. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. (...) It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase 'by all appropriate means' must be given its full and natural meaning. (...) Other measures which may also be considered 'appropriate' for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures."

¹⁸ *Ibid.*, p. 551.

¹⁹ The UN Committee on Economic, Social and Cultural Rights has outlined the difference between application, implementation, justiciability and self-executing in General Comment No. 9, *The Domestic Application of the Covenant*, E/C.12/1998/24, 3 December 1998.

²⁰ Zwart, *supra* note 3, p. 549.

²¹ Donders, *supra* note 7; Yvonne Donders, "Do Cultural Diversity and Human Rights make a Good Match?", in: *International Social Science Journal* 199, 2010, UNESCO, Blackwell Publishing, pp. 15-35.

²² Zwart, *supra* note 3, p. 553.

²³ Zwart, supra note 3, p. 551. See also p. 549: "The Western liberal approach towards human rights tends to equate the implementation of human rights treaties with granting enforceable rights to individuals. However, in many African and Asian societies, which are communal in nature, substantial cultural texture is provided by non-legal social institutions like community, duties, and religion."

²⁴ Howard, 'Cultural Absolutism and the Nostalgia for Community', *Human Rights Quarterly*, Vol. 15, No. 2, May 1993, p. 328.

²⁵ Ibid., p. 327-328.

²⁶ African Charter on Human and Peoples' Rights, articles 19-24 and 27-29; American Convention on Human Rights, article 32; ASEAN Human Rights Declaration, articles 19 and 35. The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007, also includes collective rights. Supervisory mechanisms at regional and universal level have in their case law recognized the importance of communities.

²⁷ Zwart, supra note 3, p. 553.

²⁸ The House of Representatives adopted a motion submitted by Kees van der Staaij, Klaas Dijkhoff, Harry van Bommel and Coskun Çörüz (MPs) asking the government to commission a pilot project to test the receptor approach (Parliamentary Paper 32 735, no. 19, 29 June 2011).

The Minister has since discussed the receptor approach with the House of Representatives on several occasions, among others during his meetings with the Permanent Parliamentary Committee on Foreign Affairs on human rights, freedom of religion and freedom of speech (14 June 2011) and China (16 November 2011), as well as during the parliamentary debate on the foreign affairs budget (23-24 November 2011). In addition, he referred to the receptor approach in his speech to the UN Human Rights Council on 29 February 2012 and elaborated on the concept in a letter to the House of Representatives on 7 March 2012.

²⁹ Advisory Council on International Affairs ('AIV'), 'The receptor approach: a question of weight and measure' (Advisory Letter), No. 21, April 2012.

³⁰ Ibid., p. 4 and 5 (citation); AIV advisory report no. 63: 'Universality of Human Rights: Principles, Practice and Prospects', The Hague, November 2008.

³¹ Ibid., p. 7.

³² Howard, supra note 25, p. 330.

³³ Zwart, supra note 3, p. 559.

³⁴ Ibid., p. 558.

³⁵ Zwart, supra note 3, p. 562-563.

³⁶ Ibid., p. 563.

³⁷ Oomen, B. 'Rwanda's Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law', in Haveman, R. et al (eds), *Sentencing in Supranational Criminal Law*, The Hague: Intersentia, 2006.

³⁸ In the Concluding Observations of the Committee on Economic, Social and Cultural Rights regarding the People's Republic of China (including Hong Kong and Macao) the Committee "...welcomes the assurance provided by MSAR (Macao Special Administrative Region) that the Office of the *Ombudsman* has the mandate to receive complaints on violations of economic, social and cultural rights" and "...underlines the importance of the role of *civil society* in the full implementation of the Convention and recommends that MSAR consult *NGOs and other members of civil society* in Macao during the preparation of the next periodic report". In the same report the role and importance of the family is addressed, when the Committee "...recommends that MSAR take effective measures to increase public awareness, especially in the private sector, about the importance of maternity and paternity leaves that reconcile professional and *family life* for men and women." (CESCR, E/C.12/1/Add.107, May 2005).

³⁹ OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation', HR/PUB/12/5, Geneva and New York, 2012.

⁴⁰ For example, the present Minister of Foreign Affairs, Frans Timmermans (then Member of Parliament) responded to the receptor approach in *De Volkskrant*: "Despite an endless stream of words about that receptor approach, no one can indicate exactly what the difference is with the existing policy" [Ondanks een eindeloze stroom woorden over die receptorbenadering, kan niemand precies duiden wat nu het verschil is met het bestaande beleid], Frans Timmermans and Kirsten Meijer, 'Dutch voice missed as driver for human rights' [Stem Nederland gemist als mensenrechtanaanjager], in *De Volkskrant*, 16 April 2012. Another critical article: Cees Flinterman and Jasper Krommendijk, 'And who speaks up for Liu Xiaobo?' [En wie komt dan op voor Liu Xiaobo?], in *NRC Handelsblad*, 13 April 2012.

⁴¹ AIV Advisory Letter, supra note 31, p. 8.