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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

Yvonne Donders* & Vincent Vleugel**

ABSTRACT

In his article, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, Tom Zwart introduces the receptor approach, an alternative view on the implementation of international human rights that could promote the cultural legitimacy of interna-

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tional human rights law. Zwart's introduction of the receptor approach is a remarkable contribution to the ongoing discussion on the implementation of international human rights standards and the role of cultural communities and institutions. However, we are not convinced of the usefulness or the necessity of the receptor approach. We argue here that the receptor approach does not add much to the existing international human rights framework and that Zwart's arguments can be confusing.

I. INTRODUCTION

In his article in the *Human Rights Quarterly* (HRQ), *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.¹ This approach assumes that, "especially in Eastern and Southern states, international human rights obligations can be implemented more fully through local social institutions."² The receptor approach could thereby "foster the cultural legitimacy of international human rights standards."³ Zwart's article and introduction of the receptor approach constitute a noteworthy contribution to the discussion on the implementation of international human rights standards and the role of cultural communities and institutions. However, the receptor approach's utility is debatable, since it does not make a significant addition to the existing international human rights framework. Also, where he makes interesting points about the link between international human rights law and cultural diversity, Zwart's argumentation is not always clear.

II. THE UNIVERSALISM-RELATIVISM DEBATE

Zwart places the receptor approach within the larger framework of an "adversarial debate on universalism and cultural relativism" where "international human rights and local culture are often regarded as being diametrically opposed,"⁴ even though the debate on universalism and cultural relativism is no longer markedly adversarial. "It is broadly agreed that human rights and cultural diversity have a mutually interdependent and beneficial relationship."⁵

1. Tom Zwart, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, 34 *HUM. RTS. Q.* 546 (2012).

2. *Id.*

3. *Id.* at 547.

4. *Id.*

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

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).⁶

The idea that all persons should enjoy human rights on the basis of equity 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 human rights beneficiaries. Conversely, 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 that the universal value and application of human rights do not necessarily imply the *uniform implementation* of these rights.⁷ Jack 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.”⁸ Eva 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.⁹ Abdullahi An-Na’im focuses on enhancing the universal legitimacy of human rights by internal cultural discourse and external cross-cultural dialogue.¹⁰ David Kinley argues that human rights are inherently pluralistic, even though international human rights law, with its system of obligations and instructions and its institutionalized dispute settlement regimes, may give an impression of rigidity.¹¹

6. *Id.* at 8.

7. *Id.* at 8. 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 *Sunday Times v. United Kingdom* (No. 2), 217 Eur. Ct. H.R. (ser. A) at ¶61 (1991).

8. Jack Donnelly, *The Relative Universality of Human Rights*, 29 *HUM. RTS. Q.* 281 (2007). Interestingly, Zwart refers to an earlier article by Donnelly in order to prove the existence of the adversarial debate. Zwart, *supra* note 1, at 547.

9. Eva Brems, *Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam*, 5 *HUM. RTS. REV.* 5, 11–12 (2004); Eva Brems, *Reconciling Universality and Diversity in International Human Rights Law*, in *HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* 213, 223–25 (Andras Sajó ed., 2004).

10. *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 4–5 (Abdullahi Ahmed An-Na’im ed., 1991).

11. David Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, in *LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE* 50–51 (Brian Z. Tamanaha, Caroline Sage, & Michael Woolcock eds., 2012).

Zwart takes a contrary position in claiming that the “universalism ambition becomes a push for uniformity”¹² by promoting the Western view of human rights, yet the international human rights system does not support such a push. At the end of his article, Zwart also concedes “the receptor approach does not constitute the first attempt to reconcile international human rights and local culture.”¹³ The aforementioned reconciling theories are now the rule, not the exception.

III. PREMISES AND ASSUMPTIONS OF THE RECEPTOR APPROACH

Zwart explains that the receptor approach is based on two premises. First, “states are bound by the obligations laid down in the human rights treaties which they have ratified.”¹⁴ Second, “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 Few scholars would not endorse these premises, thus making them neither new nor revolutionary.

Zwart then discusses two assumptions in order to explain the duties of states to implement human rights obligations.

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

Both assumptions are questionable, and Zwart himself seems to invalidate them at some points, despite their forming the basis of the receptor approach.

International human rights treaties are *not* exclusively to be implemented through laws and legally enforceable individual rights. Treaty implementation requires other measures. As Zwart 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

12. Zwart, *supra* note 1, at 552.

13. *Id.* at 564.

14. *Id.* at 547.

15. *Id.*

16. *Id.* at 548.

17. *Id.* at 550. *General Comment No. 03: Implementation at the National Level (Art. 2)*, U.N. GAOR, Hum. Rts. Comm., 13th Sess., U.N. Doc. CCPR/07/29/1981 (1981), reprinted in, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Int'l Hum. Rts. Instruments, at 4, U.N. Doc. HRI/GEN/1/Rev.1 (1994). The Human Rights Committee (HRC) and other treaty bodies have also stated that other means are necessary for full treaty implementation.

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.

also correctly points out “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 individually enforceable rights. Several human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), are drafted in more programmatic terms. These instruments show that the rights they enshrine need to be implemented by states, but are not necessarily legally enforceable.¹⁹

Zwart, moreover, seems to make an argument for the use of “other measures” instead of “legal measures.” He writes: “The 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*.”²⁰ However, rights enforcement 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 to effectively implement human rights, other measures will not suffice either if taken exclusively.

With regard to 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. Evidence for this statement cannot be found anywhere in the treaties or the supervisory system. In fact, the treaties, as well as the supervisory bodies, leave ample space for diversity.²¹ Zwart also nuances this assumption by stating that “[n]owhere in the treaties does it say that human rights are the prerogative

See also, The Economic, Social, and Cultural Rights of Older Persons, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 13th Sess., at 20, U.N. Doc. E/1996/22 (1996), reprinted in, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Int’l Hum. Rts. Instruments, at 49, U.N. Doc. HRI/GEN/1/Rev.1 (1994):

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. Zwart, *supra* note 1, at 551.
19. The United Nations Committee on Economic, Social and Cultural Rights has outlined the difference between application, implementation, justiciability and self-executing in *The Domestic Application of the Covenant*, U.N. ESCOR, 19th Sess., Agenda Item 3, U.N. Doc. E/C.12/1998/24 (1998).
20. Zwart, *supra* note 1, at 549 (emphasis added).
21. Donders, *supra* note 5, at 10; Yvonne Donders, *Do Cultural Diversity and Human Rights Make a Good Match?*, 199 INT’L SOC. SCI. J. 15 (2010).

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 are qualified even by Zwart, leaving the approach with a very unsound basis.

IV. THE WEST AGAINST THE REST

The second assumption shows another critical flaw in Zwart's article: gross generalization and over-simplification. Zwart writes about the "West," "non-West," "East," "North," and "South" as if these are homogeneous entities when they, of course, are not. Such simplification ignores the diversity of cultures within the West, East, North, and South.²³

Zwart, moreover, creates a rather strict distinction between African and Asian societies that revolve around family and community, and Western societies where individuals serve their own interests by claiming rights.²⁴ 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."²⁵ 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."²⁶

Furthermore, Zwart's arguments about the role of communities in human rights discourse and the issue of individually enforceable rights could be nuanced. Although most human rights articulated in international legal instruments are formulated in individual terms, the international human rights system is not blind to 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.²⁷ Again, however, Zwart refutes his own statement by

22. Zwart, *supra* note 1, at 553.

23. *Id.* at 551.

24. *Id.* at 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.

25. Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 328 (1993).

26. *Id.* at 328.

27. African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, arts. 19–24, 27, 29, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217 (*entered into force* 21 Oct. 1986); American Convention on Human Rights, *signed* 22 Nov. 1969, art. 32,

arguing that international human rights instruments already recognize the importance of community for the individual. In the text he refers to the “Covenant,” without specifying which one, whereas he refers to the Universal Declaration of Human Rights (UDHR) in the footnote, which recognizes institutions such as family, religion, and marriage.²⁸

Regarding the emphasis on individually enforceable rights, which Zwart considers a Western liberal approach, other regions in the world have also embraced individually enforceable rights in their human rights instruments and supervisory mechanisms. For instance, the African human rights system and the Inter-American human rights system have embraced individually enforceable rights in their human rights instruments and supervisory mechanisms.²⁹ Further, the fact that individuals submit their allegations of human rights violations to these judicial and quasi-judicial bodies at the regional and international level proves that they have at least some faith in such a system.

V. THE RECEPTOR APPROACH: FOR WHOM?

Although Zwart states at the end of his article that the receptor approach will “appeal to societies with rich cultural traditions,” as well as to “those who favour a strong and effective international human rights regime,” it remains unclear whom Zwart is addressing.

Since the receptor approach is about implementing human rights obligations, Zwart is presumably addressing states parties to human rights treaties. Zwart’s successful plug of the receptor approach to the previous Dutch Minister of Foreign Affairs³⁰ would support a further presumption that the

O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force 18 July 1978); ASEAN Human Rights Declaration, adopted 18 Nov. 2012, arts. 19, 35; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, adopted 13 Sept. 2007, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (2007) (includes collective rights). Supervisory mechanisms at regional and universal level have in their case law recognized the importance of communities.

28. Zwart, *supra* note 1, at 553.

29. The regional human rights instruments, *supra* note 27, contain mostly individual rights. Furthermore, there are complaints procedures whereby individuals or groups of individuals can submit communications to regional monitoring bodies. See Article 34 of the European Convention on Human Rights, Article 44 of the American Convention on Human Rights, and Article 52 of the African Charter on Human and Peoples’ Rights.

30. Advisory Council on International Affairs, *AIV Advisory Letter No. 21: The Receptor Approach: A Question of Weight and Measure*, at 3 (13 Apr. 2012). 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 Papers, House of Representatives 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 Nov. 2011), as well

approach is addressed specifically to Western states for use in their human rights foreign policy towards non-Western states. The former Dutch Minister's acceptance of the approach led to a critical report by the independent Dutch Advisory Council on International Affairs.³¹ The Council maintained that "taking account of the local human rights context is hardly a new concept" and that the international community has always endorsed approaches other than legal reform and compliance.³² Moreover, referring to its own work, the Council reaffirmed that universality of human rights does not imply uniformity of their implementation.³³ Further, the Council argued 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 marginalize victims of human rights violations involving traditional cultural practices."³⁴ Howard expressed similar fears that "nostalgia for community harbors a romantic tendency to ignore or disguise the many repressive and harmful effects of communitarian societies . . . [It] forgets that collectivities can be highly oppressive social entities."³⁵

This point is illustrated by several of Zwart's own examples. One of the examples he uses to show the importance of cultural institutions in the implementation of human rights concerns the practice of female genital mutilation (FGM).³⁶ Zwart promotes a so-called pledge society as an effective remedy to eradicate FGM. He explains, "the practice may 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."³⁷ Such initiatives are extremely important and ought to be welcomed, but this suggestion does not consider what happens to the daughter whose parents are unwilling to participate in such a pledge or what her options would be. Zwart argues that statutory bans of FGM exist in some countries, but that they are not enforced "for fear of alienating powerful players."³⁸ Is not the exact purpose of enforcing human rights to protect the individual against such "powerful players"?

Additionally, Zwart elaborates on the *Gacaca* courts as a good example of the receptor approach.³⁹ After Rwanda's 1994 genocide, the Rwandese

as during the parliamentary debate on the foreign affairs budget (23–24 Nov. 2011). In addition, he referred to the receptor approach in his speech to the UN Human Rights Council on 29 Feb. 2012 and elaborated on the concept in a letter to the House of Representatives on 7 Mar. 2012.

31. *Id.*

32. *Id.* at 5.

33. *Id.*; See also Advisory Council on International Affairs, *AIV Advisory Letter No. 63: Universality of Human Rights: Principles, Practice and Prospects* (5 Nov. 2008).

34. *AIV Advisory Letter No. 21, supra* note 30, at 7.

35. Howard, *supra* note 25, at 330.

36. Zwart, *supra* note 1, at 558

37. *Id.* at 559.

38. *Id.* at 558.

39. *Id.* at 562–63.

government introduced a new type of *Gacaca* court to try the vast number of suspects. These new courts were modeled on the traditional ones and, while still engaged in settling disputes within local communities and achieving reconciliation, were entrusted with the responsibility of determining individual guilt and applying a state-imposed, coercive punishment.⁴⁰ These *Gacaca* courts are a good example of a homegrown and culturally grounded solution, but not without downsides. It is argued that the *Gacaca* courts are not able to meet minimum fair trial standards. Neighbors are trying neighbors, which seriously compromises the impartiality of the procedures. Equality of arms, requiring a fair balance between the opportunities afforded to the parties involved in litigation, is not sufficiently guaranteed in terms of notification of charges against suspects and time to prepare a case. Citizens hold no right to legal assistance. Victims are not adequately protected when testifying. The presumption of innocence is compromised, with too much emphasis placed on confessions. There is no possibility of appeal.⁴¹

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 with the task to assess the states' implementation of their obligations under the treaty provisions. However, the receptor approach is nothing new to them. In dialogues with states parties, treaty bodies do not exclusively focus on legal means, but rather pay ample attention to all available means of implementation. Furthermore, although states are the main addressees of obligations rooted in human rights treaties, treaty bodies also address the role of non-state actors, such as civil society organizations, national human rights institutions, and ombudsmen, in the implementation of human rights. The role and importance of the family unit is often addressed as well.⁴²

This multidimensional approach is also reflected in the framework of indicators being developed by the UN High Commissioner for Human Rights

40. *Id.* at 563.

41. Barbara Oomen, *Rwanda's Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law*, in SENTENCING IN SUPRANATIONAL CRIMINAL LAW 161, 178 (Roelof Haveman & Olaoluwa Olusanya eds., 2006).

42. 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 "welcome[d] 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 was addressed, when the Committee "recommend[ed] 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." (*Concluding Observations of the Committee on Economic, Social, and Cultural Rights*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 34th Sess., 27th mtg., U.N. Doc. E/C.12/1/Add.107 (2005)).

(OHCHR). These indicators should help states implement their obligations and help monitoring bodies better supervise that process. The framework includes structural indicators, for example, legal commitments and acceptance of international human rights standards, process indicators, measures taken and policies developed to meet the obligations that flow from the standards. This also includes showing outcome indicators, such as the results of those efforts. The indicators reaffirm the idea that legal means alone are insufficient and must be followed by non-legal measures and policies, as well as the idea that not only state actors are involved in this process.⁴³

VI. 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. Zwart's ideas on the receptor approach were adopted by the former Minister of Foreign Affairs of the Netherlands, an action that members of Parliament and others criticized.⁴⁴ Zwart has also sought the academic debate by publishing an article in the HRQ, which invites reflection on the receptor approach and its foundations. The receptor approach is based on a good idea: Local context must be taken into account when implementing human rights, and cultural institutions have a valuable role to play in this process. However, this idea is not new. Instead, it is "a new term for an old idea."⁴⁵ Moreover, it should be treated with care so as not to lose sight of the potential negative aspects of cultural approaches. Despite its idealism, an all-inclusive approach that incorporates legal and non-legal means, supervision, and policies, and which includes state actors along with civil society organizations and cultural institutions, remains the best way to advance human rights for all.

43. OHCHR, *HUMAN RIGHTS INDICATORS: A GUIDE TO MEASUREMENT AND IMPLEMENTATION* (2012).

44. 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 & Kirsten Meijer, *Dutch Voice Missed as Driver for Human Rights [Stem Nederland Gemist als Mensenrechtenaar]*, *DE VOLKSKRANT*, 16 Apr. 2012, available at <http://www.volkskrant.nl/vk/nl/2824/Politiek/article/detail/3241069/2012/04/16/Stem-Nederland-gemist-als-mensenrechtenaar.dhtml>. See also Cees Flinterman & Jasper Krommendijk, *And who Speaks up for Liu Xiaobo? [En wie Komt dan op Voor Liu Xiaobo?]*, *NRC HANDELSBLAD*, 13 Apr. 2012, available at <http://www.nrc.nl/handelsblad/van/2012/april/13/en-wie-komt-dan-op-voor-liu-xiaobo-1095117>.

45. *AIV Advisory Letter No. 21*, *supra* note 30, at 8.