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Introduction

A just international order and a healthy cosmopolitan discipline of law need to include perspectives that take account of the standpoints, interests, concerns, and beliefs of non-Western people and traditions. The dominant Western scholarly and activist discourses about human rights have developed largely without reference to these other standpoints and traditions.[1] Claims about universality sit uneasily with ignorance of other traditions and parochial or ethnocentric tendencies. The purpose of this book is to take a modest first step towards de-parochializing our juristic canon by making accessible the basic ideas about human rights of four jurists who present distinct "Southern" perspectives.

Francis Deng justifiably claims to interpret and speak for the traditions and culture of his own people, the Ngok Dinka of the Sudan. He argues that traditional Dinka values are basically compatible, in most respects, with the values underlying the Universal Declaration of Human Rights and like documents. Dinka culture concretizes, supplements, and sometimes conflicts with those more abstract values in the dynamic context of change involving the constant interaction between "tradition" and "modernization".

Abdullahi An-Na'im, a Northern Sudanese and a committed Muslim, argues that a "modernist" interpretation of Islam involves ideas, which are for the most part similarly reconcilable with international human rights norms, but that acceptance of such ideas (their internalization within Islamic belief systems) depends far more on conversations and debates *within* Islam than on cross-cultural dialogue, let alone external attempts at persuasion or imposition. He further argues that coercive enforcement of Shari'a by the state betrays the Qu'ran's emphasis on freedom of religion, voluntary acceptance, and individual interpretation of Islam.

Yash Ghai (Kenya) is sceptical of most claims to universality that are made for human rights; however, adopting a pragmatic materialist stance, he reports that he has found, through practical experience of post-colonial constitution-making, that human rights discourse provides a workable framework for negotiating political and constitutional settlements among politicians and

[1] Twining (2009) Ch. 1.

leaders claiming to represent different majority, minority, and ethnic interests in multi-ethnic societies. He is strongly committed to the core values of human rights and social democracy, but he is sceptical about claims invoking "culture" rather than material interests. He is deeply concerned about the paradox involving great progress in the development of human rights norms and the dismal reality of massive human rights violations.

Upendra Baxi (India) argues that as human rights discourse becomes commodified, professionalized by technocrats, and sometimes hijacked by powerful groups, it is in grave danger of losing touch with the experience of suffering and the needs of those who should be the main beneficiaries – the poor and the oppressed. They are the main authors of human rights. To take human rights seriously, is to take suffering seriously.

These thinkers are both significantly similar and strikingly different. They all belong to a single post-colonial generation (three were born, coincidentally, in 1938; An-Na'im is a decade younger, but started early). All four have been concerned with the problems of racism, colonialism, post-independence politics, weak and corrupt regimes, poverty, and injustice in the South. They have given expression to ideas that are rooted in these concerns without claiming to represent any particular constituency. All four were trained in the common law, have spent substantial periods in the United States and the United Kingdom, and write in English. Each has a distinctive voice and says different things. They make a fascinating study in contrasts. How far they agree, complement each other, differ, or disagree is a central question posed by these readings.

All four have been activists as well as theorists, but in different ways. Francis Deng has had a very distinguished career in international diplomacy. Abdullahi An-Na'im has been a human rights activist within the Sudan and several other countries, and a publicist for human rights internationally. Yash Ghai has played a major role in post-independence constitution-making and reform, especially in the South Pacific and Kenya. Upendra Baxi has been an influential publicist, advocate, and campaigner in India and on the international stage, as well as serving as Vice-Chancellor of two Indian universities.

My standpoint is that of a British jurist working in the Anglo-American tradition who is concerned to help to make our culture of academic law less parochial and ethnocentric. The aim of this book is to raise awareness of perspectives, issues, and ideas that are not part of the mainstream of Western discourse about human rights and to provide material for reflection and discussion about central issues in human rights theory. My role as editor is to introduce the authors and let their works speak for themselves.[2] From many potential candidates, I have selected these four jurists mainly for reasons of my limited expertise. They are colleagues and contemporaries. I know each of them personally, I am familiar with their work, and I believe that it deserves to be better known. Three of them are from Sudan and East Africa, where I have

[2] My own views on human rights are set out in Twining (1975) and (2009) Ch. 5–7 and 13.

worked, but they all have wide experience of many other parts of the world. The writings included here are accessible just because they are published in English by Western-trained scholars and are mainly addressed to Western academics and human rights activists. This makes them just one potential path away from the parochialism of much Western legal theory and human rights discourse.[3]

Some commentators have queried the idea of "Southern voices" in this context. This raises issues that are considered in Chapter 6, but for present purposes it is enough to equate "Southern" with "the Global South" as in the phrase "the North–South divide".[4]

The focus of this book is on human rights. The claim is that each of the authors has made a distinctive contribution to both the theory and praxis of human rights. "Human rights" is a contested concept with many meanings. Here some standard working distinctions are useful: first, it is important to distinguish between the idea of human rights as moral and political rights and human rights law at international, regional, domestic, and other levels.[5] There are, of course, differing views about the relationship between them. It is also useful to distinguish between human rights theories as substantive moral theories that specify the scope and general content of "universal" human rights and discourse theories that treat "rights talk" as a significant form of thinking, talking, and arguing about basic human values and entitlements. These and several other distinctions are discussed in subsequent chapters. "Human rights" in the present context is used broadly to designate a general area and to cover all of these ideas and much else besides.

The core of the book consists of four chapters introducing the ideas of each of these figures mainly in their own words through a single substantial essay, supplemented by further extracts and quotations. Each chapter contains a brief biographical and interpretive introduction and some suggestions for further reading.[6] The final chapter reports on themes arising from a symposium at the Transitional Justice Institute in Belfast in June 2008 that was attended by all four authors and suggests how the framework developed by Marie Bénédicte Dembour might be used for comparing and contrasting these texts and relating them to mainstream Western theorizing about human rights.

[3] On other relevant thinkers and possible future projects see Chapter 6 below.
[4] See below pp. 211–12.
[5] Twining (2009) Ch. 6.2, and Sen (2004) discussed by Baxi (2007) pp. 56–67.
[6] The Bibliography at the end is intended to provide some signposts into an extensive literature. It lists the main relevant writings of the four contributors, selective references to other relevant general literature (including some other similar anthologies), and it includes the references for Chapters 1 and 6 and for the Introductions to Chapters 2–5. The footnote references in the readings in Chapters 2–5 are retained in their original formats and are not listed in the Bibliography.

2

Francis Mading Deng

2.1 Introduction[1]

William Twining

Francis Mading Deng was born in 1938 near Abyei in Kordofan in the West of the Sudan. His father, Deng Majok, was paramount chief of the Ngok Dinka, the only Nilotic inhabitants in the Northern Sudan. It is commonly said that "Abyei is to the Sudan as the Sudan is to Africa", a bridge between the African and Arab worlds. Deng Majok was an outstanding tribal leader, a national figure, especially prominent for his bridging role between the Arab North and the Nilotic South. He was also known as the creator of a huge family through marrying more wives than any other man in Dinka history.[2] Francis, one of his senior sons, became both the leading interpreter of Dinka tradition and a

[1] This introduction is a shortened version of Twining (2006) pp. 206–22.
[2] Francis Deng's memoir, *The Man Called Deng Majok* (1986b) includes a very frank account of debates surrounding his father's polygyny.

committed proponent of human rights, maintaining that they are basically compatible. How could this be?

Francis was the eldest son of Deng Majok's fourth wife. Although he did not groom any of his sons to succeed him, Deng Majok believed in education. The education of Francis Deng is a story of a remarkable journey through different cultures. It began in his father's compound in Abyei and continued in a boarding school for sons of chiefs run on similar lines to a British preparatory school, then at a secondary boarding school in the North, where the great majority of the boys were Muslims. He read law at the University of Khartoum, where he was taught in English, mainly by expatriate teachers, including myself. Although customary law hardly featured in the curriculum, Francis spent some of his vacations in his father's court, reading the court records, interviewing chiefs and elders, and he began a collection of recordings of several hundred Dinka songs.[3]

After graduating from Khartoum in 1962, Francis Deng pursued postgraduate studies in law, first in London, and then at Yale Law School, where he obtained a doctorate in 1967. Before the age of thirty he had been exposed to Dinka, Christian, British colonial, Northern Sudanese, and Islamic ideas as well as to both English and American legal traditions. So it is hardly surprising that one of the central concerns of all his writing has been the problem of identity.

After Yale, Deng worked for five years as a Human Rights Officer in the UN Secretariat and acquired considerable professional expertise in the area, especially in relation to women's rights. Since then he has been a firm, quite orthodox, upholder of the international human rights regime and of basic principles of democracy, both of which he considers to be universal. From 1972 Deng joined the Sudan diplomatic service, in due course serving as Ambassador to the United States, Scandinavia, and Canada. He was Minister of State for Foreign Affairs between 1976–80. Subsequently he has held a number of academic positions, mainly in the United States. He has continued to be involved in public affairs, most notably in efforts to end the civil war in the Sudan. From 1992–2004 he served as a Special Representative of the Secretary-General of the United Nations on internally displaced persons, rising to the status of Under Secretary-General. In this capacity he has had enormous influence in bringing the plight of 25 million people in 40 countries to public attention and in persuading governments that this neglected problem is a matter both of sovereign responsibility and legitimate international humanitarian concern.[4] Since 2007 he has been Special Adviser to the Secretary-General of the United Nations for Prevention of Genocide.

Even when holding responsible full-time public positions, Francis Deng has been a prolific writer. He has produced over thirty books, including two novels.[5]

[3] Deng (1973) p. 8. [4] Cohen and Deng (1998).

[5] His friend, Abdullahi An-Na'im translated one of these, *Cry of the Owl* (1989) into Arabic. This stimulated so much attention and controversy that for a time Deng became known, quite inappropriately, as "the Salman Rushdie of the Sudan".

Many of them deal with the Dinka or with the problems of North–South conflict in the Sudan. Even when writing about broader issues such as human rights, displaced persons, and dispute resolution, he regularly draws on Dinka examples and reaffirms that at the core of his multi-layered identity remains a commitment to Dinka values. A central concern of his work is to reconcile tensions between tradition and modernity, between Dinka culture and universal standards, and between national unity and diversity in a conflicted Sudan.

In his early writings Francis Deng did not make much reference to human rights, but he has always emphasized human dignity as a basic value. His first book, *Tradition and Modernization: A Challenge for Law Among the Dinka of the Sudan* (1971) was based on his doctoral thesis at Yale, where he was influenced by "the law, science and policy" approach of Harold Lasswell and Myres McDougal. Their emphasis on "dignity" as a core value had immediate resonance for Deng, for whom such concepts as *atheek*, *cieng*, and *dheng* are at the core of Dinka culture.[6] What "dignity" means in the Universal Declaration of Human Rights and whether the Dinka concepts are exact counterparts are difficult matters of interpretation. For Deng they provide the crucial link between Dinka culture and universal human rights.

Francis Deng has documented this culture in rich detail through interviews, folk tales, legends, biographies, cases, and historic events. He has recorded and produced many translations of Dinka songs.[7] His early writings bring out the special role played by song in Dinka social relations in relation to courtship, bridewealth, cattle, disputes, war, religious ceremonies, and celebrations.[8]

> Among the Dinka, songs and dance have a functional role in everyday life. They do not deal with constructed situations; they concern known facts, known people, and defined objectives. But, above all they are skills of splendor in which a Dinka finds total gratification and elevation. The vigor and rhythm with which they stamp the ground, the grace with which they run in war ballets, the height to which they jump, the manner of pride and self-approval with which they bear themselves, and the way in which the high-pitched solo receives the loud unified

[6] These concepts are explained below at pp. 12–15. [7] See especially, Deng (1973) and (1974).

[8] "To give some examples of the general significance of songs, the social structure, particularly territorial grouping, is reinforced by age-set group-spirit dramatized in initiation, warfare, and other age-set activities, which without songs would be barren. The concept of immortality through posterity receives a great deal of its support and implementation through songs. Singers not only give genealogical accounts of their families, but also stress and dramatize those aspects, which express their relevance to contemporary society. Young members of competitive families have been known to compose songs or have songs composed for them in reply to each other's allegations about incidents affecting the relative position of their families. In this process a young man may do a special investigation into the history of his family and of the tribe, to find additional evidence to sing about and bolster his family." (*The Dinka and their Songs* (1973) p. 78.) In this book Deng anthologizes ox songs, cathartic songs, initiation songs, age-set insult songs, war songs, women's songs, hymns, fairy-tale songs, children's game songs, and school songs.

response of the chorus combine to give the Dinka a euphoria that is hard to describe. As the singing stops, the drums beat even louder, the dance reaches its climax, and every individual, gorged with a feeling of self-fulfillment, begins to chant words of self-exaltation.

"I am a gentleman adorned with beads
I dance to the drums and level my feet
The girls of the tribe gather before me
The wealth of the tribe comes to me."[9]

Another feature of Dinka culture is the importance of cattle. Cattle are wealth, but they signify much more than that. Cattle constitute bridewealth that ensures continuity through procreation; cattle are prepared for special sacrifices to God, the spirits and ancestors. A great many songs are about oxen or the need for oxen – for marriage, for sacrifice, or just for *dheng*. Young men exalt themselves and their lineage through identification with their personality ox, a castrated bull of little practical value. Cattle are a source of collective pride in their relations with the outside world.[10]

The historical context

Francis Deng's writings need to be viewed in the context of the history of the Sudan. At one time the Dinka were one of the largest peoples in Africa. In the 1956 census they were estimated to number nearly two million, divided into twenty-five independent groups living a semi-nomadic, semi-pastoral life in settlements dispersed over nearly a million square miles within the Sudan. During the period of British rule, they were perceived by outsiders to be strongly religious, immensely proud, exclusive, and resistant to change. Sudan became independent in 1956. During the past half-century, except for a ten-year break (1972–83), a civil war has dominated events.[11] The Dinka have suffered terribly, experiencing repression, massacres, starvation (sometimes deliberately induced), decimation, enslavement, and displacement. Despite this terrible history of death, suffering, and displacement, Francis Deng emphasizes the resilience and vitality of Dinka culture that has formed the basis of their identity.

When Deng writes about reconciling Dinka values with "modernity" he is concerned more with the relationship to human rights norms than to values of the colonial (or Condominium) state. In Deng's writings there is a constant tension between his emphasis on the distinctiveness of Dinka culture and its compatibility with universal values. It is hard to reconcile the Dinka's

[9] Deng (1972) p. 17. [10] See below pp. 10–19.
[11] A Peace Accord was signed in Nairobi on 9 January 2005. For details, see Sudan Peace Agreements, online: United States Institute of Peace www.usip.org/library/pa/_sudan.html/ (last visited April 2008).

traditional view of cattle with modern economics or a cosmology that venerates ancestors with secular doctrines of human rights. Perhaps the biggest test of Deng's argument about the compatibility of Dinka tradition with human rights is the subject of the status and treatment of women, as it is for many of the world's cultures, traditions, and religions.[12] Deng acknowledges the difficulties and adopts a complex strategy in confronting them. In reading his work it is useful to bear in mind four points: first, Deng is not a cultural relativist. However, following An-Na'im he adopts a cultural approach to human rights and democracy that involves seeing tradition as supplementing and informing abstract values and principles. Second, human rights and the principles of democracy are universal, but only at a very abstract level. *Atheek*, *cieng*, and *dheng* are conceptions that concretize, localize, and enrich abstract notions of human dignity. Thirdly, the Dinka are changing. But for many the core values embodied in *cieng* and *dheng* have sustained their identity. Fourthly, Deng acknowledges that judged by the standards of human rights norms some aspects of Dinka culture are open to criticism. Dinka culture must change and is changing.

The selection from Deng's writings presented here falls into four parts. First, "The Cow and the Thing called 'What'" brings out the richness, vitality, and self-confidence of Dinka tradition, in which concern with dignity, procreation, cattle, and song are central themes. In the creation myth, when God offers a choice between the Cow and "What", man unhesitatingly chooses the Cow. Deng interprets "What" to refer to curiosity and the search for scientific knowledge and hence a rationalization of Dinka conservatism and backwardness in relation to modern science and technology. He tells the story of how in the face of the twin threats of successive disasters and well-meaning "modernization", the Dinka began to lose faith in their traditions. Nevertheless, when given a fair chance, he suggests that they have proved to be remarkably resilient and adaptable. The second group of readings is taken from a series of articles published in the *Sudan Democratic Gazette*. Addressed to a Southern Sudanese audience, these summarise Francis Deng's views on the relationship between Dinka tradition and "modern" ideas of democracy and human rights. The third section, from a book co-edited with An-Na'im, explores the relationship between culture and modernity in more depth. In his writings Francis Deng's achievement has been to give the Dinka a voice in the outside world. He has also illustrated in a vivid and specific way the complex relationship between long-established traditional values and modern conceptions of human rights.

[12] Deng accepts that polygamy is inconsistent with equal respect and that Dinka women have a subordinate role in Dinka cosmology and tradition. He himself is committed to UN values on the status of women. He is monogamous and the Dinka heroes in his two novels are monogamous – indeed, one resists pressures to take additional wives.

READINGS

2.2 The Cow and the Thing Called "What": Dinka Cultural Perspectives on Wealth and Poverty*

God asked man, "Which one shall I give you, Black Man; there is the Cow and the thing called 'What,' which of the two would you like?" The man said, "I do not want 'What.'" God said, "But 'What' is better than the Cow!" The man said, "No." Then God said, "If you like the Cow, you had better taste its milk before you choose it finally." The man squeezed some milk into his hand, tasted it, and said, "Let us have the milk and never see 'What.'"

While certain basic indicators of affluence or poverty are globally accepted, whether individuals or groups perceive themselves as rich or poor may not always be a matter of objective determination. Subjective factors attributable to culture may play a vital role in the way people view themselves in terms of wealth and poverty. Building largely on oral literature from the Dinka in southern Sudan, this paper aims to explore the gap between objective poverty and the subjective perception of wealth.

From a policy standpoint, there are both positive and negative implications in the way people are classified or perceive themselves. To be labeled poor is to establish a case for corrective measures toward poverty alleviation, which is positive, but it could also breed apathy, self-pity and dependency. A positive self-perception might breed complacency, which would be negative, but it could also enhance the sense of worth as a resource for self-reliance.

Although it is widely acknowledged that measuring poverty is complex, a commonly used measure is income or consumption among individuals or households. It is also considered relevant to take into account such social indicators as life expectancy, infant mortality and school enrollment.[1] There is a comparative dimension to the determination of poverty by both horizontal and vertical parameters. Horizontal parameters relate to comparisons at the same level of development, while vertical parameters relate to stratified levels of development. Countries or regions may be assessed in relation to others at the same level of development and on a scale of development progression. For example, while the poverty line of U.S.$1 a day is used to make international comparisons of consumption-based poverty, poverty lines are frequently closer to about U.S.$2 dollars a day for middle-income countries.

* Reproduced from 52 *Journal of International Affairs* 101–30 (1998) by kind permission of the publishers.

[1] The data included in this section is mostly obtained from World Bank, *Poverty Reduction and the World Bank: Progress and Challenges in the 1990s* Washington, DC: World Bank, (1996); World Bank, *World Development Indicators, 1997* Washington, DC: World Bank, (1996); and Michael Walton, "Will Global Advances Include the Poor?" paper prepared for the Aspen Institute Conference on Persistent Poverty in Developing Countries: "Determining the Causes and Closing the Gaps" Broadway, England: December (1997). The author gratefully acknowledges the assistance of Meghan O'Sullivan in bringing to his attention some of the pertinent factors in the definition of poverty.

Global perspectives on poverty imply both integration into the comparative framework and marginalization or exclusion within that framework, which then closely corresponds to a state of poverty as relative deprivation. People are said to be relatively deprived if they cannot obtain, at all or sufficiently, the conditions of life – that is, the diets, standards and services – which allow them to play the roles, participate in the relationships and follow the customary behavior which is expected of them by virtue of their membership of society. If they lack or are denied resources to obtain access to these conditions of life and so fulfill membership of society they may be said to be in poverty.[2]

In the global comparative framework, and by virtually all indicators, the people in sub-Saharan Africa are among the poorest in the world, and the southern Sudanese among the poorest of the poor. Unlike most of Africa, however, the South is less integrated into the global community, being among the least touched by the forces and benefits of modernity. Their marginalization in the modern world is both the result of their cultural outlook and the legacy of British colonial administration. Government policy in southern Sudan was "to build up a series of self-contained racial or tribal units with structure and organization based upon the indigenous customs, traditional usage and beliefs."[3] Part of the motivation for the policy was fear of southern nationalism as the people were introduced to rapid education and modernity.[4] The Nilotics, especially the Dinka and the Nuer, fiercely resisted British rule for two decades. The 1924 rebellion against the British was led by young officers of Dinka background in the Egyptian army. Whatever the motivation, the British administration closed off the South and permitted only the Christian missionaries to pass into southern territory in order to exercise a pacifying influence among the natives. This, combined with Nilotic conservatism, isolated them from modern development.

In order to appreciate Dinka self-perception, their world view and cross-cultural perspectives on their material status, it is necessary to understand the indigenous cultural framework of their values, institutions and patterns of behavior.

The Dinka are the largest ethnic group in the Sudan, numbering several million in a country of around 20 million people and several hundred tribes. Their culture is dominated by cattle (and to a lesser extent by sheep and goats), to which they attach a social and moral significance far beyond their economic value. Although there are no reliable statistics, the Dinka are probably among the wealthiest in cattle on the African continent. The average bridewealth

[2] Quoted in Gerry Rodgers, Charles Gore and Jose B. Figueiredo, eds., *Social Exclusion: Rhetoric, Reality, Responses* Geneva: International Labor Office, (1995) p. 6, no. 3. The author is grateful to Carol Graham for bringing this dimension to his attention.

[3] See Abd Al-Rahim, *Imperialism and Nationalism in the Sudan, A Study in Constitutional and Political Development 1899–1956* Oxford: Clarendon Press, (1969) Appendix B.

[4] See Francis M. Deng and M.W. Daly, *Bonds of Silk: The Human Factor in the British Administration of the Sudan* East Lansing, MI: Michigan State University, (1989) p. 191.