UNIVERSALIZATION OF INTERNATOINAL HUMAN RIGHTS LAW:

A CRITICAL LEGAL ANALYSIS OF UNITED NATIONS HUMAN RIGHTS ENFORCEMENT MECHANISMS

A dissertation submitted in partial fulfilment of the requirements of the degree of PhD in Law, Department of Law, Faculty of *Shari'ah* & Law, International Islamic University, Islamabad, Pakistan.

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IN THE NAME OF ALLAH,

THE MOST MERCIFUL, THE MOST COMPASSIONATE.

Dedication

For Mu‘awwadh, my son and his ardent interest in international relations.

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APPROVAL SHEET

This is to certify that we evaluated the thesis entitled, "*Universalization of International Human Rights Law: A Critical Legal Analysis of UN Human Rights Enforcement Mechanism"* submitted by Mr. Abdur Rauf, Reg. No. 96-SF-PHDLAW/S18 in partial fulfilment of the award of the degree of PhD (Law). The Thesis fulfills the requirements in its core and quality for the award of the degree.

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DECLARATION

I, Abdur Rauf, hereby, declare that this dissertation is original and has not been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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ACRONYMS

AI	Amnesty International
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
	Committee on Elimination of Discrimination against Women
CERD	Committee on Elimination of Racial Discrimination
	Convention on Elimination of All Forms of Racial Discrimination
CAT	Convention against Torture / Committee against Torture
CDHRI	Cairo Declaration of Human Rights in Islam
CESCR	Committee on Economic Social and Cultural Rights
CRC	Convention on the Rights of Child / Committee on the Rights of Child
CRDP	Convention on the Rights of Persons with Disabilities
CSW	Commission on the Status of Women
ECOSOC	Economic and Social Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
HRC	Human Rights Council
HRW	Human Rights Watch
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICPPED	International Convention on the Protection of All Persons from Enforced Disappearance
IHRL	International Human Rights Law
IHL	International Humanitarian Law
ILC	International Law Commission
ICC	International Criminal Court
LGBTIQ	Lesbian Gay Bisexual Transgender Intersex Queer

NHRIs	National Human Rights Institutions
OP	Optional Protocol
OHCHR	Office of the High Commissioner for Human Rights
R2P	Responsibility to Protect
RUDs	Reservations, Declarations and Understandings
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UPR	Universal Periodic Review
VDPA	Vienna Declaration and Program of Action
VCLT	Vienna Convention on Law of Treaties

Prologue

A famous Urdu poet of earlier 19th century, from the Indian Subcontinent, Ustaz Ibrahim Zauq is often quoted for beautifully capturing the wisdom of diversity in these words:

"*Gulhaaye rang-rang se hy zenat e chaman*
Aye Zauq! Is jehan ko hay zeb ikhtelaf se".[1]

The couplet may be translated as; the beauty of the garden lies in the flowers of different colors and O' Zauq! It's the 'diversity' which more smarten the world. An English paragon of this account may be found in the words of a famous British anthropologist Arthur Keith, who said, "*Nowhere is universalism welcomed and encouraged by a people; everywhere governments have forced and forcing universalism upon unwilling and resistant subjects".*[2]

Among the various scientific and artistic phenomena of a universal applause, the essential freedoms and interests of every human being (human rights) are also believed to be universal. The kith and kin, and substance of such rights has, nonetheless, remained a point of disagreement among the various ideologies. The research at hand aims to explore the pros and cons of the prevalent universalization of human rights through international law under the auspices of United Nations.

[1] Shaikh Muḥammad Ibrāhīm Zauq, by Anvarulḥasan Ṣiddīqī, "Complete Collection of his poetry and biography." Accessed December11, 2025, https://cir.nii.ac.jp/crid/1130000795197868544.
[2] Arthur Keith, British Anthropologist, Quotes available at https://quotefancy.com/quote/1267171/Arthur-Keith-Nowhere-is-Universalism-welcomed-and-encouraged-by-a-people-everywhere.

This work is divided into six chapters. The very first chapter lays down the research design. The second chapter explores the genesis, development and prevailing conception and practice of human rights as being found at a crossroads between the liberal and non-liberal democracies. Third chapter examines the jurisprudence of the, so acclaimed, universal writ of human rights. Fourth chapter identifies the challenges posed by the universalism. Fifth chapter analyses few alternative approaches and explores legal pluralism as a viable solution. The last chapter presents findings and recommendations.

ABSTRACT

The contemporary international human rights law regime, envisioned and conceived within the framework of United Nations Charter in the aftermath of World War II, was meant to ensure friendly relations among the nations[3], has, over the years, become otherwise. Its *modus operandi*, role and functioning is not only keeping apart the liberal and non-liberal democracies but also has almost developed a cold-war like situation. The universal and relative interpretation and implementation of the UN human rights standards has remained the focus of the most of international legal scholarship. It has been observed since the fall of USSR the human rights institution and bodies have systematically surpassed the relativists' stance while actively pursuing the liberal version of human rights. The non-liberal and conservative states are, therefore, finding themselves nowhere but to compromise on their ideological sovereignty and sovereign equality to not to be 'named and shamed'. This research study undertakes to critically examine the jurisprudence of the relevant mandates and jurisdictions of the concerned human rights bodies. It figures out as to whether the subject jurisprudence of the human rights bodies is compatible with the general principles and norms of International Law, as endorsed and recognized by the United Nations. Moreover, the work at hand also explores the alternative approaches for more viable international recognition and protection of human rights.

[3] United Nations Charter 1945. Article 1(2).

Chapter One

Introduction

(Research Design)

1.1 Thesis Statement

The International Human Rights Law regime has become a new 'cold war' between the 'liberal' and 'conservative' (non-liberal) democracies, wherein, the UN Human Rights Bodies are playing a crucial role. A critical legal analysis of the mandate and jurisdiction of such bodies, within the framework of the principles of UN and International Law is, therefore, required.

1.2 Background

The first quarter of the 21st century is almost over. The global recognition, promotion and protection of human rights may well be regarded as one of the sweetest fruits borne by international law. Nonetheless, human rights have, over the years, also brought a few radical transformations to international law itself. The most frequently observed and well admitted among those include; restricting states' sovereign immunity vis-à-vis its accountability towards the protection of individuals' rights, humanitarian interventions and the 'responsibility to protect' (R2P). The prevailing enforcement mechanisms, ensuring the implementation of international human rights law, being operated under the auspices of United Nations, may clearly be envisioned as devised with a theoretical framework erected

on the aforementioned conceptual and doctrinal foundations. The international human rights discourse which had taken the center stage of the world affairs in 1948 has had gone, over the years, through the various phases. With the inception adoption of UDHR until 1966, the first phase may be called the foundational phase wherein the essential standards, describing the scope and content of the fundamental freedoms and rights, were formulated. Such standards were then incorporated in international treaty obligations to be enforced through the Covenants and Conventions. The next phase, as may be bracketed from 1966 to 1989, not only enhanced the human rights to specific categories such as for women, children and migrant workers etc., but also focused on the institutional capacity building such as of treaty bodies to effectively ensure the implementation of relevant treaty obligations. The later phase, which may be categorized as the 'globalization (or universalization as preferred in this work) of human rights', commenced with the adoption of Vienna Declaration on the Program of Action in the World Conference on Human Rights held in 1993. The Declaration emphasized for the special focus on the universality, interdependence and indivisibility of human rights. The last and current phase, which got geared up with the replacement of UN Commission on Human Right with the Human Rights Council in 2006, has accelerated the universal and uniform enforcement of international human rights law. During this era, a special dimension of accountability with regards to the universal application of human rights has also emerged in the shape of 'naming and shaming'. This work is aimed at a systematic, contextual and theoretical analysis of the prevalent universalization of international human rights law.

Amid the golden jubilee celebrations of the Universal Declaration of Human Rights, during the year 1998, much of the scholarship was engaged in a popular debate between 'the End of History'[4] and 'Clash of Civilizations' theses. Huntington's *Clash of Civilizations* thesis, which was published at the end of preceding century, had attracted and engaged in an extensive scholarship equally in its favor and against. It predicted that some of the leading prospective conflicts of the succeeding century will primarily be based on the civilizational clash.[5] This proposition was entertained by many intellectuals just like the predictions, made during 1950s in the context of the then prevailing escalation of nuclear warfare between the United States and Russia, of final and decisive ambush which, luckily, never happened. However, this is one way of refuting the data-based predictions. On the contrary, one may otherwise argue that the very conflict never happened not merely because the proposition was inconsistent or baseless, rather, it was taken very seriously and the strategists remained successful in preventing the world from such an irreparable devastation. Such lessons, therefore, suggest that prevention is better than cure.

On the other hand, the conflicts, witnessed by the world by the end of the previous and at the beginning of the current century, have had involved one peculiar dimension of human rights, thus, affecting the contemporary international law in one way or the other. A discourse within the emergent jurisprudence of international law, as to how it continues legitimizing the use of force often sanctioned under the concerned organs of the United

[4] Francis Fukuyama, "Reflections on the End of History, Five Years Later". *History and Theory* Vol. 34 No. 2 (1995), 28. Also available at: https://www.jstor.org/stable/2505433.
[5] Samuel P. Huntington, "The Clash of Civilizations?" (Hein Online, 1994), https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/fora72&section=49%EF%BF%BD%C3%9C.

Nations, has become a point of scholarly attention. Ingrid Wuerth argued that this development has rather made international law weaker and, at times, counterproductive.[6] It is, therefore, a right time to look into the legality, neutrality and efficiency of the mechanisms and systems of international law as being employed for the international enforcement of human rights. Human rights or the so called international human rights, as being known and understood today, have had a long historical journey to come through.

The English word 'right' (*riht* in old English) is of a Germanic origin (*reht*) which translates the Latin term '*ius'* that means the judgment ensuring appropriate distribution of goods among the disputants.[7] '*Ius'*, was commonly used for referring to justice and law, in Latin. The Roman law did not presuppose the existence of '*ius naturale'* for every human being but the individuals (citizens) could claim *iura* (rights) under the law.[8] The idea of 'natural law' and thus the 'natural rights', according to Anthony Pagden, was introduced later in the times of Emperor Justinian in the 6th century AD. One may, therefore, trace the ancient origins of human rights in the conceptions of 'natural rights', '*jus naturale'* and the fundamental rights.

While acknowledging the fact that the seeds of modern human rights got nurtured through the ages wherein they continued relocating from civilization to civilization, the secular

[6] Ingrid Wuerth, "International Law in the Post-Human Rights Era," *Tex. L. Rev.* 96 (2017): 279, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tlr96&section=14.
[7] Quoted in [Pagden, Anthony. "Human Rights, Natural Rights, and Europe's Imperial Legacy." *Political Theory* 31, no. 2 (2003): 171-99. Accessed October 10, 2024. http://www.jstor.org/stable/3595699.] from the *Michel Villey's Philosophie du droit* (Paris 1882) . See also: https://www.merriam-webster.com/dictionary/right
[8] Ibid.

historians, generally, find the genesis of their codification in early thirteenth century's Britain when King John declared the "Magna Charta".[9] The Cyrus Cylinder, which dates back to 6th century BC, is marked as the one oldest relic evident upon the ancient and rudimentary existence of such ideas.[10] The famous Last Sermon, containing a declaration of some fundamental rights and duties, was promulgated by the Prophet Muhammad (peace be upon him), in 632 AD.[11] This was the period when, by all measures, the sovereign State of Madina under his authority was established and his Declaration would definitely had enjoyed the effect of law, yet, the Western historians generally ignore such a substantial contribution in the legal historiography of human rights. The other glittering milestones, which are often taken into account, are the British Bill of Rights 1689, the French Declaration of the Rights of Men and Citizens 1789 and the US Bill of Rights 1791. The US Bill of Rights also marks the history of human rights to become the fundamental rights for being formally placed in the modern Constitutions.

From the 'Constitutionalization' to 'Internationalization' the human rights took another century and a half. It was in 1945 when the United Nations' Charter was adopted to provide a bedrock for the formulization of a comprehensive program aimed at their international recognition, promotion and protection. Truly a precursor in this regard, the Charter declared 'the achievement of the universal respect for fundamental human rights' as one

[9] Desiree Desierto, Jacob Hall, and Mark Koyama, "Magna Carta," 2024. Also available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4503918.
[10] John Curtis, "The Cyrus Cylinder: The Creation of an Icon and Its Loan to Tehran," *The Cyrus Cylinder: The Great Persian Edict from Babylon*, 2013, 85–103.
[11] Mohammad Omar Farooq, "The Farewell Sermon of Prophet Muhammad: An Analytical Review," *Islam and Civilizational Renewal* Vol. 9, no. 3 (2018): 322–42, Also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068417.

of the fundamental purposes of the very Organization. Moreover, the Charter provided a comprehensive mechanism for the international recognition, promotion and protection of human rights.[12] With the adoption of the Universal Declaration of Human Rights (UDHR) by UN General Assembly in 1948 and its subsequent incorporation/conversion into the binding Covenants and the Conventions, the human rights have now become a very much part of international law and are protected under one of its special branch known as International Human Rights Law (IHRL).

The IHRL may recognizably be defined as an inter-states bond aiming to ensure compliance with the standards, formulated under the auspices of the United Nations (UN), for the international protection of some of the individual liberties and interests. The IHRL governing and regulatory regime generally comprises UN Human Rights Bodies (HR Bodies) e.g., the Charter and the Treaty Bodies including, Office of High Commissioner for Human Rights, Human Rights Council and the Committees. HR Bodies are supposed to pursue and ensure an overall monitoring and the enforcement of human rights on part of the state parties within their respective territorial jurisdictions.

The States from across the regions are persuaded and invited to consensually become parties to the human rights treaties and comply with obligations incorporated therein. The states parties are further required to report back the status of their compliance with the treaty obligations to the concerned treaty bodies. These bodies, under the relevant treaties,

[12] See for example Articles, 1(3), 13, 55(c), 62(2), 76(c) and 68 of the UN Charter 1945.

are vested with a mandate to receive the state parties' reports and to figure out the areas of non-compliance. Their 'concluding observations', with regards to the areas of non-compliance, are communicated to the state parties for appropriate/requisite actions/measures. In addition, subject to acceptance of the state parties, the human rights bodies are also empowered to receive communications and individuals' complaints with regards to the violations of the treaty obligations by the state parties. The complaint procedures, however, are optional and require an additional consent of the States parties. This is how the Human Rights Bodies pursue the optimal enforcement of the human rights standards as incorporated in the relevant treaties. While charged, and dealing, with the enforcement of the human rights standards, these bodies have, over the years and particularly since the establishment of UN Office of the High Commissioner for Human Rights in the wake of Vienna Declaration and Program of Action 1993, have geared up the exercise of their wide range of mandate in regard to decide the matters including, but not limited to, the status of the Ratifications of state parties, their Declarations, Understating, Objections and more importantly the Reservations.

Upon the assumption of such an active and vital mandate and a vigorous exercise of its jurisdiction, the IHRL regime is exposed to a new wave of criticism as is seen, by the critics, at times, inconsistent with the principles of UN Charter at one hand and challenging the very basis of International law itself, on the other. For instance, in 1994, the Human Rights Committee (HRC) while adopting a General Comment on a related matter ignored the principles incorporated in the Vienna Conventions on the Law of Treaties 1969 and maintained, for itself, the authority to determine and declare as to whether a state party's

Reservation is compatible with the purpose and object of the treaty.[13] Subsequently, the Committee held that it has the legitimate mandate to decide the validity of the Reservations.[14] Declaring the subject Reservations, therefore, as invalid the committee required from the states to comply with the treaty obligations regardless of their Reservations and Understandings.[15]

In November 2017, while conducting Universal Periodic Review (UPR), the Human Rights Council (HRC) recommended the Islamic Republic of Pakistan, inter alia, to decriminalize consensual sex in its jurisdiction. Additionally, the government of Pakistan was asked to enact laws for the protection of the rights of the Lesbian, Gay, Bisexual and Transgender (LGBT) people.[16] It's worth noting that the representatives of the government of Pakistan did not reject the recommendations but responded with "noted". It is, therefore, the human rights bodies are being observed as if they are actively moving towards establishing the universal writ of UN human rights under an arguable influence of Western liberal democracies. Such an active pursuit, as undertaken by the UN Bodies for the very uniform enforcement of the content and form of human rights across the world, has been received by the critics very differently within the different theoretical frameworks.

[13] General Comment No. 24, para 18. Adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994 (CCPR/C/21/Rev.1/Add.6)
[14] See for instance; Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53d Seas., 1413th mtg. 14, at 4, U.N. Doc. CCPRICI79/Add.50 (1995)
[15] See for example. Goodman, Ryan. "Human Rights Treaties, Invalid Reservations, and State Consent." The American Journal of International Law 96, no. 3 (2002): 531-60. Accessed August 22, 2021.
[16] See Para N – 152.89 of the List of Recommendations adopted by Human Rights Council in its third Universal Periodic Review of Pakistan held in November 2017.

It is a fact that the human rights project which was launched by the UN under the guarantees 'of equal respect for the nations' is finally ending up with a hegemonic slogan of 'naming and shaming'. Such recent developments are confirming the apprehensions of scholars like Oona Hathaway who had alarmed while pointing out that the states' sovereignty will become an ultimate cost of the commitment to international human rights law'.[17] The classical model of the 'Law of Nations' which is reinforced in the in UN Charter, assures a sovereign state has an exclusive territorial authority with no interference of external actors in its domestic affairs.[18] The evolving jurisprudence of international human rights law institutions, on the contrary, puts limits on the states as to how they may treat their citizens. Moreover, as will be discussed in this study, some aspects of this jurisprudence have also been invoked in the UN Security Council while seeking its endorsement to legitimize the so called humanitarian interventions involving armed actions.

Pondering upon the 'human rights movement' from a perspective of international power politics one may build a thesis that these so called 'international human rights standards' are so designed that they will face an obvious resistance in certain societies, say for instance, the conservative/non-liberal democracies including a major chunk of Muslim states. The divergent attitude of such non-liberal states which may even, be within the framework of international legal norms - in the form of conditional consents to the subject Instruments with reservations etc., is usually measured as violations and sometimes as the gross and systematic violations. The monitoring and enforcement bodies once determine

[17] Hathaway, Oona A. "The cost of commitment." *Stanford Law Review* (2003): 1821-1862.
[18] See for instance Article 2 (1), (7) of the UN Charter, 1945.

and establish such non-conformist enforcement of these standards as the 'systematic violations', it lays a track for the 'humanitarian interventions' in the targeted societies. The humanitarian intervention though not expressly provided in UN Charter or otherwise, after being criticized has recently been renamed as 'Responsibility to Protect', by the UN General Assembly. Studies do suggest that such mechanisms have had legitimized the use of force by powerful states in Iraq, Somalia, Libya and Syria etc., in the recent past whereas many others are waiting to face their fate in the time to come. [19]

A line of argument from this perspective may hold the ongoing universalization more as counterproductive. The UN Security Council's resolution 1674 of 2006 has, in fact, endorsed the use of force in pursuit of so called 'Responsibility to Protect'. It is indeed interesting, if not alarming, to note that the statistics, as reflected from UN human rights system, depict the past colonizers as more compliant, of the prevailing international human rights standards, than the states which remained their previous colonies.

The Western champions of human rights, generally, figure out the Eastern cultures, socialists and communists values and more precisely the Islamic legal traditions as being adhered to and practiced in the 'non-liberal and non-secular democracies', as the hurdles in the way of universalization of human rights.

[19] See for example: Ratner, SR, Abrams, JS and Bischoff, JL 2009. Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy. 3rd edn. Oxford: Oxford University Press.

The cross-cultural validity of UN human rights standards is, therefore, a question mark since the very dawn of this regime. The very rationale, objecting the draft of UDHR as if it had ignored the more ancient and time-tested civilizations while choosing only the Western norms[20], is yet echoing and challenging the entire program. The recent wave of universalization is only going to ascertain such fears that the underlying aim of this movement was to "proclaim the superiority of one civilization over others", as said Huntington.[21]

Finally, the whole debate congregates around the point of putting whole emphasis on the 'form' instead of 'substance'. In other words, problem arises with regards to the question of 'how' not of 'what'. Human rights being indeed a common concern of every human being are reverent to every human society, however, peoples of different cultures and religions, perceive and approach them differently.

1.3 Literature Review

Anthony Pagden, in his work *Human Rights, Natural Rights and Europe's Imperial Legacy*[22], while tracing the genius of modern human rights, argues that the very idea has certainly emerged from the concept of 'natural rights', however, their modern manifestation is indeed shaded with Universalist stance that was, arguably, used for the

[20] See for example the objection raised by the Saudi Arabian delegate on article 16 (free marriage) and article 18 (freedom of religion) of the draft of UDHR 1948.
[21] Huntington, Samuel. "The clash of civilizations revisited." *New Perspectives Quarterly* 30, no. 4 (2013): 46-54.
[22] Pagden, Anthony. "Human Rights, Natural Rights, and Europe's Imperial Legacy." *Political Theory* 31, no. 2 (2003): 171-99. Accessed December 21, 2024. http://www.jstor.org/stable/3595699.

legitimization of expansionist/imperialist designs. He supports his presumption while referring to the history of the making of UNO and the subsequent role its organs while treating the small and powerful member states with regards to their commitments with UN human rights treaties. Anthony's presumptions and apprehensions can be confirmed by taking into account the functioning of the human rights bodies in the post 'cold war' period. Michael Ignatieff, who remained at Harvard as director of Carr Centre of Human Rights Policy and is currently serving as the president at Central European University, has envisaged the human rights enforcement movement as an emerging challenge to the nationhood and states' sovereignty.[23] He asserts, an active pursuit to protect individual rights on the cost of indigenous cultural and religious values has the tendency of weakening the State from within itself. And there is no denial of the fact that the State is the primary subject of international law. He criticizes the activists whose rhetoric often elevates the status of these rights up to a universal religion or moral absolutism.

Samuel Moyn, in his famous work, *The Last Utopia: Human Rights in History,* sees the 'UN human rights' as one the universalisms launched in the pursuit of respective Utopias in human history and finds them no different from their equivalents.[24] According to him, the history of universalisms may be traced back in the very notion of 'humanity' coined by Stoics which influenced the great Greek philosophers for centuries. Moyn envisages the emergence of human rights as incidental or perhaps accidental or merely a counter product

[23] Michael Ignatieff and Amy Gutmann, "Human Rights as Politics and Idolatry," 2011. https://www.torrossa.com/gs/resourceProxy?an=5574054&publisher=FZO137.
[24] Moyn, Samuel. *The Last Utopia: Human Rights in History*. Cambridge, Massachusetts; London, England: Harvard University Press, 2010. Accessed December 14, 2024. http://www.jstor.org/stable/j.ctvjk2vkf.

of the Hitler's tyrannical order. Human rights, he asserts, have a relatively longer conceptual history but as a 'collection of movements' it is quite a recent enterprise of the greater powers of the world. He sees human rights, in their post 1970s era, more as a political movement which has a 'supranational' agenda. Human rights have thus surpassed, according to him, from 'lightening the candles to naming and shaming'.

Samuel's critics like Gray Bass, John Witte and others regard him the orthodox revisionist and challenge his assumptions suffering from ignorance if not from the fallacy about the historical and philosophical foundations of modern human rights.[25] Such an academic discourse highlights the deep divide between the pro and anti-universalism.

Emmanuelle Jouannet, in his well cited work, *Universalism and Imperialism: The True-False Paradox of International Law*[26], takes this debate to another level. He evaluates an essential and recurrent issue in 'international human right law' that is the relationship between 'universalism' of its some of the principles and the opportunity of their becoming a tool in the hands of 'imperialists'. Over the years the international law had been used as a bearer of such a paradox that is at one hand constitutive (as long as it ensures sovereign equality) but on the other self-negating (when it goes to override the states' sovereignty).

Paul Gready, in his book, *The Politics of Human Rights* [27], while taking into consideration the various factors shaping the relationship between 'international human rights' and global

[25] Witte, John. "The Long History of Human Rights: Review of Samuel Moyn, Christian Human Rights." *Books and Culture* 22, no. 2 (2016): 22-24.
[26] Ibid.
[27] Paul Gready, "The Politics of Human Rights" (JSTOR, 2003) 751. https://www.jstor.org/stable/3993435.

politics, has argued that the former is now striving hard for universalizing the 'liberal democracy' as a pre-requisite for its smooth and uniform enforcement. More or less the same assertions are also made by Regilm Salvador in his well celebrated work, *The Global Politics of Human Rights: From Human Rights to Human Dignity*[28]. Hafner-Burton in his article titled, *"Trading Human Rights: How Preferential Trade Agreements Influence Government Repression",* has assessed the preferential treatments and favoritism of European Union, G8 and other groups for using trade to promote their version of 'liberal democracies' for human rights.[29] Moreover, scholars like R. Higgins has apprehended and offered a range of arguments to conclude the development of international law itself by the political organs of the United Nations.[30]

And if we have a glance on the scholarship across the Europe and have the view of, for instance, South Asian authors, they apprehend the matter on another scale. Amartya Sen, a prolific Indian writer, who is frequently published and cited on the issue of economic inequality and its impact on the rights, examines, in a very well cited work of him, the Western claims with regards to the earlier origins of the 'democratic and political liberties' in ancient Europe. He concludes, the ideas such as, the personal liberty and equality were non-existent in the ancient world and Europe was no exception in this regard. He strongly disproves the claim that individual liberties are generally compromised in the Asian civilization and culture and it is therefore that the Asian values could not contribute in the

[28] International Political Science Review 212 (2018)
[29] Hafner-Burton, Emilie M. "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression." *International Organization* 59, no. 3 (2005): 593-629. Accessed October 14, 2020. http://www.jstor.org/stable/3877810.
[30] R. Higgins, The Development of International Law Through the Political Organ of the United Nations, Oxford, 1963.

formulation of international or the so called universal standards of human rights. On the contrary, he argues by citing the teachings of Buddhism and Islam which provide more for the observance of 'tolerance' and 'equality' which are asserted, by the European authors, as the fetus and genesis of individual liberties. He refers to the political practices and tradition as founded by the King Asoka and Emperor Akbar were far earlier and time tested.[31]

Having reviewed the cross cultural dimensions of the issue from the perspectives of European, American and Asian authors it would be appropriate if a reference, at this stage, is made to a religious stance. Islamic Law, which, since fourteen centuries, had remained a substantial part of the lives of Muslims but also influenced its contemporary legal traditions, is often portrayed, by the Westerns, as foe of international human rights. Mashood A Baderin, a well published author and Professor of Islamic Law at the School of Oriental and African Studies has examined the relationship between Islamic Law and Human Rights in a number of journal articles and books. In his book *International Human Rights and Islamic Law,* he analyses the matter at length. He asserts, it is now almost more than a half of the century that the debate on the relationship of Islam with the UN human rights has gone through the phases. The advocates of 'computability' have had gone, indeed, one mile ahead yet the human rights bodies are demanding for 'do more'. The Muslim states' practices and responses towards the treaty obligations is an empirical evidence which flats the claims of cross-cultural validity of the so called universality of human rights. The scholarship criticizing Islamic relativism in human rights can be

[31] Sen, Amartya. "Human rights and Asian values." *New Republic* 217, no. 2-3 (1997): 33-40.

classified into three groups. The modernist from within Muslim tradition, the orientalists who do not disregard Islam but aspire reformation in Islamic Law to minimize the gaps between Muslim and Western human rights and the skeptics who challenge the Islamic law and ethics in totality.[32] Guyora Binder also digs out the same sort of paradox of relativism and imperialism across the cultural and civilizational diversity.[33] The ignorance or exclusion of any input from so many other smaller states of the world in the formulization of UDHR is also substantiated by Susan Waltz in his article, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights.*[34]

Having analyzed the literature focusing the context, content and the enforcement framework of human rights, we now try to figure out the most principal point of the debate which needs to be worked upon. According to many, if not most, the core area which is capable of dismantling whole value system of the international human rights program is the treatment of RUDs, namely the Reservations, Understandings and Declarations.

The foremost aspect of this problem lies in the jurisprudence of relationship of international law (and IHRL) with the domestic law. Pierre-Hugues Verdier, and Mila Versteeg in

[32] Baderin, Mashood A. International human rights and Islamic law. OUP Oxford, 2003.
[33] Guyora Binder, Cultural Relativism and Cultural Imperialism in International Human Rights Law[33]: Buffalo Human Rights Review, Vol.5 pp. 211-221 (199). Also available at https:llssrn.com/abstract+1933950
[34] Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights,* Human Rights Quarterly Vol.23, No. 1 (Feb., 2001), pp.44 – 72. Also available at https://www.jstor.org/stable/4489323

"International Law in National Legal Systems: An Empirical Investigation[35] see and measure the theoretical foundation and the evolution made in the state practice from the traditional 'monist – dualist' classification. Finds overlapping shades of convergence between both in purview of mere post and pre legislative approvals for incorporation of international treaties into the domestic laws. Moreover, the self and non-self-executing treaties require different approaches, beyond the scope of this traditional classification, for incorporating the subject international obligations into domestic laws.

States generally have the practice of accommodating their differences with treaty obligations by reserving the subject treaty provisions. Swaine, Edward T. in his article, *Reserving*[36] has drawn a comprehensive map of the history of Reservations in International Law and analyses the up-to-date jurisprudence and the significance of the matter with special reference to international human rights law. Taking the debate further, Eric Neumayer, in his article, *Qualified Ratifications: Explaining Reservations to International Human Rights treaties*[37], provides an in-depth analysis as to whether the 'reservations' on the human rights treaties, indeed, account for the diversity or prove to be lethal for international human rights regime. The author, keeping in view the states practices of the 'liberal democracies', further argues for and against the role of reservations on core HR treaties. This study focuses only on the empirical data and does engage itself in the core legal questions such as who has the legal authority to hold a specific reservation as invalid

[35] Pierre-Hugues Verdier, and Mila Versteeg. "International Law in National Legal Systems: An Empirical Investigation." *The American Journal of International Law* 109, no. 3 (2015): 514-33
[36] Swaine, Edward T. "Reserving." *Yale J. Int'l L.* 31 (2006): 307.
[37] T Eric Neumayer, *Qualified Ratifications: Explaining Reservations to International Human Rights Treaties*, the Journal of Legal Studies, Vol. 36, No. 2 (June 2007), pp. 397-429 (33 pages)

and on what grounds. Around the same line of argument, one may find more conforming views in the works of Mccall-Smith, Kasey L. *Serving Reservations* [38]and of Donders, *Cultural Pluralism in International Human Rights Law: The Role of Reservations*[39].

To sum up afore mentioned literature, we may rely on the findings of Ryan Goodman what he mentioned in his frequently cited article, *Human Rights Treaties, Invalid Reservations and State Consent*[40]. He analyzed the elements which render the reservation invalid and figured out the rules of International Law covering the consequences to be borne by the states parties. Precisely there are three possible positions on the matter e.g;

- 'The state remains bound to the treaty except for the provisions to which reservation related.'
- 'The invalidity of the reservation nullifies the instrument of ratification as a whole and thus a state is no longer party to the treaty.'
- 'An invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provision(s) to which the reservation related.'

It, therefore, became imperative as to who shall have the legal authority to determine the compatibility test. Human Rights Committee assumed this mandate for itself while

[38] Mccall-Smith, Kasey L. "SEVERING RESERVATIONS." *The International and Comparative Law Quarterly* 63, no. 3 (2014): 599-634. Accessed July 28, 2020. www.jstor.org/stable/43301624.8
[39] Donders, Y. (2013). Cultural Pluralism in International Human Rights Law: The Role of Reservations. (Amsterdam Law School Legal Studies Research Paper; No. 2013-16). Amsterdam: Amsterdam Center for International Law, University of Amsterdam.
[40] Ryan Goodman, Human Rights Treaties, Invalid Reservations and State Consent The American Journal of International Law, Vol. 96, No. 3 (Jul., 2002), pp. 531-560 (30 pages)

adopting General Comment No. 24 in 1994.[41] Consequently, the committee subscribes to the severability doctrine i.e. rendering the reservation invalid and holding the state party bound by the treaty with no benefit to the reservation.

This position is highly criticized, on the touchstone of the principle of 'State's Consent' by the proponents of anti-severability doctrine. State's consent is an evidence of its sovereignty which is the very foundation of International Law.

1.4 Research Questions (Framing of Substantial Issues)

The research at hand undertakes the following essential questions.

1. Whether the liberal democratic values have become the hallmark of human rights in today's world and the other non-liberal states are none but the violators? Moreover, is there any empirical evidence, in terms of the relevant states' practices, to substantiate this proposition? And as to how the UN human rights system determines and evaluates the enforcement of international human rights?

2. What is the jurisprudence of universal writ of human rights and what challenges are posed to it by the international legal procedures and mechanism pertaining to the Reservations, Understandings and Declarations submitted by the states parties while ratifying international human rights treaties?

[41] General Comment No. 24, para 18. Adopted at the Fifty-second Session of the Human Rights Committee, on 4 November 1994 (CCPR/C/21/Rev.1/Add.6)

3. Is there any theorize-able pattern as to how the human rights bodies (and liberal democracies) treat the Reservations, Understandings and Declarations submitted on the specific areas of international human rights treaties? If so, what impacts it may have? What is the role of Nordic States with regards to RUDs Regime?

4. Whether the Universalism is leading the journey of human rights through the fast track to endorse the 'end of time' thesis? What are the problems of Universalism and whether the problems brought by Universalization pose any serious threat to the sovereign equality and ideological sovereignty of the nation states?

5. What are the possible alternative mechanisms and what may be a way forward in order to achieve more effective international enforcement of human rights?

1.5 Theoretical Framework

The Samuel P. Huntington in his famous work[42], *The Clash of Civilizations and the Remaking of World Order*, concludes: the "clashes of the civilizations are the greatest threat to world peace, and an international order based on civilizations is the surest safeguard against world war." The hypothesis of the proposed research is based on the finding of Huntington and emphasizes that the inclusive recognition and pluralistic enforcement of international human rights, based on the principle of sovereign equality is the only 'surest safeguard' against the greater conflict and 'world war'. The civilizational clash between the liberal and conservative democracies is apparently struggling with each

[42] P. Samuel, "Huntington, The Clash of Civilizations and the Remaking of World Order" (New York: Simon & Schuster, 1996).

other with regard to the content and enforcement of human rights. In pursuit of the so called universal enforcement, the UN Bodies, at times, go beyond the basic framework of International Law and the UN charter. This is not only alarming but also posing real threats to existing world order which was based on the principle of sovereign equality, as incorporated in the preamble of the charter. Within this theoretical framework the proposed research aims to comprehensively compile and provide legal arguments to revisit and reassure the pluralism (based on sovereign equality) in Internal Human Rights Law.

Moreover, the proposed research also intends to evaluate the theoretical foundation of the jurisprudence of UN Human Rights Bodies from the comparative purview of the 'legal positivism' and 'natural law theories' and their relevance in human rights and international law. In his well celebrated work '*Taking Rights Seriously'*, Ronald Dworkin argues the 'Ruling Theory of Law' i.e. the legal positivism and utilitarianism, is contrary to the classical liberal tradition of 'individual human rights'[43]. On such grounds the proposed research will theorize the challenges, emerging from the practices of UN human rights bodies, to the 'ruling legal theory' i.e. the legal positivism and utilitarianism, in order to conform/validate the classical 'theory of natural rights' as propounded by John Locke and further expounded by Dworkin.

[43] Ronald Dworkin, *Taking Rights Seriously* (A&C Black, 2013). Also available at: https://books.google.com/books?hl=en&lr=&id=Ud_UAAAAQBAJ&oi=fnd&pg=PR3&dq=++Dworkin,+R.+M.+2013.+Taking+Rights+Seriously.+London.:+Bloomsbury.&ots=RD9YaFusVX&sig=M-77ENHoQoJyxAOFDWM2szNJDCw.

As suggested by Dworkin, the legal positivism, at times, fails not only in the true formulation of law but also becomes deficient in achieving its purpose, the universalization of UN human rights standards is posing serious challenges to the very basis of international law such as ‘states’ sovereignty’ and ‘consent’. While taking into consideration the jurisdiction and practices of the UN human rights bodies, as employed for the international enforcement of the so coined and designed human rights, this research challenges the predominant theory of ‘universalism’ in a manner in which Dworkin challenged the then ‘ruling theory of rules’. As exposed, by Dworkin, the skepticism, rigidity and gaps in the formalism of ‘rules’ this study points out the problems in the formalism of human rights which, at times, become incompatible with the fundamental principles of international law, itself. Finally, this research suggests that the human rights bodies may resort to the ‘substance’ of rights instead of universalizing the ‘forms’ just like Dwrokin emphasized and asserted the retreat towards the ‘principles’ instead of failing the cause of justice by remaining stuck to the ‘rules’. Having discussed a number of alternative approaches, this research has found the John Rawls’ law of peoples’ framework as a foundation to accommodate the requisite ‘legal pluralism’ for a more comprehensive and inclusive recognition and enforcement of international human rights law.

1.6 Research Methodology

This is a doctrinal legal research which involves an in-depth critical legal analysis of the applicable international and national legal frameworks for the recognition, protection and promotion of human rights. It covers international treaty obligations, enabling legislations and the institutional structures forming the relevant states practices of the selective states.

It is widely accepted that it is the doctrinal research which had remained a dominant systematic source of legal reasoning since the nineteenth century and had subsequently contributed a lot in refinement, modification and creation of law.[44] Besides theory testing and knowledge building, the doctrinal research also helps synthesizing legal doctrines to develop new theories.

Besides doctrinal approach, this research also involves an empirical analysis of the data comprising relevant states' practices affecting and influencing the mechanisms in questions such 'universal periodic review' etc. Within this doctrinal legal research methodology, certain methods including comparative analysis, deductive and inductive reasoning and case studies are also used.

1.7 Purpose and Significance of this Study

Keeping in view the opinions of the jurists, advocates and critics of IHRL, this research/study will be focused on the critical legal analysis of the jurisprudence as being developed and exercised by the human rights bodies with regards to the enforcement of international human rights. The study will further explore as to whether the existing UN human rights system sustains its claim of multilateralism or is tilting towards the non-inclusive approach which, in part, substantiates the apprehensions of the relativists and politicizes the whole project. Additionally, this work shall attempt to theorize the findings

[44] Desmond Manderson and Richard Mohr, "From Oxymoron to Intersection: An Epidemiology of Legal Research," *Law Text Culture* 6 (2002): 159. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/lwtexcu6&section=13.

of the legal analyses as to whether the so called international human rights law and its enforcement is becoming a tool in the hands of 'liberal democracies'[45] in their utopian pursuits. Finally, the research at hand will also explore alternative approaches, beyond the well-trodden universalism and cultural relativism.

[45] See for instance, T Eric Neumayer, *Qualified Ratifications: Explaining Reservations to International Human Rights Treaties,* the Journal of Legal Studies, Vol. 36, No. 2 (June 2007), pp. 397-429 (33 pages)

Chapter Two

Human Rights at a Crossroads:

An Overview of the Domestic and International Protection of Human Rights in Liberal and Non-liberal Democracies

2.1 Introduction

In today's global affairs - international relations as well as international law - the 'human rights' have become an essential ingredient in one way or the other. However, one may well find human rights law and practice at a crossroads between global north and global south. Apart from other factors, this divide, to a larger extent, emanates from the liberal and non-liberal democratic values prevailing in concerning states, respectively. This chapter engages a substantial analysis of the subject states practices of select counties to substitute the presumption as to whether the liberal democratic values have become the hallmark of human rights in today's world and the other non-liberal states are none but the violators? Moreover, is there any empirical evidence, in terms of the relevant states' practices, to substantiate this proposition? And as to how the UN human rights system determines and evaluates the enforcement of international human rights?

The word 'right' as being presently used in English language, refers to a legally protected and enforceable interest of an individual human being. Its antecedent existed in Roman language as '*ius'* or '*jus'* which, according to Aquinas, literally means 'an appropriate thing

in itself' (self-evident).[46] Later, the term 'justice' became familiar for an art through which it may be determined that what is appropriate. The concept has travelled through a long distance from *ius* to *jus*, *jus* to rights, and then to rights of man, further, to man and of citizen, of persons and finally to its most modern and present connotation as 'human rights'. For the rights, thus, to be 'human rights' they should be natural and inherent, same and equal for everyone and everywhere.[47] All these ingredients when present will bring a right at *par* with human rights according to the above mentioned definition. The globally recognized declaration of human rights i.e. UDHR of 1948 has also incorporated these constituent elements while referring to the definition in the following words:

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[48]

A philosophical intersection of the language used in the definition suggests that the drafters of the Declaration regarded such freedoms and liberties as an evidence of human dignity for human is bestowed with reason and conscience which will never lead his/her action astray and detrimental to others but guide them to behave humanely in a spirit of equality (brotherhood). Presuming, therefore, the limits of his/her inbuilt reason and conscience would be enough to ensure a fair and appropriate use of such liberties. This final manifestation of the concept which is internationally recognized has in fact evolved over the times of years rather centuries.

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[46] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011). https://books.google.com/books?hl=en&lr=&id=1lRFHEI6JQoC&oi=fnd&pg=PP1&dq=++Finnis,+John.+Natural+law+and+natural+rights.+Oxford+University+Press,+2011,+P+206.+&ots=GWJQ8As5Gy&sig=3mbdhWqfjF2k9ifc7nLQcHYTkv4.

[47] Hunt, Lynn. 2007. *Inventing Human Rights: A History*. P. 20. WW Norton & Company. P20.

[48] United Nations. 1948. Universal Declaration of Human Rights. Article 1. Accessed July 11, 2024. https://www.un.org/en/about-us/universal-declaration-of-human-rights .

2.1 Historiographical Perspective

While tracing the origins of human rights, Douzinas envisioned the Natural Law tradition of Greeks proved to be the cradle from which ideas like 'equality' and 'natural justice' sprang and subsequently inspired the medieval era Christian ethos and dogma. Later, these ideals were transmitted to the philosophical works of the English Enlightenment thought as conceived by John Locke and others.[49]

Historically, the first ever political manifestation and legal expression of such interlocking qualities of rights did appear in the United States of America's (USA) Declaration of Independence (1776) and the French Declaration on the Rights of Man and of Citizen (1789).[50] The rudimentary precursor to these two landmark instruments was the British Bill of Rights (1689), which declared such rights for the subjects of the Kingdom but did not ensure universality and equality for the exercise and enjoyment of these rights to the optimal.

According to Lynn Huntt, the term 'human rights', as it means today, was not in lingual use until the French Declaration, however, the phrases with similar connotations and manifestations such as 'natural rights', 'rights of humanity', 'rights of our fellow beings' etc., may be found in the earlier French and English writings during the third decade of seventeenth century. For instance Voltaire, a famous French author, used the term 'human

[49] Douzinas, Costas. 2000. The End of Human Rights: Critical thought at the turn of the century. P. 61. Bloomsbury Publishing.
[50] Douzinas, Costas. 2000. The End of Human Rights: Critical thought at the turn of the century. P. 21. Bloomsbury Publishing

rights' in 1763 in his 'Treatise *on Tolerance'*[51] but only in a sense of natural rights (not legal). The term 'rights of man' was in fact coined by Jacques Rousseau's in his much celebrated *Social Contract* in 1762 and subsequently gained the meaning which we assign to the phrase (human rights) today.[52]

As the initial lingual usage of the term found its place in French, we find its earlier comprehensive definitions and theoretical foundations in the works of English philosopher Johan Locke. Locke preferred the term 'natural rights' while describing them as the 'absolute moral claims to life, liberty and property'.[53] Blackstone, the famous English Jurist of eighteenth century, considered the underling basis, of such a claim for the human person, in fact recognizes his faculty of prudence to be a free agent endowed with discernment to distinguish the good from the evil.[54] Theses philosophical manifestations of the rights further transformed them as political and legal values.

The founders of the United States of America held such rights as the 'truths to be self-evident'[55].

The US and the French Constitutions, however, perceived these rights for the men only until the UN Declaration of Human Rights, 1948 (UDHR) had extended those to all human

[51] Brian Masters and Simon Harvey. 2000. *Voltaire: Treatise on Tolerance*. Cambridge University Press.
[52] Jean-Jacques Rousseau, "The Social Contract (1762)," *Londres*, 1964.
[53]John Locke. 1967. *Two Treatises of Government.* P. 141. Cambridge university press.
[54] William T. Blackstone, "Equality and Human Rights," *The Monist*, 1968, 619, also available at: https://www.jstor.org/stable/27902105?casa_token=0KKwwUt1L9QAAAAA:CvdEynG51Wl89Aj2cE9Qo23xpJCd7GlI-gmd9AgR6K6RJfZX1xusc-8fcay_-jauX1s51Hofk8fxH4CnRoLMSFQhfa0lckmiKQ4_3601yUwX3awjhujr5g.
[55] Congress, U. S. "Declaration of independence." Available On*: http://memory. loc. gov/cgi-bin/ampage* (1776).

beings without any discrimination. [56] UDHR may admittedly be recognized as the first formal document incepting the international characterization and recognition for human rights. Claims as to the Magna Charta (1215) and the Last Sermon of Prophet of Islam (632) for being foremost instruments of human rights in historical hierarchy also hold relative truth. The last sermon of the Prophet of Islam being more comprehensive and legal in nature takes precedence over all, however, Western historiography of human rights seems to have not appreciated the content, nature and the legal status of the same with an open heart. Thus, one may hardly find an express reference of acknowledgement to that regard in the western literature on the subject.

The international legal character of human rights is indebted to United Nations which for the first time effectively devised a comprehensive mechanism for the international recognition, promotion and protection of human rights. The idea, though, existed even before Second World War (WWII)[57] but in spite of the resistances and challenges posed to its internationalization the same was done through the project of United Nations.[58] This landmark development paved the way for International Human Rights Law (IHRL) regime to emerge and take the globe into its arms of jurisdiction.

IHRL, as being implemented today through the United Nations system and mechanisms of Human Rights Bodies, is receiving a mixed response from various states. The most current debate revolves around the nature and contents of human rights standard as to whether they

[56] United Nation General Assembly. "Universal Declaration of Human Rights." UNGA 302 no. 2 (1948): 14-25. Article. 1.
[57] Nonetheless in the shape of British Bill of Rights 1689 and US Bill of Rights 1792.
[58] Kaplan, Seth, D. "The new Geopolitics of Human Rights" *PRISM* 9.3 (2021): 76-89.

shall be uniformly enforced through international law everywhere or should be relatively implemented on the basis of domestic law.

Moreover, which of the approaches is more compatible and less challenging with the classical framework of international law? And as to whether any such approach is being proved to be counterproductive? Questions like these are engaged for the research to be covered in this chapter.

The chapter is focusing to analyze the above mentioned questions with in the frame work of ongoing debate which takes place between the liberal and non-liberal democracies within the procedures e.g. Universal Periodic Review (UPR) and through the Concluding Observations etc., made by respective Human Rights Bodies. Such mechanisms are designed within the UN system for the international enforcement of human rights. This debate has exposed the jurisprudence of UN Human Rights Bodies to some serious legal challenges which are leaving far reaching implication on the basic structure of the Law of Nations itself.

2.2 The Recognition and Protection of Human Rights in Liberal Democracies

It is one interesting coincidence to note that the history of human rights and democracy goes hand in hand. The most simple and expressive definition of democracy may be borrowed from Abraham Lincoln who said, it the 'government of the people, by the people and for the people'.[59] In modern history, it was the French revolution of 1789 which strived

[59] Quotation from Lincoln's famous Gettysburg address, November 19, 1863. Available at: https://www.loc.gov/resource/rbpe.24404500/?st=text

hard to depose monarchy and vested the power of government in the people, however, in the pre-modern and ancient history there existed various shades of democracy. Most pertinent of such contemporary shades for the purpose of this research are the Liberal and Non-Liberal Democracies.

2.2.1 Liberal Democracy and the Liberal Order

Liberal Democracy may literally be described as the government of free people. It is aimed at the limits on the very nature and extent of the authority to be exercised by the government on individuals. Liberalism may better be described as a movement with an objective of the promotion and hegemony of the values which are nurturing the liberal democracy.[60] Over the last couple of centuries this movement has in fact become a powerful political ideology of the time. Its influence which is very much evident in almost every social institution of human life either looked at from the domestic or global lens. The movement is most compellingly fueled from within the existing international legal framework for the recognition, promotion and protection of human rights.

The existing literature deliberating upon this political thought frequently refers to the phrases such as 'democracy', 'liberal democracy', 'liberal political thought', 'liberal order', 'none-liberal democracy', 'authoritarian order' and 'conformist democracy'. These connotations are, therefore, postulants of an analytical examination.

[60] Duncan Bell, "What Is Liberalism?," *Political Theory* 42, no. 6 (December 2014): 683, Also available at: https://doi.org/10.1177/0090591714535103.

Democracy is most commonly defined as an order wherein power to rule is derived from the public/citizens, ensuring freedom, equality and representative participation in the government. Liberal democracy is often referred to a political system founded by free and fair elections for the protection of civil liberties and the rule of law to be implemented by fully independent judicial institutions. The liberal political thought is discourse and an academic approach wherein the scholars define the sociopolitical norms through the liberal values, e.g. individual liberty, equality and freedom of reason and will. They further emphasize on absolute gender equality, freedom of gender orientation and absolute freedom of expression and thought. Liberal order in its domestic orientation focuses on a governance model which is based on liberal values. It globally projects and promotes the universality of human rights, free market economy and secularism. The non-liberal democracies, on the other hand, are described as the political orders with controlled or restricted civil liberties within the limitations prescribed and derived from politico legal norms of the respective societies. The authoritarian orders stand literally and well as practically opposite to the liberal orders. These orders are founded upon strong centralized executive government with an overarching influence if not a control on legislative and judicial branches. The authoritarian orders usually suppress the dissent and do not remain passive and hesitant when it comes to use force against such element. The conformist or conservative democracies are those which fall in between the liberal and authoritarian orders. The civil liberties and other human rights in conformist polities are defined subject to the ideological norms or religious values which enjoy the Constitutional status. These democracies accept the international human rights standards but with an optimal use of Reservations, Understandings and Declarations (RUDs) thus making IHRL regime as relative instead of universal. The active liberal democracies hardly differentiate these

democracies from the authoritarian orders and remain fully skeptic of their commitments towards international human rights law.

Having analyzed the general usage of the terms related to liberal democracy we further indulge in understanding the historical background and the key elements and features of the liberal democratic orders from the standpoint of their role in making and shaping the existing international human rights law regime.

As analyzed above the individuality, as it is a core ingredient of the Liberalism, became one significant constituent element of the political thought during the 17th century in Europe. The notion emanated from the seeds of resistance to, and freedom from, the royal as well as the so called divine (Papacy)[61] prerogative, privilege and monopoly which had badly suppressed the freedom of human will and reason. In the words of Mill, the idea emerged in order to seek protection against the tyranny of authority.[62] Historiography of government/state generally suggests that during the earlier times the rulers used to derive their power/authority on their subjects by virtue of inheriting the royal prerogative or by the conquest, yet the subjects would strive for certain freedoms for the lasting acceptance of incumbent authority. Now a days the subjugation of people on monarchial or conquest basis is overruled by the political orders which are formed on the Constitutional foundations wherein the sovereign and subjects draw a finely demarked scopes of the liberties and authority, respectively. Herein the authority, in fact, is derived from the people

[61] As the historians generally refer to thirty years war ending in 1648.
[62] John Stuart Mill, "On Liberty," in *A Selection of His Works*, by John Stuart Mill, ed. John M. Robson (London: Macmillan Education UK, 1966), 1–147, https://doi.org/10.1007/978-1-349-81780-1_1.

i.e., the will of subjects. This later arrangement is often referred to as a 'liberal order' as compared to the former which is called 'authoritarianism'.

The liberal order prefers the social or collective system of governance instead of a singular overhead authoritative control. It arose in strong reaction to the monarchies, totalitarian regimes and fascism. The liberal thought emerged to be a possible solution to the problem as to whom may be vested with a legitimate authority to create and define the scope of the inevitable fundamental freedoms of a human being. It demonstrated upon the 'ultimate power of the people' in this regard.

While tracing back the origins and emergence of the liberal political thought one may come across the historical events which took place in England during second half of seventeenth century. It was January 30th, 1649 when the last incumbent King of England had to face execution after his trial by the Parliamentarians. This landmark development marked the end of monarchic rule and consequently a new order was conceived which may better be known as 'Constitutional Monarchy" wherein King was forced to sign the British Bill of Rights 1689 before he was crowned. This period is well celebrated by the English political thinkers and historians as the 'Glorious Revolution' because of which the real sovereignty got vested in the parliament which is often referred as 'Westminster Model of Parliamentary Sovereignty".[63]

[63] James A. Robinson and Daron Acemoglu, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile London, 2012), https://www.lse.ac.uk/assets/richmedia/channels/publicLecturesAndEvents/slides/20110608_1830_whyNationsFail_sl.pdf.

The English Glorious Revolution of 1689 brought into shape the first model of liberal order wherein the 'authoritarian' force (King Charles) was finally defeated by individualists (Parliamentarians) and the power was divided among the monarch, ministers and the parliament. This British model stood firm on the philosophical and intellectual foundations provided by the well propounded thesis and antitheses of John Locke and Thomas Hobbes,[64] respectively. Hobbes though admitted that the sovereignty of the ruler is subject to the consent of the people but he explored by referring to the hypothetical 'social contract' that the individuals surrendered their liberty in favor of the ruler for a durable peace and security. Locke, on the other hand, assumed a different 'social contract' wherein the ruler was bound to secure 'natural rights' instead of guaranteeing protection against the natural insecurity. The later political order which was influenced by the Glorious Revolution encapsulated a striking balance between these two positions (of Hobbes and Locke respectively). This balance may be observed in the British Bill of Rights 1689. The Bill ensured inalienable rights of the individuals to be protected by the government by exercising its authority as defined by the legislature comprising the representatives of the individuals. Legislatures would be formed through the periodical elections. The electorate, however, not included every individual at the earlier stage. So it took another two hundred years to make universal franchise because only the landholders were given the right to vote in first place. As assessed by Fareed Zakria the equal suffrage practice was adopted in most part of Europe by 1940s.[65] The limitation of the suffrage to hold the property was only partially removed in 1867, in England. Similarly, English women were given the right to

[64] See generally, Thomas. *Hobbes's leviathan*. (1651) and Locke, John. Two Treatises of government, (1689).
[65] Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Aff.* 76 (1997): 22, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/fora76&section=110.

vote by the mid of twentieth century whereas the same was not recognized for the Swiss women until 1970.[66]

Similar movements had taken place around the same era in France and across the Atlantic in Americas. The monarchical reigns began to be transformed into constitutionally constrained governments. Instead of submitting before the historically prevailing royal or divine prerogative of a person to rule the political theorists enlightened the people with an idea that the governments can only be legitimized when formed with the consent of being ruled. Thus a participatory government i.e. 'democracy' (the rule of people) came into practice.

The idea of the government of people, for people and by people which emerged at the end of seventeenth century continued flourishing, in the succeeding centuries. It grew into various offshoots forming a variety of its forms e.g. conservative and populist democracy, religious democracy, liberal and non-liberal democracy. The other, opposite to this form of government, is a system of order which is known as 'authoritarianism'. The various types of democracies were, therefore, incorporated in different Constitutions of the world. The Constitutionalization of these theories, which began with the American Constitution, spread over to France and other parts of Europe.

[66] Camille N'Diaye-Muller, "Gender Equality or Feminism, Can You Have Both? A Comparative Look at Denmark and Switzerland," 2021, 7. Also available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1123&context=international_immersion_program_papers.

Wherein the English Liberals ensured the popular restrain on the royal prerogative, the drafters of the US Constitution made it appoint that the individual freedom, equality and the rule of law must be characterized in their social and political order. Since the insertion of the 'Bill of Rights' in the US Constitution, human rights have become one of the essential ingredient in the scheme of liberal political order.

The liberal order, therefore, erects on the 'individualism' i.e. individual liberty, as compared to the authoritarian system which rests on the 'collectivism'. Individualism defines a social order based on the reciprocal rights and duties among the individuals. Such rights and duties are alone defined through the peoples' will in the shape of legislation which generally reflects the common usages and customs. On the contrary, 'collectivism' is an order among the individuals, which is established through an overarching administration, wherein the will of public is subject to certain royal prerogatives. The later system, which forms authoritarianism, requires compliance from the common man with the decrees issued by an authoritarian administration. Such regimes often prefer the national stability and security on the cost of individual freedoms.[67]

As the research at hand aims to analyze the interplay of international human rights law and politics between the liberal and non-liberal (authoritarian) democracies, it is imperative to briefly point out as to how the liberal democratic orders treat the non-liberal orders. An introspective analysis of the question as to what is the will of people? Is it ultimately what the people subscribe to and they do transpire it through the representative legislature? An

[67] Barry D. Riccio, "*Walter Lippmann*: *The Odyssey of Liberal.* New Jersey", Transaction Publishers, (1994).

answer to this question would gain pertinence for such a system, wherein the people, subscribing to certain ideology, themselves limit their representative legislature to not transgress an outline drawn under certain principles. The subsequent arrangement may still be called 'liberal'? The liberals consider the systems of order pertaining to that nature as the 'conformist democracies' which they believe do pose more serious challenges to liberalism and liberal democracies. This brings the discussion to take into account the international or global influence and outreach of the liberal democracies.

While exploring the International Liberal Order, John J. Mearsheimer categorizes the 'International Orders' to be real, ideal and agnostic.[68] According to him the empirical as well as the ideological evidences show that an order internationalized only on universalized values may sustain and succeed. Among such values 'human rights' have proven to be the most suitable as well as durable. Fukuyama remained quite optimistic for the dominance of liberal order and considered its triumph over the authoritarian models (led by USSR, as he believed so) in the cold war as end of the history.[69] He held such a categorical proposition by relying on the views of Hegel and Marx who envisioned the evolution of human societies and civilizations towards such an end of universal dominance.

The liberal democracy thus is being shaped as the librocracy. The relationship between liberalism and democracy is one of cause and effect yet liberalism remains scared of the tyranny of majority often culminating from the democratic process.

[68] John J. Mearsheimer, "Bound to Fail: The Rise and Fall of the Liberal International Order," *International Security* 43, no. 4 (2019): 7–50, https://direct.mit.edu/isec/article-abstract/43/4/7/12221.
[69] Fukuyama, F. "The End of History and the Last Man. New York-Toronto: The Free Press." (1992).

The ideals or the philosophical foundational basis of the liberal political order may well be traced in the views of John Rawls. Rawls' seminal works[70] which suggests that a human society may only come into being when its members originally choose to accept the minimum equal amount of liberty for each one of them. This minimum individual liberty comprises a range of interests and freedoms called 'human rights'. However, with regards to certain economic needs he presupposes a workable inequality which benefits the society will be acceptable. He further proposes such an arrangement of liberal order among all the likely societies of the world bonded through the Law of Peoples (International Law). The most crucial point of his hypothesis is that such an order of liberal societies should be expanded to and imposed upon the decent (non-liberal) societies ultimately through the military interventions.[71] This aspect of liberal democracy leads the discussion to explore its relationship and dependence on the idea of the universality of human rights. It is therefore appropriate to have an overview of the legal landscape for the provision and protections of Human Rights in countries to be selected for the requisite analysis.

2.2.2 The Legal Framework Protecting Human Rights in Representative Liberal Democratic States

Leading or representative states, practicing or adhering to liberal democracies, are thus selected for the purpose. Freedom and equality is the most fundamental hallmark of the liberal democracy in today's world, however, the most popular indexes generally

[70] Theory of Justice (1970), Political Liberalism (1993) and Law of Peoples (1996)
[71] Rawls, John. *The law of peoples*. Harvard UP, 1996, p. 36.

standardize the liberal values such as, human needs, environment and gender equality but homosexuality finds its place on the top of this list for the last few decades.

Relying, for this research, on the data collected and published under the V-Dem project as being presented by the 'Our World in Data' in its Liberal Democracy Index, 2023[72] Norway, Sweden, Denmark, Iceland and Finland are the top five liberal democracies[73]. Such findings are also endorsed by Freedom House.[74] However, keeping in view the global politico-economic impact for the promotion of liberal democracy in the world the role of United States, United Kingdom and France cannot be ignored. In the following sections an overview of the human rights protection framework as being applicable in top (select) Liberal Democratic States is presented. It may interestingly be noted that among these top listed liberal democracies, Norway, Sweden, Denmark and Iceland have had legalized the same sex marriages and are the strong proponents of LGBT rights. At the end of this section the legends or benchmarks for subject indexes will be analyzed for the requisite findings.

Norway

Since the last few years Norway remain among the top liberal democratic states[75] for its tripartite human rights protection mechanism i.e. international, regional and domestic. It complies with the International Human Rights Law framework having ratified the core Human Rights Instruments along with a number of Optional Protocols. Through which it

[72] Our World in Data. 2023. "Liberal Democracy Index" 2023. Accessed June 26, 2024. https://ourworldindata.org/grapher/liberal-democracy-index?time=2023.
[73] Ibid.
[74] Freedom House. 2024. "Freedom in the world 2024". [Accessed June 26, 2024]
[75] As revealed by the World Justice Project, the world Human Rights Index. Accessed December 20, 2024: https://worldjusticeproject.org/rule-of-law-index/global/2023

has accepted the competence of a number of treaty bodies to receive and examine individual complaints. On regional level, being part of European Union, it is party to the European Convention on Human Rights 1950 and accepts the jurisdiction of European Court of Human Rights as may be applicable. Domestically, Norway has a dedicated chapter on human rights in its Constitution.[76] Moreover, since May 1999, through its Human Rights Act, Norway has incorporated the core human rights instruments in its domestic legal system.[77] Pertinently, the provisions of this Act are given an overriding effect on all the other laws in case of conflict.[78]

Having a look on the human rights chapter (articles 92 to 113) of Norwegian Constitution, one may find a significant difference with regards to the right to life as provided in the Constitutions of other states in the region. Under article 93 of the Constitution, the state provides right to life for every human being beyond any limitations. It further goes to extent of abolishing the death penalty.[79] Moreover, the Constitution does not discriminate in its scheme of rights for the citizens or other persons residing in the country. The chapter does not specifically provide for freedom of religion, however, article 16 provides an equal right to exercise his/her religion for every human being and article 4 ensures the king shall profess the Evangelical-Lutheran religion which shall enjoy the state's patronage.[80] Article 100 marks the scope of the freedom of expression to the largest possible extent including specifically citizens' right to criticize the government and administration.

[76] See for instance, Part E of the Norway Constitution as amended in May 2014.
[77] See for instance Section 2 of Human Rights Act of May 1999 as available on https://lovdata.no/dokument/NLE/lov/1999-05-21-30
[78] Ibid. Section 3.
[79] The Constitution of the Kingdom of Norway. "Section 93". n.d. Accessed June 26. 2024. https://lovdata.no/dokument/NLE/lov/1814-05-17/KAPITTEL_5#KAPITTEL_5
[80] Ibid, article 16 and 4 respectively.

Besides laws, Norway also has a vibrant institutional framework for the effective enforcement of human rights within its territorial limits. Such institutions include lower and higher courts, National Human Right Institution and a number of Ombudsman offices looking after equality, anti-discrimination, child rights and public administration etc.

Certain deficiencies in this regards may, however, be pointed out. For instance, the Human Rights Committee observed in the Country report as submitted by Norway in 2018 that the state party must include an equal right for everyone to have the freedom of religion, thought and conscious and may not place Evangelical Lutheran Church and Christian values in privileged position. Similarly the committee raised its concerns on the escalating incidents of gender based violence against women and girls.[81]

Sweden

Among a wide range of justiciable human rights, Sweden has perhaps the oldest law providing right to information and access to official documents. The Freedom of Press Act adopted in 1766 and lately amended in 1949, provides this right not only to citizens but also the foreigners. The Constitution also abolishes the death penalty.[82] Article 22, of the Constitution, equates all other persons with the Swedish citizens as regards a range of fundamental rights including protection against the capital punishment. Article 1 (6) of

[81] UN Human Rights Committee. "Concluding Observations on the Seventh Periodic Report of Norway". 25 April 2018. Para 4 and 5. https://documents.un.org/doc/undoc/gen/g18/117/61/pdf/g1811761.pdf?token=dfqSV6h4NO5r6RSOX3&fe=true

[82] The Constitution of Sweden 1974. n.d. Chapter 2 Article 4. Accessed June 27, 2024. https://www.equalrightstrust.org/ertdocumentbank/CONSTITUTION%20OF%20SWED

Chapter 2 provides everyone to practice his religion, however, article 4 of the Succession Act makes it obligatory for the King to always observe the pure Evangelical faith.[83] One significant feature of the Swedish human rights regime, which often brings Sweden among the top listed states in various indexes,[84] is that the country decriminalized homosexuality since 1944.[85]

With regards to international framework, Sweden is a party to all the core UN human rights instruments, however, none is yet incorporated in its domestic law to be directly implemented. Being a dualist state, Sweden translates its international obligations into its domestic law through the adoption of enabling legislation by the parliament (The Riksdag).[86] UN Human Rights Committee, on the seventh periodic report submitted by Sweden, observed that ICCPR is yet to be incorporated in the domestic law. The courts, therefore, hardly invoke the provisions of the Covenant.[87] The Committee also raised its concerns on the State Party's reservations on some of the substantial provisions including articles 10, 14 and 20 of the Covenant and urged the state party to review and withdraw the same.

[83] Ibid.
[84] Our World in Data. Human Rights Index 2023. Accessed December 26, 2025. https://ourworldindata.org/grapher/human-rights-index-vdem
[85] Sundevall, F. and Persson, A, "LGBT in Military: Policy Development in Sweden 1944 – 2014", (2016), *Sex Res Policy* 13:119 -129 https://link.springer.com/article/10.1007/s13178-015-0217-6#citeas
[86] Linda Engvall, "Implementation of International Criminal Law in Swedish Legislation", Master Dissertation, 2006, Lund University, Sweden. P 18.
[87] Human Rights Committee. April 28, 2016. "Concluding Observations on the Seventh Periodical Report of Sweden". Accessed 27 June 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FSWE%2FCO%2F7&Lang=en

Regionally, being a member of the Council of Europe, Sweden not only is a party to European Convention on Human Rights 1950 but has had enacted an Act on European Convention on Protection for Human Rights and Fundamental Freedoms since 1994. ECHR is, therefore, implemented in Sweden through the domestic courts as well as the European Court of Human Rights.

Nationally, on the recurring recommendations of the UN Human Rights Committee, the Swedish Institute for Human Rights was established in 2022 under an Act of Parliament adopted in 2021. The Institution not only takes part in reporting, to the UN Human Rights Bodies, about the status of implementation of the international human rights in Sweden but also has the mandate to conduct independent investigations and inquiries with regards to the specific human rights issues in the country.[88] Additionally the Courts and relevant offices of the Ombudsman ensure the implementation of human rights as provided in the Constitution and other domestic laws.

Denmark

Officially known as Kingdom of Denmark, a Constitutional monarchy, has signed and ratified a number of International Human Rights Instruments and protects such rights through its Constitutional Act as amended lastly in 1953. The Danish Constitutional Act guarantees all the fundamental human rights including but not limited to 'personal liberty',

[88] Swedish Institute for Human Rights. n.d. "Act on the Institute for Human Rights 2021". Section 2. Accessed June 27, 2024. https://mrinstitutet.se/lag-om-institutet-for-manskliga-rattigheter/

'privacy', 'property', 'freedom of religion', 'of speech', 'association', 'assembly' and 'education'.[89]

Additionally, within the regional (EU) framework Denmark is a state party to the European Convention on Human Rights which is incorporated in its domestic law since 1992.[90]

As regards International Human Rights Law regime, Denmark has accepted/ratified all the core UN human rights instrument since decades and is compliant to reporting and complaint procedures of subject Human Rights Bodies.[91]

The institutional framework having mandate to have oversight and implementation of subject human right in the country include Courts, Ombudsman Offices and the National Institute for Human Rights. As mentioned above the Act of 1992 on incorporation of ECHR in Danish law empowers its courts to interpret its domestic law subject to the provisions of ECHR which has drawn a very comprehensive scheme of human right to the largest possible extent. By virtue of being state party to ECHR Demark also accepts the jurisdiction of European Court of Human Rights for addressing the complaints preferred, after exhausting the local remedies, by its citizens against its authorities.[92]

[89] The Constitutional Act of Denmark. Chapters VII, VIII. 2000. Danish Parliament. Accessed on July 12, 2024. https://www.thedanishparliament.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/the_constitutional_act_of_denmark_2018_uk_web.pdf

[90] Act no 285 of April 29, 1992 on European Convention on Human Rights.

[91] UN Treaty Bodies Database. n.d. View of the Acceptance of Procedures and Ratification Status by Country – Denmark. Accessed 12 July 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=49

[92] Jens Vedsted-Hansen, "Legislative and Judicial Strategies in Danish Law: Accommodation or Evasion of International Obligations?". In *Nordic Journal of International Law* (2022), 91, no. 1, 124–47, https://brill.com/view/journals/nord/91/1/article-p124_7.xml.

Similarly the relevant offices of Ombudsman also take the cognizance with respect to certain violations.[93] The Danish Institute for Human Rights is mainly responsible for its independent reporting on the implantation of treaty obligations arising from those instruments which are accepted / ratified by the country. The institute may also advise the government and parliament on specific human rights issue for the requisite legislative or administrative measures.[94]

Within this strong network of intuitions and legal framework applicable for the protection and enforcement of human rights, the Danish citizens and other persons for the time being in Denmark have fuller access to exercise and enjoy their human rights. The Human Rights Bodies have had appreciated the records of the country for its comprehensive approach and consistent commitment to comply with all the applicable mechanism and procedure. Human Rights Council and Human Rights Committee's reflection on the examination of its latest periodical reports is precisely analyzed below.

The Council recommended the state party to consider the long pending ratification of UN Convention for the Protection of All Persons from Enforced Disappearance[95], UN Convention for the Protection of Migrant Workers[96] and Optional Protocol on International

[93] Michael Gøtze, "The Danish Ombudsman–A National Watchdog with European Reservations," In *Transylvanian Review of Administrative Sciences,* (2009), vol. 5, no. 28: 172–93. https://rtsa.ro/tras/index.php/tras/article/view/33.
[94] Steven LB Jensen and Marie Juul Petersen, "The Danish Institute for Human Rights", (2019), https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/forskning_2019/a_review_of_survey-based_reports_based_on_data_from_national_human_rights_institutions.pdf.
[95] Human Rights Council. July 14, 2021. Report of the Working Group on the Universal Periodic Review – Denmark. Accessed July 12, 2024. Para 60.1. https://documents.un.org/doc/undoc/gen/g21/190/41/pdf/g2119041.pdf?token=oOP9OWRS0sxejSJMp7&fe=true
[96] Ibid. Para 60.12

Covenant on Economic Social and Cultural Rights.[97] However no serious or systematic violation of any particular Convention of provision thereof has be observed.

The Human Rights Committee lastly examined the periodical report, submitted on its status of complying with International Covenant on Civil and Political Rights, during August 2016. The Committee reflected its Concluding Observations on the incorporation of the Convention in its domestic law, to withdraw its reservations on article 10, 14 and 20, to ensure gender equality and improve anti-discrimination legislation, on the protective mechanism against torture and to improve the conditions and infrastructure for mental health.[98] None of these observations form an opinion as to which Norway could be held for serious or systematic violations of the Convention.

Iceland

Iceland is often ranked as global leader in gender equality. The Constitution of Iceland provides all the fundamental human right to the maximum extent. To ensure LGBT rights, the state has had legalized the same sex marriages and allowed the Church of Iceland to bless the same since the requisite legislation was adopted in 2010[99]. Moreover, the Constitution guarantees everyone the freedom to form religious associations as well as to

[97] Ibid, Para 60.5

[98] UN Human Rights Committee. 2016. Concluding Observations on the Sixth Periodic Report of Denmark. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FDNK%2FCO%2F6&Lang=en

[99]

practice his/her religion, however, the Evangelical Lutheran Church is regarded as the state church which has to be supported by the State.[100]

Internationally, the country is party to all the core UN human rights instruments and has have accepted the jurisdiction of the relevant treaty bodies for reporting as well as individual complaints. It ratified ICCPR in 1979 but reserved few articles e.g., 10 (2) and 20 (1). Article 20 (1), which requires the prohibition of propaganda on war, is considered by Iceland as it may tantamount to diminishing the scope of the freedom of expression.[101] Convention on Enforced Disappearance (CED) is yet to be accepted by Iceland.

Iceland is generally appreciated for its human rights records, however, since its 5th periodical report was reviewed by Human Rights Committee in 2012, the committee expressed its concerns that no provision of the Covenant has been incorporated in the domestic law of Iceland.[102] The courts there do not give effect to the provisions of UN conventions.[103] As regards ECHR, it was incorporated in the domestic law and given the status of statutory law through ECHR Act, 1994, however, the courts often held the provisions of ECHR subject to the Constitution.[104]

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[100] Iceland Human Rights Centre. June 24, 1999. "Constitution of Iceland". Part VI Article. 62, 63. https://www.humanrights.is/en/laws-conventions/icelandic-law/constitution-of-the-republic-of-iceland

[101] UN Treaty Bodies Database. n.d. Status of Ratification and Acceptance of Procedures for Iceland. Accessed July 1, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=61&Lang=EN

[102] Human Rights Committee. 2012. Consideration of the 5th periodic report submitted by Iceland. Accessed June 28, 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FISL%2FCO%2F5&Lang=en

[103] Laura Ervo, Pia Letto-Vanamo, and Anna Nylund, *Rethinking Nordic Courts* (Springer Nature, 2021), https://library.oapen.org/handle/20.500.12657/50043.

[104] Ibid.

With regards to the enforcement of human rights and institutional framework, Iceland is yet to have its National Human Rights Institution as required under the Human Rights Council mandate. Individuals' access to justice and rights is ensured through courts and ombudsman offices. Ombudsman offices are empowered to admit complaints against the public officials for alleged violations of human rights.

Finland

The extra-ordinary features of the Constitution of Finland entail the abolishment of the death penalty,[105] right to social security[106] and maximum freedom of expression and religion.[107] To ensure equality before law for every citizen the state adopted non-discrimination law in 2014 and set up the Non-Discrimination Ombudsman Office and the National Non-Discrimination and Equality Tribunal.

Finland fully adheres to International Human Rights Law by ratifying all the major and core UN human rights instruments which are also incorporated in its domestic law to be directly invoked before and implemented by the national courts. The country also accepts the jurisdiction of treaty bodies to receive individual complaints against it.[108] It remains party to ICCPR since 1967 and has have accepted the procedures under the Optional Protocols. Since then it has have developed and improved a lot in its human rights enforcement record over the years.[109]

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[105] The Constitution of Finland 1999. Article 7. Accessed July 1, 2024. https://faolex.fao.org/docs/pdf/fin134323.pdf

[106] Ibid. Article 19.

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[108] UN Treaty Bodies Database. n.d. Status of Ratification and Acceptance of Procedures for Finland. Accessed December 1, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=61&Lang=EN

[109] Ibid. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=61&Lang=EN

Human Rights Committee, while reviewing its seventh periodic report in May 2021, however, observed that the courts generally have the tendency to apply only those provisions of International Human Rights Law which are compatible with the Finnish domestic law. The Committee expects the national courts may invalidate such laws which are in conflict with the treaty obligations.[110] The Committee also urged the state to withdraw its reservations against article(s) 10 (2) (b) and (3), 14 (7) and 20 (1) of the Covenant.[111] It is interesting to note that Finland's reservation on Article 20 (1) of the Covenant is same as that of Iceland which reflects apprehensions that's compliance to such an obligation i.e., 'to prohibit propaganda against war' may hinder the scope of the freedom of expression as maintained under the Constitution and other laws of the state.[112]

As regards the Finnish institutional framework for the implementation of human rights is concerned, the country has its Human Rights Centre which works under auspices of a Parliamentary Ombudsman Office. However, in accordance with Paris Principles, it has to be fully independent and responsible for reporting, to the UN Human Rights Bodies, the status of state's compliance with the relevant treaty obligations. Additionally, the Finnish courts are independent in implementing human rights within the Constitutional

[110] UN Human Rights Committee. Concluding Observations on Seventh Periodic Report submitted by Finland. Accessed July 1, 2024.
https://tbinternet.ohchr.org/_Layouts/15/TreatyBodyExternal/Countries.aspx
[111] Ibid. para 8.
[112] UN Treaty Collection. July 2024. "Finland, Status of Ratification International Covenant on Civil and Political Rights".
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec

framework.[113] Besides Courts, there are other Ombudsman Offices vested with special mandate to look after specific human rights issues such as violence against women and discrimination. Violence against women though remains a consistent eye-opener for the Human Rights Bodies. It was also observed by the Human Rights Committee in its last review of the country report submitted by Finland.

Having had an overview of the legal and institutional framework applicable for the promotion and protection of International Human Rights Law in top ranked Liberal Democracies which generally include the Nordic states, it is also needful to examine the same with regards to few politically dominating states which have a global influence for the promotion of liberal democracy in the world. For this purpose, regardless of their rankings in subject indexes, three of permanent members of United Nations Security Council e.g., United States, United Kingdom and France are also considered. Besides their recent global impact, these countries are admittedly referred to as the birth places of the very ideas of natural rights later transformed as human rights (as discussed in details in the previous section (Historical Background) and their role cannot be ignored in devising and strengthening the UN Human Rights System.

United Kingdom

The United Kingdom of Great Britain and Ireland (UK) though has long history of human rights even before the inception of United Nations and its framework for the international

[113] Francesca Klug, "Judicial Deference under the Human Rights Act 1998," *European Human Rights Law Review*, no. 2 (2003): 125–33, https://eprints.lse.ac.uk/17993/.

recognition and protection of human rights.[114] However, within the context of current discussion, it has to be observed and analyzed as to how UK is performing within the scheme of International Human Rights Law regime as devised under UN system. The country remains party to the relevant treaties since decades. All the core UN human rights instruments along with various optional protocols requiring adherence to special procedures are accepted by UK.[115]

The applicable legal framework in UK for addressing such concerns and other human rights issues primarily depends on the regime created and established by the Human Rights Act of 1998. The Act incorporates ECHR and empowers British courts to interpret domestic laws subject to the principles and provisions of the Convention.[116] ECHR, therefore, holds a very special position in the legal system of UK particularly when the country does not have a written or codified Constitution. Interestingly, UK was the first country to ratify the Convention, to have first president of the international court (ECrHR) established under it and to have the first case brought against none but itself by the Greece.[117]

The British courts have been much adherent to ECHR while applying the provisions of Human Rights Act even while considering the petitions brought by the foreigners against the British citizens (soldiers) as is evident from a number of cases.[118] Before the very

[114] Marko Milanovic, "Britain's Contributions to Human Rights Law." *British Yearbook of International Law*. brad007, 2003.. https://doi.org/10.1093/bybil/brad007
[115] UN Treaty Body Data Base. n.d. "View of the Acceptance of Procedures and the Ratification Status by Country – UK". Accessed July 2, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185
[116] Klug, "Judicial Deference under the Human Rights Act 1998."
[117] Milanovic, "Britain's Contributions to Human Rights Law." 3.
[118] Rehmatullah and Ors v. Ministry of Defense and Mohammad and Ors v. Ministry of Defense. UKSC 2017. Accessed July 04, 2024. https://www.supremecourt.uk/cases/docs/uksc-2015-0002-judgment.pdf

inception of Human Rights Act of 1998, the human rights were generally protected by the courts by relying on persuasive interpretations of ECHR, British Bill of Rights 1689 and related Common Law principles such as 'presumption of innocence', "no condemnation before being heard' and 'equality before law' etc.

The critics of the Human Rights Act, though rare, mainly object for holding ECHR above the domestic law while believing that as such an approach, at times, poses challenges to the sovereignty of the Kingdom and brings the legislative prerogative of its parliament under a stroke of the pen of the judicial officers.

Besides courts, there also exists much empowered Equality and Human Rights Commission which serves as UK's national human rights institution. The Commission was established in 2007 under the Equality Act of 2006 and to act in accordance with UN standards i.e. 'Paris Principles'. It is expressly mandated to challenge discrimination, promote equality and to protect and promote human rights.[119] To such ends the commission can issue codes of practice and can also conduct, in case of abuse, inquiries against the responsible authorities.[120]

In spite of this very vibrant human rights machinery applicable in UK for the promotion and protection of human rights, the UN Human Rights Bodies do not hesitate to point out deficiencies of the mechanisms and recommend what is required to be done more.

[119] Legislation (UK). "Equality Act 2006". Sections 8, 9 and 10. Accessed 05 July 2024. https://www.legislation.gov.uk/ukpga/2006/3/pdfs/ukpga_20060003_en.pdf
[120] Ibid. Sections 13, 14 and 16.

The country's 8th periodic report on the implementation of ICCPR which is only lastly reviewed by the Human Rights Committee during May, 2024 had reflected back some concerns of the Committee with regards to the incomplete incorporation of the Covenant (ICCPR) in domestic law.[121] Other concerns entail the issues pertaining to racial discrimination, hate crimes, violence against women and children and insufficient legislation for protecting the right to abortion for women and girls and sexual orientation and gender equality etc.[122] Further observations persuade for the improvement on legislative framework related to protection against torture, detention, state's unfettered authorities pertaining to counter-terrorism measures and anomalies resulting from the amalgamation of Modern Slavery Act of 2015.

Moreover, the Human Rights Council's latest Universal Periodic Review (UPR) of the United Kingdom has reflected some concerns on the prevailing state of human rights in the country. The Working Group tasked to review the reports covering human rights records of the UK, reiterated for the ratification of the protocols optional to ICCPR and CRC and to withdraw its reservations and explanatory declaration on CEDAW. Interestingly, the states from leading liberal democracies e.g., Norway recommended the state to improve the protection of women at workplace and LGBT workers.[123] Iceland emphasized for

[121] UN Human Rights Committee. May 2024. "Concluding Observations on the 8th periodic report of United Kingdom of Great Britain and Northern Ireland". Para 4. Accessed July 02, 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGBR%2FCO%2F8&Lang=en
[122] Ibid.
[123] UN Human Rights Council 52nd Session. March 2023. "Universal Periodic Review of United Kingdom of Great Britain and Northern Ireland". Report of the Working Group. Para 43.270. Accessed 05 July 2024. https://documents.un.org/doc/undoc/gen/g22/612/26/pdf/g2261226.pdf?token=fElmPitCA8ia9iyWwf&fe=true

effective legislative measures on gender recognition, equal access to abortion, right to health for Trans persons and a ban on the conversion therapy.[124] Likewise Finland also recommended for equal access to abortion.[125]

USA

The United States of America leads the democratic world for being among the earliest states who have adopted the modern and formally written Constitutions. It was the 'Union of Colonies' which later became the 'United States' after adopting the Declaration of Independence against the British Crown on July 04, 1776. Later the federalists and their opponents agreed to the Articles of Federation, subsequently developed and adopted as the Constitution of United States of America. And it was 1789 when the Constitution being ratified by respective states was put into operation with the inauguration of George Washington as the first president of United States on April 30, 1789.[126] The famous Bill of Rights was incorporated in the Constitution by the end of 1791 wherein all the fundamental rights and freedoms e.g., of religion, speech, press, assembly, due process, fair trial, protection against self-incrimination and double jeopardy and to bear arms etc., are guaranteed.[127] Moreover, the famous Civil Rights Act of 1964 aimed at abolishing discrimination, remains applicable to ensure equality of all the citizen with regards to their civil liberties. Another relevant piece of legislation is known as the Alien Tort Claims Act

[124] UN Human Rights Council. March 2023. "Universal Periodic Review of United Kingdom of Great Britain and Northern Ireland". Para 43.35, 43.156, 43.157, 43.267, 43.268. Accessed July 05, 2024. https://documents.un.org/doc/undoc/gen/g22/612/26/pdf/g2261226.pdf?token=fElmPitCA8ia9iyWwf&fe=true
[125] Ibid. Para 43.39 and 43.155.
[126] Michael J. Garcia et al., 2016. "Historical Note on Formation of Constitution". In *The Constitution of the United States of America: Analysis and Interpretation; Supplement, Analysis of Cases Decided by the Supreme Court of the United States to June 27, 2016*, vol. 114, 14 (US Government Publishing Office).
[127] Ibid. "Amendments to the Constitution". Page 1057.

of 1948 which lays down the mechanism for a tort claimed to redress the violation of some provision of international law. In addition to these federal laws there are a number of states' laws (the details of which are not required here) and the county's regional commitments regarding the promotion of human rights. Regionally, US is yet to ratify the American Charter of Human Rights though the courts do adhere to American Charter.[128]

Besides this domestic and regional legal framework applicable for the protection of human rights United States has had made substantial contributions for devising a system for international recognition of human rights within the scheme of UN Charter. President Franklyn Roosevelt and Eleanor Roosevelt, the then first lady, in fact lead from the front the campaign for the creation and adoption of Universal Declaration of Human Rights (UDHR) from UN General Assembly on December 1948.

It is, however, pertinent to note that in spite of the fact that US remained on the forefront for the international protection of human rights its acceptance of all the core human rights instruments is yet to be completed. It has ratified only a few instruments. The sister covenants (ICCPR and ICESCR), which in fact incorporated civil and political rights and economic, social and cultural rights derived from none other but UDHR, were signed by US only in 1976. Among the covenants only ICCPR is accepted (with a declaration that the same will not have a self-executory effect) since 1992 whereas the other is yet to be ratified. The only two other Instruments i.e. Convention against Torture (CAT) and

[128] Edmundo Vargas Carreño, "Some Problems Presented by the Application and Interpretation of the American Convention on Human Rights." In Am. *UL Rev.* 1980, 30: 127. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/aulr30&section=14.

Convention on Elimination of Racial Discrimination (CERD) were accepted in 1994. Therefore a lot of essential human rights treaties including Convention on Elimination of all forms of Discrimination against Women (CEDAW), Convention on the Rights of Child (CRC) etc., are yet to be ratified by the country.[129]

Within the preview of this legal framework as sketched above from its domestic and (applicable) international law the following section presents an analysis of the enforcement mechanism and institutional structure protecting human rights in US.

One may note that the reluctance of US in ratifying UN human rights treaties is merely because of the complexity oozing from its Constitution itself. The Constitution declares a treaty ratified by the states' authority will become a law of the land, however, the president may only ratify a treaty when the same is endorsed by the two third majority in the US senate.[130] The following text is a verbatim of the excerpt of the relevant provision of the Constitution:

> "The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all the treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land; .."

[129] UN Treaty Bodies. n.d. "Ratification Status by Country". Status of United States of America. Accessed 06 July 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187
[130] United States Senate. n.d. "The Constitution of the United States". Article 6. https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm

For 'authority of the US' here the courts consider the US congress and therefore draw a distinction between the self-executing treaties and the others which require legislative action in aid. The former are thus directly applied by the courts.[131]

The US Supreme Court in particular and judiciary in general enjoys an absolute independence in order to exercise its powers in interpreting the law and Constitution for the protection of human rights as enshrined in the Constitution.[132] It was *Marbury v. Madison* which posed a question before the Court that who can ultimately decide in US what the law is? And since the beginning of 19th century (1803) the court remains adherent to the slogan, "*it is explicitly the province and duty of Judicial Department to say what law is*". And in *Brown v. Allen* in 1953, the Court held, '*we are not final because we are in fallible but we are infallible only because we are final'*.

This unique and complex composition of legal and constitutional constraints usually do not allow the US courts to frequently apply international human rights law in domestic litigations. Having analyzed the various aspects of the approach preferred by the US judicial institutions with regards to the application of international human rights law, one may safely conclude that US adheres to IHRL based on its domestic law. The latest review of the US human records by Human Rights Bodies has thus revealed a sort unwelcoming results.

[131] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
[132] Anne Bayefsky and Joan Fitzpatrick, "International Human Rights Law in United States Courts: A Comparative Perspective." In *Mich. J. Int'l L.* (1992) 14:1. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mjil14&section=8.

The only treaty body to which US has accepted the reporting procedures i.e. Human Rights Committee which monitors the enforcement of ICCPR by the states parties, has reflected the following 'concluding observations' after reviewing the latest/5th periodic report submitted by US, in December 2023. The Committee required, with concerns;

a. Fuller incorporation of the Covenant in domestic law,[133]
b. Establishment of National Human Right Institution,[134]
c. Accountability the state's agents and intelligence for abuses of human rights pertaining to custodial torture, unlawful detentions and inhuman and degrading treatments,[135]
d. To withdraw the reservation on article 20 to ensure effective protection against hate speech,[136]
e. To effectively eliminate racial disparities and discriminations,[137] and also to eradicate gender and sex based discrimination, [138] and to repeal the laws discriminating on the basis of sexual orientation and gender recognition,[139]
f. Protection of women and girls against violence,[140]
g. To decriminalize abortion and provide safe, legal and confidential access to abortion,[141]

[133] UN Human Rights Committee. December 2023. International Covenant on Civil and Political Rights – Concluding Observations on the 5th Periodic Report of the United States of America. Accessed 09 July, 2024. Para 4 and 5. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F5&Lang=en
[134]Ibid. Para 7.
[135] Ibid. Para 9.
[136] Ibid. Para 11.
[137] Ibid. Para 13.
[138] Ibid. Para 15.
[139] Ibid. Para 18.
[140] Ibid. Para 21.
[141] Ibid. Para 25.

h. To take measure aiming at abolishing death penalty,[142]
i. To completely ban the use of force through drones for extra-territorial killings,[143]
j. To put an end to gun violence,[144]
k. To take measures to prevent and mitigate the effects of climate change,[145]
l. To effectively criminalize act of torture at the federal level, [146]
m. To take fulfil its obligations in order to effectively prohibit human trafficking,[147]
n. To strength right to privacy,[148]
o. To enhance efforts for the safety of journalists to ensure freedom of expression,[149]
p. To effectively guarantee and protect the right to freedom of assembly,[150] and
q. To ensure fundamental rights for indigenous people.[151]

This precise presentation of the Committee's observations transpires that treaty obligations pertaining to almost each and every article of the Covenant is being violated. The urge for a strict compliance is therefore obvious.

[142] Ibid. Para 31.
[143] Ibid. Para 33.
[144] Ibid. Para 35.
[145] Ibid. Para 39.
[146] Ibid. Para 43.
[147] Ibid. Para 51.
[148] Ibid. Para 57.
[149] Ibid. Para 59.
[150] Ibid. Para 61.
[151] Ibid. Para 67.

Likewise, the Human Rights Council which is a charter based body and conducts universal periodic review of all the UN members, has reflected similar concerns. The group of states as reflected in the various indexes as top liberal democracies e.g. Norway, Sweden, Iceland and Finland had made some similar observations and recommendations for USA in its latest universal periodic review (UPR) conducted by the Human Rights Council in December 2020. Norway asserted for repealing the decision of resuming the capital punishment and urged to abolish it permanently and asked for lifting restrictions on funding programs for other states aiming at the promotion of women's access to sexual and reproductive health.[152] Sweden urged for the introduction of moratorium on death punishment.[153] Iceland emphasized on eliminating discrimination on the basis of, *inter alia,* sexual orientation and gender identity, the abolishment of death penalty and to ensure fuller and equal access to sexual and reproductive health of women and children.[154] Finland also pushed for the ban on death punishment and to ensure access to essential health services for women and girls.[155] If we include Denmark in the list, it also seconded such

[152] UN Human Rights Council. December 2010. "Universal Periodic Review of the United States of America". Para 26.180 and 26.299. Accessed July 05, 2024. https://documents.un.org/doc/undoc/gen/g20/348/52/pdf/g2034852.pdf?token=KtXzmtRo8Xc9yYa96R&fe=true

[153] UN Human Rights Council. December 2010. "Universal Periodic Review of the United States of America". Para 26.206. Accessed July 05, 2024. https://documents.un.org/doc/undoc/gen/g20/348/52/pdf/g2034852.pdf?token=KtXzmtRo8Xc9yYa96R&fe=true

[154] UN Human Rights Council. December 2010. "Universal Periodic Review of the United States of America". Para 26.140, 26.192 and 26.307. Accessed July 05, 2024. https://documents.un.org/doc/undoc/gen/g20/348/52/pdf/g2034852.pdf?token=KtXzmtRo8Xc9yYa96R&fe=true

[155] UN Human Rights Council. December 2010. "Universal Periodic Review of the United States of America". Para 26.305. Accessed July 05, 2024. https://documents.un.org/doc/undoc/gen/g20/348/52/pdf/g2034852.pdf?token=KtXzmtRo8Xc9yYa96R&fe=true

recommendations by requiring rescindment of restrictions imposed by US in the way of equal access for family planning services.[156]

It is interesting to note that none of the Nordic Sates form the group has expressly pointed out for any legislative or other measures for the women's and girls' right to abortion in case of USA as they consistently do for other countries.

France

Subsequent to French Revolution and the Declaration of the Rights of Man and of the Citizen, in 1789, the country adopted its first Constitution in 1793. That is also known as the Constitution of the French First Republic. The latest version of the Constitution as being presently enforced is of the 5th republic adopted by a referendum in 1958 and further amended in 2008. The new Constitution guarantees equality of all citizens before law without any distinction on the basis of origin, race or religion.[157] The other fundamental human rights are guaranteed in the preamble of the Constitution of 1946. The country has also adopted the French Declaration of the Rights of Man and of the Citizen, 1789 to be applied and enforced by law. Para 14 of its preamble also refers to the duty of the state to respect international law.[158] Consequently, the applicable human rights regime in France gets much strengthened because it is a state party to all the core UN human rights

[156] UN Human Rights Council. December 2010. "Universal Periodic Review of the United States of America". Para 26.304. Accessed July 05, 2024. https://documents.un.org/doc/undoc/gen/g20/348/52/pdf/g2034852.pdf?token=KtXzmtRo8Xc9yYa96R&fe=true

[157] Constitution (France) of October 4, 1958. Article 1. Accessed July 09, 2024. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf

[158] Preamble to the Constitution of October 27, 1946. Section 14. n.d. Accessed July 09, 2024. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf

instruments. Moreover it has had accepted the jurisdiction of relevant treaty bodies to receive 'communications' as well as 'individual complaints' against it. [159] Finally, by virtue of article 55 of the Constitution the European Convention of Human Rights, as being ratified by France, is also binding on the state and courts do adhere not only to the provisions of the Convention but also to the rulings of the European Court of Human Rights while shaping the decision in domestic human rights cases.[160] Hence ECtHR takes precedence over the French domestic laws.[161] The courts also have a strong mandate for the judicial review of any legislation contravening Constitution or an international obligation.[162] Besides this strong judicial mandate for the protection of human rights under international as well as domestic law, there exist French National Consultative Commission on Human Rights with a broad and independent mandate pertaining to monitoring and reporting to the international human rights bodies and advising to the government and parliament on the specific human rights issues. The Commission has long history since its establishment from as early as 1947 and is considered as the world oldest national human rights institution. UN Human Rights Council generally appreciates the Commission for its absolute coherence with 'Paris Principles' – UN standards for the National Human Rights Institutions.

[159] UN Human Rights Treaty Bodies. n.d. "View of the Acceptance of Procedures and Status of Ratifications by Country – France". Accessed July 09, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=62
[160] Constitution (France) of October 4, 1958. Article 55. Accessed July 09, 2024. https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf
[161] Myriam Hunter-Henin. 2011. "Horizontal Application of Human Rights in France: The Triumph of the European Convention on Human Rights," *Chapter* 3. Pp 98–124. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626442.
[162] Ibid. article 61.

To have an oversight of the performance of the functioning of this legal and institutional framework for the protection and promotion of human rights in France, a brief reflection of the stance of selected Human Rights Bodies i.e. Human Rights Committee and Human Rights Council is exhibited below.

Human Rights Committee in its (last online available) review of the 5th periodic report has observed that the state should review and bring in conformity with article 18 of ICCPR its Act No. 228 of March 2004 and 1192 of 2010 which restricts face coverings in public. The law thus appears to be violating and infringing the freedom of expressing one's religious beliefs and practices.[163] Moreover, the country was required to continue its effort to improve and ensure effective protection of minorities as required under article 27 of the Covenant.[164] The Committee specifically observed and required form the state to ensure equality and take notice of the incidents of racial discrimination against the people of African origin and to effectively prosecute those soldiers involved in sexual abuse of children. These minor recommendations in fact reflect that there are no systematic violations of the provisions of the Covenant. The issues raised in subject concluding observations have been replied by France in subsequent (6th) report but the Committee didn't have yet reviewed the 6th periodic report submitted by France.

The Human Rights Council's latest review of the country also has invited a slightly different response by the Nordic states (also referred as the top liberal democracies in this

[163] Human Rights Committee. 2015. "Concluding Observations on 5th Periodic Report on ICCPR by France". Accessed July 09, 2024. Para 22. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FFRA%2FCO%2F5&Lang=en

[164] Ibid. para 6.

research) with regards to France. Norway and Sweden did not make any likely recommendations as they consistently did for USA and UK i.e. to ensure equal access to abortion, gender orientation, and the rights of LGBTIQ people. However, Iceland urged for the introduction of self-identification process for gender recognition which should be extendable to include non-binary and third or other gender orientations.[165] And Finland raised only a point for the incorporation of 'consent based rape' into French criminal law.[166]

The preceding analyses suggests a slightly different picture of the state of human rights for France as compared to the UK and much different as compared to the US. The UK and the US both have a Common Law tradition, whereas, France follows the Civil Law tradition which brings it nearer to Nordic States in many regards. The US appears to be a completely different planet with regards to approach for defining, recognizing and implementing human rights. This exceptional attitude of the US brings to surface a lot of very serious questions in order to label as to whether UN human rights are relative to indigenous orientations in their form or uniform. The US on the other hand is one of the leading and earlier proponents of incepting the idea of international human rights in UN charter and UDHR. It is therefore an unresolvable paradox and a dilemma of all times for the esteemed researchers, scholars and lawyers of human rights across the regions and continents.

[165] UN Human Rights Council. July 2023. "Report of the Working Group on the Universal Periodic Review of France". Accessed July 05, 2024. Para 45.63 and 45.153. https://documents.un.org/doc/undoc/gen/g23/125/85/pdf/g2312585.pdf?token=pTth1tmTxjz0a6iY8I&fe=true

[166] UN Human Rights Council. July 2023. "Report of the Working Group on the Universal Periodic Review of France". Accessed July 05, 2024. Para 45.264. https://documents.un.org/doc/undoc/gen/g23/125/85/pdf/g2312585.pdf?token=pTth1tmTxjz0a6iY8I&fe=true

2.3 The Recognition and Protection of Human Rights in Non-Liberal Democracies

Democracies other than the liberal democracy may generally be prescribed as non-liberal democracies. However, a range of terms for various forms is usually found in the literature. The terms include the illiberal democracies, authoritarian, populist and the conformist democracies. Before, this chapter indulges in the research to analyze the statistics and records to have a well-founded opinion regarding the state of human rights in non-liberal democracies, it is needful to clearly categorize the countries falling within the respective forms of non-liberal democracies.

2.3.1 Forms of Non-Liberal Democracies

Most commonly relied upon factor which is considered by many political scientists[167] as an element which decisively describes the non-liberal democracies is that the countries devoid of liberal values, generally do not have Constitutional constraints on the institutions whose functions is to ensure free and fair process for the formation of a requisite representative government. The term 'illiberal democracies' is also in use and applied for societies governed under similar conditions.[168] In the absence of such legal constraints the subject electoral institutions fail to guarantee level playing field for all the contesting parties representing different (at times opposing) ideologies. Consequently, the powerhouses (often referred to as the establishments) generally do not allow the will of

[167] Paul Blokker, "Populism and Illiberalism," in *Routledge Handbook of Illiberalism* (Routledge, 2021), see generally, https://www.taylorfrancis.com/chapters/edit/10.4324/9780367260569-21/populism-illiberalism-paul-blokker.
[168] Bell, Daniel A., David Brown, Kanishka Jayasuriya, and David Martin Jones. *Towards illiberal democracy in Pacific Asia*. Palgrave Macmillan UK, 1995.

people to choose their ruler (Like China). Such ex-factor elements either have influence in part or fuller control on the electoral processes and subsequently on the results thereof. In some cases these authoritative element can restrict an equal opportunity to contest and like control the freedom to campaign etc., (in Iran for instance). The oppositions or other minority groups are therefore not given a fair and credible chance to win the polls.

Authors, such as Farid Zakria, find illiberal democracy devoid of Constitutional Liberalism.[169] He asserts that the illiberal countries are those which have a clear splits in the populations and the majority groups do not tolerate the fundamental freedoms of the minority groups. In the absence of such an effective 'Legal Constitutionalism', these societies thus suffer at the hands of the tyranny of a majority. (Like in India as the case may be). With a concentration of such centralist's dominant elements these majoritarian orders thus form another, relatively recent, offshoot of illiberal democracy which is often referred to as 'Populist Governments'.[170] These are the governments where leaders pose themselves as the champions of the common majority against all others.

The expression 'Non-liberal' remains inclusive of 'authoritarian governments' also. These are the countries with less democratic values and with poor human rights records. Authoritarianism rejects plurality and believes in strong central power with less or no constraints.[171] If one asks what makes a state authoritarian in the present day world? The answer must include factors such as 'electoral processes', 'government with less

[169] Zakaria, "The Rise of Illiberal Democracy," 22.
[170] Hugo Canihac, "Illiberal, Anti-Liberal or Post-Liberal Democracy? Conceptualizing the Relationship between Populism and Political Liberalism," *Political Research Exchange* 4, no. 1 (December 31, 2022): 2125327, https://doi.org/10.1080/2474736X.2022.2125327.
[171] Juan Linz J, "*An authoritarian regime: Spain"*, Tidnings och Tryckeri Aktiebolag, 1964.

accountability', and with 'limited freedoms of religion' and 'expression'. Authoritarian governments usually take the form of military dictatorships, oligarchies, one party rule and monarchies.

Yet another, though rare in use, in the existing literature, is a form of government which may be called 'Conformist Democracy'. Generally being experimented among the societies with strong nationalisms or religious ideologies. Conformism literally means a strong tendency to subscribe to the ideas, beliefs or behavior of a particular group.[172] Earlier, writings like 'Culture of Conformism: Understanding Social Consent', by Patrick Colm Hogan, have explored the very paradigm of studying and articulating the social behaviors and political dimensions forming Conformism.[173]

Having analyzed all the possible aspects of the various elements distinguishing the liberal democracies from the non-liberals, it may be concluded that the nuclear element which may draw a clear distinction between these two is the content and scope of the individual liberty. Moreover, it also takes into consideration the legal and Constitutional framework of the respective political order under which such liberty is guaranteed and protected.

On the other hand, among the non-liberal societies, those which accord religion a Constitutional status, adhere to the idea of human dignity instead of individual liberty. All

[172] https://www.collinsdictionary.com/dictionary/english-word/conformism
[173] Patrick Colm Hogan, *The Culture of Conformism: Understanding Social Consent* (Duke University Press, 2001), https://books.google.com/books?hl=en&lr=&id=doRRo75SGoQC&oi=fnd&pg=PP12&dq=Hogan,+Patrick+Colm.+The+culture+of+conformism:+Understanding+social+consent.+Duke+University+Press,+2001.&ots=VNZCwN04Nt&sig=BFczUV55JSPuGXOW7A2gwUJA2g8.

the Abrahamic religions e.g., Judaism, Christianity and Islam generally have faith in the dignity and honor of human person. The public good or human welfare is, therefore, defined as per the Will of God instead of the Will of individuals in such political orders.

For the Muslim States if, as theoretically analyzed, the phrase 'Conformism' best explains their politico-legal order. It is interesting to note that in an Islamic polity the ruler or sovereign is bound to exercise his powers under the strict rules of Shariah[174] where as in liberal orders the respective Constitutions ensure the individual liberty against the sovereign prerogative.

Other phrases such as social and capitalist democracy are also in use which may understandably be ascribed to the political orders formed on 'socialist' and 'capitalist' ideologies, respectively.

2.3.2 The Legal Framework Protecting Human Rights in Representative Non-Liberal Democracies

Having descriptively distinguished the non-liberal democracies it will be needful to figure out some representative states which are undergoing illiberal orders. For this purpose the research and data as quantified by the V-Dem project, which is generally trusted by many individuals as well as the institutions (e.g. Our-World-in-Data *et al.*), is hereby relied upon. Accordingly Russia along with Hungry and Poland, China, Turkey and Iran are frequently

[174] Quran. 4:59.

listed as non-liberal democracies.[175] The similar statistics are reflected by Deliberative Democratic Index with minor shuffling and additions in the list including Venezuela and Saudi Arabia.[176] The human rights records of these countries, as examined and reviewed by the respective UN Human Rights Bodies, are presented below.

Russia

The legal framework for the recognition, protection and implementation of human rights in Russian is primarily devised under the federal Constitution, adopted in 1993 and further amended in 2020. The Constitution declares a wide range of rights with a peculiar distinction of civil and human rights. Second chapter of the Constitution which is dedicated to civil and human rights includes very comprehensively all the rights of the Universal Declaration of 1948. The social and economic rights e.g., right to work, social security, home, education and health etc., are declared with more comprehensive and clear expression but nonetheless the civil and political rights e.g., of religion, association, assembly, expression and to elect and be elected through elections and referendums. Article 2 of the Russian Constitution upholds the dignity, freedom and other civil rights of man. The Constitution apparently codifies all the fundamental human rights. Judicial protection of human and civil rights is guaranteed.[177] Like the American Constitution declares human rights as 'self-evident' its Russian counterpart holds them as having 'direct force' i.e. self-executing.[178] This kind of approach, however, is considered by critics as a

[175] Freedom House (2024) – processed by Our World in Data. "Electoral democracies" [dataset]. Freedom House, "Freedom in the World" [original data].
[176] Deliberative Democracy Index (2023) – processed by Our world in data. "V- Dem". https://ourworldindata.org/grapher/deliberative-democracy-index-vdem?tab=table
[177] The Constitution of the Russian Federation 1993 as amended in 2020. Article 45.
[178] Ibid. Article. 18.

double edged weapon. At times it holds the supremacy of the rights to be directly applied but generally its language remain subject to an extreme judicial discretion in the absence of implementing legislation.[179]

Besides the domestic legal structure applicable for the protection of human rights, the Russian Constitution declares International law to be considered as an integral part of the legal system and will supersede its domestic law.[180] The constitution also recognizes human rights as provided in International Treaties and Customs.[181] Article 55 further makes it appoint that the rights as provided in the Constitution must be interpreted harmoniously with the standards as incorporated in International Treaties. This provision has in fact provided a wide range of scope to the courts for reconciling the domestic legal content providing human rights with the regional (EU) as well as UN human rights standards. The Russian Constitutional Court as well as other courts, thus, have the tendency of applying international law in domestic cases.[182]

Having seen the status of international law within the Russian legal system it will be pertinent to know to what an extent the country is part of the regional and international human rights law regime.

[179] William W. Schwarzer, "Civil and Human Rights and the Courts under the New Constitution of the Russian Federation," in *Int'l L.*, vol. 28 (HeinOnline, 1994), 830. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/intlyr28&section=56.
[180] The Constitution of the Russian Federation 1993 as amended in 2020. Article 15(4).
[181] The Constitution of the Russian Federation 1993 as amended in 2020. Articles 15 (4) and 17.
[182] Gennady M. Danilenko, "Implementation of International Law in Russia and Other CIS States," *Wayne State University School of Law*, 1998, 23, https://www.nato.int/acad/fellow/96-98/danilenk.pdf.

As regards the regional framework, the country remained a state party to the European Convention on Human Rights since May 1998 wherein it has had accepted the jurisdiction of the European Court of Human Rights to address any abuses of the convention on its territory. However, since it invaded Ukraine in March 2022, Russia withdrew its accession to ECHR and subsequently the European Court of Human Rights ceased to have its jurisdiction on Russia with regards to the enforcement of the Convention. During this period the European Court did not have the requisite cooperation from the Russian courts and government as per the requirement of the Convention. In spite of Constitutional amendment which in fact empowered the Constitutional Court to adopt and implement the decisions of European Court of Human Rights, the Court remained reluctant in doing so on the touchstone of ascertaining the constitutionality of such decisions.[183] Having observed the state of compliance with regional commitments we move further to analyze the status of implementation of UN human rights treaty obligations.

Succeeded from USSR, Russia is party to UN core human rights instruments including Convention against Torture since 1987, International Covenant on Economic Social and Cultural Rights and International Covenant on Civil and Political Rights since 1978 (also accepted it optional protocol since 1991), Convention on Elimination of all forms of Discrimination against Women since 1981 (its OP since 2004), Convention on Elimination of Racial Discrimination since 1969 and Convention on the Rights of Child since 1990. [184]

[183] Lauri Mälksoo and Wolfgang Benedek, *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, 2018), 391. https://books.google.com/books?hl=en&lr=&id=gBA6DwAAQBAJ&oi=fnd&pg=PR7&dq=Russia+and+European+Court+of+Human+Rights+&ots=Kp4WRxBPE4&sig=uEz5tCftzC-e9l1XIENXpB_PBpk.
[184] UN Treaty Bodies Data Base. "View of the Status of Ratification by Russian Federation". Accessed July 30, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=en

The compliance with the treaty obligations *vis*-a-*vis* the domestic application and implementation of UN human rights standards as reviewed by human rights bodies e.g., Human Rights Council and Human Rights Committee etc., is not found to be optimistic. The latest Universal Periodic Review of the state, held during April 2024, has recommended and required as following:

a. The state must ratify the UN convention for the Protection of all Persons against Enforced Disappearance.[185]
b. Ratify the Optional Protocol to the Convention against Torture. Criminalize the act of torture and investigate all the cases involving the act of torture.
c. Ratify the 2nd OP to ICCPR and abolish death penalty. And also revise or repeal the laws inconsistent the provisions of the Covenant.
d. Establish, strengthen and ensure fuller and non-selective engagement with UN human rights enforcement mechanisms. (16 recommendations)
e. Ensure compliance with treaty obligations pertaining to freedom of expression, and association (16 recommendations)
f. Ensure the protection of LGBTI+ persons and protection against gender-based violence. (15 recommendations)
g. The Nordic States including Norway, Sweden, Finland and Denmark did raise voices for the rights of LGBT persons, release of journalists to ensure freedom of

[185] UN Human Rights Council. "Report of the Working Group on the Universal Periodic Review of Russian Federation". Para 35.1 to 31.5. Accessed on July 30, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=en

press and expression, to repeal the legislation aimed at restricting the work of civil society and to end the gender based violence.[186]

The Human Rights Council's Universal Periodic Review does not seem to endorse the output of the Russian domestic human rights machinery. Similarly the Human Rights Committee, after examining 8th periodic report submitted in 2022 by Russia on the implementation of International Covenant on Civil and Political Rights, has forwarded following concluding observations. The Committee expressed its concerns on the non-implementation of its views in a number of cases by the Russian Constitutional Court. The individual complaint procedure requires in accordance with the Optional Protocol that the state party has to implement the views of the committee. The Committee, therefore, reiterated for devising a mechanism so required.[187] The state was required to ensure national legislation in conformity the provisions of the Convention and to establish a sound institutional framework for reporting, implementation and follow-up of the recommendations of the Committee. The Committee also urged the state party to fulfil its treaty obligations with regards to the enforcement of substantial rights as declared in the Covenant e.g. right to life etc., particularly in a situation of armed conflict.[188] Moreover, the observations include the concerns on discrimination on the basis of sexual orientation, domestic violence, counter terrorism measures, torture and ill treatment, independence of judiciary and fair trial. The Committee particularly emphasized for the protection of lawyers and journalists with regards to strengthening the freedom of expression and culture

[186] Ibid.
[187] Human Rights Committee. "Concluding Observations on the 8th Periodical Report of Russian federation". Para 4. Accessed July 31, 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FRUS%2FCO%2F8&Lang=en
[188] Ibid. Para. 7.

of pluralism as required in the Convention. The Committee also mentioned in its previous 'concluding observations' requiring the undoing of the legislation restricting freedom of association and reiterated for the same. It may, therefore, be concluded that the findings of the committee, as analyzed above, with regards to the implementation of ICCPR brings down the ranks of the Russian Federation much below as compared to the liberal democracies.

China

The international relations scholars and researchers generally place China on the top of the list for the countries undergoing authoritarian systems and with poor human rights records. Many critics like Andrea J. Worden apprehend that China wants to redefine the international human rights law system for its own ends.[189] The Chinese model will, therefore, help us understand how the human rights are defined and implemented in an authoritarian order. The authoritarian regimes, as being shaped through this model, affect the content and form of human rights across other regions.[190] Marina Svensson, one of the leading and prolific publicist on the subject, has explored in more detail the foundations of the Chinese attitude towards UN human rights law system.[191] Having reviewed western and Chinese scholarship on the human rights discourse in China one may admittedly accept that there exist a clear divide and departure between the liberal and Chinese conception as

[189] Andrea Worden, "With Its Latest Human Rights Council Resolution, China Continues Its Assault on the UN Human Rights Framework," *China Change* 9 (2018).
[190] Tanner Larkin, "China's Norm-fare and the Threat to Human Rights." *Columbia Law Review* 122, no. 8 (2022): 2285-2322.
[191] Marina Svensson, "Human Rights in China as an Interdisciplinary Field: History, Current Debates, and New Approaches," in *Handbook of Human Rights* (Routledge, 2012), 685–701. https://api.taylorfrancis.com/content/chapters/edit/download?identifierName=doi&identifierValue=10.4324/9780203887035-68&type=chapterpdf.

well as the practice of human rights. The Chinese scholarship thus glorify their ideology as the 'oriental human rights' in comparison with its western counterpart, 'the liberal human right'.

Domestically, the Constitution of the People's Republic of China (of 1982 as lastly amended in March 2018) has had declared that the state shall respect and protect human rights as prescribed by law.[192] However, the socialist system as defined by the Communist Party of China enjoys the inviolability and supremacy above all laws.[193] The Party is the sole ruling party since the Republic came into being 1949 and therefore has the leading role in characterizing the Constitution and so the Chines model of human rights. The rights declared therein include equality before law, right to elect and be elected, freedom of speech, assembly, association, press, procession, religious belief, liberty i.e. prevention against unlawful arrests, personal dignity and honor, privacy, to petition against government, right and obligation to work, to rest, social security, right and obligation to receive education, right to form family with an obligation to practice family planning.[194]

Besides these rights the Constitution further lays a list of citizens' obligations ensuring the national interest, integrity, security and public order while exercising the above mentioned rights.[195] Peculiar features of the Chines human rights model makes work, education and family planning as an obligation and duty more than a right. Moreover, all other civil, social

[192] "Constitution of the People's Republic of China," Article 33. Accessed August 2, 2024, https://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html.
[193] "Constitution of the People's Republic of China," Article 1.
[194] "Constitution of the People's Republic of China." Article 33 – 50.
[195] "Constitution of the People's Republic of China." 51 – 56.

and political rights are narrowly defined within the strict limitations in the interest of the government and state. Social rights which are positive in nature are therefore not affected rather they are more strengthened in this model but other rights (civil and political) are far from the liberal standards. Subject to the Constitution there are other subordinate laws for the enforcement of rights. The Peoples Court (the apex court) and Peoples Procuratorates are bodies mandated to grant remedial compensations for the violations of human rights. Additionally, the Chines National Human Rights Commission is also legally mandated to probe, investigate and grant compensation with regards to the implementation of the rights as protected in the Constitution.[196] Though legally empowered to do so but practically as critics observe the Commission is ineffective for it is not independent of the government.

As regards the international human rights law regime, China has ratified a few of the UN human rights instruments including Convention against Torture (since 1988), Convention on Elimination of all forms of Discrimination Against Women (since 1980), International Covenant on Economic Social and Cultural Rights (since 2001), Convention on Elimination of Racial Discrimination (since 1981) and Convention on the Rights of Child (since 1992).[197] However, none of the procedures such as for reporting, individual complaints and visits or inquiry is accepted by China. It therefore seems that China does not recognize the UN human rights enforcement mechanism.

[196] "Organic Act of the Control Yuan National Human Rights Commission - Article 2 - Laws & Regulations Database of The Republic of China (Taiwan)," accessed August 2, 2024. https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0010119.
[197] UN Treaty Body Database. "View of the Ratification Status by Country – China". https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=36

The Human Rights Council in its most recently held 56th session in June-July 2024 conducted the country's Universal Periodic Review wherein it required as following:[198]

a. 15 recommendations for the ratification of International Covenant on Civil and Political Rights along with 9 recommendations reiterating for the acceptance of Optional Protocol to the Covenant.
b. 2 recommendations for the ratification of Optional Protocol to Convention against Torture.
c. 13 recommendations for eliminating the discrimination against women and 9 recommendations to curb violence against women.
d. 9 recommendations to ensure and guarantee freedom of expression.
e. 10 recommendations for the protection of civil society.
f. 11 recommendations for strengthening freedom of religion, thought, conscience and belief.
g. Norway and Sweden along with United States and Malta has emphasized for the rights of LGBT persons.

Since the country is no more a party to ICCPR, it has, therefore, not accepted the reporting procedure for Human Rights Committee thus no 'concluding observations' of the subject treaty body exit. However, for the purpose of this research its report on International Covenant on Economic Social and Cultural Rights and concluding observations thereupon by the Committee on Economic Social and Cultural Rights are analyzed. The Committee

[198] UN Human Rights Council. "Report of the Working Group on Universal Periodic Review of China" 2024. Accessed August 2, 2024. https://documents.un.org/doc/undoc/gen/g24/034/58/pdf/g2403458.pdf?token=a8g4alWJxPKebcpuJU&fe=true

required from China to withdraw its reservations on the Covenant and fully incorporate the provisions of the Covenant in domestic law.[199]

Kingdom of Saudi Arabia

Apart from the liberal and authoritarian democracies Saudi Ariba is a Kingdom of classical model undergoing a familial or monarchical rule of Saud family. The politico-legal order of the country is a complex blend of Islamic law (Shariah), monarchy and tribal customs. The King being head of the government and state has all and overarching power and authority. The executive authorities are exercised by the ministers appointed by the King from the royal family. The legislation may directly be issued through the royal decrees or as may be recommended by the Shura Council whose members (experts of Islamic Law) are appointed by the King. Judicial functions are exercised by the jurists subject to Sharia wherein the King is the final court of appeal. Such unfettered power of the Monarch is not directly vested by the people but acclaimed by the King for him being the custodian of the two holiest places of Islam.

The Kingdom does not have a formal Constitution however a royal decree issued in 1992 is commonly referred as to its Basic Law of Governance. According to the Basic Law the Quran (the holy book revealed to Prophet Muhammad peace be upon him) and the

[199] UN Committee Economic and Social Council. March 2023. "Concluding Observations on the third Periodic Report of China". Accessed August 5, 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FCHN%2FCO%2F3&Lang=en

traditions/practices (Sunnah) of the Prophet Muhammad (peace be upon him) is the Constitution of the Kingdom.[200]

The Basic Law thus enshrines the duties and powers of the state and rights of the citizens. Like the Chines Constitution, the Kingdom enjoins itself to while declaring, "The state shall protect human rights in accordance with the Shariah".[201] Within this prescribed framework the Kingdom further ensures right to social security,[202] to work,[203] education,[204] public health,[205] environment,[206] and security of person.[207] The right fair trial (crime and punishment according to Shariah)[208], freedom of expression for education and national unity[209], right to privacy of corresponding and communication according to Shariah[210] and right to complaint.[211]

Having provided these basic rights in accordance with Shariah, the Basic Law also accommodates International law in this regard. Article 70 of the Law provides for the adoption of international law subject to the royal decree whereas Article 81 ensures that "with regards to treaties and agreements, the application of this [Basic] law shall not violate commitments of the Kingdom towards other states, international organizations and

[200] "Basic Law of Governance". Article 1.| The Embassy of The Kingdom of Saudi Arabia, accessed August 6, 2024, https://www.saudiembassy.net/basic-law-governance.
[201] "Basic Law of Governance | The Embassy of The Kingdom of Saudi Arabia." Article 26.
[202] Ibid. Article 27.
[203] Ibid. Article 28.
[204] Ibid. Article 30
[205] Ibid Article 31.
[206] Ibid. Article 32.
[207] Ibid. Article 36.
[208] Ibid. Article 37.
[209] Ibid. Article 29
[210] Ibid. Article 40.
[211] Ibid. Article 43.

bodies". The kingdom, however, generally ratifies international treaties with a declaration that it shall implement the same subject to Islamic Shariah.

The Sharia Courts which are courts of first instance in the Kingdom as well the Supreme Judicial Council are generally empowered to protect and implement the rights of citizens in accordance with the Shariah and Basic Law. More specifically there exist since 2005 the Human Rights Commission of Saudi Arabia. The Commission is tasked to ensure the implementation of human rights according to international standards.

With regards to international human rights law regime the Kingdom has ratified a few treaties including Convention against Torture (since 1997), Convention on Elimination of all Forms of Discrimination against Women (since 2000), Convention on Elimination of Racial Discrimination (since 1997) and the Convention on the Rights of Child (since 1996). The country has not even signed the sister covenants e.g. International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights. It may also be kept in mind that the Saudi delegate abstained from voting in favor of the Universal Declaration of Human Rights when its resolve was under the consideration of UN General Assembly in 1948. The delegate explained that the declaration had certain elements contrary to Sharia and its drafters have ignored the time tested civilizational values of the world other than Europe.

During the latest Universal Periodic Review of the Kingdom, held during January 2024, the Human Rights Council observed and recommended as follows:[212]

a. An urge to ratify International Covenant on Civil and Political Rights. (23 recommendations)
b. There were around 20 recommendation seeking for the ratification of International Covenant on Economic Social and Cultural Rights.
c. Reiterating for the ratification of 2nd Optional Protocol to Convention against Torture. (12 recommendations)
d. Recommendations pertaining to gender related matters generally acknowledged the existing and applicable framework, however sought for the strengthening measures to continue. However, roughly a dozen states pointed out for the review of legislation ensuring gender equality and also to criminalize all forms of gender based violence.
e. Norway and thirteen other states expressed their concerns on the safety of journalist and urged for strengthening freedom of expression. Similarly there were voices for with an urge for the political rights.
f. Denmark also raised it voice for the freedom of expression and emphasized on the withdrawal of country's reservations on Convention against Torture.
g. There were 15 recommendations seeking the withdrawal of country's reservations on Convention on Elimination of all Forms of Discrimination against Women.

[212] UN Human Rights Council. 2024. "Report of the Working Group on the Universal Periodic Review of Saudi Arabia. Accessed August 8, 2024. https://documents.un.org/doc/undoc/gen/g24/034/65/pdf/g2403465.pdf?token=ETdLlz68xFnOAZ1a4E&fe=true

h. Other and miscellaneous recommendations included the prohibition of child and forced marriages, ratification of Optional Protocols to the Convention on the Rights of Child, gender equality, women health care and the abolishment of the discriminatory male guardianship.

Quite exceptionally for the Kingdom there was no specific recommendation seeking the rights of LGBTQ persons, right to abortion for women and girls.

Since Saudi Arabia is yet to ratify ICCPR so the analysis pertaining to the 'Concluding Observations' of Human Rights Committee is not applicable in its case, however, for the purpose of this research an analysis of the review of Committee on Elimination of all forms of Discrimination against Women on the country's periodic report on CEDAW is considered.

The Committee considered the 3rd and 4th report of Kingdom for its 'concluding observations' during 2020.[213] The Committee expressed its concerns on the reservations made by the country generally and on article 9(2) of the convention whereby the supremacy of Shariah is upheld. The Committee considered such a reservation as incompatible with the very purpose and object of the Convention. It urged that the state party may also amend its Basic Law to implement the treaty obligation with regards to the incorporation of a comprehensive anti-discriminatory legislation. Quite alarmingly, the committee asserted

[213] UN Committee on the Elimination of Discrimination against Women. 2020. Concluding Observations on the Combined Third and Forth Periodic Reports of Saudi Arabia. Accessed August 08, 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FSAU%2FCO%2F3-4&Lang=en

that the traditions, cultural and religion are not to be used to justify discrimination against women as defined in the convention.[214] The committee also sought for the legalization of abortion in cases including rape, incest and severe impairment of the fetus and also to ensure women's' access to safe abortion.[215] Moreover, it required for the compliance by the state party with obligations as spelled out pertaining to equality in marriage, family, economic responsibilities, inheritance, right to property, custody matters and right to divorce. Among these matters a number of issues are subject to the personal status which are to be dealt with in accordance with Shariah. The committee, however, required from the Kingdom to have a codified uniform law in this regard.[216]

Iran

As constitutionally known, the Islamic Republic of Iran, defines its system of Islamic Republic as the one which is based on the faith in the divine sovereignty of God and remains submissive to His commands as revealed to His Prophet and transmitted through the twelve Imams (the decedents of his daughter and son-in-law).[217] Besides being an Islamic republic, the country further declares '*Jafri athna ashri*' as its official faith[218] and necessitates the same the head of the state and other key positions. Iran therefore follows a different politico-legal ideology as compared to Saudi Arabia wherein Quran (the revelation from God) and Sunnah (the traditions of the Prophet) is declared, *per se*, as the Constitution. This peculiar character of the Iranian Constitution shapes the country as a

[214] Ibid. Para 16.
[215] Ibid. Para 48 (b).
[216] Ibid. Para. 63.
[217]Constitution of Islamic Republic of Iran 1979. Article 2. Accessed August 12, 2024. https://biblioteka.sejm.gov.pl/wp-content/uploads/2017/04/Iran_ang_010117.pdf
[218] Ibid. article 12.

quite a different polity than the ordinary liberal democracies and even authoritarian regimes. It may conveniently be categorized as a theocracy. However, for the purpose of this research Iran is kept in the so called non-liberal authoritarian block.

For having an idea about the nature, content and scope of human rights in the regime the fundamental law of the land is analyzed. Chapter three of the Constitution sets forth the fundamental rights while naming them the right of the nation. While ensuring equality without any discrimination of gender, tribe, clan, color and race the Constitution expressly though widely spells out all the human, political, economic, social and cultural rights within the scope of Islamic principles.[219] The list of the rights goes with the rights of women to health care, protection of family and children. Then subject to law the guarantees as to the enjoyment of life, liberty, property and jobs. No one shall be punished for having a certain belief. Expression and publication will enjoy freedom subject to essentials of Islam and public order. Interception with the private communications is prohibited. Subject to Islamic standards and Constitution the freedom of associations and societies is provided. Freedom of assembly and to long march is guaranteed as long as it is not violating the Islamic essentials. The government shall ensure equal opportunity of work, social security and freedom of profession. Government is made responsible to provide free education and housing to every Iranian. Protection against arbitrary arrest and detention and exile and every one's right to be treated with in accordance with law is provided. Similarly some of the basic principles of fair trial including presumption of innocence, no crime and punishment without law, and protection against torture for acquiring confession or other

[219] Ibid. Articles 19-20.

evidence is also incorporated in the Constitution.[220] Article 61 of the Constitution empowers the courts to implement these rights in accordance with the principles of Islam and law.

Additionally, Iran may also subscribe to other human rights standards by accepting international instruments to be endorsed by its parliament *(majles e shura).*[221] The country has, after the revolution of 1979, ratified the Convention on the Rights of Child in 1994 and the Convention on the Rights of Persons with disability in 2009. It is party to the Covenant on Civil and Political Rights and Covenant on Economic Social and Cultural Rights since 1975 and Convention on the Elimination of Racial Discrimination since 1968. The core instruments which are yet to be ratified by the country include among others the Convention against Torture, Convention on Elimination of all forms of Discrimination against Women and all the Optional Protocols.[222]

Within this legal framework for the protection and enforcement of human rights in Iran the international observers are generally critical about the subject performance of the country. Human Rights Council conducted its latest universal periodic review of the country in March 2020 and had following substantial recommendations.[223]

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[220] Constitution of Islamic Republic of Iran 1979. Articles 22-39. Accessed August 12, 2024. https://biblioteka.sejm.gov.pl/wp-content/uploads/2017/04/Iran_ang_010117.pdf
[221]Constitution of Islamic Republic of Iran 1979. Article 77. Accessed August 12, 2024. https://biblioteka.sejm.gov.pl/wp-content/uploads/2017/04/Iran_ang_010117.pdf
[222] UN Treaty Body Database. "View of the Acceptance of the Ratification Status by Country – Iran". Accessed August 13, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=81
[223] Human Rights Council. 43rd Session. March 20, 2020. Outcome of the UPR of Islamic Republic of Iran. Available at: https://documents.un.org/doc/undoc/gen/g20/072/34/pdf/g2007234.pdf

a. Around thirty states sought the ratification of Convention on Elimination of all forms of Discrimination against Women and many of them asked for acceding to its Optional Protocol also. And 26 sates urged on establishing a moratorium on executions and death penalty.
b. Fifteen states asked for the ratification of Convention against Torture and its Optional Protocol.
c. Three recommendations seeking the ratification of second Optional Protocol to Covenant on Civil and Political Rights.
d. Five states asked for the ratification of Rome statute of the International Criminal Court.
e. Eleven states reiterated for the acceptance of the Human Rights Council's procedure pertaining to special rapporteur's visits to examine the human rights situation.

Interestingly no recommendation seeking the rights for LGBT persons and women's right to safe abortions.

The last report reviewed by the Human Rights Committee was the one submitted by Iran in June 2022 on the implementation of Covenant on Civil and Political Rights. The Committee forwarded its 'concluding observations' on the report as following:[224]

a. The state party must ensure that the provisions of the Covenant are given effect in its domestic law and the former is interpreted in the lights of later in case of any

[224] Human Rights Committee. 2023. Concluding Observations on the fourth Periodic Report of Islamic Republic of Iran. Accessed August 13, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=IRN&Lang=EN

conflict thereto. The committee also persuades the country seeking the ratification of 1st Optional Protocol to Covenant to comply with the individual complaint procedures in cases of the violations of rights as provided therein.

b. It required for the establishment of National Human Rights Commission in accordance with 'the Paris Principles' to ensure the implementation of the rights as provided in the covenant.

c. While specifying the violations of articles 2, 6, 7, 14 of the covenant pertaining to the causalities taking place during the protests of November 2023, downing of Ukrainian airplane and poisoning of the schools girls, the Committee urged for the investigations to compensate the victims.

d. The violations of articles 20, 26 and 27 involving the discrimination and hate speech instigating gender based violence pertaining to the rights of LGBT persons were also noted and committee asked for the specific measures as in accordance with abovementioned articles.

e. The Committee also, while contextualizing the universal character of human rights and referring to obligations as incorporated in articles 2, 6, 7, 9 and 26, noted that the consensual sex between the adults and same gender still remains a punishable offence. It therefore required from the state party to repeal the Islamic penal law to decriminalize the consensual sex and also to abolish/undo death penalty (*hudud*) for the same.

f. The state party should take cognizance of the report concerning gender equality in accordance with article 3, 25 and 26 and take measure to ensure *de jure* as well *de facto* gender equality.

g. It was also required that the country must adopt positive legislation, in accordance with article 26, aiming at protecting women and girls from domestic violence and undo the legislation which legalizes marital rape and honor killings.

h. The committee expressed its concerns with regards to the Family Protection Laws of the state which provides for the imposition of the death penalty on willful abortion and required undoing of the same in the context of article 6 of the Covenant.

i. In the context of article 6, 7 and 14 the committee was deeply concerned over the reported large scale executions resulting from the application of Islamic penal laws i.e. *hudud*, *ta'zir* and *qisas*. The committee, therefore, urged the state to seriously implement the measures for the imposition of death penalty as required under article 6 of the Covenant e.g., for only severe crimes, to exempt juveniles and pregnant women and grant respites, mercies, and pardons.

j. The Committee also urged for the effective measures to be taken for the protection against torture as provided in article 7 of the Covenant. Moreover, protection against corporeal punishment and inhumane treatment was also required.

k. The committee also expressed its dissatisfaction with regards to the implementation of the obligations as incorporated in the Covenant for the liberty and security of the individuals, fair trial, prevention against arbitrary arrest and detention and safeguards during the custody.

l. Moreover, the freedom of movement, right to privacy and freedom of expression and association is also not found as per the treaty obligations. The Committee therefore urged for the concrete and substantial measures to be taken through the legislature as well as executive.

m. The Committee lastly put a special emphasis for the rights of the minorities to be equally treated with other citizens. It was recommended that the minorities should be given effective representation in the forums responsible for making laws and policies which particularly affect them.

The abovementioned precise purview of the insights of the Human Rights Committee depicts rather a very dark picture of the implementation of UN human rights standards in spite of the fact that Iran has expressly provided almost all these rights in its Constitution. The only departing factor in theory is that the country implements such standards subject to subscription and adherence to Islamic law which is protected in its Constitution. The universalists may find a ground to substantiate their presumption that only uniform standards of human rights could bring the optimistic results however at the same time it may also be noted that universal scheme of human rights in part provides freedom of religion, culture and related rights. So this may be considered as the colliding impact of various rights within the United Nations' scheme of human rights which makes the holistic application of UDHR very much questionable.

Turkey

As declared in the Constitution, the Republic of Turkey is a democratic, secular and social state.[225] The fundamental rights individuals, as provided in the Constitution, began with the right to life, honor and protection against torture. Forced labor is prohibited. Everyone has the fundamental right to enjoy his liberty and security which may only be restricted

[225] The Constitution of Turkey, 1995 as amended in 2019. Article 2. Accessed August 18, 2024. https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf

subject to law. Any administrative action violating the prescribed law is liable to the individual's right to petition.[226]

Unlike its Iranian and Saudi counterparts, an unusual feature of the Turkish Constitution is that it provides the subject rights with detailed explanations outlining their scope and limitations. Around 60 articles (i.e., from article 17 to 76 with few others) have been dedicated to incorporate a wide range of civil, political, economic, social and cultural rights. The language pertaining to these rights is quite expressive and inclusive. While mentioning freedom of expression, for instance, it provides and explains freedom of communication, freedom of opinion, freedom of expression, dissemination and publication in separate articles.[227] Similarly, it provides not only the freedom of assembly but explicitly the freedom to hold meetings and marches as well.[228] Moreover, equality in general and particularly of the spouses in formation of family is expressly provided.[229] Other rights include the right to legal recognition, of due process, right to work and rights related to work, right to education, to form unions, health, clean environment, housing, social security, right to vote and to be elected, to join public service and to hold public offices etc.

Article 16 guarantees the basic rights of aliens in Turkey to be protected in accordance with international law, however, international treaties ratified by state shall become enforceable after being ratified by the parliament (Grand National Assembly) with an adoption of

[226] Ibid. Article. 40.
[227] The Constitution of Turkey, 1995 as amended in 2019. Articles 22, 25, 26, 28 and 29. Accessed August 18, 2024. https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf
[228] Ibid. Article. 34.
[229] Ibid. Article 41.

subject enabling legislation.[230] As later amended in 2004, the Constitution further makes it appoint '*in the case of conflict between international agreements duly put into effect, concerning fundamental rights and freedoms and the laws due to difference in provisions on the same matter, the provisions of international agreement shall prevail'*.[231]

On regional level Turkey joined the European Convention of Human Rights in 1987 and has had accepted the jurisdiction of the European Court of Human Rights since 1990. As regards international human rights law the country has ratified all the core instruments along with Optional Protocols.[232] The optional Protocol on Economic Social and Cultural Rights is yet to be ratified and perhaps the only Committee the jurisdiction of which is not accepted by Turkey is the Committee on Enforced Disappearance.[233] The individual complaints procedures for the Covenant on Civil and Political Rights, Convention against Torture, Convention on Elimination of all forms of Discrimination against Women, Convention on the rights of Child and Convention on the Rights of Persons with Disabilities are also accepted by Turkey.[234]

Having widely defined and declared a comprehensive range of human rights, Turkey also has a strong institutional framework for the implementation of the same. Besides the courts and Ombudsman offices having general oversight for the enforcements of human rights in

[230] Ibid. Article 90.
[231] Ibid.
[232] UN Treaty Body Database. "View of the Acceptance of Procedures and the Ratification Status by Country – Turkiye".
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=179
[233]Ibid.
[234] UN Treaty Body Data Base. "View of the Acceptance of Procedures by Turkey". Accessed August 19, 2024. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=179&Lang=EN

the country Turkey has also established in 2016 its Human Rights and Equality Institution. Under its establishing Act[235] the Institution was mandated to eliminate discrimination and perform functions as national Equality Body in addition to the duties as National Human Rights Institution. Section 17 of the Act empowers the institution to receive and decide upon the complaints regarding the violation of human rights.[236] Within this legal and institutional framework the state of human rights, as monitored and observed by the UN Bodies, also needs to be examined. To this end the review and recommendations of Human Rights Council and Human Rights Committee are considered.

The latest Universal Periodic Review of the human rights records of Turkey was conducted by Human Rights Council in June/July 2020 wherein the Council has recommended a number of measures.[237] Collectively a dozen or so recommendations persuaded Turkey for the expediting its pending ratifications of the remaining few instruments e.g. Convention for the Protection of all Persons from Enforced Disappearances and its Optional Protocol, the Optional Protocol on Economic Social and Cultural Rights, Rome Statute of International Criminal Court and Additional Protocols to the Geneva Conventions of 1949. Around twenty states recommended for strengthening the freedom of expression. Other recommendations emphasized for ensuring the effective implementation of subject treaty obligations such as pertaining to repealing of honor crimes, criminalization of domestic and gender based violence and discrimination based on sexual orientation. No particular

[235] Law No. 6701 of 2016. Accessed August 19, 2024. https://www.tihek.gov.tr/public/editor/uploads/1660833133.pdf
[236] Law on Equality and Human Rights Institution of Turkey. Article 17. Accessed August 19, 2024. https://www.tihek.gov.tr/public/editor/uploads/1660833133.pdf
[237] Human Rights Council. 2020. "Report of the Working Group on Universal Periodic Review of Turkey". Accessed August 19, 2024. https://documents.un.org/doc/undoc/gen/g20/072/45/pdf/g2007245.pdf

recommendation from Nordic States seeking legislation for the safe abortion and the rights of LGBT persons.

The Human Rights Committee having examined the initial and perhaps the only periodic report of Turkey on the implementation of Covenant on Civil and Political Rights gave its 'concluding observations' in November 2012.[238] The Committee expressed its concerns on the declaration cum reservation made upon by Turkey at the time of the ratification of the Covenant with regards to limiting the enforcement of subject treaty obligations pertaining to the matters taking place within the territorial jurisdiction of the state and not outside. The committee urged for the withdrawal of this declaration and another reservation made on article 27, related to the rights of minorities, wherein the state accepted the implementation of the Article subject to its domestic law and Constitution.[239] Moreover the committee further required from the state to take effective measures to ensure equal protection of law for LGBT persons and to repeal the legislation reducing punishment for honor killings.[240] It is pertinent to note here that the committee did not observe any specific and systematic violations but recommended measures only aimed at strengthening the existing mechanisms.

Statistically, Turkey has accounts quite similar to the liberal democracies with regards to complying with UN human rights system for implementing International Human Rights

[238] Human Rights Committee. "Concluding Observations on the Initial Report of Turkey Adopted in November 2012. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FTUR%2FCO%2F1&Lang=en
[239] Ibid. Para 5.
[240] Ibid. Para 10, 13.

Law yet many indexes rank it as an authoritarian regime. Among others one reason is perhaps the populist ruling party does not subscribe to 'liberal values' to an optimal extent.

This element among others may commonly be observed with regards to some other countries having governments formed on ideologies not compatible with the 'liberal values' e.g., Afghanistan, Azerbaijan, Burundi, Central African Republic, Chad, DR Congo, Equatorial Guiana, Eretria, Libya, North Korea, Sudan, Syria, Tajikistan, Turkmenistan, Uzbekistan and United Arab Emirates. All these countries have also remained on the hit list of Human Rights Bodies to be 'named and shamed' for noncompliance with UN human rights standards.

The liberal democracies assume that perhaps it is only the liberalism which has ever introduced and protected the best model of human rights. This may be one of the reasons that it does not recognize any other standards of human rights defined within any other system of order. Such an arguable observation leads the research to have an in-depth understanding and substantial analysis of the pros and cons of the United Nations Human Rights System.

2.4 The United Nations Human Rights System

The United Nations Organization came into being in the aftermath of World War II, however, the embryonic idea of the organizations had inspiration from and seems to be the continuity of its predecessors i.e. League of Nations (1919) in a close shot and the Treaty of Westphalia (1648) in the long. As assumed by the League so is declared by the United Nations the very purpose of the organization shall be to achieve and protect international

peace and security. In addition to 'international peace and security', unlike its predecessors the preamble as well as Article 1 clause (2) and (3) of the UN Charter expressly mentions 'human rights', 'fundamental freedoms', equal rights of men and women' and 'of nations small and large' in relation with the very purposes of the organization. The Charter did not though define and enlist in itself the human rights so mentioned. A triangular program aimed at the international recognition, protection and promotion of human rights was, however, envisioned, devised and incorporated in the Charter.

As the Charter reassured that United Nations shall promote universal respect for the observance of human rights,[241] it has mandated the General Assembly to undertake studies and make recommendations as to how international cooperation may be achieved for the realization of human rights and fundamental freedoms for all without any discrimination.[242] This responsibility was assigned to one principal organ of the organization i.e. the Economic and Social Council and all the member states were required to pledge themselves with the Council for the requisite cooperation.[243] In this regard the Council was specifically required to make recommendations.[244] For the fuller achievement of this objective, the Charter further laid down a comprehensive *modus operandi* by requiring from the Council to set up Commissions for the promotion of human rights.[245]

[241] Ibid Article. 55 (c)
[242] United Nations, "United Nations Charter (Full Text)," Article 13(b) United Nations (United Nations), accessed August 23, 2024, https://www.un.org/en/about-us/un-charter/full-text.
[243] Ibid. Article 56.
[244] Ibid. Article 62 (2).
[245] Ibid. Article 68.

To give effect to this provision of the Charter, the Council thus in its meeting held in February of 1946 in London established a Nuclear Commission on Human Rights which had held its first session from January 27th to February 19th, 1947. Eleanor Roosevelt, the then United States' first Lady became the first chairperson of the Commission whereas P.C. Chung of China was elected as the vice chairman and Charles Malik of Lebanon as the rapporteur.[246] The Drafting Committee, after considering a multiple drafts, finalized the UN Declaration of Human Rights.

The final draft was presented in the form of a resolution[247] for the consideration of United Nations General Assembly on December 10th, 1948. The resolution was supported by the 48 UN member states. Eight states abstained from voting, whereas, none among the then 56 members casted a vote in dissent.[248]

In a nutshell the proceeding years witnessed the pursuit of abovementioned triangular program. This journey may be categorized as recognition or the standard setting phase from 1947 to 1954, the promotion phase from 1954 to 1966 and protection phase from 1967 to 1993. The post 1993 or the post-Cold War era may be termed as the era of hot pursuit wherein UN Human Rights Bodies became more pro-actively engaged for the uniform and universal implementation of UN standards through International Human Rights Law. This

[246] United Nations Economic and Social Council. Summary of the Records of 7th Meeting. January 31, 1947.
https://documents.un.org/doc/undoc/gen/gl9/902/37/pdf/gl990237.pdf
[247] UNGA Resolution 217 A of December 10, 1948.
https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf
[248] United Nations Universal Declaration of Human Rights 1948. "History of Declaration". Accessed on August 27, 2024. https://www.un.org/en/about-us/udhr/history-of-the-declaration

triangular program of United Nations has progressed and evolved over the years and today there works a very comprehensive mechanism behind the international human rights law which may better be terms as ‘United Nations Human Rights System’.

The institutional framework providing the skeletal for this program comprises a range of bodies. These bodies are categorized as ‘Charter Based Bodies’ and the ‘Treaty Bases Bodies’. Former include the UN General Assembly, the Economic and Social Council, the Security Council, the Human Rights Council (Formerly Human Rights Commission) and the Office of the High Commissioner for Human Rights. The Treaty Bodies include around ten committees created by the respective treaties.

The charter bodies are the principal and subsidiary organs directly established under the Charter whereas a treaty body is created by almost each and every human rights instrument. The Treaty bodies have very actively expedited their work since 1990s which is unprecedented in the history for such an international organization. As regards their work and function, the treaty bodies are essentially different than the Charter Bodies. The Charter bodies are sort of intergovernmental institutions and play their role in devising policy oriented frameworks and peers based reviews, monitoring and implementation of human rights across all the states having membership of UN. On the other hand, the Treaty Bodies are constituted involving experts with legal focus and pursue law based implementation of human rights among the states which are parties to the relevant instruments. These bodies are referred to as Committees under the relevant provisions of the concerned Conventions. Following are the committees looking after the implementation of core Human Rights Instruments.

i. Committee on Elimination of Racial Discrimination.[249]

ii. Human Rights Committee.[250]

iii. Committee on Economic Social and Cultural Rights was established by Economic and Social Council[251] that was the original treaty body having the subject mandate for the International Covenant on Economic Social and Cultural Rights.[252]

iv. Committee on the Elimination of Discrimination against Women.[253]

v. Committee against Torture,[254] and a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[255]

vi. Committee on the Rights of Child.[256]

vii. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.[257]

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[249] "International Convention on the Elimination of All Forms of Racial Discrimination," OHCHR. Articles 8-16. Accessed November 4, 2024, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial.

[250] "International Covenant on Civil and Political Rights," OHCHR, Articles 28-44. Accessed November 4, 2024. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[251] Economic and Social Council. Resolution 1985/17 of May 28, 1985.

[252] "International Covenant on Economic, Social and Cultural Rights," OHCHR, Article 18. Accessed November 4, 2024, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[253] "Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979," OHCHR, Article 17. Accessed November 4, 2024. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women.

[254] "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," OHCHR, Article 17. Accessed November 4, 2024. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.

[255] "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," OHCHR, Article 2. Accessed November 4, 2024, https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel.

[256] "Convention on the Rights of the Child," OHCHR, Article 43. Accessed November 4, 2024. https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

[257] "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families," OHCHR, Article 72. Accessed November 4, 2024.

viii. Committee on the Rights of Persons with Disabilities.[258] And,

ix. Committee on Enforced Disappearances.[259]

The *Modus Operandi* of all the treaty bodies, as regards their role and functioning with respect to the implementation of the treaty obligations as spelled out in the provisions of the subject Instruments, is almost similar. These bodies comprise periodically elected experts who work in their personal and independent capacity. The Committees receive and consider the country reports on the implementation of the treaty obligations. Each state party is under an obligation to submit its country's initial report for the consideration of the relevant Committee with two years and then the periodical reports after every four years or so as may be required by the subject treaty. The reports so received for the consideration of the Committees are examined by the independent experts. After examining the reports the committees figure out the areas of non-compliance vis-à-vis specific treaty obligations. These findings are compiled as 'Concluding Observations' and sent to the state parties requesting the specific legislative, judicial and other measures to be undertaken by the concerned states. The next periodical report is required to focus on these observations and reflect on the measures so undertaken by the concerned states. While examining the countries human rights situation under a certain treaty the committee may also consider a Shadow Report. Shadow reports are submitted by the human rights watch dogs e.g., civil

https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers.

[258] "Convention on the Rights of Persons with Disabilities," OHCHR, Article 34, accessed November 4, 2024.
https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities.

[259] "International Convention for the Protection of All Persons from Enforced Disappearance," OHCHR, Article 26. Accessed November 4, 2024.
https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced.

society and non-governmental organizations. These continuous cycles of periodical reviews, examinations, concluding observations and monitoring are aimed at the enhancement of states parties' compliance with the treaty obligations. Besides periodical reviews, another function the Committees are entrusted with under the relevant treaties, is the adoption of General Comments. The Comments are aimed at explaining or specifying the language used in the relevant treaties wherein the states parties have conflict with regards to the interpretation of the same. Moreover, the treaty bodies are also required to extent the technical cooperation for the concerned states which lack in expertise with regards to the adoption of specific legislative or institutional measures consistently required by the committees. Another significant aspect of the jurisdiction of the Committees, though not actively pursued, is to receive 'communications' from the state parties against other states, subject to their 'Declarations' to that effect, for the violations of rights as declared in the subject Convention. The Committees can also entertain the 'individual complaints' subject to the provisions of the relevant Optional Protocols. Under this jurisdiction, which is subject to separate ratification of the relevant Optional Protocol by the states parties, the Committee may receive and subsequently address the complaints of individual human rights violations if the complainant has exhausted domestic remedial procedures or his matter is being unnecessary delayed or suffers from an unfair trial.

The Committees do submit annual reports on their activities to the General Assembly. These reports help the Assembly adopting requisite resolutions for setting further policies.

The International Commission of Jurists and likely forums publish their reports on the functioning of the treaty bodies.[260]

After having an overview of the UN human rights system the substantial question arises as to whether there exists a balance between the jurisdictions as vested or assumed by the UN human rights bodies and the national sovereignty of the states? The means adopted by human rights bodies, thus, are required to be respectful of the sovereignty. Moreover, which of the approaches i.e. political as employed by Charter based bodies or the legal one as exercised by treaty bodies, is more viable and productive? Speculations, if not the serious challenges, like the perception that since the very moment whence matters like LGBT etc., are on its agenda, the universalistic character of International Human Rights Law regime has started inviting a counterproductive narrative. However, around two decades ago they were completely unknown in the most parts of the world.[261] It is therefore believed by a number of critics that human rights discourse and IHRL are being parted and the gap between both is on its increase. Is it true to hold that IHRL regime has perhaps gone beyond the founding principles of the United Nations? To what an extend, the role of non-governmental international organizations such as of Amnesty International and Human Rights Watch etc., in shaping and reshaping IHRL regime is also of vital importance? And how much they are potentially capable of influencing UN Human Rights Bodies? These questions shall be dealt with in the next chapter (2) which focuses on the jurisprudence and related issues within the so called universal writ of human rights.

[260] Alex Conte, "TreatyBodies-CoreFunctions," n.d.
[261] Frédéric Mégret and Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (OUP Oxford, 2020), 2.

2.5 Conclusion

This chapter focused on exploring the dimensions of the various aspects of considering human rights law and practice at a crossroads. Firstly, it explored and traced the historical origins and development of the concept of 'Human Rights', 'Human Rights Law' and 'International Human Rights Law' as being known, used and applicable today. As evident from the reports of global Human Rights watchdogs and whistleblowers, the very conception as well as the application and enforcement of International Human Rights Law is not uniform and consistent across the regions. A prominent division and disparity with regards to the substance and form of human rights, in theory as well as in practice, thus exists among the states may conveniently be categorized into the Liberal and Non-Liberal Democracies. Human rights, as being practiced and protected under the various domestic as well as international legal frameworks, are then analyzed separately in the representative Liberal Democracies and Non-Liberal States. These frameworks are synchronized or do interact, in one way or the other, within the United Nations Human Rights System. The United Nations' multifaceted system, comprising charter and treaty bodies, provides a wide range of mechanisms involved from standard setting to a fuller implantation of human rights across the world. The chapter concludes that the emerging and ever evolving jurisdiction of UN Human Rights mechanisms is leaning towards proving to be counterproductive. More evidence is provided in chapter 4 wherein few case studies on humanitarian interventions are discussed in order to establish a link between so called systematic and large scale human right violations and the subsequent armed actions. It is, in a sense, bringing back the subjective moral or just causation for the use of force in the name of humanitarian intervention or the so called responsibility to protect.

Chapter Three

The Jurisprudence of the Universal Writ of Human Rights:

Do the States have no right to Reservations while ratifying human rights treaties?

3.1 Introduction

As the last sections of the preceding chapter provide a substantial explanation as to how the UN human rights system works through a number of organs, subsidiary bodies and institutions, this chapter aims at an in-depth critical legal analysis of the mechanisms and methods so employed by such bodies in their pursuit of the universal application of UN human rights standards. The core and cardinal question, therefore, to be addressed here is to figure out as to what is the applicable jurisprudential basis underlying universal writ of human rights and what are the challenges which are posed to it by the international legal procedures and mechanisms affecting and governing the Reservations, Understandings and Declarations submitted by the states parties at the time of ratifying subject international human rights treaties?

The *modus operandi* as well as the jurisdiction so assumed and exercised through such mechanisms by the Charter (UN) as well as treaty bodies necessitates a critical jurisprudential appraisal. The jurisprudential framework essentially involves the fundamental theories and principles of international law of treaties and the relevant international customs. A challenge, however, exists as to whether there is any foundational

philosophy behind internationalization of human rights? Secondly, whether a theory for the cross-cultural application of human rights is actually possible?[262]

In the clear absence of such a theoretical framework, the human rights language remains largely disbanded and, as assessed in previous chapter, the human rights have become a string of traction between Global North (Capitalist Block) and Global South (Socialist Block). The attempts on formulizations of assumptions for the so called universalization, therefore, merit a critical analysis of the Jurisdictional clauses in core human rights instruments and the procedural rules of the Human Rights Bodies.

3.2 Issues within the Jurisdiction of UN Human Rights Bodies

Having had an overview of the UN Human Rights System (in section 2.4) and the role of and functioning of the concerned bodies it was transpired the cross-national enforcement of human rights is not only affecting the municipal law but also posing serious challenges to International law. It has also been noted that the Charter and Treaty based Human Right Bodies have, over the years, gone through a radical reformation particularly in the context of before and after the Cold War dimensions of international politics.

The most conspicuous among such developments is the replacement of UN Commission on Human Rights with the Human Rights Council in 2006. UN General Assembly enhanced the scope of jurisdiction of the Council empowering it to pursue a more active

[262] Sarah Pritchard, "The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice," *Australian Journal of Human Rights* 2, no. 1 (1995): 3–38. https://www.austlii.edu.au/au/journals/AJHR/1995/2.html.

enforcement of the uniform human rights standards as incorporated in treaties adopted under the auspices of United Nations. The Council, thus, assumed jurisdiction in addition to the functions previously mandated to the Commission.

Moreover, since the sister covenants, ICESCR and ICCPR became enforceable in 1976, the concerned treaty bodies also became active. Human Rights Committee adopted its provisional Rules of Procedures in the 1st and 2nd session and assumed its work. However since its first elections it has amended its rules of procedures for more than ten times. And so it went through the drastic developments with respect to the modes of exercising its mandate and jurisdiction. Same holds truth for other treaty bodies.

The Vienna Declaration and Program of Action, adopted in 1993 at the World Conference on Human Rights in 1993, may be marked as significant bench mark which brought the existing vigorous approach in UN's human rights enforcement mechanisms. This chapter explores the various dimensions of the jurisdiction of human rights bodies which at times prove to be counterproductive.

3.2.1 Charter Based Bodies

United Nations General Assembly - Among the Charter Based Bodies the most comprehensive is the United Nations General Assembly. It is the largest organ of the organization which has an overall supervisory role in the system.[263] From standards setting, by adopting resolutions, to the very transformation of specific treaty obligations in the form

[263] The UN Charter. 1945. Article 12 (1) (b). https://treaties.un.org/doc/publication/ctc/uncharter.pdf

of Conventions the Assembly plays an important and vital role. Moreover, only Assembly may amend, as may be required, the provisions of the Conventions as adopted on the subject. Similarly the members of the various human rights bodies are also elected by the Assembly. The Assembly, moreover, is authorized under the Charter to establish institutions as its subsidiaries for the fuller achievement of its objectives and functions.[264]

Economic and Social Council - The ECOSOC is another principal organ which has a broader mandate as regards to the promotion and protection of human rights. More specifically it has to conduct studies, set up commissions and make recommendations to General Assembly for the promotion and observance of human rights.[265] The Council established the UN Commission for Human Rights in 1946 which worked until it was replaced by Human Rights Council in 2006. All the Treaty Based Human Rights Bodies are required to submit the reports received by the states parties on the implementation of the core human rights instruments along with their comments to the Council for onward submission to the General Assembly.[266] The Council also served as a monitoring body looking after the implementation of International Covenant on Economic Social and Cultural Rights 1966.[267]

International Court of Justice – The International Court of Justice is one of the principal organs of UN 'whose function is to decide matters in accordance with international law'.[268]

[264] Ibid. Article 22.
[265] Ibid. Article 62 (2), 68.
[266] For instance, ICCPR. Article 40 (4), Convention on the Rights of Child. Article 44 (5).
[267] International Covenant on Economic Social and Cultural Rights. 1966. Article 16 (2).
[268] "Statute of the Court Of Justice | INTERNATIONAL COURT OF JUSTICE," Article 38., accessed November 4, 2024, https://www.icj-cij.org/statute.

The Court assumes its role as being more an International Law body rather than a specific human rights body, how a number of human rights instruments[269] have adopted ICJ as an optional tribunal to decide a dispute between two or more states parties concerning the interpretation or application of subject Convention.[270] On other way round 'human rights law' has now become a part and parcel of International Law and therefore the Court has to deal with it in one manner or the other.

United Nations Security Council – The Charter has entrusted the Security Council with the most primary duty of the Organization i.e. the maintenance of international peace. To this end the Council is required to act in accordance with the principles of the United Nations.[271] The purposes and principles thus entail reference to human rights. Besides its core function which is to ensure that the member States remain 'abstained in their international relations from the threat or use of force against other states'[272]. The Security Council has, over the years, thus assumed its role for the promotion and protection of human rights while linking the same with international peace and security. For instance, it adopted resolutions during the 1960s for eliminating the then prevalent apartheid in South Africa.[273] In 1976 the Council imposed an armed embargo.[274] It seem that the Council has also assumed a link between human rights and democracy and passed resolutions for

[269] "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Article 30 (1).
[270] "Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979," Article 29 (1).
[271] The United Nations Charter. 1945. Article 24. https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[272] Ibid. Article 2(4).
[273] United Nations Security Council. S/Res/191 of 1964.
https://digitallibrary.un.org/record/112232?ln=en&v=pdf . See also S/Res/181 and 182 of 1964.
[274] Ibid. S/Res/418 of 1977.

restoring the later for instance in case of Haiti in 1994.[275] During this last decade of the previous century the Council did not hesitate to pass resolutions affirming military interventions on the basis of Human Rights violations. The Resolution 688 of 1991, demanding the end of repression by Iraq to ensure international peace and security,[276] though inconsistent with article 2(7) of the charter, eventually became a precedent for the subsequent interventions. The Council extended its jurisdiction and squeezed the scope of 'matters essentially within the domestic jurisdiction of the states'[277] thus took a projectile jump and took a decision which made it clear that the human rights violations is no more such an internal matter. It may, therefore, justify intervening actions on behalf of the international community. The supporters of the resolution, particularly, the delegate from United Kingdom helped coining the device.[278]

Previous resolutions such as 678 of 1990[279] which authorized the US led coalition to use force against Iraq to defend Kuwait were essentially against the armed aggression. This was the only 2nd time in the history of UN Security Council since it allowed the same for the implementation of the withdrawal of North Korean forces from South Korea.[280] In both the cases, notably, it was the US who carried out the decision so made by UNSC.

[275] United Nations Security Council. S/Res/940 of 1994. https://digitallibrary.un.org/record/191651?ln=en&v=pdf.
[276] Ibid. Resolution 688 of 1991. https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20SRES688.pdf
[277] United Nations Charter. 1945. Article 2 (7).
[278] Ninan Koshy, "The United Nations, the US and Northern Iraq," *Economic and Political Weekly* 31, no. 40 (1996): 2761, https://www.jstor.org/stable/4404662.
[279] United Nations Security Council. Resolution 678 of 1990. (para 2) https://documents.un.org/doc/resolution/gen/nr0/575/28/pdf/nr057528.pdf
[280] United Nations Security Council. Resolution 82 of 1950. (para 3) https://digitallibrary.un.org/record/112025?ln=en&v=pdf

The doctrine and subsequent mechanism in the name of Responsibility to Protect (R2P) got evolved for the forceful promotion of human rights.[281] In the aftermath of 2005's World Summit on Human Rights, the UN General Assembly having adopted this resolution (60/1) authorized the member states to assume the responsibility to protect the individuals against the large scale systematic violations of their human rights through Security Council invoking its jurisdiction involving the use of force under chapter VII of the Charter.[282] In the following two decades the western vetoed powers i.e. US, UK and France backed by the 'liberal democracies', so enabled to test their mussels against the states with bad human rights records, availed this opportunity against Libya, Syria and Iraq. However, the socio-communist block i.e. the Russia and China blocked their moves against Iran.

During the last decade of the previous century, an end to the Cold War has brought some significant as well radical reforms for the system. The World Conference on Human Rights held during 14th to 25th June in Vienna adopted the Vienna Declaration and Program of Action. The Declaration was later formulated into and adopted as UNGA resolution.[283] This development is followed by the establishment of the Office of High Commissioner for Human Rights by the end of 1993[284] and replacement of UN Commission on Human Rights with Human Rights Council in 2006.[285]

[281] United Nations General Assembly. Res/60/1 of 2005. Para 138-140 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf
[282] Ibid. Para. 139.
[283] United Nations General Assembly. A/Res/48/121 December 1993.
[284] United Nations General Assembly. A/Res/48/141 December 1993. https://documents.un.org/doc/resolution/gen/nr0/712/25/img/nr071225.pdf
[285] United Nations General Assembly. A/Res/60/251 March 2006. https://documents.un.org/doc/undoc/gen/n05/502/66/pdf/n0550266.pdf

Office of the High Commissioner on Human Rights – Pursuant upon the recommendations of Vienna Declaration and Program of Action[286] the OHCHR was established under a UNGA resolution[287] on 20th December 1993. The preamble of the resolution clearly mentions the necessity for the adaptation of UN machinery to ensure effective and efficient protection and promotion of human rights. The resolution created the post High Commissioner for Human Rights who was designated as the principal UN human rights official. The Commissioner had to be adherent to principle of indivisibly and interdependence of all human rights[288] and lay annual reports reflecting his/her performance before the General Assembly.[289]

The mandate of the Commissioner includes to coordinate the overall activities aimed at the promotion and protection of human rights throughout UN system [290] thus "play an active role in removing current obstacles and in meeting the challenges to the full realization of human rights and in preventing the continuing violations of human rights though out the world".[291] The office, therefore, gets engaged with the intergovernmental human rights bodies. The OHCHR, as headquartered in Geneva, now has three main divisions to separately deal with thematic engagement and Special Procedures, to facilitate Human Rights Council for its Universal Periodic Review and related treaty enforcement mechanisms and to conduct Field Operations and Technical Cooperation.

[286] Adopted by the World Conference on Human Rights in Vienna on June 25, 1993. Para 16 and 18. https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/vienna.pdf
[287] United Nations General Assembly. A/Res/48/141 December 1993. https://documents.un.org/doc/resolution/gen/nr0/712/25/img/nr071225.pdf
[288] Ibid. Para. 3(b).
[289] Ibid. Para 5.
[290] Ibid. Para.4.
[291] Ibid.

The Office has enhanced its worldly presence through country offices, regional offices and human rights advisors to UN country teams. However, to a considerable extent the mandate of the office was shifted to, if not overlapped with, the Human Rights Council. The General Assembly directed the Council to "assume the role and responsibilities of the UN Commission on Human Rights relating to the works of the OHCHR as decided by the resolution 48/141 of 1993".[292] Such initiatives have had complicated the relationship of OHCHR with the High Commissioner itself and with Human Rights Council and at times also with the Security Council.

Human Rights Council – having replaced its predecessor (UN Commission on Human Rights) the Human Rights Council has now taken a most significant place as a principal human rights body within the UN system. The Council was established by the General Assembly in March 2006[293] as its subsidiary[294] yet again in the aftermath of and specifically referring to the Vienna Declaration and Program of Action, 1993. The founding resolution was adopted with 170 votes to 4 members including USA, Israel, Marshal Islands and Palau. Belarus, Venezuela and Iran remained abstained. The Council is an intergovernmental body comprising 47 UN members elected periodically while keeping in view the geographical representation as thirteen members each from Asian and Africa group, six from Eastern Europe, eight from Latin America and Caribbean and seven from the Western Europe and other states.[295]

[292] United Nations General Assembly. A/Res/60/251. March 2006. https://documents.un.org/doc/undoc/gen/n05/502/66/pdf/n0550266.pdf
[293] United Nations General Assembly. A/Res/60/251 of March 15, 2006.
[294] Ibid. Para 1. (in accordance with article 22 of UN Charter).
[295] Ibid. Para 7.

While deriving the very legitimacy by referring to peace, security and respect for human rights as the purposes of United Nations the founding resolution of General Assembly mentions in its preamble the core principles of the Council e.g., all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and to be equally protected with the same emphasis.[296] The Council is also vested with an express mandate to address the situations of human rights violations including the gross and systematic violations.[297] For the fuller promotion of human rights at international level the council is empowered to follow up with the states regarding the obligations undertaken by them under the core human rights instruments. To this end the Council regularly conducts the Universal Periodic Review (UPR) of all the UN member states.[298]

For UPR, which in fact is a peer review to be undertaken by the fellow states instead of experts, the Council works in close coordination with governments, regional organizations, national human rights institutions and civil society.[299] The review is largely dependent on the relevant country report, information compiled by OHCHR based on country's reports to the treaty bodies and special procedures and summary submissions by other stakeholders including national human rights institutions, regional organizations and civil society. The *modus operandi* of the review includes an interactive dialogue of the working group with the representatives of the country under review followed by the recommendations to be considered by the concerned country.[300] The outcome of each review is recorded by

[296] Ibid. Preamble and Para 2, 4.
[297] Ibid. Para 3.
[298] Ibid. Para 5 (e).
[299] Ibid. Para 5 (h).
[300] Human Rights Council. Institution Building. Resolution 5/1 of June 18, 2007.

rapporteurs and published on the official Website of the United Nations. This is to be implanted complementarily by the concerned state.[301] Others states and stockholders can extend their cooperation for the implementation of the outcome of the review only subject to the consent of the concerned state.[302]

The principles, objectives and other procedures to be adhered to are mentioned in the Council's resolution 5/1 (on Institutional Building) of June 2007 which was adopted under the mandate vested by the virtue of the founding resolution i.e. 60/251 of 2006.

Further, the Council was authorized to resume, rationalize and redefine all the mandate of its predecessor (UNCHR) to maintain a system of Special Procedures, expert advice and complaint procedure.[303]

The Special Procedures have been inherited by the Council from its predecessor Commission. The mandate and the subject jurisdiction of these procedures is thus resumed as already was in practice under the resolutions of ECOSOC and CHR. These procedures target the country specific violations or situation of human rights. Under these procedures the council appoints independent human rights experts with either a thematic or country specific mandate. The special procedures may assume their jurisdictions even for those countries who have not ratified the subject treaties.

[301] Ibid. Para.33.
[302] Ibid. Para 36.
[303] A/Res/ 60/251. Para 6.

Likewise, as provided for the resumption of the special procedures, the same para (6) of the founding resolution authorized the council to continue with Commission's Expert Advice and the Complaint Procedures also. The Council advisory committee, comprising 18 experts, serves as a think tank and is responsible to render the requisite advice.[304]

Under the Complaint Procedures the Council addresses the consistent patterns of gross and systematic violations of human rights.[305] This procedure was conceived by the Economic and Social Council Resolution during 1970s.[306] The Council receives the complaints or communications from individuals as well as groups and organizations against the violations as mentioned above. The complaints must qualify an admissibility criteria including *inter alia* not being politically motivated, not falling within the national legal jurisdiction and has had exhausted available domestic remedies.[307] In this regard the Council also involves the role of National Human Rights Institutions vested with quasi-judicial jurisdiction in accordance the 'Paris Principles'.[308] The complaint is examined and the consistent patterns of gross violations shall be established by the separate working groups created by the Council.[309] The parties to the complaint i.e. the state concerned and the complainant are kept informed with the proceeding of the group.[310] Having come to the conclusion the

[304] Human Right Council. Institution Building. 2007. Resolution 5/1. Para 75.
[305] Human Rights Council. Institution Building. Resolution 5/1 2007. Para. 85.
[306] Economic and Social Council. Procedures for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms. E/Res/1503 (XLVIII) of May 27, 1970. (Modified by ECOSOC Res 2000/3 of 2000) https://digitallibrary.un.org/record/214705?ln=en
[307] Human Rights Council. Institution Building. Resolution 5/1 2007. Para. 87.
[308] Ibid. Para. 88.
[309] Ibid. Para. 89.
[310] Ibid. Para. 106.

working groups shall recommend the measures involving the appointment of a special and highly qualified expert to monitor the situation and report back to the Council.[311]

3.2.2 Treaty Bodies

The treaty bodies, as introduced in previous section (1.4), are in fact supposed to determine and establish the normative content and scope of the human rights as spelled out in subject treaties to be implemented through the state's obligations.[312] The procedures and methods so employed by the treaty bodies for this purpose remains of vital importance.

The most general framework in this regards exists in the classical approach as incorporated in the Vienna Convention on the Law of Treaties, 1969.[313] The Convention relates the question of interpretation with the text, context, object and purpose of the relevant treaty. It has been observed by the commentators that the treaty bodies remain inconsistent while being adherent to these principles.[314] Kerstin Mechlem has criticized the Committees for being not being consistent with the requisite legal approach while framing 'Concluding Observations', dealing with 'Individual Communications' and adopting General Comments.[315] It is therefore alarming that the Concluding Observations are not legally binding and have to be only accepted with persuasive value yet they are, at times, rigorously chased to be complied. Similarly, the General Comments are adopted in the plenary sessions of the Committees after a lengthy process yet invoke a debate among the

[311] Ibid. Para. 109.
[312] Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights," *Vand. J. Transnat'l L.* 42 (2009): 905, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vantl42&section=24.
[313] "Vienna Convention on the Law of Treaties (1969)," Articles 31-32.
[314] Mechlem, "Treaty Bodies and the Interpretation of Human Rights," 909.
[315] Ibid.

scholars as to whether they authoritatively add on treaty obligations or merely provide guidance on the interpretation of the same.

Others, object the strict adherence to VCLT in case of those states which are parties to Human Rights Instruments but they did not ratify VCLT as Art. 4 of the Convention limits its application to those treaties which are concluded after it came to force in January 1980. Now, the question arises as to whether such legal rules are reduced to the customary value or the treaty bodies may take precedence over them. This makes IHRL as *lex specialis*. A critical legal analysis of the various aspects of the mandates and the jurisdictions so assumed by the treaty bodies, while disposing off their primary functions, is exhibited below.

Concluding Observations

All the treaty bodies, referred as Committees in the relevant Conventions, are vested with the mandate to make their observations after examining the compliance reports submitted by the states parties.[316] The purpose of concluding observations is to figure out the areas of non-compliance wherein the subject state party is required to take requisite legislative, judicial or other measures in accordance with the treaty obligations. All the Core Instruments have prescribed the manner of adopting such observations almost in similar fashion. For reference, here, the structure on which Human Rights Committee[317] is modeled by ICCPR is briefly explained which may be applicable *mutatis mutandis* for other treaty bodies.

[316] "International Covenant on Civil and Political Rights," Article 40 (1).
[317] "International Covenant on Civil and Political Rights," Article 40 (4).

These observations which are technically called the 'Concluding Observations' are to be forwarded to the concerned states. The term 'concluding observations' which is in a frequent use of the Committees' work is, however, not mentioned in the Covenant but prescribed under the 'Rules of Procedures'[318] adopted under article 39 of the Covenant. An exception in this regard exists in the Convention on Elimination of all forms of Racial Discrimination, wherein, the concerned Committee is required only to annually report its general recommendations and suggestions based on the examination of compliance reports submitted by the states parties.[319]

The Committee's Rules of Procedures lay out the detail guidelines as to how the initial and periodic reports are to be prepared. The Committee thus rules out if a report does not fulfil the substantial obligation in accordance with article 40 (1) of the Covenant. Moreover, the Committee has adopted a mechanism under which a 'list of issues' is sent to the state before the examination of the report submitted by the state party. The reports are then examined in the presence of the representatives of the concerned state. The representatives introduce the report and respond to the questions raised by the members of working group, tasked to review the subject report, from the list of issues and others, if any. After exhausting this process which is known as the 'Constructive Dialogue', the committee adopts the 'concluding observations'. The structure of the observations entail an introduction, positive aspects, impeding factors, principal matters of concern, suggestions and comments. The

[318] Human Rights Committee. Rules of Procedures as amended in 2021. Rule 34. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F3%2FRev.12&Lang=en

[319] "International Convention on the Elimination of All Forms of Racial Discrimination," Article 9 (2).

observations may seek additional information if the report under review remains deficient. Finally the report mentions the date by which the next periodical report shall be due.[320] For the follow up and to achieve the fuller implementation of the recommendations the committee may also appoint a rapporteur who reports back to the committee with regards to the measure undertaken by the state party within the timeframe so stipulated.[321]

As regards the legal status of the concluding observations is concerned it is generally established from the norms as well practice that these are not *stricto sensu* binding yet they, in many way, influence the domestic as well international law and jurisprudence. At the very first instance it may be observed the Committees continuously pursue through such observations the state parties to withdraw their reservations. Whereas, under the general principles of International Law, states may exercise their right to reserve certain provisions of a treaty while accepting the same.[322] This right is also specifically provided in the European Convention on Human Rights[323] as well as the Convention on the Rights of Persons with Disabilities.[324] For other human rights instruments, it stands established because in practice a number of states have had submitted their reservations at the time of accepting the same.[325] An in-depth analysis of the repercussions and implications of Reservations shall be dealt with in the next chapter. Here the Committees' jurisdiction as

[320] "Rules of Procedure and Working Methods," OHCHR, accessed November 12, 2024, https://www.ohchr.org/en/treaty-bodies/ccpr/rules-procedure-and-working-methods.
[321] "Rules of Procedure and Working Methods."
[322] "Vienna Convention on the Law of Treaties (1969)," Article 19.
[323] "European Convention on Human Rights", 1950. Article 57.
[324] "Convention on the Rights of Persons with Disabilities", 2006. Article 46.
[325] "United Nations Treaty Collection," accessed November 12, 2024. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

to how it may deal with their scope while adopting the concluding observations is discussed.

The Committees, however do not hesitate to disregard such reservations on the touchstone of their incompatibility with the purpose and object of the relevant treaty. This jurisdiction is nowhere expressly vested in the Committees, rather, as the critics assert, this is the prerogative of the state parties to decide if some reservation defeats the purpose and object.[326] But the jurisdiction so assumed has led the committees to actively pursue and assert their jurisprudence even to the extent of matters essentially falling within the scope of Declarations and Reservations on account of domestic reasons. For instance, the Committee most recently observed and recommended Pakistan on reviewing its 2nd periodical report to take measures ensuring independence of judiciary specifically in the context of 26th Constitutional amendment. It further required measures on recognition of intersex orientations and to decriminalize same-sex consensual relationships.[327]

For such reasons, the authors like Opsahl have challenged the jurisdiction so assumed by the Committees as being inconsistent with the language of the Conventions wherein they provide for the adoption of such general comments[328] not specific for particular states.[329] The Committees have historically evolved with such an extended jurisdiction as is evident from the annual reports. While adopting its rules of procedures, as reflected in the very first

[326] Philip Alston, "The Committee on Economic, Social and Cultural Rights," *NYU Law and Economics Research Paper*, no. 20–24 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630580.
[327] Human Rights Committee. Concluding Observations on the 2nd Periodical Report of Pakistan. November 2024. Para. 13 (e). Accessed on November 12, 2024. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FPAK%2FCO%2F2&Lang=en
[328] ICCPR, Article 40 (4).
[329] Martin Scheinin, "How to Untie a Tie in the Human Rights Committee," in *International Human Rights Monitoring Mechanisms* (Brill Nijhoff, 2001), 129–45.

annual report, the Committee only decided to adopt general comments in accordance with Article 40 (4) of the Covenant, if it may find the state party has not discharged its obligations as such as required under the Covenant.[330] The comments so adopted shall also be communicated to the state party for its observation.[331] The report also mentions a significant rule of the committee regarding its method of work to reach decisions by the consensus.[332] It was during 1985 when the committee started reporting the dialogue occurring between the member of Committee and representatives of the state whose report was so under the review. The minutes so reflecting the dialogue got the title of 'Concluding Observations by Individual Members' in annual reports of the committee.[333] Tomuschat has also ascribed this paradigm shift, in the working model of the Committees, to the post-cold-war era wherefrom the domestic sensitivities of the state parties were began to be overlooked.[334] The Human Rights Committee, thus, formally issued its first collective 'Concluding Observations' on reviewing the report submitted by Nigeria in 1992. By 1994 almost all the other treaty bodies also followed the exercise.

While locating the legal status of the 'concluding observations' it is pertinent to mention that the Committees do not establish their findings, regarding the non-compliance of treaty obligations, in a judicial manner. Nor any provision of their founding treaties empower them to do so. Moreover, the observations so issued also do not remain essentially limited

[330] Report of the Human Rights Committee. 1976. Annexure II. Rules of Procedure. Rule 70 (3) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A%2F32%2F44&Lang=en
[331] Ibid. Rule. 71.
[332] Human Rights Committee Annual Report. 1976. Para. 32.
[333] Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies," *Human Rights Law Review* 6, no. 1 (2006): 29.
[334] Christian Tomuschat, *Human Rights: Between Idealism And Realism* (Oxford University Press, 2014).

to measuring the violations of specific treaty obligations. For instance, it is a very common and fashionable practice of the Committees to recommend, through the observations, the states parties to withdraw their reservations or ratify other treaties. The 'observations', therefore, do not constitute any legal obligation or binding norms but remain advisory, recommendatory and persuasive in nature. The 'observations and recommendations', thus, play an important role in interpretation of the treaty obligations and more often are referred by the judges of domestic as well as international courts.[335]

General Comments

Another significant aspect of the jurisdiction of treaty bodies, including Human Rights Committee, is as to how they determine the scope and content of treaty obligations as spelled out in the relevant instruments. To address these challenges the treaty bodies are empowered to adopt "General Comments'.[336] Like other matters, the Committee generally approves a matter to be considered for the adoption of a General Comment with an agreement of a majority of its members.[337] The 'comments' so adopted determine the scope of the treaty obligations vis-à-vis the cross cutting implications emanating from the domestic laws etc. The jurisprudence and the jurisdiction of the treaty bodies, forming the basis for such comments, also appears to be inconsistent with the applicable principles of

[335] For instance ICJ referred to a concluding observations of Human Rights Committee urging Israel for the application of ICCPR in the occupied Territory. ICJ Reports 2004. P, 180.
[336] For instance, under article 40 (4) of ICCPR, Human Rights Committee may adopt General Comments. And Human Rights Committee, Rules of Procedures 2021, Rules 76-77.
[337] Human Rights Committee. Rules of Procedures. 2021. Rule 52.

International Law.[338] The practice of Human Rights Committee is analyzed here for being a leading human rights body with the largest mandate and subject matter.

The committee commenced with the adoption of the General Comments in 1981 while adopting the first general comment with regards to the states' obligation for reporting to the committee. The Committee has, up till, now adopted around 37 General Comments and the last one reflects on the states' obligation with regards to the freedom of Assembly. Some of its comments have triggered more criticism as compared to others.

For instance, David H. Moor, who himself remained a member of the Committee, notes the incompatibility of Committees interpretation in its Comment No. 31 with the text of Article 2 of the Covenant wherein the states parties are required to protect the rights of all individuals within its territory and subject to its jurisdiction. The Committee went one mile ahead and considered the states parties to protect the rights as enshrined in the covenant for all the individuals within its territory or subject to its jurisdiction and explained further that the jurisdiction means and includes all persons within the power or 'effective control' of the state.[339] This is how the committee ignores the general principles of treaty interpretation in pursuit of the so called wider promotion of human rights.

[338] David H. Moore, "Treaty Interpretation at the Human Rights Committee: Reconciling International Law and Normativity," *UC Davis L. Rev.* 56 (2022): 1314, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/davlr56&section=28.
[339] David H. Moore, "Treaty Interpretation at the Human Rights Committee: Reconciling International Law and Normativity," *UC Davis L. Rev.* 56 (2022): 1330. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/davlr56&section=28.

Max Lesch has regarded such an endeavor of the Committee as 'informal making of human rights law'.[340] In order to substantiate his assertion he refers the views[341] of the Committee, wherein it relied on its own General Comment No. 36 on article 6 of ICCPR, establishing the right to life includes to enjoy protection from acts and omissions which may become cause of immature or unnatural death. This is the broadest possible extension of the states' obligations pertaining to Article 6 of the Covenant. This approach transpires as to how the human rights bodies switch to a normative approach by going well beyond their legal mandate.

Other factors with possible influence on the treaty bodies' subject activism may include the predominant impact of the members from certain regions, the institutional design behind the drafting, reading and adopting process and the technical support made available by other UN agencies.

Individual Complaints

Yet another function of the treaty bodies is to receive individual complaints for the alleged violations of human rights, as guaranteed under the relevant treaty, by the state against specific individuals. This mandate is created under the optional protocols to various human rights instruments. The protocols make it appoint that such complaints are admissible by the relevant treaty bodies only after the complainant has had exhausted all the domestic

[340] Max Lesch and Nina Reiners, "Informal Human Rights Law-Making: How Treaty Bodies Use 'General Comments' to Develop International Law," *Global Constitutionalism* 12, no. 2 (2023): 378–401, https://www.cambridge.org/core/journals/global-constitutionalism/article/informal-human-rights-lawmaking-how-treaty-bodies-use-general-comments-to-develop-international-law/7D1E7EF25889DDD944D8FB2691AA36A7.
[341] Human Rights Committee. Views adopted under article 5(4) of the Optional Protocol Concerning Communication (Daniel Billy v. Australia) No. 3624 of 2019. September 18, 2023.

forums or being denied with the right to fair trial or unnecessarily delayed. The treaty bodies once admitting such complaint seek a corresponding observations or statement from the concerned state party. After examining the same the bodies form their 'View' to decide the matter. While forming their Views the Committees take into consideration the relevant 'concluding observations' as well as the 'general comments'. The decision so adopted is then communicated to the concerned state party for the necessary measures to be taken. The states are required to report back to the Committees within six months on the measures so undertaken for the implementation of the decision otherwise the Committees continue with a follow-up procedure.

Among the various functions of treaty bodies as discussed above, their 'Views' shape the scope of subject treaty obligations more effectively as compared to the 'General Comments' and 'Concluding Observations'. Though limited in range as only fewer states have accepted this optional jurisdiction the Committees under this jurisdiction require specific measures aiming at specific remedial actions by the state parties.[342] The Committees act in quasi-judicial manner while dealing with the individual complaints.

The interpretation of the various treaty provisions by the Committees, while adopting 'Views' on specific violations, thus triggers a debate of legality vs. legitimacy among the scholars. The legality theory requires a strict adherence to the rules of Interpretation within the VCLT framework. The legitimacy theory, however, justifies those broader

[342] Geir Ulfstein and Helen Keller, "UN Human Rights Treaty Bodies," *UN Human Rights Treaty Bodies: Law and Legitimacy (Cambridge Univ. Press 2012)*, 2012. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2053143.

interpretations which are drawn within the context of normative purpose and object of the treaty in question. The middle course, therefore, seeks to justify even the normative interpretations only if they are endorsed by the corresponding states practices of the treaty creating states. Such states practices may be determined from the Constitutions of the respective states. The human rights bodies, however, are not case sensitive in this regard.

Interstate Communications

Last but not the least, is the mandate of the Committees to receive Communications from the state parties on the alleged violations of treaty obligations by other state parties.[343] The Committees shall receive such Communications subject to the Declaration of state parties that they accept the competence of the Committees in this regard.[344] This jurisdiction has not been exercised by the Committees yet it poses threats to the sovereignty of the states for having supra states element.

3.3 RUDs and the Vienna Convention (on the Law of Treaties) Framework

A Reservation is defined as 'a unilateral statement which purports to restrict, exclude or modify the legal effect of one or more provisions of a treaty with regards to its application to the concerned state.[345] Such statements are generally allowed to be submitted, in writing[346], with the repositories of the instruments at the time of ratification.[347] The

[343] "International Covenant on Civil and Political Rights," Article 41 (a).
[344] ICCPR 4. Article 41 (1).
[345] "Vienna Convention on the Law of Treaties (1969)," Article 2 (1) (d).
[346] Ibid. Article 23.
[347] Ibid. Article 19.

Reservations must not be defeating the purpose and object of the treaty if not expressly prohibited. It requires to be accepted by the other states parties if the subject treaty requires the consent of the states shall essentially bind all the parties to the entirety of the treaty otherwise even a single acceptance may serve the purpose.[348] If no objection is made for a year after the reservation is notified it shall be deemed that the reservation is accepted.[349] As regards to an Objection on the Reservation is concerned it does not preclude the treaty from entering into force between the reserving and objecting states unless the contrary is expressly desired.[350] An effective Reservation modifies the relevant obligation for the reserving state[351] which remains legally bound only to the extent and in a manner it so desires. The Reservations as well as Objection may be withdrawn at any time.[352]

Besides Reservations and Objections the states have a practice of submitting Declarations and Understandings while accepting human rights treaties. The statements forming the Understandings differ from the Reservations for they do not intend to alter or modify the treaty obligation but express as to how the declarant state may interpret the provision in question.[353] The Declarations form those statements which express the position of the state party with regards to the matters generally raised by the treaty. Declarations are usually general in nature and do not address a specific treaty obligation. Most common Declarations on the human rights treaties aim at limiting the states' compliance with treaty obligations subject to their Constitutions. This triangular mechanism jointly termed as

[348] Ibid. Article 20 (4)| (c).
[349] Ibid. Article 20 (5).
[350] Ibid. Article 20 (4) (b).
[351] Ibid. Article 21 (a).
[352] Ibid. Article 22.
[353] Human Rights Committee. General Comment No. 24. Adopted under Article 40(4) of ICCPR. November 11, 1994. Para. 3.

RUDs is an essential component of the regime of International Law which provides the states a margin if they intend to become party to a treaty on a conditional basis. The legal value and strength of RUDs is evident from and established by the international customs as well as treaty law in the shape of Vienna Convention on the Law of Treaties 1969.

As formalized by VCLT, the classical text-context-object blind approach of the treaty interpretation may also be regarded as the cotemporary international customary Law on the subject.[354] It embodies a balance within the literal and objective approach for a uniform and consistent interpretation. That might be among the reasons that this jurisprudence is not frequently bought by other treaty bodies such Committee on Elimination of all Forms of Discrimination against Women and the Committee on the Rights of Child. The human rights bodies, however, treat them with little difference.

While affirming and adhering to the principles of indivisibility, interdependence and interrelatedness of human rights, as reflected in the UNGA resolutions,[355] it remains imperative for human rights bodies to determine the scope and implications of RUDs. The treaty bodies thus frequently assess and evaluate RUDs and never hesitate to declare them invalid for being incompatible with or defeating to the purpose and object of the concerned treaty. Whatever the jurisprudence of the human rights bodies is in this regard, it has triggered more drastic implications. Once a Reservation on a certain provision is held invalid, the non-implementation of the corresponding treaty obligation is noted by the

[354] Neha Jain, "Interpretive Divergence," *Va. J. Int'l L.* 57 (2017): 09, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vajint57&section=5.
[355] UNGA. Res.60/167 of December 2005.

concerned body (formally known as Committee) as violation. Such Views as well as the Observations of the treaty bodies in fact challenge the fundamental principles governing process of 'consent' in International Law. It is, therefore, a very primary concern of the critics regarding the jurisprudence of the Human Rights Bodies as to what impact and effect will bring an invalidation of a Reservation on the states' Consent itself.

This jurisprudence pertaining to the jurisdiction so assumed and exercised by the Committees needs a deeper analysis. In *R Kennedy v. Trinidad and Tobago*, while dealing with a Trinidadian reservation on Article 1 of the First Optional Protocol, the Human Rights Committee declared it invalid. The Reservation was aimed at restricting the Committee's Jurisdiction from entertaining the Communications relating to the condemned prisoners. The Committee considered the reservation contrary to the object and purpose of ICCPR while referring to Article 19 of VCLT which requires *inter alia* the reservation may not defeat the purpose and object of the treaty.[356] The Committee held that the object of the First Optional Protocol is to 'allow claims in respect of Covenant rights be tested before it'.[357] However, in another Communication[358], the Committee completely avoided to assess the question of the validity of a Declaration submitted by the respondent state party while giving its consent.

The Committee, in this regard, derived its mandate from VCLT which establishes the interpretation based on the subsequent practices of state parties as agreed upon among

[356] Vienna Convention on the Law of Treaties. 1969. Article 19 (c).
[357] Human Rights Committee. Kennedy v. Trinidad and Tobago. Communication No 845/1999.
[358] Human Rights Committee. Elgueta v. Chile. Communication No. 1536/2006.

them.[359] The agreement of the States parties on the subsequent practice as required herein is arguable. The Committee, for instance, is constituted under the provisions of ICCPR which is ratified by states parties yet the Comments, Observations and Views of the Committee are not explicitly binding on them. The relevant provisions of the Covenant only render the Committee a kind of monitoring and supervisory role for persuading the states parties to fully implement and enforce the rights incorporated in the Covenant. The subject jurisdiction as being exercised by the Committee is assumed under the 'Rules of Procedure' crafted by the Committee itself.[360]

The Committee's jurisprudence is justified by itself in its General Comment No. 24 which explains the framework regulating and governing the status and implication of RUDs.[361] On the admissibility of the Reservations, the Comment asserts that the Covenant though did not expressly provide for the submission of Reservations yet they may be considered permissible within the framework of general International Law. In this regard the Vienna Convention on Law of Treaties (1969) provides the states a right to submit Reservations if they are not expressly prohibited by the treaty concerned and are not incompatible with its purpose and object.[362] The Committee asserts the 'purpose and object' of Convent which could only be formulated through the holistic achievement of rights mentioned in its all the many articles.[363] More significantly, the committee drew a distinction regarding the human right treaties for not reflecting the mutually corresponding obligations but ensuring the

[359] Vienna Convention on the Law of Treaties. 1969. Article 31 (3) (b).
[360] ICCPR. Article 39 (2).
[361] Human Rights Committee. General Comment No. 24 adopted under Article 40 (4) ICCPR. November 11, 1994.
[362] VCLT. Article 19 (a), (c).
[363] General Comment No. 24. Para. 7.

rights of individuals. Additionally the covenant obligations are aimed at the protection of peremptory norms from which no deviation is possible.[364] The Committee thus left a very narrow scope for the formulation of reservations only to the specific elements of such obligation but not the articles generally. The Committee also overruled the implied acceptance of the reservations as mentioned above.[365] Finally, the Committee withheld the jurisdiction to determine the validity of Reservations without citing any legal provision but justifying it for effectively supervising and monitoring the implementation of the covenant by the states parties.[366] On the reservations already submitted by the states parties, the committee laid down its directions wherein the states are required to precisely point out the their domestic laws which are incompatible with the treaty obligations and also give a timeframe for amending the conflicting laws in accordance with the provisions of the Covenant.[367]

It seems as if the Committee relied on the *ratio decidendi* of the European Court of Human Rights which it applied in Belilos case against the Switzerland. Wherein the Court while declaring the reservations invalid, held Switzerland liable under the subject treaty provisions.[368]

Such an extreme position and the jurisprudence severability of reservations from states' consent as employed by the Committee in this regard, in fact, invoked a strong reaction.

[364] General Comment No 24. Para 8.
[365] Ibid. Para 17.
[366] Ibid. Para. 18.
[367] Ibid. Para. 20.
[368] Belilos v. Switzerland, No. 10328/83 (ECtHR April 29, 1988).

The United States was the first one among others to object on this.[369] The Committee was vehemently criticized for assuming this jurisdiction which was apparently *ultra vires* of the Covenant. The Committee also held that such an invalidation of the contentious Reservations does not invalidate the Consent of the state's parties.[370] It is, therefore, more inconsistent with general and classical framework of international law related to the states' 'free Consent' as mentioned in the preamble of VCLT while referring to the universal recognition of '*pacta sunt servenda*'.[371]

The states practice of adopting treaties with Reservations has the long history and enjoys the customary status also. Prior to the League of Nations 1919 the subjects of international law were adherent to the principle of unanimity wherein the stipulated reservations had to be accepted by all the parties before the treaty's entrance into force for the reserving state.[372] Later, departing from the unanimity principle the 'purpose and object' test was introduced for the validity of reservation if the same was not expressly objected by the states parties. The International Conventions, therefore, used to formally provide for formulations of Reservations. As is evident from, many regional and international treaties including but not limited to European Convention of Human Rights,[373] International Convention on Eliminations of all forms Racial Discrimination 1965,[374] Convention on Elimination of all forms of Discrimination against Women 1979,[375] Convention against

[369] Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)," *International & Comparative Law Quarterly* 46, no. 2 (1997): Page 330.
[370] Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee. Page 407.
[371] "Vienna Convention on the Law of Treaties (1969)," Preamble Para 2.
[372] Cf. ICJ Advisory Opinion Relating to the Reservations on Genocide Convention, 1951.
[373] "European Convention on Human Rights", 1950. Article 57.
[374] "International Convention on the Elimination of All Forms of Racial Discrimination," 1965. Article 20.
[375] "Convention on the Elimination of All Forms of Discrimination against Women 1979". Article 28.

Torture[376] and Convention on the Rights of Child 1989[377] expressly provide the states parties right to formulate reservations. Subsequently these issues which also fall within the ambit of *sine qua non* were not substantially addressed by the Human Rights Committee.

As an obvious consequence, the legal implications rather repercussions has arisen since the Committee started invalidating the Reservations and in particular while dealing with the Individual Communications pertaining to the alleged violations of such articles by the states which were under the Reservations. These alarming reactions lead the issue to be considered by the International Law Commission to conduct a detailed study and give recommendations.

The Commission concluded its work by 2011 and its report was presented by A. Pellet, Special Rapporteur.[378] The most substantive outcome of the report was the conceptualization of the Reservations as the 'unilateral acts of the states'. It is, therefore, the law of unilateral acts, instead of the law of treaties, which should governs the matters related to the Reservations. The Commission recommended that the treaties may lay down the provisions which explain the nature and limitation of the competence of such bodies to assess the permissibility of the Reservations. It laid down a strict criteria for the treaty monitoring bodies who may decide the invalidity of reservation only on the touchstone of its permissibility[379] and to that regard the competence of the treaty bodies is equivalent to

[376] "Convention against Torture ... 1984," Article 28-29.
[377] "Convention on the Rights of the Child, 1989." Article 51.
[378] Alain Pellet, "The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur," *European Journal of International Law* 24, no. 4 (2013): 1061–97. https://academic.oup.com/ejil/article-abstract/24/4/1061/606385.
[379] "International aw Commission, Guide to Practice on Reservations to Treaties, 2011." Part 3.2.1 (1) (2).

the states parties.[380] Moreover, the assessment made by such a body has 'no greater legal effect then the Reservation which is unilaterally submitted',[381] however, if a particular reservation is found invalid the state party should express its intention as to whether it does not want to be bound by the treaty without the benefit of reservation.[382] The net result is that the treaty bodies may assess the permissibility of the reservations but their views are not legally binding.[383]

This debate is concluded with more precision and accuracy by Ryan Goodman who formulates all the three possible consequences of invalidating a Reservation. Firstly, the state remains bound to the treaty except for the provisions to which the Reservation is related. Secondly, the invalidity of a reservation nullifies the instrument of ratification as a whole and thirdly, the reservation can be severed from the ratification wherein the instrument of ratification remains effective with no exception to the provision reserved.[384] He rules out the third option as being contrary to the spirit of international law. It has also been objected by many states including USA, UK and France.[385] The second option is in favor of none. The first option is more suitable for the states who prefer reservations as compared to those who do not. The microscopic analysis of the States practice will further suggest which states need to lay RUDs for what reasons and what are those states which do not need to use RUDs and why so. The findings may once again drag the discussion to

[380] Ibid. Part 3.2.4
[381] Ibid. Part. 3.2.1 (2).
[382] Ibid. 4.5.3 (4).
[383] Pok Yin S. Chow, "Reservations as Unilateral Acts? Examining the International Law Commission's Approach to Reservations," *International & Comparative Law Quarterly* 66, no. 2 (2017): 365.
[384] Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent," in *International Law of Human Rights* (Routledge, 2017), 531.
[385] Observations transmitted by a letter dated 21 July 1995. UN Doc. A/50/40. https://www.iilj.org/wp-content/uploads/2016/08/US-and-UK-Responses-to-the-General-Comment.pdf

the two distant viewpoints i.e. of liberal vs. non-liberal democracies to look at human rights. The solution lies within the classical approach of accepting international obligations with the free consent. Other pursuits will certainly cast the states' sovereignty.

3.4 Comparative Analysis of the States' Practices with regards to the RUDs on the Treaty Obligations: Are RUDs really accommodating diversity?

This is a matter fact that the contemporary UN standards of human rights have been launched and projected by some states of the world and others were persuaded to join them. United Nations Charter, the bedrock of contemporary human rights, itself was promoted by few and initially adopted by only 51 original members in 1945. By then the majority of its present members were under the colonial domination of few of its founding members. Therefore a predominant factor remained influential not only for devising the salient features of the UN Charter but also on the subsequent formations and developments of international law including human rights. While defining its purposes and principles the Charter as well as the Statute of the International Court of Justice involves only Civil and Common Law traditions while Islamic Law and other regional traditions remained conspicuous for absence. The Liberal Democracies, therefore, find more favorable conditions for promoting their civilizational values within the UN framework.

A statistical analysis of the states' practices on the use and role of RUDs on the core instruments and the corresponding 'Views' and 'Observations' of human rights bodies may substantiate the proposition. Out of nine famous core human rights instruments there are treaties with less and higher number of reservations. The highest number of reservations have been attracted by the Convention on Elimination of all Forms of Discrimination

against Women. As of now (November 26, 2024) it has been ratified by 189 states.[386] Among the parties there are 48 states which have submitted reservations on one or another articles of CEDAW. A majority of the Muslim states have submitted reservations on article 16.[387] The International Covenant on Civil and Political Rights has 174 states parties.[388] Among them are around 63 states which have submitted reservations.[389] Similarly, Convention against Torture is also ratified by 174 states.[390] Convention on the Rights of Child has the highest number of ratifications which are 196 in number,[391] however, it is yet be ratified by the United States of America.

Among the core instruments the ICCPR is considered more comprehensive for it covers a largest possible range of all the essential human rights. All other Conventions take into considerations the protection of specific rights which are already, in one or the other, subject matter of the provisions of ICCPR. The subject analysis of RUDs related states practices pertaining to this covenant may, therefore, serve the purpose of this section.

[386] "United Nations Treaty Collections. Status of Ratifications Convention on Elimination of Discrimination against Women 1979". https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en

[387] "Amnesty International, Reservations to the CEDAW - Weakening the Protection of Women from Violence in the Middle East and North Africa Region," 2021. Page 11.

[388] United Nations Treaty Collection. Status of Ratifications – International Covenant on Civil and Political Rights 1966/1976. Accessed November 26, 2024. https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind

[389] "Center of Civil and Political Rights", 2017. Reservations and Declarations made by the State Parties of ICCPR. Accessed on November 26, 2024. https://ccprcentre.org/files/media/List_of_ICCPR_reservations.pdf

[390] "United Nations Treaty Collection, Status of Ratifications CAT 1984. Accessed on November 26, 2024. https://ccprcentre.org/files/media/List_of_ICCPR_reservations.pdf

[391] "UN Treaty Collection Status of Ratifications Convention on the Rights of Child. 1989". Accessed November 26, 2024. https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4

The existing scholarship have different views as regards to the statistical results and their interpretations are concerned with respect to the legal and political use of RUDs. Theoretically speaking RUDs may best play their role for accommodating the cultural/religious diversities across the nations, however, a critical analysis of the literature, produced on the subject, suggests two other possible presumptions as well. Firstly, the states who intend to seriously implement such treaty obligations lay more RUDs.[392] Accordingly the authors, like Neumayer, assert that is why the Liberal Democracies put serious and extensive RUDs on human rights treaties as compared to non-liberal or authoritarian states.[393] Secondly, the states who least bother to positively implement human rights rarely lay RUDs.[394]

First presumption apparently suffers a logical inconsistency for Liberal Democracies as being the primary entrepreneurs on hand and frequent users of RUDs on the other. In this regard, Goodman distinguished the attitude of United States from a core group of Liberal Democracies comprising Nordic States e.g. Finland, Denmark, Iceland, Norway and Sweden along with Belgium and Netherland. The US in spite of sharing liberal values is blamed for playing double standards while urging others to comply with human rights without setting itself as an example.[395] The Liberal Democracies remain adherent to international human rights law and norms. They not only avoid formulating RUDs but also

[392] Arthur Rovine, "Defense of Declarations, Reservations, and Understandings," *US Ratification of the Human Rights Treaties: With or Without Reservations*, 1981, 57-58.
[393] Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties," *The Journal of Legal Studies* 36, no. 2 (June 2007): 401. https://doi.org/10.1086/511894.
[394] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005), 127-28.
[395] Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent," in *International Law of Human Rights* (Routledge, 2017), 546.

'Object' the reservations by non-liberal states in a very systematic and consistent manner (as already discussed in chapter one of this study).[396] Such objections, further, help the treaty bodies to invalidate RUDs of non-liberal states. The quantitate evidence may not support as surveyed by Neumayer[397] but quantitatively the proposition may survives the skepticism to the extent that liberal democracies do not favor RUDs regime as such. The human rights bodies also pursue their agenda very actively.

As long as the second proposition is concerned, a mere quantity of RUDs may not account for shaping the attitude of non-liberal states towards the adoption of uniform standards of human rights. A number of factors are, therefore, involved which render the simplification a risk of inaccuracy. Such as a number of non-liberal states are yet to be party to either one or human rights instrument. Among those which are parties and yet not availed RUDs their status of compliance provides an evidence to contrary. Qualitative as well the quantitative analysis of the formulation of RUDs by Muslim states, however, substantiate the proposition, as shown by Numayer[398]. The Muslim states have put a caveat that they will implement the human rights instruments, particularly CEDAW and CRC, subject to principles of Islamic Law. All such 'reservations' are consistently 'objected' by the Liberal Democracies and the human rights bodies are in rigorous pursuit of invalidating those. For instance only a few weeks ago the Human Rights Committee, while reviewing its 2nd periodical report on ICCPR, recommended Pakistan to withdraw such reservations.[399]

[396] Ibid.
[397] Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties," *The Journal of Legal Studies* 36, no. 2 (June 2007): 397–429, https://doi.org/10.1086/511894.
[398] Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties," *The Journal of Legal Studies* 36, no. 2 (June 2007): 407, https://doi.org/10.1086/511894.
[399] HR Committee. Concluding Observations on Second Periodical Report of Pakistan. November 7, 2024.

3.5 Conclusion

Instead of legal, the normative approach of human rights bodies with regards to the assumption and exercise of their jurisdiction has raised their status from being merely monitoring bodies to a sort of quasi-judicial organs. Many critics have found it *ultra vires* of their parent treaties as well as contrary to the established customary international law. The ever budding adventurism of the human rights bodies is, therefore, posing serious challenges to the well-established classical principles of International Law. '*Consensus facit legem'* (consent makes the law) '*sine qua non*' (without condition nothing as) and *par in parem non habet imperium* (equals have no sovereignty over each other) are among the many of those. The final manifestation of the international customs related to the treaties exists in a codified shape in the Vienna Convention on the Law of Treaties 1969. It lays down the essential principles and rules which govern the interpretation of treaties and the implication of reservations as well objections. The human right bodies' inconsistent references to the Convention lead the matter be considered by the International Law Commission under the recommendations of UN General Assembly. The Commission further provided guidelines for the treaty bodies as to how they may maintain balance, while pursuing their mandate to ensure the effective implantation of subject instruments, between the legal and normative tendencies.

In spite of the fact that the treaty bodies' General Comments, Concluding Observations and Views are not legally binding, it has been noted, yet they influence the domestic courts

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FPAK%2FCO%2F2&Lang=en

as well the national legislations. The international, regional and domestic courts fashionably find themselves bound to interpret laws in the light of jurisprudence so produced by the human rights bodies.

If the two parallel streams of UN human rights enforcement mechanisms i.e., charter and treaties based, is compared the former are trying to achieve the objective within the political influence while the later through the legal framework. Both are, however, under the predominant influence of Liberal Democracies. The non-liberal states are on the receiving ends and being rigorously chased to adopt and implement the 'universal', 'interdependent', and 'indivisible' human rights. This universalization campaign has costs for its successes. What challenges it is brining for the sovereignty of the states is assessed in the next chapter.

Chapter Four

The Problems of Universalism:

To where is Leading the prevailing IHRL the nation states?

4.1 Introduction

In the words of Makau, '*all truths are local'*,[400] and then, relative. He is one of the strong antagonists of universalization of international human rights law for it being characterized by the fundamental features of western liberal democracy, and so, brining profound implications for the non-western societies. Such kind of assertions have, in fact, challenged as to whether the prevalent creed of human rights is genuinely universal. On the other hand, as observed in the previous chapter, the jurisprudence of the human rights is also providing no evidence to the contrary. The principles of 'universality and indivisibility, as being exercised by concerned Committees and Human Rights Council, also exhibit the tendencies of rejecting the cross cultural fertilization. This chapter explores as to whether there exits any theorize-able pattern as to how the human rights bodies (and liberal democracies) treat the Reservations, Understandings and Declarations submitted on the specific areas of international human rights treaties? If yes, what kind of impacts and implications it may have? Then what particular role is being played by the activism of the Nordic States with regards to RUDs Regime? Subsequently the chapter aims to figure out as to whether the Universalism is leading the journey of human rights through the fast track

[400] Makau Mutua, "The Complexity of Universalism in Human Rights," in *Human Rights with Modesty: The Problem of Universalism* (Brill Nijhoff, 2004), 51. Also available at: https://brill.com/downloadpdf/display/book/9789047413547/B9789047413547_s005.pdf.

to endorse the 'end of time' thesis? What are the problems of Universalism and whether the problems brought by Universalization pose any serious threat the sovereign equality and ideological sovereignty of the nation states?

The historical lineage of the contemporary shades of 'Universalism' in international human rights law may better be traced while analyzing the resultant Declarations of the two historic World Conferences on Human Rights. One of these Conferences was held during while other after the Cold War era. The purpose of having these conferences was to measure the progress and assess the challenges to be faced in the international protection of human rights standards as adopted in the Universal Declaration of Human Rights 1948. The very idea of the World Conference was conceived by the United Nations General Assembly in its 1404th plenary session, held in December 1965.[401] The proposed, and so decided, 1st World Conference was held in Tehran during April/May 1968. The proclamation of the Conference urged the people and their governments to ensure dedication to the principles of the UDHR. More importantly, on the report of the 2nd Committee, the conference requested the UN Commission on Human Rights to adopt Model Rules of procedure for the bodies dealing with the violations of human rights. By then it was the Commission which is mainly responsible to take measures on such violations. It is pertinent to mention here that the Covenants (ICCPR and ICESCR) were adopted only a couple of years earlier to 1968 and were yet to become enforceable.

[401] UNGA A/Res/2081(XX).
United Nations General Assembly. Resolutions adopted on the report of Third Committee. Para 13. https://documents.un.org/doc/resolution/gen/nr0/218/44/pdf/nr021844.pdf

The second World Conference, on the subject, was held in Vienna during June 1993 when the international law and politics just became out of the stringent sphere of the Cold War era. The conference's Declaration and the Program of Action proved to be a stimuli in the dormant waves of universalism in the settled waters of the then international human rights law. The core focus of the conference was to carry out a comprehensive analysis of the then existing international human rights system and machinery for adopting future measures for the fuller and uniform observance of UN human rights standards.

The Declaration of the Conference was adopted the by General Assembly in the same year for implementation.[402] The resolution, while reaffirming the findings of the Declaration, reemphasized the purpose and principles of United Nations in relation to ensure universal respect for human rights and the commitment of member states to fully cooperate to this end.[403] Referring to the preamble of the Charter, it recalled for their commitment to ensure respect for the obligations arising from international treaties to ensure increased coordination on the international enforcement of core human rights instruments. Having ensured this framework, the Declaration provided the following three foundations for the future rigorous pursuit of universal protection of human rights:

a. The universal nature of human rights is beyond the question.[404]
b. All human rights are universal, indivisible, interdependent and interrelated.[405]
c. Improve efficiency and effectiveness of the human rights bodies.[406]

[402] UN General Assembly. A/Res/48/141 of December 1993. https://documents.un.org/doc/resolution/gen/nr0/712/25/img/nr071225.pdf
[403] *cf.* United Nations Charter 1945. Article 1 (3), 55 and 56.
[404] The Vienna Declaration and Program of Action on Human Rights. 1993. Para 1. https://www.ohchr.org/sites/default/files/vienna.pdf
[405] Ibid. Para 5.
[406] Ibid. Para 88.

Since then, for more than a quarter of a century the Universalization project is in progress. In the previous chapter, it has been observed as to what an extent this theorization has affected the jurisprudence of International Law. This Chapter explores as to how those budding normative trends of international human rights law are accommodated in domestic laws by the 'monist' and 'dualist' states. What consequences are being faced by those states who consistently fail to comply with the jurisprudence of human rights bodies? Moreover, it will look at the challenges posed by the Universalization, of UN human rights standards, to the 'Sovereign Equality' of the nation states.

4.2 Monolithic vs. Dualistic Approach towards IHRL

International law intends to bind the sovereign states with respect to such obligations which are consensually accepted by them. Norm internationalization is generally analyzed by the critics and experts with the framework of 'Human Rights and the Transnational Legal Theory'.[407] Norm internalization may be explained as an international legal process, whereas, transnational legal process is vertical in its approach through which the public and private actors including nation states, corporations, International Organizations, NGOs, and Individuals interact to learn, interpret, enforce and internalize the rules of international law.[408]

[407] Harold Hongju Koh, "Transnational Legal Process," in *The Nature of International Law* (Routledge, 2017), 311–38. https://www.taylorfrancis.com/chapters/edit/10.4324/9781315202006-11/transnational-legal-process-harold-hongju-koh.
[408] U.N. Doc. S/Res/1441 (2002).

The states then comply with international law either by directly incorporating those treaties into their domestic law or by transposing such treaty obligations through an enabling legislation. The former trend is formally known as 'monism' while later is called 'dualism. Both kinds of the states' practices have varying implications with regards to the acceptance and implementation of international human rights law. A middle course, often referred to as *transformation,* also exits which tries to reconcile between the two extremes.

Dualism considers the domestic and international law as two independent streams of laws, separate and independent of each other. According to this theory, none of these can override the other. Their mutual relationship, accordingly, depends purely on the will of the states. This is in conformity with the classical definition of international law, as demonstrated by Oppenheim, that this is a law among the states not above the states. This approach is more conscious of the state's sovereignty.[409]

The monist theory derives justifications for the unity of domestic and international law from the views of Lauterpacht and Hans Kelsen. Lauterpact advocates the unitary view while considering the sources of both the streams in the Natural Law tradition, particularly, when it comes to the protection of human rights. The historical emergence of human rights also provides in favor of this tradition as today's human rights have genesis in British and then US Bills of Rights. Gardbaum, further, explored that the various articles of the UDHR are verbatim of certain provisions from the Constitutions of the then UN Members.[410]

[409] Malcolm N. Shaw, *International Law* (Cambridge university press, 2017), 98.
[410] Stephen Gardbaum, "Human Rights as International Constitutional Rights," *European Journal of International Law* 19, no. 4 (2008): 749–68, https://academic.oup.com/ejil/article-abstract/19/4/749/349348.

Kelsen seeks to harmonize international law with domestic law on logical grounds while finding common elements in their definitions such as obligations and sanctions. He further established the supremacy of International law on the municipal laws.[411]

In practice, the states, generally, do not strictly confine themselves within either of the theories. It is, therefore, difficult to categorically divide the states with respect to monism and dualism. For instance, in the United Kingdom, this is a prevalent policy under which the courts usually interpret the domestic law in compliance with the provisions of human rights instruments in the light of international law. The United States, on the other hand, resorts to implement treaty obligations subject to its Constitution.[412] Similarly, there are a number of states like Norway[413], Sweden, France etc., which have incorporated many of international core human rights instruments such as ICCPR etc., as it as, into their domestic legislation.

In many common law countries this monism-dualism debate has found a different trajectory.[414] These states do adopt the core human rights instruments with reservations and declare themselves as dualist states. Yet driven by international donors through the civil societies their courts usually tend to interpret domestic laws as much as compatible with

[411] Hans Kelsen, *Principles of International Law* (The Lawbook Exchange, Ltd., 2003), 403.
[412] Louis Henkin, "International Law as Law in the United States," *Mich. L. Rev.* 82 (1983): 1557. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mlr82&section=82.
[413] Norway. The Human Rights Act. May 1999.
[414] Melissa A. Waters, "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties," *Colum. L. Rev.* 107 (2007): 646. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr107&section=24.

international human rights law.[415] For instance, in a Constitutional petition, a Pakistani Judge, coined a novel jurisprudence within the state's dualist framework. While addressing a question as to whether a treaty obligation creates a right in the absence of domestic enabling legislation, he held, 'in the mere absence of a domestic law to the contrary it will be assumed that the said provision of treaty stands adopted'.[416]

4.3 The Universal writ of Human Rights and the 'Sovereign Equality'

Sovereignty is described as the recognition, by other states, of a right to have exclusive authority on subjects within a declared territory. International law, which generally comes from the treaties signed among the sovereign, is thus built upon the underlying basis of sovereign equality. The history of recognizing 'sovereign equality' as one of the fundamental principle of international law may be traced to the Peace of Westphalia, 1648, which, in fact, achieved a lasting settlement among the European nations after a thirty years war.[417] Earlier to that, the writings of the natural law thinkers like Hugo Gratious mentioned about the concept of sovereignty as one of the primary principles of international law.[418]

The idea of the equality among the sovereigns is attributed, to be first introduced, by Emerich de. Vattel who analogously considered all the sovereign states as equal as all the

[415] Jack Donnelly, "State Sovereignty and International Human Rights," *Ethics & International Affairs* 28, no. 2 (2014): 229.
[416] See for instance, Rahil Azizi v. The State and Other. Islamabad High Court, 2023. Available at: https://mis.ihc.gov.pk/attachments/judgements/161521/1/W.P_No._1666_of_2023_Rahil_Azizi_Vs._The_State_638282052901135229.pdf
[417] Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review* 21, no. 3 (September 1999): 571.
[418] Randall Lesaffer, "The Classical Law of Nations," in *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing, 2020), 22.

human beings are created with equality in person and dignity by the nature. During 18th century, the famous social contract theorist, Thomas Hobbes, theorized the notion of absolute sovereignty in his much celebrated work 'Leviathan'.[419]

As long as the formal legal basis of the doctrine of sovereign equality is concerned, the historians noted, the plenipotentiaries of the states emphasized on the recognition of sovereign equality during the negotiations for adopting laws of war. For instance, the French and Brazilian delegates urged on the recognition of the principle of sovereign equality during the Hague Conferences of 1898 and 1907.[420] The concept, however, found a more firm place while being incorporated in the final document of the League of Nations. Article five of the Covenant of the League of Nations, 1919, required the agreement of all the members of the League for making any decision.[421] Later the famous Moscow Declarations, 1943, transpired the will of the then world powers[422] to convene an international conference of all the peace loving states on the basis of the sovereign equality.[423] Finally, the doctrine was encoded in the UN Charter in 1945, with a fuller expression, wherein, it reads, '*the organization is based on the principle of sovereign equality of all its members'*.[424] The political independence and territorial integrity was also secured by the Charter under the principle of noninterference.[425]

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[419] Thomas Hobbes, "Leviathan," 2022. https://openlibrary-repo.ecampusontario.ca/xmlui/handle/123456789/1245.
[420] As cited by D Nincic in "Problems of Sovereignty in the Charter and in the Practice United Nations", (Leiden Brill, 1970), 37.
[421] "Covenant of the League of Nations", 1919. Article 5 (1).
[422] The United States, Soviet Union, China and United Kingdom.
[423] Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization," *The Yale Law Journal* 53, no. 2 (1944): 207.
[424] "UN Charter", 1945. Article 2 (1).
[425] Ibid. Article 2 (4)

A critical introspection of the Charter, however, suggests that the equality of all the UN members is limited to their role in the General Assembly for adopting the resolutions which have no binding effect.[426] On the other hand, the most powerful organ of the organization i.e. the Security Council, includes only five states as its permanent members, each vested with veto power, for adopting/blocking the decisions which are binding on all the member states.[427] The United States of America, United Kingdom, France, Russia and China are the permanent members, whereas, the General Assembly elects other ten members for a term of two years.[428] This composition of the UN Security Council has, in fact, repudiated the principle of equality in a manner as put by George Orwell, *"all animals are equal but some animals are more equal than others".*[429]

This inconsistent approach of the master drafters of the UN Charter became the target of scholarly criticism. Hans Kelsen warned, even before the foundation of the Organization was formally laid down, that only the establishment of an international court endowed with compulsory jurisdiction for all the members may help the foundation of an international organization on the principle of sovereign equality.[430] This idea, however, could not appeal the promoters of international peace as it was apprehended that such an institute will become a supra state organ and hence, will be inconsistent with the established notion of states' sovereignty.

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[426] Ibid. Article 18.
[427] Ibid, Article 25.
[428] "UN Charter, 1945". Article 23, 27.
[429] George Orwell, *Animal Farm* (Oxford University Press, 2021).
[430] Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization," *The Yale Law Journal* 53, no. 2 (1944): 211.

The Charter, very carefully, constricted the role of Security Council only to deal with the matters concerning the use of force which may threaten the international peace and security,[431] however, the Council has, over the years, also undertaken human right violations as one of the instances posing dangers to international peace. It has also overstepped another barrier of Article 2 (7), which was aimed at protecting the inviolability of the states' sovereignty from external interference. The article reads, "*Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state".*[432] It was, on the contrary, also used by some states, such as Russia, as the 'iron curtain' licensing the state to exercise their sovereignty even, at times, at the cost of fundamental human rights of their masses. By latter half of 1970s, the UN human rights bodies which were concerned for the implementation of human rights instruments, took a paradigm shift from merely monitoring role, to a new era of 'blaming and shaming' the states' inactions and violations with respect to the treaty obligations.[433] (As discussed in the previous chapter). This move got more momentum during the 1990s with an ever growing pace. The consequent jurisprudence of international law thus figured the human right out of those matters which are essentially within the domestic jurisdiction, but a concern of international community. The state's sovereignty, therefore, was exposed to the new threats from the international human rights law regime.

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[431] "UN Charter, 1945". Articles 39 - 42.
[432] Ibid, Article 2(7).
[433] Jack Donnelly, "State Sovereignty and International Human Rights," *Ethics & International Affairs* 28, no. 2 (2014): 229. https://www.cambridge.org/core/journals/ethics-and-international-affairs/article/state-sovereignty-and-international-human-rights/455EEF88258C4568D5E8EDB88BD7FA99.

Moreover, the *ad hoc* International Criminal Tribunals for Rwanda (ICTR) and former Yugoslavia (ICTY) as well the permanent establishment of International Criminal Court (ICC) formally devised the principle and law to hold state officials, on the basis of individual criminal liability, for the crimes of genocide and crimes against humanity. It all happened just before the end of previous century. Later, in 2009, the ICC indicted the head of the Sudanese state, President Umar al-Bashir, for all the three crimes allegedly perpetrated by him in Darfur.

The growing influence of global liberalism, in fact, led the authors, like Jack Donnely etc., to envision the eclipse of state's sovereignty in the ever expanding shades of the universal writ of international human rights regime. Jennifer has assessed the changing roles of the permanent members (P5) of the UN Security Council for a selective endorsing and blocking of military actions, aimed at the protection of human rights. She found that the traditional absolute sovereignty has now become a contingent one.[434] On the other hand, Kallis has found the reactionary resurgence of absolute sovereignty in the shape populism.[435] Some of leading international affairs taking place in last decade, such as a number of USA's unilateral actions under Trump regime and withdrawal of UK from European Union, have provided some substance to the proposition. The sovereignty debate between the liberal and non-liberal democracies, particularly in the rise of populism, has

[434] Jennifer Ramos, *Changing Norms through Actions: The Evolution of Sovereignty* (Oxford University Press, USA, 2013).
[435] Aristotle Kallis, "Populism, Sovereigntism, and the Unlikely Re-Emergence of the Territorial Nation-State," *Fudan Journal of the Humanities and Social Sciences* 11, no. 3 (September 2018): 285–302. https://doi.org/10.1007/s40647-018-0233-z.

therefore gained another momentum.[436] The western populists' tendencies, like the recent return of Trump in US, are also focused on taking control of their national policies and therefore want to revive the classical Westphalian model of sovereignty. On the other hand, liberal globalism is striving hard for the universalism.[437] The liberalism is emphasizing on the notion that the sovereignty is an attribute of individuals collectively as 'popular will' and not of a government or state.

Among others, as discussed above, the sovereign equality, rather the sovereignty itself, is currently facing the biggest challenge from the doctrine of the 'Responsibility to Protect'. The debate on this idea was initiated in 1999 by the former UN secretary general, Koffi Annan, who proposed as to how the international law may maintain balance between the state's sovereignty and the protection of the human rights of its citizens.[438] The next section analyses the crosscutting implications of the 'Responsibility to Protect' (R2P) vis-à-vis the states' internal sovereignty and as to how both are affecting the state of human rights.

4.4 Human Rights, Humanitarian Interventions and the Responsibility to Protect

The preceding section has assessed the budding threats to the internal sovereignty of the states. Yet again, an appraisal of the evidence has found the protective sphere of human rights is being stretched away from the territorial limits of the sates. The clear divide among the Liberal and Non-Liberal democracies continue to exist even on this issue. This section

[436] Michael Cox, "The Rise of Populism and the Crisis of Globalisation: Brexit, Trump and Beyond," *Irish Studies in International Affairs* 28, no. 1 (2017): 11, https://muse.jhu.edu/pub/423/article/810132/summary.
[437] Michael Ignatieff, "The Return of Sovereignty," *New Republic*, 2012. https://research.ceu.edu/en/publications/the-return-of-sovereignty.
[438] Kofi Annan, "Two Concepts of Sovereignty," *The Economist* 18, no. 9 (1999), 37. https://www.tamilnet.com/img/publish/2008/01/TwoconceptsofsovereigntyAnnan.pdf.

tries to theorize the 'Security Council's involvement for the human rights enforcement agenda and subsequent developments which have lead the United Nations to formally adopt the mechanism for the 'responsibility to protect'. Critics have seen this doctrine as a recourse towards the legitimization of 'the use of force' against the states which fails to address the human rights violations established as 'systematic' and 'large scaled' through the mechanisms which are predominately under the influence of Liberal Democracies. The jinni of *jus ad bellum* debate, which was bottled in article 2 (4) of the UN Charter, seems coming out again.

Malcolm N. Shaw, a well published scholar of International Law, ascribes the notion of 'just war' to the Christianization of Roman Empire wherein Christianity became devoid of pacifism.[439] The writings of St. Augustine[440] and St. Aquinas[441] are evident that the wars imposed on the wrongdoers to God, or to hold the Christian truth and love, were so recognized as a 'Just war'.[442] However, such a subjective basis forming the morality of justice for going war was abandoned at the 'Peace of Westphalia' in 1748 which ended the worse thirty-years European war fought among the adherents of Catholicism and Protestantism. In the subsequent years the declaration of war remained a sovereign prerogative. The Statute of the League of Nations 1919 restricted this resort to war subject to an arbitral award or the decision of the Permanent Court of International Justice, at the very least, for two months.[443] The final and prevalent manifestation of the *jus ad bellum*

[439] Malcolm N. Shaw, *International Law* (Cambridge university press, 2017), 651.
[440] Augustine Augustine, *The City of God* (Xist Publishing, 2015).
[441] Saint Thomas Aquinas, *The Summa Theologica: Complete Edition* (Catholic Way Publishing, 2014).
[442] Amaya Amell, "The Theory of Just War and International Law: From Saint Augustine, through Francisco de Vitoria, to Present," *Hispanic Journal* 38, no. 1 (2017): 66–68.
[443] The Covenant of the League of the Nations. 1919. Article 12. https://legal-tools.org/doc/106a5f/pdf

was drawn and incorporated by the drafters of UN Charter in 1945. As discussed earlier (Section 4.1) there exists apparently a comprehensive prohibition on the use of force, however, the language of the relevant article has no less than two interpretations. It goes on:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[444]

The last part of the Article i.e., '*or in any other manner inconsistent with the Purposes'*, had been invoked to justify the military interventions in the name of humanitarian causes or to protect the human rights in line with the Purposes e.g., to ensure '*respect for the human rights and fundamental freedoms'*.[445] The flux of such interventions at times endorsed by the Security Council itself finally resulted in the evolution of the 'doctrine of the 'Responsibility to Protect' as being adopted in UN World Summit 2005. The doctrine clearly established and authorized the international community to respond with collective action wherein a state 'manifestly fails in protecting its population from genocide, war crimes and other crimes against humanity.'[446]

As precisely generalized, in this section, the above-mentioned legal framework, though under development, provides, in a way, a basis for an armed action in order to address the so established systematic and large scaled violations of human rights. A detailed and deeper

[444] "United Nations Charter (1945)," Article 2(4). https://www.un.org/en/about-us/un-charter/full-text
[445] United Nations Charter. 1945. Article 1 (3).
[446] United Nations General Assembly. A/Res/60/1 of October 24, 2005. https://documents.un.org/doc/undoc/gen/n05/487/60/pdf/n0548760.pdf?OpenElement

analysis of a number of substantial aspects of this evolving and challenging jurisdiction is, therefore, requisitioned.

The history of military actions which were carried out in the name of humanitarian actions is long, however, the United Nations has recently renamed such intervention as 'Responsibility to Protect'. It seems needful to portray, here, a precise sketch of the inventions propelled subsequent to the UN Charter. Though controversial, as regards its legal basis are concerned, the so called first humanitarian intervention lead the fall of Dhaka in 1971 and consequently the eastern part of country was seceded from a sovereign state of Pakistan.[447] Almost two decades later UK and US led coalition forces launched military action to protect the Kurdish populations from Saddam led Iraqi forces in 1991.[448] In the next year (1992) NATO launched another operations in Bosnia and Herzegovina, and US forces intervened Somalia in 1993[449]. Both expeditions lasted till 1995.[450] In 1994 UN Security Council authorized USA to use force to undo the military coup in Haiti, 1994.[451] During the same year a genocide in Rwanda, however, remained waiting for the protective action. It was carried out by France but, arguably, intentionally late and proved to be ineffective.[452] In 1999 an unauthorized intervention was carried out by NATO in Kosovo which later termed as illegal but legitimate by the Security Council.[453] In the same year, Australia led UN Peacekeeping Force separated East Timor from Indonesia. In 2000,

[447] UN Security Council. SC Resolution 307 of December 21, 1971. https://documents.un.org/doc/resolution/gen/nr0/261/67/pdf/nr026167.pdf
[448] UNSC. SC Resolution 688 of April 5, 1991. https://digitallibrary.un.org/record/110659?ln=en&v=pdf
[449] UNSC. SC Resolution 814 of March 26, 1993. https://digitallibrary.un.org/record/164678?ln=en&v=pdf
[450] UNSC. SC Resolution 781 of October 9, 1992. https://digitallibrary.un.org/record/151454?ln=en&v=pdf
[451] UNSC. SC Resolution 917 of May 6, 1994. https://digitallibrary.un.org/record/186367?ln=es&v=pdf
[452] UNSC. SC Resolution 929 of June 22, 1994. https://digitallibrary.un.org/record/197582/?ln=en&v=pdf
[453] UNSC. SC Resolution 1244 of June 10, 1999. https://digitallibrary.un.org/record/274488?ln=en&v=pdf

British Army unilaterally used force in the name of humanitarian intervention in Sierra Leone. In 2002, USA and UK jointly intervened again Iraq to protect its people and world at large form weapons of mass destruction.[454] Though sanctioned by UN Security Council yet the allied forces later admitted there were no such weapons found, however, it cost thousands of lives besides the sovereignty of Iraqi people. This an adventure, however, moved the General Assembly to shift its focus from the phrase 'humanitarian intervention' to 'responsibility to protect'.

As instigated by Kofi Annan in 1999, the UN General Assembly was moved to consider as to how the legality or legitimacy of humanitarian interventions may be established while they are unacceptable as they violate the state's sovereignty. On the proposal of Canada, the Assembly convened the International Commission on Interventions and State Sovereignty (ICISS) to report on the matter. The Commission considered at length all the possible aspects of the questions and found:

a. *"State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.*
b. *Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to international responsibility to protect."*[455]

[454] UNSC. SC Resolution 1441 of Nov 8, 2002.https://www.un.org/depts/unmovic/documents/1441.pdf
[455] Report of International Commission on Intervention and State Sovereignty. December 2001, xi. https://www.walterdorn.net/pdf/Responsibility-to-Protect_ICISS-Report_Dec2001.pdf

The Commission considered that primarily such obligations are inherent in sovereignty of every state to protect its individual against repression and violence, however, the charter of the United Nations has also placed, in second place, this responsibility on the Security Council also when it involves threat to international peace.[456] Moreover, states as well as the Council (indirectly) are imposed with obligations under human rights conventions and declarations to address the implications of internal conflicts on human rights. Situations comprising urgent and compelling human needs, therefore, warrant actions including military interventions. The minimum threshold to establish as to whether such compelling needs exist, there must occur or to be apprehended a large scale loss of life, or ethnic cleansing as may carried out by acts of killing, terror or rape.[457] It was proposed that the military interventions are extra ordinary measures and must carried out with the prior approval of the Security Council, however, if the Council fails to take timely measures, the matter will be brought before the General Assembly to move the Council. Nonetheless, the commission recommended, as a last resort, the inaction of the Council may not stop the states to consider other means to meet out the gravity of situation. [458]

The commission's *ratio decidendi* could provide no new ground to support the already existing jurisprudence of interventions, however, it reinvented the classical idea of 'Marshal Plan'[459] in the shape of 'responsibility to rebuild' the states which may suffer

[456] UN Charter, 1945. Article 24.
[457] Report of ICISS. December 2001, xii.
[458] Ibid. xii.
[459] 1948, wherein US gave a program of financial aid to the western countries, affected by World War II,

such interventions.[460] Moreover, it ensured the intervening military operations must comply with International Humanitarian Law.[461]

The report of the Commission, its findings and recommendations pertaining to international community's responsibility to protect, came under discussion in World Summit of 2005. The outcome of document of the Summit was later adopted by the General Assembly as it resolution. [462] The resolution urged the member states to realize the responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. It was further, required that the international community should, as appropriate, encourage and help the States to exercise this responsibility and support the United Nations in establishing an early warning capability.

In this regard, the General Assembly reiterated that community of the states, being parties to United Nations Charter, also have the responsibility to use appropriate diplomatic, humanitarian and other peaceful means. In accordance with Chapters VI and VIII of the Charter, they are required to help in protecting the populations from genocide, war crimes, ethnic cleansing and crimes against humanity. To this end the states should be prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in

[460] Report of ICISS. December 2001, xi.
[461] ICISS Report, xiii.
[462] UN General Assembly. A/Res. 60/1 of October 24, 2005. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The resolution also ensured support for the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.[463]

This new concept i.e., 'Responsibility to Protect', was perhaps first experimented to topple the Col. Gadhafi's government in Libya in 2011. It was achieved through a NATO lead operation which was sanctioned by the Security Council.[464] This resolution was, though, abstained by Russia and China. Same year, in Syria also a patch of limited unilateral actions took place due to deadlock in UNSC. Following almost the similar pattern the Kingdom of Saudi Arabia is carrying out an intervening operation in Yemen, since 2015. The Kingdom was invited by the reposed Yemeni President *Hadi* to curb *Houthi* uprising in the country.

A critical analysis of the interventions hardly suggests that these actions, which nonetheless dismantle the sovereignty of the subject states, were purely for protection of human rights. Even if yes, in few cases, were they not counterproductive in terms of the cost and collateral damage. As the case may be, for instance, the US led intervention in Iraq in 2002 was admittedly wrong.[465]

[463] Ibid. United Nations General Assembly. Res/60/1 of 2005. Para 138-140. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf
[464] UNSC. SC Resolution 1973 of March 17, 2011. https://documents.un.org/doc/undoc/gen/n11/268/39/pdf/n1126839.pdf
[465] As admitted by Collon Powel and Tony Blayer

Alarming enough, the tragedy faced by the Rohingya people in Myanmar, during 2019, though comprised genocide, mass displacement, ethnic cleansing and all other crimes against humanity[466], yet, neither Security Council nor any other champion of human rights thought of carrying out the 'Responsibility to Protect'.[467] The experts have voiced, such an inaction on the part of the United Nations human rights and security apparatus, as '*failures stemming from the systematic and structural obstacles to carry out its broad and multifaceted mandate*.[468] Same holds the truth for the systematic and perpetrated human rights violations taking place against the people of Kashmir.[469] The human rights are being vehemently denied by the occupying Indian forces, since 1947 but during 2019-20 it broke all the previous records of human rights violations and crimes against humanity.[470] UN Security Council has had sanctioned the right of self-determination for the people of Kashmir for almost six time in its resolutions,[471] yet, there is no humanitarian intervention or any action in the name of Responsibility to Protect.

The continuing selective approach of the UN Security Council and its permanent members, towards approving or carrying out such an interventionist responsibility to protect human

[466] Imran Syed, "To Intervene or Not to Intervene: Ethics of Humanitarian Intervention in Myanmar," *IPRI Journal* 19, no. 1 (2019): 118, https://ipripak.org/wp-content/uploads/2019/03/Article-No.-5_Imran-Syed-ED-SSA.pdf.
[467] N. Suleimenov, "Unnoticed Humanitarian Crisis: Desperate Situation of Myanmar Rohingya," 2018. https://dspace.enu.kz/bitstream/handle/enu/15651/Merged20240620 142631.pdf?sequence1&isAllowed=y.
[468] Gert Rosenthal, "A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018," *United Nations: Genève, Switzerland*, 2019, 4. https://progressivevoicemyanmar.org/wp-content/uploads/2019/10/Myanmar-Report-May-2019.pdf.
[469] Office of the United Nations High Commissioner for Human Rights. Report on the Situation of Human Rights in Kashmir. April 2019, 13-29. https://www.ohchr.org/sites/default/files/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf
[470] Zia Akhtar, "Kashmir's Right to Self-Determination: UNSC Resolutions, Human Rights Violations and Culpability under International Law," *Athens JL* 9 (2023): 167. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/atnsj9&section=12.
[471] U Security Council. SC Resolution 47 of April 1948. http://unscr.com/en/resolutions/doc/47

rights of the people, reveals that perhaps some ulterior interests also persuade the states for such interventions.

Hypothetically, if a skeptic brain tries to trace the pattern, or any systematic design, in the history of humanitarian interventions by US, UK and France, it may find the so called large scale violations of human rights to the extant they involve liberal values. Such violations when scrutinized by the human rights bodies again under the influence of liberal democracies are thus reflected in 'concluding observations' and 'recommendations'. Human rights watchdogs and whistleblowers would continue documenting non-compliance with treaty obligations such as decriminalization of consensual sex, freedom to change religion, same rights well as responsibilities of men and women during marriage, and rights of LGBTQI etc.,[472] on part of non-liberal states. It is pertinent to note that these rights are defined in such a manner that many of the non-liberal states, such as the Muslim states for instance, are bound to derogate from because of their Constitutional, cultural and religious constraints. Unfortunately, liberal democracies are not ready to accept any other higher good. The liberal democracies, if then, persuade any of permanent members of UNSC to pull its muscles for performing the 'responsibility to protect', who may stop it. In that case the universalization project will prove to be counterproductive. These are some of the apprehensions which lead to consider the prospective challenges which may be posed by the universalization of international human rights law to the ideological sovereignty of certain states.

[472] Terence Ball, Richard Dagger, and Daniel I. O'neill, *Political Ideologies and the Democratic Ideal* (Routledge, 2019), 88, https://www.taylorfrancis.com/books/mono/10.4324/9780429286551/political-ideologies-democratic-ideal-terence-ball-richard-dagger-daniel-neill.

4.5 Serious Challenges to the Ideological Sovereignty of the Nation States

A student of human history may not be able to cite a single page without conflict. As, put by Torsky, "anyone desiring a quiet life has done badly to be born in twentieth century",[473] remains true also for all other centuries. Wars among nations have not only been fought with swords and guns but also with competing ideas and cultures, in order to achieve the hegemony over another. A systematic coherence of such ideas form an ideology.[474]

Different nations of the world do adhere to the different ideologies. The ideologies do affect, and shape, the thinking as well as the actions of their believers. Eventually, the formation and functioning of subject governments is bound by the outlines drawn by their respective ideologies.[475] Liberalism, Socialism and Marxism are the popular political ideologies of the time. Moreover, Conservatisms or Conformism including for instance the Islamic political thought etc., are generally considered, by the critics, as the potential political ideologies of the time. Populism and Fascism may not be regarded as ideologies in the strict sense but the approaches as adopted in persuasion and enforcement of particular ideologies.

Liberalism, strives hard for the constraints on the rule of majority to the extent it does not deprive and restrict individuals from their rights and liberties. It espouses the schema of

[473] Russian revolutionary Leader (1879 - 1940).
[474] Terence Ball, Richard Dagger, and Daniel I. O'neill, *Political Ideologies and the Democratic Ideal* (Routledge, 2019), 5. https://www.taylorfrancis.com/books/mono/10.4324/9780429286551/political-ideologies-democratic-ideal-terence-ball-richard-dagger-daniel-neill.
[475] Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Princeton University Press, 2013), 1.

absolute individual liberty and equal opportunity while strongly and systematically opposing to the religious conformity and ascribed status. Liberal ideology while affecting the jurisprudence provided basis for the legal positivism to combat Natural Law tradition which approved the laws to be compatible with morality. Jeremy Bentham coined the theory of utilitarianism to make law a positive science instead of normative system.[476] Moreover, when it came to Economics, it gave birth to Capitalism with the invention of industrialization in England. The most recent agendas of liberals is to secure legal protections for the consensual sex, safe abortions, same-sex marriages and LGBTI rights.

The prevailing international human rights law is as much computable with liberal values as may be possible. As discussed in earlier chapters, all the core human rights instruments, to the maximum extent, accommodate the sachem of rights as envisioned by liberalism. Moreover, the jurisprudence of human rights bodies is also actively persuading other (non-liberal) states to fully comply with such treaty obligations.

Communism is the peoples' democracy. Karl Marx considered the rule of or in favor of working class (common people) can only achieve the spirit of democracy. Socialist democracy focuses on the equality of all individuals in political as well as economic spheres. Only equal distribution of wealth can ensure pure equality of individuals which may, further, ensure the will of majority to form a government. Otherwise wealth will become a decisive factor in formation of the government and that will leave the poor at the

[476] Jeremy Bentham, "The Principles of Morals and Legislation" (New York: Prometheus Books, 1988), https://masculinisation.wordpress.com/wp-content/uploads/2015/05/an-introduction-to-the-principles-of-morals-and-legislation-jerremy-bentham.pdf.

mercy of rich. Socialism as being practice, for instance in China, is currently under much pressure by the liberal world for being devoid of adopting and implementing international human rights law. Particularly, the advocates of civil and political rights, frequently abuse China for systemically violating human rights. On the other hand the Constitution and subject legislation of China is savoir of the state's socialist ideology. Its legal framework is, thus, unable to let such rights penetrate through interposition into its domestic legislation. Human Rights Council has therefore, consistently, recommended China to accept and comply with concerned human rights instrument. In response, China has urged in the UN General Assembly and other forums for the reinvention of human rights system which should be more inclusive.[477]

Conservatism, literally implies tendencies which resist the change. Traditionally, in Europe, those who defended the traditional social hierarchy from the attacks of liberalism, were known as conservatives. This ideology asserts that only the religious and moral values are right as compared to liberal atheism. Its democracy wants the government of moral and righteous majority. Gay's rights, same sex marriages and abortion etc., are the core issues which create an unresolvable divide among the liberals and conservatives.[478] In USA, wherein, conservatives tendencies still prevail in certain states, these issue are source of unrest and in spite of consisting persuasion on part of human rights bodies, the cultural and

[477] Raphael Viana David, "China's growing influence at the UN Human Rights Council," *Sur: Revista Internacional de Derechos Humanos* 19, no. 32 (2022): 38. https://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=18066445&AN=174959898&h=nXV4rJGAufxQFDKVrf6ppbyhZ9B2MnwSCAYahvckVZIic%2FZc6JO3BpBJuDTf%2BJM7qwDSdgb3oooLDMjHq3XfBQ%3D%3D&crl=c.

[478] Dominic Stolerman and David Lagnado, "The Moral Foundations of Human Rights Attitudes," *Political Psychology* 41, no. 3 (June 2020): 440. https://doi.org/10.1111/pops.12539.

religious constraints continue to resist the incorporation of above mentioned rights in the domestic laws of the states.[479]

The Islamic political thought also includes certain elements of democracy, however, imposes on the ruler the supreme duty of the enforcement divine law (*Shariah*) on the government as well as individuals. The Muslim jurists assert that *Shairah* provides a complete system and corpus of principles and rules to deal with each and every aspect of human life, including human rights, and so on, a system of political order.[480] The western readers and critics of Islam, within the strict and selective purview of terrorist suicide attacks such as of 9/11, narrowly see the Islamic political thought as 'radical Islamism' or 'Islamofascism'. Few of them find fairness in separating Islam as a religion from the Islamists ideology, yet, very few present a coherent and organic system of Islamic order. The relationship between Islam and human rights law has been does not find a singular connotation among the experts. Few advocate complete harmony between both.[481] Others believe Islamic Law is generally compatible with human rights with few exceptions.[482] The traditional scholars such as Maudidi have presented Islamic scheme as the higher standards if compared to the United Nations' formulation of human rights.[483]

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[479] Gaetan Cliquennois, Simon Chaptel, and Brice Champetier, "How Conservative Groups Fight Liberal Values and Try to 'Moralize'the European Court of Human Rights," *International Journal of Law in Context* 20, no. 3 (2024): 362. https://www.cambridge.org/core/journals/international-journal-of-law-in-context/article/how-conservative-groups-fight-liberal-values-and-try-to-moralize-the-european-court-of-human-rights/896E5892A544944D11D7F05C7C3DAAC6.

[480] Mansour Alhaidary, "The Islamic Law and Constitution," *Available at SSRN 1729420*, 2010. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729420.

[481] As asserted by the Islamic Council of Europe while adopting; The Universal Islamic Declaration of Human Rights, 1981. http://hrlibrary.umn.edu/instree/islamic_declaration_HR.html

[482] Mashood A. Baderin, "International Human Rights and Islamic Law." Oxford University Press, 2003.

[483] Siti Rohmah, Moh Anas Kholish, and Andi Muhammad Galib, "Human Rights and Islamic Law Discourse: The Epistemological Construction of Abul A'la Al-Maududi, Abdullahi Ahmed An-Naim, and Mashood A. Baderin," *JUsticia Islamica* 19, no. 1 (2022): 141.

Denying the compatibility of certain UN human rights standards with Islamic Law may not be connected with radicalization but liberal democrats hardly realize the distinction. The classical approach of International Law within the framework of Reservations, Understandings and Declarations (RUDs) could only, to an extent, secure reconciliation between both. The universalization movement, perhaps, considers Islamic Law as a potential impediment in its way and strives to overrule it. Muslim states and Islamic law, on other hand, do not rule out individual rights but provide its own scheme of freedoms and rights. As concluded in the previous chapter, the prevailing jurisprudence of universalization of international human rights law frequently invalidates the reservations and understandings of states with different concepts of rights and thus pose serious threats to the ideological sovereignty of non-liberal states.

Interestingly, all these ideologies commonly adopt or, at the least, refer to the principles of democracy as the basis of their government. The difference, however, lies only with respect to forms. Such forms manifestly appear in the respective Constitutions and the concerned institutions of the states. In addition, the subordinate legislation carries out the objectives of such ideologies which makes harder the interposition of the values of one system into another. While referring to the unsuccessful experiments, for instance in Iraq after the removal of Saddam, Terence Ball and others have emphasized that one form of democracy may not be implanted into other. Rather, the peace of world rests at the culture of tolerance, compromise and live and let-live, between liberal and non-liberal democracies.[484]

https://jurnal.iainponorogo.ac.id/index.php/justicia/article/view/3282.

[484] Terence Ball, Richard Dagger, and Daniel I. O'neill, *Political Ideologies and the Democratic Ideal* (Routledge, 2019), 40.

However, an analysis of the Muslim states practices clearly brings to the surface the challenges which are faced by the Muslim states while dealing with human rights treaty obligations pertaining to 'gender equality', 'abortion', 'consensual sex', 'LGBTI rights' and such other rights which are on the agenda of liberal democracies.[485] Reasons behind this tension could be many. One among the others is that the Liberalism primarily emerged with antireligious sentiments in medieval Europe it[486], therefore, remains foe of all such values which, in one way or the other, ascribed with any religion. Consequently, the liberal democracies consider generally all of their opponents, and particularly Islamic Law, as an anti-human-rights systems.

International human rights law primarily wants the states to protect the fundamental human rights of the individuals, within their territorial jurisdictions. The principles of sovereign equality and noninterference was, in fact, the crux of United Nations' formula to foresee a durable and peaceful world. The universal writ of human rights, therefore, needs to strike balance between both. The revival of only an effective, substantial and uniform RUDs mechanism may provide the underlying basis to maintain such durable balance.

4.6 Conclusion

This chapter has analyzed and discussed various aspects of the malty facet problem of the universalism. This is perhaps a problem inbuilt in the nature of contemporary international

[485] Mashood A. Baderin, "A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence," in *International Law and Islamic Law* (Routledge, 2017). 625–63, https://www.taylorfrancis.com/chapters/edit/10.4324/9781315092515-28/macroscopic-analysis-practice-muslim-state-parties-international-human-rights-treaties-conflict-congruence-mashood-baderin.
[486] Terence Ball, *et al*, *Political Ideologies and the Democratic Ideal* (Routledge, 2019), 47.

human rights and remains debatable since the very birth of a system aimed at their recognition, promotion and protection. This system is developed under the auspices of the United Nations and prescribed as United Nations Human Rights System. The salient features of this system has been discussed in one of the pervious chapters. The system is essentially articulated on two theories, namely 'cultural relativism' and 'universalism'.

Relativism considers the substance of human rights standards is generally recognized by all human societies across continents. However, the application and implementation of these standards may very culture to culture. The reliance on this theory is evident from the Universal Declaration of Human Rights 1948, the very foundation of existing international human rights law. The Declaration was introduced as soft law, which, only set out the standards and guidelines instead of creating specific obligations. It was brought before the United Nations General Assembly and was adopted as a resolution. The UN Charter ascribed the persuasive value to its General Assembly's resolution. The International Court of Justice has, additionally, accorded such resolutions the status of international custom, which, serves as the source of international law after treaties. The succeeding years, at least three decades, of the Declaration witnessed the recognition, promotion and protection of human rights within the theoretical framework of 'relativism'. The member states trans-positioned the standards of Declaration in their Constitutions and respective subordinate laws. Such a domestication of the standards of the Declaration was, however, not uniform as regards the scope and content of respective rights. Moreover, instruments, other than the Declaration, which were adopted in the form of Conventions have had specific obligations for the states parties, were also ratified by the states but with or without 'reservations',

‘understandings’ and ‘declarations’. The role of these RUDs was thus ensuring the conformity of treaty laws with the theory of ‘relativism’.

The critics of ‘relativism’, for a number of reasons, have often, credited the cold war politics for keeping the ‘relativism’ alive, for few decades, in the promotion and implementation of international human rights law. However, after the fall of USSR in 1991, the theory of ‘universalism’ was more rigorously invoked for the uniform implementation of UN human rights across the nations and cultures.

‘Universalism’ theorizes human needs and nature a universal phenomenon and therefore strives for the uniform recognition and application of human rights for all human beings irrespective of their cultural or religious denominations. It considers such incompatible cultural or religious values as an impediment which deprives various groups of human beings from their basic and fundamental rights and liberties. The United Nations human rights machinery has, over the years, becoming more and more coherent with the theoretical framework of ‘universalism’. The replacement of UN Commission on Human Rights with the Human Rights Council in 2006 with a fresh vibrant mandate and more activism in the jurisprudence of human rights treaty bodies are the significant evidences in support of this proposition. This overhauling of the human rights institution within the theoretical shift from ‘relativism’ to the ‘universalism’ has brought with challenges of acceptance and implementation of subject treaty obligations pertaining to such rights which have different orientation among, for instance, the liberal and non-liberal democracies. Issues, for instance, concerning the human rights and treatment of LGBTI persons is one textbook example of such avenues wherein relativists-universalists divide is as prominent

as anything. Other issues include the scope and content of the freedom of religion and expression, decriminalization of consensual sex, safe abortions, same rights of men and women related to marriage and in context of socialists states certain civil and political rights.

After evaluating the pros and cons of both the theories this chapter has found the universalization of international human rights as counterproductive in terms of many things. There are critics who have seen this policy shift as little premature at this stage wherein certain UN human rights are yet incomplete and need to be more inclusive to be universally acceptable. The evidence to support this premise comes from the analysis of states practices with respect to the incorporation and implementation of human rights treaty obligations by the states. The states generally have two approaches in this regard, monism and dualism. The liberal democracies have no problem whole being monist and directly applying treaty law to protect individual human rights. The dualist states, on the other hand, incorporate such obligations in their domestic laws, within the constraints of their Constitutional framework,[487] to ensure only a relative protection. The human rights bodies, now, generally ignore such constraints, and also invalidate the subject RUDs. This attitude reflects their fuller adherence to the 'universalism'. The states which rely on RUDs mechanism assert the principle of sovereign equality and sovereign consent as the very foundations of the treaty law. Moreover, rules related to consent and reservations from within the VCLT Framework are also often invoked but in vain. The human rights bodies

[487] For instance, Article 227 (1) of the Constitution of Islamic Republic of Pakistan (1973) limits the parliament that, "no law shall be no enacted which is repugnant to the injunctions Islam, as laid down in Quean and Sunnah".

consider the special nature of human rights treaties, at times, beyond the scope of classical VCLT framework.

Such an active and partisan perusal of the human rights records of the non-liberal states results in depiction of non-liberal, conservative and conformist states as violators of human rights. The consequent consisting reporting and documentation of the so called systematic violations of human rights, at times, moves the apparatus of UN Security Council to seek sanction for the humanitarian intervention. Such interventions aiming at the protection of human rights nonetheless brought collateral damage and prove to be counterproductive, also. The legality as well as the legitimacy of these interventions also meet with no single opinion among the jurists of international law. The concept with a new dressing, however, seems to be regularized in the shape of 'Responsibility to Protect', as endorsed by the United Nations General Assembly in 2005.

Last but not the least, is the apprehension pertaining to more serious challenges which the universalism is posing to the ideological sovereignty of the states. As observed in chapter, the human rights bodies, while being under the predominant influence of liberalism, when pursue the universal application of UN human rights standards across non-liberal nations, hardly regard the ideological diversity. For instance when Human Rights Council or the Human Rights Committee, as the case may be, require from the Muslim states to decriminalize consensual extra-marital sex which is penalized under *hudud* laws enjoying inviolability under their Constitutions, they are left with no option.

It seems, that a time has ripen for the post-liberal redefinition of human rights values and system, wherein, it must include the diverse civilizational and cultural ideals.

Chapter Five

Legal Pluralism: A Way Forward

5.1 Introduction

Setting aside the bipolar universalist-relativist debate, there are some scholars who have explored few alternative approaches to revamp the existing discourse of international human rights law. These approaches include, but not limited to, transformative universalism, pragmatic approach, intersectional framework, constructive theories and pluralism. This chapter is devoted to find out as to what the possible alternative mechanisms are and what may be a way forward in order to achieve more effective conceptualization and international enforcement of human rights?

The transformative approach reinforces the very need for a reformation in the existing international human rights law framework. It advocates for a dialogue based reforms to include input from the diverse cultures but without compromising the fundamental principles of existing international framework.[488] The pragmatic approach emphasizes on the practical aspects of human rights and intends to shift the focus of human rights machinery from theoretical debates to the enforcement. As suggested by Richard R, this approach considers the existing human rights as contingent truths instead of universal

[488] Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2007).

truths.[489] Intersectional framework suggests as to how the various sections, based on gender and class, are not fully benefited from the existing mechanisms. It reiterates on the class based mechanisms for the enforcement of human rights, such as more efficient and sensitive protections for the vulnerable groups. The constructive theories point out the need for reinterpretation in the context of emerging global and national challenges.[490] Combining all these approaches in one organic whole makes them 'pluralism'.

Having analyzed (in the previous chapter) the problems of 'universalism' as it has brought with, over the last two decades, it is needful to look for some renovation and reform. The pluralistic approach is based on the multidimensional comprehension of human rights issues at national and international level. Pluralism, as advocated by Bhikho Parekh[491] and others, articulates significance of reconciliatory contributions of diverse societies for the common understating of right.[492] It explores the overlapping consensus rather than imposing liberal ideas in the name of universalism or completely rejecting them on being culturally relative. The universal norms could only be admissible as universal when they are defined inclusively while taking into consideration the diverse cultural and religious identities of the various communities. Once comprehensively defined, such norms could be translated in a language of binding obligation. Those obligation could be effectively

[489] Richard Rorty, "Human Rights, Rationality and Sentimentality," in *Wronging Rights?* (Routledge India, 2012), 107–31. https://api.taylorfrancis.com/content/chapters/edit/download?identifierName=doi&identifierValue=10.4324/9780203814031-8&type=chapterpdf.

[490] Elizabeth Stubbins Bates, "Sophisticated Constructivism in Human Rights Compliance Theory" (Oxford University Press UK, 2014). https://academic.oup.com/ejil/article-abstract/25/4/1169/385586.

[491] Bhikhu Parekh, "Human Rights and Moral Pluralism," in *Ethnocentric Political Theory*, by Bhikhu Parekh (Cham: Springer International Publishing, 2019), 41. https://doi.org/10.1007/978-3-030-11708-5_3.

[492] B. Parekh, "Rethinking Multiculturalism: Cultural Diversity and Political Theory," *Ethnicities* 1, no. 1 (March 1, 2001): 109–15. https://doi.org/10.1177/146879680100100112.

implemented with contextual variations of the domestic legal frameworks. Moreover, it justifies the need of accommodating culturally sensitive 'reservations' as submitted, for instance, by Muslim States on CEDAW and some Western states on ICCPR on the provisions relating to death penalty. Donders, in this regards, has suggested to encourage the signatories of human rights treaties to submit more 'interpretive declarations' and 'understandings' instead of hard reservations.[493] Moreover, the Vienna Convention on Law of Treaties framework should be applicable while dealing with such RUDs while adhering to its principles related to states' sovereignty.

This approach employs an inclusive methodology to reconcile the diverse legal norms of various cultures related to the areas of tension between the liberal and non-liberal societies. These areas include, for instance, the matters related to child marriages, female gentile mutilation, the legalized gender discrimination, rights of LGBT persons, hate speech and other.[494] The advocates belonging to various civilizational backgrounds have highlighted the significance of the respective values which may contribute in redefining human rights. Among the many proponents of this theory, Yash Ghai asserts on the inclusion of much ignored Asian Values[495] and Abdullai proposes for liberating human rights from the colonial paradigm.[496]

[493] Yvonne Donders, "Cultural Pluralism in International Human Rights Law: The Role of Reservations," *The Cultural Dimension of Human Rights, Collected Courses Volume, European University Institute, Florence, OUP*, 2013. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230276.
[494] Helen Quane, "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?" *Oxford Journal of Legal Studies* 33, no. 4 (2013): 677. https://academic.oup.com/ojls/article-abstract/33/4/675/1440930.
[495] Yash Ghai, "Human Rights and Asian Values," *Journal of the Indian Law Institute* 40, no. 1/4 (1998): 67–86.
[496] Abdullahi Ahmed An-Naim, *Decolonizing Human Rights* (Cambridge University Press, 2021).

The ideological basis for the pluralistic approach may come from the Johan Rawls's concept of 'reasonable pluralism' as he proposed in his famous work, 'Laws of Peoples, 1999'.[497] Rawls, though popular among the Universalists, proposed for the coexistence of diverse, incompatible but reasonably comprehensive doctrines. According to him, in a free and open society, the individuals, while exercising their reason and experiencing through senses, will inevitably develop and adopt different religious views as well as the moral philosophies. Such a pluralism is, therefore, not only inevitable but desirable in a democratic society.

This chapter explores the various aspects of the pluralistic approach as a way forward for the international recognition, promotion and enforcement of human rights.

5.2 A Theoretical Foundation for the Proposed Pluralistic Approach

While being a stanch advocate of liberal democratic values, John Rawls is much celebrated as an ideologue in liberal societies. However, his thesis does not completely outlaw the religious and cultural values of non-liberal societies as admitted by Charles Beitz that the acceptance of decent non-liberal societies undermines the universality of liberal human rights.[498] His major premise, though, favors the liberal Universalists, the minor premise of his syllogism, nonetheless, recognizes the stance of Relativists. 'The Law of Peoples' framework, as proposed by Rawls, means a "*political conception of right and justice that*

[497] Veljko Dubljevic, "How to Understand Rawls's Law of Peoples," *Social & Political Thought*, 85, accessed December 18, 2024. https://ssptjournal.wordpress.com/wp-content/uploads/2013/02/sspt-20-pdf-online.pdf#page=87.
[498] Charles R. Beitz, "Rawls's Law of Peoples," *Ethics* 110, no. 4 (July 2000): 669–96, https://doi.org/10.1086/233369.

applies to the principles and norms of international law and practice" to be accepted and complied with by the peoples (nations).[499] He explains when a liberal political conception is extended to the law of peoples, certainly tyrannical governments may not be allowed to disregard it, however, not all the regimes can be reasonably required to fully subscribe to liberalism. If such other (non-liberal) view is rejected *per se*, it will amount to a negation of liberalism itself. The crux of his thesis is to lay out a framework as to how the international human rights law system may apply a 'reasonable pluralism' to enforce the common good and also accept the legitimate other. This viewpoint of Rawls may, therefore, provide a common ground to lay down the foundations of pluralist approach to revamp the international human rights law framework for the coming generations.

Rawls's 'law of peoples' framework may be summarized into three essential principles for the proposed model of pluralist conception of international human rights law.

a. The states' right to wage war shall be strictly limited to its self-defense, as already been accepted under UN Charter.[500]
b. States' right to internal sovereignty shall also be limited to the extent of its express international commitments for protecting the human rights of its people.[501]
c. Human rights do not depend on any particular comprehensive moral doctrine, instead, they express a minimum standards for all peoples and a systematic

[499] John Rawls, "The Law of Peoples," *Critical Inquiry* 20, no. 1 (October 1993): 36. https://doi.org/10.1086/448700.
[500] UN Charter, 1945. Article 2(4).
[501] John Rawls, "The Law of Peoples," *Critical Inquiry* 20, no. 1 (October 1993): 42. https://doi.org/10.1086/448700.

violation of these rights (corresponding to those standards) will be a matter of trouble for all the peoples as a whole both liberal and hierarchical (non-liberal).[502]

The first two principles generally provide a bare minimum mechanism or framework to be observed with regards to international extension or application of human rights. The third principle deals with core and cardinal issue of norm-setting and then translating them into a language of obligations to be complied with by the international society of states. It is pertinent to note here that Rawls has used the words – 'the conception' of human rights does not depend on 'one particular moral doctrine' it therefore should come from a 'minimum standards', 'acceptable to all peoples (nations)', and 'the systematic violations' of which trouble all the peoples, liberals and non-liberals. These words of him are elaborative enough to understand that the most appropriate conception of human rights is requisite of pluralistic and all-inclusive approach. He also reiterated for the respect of the principle of non-intervention in express words. Rawls, to certain extent, however, acknowledged, in the grave circumstances, the right to war for the defense of 'well-ordered' (human rights compliant) societies and peoples from the immediate threat of the tyranny of outlaw regimes (abusers). Nonetheless, he preconditioned this extraordinary measure to be undertaken within the framework consensually devised by the liberal and non-liberal societies.[503]

A critical assessment of Rawls's model of plurality suggests as to how it is capable of accommodating diversity while maintaining the principles of justice. The areas of tension

[502] Ibid. P 57.
Ibid. 61.

and conflict may be considered with diverse approaches and the public reason may foster the framework for accommodating diverse opinions. If legal framework proves to be stagnant for certain matters, one can go back to morality for the minimum consensus. The critics may also point out some of the unaddressed or open ended questions, as pointed out by Iris Marion, from within the Rawls's principles.[504] For instance, what shall be the criterion of reasonability? Because, supposedly, the proposed model rejects the values if found non-reasonable. And how about the public reason of marginalized groups if they suffered the tyranny of majority? Similarly Michal Sandel has objected that the Rawls's approach is based on the well rooted presumptions in the superiority of liberal values as compared to other (already mentioned above as a major premise in his syllogism).[505] Amartya Sen has pointed out that his theory is too ideal and ignores some of the practical challenges. For instance, it is bound to fail if the reasonable peoples of various communities do not cooperate too reasonably to formulate minimum standards.[506]

Many, if not all, of these speculations are based on the liberal bias against the cultural pluralism. All such concerns have sort of in-built answers in the proposed theory, wherein, it provides the larger framework for the reconciliation of varying doctrines through

[504] Ipris Marion Young, "Justice and the Politics of Difference," in *The New Social Theory Reader* (Routledge, 2020), 261–69. https://www.taylorfrancis.com/chapters/edit/10.4324/9781003060963-43/justice-politics-difference-iris-marion-young.
[505] Michael Sandel, "Liberalism and the Limits of Justice," in *Debates in Contemporary Political Philosophy* (Routledge, 2005), 150–69. https://www.taylorfrancis.com/chapters/edit/10.4324/9780203986820-14/liberalism-limits-justice-michael-sandel.
[506] Amartya Sen, "The Idea of Justice1," *Journal of Human Development* 9, no. 3 (November 2008): 331–42. https://doi.org/10.1080/14649880802236540.

reasonable dialogue to conclude minimum standards. All further possibilities could only be the extensions of this *Grundnorm* of the theory.

5.3 Few Practical Approaches within the Pluralistic Framework

Having set (in the preceding section) a theoretical framework which may serve as foundation for developing a desired formulation of international human rights and law, based on pluralism, this section analyses a few practical approaches aiming as to how a bare minimum set of shared rights and related mechanisms may be devised. These approaches, primarily, engage the question relating to the articulation of an essential and permanent framework, for the adoption of an inclusive and comprehensive set of human rights, from within the existing corpus of international human rights law as well as *ab initio,* for the times to come.

Kao has categorized the views of pluralistic scholars as generally falling in two kinds, the maximalist and the minimalist.[507] The maximalist approach involves the maximum substantive moral frameworks including the religious and metaphysical rationale. He, proposed that the larger version of good may be conceptualized on the moral common ground underlying divergent cultural convictions. The minimalists, on the contrary, choose a set of minimum rights, from within the existing UN standards, having a larger cross-cultural recognition. Further, they advocate for achieving the requisite compatibilities of others and varying standards with the former.

[507] Grace Y. Kao, "*Grounding Human Rights in a Pluralist World"* (Georgetown University Press, 2011), 4.

Kao prposes, for such a maximalist comprehension of human rights, three declarations including, Cairo Declaration (1990), the Papal Encyclical Pacem in Terris (1963) and The Parliament of World's Religions' Declaration toward a Global Ethics (1963) may be considered.[508] Further, to Kao's suggestion, these Declarations may contribute and add into the philosophical foundations of the scheme of rights as codified in the Universal Declaration of Human Rights, 1948. The UDHR, then, may prove to be more inclusive. While referring to the works of Michael Perry,[509] Max Stackhouse,[510] Hans Kung[511] and Nicholas Wolterstorff,[512] he also emphasized on the need of including religious worldviews in the conceptual basis of rights.

Regarding the implementation and enforcement of the selected and so recognized set of right, Rawls had derived some sort of support from the ideas of Immanuel Kant as he proposed in his famous work, 'the perpetual peace'. Kant considers "human freedom of choice and action, exercised in accordance with the *pure reason* is in itself a greatest value"[513] that may serve as fundamental norm for the larger recognition of nations. It may further serve as corner stone for the 'world government'.

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[508] Kao, *Grounding Human Rights in a Pluralist World*. 31.
[509] Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, 2006).
[510] Max L. Stackhouse and Stephen E. Healey, "Religion and Human Rights: A Theological Apologetic," in *Religious Human Rights in Global Perspective* (Brill Nijhoff, 1996), 485–516. https://brill.com/downloadpdf/edcollchap/book/9789004637146/B9789004637146_s022.pdf.
[511] Hans Kung, "Explanatory Remarks Concerning a 'Declaration of the Religions for a Global Ethic". https://dialogueinstitute.org/s/Declaration-of-a-Global-Ethic.pdf.
[512] Nicholas Wolterstorff, "A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History," *Wake Forest L. Rev.* 36 (2001): 535. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wflr36&section=27.
[513] Immanuel Kant, "Toward Perpetual Peace," 1795 in *Theories of Federalism: A Reader*, ed. Dimitrios Karmis and Wayne Norman (New York: Palgrave Macmillan US, 2005), 1. https://doi.org/10.1007/978-1-137-05549-1_8.

Having consolidated the integrated effect of such ideological foundations, a bare minimum set of human rights may be articulated on the following principles as proposed by Rawls.

a. All peoples are to be considered free and independent and their freedom and independence shall be respected by other peoples,
b. The peoples (of all nations) must comply with their commitments as promised in treaties,
c. Peoples are equal and parties to the agreements which bind them,
d. The peoples have to respect and observe the principle of non-intervention,
e. The right of resort to war shall be strictly limited to the self-defense of the peoples,
f. They have to honor human rights as may be agreed upon,
g. Even in the war for the self-defense they have to observe restrictions, and lastly,
h. The peoples must mutually cooperate and assist other peoples living in unjust and unfavorable conditions prevailing in their respective territories.[514]

While Rawls's views, accommodating plurality, are appreciated, Kao has observed, his justification that the international community has sufficient reason to enforce such rights has lead the contemporary international human rights law to dismal. It is, therefore, imperative to realize that such bare minimum principles (as arrayed above) may only serve as the aspirational and corrective standards for the positive law.[515] That, it is the law which has to be adopted in accordance with the specific indigenous needs of the peoples.

[514] John Rawls, "The Law of Peoples," *Critical Inquiry* 20, no. 1 (October 1993): 46. https://doi.org/10.1086/448700.
[515] Kao, "*Grounding Human Rights in Pluralistic World*" 75.

It is also pertinent to be realized that the human needs, thus, forming the rights may have different orientations depending on the different anthropological conditions. The human right thus do not have exclusively western origins but other civilizations have also contributed towards their development even much before the West.[516] This premise provides a foundation for another approach aiming at pluralism. As identified by Ellen Messer, the plurality and inclusiveness may be achieved while accepting "unity in diversity" i.e., the international practice of human rights depends on the recognition, in particular, the laws of the states and customary behavior of the peoples.[517] He regards UDHR an inclusive document to certain extent which may be allowed to be interpreted by states according to their needs and constraints.

Moreover, an admissible evidence exists, in one way or other, with regards to the coexistence of different normative legal orders in the domestic jurisdictions of almost every state of the world. For instance, the local systems of the ingenious people in ancestral lands are recognized in United States,[518] the Constitutional recognition for the application of Islamic Law in Nigeria[519] (besides civil law tradition), same holds truth for Pakistan[520] (besides common law tradition) and a *de facto* acceptance of the decision of the religious

[516] Asmarom Legesse and Kenneth W. Thompson, "The Moral Imperatives of Human Rights: A World Survey," 1980.
[517] Ellen Messer, "Pluralist Approaches to Human Rights," *Journal of Anthropological Research* 53, no. 3 (October 1997): 312. https://doi.org/10.1086/jar.53.3.3630956.
[518] Human Rights Council. Report of the Special Rapporteur on the Rights of Ingenious People. August 2012. Accessed December 20, 2024. https://digitallibrary.un.org/record/733435?ln=en&v=pdf
[519] Jamiu Muhammad Busari, "Shari 'a as Customary Law? An Analytical Assessment from the Nigerian Constitution and Judicial Precedents," *AHKAM: Jurnal Ilmu Syariah* 21, no. 1 (2021), https://www.academia.edu/download/109960593/18815_65592_1_PB_2_.pdf.
[520] National Assembly of Pakistan. Enforcement of Shariah Act 1991. Section 4. Accessed Dec 20, 2024 https://na.gov.pk/uploads/documents/1335242059_665.pdf

courts in United Kingdom in the shape of alternate dispute resolution.[521] The analysis of aforementioned states' practices pertaining to their Constitutional arrangements for accommodating pluralism in the domestic legal order, in fact, strengthens the presumption that pluralistic approach in international human rights law will prove to be more effective than any other.

On the similar assumptions, Helen Quane, while equating liberalism with theocracy as if both deny the pluralism, has identified a relationship of legal pluralism with human rights.[522] According to his approach, the diversity of various normative system of rights may be accommodating in the contemporary human rights system by recognizing the religious and customary law. For instance, the European Court of Human Rights acknowledged the establishment of plurality of legal system for certain religious groups wherein they have a choice of court, just as for the family and personal matters.[523] Similarly, within the right to freedom of religion framework, states can be allowed to apply religious and customary law exclusively to govern the personal status of persons belonging to respective faiths. Domestic laws, which are aimed at regulating the personal status of individuals may admittedly be considered case sensitive in this regard. Legal pluralism, in fact, remains an inevitable and unavoidable need in such matters. This is one of the reasons that Convention on Elimination of all Forms of Discrimination against Women has

[521] Dominic McGoldrick, "Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws," *Human Rights Law Review* 9, no. 4 (2009): 603–45, https://academic.oup.com/hrlr/article-abstract/9/4/603/683680.
[522] Helen Quane, "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?," *Oxford Journal of Legal Studies* 33, no. 4 (2013): 675–702, https://academic.oup.com/ojls/article-abstract/33/4/675/1440930.
[523] European Court of Human Rights. Refah Partisi and others v. Turkey. 2003. Para. 43-70. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60936%22]}

attracted highest number of Reservations. Helen asserts, with exception of few, generally in the view of concerned international bodies the religious and customary law has the inherent capacity to adapt to international human rights law.[524]

The pluralists observe that all the leading legal traditions such as of Common Law, Civil Law and Islamic Law generally adhere to the principle of plurality and inclusiveness. For instance, BZ Tamanaha has provided a detailed examination as to how the Common Law and Civil Law appraises the legal pluralism to ensure the rights of cross-cultural communities.[525] MT Rahman, while referring a number of Verses from the Quran and examples from Sunnah has established this proposition for Islamic law.[526]

All these approaches may be integrated to articulate a comprehensive theory of international human rights as propounded by Michael Perry. He asserts that the subject theory should essentially be dealing with, at the least, three aspects. First, it should lay down the moral foundation of human rights. Secondly, it must figure out what kind of normative relation may exist between the morality and human rights law. Lastly, the theory may provide an institutional framework for the protection of human rights, so defined.[527]

[524] Helen Quane, "Legal Pluralism and International Human Rights Law". 700.
[525] Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford University Press, USA, 2021).
[526] M. Taufiq Rahman and Paelani Setia, "Pluralism in the Light of Islam," *Jurnal Iman Dan Spiritualitas* 1, no. 2 (2021): 204–10.
[527] Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, 2006).

5.4 Core Areas of Tension Necessitating Legal Pluralism in IHRL

The existing discourse on the liberal and non-liberal version of human rights, if scanned through a philosophical lens, will be found well ingrained in the two different soils namely, 'existentialism' and 'determinism'.[528] The decisive distinction between both is the role of 'free will' in formulation of ideas, values, norms and everything.

The Existentialists consider, that the human will is capable of discovering what is right and what is wrong for human being. The only apparent test which may examine the accuracy of such a choice is the consequence brought by its utilization. If it results in a pleasurable feeling it is right and good thus legal. If an act or a practice is painful it will be regarded as bad, wrong and illegal. In legal philosophy, the thoughts of Jeremy Bentham may confer this idea as he wrote, *"Nature has placed the mankind under the governance of two natural sovereign masters, pain and the pleasure. It is for them, alone, to point out what we ought to do as well as to determine what we shall do."*[529]

Determinists, on the other hand, believe that human actions, like other events taking place in the universe, are caused by prior pre-determined causes. The human will, therefore, may not freely discover as to what is good, instead, it has to seek aspiration from external factors such as nature, morality and religion etc. contrary to the existentialists, they do not subscribe to consequentialism but consider the attributes of acts and things, regardless of

[528] Justyna Przedańska, "The Faces of Freedom in the Concepts of a Liberal and Non-Liberal State," 2021, 156-57. https://www.academia.edu/download/108662935/12071.pdf.
[529] Jeremy Bentham, "The Principles of Morals and Legislation" (New York: Prometheus Books, 1988), Introduction.

their utility, are naturally endowed in themselves *per se*. It is human reason, instead of human free will, which may determine such causes for the prospective effects.

Having distinguished the two underlying philosophies one may find liberal discourse of rights essentially revolves around the free will and utilitarianism. The non-liberal and authoritarians conception of rights is dependent on the pre-existing morality, natural justice and religion. Falling distant apart from each other these two streams cannot reconcile but coexist with each other if there exist a durable framework facilitating inclusiveness and pluralism. This viewpoint may help understanding some of the core areas of tension between the liberal and non-liberal conceptualization of varying set of human rights. The most volcanic among those are analyzed below.

Rights of LGBTQI + Persons

As analyzed in Chapter Two of this study, almost all the Liberal Democracies and particularly the Nordic States are currently more conscious of the rights of Lesbian, Gay, Bisexual, Transgender, Queer and Intersex persons. It was found that the Nordic states are not only recognizing these rights but also have become strong advocates and promoters of the same. They consistently and systematically influence the human rights bodies to urge and pursued the non-liberal, authoritarian and Muslims states for the recognition and effective protection of these rights. Therefore, it is evident from the a perusal of 'concluding observations', 'list of issues' and 'recommendations' frequently flowing from UN Human Rights Bodies towards the non-liberal sates, wherein, they are consistently required to decimalize the consensual sex among the Lesbian, Gay, Bisexual, Transgender,

Intersexual, Queer and Heterosexual persons. Similarly, decriminalization of acts pertaining to abortions is one of most consistent recommendations. Moreover, the positive legislative and administrative actions are also asked to be undertaken by the states with regards to the recognition and legal protections of these rights along with matters related to the gender identity and sexual orientation. It is pertinent to note that so for these rights are specifically codified in any particular binding treaty yet they are construed by extending the equality clauses in ICCPR and other Conventions.[530]

On the contrary, in most of non-liberal states and some other states with a diverse cultural identities, just like few states in US etc., almost every aspect related to LGBTQI is, one way or the other, an offence termed as, fornication, adultery, sodomy, obscenity and many more. Such acts are penalized in those states for being considered harmful and unacceptable by the society at large within the prevailing framework of moral, cultural or religious norms (in particular, for the Muslim states). International Human Rights Law needs to realize that on size does not fit all. The only viable solution to this and such other dilemmas is legal pluralism wherein two or more varying legal traditions may co-exist and be applicable.

Gender Equality

Another highly debated matter among the liberal and non-liberal circles is the recognition of gender equality. In addition to the articles incorporated in other Conventions aiming to ensure the equality between men and women with regards to the enjoyment subject right,

[530] "International Covenant on Civil and Political Rights, 1966". Articles 3, 14 and 26.

a specific convention namely, Convention on Elimination of All Forms of Discrimination against Women was adopted in 1979. It has been observed by the critics that, in spite of the recognition of human equality in almost all the normative systems, CEDAW has attracted the highest number of 'reservations' by the states parties.[531] Among other points of possible conflict, it incorporates an obligation on the states parties 'to ensure, on the basis of equality of men and women, *same* right to enter into marriage, during marriage, at the time of its dissolution, as parents, to decide number and spacing of children etc.'[532] The influence of the predominant influence of the liberal inclination is evident from the very language of the article, wherein, the word 'same' is used neither similar nor equal.

On the other side, the non-liberal states try to ensure equality between men and women with sort of equal or similar rights instead of 'same' rights. For instance, the Cairo Declaration, 1990, holds, *"woman is equal to man in human dignity and has her own rights to enjoy as well as duties to perform"*.[533] Moreover, the obligations corresponding to this article further indulges issues like polygamous marriages, marital rape, abortion etc. All such matters fall within the ambit of personal laws which are generally derived from religious aspirations and individuals have strong convictions to adhere to them. It is, therefore, impossible for the non-liberal stats to accommodate *stricto sensu* the obligations emanating from article 16 of CEDAW, but on the cost of their freedom to profess religion.[534] This one of the substantial reason behind the reservations and declarations of

[531] Anak Agung Ayu Nanda Saraswati, "The Disclosure of Reservations to CEDAW on Women's Rights in Malaysia, Brunel, and Indonesia," *Indonesian J. Int'l L.* 19 (2021): 516. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/indjil19&section=25.
[532] "Convention on Elimination of All Forms of Discrimination Against Women, 1979." Article 16.
[533] "Cairo Declaration of Human Rights in Islam, 1990", Article 6. Accessed December 21, 2024. http://hrlibrary.umn.edu/instree/cairodeclaration.html.
[534] UDHR, 1948. Article 18, ICCPR, 1966. Article 18.

Muslim states, wherein, the ensured compliance with such obligations subject to *Shariah*.[535]

Freedom of Expression and Hate Speech

Right to hold opinion and right to the freedom of expression is an essential hallmark of liberal democracies. As regards its scope and content is concerned, it remains a point of conflict for the liberal democracies as being practiced in the non-liberal and authoritarian regimes. To this end a normative standard of set in UDHR, 1948,[536] wherein, it is provided that, "*this right includes freedom to hold opinions without interference and seek, receive and impart information and ideas through any media and regardless of frontiers*".[537] This is quite a liberal conception of the freedom and apparently not restricted to any limitation. However, another article of the Declaration mentions, "*in the exercise of his rights and freedom, every one shall be subject to such limits as determined by law in respect of the rights of other*."[538] Liberal states, particularly the Nordic states, subscribe to this absolute standard without any limitation, even they advocate the toleration of hate speech.[539] However, incidents like the desecration of Holy Quran taking place in Norway and Sweden moved the Human Rights Council to adopt a resolution on countering religious hatred.[540]

[535] Fahad Al Aghbari et al., "Rights of Women in the Establishment and Dissolution of Marriage in Oman: Between CEDAW and Sharia Perspective," *Legality: Jurnal Ilmiah Hukum* 32, no. 1 (2024): 35.
[536] UDHR, 1948. Article 19.
[537] Ibid.
[538] UDHR, 1948. Article 28(2).
[539] Amal Clooney and Philippa Webb, "The Right to Insult in International Law," *Colum. Hum. Rts. L. Rev.* 48 (2016): 1. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/colhr48&section=12.
[540] Human Rights Council. Resolution 53/1 of July 12, 2013.
https://documents.un.org/doc/undoc/gen/g23/145/38/pdf/g2314538.pdf

The non-liberal and authoritarian states, on the other hand, find some scope to restrict hate speech and other abuses of the freedom of expressions under the ICCPR framework. The Covenant while incorporating the standard as set in UDHR, has also provide certain criteria for the state parties as to how they may regulate the scope of the freedom. It provides that the exercise of this right carries with special duties with regards to the repute and respect for the rights of others and for the protection of national security, public order and morality.[541] Moreover, it requires from the states to prohibit any propaganda for war or any advocacy for the national, racial or religious hatred which incite to violence, etc.[542] The Covenant has, therefore, not only provided for but, in fact, has required to criminalize the freedom of expression if it overlaps with hate speech. The non-liberal states, though, fulfil this obligation while restricting hate speech yet the human rights bodies require from them to repeal such laws, as for instance, the blasphemy laws of Muslim states are consistently criticized by the human rights bodies.[543]

An impartial analysis of the compliance with the relevant treaty obligations, as spelled out in article 20 of ICCPR, may better suggest as to whether which among the liberal and non-liberal states practices are to be held accountable for the systematic violation of this article. Besides these three substantial areas of tension, as discussed above, among the liberal and non-liberal versions of human rights, the interpretation of the scope and matter of a lot of other UN standards is also not less significant. Just as, freedom of religion, freedom of association, freedom of assembly, issues pertaining to death penalty within the scope of

[541] ICCPR, 1966. Article 19 (3) a and b.
[542] Ibid. Article 20. (1) and (2).
[543] Meghan Fischer, "Hate Speech Laws and Blasphemy Laws: Parallels Show Problems with the UN Strategy and Plan of Action on Hate Speech," *Emory Int'l L. Rev.* 35 (2021): 40. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/emint35&section=12.

right to life, matters related to torture and corporeal punishments and so on. It may not be inadmissible to assert that almost each and every human right somehow or the other has certain aspect of relative application. It is, therefore, an appealing call of the hour to bring legal pluralism in international Human Rights Law.

5.5 Conclusion

After having a comprehensive analysis of a wide range of issue brought by the universalization of liberal UN standards of human rights, through International Law and Institutions, the focus of this chapter was to consider the possible and viable solutions. As suggested by experts and critics, in this regard, a number of alternative approaches were taken into consideration and analyzed.

Cultural relativism, as an old and classical counter part of universalism, has remained a point of concentration for much of the scholarship during the last quarter of previous century. The culturists relied on the classical framework of treaty law governed under international customs which were later incorporated and codified in the Vienna Convention of Law of Treaties 1969. Under this framework the anticipatory use of ‘reservations’, ‘declarations’, and ‘understandings’ (RUDs) was helpful for the non-liberal states in implementing such liberal human rights with variant interpretations suiting to their local constraints. However, with a policy shift, towards more activism in the jurisprudence of human rights bodies, for the more uniform and universal enforcement of human rights treaty obligations, the cultural relativism became irrelevant for being treated as anti-human rights. The emerging jurisprudence of human rights bodies went a mile ahead from the

VCLT framework while establishing the special status of human rights treaties. This influential development have had devalued the classical rationale of the relativists.

Alternative ideas and mechanisms, then, found place in the scholarly academic work on the subject, since the beginning 21st century. Among these approaches, the inception of Legal Pluralism in contemporary mechanism of international human rights law is seen as a viable solution. The essential philosophical and theoretical foundation is derived from the Rawls's '*Law of Peoples'.* He proposed for the enforcement of common good to achieve justice as fairness through the law of peoples, the acceptance of 'reasonable pluralism' is inevitable. That common good must accommodate the values of other moral systems and only through such an inclusive approach a bare minimum set of rights may be described.

Having prescribed the Rawls's philosophical framework as a bedrock for the inception of pluralistic approach, few of the selected practicable approaches are also discussed. Such as, maximalists, among the advocates of pluralism, urge the maximum inclusion and accommodation of ideas of rights emanating from various legal traditions. Such an inclusive conception of human rights may prove to be more universal for its international enforcement. Some of the experts have envisioned the existence of legal pluralism in all the legal traditions and systems, prevailing in various parts of the world, wherein it has been seen as best solution to accommodate cultural and religious diversity. Common Law, Civil Law and Islamic Legal tradition already provide principles and frameworks as to how pluralistic inclusion of diverse values may be achieved and practiced. The states practices

of the countries subject to these are and other legal traditions were also analyzed to provide an evidence in support of the proposition.

Finally, the three most substantial areas of conflict, from within the prevailing human rights system, are selected for a brief perusal to understand and realize as to how the concerned mechanisms under the influence of liberal universalism are affecting the non-Liberal nations. This brief prescriptive analysis helps rationalizing the problem and justifies the need of accommodating legal pluralism. From within the areas of such a conflict and tension, issues pertaining, though not limited to, the recognition and enforcement of the rights of LGBTIQ+ persons, gender equality in reference with same rights of men and women in marriage and subsequent matters, and freedom of expression in context of hate speech are considered for this purpose. The analysis of these three selected issues suggest the deeper and irreconcilable divide among the liberal and non-liberal conception of subject rights. It is also observed that the roots of such a departure may be traced as ingrained in the philosophies of existentialism and determines, respectively.

The two parallel system of ideas, always run separately from each other and never meet at a juncture unless one supersedes the other. As observed such an overriding approach which is currently being practiced under auspices of Human Rights Council and other treaty bodies is proving to be counterproductive. Only a viable solution, therefore, remains the acceptance of the varying yet legitimate other human rights systems and traditions. The existing mechanisms could further devise a framework to ensure its efficacy and also to avoid the possible apprehension of its misuse and abuse. The prospective coexistence

among the liberal and non-liberal versions of human rights, thus, could be achieved through an appropriate inclusion of legal pluralism in international human rights law system.

Chapter Six

Findings, Conclusions and Recommendations

The western proprietorship of human rights, having had its influence thorough international law and institutions for almost 75 years (since the foundation of UDHR, 1948), has brought a penumbra of legal and cultural artefacts affecting almost every human being in a way or the other. The most current phase of this ongoing ambush involves challenges to the ideological sovereignty (cultural/religious identity) of the nation states, particularly, comprising the non-liberal societies. The Liberal Democracies, equipped with an optimal requisite resource, are leading from the front the whole discourse of present the day international human rights law. The non-liberal states are at the receiving end and striving hard in defense of their domestic norms which are not compatible with the liberal version of human rights. International law, once defined as, 'the law among the states, not above the states', has been oxidized, by the liberal human rights movement, to such an extent that its originality is being fainted off. The ideological differences between the liberal and non-liberal conceptions of human rights did, in fact, appear as soon as the United Nations took its very first step towards achieving the proclaimed 'universal respect for human rights and fundamental freedoms for all'[544]. During the adopting process of the resolution carrying its declaration of human rights,[545] in the General Assembly, one of the member states specifically pointed out:

[544] United Nations Charter, 1945. Article 55 (C).
[545] UDHR. United Nations General Assembly. A/Res 217(III) of December 10, 1948.

"The authors of the draft declaration had, for the most part taken into consideration only the standards recognized by Western civilization and had ignored more ancient civilizations which are past the experimental stage and had proved their wisdom through the centuries. It was not for the Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the World."[546]

The succeeding years and decades witnessing the various ups and downs, from standard setting to formulation of binding obligations and from relative application to uniform implementation of human rights, could only endorse the apprehension/proposition as quoted above. To support this assertion one may observe the occurrence of a normative shift, in United Nations' jurisprudence of international law, from the 'respect for sovereign equality'[547] to the extent of strategies known as 'naming and shaming'.[548] The consequent results of this paradigm shift can be celebrated by the liberal democracies while proving to be counterproductive for the others. Such a drastic and divergent turn, in the context of prevailing mechanisms aiming at the universalization of human rights, leads to crediting United Nations for failing the Kantian idea of the global government for perpetual peace.[549]

The research at hand was aimed at engaging the presumption as to whether the international human rights law regime has become a new cold war between the liberal and conservative

[546] Michael Ignatieff, "The Attack on Human Rights," *Foreign Affairs*, 2001, 103.
[547] United Nations Charter, 1945. Article 78.
[548] Elvira Dominguez-Redondo, "The Universal Periodic Review—Is There Life Beyond Naming and Shaming in Human Rights Implementation?" *New Zealand Law Review* 2012, no. 4 (2012): 673. https://www.ingentaconnect.com/content/lrf/nzlr/2012/00002012/00000004/art00006.
[549] Jochen Rauber, "The United Nations-A Kantian Dream Come True-Philosophical Perspectives on the Constitutional Legitimacy of the World Organisation," *Hanse L. Rev.* 5 (2009): 49. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hanselr5&section=7.

democracies.[550] To have substantial findings, in this regard, a detailed critical legal analysis of the mandate and jurisdiction of the concerned human rights bodies and related mechanisms was undertaken while addressing a handful of questions.

The second chapter of this work has dealt with the question as to why the existing human rights discourse is at a crossroads between the liberal and non-liberal democracies and how an outline may be drawn with regards to the human rights within their domestic and applicable international legal framework. Having traced the origins of the liberalism in west in the enlightenment theories, voicing for the individual liberties and rule of law against the monarchic arbitrariness, which brought with the glorious revolutions taking place in England during 1688-89 and a century later in France and United States. With the subsequent developments during subsequent three centuries, liberalism has become a symbol of constitutional and legal guarantees for individual liberties and fundamental rights against the freely elected governments. The hallmark of such liberties, as a perusal of the state practices of selective top liberal democracies suggests, in the recent international human rights law discourse, is absolute freedom of expression regardless of hate speech in certain states, absolute gender equality with 'same' right for men and women, women's right to safe abortions and the rights of LGBTQI+ persons.

On the contrary, non-liberal states include a variety of systems, such conservatives, conformists, populists, authoritarians, and others. The common threshold among all the forms of non-liberal governments is the more administrative and authoritarian and legal

[550] Thesis statement, of the research at hand.

control on the freedoms within the subject constraints of morality, religion, culture, ideology and sometimes security. The states practices of the non-liberal states in correspondence with relevant treaty obligations are assessed by the human right bodies with general concerns ranging from the invalidation of their Reservations to the recommendations aiming at repealing of incompatible laws.

A critical perusal of the 'concluding observations' by the Human Rights Committee and list of recommendations as forwarded by the Human Rights Council after the latest periodical reviews, revealed a clear influence of liberal democracies on these human rights bodies. Such an assessments of these bodies transpired an evidence which support the presumption of predominant influence of Liberal Democracies on the jurisprudence of human rights bodies. It was therefore, imperative to have an overview of the UN Human Rights System. The role and functioning of the human rights bodies from with the mandate, as prescribed by their parent treaties, was also analyzed to figure out their overstepping which raises questions on the jurisprudence so invented by these bodies.

The third chapter of the work at hand was engaged in examining the jurisprudence of the universal writ of human rights and what challenges are posed to it by the international legal procedures and mechanism pertaining to the Reservations, Understandings and Declarations (RUDs) submitted by states parties while ratifying international human rights treaties. It was figured out that most of the States parties, from among the non-liberal group democracies, which avail the right to attach RUDs generally implement the treaty obligations subject to their RUDs, however, the human rights bodies often disregard those

limitations on the touchstone of compatibility test. Accordingly, they apply the object and purpose criterion for considering the legality and validity of such RUDs. Charged with a mandate to ensure effective implementation, the human rights bodies declare those RUDs as invalid and hold the subject states accountable for non-implementing treaty obligations. Reservations to CEDAW, CRC and ICCPR submitted by many of the non-liberal states usually undergo such a treatment. These states assert their right to specify and limit a particular treaty obligation within the VCLT framework and consider that the human rights bodies cannot invalidate their RUDs. Moreover this unbridled jurisdiction, as assumed by the human rights bodies, in fact, affect the spirit of the state's consent which is the foundation of International Law. The analysis, therefore, found that such an active jurisdiction, as assumed by the human rights bodies to ensure the universal writ of human rights, is only consequent upon some drastic implications on the jurisprudence of the law of treaties.

Additionally, this chapter considered some aspects of theorize-able pattern while evaluating the jurisprudence of the human rights bodies (and liberal democracies) as to how they treat the RUDs submitted on the specific areas of international human rights treaties. An appraisal of the 'concluding observations' and recommendations of the concerned bodies leads to form a view that these bodies are sensitively consistent while ruling out RUDs involving limitations of the rights of LGBTQI persons, hate speech, personal and family laws or a reference to Islamic Law, or Shariah (as many of the Arab States do). Moreover, it has also been noted that the Nordic States consistently object and urge the concerned states to undo the laws involving such limitation, during the Human

Rights Council's universal periodic review. These states also have a consistent history of availing the option of objecting such reservations within the treaty ratification mechanism. Findings like this lead to help understanding the influence of Liberal Democracies on the contemporary international human rights law regime. The critics of liberalism, thus, do not hesitate to presume that the universalization of human rights has perhaps been hijacked by the liberal democracies.

In the fourth chapter it was assessed as to whether the universalism is leading the journey of human rights through the fast track to endorse the 'end of time' thesis. At first it was figured out what is universalism and as to how it works within the framework of International Law. In this regards, states practices pertaining to monism and dualism were assessed as to how they help accommodating the international obligations in domestic law. The Liberal Democracies generally adhere to the monist theory wherein the domestic courts are supposed to directly give effect the intentional laws in domestic jurisdictions. This discussion lead to entertain one another yet important aspect of the problem i.e., as to how universalization of human right law is affecting the state's sovereignty. It was assessed in within the ambit of the principles of United Nations pertaining to sovereign equality and respect of the sovereignty of the states. On the other hand the universalization project is also criticized for moving the UN Security Council to sanction the use of force in the name of humanitarian interventions. Such interventions which are carried out in the name of humanitarian rights and to protect the fundamental rights of the individuals living under the tyranny of the governments. A critical perusal of a long series of the interventions revealed the selective behavior of the Security Council as well as in the unilateral measures

undertaken by the interventionists. For instance, in spite of the alarming reposts of Human Rights Council and other whistleblowers on the large scale, perpetrated and systematic violations of human rights including genocide and crimes against humanity in Myanmar, Kashmir and Palestine, no such humanitarian action has been taken nor the UN security Council was effectively moved. It was concluded such measures proved to be counterproductive and were revisited by the UN General Assembly in 2005 but to be renamed as 'Responsibility to Protect'. This analysis also undertook to figure out as to whether sovereignty is limited or absolute. Finally it was concluded, within the framework of R2P and related jurisprudence, to what an extent the universalization is posing serious threats to the sovereign equality and the 'ideological sovereignty' of the nation states.

Fifth chapter analyzed a few alternative approaches in order to articulate a theoretical foundation and framework which may serve as a workable way forward to achieve more effective and comprehensive international enforcement of human rights. It is proposed, from within the structure provided by John Rawls in his well celebrated work, the 'Law of Peoples' for the international justice, some elements may be picked to articulate a theatrical framework to accommodate legal pluralism for a more comprehensive conception and enforcement of international human rights.

The conclusion of conclusion may, therefore, finds, 'as it remains an undeniable fact that a higher good can't be captured in shades of black and white, either from liberal or non-liberal versions of human rights, then the only viable solution is to let both co-exist and to be applicable in respective realms'.

Recommendations

a. To realize the need of incepting legal pluralism in international human rights law, a cross cultural dialogue may be initiated through the concerned quarters. This dialogue may foster a mutual understanding of accommodating diverse moral system to find common good and also to realize the other higher good.

b. On priority basis, the cultural and religiously sensitive matters may be considered by human rights bodies within their contextual and local application.

c. Human rights bodies must adhere to inclusive approach and include in their pool of experts, scholars from diverse origins not those who were trained and educated on west or western institution.

d. Inclusive legal frameworks may be devised at national, regional and international level for the recognition of legal pluralism at all levels.

e. The unilateral use of force in the name of humanitarian interventions or responsibility to protect shall be prohibited.

f. Only the UN General Assembly, not the Security Council, may adopt a resolution for carrying out a responsibility to protect where the circumstances so warrant.

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