

INTEGRATION OF UNIVERSALISM AND CULTURAL RELATIVISM : A SUCCESSFUL WAY OF PROTECTING HUMAN RIGHTS

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Introduction

The on going debate of “human right’s universalism affected by cultural diversity” continues creating problems in justifying human rights standards from the perspective of national context. We all agree that human rights should be universal in nature and it is also undeniable that in every country human rights must be validated by the existing customs of that particular country. The purpose of this article is to focus, how the universal and divine character of human rights is diverted in different socio-economic, cultural and religious context of various countries all over the world.

“Human rights”- the rights of every human being which sometimes called “natural rights”, “birth rights”, “international rights” etc., held to exist independently, cannot be taken away and as “birthright” possessed by “all members of human family”.¹ It is applicable to all human without any kind of distinction whatsoever. However, international actions and concerns requires compliance with these rights and given precedence over state power which cannot annul it, can only regulate it.

Universal Nature of Human Rights

Human rights must be universal i.e., everywhere it must be the same. The degree of finality that it has and the determination as well as the protection of these rights whether someone accepts it or not must be placed at the centre of concern and this should only be the notion of human rights.

The concepts of human rights have no meaning unless rights are universal. It is the idea that human rights apply as they are, in all societies and categories of people. The universalists perceive human rights as self evident universal norms, rooted in the concept of dignity of human person. The underlying presumption is that human rights exist objectively independent of culture, religion, ideology or value system.²

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1. See, The Preamble of The Universal Declaration of Human Rights, 1948.
 2. www.fit.edu/campuslife/clubs.org/sccr/NL/abstracts1999.htm last visited on 07.08.2005

Cultural Relativity of Human Rights

Notions of rights and values differ because of their dependence on culture. It is difficult to define culture and is being used in a broad and diffuse way that it includes almost everything i.e., political, social, religious, ideologies and institutional structures. It represents a set of norms that greatly affect human behavior and influences the perception about the whole world. Human rights are culturally relative. We cannot exclude culture as we are always dealing with cultural practices that assist or impede our human rights work. It is therefore important to talk about culture when we talk about human rights. Human rights can only exist by reverting back to cultural norms, not looking to external (western, legal) documents. Each group should look to their own culture to devise and implement their own notion of rights. For a relativist, allowing the notion of universalism is accepting alien values and western imperialism.³

Individual Welfare and International Standards

Earlier, under international law, relation between states and its subjects as well as protection of individual human rights was a matter of domestic jurisdiction of the concern states. Gradually, states became concern about its nationals in a foreign country and tried to create a standard, which should be maintained by every country when they are dealing with foreigners. These standards afterwards came to be known as international standards. Individual human welfare greatly developed in the 18th & 19th centuries when obligations were imposed on some particular states to protect the minority rights in their territories resulting voluntary inter-state co-operation and promotion of economic interest.

Universal Standards of Human Rights

Having a wide range of participation and concern for the whole world, the basic international instruments that contain human rights universal standards are-

- The United Nations Charter, 1945.
- The Universal Declaration of Human Rights, 1948 (UDHR).
- The International Covenant on Civil and Political Rights, 1966 (ICCPR).
- The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

References Of Human Rights Under Various Instuments

(A) United Nations Charter, 1945

Scattered and infrequent references of human rights appear in the United Nations Charter, namely-

3. *ibid.*

- The Preamble.
- Art.1 (3), 13(1)(b), 55(c), 62 Para 2, 68, 76(c).

The progression of international human rights law generally related to the developments that took place at the end of the Second World War. After the War the United Nations was established to save succeeding generations from the scourge of war... and to reaffirm faith in fundamental human rights⁴--

If we fail to use the Charter and the organization we have created with it, we shall betray all of those who died in order that we might live in freedom and in safety. This Charter is no more perfect than our Constitution, but like that constitution it must be made to live.⁵

The United Nations Charter⁶ is an international treaty and binds all the member states and the substantive provisions of the Charter also bind non-state parties in general international law.⁷

(B) The Universal Declaration Of Human Rights, 1948 (UDHR)

Though there are references of human rights in the Charter but nowhere does it catalogue or define them. It is only the UDHR, which has done this work. It provides a more detailed and comprehensive provisions. During the years between 1948 and 1976 it was the only most invoked human rights instrument. It is the parent document, the initial burst of idealism and enthusiasm, in some sense the constitution of the entire human rights movements,⁸ and it is the common standard of achievement for all peoples of all nations.⁹

The Declaration contains a wide and remarkable range of rights including-

- (i) civil and political rights known as the first generation of rights.
- (ii) social, economic and cultural rights known as the second generation of rights

4. Rehman, Javaid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; p. 24. See also the Preamble of the United Nations Charter (1945).

5. President Harry S. Truman, Address to the Delegates in San Francisco at the adoption of the United Nations Charter (1948), cited in Hottel, R.C.; "Ups and Down in UN History", 2001, 5 *Washington University Journal of law and Policy*; p. 17

6. Adopted in San Francisco 26 June 1945, Entered into force 24 October 1945.

7. Sands, P. and Klein, P.; *Bowetts Law of International Institutions*, 5th ed 2001, London Sweet and Maxwell; p. 24.

8. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; p.120.

9. See, the Preamble of The Universal Declaration of Human Rights, 1948.

(iii) group or peoples rights also known as the third generation of rights or solidarity rights.¹⁰

(C) International Covenant On Civil And Political Rights, 1966 (ICCPR)

In order to provide a legally binding human rights instrument and appropriate modes of implementation for different kinds of rights, two instruments were adopted by the General Assembly in 1966; one dealing with economic, social and cultural rights which are incorporated in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the other with civil and political rights which are incorporated in the International Covenant on Civil and Political Rights (ICCPR).

The ICCPR covered many rights incorporated in the UDHR or other international and regional human rights treaties. The ICCPR grants rights to all individuals who are within the territories of state parties and are subject to their jurisdiction without any distinction and regardless of their birth or other status. Thus the protection covers nationals, aliens, refugees and illegal immigrants.¹¹ The reference in the ICCPR to 'everyone' or 'all persons' in relation to a majority of rights confirms this view. The Covenant is a treaty and therefore legally binding instrument, can create an ongoing institution i.e., the Human Rights Committee which gives institutional support to the covenants norms. The covenant states the rights in considerably greater detailed and Article.1 and 27 asserted group or collective rights, which are absent in the Universal Declaration. It requires the states to provide a remedial system in the event of violations of rights.¹²

(D) The International Covenant On Economic Social And Cultural Rights, 1966 (ICESCR)

The ICESCR adopted at New York, 16 December 1966, and entered into force on 3 January, 1976. It is divided into five parts, dealing the right to self-determination; general nature of states parties' obligations, provides specific substantive rights, implementation provisions and general provisions of a legal nature. The interdependence of the civil and political rights and the economic, social and cultural rights is reflected in the Preamble of the ICESCR which states-

In accordance with the Universal Declaration the ideal of free human beings enjoying freedom from fear and want, can only be achieved if conditions are created whereby every one may enjoy his economic, social and cultural rights as well as his civil and political rights.

10. Alston, P.; *The Commission on Human Rights*, (ed.), p.188.

11. Rehman, Javaid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; p.64.

12. The International Covenant on Civil and Political Rights, 1966; Article. 2.

It is also recognized by the Vienna Declaration and Program of Action, 1993 which states-

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.¹³

The general nature of the obligations i.e., whether they are progressive realization of rights or whether the Covenant imposes obligations carrying immediate legal affect remain controversial. The correct view appears from the Limburg Principles¹⁴-

...the obligation to achieve progressively the full realization of the rights requires states parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for states the right to defer indefinitely efforts to ensure full realization. On the contrary all states parties have the obligation to begin immediately to take full steps to fulfil their obligations under the Covenant.

Identified Problematic Issues

(A) Under United Nations Charter, 1945

Notwithstanding the references to human rights in the Charter, it must not be assumed that human rights, equality and self-determination were the primary concerns of the politicians who engaged themselves in the drafting of the Charter.¹⁵ The major powers, prominently the United States and the United Kingdom, had been reluctant to sanctify the cause of complete equality and non-discrimination.¹⁶ It was eventually the pressure from various NGOs and lobbying from a number of states that highlighted the necessity for greater recognition of human rights provisions in the Charter.¹⁷

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13. Vienna Declaration and Programme of Action (New York: United Nations Department of Public Information) 1993 para 5 (pt 1) Adopted by the United Nations World Conference on Human Rights 25 June, 1993.
 14. Limburg Principles, Principle 22, see also the statement to the Committee on Economic Social and Cultural Rights by B. G. Ramcharan Deputy High Commissioners ICESCR 25th Sess.
 15. Henkin, L.; *International law: Politics, Values and Functions*, 1989, 216 (iv) Rec.des cours .13, p. 215.
 16. Rentelen, A.D.; *International Human Rights: Universalism versus Relativism*, 1990, Newbury Park : Sage publications, p. 21.
 17. Rehman, Javaid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; p.26.

The Charter does not establish any particular regime of human rights protection and the emphasis is upon the non-intervention in the affairs of member states of the United Nations.¹⁸

The main focus of the Charter is the promotion of international peace and security with regard to the right to equality and non-discrimination, it must be emphasized that at the time when the Charter came into operation in October, 1945, there were serious impediments to the establishment of a regime based in equality and non-discrimination; colonialism persisted in large measure, racial, religious and sex-based apartheid was widely practiced; and the right to self-determination of all peoples, although inscribed in the text of the Charter considered by many to be a pious hope rather than a firmly established legal right.¹⁹

(B) Under Universal Declaration Of Human Rights, 1948

The Declaration adopted on 10 December 1948, with 48 votes in favor, none against and 8 abstentions. The countries, which did abstain in the final vote, were –Byelorussia, Czechoslovakia, Poland, Ukrain, USSR, Yugoslavia, Saudi Arabia and South Africa on the grounds as expressed by Ambassador Andrei Vishinsky of the Soviet Union that- articles were too abstract, no provisions for protecting the rights of minorities, no mention of the sovereign rights of states.²⁰

The representative of the Ukrain said that- the Declaration proclaimed rights that could not be exercised under existing conditions and within the economic structure of many countries. Before the right of work, to rest and to education could be implemented, the economic system of free enterprise would have to be realistically altered. True equality, he said, was possible only under a system which guaranteed to everyone equal conditions and opportunities for the development of their potential, and that was not the kind of equality contemplated by the Declaration. Speaking for Czechoslovakia, its representative complained that the Declaration was not imbued with revolutionary spirit; it was neither bold nor modern. The representative of Byelorussia said that it was merely a proclamation, it did not guarantee the rights proclaimed. There was no mention of duties, which an individual owed to his neighbors, his family, his group or his nation. The Yugoslavs found more measured language to explain their abstention: the traditional categories of human rights (meaning civil and political rights) included to be widened, and

18. *Ibid.*, p.27.

19. Blum, Y.; "Reflections, on the Changing Concept of Self-determination", 1975, 10 *Israel Law Review* 509; p. 511; Emerson, R.; "Self-Determination", 1971, 65 *AJIL* 459; p. 471.

20. Humphery, J. P.; *Human Rights and the United Nations: A Great Adventure*, 1984, New York; p. 72.

include the collective rights of certain communities.²¹

In the Third Committee, the South African had said that the list of rights included in the Declaration was too wide and that it should have been limited to those fundamental rights that were universally recognized. The Declaration although not a treaty, would nevertheless impose certain obligations on member states, since it would probably be recognized as an authoritative definition of the fundamental rights and freedoms mentioned in the Charter, which that instrument had left, undefined. "If such an interpretation were accepted", they said, "those member states, which voted for the Declaration, would be bound in the same manner as if they had signed a convention embodying those Principles."²²

Saudi Arabia did not explain its abstention but in the Third Committee Tamil Baroodi had said that the provision in Article 18, which recognizes the right of everyone to change his religion or belief, was contrary to the rule of the Koran.²³

There is a debate about the legal value and content of a number of rights, in particular of economic, social and cultural rights. Thus, questions have been raised about the legal and juridical value of such rights as the right to rest and leisure, the right to a decent standard of living, and the right to participate in the cultural life of the community.²⁴ In the light of divisions, it is sensible to take account of the views of one leading authority when he writes, it must not be assumed without more that any and every human right referred to in the UDHR is part of customary international law.²⁵

(C) Under International Covenant on Civil and Political Rights, 1966

Unlike the UDHR, the ICCPR does not accord protection to the right to asylum,²⁶ the right to own property,²⁷ the right to social security,²⁸ the right to a proper social order and duties to society.²⁹ The provision of

21. Ibid., p.73.

22. Ibid.

23. Ibid.

24. Rehman, Javaid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; p. 60.

25. Thornberry, P.; *International Law and the Rights of Minorities*, 1991, Oxford. Clarendon Press; p. 322.

26. The Universal Declaration of Human Rights, 1948, Article.14.

27. ibid., Article 22.

28. ibid., Article 28.

29. ibid., Article 29.

Article 4 permits state parties to make derogations from the provisions of ICCPR in time of public emergency, which threatens the life of the nations. The concept of reservation may be used by states in order to deny proper implementation of these rights.

(D) Under the International Covenant on Economic, Social and Cultural Rights, 1966

There are various arguments advocating the greater importance of superiority of civil and political rights since they arguably form a critical basis for protecting human rights.³⁰ As Leckic, notes, this assumption led to gross violations of neglect of economic and social rights. When people die of hunger or thirst or when thousands of urban poor and rural dwellers are evicted from their homes, the world still tends to blame nameless economic and developmental forces, or the simple inevitability of human deprivation before placing liability at the doorstep of the state. Worse yet, societies increasingly blame victims of such violations for creating their own dismal fates, and in some countries, they are even characterized as criminals on this basis alone. It is also argued that the language of the social and economic rights largely represents undertakings of a progressive nature.³¹ Progressive achievement is thus described as the linchpin of ICESCR.³²

According to Robertson and Marrills-

...it is thus quite clear that this is what is known as a promotional convention that is to say, it does not set out rights which the parties are required to implement immediately but rather lists standards which they undertake to promote and which they pledge to secure progressively, to the greatest extent possible, having regard to their resources.³³

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30. Leckie, S.; "Another step Towards Indivisibility: Identifying the Key Features of Violations of Economic Social and Cultural Rights", 1998, 20 HRQ 81; p. 82.
 31. Trubeck, D. M.; *Economic, Social and cultural Rights in the Third World*, in T. Mleron (ed.); pp 210-212.
 32. Alston, P. and. Quinn, G.; "The Nature and scope of state Parties Obligations under the International Covenant on Economic, Social and Cultural Rights", 1987, 9 HRQ 156; p.172.
 33. Robertson, A. H. and G.Merrills, J.; *Human Rights in the world: An Introduction to the study of International Protection of Human Rights*, 4th end 1996, Manchester: Manchester University Press; p. 276, also see McGoldrick, D.; *The Human Rights Committee: Its Role in the Development of the International covenant on civil and Political Rights*, 1991, Oxford: Clarendon Press; pp.11-13. Bueren, G.Van; "Combating Child Poverty: Human Rights Approaches", 1999, 21 HRQ 680; p. 684.

Although the title of the ICESCR expressly refers to cultural rights and Article 15(i) recognizes the right of everyone to take part in cultural life those rights have attracted relatively little attention in this context. Rather, they have tended to be dealt with in relation to the ICCPR, whether under its nondiscrimination clause (Article 2(1)), the minorities provision (Article 27) or specific rights such as freedoms of expression, religion and association and the right to take part in the conduct of public affairs. Nevertheless, it is clear that this neglect of the specifically economic and social rights dimensions of cultural rights is unjustified and should be remedied.³⁴

The Reagan and Bush Administrations opposed the concept of economic and social rights on the ground that while the urgency and moral seriousness of the need to eliminate starvation and poverty from the world are unquestionable... the idea of economic and social rights is easily abused by repressive governments which claim that they promote human rights even though they deny their citizens the basic civil and political rights.³⁵

The phenomenon of arbitrary discrimination and denial of the right to work (embodied in Article 6) has been deployed to victimize individuals and groups in many parts of the world. Ethnic minorities and women in a number of states³⁶ are deprived of equal opportunities or free choice of employment. The Committee has criticized violations of the convention provisions whereby women require permission from their husbands before being able to work outside their homes³⁷ or there are racial or ethnic motivations behind discrimination in granting employment.³⁸

In case of irregular workers who perform the same tasks as other employees but their employment is not officially recognized, they are on a lower wage and they do not have any health or unemployment benefits.³⁹

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34. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; p. 264.
 35. Introduction, U.S.. Dept of State, Country Reports on Human Rights Practices for 1992.
 36. See, e.g. Discrimination Against Religions and Ethnic Groups in States, Minority Rights Group (ed.) *World Directory of Minorities* (London: Minority Rights Group) 1997.
 37. See, the concluding observations on report of Iran E/C 12/993/7, p. 3, para 6.
 38. See, the Summary Records on the Part of the thirtieth meeting on Report by Dominican Republic (06/03/1996)E/C 13/1996/SR 30, para 17.
 39. See, concluding Observations of the committee on Economic Social and Cultural Rights: Japan 31/08/2001 F/C 12/1/Add 67 (concluding observations/ comments), para 61.

(E) Human Rights and Muslim World

Historical formulations of Islamic religious law commonly known as *Sharia* include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of *Sharia* to regulate the behavior of Muslims derives from its moral and religious authority as well as the formal enforcement of its legal norms.⁴⁰ Whatever may have been the historical status of *Sharia* as the legal system of Muslim countries, the scope of its application in the public domain has diminished significantly since the middle of the nineteenth century. Due to both internal factors and external influence, *Sharia* principles had been replaced by European law governing commercial, criminal and constitutional matters in almost all Muslim countries. Only family law and inheritance continued to be governed by *Sharia*.⁴¹

However, there are some human rights, which are in contradiction with the *Sharia* Law, namely:

- Provision relating to marriage (Article 16)
- Provision relating to change of religion (Article 18)
- Provision relating to inheritance [Article 25(2)]
- Provision relating to the rights and status of non- Muslims etc..

(F) Regional Arrangements

Human rights differ from region to region; the African and the Asian do not have the same human rights as the European or the American. Regional bodies either duplicate the work of other instruments or develop contradictory policies and procedures. If Human Rights Commissions are established in certain regions, they might interpret international standards too narrowly and thus adversely affect the work of global bodies in this field.⁴²

European Human Rights

Though the European Convention on Human Rights, 1950 draws inspiration from UDHR, it does not provide for the right to self-determination, economic, social and cultural rights; it only promotes and protects the civil and political rights.

40. An -Na'im, Abdullah Ahmed; "Human Rights in Muslim World", 1990, 3 Harv. Hum. Rts.J.13

41. Ibid.

42. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; p. 568.

The European Social Charter, 1961

A major criticism of the European Convention on Human Rights, 1950 has been its almost exclusive focus on the protection of civil and political rights and for this, there has been a growing demand to have an effective regional treaty providing a more direct focus on social and economic rights.⁴³

The Inter-American System

The five provisions which are in the Convention of the American Declaration on the Rights and Duties of Man, 1948 but not in the ICCPR are the right of reply (Article 14), the right to property (Article 21), freedom from exile [Article 22 (5)], the right to asylum [Article 22(7)], and prohibition of the collective expulsion of aliens [Article 21(9)]. The Protocol does not recognize the right to adequate clothing and housing or to an adequate standard of living (Article 11 of the ICESCR).

The Inter-American system for the promotion and protection of human rights could not, by itself, cause the *de facto* situation to change nor make practical conditions in the Americas develop along different lines. While the system has advanced in theory practical conditions in America in respect of human rights have made small progress. In Latin America, in the course of the last forty year there has been a certain economic progress. However, except in a few cases human Rights in Latin America today do not seem to be more respected than they were in 1948. Indeed, on the contrary, it is easy to find cases where there has been an obvious regression. Things being what they are, one is obliged to note the sad fact that the force of those economic and political factors which have impeded progress and which have even led to it regression, has been greater and more-decisive than the force which might have resulted from normative progress.⁴⁴

African System

History reveals that the non-universalistic conception of human rights has long prevailed and still prevails, in Africa. The conception has been used to challenge the human aspects of those rights or question whether they are truly rights in the legal sense. In the past and still today, the universal application of human rights has been denied by dehumanizing peoples, races and groups. Such was fate of the slaves, the colonized peoples, the Indians and the Blacks. Even today the color of one's skin

43. Rehman, Javid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; P. 171.

44. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; pp.642-644.

can prevent one from having the right to human dignity. What is more, even in homogeneous news societies where the universalism of the concept of man is not contested, the scope of human rights is limited according to the period and circumstances. Generally this is a reflection of the society concerned and of the ideology of those in power but sometimes it reveals simply a state of crisis. And Africa in fact, is undergoing a crisis.⁴⁵

The provisions of the Charter, while distinctive in the manner described, have been the objects of criticism. Criticisms have been leveled against the vague nature of its provisions and its so-called "claw-back" provisions, which authorize the State to deprive the individual of his or her rights. The "claw-back" clauses are used in relation to Articles 5-12 and have similarities to derogations, save that in the case of the latter, circumstances are explicitly stated in which rights may be limited. In so far as "claw-back" clauses are concerned, a wide range of discretion is conferred upon the State to exclude enjoyment of rights. In each instance, the State is permitted to justify limitations on the rights by reference to its own domestic laws. As we shall consider, these "claw-back" clauses feature in many of the rights within the Charter. Some of the African States have been criticized for allowing such practices as female circumcision or for criminalizing adult homosexuality. Though the African Charter clearly prohibits slavery and slave trade, various practices of servitude, in particular child labor, continue to take place.⁴⁶

African Charter, do not specifically prohibit discrimination on the basis of nationality. However, mass expulsion as the most acute form of discrimination has been conducted against many ethnic, religious and racial groups in Africa.⁴⁷

Asia and Human Rights

There is no basis in geographical proximity to make Asian nations a continent in the same way as Europe or Africa. Asia is a conglomeration of countries with radically different social structures, and diverse religious, philosophical and cultural traditions: their political ideologies, legal systems, and degrees of economic development vary greatly; above all, there is no shared historical past even from the times of colonialism. The Asian experience reinforces the concept of the indivisibility of human rights by showing that it is not possible to allocate, a priori, priority to certain categories of human rights, or to propose particular stages for the

45. Vasak, Karel and Alston, P.; *The International Dimensions of Human Rights*, 1982, (eds.); p-601.

46. Rehman, Javaid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; p.239.

47. Ibid.

promotion of human rights according to the degree of development of a society. The most striking characteristic of the approach to human rights problem in Asia in the 1960s was the assumption that the attitude of Asian countries to human rights are, in general, identical with those of developing countries, as a whole viewed at the Seminar on Human Rights in developing countries organized by the United Nations in Kabul from 12-25 May 1964. The failure to achieve socio-economic rights was the main obstacle to ensure respect for other human rights. For this reason, the concept of the "welfare state" was considered to be of particular importance to developing countries. Human rights could not be fully implemented without a stable system of government and a body of public officials discharging their duties with fairness and impartiality. Lack of technical skills, absence of proper planning, inefficiency and corruption in the administrative services, shortage of capital, inadequacy of foreign aid, political interference in the sphere of administrative and technical decisions and the population explosion, the absence of effective regional inter-governmental political or socio-economic institutions, practices stemming from traditional social values considered to be hindrances to the realization of human rights.⁴⁸

The Socialist Countries and Human Rights

As social opportunities and rights are not inherent in the nature of man and do not constitute some sort of natural attributes, rights and freedoms of individuals in any state are materially stipulated, depend on socio-economic, political and other conditions of the development of society, there may arise clash of interest between the society as a whole and the interests of individuals.⁴⁹

(G) The Rights of Women

From the very moment of her birth, girls face obstacles in education, nutrition, health and other areas solely because of their sex. International law is also reluctant to intervene in private matters as opposed to public and this leads a negative impact on the position of women. There are also difficulties in enforcing the norm of non-discriminations in domestic sphere apparent through a large number of reservations to significant provisions contained in the Convention on the Elimination of All Forms of Discriminations Against Women, 1979 on various grounds like family solidarity and cultural integrity. Legislative enactment's and administrative policies in some countries forbidding women from political participation at the governmental level, irregularities in obtaining credit, loan or benefits, excluding from inheritance and property ownership

48. Vasak, Karel and Alston, P.; *The International Dimensions of Human Rights*, 1982, (eds.); pp-651-661

49. *Ibid.*, p-631.

through legal disabilities, domestic violence behind close doors, governments inability to take effective action to enforce laws and even to provide immediate relief to the victim women make scopes for these kinds of violence.⁵⁰

Inadequate Access to Justice for Women

According to Rashida Patel in her book "Woman versus man" the victims of violence do not seek punishment for the perpetrators because of –

- the dependence and inferior legal, social and economic status of women.
- no access to conciliatory or legal services.
- double standards of morality and laws.
- lack of social security.
- wrong interpretation of religion.
- deteriorating judicial system.
- lack of confidence in the police.
- defective investigation by police and long delays in compiling of medical reports.
- defective laws etc.

A very small number of cases decided by the courts made use of international human rights standard in such a manner that would advance justice for women. They are still isolated and ostracized when they seek redress in family matters. Lack of knowledge about their rights, proper implementation of the laws, absence of legal aid constitute an impediment for women to access justice.

(H) Rights of the Child

The Convention on the Rights of the Child, 1989 states in its preamble- "In all countries in the world, there are children living in exceptionally difficult conditions".⁵¹ Violations of the rights of children take the form of torture, cruel, inhuman or degrading treatment, disappearances, excessive work and labor, prostitution, sexual abuse and slavery. Children also form a significant proportion of the global refugee or stateless population. Millions of children around the world are at serious risk of starvation and malnutrition. In case of protection to child born out of wedlock, the position remains ambiguous and uncertainty exists in other regional and international human rights instruments. Another crucial subject is the provision of Article-20 relating to adoption, which affirms the widespread religious and cultural differences on this subject, like

50. Rehman, Javaid; *International Human Rights Law A Practical Approach*, 2003, Pearson Education Ltd.; p-344

51. *Ibid.*, p-376.

Sharia does not permit adoption, and in case of inter country adoption there remains the risk of improper placements, which may result in financial gain. The rights for the child to change his or her religion proved unsuccessful as society, state and parental pressures force children towards religious and cultural extremism. Although there is provision for the abolition of slavery and slave trade, nonetheless it is still being practiced in Africa and Asia. Institutionalizing child labor, undisclosed sexual abuses taking place within home and family, use of children as combatants in internal conflicts, illiteracy for economic and social reasons often in practice remain the rights of the child ineffective.

(I) Torture- A Crime Against the Dignity of Mankind

One of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities.⁵²

Problematic Issues

- There are disagreements over the meaning and scope of the term 'torture'.
- There are difficulties in identifying the nature of prohibitions involved in treatment or punishment that is cruel, inhuman or degrading.
- Societies and individuals differ in their perceptions. Some societies view certain punishments as cruel, inhuman or degrading whereas others regard them as fair and just means of retribution.
- Issues of cultural relativism are directly relevant to this debate.
- There are difficulties in implementing and enforcing the prohibition of torture.
- Pain and suffering admonishment as a lawful sanction, does not come within the definition of torture though it may lead to cruel, inhuman or degrading treatment or punishment.

(J) Terrorism and International Law

We are all determined to fight against terrorism and to do our utmost to eliminate it from the face of the earth.⁵³ The force we use to fight it should always be proportional and focused on the actual terrorists. We cannot and must not fight them by using their own methods by inflicting discriminate violence and terror on innocent civilians, including children.

Terrorism violates the fundamental human rights as incorporated in the International Bill of Rights and also some other specific human rights treaties.

52. Ibid., p-407.

53. Ibid., p-437.

Problematic Issues

- there is no established definition of the precise meaning and scope of the term 'terrorism'. The ambiguity in the definition has been used by some states to deny their peoples legitimate rights such as freedom of expression and religion, and collective group rights particularly the right to self-determination.
- there is the complex issue of defining the meaning and scope of the so called political offences.
- there is the difficulty of identifying perpetrators of the crime of terrorism.
- there is a great measure of truth in the well known cliché : One mans terrorist is another mans freedom fighter.
- there is a major ideological conflict between the developing states and the developed world. Developing states have emphasized terrorism largely in the context of racial oppression and colonial regions and the developed world has concerned itself with individual acts of terrorism.
- However in order to put an end to terrorism and strengthening the global prohibition the major offences should be codified in the form of a binding instrument and the world community should try to find out the underlying causes which lead individuals to such extreme measures.

State Sovereignty and Human Rights

Brownlie states that sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law and as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states and to organizations of states defined by law.⁵⁴

Koskenniemi⁵⁵ observed that it is notoriously difficult to pin down the meaning of sovereignty. Usually the concept is connected with ideas of independence (external sovereignty) and self-determination (internal sovereignty). Sovereignty in the relations between states signifies independence; independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other states, the functions

54. Brownlie, Ian; *Principles of Public international law*, 4th ed 1990, Ch. 13 p.287

55. Koskenniemi, Mantti; *From Apology to Utopia: the Structure of International Legal Argument*, 1989, Ch. 4.

of a state. Sovereignty thus implies freedom of action by a state.

Human rights in many states should generally be traced to a recurrent structural phenomenon related to power and ideology rather than to individual pathologies. The fight over rights therefore becomes the fight over the redistribution of power, sometimes imbedded in ideological struggles of in complex ethnic conflicts.⁵⁶

Although the venerable term sovereignty continues to be used in international legal practice its reference in modern international law is quite different. International law still protects sovereignty but it is the people's sovereignty rather than the sovereigns' sovereignty and there is no support for the contention that internal human rights are essentially within the domestic jurisdiction of any state and hence insulated from international law. This contemporary change in content of the term sovereignty also changes the cast of characters who can violate that sovereignty, of course popular sovereignty is violated when an outside force invades and imposes its will on the people.⁵⁷ But if it is violated by the internal power that seizes the power and purports to wield the authority of the government against the wishes of the people is also another aspect of violation of sovereignty. And it is said that the word sovereignty can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy.⁵⁸ In case of matters, which are very closely concern with the interests of more than one state and are not in principle regulated by international law, state is the sole judge.

The Vienna Declaration⁵⁹ adopted by states at the second world conference on Human Rights provides in Sec. I. Para. 5 that all human rights are universal, indivisible and interdependent and interrelated while the significance of national and regional particularities and various historical, cultural and religions back grounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Human rights NGOs from the Asia Pacific region also gathered at Bangkok to transact their business immediately before the intergovernmental meeting began: The Bangkok NGO Declaration on Human Rights provided in Para 1:

56. Steiner, H.J.; "The Youth of Rights", 1991, 104 Harv. L. Rev 917; p. 929

57. Reisman, W. Michale; "Sovereignty and Human Rights in contemporary International Law", 1990, 84 A M J. Int. L 866; p 869.

58. *ibid.*

59. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; p.147.

Universality, we can learn from different cultures, in a pluralistic perspective universal human rights are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity... While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's right, must not be tolerated. As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.

Human Rights as Customary International Law

There is an ongoing debate about the matter that whether human rights either wholly or in part acquired the status of customary international law and how important it is to determine the extent of customary law. Two answers can be given: first; in spite of the existent of many treaties there are many states who are not the parties of these treaties, they can neither bound by those treaty obligations nor entitled to invoke those obligations against the other states. Therefore their obligations & rights should be determined under customary international law. Secondly; the parties and also the non-parties of a treaty may have the opportunity to have recourse to international law remedies not provided for in the treaties. The arguments in support of a finding that rights are a part of customary law rely on different kinds of evidence. They include the followings⁶⁰

- (1) The incorporation of human rights provisions in many national constitutions and laws.
- (2) Frequent references in United Nations resolutions and declarations to the duty of all states to observe faithfully the UDHR.
- (3) Resolutions of the united Nations and their international bodies condemning specific human rights violations as violation of international law.
- (4) Statements by national officials criticizing other states for serious human rights violations.
- (5) A dictum of the international court of Justice that obligations *erga omnes* in international law include those derived from the principles and rules concerning the basic rights of the human person (Barcelona Traction Indigent, 1970).
- (6) Some decisions in various national courts that refer to the Universal Declaration as a source of standards for judicial decision. General statement by international bodies that UDHR constitute an obligation

60. Ibid., p. 136

for the member of the international community are not without significance, but their weight as evidence of custom cannot be assessed without considering actual practice. National constitutions and legislation similarly require a measure of conformation in actual behavior. Neither governments nor courts have accepted the Universal Declaration as an instrument with obligatory force. Many have, of course, lauded its principles as standards to be achieved and in specific instance have rhetorically relied on the Declaration as a touchstone of legality. This conclusion, however, does not dispose of claims that 'some' important human rights included in the Declaration have become customary law and therefore binding on all states. The most obvious are the prohibitions against slavery, genocide, torture, and other cruel, inhuman and degrading treatment. No Government would content that these prohibitions apply only to parties to the treaties that outlaw them. The list does not stop there. The ALI Restatement (Third) of 1987⁶¹ adds the following actions as unlawful for a state to practice, encourage or condone:

- i) The murder or causing the disappearance of individuals.
- ii) Prolonged arbitrary detention.
- iii) Systematic racial discrimination.
- iv) Consistent patterns of gross violations of internationally recognized human rights.

However, developments affecting human rights in the past decade indicate that the list of customary law right may have significantly increased. Studies carried out for the United Nations Commission on Human Rights which have examined national laws on a global scale as well as governmental and scholarly statements reveal that several rights have been widely invoked as principles of general international law. The examples include:

- i) The right to self-determination of peoples.
- ii) The individual right to leave and return to one's country.
- iii) The principle of non-refoulement for refugees threatened by persecution.⁶²

61. (Eds.) Restatement (Third), Foreign Relations Law of the United States (1987). Section 702.

62. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; p-139.

However, recent developments in various parts of the world indicate that certain human rights have penetrated deeply into the consciousness of peoples in many countries. Violations are more and more resented in places where previously they had been ignored or seen as unavoidable. Individual human rights were emphasized in the popular demands and given effect in the new political arrangements. The rights were asserted as fundamental entitlements recognized by the international community. Protection against arbitrary arrest, against political trials and against lack of procedural rights were emphasized. Freedom of speech and of peaceful assembly were demanded as basic rights. Political participation through genuine elections, ensure by secret ballot, was another salient demand. The main point is that these rights were now demanded as basic and essential whether or not in treaties. Present tendencies also suggest that other, human rights may be on their way to acceptance as general international law specially by virtue of their wide spread inclusion in national law as well as general recognition of their international significance. Several economic and social rights may well meet that dual test in particular, the right to basic sustenance and to public assistance in matters of health, welfare and basic education. International Labor Organization practice indicates that trade union rights, including freedom of association are widely accepted as international common law. Also significant in it is the widespread recognition of the rights of woman to full equality and to protection against discrimination, though the gap between the proclaimed rights and actual conditions remains great.⁶³

However, it is important to keep in mind that a new norm cannot emerge without both practice and *opinion juries* and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinion juries*.⁶⁴ Gender based discrimination is still practiced in many states in varying degrees, but freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law. A violation is gross if it is particularly shocking because of the importance of the violation. All the rights proclaimed in the Universal Declaration of Human Rights protected by the principal International Covenants are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity. Consistent patterns of violations of such rights as state policy may be deemed gross *ipso facto*. These include for example, systematic

63. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; pp-136-140.

64. Higgins, Rosalyn; "Problems and Process: International Law And How We Use It", 1994; p. 19.

harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged), denial of fair trial in criminal cases, grossly disproportionate punishment, denial of freedom to leave a country, denial of the right to return to ones country, mass uprooting of a country's population, denial of freedom of conscience and religion, denial of personality before the law, denial of basic privacy such as the right to marry and raise a family and invidious racial or religions discrimination.⁶⁵

Concluding Observations

Promotion and protection of human rights may not be possible unless there is cultural legitimacy. Individual must be respected as an individual and that results in respect for cultural differences. There may be a thorough consideration about how one culture understands the values of another culture. Individual freedom can exist if; he himself is free and not controlled by anyone. Cultural diversity may be bridged by finding out the common ground, which will work between those diversities. Human rights should be the way of expressing the social and political orders of a giving society. The standards of human rights given by the UDHR may be valid but not universal in nature and are not applicable for all. Universality and validity is not the same thing, if cultural diversity has a conflict or inconsistency in respect of some rights, that rights cannot be termed as universal rights. Though International law requires the consent of states in case of every new norms created by it, it may happen that the state not consented in that particular rule has a sovereign right to reject that rule identifying inconsistency with its national laws, if it happens, then the question arises as to where the universality of that norm lies! Universal norms are not applicable for that state and cultural diversity is getting a preference over that norm by degrading international law's status as its subject and applies it by purifying under its culture. The very purpose of universal nature of human rights cannot be maintained by incorporating provisions of reservations. Human rights should form a single, indivisible standard, have the same value and levels and must not have any hierarchical terminology between those rights. Cultural and religious norms should be interpreted in such a way that is not contradictory to the intend and purpose of international standard like-

65. Steiner, H.J. and Alston, P.; *International Human Rights in Context: Law, Politics and Morals: Text and Materials*, 2nd ed 2000, Oxford: Clarendon Press; p.147.

Verse 2:256 of the Holy Qur'an provides "Let there be no compulsion in religion: Truth stands out clear from error" and in **verse 18:29** it is provided that Allah instructs the Prophet "Say, the Truth is from your Lord, let him who will believe and let him who will reject it".

By upholding these verses in the sense of freedom of choice and non-compulsion in religious belief and conscience, we may create a bridge between the two controversial issues of human rights i.e., universality and cultural relativity.

Modern human rights have a gradual departure from the early conception of human rights and originated from the modern thoughts of nature of justice. People hold these rights against all, even, against his family. As an expression of human dignity these rights require active protection both in law and practice. As universalism is a complex, not one but many, we have to recognize that there are various universalisms competing with one another and the UDHR is one of the ways of expressing it and there are other ways remaining. These remaining ways should be the different cultural, religious thoughts. We all know that all religions have a focus on the protection of human rights and universal claims as an expression of human dignity though it may come out in distinctive languages or ways. All these ways (modern thoughts of human rights and cultural diversity) are contributing in completing and covering universalism, human rights provided by UDHR together with cultural relativity will be the most appreciable way in making the protection of human rights within the world community a successful one.