Antidemocratic Human Rights Law

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(1) Introduction to Human Rights

Human rights are those rights which a person becomes entitled to by virtue of being born a human regardless of which country or territory that person belongs to. Human rights are perceived as natural rights derived from the human nature; and, the human nature is such that people are born with the power to reason and to differentiate between right and wrong; in this sense, all human rights are natural moral rights. *Jack Donnelly* opines that '*human rights are, literally, the rights that one has simply because one is a human being*'[1] and that the source of human rights is man's moral nature.[2]

The concept of 'human rights' emerged in the 17th century through natural rights philosophy. For instance, *John Locke* who is regarded by some authors[3] to have discovered human rights, in his work – *Two Treatises of Government (1690)*, propounded that *'man was born with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world*'.[4] Thus, natural rights philosophy recognized human rights as inherent in the human nature rather than having provenance in a self-governed polity.

These natural or moral rights then became part of the political agenda in the western world, by way of liberalist movements against the then oppressive monarchical powers; for instance, in breaking away from Great Britain, the Virginia Declaration of Rights (1776) was unanimously adopted in the US, which in its section 1 proclaimed that '*all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity…*'. A similar phrase appeared in the US Declaration of Independence, later in the same year. And, in France, the French Revolution culminated in the French Declaration of the Rights of Man and Citizen (1789) which

[1] Jack Donnelly, Universal Human Rights in Theory and Practice, CUP (2005), 10
[2] Ibid, 14
[3] Prof.Laksiri Fernando, Human Rights, Politics and States (2002), 13
[4] Locke: Two Treatises of Government (CUP, 1988); Daniel Moeckli et al, International Human Rights Law (2010), 20

enshrined in it the natural, inalienable and sacred rights of 'man'.

However, such human rights existed only in theory and the democratic Constitutions that followed Declarations of Independence which provided for natural rights, did not recognize human rights as natural or moral rights but as democratic constitutional rights with many limitations that would facilitate democratic governance at the expense of individual rights and freedoms. Hence, with time, human rights acquired the status of international law through international constitutionalism in order to have legal force on all States.

(2) Universality of International Human Rights Law

Atrocities committed on innocent civilians during the Second World War (WW-II) by leaders of the democratic world were pervasive and the horrors of WW-II kept haunting the minds of the international community whose sovereign States have virulently violated their rights and freedoms; this, in turn, gave the impetus for the codification of human rights at international level. And, the resultant international instruments were intended to have universal application on sovereign States which had shamefully and blatantly violated people's rights and freedoms.

The concept of 'universality' in relation to international human rights law emerged with the General Assembly (GA) of the United Nations Organization (UN) adopting the Universal Declaration of Human Rights (UDHR) in 1948. For the first time in the history of international law, UDHR codified the most fundamental human rights including right to life, liberty, freedom from torture, slavery, etc. According to the sixth preambular paragraph of UDHR, all Member States are bound to promote universal respect for and observance of human rights and fundamental freedoms[5]; and, in its Article 1 it clearly enunciates that '*all human beings are born free and equal in dignity and rights*'[6]. This way, human rights acquired the status of universal law imposing moral obligations on all States. In fact, the moral rights philosopher - *James Griffin* viewed human rights as 'universal moral rights' including autonomy, liberty and welfare rights that constituted his 'normative agency'; and, to *Griffin,* most of the human rights enshrined in UDHR were moral rights having universality.

International instruments adopted after WW-II, recognize human rights as part of international law and as such seek to enforce such rights on all States that are parties to those instruments. For instance, the Charter of UNO –1945 (UN Charter) casts a duty on all States to promote and encourage respect for human rights and

[5] Blackstone's International Law Documents (2001), 39

[6] Ibid

fundamental freedoms for all[7], whereas the International Covenant on Civil and Political Rights 1966 (ICCPR) obliges all States Parties to respect and ensure to all individuals within their respective territories the international civil and political rights recognized in the Covenant.[8] Similar provisions were also enshrined in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) that provides for international human rights in the economic, social and cultural spheres.

As of today, there are 9 core international human rights treaties[9] that give legal force to human rights on the international plane by establishing a process involving treaty bodies, periodic reports, recommendations and follow-up action.

Further, the UDHR and certain fundamental provisions of the core human rights treaties such as those dealing with apartheid, genocide, slavery, torture, arbitrary deprivation of life, etc. have become part of customary international law as peremptory norms *(jus cogens)* through State-practice and judicial activism, thereby, universally binding on all States including non-States Parties.[10]

Besides international instruments, there also emerged a number of international institutions such as ECOSOC[11], Human Rights Commission (HRCion)[12], International Committee of the Red Cross (ICRC), International Court of Justice (ICJ), International Criminal Court (ICC), International Monetary Fund (IMF), World Trade Organization (WTO), World Bank and International Labour Organization (ILO) all of which act as supranational entities in promoting and protecting international human rights within member States.

Such post-WWII international instruments and institutions as mentioned above exert enormous pressure on sovereign States to implement international human rights inherent in such instruments and institutional policies. In fact, *Theodor Meron* is of the view that 'ECOSOC Rights are embedded in the policies and programmes of specific UN agencies like ILO, WHO and the World Bank'[13] which are involved in the implementation of universal human rights within the political structures of sovereign States. And, *Philip Alston*[14] rightly holds that human rights have become a movement involving international law and institutions, and a movement that spreads liberal constitutions amongst States, and that such an international movement has

[7] Art. 1(3), UN Charter
[8] Art. 2(1), ICCPR
[9] see **Annex I** to this Term Paper for '9 core human rights treaties'
[10] *Filartiga v. Pena-Irala 630 F.2D 876 (2D Cir. 1980)*
[11] Economic and Social Council of UN
[12] Human Rights Commission was replaced with Human Rights Council in 2006
[13] Theodor Meron, Human Rights in International Law, Legal & Policy Issues, CPO (1992), 256
[14] Philip Alston & Ryan Goodman, International Human Rights, OUP (2013), 59

influenced the internal developments in many sovereign States. In this manner, international human rights have acquired the status of universal law everywhere binding, requiring no democratic provenance.

For instance, although Article 2(7) of the UN Charter prohibits UN from intervening in matters that are essentially within the domestic jurisdiction of any State, ICJ has held otherwise; in 1971, South Africa was first found to be in violation of its obligations under UN Charter with regard to 'respect for human rights and fundamental freedoms for all without distinction as to race'.[15]

Further, all member States are subjected to the Universal Periodic Review (UPR) mechanism established by General Assembly Resolution 60/251, to which all member States have submitted. And, UPR uses the UN Charter and UDHR as the primary yardstick for measuring respect for human rights, justifying the universality of international human rights law and its overriding effect on State sovereignty.

Furthermore, on many occasions, GA and HRCion have intervened in '*gross violations of human rights*' as in the case of former Soviet Union where Russian wives of other nationals were prevented from leaving the USSR; here, in a strong resolution[16], GA recommended that USSR lift its restrictions on married women's rights enshrined in UDHR, i.e. right to leave any country including one's own and, to marry without any limitation due to race, nationality, etc.

UNO uses a range of *charter based mechanisms* including 1235 and 1503 - complaint procedures, as well as *treaty based mechanisms* involving monitoring committees to deal with human rights violations within States Parties. And, all these mechanisms, inter alia, justify the universality of international human rights law.

Therefore, international human rights law is universal in character in that it creates rights for individuals regardless of where they may live in this world, imposing legal obligations on all States to protect such international human rights by way of international constitutionalism involving the adoption of international Charters, Declarations and Treaties for the implementation of such universal rights.

(3) Anti-Democratic Nature of International Human Rights Law

A corollary of human rights being predicated on the idea of universal law is that such rights become an international movement entailing international mechanisms that interfere with the autonomy of sovereign States; this is the

[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports (1971) 16, p.57, para. 131*

[16] GA Resolution 285 (III), 25th April 1949

true nature of international human rights as perceived by certain philosophers like *John Rawls (1921-2002)* who recognized 'human rights proper' as rights that limit the internal autonomy of all States and which provide justifying reasons within international relations for coercive intervention and war; to *Rawls*, human rights play a political role in international relations and constitute a necessary condition of a State's status recognition and respect as a full and equal member of the international order in good standing.[17]

For instance, *Rawls*' above theory holds true in post-conflict Sri Lanka where mass killings, enforced disappearances and other war crimes that have allegedly taken place during the latter stages of the conflict around year - 2009 warranted intervention by the international community and the United Nations Human Rights Council (UNHRC) which condemned and held the Sri Lankan government accountable for such human rights violations despite Sri Lanka's opposition to such international intervention in their domestic matters. In fact, in response to such 'intervention by UNHRC'[18], States like Pakistan and the Russian Federation stressed that Sri Lanka alone should, as a sovereign State, decide for itself, without any outside influences. Nevertheless, such UN interventions have superseded the sovereign powers of Democratic Sri Lanka, substantiating both 'universality' and the 'anti-democratic nature' of international human rights law.

Certain aspects of the political philosophy of *Jean-Jacques Rousseau (1712–1778)* also help to understand the anti-democratic nature of international human rights law. To *Rousseau*[19], the 'sovereign' is the supreme and ultimate authority in the State and, is inalienable; it is the voice of the law and, is independent of any outside influences. It's no wonder that *Rousseau*'s theory had become reality in the contemporary world where many democracies have overtly objected to international human rights law, adducing 'sovereignty' as a plausible cause of non-compliance with such universal law.

For instance, the US who espoused and, in fact, introduced to the rest of the world, international constitutionalism in respect of human rights, treated such international constitutions as completely anti-democratic and, thus, not binding on them as a sovereign State. Thus, the US have incessantly adopted a negative approach towards the concept of universal law based on which international human rights are affirmed; as *Jed Rubenfeld* puts it – *"The*

[17] John Rawls, A Theory of Justice (Clarendon Press, 1972), 79-80, 90; Daniel Moeckli et al, International Human Rights Law (2010), 57

[18] UNHRC Resolution A/HRC/25/1 adopted on 27th March 2014

[19] Jean-Jacques Rousseau, The Social Contract, 1762, Book II, Chapter 1-5; at www.sparknotes.com/philosophy/socialcontract/section4.rhtml

American Constitution does not claim the authority of universal law. It claims rather the authority of democracy – of law made by 'the People', of self-given law. 'Human rights' are natural rights. Constitutional rights are man-made".[20]

Turning to France, it was not long ago that France imposed a legal ban on face covering in public, thereby also banning the burqa amongst the female Muslim community in France; this legislative ban was despite the universal recognition of cultural rights under UDHR, ICESCR and the European Convention on Human Rights. None the less, in *S.A.S. v. France*[21], the European Court of Human Rights upheld this ban on face concealment on the ground that preservation of a certain idea of 'living together' was the 'legitimate aim' of the French authorities. However, such a deliberate disregard for the burqa is, undoubtedly, a violation of cultural rights of the entire Muslim Community in the world and, thus, such rights perceived as 'universal' can only be enforced against the sovereign powers of the French legislature, substantiating the fact that international human rights law is anti-democratic.

Further, in the Sri Lankan authority, Singarasa v. AG[22] it was held that the findings of the Human Rights Committee under the ICCPR were not binding on Sri Lanka as a matter of 'sovereignty'. And, in *Vishaka and Others v. State of Rajasthan*[23] although the Supreme Court of India interpreted 'sexual harassment' in line with the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), *Justice Verma* held, inter alia, that gender equality is a universally recognized basic human right that should be considered in the construction of the domestic law (only) *when there's no inconsistency* with the latter. Thus, the anti-democratic feature of international human rights law becomes evident.

Furthermore, States adduce different aspects of 'sovereignty' (i.e. democracy) as a reason for non-compliance with universal human rights law; one such aspect being '*cultural relativism*' according to which a State's conduct is to be judged relative to its culture in contrast to universal moral standards that are absolute. For instance, the Supreme Court of Sri Lanka in the **ICCPR Opinion**[24] held, inter alia, that ICCPR should not be considered an instrument that warrants the amendment of Personal Laws (which reflect patriarchal cultural values) and that any such amendment must be driven by the particular cultural sector governed by that particular personal law. However, the Human Rights Committee in its General

[20] Jed Rubenfeld: Commentary on Unilateralism and Constitutionalism, New York University – Law Review, Vol.79, (Dec. 2004), 2000-2001

[21] Appl. No. 43835/11, (ECHR, 1 July 2014)

[22] SC Spl (LA) 182/99, 15th Sep. 2006

[23] [1997] 6 SCC 241

[24] S.C.Ref.No:01/2008

Comment No. 31 issued in 2004, clearly states that States parties are precluded from invoking constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the Covenant.[25] And, the Committee on Economic, Social and Cultural Rights in its *concluding observations*[26] on Sri Lanka's combined second to fourth periodic report on the implementation of ICESCR, also recommended that Sri Lanka should repeal all discriminatory statutory laws including Muslim Personal Laws, stressing that guaranteeing equal rights of men and women is an immediate obligation of Sri Lanka which cannot be conditioned on the willingness of communities concerned to amend such laws. Therefore, cultural norms relative to sovereign States, are a challenge to the application of international human rights based on universal law.

Even decades after WW-II, the pressure exerted by international instruments and organizations on sovereign States against human rights violations is enormous whilst some States like the US have continuously rejected the universality of international human rights law altogether. Yet, such sovereign States are bound by international charters, declarations, treaties and organizational policies to implement international human rights within their domestic jurisdictions, which clearly indicate the anti-democratic nature of international human rights law.

(4) Scepticism over International Human Rights Law being Anti-Democratic

International human rights conventions as well as international institutions that promote universal human rights have come into being essentially through State participation. And, Parties to such conventions, members of UN, its organs and agencies, are all sovereign States. Hence, theoretically, 'international human rights law being anti-democratic' may be considered a dubious matter warranting further discussion.

Although it has been held in cases like *Singarasa v. AG*[27] that the findings of Human Rights Committee under ICCPR are not binding on Sri Lanka as a matter of 'sovereignty', it must be mentioned that States are sovereign equals because international law recognizes them as sovereign and, thus, international human rights predicated on international law cannot be regarded as a concept contrary to sovereignty or democracy; *Vishaka and Others v. State of Rajasthan*[28].

Further, it might be argued that human rights are an inherent part of democracy for the reason that any democratic State

[25] CCPR/C/21/Rev.1/Add.13, General Comment No.31, p.2, para. 4

[26] UN Doc. E/C.12/LKA/CO/2-4, 9th Dec.2010, pp.4&5, para.15

[27] SC Spl (LA) 182/99, 15th Sep. 2006

[28] [1997] 6 SCC 241

derives its autonomy from its people and, for the preservation of rights and freedoms of its people and, therefore, how universal human rights could run counter to democratic norms becomes rather contentious at least in theory.

According to the 'social contract' as espoused by *Jean-Jacques Rousseau*, the 'sovereign' reflect the general will of the people, which is to provide for the common good of all; and, sovereign employs the government as a representative of the people for carrying out their general will; thus, the sovereign can change or alter the form of government if the latter fails to carry out the will of the people. Hence, to *Rousseau*, government's authority is grounded on people's will. This very political ideology of *Rousseau* is recognized in international human rights documents such as UDHR which in its Article 21(3) stipulates that 'the will of the people shall be the basis of the authority of government'. Further, Common Article 1 of ICCPR and ICESCR expressly provides for the 'right of self-determination' of all States and, thereby, recognizes State sovereignty within the universal law concept. Therefore, it might be contended that international human rights law is not anti-democratic or anti-nationalist, but rather pro-democratic, and an inherent part of democracy.

What international laws are democratic and what are not is a matter of choice for the individual States; for instance, the US has readily embraced the economic policies of international institutions like the World Bank, IMF and WTO whose economic policies benefit the US at the expense of the developing world; in contrast, when it comes to human rights and environmental rights the US becomes a sovereign State over which no external authority is superior. On the other hand, the European Community, in comparison with the US, manifests a welcome attitude towards universal rights for the reason that their internal democracies have treated them with much brutality during WW-II that international governance is necessitated. The point is clear which is – whatever international norms that are favourable to a given democracy are not anti-democratic! Therefore, one may argue that universal rights are not anti-democratic.

Further, many democracies have given legal recognition to human rights because such rights are 'just' , 'moral' or 'fair' to be recognized as law within their democratic frameworks, i.e. universal law is not the only constitutionalism from which rights and freedoms arise; for instance, very recently, the US Supreme Court, in the landmark judgment - *Obergefell v. Hodges*[29], upheld same-sex couples' fundamental right to marry as a fair Constitutional right, not as a right of universal origin; as per U.S. Supreme Court Justice Anthony

[29] Obergefell et al v. Hodges, Director - Ohio Department of health, et al. 576 US_ (26th June 2015)

Kennedy who delivered the majority judgment in this case, same-sex couples have the right to equal dignity in the eyes of the law because US Constitution grants them that right. At a time when even the UNO does not expressly recognize LGBTIQ[30] rights in their international conventions, the recognition of such rights by the US through democratic constitutionalism might render 'international human rights law being anti-democratic' rather a peripheral argument.

However, the above arguments are merely theoretical or grounded on contestable judicial constructions of democratic norms that do not reflect the actual impact of international human rights law on sovereign States, which is to limit their autonomy in the implementation of international human rights law.

(5) Conclusion

Universally binding international human rights law emanates from international constitutionalism that entails international conventions, mechanisms and institutional policies that operate to implement international human rights within sovereign States. None the less, international human rights law has no democratic provenance and, thus, enforcement of such rights on sovereign States is often met with resistance, indicating the fact that international human rights law is anti-democratic.

[30] i.e. Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning persons