Human Rights Law

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The Emergence of Rights Language

- **Natural Law Vs. Enlightenment and Positivism**
- **The Revolutionary Uses of Human Rights**
  - ***From the United States Declaration of Independence (1776).***
    - *We hold these truths to be self-evident, that all men are created **equal**, that they are endowed by their **Creator** with certain **unalienable Rights**, that among these are **Life, Liberty and the pursuit of Happiness**. . . . That to secure these rights, **Governments** are instituted among Men, deriving their just powers from the **consent of the governed,** . . . That whenever any Form of Government becomes destructive of these ends, it is the Right of the **People to alter or to abolish it**, and to institute new Government, laying its foundation on such principles and*

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- Jeremy Bentham long to insist, in Anarchical Fallacies, written during 1791–1792, that ‘‘natural rights is simple nonsense: natural and imprescriptible rights [an American phrase], rhetorical nonsense, nonsense upon stilts’’ (Bentham, 1792/1843, p. 501). there are many who see the idea of human rights as no more than ‘‘bawling upon paper’’ (to use another of Bentham’s barbed descriptions).

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- ***From the French Declaration of the Rights of Man and of the Citizen (1789).*** The representatives of the French people, organized as **a National Assembly.**
  - Article 1: Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
  - Article 2: The aim of all political association is the preservation of the natural and imprescriptibly rights of man. These rights are liberty, property, security, and resistance to oppression.

Philosophical Foundations

- The rights described in the Declarations are **moral** ideas known as **natural rights, derived from the natural law, which** in Christian civilization had to do with the **moral character given by God** to his creation.
- The **reason** of man came to replace the word of God as the highest authority, fracturing the logic of natural law and duty that lay behind the Christian natural rights framework. For example jurists like **Hugo Grotius (1583–1645) and Thomas Hobbes (1588– 1679)-** sought to drive rights not from the natural law ordained by God but from our **basic humanity**.

Evolution of the international human rights law

1. **Development from within: rights limiting governments**
2. **Evolution of the international human rights law**
    1. **Introduction**
    2. **The shift from domestic to the international milieu**
    3. **Period of active normative legislation**

Development from within: rights limiting governments

- **Monopoly of powers**: State's power to employ **physical force** through **rules and orders**: **almost unilatera**l
- **Right of private reprisal very limited**
- Concerns: obvious **dangers of monopoly of power by the state**
  - **Supreme power** to authorize force may lead to **concentrations of powers**
  - And hence to **its cruel, inhuman and unwarranted application**
  - Raises the question **'what safeguards there are against the guards?'**

- The idea is that in any system, there must be a recognition of '**fundamental rights' that no government - modern or ancient - can legitimately discard or undermine**

- But the idea of **recognition of fund. Rights as providing limits on state powers is not a new one.**
  - Has its roots in **philosophical idea of the early periods**.
  - One such justifications in favor of state / royal power emerged in connection with the '**social contract' theory**.

1. **Thomas Hobbes**:
   - Humans outside an estab. Legal order would necessarily be in a **'state of nature**' – w/o anything to guide them or binding them
   - Basic precepts of **morality**, although exiting, are **minimal**
   - All face the imperative to secure the means for their **own survival**;
   - In the absence of organized and **effective prohibition of use of force**, each **naturally free to use whatever neces. to preserve life**.
   - Hence **war of all against all**

- Accompanied by a covenant for a **force to back it up**…
- This **done only if everybody transfers all his/her 'natural rights' to use force to a sovereign or assembly to whom**
- In return, each receives **protection (and imposi. of sovereign laws)**

• But, the **natural right** conception is here conceived as a **weak means against state arbitrariness…**.

- because the only fundamental right given up under social contract (i.e. of use of force) is limited in scope, does not include many other rights….

- Since other rights (of **fair trial, property, liberty** etc) are only provided by virtue of **positive law of the sovereign**, they logically don't provide independent substantive ground for limiting state power….

2. **John Locke:**

- Argued in a state of nature, people have **rights to life, liberty, property;**
- **Laws of reason** binding on all humans runs regulates human conduct…
- as **humans are equal**, **no one has right to use force against the other**…each **must respect the other's liberty, no violence**…
- each entitled to **equal access to fruits of the world…with** possibility **of right of private possessions.**
- problem: there is mechanism to enforce one's natural rights except through **self help**…..
- A spiral of violence likely to happen in **defense and counter-defense maneuvers of persons**
- hence everyone's situation in a state of nature becomes **unstable….and peaceful life under law of nature becomes illusion**…

•Hence, to avert such a scenario, Locke argued a **wholesale transfer of all one's natural rights to a single sovereign is not a solution**

- Only one's '**executive powers of natural laws**' should be

- A social contract provides for establishment of a government to **remedy insecurity of state of nature..**
- And gov't makes general rules '**EXPRESSING' natural rights and do all tasks of modern gov't (adjudication, defense etc)**
- It is this sense **of insecurity in a state of nature** which force people to form a government…

- A gov't loses its power of being obeyed if it violates its subjects' '**natural rights'**

- During the **Age of the Enlightenment**, Such **doctrinal orientation** has been a basis for inclusion of **'bill of rights'** in many contemporary **constitutions and state practices**….
  - Ex. The series of amendments on US Constitution of 1787 (James Madison introducing **bill of rights 1798**) – listed **rights beyond reach of fed. Gov't**
  - **French Revln**. of 1798: Declaration of the Rights of Man and Citizens: stated fundamental natural rights superior to laws of the state…

Some Provisions of the Declaration:

• Men are born and remain **free and equal in rights**. **Social distinctions** may be founded only upon the **general good**.

• The aim of all **political association is the preservation of the natural and imprescriptibly rights of man**. These rights are **liberty, property, security, and resistance to oppression.**

•The principle of all **sovereignty resides essentially in the nation**. No body nor individual may exercise any authority which does not proceed directly from the nation.

• Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. **These limits can only be determined by law**.

- **Developments since the late 18th C: Positivism and Its Consequences**

  - **Theories of natural rights and social contract became less of practical effect.**

  - **David Hume and Jeremy Bentham** ridiculed idea of **social contract taking place anywhere in world as basis for founding government**
  - **principle of utility** (**most useful to most persons) provided far better test for quality of laws than contestable natural laws**
  - Laws, they argued and so did John Austin, are **whatever the sovereign provides in any society, and w/c must be obeyed**;

  - **Rights are therefore consequences of sovereign legislation, not preconds of sovereignty**

Introduction

- Assessment of the evolution of human rights in international law seen as an **historicist account of the subject's growth and change over time**.
  - Such a timeline enables verification of **original ambitions**, its **dynamic growth and expansion over time**.
  - Chapter proposes starting point for international human rights in early international law –
    - Explains **gradual evolution** in terms of an **incremental transfer of power and autonomy in human rights matters from municipal to int'l law**
    - Initially for the **convenience of states** but later evolved into **'objective' standards.**
    - In such a review, important to establish the terms of state relationship with individuals – either as citizens or as aliens for protection of rights.
- ***One thing is clear***: in the society after the **Peace of Westphalia(1648)**, neither international law nor the idea of human rights in it had an *automatic* or *inevitable place*.
  - Each stage in the development of international human rights has depended on **specific *concessions granted* by States**.
  - Some **concessions were voluntary, most made reluctantly**

- Hence, **internationalisation of individual rights has been product of gradual social transformation**…

- The legal consequences of processes involved may be represented in two broad stages: **the facilitative and the legalisation stages**.
  - **Refers respectively to the period up until the UN Charter and**
  - The period thereafter [i.e. **legalisation stage from 1945 onwards**].

Shift from domestic to the international milieu

- First stage in the **internationalisation of human rights** was no more than **forum shift** for the processing of individual rights from domestic to the international forum.
  - Adjustment necessitated by **inadequacies of the domestic law** framework and **'inconvenient' consequences of conflict between 'territorial sovereignty'** and **an emerging ability 'to move across territorial boundaries'.**
  - Inability of the domestic regime to **secure safety and rights of individuals abroad** proved to be launch pad for the **internationalisation of human rights,**
  - To this extent, therefore, the **process** is **neither recent nor new – is as old as international law itself**.
  - This confirmed by **the law of diplomatic protection upon**

- In principle, primary **responsibility for the guarantee of individual rights was initially seen a matter of national** rather than **international competence**
- This was because of ***reciprocal commitments* of individual loyalty to the state in return for protection by the state**.
- National legal regime perceived by and large as **self-sufficient**
- Yet, self-sufficiency of national regimes for the guarantee of individual rights was limited to the **territorial boundaries of each state**.
- Hence, a different regime of international norms necessary to *complement* national rules to ensure rights of individuals **outside citizenship countries**.
- This is the proactive role of international law - **in the facilitation of the rights of aliens…**
- Further **customary international law interest in the guarantee of individual rights is also to account, but was of a passive (non-proactive) character**.
- In effect, national law maintained primary but not exclusive responsibility for the guarantee of individual rights.

- The necessity of international law in the post-Westphalian co-existence (still premised on **sovereign equality**) was based on the **recognition of *common interest or common values* that cannot be promoted unilaterally**.

states are unable or unwilling to carry out their primary functions.

- Yet, relationship between **international law and national human rights regimes were never static, but one in dynamic evolution**.
  - In many instances when national regimes were considered self **sufficient – they were challenged by practical contradictions, inter-state conveniences or sheer inability of national regimes.**
  - Hence necessitating **remedial intervention on international norms**
  - Sure this process of **reform of relationships and transfer of human rights responsibility was unpredictable, slow, occasional and largely ad-hoc**.
  - Since they also **go against sovereignty of states, are conceded only reluctantly**.
  - This explained why a well-established body of international law norms relating to human rights has fallen short of ***an independent system*** **of international protection.**
- However, **weaknesses in the traditional social contract theory framework for the guarantee of the *rights of citizens* became more evident in the 19th c. as states began to *enhance relations* with each other**.
  - Self interest in **matters such as trade, the increased**

protection of religious and other national minorities **exemplify the emergence of common moral standards.**

- In case of ***aliens*****, 'private' reprisals also came to be replaced by 'public' reprisals** where national authorities of the victim assumed the responsibility of ensuring just satisfaction for victims of denial justice.
    - This set foundation for ***modern international standards*** **concerning victim status, the exhaustion of domestic remedies, and due process as a human right**.

- ***The Victims of War: another phase of transfer of national powers***
    - Today, there is a body of codified norms and standards that regulate the **conduct of armed conflict.**
    - These 'Red Cross' standards concerning ***ius in bello*** **are complemented by the standards of *ius ad bellum* set out in the UN Charter to define when a state may legitimately resort to force under international law.**
    - Both the 'Red Cross' norms and the Charter law form **international humanitarian law, sharing common humanitarian concerns for the welfare of all individuals in times of conflict.**
    - **The four Geneva Conventions of 1949, specifically their**

modern human rights law.

- It was however only after the atrocities enacted by the wars in **Cambodia, the Former Yugoslavia, Rwanda and Sierra Leone that shortcomings of *national primary responsibility* for genocide, war crimes and crimes against humanity became evident**.
- And the **Ad-Hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the Special Tribunals for Sierra Leone and Cambodia – establishment of ICC** all represent another phase of transfer of human rights responsibility to international law.

- Still, **internationalisation of human rights took the form of occasional, ad-hoc and isolated events, rather than a purposeful integration of norms and processes**.
  - Its focus remained heavily on states; **concern for individuals** was a means to secure the identity of the state as the ultimate bearer of international rights.
  - Furthermore, **internationalisation was predominantly in the form of customary international law standards and bilateral agreements**.

- **The UN Charter marks the beginning of the *second stage* of human rights internationalisation.**
  - Scope of the internationalisation process at this stage is much **wider and its effects radically transformative.**
  - The **standardisation of human rights norms** setting out **common, often negotiated positions between international law actors turned out to be an important facility in the internationalisation process**.
  - This is in contrast to the early **facilitative stage** - standardisation was then employed for **limited *political purposes* to facilitate parochial *national objectives*.**
  - This new perspective of standardisation helps to identify roles of new actors; is aimed at radically different objectives and priorities.
- In 1945, the **aspiration of promoting the respect for human rights was truly ambitious**.
  - The aspiration to transform abstract human rights ideals *known to political and religious philosophy* into tangible **outcomes required three things**
    - A radical restructuring of relations between **international actors**,
    - The identification and definition of **standard**s, and

defined this important transition.

- ***At The Dawn of the United Nations Charte****r*
  - o At the dawn of the UN Charter three factors were notably relevant to influence **development of international human ri**ghts law:

1. The *droit acquis* of human rights at international law

- By the 1940's, there was enough international law involvement in the welfare of individuals;
- It was hence unjustifiable to suggest that international law had no interest in human rights or that guarantee of the rights of citizens was simply **a domestic concern.**
- By this time, a structured complementary relationship had already evolved between national and international law, neither had exclusive responsibility.

2. The confrontation of acute global problems touching on human rights;

- The confrontation of **acute human rights problems that undermined the credibility of the *social contract theory* and *the primary responsibility* of national authorities to guarantee individual rights.**
- At the dawn of the United Nations Charter, the world, but especially

war were fairly evident; however, the moral and political lessons of the war were equally compelling.

- One unequivocal lesson from this war was how easy it had been for governments to **disregard the primary article of political governance – the social contract.**
    - The *sacred trust of sovereignty* invested in governments in return for the *protection of their citizens* seemed totally insignificant; governments brutalised and murdered their own citizens.
    - The **culture of fear and terror became standard governmental** tools, proved shocking to the moral sensibilities of the time.
    - Threatened a gradual collapse of democratic values since WWI.
    - The limited response of containment under the League of Nations proved ineffective.
    - If the looming decent into Hobbsian chaos was required, an entirely radical strategy was called for - that which accepted shortcomings of the principles upon which individual rights were expected to be guaranteed.
    - The doctrinal presumptions of the Lockean social contract ideals had proved flawed and untenable - the two wars taught that
        - Governments could not be accounted as objective

- The ***territorial delimitation*** **of governmental** human rights responsibility as an attribute of sovereignty was itself incompatible with effective human rights protection.

- **The campaign for the universalization of human rights standards.**

- Global character of problems of human rights had already been recognised by inter-war activities, fuelled by influential campaigns for more credible system of human rights guarantee based on the recognition of the universality of individual rights.
  - These campaigns constituted the 3rd category of notable factors in the designation of human rights policy in the Charter of the United Nations.
  - The common narratives about the Covenant of the League of Nations is that it had no more than a peripheral interest in human rights.
    - This is far from correct; political factors may have prevented the adoption of human rights as a central theme,
    - But the global character of human rights concerns was already then exercising the minds of some of the delegates to the Paris Peace conference.

men, women and children . . .’

- Provision reflected sentiments of universality that transposed to the Constitution of the **International Labour organisation**,
- But was part of a broader human rights idea requiring the ‘just treatment of the native inhabitants of territories’, the regulation of ‘traffic in women, children’ and dangerous drugs as well as the traffic in arms.

- A less obvious endorsement of universality of human rights found in the common undertakings of the minority treaties signed with selected countries.
- Finally, the **US President Roosevelt is credited with a campaign for a universal framework of human rights that proved immensely attractive and influential**.
  - The so-called ‘**four freedoms**’ campaign was the international by-product of his domestic new deal policy in which he envisioned the benefit of human rights and humanitarian standards *to all*.
  - The universality vision was reiterated in other intergovernmental documents as well, such as the Atlantic Charter signed by the US and the UK in 1941 and the Declaration by United Nations signed by the US, the UK, USSR and China in 1942.

- In 1945, therefore, international law *was not indifferent* to the welfare of individuals. Many matters of human rights were considered a part of proactive international concern.
- ***At San Francisco***
  - At the SF meeting to negotiate terms of a new legal order, there was an acute appreciation of the shortcomings in the system for the protection of individual rights.
  - Including acknowledgement that *nationality* was no longer a secure guarantee for the respect and guarantee of individual rights.
  - Similarly evident that the failings of human rights policy were not limited to particular countries or regions, required a holistic and global strategic response.
  - Social contract theory as the basis of national policy in human rights matters was no longer credible.
- The UN Charter spawned an entirely new language for addressing matters of individual rights.
  - With the emphasis on the individual, the new language was one of human rights instead of the *fragmented rights of aliens* and *citizens,* or of *minorities* – *workers* or *victims of war*.
  - Plus new language captured the notion of rights as belonging to *all* – regardless of differences such as language, nationality, religion or other distinctions.

- ‘Entitlements’ language used to claim rights from governments, hold them accountable.

- Of course, there was a pragmatic recognition of the important distinction between the normative priorities as they stood in 1945, and the aspiration and ambition to improve upon them.
- In brief, in negotiating terms of the Charter, there was a clear understanding that the UNO would be based on
  - the principles of co-existence such as sovereign equality of its members,
  - the guarantee of territorial integrity and political independence,
  - the non-intervention in matters that are essentially within the domestic jurisdiction of any State;
  - While same time aiming to achieve the co-operative purposes set out in Article 1 of the Charter.
- The Charter has no other prescriptions for achieving the human rights aspirations it sets out; however, it was an effective start to create a secure institutional framework in which to work.
- The HR responsibilities of the *principal organs* – including the Economic and Social Council (ECOSOC) are founded directly upon the Charter’s human rights ambitions.

Are HRs Absolute?

- Are HRs "**absolute**" or should they be balanced with other **Values**? If they ought to be balanced with other values, how should this balance be struck? Can HRs **conflict** with each other, and if so, how should such conflicts be resolved? Are HRs "**expensive**"(**financially or otherwise**?) and if they **demand scarce resources**, can we say that there are "rights" to what is **expensive, difficult, or impossible** to **respect, provide, promote, protect or fulfill(Civil and Political Rights Vs. Economic, Social and Cultural Rights- on Issues Realization(progressive and Immediate –Core Minimum?)**? How are HRs related to **duties, obligations, and responsibilities**? Are HRs "**universal,"** if so, how should we settle conflicts between universal rights and **particular cultures** that deny their validity?

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- **Are HRs absolute? Torture ? Art. 29(2) of UDHR?**In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a **democratic society**. Hence, some argue that torture might be allowed to **protect a democratic society** from **immense danger**.
- **Natural and Institutional Rights**?- State of Nature – Fair Trial which is intrinsically institutional. **Democracy** is the self-government of a people, whereas human rights protect individuals (and perhaps vulnerable groups) from all abusive governments, whether democratic or not. However, democratic institutions may violate HRs.

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- **Are HRs inalienable**? Some HRs appear to be **alienable**; **soldiers** for example, give up their right to **security** to some extent. Others may not be; the right to education may include the obligation to be educated. The alienation of HRs is different from their forfeiture . **Criminals** may forfeit their right to liberty.
- **Are HRs Conflict each other?** Conflicts of rights fall into two main categories. The HRs of some may conflict with those of others and or one right may conflict with another right of the same person. Your right to **security** may conflict with others' right to a fair trial and or your right to freedom of **movemen**t. My right to free expression may be limited by, but not in conflict with, your right to privacy.
- **Duties and Costs-** rights generally entail duties. **HRs** do not depend on the performance of one's duties. However, **HRs protection** entails the performance of corresponding duties, so that anyone enjoying rights without performing duties would act unfairly. Gov'ts are the primary HRs duty-bearers, but classical natural rights philosophy held that everyone had such duties. In modern times, such obligations are extended to nonstate actors, transnational corporations. **If HRs are to be Universal, Obligation must be Universal too**. **Extraterritorial Obligation of States (ETOs)?- respect, fulfill, promote, provide, protect and ensure?**

Cont'ed

- **HRs and Other Values(Justice, Democracy, communitarian and culture and religion)**
  - Are **Justice** the foundation of HRs or vice versa?(UDHR Preamble one)- is justice broader than HRs notion? What is justice and its dimension?
  - The right to vote, freedom of speech *inter alia,* are inherent features of **democracy**. The right to education is however, is necessary to an adequate exercise of democratic values. Democracy articulates who should rule, how whereas HRs set limits to rule. HRs may limit democratic gov't and thus be opposed to democracy. HRs philosophers find the sources of moral truth outside actual decision-making processes whereas democrats find it in democratic process. Although democracy is the best political form to protect HRs, tension exists between the values of HRs and democracy.

Cont'ed

- **Commentarial vs. Libertarian (individualism)**
- **Universalism vs. Cultural Relativism**
  - **-**(universal validity and culture specific validity)- Ethnocentrism of West vs. Cultural imperialism of non Western.
  - Historicity of HRs- war of independence and Great Revolutions(Wn Historical Experience) and Colonization
  - The language Discourse of HRs- Wn oriented
  - Should we respect Nazi Germany cruel and unjust cultures?
  - Universalism is intolerant
  - Cultural relativism may be smokescreen for oppressive rules

Philosophical Theories of HRs

- **Natural Law(Sacredness Religious): John Locke and Michael Perry** believed that God had created human beings and the natural world. God Willed the preservation of mankind. Life, liberty and property exist even in the absence of government in the State of Nature which has law of nature. But Hobbes assumed State of Nature as lawless. Locke believe that government is necessary for executions of rights in case of violations hence, social contract must be entered into.
- **Capability Approach-** A person's capabilities are his/her abilities to take certain actions that are **fundamentall**y important to **any human life**, to be whatever he or she wants. Capabilities are intrinsically valuable because they make life **fully human**. A typical list of capabilities, as suggested by **Nussbaum**, includes life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species play and control over one's environment. The Idea of HRs can be related to that of capabilities insofar as everyone has a justified claim for their capabilities to remain secure. **Freedom**

Cont'ed

- **Moral Agency-** As asserted by **Alan Gewirth** that morality presupposes agency (purposive action- **needs**) and all agents must regard the proximate necessary conditions of their actions as **necessary goods(freedom and well-being)- incapables?**
- **Social Construction-Friedrich Nietzsche**
- **Sentimentality: Sympathy – Richard Rorty**
- **Legal Positivism on HRs:** Articulates that Human Beings have the rights given to them by the law, and there are no other rights. **John Austin and Thomas Hobbes**

Cont'ed

- **John Rawls theory of justice** (gives priority to basic liberal freedoms (freedom of religion, association, and expression and second to the material needs of the worst off). He listed Art. 3-18 of the UDHR as HRs proper**. ('[the] right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).** Rawls under "The Law of Peoples" treat HRs on the basis of **functionalism. Ronald Dworkin- HRs is the function of establishing conditions of political** legitimacy whereas Joseph Raz treat HRs as a function of placing limits on the state sovereignty by specifying certain defeasible grounds for International Intervention. HRs are the political rights that trace the outer boundaries of an intelligible conception of dignity.(Developing vs. Developed Countries?**). Functionalism** narrowly attaches HRs with particular institutional arrangement or roles(State).- Output of HRs
- **Foundationalism – HRs as a specific norm(interest based)- hard line foundationalist and moderate foundationalist (autonomy and liberty –James Griffin)- Minimalism –input of HRs- Utilitarianism –Jeremy Bentham**
- **Plurality – Moral and prudential values- John Tasioulas**

Cont’ed

- **Robert Nozick of Libertarian theory** of **HRs**-no one has the right to interfere with the freedom of anyone else provided that the equal rights of others are respected. Everyone is free to assist those in need, but the needy have no right to assistance from others who are not willing to give it. **Taxation – counter-arguments.**

Origins of Human Rights

- Use of the term '**human rights**' began at the end of the eighteenth century (for example, in the French Declaration of the Rights of Man and of the Citizen(1789)—'***les droits de l'homme. But*** Before the end of the eighteenth century, the talk was instead of '***natural rights***'. '**Natural rights'** were generally seen as derived from '**natural laws'.**
- Although the doctrine of **natural law** has ramified roots deep in **Greek and Roman antiquity but its most influential statement was given by St. Thomas Aquinas.**

Cont'ed

- **God** has placed in all things various **innate natural dispositions**, but **only in human beings has he further placed a disposition to reason**: that is, a disposition issuing in various **precepts to guide action**—for example, that we are to **preserve ourselves in being; to propagate our kind; to seek knowledge of, and to worship, God; and to live peacefully in society**. These and other percepts constitutes **natural law and natural law** serves as the measure of **natural rights**.
- The **Protestant Hugo Grotius** earned his reputation as the founder of the **modern secular theory of natural law** by taking the further step of arguing that **God is not needed even to explain the obligatoriness of natural law**.

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- He thought that we can establish **natural laws** through the kind of **understanding open to all of us**, whatever we believe about religion: namely, that we must act in accord with our **rational nature**, and that we must do the various things necessary to maintain a society both **consonant with reason and composed of inconsistently motivated members such as us—by nature desirous of society yet by nature so self-interested as to undermine society.**
- Like **Hugo**, **Samuel Pufendorf** thought that although **divine revelation** may help us to know **natural law**, ‘it can still be investigated and definitely proved, even without such aid, by the **power of reason**’. What particularly needs empirical investigation, he thought, is which precepts are needed to produce **a rationally stable society** out of the unsocially social creatures that human beings are.

The Enlightenment Project on Human Rights

- **John Locke *(Two Treatises of Civil Government*)** Locke does from time to **time refer to God, but it is the God of the Deists: the designer who set the great machine going and then departed from the scene—no intervention, no revelation**. **Reason** alone, he thought, can establish fundamental moral principles—indeed, can establish them with certainty. The natural rights that he focused on were the **taking of a person's life, liberty, or property without due process**, the three most common ways for monarchs to keep their subjects under their thumb.
- **Comprehensive lists of natural/human rights were increasing from time to time including –**
  - The England, ***Magna Carta*** **(1215**) concerned the rights of certain social classes and institutions.
  - The **English Bill of Rights (1688**) was concerned with 'vindicating and asserting their ancient rights and liberties

Cont’ed

- The **American Declaration of Independence (1776) fell back on *natural rights***. *And* the **United States Bill of Rights (1791)**
- **Natural law** began as part of a teleological metaphysics capable of supporting strong interpretations of how **morality is rooted in nature**, and it ended up at the close of the eighteenth century in something approaching vacuity.
- In the case of ‘**human rights**’ there are so few criteria to determine when the term is used **correctly or incorrectly** that we are largely in the dark even as to what considerations are to be taken as relevant. **In contrast**, we largely agree about what is relevant to **correct and incorrect use of the word ‘justice**’. The words ‘just’ and ‘fair’, as we have them in ordinary speech, are such that, so long as the context or the speaker makes clear what sort of justice is under discussion—distributive, retributive, procedural, or so on—we largely agree on what is at issue. HRs are **indeterminate** notions.

Different Approaches to Explaining Rights :Substantive and Structural Accounts

- **Joel Feinberg's** account of rights is largely **structural**. **A right**, he says, is a claim with two features: **it is a claim, first, *against specifiable individuals and,* second, *to their action or omission on one's behalf.*** it is such a claim when it is sufficiently backed by **laws or moral principles** and therefore valid.
- **Ronald Dworkin's** view that rights are **'trumps'** is another highly structural one. Right is as trumps over the best policy of promoting the **good of all**. But it is not only rights that promote good of all but also justice and fairness do promote good of all. The domain of justice and the domain of human rights are only **overlapping, not congruent**.

- A satisfactory account of *human rights,* therefore, must contain some adumbration/indication of that exceedingly vague term '**human dignity**', again not in all of its varied uses but in its role as a ground for human rights. A **substantive evaluation.**
- **Robert Nozick's account of rights as 'side-constraints** which is still largely structural -rights set **limits on the permissible pursuit of personal or the common good**; these side-constraints, though, may be overridden in the extremely rare case of a 'catastrophe'.
- **John Rawls-theory of political justice** between peoples-to have a well ordered people with liberal democracy 'hierarchical' peoples who are not aggressive, respect human rights with minimal consultation hierarchy. To reach agreement between well ordered peoples public reasons: reasons that do not derive from any particular comprehensive view and will be accepted as authoritative by all parties to the agreement must be placed. Hence, the role of HRs is to **provide the justifying reasons for war and its conduct, and to set conditions for when one state may coercively intervene in another** .
- **Human rights** can, therefore, be directly grounded in **values (individual responsibility, autonomy, freedom, and human dignity**)without becoming culturally limited.

Accounts of HRs

- **Top Down** -one starts with an **overarching principle**, or principles, or an **authoritative decision** procedure—say, the principle of **utility or the Categorical Imperative or the model of parties to a contract reaching agreement**—from which **human rights** can then be derived.
- **Bottom Up-**one starts with **human rights** as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what **higher principles one must resort to in order to explain their moral weight**, when one thinks they have it, and to resolve conflicts between them.
- **Objective vs. Subjective Rights**
- **Reason- Freedom –dignity**
- **Human Beings are moral agents of their own-deliberating, assessing, choosing, and acting** to make what we see as a good life for ourselves. But humans must be **autonomous**, **informed (minimum education), minimum provision to act and liberty to act- to recognize and enforce personhood**

Grounds of HRs: Substantive values

- **Personhood** (a **right to life** (without it, personhood is impossible), to **security of person** (for the same reason), to a voice in political decision (a key exercise of **autonomy**), to free expression, to assembly, and to a free press (without them, exercise of autonomy would be hollow), to worship (a key exercise of what one takes to be the point of life). It also generates, I should say (though this is hotly disputed), a **positive freedom**: namely, a **right to basic education and minimum provision needed for existence as a person—something** more, that is, than mere **physical survival**.**)** It also generates a right not to be tortured because torture destroys one's capacity to decide and to stick to the decision.
- 'Persons', however, have **'dignity**'; they are of unique value; they have **no equivalents and hence,** human rights, especially on the personhood account, as essentially **deontologica**l. Trade offs?

2nd Ground of HRs: Practicalities

- We should probably have to leave a **generous safety margin**. We need also to consult **human nature**, the **nature of society**, and so on, in drawing the line. Donating blood may not infringe the concept of personhood like security of persons but in torture there must not be an exception for practical reasons. Freedom of the press differs from country to country

The Principle of Equal Respect a 3rd Ground?

- Equal respect expresses the **moral point of view itself**, and human rights, being **moral standards**, must likewise be expressions of it. **Equal opportunity (e**galitarianism of the late Middle Ages.**)** We differ in **social status**; we are equal in **human status meaning no inferiority and superiority(**lord, freeman, slave,**)**.

Cont’ed

- **Human rights** include at least **one distributive requirement**, minimum provision, because it is required by personhood. And for the same reason, human rights include some **retributive requirements**, such as **proportionality in punishment** and **a ban on cruel and unusual punishment**—proportionality because it is a **protection of liberty**, and the ban because it is a **protection of agency** generally.

Understanding Agency

- **Normative Agent** is our capacity to choose and to pursue our conception of a **worthwhile life(autonomous which implicates liberty)**.
- '**Agency**' we must mean not just having certain **capacities (autonomous thought, executive action**) but also **exercising** them. We need **knowledge/education** not only to protect autonomy and liberty but to protect other rights too.
- The word **'agency'** is used more or less broadly within the spectrum from **deliberation to choice to action to outcome**. In the **personhood account,** it is used broadly—to cover all of **these stages**.

Cont’ed

- Infants, the severely mentally retarded, people in an irreversible coma, are all members of the species, but are **not agents**.
- Kant thought that one would be **autonomou**s only if one’s actions came from a **purely rational, intentional centre, undetermined by anything outside it—undetermined**, for instance, by one’s biology or one’s society. But r**ationality** requires **thought**; thought—at least thought about how to live one’s life—requires **languag**e; and language is a cultural artefact, deeply influenced by the form of life lived by animals like us.

In What Sense are HRs Universal?

- Freedom of Expression
- The ground for freedom of expression lies in a **normative notion of agency**: we are s**elf-deciders**; that is part of the **dignity** of human standing.
- **Welfare rights** are society **dependent** and may not exist in the state of nature.
- **Do We Need a more Pluralist Account ?**
  - **What is wrong with torture? It causes excruciating pain undermining someone's will having an ultimate effect**

What is Source?

- **Source** is any pieces of information that can be used in the course of legislation. Sources also connotes the authoritative and binding nature of a certain law.
- Article 38(1) of the Statute of the International Court of Justice indicates the traditional sources of public international law including **international conventions (treaties), international custom, international principles of law recognized by civilized nations, and subsidiary sources (publicists of**

Soft Laws as a Sources of HRsL

- In most cases, norms of HRsL are derived from non-binding soft rules including UN General Resolutions and UDHR. Both treaties and international custom are found on the basis of **consent** of states which could be a challenge for the protection and promotion of HRs in general.
- **Non-conventional sources** of HRsL are the products of common consensus and are either *jus cogens* or emulate *jus cogens*.
- Obligation of ***erga omnes – obligations which are valid for all whereas Opinio juris*** is a general belief by states that a non-treaty rule is a legally binding on them.(state acquiescence). This is very similar to jus ***cogens norms***
- UN GA as soft law non-binding but and consent of states can be obtained through voting system.
- UDHR as binding because it is cited in many binding international conventions, national constitutional provisions ,and UNSC.
  - customary international law status
  - General principle of law
  - United Nations consistent reliance on UDHR(authoritative interpretation approach-Art. 55 and 56 of the UN Charter)

Cont'ed

What are Rights?

- **Will/Choice theory**-The will theory is subscribed to by those who view the **purpose of law as being to grant the widest possible means of self-expression** to the individual. Individual **discretion** is the single most distinctive feature of the concept of rights in this view.
- **Right/benefit theory-**argues that the purpose of rights is not to protect individual assertion but certain **interests**.-Rights are said to be **benefits secured for persons by rules regulating relationships.**

Henry Shue(1980)-Tripartite Obligation of Gov't

- **Obligations to respect**: In general, this level of obligation requires the state to **refrain** from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts.
- ***Obligations to protect****: This level of obligation requires the state to* ***prevent*** **violations of human rights by third parties**. The obligation to protect is normally taken to be a **central function of states**, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: a) **to prevent violations of rights by any individual or non-state actor**; b) to **avoid and eliminate incentives to violate rights by third parties(state sponsored violations of HRs)**; and c) **to provide access to legal remedies when violations have occurred in order to prevent further deprivations.**

Cont’ed

- ***Obligations to fulfill****: This level of obligation requires the state to take* measures to **ensure, for persons within its jurisdiction, opportunities to obtain satisfaction of the basic needs as recognized in human rights instruments**, which cannot be **secured by personal efforts**. Although this is **the key state obligation in relation to economic, social and cultural rights,** the duty to fulfill also arises in respect to civil and political rights. It is clear that enforcing, for instance, the prohibition of torture (which requires, for example, police training and preventive measures), the right to a fair trial (which requires investments in courts and judges), the right of free and fair elections or the right to legal assistance, entails considerable cost.

Drafting History of the UDHR(Int'al Bill of Rights)

- **WWII and its impact to Humanity**
- **Ricardo J. Alfaro** foreign ministry of Panama- statement of Essential Human Rights to be considered in the UN Charter but was rejected.
- **The ECOSOC** –UN Organ was tasked to promote cooperation in the area of social and economic as per art. 68 mandated to create Commission on thematic issues, including human rights.
- **Commission on Human Rights** – under chairmanship of Eleanor Delano Roosevelt, widowed wife of the former US President Franklin Delano Roosevelt under Harry Truman presidency. The Commission was representatives of States. The drafting subcommittee included Roosevelt, Chinese representative **Peng-Chun (P.C.) Chang**, **John Humphrey**, a Canadian legal scholar, **René Cassin** of France, **William Hodgson** of Australia, **Geoffrey Wilson** of Great Britain, **Hernán Santa Cruz** of Chile, and V**ladimir Koretsky** of the Soviet Union and Lebanese representative **Charles Malik**.
- **Previous works where lesson have been take in the Draft of the UDHR** English **Magna Carta(1215),** the U.S. Declaration of Independence(1776) and Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen(1789) and Speeches of **US President Franklin Delano Roosevelt**.

Why the UDHR was Bifurcated ?

- **Perceived differences** between the respective categories of rights (CPR vs. ESCR)
- **Cold War divisions**: the Eastern bloc tended to champion ICESCR rights, while Western States were seen as the major proponents of ICCPR rights. An Optional Protocol to the ICCPR was also adopted in 1966, providing for a right of individual petition in respect of violations of the ICCPR against States that ratify that Protocol.
- **ICCPR+ICESCR+UDHR**= International Bill of Rights
- **The UN and the Standard Setting Role of HRs**
- In Preamble, Article 1(3), the promotion and encouragement of human rights and fundamental freedoms. Under Articles 55 and 56, Member States are committed to '**joint and separate action' to create 'conditions of stability and well-being' across the world**, including the **promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion**'. Thus, from 1945, it was clear that human rights could no longer be characterized as a domestic issue, hidden by the veil of State sovereignty. The UN Security Council under Chapter VII is mandated to bring about **peace, security and stability which human rights are foundations of such values. The above values are considered to be as peremptory international norms.**

UN Human Rights Institutions

- The UN human rights institutions are generally either '**Charter bodies**' or '**treaty bodies**'. **Charter bodies** are established by the **Charter itself**, or by **bodies which are themselves created by the Charter, by a political wing of intergovernmental state**. **Treaty bodies** are created by the respective **UN human rights treaties**. The main Charter bodies are the **political UN human rights institutions**, as they are made up of the **representatives of governments**, while the **treaty bodies** are the **quasi-judicial arm of UN human rights supervision, composed of human rights experts acting in their individual capacity**. Both types of bodies are supported by the **Office of the High Commissioner for Human Rights**.
- **UN General Assembly** –is entitled to 'initiate studies and make recommendations . . . assisting in the realization of human rights and fundamental freedoms. It provides recommendations by way of declaration or resolution which are of course non-binding but has significant moral force. **Unanimous or consensus resolutions** can also constitute strong evidence of the existence of a customary norm.
- **ECOSOC(Economic and Social Council)- 1946**

ECOSOC

- Is authorized by Article 62 of the UN Charter to ‘make or initiate studies and reports with respect to international, economic, cultural, educational, health and related matters’ and may ‘make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms’. ECOSOC receives and transmits to the General Assembly the reports of the treaty bodies and also coordinates a wide variety of UN programmes. But ECOSOC effectively delegated its mandate to the Commission on Human Rights in 1946 according to Art. 68 of the UN Charter, now Human Rights Council(2006), main charter body now.
- **Commission on Human Rights** – is engine room of UN human rights activity which has drafted most of the UN human rights documents prior to its dissolution in 2006. Through its **standard-setting and norm development,** it produced the **bulk of international human rights law. It** was assisted in its functions by **the Sub-Commission on the Promotion and Protection of Human Rights**, a **‘think tank**’ composed of 26 human rights experts serving in **their individual capacities**.

Cont'ed

- **The Human Right Council -2006**
  - **the Council** is responsible for **promoting the protection of human rights**, **fostering international cooperation on human rights,** providing capacity building assistance to States to help them to meet their human rights obligations, and **responding to specific violations of human rights**.
  - *Status quo of Commission on Human Rights was* retained as to the composition -**special procedures, a complaints mechanism, significant NGO access and an independent advisory body – as well as**

Treaty Bodies

- The treaty bodies are established under the respective **UN human rights treaties**. Ex. Art. 28 of the ICCPR established the Human Rights Committee but the ICESCR is an whereby the Committee on ESCR was established by ECOSOC Resolution in 2008.
- The treaty bodies are made up of **independent human rights experts**, unlike the **government representatives that populate the Charter bodies.** The treaty bodies are part-time bodies, and are not paid for their work, though their expenses are refunded. As a result there is a backlog in their work.
- The decisions of the treaty bodies are **not legally binding**. However, their **interpretations of their respective treaties have strong persuasive force**, as they represent **authoritative interpretations of legally binding documents**. The treaty bodies act as the **quasi-judicial arm of the UN human rights machinery**.
- **Function of the Treaty Bodies-** All treaty bodies **monitor their respective treaties** by way of **reporting processes**, and all are able to issue **general comments(useful jurisprudential tool for interpretation)**. Some treaty bodies are empowered to receive and decide upon **individual(widely utilized form of complaint) and interstate complaints(but problem of tit-for-tat).**

Chapter Two: Protection and monitoring of human rights under the UN System

Charter-based bodies: competence and procedures
Treaty-based bodies: rights and monitoring mechanisms

- **Charter-based bodies: competence and procedures of the HRC**

  - **The Special Procedures of the Human Rights Council**
  - **Universal Periodic Review**

Human Rights Council

- The Human Rights Council, which replaced the Commission on Human Rights in 2006 by GA resolution, is a separate entity from OHCHR.

- Distinction originates from the separate mandates given by GA.

• The HRC is the only *inter-governmental body* within the UN system dedicated exclusively for HRs

Is made up of ***47 states*** responsible for strengthening promotion and protection of HRs.

Meets for no fewer than three times per year, for a total of ten weeks.

Can also hold Special sessions when emergency of a situation requires it.

•Traditionally addressed country situations, and rarely a thematic issue

- Mandate of the HRC: promotional and protective
- Its meetings are public and any State Members, Observers and NGOs with consultative status can participate in the discussions.
- The Council is an intergovernmental organ, works under political principles; same facts may be treated differently;
- However, the governmental composition also assures human rights agenda remain on the political discourse of the States.

2. *Public Special Procedures* of the HRC – is general name given to the mechanisms established by the HRC (through a resolution) to address either

- *Specific country situations* or
- Thematic *issues* in all parts of the world.

- Is ***really universal system*** affecting each country in civil, political, economic and social rights as well as rights to envi. And development
- complements shortcomings of the treaty system.

- SP are either an ***individual*** (like a special rapporteur - representative - independent expert) or simply a ***working group***.

  - Are prominent independent experts, work voluntarily, individual capacity.
  - Appointed by the HRC, mandates defined by the res. creating them
  - SPs' mandates call on power to *examine, monitor, advise and publicly report* on human rights situations
    - in specific countries (***country mandates***) or
    - on major phenomena of HR violations worldwide

Thematic mandates Ex.

- Special Rapporteur on ***adequate housing*** as a component of the right to an adequate standard of living and on the right to non-discrimination in this context

- Working Group on Arbitrary Detention

- Special Rapporteur on the Right to Education

Country Mandates Ex.

- Special Rapporteur on the situation of human rights in Cambodia

- Independent Expert on the situation of human rights in Côte d'Ivoire

- Most Special Procedures
  - ***receive*** information on specific allegations of HRs violations, and
  - ***send urgent appeals of allegation*** to gov’ts asking for clarification

  - Process involves *sending a letter* to the concerned Government requesting information, comments on allegation, and asking preventive or investigatory action be taken.

  - Mandate holders also ***carryout country visits*** to investigate violations of HRs.

  - They typically send letter to a government requesting permission to visit, and if the government agrees, an invitation is extended.

  - Some countries issue ***‘standing invitations’***

- After visits, SP mandate-holders issue ***mission report*** (findings and recommendations).

- Pronouncements not legally binding; however, publicity of procedures used not only as a channel of information but also as a tool to exercise pressure over States and other concerned actors

- **Decision to intervene** at the *discretion of the special procedure mandate holder*.

- His criteria generally relate to reliability of source, credibility of information received.

- The following minimum information must be provided for all *SP in order for the communication to be assessed:*

  - Identification of the alleged victim(s);
  - Identification of the alleged perpetrators of the violation;
  - Identification of the person(s) or organization(s) submitting the communication (this information will be kept confidential);
  - Date and place of incident
  - Detailed description of circumstances of the incident.
  - *No abusive language* or *obviously politically motivated*
  - Communications should not be based *solely* on media reports.

2. The 1503 (Complaints) Procedure of the HRC

- ***How does the complaint procedure work?***

  - The Complaint Procedure is established to address ***consistent patterns of gross and reliably attested*** violations of all HRs and fundamental freedoms occurring in any part of the world and under any circumstances.

  - Is *confidential,* with a view to enhancing cooperation with the state concerned.

- Two distinct bodies:

  - the *Working Group on Communications* and
  - *the Working Group on Situations* - have been established to examine communications and to bring to the attention of the ***Council***.

- Manifestly ill-founded, anonymous communications screened out by the Chairperson of the Working Group on Communications.

- Communications not rejected in the initial screening *transmitted* to the state concerned to obtain its views on the allegations.

- *The Working Group on Communications* (WGC) is designated by the Human Rights Council Advisory Committee from among its members, for three years.

  - Consists of ***five*** independent and highly qualified experts and is geographically representative of regions.

  - The WGC meets twice a year, for a period of five working days, to assess the ***admissibility and the merits*** of a communication.

•*The Working Group on Situations* (WGS) comprises **five** members, appointed by the regional groups from among the states member of the Council, for the period of one year.

- Meets twice a year, for a period of five working days
- ***Examines***
  - *communications transferred* to it by WGC,
  - as well as *situations* which the *Council is already seized of* under the complaint procedure.

- Presents the ***Council a report*** on consistent patterns of 'gross and reliably attested violations' of human rights and makes ***recommendations*** on the course of action to take.

- The Council may take a decision concerning each situation brought to its attention.

Criteria for a communication to be accepted for examination

- No communication related to a violation of HRs and fundamental freedoms is admissible, if it is:

  - Manifestly *political motivations* and

  - object *inconsistent* with the UN Charter, UDHR, and other instruments

  - does not contain factual description of the alleged violations, including the rights which are alleged to be violated;

  - language is *abusive*

  - Is not submitted by a person *claiming to be victim of violations*

    (Any person, NGOs *acting in good faith*, not resorting to politically motivated stands and *claiming to have direct, reliable knowledge* of violations may lodge)

(Knowledge of the individual author can be second-hand, provided they are accompanied by clear evidence)

- It is exclusively based on reports disseminated by mass media; or

- Refer to violations already being dealt with by a special procedure, a treaty body or other UN or regional complaints procedure.

- The domestic remedies have not been exhausted (unless ineffective or unreasonably prolonged)

- *Where to send communications?*

Communications intended for handling under the Council Complaint Procedure may be addressed to:
Human Rights Council and Treaties Division, Complaint Procedure
OHCHR-UNOG
1211 Geneva 10, Switzerland
Fax: (41 22) 917 90 11 , E-mail: CP@ohchr.org,
Communications

3. The Universal Periodic Review

- The Universal Periodic Review (UPR) is a *unique process* which involves a review of the human rights records of all 192 UN Member States *once every four years*.

- Was created through the UN General Assembly on 15 March 2006, by resolution 60/251.

- Is a state-driven process, under the auspices of the HRC

- Provides opportunity for each state *to declare what actions they have taken to improve the human rights situations* in their countries.

- Is *a cooperative process* which, by 2011, will have reviewed the human rights records of every country

- Currently, no other universal mechanism of this kind exists.

Treaty-based bodies: rights and monitoring mechanisms

- There are nine *core international human rights treaties*, ten *HRs treaty bodies*.
  - Treaty bodies are created in accordance with provisions of the treaty that they monitor.

- There are *ten human rights treaty bodies*…

1. Human Rights Committee (CCPR)
2. Committee on Economic, Social and Cultural Rights (CESCR)
3. Committee on the Elimination of Racial Discrimination (CERD)
4. Committee on the Elimination of Discrimination against Women (CEDAW)
5. Committee against Torture (CAT)
6. Subcommittee on Prevention of Torture (SPT)
7. Committee on the Rights of the Child (CRC)
8. Committee on Migrant Workers (CMW)
9. Committee on the Rights of Persons with Disabilities (CRPD)
10. Committee on Enforced Disappearance (CED)

Common Complaints Procedures of human rights bodies

- Three main procedures for bringing complaints of violations before the human rights treaty bodies are:

- *Individual communications*
- *state-to-state complaints*
- *inquiries*

- International Covenant on Civil and Political Rights -1966
- Optional Protocol to the International Covenant on Civil and Political Rights
- 2nd Optional Protocol to ICCPR aiming at the abolition of the death penalty

o Important rights: right to self determination, right to life, freedom from torture, cruel and degrading treatment, from slavery, right to liberty and security of person, freedom of movement, right to fair and public trial, right to privacy....

- **The Human Rights Committee**: a body of independent experts that monitors implementation of the ICCPR by its State parties.
  - The HRC is composed of *18 independent experts*
  - The ICCPR Convention adopted and opened for signature, ratification, accession by GA Resolution 2200A (XXI) of 16 December 1966
  - Entered into force 23 March 1976.

1. Reporting obligation

- All states parties submit *regular reports* on how rights are

- Committee ***examines*** *each report,* and addresses its *concerns* to the state party in the form of ***'concluding observations'*****.**

2. Inter-state complaints

• Article 41 of the Covenant provides for the Committee to consider inter state complaints.

3. Individual complaints

• First Optional Protocol to the Covenant gives Committee competence to examine ind. Comp. with regard to violations of Covenant by states parties to the ***Protocol***.

• Competence of the Committee extends to the *Second Optional Protocol* to the Covenant on the abolition of the death penalty.

• Committee meets in Geneva or New York, holds three sessions per year.

• publishes *general comments on thematic issues* or its *methods*

2. Committee on Economic, Social and Cultural Rights

- International Covenant on Economic, Social and Cultural Rights 1966
- Optional Protocol of the Cov. on Eco., Social and Cultural Rights 10 Dec. 2008

- *Rights guaranteed*: self-det., right to work, right of trade unions to organize and strike, right to family, right to mental and physical health, right to education, housing etc.

- **The Committee on Economic, Social and Cultural Rights** (CESCR)
  - *monitors implementation* of the Covenant by its States parties.
  - Established in 1985.

1. Reporting: States submit *regular reports* to the Committee on how the rights are being implemented, *initially within two years, and then every five years*.
  - Committee examines report, and addresses its concerns and recommendations to the state party in the form of 'concluding observations'.

- The Optional Protocol *opened for signature* in 2009.

- ***Other committees*** with competence can consider individual communications involving issues related to economic, social and cultural rights.

- Committee meets in Geneva, holds two sessions per year.

- Committee also publishes its interpretation of the provisions ((general comments)

CERD

- The CERD Prohibits
  - any *distinction*, *exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin*
  - which has the purpose or effect of *nullifying or impairing recognition, enjoyment or exercise, on an equal footing, of HRs and fund. freedoms* in the pol., eco., social, cultural or other field of public life.

- The Committee on the ERD monitors implem. of the Conv. by state parties.

1. Reporting: states submit regular reports to the Committee, initially one year after acceding to the Convention, and then every two years.
  - Committee examines each report and addresses its concerns to the State party in the form of concluding observations.

2. **Other procedures**: the Convention also establishes three other mechanisms for the Committee to perform its monitoring functions:

a. The *early-warning procedure*,

- aimed at preventing existing situations *escalating* into conflicts and
- urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention)

b*. The examination of* *inter-state complaints* and

c*. The examination of* *individual complaints*

- Committee meets in Geneva, holds two sessions per year.
- Committee also publishes its interpretation of provisions *(general comments)*

Women CEDAW

- Conv. takes an important place in bringing *the female half of humanity* into the focus of human rights concerns.

- CEDAW, adopted on 18 December 1979
  - guarantees the right of all women to be free from discrimination and
  - sets out obligations for states parties designed to ensure legal and practical enjoyment of that right.

- While the ICCPR also contains free-standing provisions for *non-discrimination* on the basis of gender, the Convention is a *specialized treaty* in greater details.

- 'Discrimination against women' embraces
  - any distinction, exclusion or restriction made on the basis of ***sex***
  - which has the effect or purpose of *impairing or nullifying the recognition, enjoyment or exercise by women,* irrespective of their marital status, on a basis of equality of men and women, of human rights and fund. freedoms in the pol., eco., social,

- The Committee on the EDAW monitors implementation of the Convention.
  - Committee of 23 experts on women's rights from around the world.

1. **Reporting**: states obliged to submit regular reports to the committee.

- Committee considers each State party report and addresses its concerns to the state party in the form of concluding observations.

2. **Communications and inquiries**: In accordance with *the Optional Protocol to the Convention*, the Committee is mandated to:

I. Receive *communications* from indiv. or groups of indiv. submitting claims of violations of rights protected under the Conv. to the Committee,

II. Initiate *inquiries* into situations of grave or systematic violations of women's rights.

5. Committee against Torture (CAT)

• Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits

- any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as
  - obtaining from him or a third person info. or a confession,
  - punishing him for an act he or a third person has committed or is suspected of having committed, or
  - intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,
  - when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of ***a public official*** or ***other person acting in an official capacity***.

- It does not include pain or suffering arising only from, inherent in or incidental to ***lawful sanctions.***

• CAT adopted and opened for signature, ratification and accession by GA resolution in 1984, entry into force in 1987.

• Committee Against Torture, body of *10 independent experts,* _monitors implementation of the convention, began its function in 1988.

1. Reporting: states parties obliged to submit regular reports to the Committee.

- First report submitted *within one year,* thereafter every four years
- Committee invites state representatives to attend the meetings when their reports are considered.

It may also inform a state from which it decides to seek further information that it may authorize its representative to be present at a specified meeting.

2. Powers of investigation of the Committee

• Committee is *empowered to receive info.* and *to institute inquiries* concerning allegations of ***systematic practice*** of

- The procedure is marked by two features: *its* ***confidential character*** and *the pursuit of* ***cooperation*** with the states parties concerned.

- The competence conferred upon the Committee by this article is ***optional***; at the time of ratifying or acceding to the Convention, a state may declare that ***it does not recognize it.***

- **Gathering of information**: In respect of such states, Committee is empowered to receive information concerning the existence of the practice of torture.
  - If Committee believes of well-founded indications that torture is being systematically practised, it invites the state
    - *to cooperate in its examination* of the information and, to this end,
    - to *submit observations* with regard to that information.

- It may also decide to *request additional information* from sources.

- **Inquiry procedure:** if it considers that the information gathered warrants it, the Committee may designate one or more of its

- In that case, Committee invites the state to cooperate with it in conduct of the inquiry.

- Accordingly, the Committee may request the state to designate a representative to meet with the members conducting the inquiry to provide information.

- The inquiry may also include, with the agreement of the state, a visit to its territory by designated members who may then conduct hearings of witnesses.

- After all the proceedings, Committee may decide to include *a summary account of the results* of the proceedings in its annual report.
  - In that case, work of the Committee is made *public*; otherwise, all works are confidential.

3. Inter-State complaints

- The conduct of this proceeding is subordinated to the ***recognition*** by states of *the* ***competence*** of the Committee.
- In such cases, Committee may receive and consider communications in which a state alleges that another State is not discharging its obligations under the Convention.

- *Recourse to the Committee:*
  - The procedure comprises two stages - if a state violates, another state may in the first place, by written communication, bring the matter to the *attention of that State Party*.

  - The State which receives the communication is required to furnish in writing and within three months *any explanations necessary to clarify the matter.*

  - In the event they are unable to settle the matter between them, it may be referred by either State to the Committee.

Friendly solution of the matter

If these conditions are met, Committee endeavours to arrive at a friendly solution of matter, by making available its good offices to states.

The Committee submits report statement of the facts and solution if a friendly solution is found; otherwise, submits only the facts with the submissions of the States concerned. The report is then communicated to the states concerned.

4. ***Individual complaints***

- Conv. Gives *individuals, in certain circums.,* right to lodge complaints.
- For the Committee to be able to admit and examine individual communications, its competence must have been ***expressly recognized*** by the state.
- Individual complaints are always examined by the Committee in closed meeting.

Submission of communications

claims to be victim of violation by state which accepted competence.

- If the alleged victim is not in a position to submit the communi. himself, *his relatives or representatives* may act on his behalf.

Consideration of the merits

If Committee decides a communication is admissible, considers the merits.

- State shall submit to Committee expla. clarifying the case and indicating any measures it may have taken to remedy situation.
- The author of the communication may also submit his observations or additional information to the Committee.

Provisional measures

- In the course of the consideration of inadmissibility or merits, Committee may request the State to take steps to avoid possible irreparable damage.

Conclusion of the proceedings

- In light of all information made available to it, the Committee

Cooperation with other bodies

- There are other methods of combating torture at either regional level or the international level.
- *The Special Rapporteur on Torture*: the Committee has considered on a number of occasions question of cooperation with the Commission on Human Rights Special Rapporteur responsible for issues relating to the practice of torture in the world.
- The Committee considers mandate conferred on it and mandate conferred on the Special Rapporteur by the Commission on Human Rights are different but complementary.

The Optional Protocol

- To the Convention, entered into force in 2006, creates the Subcommittee on Prevention of Torture (SPT).

- The SPT has *a mandate to visit places* where persons are deprived of liberty in the states.
- Under the OP, States shall *establish an independent national preventive mechanism* for the prevention of torture at the domestic level which has also a mandate to inspect places of detention.

7. Committee on Migrant Workers (CMW)

- The Convention was adopted
  - Realizing importance of the migration phenomenon, which involves millions of people and affecting a large number of states in the international community,
  - Aware of impact of the flows of migrant workers on States and people concerned, and
  - Desiring to establish norms contributing to the harmonization of the attitudes of states through acceptance of basic principles concerning treatment of migrant workers
  - Vulnerability of migrant workers and their families owing to their absence from their state of origin
- The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) monitors Convention (1990)

1. Reporting: All States parties are obliged to submit regular reports to the Committee, one year after acceding to the Convention, and then every five years.
   - o Committee examines each report & address its concerns and recommendations.

2. The Committee will also, *under certain circumstances, be able to consider individual complaints or communications* from individuals claiming that their rights under the Convention.

6. Committee on the Rights of the Child (CRC)

- The Committee on the Rights of the Child monitors Convention.
  - Also monitors implementation of *two optional protocols* to the Convention, on *involvement of children in armed conflict* and *on sale of children, child prostitution and child pornography*.
  - In 2011, the UN GA approved *a third optional protocol* on *a Communications Procedure*, which will allow *individual children* to submit complaints regarding violations of rights under the Convention and the first two optional protocols.
  - Protocol opens for signature in 2012, will enter into force upon 10 ratifications.

1.Reporting: States are obliged to submit reports, initially two years after acceding to the Convention, and then every five years.

- Committee examines report and addresses its concerns as 'concluding observations'.
- Committee reviews additional reports which must be submitted by States who acceded to the two Optional Protocol.

2.Individual complaints: Committee will soon be able to consider individual complaints by children.

- In the meantime, violations of child rights may be raised *before other committees* with competence to consider individual complaints.

8. Committee on the Rights of Persons with Disabilities (CRPD)

- Include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may *hinder their full and effective participation in society* on an *equal basis* with others.
- The Committee on the Rights of Persons with Disabilities (CRPD) monitors implementation of the Convention of 2006, entered into force in 2008.
- Report: states are obliged to submit *regular reports* to the committee, initially within two years, and thereafter every four years.
- Committee examines each report, makes recommendations on the report.
- The *Optional Protocol to the Convention* gives the Committee *competence to examine individual complaints* with regard to alleged violations of the Convention by states parties to the Protocol.

Global enforcement of HRs

- ***Naming and shaming(Boomerang** effect)- Pressurizing government by media, NGO, Public Protests, other states. Common but weak form of punishment*
- Diplomatic and **economic sanctions(very difficult from HRs points of view because the consequence of economic sanction will have an effect of exacerbating human rights violations)**
- **Military force(Humanitarian Intervention)-**under Chapter VII of the UN Charter in order to respond to threats to international peace and security.(Problem of veto power in the UN Security Council). **Syria**
- **International Criminal Law- Under the ICC Rome Statute –** Omar Al-Bashir, Uhuru Kenyatta

Regional Human Rights Systems

Why Regional HRs Systems ?

- To address **distinctive Regional HRs Issues** like ACHPR which allows free disposition of their wealth and natural resources, FGM and Peoples of Rights
- To **commit to Higher HRs Standards** than could agreed in UN treaties open to all States
- To **Create Stronger monitoring and enforcement mechanisms such as regional courts and commissions** because we did not have International Courts
- Due to **greater political will for compliance** with HRs domestically than relaying on International *fora* which is less attractive

The European HRs System

- **European Convention on Human Rights and Fundamental Freedoms, 1950**
- The **Council of Europe** adopted European Convention which entered into force in 1953 and had influence from UDHR
- **Institution for the implementation of European Convention**
- **The European Commission of Human Rights set** up in 1954;
- **The European Court of Human Rights** set up in 1959;
- **The Committee of Ministers of the Council of Europe**, which in turn consists of (a) **the Ministers of Foreign Affairs of the member States; or (b) their representatives**.
- **Complaints** could be brought against Contracting States either by other **Contracting States, or by individual applicants**, which include (i) **individuals; (ii) groups of individuals; and (iii) non-governmental organizations.**
- Recognition of the right of individual applications was, however, optional and can, therefore, only be exercised against those States which have accepted it.

Cont'ed

- **Council of Europe** has 47 member States all of which must accept **the rule of law and HRs protections as a precondition to join it**
- **European Convention on HRs 1980 was drafted in line with the ICCPR**
- **Committee of Ministers (Intergovernmental body)**
  - Monitors and follows up Compliance to the judgment of the ECtHRs
  - Issues Recommendations to member States
- **Parliamentary Assembly of the Council of Europe**
  - Elected regional Legislature
  - Makes Recommendations on HRs Issues

Individual Petition System

- The Commission determines admissibility on certain criteria, was used as screening procedure (causation should be specifically shown, exhaustion of local remedies) and issues non-binding recommendations
- **ECtHRs**(A permanent court which heralds the deletion of the Commission)-Situated in **France, Strasbourg** (English and French as medium of Communication)
  - Rich in Case and development of norms over HRs
  - Higher Rate of Compliance
  - Facing backlash effects these days due to politically sensitive cases
- **The Courts three Stage**
  - Committee of three judges
  - Chamber of Seven Judges
  - Grand Chamber of Seventeen Judges
- The Court could receive communication from States, individuals/Groups or NGOs on grounds of exhaustion of local remedies (Art. 40 cum 38)

The Inter American HRs System

- **Organization of American States (OAS) 1948-Intergov’tal**
  - **Goal-** Promote peace and security, democratic governance and HRs in Americas
  - Scope of Rights were limited to CPR and states undertake to take measures on progressive bases and as a result of this Additional Protocol on ESCR
- **4 Steps by OAS to Promote HRs**
  - Adopted American Declaration on the Right and Duties of Man 1948
  - Inter-American Commission on HRs 1959/1978
    - Promotional mandate and Reports of Violations of HRs allegations and carry out on-site visit, stimulate public consciousness about HRs and publish special reports about HRs
  - American Convention on HRs 1969
    - Non-binding recommendations
  - Inter-American Court of HRs 1969
    - Recognition to the Court’s Jurisdiction is Optional
- Systematic HRs violations are prevalent (forced disappearance and extrajudicial killings –Latin America)

The African HRs System

- **OAU to AU(HRs issues and Issues were already addressed like decolonization and self-determination)**
- **The African Charter on Human and People's Rights, 1981-**
- The Philosophical foundation resembles to the **UDHR**- 7th preamble (All Human Rights are interdependent, indivisible and interrelated)
- **Unique Features of the ACHPRs**
  - Inclusion of Duties of individual person towards family and society and collective social and moral interests (Art. 27, 28 and 29 promoting social harmony and cohesion)
  - Indivisibility, interdependence and interrelatedness of HRs-7th preamble
  - Inclusion of Collective rights or solidarity rights (Art. 19-24)
  - Absence of Derogation clause (No claw back clause for Art. 15-24)

Unique Features

- The Charter recognizes the **indivisibility of all rights: All 'generations' of rights are recognized. Socio-economic rights are justiciable**.
  - *SERAC(social economic Rights Action center) vs Nigeria, para 68*
- **No derogations are allowed**
  - *Media Rights Agenda vs Nigeria, paras 68 & 69. except Art. 27(2)*
- **Recognition of peoples' rights such as the peoples' rights to development, free disposal of natural resources, and self-determination**.
  - *Endorois case, para 155*
- **Imposition of duties on both states and individuals.**
  - Preamble to ACHPRs

African Commission on HPRs(Art. 60 and 61)

- Very vibrant on issues of HRs
- Review Reports from States
- Investigate violations of HRs
- Review Communication from individuals and NGOs
- Issues non-binding recommendations
- **African Court on Human and Peoples Rights 2004 situated in Tanzania, Arusha**
  - **Not as such vibrant, only dispenses one case or two**
  - Cases are referred by African Commission on Human and Peoples Rights indirectly
  - Optional Protocol allows to receive individual complaint directly but few are ratifying to it

Sub-regional Integration Systems in Africa

- Africa contains sub-regional legal systems which **promote economic and political integration** aiming **at tax harmonization, free trade, common currency and customs union**. These include
  - Economic Community of West African States(ECOWAS)
  - East African Community (EAC)
  - Southern African Development Community (SADC)
- But **progressively developed into HRs protection and promotion**. One of the principles and objectives of these sub-regional systems is the **promotion and protection of HRs, human rights friendly economic integrations**.

Cont'ed

- Since 2005, the courts created by these sub-regional systems have reviewed complaints from individuals and NGOs alleging violations of HRs , mainly rights in the African Charter
  - In ECOWAS, a new protocol expanded the court's jurisdiction
  - In the EAC and SADC, the court adopted an expansive interpretation of its existing jurisdiction to include HRs
  - Gov't responses to these HRs rulings have ranged widely, from compliance to resistance and backlash

ARAB and ASEAN HRs System

- **The League of Arab States (1945)**
  - Interested on **promotion of political, economical, cultural and scientific cooperation among Arab nations**
- **Establish Arab Charter on HRs on 2008**
  - **Establishes an Arab HRs Committee of Independent Experts to Monitor Implementations of the Charter**
- **Positive Aspects of the Arab Charter on HRs**
  - **A legally binding document**
  - **Asserts that HRs are key national concerns**
  - **Reaffirms that All HRs are universal, indivisible, interdependent and interrelated**
  - **Provides that nothing in the Charter impairs rights and freedoms protected by domestic law or in other International or regional treaties a state has ratified.**

Cont'ed

- **Problematic Aspects**
  - Leaves some rights to national legislation including application of the death penalty against those under 18, and equal rights of men and women in marriage
  - Does not extend many rights to non-citizens
  - Allow restrictions on the freedom to hold (as opposed to manifest) religion or belief
  - Does not prohibit cruel, inhuman , or degrading punishments
  - IN general, the charter reflects the reservations to international HRs treaties made by member states of the Arab League

Arab HRs Committee

- **Problematic Aspects include**
  - Most members of the Committee hold government positions which can debilitate their impartiality
  - Committee reviews reports from states parties, No Individual Complaints procedure
  - Most States Parties have not submitted their initial reports to the Committee
  - Unclear rules for participation of NGOs
  - Limited impact on national laws and policies at least so far

Association of Southeast Asian Nations (ASEAN)

- In 2009, ASEAN's ten members States created the ASEAN Intergovernmental Commission on HRs
- IN 2012, Member States adopted the ASEAN HRs Declaration (non-binding) which had been drafted under the auspices of the Commission
- **Positive Aspects**
  - Intergov'tal Commission Provides a focal point for sub-regional HRs activities
  - Declaration reaffirms all rights in the UDHR and recognizes other right eg. Children's right to be free from economic and social exploitation , the rights of those with Communicable diseases such as HIV/AIDS
  - Declaration could serve as a template for drafting a HRs treaty for ASEAN

Cont'ed

- **Problematic Aspects**
  - Intergovernmental Commission is a political body whose members are accountable to the States that appoint them
  - Commission operates by consultation and consensus each State has an effective veto
  - Commission has only a promotional mandate, it cannot review State Reports, initiate independent investigation, or review complaints from individuals or NGOs
  - Declaration's drafting process lacked transparency or meaningful NGO input
  - Declaration criticized for asserting that
    - "The realization of HRs **must be considered in the regional and national context bearing in mind different political, economical. Legal , social , cultural , historical and religious backgrounds**. **Relativist**
    - **"Rights "must be balanced with the performance of corresponding duties**."

Civil and Political Rights

- **What are civil and political rights?**
- **Civil right :** rights that are restrict oppressive or abusive conduct by government and their officials. Ex. The right to life, liberty and equality
- **Political rights** : enable citizens to participate in the political process and governing themselves and each other. EX. Freedom of association and universal suffrage
- **Overlap between categories**: freedom of speech, usually characterized as a civil right, is often implicated in criticism of government or elections.
- **Negative Liberties vs. Positive Obligations**
- Civil and Political rights are **primarily negative liberties**. The rights are respected if the government and its officials refrain from acting**. However,** there realization of some civil and political rights imposes positive obligations on states and requires them to adopt **affirmative measures**.(The right to fair and impartial hearing)
- **Civil and Political Rights Legal Instruments**
  - **ICCPR 1966/1976-167 States Parties as of January 2014**
  - **UDHR 1948**
  - **Regional HRs System**
  - **National Constitutions**

Cont’ed

- **ICCPR** protects nearly all civil and political rights in the UDHR, but defines rights with greater precision and creates international monitoring mechanisms. **The Right to life in UDHR Art. 3 is more elaborated in the ICCPR Art. 6(1)**
- **ICCPR Monitoring Mechanism** –a body of elected independent experts, the UN Human Rights Committee(UNHRC)
- State parties submit reports describing their implementation of the ICCPR. UNHRC reviews the reports and issues concluding observations and issues General Comments that interpret the ICCPR and Provides guidance to all States Parties

Cont'ed

- **Rights under the ICCPR**
  - **The Right to life**
  - **The right against torture, cruel, inhuman and degrading treatment**
  - **Liberty and security of persons**
  - **The Right to equality**
  - **The right to be recognized everywhere as a person**
  - **Freedom of thought, conscience and religion**
  - **Freedom of association and assembly**
  - **Family Rights**
  - **Participation in governmental affairs**
  - **Minority rights**
- **Art. 6(the right to life) General Comment No. 6**
  - **Inherent**
  - **Arbitrary**

Economic, Social and Cultural Rights

- Economic and social rights guarantee the conditions under which everyone is able to meet basic human needs relating to the workplace, social security, housing, food, water, health care and education.
- US President of Franklin D. Roosevelt (**freedom from want** which means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world.
- **The Right to education**
- **The Right to food freedom from hunger and access to safe and nutritious food and clean water**
- **The right to health(Physical and mental health facilities)**
- **The Right to housing**
- **The right to social security**
- **The right to work**

Cont’ed

- **Positive Obligations vs. Negative liberties**
  - ESRs primarily involve positive obligations. States must adopt affirmative measurers to secure these rights . However, some ESRs involve negative liberties that require State to refrain from acting. Ex. A stream runs through a rural community, providing its residents with clean and safe water for drinking and farming. The State must not interfere with the residents'’ access to the stream as indigenous to such.
- **Legal Instruments**
  - **UDHR**
  - **ICESCR 161 member states as of January 2014**
  - **Regional**
  - **National Constitutions**
- **Art. 2 ICESCR vs. ICCPR Art. 2- Obligations of States**

Challenges and Responses to ESCRs

- **Features of ESCRs (Art. 2)**
  - ***Progressive Realization***
  - ***Maximum available Resources***
  - ***Legislative Measures***
  - ***International Assistance***
- ***Directive Principles of State Policy (DPSP) vs. The Power of the Judiciary in issues of policy***

- **Challenges** as the result of the above features
  - **The Universality Challenges**
    - ESCRs are not universal rights because they vary acc. To each country’s level of economic development and the international assistance it receives. A right that means different things in different places is not a human right.
  - **The Political Process Challenges**
    - Because of the existence of legislative measures only which could difficult to negotiate
  - **The vagueness challenge**
    - Due to the progressive realization it is impossible to determine whether a state is satisfying its legal obligations at any given moment in time. Minimum Core Obligations
  - **The Justiciability challenge**
    - Violations of rights require **legal remedies** that are **legally enforceable** in **court of law**. But judges don’t have the institutional capacity, political legitimacy or expertise to award such remedies, which require ordering gov’ts to allocate limited resources in specific ways.

Responses to the Challenges

- Develop a more precise legal framework to clarify the obligations of States in light of the four distinctive features of ESCRs. This can be done by employing multiple actors including national legislatures, administrative agencies and courts as well as international HRs experts.
- **Committee on ESCR-**
  - is a treaty body for the ICESCR
  - 18 independent, elected experts review reports from all States Parties describing the implementation of the ICESCR and issue concluding observations and recommendations
  - Based on these reports the Committee adopt **General Comments** that interpret the ICESCR and provide guidance to all States Parties.

Cont'ed

- **General Comment No. 3-States Party obligations**
  - Distinguishes between **immediate obligations** that all State Parties must meet and **progressive obligations** that can be achieved over time and in light of available resources .
    - **Immediate Obligations**
      - ***No discrimination relating to ESCRs***
      - ***To take steps towards full realization of ESCRs that are deliberate, concrete and targeted***
      - ***To provide judicial remedies for ESCRs capable of immediate application by courts***
      - ***To ensure the satisfaction of, at the very least, minimum essential levels of each right; this is a minimum core obligation of every state party***

Cont'ed

- **Progressive Obligations**
  - ***To move as expeditiously and effectively as possible towards full realization of ESCRs and to avoid deliberate retrogressive measures***
  - ***Where resources are inadequate to strive to ensure the widest possible enjoyment of ESCRs under the prevailing circumstance***
  - ***To give special protection to vulnerable members of society through the adoption of low cost targeted programmes***
- ***See Ministry of Health of RSA vs. Treatment Action Campaign (2002)- Separation of power and Accountability***

Restrictions/limitations and Derogations of HRs

- **Reason of State-** is a doctrine that whatever is required to insure the **survival of the state** must done by the individuals responsible for it no matter how **repugnan**t such act may be to them in the their **private capacity as decent and moral man**.
- **Security and issues of morality –**public morality must be placed in the survival issues of the state.
- **Security issues** can be **internal chaos and disorder and external or foreign aggression** and in such instances the state must maintain the **constitutional order(contract entered under the civil state/social contract)** by taking measures of reason of state for the **common good** to assure not to fall under **state of nature**.
- However, how **Constitutional Reason of State should be guided and implemented** ? **Balancing common good and individual rights**.
- Constitutional Reason of State for security- **Absolute vs. Limited (criteria base)**

Cont’ed

- **Survivalist (James Hargnton**(Institutional safeguard (a special power to deal with security problems outside the regular channels of constitutional procedure like a board should act to the restoration of the constitutional order), **Spinoza**(subversive acts vs. subversive opinion must be spared and reason of state must be applied to subversive acts for the security and survival of the political order) **and Montesquieu**(Constitutional Reason of State must be taken but caution must be placed on the potential abuse of institutional safeguards-**intermediary powers(check and balance)**)) **vs. Moralist(J. Milton, J. Locke and I. Kant** (All moralist are cognizant of the significant role of revolution and hence of dynamic change in the political order. Reason of State cannot be merely the maintenance of the status quo; it must be expressive of mode or modes of progressive change. Kant focuses on categorical imperative which declares that balance must be taken between the right to revolution and the prerogatives of the political order))

Cont'ed

- **Rights and Duties – Duties are correlated to rights**
  - Obey the law
  - Pay taxes
  - Common Good (to defend ones country)
- **Absolute Rights Vs. Rights that may be subject to restrictions**
  - Inviolabilities (The right to equality? torture)
  - Legitimate restrictions
- **Limitations-** emerges from the recognition that certain rights **are not absolute** and that they underpin **a balance** between **individuals rights and community interests**.
  - Limitation is a permanent act by law in time of peace
  - Limitation is a permanent restriction of the scope and substance of the right with appeal to a more profound interest of the public.
- **Derogation or suspension of certain Rights –**exists only when there is **a state of emergency of a certain character and is imposed with the sole purpose of responding and arresting to the emergency to restore normalcy**. And its consequence is a **temporary but a total suspension of the rights in question**.
- **Hence, Normalcy is a rule and emergence is an exception**

Claw back clause, Margin of appreciation

- **Claw back clauses** –are **vague phrases** which allows **high discretion to enact laws** on certain rights by member states in the African Charter. These vague phrases are loopholes for systematic violations of rights under the African Charter by member states exaggerating sovereignty. Prevalent in the ACHPRs
- Article 6 every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom "**except for reasons and conditions previously laid down by law**. …. Which is similarly phrased with Article 17(1) of the FDRE Constitution.
- **The Doctrine Margin of Appreciation** –was developed by ECtHRs to restrict arbitrariness over the implementation of rights. This doctrine serves two ends
  - Restrict states from arbitrary implementation of rights
  - Place states at better position for implementation of rights- discretion of states for implementation.

Systems of Protection for Vulnerable Groups

- **Reason for additional Protection**
  - Degree of Vulnerability
- **Gender Equality**
  - **UN Charter**
- **Women's HRs**
  - **CEDAW's(1981)** core objective is to **prohibit discrimination against women** in the enjoyment of HRs and Fundamental Freedoms
  - Discrimination against women shall mean **any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their martial status, on a basis of equality of man and women, of human rights and fundamental freedoms in the political economic social cultural civil or any other filed. Art 1 CEDAW**
  - **Does the definition of discrimination against women in CEDAW prohibit laws or polices that give a preference to women and girls ? No as per Art 4 CEDAW**

Cont'ed

- **Rights encompassed /protected in the CEDAW**
  - **Civil and Political rights –Art 7, 15 16**
  - **ESRs –Art.10, 11 and 12**
- **Which kind of laws, policies and practices discriminate against women and therefore violate CEDAW? State must take measures to eliminate discriminatory laws, policies and practices**
  - **In the public sphere/platform-** in national Constitutions and laws, gov't policies, public institutions and participation of women in political life –**Art. 2**
  - **In the private sphere**- by private individuals, businesses associations and groups –**Art. 2(e) cum 16**
  - **In the cultural sphere –**prejudices, stereotypes and customary practices and beliefs –**Art. 5(a)**

Cont'ed

- **Committee on CEDAW- Does CEDAW adequately respond to the challenges of protecting the HRs of women and girls?**
  - **CEDAW and its monitoring mechanisms have acted as a catalyst for eliminating or reducing inequality in many countries. But significant obstacles remain , including**
    - **Discrimination in the cultural sphere and**
    - **Broad reservations**
- **CEDAW Committee**
  - Reviews Reports from States Parties regarding implementation of CEDAW
  - Issues General Recommendations
  - Review Complaints from Individuals and NGOs alleging violations of CEDAW
  - Investigates gross or systematic violations

Positive Steps

- Educational Opportunities in **Bangladesh** used CEDAW to help attain gender equality in primary school enrolment
- Violence against women in **Mexico** referenced CEDAW in a model law to combat gender based violence
- Marriage and family relations **Kenya** relied on CEDAW to eliminate discrimination in inheritance rights
- Political participation in **Kuwait** extended voting rights to women in 2005 in response to a CEDAW Committee Recommendation

Challenges to CEDAW

1. **Gender discrimination and Culture** –infanticide, FGM, sale of daughter, honor killings, marital rape, witch hunting, early marriage and domestic violence, abduction etc
2. **Reservation –Art. 2 Vienna Convention on the Laws of Treaties** – "a unilateral statement … mad by a State, when… ratifying … a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State"

- **Which reservation are permitted ?**–Art 28(2)- A reservation incompatible with the object and purpose of the present Convention shall not be permitted. Broad and core obligation of are taken reservation
  - **EX Saudi Arabia. Islamic Law or sharia** – in **marriage, divorce, custody , adoption or inheritance** reservation
  - **Cultural Practices and discrimination in the family EX. India** reserving **Art. 5(a) and 16(1)-non interference**
  - **France –Art. 5 – Family Education (public education)-Privacy Rights**

- **Why So many Broad Reservation?**
  - Because affects deeply –rooted/held national values relating to culture, religion and society. In order to mediate between these values –reservation is one
  - State need more time to implement fully the expansive rights and obligations in CEDAW

Reservation to CEDAW

- **Responses to Broad CEDAW Reservations**
  - Several States Parties, especially in Europe, have filed **objections** to broad reservations. The legal effect of these objections is uncertain however.
  - The CEDAW Committee has pressed States on whether reservations are necessary or are overly broad. The Committee has also indicated that reservations to Arts.2 and 16 are **incompatible with the "object and purpose**" of CEDAW
  - Several States have **withdrawn or narrowed reservation** after a dialogue with

Children’s Rights

Definition

Definition of a Child

- **Age wise Definition- It varies from state to state**
- **Biological Definition**(Puberty and other biological developments, including public hair).
- **Social Construction –** Social roles allocated to children and adults. These roles are given on the basis of social competence which is characterized by the community.

Reasons for the Existence of a Separate Child Rights

- child is a particularly **vulnerable member of society** and, therefore, **requires and deserves special protection**.
- Children requires **special care and protection** because of their **mental and physical immaturity which creates a conducive platform for vulnerability of different dangers**. This **special care and protection** is within the broader human rights discourse.
- **Child Rights vs. the Non-discrimination clause/Equality –** child rights is an exception to such clause because **differential treatment** for children is compulsory as they are **immature mentally and physically. Legitimate Differentiation**
- **Children vs. Adults- Capacity** ?(**Rationality culpability and autonomous in leading life**), **lack of wisdom**
- **Continuation of generation (Karl-Eric Knutsson**: "Protecting the **health and education of today's children** is the most **basic and wisest of all investments)**

Cont'ed

- The difference between **child and adult** has also been expressed much more recently. According to Goldstein, Freud and Solnit, children differed from adults in their **mental nature**, **their functioning**, **their understanding of events and their reaction to them**. In addition, children also differed amongst themselves in the course of their **individual growth and development** as a family member.
- **Child Protectionist theory** - Children are irrational, immature and dependant to the adults and hence, rational autonomous adults make decisions on behalf of those irrational and dependent individuals(**Paternalism**)- decision making process.
- **Child Liberation theory**-Historically children were property of their parents and hence, denied participation in the decision making process**. This was considered as a form of oppression equal to women and minorities in history.**

Cont’ed

- They further argued that children should be allowed to **make decisions, even incorrect ones, because they would never gain experience** in such matters otherwise and that children should not be prevented from making decisions simply because they might make the **wrong ones**. Adults are not error free, they commit mistakes in passing decisions.
- **Welfare Rights(Right to Protection) vs. Liberty Rights (Rights to**

Cont'ed

- Children are not rational and are incapable of **making reasonable and informed decisions** and that **lack of maturity** was **sufficient reason to deny autonomy to children**. Secondly, children are **prone to make mistakes than adults** because they lack the **wisdom** that come with the **experience of life** and that children should be protected from their **own incompetence**. But to what degree should children be allowed to participate in their own affairs? Locke's reasoning that individuals are usually **the best judges of what is in their interests** and **acting on the contrary assumption**, that **others may know better**, is **likely to lead to far worse outcomes**.
- Generally, a balance should be made between **paternalism and autonomy** by crafting the best interest principle

What is Protected?

Rights vs. Interests

- **Will/Choice theory**-The will theory is subscribed to by those who view the **purpose of law as being to grant the widest possible means of self-expression** to the individual. Individual **discretion** is the single most distinctive feature of the concept of rights in this view.
- **Right/benefit theory-**argues that the purpose of rights is not to protect individual assertion but certain **interests**.-Rights are said to be **benefits secured for persons by rules regulating**

Historical Antecedent of Child Rights

- The **Ten Commandments**, arguably the **most influential of all legal codes contains a clear normative pronouncement on parent-child relations but it is in terms of respect for parents, and is silent on the obligation of parents to love and nurture their children.**
- It was not until the **last half of the twentieth century**, however, that the child was **accorded status as a person under the law**. This century also witnessed the expansion of the **human rights movement to include the rights of the child.** The sympathy felt by England's **Eglantyne Jebb** for these defenseless victims of World War I led her to start a campaign for better protection of the world's children**. Save the Children International** in 1923 which is a basis for the **UN Convention on the Rights of the Child 1990**.

Children in the World Wars

Children were most vulnerable than adults in the world wars. The follow was a fact children painfully experienced in the 1990s

- **100 million abandoned children were driven to resort to hard labor, petty crime, prostitution, or begging in order to survive;**
- **50 million children worked under unsafe or unhealthy conditions;**
- **120 million children 6-11 years of age were not in school;**
- **3.5 million children died annually from preventable or curable diseases;**
- **155 million children under five years of age lived in absolute poverty; and**
- **millions, including many in wealthier countries, were maltreated or neglected, sexually exploited, or victims of drug abuse.**

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- *The United Nations Declaration on the Rights of the Child-1959*
  - **Principle 2**
  - States 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop **physically, mentally, morally, spiritually and socially in a healthy and normal manner** and in conditions of freedom and dignity. In the enactment of laws for this purpose, the **best interests of the child shall be the paramount consideration. This was for the 1st time where specific mention was made to BIP in the International Arena. Principle 7 on the right to education also embraced the BIP.**

Significance of the UN-CRC

- **The Identity of the Convention's Subject**
  - Child is considered as possessing rights and enable to participate in affairs affecting her interest(Judicial, administrative or any other). Hence, a child is an independent person from parents. The Convention transforms a child from passive object of law to active subject of law. Articles 1, 12, 42 and 3(1) of the UN-CRC

- **The Scope and Content of the Rights Set Forth in the Convention**
  - The Convention is both an innovator and consolidator of existing norms. It consolidate by bringing together "in one up to date global perspective the rights of the child expressed in 80 texts that deal directly or indirectly with the rights of the child(ILO for minimum Age, working conditions, child labour and exploitation, traffic in children and on slavery; on refugees and stateless persons; on the rules of war; against discrimination in education; on child custody, abduction, support, illegitimacy, and adoption; and on consent to marriage, minimum age for marriage, and registration of marriages.); it puts the whole gamut of HRs(both Civil, political and socio-economic rights- Considering the indivisibility, interdependence and interrelatedness of HRs in the Vienna Declaration and Program of Action 1993**).**

Cont’ed

- It **innovates** by going beyond **existing standards and practices** – the child’s right to live and develop, to name and nationality from birth; in adoption proceedings; if disabled, a refugee, or in trouble with the law; to protection from all forms of exploitation; as a member of a minority or indigenous group; and in relation to the problems of drug abuse and child neglect

Cont’ed

- **The Convention’s Potential Impact on the World’s Economic and Social Life**
  - **i**n terms of the **present and future economic and social health of the world society. From Utilitarian stand point,** it is today's children who will, in the years ahead, make the decisions and perform the services necessary to **lift the level of life for all humankind**. **Karl-Eric Knutsson**: "Protecting the health and education of today's children is the **most basic and wisest of all investments.**
  - **The Right to Education - the World Bank**. "The educated child," in the opinion of this institution, "**would make a greater contribution to the world economy, increasing economic production to the benefit of all.**" More specifically, the bank has estimated that "an increase of one year in the average years of education may lead to a 3% increase in GDP [gross domestic product]. The convention's rights are, thus, linked significantly with **economic and social problems and needs. International Cooperation in the final paragraph of the Convention cum Art. 4**

Cont’ed

- **The Convention's Potential Impact on the Domestic Life of Its Parties: Their Laws, Procedures, Practices, and Institutions**
  - Process of incorporation, the rights set forth in the convention can be cited in the courts of these nations and, in general, find enforcement through their domestic procedures. Art. 9(4) of the FDRE Constitution cum Art. 13(3)for better standards - Obligations of a ratifying country –Core Minimum Obligations – **Pressures** will be created at home to force the government to respect the binding laws of the nation including HRs. NGOs and Civil Society Organizations.
  - Obligation of Parties- Article 42 cum 12(Participatory proceedings)

Instruments Concerning Rights of the Child

- ILO for minimum Age, working conditions, child labour and exploitation.
- Treaties on the elimination of all forms of discrimination against women and against genocide, torture, and all forms of racial discrimination. In addition, the terms of two major United Nations (UN) human rights treaties, the Covenants on Civil/Political Rights and on Economic/Social/Cultural Rights, **apply either directly or indirectly to children. UDHR 1948-** There are provisions in this tailored to children. Motherhood and childhood are to be entitled to **special care and assistance**, and children born out of wedlock are to enjoy the **same social protection Art. 25(2)**

- **Intergovernmental Organizations which helped the Convention's Background**
  - United Nations International Children's Emergency Fund, established in 1946, The League of Nations(adoption in 1924 of the Declaration of the Rights of the Child, drafted by the Save the Children International Union), UN Charter in 1946 and Draft the UN- CRC by the help the **ECOSOC**(**Economic and Social Council**)- UN General Assembly, which, on November 20, 1959, proclaimed the Declaration of the Rights of the Child(consciousness-raising effort)

Legal Definition of A Child: Age Wise

- A “child” as defined in Article 1 of the Convention on the Rights of the Child (CRC), means “***every human being below the age of 18*** *years* ***unless,*** under the **law applicable to the child, majority is attained earlier**”.

- For the purposes of this Charter, a **child** means **every human being** below the **age of 18** years. Art. 2 of the **ACRWC and hence, no emancipation mechanism under ACRWC**
- **Art. 215 RFC- A minor is a person of either sex who has not attained the full age of eighteen years.**
- **Child- group (Scope of applicability and extent of liability)**
- Q. **Emancipation**? 7(2) RFC cum 312 RFC- BIC?

The Substance of the Convention

1. The Non-discrimination Clause- Equality (substantive and Procedural) -Unfounded grounds –sex, color, gender etc

- It is important to note that the principle of nondiscrimination does not require that **all children receive identical treatment in all case**s; rather, the implementation of certain rights will vary from child to child because **of differences in age, maturity, and "evolving capacities,**" as cited in **Articles 5 and 12**. The Convention also recognizes the **need for special treatment for children in certain categories**: the **disabled, for example (Article 23), and those who have been temporarily or permanently deprived of their family environment (Article 20).**

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2. The Relativity of the Convention's Obligations and Rights

- **Obligations and Rights in the Convention are not absolute-**but are subject to certain qualifications. **Art. 2** puts obligations to States to respect and ensure of the Convention. Obligation is qualified by certain **limitation**s on what they can or must do in order to fulfill this undertaking. Articles 3(2) cum 4 ("**to the maximum extent of their available resources vs. Core Minimum Obligations). Article 9,10, 14**

Cont'ed

3. The Best Interest of the Child Article 3(1) cum other Articles

- Although there is no standard definition of "**best interests of the child**," the term generally refers to the **deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.**
- **Best Interest Factors**
  - The **emotional ties and relationships** between the child and his or **her parents, siblings, family and household members, or other caregivers**
  - The **mental and physical health needs of the child**
  - The **mental and physical health of the parents**
  - The **presence of domestic violence in the home**
  - The **capacity of the parents to provide a safe home and adequate food, clothing, and medical care.**

The Role of the BIC

- **A Substantive Right – BIC** is by **itself a right** where it can be **invoked in court of law** for decisions to be assessed and taken as a primary .
- **A Fundamental, Interpretive Legal Principle** – If a legal provisions opens a **lacuna**e as to its interpretation, interpretation should satisfy **BIC**.
- **A Rule of Procedure – Justifications** must be made as to different child related decisions taken including **possible evaluation of the impact of the decision-various criteria**.
- ***the* – BIP** is **the basis of determining factor for specific actions, notably adoption (Article 21) and separation of a child** from parents against their will (Article 9)
- ***a*- BIP** is **a primary (but not the sole) consideration for all other actions affecting children. This is especially true for extreme cases.**

The Right to Life (Art. 6)

- The Consequence of the wars (WW I and II) compels the Convention to focus on the Right to Life. "recognize that every child has **the inherent right to life**." it places parties under an obligation "**to ensure to the maximum extent possible the survival and development of the child**."
- **The Right of the unborn child vs. Abortion . Art. 1 Definition over the beginning of childhood**. **Paragraph 9 of the convention's preamble** calling attention to the fact that "the child . . . needs safeguards and care, including appropriate legal protection, **before as well as after birth**."**Article 24, Paragraph 2(d**), which commits parties to ensuring appropriate prenatal care for mothers indicates about prolife concern.

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- Article 7 states that "the child shall be **registered immediately after birth and shall have the right to a name, (and) to acquire a nationality**," and Article 8 states that "**States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference**.“
- **The Right to Survival and Development**
  - **Physical Survival: The Right to Health Cum Art. 24**
    - The **denial of medicine, clean water, or adequate nutrition** is as clearly a violation of a person's right to life as **is execution by a death squad.**

Cont’ed

- **Qualitative Survival: The Right to Development Art. 23 cum 27**
- **Physical Development Art. 27(3) cum Art. 24(2c) and 26**
  - with regard to nutrition, clothing, and housing." The obligation thus assumed by parties is qualified by the phrase "in accordance with national conditions and within their means. This is because hanger and malnutrition are inimical to physical development of the child.
- **Mental Development (The Right to Education Art. 28 and 29 cum 23)**
- **Spiritual and Moral Development Art. 14 cum 30**

The Right to Protection

- **Article 19 cum 39** ("States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from **all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."**) **Optional Protocol to the CRC the sale of children, child prostitution and child pornography (2000 and entered into force in 2002)**
- **Optional Protocol to the CRC on the involvement of children in armed conflict (2000 and entered into 2002)**
- **Optional Protocol to the CRC on Communication Procedure (2011)**

Economic Exploitation

- **Article 32- State parties** commit themselves to provide a **minimum age or ages for employment**, appropriate regulation of hours and conditions, and appropriate penalties or other sanctions to ensure the effective enforcement of the present article. Birth Registration is important (Art. 7)
- (**Proc. No. 760/2012 Vital Events Registration and National Identity Card Proclamation)**

Sexual Exploitation (Art.34)

- states parties undertake to take "all appropriate measures" to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual activity, and the exploitative use of children in pornographic performances and materials.
- **Traffic In Children (Art. 11 cum 35)**
- **Abandoned Children (Art. 20) cum General Comment No.6**
- **Adopted Children(21) Cum GC**
- **Children Involved in the Juvenile Justice System (Art. 37 cum 40) cum General Comment No.10**
- **Children and Drug (Art.33)**
- **The Child’s Privacy (Art. 16)**

Implementation of the Convention

- **Article 43-45**
- **The Committee on the Rights of the Child**
  - **Structure**
  - **Function of the Committee**
    - Submission and Non-submission of Reports by States Parties
    - Attendance by States Parties at the Examination of Reports
    - Request for Additional Reports or Information
    - Request for Other Reports or Advice
    - Suggestions and General Recommendations on a State Party's Report
    - Other General Recommendations
    - General Comments on the Convention
    - Transmission of States Parties' Reports that Contain a Request or Indicate a Need for Technical Advice or Assistance

African Charter on Rights and Welfare of the Child

- **Protection before the ACRWC**
  - **First Declaration on the Rights and Welfare of the Child** having been adopted by the **Assembly of Heads of State and Government in 1979**.
- a number of **Declarations and Resolutions** adopted by **OAU/AU(**primarily related to d**evelopment, health and children affected by armed conflict) and ILO**
- **Why Regional Protection ? ACRWC(1990)-**
  - **CRC ignored vital socio-cultural and economic realities of the African milieu**
  - **ACRWC** stresses the need to **consider African cultural peculiarities in matters relating to the rights of children(**African historical and cultural values.**)**
  - **ACRWC 'offers a higher level of protection than that offered by the CRC**
  - **African was in a state of** devastating impact and economic consequences of Structural Adjustment programmes (a **complementary mechanism to that of the UN** in order to enhance the enjoyment of the rights of children in Africa)
  - **International Law is subsidiary to regional mechanism which more effective than the international for a(less attractive)**
  - Some substantive provisions are in the CRC are vague

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- In many respects, children are more likely to be victims of human rights violations than adults, and **African children** are **more likely to be victims than children on other continents**. **Causes** of human rights violations in Africa, such as **poverty, HIV/Aids, warfare, famine and harmful cultural practices have a disproportionate impact on the continent's children**.(**Francis Viljoen 2000)**
- **OAU to AU- (1963/2001)**
  - one of the causes for this transformation was among other things, the less focus for human rights including child rights in the OAU.
  - OAU's agendas were already solved(decolonization and self-determination)
  - 1970s Africans were once again hardly affected by economic crisis and the need to focus on economic integration

Legal Frameworks/Treaties on Human Rights in Africa

- **the African Charter Governing Specific Aspects of the Refugee Problem in Africa, 1969, which entered into force in 1974;**
- **the African Charter on Human and Peoples' Rights, 1981, (ACHPR) which entered into force in 1986;**
- **the African Charter on the Rights and Welfare of the Child, 1990, (ACRWC) which entered into force in 1999;**
- **the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, 1998, which entered into force in 2004;**
- **the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003, (AWP) which entered into force in 2005.**

Institutional Frameworks

- **the African Union (AU), the Pan-African organization that succeeded the defunct Organization of African Unity (OAU(1963-decolonization and self- determination for all African peoples- which was intending political independence than HRs)) in 2001;**
- **the African Commission on Human and Peoples' Rights (the African Commission);**
- **the African Court on Human and**

ACRWC(Adopted in 1990 and entered into force 1999)

- Couches **children's rights and welfare issues** in familiar **African language**, allowing for the **virtues of children's cultural heritage, historical background and the values of African civilization to be given priority**.
- Recognizes children in Africa as **direct bearers of rights** and, in turn, children **bear responsibilities to others.**
- **The definition of a child under Art. 2 is more better than the CRC because it secures among others things,** prohibition of **child betrothals**, children participating in **armed conflicts**, **child labour practices and child trafficking**, which are dangerous situations facing children in Africa.

Child Protection in other texts

- The 1979 Declaration on the Rights and Welfare of the African Child (Declaration) developed by Assembly of Heads of State and Government of the OAU
- International Labour Organization's International Programme on the Elimination of Child Labour (ILO-IPEC)
- The then OAU Labour and Social Affairs Commission

ACRWC Rational For Child Protection

- Preamble +Rights and Duties –Part I, African Committee of experts –Part II, Mandate and Procedure- Part III and Miscellaneous –Part IV.
- the child should grow up in **a family environment** in an atmosphere of **happiness, love and understanding** (Preamble of the ACRWC)
- The **critical situation facing most children in Africa** due to unique factors of their **socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger**, and that on account of children's **physical and mental immaturity**, they need **special safeguards and care**.

Substantive Elements of ACRWC

- Definition- Art. 2 a child is every human being under 18 years. **Bottleneck –Registration problem?**
- **Nature of State Obligation-** Core Minimum obligations(incorporation into domestic laws) and necessary steps
- **Core/general Principles-** underpin, inform and guide all the other provisions in the interpretation and enforcement.
  - **Non-discrimination(Art. 3 cum 26)- Within their jurisdiction (Art. 2(1) of the ACRWC)**
  - **Best Interest of the Child (Art. 4)-Comprehensive approach than the CRC by encompassing *the* than *a***
  - **life, survival and development (article 5)(Including the right to life and abolishment of death penalty)- Capital punishment? Art. 5(3) of the ACRWC (Art. 117 FDRE Criminal Code cum Art. 6(5) of the ICCPR) and life imprisonment also violates Art. 17(3) of the ACRWC**
  - **respect for the views of the child (article 7)- Participation (Children are engaged actors than passive beneficiaries – children must be allowed to voice their respective views)**

ACRWC vs.CRC

- **Nationalit**y (art. 7(2) CRC. Vs. Art. 6(4) of the ACRWC- the right to acquire nationality is **worthless** if there is no **recognizable state** to which to make an application whereas ACRWC explicitly providing for citizenship from the **territory or residence** in which the child is born.
- **Educatio**n (Article 11(3)(e) cum Article 11(6) of the ACRWC)- Very comprehensive
- **Disabled children(**Article 13(1) cum 13(3) of the ACRWC (Mental or physical disability**)**
- **Health and Health Services (**Article 14(2)(g) of the ACRWC**)**
- **Child Labour** (Article 15)
- **Parental responsibilities(Article 20(2a))**
- **Harmful social and cultural practices(Article 21***)*
- **Children in armed conflict(Art*. 22(2) ACRWC vs. Art. 38 CRC)***
- **Children's duties(Article 31)**
- ***Child victims(Art. 39 CRC must be fetched) where the ACRWC failed to have – Rehabilitation Centers***

Treaty's monitoring and enforcement mechanism(ACERWC)

- **The African Committee of Experts on the Rights and Welfare of the Child (ACERWC)-** (article 42 supplemented by Rules 65, 70, 72 and 73, 75, 76 and 77)
  - receive state reports, **individual communications**, as well as conduct **ad hoc missions and onsite visits to states considered to be violating their treaty obligations.**
  - has **standing before** the newly established African Court on Human and Peoples' Rights. These shows better mechanism of

Cont'ed

- **Indigenous Peoples Rights(ILO Convention No.169, 1989)**
  - Consultation rights against measures of government – **a procedural rights**
  - **Exogenous and indigenous**
- Declaration on the rights of Indigenous peoples in 2007(Categories of **Rights protected for indigenous peoples**)- are **collective rights**
  - **Property rights-** Land and natural resources
  - **Cultural rights** –Heritage preservation and development
  - **Political rights** –self-government and self-determination including succession
- **Corporations and investments exploitations vs. Indigenous Peoples Rights**
- **Rights of Indigenous Peoples is monitored by charter based special rapporteur**
- **Minority Rights (Article 27 of the ICCPR vs. Article 1 of the ICCPR and ICESCR)**
- It is not about numbers but **disempowerment** (due **to ethnic, religion, or linguistic**)- neglecting a certain member of the group from participation and enjoyment of fundamental rights and freedoms- **discrimination on these bases- Minority rights are rights of individual members of a certain ethnic, religious or linguistic groups.**
- Decision making and participation and questions of empowerment
- **General Comment Number 23**
- **Declaration on the Rights of Persons belonging to national, ethnic and linguistic minority in 1992**

Cont’ed

❖ **Persons with Disabilities**

- Types of disability includes mental, intellectual, sensory and physical disability which are long term in nature.
- Is regulated by UN Convention on the Rights of Persons with Disability which entered into force in 2008
- Optional Protocol on UN Convention on the Rights of Persons with Disability gives competence to the Committee to receive individual complaints
- The Committee on the Convention on the Rights of Persons with Disability monitors the implementation of the Convention by way of receiving state reports, individual complaints, inquiry, non-binding recommendation and general comments for interpretation guidelines

Human Rights, Culture and Globalization

- ***We all do no end of feeling, and we mistake it for thinking . Mark Twam***
- ***Claims can be categorized into:***
  - **Subjective**- a claim or judgment is subjective if **its truth depends on whether or not it conforms to the tastes, attitudes, and beliefs of the claimer (the person making the claim**)
  - ***Inter -subjective –***A claim or judgment is inter-subjective if its truth depends on whether or not it confirms to the **beliefs, attitudes, and conventions of the group to which the claim belong**s. Example, it is rude to belch at the dinner table which is a matter of custom.
  - ***Objective –*** A claim or judgment is objective if its truth **does NOT** depend on whether it conforms to the **beliefs or attitudes of any group of individual.** Example, the earth is spherical which is a matter of fact.
- **Categories of Ethics**
  - Ethical Relativism- is the view that al moral claims are inter-subjective.
  - Conventional Ethical Relativism- is the view that a more specific type of ethical relativism, holds that the moral conventions of a culture determine what is **right and wrong for the members of that culture to do. On this view seemingly conflicting moral judgments can be equally correct when made from within different cultural contexts . For instance, consider the claim it is wrong to eat beef, which is true from within Orthodox Hinduism but false from within certain other cultures. This type of relativism claims moral reformers are simply misguided and that moral progress is impossible. It also claim there is little, if any, point to moral argument moral deliberation.**
- **The Term Cultural Relativism is borrowed from anthropology and moral philosophy. Culture as a manifestation of identity and the universal standards of HRs(Cultural Rights).**

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- **Cultural Relativism – a position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of rights enjoyed by individuals in a given society. A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable. Hence, substantive HRs standards vary among different cultures and necessarily reflect national idiosyncrasies. And difference exists in the meaning making or construction of HRs Standards.**
- **Cultural Relativism** is the claim that different cultures have **different moral codes**. It says there are **no independent standards by which to judge correct or incorrect actions**. All standards are **culture bounded.**
- **Claims of Cultural Relativism**
  - **Absence of objective truth in morality – Rights and Wrongs are only matter of opinion, and opinions vary from culture to culture. Hence, there** is **no objective standards** that can be used to judge one **societal code better than another**.
  - **Different cultures have different moral codes, and the moral code of a society determines what is right within that society. So the moral code of our own society has no special status.**
  - **It is mere arrogance for us to try to judge the conduct of other peoples. We should, therefore, adopt an attitude of tolerance toward practice of other cultures.**
- **Does it follow that just because people disagree that there is no objective truth? Relativism of this type, sometimes leads to truths that are later disproved.**
  - **Example the world is flat like a pizza – the world is round, like a ball**
-

Cont’ed

- **Can we take cultural relativism seriously? If we did, we could no longer say that the customs of other societies are morally inferior to our own that means any customs!**
- **Is there anything good about cultural relativism? Ye we become more tolerant of other people and realize that we may be blinded by our own cultural prejudices.**
- **Are there any values that all cultures might have in common? There are few universal moral principles. For instance**
  - **Care for young**
  - **Truth telling**
  - **The Prohibition against murder**
  - **Can you think about others?**

Cont'ed

- **If we would to try to develop a culture- neutral standard of rightness, what might be it like?**
- **Objective valid moral principles are those that promote and protect the interests of all relevant beings. On this view, whether a cultural practice is morally good or bad depends on whether it promotes or hinders the welfare of those who are affected by it.**
- **Ethical subjectivism- is the idea that our moral opinions are based on our feelings, and nothing more. There is no right or wrong , only expressions of our feelings. Therefore, we can't judge another's opinion as being wrong or right since it is merely an opinion and nothing else. Thus, there are not such things as moral facts only our attitude about morality.**
- **The problem is that subjectivism assumes only two possibilities:**
  - **There are moral facts in same way that there are fact about stars and planets;**
  - **Our values are nothing more than the expression of our subjective feelings.**

Cont'ed

- **There is a third crucial possibility which the argument overlooks – Moral truths are in fact truths of reason. That is a moral judgment is true if it is backed by better reasons than the alternatives..**
- **Think of accepting Ethical Subjectivism as an excuse… We did not usually allow people to do things simply because they feel they are right. But rather reason should be attached.**
- **What we have done instead is to develop theories of rightness and obligation based on the notion of reason:**
  - **Ethical egoism – each person ought to do whatever will best promote his or her own interests.**
  - **Utilitarianism- we ought to do whatever will promote the greatest happiness for the greatest number of people.**
  - **Kant's moral theory –our duty is to follow rules that we could consistently will to be universal laws- that is, rules that we would be willing to have followed by all people in all circumstance .**
  - **Virtue Ethics-we ought to strive to develop a good character.**
- **A theory is a model, based on and representing reality if it works as a model, it can be used to guide and/` or predict reality.**

❖ **Theories of Ethics**

- Consequential theories
- Non-consequential theories
- Social Contract theory
- Virtue/Character ethics

Culture, HRs and Globalization

- **Universalism vs. Universality of HRs (Cultural Rights vs. Standards of HRs in UN Charter, UDHR and Vienna Declaration and Program of Action 1993**)
- **Culture, HRs and Globalization for Development, Investment and Trade-Cultural Transformation? And Cross-cultural dialogue vs.effect**
- Globalization, comprehensive term for the emergence of a global society in which **economic, political, environmental, and cultural events in one part** of the world quickly come to have significance for people in other parts of the world. Globalization is the result of advances in **communication, transportation, and information technologies**. It describes the growing **economic, political, technological, and cultural linkages that connect individuals, communities, businesses, and governments around the world**. Globalization also involves the growth of ***multinational corporations*** **(businesses that have operations or investments in many countries) and *transnational corporations* (businesses that see themselves functioning in a global marketplace).** The most dramatic evidence of globalization is the **increase in trade and the movement of *capital* (stocks, bonds, currencies, and other investments)**.

Doctrines Associated with Relativism

- **Elitist Theory** –(necessarily emanates from cultural relativism) asserts that one can appropriately honor HRs in certain societies usually the most sophisticated ones but not in others, on account, for example, of **the latter's insufficient economic development. HRs are good for those West but not for much of the Non-West world.**
  - **Two Versions of Elitism**
    - **The Right wing – associate HRs with Colonialism that backward people can't govern themselves and that democracy only works for superior cultures.**
    - **The Left –Wing Version liberals for Western Countries but support leftist dictatorships abroad – we should be tolerant of and respect the cultural identity and political self-determination of the Third Word Countries .**
  - **Dilemma of This theory- is immoral and replete with racist overtones- West phobia**
    - **They are anxious to articulate an international HRs Standard**
    - **They wish to respect the autonomy of individual cultures.**

Cont’ed

- **Conspiracy Theory-** asserts that the law of HRs results from a conspiracy of the **West to perpetuate imperialism**. HRs Standards are used as an instrument of domination to the Third World Countries by the West. HRs Standards are Machiavellian creation of the West calculated to impair the economic development of the Third World Countries. HRs Standards are used as moral imperialism used to foster free and unrestricted trade which could possibly exploit the Third World.

Responses to Gross Violations of HRs

- **Gross and systematic violations of HRs where the normal procedure become not enough to these violations to prosecute. State obligation includes the duty to respect, protect and fulfill (all appropriate measures) on the basis of exhaustion of local remedies.**
  - **State policy(state sponsored) and Impunity**
- **International Responses**
  - Ad hoc Tribunals
    - Nuremberg Trial (on the basis of London Agreement and Law No. 10 Allied Controlled Council)
    - ICTY (on the basis of ICTY Statute)
    - ICTR(on the basis of ICTR Statute)
  - Permanent Tribunal – ICC Rome Statute

Main difference between Ad hoc Tribunals and Permanent (ICC)

- Almost all Ad hoc tribunals were set up by UNSC using its mandate under chapter VII whereas ICC is an independent court outside the UN
- Almost all Ad hoc tribunals had primary jurisdiction unlike the ICC which has complementary jurisdiction to domestic
- Almost all ad hoc tribunals were created exposto facto to address particularly case whereas the ICC prosecutes ***ratione temporis***
- *Almost all ad hoc tribunals had limited jurisdiction whereas ICC have subject matter jurisdiction(genocide, crimes against humanity, war crimes and crime of aggression)*

Importance of Transitional Justice

- ❖ **Regional Responses**
- ❖ **National Responses**
- ❖ **Modalities of Responses towards Gross HRs Violations**
  - **Prosecution**
  - **Truth and Reconciliation**
  - **Amnesty**
- **The need for justice – between victims and perpetrators**
- **The need to know the truth-society at large, victims or parents wants to know who were the participators**
- **The need for conciliation**

ICC Jurisdiction

- **Complementarirt**y (unable(failure of state machineries) or unwilling test)
- State Referral /self-referral
- UN Security Council Referral
- Automatic Referral /Consensual –auto-referral
- *Proprio motu*(ICC prosecutor self-initiative)

Gross Human Rights Violations

1. Genocide (Convention against Genocide 1948)

- Article 2 of Convention against Convention cum Art. 6 of the Rome Statute Definition of Genocide = is a**ny of the following acts** committed **with intent/motive to destroy, in whole in part, a national, ethnical, racial or religious groups such as**: there is a special intent in genocide
- **Killing members of the group**
- **Causing serious bodily or mental harm**
- **Deliberately inflicting conditions of life calculated to bring about its physical**

Cont’ed

- **As such in the definition** connotes the emphasis that genocide is a crime directed against a group, collective or community rather than an individual.
- **Ethnic cleansing** is rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area. **ICJ in Bosnia vs. Serbia (2007). However, in certain context, genocide may overlap with ethnic cleansing for example where perpetrators kill members of a protected group to create terror and induce the survivors to flee. Expulsion may not bring destruction/annihilation to the group.**
- **Liabilities Article 4 persons committing genocide … shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.**

Cont’ed

- **Crimes Against Humanity- Article 7 of the Rome Statute defines** "crime against humanity" means any of the following acts when committed **as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.**
- **War Crimes Article 8 of the Rome Statute –(Humanitarian Law)**Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention and Hague Laws and Common Article 3: Committed as part of a **plan or policy or as part of a large-scale commission of such crimes in state of active hostility**.
- **Crimes of Aggression Article 8bis of the Rome Statute-**crime of aggression” means the **planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations**.

National System of Protection

- **FDRE Constitution and Status of Human Rights**
- **Dualist vs. Monist Divided**

- **The monist doctrine** does not recognize the distinction between the domestic and the international and does not allow room for contradiction between the two sets of rules. Because domestic law and international law are part of the same system of norms. In case conflicts happens in the application and interpretation international law will be prioritized. **Switzerland**
- **The dualist doctrine** represents a contrasting approach and starts from the assumption that the national and international legal system regulate entirely different and parallel subject matters and have no room for conflict. It argues that international law regulates a horizontal state to state affairs and domestic law regulates a vertical affair of government and its inhabitants. **It is a sibling of strict sovereignty. Under such approach the constitution of the state accords no special status to treaties; the rights and obligations created by them have no effect in domestic law unless legislation is in force to give effect to them by way of incorporation into domestic law**. **UK has purist form of dualism.**
- **With dualism the provisions of a treaty which have been incorporated into domestic law have the status only of domestic law, and can be amended or repealed by later legislation. And no remedy domestically for such violations of treaties. USA embraces both dualism and monism in treaty making.**

Relative Merit and Demerit

- Dualism promotes certainty and precision. However, dualism is more complicated as compared to monism in the practical world and defeating the very aims of treaties at the international level.
- Proclamation No.114/1998- Accession to the African Charter on Human and Peoples Rights Proclamation. But we can’t find the full version of the charter

Self-executing and Non-self-executing

- **Self-executing and non-self-executing treaties** – where the former refers to a treaty that becomes judicially enforceable upon ratification whereas the later refers to a treaty which becomes judicially enforceable through the implementation of legislations. It is depends on the text of the treaty.
- Power to legislate (parliament or Council of Ministers/ Executives)
- Who is empowered to participate in treaty making in Ethiopia?
- Delegated power? Art. 77(12)?
- Art. 51(8)- FDRE Constitution- the **federal government** shall formulate and implement **foreign policy**; it shall **negotiate and ratify international agreement**s. **Art. 55(12) the HPR shall ratify international agreements concluded by the Executive**. Art. 72(2) cum Art. 76(3) Responsibility to the HPR.

Vienna Convention on the Laws of Treaties 1969

- **(VCLTs) Part III(Art. 26, Art. 27 and Art. 31)**
  - Art. 27(1)-A State party to a treaty **may not invoke** the **provisions of its internal law** as justification for its failure to perform the treaty.
  - Art. 31(1) -Duty of good faith –duty to ensure normative compatibility-interpreting with the **ordinary meaning** in their **context** and in the light of its **object and purpose**
  - Art. 31(2)- **context** includes the **text, preamble and annexes**
  - **Art. 26 Pacta sunt servanda -**Every treaty in force is **binding upon the parties** to it and must be performed by them in **good faith**.

Organization of human & dem. rights under the FDRE Constitution 1995

- The Transition Period Charter of Ethiopia, adopted on the 22nd of July 1991 following a conference held from 1-5 July 1991 established the Transitional Government, and proclaimed the dismantlement of all 'Institutions of repression installed by the previous regimes'.

- Transitional Government was composed of Council of Representatives (from liberation mov'ts, prominent indivds. and pol. Parties) and Council of Ministers.

- Part I of the Charter briefly addressed certain democratic rights: namely freedom of conscience, expression, association, assembly, right to engage in unrestricted political activity, and to organize political parties, and the right to self-determination.

- The Council of Rep. Was also empowered to constitute the Constitutional Commission which shall draw the future Constitution and submit same to the people for deliberation.
- The Constituent Assembly was established in June1994, and the FDRE Constitution adopted by the Transitional Government in Dec. 1994.

Status of human rights provisions

1. ***Extensive coverage***: the fact that the Ethiopian Constitution has extensively dealt with various themes of democratic and human rights under Art. 14-44 implies the degree of eminence accorded to issues of promoting and protecting human rights within the broader framework of the Constitution's setup.
2. ***Reconfirming inviolability and inalienability of human and democratic rights***: this is also evident from the very organization of Article 10 under 'Fundamental Principles of the Constitution (along with sovereignty of the people, constitutional supremacy, and separation of state and religion) where it was explicitly indicated that
    1. Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable; and that
    2. Human and democratic rights of citizens and peoples shall be respected.

• Note the slight differences in emphasis: 'inviolable and inalienable' Vs. 'respected'.

• This implies that human rights entail both rights and obligations; states assume obligations and duties under international law *to respect, protect and fulfil human rights*.

4. ***Amendment procedures****: (Art. 105)* stipulated that ALL Chapter Three rights and freedoms would be subjected to a different and stringer amendment procedures than is applied with regard to other articles of the Constitution.

5. ***Possible Horizontal application of human rights provisions****:* Article 10.1 under Chapter Three obligates all federal and state legislative executive and judicial organs at all levels with responsibility to and duty to respect and enforce provisions of the Chapter.

- Most Constitutions generally regulate vertical relationship (between state, its various institutions and the individual)
- Some have however regulated certain aspects of horizontal relationship in the application of human rights.
- While the Constitution calls for application and enforcement of Chapter III provisions by all state agencies in human rights matters, and hence that horizontal application was not spelled out explicitly, the fact that the Supremacy Clause under Art. 9(2) has required 'all citizens, state organs, political organizations, other associations as well as their officials' to ensure observance of the

Indeed, this involves hefty responsibility laid on the government

- to Respect - *refraining* from interfering with or curtailing the enjoyment of human rights,
- Protect *requiring it* to shield individuals and groups against human rights abuses. and
- Fulfil, meaning that states must *take positive action* to facilitate the enjoyment of basic human rights.

That shows the level of political commitment displayed on the part of the state in drawing a constitution that extends such a status to Human Rights values.

3. ***Scope of application****:* fundamental rights and freedoms shall be interpreted in a manner conforming to the principles of UDHR, International Covenants, and instruments adopted by the country. **Indivisibility of Human Rights**.

Issues remain regarding the possibility of ‘direct application’ of human rights in the national legal system, but point remains that each of those rights would need to be interpreted and applied by reference to developments in international normative standards, which obviously heightens their status in a national legal system.

Regional Constitution and Laws

- **Constitutional Supremacy Clause**
  - **Deviance**
    - **Positive** (widens the enjoyment of rights and fundamental freedoms)-sometimes called foster doctrine
    - **Negative** (reduce or diminish enjoyment of fundamental rights and freedoms)
- **Federal Laws Supremacy Clause?** What will be the scenario if regional laws contradict the federal laws in Ethiopia?