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Knitting Human Rights Values and the Rule of Law in Creating a Human Rights State

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ABSTRACT

A human rights state adheres to human rights values, guided by the principles of the rule of law. There is no rule of law in a society where human rights are not valued. For a legal entity to be recognised as a human rights state, its ideals of human rights as a component of the rule of law must be viewed not only from an intellectual squint of ecumenical values but must also demonstrate how they relate to other key elements of states in ways that depict the principles and values of statehood. Therefore, this research establishes the relations between the values of human rights and the rule of law in building a human rights state. Establishing a relationship between these two sets of ideals, from human rights and constitutional perspectives, will help in amalgamating divergent views that uphold human rights as a practice. The doctrinal research method is employed in this study through the use of scholarly articles, books, and other relevant materials. So, while human rights standards are developed to provide adequate protection, their implementation requires certain structures of the rule of law. Without this, it is unlikely that human rights can be realised. The rule of law, administration of justice and democratic structures are key components in creating a human rights state. The positive development of human rights depends on the creation of certain state institutions and laws, and the implementation of state policies is ensured by an effective legal framework. Internationally recognised human rights also impose restraints on states and retrain them from taking any measures. These result in the violation of a given right through either their organs or agents. Therefore, there should be an increased role for non-legal measures and other non-state actors in the domestic implementation of human rights.

Introduction

There is no rule of law in a society where human rights are not valued and the antithesis is also true. Without human rights in society, the rule of law is reduced to rule by law.[1] This forms the thesis of this article. The term 'rule of law' is a contested one because it means different things to different people.[2] It includes preserving order,

[1] Margaret Jane Radin, "Reconsidering the Rule of Law," in *The Rule of Law and the Separation of Powers* (London: Routledge, 2017), 37–76, https://doi.org/10.4324/9781315085302-2
[2] Antje Wiener et al., "Global Constitutionalism: Human Rights, Democracy and the Rule of Law," *Global Constitutionalism* 1, no. 1 (March 16, 2012): 1–15, https://doi.org/10.1017/S2045381711000098

ensuring security, or facilitating the administration of courts.[3] It is also a principle of governance that states that citizens, institutions, and the state are answerable to laws that are independently decided, uniformly implemented, publicly proclaimed, and consistent with international standards and norms.[4] It creates a legal framework for protecting and promoting human rights. This is how the rule of law and human rights are intertwined. Since the Universal Declaration of Human Rights (UDHR) was ratified in 1948, the United Nations (UN) has made concerted efforts to elucidate the nexus between the rule of law and human rights. Human rights are enshrined in the 1945 UN Charter, but the rule of law was not established until three years later, in the UDHR, which first referred to it. Several resolutions passed by the United Nations General Assembly (UNGA) have established a close relationship between these two key values that are essential for forming a human rights state.[5] Also, in a pluralistic democracy, the rule of law and human rights are values on which the Council of Europe, the European Convention on Human Rights, and the European Court of Human Rights are founded. It is important to remember that human rights also have a legal component. Human rights are directly influenced by laws, and laws, in turn, shape legal concepts, norms, and principles. As a result, any political system that seeks to disseminate information and educate people on human rights must always consider the legal aspects of it. A human rights state adheres to human rights values, guided by the principles of the rule of law. They have played a crucial role in the growth and consolidation of these ideals.[6] In other jurisdictions worldwide, discussions about the linkage between human rights and the rule of law are of utmost concern.[7]

Philosophically, the rule of law can be traced back to the ideology conceived by Aristotle and has been spearheaded by Roman jurists, medieval natural law thinkers, Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu, the American founders, German philosophers like Kant, Hegel, and the nineteenth-century advocates of the Rechtsstaat. Until recently, however, the human rights movement paid little attention to the relationship between the rule of law and human rights.[8] The rule of law may also be indirectly related to fostering the protection of rights, democracy, and political stability, which are key determinants of rights performance.[9] Although the concept of the rule of law is mentioned in major political texts and international treaties, it has not been defined in any of these texts. The European Commission for Democracy

[3] Steven T. Walther, "The Globalization of the Rule of Law and Human Rights," *Futures* 31, no. 9–10 (November 1999): 993–1003, https://doi.org/10.1016/S0016-3287(99)00058-0

[4] Oksana Shcherbanyuk and Laura Bzova, "Rule of Law and Human Rights: Analysis of International Standards and Case Law," *Perspectives of Law and Public Administration* 13, no. 1 (March 25, 2024): 25–32, https://doi.org/10.62768/PLPA/2024/13/1/03

[5] Per Sevastik, "Rule of Law and Human Rights: At the National and International Levels," *Max Planck Yearbook of United Nations Law Online* 26, no. 1 (December 13, 2023): 631–83, https://doi.org/10.1163/18757413_02601025

[6] Peter Leuprecht, "La Convention Européenne Des Droits de l'homme Face à La Contestation de Ses Valeurs Fondamentales," *Revue Québécoise de Droit International*, June 17, 2021, 69–77, https://doi.org/10.7202/1078529ar

[7] Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law," *Human Rights Law Review* 18, no. 3 (September 1, 2018): 473–94, https://doi.org/10.1093/hrlr/ngy015

[8] Jana von Stein, "Making Promises, Keeping Promises: Democracy, Ratification and Compliance in International Human Rights Law," *British Journal of Political Science* 46, no. 3 (July 24, 2016): 655–79, https://doi.org/10.1017/S0007123414000489

[9] Nicola Lacey, "Populism and the Rule of Law," *Annual Review of Law and Social Science* 15, no. 1 (October 13, 2019): 79–96, https://doi.org/10.1146/annurev-lawsocsci-101518-042919

through Law, the so-called Venice Commission, explained in a research report that the British concept of ''Rule of Law'', the German 'Rechtsstaat', and the French' État de droit' have different origins. However, it concluded that the underlying standards are the same. These entail legality, legal certainty, prohibition of arbitrariness, access to justice, non-discrimination, equality before the law, and respect for human rights values.[10]

For Dicey, there were two interrelated features of English political institutions since the Norman Conquest. One was the undisputed supremacy of the central government, and the other was the rule of law. The latter ensured the security of individual rights. Dicey's concept of the rule of law has the following three aspects:[11]

1) The absence of arbitrary or wide discretionary governmental power and the presence of regular law, with the important corollary that no individual can be punished except for a distinct breach of law established in the ordinary legal manner by courts;
2) That no individual is above the law and that everyone, whatever the rank or condition, is subject to the ordinary law and jurisdiction of ordinary tribunals; and
3) General constitutional principles, including individual rights resulting from judicial decisions determining rights of private persons in particular cases brought before the courts. It is this third concept of the rule of law that links it with human rights.

Human rights declarations, while embodied in positive laws, are widely thought to pre-exist, or exist apart from the documents that recognise them and would thus survive even if the documents were altered or abolished. Natural law principles and religious principles are similarly thought to exist independently of any human law-making agency (although religious authorities do have a say in the latter). Owing to this quality, they establish limits on state law that no government or lawmaker can alter.[12] The adoption of a human rights-based approach to development broadens the concept of governance, making it necessary to add the qualifier "the rule of law" for it to be meaningful. As a consequence, the older and more restricted conception of governance as efficiency in economic management has evolved into a broader understanding of how leaders exercise power and authority effectively and inclusively to advance the cause of human rights.[13] Therefore, the widespread use of human rights instruments and their infiltration into national legal systems through ratification and domestication is not only a global consensus but an affirmation that human rights are a key and relevant pillar of the rule of law, and the two cannot be separated in the project of creating a human rights state.

To create human rights states, checks and balances are non-negotiable. When a state is not subject to checks and balances, human rights abuses become inevitable.[14] Not all authoritarian states are human rights states because authoritarianism consumes the

[10] Jolien Schukking, "Protection of Human Rights and the Rule of Law in Europe," *Netherlands Quarterly of Human Rights* 36, no. 2 (June 17, 2018): 152–58, https://doi.org/10.1177/0924051918767967
[11] Jonathan Rose, "The Rule of Law in the Western World: An Overview," *Journal of Social Philosophy* 35, no. 4 (December 11, 2004): 457–70, https://doi.org/10.1111/j.1467-9833.2004.00245.x
[12] James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," in *Bills of Rights* (London: Routledge, 2017), 293–320, https://doi.org/10.4324/9781315096339-12
[13] Francisco Sagasti, "A Human Rights Approach to Democratic Governance and Development" (New York: UN Library, December 31, 2013), https://doi.org/10.18356/41f39273-en
[14] Neil A. Englehart, "State Capacity, State Failure, and Human Rights," *Journal of Peace Research* 46, no. 2 (March 1, 2009): 163–80, https://doi.org/10.1177/0022343308100713

essential traits of liberty, and the people are left with the choice of succumbing to the decisions of their rulers. For example, in the Democratic People's Republic of Korea (North Korea), under totalitarian leadership, the human rights of the people are restricted, and it is far from being recognised as a human rights state.[15] The practice of governance in a country like this depicts the gap between human rights and the rule of law. Also, in many African states, there is no shortage of abuse of human rights despite the talk of human rights and democratisation on the continent.[16] Bridging the gap between the rule of law and human rights ought to be the primary focus of many states, as these two are inextricably linked.

There is a substantial body of literature on the subjects of the rule of law, human rights, and statehood, which are often dealt with separately. However, this research is specifically concerned with establishing a nexus between these three elements – the rule of law, human rights and statehood – and how they can operate in the same place to produce a state as a legal entity that upholds human right values. Therefore, further research is needed on creating 'cohesive forces' that recognise social factors outside of law to create a balanced system of statehood premised on respect and protection of human rights and the rule of law. This will minimise the gap between idealism and realism in the context of creating a human rights state.

Methods

The purpose of this study is to establish a connection between human rights and the rule of law in the creation of a state. To execute this study, doctrinal legal research is conducted using secondary data, including scholarly journals, international conventions and treaties, and other relevant materials.[17] This method is chosen to conceptualise and theorise human rights, which can transcend from idealism to realism. International legal frameworks on human rights are carefully examined to reflect what modern states ought to be and how they can make progressive realisation of these values.[18] This is achieved through the application of doctrinal legal research to analyse and assess the existing international human rights frameworks relevant to statehood.[19]

Discussion

In this era of globalisation, when movements of people become more frequent than before, conflicting issues of human rights emerge in various parts of the world, thereby

[15] Hyun-Joo Lim, "Human Rights Activism Among North Korean Refugees in the UK: Hope for a Democratic Future?," *Journal of Human Rights and Social Work* 6, no. 4 (December 13, 2021): 277–86, https://doi.org/10.1007/s41134-021-00183-z

[16] Maria A. Sanchez, "The African Court on Human and Peoples' Rights: Forging a Jurisdictional Frontier in Post-Colonial Human Rights," *International Journal of Law in Context* 19, no. 3 (September 27, 2023): 352–66, https://doi.org/10.1017/S1744552323000046

[17] Pradeep M.D., "Legal Research- Descriptive Analysis on Doctrinal Methodology," *International Journal of Management, Technology, and Social Sciences* 4, no. 2 (2019): 95–103, https://doi.org/10.47992/ijmts.2581.6012.0075

[18] Siobhán McInerney-Lankford, "Legal Methodologies and Human Rights Legal Research: Challenges and Opportunities," in *Research Methods in Human Rights* (Cheltenham: Edward Elgar Publishing, 2024), 14–35, https://doi.org/10.4337/9781803922614.00011

[19] Fons Coomans, Fred Grünfeld, and Menno T. Kamminga, "Methods of Human Rights Research: A Primer," *Human Rights Quarterly* 32, no. 1 (February 2010): 179–86, https://doi.org/10.1353/hrq.0.0127

probing human rights not only as an ideology but also as a practice.[20] It is fitting to note that human rights issues are among the most frequently violated. While it is legitimate to draw on philosophical arguments to claim any global social issue as a human right,[21] it is also worth identifying which rights are officially recognised.[22] The most reliable source of the core content of international human rights is found in the International Bill of Human Rights, which comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

The contentious legal issue in this research is to knit human rights values with the rule of law. Therefore, this research considers the following principles of application:

1) progressive realisation of ESCR (states must take meaningful measures towards full realisation of these rights);
2) immediate implementation of CPR (states have duties to protect and respect these rights);
3) non-discrimination applied to all rights;
4) an effective remedy for violation of CPR; and
5) equality of rights between men and women.

The International Bill of Rights also specifies that human rights may be subject to limitations and derogations and that the rights in the Covenants may not be used as a pretext for lowering an existing standard if there is a higher one under national law.

Progressive Realisation of Civil and Political Rights in the Dispensation of the Rule of Law

According to the French Revolution, freedom is the foundation of the first generation of rights, which includes civil and political rights.[23] The state must implement suitable legislative, administrative, and other measures to fully realise human rights to perform its commitment to uphold these rights.[24] This implies that a strategy that aims to improve human rights must focus on their realisation.[25] In addition to avoiding human rights violations, existing policies must also consider them as a transversal issue – a criterion known as mainstreaming. Furthermore, to move closer to implementing them,

[20] Lijue Song and Changshan Ma, "Identifying the Fourth Generation of Human Rights in Digital Era," *International Journal of Legal Discourse* 7, no. 1 (April 26, 2022): 83–111, https://doi.org/10.1515/ijld-2022-2065

[21] Blayne Haggart and Clara Iglesias Keller, "Democratic Legitimacy in Global Platform Governance," *Telecommunications Policy* 45, no. 6 (July 2021): 102152, https://doi.org/10.1016/j.telpol.2021.102152

[22] Bennett Holman and Torsten Wilholt, "The New Demarcation Problem," *Studies in History and Philosophy of Science* 91 (February 2022): 211–20, https://doi.org/10.1016/j.shpsa.2021.11.011

[23] Suzana Košir and Radhika Lakshminarayanan, "Inclusion of 'Generations of Human Rights' in Social Science Textbooks," *International Journal of Educational Development* 80 (January 2021): 102295, https://doi.org/10.1016/j.ijedudev.2020.102295

[24] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights (3rd Edition) : Cases, Materials, and Commentary*, ed. Sarah Joseph and Melissa Capstan (Oxford: Oxford University Press, 2013), https://doi.org/10.1093/law/9780199641949.001.0001

[25] Muwaffiq Jufri, "Regulation Model of Religious Rights and Freedoms for Local Religious Believers in the Majapahit Constitution," *Jurnal HAM* 13, no. 3 (December 22, 2022): 539, https://doi.org/10.30641/ham.2022.13.539-556

policies must be clearly established. Effective policymaking is essential for upholding human rights.[26]

Table 1. International Covenant on Civil and Political Rights

ICCPR	Articles
Right to Self-determination	Article 1
Right to life	Article 6
Right to freedom from torture and the right to humane treatment	Articles 7 and 10
Miscellaneous rights	Articles 8, 11 and 16
Freedom from arbitrary detention	Article 9
Minority rights	Article 27
Freedom of movement	Article 12
Right to a fair trial	Article 14
Right to privacy	Article 17
Freedom of thought, conscience, and religion	Article 18
Freedom of expression	Articles 19 and 20
Freedom of assembly and association	Articles 21 and 22
Protection of the family	Article 23
Protection of children	Article 24
Rights of political participation	Article 25
Right to non-discrimination	Articles 2(1), 3 and 26

***Source**: Compiled by the author based on the contents of the ICCPR*

The International Covenant on Civil and Political Rights was adopted by the United Nations in 1966 and came into force after ratification in 1976. This treaty is the most important human rights instrument in the world, as it has universal coverage (unlike, for example, the European Convention on Human Rights, 1951).[27] It also contains a large number of rights (unlike single-issue treaties such as the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1989), and it purports to apply to all classes of persons (unlike the Convention on the Rights of the Child 1989).[28] Furthermore, a large body of jurisprudence has emerged under ICCPR, unlike its sister treaty, the International Covenant on Economic, Social and Cultural Rights (which will be discussed in the next section). ICCPR has also been domesticated and incorporated into the domestic laws of many state parties. However, it faces challenges in terms of its effectiveness. Backlogs of state reports, limited resources, and varying levels of state compliance hinder the committee's ability to effectively monitor and address violations of civil and political rights.[29] Additionally, recommendations from human rights

[26] Olivier De Schutter, "The Progressive Realization of Human Rights and the Obligation to Fulfil," in *International Human Rights Law* (Cambridge: Cambridge University Press, 2010), 461–512, https://doi.org/10.1017/CBO9780511779312.006

[27] Pádraig McAuliffe, "Theories of State Development at the Dawn of the International Covenant on Economic, Social and Cultural Rights," *Journal of the History of International Law / Revue d'histoire Du Droit International* 27, no. 2 (April 7, 2025): 237–77, https://doi.org/10.1163/15718050-bja10116

[28] Angelique Gatsinzi and Gavin Hilson, "'Age Is Just a Number': Articulating the Cultural Dimension of Child Labour in Africa's Small-Scale Mining Sector," *Resources Policy* 78 (September 2022): 102779, https://doi.org/10.1016/j.resourpol.2022.102779

[29] Ade Risna Sari and Amtai Alaslan, "Protecting Civil and Political Rights: Comparative Analysis of International Human Rights Mechanisms," *The Easta Journal Law and Human Rights* 1, no. 03 (June 30, 2023): 176–84, https://doi.org/10.58812/eslhr.v1i03.94

commissions are non-binding, and enforcement mechanisms depend on the political will of the concerned state party.

When addressing the global issue of human rights in an informed society and how these rights may translate in such a context, one immediately thinks of civil and political rights that should be directly and naturally exercised through information and communication means or protected against their misuse.[30] However, despite decades of intense regulatory and legislative processes at the national, regional, and international levels, and despite many references to the rule of law in official outcomes of the first phases of programmes on the rule of law, fundamental human rights such as the right to a fair trial, the right to the presumption of innocence, the right to an effective remedy, the right to equality before the law, and the principle of no punishment without law are seldom if ever addressed effectively. Civil and political rights were among the first areas addressed by the international human rights treaty regime negotiated in the mid-1940s. Along with economic and social rights, they were the central core – the first 19 articles of the Universal Declaration of Human Rights, passed unanimously by the General Assembly in 1948.[31]

While human rights standards have been developed to provide adequate protection in these circumstances, their implementation requires certain structures without which it is unlikely that core civil and political rights can be effectively protected. The rule of law, administration of justice and democratic structures are key components in this regard. While human rights law does not mandate the existence of a particular political system, it is difficult to see how rights can be protected without at least a minimum of checks and balances. A state creates institutions to uphold the rule of law and human rights in the absence of a comprehensive formal constitution and its comparatively ineffective system of checks and balances.

For example, the political challenges in Cameroon reflect a need to combat violence against the civil rights of women by creating a legal framework where the rule of law thrives and discrimination is minimised. To Cameroonians, their current issue goes beyond simply being a party to a convention, treaty, covenant, or proclamation. The state recognised the need to ratify laws pertaining to women's rights and support them with the rule of law, demonstrating its commitment to upholding human rights laws.[32] Cameroon's 2012 ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa serves as an illustration of such initiatives, which have as their primary goal the eradication of any practices that violate women's rights. The fact that the State has done nothing to create a framework based on the rule of law that fully addresses violence against women after ratifying this Protocol is a truly startling standard and reality.

To create such an efficient and effective system, institutions must have a robust legal and civil service with an independent justice system that has the authority to review

[30] Meryem Marzouki, "The 'Guarantee Rights' for Realizing the Rule of Law," in *Human Rights in the Global Information Society* (The MIT Press, 2006), 197–218, https://doi.org/10.7551/mitpress/3606.003.0012

[31] Beth Simmons, "Civil Rights in International Law: Compliance with Aspects of the 'International Bill of Rights,'" *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 437, https://doi.org/10.2979/gls.2009.16.2.437

[32] Nana Charles Nguindip, "Re-Evaluating the Legal and Institutional Complications Affecting the Protection of Women's Rights in Cameroon: The Need to Remedying the Odds," *Pancasila and Law Review* 5, no. 1 (March 25, 2024): 1–18, https://doi.org/10.25041/plr.v5i1.3186

laws, and a fair and professional system for appointing judges.[33] So, while human rights are key components of the rule of law, they can only be energised and safeguarded by the rule of law. Indeed, there are deep-seated structural factors that can undermine the adequate protection of rights in all systems. Social exclusion, inequality, and discrimination in particular are prone to significantly increase vulnerability, as evident in the higher likelihood of persons from certain ethnic, class or national backgrounds being subject to arbitrary arrest, detention, ill treatment and other violations.

Progressive Realisation of Economic, Social and Cultural Rights in the Dispensation of the Rule of Law

The decade of austerity policies resulting from the 2008 economic crisis significantly impeded the realisation of economic, social and cultural rights (ESCRs) worldwide, especially for non-citizens who became targets of populist nationalist ideologies.[34] Yet, they are among the most advocated rights at all levels. Just like civil and political rights, ESCRs occupy a significant and strategic position in the realisation of the rule of law and democratisation.[35] These rights are represented as "equality" or second generational rights. A right arises from the demand that the state provide fulfilment of every basic need of the people.[36] The state is obligated to act more actively so that these rights are fulfilled and available. The second-generation rights are formulated with positive language: "Right to." These rights are the rights of social equality associated with socialism. The right to work and decent wages, the right to social security, the right to education, the right to health, the right to food, the right to housing, the right to land, the right to a healthy environment, the right to the protection of scientific, literary and artistic works forms significant position of economic, social and cultural rights.[37]

So, how are economic, social and cultural rights relevant to the rule of law? Laws must be established on the principle of legitimacy, rooted in a confidence that all reasonable people would be able to ascertain their merits in a legal claim. Legislation is legitimised through this public endorsement and agreement of reasonable citizens. The state cannot call on its members to accept and participate in their democratic system if it does not conduct itself in a way that properly sustains each individual as a valued contributor in social, political, and economic life. This can be achieved through the constitutionalisation of social rights as a rule of law.[38] Whether an international treaty that has been signed and ratified by a country can automatically become a part of that

[33] Odi Jarodi, Muhammad Khafid, and Arief Yulianto, "From Fragmentation to Coherence: Enhancing Human Resource Capacity in Indonesian Law Reform for Effective Justice Delivery," *Journal of Law and Legal Reform* 5, no. 4 (December 31, 2024), https://doi.org/10.15294/jllr.v5i4.18924

[34] Claire Lougarre, "The Protection of Non-Nationals' Economic, Social and Cultural Rights in Un Human Rights Treaties," *International Human Rights Law Review* 9, no. 2 (October 24, 2020): 252–90, https://doi.org/10.1163/22131035-00902008

[35] Eberhard Eichenhofer, "Rights and Principles of the Economic, Social and Cultural Order," in *Writing Constitutions* (Cham: Springer International Publishing, 2024), 393–466, https://doi.org/10.1007/978-3-031-39622-9_11

[36] Jenny Grönwall and Kerstin Danert, "Regarding Groundwater and Drinking Water Access through A Human Rights Lens: Self-Supply as A Norm," *Water* 12, no. 2 (February 5, 2020): 419, https://doi.org/10.3390/w12020419

[37] Naomi Lott, "Establishing the Right to Play as an Economic, a Social and a Cultural Right," *The International Journal of Children's Rights* 30, no. 3 (August 22, 2022): 755–84, https://doi.org/10.1163/15718182-30030007

[38] Fritz W. Scharpf, "De-constitutionalisation and Majority Rule: A Democratic Vision for Europe," *European Law Journal* 23, no. 5 (September 28, 2017): 315–34, https://doi.org/10.1111/eulj.12232

country's national laws will depend on "how effect is given to international instruments in the particular country.[39] Despite much controversy over their details and the ways they are implemented, it is worth recalling that no nation opposed these "new" rights in principle. Such rights, after all, were already present in many twentieth-century constitutions and in legislation like that of the New Deal period in the United States – rights to a minimum standard of living, to work, to social security in the event of unemployment or disability, to form and join unions, and to education.[40] The rule of law has played a crucial role in enshrining ESCRs in national constitutions, laws, and regulations.

For example, in The Gambia, the gap between the rule of law and ESCRs is wide, even broader than that of civil and political rights. Over the years, the country has relegated these rights to mere policy aspirations. The Constitution of The Gambia, 1997, contains a bill of rights that provides for ESCRs, but these rights only form part of National Objectives, and this makes it difficult for stakeholders and individuals to hold the Gambian Government accountable through the judicial process for ESCR violations.

In jurisdictions where these rights are justiciable or their legal protection is ensured, the rule of law provides means of redress when those rights are violated or public resources are misused. But does the principle of non-intervention in the domestic affairs of states mean that they are free to violate human rights? The principle of state sovereignty means that neither another state nor an international organisation can intervene in a state's action to adopt, interpret, and enforce its laws within its jurisdiction. Along with the principle of non-intervention, upon joining the United Nations, states have pledged themselves "to take joint and separate action in co-operation with the Organisation for the achievement of the purposes outlined in Article 55," which include 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.[41] It is by doing this that states begin to recognise and respect human rights as a sine qua non for the rule of law.

Human Rights to Non-Discrimination

Aside from the aforementioned human rights issues germane to the rule of law, the issue of non-discrimination is fundamental to creating a state that upholds human rights values. Non-discrimination is a key principle in the Universal Declaration of Human Rights (Articles 2 and 7). The core principle that guides the formulation of legislation and the pursuit of justice is equality before the law. Injustice in the formulation results from the use of prospective thinking and a disregard for ideal norm thinking, which prioritises justice and acknowledges the importance of fairness without exception. The status or situation of being treated fairly and in conformity with regularly established law is known as equality before the law. Justice as the standard, which implies that fairness must be maintained in the formulation and implementation of the law, is the key phrase in this

[39] John Mukum Mbaku, "The Role of International Human Rights Law in the Adjudication of The Role of International Human Rights Law in the Adjudication of Economic, Social, and Cultural Rights in Africa Economic, Social, and Cultural Rights in Africa THE ROLE OF INTERNATIONAL H," *Penn State Journal of Law & International Affairs* 8, no. 2 (2020), https://elibrary.law.psu.edu/jlia/vol8/iss2/8

[40] Mary Ann Glendon, "The Rule of Law in the Universal Declaration of Human Rights," *Northwestern Journal of International Human Rights* 2, no. 1 (2004): 1–19, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1008&context=njihr

[41] Stephen P Marks, "Human Rights : A Brief Introduction Human Rights," *Harvard University*, 2016, 1–25, http://nrs.harvard.edu/urn-3:HUL.InstRepos:27015684

definition. The principle of equality before the law is compromised if discrimination occurs in either of these two domains. The justice that arises from the concept of legal equality is a form of justice founded on ideas rather than constitutional justice.[42]

States in many parts of the world regularly amend and, in some cases, write entirely new constitutions. This may occur for several reasons. For example, it may reflect a desire to redefine the distribution of political power, to create a constitution that is more democratic, has better checks and balances, and is more responsive to the electorate's aspirations. Constitutional change may also be undertaken after a period of conflict to establish a new constitutional order and provide a vision for moving forward to create a more equitable society. Alternatively, there may be a desire to update an existing constitution so that it is more responsive to political, economic, or social changes in society. Whatever the reason, a key part of any constitutional reform is ensuring the promotion, respect and protection of human rights and fundamental freedoms. Socrates wrote that freedom is the essence of democracy. It is as accurate today as it was over 2,000 years ago. A well-structured constitution can significantly enhance the protection of freedom and lay the foundations for effective democratic governance.[43]

According to the theory of social contract, some aspects of which have now been discredited, human beings surrendered their freedom in return for the responsibilities of governments. The 'blessings' of the government would lapse into tyranny unless it is accompanied by a recognition that there are certain fundamental rights that are possessed by all citizens. These are the rights that are inherent in all citizens by virtue of being humans.[44] These are the inalienable rights because the enlightened conscience of the community would not permit the surrender of these rights by any citizen, even on his own volition. These are the inviolable rights because they are not only vital for the development and efflorescence of human personality and for ensuring its dignity, but also because without them men would be reduced to the level of animals.[45] As concern for rights and civil liberties has become a part of the national movement, the framers of modern constitutions have been committed to providing them in constitutions that guarantee freedom, equality, and justice. They provide in the constitution two types of rights – one justifiable and the other non-justifiable: the justifiable rights are fundamental rights, and the non-justifiable rights are Directive Principles of State Policy.[46] These are similar to the Civil and Political Rights and Economic, Social, and Cultural Rights provided in the Universal Declaration of Human Rights.[47] But why are these rights non-discriminatory rights? Why must they be recognised as a significant pillar or component

[42] Bambang Joyo Supeno, "Principle of Equality Before the Law and Diversion on Criminal Justice System for Children in Indonesia," *Untag Law Review* 4, no. 1 (2020): 71–80, https://doi.org/https://dx.doi.org/10.56444/ulrev.v4i1.1527

[43] United Nations, *Human Rights and Constitution Making*, *Human Rights and Constitution Making*, 2018, https://doi.org/10.18356/c60619e9-en

[44] Amartya Sen, "Elements of a Theory of Human Rights," in *Justice and the Capabilities Approach* (London: Routledge, 2017), 221–62, https://doi.org/10.4324/9781315251240-6

[45] Marcello Ienca and Roberto Andorno, "Towards New Human Rights in the Age of Neuroscience and Neurotechnology," *Life Sciences, Society and Policy* 13, no. 1 (December 26, 2017): 5, https://doi.org/10.1186/s40504-017-0050-1

[46] Ajit Mondal, "Dynamics of Transformation of Right to Education in India from Directive Principle to Fundamental Right: A History of Denial," *Journal of Social Inclusion Studies* 8, no. 2 (December 3, 2022): 177–202, https://doi.org/10.1177/23944811221128950

[47] Tamyiz Mukharrom and Supriyanto Abdi, "Harmonizing Islam and Human Rights Through the Reconstruction of Classical Islamic Tradition," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 1 (March 31, 2023): 40, https://doi.org/10.22373/sjhk.v7i1.16436

of rule? Well, this can be elucidated based on the nature of these rights. Their attributes are:

1. Inalienability of Human Rights

Human rights are inherent to the natural existence of humans, and they are not derived from positive law through legislative processes. They are rights conferred on people in the face of an existential threat. They are inherent in all individuals irrespective of their caste, creed, religion, sex and nationality. Human rights are granted to an individual even after their death. The different rituals in different religions bear testimony to this fact. The inherence theory holds that human rights are inherent and inured to humans by reason of their humanity alone. The conceptual framework of the inherence theory of human rights is inspired by the natural law thoughts that man, by nature, is endowed with certain freedoms and liberties that are ingrained in his nature. These rights exist by virtue of that law of nature which is higher than positive or man-made law and which constitutes a universal and absolute set of principles governing all human beings. Human rights cannot be taken away permanently from any person, nor may anyone renounce their rights as a human being. This is the inalienability theory of human rights.

The existence of human rights does not depend on any legal or constitutional authority; it is for this reason that men can still enjoy them as their legitimate and authentic claim, without them being officially enacted by a law-making authority. However, human rights are better and easily enforced when positively recognised in a social compact. By its nature, human rights are beyond the power of legal or political authority to annul because it is impossible to remove from existence something that is an inherent aspect of human nature. This makes human rights a paradigm shift and a more comprehensive inclusion as a significant pillar of the rule of law in modern governance.

So, what happens when human rights are practised alongside the rule of law? One idea puts it this way synthetically: it is an act of constitutionalising human rights (incorporating human rights into a constitution).[48] The issue of human rights has become so central and contentious in both local and international affairs. The debate over human rights violations and the underlying questions occupies a current position of discourse. The West have made respect for human rights an important condition for East-West détente, and to a lesser degree for development assistance to the South. The concept of inalienability of human rights is particularly important in ensuring the realisation of good governance and rule of law among the committee of nations.

2. Universality of Human Rights

Human rights are not the exclusive domain of any privileged class of people. Human rights are universal in nature, without consideration or exception. The values such as divinity, dignity and equality which form the basis of these rights are inherent in human nature. No concept compels the international community to recognise human rights as a pillar of the rule of law more than its universality. According to Lord Hoffman,[49] the claim of human rights to be universal can no doubt be traced back to mediaeval natural law

[48] Hugo S. Ramírez-García, "La Constitucionalización De La Persona: Un Marco De La Relación Entre El Estado De Derecho Y Los Derechos Humanos," *Cuestiones Constitucionales*, November 23, 2022, 367–95, https://doi.org/10.22201/iij.24484881e.2022.47.17533

[49] Leonard Hoffmann, "The Universality of Human Rights," *Law Quarterly Review* 125, no. July 2009 (July 1, 2009): 416–32, https://search.informit.org/doi/10.3316/agispt.20093200

theory and beyond but for practical purposes, I can begin in 1776 with the American Declaration of Independence drafted by Thomas Jefferson: "we hold these truths to be self-evident, that all men are created equal, that their Creator endows them with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

The global human rights regime relies on national implementation of internationally recognised human rights. Norm creation has been internationalised. Enforcement of authoritative international human rights norms, however, is left mainly to sovereign states. The few and limited exceptions – most notably genocide, crimes against humanity, war crimes, torture and arbitrary execution – only underscore the almost complete sovereign authority of states to implement human rights in their territories as they deem fit.[50] It is by dint of the concept of universality that the Universal Declaration of Human Rights becomes a sine qua non for modern constitutions.

Challenges of Human Rights in the 21st Century

While there is continuous and consistent advocacy for human rights across all levels and regions, this does not put off the challenges and abuses. The rule of law is an ideology that is pontificated by politicians and legal experts, and yet, human rights, which form one of the pillars of this ideology, remain a challenge in many jurisdictions. The challenge of human rights implementation highlights the gap between international norms and local realities. It identifies several problematic factors in the effective domestic implementation of international human rights values. There is a long-standing cultural critique of universal human rights and their continued cultural disconnect in many societies today.[51]

Cultural practices are also a main challenge to human rights. Again, in The Gambia, for example, the State is grappling with Female Genital Mutilation, a cultural practice among some ethnic groups in the country. The practice had been existing without obstruction from the State until 2015, when an amendment was passed to criminalise it. The case is premised on the constitutionality of amendments made to the Women's Act, 2010, under Act Number 11 of 2015, which prohibits FGM. Under the laws of The Gambia, the Supreme Court has the exclusive jurisdiction to interpret and enforce the Constitution. Hon. Almameh Gibba, the National Assembly Member for Foni Kansala, a constituency in the western region of the country, and seven others, have filed a case before the Supreme Court against the State seeking to decriminalise the practice of female circumcision. On 4 March 2024, Gibba presented a Bill before the lawmakers for the repeal of the law that bans this cultural practice. However, the National Assembly, after adopting a report from the Health and Gender Committee, voted against the bill. Now, he is before the Supreme Court on the same mission – to seek decriminalisation of the practice. The plaintiffs are seeking, inter alia, an order from this Court to declare that the repeal of section 32 of the Women's Act of 2010 and insertion of section 32A and 32B violate certain provisions of the Constitution of The Gambia, 1997 (sections 17(1) and (2), 25(1)(c), 28(1) and (2), and 33(2) and (3)) and are therefore, unconstitutional. This

[50] Jeremy Julian Sarkin and Ross Callum Capazorio, "The Syrian Conflict as a Test Case for the Limits of the International Community and International Law: Global Politics and State Sovereignty Versus Human Rights Protection.," *Human Rights Quarterly* 44, no. 3 (August 2022): 476–513, https://doi.org/10.1353/hrq.2022.0024

[51] Julie Fraser, "Introduction: The Challenge of Human Rights Implementation," in *Social Institutions and International Human Rights Law Implementation*</i> (Cambridge: Cambridge University Press, 2020), 1–20, https://doi.org/10.1017/9781108777711.002

case is still before the Supreme Court. Such practices challenge the progressive creation of a human rights state.

According to studies on *The Critical Human Rights Issues of 2022 Year in Review,* political polarisation erodes the legitimacy of democratic institutions, impairing their abilities to protect the rights of citizens. It draws attention away from what we have in common by emphasising our differences, further dividing societies, and deepening chaos. Simply put, it is a threat to a peaceful society. Due to the impact of globalisation on territorial, physical, and informational boundaries, international law has grown in significance on the global scene 75 years after the 1948 Universal Declaration of Human Rights was enacted.[52] Non-Governmental Organisations are also grappling with human rights challenges looming on the near horizon. These include the issues of 'neuro rights', the challenges of digital technology, artificial intelligence, the use of robots in armed conflicts, and the potential presence of human beings in outer space.[53] The challenges are so multifaceted and complex that they have become contentious issues in governance and the rule of law.

Additionally, transitional countries where authoritarian features have been deeply embedded in state institutions and policies face several challenges that limit their ability to meet citizens' expectations regarding their rights. Weak or failing institutional capacities, an exclusive approach to establishing an institutional framework, a lack of knowledge and experience regarding human rights protection, and the authoritarian features of state institutions significantly impact the promotion and protection of human rights as a fundamental principle of the rule of law.[54] This is a setback to the notion that legal reform should respond promptly to emerging social demands.[55]

Human rights and development continue to evolve separately. It makes an obvious, but underappreciated point. Human rights are the subject of binding international legal obligations, and their relevance to development can be understood in light of this. There are also challenges in integrating human rights into development, as well as divergences in discourse and policy frameworks. The consequences of these divergences are examined, including a lack of prominence for legal duties in human rights development, the absence of a normative baseline against which to assess development processes and outcomes, an overall lack of policy coherence, and a potential undermining of human rights accountability.[56]

Conclusion

It is sufficient to aver that human rights occupy a significant and relevant position in human development across all aspects of life, including political, economic, cultural,

[52] Guilherme Calmon Nogueira da Gama, "Human Rights Challenges in Brazil: Children and Vulnerable Persons," *British Journal of American Legal Studies* 9, no. 3 (December 1, 2020): 461–73, https://doi.org/10.2478/bjals-2020-0010

[53] Bertrand Ramcharan, "NGOs and Human Rights Challenges of the Future," in *The Protection Roles of Human Rights NGOs* (Brill | Nijhoff, 2022), 881–84, https://doi.org/10.1163/9789004516786_055

[54] Melek Saral, "Human Rights Challenges in Post-Uprising Egypt: Political Actors' Reflections on the Years of 2011–2013," *The International Journal of Human Rights* 25, no. 8 (September 14, 2021): 1374–94, https://doi.org/10.1080/13642987.2021.1947807

[55] Anita Böcker, "Can Non-Discrimination Law Change Hearts and Minds?," *Erasmus Law Review* 13, no. 3 (November 2020): 21–33, https://doi.org/10.5553/ELR.000148

[56] S. McInerney-Lankford, "Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective," *Journal of Human Rights Practice* 1, no. 1 (March 1, 2009): 51–82, https://doi.org/10.1093/jhuman/hun005

civil, and social spheres. Therefore, it requires and demands that a human rights state be established, having a fundamental connection and being mutually constitutive with the rule of law. As the rule of law is gaining traction in many parts of the world through constitutionalism, there is indeed a quantum leap towards sustaining a global community that protects, respects and fulfils human rights. To prevent states from embracing the rule of law and violating human rights, there is an urgent need to create a responsible community of actors and social movements that push back against this trend. It will mobilise people from the ground up to defend democratic values and protect human dignity, especially for the most vulnerable and marginalised. Those who seek to divide the world are fewer and less powerful. If those who are oppressed and abused turn up, they can turn the tide.

The positive development of human rights depends on the creation of specific state institutions and laws, and the implementation of targeted state policies leads to an increased enjoyment of human rights. Several elements are necessary to promote human rights, including commitment to international treaties, constitutional guarantees, and strong institutional frameworks. Internationally recognised human rights also impose obligations on states and prohibit them from taking any measures that result in the violation of rights through their organs or agencies.

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