

Backlash against human rights

Backlashing is a perennial challenge for human rights. Its manifestation in various forms including the repudiation of human rights standards or resistance to being evaluated by them has made the phenomena central to the discourses on human rights.^[i] The backlash or *reversal of progress*,^[ii] a *strong negative reaction*,^[iii] and *counter reactions* ^[iv] have been witnessed in various settings across the world.

An analysis of the phenomena what can be called the *backlash analysis* is done in light of specific rights like *LGBT rights, women's sexual and reproductive freedom, rights of immigrants and ethnic and religious minorities*.^[v] The analysis also covers the behaviour of institutions and movements. The *backlashers* have been identified as state institutions,^[vi] a group of states, movements and non-state actors.

With growing attention on the subject, is there a way to comprehensively understand it?

Backlash analysis *vis-a-vis* International Human Rights Law

Overlegalization

The expansion of the human rights framework through redressal procedures and new protocols has been rapid since the 1990's. Take the example of the Optional Protocol to the Convention against Torture, 2002 which set up a Sub-Committee on Torture. Also, the Optional Protocol to the Convention on the Rights of the Child, 2014 which adopted the Communications Procedure.

New human rights treaties have been adopted including the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, and the International, and the Convention on the Rights of Persons with Disabilities.

In light of the many human rights instruments, human rights institutions advocate for the ratification of treaties and Optional Protocols making *ratification* an essential part of the concept of state responsibility.^[vii] Few ratifications is viewed as a complex challenge for international human rights law. ^[viii] There are also *concerns over compliance and engagement with treaty provisions*; the same leading many to witness the *exit, denunciation and withdrawal* from human rights regimes.^[ix]

Norm creation

The expansion of the human rights framework while it established links with agendas like corruption, climate change, technological advancements/AI has created what is being called a constellation or *patchwork of norms*^[x]. These norms can be traced to various sources including legal institutions and those of a more autonomous nature. Normative expansion in this fashion also relies on the *staying out* or *moving away* approach. ^[xi]

Norm application

Domestic institutions have been active in arguing for the application of domestic standards in the implementation of human rights. The reliance on domestic standards or in many cases *constitutional values* is being viewed as mirroring the rejection of other available standards on the subject. ^[xii]

The *return to basics* and *return to constitutional principles* idea was also the subject matter of the 2019 *Report of the Commission on Unenforceable Rights* set up by the U.S. Secretary of State Michael Pompeo. ^[xiii] Quoting from the report, “the broad consensus that once supported the UDHR’s principles is more fragile than ever... Some countries, while not rejecting those principles outright, dispute that internationally recognized human rights are universal, indivisible and interdependent and international institutions, and overuse of rights language with a dampening effect on compromise and democratic decision-making. *The report asserted the decision making capacity of real communities, the small places*” where liberty is cultivated and nurtured.

All in all, the phenomenon of backlashing has a wide scope for analysis. Irrespective of whether it is an attempt to wrestle the overlegalization of human rights or insist on the sanctity of domestic standards, *backlashing* continues to re-define the landscape of arrangements on human rights.

Notes

^[i] Andrew Gilmour, UN Assistant Secretary General for Human Rights, Speech, 2017, <https://www.frontlinedefenders.org/en/statement-report/statement-andrew-gilmour-un-assistant-secretary-general-human-rights>

^[ii] *Ibid.*

^[iii] Sanja Draic, “On the Concept of Human Rights Backlash”, 2019. <https://www.iwm.at/publications/5-junior-visiting-fellows-conferences/vol-xxxvii/on-the-concept-of-the-human-rights-backlash/>

^[iv] Laurence L. Helfer, Over legalizing Human Rights..., *Columbia Law Review*, 2002.

^[v] *Supra* note i.

[vi] Human rights backlash can originate from all branches of the state—legislative, executive, judicial. *Supra* note iv.

[vii] Consider India's Third Review at the Human Rights Council, the key focus being the ratification of the Torture Convention by India. Also, the Committee on Enforced Disappearances 7th and 8th Sessions, 2014–2015 advocating the fulfilment of state responsibility through the criminalization of enforced disappearances by all member states. [viii] Particularly the Convention on Rights of Migrants. See Western, Lockhart and Money, “Does anyone care about migrant rights? An analysis of why countries enter the convention on the rights of migrant workers and families”, *The International Journal of Human Rights*, Vol. 23 Issue 8, 2019.

[ix] *Supra* note 5. Also, the US exit from the Human Rights Council.

[x] Urs Gasser and Carolyn Schmitt, The Role of Professional Norms in Governance of Artificial Intelligence, 2019. Forthcoming in: Markus D. Dubber, Frank Pasquale, and Sunit Das (eds.), *The Oxford Handbook of Ethics of AI*, Oxford University Press. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378267

[xi] One can cite example of the 2020 Switzerland Referendum on the Human Rights Due Diligence Law, initiated by Swiss civil society to make Swiss companies accountable towards human rights in different parts of the world. (Antony Crockett, Else Savourey, Oliver Elgie and Jerome Temme, “Switzerland to hold referendum on human rights due diligence law”, 2020. Available at <https://www.lexology.com/library/detail.aspx?g=6a960415-e76f-4d74-96af-10862cb3c142>)

[xii] See domestic court ruling in Singapore on the non-applicability of international human rights standards and foreign materials to the case in hand. *On Ming Johnson v. Attorney*, 2020. [xiii] Report of the Commission on Unalienable Rights, United States, 2019. <https://hu.usembassy.gov/report-of-the-commission-on-unalienable-rights/>

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