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, it is of great value to ascertain whether there a way to comprehensively understand it?

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

*Overlegalization*

The expansion in human rights redressal procedures and mechanisms since the 1990’s has been rapid. Take the examples 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 on the Communications Procedure, 2014. There have been new human rights treaties also finalised and 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.

Human rights institutions advocate the ratification of treaties and Optional Protocols making *ratification* an essential part of the concept of state responsibility.\[vii\] A few human rights treaties have had to constantly engage with the challenge of fewer ratifications by states.\[viii\] Overall, the human rights landscape is dominated with concerns over compliance and engagement
with treaty provisions; the same leading many to witness an unprecedented 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 also 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 also being viewed as mirroring the rejection of other available standards on the subject.[xii] The return to basics or 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] The work of the Commission concerned the determination of an informed review of the role of human rights in the foreign policy of the United States based on the founding principles of the Universal Declaration of Human Rights and the United States Constitution. The Report while identifying the various challenges to human rights expressed, 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 emphasised the role of small spaces, the real communities where liberty is cultivated and nurtured. Reliance was placed on the principle of subsidiarity—that decisions ought to be made at the level closest to the persons affected by them—starting with their primary communities—and that larger, more general and distant communities should intervene only to help the primary ones, not to replace them.

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


[iii] Ibid.

[iv] Ibid.


[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.


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


Author

Deepa Kansra is Assistant Professor at the Human Rights Studies Programme, School of International Studies, Jawaharlal Nehru University, Delhi.