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Human Rights: Terms and Conditions Applied to State Sovereignty and the Limits of Universal Human Rights

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This article aims to stir up discourse on the involvement of sovereigns in shaping the kinds of rights available to their people. This is pertinent to understanding how social contract theory and natural rights underpinned and evolved into the postmodern concept of human rights, where it is the supposed duty of each state to protect the rights of its people. The paper includes a global comparative analysis of basic human rights and their availability in various states to understand the role that each government plays in creating such variations that we see in the human rights arena. When the sovereigns, instead of being protectors of the rights, became the givers of these rights, that is when the fate of human rights changed. Whether the change is for better or for worse is what the paper intends to find. This paper delves deeper into the duties of the sovereign as it assumes the role of the 'guarantor' and the 'protector' of rights, where it, in its own misconception, reveals itself to be a 'violinist'. The concept of human rights and its universality is rather paradoxical to the sovereignty of the states. But are human rights in fact universal? They were certainly meant to be so. If so, is it the reality that we see today in the global trends of human rights?

Keywords: *human rights, state sovereignty, social contract theory, universality, right to equality.*

INTRODUCTION

Human Rights are somewhat, if not certainly, rooted in this universal perception of an ideal blob of a human who is free from any tangible or intangible, conscious or unconscious trauma

of the past. As paradoxical as this statement as is the emergence of institutionalised human rights in the very century which saw the most violations of them.¹ Are human rights undeniably as pragmatic as they seem to be idealised? Certainly, there must be some variations in their universality; are the same rights and liberties available to all in every other nation in this world? In contemporary times, human rights have remained to be determined by the interests of the states rather than the interests of the people. What are the exact determinants for the people to even assert their rights? Do these exist in a rigid sense, or are they contingent on various socio-economic, cultural and political conditions of the nation? Where does the postmodern principle of human rights fit in the backdrop of these questions? The paper intends to analyse the ends of human rights by unwrapping the deep-rooted politicisation of rights and liberties by the sovereigns, which becomes a major obstruction to the universalisation of these human rights.

PHILOSOPHICAL BACKBONE OF HUMAN RIGHTS

What, When, and How of Human Rights: The assumption that human rights are obvious and uncontroversial generates an aura of false certainty in the realm of institutionalised human rights.² Institutionalisation is meaningless without defining the substance of human rights, what this entails, who has these rights, and when and how these can be enforceably asserted.

Natural rights theorists argue that ‘humans’ have rights as a virtue of being a human; a corresponding question arises as to who exactly a human is.³ Similar are the thoughts proposed by Gryphons, who grounded human rights on human personhood, being able to exercise human rights in society through human agency.⁴ These theorisations leave humans as the beneficiaries of rights, as an inherent and obvious factor. A common theory on natural rights advances two sides of it: one passive, which is the right not to be treated in a certain way; this right imposes a duty on others not to infringe the right of the one. For example, the one has a right not to be discriminated against based on their caste, gender or religion. Whereas active rights are the ones which can be exercised by oneself without any

¹ Costas Douzinas, ‘The End(s) of Human Rights’ (2002) 26(2) Melbourne University Law Review <<https://www5.austlii.edu.au/au/journals/MelbULawRw/2002/23.html>> accessed 15 June 2026

² Marie-Bénédicte Dembour, ‘What Are Human Rights? Four Schools of Thought’ (2010) 32(1) Human Rights Quarterly 1 <<https://muse.jhu.edu/pub/1/article/372282/pdf>> accessed 15 June 2026

³ *Ibid*

⁴ James Griffin, *On Human Rights* (OUP 2008)

interference, such as the right to move freely or the right to speak freely.⁵ This notion is taken one step further through the social contract theory in the context of protection and assertion of rights. This presupposition mixes into the cocktail of rights the bittersweetness of state intervention.

The idea of social contract theory is that the people enter into a social agreement with the state, where they submit some of their liberties in exchange for protection of their rights.⁶ Raz classified human rights into those recognised by law and those created by law. He particularly emphasised the recognition and enforcement of these rights through the sovereign and international institutionalisation.⁷ Costas Douzinas, on the other hand, problematizes the idea that human rights are viewed as something to be claimed from the state, and not something inherent to humans.

A lot is left to ponder by these theorists when it comes to the assertion and enforcement of rights through the state. Sandra Fredman seems rather optimistic when she suggests that the state should not only be seen as the enemy, but rather nudged to be the enabler of choices in rights.⁸ What choices, say? The choice to enjoy life as one values, the choices as one considers crucial as part of life, the choices that form the functioning of being human.⁹ Being free to make these choices should form the substance of human rights, and the state should strive to provide these choices to everyone.

Postmodern Principle of Human Rights: The proclamation of human rights has always been ideologically a result of a specific interest class rising against the despotic state powers. These ideologies further developed into natural rights, grounded in morality, appealing to God or the divine powers for protection.

The postmodern notion of human rights is what we know as evolved cumulatively from the various human rights theories, where the state has assumed the position of God to protect the rights of its people. Often, the state, in an attempt to recognise rights, creates an issue of undecidability where humans then do not get those human rights which are evolving.

⁵ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press 1979) 1-15

⁶ Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston tr, Penguin 1968)

⁷ Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31
<https://scholarship.law.columbia.edu/faculty_scholarship/1607> accessed 04 July 2026

⁸ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008)

⁹ Amartya Sen, 'Human Rights and Capabilities' (2006) 6(2) *Journal of Human Development* 151
<<http://dx.doi.org/10.1080/14649880500120491>> accessed 06 July 2026

Amartya Sen, in his capabilities approach, stresses not listing the contents of the rights, but rather believes rights to be determined through continuous public debates. The state otherwise cultivates a perception that rights are something that states determine and guarantee. And when the states start guaranteeing rights, these become the manifestations of state interests. The sovereigns, in the process, displace their role as protectors of rights and assume the role of guarantors and determiners of rights, which moves their people further away from attaining postmodern justice.

The concept of human rights as understood in contemporary times is largely based on the tussle between the beneficiaries of rights and the sovereign lawmakers. Synchronic universality of human rights is only possible when these rights transcend the great sovereignty of the nations. This notion requires the sovereigns to address the lacunae in universality and cultural realisation. The acknowledgement of the human rights of others through cultural relativity could be a path forward to attaining postmodern justice. This introspection can be rationalised through Sandra Fredman's notion of enhanced choices, where states' intervention could create conditions for the citizens to be able to enjoy their rights with cultural variations, hence reconciling the rights of others with the postmodern principle of justice. Nonetheless, can state intervention really be the key to realising the postmodern principle of human rights justice, or will it reveal itself to be the biggest impediment to it?

PRAGMATIC REALITIES

Right to Equality- Racial and Caste Discrimination: The principle of non-discrimination as the starting point for the Right to Equality is considered to be the norm in the international human rights regime. The International Convention on the Elimination of All Forms of Racial Discrimination, 1965 ('ICERD') stands to embody the heart of agitation against colonialism and apartheid.¹⁰ 185 countries in the world have signed and ratified the convention, whereas 12 countries, such as Myanmar, Malaysia, North Korea, and South Sudan, have taken no action on it.

¹⁰ David Keane and Annapurna Waughray (eds), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press 2017)

Article 8 of Malaysia's Federal Constitution acknowledges the right to equality and upholds the notion of non-discrimination through equal treatment rights. Article 153, while contradicting Article 8, allows ethnocentric affirmative actions and extends special treatment to the Malays, which comprises 69.9% of the Malaysian population, on the grounds of major income disparities with the Indian and Chinese ethnic groups.¹¹ This differential treatment perpetuates social exclusion of minority communities that are not of Malay descent. This is against the principle of meritocracy and egalitarianism, intelligibly contrary to the prohibition of discrimination by ICERD, which quite explains Malaysia's inaction on ICERD.

India prohibits all forms of discrimination and provides the right to equality in the supreme law of the land, its Constitution, which gives this right an incredible stature. It also includes affirmative action for certain marginalised communities with a high population majority in the country, yet it has ratified the ICERD, which speaks volumes for its credibility in extending the same. Malaysia, historically, like India, was colonised by the British; however, the former supposedly gained its independence through a social contract with the Malaya Federation under the British, where Malays purposively negotiated terms of citizenship and privileges to attain special indigenous prestige. Though Article 153 talks about the protection of other communities, the extent is unclear. Despite India having more ethnic diversity, it does not appear to be ethnocentric with its affirmative action clause under its Constitution, which prohibits all forms of discrimination, be it racial or casteist. Nor does this affect in any way its ratification with respect to ICERD.

Affirmative action in the form of reservations in India is recognised as a manifestation to promote substantive equality under Article 15 of the Indian Constitution, unlike an entirely privileged rule in the case of Malaysia.¹² What seems to be the factor maintaining such variation in these countries? Malaysia, in black and white, may be a parliamentary democracy with a constitutional monarchy, but its political history, with Mahathir bin Mohammad as prime minister for 22 years from 1981, who was succeeded by his chosen successor in 2003, marked Malaysia with an authoritarian-style government for almost 30

¹¹ Noor Shuhadawati Mohamad Amin and Nor Hafizah Mohd Badrol Afaqndi, 'An Analysis of the Constitutional Principles of Equality and Affirmative Action vis-à-vis Employment in Malaysia' (2023) 20(4) Journal of Social Sciences and Humanities 199-207

<<https://ejournal.ukm.my/ebangi/article/view/66018/14555>> accessed 12 June 2026

¹² *Indra Sawhney Etc v Union of India and Ors* AIR 1993 SC 477

years, changing its political trajectory.¹³ This does not seem to be the case with the strong multiparty democracy that India has held for years. This has allowed for high participation in the realm of rights and discriminatory policy, especially since the current and previous presidents have been from the Dalit community.

In America, Black Lives Matter movement is a memorialised proof that the legacy of apartheid has not been eliminated after the racial champion against those Western powers which purported to divide and classify humanity. Racial and ethnic discrimination, historically, has been perpetuated through legalised and systemic persecution, as executions of African-American convicts through prejudiced capital punishments were carried out.

Right to Life – Capital Punishment: A global consensus on capital punishment is that it cannot be enforced without violating human rights to not be arbitrarily deprived of life and be subjected to cruel, inhuman and degrading treatment.¹⁴ Article 6 of the International Covenant on Civil and Political Rights has been through interpretation consider to specify that no one shall be subjected to the death penalty without a fair trial. 144 countries have completely abolished the death penalty, 55 still exercise and practice the death penalty, while 20 countries carried out capital punishment in 2022. The top executioners of the death penalty in 2022 were China, Iran, Saudi Arabia, Egypt and the USA.¹⁵

In India, capital punishment has been limited to the ‘rarest of rare cases’¹⁶ and to the most serious crimes such as murder and terrorist offences aimed at undermining national integrity and security. 27 states in the US still have legalised capital punishment, even though it is carried out by lethal injection, unlike in India, where the convicted are hanged till death. Being against the death penalty is considered to be ‘soft on crime’, and being labelled such does not go well with the US and its punitive streak.¹⁷ US practice sits uneasily with its stated

¹³ Thomas R Leinbach, ‘Malaysia from independence to c. 2000 in Malaysia in History’ (*Britannica*, 06 August 2026) <<https://www.britannica.com/place/Malaysia/Malaysia-from-independence-to-c-2000>> accessed 12 June 2026

¹⁴ Roger Hood, ‘World-Wide Abolition of Capital Punishment: A Human Rights Imperative’ (*Law Commission of India*, 10 July 2015) <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/01/2023010534.pdf>> accessed 12 June 2026

¹⁵ ‘Torture and the Death Penalty: FACTS AND FIGURES’ (*World Coalition Against Death Penalty*, 2023) <https://worldcoalition.org/wp-content/uploads/2022/06/FactsFigures2023_EN-v2.pdf> accessed 12 June 2026

¹⁶ *Bachan Singh v State of Punjab* (1982) 3 SCC 24

¹⁷ Matthew B Robinson, *Death Nation: The Experts Explain American Capital Punishment* (Pearson/Prentice Hall 2008)

commitment to human rights, considering it retained capital punishment while advocating rights protection abroad, and certain post 9/11 interrogation practices drew sustained criticism. Political pressure maintains the continuation of capital punishment as it falls under the highly politicised 'law and order'. Using 'enhanced interrogation' as a glorified façade to use torture as a means of interrogation shows the extent to which the US is willing to go. The credit for India and the US not having formally abolished capital punishment goes to the high public support for deterrent and extreme punitive measures for serious crimes.

Portugal was the first country to abolish capital punishment for all crimes in 1976; in fact, all European Union countries have abolished capital punishment in line with the European Convention on Human Rights.¹⁸ In 1764, Cesare Beccaria, a jurist and philosopher of Milan, openly condemned the death penalty through his writings, which brought about a new wave of abolitionism in the 19th Century.¹⁹ European Countries have occupied the top positions with respect to democratic growth, representation, and especially in the human rights arena. Amnesty International deems the death penalty as the ultimate form of cruel, inhuman and degrading punishment.

China has been declared in its UN Universal Periodic Review 2021 to be the world's leading executioner, putting to death thousands every year for around 46 crimes, of which 22 are non-violent.²⁰ The Chinese government has tightened and exercised social control, suppressed civil society, and banned NGOs since 2013. Oblivious the world is to atrocities that undergo in the name of capital punishment, atrocities such as documented religious repressions and mass detention of Uyghurs which took place in Xinjiang, where the largest non-Chinese ethnic group Muslims of Uyghurs, which enjoyed autonomy in their region and other ethnic minorities were labelled as terrorists and executed for endangering national security, conveniently to suppress religion of Islam despite the Chinese government's claim

¹⁸ 'Countries That Have Abolished the Death Penalty Since 1976' (*Death Penalty Information Centre*) <<https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>> accessed 12 June 2026

¹⁹ Tatjana Holzl, 'The Charter of Law of Abolition of the Death Penalty, 1867: a pioneer milestone of European humanism and liberalism' (*Digital Treasures*, 01 July 2021) <<https://www.digitaltreasures.eu/the-charter-of-law-of-abolition-of-the-death-penalty-1867/>> accessed 12 June 2026

²⁰ The Rights Practice, *UN Universal Periodic Review of China Midterm Report* (UN Human Rights Office 2021)

that it guarantees freedom of religion.²¹ Countries like China and Iran have used capital punishment as a tool of intimidation to suppress dissent against power and to kill any form of separatist ideology.²² Countries till today practice the death penalty as punishment for acts which should not even be considered as crimes to satisfy public sentiments or to control and suppress dissent or religion.

Right to Freedom of Religion- Secularism: Can freedom of religion be considered as important as other fundamental freedoms of speech, movement and profession? Freedom of Religion protects one's freedom of conscience, faith, belief and worship. These four words construct the very substance of the human mind, which allows us all to function and make choices. Article 18 of the Universal Declaration of Human Rights(UDHR) protects and guarantees freedom of religion and belief. 192 members of the United Nations have all signed the UDHR, but do all of these countries protect and acknowledge freedom of religion as it is purposively constructed?

Despite the ECHR's Article 9 protecting one's right to freedom of thought, conscience and religion, French law banned wearing full veiled clothes in public spaces, indirectly prohibiting the burqa, a religious garment. France has, furthermore, prohibited the adornment of any kind of religious symbol, like a Sikh turban and Jewish headcovers. *S.A.S. v. France* decision held that the French law was no violation of the right to manifest one's religious belief.²³ French law reveals a tension between its commitment to freedom of religion and its restrictions on religious dress, where it conveniently applied this law to 'large' Christian crosses but allowed 'ordinary-sized' crosses. Canada, however, did not make this mistake when it banned the kirpan, which is a sharp knife but an essential religious practice in Sikhism. Canadian Supreme Court held it to be violative of the Right to freedom of religion guaranteed by the Canadian Charter of Rights and Freedoms.²⁴

²¹ 'Devastating Blows: Religious Repression of Uighurs in Xinjiang' (*Refworld*, 01 April 2005) <<https://www.refworld.org/reference/countryrep/hrw/2005/en/20125#:~:text=Xinjiang%20leads%20the%20nation%20in,based%20terrorism%20in%20the%20region>> accessed 12 June 2026

²² 'Iran: Alarming Surge in Executions' (*Human Rights Watch*, 20 August 2024) <<https://www.hrw.org/news/2024/08/20/iran-alarming-surge-executions>> accessed 12 June 2026

²³ Bernard Keenan, 'S.A.S. v France – the French principle of “living together” and the limits of individual human rights' (*LSE Human Rights*, 14 July 2014) <<https://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/>> accessed 12 June 2026

²⁴ 'Questions and Answers on Restrictions on Religious Dress and Symbols in Europe' (*Human Rights Watch*, 21 December 2010) <<https://www.hrw.org/news/2010/12/21/questions-and-answers-restrictions-religious-dress-and-symbols-europ>> accessed 12 June 2026

The Basic Law on Human Dignity and Liberty provides for the right of Israeli citizens to freedom of religion. Yet there is a different treatment of Orthodox Jews and non-orthodox jews, Muslims, and Christians with respect to policy formulation and personal status law. The Israel Government, which is far-rightist and ultra-Orthodox, provides preferential treatment to orthodox jew 'citizens' with respect to laws and legal policies, for example, legal recognition of marriage and more funding for religious institutions.²⁵

India, a country which celebrates its religious and ethnic diversity, considers the right to freedom of conscience, faith, belief and religion as a fundamental right under its constitution, yet refuses to recognise hijab as an essential practice and allows the ban of hijab in educational spaces.²⁶ Commentators have questioned whether the citizenship regime is compatible with India's secular commitments, one describing the resulting framework as 'pseudo-secular'.²⁷ The state decides citizenship through religion, conveniently excluding Muslim immigrants under the Citizenship Amendment Act 2019, when it had just decided on the Triple Talaq case, a celebratory moment for all Indian Muslims.²⁸

Politicising Rights: It is pertinent to understand the role the state plays, through legislative and judicial politicisation, in showcasing its secularity and religious neutrality. Through and through, human rights have been defined by state interest instead of subject interest, where human rights have been reduced to a game of politics. Considering how Israel government, a far-rightist and ultra-Orthodox coalition government, released an agreement endorsing discrimination against the LGBT community on the grounds of religion, is living proof of the above statement.²⁹

Armed Forces Special Powers Act, 1958 is an Indian act which delegates powers to the armed forces as a counter-insurgency measure, even to an extent where it has been described as a

²⁵ 'Religious Freedom in Israel' (*The Institute on Religion and Public Policy*)

<<https://www.justice.gov/file/275216/dl>> accessed 12 June 2026

²⁶ *Ayesha Hajeera Almas v Chief Secretary, Chief Secretary, Primary & Higher Education, Education Department, Karnataka Govt. Ministry & Ors* SLP No 7794/2022

²⁷ Anmol Jain, 'A Pseudo-Secular India? An analysis of the Citizenship regime' (*Bar and Bench*, 12 October 2019) <<https://www.barandbench.com/columns/a-pseudo-secular-india-an-analysis-of-the-citizenship-regime>> accessed 12 June 2026

²⁸ *Shayara Bano v Union of India and Ors* AIR 2017 SC 4609

²⁹ Ilan Ben Zion, 'Israel Palestine: New Netanyahu far right govt targets West Bank settlements, LGBT, justice' *The New Zealand Herald* (29 December 2022) <https://www.nzherald.co.nz/world/israel-palestine-new-netanyahu-far-right-govt-targets-west-bank-settlements-lgbt-justice/TE7MLRLAQEBEVILNLOQYMD6RY/#google_vignette> accessed 12 June 2026

'Licence to Kill'³⁰ by the critics of the Act, in areas declared as disturbed areas. Nagaland has had incidents of arbitrary killings, all in the name of the greater good and public interest defining morality. What happens to human rights when the violators themselves assume the role of protector? The so-called makers misinterpret their role and manipulate their position when it comes to human rights. When human rights become a monopolised matter of the state, the very essence of human rights is lost.³¹

CONCLUSION

It is paradoxical indeed when it is the state that decides on what rights are to be given to the people, and to whom these rights are to be given. This is the reason why human rights, which were supposed to be universal, have remained largely communitarian. Wasn't the state just a protector? Didn't humans already have rights? Do humans have rights because they are humans, or is it because they have rights that they are humans? True universalisation can only be achieved when 'citizenship' stops being the constant determinant of human rights. Human Rights in postmodernism, unfortunately, have diminished to the level of mere contracts where the sovereign's 'terms and conditions' apply.

³⁰ A G Noorani, 'AFSPA: Licence to Kill' (*Frontline*, 01 April 2015) <<https://frontline.thehindu.com/the-nation/afspa-licence-to-kill/article23592020.ece>> accessed 12 June 2026

³¹ 'Babasaheb Dr. B. R. Ambedkar's speech in the Constituent Assembly on 25th November 1949' (*Round Table India*, 26 November 2016) <<https://www.roundtableindia.co.in/babasaheb-dr-b-r-ambedkar-s-speech-in-the-constituent-assembly-on-25th-november-1949/>> accessed 12 June 2026