

Can Human Rights be Reconciled with State Sovereignty?

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Abstract: This paper centres on the question as to whether human rights can be reconciled with sovereignty. Therefore, in order to examine the reconciliation of human rights and state sovereignty, it is important to know the nature of relationship between them. This research first, analyzes the impact of the historical evolution of human rights on changing the nature of sovereignty and then engages with the different arguments based on the moral, legal, and political nature of the human rights which has an effect on its relationship with state sovereignty. There are some who think that human rights exist outside legal system of the states and they are moral, independent, and universal, linked to the nature of our own humanity like Chris Brown who thinks human rights have a moral nature rather than legal. In contrast, some others are thinking that human rights exist within legal system of the states and focusing on the particularity of the human rights. In between, there is Andrew Vincent's argument, which is more supported in this paper, who explains this relationship through the political dimension which has both moral and legal outcome, in Andrew Vincent's words; the states can become both object and subject of the human rights at the same time.

Keywords: Human Rights, Sovereignty, Responsibility, State, Humanitarian Intervention, Andrew Vincent

1. Introduction

The relationship between human rights and state sovereignty is controversial, complex, and contradictory. While they compete and conflict one another, they too can coexist. Human rights and state sovereignty are two different topics in theories studied separately but the problem starts in practice as the human rights are expressed by the "positive law" of the states (Jackson, 2007, p.115) and the historical background of the norm of sovereignty starts after the Westphalian peace treaty (1648), which lasted for three centuries before any change happened to it, this sovereignty was based on the absolute right of the state over internal and external issues, in other words it was based on the principle of non-intervention (Kuperman, 2009).

The conventional meaning of sovereignty is "a defined and delimited territory, with a permanent population, under the authority of a government" (Jackson, 2007, p.6). It is noticeable from this definition that sovereignty has both inward and outward dimensions, the former means domestic rule over the population of the state and the latter, which is more relevant with the interventions, is the

independence from outside forces as well as the acknowledgement by the other states in the international community, as Jackson argues that "governmental supremacy and independence is that distinctive configuration of state authority that we refer to as sovereignty" (Jackson, 2007, p.6), which is used as a shelter and safeguard by the weak states to protect themselves from the powerful states. Benedict Kingsbury has stated "the normative inhibitions associated with sovereignty moderate existing inequalities of power between states, and provide a shield for weak states and weak institutions. These inequalities will become more pronounced if the universal normative understandings associated with sovereignty are to be discarded" (Kingsbury, 1999, p.86). Therefore, sovereignty is necessary to protect the weak states, but who can imagine the world without human rights. The universal declaration of human rights has brought the concept of sovereignty under the question of, how much possible for the states to violate human rights of their citizens and justified it nationally or internationally under the shadow of sovereignty, so it was a big step forward for human rights in making an obligation on the states to protect human rights because states can be a key violator of the human rights, meanwhile the existence of the states are essential for its implementation of the (Donnelly, 2003).

In order to examine the reconciliation of human rights and state sovereignty, it is important to know the nature of relationship between them. There has been much discussion about the relationship between the human rights and state sovereignty ever since the universal declaration of human rights came to existence. This article first, examines the impact of the historical evolution of human rights on changing the nature of sovereignty and then engages with the different arguments based on the moral, legal, and political nature of the human rights which has an effect on its relationship with state sovereignty. There are some who think that human rights exist outside legal system of the states and they are moral, independent, and universal, linked to the nature of our own humanity like Chris Brown who thinks human rights have a moral nature rather than legal. In contrast, some others are thinking that human rights exist within legal system of the states and focusing on the particularity of the human rights. In between, there is Andrew Vincent's argument, which is more supported in this paper, who explains this relationship through the political dimension which has both moral and legal outcome, in Andrew Vincent's words; the states can become both object and subject of the human rights at the same time. And then will look at the impact of the humanitarian intervention on promotion and implementation of human rights by focusing on the responsibility to protect which emerged at the beginning of twenty first century and changed the notion of absolute sovereignty to the responsibility to protect, in which will possibly help the reconciliation between human rights and state sovereignty.

2. Human Rights and State Sovereignty

The historical evolution of the human rights is almost equivalent to the political development of the western world; there are three stations where the human rights made a significant step forward and transformed the nature of sovereignty. The first one was during and after the enlightenment period, which changed the divine framework of enjoying rights (natural law) to the natural rights of mankind as it can be seen in the "US declaration of the independence" (1776), and in the "rights of man and the citizen" of the French declaration (1789), which they focused on the "individuality, freedom, and liberty" as they became a good foundation for the human rights, (Langlois, 2009, p.12). So the human rights in the classical liberal are expressed legally as a "civil rights" "in the constitutional law for example "English bill of rights" (1689) and "French declaration of the rights of man". Furthermore, they became

foundation for international human rights after the Second World War for example "UN charter" (1945) and the "Universal Declaration of Human Rights" (1948) (Jackson, 2007, p.119-120). These facts has led Jackson to think that sovereignty emerged as a "privilege" to the kings and leaders, and in 18th century after the French and American revolution that concept was changed to popular sovereignty (Jackson, 2007, p.79) which Thomas Paine defines as "the nation is essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derive from it" (Oackeshott 1939, p. 20 in Jackson, 2007, p.78). The norm of sovereignty was based on the absolute right of the state over internal and external issues the external dimension means the principle of non-intervention which is mentioned and supported in the UN Charter by article 2.4 and 2.7 (Kuperman, 2009, p.336).

The second station is after WWII, where the UN charter (1945) and the "Universal Declaration of Human Rights" (1948) gave universal dimension to the human rights as a moral response aftermath of the Second World War. Both are derived from the liberal political and social theories, which are universal in nature, despite the fact that they imposed the moral obligation on the states, still their implementation is problematic and this progress remained in the promotional level. However, it was a big step forward because it was the first time when the human rights emerged, extended, and recognized internationally (Langlois, 2009, p.15-17), as it is mentioned in the article 21 of the universal declaration of human rights "the will of people shall be the basis of the authority of government" (Donnelly, 2003, p.186). Furthermore, the proliferation of the international human rights declarations and treaties, and the international organizations (NGOs) have created a new status for the individuals in the international sphere and produced a new notion of international legitimacy for the states (Donnelly, 2007, p.29). This promotion of the international human rights law, which started after the Second World War with the existence of the UN charter and the universal declaration of human rights, has made a standard for measuring human rights and became a base for other human rights treaties and declarations, but the implementation of international human rights law remained in the national borders, and became impracticable, weak, and controversial (Donnelly, 2003, p.136) Dunne points out that there are two main reasons which made the human rights to stay in the promotional level during the cold war. First, all the states have given the priority to their national security. The second reason is that the great powers considered the human rights just as a standard not as the responsibility (Dunne & Hanson, 2009, p.62).

The third, station is after the cold war, which will be focused on in the next section, made further erosion to the state sovereignty and the interventions which made a normative change is recharacterized the state sovereignty. The R2P is particularly changed the traditional understanding of sovereignty as a privilege to the new understanding of sovereignty as responsibility, as it is mentioned in the paragraph 2.15 of the report of ICISS in 2001, sovereignty as responsibility "first, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN, and finally, it means that the agents of state are responsible for their actions; that said, they are accountable for their acts of commission and omission" (ICISS, 2001, p.29). So from that statement it can be said that the human rights cannot be eradicated from human beings lives. However, the concept of sovereignty can be changed and recharacterized and it is not an easy task because of problems related to the universality of the human rights, which is coming from the complex relationship between human rights and state sovereignty.

3. The Nature of Relationship between Human Rights and State Sovereignty

There are three main explanations for the nature of relationship between human rights and state sovereignty as it is very controversial, contradictory, and complex which leads to consider universality of the human rights as a matter of controversy and cannot be justified easily. The first two explanations are moral, legal which are based on the normative theory and it is believed in this essay that they cannot give a clear answer as they only show part of the whole image. The third approach is Andrew Vincent's explanation in the political context which is believed to be more appropriate to explain this relationship because it has both moral and legal outcomes.

Chris Brown argues that human rights is emerged from the liberal political theory which believes in all individuals freedom and liberty rights, as they are "inalienable and unconditional", and the states are ought to protect them. He also argues that the nature of rights have a moral foundation rather than legal in order to prove that he used the Hofeld's understanding of rights as claim and refused the positive law to become a foundation for rights, because of the particularity nature of the positive law, furthermore he states that "if human beings have rights by virtue of their common humanity, it can only be because there are some 'general moral standard' that are universal in application". He thinks that these "general moral standard" is derived from the natural law, thus natural law is a foundation for human rights which has the universal nature (Brown, 1997, pp.41-49), therefore majority of the theorists would agree that "human rights are the minimum demand of all humanity on all humanity" (Luban, 1985 in Dower, 1997, p.89).

In contrast, despite the fact that some people define human rights as moral values linked to the existence of a human being independently from the fundamental rights, there are some scientists who think that they still have to be arranged within the legal framework, for example, Forsythe argues that "even if human rights are thought to be inalienable, a moral attribute of persons that the state cannot contravene, rights still have to be identified that is, constructed – by human beings and codified in legal system" (Forsythe, 2000, p.13). This positive role of the state have a philosophical background in the "social contract theorists" like Locke, Kant, and Paine, which they claim that the rights that a person have naturally "cannot be enjoyed in the state of nature" and they also believe that the states can obtain the legitimacy by safeguarding and implementation of these natural (human) rights (Donnelly, 2003, p.35-36). That legal system which is made by the states, and meant to provide the situation to enjoy the human rights according to the contractarian theory, therefore states will have to have the sovereignty. However, the problem is that sometimes states themselves become the violator of human rights or they fail to create the environment, "as a minimum degree of security and order" to enjoy human rights, consequently, the existence of sovereignty will stop and hence the international law will not be violated if the humanitarian interventions occur, so the justification is coming from the sovereignty itself (Ayooob, 2002, p.82).

The justification of the human rights, as appeared in both previous explanations, is one of the problems that is faced by the proponents of the human rights, because both moral and legal meaning of rights have its own problems like. First, if the rights are seen as a moral meaning they become less enforceable because when the rights are claimed on the moral basis, one might think that these rights cannot be

claimed and that cannot be justified easily. Second, if the rights are considered as a legal meaning they become more enforceable because they are specified through the law and there is a clear procedure of how to claim them. However, the problem is, if human rights were legal rights then there would be no human rights unless they were mentioned in the law (Cranston, 1973, p.4-7). That is why the Human Rights Commission did not give any explanation purposely, to avoid these justification problems; and therefore the (UDHR) is considered as collection of a moral demand that needs to be legalized nationally and internationally (Langlois, 2009, p.17).

In between two previous arguments, there is Vincent's argument which is more adequate and satisfactory, because he thinks that the states have "paradoxical", contradictory, and complex relationship with the human rights, because the states are encouraging and promoting human rights meanwhile, they are the main violator of the human rights. In respect of the explanation of the relationship between the human rights and the state Andrew Vincent is using the subject and object expression. His argument is focusing on the political aspect of the human rights, which has a moral and legal outcome and he is presenting this dialectical relationship by two steps, through the combination of two different argument, in the first argument he connects rights to the legal frameworks by focusing on the positive aspect of the state, but in the second argument, he is concentrating on the self-control of the states through the constitution as a specific feature of the state.

In the first argument, he depends on Hannah Arendt's work; the main point which Vincent concentrates on in her work is "the right to have rights" which is derived from the right of the individual to join the groups and can be seen as a "minimal universal". Vincent considered that as a "constitutive" element of the state. She also believes that there is a contradictory relationship, because the only way to attain human rights is through the state, especially the "modern nation state", which is derived from the "French and American revolutions", and the main violations are also done by the states, she acknowledges that there is human rights but this rights does not have the moral or universal ground and the rights outside the legal framework are meaningless and ineffective. She considers that "universal declaration of human rights" is a significant step forward to spread the human rights nationally and internationally.

Furthermore, in the second argument he is dependent on Jellineck's work, who is watching at the human rights through the "public law" and refused the existence of the rights independently out of the "public law" which is the main element for "civil state". Human rights are embedded in the responsibilities and activities of that "civil states" which they have historical background as they came from the "French Declaration of the Rights of Man and the Citizen". He also thinks that the nature of these legal frameworks is independent and they limit themselves through the "constitutional Law". Jellinek believes that the human rights are expressed and protected through the "general principles of law" for example "liberty" is expressed by "supremacy of law" furthermore he is using a "neo-Kantian argument" which shows the state as a "subject will" and autonomous which enables it for the self-control through the constitution (Vincent, 2010, p.165-170). From the last three arguments, it is noticeable that, it is very hard to justify human rights, therefore Vincent's work is the most appropriate to explain the contradictory relationship between two concepts, it is clear that the human rights are expressed by international law, but under the light of this "paradoxical" relationship between human rights and state sovereignty the humanitarian interventions are also controversial which explained in the next section.

4. Humanitarian Intervention

Humanitarian intervention is defined as “coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants” (Roberts, 2002 in Carey, 2010, p.166). Traditionally the idea of intervention was just to hand in some essential needs like food and medicine for the civilians who are in danger from the natural or political disaster and the interveners kept their neutrality, but the notion of the humanitarian intervention is changed significantly to include the use of armed force especially after the cold war (Kuperman, 2009, p.337). As there are two human atrocities which they gave international human rights law a new thrust and shocked the world conscience, the Holocaust and Rwanda, the former helped to promote and recognize of human rights internationally, while the latter helped the implementation and enforcing international human rights as the new international norm came to existence in the -name of humanitarian intervention (Donnelly, 2003, p.136).

This new dimension (using the armed forces in the humanitarian interventions), is challenging the national and international law which they are based on the sovereignty, as the UN charter mentioning its commitment for the norm of non-intervention in the Article 2.4 and 2.7 (Kuperman, 2009, p.337). Article 2(7) in the UN charter “Nothing contained in the present charter shall authorize the united nations to intervene in matters which are essentially within the domestic jurisdiction of any state” and article 2(4) supports it “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state” (Donnelly, 2003, p.243). The original purpose of accepting the norm of non-intervention in the international law was to reduce the conflicts between the states not in the states but during the last two decades the number of intra- state conflicts have raised and that led to the violations of the human rights by the states or the agents of the states, that is why the nature of the interventions are changed to the humanitarian rather than political and multilateral rather than unilateral as Ayoob pointed out. That humanitarian nature have justified and enabled the interventions to overrule the state sovereignty, and that relatively changed the concept of sovereignty as a privilege to sovereignty as responsibility (Ayoob, 2002, pp.81-84).

Kofi Annan in the “Two Concepts of Sovereignty” stating that under the light of mass atrocities which the international community failed to react, like Rwanda, or reacted illegally without the authorization from the Security Council of UN, like Kosovo, the international community needs to resolve issue of how to respond to the critical humanitarian situations, and how to create common ground because the world is changed after the cold war. He also identifies that the norm of sovereignty and the national interest are the main obstacle, while the norm of intervention is developing in the international system (Kofi Annan, 1999, pp.49-50). He also asked a question on how to avoid another Rwanda “... if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”(ICISS report, 2001, p.18).

5. Responsibility to Protect: Embracing Sovereignty and Human Rights

In response to that, in 2001 the International Commission on Intervention and State Sovereignty (ICISS) has released a report ‘responsibility to protect’ which is believed that is a good effort towards the reconciliation of the human rights and state sovereignty because of these reasons. First, it is trying to

find the legal and moral solutions for humanitarian intervention and state sovereignty. This document says that the states have the responsibility to protect their citizens from the “genocide, war crimes, ethnic cleansing, and crimes against humanity” which is a significant shift from “right to intervene” to the rights of individuals to be protected, and the R2P is giving the priority to the states where the violations are happened and if, for any reason, the state fails to fulfil its responsibility to protect the human rights, then international community will take action, furthermore, it is giving the priority to the prevention rather than reaction, and at the same time it considers help for the weak states in order to fulfil their responsibility (ICISS report, 2001, p.17-18).

Second, any intervention on humanitarian ground should meet basic objectives like, establishing the legitimacy of military intervention after all other approaches have failed and making a clear rules and procedures on how and when to intervene. On top of that, finding the solution to the cause of conflict and encouraging the peace process after the intervention which can be seen as a third dimensions of the R2P, but the legal interventions are only authorized by Security Council as the decision making process is not easy because of the political considerations of the big powers who have the right of Veto (Donnelly, 2003, p.257). Third, the responsibility to protect is starting from the fact that states are no longer have the “absolute right of non-intervention” and making their sovereignty conditional on fulfilling their responsibility towards their citizens and if they failed they would be a subject of intervention for humanitarian protection in the cases like “large scale loss of life” or “large scale ethnic cleansing” (Jackson, 2007, p.131).

In addition, R2P is not focusing only on the military interventions, but it will be the last resort, because R2P has three dimensions as follow: First, “responsibility to prevent”, this dimension has a priority before any intervention is happened, because it focuses on making the long term plan for the “root cause” of the conflicts like; “poverty, political repression, and economic deprivation” and the direct prevention through the political, diplomatic, and economic means, the legal foundations for this dimension is Article 99 and 55 in UN charter, what is interesting about this dimension is costing less than the military interventions (ICISS report, 2001, p.19-29). Second, “responsibility to react” this dimension will be activated only if the prevention measures are failed to contain the situation, and military interventions are only happened in the most extreme cases through tough threshold criteria like “just cause” in which the military interventions are only allowed in two cases like, “large scale loss of life and large scale ethnic cleansing”, with taking other precautionary criteria in consideration, like “right authority, right intention, last resort, proportional means and reasonable prospects” Both chapter VII and Article 51 in UN Charter supporting this dimension (ICISS report, 2001, p.29-39). Third, “responsibility to rebuild” this is about international responsibility to help states to rebuild themselves “politically, economically, and judicially” after military interventions by making a long-lasting peace, supportable development, and promoting a good administration in corporation with the local authorities and focusing on three crucial areas like “security, (justice & reconciliation), and economic development” the most relevant article in UN charter is Article 76 (ICISS report, 2001, p.39-47).

In the practical step for R2P, the whole report was expressed by two paragraphs (138 and 139) of 2005 world summit, as it is not enough for that important report which moderates the tension between humanitarian interventions and state sovereignty. However Ban Ki-moon issued a report on “Implementing the Responsibility to Protect” which explains the R2P through three pillars and showing

how to functionalize the R2P in the foreign policy of the states. In pillar one “The Protection Responsibility of the State” he focuses on the states responsibility towards their own citizens to protect them from four crimes “genocide, war crimes, ethnic cleansing and crimes against humanity” as they are mentioned in paragraph 138 in 2005 world summit (Ban Ki-Moon, 2009, p.1-8). Furthermore this pillar as (Gallagher, 2011) saying has the internal dimension, and it has a historical legacy which came from the contractarian notion of the state. And pillar two “International assistance and capacity-building”, this pillar insisting that the international community has a responsibility to help the weak states to meet their obligation towards their citizens and fulfil their responsibility by focusing on the prevention measures, paragraph 138 is supporting this pillar which has external dimension by transferring the responsibility from state to international community through the UN, and Ki-Moon is focusing on the role of the early warning to reduce the crimes of mass atrocities (Ban Ki-Moon, 2009, pp.15-21). Pillar three “Timely and decisive response” this pillar is very controversial and insisting that if the states failed to protect their citizens or when they violate human rights themselves then the responsibility to protect human rights, will be fully transferred to the international community through the UN Security council under chapter VII, this pillar is supported by the paragraph 139 in 2005 world summit, Ban Ki-Moon is stressing on the significant element of the response, because mass atrocities can happen in the short time (Ki-Moon, 2009, pp.22-27).

Despite the fact that R2P is a good report for the reconciliation human right and state sovereignty but it is still could not end the conflict, because of many problems that is facing the R2P. One of these problems is the national interest, states will take part in humanitarian interventions except if they see their national interest is at stake, and even if it is for the humanitarian purposes the states are still not ready for the high expense or for the live losses for example in the case of Somalia, and that will lead to another problem of selectivity which is more likely unavoidable, as Kofi Annan has noted that “if the new commitment to intervention in the face of extreme suffering is to retain the support of the world’s peoples, it must be – and must be seen to be – fairly and consistently applied, irrespective of region or nation” (Ayoob, 2002, p.85-86). Another main obstacle of enforcing human rights internationally is the lack of courage because the failure of one state to respect human rights is not affecting other states national interest and that shows the international human rights is more depending on the “moral interdependence rather than material” (Donnelly, 2003, p.179). There are some new critics about the intervention on the humanitarian basis, saying that it has been used as a means to justify interventions by the powerful nations to interfere in the internal issue of the states (Holzgrefe, 2003, p.18).

6. Conclusion

To summarise, sixty four years after the Universal Declaration of Human Rights, much different world can be seen today as the number of states who protects and brings the international human rights laws and treaties into their domestic law, are significantly increasing therefore, a good future for the human rights can be seen. However, it is still soon to talk about the reconciliation between these two concepts, as the answer is hidden in the future. And we are all aware that the current international system is based on sovereignty, and the historical evolution of human rights has always had an impact on changing the nature of sovereignty especially after the universal Declaration of Human Rights, which led to the paradoxical relationship between the human rights and state sovereignty, and also after the cold war when the nature of sovereignty is more changed from privilege to responsibility.

The big question is what will happen to the world without human rights. In the answer, it could be said that there will probably be more genocide and more crimes against humanity, and there is no any legal principles explicitly recognizing sovereignty as responsibility, so that becomes difficult for international community to make any decision about interventions in the case of human atrocities under the current system of the international law, and that, on the one hand, will help the states to become the main violator of human rights, and, on the other hand, there is no any alternative available to states as providers and protectors of human rights, which will lead to the paradoxical, contradictory, and complex relationship between human rights and state sovereignty. However, the human rights should be given a priority.

The R2P is considered as a good report to keep the balance between human rights and state sovereignty and it was a big step forward towards the reconciliation between the two concepts, but the current international system is still not complying and adaptable with it. However, even though it could not reconcile them, it is still reduced the tension between them, because it has brought a new notion of intervention which is different from previous understanding of intervention in two ways according to Ayoob, first the new interventions are distinctive in terms of purposes and goals, which supposed to be humanistic and global in nature rather than related to the national interest. The second difference is being carried out by international community rather than one or two states. And it is not the end of the R2P yet, the future decades will tell us more about that, but in any case the international system should be changed, as Donnelly thinks that current international system is still based on the sovereignty which it cannot adapt the universality of the human rights. This is more acceptable in the world which is based on the cosmopolitan concept of the world order where the individuals and the organizations other than states can play a big role (Donnelly, 2007, p.30), and even if the world government is impossible, still the international system should change in the way which is more adaptable with the sovereignty as responsibility and it is believed that the international system will change in favour of human rights.

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