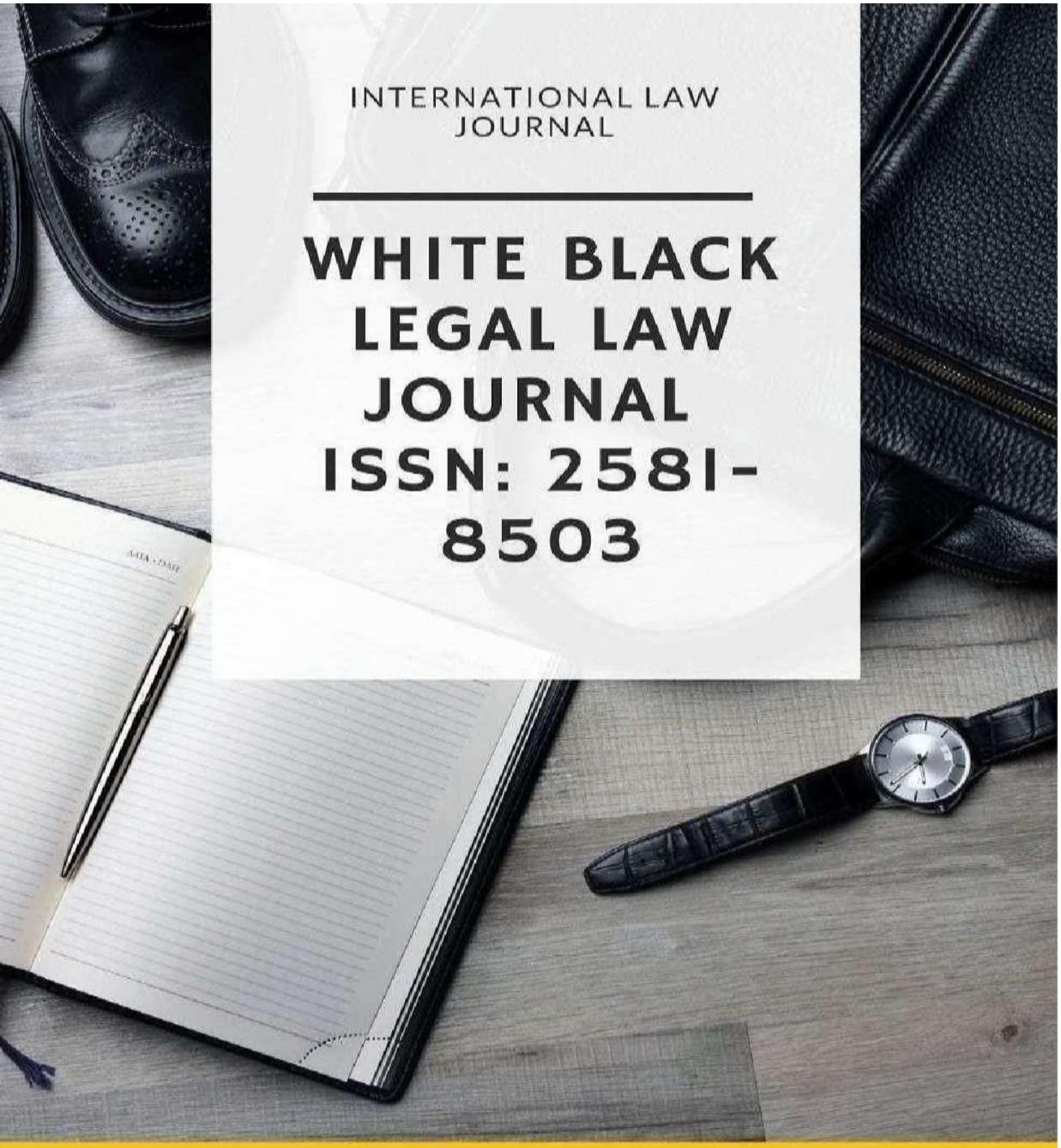

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With this thought, we hereby present to you

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MULTIVALENT SCHOOL OF THOUGHT TO SUSTAIN DIVERSITY IN LAW

AUTHORED BY - DEEPATHANISHA THAMBIRAN

ABSTRACT

As we progress towards universal norms and standards adhered to globally, the challenge of diversity in law arises. **With different legal traditions around the world, what will be the guiding factor or the source of this universal norm? Which legal tradition or principle should be used as a parameter to dictate or regulate the conduct of a global citizen?** Globalisation thrives on difference and diversity. With domestic laws influenced by international standards of rights and duties, the international society can be seen moving towards the constitutionalization of international law. While doing so, the epistemic community should also protect diversity in law.

Diversity in universal law deals with - Normativity- Tolerance- Identity.

All legal traditions have certain principles which are normative in character. Normativity regulates the code of conduct. Some norms, like human rights, can be seen as standard norms across different legal systems. Individualistic systems like civil law and common law focus on liberty and rights, whereas collective traditions focus on alternative concepts to rights. Both these systems can borrow certain community benefits and self-empowerment concepts from each other. Working with varied legal traditions with contradictions and inconsistencies will help better understand the law and global justice.

Tolerance towards other legal traditions involves accepting them despite their differences. For the transitional phase towards the universality of international law, there should be consistent protection of human rights all around the world. The identity of an individual is a multivalent concept in the post-modern world. An individual is not just a private person or a statesman but also a citizen of the world. According to Kant, being a global citizen is a common right of all humankind and violence anywhere is felt everywhere.

Thus, in this paper, I will work on the universality of human rights from the perspective of different legal traditions to identify the extent of diversity in law.

After the Second World War and its impact, the countries needed international standards for trade and regulations. The powerful and victorious countries with domination started the League of Nations, and without question, their laws and procedures were taken and eventually imposed as international standards. Other countries were expected to adhere to these standards with more dialogue about the possible other legal systems and their parameters. Thus, international law became a one-size-fits-all. The developing and the underdeveloped countries had close to no opportunity to represent their views and were forced to follow standards fixed by international organisations.

NORMATIVITY

Normativity regulates the code of conduct. The technical aspect follows the procedure established, whereas the substantive aspect is the moral content of the law. The validity of a law is eventually judged by its functional attributes. International standards give a platform to analyse those attributes critically. Rights and obligations become meaningful when they fulfil the wishes of their subjects. About human rights, Prof M Loughlin states human rights are a modern version of natural rights whose character is essentially an appeal to some fundamental set of rights that inhere in the individual and demand recognition, whether or not they have been enacted in the laws of particular states.[1]

UNIFORMITY AND DIVERSITY

While universality sets the minimum standard to adhere to, it also has shortcomings. In uniformity, the rate of change is difficult. Humans are social beings, and the law operates in a society bound to change with time. For instance, what is considered moral today might not be moral tomorrow. Law, which derives its source from the character of society, also changes dramatically in due course of time. If the laws and legal systems followed around the world were the same, then every nation would suffer simultaneously from the same shortcomings of

[1] T Naidike, *Normative basis of law as the source of rights and obligations,*T Naidike's blog, (Nov 20 2022, 9.29 pm) https://tnaidike.wordpress.com/normative-basis-of-law-as-the-source-of-rights-and-obligations/#:~:text=A%20legal%20right%20properly%20so-called%2C%20created%20from%20the,just%20law%20plays%20the%20part%20of%20an%20equaliser.

the law. As stated by Rodolfo Sacco, the rate of change will be difficult.[2] However, this argument does not suggest that unification should not be done. All societies around the world can follow the core principles. However, the procedures and supplementary aspects of the law cannot be expected to be universal since diversity is not just about inter-society but intra-society as well. For instance, the same or similar societies can have different laws and systems, while contrasting societies can also share similar views.[3] So, this makes it very subjective. Uniformity creates conflicts when there are more solutions to one problem. Society is not static, and neither is the law. There will be growth and progress only if there is room to accommodate variations. Such variations are common not just to law but to all conduct of human beings. For instance, legal education also focuses more on comparative law because of the need for awareness and inclusiveness of other legal systems to come to a consensus. Just like variation, law too cannot stop at one goal; it keeps looking for different and better solutions to ever-arising conflicts. That is why, while aiming for a universal norm, it is imperative to be cautious of the alternative schools of thought. The failure to do so will lead to history repeating itself when the period of colonisation imposed a single set of Western norms on diverse societies without considering their uniqueness.

While UDHR claims to list out the core principles and standards applicable universally, the law's functionality could be judged from data showing how poor human rights protections are in most Asian countries.[4]

How different legal traditions incorporate human rights depends on their civilizational history and colonisation. For instance,

- The civil law system aims to use the law to administer the state.
- The common law system uses the law to protect its subjects.
- Although similar to civil law states, Islamic states consider the law and the state as one integral part and not a different concept.

Islamic states follow religious laws that talk about most of the conduct of human beings. The concept of universal human rights dictates that human conduct acts in the same area. Thus, it could violate secular autonomy if the UDHR is imposed on them just like other legal systems.

[2] Sacco Rodolfo, *Diversity and uniformity in the law,* vol 49, no 2, (2001), The American Journal of Comparative Law, pp 171-89
[3] *Id* at 02
[4] Mitchell, Sara McLaughlin, Jonathan J Ring, and Mary K Spellman. *"Domestic Legal Traditions and States' Human Rights Practices."* 50, no. 2 (2013), Journal of Peace Research, pp 189–202

Though core principles and the basis of these rights can be traced to find common ground, the procedure of realising such rights must be recognised.

THE COLONIZER AND THE COLONIZED

When the colonies gained independence from their respective colonisers, they either retained their colonisers' legal system or returned to their native systems. The colonised states that retained their coloniser's legal system have a weaker system in place comparatively. The reason is that the colonisers, like the British, while governing India, deployed their legal system, which developed organically in their country over a period of time and imposed it on their colonies, which might not be suitable for such a population. With socio-cultural differences and diversity, each society differs in what kind of law they respect and follows.

Two aspects can judge a legal system. One is the validity and procedure followed, which is a technical aspect.[5] The other is the practicality of such a law and how successful it is operating and accepted in a given society. Most of the issues of inefficiency and failure of the administration of justice happen in a state because of the incompatible laws it has. For this, the colonisers have to be blamed.

In their paper, Linda Camp, Keith and Ayo Ogundele[6] Argue that colonised states have a weaker legal system than others. After independence, the colonised states had to govern themselves while fighting the loss of identity and other issues created during the colonisation. The other issue was the dual legal system imposed in the colonies. Colonisers have created different legal systems to be imposed on their colonies based on their level of civilisation and beneficial interests. One is the western legal system, and the other is the multiple laws followed by different chiefs of the native society, which can be seen in the indirect governance of British colonies.

In a study about the effect of different legal systems in implementing human rights, it is found that around 90 per cent of the French legacy colonies have achieved moderate human rights

[5] H Patrick Glenn, Legal traditions of the world: sustainable diversity in law, pp 361-385 (oxford university press, 2010)
[6] Keith, Linda Camp, and Ayo Ogundele. *"Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights."* 29, no. 4 (2007), Human Rights Quarterly, 1065–97.

protection compared to 78 per cent achieved by the British colonies.[7] Though there is no data to show the direct relationship between legal systems and human rights abuse, different legal systems are one of the factors influencing the same.

Legal systems are essential not just to the law and order and governance of the nation but also to the nation's growth and development. Because when it comes to business, even when the finances, supply chains, products, and customers are taken care of, in the end, the type of legal system in force will decide the operation of the business.[8]

DIVERSITY AND HUMAN RIGHTS

Constitutionalism dramatically impacts the state's respect towards human rights. A nation's constitutionalism is developed in time based on its history, process and context. Every nation's experience is different and unique as it experiments with trial-and-error methods to find the appropriate system that works for its society. When human rights come into the picture, it has more characteristics of Western individualistic values. After independence, the new states in international law could not place their contribution in international law because of their loss of identity.[9] The concept of dictating the constitution to powerless nations by dominant states also impacts the rights and obligations respected by their subjects. Human rights violations are still prominent in many countries, especially in Asia and Africa.[10] because when individualistic values are imposed universally, there is no public consensus. When the legal system and local customs are mutually inconsistent and incompatible, it results in a weaker system.[11]

1. Another cause for human rights violations is the act of state repression to control public dissent. This is due to the lack of resources in a larger population, which leads to unfulfilled promises and strained resources, making it more challenging to provide human rights protection.
2. The ethnic composition of society also affects the operation of human rights, an empirically proven concept.
3. Economic standing also leads to more national human rights issues.

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[7] Mitchell, Sara McLaughlin, Jonathan J Ring, and Mary K Spellman, *supra* note 4 at 04
[8] Low Kee Yang and Philip Zerrillo, *A walk through Asia: Negotiating the legal systems in ASEAN*, vol 5 issue 1, the centre of management practice (SMU), pp 1–2, https://cmp.smu.edu.sg/ami/article/20180530/negotiating-legal-systems-asean
[9] Anand, R. P, New states and international law, pp 1–78, (hope India publications 2008)
[10] Human rights in Asia pacific- research: Review of 2019, ASA 01/1354/2020, Amnesty International 2020, https://www.amnesty.org/en/documents/asa01/1354/2020/en/
[11] Keith, Linda Camp, and Ayo Ogundele, *supra* note 05.

4. Military regimes can be another factor, as they require the use of force, the human rights regime can be seen as weaker respectively.
5. Political democracy
6. The judicial independence of a nation also influences the protection of human rights, especially during the emergency period of the government.

Though these cannot be used to justify the human rights violations and the failure to protect thereof, it is still essential to admit the procedural difficulties in implementing them. Because even similar societies have different legal systems, and contrasting societies have similar laws.[12] Diverse methods must be formulated to incorporate universal norms into the domestic cultural and legal system.

HUMAN RIGHTS AND COMMON MORALITY

The central premise of universal human rights is the existence of a common morality.

Even if the foundation and the basis for these rights are the same, the purpose of realising these rights and their values is different in different cultures. The concept of cultural relativism also talks about the same phenomenon.[13] According to cultural relativism, all cultures are equal, and their evaluation ought to be internal to that particular culture. For example, let us take Asian values into account. It has a history of respect for authority, family ties, frugality, savings and sacrifice, and punishment as a deterrent for crimes which cannot be compared to individualistic values.

Human rights are not the result of natural rights but of civilisation. Civilisations are developed by the change of time and their respective values. Thus, human rights cannot be static. It changes and should change according to time to remain relevant. In that case, how can the whole world follow a universal norm when those rights are bound to change in time?

Human rights cannot be abstract; they overlook the functionality in the real world. For instance, the Chinese Confucian concepts focus more on harmonising the conduct between individuals and society, unlike the Western concepts of catering more towards individual growth and

[12] Ghai, Yash, *"HUMAN RIGHTS AND ASIAN VALUES."* 40, no. 1/4 (1998), Journal of the Indian Law Institute, pp 67–86.
[13] Walker, Scott, and Steven C. Poe. *"Does Cultural Diversity Affect Countries' Respect for Human Rights?"* 24, no. 1 (2002), Human Rights Quarterly, pp 237–63.

rights.[14] Thus, ignoring these diverse concepts will result in epistemological violence based on cultural differences.

INTERNATIONAL RELATIONS

The drastic difference in values can be seen even in the international relations between the states.

For instance, though Europe and Asia are part of their regional groups, their purpose is different as the European Union was formed primarily for interdependence; the ASEAN was formed primarily based on non-interference. According to the basic principles of AHRD, HUMAN RIGHTS ARE UNIVERSAL, INDIVISIBLE, INTERDEPENDENT AND INTERRELATED.[15] Nevertheless, the emphasis is given to the realisation of these rights in the regional context, taking into account the political, economic, legal, social, cultural, historical and religious diversities. In the paper, human rights and Asian values,[16] The author compares the nature of human rights in light of whether they are Western norms in disguise.

At times, some rationality can be found in the argument about whether these values cater more to trade and commerce and not the national interest of individual states. The jurisprudence of modern international law also rethinks the consensus of the international community as a whole regarding these arguments.[17] Human rights can also be seen taking a backstage when it comes to commercial morality and standards in international trade, which brings the question of human rights in disguise, ignoring the alternative legal systems and their values.[18] This brings the question of whether we have enough data to prove the efficiency of the UDHR in significant populations with different socio-cultural setups. Even if the West has a proven concept of adhering to human rights as given in the UDHR, how is it applicable to other parts of the world with incompatible legal systems and societies? With multiple definitions of justice and multiple variables involved, how nuanced should the study be on global justice? Rights must be

[14] YARULIN, Ildus, and Evgeny POZDNYAKOV, *"ARE UNIVERSAL HUMAN RIGHTS UNIVERSAL?"* .no. 71 (2021) Politeja, pp 67–77.
[15] See general principle 7, ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration, February 2013
[16] Bagchi Anandita, *"Human Rights and 'Asian Values' – A Forced Dichotomy?"* East Asia research programme, (Nov 11, 2022, 1.20 am), http://earp.in/en/human-rights-and-asian-values-a-forced-dichotomy/
[17] CONSTANTIN, ANDRÉS, *"Human Subject Research: International and Regional Human Rights Standards."* 20, no. 2 (2018), Health and Human Rights, pp 137–48.
[18] Cerna, Christina M, *"Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts."* 16, no. 4 (1994), Human Rights Quarterly, pp 740–52.

examined in the light of expatriates and the majority, privileged and indigenous, individual rights versus social rights.

To conclude, diversity in law is integral to achieving universality. Legal systems, primarily Individualistic traditions, can borrow normativity and group rights, as seen in environmental legislation, while legal systems with collective traditions can borrow self-empowerment rights from the other. Adopting a multivalent school of thought is not just considering the different legal traditions but accepting them despite the differences. This school of thought will facilitate the non-violent adoption of universality. The right of visitation, which is the right to present oneself to the global society, requires consistent application of human rights. In the transitional phase of moving towards a cosmopolitan society, harmonising the differences between the socialist states, western capitalistic states, and Islamic states is integral. Initially, when just over 50 countries adopted the UDHR, the interest of certain states was marginalised. However, since then, 18 treaties and optional protocols that advance human rights have been internationally agreed upon. This development shows the trend of acceptance toward universal norms. At the same time, procedural laws and the margin of discretion must be given to the states to account for the diverse legal systems around the world. Change must come from legal scholarship as well. Once the need for inclusiveness and the existence of diverse legal systems are accepted among scholars, the work of formulating a foundational standard will be functional. Instead of working on the procedural difficulties of imposing universal human rights norms, the laws should be formulated bearing in mind the diverse socio-cultural differences in the legal systems around the world. Unlike private laws and business agreements, human rights have to be agreed on a dynamic footing to cater to the needs and demands of the future. If the departure and the reaching point are the same, it limits the scope of innovation and the source of alternative solutions.