

Enforcement of International Human Rights Law by Domestic Courts

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Abstract

While international community has attained considerable success in creating international norms to regulate protection and promotion of human rights worldwide, it has not been able, understandably owing to inherent weakness of international law, to provide for effective international mechanism to enforce those norms. This has been sadly manifest in the frequent non-observance of human rights norms by many states in relation to their nationals. While international judicial and quasi-judicial mechanism has not developed sufficiently to deal with violation of human rights in state territories, municipal or domestic legal system has remained so far largely unused to enforce international human rights in respective state territories. The issue of invoking international human rights law in domestic courts would invariably bring to focus the relationship between international law and domestic law and the status of international law in domestic legal system as well as the role of domestic courts in relation to the application of international law.

There are, no doubt, characteristic differences between international law and municipal law. These differences have been often over-exaggerated or understood differently in different states, with the result that there exist widely diverging theoretical approaches towards understanding the relationship between international law and municipal law. This explains why status of international law in domestic legal system and the role of the national courts to apply international law varies greatly from country to country. These divergent perceptions of international law tend to weaken the regime of enforcement of international law in state territories, because the states believe they have the liberty to apply the norms of international law in state territories the way they like, not always the way they ought to. But there are strong theoretical reasonings and arguments for narrowing down these differences in perceptions of international law and its application by individual states. Greater uniformity in perceptions and approaches towards application of international law could immensely improve the regime of enforcement. Emphasizing the legal nature and binding character of the norms of international law could provide the key to the problems of ensuring uniformity of state practices and facilitate invocability of these norms in domestic courts.

In principle, given that the norms of international law are legal and binding in character, it is not inappropriate for domestic courts to apply international law directly, if it does not contradict domestic

norm. However, qualitative change in international law in the last few decades seems to have made participation of domestic courts in the application and enforcement of international law conceptually inevitable and legally essential. First, concept of *hostis humanis generis* and resultant recognition of universal jurisdiction of any duly constituted international or domestic court for certain crimes has made individuals subjects of international law. International War Crimes Tribunals at Nuremberg and at Tokyo, International Criminal Tribunals for Rwanda and for Yugoslavia and International Criminal Court have confirmed this development. *Pinochet case* has relied on universal jurisdiction. Second, many international human rights instruments including International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Genocide Convention, Convention against Torture, Convention on the Rights of the Child and Convention Against Discrimination of All Forms Against Women, have not only provided for rights and obligations of the states parties towards one another, but also proclaimed rights of the individuals which are to be protected by the states of the nationality as well as by the international community. Individuals are no more passive objects of the treaties who can only derive benefit through their respective states; they have also become active subjects of international law, albeit, through their states to assert their rights by various means. Third, the view has gained strong ground in international law that human rights obligations are owed *erga omnes*, that is, to the whole international community. This has strengthened the concept of universal jurisdiction to deal with gross human rights violations. Fourth, in case of massive violations of human rights like genocide, ethnic cleansing, torture, traditional concept of exclusive domestic jurisdiction does not hold good.

These developments essentially presuppose the necessity and permissibility of invoking international human rights law in domestic court and according *locus standi* to individuals in domestic courts. Rights of the individuals proclaimed in the international human rights instruments imply remedies which can be best provided by domestic courts. It would not be easy to imagine the citizens of a state to have recourse to international mechanism, if there be any, for the redress of violation of their rights. Domestic courts are for obvious reasons more appropriate and convenient forums for the individuals to seek relief. Giving rights to individuals would seem to imply the rights to invoke them in the domestic courts. European Convention on Human Rights and Fundamental Freedoms recognizes the right of the individuals to have recourse to domestic courts in case of infringement of their rights provided for in the Convention (Art. 13).

When norms of international law are invoked in domestic courts, and the courts do entertain private right of action i.e. *locus standi* for individuals and organizations, and apply international law, we talk of direct application of international law in state territories. The question of direct application of international law is not as complex as it has been made to so appear by over-cautious state practices. In fact, domestic courts do apply international law. Frequency and extent of such application have varied from country to country and have also depended on the varied nature of causes of action. Numerous

international human rights instruments providing for the rights of individuals and increasing acceptance of individuals as subjects of international law have contributed to more frequent application of international law by domestic courts. Many European countries specially new democracies of Eastern Europe including Russia have more radically opted for direct application of the norms of international law, specially international human rights law.

Invocability of international law in the domestic courts and conferring *locus standi* on the individuals and private organizations i.e. direct application of international law in state territories will, however, engender complex of problems requiring appropriate elucidation and resolution.

There is wide gap between practices of different states on domestic implementation of the norms of international law, specially international human rights norms, which need to be narrowed down

While the constitutional position of domestic enforcement of international law in the United States would seem most ideal, the practical aspects of it are not. Article 6, Section 2 of the U.S. Constitution provides that "...all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". On the other hand, the U.S. Supreme Court in *Paquete Habana* has ruled that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination".

Both treaties and international customs supersede all inconsistent state and local laws and also earlier inconsistent federal laws, but not the Constitution. This position is congenial to domestic enforcement of international human rights law. In reality, however, the legal position is marred by series of exceptions and deviations, which, in fact, have become laws themselves to hide the actual legal position.

Division of treaties into self-executing and non-self-executing and discretion of the organs of the state to declare any treaty non-self-executing has substantially narrowed constitutional scope for direct application of treaties. On the other hand, *Filartiga v. Pena-Irala* notwithstanding, the U.S. courts are often found reluctant to engage in vigorous intellectual exercises to construct customary international laws from universal state practices and apply them within their jurisdiction. Moreover, whether it is treaty norm or customary norm, any attempt on the part of the judiciary to enforce international law could be blocked by later-in-time enactment by the congress. Initiatives and activities of the courts can also be squeezed by the doctrines of sovereign immunity of the state, act of the state, political question, *forum non conveniens*, and resultant deference to political branches of the government.

While the U.S. domestic human rights records are commendable, direct application of international human rights instruments in the U.S. territories is not. This is a contradiction which manifests itself in poor U.S. ratification records of human rights treaties, in the sweeping reservations, understandings and declarations (RUDs) attached to ratified treaties and in attempts to endow all treaties with non-self-executing status. Costs of the policies of non-ratification, making of sweeping reservations and declarations on ratified treaties, and U.S. courts' over-cautiousness to use international human rights law are proving very high, for it passes a wrong message to the world community about U.S. human rights commitment. Despite the best intentions of the U.S. Government and the people, it cannot but have a negative impact on world human rights movement.

The United Kingdom's approach towards implementation of international law is dualistic. Treaties in U.K., are never self-executing. They are applied through transformation i.e. specific adoption by enabling legislation, when necessary. So far as it concerns human rights, the governments in U.K. have always insisted that "the very rights and freedoms recognised by other system are inherent in the United Kingdom's legal system and are protected by it and by Parliament".

However, there has been growing criticism of U.K.'s human rights performance and, in particular, of her inadequate holding of standards contained in the European Convention on Human Rights. In view of this development, and pressure both from inside and outside, the U.K. adopted European Human Rights Convention Act in 1998 incorporating the provisions of the European Convention. It is considered a major development and progressive shift in its human rights implementation policies. Customary international law, on the other hand, is considered part of common law, but to the extent that they are not conflicting with statutes. In principle, they are to be directly applied by the courts.

Like many other commonwealth countries implementation of international law in India generally resembles that of U.K. in that it envisages implementing legislation in case international norms affect rights of citizens and entails change in domestic law. However, Indian courts specially the Supreme Court have played over the years such a dominant role under now well-known in the sub-continent concept of judicial activism that enforcement of international human rights norms has acquired in India a new dimension, markedly distinguishing her from other commonwealth countries. Indian Supreme Court has rarely missed opportunity to take advantage of progressive provisions of international human rights law to illuminate its own law, so it could provide justice to the victims of violations of human rights.

If we look at domestic enforcement of international human rights law through the prism of monism and dualism, it would appear that the countries of Europe are more monistic rather than dualistic in approach. However, it may be too simplistic to evaluate the problem merely by these two concepts. In practice, individual states have developed their own peculiar methods of applying international law. Significantly, the new democracies in East Europe including specially Russia have strengthened Europe's predominantly monistic tradition.

Weimer (Germany) Constitution of 1919 regarded generally recognised principles and rules of international law i.e. customary norms as part of the federal law, and hence directly applicable in the federal territories. The Spanish Constitution of 1931 placed treaties above domestic law, and this provision was incorporated in the Constitution of 1978. The French Constitution of 1946 accorded to the treaties superior position, and provided for direct application, curiously subject to the condition of reciprocity. Dutch Constitution of 1953 went further and made treaties superior not only to legislation but also to the constitution, and rendered them directly applicable. The 1993 Constitution of Russia provided for direct application of international law, and placed rules of international treaty above domestic law.

The courts in the countries of Europe enjoy wide power and jurisdiction to apply international law, whether treaty or customary. Application of general international law by the national courts in Europe have been influenced by the application of the European community law by these countries. The decisions of the European Commission, the European Court of Justice and the European Court of Human Rights have greatly influenced the jurisprudence of judicial decisions of the member-states.