Human rights law: an unexplored aven

Adeel A. Mangi

And what is the argument on the other side? Only this, that it has never been done before. It is an argument which does not appeal to me in the least. If nothing were attempted which had never been done before, the law would remain the same whilst the world would move on. And that, would be bad for both.
Lord Denning, House of Lords, Packer vs. Packer (1954)

So spoke one of the greatest judges of the twentieth century, a man eternally in pursuit of justice over mere application of law. His words carry a deep significance for Pakistan. The protection of human rights through the legal system is an issue which has received increasing public attention in our country in recent years.

High profile cases such as the blasphemy cases and the Saima case, as well as the dedicated work of the Human Rights Commission of Pakistan, have focused public opinion and raised awareness.

Whilst much has been achieved, however, it is submitted that one extremely promising legal avenue has received scant attention. This relates to the use of customary international law within Pakistani courts.

Customary international law is one part of international law, a larger body which includes items ranging from treaties to decisions of International Courts to authoritative writings.

Customary international law is comprised of those rules which are regarded in the international community as having received the common consent of civilised nations.

Now, these rules can be applied in national courts in two ways. The first of these is the theory of incorporation and the second is that of transformation.

A useful definition of the doctrine of incorporation is provided by Nourse L.J. in the English Court of Appeal in the International Tin Council case to the effect that "the rules of international law from time to time in force are automatically incorporated into the common law and, subject always to statute, are supreme" i.e., a rule of international law is automatically applicable in national courts so long as there is no conflicting national statute or common law rule. It now seems, particularly after the Trendtex case, that this is the doctrine which reign supreme in English law.

Transformation is defined by Brownlie as the view that "customary law is a part of the law of only in so far as the rules have been clearly adopted and made part of the law by legislation, judicial decision, or established usage".

In countries which subscribe to this view international law only becomes a part of national law on the enactment of a national statute to the same effect.

Pakistan, as established in the case of Qureshi v USSR, follows the English model and has adopted the incorporation approach. This simple fact opens up a wealth of opportunities for those engaged in the protection of human rights in this country which remain, as yet, largely unexplored.

What constitutes a rule of customary international law is, of course, an open question. Treaties, conventions and custom all contain expressions of international law, but when these crystallise into rule of customary international law is a more subjective question.

There is reason to believe, however, that an activist judiciary, such as one we currently have, would be favourably inclined towards efforts to extract such rules. In recognising rules of customary intonational law nor would they be alone. A few examples could be useful on the recognition of a rule of customary international law.

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The US also follows a broadly incorporation based approach and its judiciary has made extensive use of the concept. The predominant American legal theory was effectively articulated by Mr Justice Gray in the case of The Paquette Habana (1900). He stated: "International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act of judicial decision, resort must be had to the customs and usages of civilised nations."

An older precedent to the same effect, should one be needed, can be found in the judgment of Chief Justice M 'Khean in the 1784 case of Respublica v De Longchamps where he asserted, "The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this State."

The case of the Paquete Habana is, in fact, a useful one for the purposes of illustrating the American legal theory at work. Janis and Noyes refer to it as "probably the best known decision of a US court finding and applying customary international law".

Two Spanish owned and manned fishing smacks running out of Havana, were captured by a blockading squadron during the war with Spain. They were brought to Key West where they were condemned by a district court as prizes of war and auctioned off.

The question for the court was whether this capture conflicted with a norm of customary international law. The court explored a mass of treaties and international agreements as well as military orders and writings by jurists and commentators in the course of their investigations.

They finally concluded: "This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilised nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."

Following this approach the American

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Courts have found themselves willing to find rules of customary international law applicable in American law in a number of cases. Two examples will be illustrative. The first is that of Filartiga v Pena-Irala (1980), where the court found (per Kaufman J) "that an act of torture committed by a State official against a person held in detention violates established norms of the international law of Human Rights and hence the law of nations".

It is also important to note that the court in that case submitted "that a Declaration (such as the Universal Declaration of Human Rights) creates an expectation of adherence.....(and) insofar as the expectation is gradually justified by State practice, a Declaration may by custom become recognised as laying down rules binding upon the states."

The second illustrative case is that of Hess vs. Argentine Republic (1987) where, although overruled on appeal on different grounds, the court laid out the rule of customary international law that attacking a neutral ship in international waters during a war is a clear violation of international law.

There is absolutely no reason why the Pakistani common law could not build on similar foundations. If lawyers were to make effective use of this it could be the genesis of a revolution in Pakistani human rights law. Successive Pakistani governments have shown consistent lethargy in signing and ratifying the wealth on UN human rights conventions. This method of back door incorporation could be the ideal way to circumvent that culpable lack of commitment.

To eternally wait for enlightened legislation is a futile hope. The judicial option is one which must be explored to its full potential.