"THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS"

A paper prepared by
Mr Justice Muhammad Haleem,
Chief Justice of Pakistan

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SYNOPSIS

The title of the paper on "Domestic Application of International Human Rights Norms" reflects the belief that the world has moved into an era in which greater conscious effort is being launched toward the promotion and protection of human rights on a global scale. This paper is meant to draw the attention of states constituting the comity of nations to undertake steps for effective national, regional and international measures to halt the deprivation of rights. The treatise has projected the role that domestic courts can play in the enforcement of international human rights norms.

The processes referred to above began in earnest with the adoption by the UN General Assembly of the "Universal Declaration of Human Rights", which provided the necessary impetus for the development of a global human rights movement. Since then, activities at the United Nations have included the drafting of a large number of conventions, covenants and treaties on human rights. Although nation-states have not been able to match their impressive record of codification and prescription with equally vigorous attempts at the application and enforcement of human rights norms, recent developments suggest that effective steps are essential in that sphere. The present paper attends to this universally felt need. It points to the new directions that are emerging to design an expanded role for domestic courts. It has been emphasised that domestic courts can play a meaningful role in the transnational development and diffusion of international human rights norms.

An effort has been made in this paper to refine human rights theory and concepts and to verify the various competing and contending human rights perspectives. The paper covers a number of relevant dimensions such as the significance of human rights, equation of human rights and the rule of law, internationalisation of human rights, the role of the UN Charter of Human Rights, the contributions of the UN Commission on Human Rights, the nature and scope of human rights treaties and conventions, a probe into the European, the African and the American systems, a look into the approaches to the implementation of human rights norms, an examination of human rights jus cogens, the relations between international human rights norms and domestic law, the domestic legislative protection of international human rights, the incorporation of international human rights norms in national constitutions, and finally and most importantly the direct application of the international law of human rights by domestic courts.

The thesis inherent in this paper points to three special features of international human rights norms: for instance, there is a recognition that individual citizens are now treated as subjects of international law; that nation-states are the primary guardians of international human rights;

and that the prime need of immediate significance at the international level is that the international community and its member states should concern themselves lawfully with human rights violations and control them by a process of the assimilation of verdicts given by the domestic courts in this field. Thus the paper sets the stage for further work that will aid in the actual protection and enforcement of human rights at the global level.

SIGNIFICANCE OF HUMAN RIGHTS

The quest for human rights and human dignity is a phenomenon of contemporary life of universal dimensions and immense significance. The concept of human rights is a concept of world order. It is a determination for so structuring the world that every individual's human worth is realized, and every individual's human dignity is protected.

Human rights are based on an international consensus. They include the right not to be subjected to torture, to cruel, inhuman or degrading treatment or punishment, or to arbitrary arrest, imprisonment or execution. Human rights also include the right not to have one's home invaded and the right to fair, prompt and public trial.

A state is considered to violate international law if it practices, encourages or condones:

(a) genocide,

(b) slavery or slave trade,

(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhuman or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination, or

(g) consistent patterns of gross violations of internationally recognized human rights

Human rights are of broad application. They apply not only to countries that have recognized these rights in their legal institutions, but to virtually all countries.

Human rights are not controversial in the sense that other political and economic issues are. These are recognized in the constitutions of many countries whose political principles are otherwise quite divergent.

Human rights express universal requirements of social justice. The international commitment to implement human rights is a commitment to encourage the development of just institutions in every society. These rights are inalienable in the sense that a person who has them cannot voluntarily and irrevocably divest himself of them by gift, sale or transfer to another person.

The history of mankind can be described as the history of the long struggle to assert and then to protect human rights. The concept has made a remarkably sudden entry into the international vocabulary. It has become a very live issue in the conduct of world affairs, and the world as a whole is now seized with the issue of human rights.

EQUATION OF HUMAN RIGHTS AND THE RULE OF LAW

Human rights can be enforced in settings where the rule of law prevails. The American Conference on "World Peace Through The Rule of Law", held at San Jose, Costa Rica in June 1961 agreed that the effective protection of the fundamental human rights of the individual is the indispensable basis for achievement of a sound legal order based on peace and justice. Similar conferences of continental scope held in Nigeria, India, Thailand, Sri Lanka, Japan, Brazil and Italy yielded identical conclusions and they were given universal expression in the "Declaration of General Principles for a World Rule of Law", adopted at the First World Conference on "World Peace Through The Rule of Law" held in July 1963, at Athens in Greece. A consensus emerged that all states and persons must accept the rule of law in the world community. It was suggested that in international matters, individuals, juridical persons, states and international organisations must all be subject to international law, deriving rights and incurring obligations thereunder. The Conference also concluded that international law and legal institutions must be based on fundamental concepts of fairness, justice and human dignity.

In 1949, the International Law Commission in Article 14 of its "Draft Articles on Rights and Duties of States" formulated the basic principle of the state system as follows:

> "Every state has the duty to conduct its relations with other states in accordance with the principle that the sovereignty of each state is subject to the supremacy of international law."

The important point is that the peoples of the world now have an established institutionalized process through which they can freely and unambiguously express their expectations about policy, authority and control in relation to human rights.

The general principle establishing international accountability and the right to censure is now regarded as a settled law. Any state may pursue international remedies against any other state for a violation of the customary international law of human rights. The International Court of Justice gave currency to this idea in the Barcelona Traction case by suggesting in a dictum that "basic rights of the human person" create obligations erga omnes. Since the Judgment of the PCIJ in the Barcelona Traction case, there has been a growing acceptance in contemporary international law of the principle that all states have a legitimate interest in and the right to protest against human rights violations wherever they may occur, regardless of the nationality of the victims.

The recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that extent they both signify the recognition of a higher, fundamental law not only on the part of states but also, through international law, on the part of the organized international community itself. Such fundamental law

constitutes legal order. The recognition and protection of human rights have now assumed the complexion of legal rights of individuals and of legal obligations of states and of the United Nations as a whole. Members of the United Nations are under a legal obligation to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights.

INTERNATIONALISATION OF HUMAN RIGHTS

The adoption of the UN Charter ushered in a process leading to the gradual internationalisation of human rights through the rule of law. The UN Declaration clearly envisages the important role that the rule of law plays for the realisation of the goal of respect for universal human rights. The Declaration states:

> "... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The very objective of the maintenance of international peace and security being directly linked to the assurance of respect for human rights can be attained only through the process of internationalisation. Former Secretary-General of the United Nations, U Thant, in his Human Rights Day Message on December 10, 1965, pointed out that "we need constantly to remind ourselves that the United Nations is firmly committed to the proposition that the eventual objective of all its functions and activities is the well being of individual men and women and also the freedom and opportunity to find their worth as human beings, whatever their race, language, religion or political belief."

The UN Charter introduced a significant change in the pre-existing legal conceptions by requiring the member states to pledge themselves to take joint and separate action in co-operation with the organisation in order to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex. language or religion. These provisions impose legally binding obligations on the member states. To the extent that the Charter creates these obligations no UN member state can claim that human rights as such are a matter within its domestic jurisdiction. The UN law-making practice indicates that the obligation to these rights will be deemed to be violated if a state systematically pursues governmental policies denying the enjoyment of these rights on a large scale, particularly rights that are most basic. This internationalisation of human rights has greatly reduced, if not made practically insignificant, the domestic jurisdiction defence that was available to states under the international law of the pre-World War II era.

THE UN CHARTER

The United Nations Charter, after reaffirming, in the Preamble, faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, pronounces in Article 1(3) that one of its purposes is to promote and encourage respect for human rights and fundamental freedoms for all without distinction on account of sex or other ground. Of particular significance is Article 8 which reads:

"The United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs".

The founding of the United Nations in 1945 with the signing of the UN Charter marked the first agreement among nations to promote and observe human rights and fundamental freedoms for all. The first definition of what was meant by human rights was not delineated until 1948 in the UN Universal Declaration of Human Rights. Since then the Declaration has come to be regarded as basic international law, augmented later by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, agreements on a regional basis have been established by the Organisation of American States as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The General Assembly, the Economic and Social Council, or any other competent organ of the United Nations, is authorised to discuss a situation arising from any alleged non-observance by a state or a number of states of their obligation to respect human rights and freedoms. The object of such discussion may be the initiation of a study of the problem under the aegis of the United Nations; it may be a recommendation of a general nature addressed to the concerned state and drawing its attention to the propriety of bringing about a situation which is in conformity with the obligations of the Charter. Thus the pressure of world public opinion as expressed through these channels is brought to bear upon the recalcitrant state. A dispute or situation ceases to be essentially within the domestic jurisdiction of a state if its nature or repercussions are such as to constitute a direct or potential threat to international peace and security. The correlation between peace and observance of fundamental human rights is now a generally recognised fact. The United Nations, as the guardian of peace, is qualified to intervene whenever those rights are threatened.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

One of the accomplishments of the United Nations has been to consolidate the principle that human rights are a matter of international concern and that the international community is entitled to discuss and to protect human rights. The UN Declaration of Human Rights was adopted on December 10, 1948. It contains 30 articles, the first 21 are generally identified as civil and political, ranging from prohibition of torture and arbitrary arrest to the freedoms of speech, assembly, religion and emigration and the right to vote by secret ballot. The remaining articles include the so-called economic, social and cultural rights, such as the right to work, education and adequate standard of living, social security, and vacations with pay.

The UN Declaration of Human Rights envisages that all human beings are born free and equal in dignity and rights and that everyone has the right to life, liberty and security. It also declares that no one shall be held in slavery or servitude and no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It asserts that everyone has the right to recognition as a person before the law and that no one shall be subjected to arbitrary arrest, detention or exile.

When the Universal Declaration was adopted unanimously in December 1948 by the General Assembly, the stated expectation was that it mirrored merely a common standard of achievement, and was devoid of legal authority and enforceability. In the early three decades subsequent to its adoption, however, the Universal Declaration has been affirmed by numerous resolutions of United Nations' entities and related agencies; invoked and reinvoked by a broad range of decision-makers, national and transnational, judicial and others; and incorporated into many international agreements and national constitutions. The result is that the Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the UN Charter and as established customary law, having the attributes of jus cogens and constituting the heart of a global bill of rights.

THE UN COMMISSION ON HUMAN RIGHTS

The UN Commission on Human Rights has demonstrated considerable ingenuity in fashioning remedies which combine diplomatic contacts with a government, conciliation, fact-finding, and embarrassment to the state involved in the violation of human rights. The United Nations has begun to experiment with two approaches which require further exploration: aid to the victims and technical assistance to governments.

The Secretary-General, Javier Perez de Cuellar, noted in his address of February 15, 1983 to the UN Commission on Human Rights:

> "It is a source of encouragement that in the human rights programme of the United Nations in recent years, attention has been given not only to dealing with violations, but to providing assistance to governments, at their request, in strengthening their laws and institutions for restoring respect for human rights, as well as providing assistance to victims of violations of human rights".

HUMAN RIGHTS TREATIES AND CONVENTIONS

Respect for human rights is a proper subject for discussion bilaterally and multilaterally for a thorough exchange of views on their implementation. Widely ratified international conventions establishing effective organs of enforcement are the method through which the international community aspires to protect human rights. In the history of international relations this is a very recent goal and the international community has only just begun to implement it.

Like other international law, human rights law is made by bilateral and multilateral treaties and by conventions for the protection of human rights. There is also customary human rights law made by national practice with a developed sense of legal obligation. Treaty law overrides contrary provisions of domestic legislation. A human rights treaty protects all persons within the jurisdiction of the signatory state.

Modern human rights treaties are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings

irrespective of their nationality, both against the state of their nationality and all other contracting states. In concluding these human rights treaties, states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but all individuals within their jurisdiction.

The UN Charter and the two International Covenants are by no means the only multilateral effort at promoting human rights. There are over 20 treaties now and they include, inter alia:

(a) the Convention on the Prevention and Punishment of the Crime of Genocide,

(b) the International Convention on the Elimination of all Forms of Racial Discrimination,

(c) the Convention concerning the Abolition of Forced Labour,

(d) the American Convention on Human Rights,

(e) the Convention Relating to the Status of Refugees,

(f) the Convention on the Reduction of Statelessness,

(g) the Convention on the Political Rights of Women,

(h) the Convention on the Nationality of Married Women, and

(i) the Convention on the Elimination of All Forms of Discrimination Against Women.

These conventions create binding legal obligations on the parties to them.

The adoption by the General Assembly in 1966 of the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, and the Optional Protocol to the Covenant on Civil and Political Rights, marks the beginning of a long process of investiture of a great idea with the substance of power capable of producing effective change in all realms of personal, national and international life. These international treaties are binding commitments by states towards their own citizens, towards one another, and toward the community of nations to ensure, observe and safeguard human rights. By transforming international concern with human rights into legally binding international obligations, the Covenants have laid the groundwork for the erection of international institutions and procedures which are meant to give concrete expression to these obligations.

It is not only on the global level that efforts to promote human rights take place; by and large, some of the most innovative attempts have occurred at regional level. Indeed, it appears that regional arrangements have most rapidly advanced the commitment of nations to human rights.

THE EUROPEAN SYSTEM

A prominent regional achievement is the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention established a Commission and a Court for handling both state and individual complaints.

In some instances individuals are able to assert their human rights in courts or other appropriate forums. For example, the European Convention on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights establish specific procedures for the bringing of complaints by private individuals where the nation concerned has agreed to such a procedure.

In the law of human rights, it has long been apparent that the mere creation of international standards may be meaningless if it is unaccompanied by appropriate institutional enforcement mechanisms at the transnational level. The European Commission and the Court of Human Rights of the Council of Europe, are generally considered to be the most effective existing enforcement institutions, inspite of their limited geographical scope.

The European Convention on Human Rights represents more than a common standard of achievement. It imposes upon the contracting state parties a certain body of legal principles which they are obliged to conform to. In specific cases compliance with this law is ensured by the use of the Convention's enforcement machinery. The Convention forms an integral part of the domestic law of many of the contracting state parties. The Conventions' provisions are deemed to maintain great validity whether or not prior legislation on the subject exists at the domestic level. The basic function of this machinery consists primarily of examining and determining whether domestic law as it stands complies with the provisions of the Convention. Although constructed upon tenets of traditional treaty law, the Convention law transcends the traditional boundaries drawn between international and domestic law.

THE AFRICAN SYSTEM

The international human rights movement reflects, to a large extent, the liberal, individualist tradition of civil and political liberties. There is something very new in the present attempt by the Organisation of African Unity to embody a list of collective or peoples' rights in a human rights convention that provides for the enforcement of those rights. With the drafting in 1981 the African Charter on Human Rights and Peoples' Rights, meaningful steps are being taken in that direction.

THE INTER-AMERICAN SYSTEM

The American Convention on Human Rights entered into force in 1978. The Convention establishes two supervisory organs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Court is a judicial institution of the Organisation of American States (OAS) in matters relating to human rights. It has the power to decide disputes relating to the interpretation and application of the Convention to states which have accepted the Court's contentious

jurisdiction. The decisions of the Court in these cases are final and binding for the parties to the dispute. The role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction. These opinions are important also for the contributions they make to the development of international human rights law.

IMPLEMENTATION OF HUMAN RIGHTS NORMS

Scholars tend to agree with the proposition that public policy does not allow states to violate severally such norms as they are prohibited form violating jointly with other states. Judge Mosler of the ICJ, who deserves credit for coining the phrase "public order of the international community", characterised such order as consisting of principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic; the law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law.

There are three main approaches to the international implementation of human rights. The first approach is on the government-to-government level. This may be through bilateral diplomacy or resort by a government to multilateral machinery. The difficulty with this approach is that governments are often reluctant to complicate diplomatic relations by bringing human rights complaints against another government. The second approach is to give individuals direct access to an international commission or tribunal. Such a right is available to an individual (subject to acceptance by the state) to petition the European Commission and the European Court of Human Rights and he can also invoke the right of individual petition under the Optional Protocol to the International Covenant on Civil and Political Rights and under the Convention on Racial Discrimination. This approach is feasible between countries which share a substantial degree of consensus on human rights standards. The third approach is through an international executive who can influence government action through fact-finding, publicity and persuasion.

HUMAN RIGHTS JUS COGENS

The notion of peremptory norms of international law (jus cogens) is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted. The principle of jus cogens restricts the freedom of states to make agreements at variance with these peremptory norms. Its moral and deterrent effect is of particular importance in the present context of internal and international violence. The rules of customary international law that require the states to abstain from the violation of human rights constitute jus cogens and all agreements made in contravention of these rules are considered illegal. Judge Mosler of the ICJ took account of the dignity of the human person and declared that obligations to protect human rights fall in the domain of jus cogens. Third states have the right and duty to question the illegal act, and to refrain from recognising it or giving it legal effect.

Many of the policies about human rights would appear to be so intensely demanded that they are acquiring not merely the status of international concern, but also that of jus cogens and of a global bill of

rights. Nations suggest that the great bulk of contemporary human rights principles are identifiable as jus cogens. This view finds support in the statement of Judge Tanaka of the ICJ that the law concerning the protection of human rights may be considered as belonging to the jus cogens. Thus all rules of general international law created for a humanitarian purpose constitute jus cogens.

THE RELATIONS BETWEEN INTERNATIONAL HUMAN RIGHTS NORMS AND DOMESTIC LAW

The relation between international law and municipal law is a question of determining what are the most appropriate juridical means of achieving, in state legal systems, the aims and intentions lying behind the rules established by international law. The obligations imposed on a state by international law with a view to ensuring the implementation, in municipal law, of the terms of an international treaty to which the said state is a party, are the means of guaranteeing harmony and material agreement between the two legal orders.

A state has an obligation to make its municipal law conform to its undertakings under treaties to which it is a party. With regard to interpretation, however, it is a principle generally recognised in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the state's international obligations.

A matter is essentially within the domestic jurisdiction of the state only if it is not regulated by international law or if it is not capable of regulation by international law. In the modern age of economic and political interdependence, most questions which, on the face of it, appear to be essentially domestic are, in fact, essentially international.

A valid domestic jurisdiction defence can no longer be founded on the proposition that the manner in which a state treats its own nationals is ipso facto a matter within its domestic jurisdiction. A government's human rights policy is no longer prima facie a domestic matter. A state engaging in gross violations of human rights is considered to be violating the United Nations Charter obligations and consequently is not protected by the domestic jurisdictions clause of the Charter. It is, therefore, apparent that under international law the subject of human rights is not deemed to be inherently domestic in nature.

So far, a major deficiency in the development of human rights law is one of enforcement. The implementation of human rights law largely depends on the consent of nations. However, even if that consent is forthcoming, an adverse judgment against a consenting nation may or may not be effectively enforced. Currently, the implementation and enforcement of human rights law are largely dependent on voluntary compliance, moral pressures, and other forms of influence.

The questions arise as to why governments adhere to numerous human rights treaties? Why do they repeatedly vote for formulas that produce resolutions and declarations, and establish bodies designed to promote the implementation of the legal norms proclaimed in these instruments? The answer no doubt is that they find it difficult to vote against what is deemed to be good, what a vast majority of people of the world want, and what consequently makes good political sense for governments to be for, if only to give lip service to. The vast body of international human rights

law as is available today is testimony to the fact that governments know that the appeal, the yearning, and the demand for human rights is universal. It has been brought on by the universality of mankind's suffering and the worldwide awareness produced by the speed with which news travels in the world. Today, unlike in the past, what happens in any part of the world is flashed instantaneously to all parts of the world, provoking sympathy, protests, and empathy. (See the remarks of the Judge of the Inter-American Court of Human Rights, Professor Thomas Buergenthal, in the Proceedings of the 75th Anniversary Convocation of the American Society of International Law, Washington D C April 1981).

The time has come for world citizens to stop thinking of human rights and human needs as internal affairs. Human needs are coming to be regarded as a first charge on the world's resources. And human rights are becoming a first charge on the public conscience of people anywhere. The issue of human rights, in the very recent past, has penetrated the international dialogue. It has become an active ingredient in interstate relations and has burst the sacred bounds of national sovereignty. No nation can any longer claim not to know what human rights are; nor can any nation now assert that the manner in which it treats its own nationals is free from international scrutiny.

In the present context of world society, a recognised principle is that the jurisdiction of a state to entertain claims of human rights is determined by the position that the state has acquired in the comity of nations at a particular time. In its Tunis and Morocco Nationality Decrees Opinion, (Series B No: 4 at p24, 1923) the PCIJ declared that the question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. The Court's analysis indicates that the phrase "the development of international relations" has reference to the legal obligations assumed by states with regard to a specific subject.

In its Advisory Opinion on Namibia, the ICJ declared the extension and continuation of apartheid in Namibia to be a violation of the purposes and principles of the Charter. In 1967, by an overwhelming vote, the Economic and Social Council (ECOSOC) extended the interpretation of the UN Charter to reach beyond racial discrimination, authorising the Commission on Human Rights to study situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid.

An inspiring recommendation of experts in respect of the protection of human rights is that the various provisions of international agreements can be interpreted by domestic courts. It would be worthwhile for the domestic courts to declare any variance with the peremptory norm of human rights as void and the courts may find it appropriate to terminate any existing agreement which is in conflict with that norm. The opinion merits consideration that General Assembly resolutions in respect of human rights should be given legal effect by domestic courts as indicative of a general consensus of customary international law. Such resolutions can give an important impetus to the emergence of new rules needed for the promotion of human rights.

It is important for the protection of human rights and for the realisation of the rule of law that domestic courts be allowed to review the acts of foreign states when such enquiry is necessary to determine the

nature of human rights violations. This practice does not violate the recognised principles of sovereign immunity. The domestic courts can have an obligation to determine whether foreign acts of states comply with the requirements of international law. Where the foreign act violates a generally accepted principle of international law in the domain of human rights, the domestic courts fulfil their role by refusing to accept the policy of the foreign legal system.

Article 27 of the International Law Commission's "Draft Articles on State Responsibilities" provides that any aid or assistance given by a state to another state for the commission of an internationally wrongful act, wherever such incidents are reported, in itself constitutes an internationally wrongful act. The domestic courts can entertain claims arising out of an alleged violation of human rights and these claims cannot be defeated by the "act of state" defence since the international law of human rights contemplates external scrutiny of such acts. The balancing of the functions of the domestic courts and those of international tribunals requires the domestic courts to entertain the petitions of those whose human rights have been violated.

If international protection of human rights is to respond concretely to the imperatives of the age, it must be institutionalised. And if human rights are to be protected internationally, they must be juridically defined and be made contractually binding. The domestic courts can become the most effective means by which international conventions could be implemented and made effective.

Effective enforcement of remedies requires that they be articulated as effectively as possible, that they support international legal norms. Independent lawyers and judges obviously are the people who can be most effective in this articulation. Private non-governmental organisations, in compiling information on the human rights practices of the various countries, can undertake an examination of the independence of lawyers and judges and of the extent to which judges are subjected to political pressure in various countries.

A task that the domestic courts often face in the area of international human rights norms is that of determining the adequacy of procedural alternatives. Here the doctrine of selective incorporation assumes special significance. Under this doctrine, the specifics of the international human rights norms can be progressively applied to all those states which constitute the comity of nations. The states should be able to afford flexibility in the implementation of domestic constitutional values.

The domestic application of human rights norms is now regarded as a basis for implementing constitutional values beyond the minimum requirements of the constitution. The international human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. The domestic courts can assume the task of expanding these liberties. The exercise of judicial power to create an order of liberties on a level higher than the respective constitutions is now considered to be an ingredient of judicial activism. The present thinking at the international level supports an expanded role of domestic courts for the observance of international human rights norms. This reappraisal enables domestic courts to extend to citizens, via state constitutions,

greater protection of internationally recognised human rights. This type of court activism is commanding appreciation all over the world.

A consciousness is now emerging that in the sphere of human rights the citizen of a particular state is no less a citizen of all other states and that each citizen is entitled to due process of law and the equal protection of laws from all state governments. This legal revolution which has brought human rights law to the fore does not inhibit the independent protective force of domestic law, for without it, the full realisation of liberties cannot be guaranteed. The principle stated by Mr Justice Bradley of the United States Supreme Court in 1886 in the case of Boyd versus United States (116 US 616) has started attracting great attention, after the lapse of a hundred years, at the international level. The principle states that:

> "constitutional provisions for the security of person and property should be liberally construed and it is the duty of the (domestic) courts of law to be watchful for the constitutional rights of the citizens".

It is now felt that the protection of international human rights can ensure the maintenance of constitutional structures of governments at the national level. Obviously, the genius of the written constitutions of national states resides not in any static meaning, but in the adaptability of the great principle of the constitution to cope with problems of human rights. The universal approach maintains that every such principle must be of wider application than the circumstances giving rise to it at the domestic level. National constitutions are not short-lived documents designed to meet passing needs. The demands of international peace and security have assumed responsibility for their care, and therefore, in their application, the domestic contemplation is enlarged to incorporate international contemplation. This is surely an important and a highly significant development of constitutional jurisprudence. Adopting the premise that domestic courts can be trusted to safeguard international human rights, it can well be appreciated that domestic courts can provide a double source of protection for the rights of citizens. Thus the domestic courts can thrust themselves into a position of prominence in the struggle to protect the people from arbitrary intrusions of their freedoms.

The attention of nation states to international human rights norms is resulting in the birth of a transnational legal science and of a system whose basic postulates can survive without challenge, in this last phase of the 20th century and the ensuing 21st century. An argument is now being forcefully made that the newly developing formal aspects of international human rights norms, along with their logic, their style of reasoning, their levels of generalisation, and their techniques of inter-relating liberties and universal cases and concepts, are indeed superb. The new legal methodology of human rights points to a recognition of the structural unity of the total human society. The emergence of human rights law is much more than an intellectual achievement and it is much more than a method of reasoning or a method of organising thought. The substantiation of international human rights norms is part of a larger process of attempting to reconcile law and equity, justice and mercy, equity and freedom. It is now being viewed as the equation of Allah Almighty and mankind. It is a new vision of the ultimate destiny of man which the courts of law can upgrade and enhance for the welfare of humanity as a whole.

DOMESTIC LEGISLATIVE PROTECTION OF INTERNATIONAL HUMAN RIGHTS NORMS

It is now considered important for the states concerned to be able to have the first opportunity of providing remedies for the violation of human rights. The provisions of remedies would require specific legislation for domestic incorporation. Some would like to see this idea expressed in more forceful terms to place a legal obligation on states either to incorporate it in treaties or to have essentially identical terms incorporated in written constitutions by appropriate amendments. This suggestion emphasises the need for convincing national governments to incorporate legislation on human rights in such a way that national courts might in fact utilize the international human rights norms. The domestic courts can take cognizance of a human rights violation more easily and in a shorter time than an international court.

It is of cardinal importance to the domestic legislation of human rights that violations by every country be treated with equal attention, with the same due process, and with severity proportional to the offence. States can be persuaded to accept the interpretations of courts of law based on the domestic legislation of other states. The courts of law can also examine, on the petition of affected persons, whether the state concerned has complied with its human rights obligations.

DIRECT APPLICATION OF INTERNATIONAL LAW BY DOMESTIC COURTS

The enforcement machinery that exists domestically to protect human rights should resemble the enforcement machinery that exists internationally. The domestic courts can be successfully enlisted in the process of enforcement. It is the prestige of domestic courts that can persuade the executive and the legislative branches of government to comply with the decisions taken by the international courts in the sphere of human rights.

Domestic courts can, however, look to the respective national constitutions as the best protection of human rights. An illustrious example of this observation is provided by the US Supreme Court in its decision of the case of Brown versus Board of Education (347 US 483--1954). It appears that international norms played a large part in bringing about the Supreme Court's decision in this case. The prestige of the Court itself was enhanced because the decision solved an international problem of human rights pertaining to segregation in schools and in that fashion brought the United States of America into conformity with international law.

The domestic courts can find it useful to consistently interpret and apply the international law of human rights. Since there are few international tribunals and their jurisdiction is very limited, domestic courts can play a major role in the interpretation and development of international law in this sphere. International organisations, in their turn, can accord substantial weight to judgments of domestic courts.

The problem of bringing about actual remedies in domestic jurisdiction is analogous to the problem of bringing about remedies internationally. The domestic courts now face the challenge of how to root their decisions as solidly and as effectively as possible in international human rights legal norms. The greater degree to which international legal

norms become known to domestic courts, the better the chance of justice being dispensed in this field.

It appears that national courts may be used as a fora for enforcement of international human rights. If these courts cannot be harnessed, the prospects of private initiation and effective enforcement of human rights are bleak. Securing a long-term extension of national jurisdiction in matters such as these will require more than simply persuading the judiciary on a case-by-case basis. Terms such as "act of state", "political question", "separation of powers", etc., even though they are still relevant in the domain of international law, have required a different status in the context of human rights. The new perspective enables courts of law to accord greater weight to the concept of human rights whenever it competes with the "act of state" defence. That concern should therefore be addressed systematically by according predominance to the concept of human rights over the "act of state" defence.

Human rights are so important as to deserve a simultaneous attack at the domestic level by legislation, governmental administration and non-governmental functioning.

A UN HUMAN RIGHTS TRIBUNAL

A desirable long-term solution would be to establish, through a special protocol, a UN Human Rights Tribunal which would be empowered to apply not only the International Bill of Human Rights, but the entire corpus juris of international human rights adopted under the aegis of the United Nations. The UN Human Rights Tribunal could be given authority to give advisory opinions, or to decide, on the basis of reciprocity, disputes between states pertaining to the interpretation or application of particular human rights instruments. It can also entertain complaints from individuals, or various groups, or organisations, against the states concerned. The Human Rights Tribunal can maintain effective co-ordination and meaningful equation with domestic courts in the United Nations member countries.

INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS IN NATIONAL CONSTITUTIONS

The Pakistan Constitution has the distinctive privilege of incorporating in its Chapter I, about two-thirds of the 30 fundamental human rights enumerated in the UN Charter of Human Rights. These rights are incorporated in provisions ranging from Article 8 to Article 28. The Constitution declares that:

> "any law, or any usage having the force of law, in so far as it is inconsistent with the rights conferred by that Chapter (of the Constitution), shall to the extent of such inconsistency, be void".

The Pakistan Constitution has accorded recognition to rights pertaining to the security of person, dignity of man, freedom of movement, assembly, association, speech, religion and protection of property. The Constitution provides safeguards against arrest and detention, against discrimination in services and against taxation for the purposes of any particular religion. The Constitution also guarantees equality before the law and equal protection of law.

In addition, the Constitution sets out the principles of policy in Article 31 to 40 and makes each organ and authority of the state responsible to act in accordance with these principles. The principles are concerned with the promotion of local government institutions, participation of women in national life, protection of minorities and families, social justice, economic and social well being of people and the promotion of international peace. These principles are identical in nature and scope to civil and political rights forming part of the International Covenants and Regional Conventions at the international level. Even though the principles of policy are not justiciable, yet the mere fact that the national courts have been called upon, in collaboration with all other organs of state, to promote international peace, good will and friendly relations among all nations, impliedly authorises domestic courts to interpret constitutional provisions in consonance with the spirit of the international law of human rights.

The Supreme Court of the United States of America has often employed human rights precepts as legally relevant standards or juristic aids to incorporate constitutional and statutory norms. This is what judges are most comfortable with, and it is worth pursuing this as a strategy. Indeed, use by the domestic courts can be made with express or implicit expectation that fundamental constitutional rights constitute legal principles. History demonstrates that there is a human rights purpose behind most amendments to the US Constitution. This precept can be emulated in other national settings. Human rights can be incorporated directly by the judiciary as the basis for its decisions. The international law of human rights does recognise the capacity of private plaintiffs to litigate its provisions in domestic courts. National courts can serve as an effective mechanism for the protection and extension of civil liberties and can operate with great force for the co-ordinated international role.

In my view, courts should be viewed not in isolation but as a co-ordinated source of governmental power, as an integral part of the larger political system. In the present context of world society the legitimacy of the domestic courts and the powers judges exercise in human rights litigation are founded on the unique competence of the judiciary to perform a distinctive social function which is to give concrete meaning and application to the public values embodied in any authoritative legal text such as the chapters on fundamental human rights in the national constitutions. The capacity of judges to give meaning to public values inherent in the concept of fundamental human rights turns not on some personal moral expertise, but on the method by which a public morality at the domestic level must be construed. One feature of that process which signifies the role of domestic courts in the implementation of international human rights norms is the dialogue that judges usually conduct. They listen to all grievances, hear a wide range of interests, reply and assume judicial responsibility for what they say. The foremost task of judges of domestic courts which has assumed prominence in the domain of human rights is to weigh their fundamental commitment to individual rights and group rights against the competing sentiments of nationality, the prejudices of race, the interests of ethnic groups, the demands of justice, the cultivation of virtue, the impulse of compassion, the higher callings of truth and salvation, and the allure of prosperity.

CONCLUSION

Even some success in the international human rights field, however small, will make this world a better place to live in. That, after all, is what law is all about.