Jurisdictional Basis of Using International Human Rights Law

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The source of human rights is far older than our established religions. It is based on the ancient ethical belief that we should treat every person in a way that we ourselves would wish to be treated. This ethical belief is loosely called deontology. Do unto others as you would have others do unto you. We wish to be treated with humanity, dignity and respect. So we must treat others with humanity, dignity and respect.

Unfortunately human beings do not always treat each other well. Savagery, degradation, contempt and abuse of power feature frequently in human history. The humiliation and genocide of the Jewish people in World War II, the massacre of the Armenians by the Turks at the beginning of the 20th Century, the British concentration camps in South Africa during the Boer Wars, remind us that no culture can be complacent about its own conduct towards others. And, we need look no further than our own homes in current times. Domestic violence, the sexual abuse of children, the treatment of our elderly, are all issues which confront our own commitment of the humane treatment of persons. When we call homosexuals “poofters” with contempt, we show them disrespect and contempt. When we hit children in our schools, we treat them with disrespect and contempt. So respecting human rights is really about individual ethics.

And the law too is based, partly on ethical beliefs. It is based on what society believes are values to be enforced and protected. Even against the rich and the powerful. Protecting human rights is therefore also about the rule of law. The rule which says that the law applies to all and that it applies to all, in the same way. Equality before the law is one of the important principles behind the rule of law. Nothing tests this principle more than human rights jurisprudence and jurisdiction.

The common law

The common law has not been behind-hand in the protection of human rights. The principles of fair trial, of the right to counsel, of the fair treatment of suspects, of trial without delay, of equality and non-discrimination, were all common law principles which developed before the written constitutions of the world, or the Universal Declaration of Human Rights, or the Canadian Charter. The principles developed because there was a judicial recognition that justice included a need to protect the weak and vulnerable from the strong. Thus the Judges' Rules for instance. But the difficulty with the common law was that it could not be enforced in the face of contrary statutory provisions. The judicial role has always been to apply the law written by the legislature. To apply human rights in the face of contrary legislative intention would have been unjudicial.

So judges began to look at other ways to maintain human dignity. Between 1988 and 1998 Commonwealth judges met in Bangalore in India to discuss ways to strengthen the protection of human rights in the Commonwealth. The agenda was to see how international human rights law could apply to national courts. The convenor was Justice Bhagwati, the former Chief Justice of India, and India was chosen because it is the world's largest democracy. The decision to choose India also recognized the sterling work done by the Indian Supreme Court in the guarding of human rights.

Bangalore was followed by Harare. This location recognized the work done in the Supreme Court of Zimbabwe, to use international human rights law emerging from the European Court of Human Rights to interpret the Zimbabwe Constitution.

At Harare, Arthur Chaskelson (later Justice Chaskelson of the Constitutional Court of South Africa) said this:

> "the protection of human rights depends to a material extent upon the powers and the will of the courts. Whatever merit the doctrine of parliamentary supremacy may have in a political system in which parliament reflects the will of the people, it can have none in a system in which the majority are voteless, and parliament is controlled by a small elite. What has happened in South Africa lays bare the hollowness of that doctrine. And although South Africa is ruled by a minority regime, the same course can be followed by other unrepresentative governments, and also by majority governments, where the opposition is weak, and the courts and the legal profession are either not powerful enough, or not vigilant enough to resist incursions upon freedom. Judge Learned Hand told us that 'liberty lies in the hearts of men and women; when it dies then no constitution, no law, no court can save it'.
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> That may be true. But ordinary men and women need support in their fight to claim and protect their liberties. And their natural protectors are courts, not governments. After all, most governments think they know best what the public interest requires, and are inclined to play down, if not ignore, the rights of those opposed to their policies. Courts need the power, as well as the will, to help governments resist such temptations. What the recent history of South Africa shows is that slavish adherence to the doctrine of parliamentary sovereignty is wholly inadequate for that purpose. (Commonwealth Secretariat (1989: Annex 1))."

That judicial colloquium, was followed by several more. It led to the building of a judicial consensus amongst Commonwealth judges. The principles may be summarized as follows:

1. Fundamental human rights and freedoms are universal. They find expression in constitutional and legal systems throughout the world; they are anchored in the international human rights codes to which all genuinely democratic states adhere; their meaning is illuminated by a rich body of case law, both international and national. The universality of human rights derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the judiciary.

2. It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.

3. Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law's undertakings are realized in the daily life of the people.

4. Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for judges and they interpret their constitutions and ordinary legislation and develop the common law. Likewise, even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.

5. The legislative and executive branches of government have a duty to secure the equal protection of the law, speedy and effective access to justice and effective legal remedies. This requires adequate funds for the proper functioning of the courts and adequate legal aid and advice for people who cannot otherwise obtain legal services. It is also essential for each branch of government to introduce and maintain appropriate rules and procedures to promote compliance, in discharging their functions, with the international human rights instruments by which they are bound. Where states have accepted the jurisdiction of supra-national human rights courts and commissions to provide redress to victims of breaches of human rights, national courts should strive to ensure effective recourse to such redress.

6. Independent human rights commissions are needed with powers to assist victims to seek redress; to bring cases on issues of public interest and importance; and, by means of investigation, monitoring, research and public education, to foster a climate of respect for human rights.

7. The provision of equal justice requires a competent and independent judiciary and legal profession trained in the discipline of the law and sensitive to the needs and aspirations of all the people. It is fundamental for a country's judiciary and legal profession to enjoy the broad confidence of the people they serve. Public confidence in the judiciary depends not only on the institutional arrangements for protecting its independence from political pressures but also on the transparency and legitimacy of the manner in which judges are selected. Any mechanism, including judicial service commissions, should ensure that persons are selected because of their proven integrity, ability and independence and that the views of the existing judiciary are given appropriate weight.

8. Judicial review and effective access to the courts are indispensable not only in normal times but also during periods of public emergency. It is at such times that basic human rights are most at risk and when courts must be especially vigilant in their protection.

9. Freedom of expression is essential to safeguard democracy and human rights. The protection of freedom of expression in its widest sense is a chief responsibility of the judiciary.

10. All persons are equal. Equality means full and unfettered membership in every aspect of the democratic social order. Equality not only signifies equal protection of the law, but also equality of opportunity and treatment, together with equal sharing in the dignity which is the individual birthright of all. Equality does not imply homogeneity or diminution of personal liberty. Equality celebrates the priceless individuality and the right to fulfillment of every human being.

11. The principle of equal treatment forbids not only intentional or direct discrimination but also forbids practices and procedures which have a disparate adverse impact upon vulnerable groups and which have no objective justification. It is essential to secure the elimination not only of overt discrimination but also of indirect discrimination of this kind.

12. The principle of equality may require public authorities to take affirmative action to diminish and eliminate conditions which cause or perpetuate discrimination and to ensure equal access to and enjoyment of basic human rights and freedoms. Such affirmative action must be no more than is appropriate and necessary as a means to achieve equality.

13. Equality and justice both require a sensitive understanding of the needs, realities and perspective of women so that they may be free from violence and from infringement of their personal dignity and privacy. Violence against women is an affront to human dignity, a violation of human rights, and a barrier to the achievement of real equality. It is the duty of the judiciary to understand the nature, extent and impact of violence against women in the conduct of proceedings in their courts and in their judgments. Training is needed for judges, lawyers, law enforcement agencies, prosecutors, the prison service and other public authorities.

14. Lessons should be drawn from such advances as have been made in the protection of the rights of women for others suffering unfair discrimination, for example, because of gender, sex or because they are living with HIV/AIDS or because they are mentally or physically disabled.

15. The fundamental human rights of every one must be protected by the public authorities of the state with effective remedies for breaches of human rights by those acting or purporting to act in an official capacity. Claims based on national security, state and individual immunity and political expediency ought not to deprive victims of such breaches of access to justice or shield from criminal liability those individuals who commit genocide, war crimes, crimes against humanity or other gross breaches of human rights.

16. It is a matter of public concern that some legislatures pass amendments to their constitutions or laws designed to erode or diminish fundamental rights and freedoms as interpreted and applied by national courts and by international human rights fora. This practice should not be resorted to and no amendment should be made which would destroy or impair the essential features of democratic societies governed by the rule of law.

17. The criminal justice system should function in a manner that is impartial and independent, ensuring justice to the accused but at the same time protecting the victims and society at large. The proper working of the criminal justice system requires free legal assistance to an indigent accused to ensure a fair investigation and trial.

18. The death penalty should not be extended to any offences to which it is not now applied in the particular country. States whose constitutions preclude the determination by the courts as to whether the sentence is inhuman and degrading should amend their constitutions to remove this fetter on judicial determination. The death penalty should be carried out, if at all, only after the exhaustion of all domestic and international legal remedies.

19. Public interest litigation has a special role to play in protecting the human rights of disadvantaged sections of the population. Judgments in such cases should be based on clear constitutional and legal criteria; they should be enforceable and effective, keeping in mind the rights and interests of those not party to the litigation; and they should be subject to appeal or judicial review.

20. Courts should adopt a generous approach to the matter of legal standing in public law cases. They should also welcome amicus curiae submissions in significant cases.

21. The principles of human rights should be brought into the daily activities of government and public officials alike, as well as of ordinary men and women. Furthermore the jurisprudence of international and regional human rights bodies and the decisions of courts throughout the Commonwealth should be disseminated to judges, lawyers and public officials. In these ways a global culture of respect for human rights can be fostered.

22. A South Asian charter of human rights, similar to regional human rights conventions elsewhere, would make a significant contribution to the protection of human rights throughout South Asia. The making of such a charter should be given a high priority.

These judicial conferences were crucial, because there was an agreement that human rights law could not be left to the executive or the legislature to develop. They had to be enforced by an independent judiciary. A judiciary independent of the executive and the legislature. Independent of the rich and powerful. Independent of the litigants. A brave, impartial and well-qualified judiciary.

That in turn led to legislative recognition. In South Africa and Fiji, it led to an enactment that the judiciary should interpret the Bill of Rights, and that in doing so, it should apply international law. Such a provision was revolutionary, because it cut across national borders to allow for the development of

international human rights law. Outside of the Commonwealth, such an idea is still worrying, even frightening. In 2002, for instance Rehnquist CJ of the Supreme Court of the USA said that in interpreting American law, the views of the world community were irrelevant (**Atkins v. Virginia** 536 US (2002); 70 US LW 4585). In the same case Justice Scalia said that the views of the majority on the court, which relied on international human rights law on the issue of the death penalty for the mentally retarded, deserved "the prize for the Court's most feeble effort to fabricate national consensus."

But we are fortunate here in Fiji. Because section 43(2) of the Constitution says in relation to the chapter on human rights:

> "In interpreting the provisions of this Chapter, the Courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter."

How does this work? If the right alleged to be infringed is the right to counsel, then one looks first at the provisions of section 28 of the Constitution. Then one looks at local cases on the right. Then one looks at comparable provisions in other jurisdictions (including for instance the Rome Statute for the International Criminal Court). Then one looks at the jurisprudence in those countries, or in those courts. Then one applies those principles to the factual situation in our courts.

Section 43(2) of the Constitution will do more than enrich our jurisprudence. It allows the judiciary to show leadership in promoting democracy and the rule of law. Courts must do much more than enforce community standards. They must enforce international standards of humanity and dignity in a way that our thoughts and values are transformed. Our judgments are not always popular. But they represent current laws of humanity and respect. They

enforce those values on the executive and they test our nation's commitment to the rule of law.

But the judiciary needs a strong, committed and independent bar to assist it, and to protect it from executive attack, or worse still, executive refusal to follow court orders. Unfortunately, members of the bar, either out of fear, or apathy, have not always protected the independence of the judiciary. And in so failing, they also fail to protect the rule of law. So the role of lawyers is crucial to the development of human rights law. I hope that such criticism will never be leveled at any of the new lawyers present here.

We live in times of conflict and instability. Genocide, terrorism, anti-terrorism laws, the trafficking of humans, the movement of refugees and State-sponsored violence severely challenge the law and its ability to maintain peace and good order. International standards of human rights law allows for judges to apply the law uniformly, and to avoid fudging the law to protect the powerful, or collaborating with the popular and influential. The test for us is whether we are able to be humane with our least important, or least attractive citizens. That is the test for our civilization.

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