Fragmentation Of Human Rights

Ayusshi Singh*
Shashi Lata Singh*

"…until justice rolls down like water and righteousness like a mighty stream."

—Martin Luther King Jr.

INTRODUCTION-The Human Rights discourse has always been one fraught with difficulties. It has developed after a lot discussions and debates and sometimes radicalism. This can be seen in the reluctance of the international community to expand the scope of humanitarian law and inclusion of the colonies in the application of human rights. This can also be seen in the fact that it took 10 years for the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic, Social, and Cultural Rights) to come into force, due to the extreme reluctance of the colonizing countries to not include the terms 'self-determination' and 'internal conflict'. Overtime as the discourse has moved along, a new debate has come into play. This is about the fragmentation of international law with respect to human rights. This paper discusses the meaning and requirement of fragmentation of international law especially with the increasing need for regionalization of human rights.

REGIONALIZATION-The universal application of international law has always been its perpetual quest. All international organizations have been created with this intention, which is universal application of international law. However, this isn't realistically possible. A state's laws and local practices are extremely important for its governance. Globalization and localization at present have contradictory pulls. Francis Deng describes this as:

"While the centerpiece remains the state, a relic of European intervention, the internal challenge of localization demands a more effective use of indigenous cultural values and institutions for nation building and self-reliant development"[1]

***Legal Associate**
***Associate Prof.**

This can be understood in the context of Africa, where globalization was dramatized by the colonial incorporation of the continent into the European mold. However, the ground realities of Africa pull it in the opposite direction. Internally there are demands of self-determination, human rights and good governance. "While sovereignty stipulates the basis of relations with the outside world, it should be predicated on domestic legitimacy."[2] This is essentially what regionalization means. Incorporation of international law in domestic law is the essence of regionalization. However, in the context of human rights, it means molding the international structure of human rights in a way that makes it more meaningful and relatable to the cultural region. This means that such molding differs from region to region. The obligation of a state for providing special measures for health services in the UK may mean providing insurance to the people. Whereas in Africa, providing special measures for health services may mean making the most basic medicines available to the people.

While the cultural perspectives on the norms of humanity and human dignity vary considerably from region to region[3], the principles that are involved for the protection of human rights are largely similar and have been adopted by the international community in the International Bill of Rights. This understanding of universalization of human rights, however, is as utopian in nature as it is monolithic. The situations and circumstances in which relativism is invoked are far more complex and nuanced. This is because there can be lot of conflicting rights that are at stake in the situation and applying the standard international law on human rights will not provide relief to all the people who are involved in the situation and whose rights are at stake.

This cultural relativism also helps in the expansion of human rights violations that may take place. This is based on the understanding that different cultures recognize the dignity inherent to a human being differently. Therefore, inclusion of relativism in the bigger universal structure of human rights, as explained by Francis Deng, is a:

"…local reinforcement and enrichment of universalism to explore the weakness of each tradition in approximating the ideals, or to appreciate the sources of genuine conflicts between the local and the universal standards."[4]

For the universality of human rights to gain legitimacy, it must be rooted in the "norms and institutions of the particular cultures

involved".[5] This means that for a system of universal structure of human rights to be evolved, there need to be cultural ties that need to be interlinked with it. Such involvement of local norms and practices makes the universal system more acceptable to the people in of different states. This is because, such an inclusion makes it seem more culture friendly and depicts a certain respect towards that culture, and hence the people find it more acceptable.

"…the victims of human rights violations in the context of the nation-state look and appeal to the principles and mechanisms of universalism to provide them with international protection against their own national and local authorities. On the other hand, not all relativists are offender: some may indeed be motivated by competing ideals within their own cultural contexts or at least by a different order of policy priorities."[6]

FRAGMENTATION-The concept of fragmentation of international law stems from the idea of universalism. This can be understood in the light of the increase in international tribunals that have been set up like the ECHR (European Convention of Human Rights), ICTY(International Criminal Tribunal for the former Yugoslavia), ICTR(International Criminal Tribunal for Rwanda) and others which have a specific jurisdiction, i.e. they are regional in nature. The judgments given by these courts sometimes clash with those given by the ICJ, which is an international court of universal jurisdiction. This is seen as fragmentation of international law.

ICJ Presidents have expressed their concern about this matter on a number of occasions. President Schwebel in 1999 said:

"…in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law."[7]

The ICJ Presidents have repeatedly expressed their concern over the dilution of the substantial law and the possibility of forum shopping and have encouraged the proposal that such regional courts should ask for advisory opinions of the ICJ and use them in their own court and decisions. Judge Guillaume said:

"…gives rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases."[8]

Justice Guillaume has further said that there has been an increase in instances of forum shopping, overlapping jurisdiction and 'serious risk of inconsistency within case law'. All in all, these specialized courts and tribunals are accompanied by a 'serious risk' of 'loss of overall control'.[9] The judges of ICJ have been trying to create an institutional hierarchy and clear norm by reiterating the importance of advisory opinions of the ICJ for the regional courts. This requirement of norm and institutional hierarchy is something that the structure of international law inherently lacks. This also cannot be created indirectly but the tactics proposed by the ICJ Presidents. An 'overall plan' is being sought for the universalism of international law, without realizing that such an 'overall plan' isn't practically possible.

However, this fragmentation in law is not necessarily problematic. The regional courts have been set up for a specific reason. E.g. the ICTY has been set up to deal with the human rights violations that took place during the break down of Yugoslavia. The ICTR has been created to deal with the human rights violations that took place in Rwanda. These are region specific and attempt to join local cultures and practices with the international human rights regime. The international community, while a community is not united in all aspects. There are state boundaries and state sovereignty and a semblance of an international order. However, the norms that are prevalent are ad hoc and inconsistent and the boundaries are porous.

"Without attempting yet another sociology of globalization, it may be accepted that political communities have become more heterogeneous, their boundaries much more porous, than assumed by the received images of sovereignty and the international order, and that the norms they express are fragmentary, discontinuous, often ad hoc and without definite hierarchical relationship – that we now live in a 'global Bukowina'."[10]

While there is a need for legal coherence, it cannot convey the political reality. This is because of the simple fact that the workings of states in an international community are never coherent or simple. They are complicated and nuanced. The more coherent the law tries to become, the farther it went from the political reality. This is especially true in

cases of human rights, where the law cannot be as coherent as it would like to be. This is because no state voluntarily accepts to commit human rights violations. Also, unlike trade, where the treaty violations and modes of performance can be anticipated, violations of human rights occur in many ways and most of them are unanticipated and unimaginable. Human rights can also not be limited to just a handful. There are too many human rights and too many violations of them to be coherent.

Also, there are times where deviation is required from judgments of the ICJ. This can be seen in the case of Prosecutor v Tadic[11], where the ICTY deviated from the holding in Nicaragua v USA[12]. Nicaragua brought the doctrine of effective control for state accountability and held that:

"The Court has taken the view [paragraph 110] that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. Al1 the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[13]

"The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras."[14]

This holding of the ICJ created a very high threshold to prove the involvement of a state in any unlawful activity in another. Hence, this reduces state accountability to the minimum. This can be problematic as following the effective control test means that unless the actors are directly under the command of the state, the state cannot be held responsible. Not even if the state is providing them with ample support to carry out illegal activities. This was deviated from in Tadic where the ICTY came up with the principle of overall control and held that it isn't necessary for a state to be directly in control over all the activities:

"…it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts."[15]

This shows that the ICJ isn't infallible and hence following its decisions can be harmful. While in the international legal system the precedents have no binding value, they have a persuasive value. If cases like Nicaragua are followed without any deviation only owing to the fact that it was the ICJ that passed it, the results can be really problematic. Hence fragmentation of law brings in new perspectives

and keeps the law from becoming stagnant. There are also options by which judgments that are not just or problematic in nature can be bypassed and a better judgment can come in its place.

Fragmentation of law is even more prevalent to a certain extent more important in cases of human rights. This is because, as explained above, there is a need for regionalization of human rights, as human rights is very localized while being universal. With regionalization, there will be fragmentation of law regarding human rights as well since the decisions will be passed giving due regard to the needs and wants of that specific region. This is also not dividing the substantial law and creating confusion by giving different interpretations to it, this is evolving the law so as to apply it in a manner that is just in that in a particular situation, in a way to provide justice and restore the rights of the person or groups of person violated. The acceptance of fragmentation will lead to a wider understanding, analysis and application of law without the fear of standardization. This will lead to an integration of these understandings and applications and create a broader forum for individuals as well as states to bring claims to international human rights bodies.

CONCLUSION-Fragmentation of law and regionalization of law go hand in hand. International law cannot be expected to be universal and hierarchal in nature as it is not realistically possible. Forcing the creation of such a hierarchy will result in the withdrawal of many states from this institution and create islands of these laws that barely overlap and are not as efficient as the current system.

ERENCES:

1 Universalism and Democracy - Southern Voices by Francis Deng, pg. 33
2 Ibid.
3 Supra note 1, pg. 36
4 Supra note 1, pg. 37
5 Supra note 1, pg. 37
6 Supra note 1, pg. 37
7 Fragmentation of International Law Postmodern Anxieties by Koskenniemi, 2002, pg. 554
8 Ibid.
9 Supra note 7, pg. 555

10 Supra note 8, pg. 557-558
11 Prosecutor v Tadic ICTY (1999) Appeals
12 Nicaragua v USA (ICJ) 1986
13 Nicaragua v USA (ICJ) 1986, para 115
14 Nicaragua v USA (ICJ) 1986, para 116
15 Prosecutor v Tadic ICTY (1999) Appeals para 137

BIBLIOGRAPHY

- Universalism and Democracy - Southern Voices by Francis Deng
- Fragmentation of International Law Postmodern Anxieties by Koskenniemi, 2002
- Prosecutor v Tadic ICTY (1999) Appeals
- Nicaragua v USA (ICJ) 1986