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THE ROLE OF THE JUDICIARY IN RECOGNIZING AND IMPLEMENTING INTERNATIONAL LAW: A COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO SRI LANKA

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Abstract: International law had had a profound impact and influence on the domestic legal system in the contemporary world. However, the status of international law within the domestic legal system is not properly defined in many of the jurisdictions including Sri Lanka. In the absence of such a constitutional provision, the judiciary as the last bastion of hope has a responsibility of interpreting domestic law in light of the international standards that have been agreed upon by the country through ratification of international treaties and those principles of customary international law that has become binding on the country. However, too much judicial activism could jeopardize the constitutional fundamentals of separation of powers and the rule of law. Therefore, this study argues that the best way to resolve this issue is by providing a constitutional provision for the role of the judiciary in the recognition and implementation of international law in a domestic context. Using a qualitative methodology with a comparative analysis of the constitutional provisions of the selected jurisdictions of India and South Africa a proposal is made for a constitutional provision for the judicial role in the recognition and implementation of international law in Sri Lanka. The results have revealed that a constitutional provision would help to advance the separation of powers and the rule of law and to well define the role of the judiciary in absorbing international treaty law to the domestic sphere, making the law more certain and predictable and upholding the rights and duties of individuals in a domestic context while fulfilling international obligations of a country under the domestic legal system.

Keywords: International Law; Judicial Activism; Constitutional Law

INTRODUCTION

In many countries, the constitution would act as the supreme law of the country, where for example, the Preamble of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka recognizes that its Constitution shall be the supreme law of the country. It would normally have a mechanism for the recognition and implementation of domestic laws. While these rules of domestic law implementation may be less problematic, the same cannot be said when it comes to implementation of international law in domestic contexts and this is a well-documented area of international law when it

comes to implementation of international treaties in particular (Hishashi 2015). Therefore, there is a need for enacting similar provisions in the constitution of a country for the recognition and implementation of international law within the domestic legal system to get rid of the uncertainty or any ambiguity that may arise in its absence. However, this recognition and implementation of international law should be done complying with separation of powers and the rule of law coming under the broad spectrum of Constitutionalism, while always taking into consideration the sovereignty of the country as well.

The separation of powers is an important tool for establishing an impartial and independent judiciary whose main function is to interpret and apply laws instead of creating substantive legal rules or norms concerning individual adjudication where the court is called upon to adjudicate on such a matter (Gerangelos 2009). On the other hand, rule of law, according to A. V. Dicey (Cosgrove 1981) is the supremacy of law above any other principle or precept. When it comes to the recognition and implementation of international law in a domestic context, upholding the notion of the rule of law is a vital consideration (Dyzenhaus 2005). One idea that comes under the broader notion of the rule of law is the idea of predictability and certainty of the law. It has often been found that, where there is an over-ambitious or overactive judiciary, the certainty of the law may be compromised as a matter of the judiciary's notion of justice and fairness (Molot 2000).

Therefore, this article looks at the different practices and attitudes of the judicial arm in the recognition and the implementation of international law in domestic contexts, whereby the practices, approaches, and the constitutional provisions of the selected jurisdictions of India and South Africa are analyzed for proposing an optimal constitutional model for allocating a proper role for the judiciary in recognition and implementation of international law in the domestic context of Sri Lanka.

JUDICIARY AND TREATY LAW

The executive is vested with the power of concluding treaties on behalf of the country. However, the executive is not allowed to directly bring international law without the participation or intervention of the legislature in many countries (Shelton 2011). This can also be justified under the notion of separation of powers since the law-making power is exclusively vested with the legislature. Against this backdrop, the respective role assigned to the judiciary is somewhat overlooked. This happens when the legislature fails to give effect to treaties that have been ratified by the executive by enacting enabling legislation to make such treaties a part of the domestic law. In such a situation the judiciary faces a dilemma in adhering to the broader notion of separation of powers and protecting the legitimate interest of the individuals who expect to yield the benefits from the treaties that have been ratified by the executive at the domestic

sphere, which concerns with the rights and duties of individuals. Therefore, it is argued that providing a proper constitutional guide as to the exact role of the judiciary concerning the recognition and implementation of international treaties at the domestic level would help the judiciary in not venturing into the law-making sphere which is left for the legislature under the separation of powers and to create certainty with uniformity of practice, thus enhancing the rule of law ideal of certainty of law.

JUDICIARY AND CUSTOMARY INTERNATIONAL LAW

The judiciary has a more significant and direct role to play in this regard. Once a litigant prays for a right or a duty that is derived from a principle of Customary International Law (CIL), the judiciary must decide on the existence and validity of such a CIL at the domestic level. In doing this, the judiciary is generally required to provide its interpretation as to the recognition and implementation of such rules of CIL in the domestic context. The judiciary being a forum for individuals to seek recourse against abuses of their rights and duties by the state, should have a systematic approach founded by a higher authority, such as the constitution to resolve such matters between the individuals and state, where the issue in question involves a principle of CIL (Haljan 2013). Therefore, to avoid any conflicts between the other state organs and the judiciary, it is argued that the constitution itself should provide for the role of the judiciary regarding recognition and implementation of CIL at the domestic level to uphold the constitutional fundamentals of separation of powers and the rule of law.

Constitutional Assignment of Judicial Powers and Functions Concerning International Law

The judicial branch is given the competency for interpreting and applying the laws that are recognized as being valid under the constitution. The same applies to the interpretation and application of international law in a domestic context when such are put into question. The Vienna Convention on Law of Treaties (VCLT) under Article 31 (1) provides that treaties are required to be interpreted in good faith by giving effect to its ordinary meaning, considering the context, having regard to the object and purpose of such a treaty. While the provisions are applicable at the international level, it is argued that its relevance at the domestic level is unclear since there is no established CIL on the issue. This fact emphasizes the lack of uniformity regarding the interpretation of international law at the domestic level since if there was a uniformity of state practice, the provision in the VCLT would have become binding upon the states as a matter of CIL. Therefore, it is argued that the judiciary should be provided with a proper guideline, preferably through constitutional provisions concerning the interpretation of both treaty and customary international law principles at the domestic level by spelling out the

competencies of the judiciary in this regard. To induct a common method for providing a proper role and guidance on interpretation to the judiciary in the process of recognizing and implementing international law in a domestic context, the relevant judicial practices and attitudes of Sri Lanka, India, and South Africa are comparatively discussed for this purpose.

SRI LANKA

When one considers the judicial attitude and practices regarding the application of international law in the domestic context, there seems to be no coherence that could be discerned from the attitudes and practices of the Sri Lankan Judiciary. This is especially true concerning the application of law related to human rights (Sornarajah 2016-2017). Article 4 (c) of the Constitution requires the judicial power of the people to be enforced through the courts established by Parliament. The judiciary is given the sole responsibility of adjudicating matters related to fundamental rights violations which result from executive and administrative actions under Article 126 (1) of the constitution. However, when it comes to the competencies of the judiciary regarding the recognition and implementation of international law at the domestic level, the Constitution has remained silent. This has created great confusion in predicting the use of international law principles by the Sri Lankan Courts. For example, in the case of (*Visal Bhashitha Kavirathne and Others v W.M.N.J. Pushpakumara, Commissioner General of Examinations and Others* 2012) the Court while referring to the fact that, right to education is even recognized in the Universal Declaration of Human Rights, ended its examination on the substance of the matter by only pointing out the existence of such a right without going another step by explaining as to why the Sri Lankan law should be reflective of such a recognized right. Since many of the judgments where the Courts do refer to an international legal instrument, it ends right there with a mere reference instead of going ahead with a critical evaluation of such standards against the existing law of the country.

The decided case law on this matter further exemplifies the non-uniformity of the judicial attitude and practices even concerning providing such lip service at least. In the case of (*Leelawathie v Minister of Defence and External Affairs* 1965), the question revolved around the refusal to grant registration of citizenship to a spouse. One of the questions for the court to decide was whether it amounted to a breach of the provisions of the Universal Declaration of Human Rights (UDHR). The court declared that even though the UDHR was of the 'highest legal order', it formed no part of the law of Ceylon (as it was back then) since the UDHR is not an applicable law in Sri Lanka. The disappointing aspect of the decision is that the court did not venture into an inquiry as to whether the UDHR has become a part of the law of Ceylon through the principles of CIL.

In the (in) famous case of (*Singarasa v Attorney General* 2013), the question that the court had to decide was whether an individual had recourse under the optional protocol to the ICCPR to make a claim for violation of his rights as guaranteed under the ICCPR which was ratified by Sri Lanka in 1980. The Court in its opinion declared that, since Article 3 vests the sovereignty with the people and Article 4 declares as to how such powers are to be exercised, it would be a violation of this sovereignty if an external body was allowed to adjudicate on this matter apart from the Sri Lankan judiciary. The court also went on to hold that, the constitutional dynamics of the country adhere with a dualistic approach where there is a need for enabling legislation to be enacted by the Parliament if a particular provision in an international agreement ratified by the executive is to take effect at the domestic sphere. While the Court was bold enough to state that Sri Lanka was a dualist country, it failed to properly explain why it is the case with a reason (Sornarajah 2016-2017).

The Court in its reasoning pointed out that the executive had no power to enact laws and anything done by the executive which violates the constitution is not valid. The Court explained that the accession to the optional protocol and the declaration made under Article 1 to the protocol thereof by the President back then, was inconsistent with Article 33 (h) of the constitution since it was not within the powers conferred upon the President by that Article. However, the court failed to make any reference to the provisions of the VCLT, where Article 46 provides that, as a general rule a state should not invoke the contention that its consent for a particular treaty was given in violation of its internal laws. The court did not make any effort to give a harmonized construction to make the law compatible with the country's obligations at the international level.

There have been some other instances in which the courts have taken a more purposive or some may call a teleological interpretation as to the recognition and implementation of international law in a Sri Lankan context. Often cited in this regard is the decision in (*Bulankulama v Secretary, Ministry of Industrial Development and Others* 2000) where the Court held that, by becoming a contracting party to the United Nations, Sri Lanka is not allowed to escape the obligations and responsibilities cast upon it by the said United Nations. The Court opined that the Stockholm Declaration of 1972 and the Rio Convention of 1992 is endorsed by the United Nations, though may not be as binding as an Act of Parliament and be termed as 'soft law' is binding upon the government if they are either expressly enacted or are adopted by the Supreme Court in its decisions.

Further, in the decision of (*Weerawansa v Attorney-General and Others* 2000) the Supreme Court used the provisions of the ICCPR in interpreting the Fundamental Rights guaranteed under the constitution of Sri Lanka. More recently, in the case of (*Manohari Pelaketiya v Secretary of Minister of Education* 2012), the Supreme Court used the provisions of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in interpreting the offense of sexual harassment at the workplace.

The Court reiterated the state's obligations derived from both the Constitution and international law regarding the protection of women. In (*Kariyawasam v Central Environmental Authority and Others* 2019) the Court endorsed the decision in (*Wijebanda v Conservator General of Forests* 2009) which recognized that the right to environment is implicit in any meaningful interpretation of Article 12 of the Constitution. The Court went on to state that, while some of the international instruments may not be binding on the government, the principles therein can be recognized by the judiciary in making their pronouncements.

The cases discussed above showcases a general uncertainty as to the attitudes and practices of the courts in recognizing and implementing international laws in the Sri Lankan context. While some decisions have utilized a monistic approach, some of the other decisions have applied a rigid dualistic approach. The zig-zag nature of these practices and attitudes does not help an individual who is trying to vindicate his rights, which may either arise from a ratified treaty or principles found under CIL. The matter is also exemplified by the fact even where the Courts have used international law in their interpretative endeavors, much of has remained mere lip service just to make good the judgment instead of bringing in substance for legal reasoning behind the arrival of a conclusion.

Therefore, it is argued that Sri Lanka should endeavor to instill constitutional provisions for assigning a clearly defined role for the judiciary for the recognition and implementation of international law at the domestic level.

INDIA

Indian Constitution has advocated for a dualistic approach when it comes to the recognition and implementation of treaty obligations and a monistic approach concerning the principles of CIL (Singh 2015). The judicial arm has always been praised for its activism in enhancing and protecting the rights of its citizenry and their role in recognition and implementation of international law at the domestic law has not provided any exceptions. In the case of (*L. Chandra Kumar v Union of India* 1997), the Court held that the judicial review process in India comprises of judicial review of the actions of the legislature, judicial review of the decisions of the judiciary itself, and administrative actions. Therefore, the role of the Indian judiciary regarding the recognition and implementation of international law must be studied in this background.

In the case of (*Vishaka v State of Rajasthan* 1997), the Indian Supreme Court held that, in the absence of effective measures to protect against sexual harassments under the domestic laws, recourse may be made to the International Agreements and their norms to give a purposive interpretation to Articles 14, 15 19(1)(g) and 21 of the constitution for providing safeguards against sexual harassment at the workplace.

The Court emphasized the need to interpret the fundamental rights as granted and protected under the constitution in light of the international standards where there is no conflict between such fundamental rights and international legal principles found upon such international laws and where harmony between the two is possible.

In (*Kesavananda Bharathi v State of Kerala* 1973) the Court observed that according to the provisions of Article 51 of the Constitution and to give effect to India's obligations under international law, the Courts are required to interpret the Constitution in light of the outlining principles of the United Nations Declaration on Human Rights. Sunil Agrawal (Agarwal 2010) comments that even where the Constitution or any other legislative enactment fails to provide for the proper role of the judiciary concerning the recognition and implementation of international law at the domestic level, through the use of judicial activism and its proactive attitude, it has been able to recognize and implement the international treaty and CIL obligations of the country to protect and advance the rights and liberties of individuals.

The main significance of the Indian judiciary in comparison to the approach taken by its Sri Lankan counterpart lies in the use of international law in its interpretative process. Unlike in Sri Lanka, the Indian judiciary has gone far beyond than providing mere lip service in the use of international law, where international law coupled with the rights recognized under the constitution has been advanced to include rights that were not originally or directly recognized under the constitution such as the right to a clean and healthy environment (Rosencranz 2002).

In a Sri Lankan context, what has been achieved by the judicial arm of India cannot be replicated since it would require a wholesome change in the judicial system where under the current constitutional setting, the Supreme Court is only allowed to scrutinize bills of Parliament, and the Parliament is precluded from reviving legislation under Article 80 (3) of the Constitution. Article 80 (3) of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka provides that no court or tribunal shall call upon the validity of an Act of Parliament (even where it conflicts or otherwise repugnant with the provisions of the constitution). Therefore, putting in place a constitutional provision for the role of the judiciary concerning the recognition and

THE REPUBLIC OF SOUTH AFRICA

The 1996 Constitution provided constitutional provisions for recognition and implementation of both international agreements ratified by the Republic of South Africa and principles of CIL in the domestic sphere. It has not disappointed us with failing to mention the respective role of the judiciary in the recognition and implementation of international law in the domestic context either (Dugard 2005). Article 233 of the Constitution provides that; the courts must prefer an interpretation of legislation that is consistent with international law over any other interpretation which

may be inconsistent with international law. Article 39 of the Constitution which deals with the interpretation of the Bill of Rights as provided under Chapter 2 of the Constitution, states that the courts must consider international law when they interpret the substantive rights which are afforded to individuals. The use of the term 'must consider' is also of considerable importance since it obliges the judiciary to look into international law when they are interpreting the Bill of Rights since the same article gives a discretion for the courts in using foreign law as it uses the term 'may' instead of 'must' which makes it clearer that there is a positive obligation on the part of the judiciary in using international law to interpret the provisions of the Bill of Rights.

In the case of (*S v Makwanyane* 1995), the Court held that the term international law in this context involves both international treaty law and principles of CIL. In (*Carmichele v Minister of Safety and Security and Another* 2001) the Court looked at the decisions of ECtHR and CEDAW in arriving at its decision. This clearly shows the progressive nature of the court in expanding the rights granted to individuals under the Bill of Rights. The 1996 South African Constitution under Article 172 grants the judiciary the power to review legislation and its compatibility with the Constitution. Dugard (Dugard 2005) opines that sometimes this provision is invoked to challenge legislations for being incompatible with international law since international law is made a part of the Constitution. However, in the case of (*Azapo v President of the Republic of South Africa* 1996), the Court held that the inquiry is only limited to determining whether the statute in question is inconsistent with the constitution and it does not extend finding out whether it is inconsistent with international law.

The 1996 South African Constitution has once again led the way and shown the way to assign constitutional competencies regarding the role of the judiciary in recognition and implementation of international law at the domestic law. From a Sri Lanka perspective, the South African model does seem workable even under the current constitutional structure and therefore, it can be argued that this model is something that Sri Lankan lawmakers can easily adopt.

GUIDE ON INTERPRETATIVE PROCESS FOR THE JUDICIARY

The current Sri Lankan Constitution of 1978 does not provide any guideline for the interpretation of international law in the domestic sphere. The courts in the absence of any specific guidelines have used their measures and sense of justice and have given interpretations for the recognition and implementation of international law in the Sri Lankan context which has made it very difficult to create any certainty of the law which inevitably results in the breach of the constitutional fundamental of the rule of law which endeavors at making law certain in its application and interpretation to a given circumstance. Therefore, it is recommended that a constitutional provision be made for

guiding the judiciary on the use of international law concerning their duty of applying and interpreting law when they are required to do so.

Out of the two selected jurisdictions, only the South African Constitution of 1996 provides an interpretive guide for the interpretation and application of international law in a domestic context. The Indian experience has shown that through the premise of judicial activism, they have been able to apply and interpret domestic law in light of the principles and standards found under international law. Being the ultimate protector of the Constitution and the rights and liberties of its individuals, the Indian judiciary has also found a coherent way to interpret and apply international law in a domestic context and fulfill its obligation concerning the recognition and implementation of international law at the domestic context.

The need for such provision in the Sri Lankan context (Table 1) is also made necessary since, under the current constitutional framework, courts are not allowed to question the constitutional validity of statutes passed by the legislature and hence having a proper guide on the interpretation and application of international law at the domestic sphere is intensified.


Table: Proposed Constitutional Provision

| | | |
|---|-------------------|---|
| Interpretation of International Law | Article x | <p>(A) The courts must interpret international law in a purposive manner to enable the state to fulfill its international obligations both at the international and domestic levels.</p> <p>Provided that where there is a possibility of interpreting a provision under several approaches, the courts must pick the approach which accords with the principles of international law.</p> |
| | | <p>(B) In interpreting domestic law considering international law, the courts:</p> <p>(i) May presume that the legislature did not intend to legislate in a manner which would conflict or breach its international legal obligations;</p> <p>Provided where the Parliament has used unambiguous words as to their intention, the courts shall give effect to such notwithstanding any inconsistencies between domestic law and international law and domestic law.</p> <p>(ii) Must presume that the common law¹ did not intend to make law inconsistent with the international obligations of the state.</p> |
| Interpretation of Fundamental Rights | Article xx | <p>The courts must interpret the fundamental rights granted to individuals under the constitution using the standards and principles as found under international law and it may also have recourse to foreign law.</p> |

¹Refers to case law

CONCLUSION

It seems clear that allocating a proper role for the judiciary concerning the recognition and implementation of the international law in a domestic context would help to upkeep the constitutional fundamental of separation of powers, whereby demarking the role of the judiciary and spelling out what they can and cannot do, it will make sure that the judiciary will be stopped from usurping the legislative function in the disguise of judicial activism. Further to that, this kind of competence allocation coming from the Constitution will also help to keep the certainty of law which is a fundamental ideal coming under the broader notion of the rule of law.

The comparative analysis made with India and South Africa does suggest that resolving any conflicts which may arise as a result of not allocating the sphere of competencies to the judicial branch could hamper the constitutional fundamentals of separation of powers and the rule of law, while the certainty of law would also have to be compromised as a result. Therefore, the suggested constitutional provisions would become helpful for a country such as Sri Lanka, where the status quo of the current constitutional arrangements are not international law friendly. Therefore, it could be concluded that providing a constitutional provision that allocates the judiciary with its role when it comes to the recognition and implementation of international law at the domestic level can be seen as a viable solution in the realization of the rights and duties of individuals granted under the international law as the adjudication of such rights and duties would ultimately be reserved for the judiciary. 

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REFERENCES

1. Agarwal, S. (2010). Implementation of International Law in India: Role of Judiciary. *SSRN*, 1-14.
2. *Azapo v President of the Republic of South Africa*, 4 SA 671 (Supreme Court 1996).
3. *Bulankulama v Secretary, Ministry of Industrial Development and Others*, 3 Sri L R 243 (Supreme Court 2000).
4. *Carmichele v Minister of Safety and Security and Another*, ZACC 22 (Supreme Court 2001).
5. Cosgrove, R. A. (1981). *The Rule of Law: Albert Venn Dicey, Victorian Jurist*. Carolina: Carolina Press.
6. Dugard, J. (2005). *International Law: A South African Perspective*. Durban: Juta.
7. Dyzenhaus, D. (2005). The Rule of (Administrative) Law in International Law. *Law & Contemp Probs*, 127-166.
8. Gerangelos, P. (2009). *The Separation of Powers and Legislative Interference in Judicial Process*. Oxford: Hart.
9. Haljan, D. (2013). *Separating Powers: International Law Before National Courts*. Leuven: Springer.
10. Hishashi, O. (2015). Problems of Interaction Between the International and Domestic Legal Orders. *Asian Journal of International Law*, 246-278.
11. *Kariyawasam v Central Environmental Authority and Others*, SC FR Application No. 141/2015 (Supreme Court 2019).
12. *Kesavananda Bharathi v State of Kerala*, SCR 1 (Supreme Court 1973).
13. *L. Chandra Kumar Vs Union of India*, AIR SC 1125 (Supreme Court 1997).
14. *Leelawathie v Minister of Defence and External Affairs*, 68 NLR 487 (Supreme Court 1965).
15. *Manohari Pelaketiya v Secretary of Minister of Education*, SC/FR/No. 76/2012 (Supreme Court 2012).
16. Molot, J. T. (2000). The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role. *Stanford Law Review*, 1-110.
17. Rosencranz, A. (2002). *Environmental Law and Policy in India*. New Delhi: OUP.
18. *S v Makwanyane*, 3 SA 391 (Supreme Court 1995).
19. Shelton, D. (2011). *International Law and Domestic Legal Systems*. Oxford: OUP.
20. *Singarasa v Attorney General*, 1 Sri L R 245 (Supreme Court 2013).
21. Singh, G. (2015). *International Law*. Lucknow: EBC.
22. Sornarajah, M. (2016-2017). The Reception of International Law in Domestic Law of Sri Lanka in the Context of Global Experience. *Sri Lanka J Int'l L*, 3-42.

23. Visal Bhashitha Kavirathne and Others v W.M.N.J. Pushpakumara, Commissioner General of Examinations and Others, S.C. (FR) Application No.29/2012 (Supreme Court 2012).
24. Vishaka v State of Rajasthan, AIR SC 3011 (Supreme Court 1997).
25. Weerawansa v Attorney-General and Others, 1 Sri L R 387 (Supreme Court 2000).
26. Wijebanda v Conservator General of Forests, 1 Sri L R 337 (Supreme Court 2009).