The Reception of International Law and the Application of Monism and Dualism in Sri Lanka

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Abstract

Every country has its own domestic legal system. However, the international legal system has an influence on the domestic legal system. The nature of the international influence within the domestic legal system is determined by how a country accepts international law into its legal system. Monism and Dualism are well known approaches adopted in reception of international law to domestic law. The research paper identifies these concepts, differences between the concepts, advantages, and disadvantages of the two concepts and their applicability to the Sri Lankan context. The paper focuses on identifying the most appropriate approach to receiving international law into Sri Lanka's domestic legal system by analysing case laws, legislation, and other secondary sources, both local and foreign. The paper concludes that either pure monism or pure dualism is not the best approach to be adhered to in receiving international law and a combination of both theories should be followed in order to get the maximum advantages from international law.

Key words: *Monism, Dualism, International Law, Treaties, Legislations*

Introduction

> "Governments that block the aspirations of their people, that steal or are corrupt, that oppress and torture or that deny freedom of expression and

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> human rights should bear in mind that they will find it increasingly hard to escape the judgment of their own people, or where warranted, the reach of international law."

The preceding remark by William Hague indicates that international law can have an impact on domestic legal regimes in order to defend people's rights. International Law governs international relations between states, whilst domestic law governs the activities taking place within the jurisdiction. International law can be understood as a combination of treaty law and customary law. The application of treaty law in international law and at national level differs from each other. Application of treaty law at the international level is determined according to the implications of the 1969 Vienna Convention on the Law of Treaties (VCLT 1969), 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT 1986) and 1978 Vienna Convention on Succession in respect of Treaties (VCLT 1978). However, application of international law at the national level depends on the approach observed in accepting international within their local territories, either monism or dualism. A number of recent decisions in domestic courts have revived monism and dualism as potential ways to understand domestic judicial reasoning on international law.

There is no precise or single definition of the terms monism and dualism. It is identified through the

relationship between domestic and international law. "The view of the monist theory is that international law is incorporated into domestic law automatically. The contrary view is the dualist view that international law that develops in a distinct sphere of international relations has to be specifically transformed into domestic law by some appropriate act such as legislation."[1] It is a well-established theory that no State is strictly monist or dualist.[2] At present moderate monism and moderate dualism are two emerging aspects in respect of receipting international law to municipal law.

Simply put, in a monist legal system, international law is considered a part of the state's internal legal order, and there is no need for domestic implementation of the said law through domestic legislation, whereas in a dualist legal system, international law stands apart from national law, and it must be domesticated through legislative process to have effects on the rights and obligations of the people. "The tension between these competing views of international law reached its height in Europe between World War I and World War II, when legal scholars began to seriously question how and to what extent

[1] Madelaine Chiam, 'Monism and Dualism in Intenational law'. *Oxford Bibligraphy* (2018) <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml> accessed 20 May 2021

[1] M Sornarajah,, 'The reception of International Law in the Domestic law of Sri Lanka in the context of the global expeirence' [2016] <https://jil.law.cmb.ac.lk/wp-content/uploads/2018/08/Vol25_01.pdf> accessed 25 May 2021

[2] K A A N Thilakarathna and Nisanka Jayarathna, 'Theories Involved in Recognizing and Implementing International Law in Domestic Contexts' (2021) 109 JL Pol'y & Globalization 80

binding international legal obligations and formal international institutions could minimize the threat of war.""[3] Hans "Kelsen's monist theory was intended to promote international peace by creating binding obligations enforceable against state actors in formal international justice institutions, as indicated in his famous work, *PeaceThrough Law* (1944)"[4]. However, this shows that the application of international law in the domestic legal system is very important because, on one hand, it helps to balance the relationship between the states and, on the other hand, it balances between the power of the state and the rights of its people.

The difference between Monism and Dualism

Countries like China, Coted'Ivor, the Czeck Republic, the Dominican Republic, Egypt, Ethiopia, France Japan, the Netherlands, Portugal, the Russian Federation, Senegal, Switzerland, Turkey, and the United states adapt the theory of Monism whereas the dualist view is taken in Australia, Botswana, India, Israel, Italy, Kenya, Malawi, Nigeria, Norway, Uganda, the United Kingdom, and Zimbabwe. Monism and dualism represent two different approaches towards the relationship between public international law and municipal law Furthermore; there are a number of differences between these two approaches.

[3] Carolyn A. Dubay, 'General Principles of International Law: Monism and Dualism' [2014] International Judicial monitor. http://www.judicialmonitor.org/archive_winter2014/generalprinciples.html> accessed May 2021

[4] ibid

1. Monism views international and domestic law to be part of the same legal system, whereas dualism considers those to be independent legal systems. Hans Kelsen and Lauterpacht made a massive contribution to the theory of monism. These two philosophers based their opinion on universalism and Kantian philosophy. According to them "all law is one and international law and municipal law are part of a single system."[5]Opposing view of dualism was held by Anzilotti and Triepel who based their theories on Hegel's philosophy. According to them international and national legal systems are two different legal orders.

2. Since ratification is not deemed sufficient in dualist countries, international law must be incorporated into domestic law through enabling legislation. Therefore, it is known as the doctrine of transformation. While appearing to support the transformation doctrine, *West Rand Central Gold Mining Co v. R* held that whatever has received the consent of civilized nations as international law will be recognized and applied by municipal tribunals. Monist countries, on the other hand, consider international law to be domestic law and incorporate it without making significant changes to domestic law. Ratification is considered adequate

[5] Dayantha Laksiri Mendis, ' The application of human right and humanitarian law treaties at international and national level', (2021) First Edition< https://www.wto.org/english/res_e/booksp_e/aid4trade13_chap6_e.pdf > accessed on 19 May 2021

for the application and they are self-executing. Therefore, it is known as the doctrine of incorporation.

3. Whenever there is a disagreement between domestic and international law in a dualist state, domestic law takes precedence. Due to its "supreme universal" nature, international law is regarded to take precedence over domestic law in monist countries.

4. State has full sovereignty in dualist countries. But in monist system if the international law coerces the state, "it happens because the state has agreed to limit its sovereignty: the state's self-imposed limitation by its freely compiled will to take part in treaties and by the freely acceptance of the customary international law." [6]

5. Theory of monism is based on naturalistic theory and takes the position that both states and individuals have rights under international law whereas the theory of dualism is based on the Positivism with the notion that only states have rights under the international law not the individuals. [7]

[6] Marian Brindusa., 'The dualist and monist theories '[2017] The Geneva Crisis- The Way Forward <https://revcurentjur.ro/old/arhiva/attachments_200712/recjurid071_22F.pdf > accessed on 20 May 2021

[7] Dayantha Laksiri Mendis, ' The application of human right and humanitarian law treaties at international and national level', (2021) First Edition< https://www.wto.org/english/res_e/booksp_e/aid4trade13_chap6_e.pdf > accessed on 19 May 2021

Present Sri Lankan context

In the past, the application of international law to the domestic legal system was restricted to diplomatic relations and times of war. Nevertheless, now it is expanding into the economic, social, and cultural worlds.

Article 27 (15) of Sri Lankan constitution reads as,

> "The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order and shall endeavour to foster respect for international law and treaty obligations in dealings among nations."

This is an implication that Sri Lanka should respect and adhere to international legal standards. However it has been reviewed that Sri Lanka observes the Monist theory regarding the reception of customary international law to the domestic legal system where as Sri Lanka adhere to dualistic approach regarding the international treaties. [8] Also the constitution of Sri Lanka provides that president should not act against the international customary law. Article 33(h) of the constitution reads as follows,

> "President shall have power … to do all such acts and things, not being inconsistent with the

[8]Pradeep Uluwaduge, M Ranjith, GCL Pathirana, 'Application of International Law in Domestic Legal System: Sri Lankan Experiences (In Sinhala)', (2013), <https://www.researchgate.net/publication/335788900_Application_of_International_Law_in_Domestic_Legal_System_Sri_Lankan_Experiences_In_Sinhala > accessed 2 July 2021

> provisions of the Constitution or written law, as by international law, custom or usage he is required or authorized to do.]

However Article 33(h) provides that priority should be given to the domestic law in case where there is a discrepancy between the domestic law of the country and the international customs and usages adopted under monistic theory. In the case of *Sepala Ekanayaka v. Attorney General*[9] it was decided that international customary law can only be adopted when the domestic law is silent. [10] The judgment further held that according to the proviso to the Article 13(6), retrospective laws can be made with regard to matters having an interest in the international law. The proviso to the Section 13(6) reads as follows:

> "Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"

According to the facts of the case, there has been no

[9] *Sepala Ekanayaka v. Attorney General (1988)* 1 SLR 46

[10] Pradeep Uluwaduge, M Ranjith, GCL Pathirana, 'Application of International Law in Domestic Legal System: Sri Lankan Experiences (In Sinhala)', (2013), <https://www.researchgate.net/publication/335788900_Application_of_International_Law_in_Domestic_Legal_System_Sri_Lankan_Experiences_In_Sinhala > accessed 2 July 2021

legislation in Sri Lanka addressing the offences committed by the defendant involving airplanes. However, by that time, Sri Lanka had been a party to three conventions dealing with aviation-related offenses. They are Convention of Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14th September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on 16th December 1970 and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23rd September 1971. Theses conventions had been given effect by Offences against Aircraft Act, No. 24 of 1982 and used to punish the offender.

In case of applying international treaties within Sri Lanka, the Dualist theory has been practiced. According to article 157 of the Constitution, treaties which are essential for the development of the national economy shall be passed by a 2/3 majority and thereafter those treaties shall have the force of law. The dualist approach of Sri Lanka was held in the case of *Leelawathi v. Minister of Defense*.[11] The petitioner in this case was an Indian citizen married to a Sri Lankan citizen. After 2 years of subsistence marriage, when the petitioner applied for citizenship, her application was refused. In this case, the petitioner claimed that Ceylon, despite being a signatory to the United Nations Declaration of Human Rights, had violated it. But it was held that even though Ceylon is a signatory, it is not

[11] *Leelawathi v. Minister of Defense* NLR-Vol.68-P487

binding as it does not form a part of domestic legislation because Sri Lanka is a dualist country. Thus, for any international Treaty to become domestic law it needs to be incorporated through an Act of Parliament. Otherwise, such a Treaty, even having relevance as high moral authority, it will have no legal force. In *Singarasa V. Attorney General* it was held that,

> "The framework of our Constitution adheres to the dualist theory, the sovereignty of the people of Sri Lanka and the limitation of the power of the President as contained in Article 4(1) read with Article 33 [f] in the discharge of functions for the Republic under customary international law". [12]

In this case it was held that even Sri Lanka had ratified the International Covenant on Civil and Political rights (ICCPR) in 1980 and its' additional protocol in 1997, Sri Lanka was not bound to adhere in to those standards since Sri Lanka had not incorporated this conventions via enabling legislations. However, since Sri Lanka is a signatory to the ICCPR, the Human Rights Committee has recommended that the offender be pardoned. Later, due to the influence from the international community and for the protection of right of the people Sri Lanka enacted International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 as the enabling legislation to ICCPR.

But in *Tikiri Banda Bulankulama v. the Minister for the*

[12] *Singarasa v. AG* [2013] 1 SRI L.R. 245

industry[13] court has previously used the notion of "intergenerational equity" which is a concept of international environmental law which did not exist within Sri Lankan legal system to depend the interest of the environment. This principal of intergenerational equity is only found in international environment law and highlighted by Weeramantry J in the case of *Hungary v. Slovakia*. In the Bulankulama cases Amarasinghe J held that "either expressly enacted or by becoming part of the domestic law by the adoption by a superior court of record and by the Supreme Court in particular in their decisions, Sri Lankan judges can refer to International law in the absence of enabling legislation in Sri Lanka" This shows the liberal approach of the courts in receiving international law.

Advantages and disadvantages of dualism and monism

International law is more concerned with individual rights, and it develops laws to defend such rights, as well as exerts some pressure on domestic legal systems to protect human rights. Furthermore, there is a view that a country must respect international law in order to acquire international recognition. Some scholars identify that adopting international law is a treat to the domestic legal system. However, despite the threats, the courts uniformly used international law to protect the rights of the accused.[14]

[13] *Tikiri Banda Bulankulama v. Minister of industry* [2000] 3 Sri 243

[14] M Sornarajah,, 'The reception of International Law in the Domestic law of Sri Lanka in the context of the global expeirence' [2016]

There are many positive points in adopting monistic approach. Monism is effective in protecting human right and environmental rights. International human rights treaties are justifiable on the grounds that the constitution itself contains a statement of the citizen's rights. "All that the court does is to use the international treaties to ensure the content of the rights by reading the rights in a manner consistent with their statement in the international treaty."[15]

Today there is a trend towards the acceptance of monism view because "national courts believed that the use of international law was a mean of controlling executive power, exercised by handful of persons to the detriment of the citizen of the state".[16] For instance, Bangladesh court in *Nurul Islam v. Bangladesh*[17] recognized that there is a need to make law on cigarette advertising following WHO convention on tobacco control. Violation of international law in monist countries is less. Also, monism helps to update clauses which are outdated.[18] For instances if a particular treaty has been amended or courts have set out new precedents, then in such a context those

<https://jil.law.cmb.ac.lk/wp-content/uploads/2018/08/Vol25_01.pdf > accessed 25 May 2021

[15] M Sornarajah,, 'The reception of International Law in the Domestic law of Sri Lanka in the context of the global expeirence' [2016] <https://jil.law.cmb.ac.lk/wp-content/uploads/2018/08/Vol25_01.pdf > accessed 25 May 2021

[16] ibid

[17] *Nurul Islam v. Bangladesh* (2000) 52 DLR (2000) 413; ILDC 477

[18] 'Australian is a dualist country' (2013, November) Law Teacher: <https://www.lawteacher.net/free-law-essays/australian-law/australia-is-a-dualist-country.php#citethis> accesssed 23 May 2021

amendments automatically update with in the domestic legal system unless like in Dualist Countries.

Although adopting a monist approach in the reception of international law has some advantages, it also has several downsides. Domestic law in monist countries becomes null and void once international law is accepted. It has an impact on the country's sovereignty. The Monist method of submitting to an extraterritorial legislature has also been criticized. Justifications for Dualism are,

I. political theory concerned with self-determination, democracy, and accountability[19]
II. constitutionalism, particularly the principle of the rule of law

According to dualist perspective, provisions included in the international and domestic legal system must not be concurrent or conflicting.[20] Therefore, it is clear that this system does not bring any threat to the sovereignty of people.

Dualism is considered as an archaic doctrine that has no place in modern international law[21] due to its

[19] *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168,

[20] Marian Brindusa., 'The dualist and monist theories '[2017] The Geneva Crisis- The Way Forward <https://revcurentjur.ro/old/arhiva/attachments_200712/recjurid071_22F.pdf > accessed on 20 May 2021

[21] M Sornarajah,, 'The reception of International Law in the Domestic law of Sri Lanka in the context of the global expeirence' [2016]

disadvantages. It is a well-known fact that dualism often leads to violation of international law if it contradicts. Or else, the political regime in power may sometimes ratify the treaty and perhaps may not adopt an enabling legislature. In such a context, ratification is not effective. On the other hand, in dualist countries, once the international law is enacted as a national law, another domestic law can override it through amendments. So the affectivity of international law diminishes at such a time.

In addition, there is a well-recognized view that Human Right law seeks to advance interests of people where as dualism is used only to keep such rights away from the people. *Singarasa case* can be identified as one of the land mark case in this regard

Conclusion

"The transformation of international norms into domestic law is not necessary from the point of view of international law……the necessity of transformation is a question of national, not of international law".[22]So, in deciding whether Sri Lanka should adopt a monist or dualist approach following facts should be taken into consideration.

<https://jil.law.cmb.ac.lk/wp-content/uploads/2018/08/Vol25_01.pdf > accessed 25 May 2021

22Antonio Cassese, *International Law in a Divided World* (Clarendon Press, Oxford, 1992, pp. 21-22)

- Sri Lanka is a multi-cultural country where ethnic tensions have arisen as a result of its diversity.
- Sri Lanka's multi-party political system, which results in changes in national policies as governments come and goes.
- Sri Lankan religious and cultural influences
- Sri Lanka is a developing country with a mixed economy (Socialism and Capitalism).

Despite the criticisms that direct incorporation of international treaties and conventions into domestic legal systems could harm individuals' rights, the monist approach is well suited to Sri Lanka's political context, which is based on a multi-party system, because political decisions made by the parties will have a negative impact on people's rights. Attempts by politicians to benefit on existing diversity may result in discrimination. As a result, monist theory can be described as promising in this respect. Also, Sri Lanka is a country with ethnic diversity. So the domestic legislation enacted by the majority members of the parliament can prejudice the other ethnic minorities. As a result, in such a situation, the monist approach is preferable.

But when it comes to treaties regarding economic issues, it is justifiable to follow a dualist approach because Sri Lanka is still a developing country in which there is a mixed economy of both Capitalism and Socialism. Therefore, international treaties should be implemented with proper care considering their economic impact. In

such a context, a dualist approach might be better, because, if a monist approach is followed, the domestic law will be over-ruled by international law without taking the economic circumstances into consideration.

Also, it is argued that monist approach violates the parliamentary sovereignty. But Article 3 of the constitution reads as follows,

> "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."

So accordingly, rights of the people are given prominence compared to parliamentary sovereignty in Sri Lanka. Therefore, in such a context above argument of losing sovereignty is not as valid as international law concerns more on Human Right.

With the globalization, national court judges are becoming trustees of humanity. Therefore, more liberal approach of monism should be applied. So, the judges of the court can decide the application of law. Parliament need not to intervene regarding international law. In a very famous case of *Hungary v.. Slovak Republic*[23], European Union adopted a monist view due to its effective nature, to provide international remedies. International human rights treaties and environment treaties are composed by experts on above fields in the

[23] *Hungary v. Slovak Republic Republic* c- 363/10 (16October 2012)

world. So, it should be received by the country from a monistic perspective. Just ratifying a convention in a dualist system does not give any legal effect without enabling legislation. As a result, when it comes to human rights and environmental treaties, the monist approach should be followed.

Furthermore, Parliamentary sub-committee report on fundamental rights also suggests that a more liberal view should be adopted when interpreting fundamental rights by taking international legal obligations into consideration. And also sub section on "incorporation of treaties" of the report also emphasize that "provisions of a Human Right treaty shall become a part of the domestic law on the expiry of a period of two years reckoned from the date of ratification"[24] and this can be identified as a due recognition given to the monist approach.

Most of the states adhere to a blend of these theories in complying with international law rather completely lying on a single approach. For example, Unites states can be identified as a combination of these theories. Article VI of the United States Constitution reads as follows,

> "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the

[24] The Constitutional Assembly. *Report of the Sub-committee on Fundemental rights.* Colombo: Parliament of Sri Lanka (2016) <https://www.google.com/search?q=The+Constitutional+Assembly.+Report+of+the+Sub-committee+on+Fundemental+rights> accessed 20 May 2021

> authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

"This express incorporation of treaties into binding (and supreme) domestic law was complemented by the understanding that customary international law "is part of our law," as famously noted in the United States Supreme Court's decision in The Paquete Habana, 175 U.S. 677 (1900)."[25]

When examined critically, no legal context exhibits pure monism or pure dualism. There is an entire set of intermediary situations where elements of the two theories are combined together. Sri Lanka also should not strictly adhere only to a single approach and should observe a blend of both approaches. In a country like Sri Lanka, a more monist approach should be taken regarding environmental and human rights law, while a dualist approach should be taken regarding economic treaties as discussed above. It is the responsibility of the legislature to pass legislations to incorporate international law to domestic legal system and judicial activism can be used to protect the rights of the people by way of creeping to monism in case where the legislative hand of the government is silent.

[25] Carolyn A. Dubay, 'General Principles of International Law: Monism and Dualism' [2014] International Judicial monitor. http://www.judicialmonitor.org/archive_winter2014/generalprinciples.html > accessed May 2021