Placing International Law within the Domestic Context Through Constitutional Recognition: A Policy Oriented Approach

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Abstract: *International law that primarily governe the relationship between the interaction of States even at the beginning of the 20th century has now evolved into a comprehensive body of law that govern subject areas such as family law and property law through the international standards set out in many of the human right treaties across the world which were an exclusive part of the domestic law. Though, the impact of international law has become undeniable, how countries have utilized international law in their domestic legal system has not found any specific pattern. While a country may be free to adopt its own methodology of adopting or transforming international law into the domestic legal system, main research problem which is addressed through this paper relates to the question of as to how the constitutional framework could be utilized to place international law within the domestic legal system through an policy oriented approach, and by policy it is intended to analyse how a country could best utilize international law in the domestic context by considering the constitutional structure of a country along with its own social, economic and cultural realities. This analysis is carried out utilizing the doctrinal approach, and the results have revealed that such a constitutional mechanism could help to make international law more obligatory and directory, demarking the competencies of the governmental institutions regarding the recognition and implementation of international law, advancing the pith and substance of constitutional rights, selecting international obligations possible of being given effect at the domestic level and the general advancement of domestic human rights norms by upscaling them with international standards. In this context, it is highly recommended that a proper constitutional framework be instilled with a policy-oriented approach for the recognition and implementation of international law at the domestic sphere.*

Keywords : *Recognition of International Law, Policy Oriented Approach, Human Rights.*

1. Introduction

In many countries, the constitution would act as the supreme law of the country. It would normally have a mechanism for the recognition and implementation of domestic laws. 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 in a manner which would not hinder the constitutional framework and the mandate regarding the recognition and implementation of any other law. The mechanism for recognition and implementation of international law within the domestic legal system should be done in accordance with the constitutional fundamentals of separation of powers and the rule of law

coming under the broad spectrum of Constitutionalism, while taking into the consideration the sovereignty of the country as well.

The second Republican Constitution of Sri Lanka makes reference to international law in its directive policy coming under chapter VI of the said Constitution.[1] Article 27 (15) of the Constituion[2] declares that, the State shall 'endeavour to foster respect for international law and treaty obligations.' However, this Article does not provide provisions for the recognition and implementation of international law in the domestic legal system. Since Article 27(15) is merely a guideline, it is incapable of creating, any rights and duties as Article 29[3] makes it clear that no right, obligation, or responsibility declared in the directive policy is going to be justifiable. As a result, these directive principles of state policies are of little importance in terms of substantive individual rights.

Meanwhile, Article 157[4] allows the Parliament to give effect to treaty obligations undertaken by the Sri Lankan government relating to foreign investments or national economy by the approval of a two thirds majority. Accordingly, the Parliament directly enacts the relevant international treaty a part of the domestic law without there being a need for any enabling legislation. However, this approach has been used in rare occasions and finding examples are very difficult indeed. While the 1978 Constitution in two instances refers to international law, when it comes to the implementation of international law the domestic context, the Constitution is silent. There is no mechanism within the Constitution on how to apply the international rules or customs into the domestic legal sphere.

The current constitution fails to provide provisions as to how the country should give effect to international treaties under the domestic legal system that have been ratified, as the constitution also fails to provide a coherent mechanism for the entering into international legal obligations which arise through the signing /ratifying international treaties. In order to adopt a proper mechanism to create the international treaties which are ratified by the state as a part of the domestic law, constitutional legitimacy should be upheld. This can only be achieved through providing constitutional provisions as to how the country should enter/undertake international obligations through treaties and how they are to be domestically implemented. This problem is not limited to Sri Lanka's treaty obligations arising under international law. It is evidently the case of application of customary international law in the domestic legal system. The judiciary plays a creative role in interpreting the constitution. However, the Sri Lankan judiciary has failed in applying the principles of customary international law in the domestic legal system or to show any coherence which has resulted in the law becoming uncertain and unpredictable. This can also be attributed to the absence of constitutional provisions regarding recognition and implementation of international law in the domestic context.

In this backdrop, it's imperative to discover a proper mechanism for the recognition and implementation of international law as rights and obligations which are derived from a higher international standard. In addition to this, where a country ratifies an international treaty or undertakes an international obligation pertaining to some rights or obligations, it would be unfair to deny the people, the ability to yield the fruits

[1] Consitution of the Democratic Soclailst Republic of Sri Lanka 1978, Chapter VI.
[2] ibid, Article 27 (15).
[3] ibid, Article 29.
[4] ibid, Article 157.

arising out of such an undertaking by not having a proper mechanism for the recognition or implementation of such obligations in the domestic legal system. When seeking for a constitutional implementation of international law in the domestic context, there would be a great need for the three branches of the government, namely, the legislature, the executive and the judiciary from the time of negotiating the Sri Lankan international law obligations by implementing them within the domestic sphere.

Hence, the main contention of this research is to identify as to how the constitutional framework could be utilized to place international law within the domestic legal system with a policy oriented approach.

2. Methadology

This study was conducted using a doctrinal approach to find policy reasons that could be used to advocate for constitutional recognition and implementation of international law. Nonetheless, the research contains a critical examination of primary sources, including constitutional provisions, jurisprudence, and secondary sources of textbooks and journal articles.

3. Discussion

The need for a constitutional provision for the recognition and implementation of international law rests on a number of grounds. These include the increasing impact of international law on the domestic sphere, philosophical considerations, upkeeping the constitutional fundamentals of separation of powers, rule of law, allocating competencies to the judiciary regarding their role concerning the same, uplifting the rights and duties of the individuals at the domestic sphere and to fulfil the international obligations of a country taken at the international level (*pacta sunt servanda*) by giving effect to such obligations at the domestic level. With the expansion of international law, it has had a profound impact on the domestic legal system[5]. While the traditional notion of international law only concerned with the interactions of states at the international level the expansion of the application of international law upon international organizations, Non-Governmental organizations (NGO's), multinational organizations and at times even individuals, the ambit of international law has expanded by leaps. This has had a considerable impact on the national legal system, specifically when there is inconsistency between the international and national legal standards.

As international law itself does not provide any guideline on how it should be absorbed into the domestic legal system it has created many controversies and confusion. According to Chiam[6], since the theories of monism and dualism have been unable to grasp the state practices associated with the recognition and application of international law at the national level they simply provide abstractions that are not very helpful in a practical sense. In the absence of an appropriate guideline or theory to be applied regarding this gap, facilitating constitutional provisions is a viable solution to overcome the difficulties faced by countries. The Constitution is more appealing because it is the supreme law of the land, the authority it has over the legal system and its operation in a country. In the case of *Singarasa V. Attorney General*[7], Sarath N. Silva, C.J. commenting

[5] J. Starke and I. Shearer, *Starke's International Law* (11th Edn, Butterworths 1994)

[6] M. Chiam, 'Monism and Dualism in International Law' (2018) Oxford Bibliographies https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml#:~:text=Monism%20and%20dualism%20also%20provide,a%20single%20universal%20legal%20system. Accessed 23.07.2020

[7] (2013) 1 SRI L.R 245-252, at 251.

on the dualistic nature of the 1978 constitution held as follows;

" … The Classic distinction of the two theories characterized as monist and dualist is that in terms of the monist theory, international law and municipal law constitute a single legal system. Therefore the generally recognized rules of international law constitute an integral part of the municipal law and produce a direct legal effect without any further law being enacted within a country. According to the dualist theory, international law and municipal law are two separate and independent legal systems, one nation and the other international. The latter being an International law regulates relations between States based on customary law and treaty law. Whereas the former, national law, attributes rights and duties to individuals and legal persons deriving its force from the national Constitution…"

The theories advanced by H.L.A Hart under his thesis of 'rule of recognition'[8] and Hans Kelsen's theory of 'grundnorm'[9] also advocate the idea of enacting constitutional provisions for the recognition and implementation of international law in the domestic sphere. In his master class, 'The Concept of Law', Hart argues that in modern societies the recognition and validation of laws are carried out with the rule of recognition. The rule of recognition simply means the rules recognized by a society, so as to decide on the validity of a specific rule. Hart argues that, while in primitive societies there was no requirement for such a rule of recognition since it was not a complicated society where interaction between individuals were limited therefore, primary rules were sufficient to govern such societies. However, as the societies got more complex, primary rules became inadequate and the need for having secondary rules emerged. The main secondary rule is the rule of recognition, which provides guidelines as to the recognition of any other rule in a legal system. What has happened to these societies when they have turned from primitive societies to complex ones is equally applicable to the impact of international law upon the domestic legal system where in the good old days there was hardly any talk of conflict between the two, whereas in the modern world they have often come into conflicts and disagreements. Therefore, having a rule of recognition is important to resolve this controversy. Hart argues that, in countries with a constitution, the constitutional provisions related to recognition and validation of laws in the domestic sphere will be the rule of recognition since it will provide for the recognition of a legal rule and determine whether such rule is valid or not. Therefore, according to the philosophical arguments put forward by Hart, it becomes clear that providing a constitutional provision for the recognition and implementation of international law in the domestic sphere is required.

Kelsen in his work 'The Pure Theory of Law' speaks about the validation of norms for those norms to become binding and effective. Where a lower norm is validated by a higher norm, the lower norm becomes effective under the legal system (whether international or domestic), and when one cannot validate a lower norm by a higher norm, such would become the grundnorm. In the domestic sphere, the constitution would be the grundnorm and for any law to be validated, it should be ultimately traceable to the ultimate norm of validation in the chain of norm validation. Regarding the recognition and implementation of international law in the domestic sphere, such a

[8] H.L.A Hart, *The Concept of Law* (3rd Edn, OUP 2012)

[9] H. Kelsen, *Pure Theory of Law* (1st Edn reprint, California Press 1967)

process should also find a validation through a grundnorm. The constitution being the grundnorm of a given domestic legal system should therefore contain such provisions for the validation of international law at the domestic sphere. It would be particularly helpful for the three branches of government to determine the existence and validation of a standard that is questioned at the national level.

These philosophical arguments support the assertion that there is a need to provide a constitutional provision for the recognition and implementation of international law in the domestic sphere. The constitution being either the basic norm or the basis of the rule of recognition would help to clarify the position of international rules and norms in the domestic sphere. This would help to eliminate any confusion or conflict that might lead to a lack of constitutional provisions. Regarding the position of CIL in the national sphere, again, the Constitution provides no guidance as to their status in the domestic sphere. Therefore, when adopting international law in the domestic sphere, allocating power to the three branches of government must done while ensuring a proper balance of the powers exercised by each of these branches. It must be conceded that a branch cannot circumvent or exceed its authority. Consequently, it may be emphasized that an introducing constitutional provision for the recognition and application of international law would also contribute to advancing the notion separation of powers within the constitution.

The rule of law is considered as an important fundamental of the legal system of a country. In particular, the idea of maintaining the certainty of law as a precept of the rule of law as shown by Fuller[10] in his thesis on 8 aspects of making a valid law is an important remark in the recognition and implementation of international law the domestic sphere. When considering the recognition and enforcement of international law at the national level, the importance of maintaining the certainty of the law can never be undermined. It is argued that the Constitution, as the supreme law of the country, can provide the necessary guidelines to achieve constitutional certainty in the implementation of international law. It is therefore clear that compliance with the rule of law and the constitutional provisions for the recognition of international law will also ensure legal certainty.

International obligations are fulfilled by countries under the premise of *pacta sunt servanda*. Therefore, international law is much dependant on the respect shown to it by its participants, the states. State practice sometimes has shown a tendency to use international law when it is advantageous to it and sometimes it has disregarded it when it has shown to be detrimental for them[11]. When a country takes up an obligation at the international level, whether it fulfils that obligation or not will be determined according to international law and when it comes to its obligations under the domestic sphere, international law is bit weak in enforcing its authority at the domestic level, unless the norms that are violated enjoys a jus cogens status, which are considered as being inviolable.

In the absence of any external pressure, the recognition and implementation of international law is a matter solely to be decided in accordance with the domestic law of a country. Therefore,

[10] Lon Fuller, Morality of Law (2nd Edn, Yale 1969) Chapter 2.

[11] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) EJIL 369

having constitutional provisions for such recognition and implementation of international law at the domestic level seems the only viable solution to advance the premise of pacta sunt servanda which binds the fabric of international law together. It is also argued that, by providing constitutional provisions for the recognition and implementation of international law at the domestic sphere, the respect to and the advancement of international law could also be achieved as a constitutional backing for international law would obviously help to uplift the position of the voluntary nature of international law into something which is more mandatory. By having a constitutional provision for the recognition and implementation of international law at the domestic sphere would, therefore, be useful to make international obligations taken by the state be made mandatory than a directory. Since taking up such obligations would have been within the powers and discretion of the state sovereignty. However, once it chooses to take international obligations at the international level, it is not within their power not to recognize and implement such obligations under the domestic sphere since under the constitution, the sovereignty is with the people and not with any branch of the government or the government itself.

4. Conclusion

In conclusion, this research has revealed that a constitutional provision for the recognition and implementation of international law in the national context is useful for a number of reasons. These provisions are useful to integrate the principles of international law within the national sphere. This process should be carried out according to the concepts of state sovereignty, separation of powers, rule of law and constitutional supremacy. Nevertheless, the assignment of appropriate competence to the judiciary, the raising of the rights and duties of persons will also increase the international obligations of the complaint. The study, therefore concludes that a constitutional provision for the recognition and implementation of international law in the national sphere is the best option available. The rationale for choosing the constitution over other mechanisms is that the constitution is considered to be the grundnorm of the country and it provides for the ultimate recognition rule regarding the recognition and implementation of the law in a particular legal system.

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