

Using International Law as an Aid to Construction in order to Protect the Rights of the People: A Sri Lankan Perspective

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Background

A legal system is based on basic norms and values which guarantee smooth functioning of the society it serves. These norms and values reflect communal morals rooted in the natural law tradition and they direct the “Black Letter” legal rules towards social justice. Justice is the ultimate goal of law and in achieving the same, judiciary plays a vital role. The courts fulfill a fundamental role in the process of interpretation. Under the laws of Sri Lanka, only the courts are entitled to give a final and authoritative interpretation of statute law. In the process of interpretation, International Law (IL) is sometimes used to interpret domestic legislation, and judges tend to use IL as a tool of inspiration. In Human Rights and Fundamental Rights (FR) jurisprudence¹, it can be observed that IL is often used to support the reasoning of cases. But it should be noted that there is a qualitative difference between “using IL as an aid to construction” and “incorporating IL in to Municipal Law through judicial actions.”

In a dualist system, it is generally accepted that if IL is not incorporated into the domestic legal system it cannot be used as an aid to construction. Despite such conceptions, some jurists argue that even though an IL convention is unincorporated, if a country has ratified that convention, the judiciary can use it in their interpretation process. Bangalore Principles-1988² are also in support of such arguments. Further it is not realistic to expect the Legislature to provide for all contingencies and eventualities.

In this context this paper attempts to analyze the approach of judiciary of Sri Lanka toward using IL as an aid to construction and it evaluates the hypothesis given below.

The Sri Lankan judiciary does not effectively use IL as an aid to construction to protect the rights of the people.

Further, this paper examines the relevant judicial decisions in the light of Bangalore Principles -1988 and compares the position of selected commonwealth countries to make recommendations.

¹ “Whatever may have been possible in the world of 1945, the complete isolation of constitutional law from dynamic impact of IL is neither possible nor desirable today. That is why national courts,... have a duty , so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of IL, including fundamental freedoms” *Al-Kateb v. Goodwin (2004)HCA 37*, Kirby J

² “It is within the proper nature of the judicial process and well- established judicial functions for national courts to have regard to international obligations which a country to undertakes-whether or not they have been incorporated into domestic law- for the purpose of removing ambiguity or uncertainty form, national constitutions, legislation or common law” Principle- 04

Methodology

This is mainly a library based research in which text books, journal articles, landmark judgments and internet information are used.

Outcome

Sri Lanka is a dualist country. IL applies in a dualist legal system, if the country has not only ratified a particular convention or covenant but has also incorporated those into the domestic law. For a convention to operate and be enforceable by individuals within the domestic legal system there must be an enabling Statute, which is a government action by the state incorporating IL norms into domestic law. This action is mandatory in order to grant force of law to such IL in the country. Under Article 4(d) of the 1978 Constitution of Sri Lanka, the state is bound to respect, secure and advance Fundamental Rights (FR) by all organs of the government and under Article 27(15) to Endeavour to foster respect for international law and treaty obligations. When reading above mentioned Articles together, it can be argued that the judiciary is able to ensure the protection of FR while incorporating IL which Sri Lanka has ratified, in to domestic law through its creative interpretation. Ratification is “*a positive statement by the government of a country to the world and to the people (of the country) that the executive and its agencies will act in accordance with the Convention.*”³ The purposive approach to interpretation makes this task reliable.

In the case of *Weerawansa v. AG*⁴ the court held that Article 27(15) implies that the State must likewise respect IL and treaty obligations in its dealing with its own citizens, particularly when their liberty is involved. The State must afford them the benefit of the safeguards which IL recognizes.

Again in the *Eppawala case*⁵ the court endorsed on a broad interpretation of Article 12(1) using International Standards which are regarded as “soft law” and considered purported agreement in the light of the principles set out in the Stockholm and Rio De Janeiro Declarations. This was a very positive move by the Sri Lankan judiciary towards the protection of FR of the citizen of the country. In this case, the Supreme Court insisted that though these IL instruments are regarded as soft law, as a member of the United Nations, Sri Lanka cannot ignore those documents. Further the court stated that “*moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular in their decisions.*”⁶ According to this dictum, it can be argued that the judiciary encouraged the quasi monist system in this case.

In the FR case named *Sanjeewa v. Suraweera*⁷ the court referred to Article 12 of the ICCER⁸ as an external aid to interpretation and recognized the right of everyone to enjoyment of the

³ The Bangalore Principles, 1988: Kirby M., “the Bangalore Principles, ten years later”1998

⁴ (2000)1 Sri L.R 387

⁵ *Bulankulama and others v. Secretary, Minister of Industrial Development and others* (2000)3 Sri L.R. 243

⁶ *2000 (3) Sri L.R 243*, Justice A.R.B.Amarasinghe

⁷ (2003)1 Sri L.R.317 this case is also known as the Gerald Mervin Perera ‘s case

⁸ International Covenant on Economic Social and Cultural Rights

highest attainable standard of physical and mental health. These cases demonstrate how the Supreme Court plays a creative role without encroaching on the territory of Legislature.

This tendency of using IL as an aid turned in to a different direction in a controversial case named *Nallaratnam Sinharasa v. AG*⁹ where the court held that Sri Lanka's accession to the Optional Protocol to the ICCPR¹⁰ was unconstitutional. It is clear that in this case the Supreme Court has relied on the positivist ideology. Even though this was a legally sound decision, it can be argued that this was a major drawback of Sri Lankan FR Jurisprudence. According to the Presumption that a Statute will not be interpreted so as to violate a rule of IL or International obligation, it can be argued even if Sri Lanka has neither incorporated nor ratified ICCPR, IL norms included in ICCPR may still be applied or used by the courts. This is because the application of Customary IL would impose a duty on Sri Lanka to respect the basic HR norms in terms of protecting rights of people of Sri Lanka. The Indian Supreme Court referred to CEDAW in *Vishaka v State of Rajasthan*¹¹ and recognized that the International Conventions and Norms are of great significance in the formulation of the domestic law. On that basis the creative role of the judiciary can always be used to serve the purpose of protecting the rights of the people.

Conclusion

The above analysis shows that the Sri Lankan judiciary has only in a very few instances used its interpretation process to recognize IL norms to ensure the rights of the people. Particularly in *Sinharasa's case* the judiciary has taken a literal approach based on positivism. But the wealth of norms developed at the international arena would definitely enrich the interpretation process and it would help to ensure the protection of rights. This position may be encouraged by a purposive approach. In conclusion, this paper suggests that while taking into account local laws, traditions, circumstances and needs, the judiciary must use its creative role in interpretation; through a purposive approach, it should use IL as an aid to construction and reconciliation of the competing interests in the community and ensure social justice.

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⁹ S.C. SPL (LA) No.182/99 (2006)

¹⁰ International Covenant on Civil and Political Rights

¹¹ 1997 AIR 3011