ADMINISTRATION OF JUSTICE WITH SPECIAL REFERENCE TO HUMAN RIGHTS PROTECTION: CHALLENGES AND PROSPECTS

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In the process of administration of justice, victims of human rights violation cases are not always remedied as per the international standards. As a result, access to justice is not always guaranteed for those who look forward for justice. This might create a gap between the established law and ensuring justice. This is apparent in particular in the area of human rights protection. Despite the progressive developments ensue in international human rights treaty law due to the lethargy of the legislatures in states which follow dualistic approach in incorporating international law into domestic law people in such countries whose human rights are violated by the state instruments are unable to profit from those progressions occur at the global level. In exceptional occasions Sri Lankan judiciary has attempted to address this injustice through judicial activism. They have not departed from the traditional dualistic tradition but have done the justice to victims of human rights violations through different judicial interpretations and also by way of creeping through monism. In monist countries when international treaties are ratified or acceded by states, those international treaties become self-executing. Hence, the judges can adjudicate the cases in light of the legal principles stipulated in such treaties without the need of transformation of them to domestic law through acts of legislature. Nevertheless, one may argue that through this approach the executive branch of the government would have more powers in the process of international incorporation of treaties and the judiciary can bypass the legislature and directly apply the principles of international treaties to the cases before the courts. In contrast, in dualistic countries treaties will not automatically become executed but those should be incorporated through an enabling statute adopted by the legislature. Thereby the legislature maintains the monopoly of law making authority without leaving any space for the judiciary to do so. However, many states traditionally known to be dualistic counties now dramatically use the legal principles embedded in treaties which are transformed to be customary international law principles to be invoked without the need of an enabling legislation. This trend could be seen through the jurisprudence of many apex courts of India, Canada and Australia in spite of the fact that those states maintain the dualistic tradition of international incorporation. However, Sri Lankan judges have faced with a blockade in Nallaratnam Singarasa v. Attorney General judgment and as a result, the emerging monist trend created by previous judges through landmark judgments seems to have been ended. Therefore, it is important to examine the way forward for Sri Lanka in the post Singarasa era in order to overcome such negative implications that hinder the access to justice through the monist passage for the victims of human rights violations. This research paper thus wishes to examine such new trends emerging in many such jurisdictions and some of the positive and negative examples drawn from Sri Lanka. Therefore, the research question addressed in this research is Can Sri

Lanka's judiciary, though not empowered to make legislations, interpret Sri Lanka's obligations under international law into the municipal law of the country in pronouncing its decision in a case concerning issues of international law? The methodology used in the research is qualitative and many text books, scholarly articles and case law jurisprudence of a number of jurisdictions have been used.

Key words: Administration of Justice, human rights protection, monism, dualism

Transcribed plenary speech of Ms Wasantha Seneviratne

I have selected the topic of "Administration of Justice with special Reference to Human Rights Protection: Challenges and Prospects". In fact, I am very thankful to Honourable Former Attorney General Palitha Fernando for paving way with references to cooperation of International Law and emerging trends with regards to creeping towards monism which would be the clasp of my presentation as well, with some highlights on judicial activism and some selected jurisdictions.

We find international law to be very important and it includes Treaty Law and Customary International Law as predominant sources of law. But at the same time International Law does not direct towards the obligatory States as to which way should be used when incorporating international law in their domestic systems. As a result, we find number of diverse practices as well as patterns emerged in the different jurisdictions and under this some countries prefer monist tradition of international law reception and in other countries they prefer the dualistic tradition of international law incorporation. I wish not to embark on the differences between monist school of law and dualist school of law, but I wish to show that either by monism of dualism the expected ambit is the flourishing trends of the global level to be transferred to the domestic level, and eventually for the benefit to be given to the people. Unfortunately, we find that the reality in the ground level, especially in cases of violations of human rights the victims do not gain the benefit of these emerging trends of the global level due to many reasons. Perhaps this could be due to the lethargy of the executive branch or the legislative branch of the of the state organs. Therefore, I thought that I should specifically focus on the question, "whether the judiciary can eliminate the lethargy of the above-mentioned branches by judicial activism and whether such method could provide justice to the people in the country".

When we look at the monistic school of law and the dualistic school of law, we find in monist countries without the deed of an emerging legislations, treaties that have been ratified by the states can be incorporated to the domestic laws, and these treaties could be named as "Self-executing treaties". Nevertheless, most countries are under the recognition of being dualist countries and they require an expressive act by the legislator, in the name of an enabling legislation and without which in most of those countries judiciary are reluctant to incorporate

those international standards to which their domestic states become a party, which highlights the need for an enabling legislation.

With the emerging new trends in the world, it is important to discuss "whether the Sri Lankan judiciary is free to interpret Sri Lankan obligation to under international law into its municipal law backdrop in announcing a case concerning issues of international law without an enabling statute". In certain human rights cases, in fact some of the Sri Lankan judges have felt that they should administer justice through judicial activism although they are not to depart from the traditional dualistic tradition. However, they have administered justice to human rights violations through different interpretation and by creeping through monism. Thus, few minutes should be used to explain the modern trend of creeping towards monism in the world, and as to how we can move away from the positivistic school of thought.

I will first take an example from the United Kingdom with the corporation of treaty law and customary international law by citing several known cases. In *Trendtex Trading Cooperation v Central Bank of Nigeria,* Lord Dening states, "seeing that the rules of International Law have changed and do continue to change, and also courts have given place to the changes without an act of parliament it follows to my mind inevitable that the rules of international law as existing from time to time do form part of our English Law… We should give effect to those changes and not be bound by the stare decicis of the international law". In the given case, Lord Denings exact words show us that the domestic courts have responded to important changes in the international law by moving away from dualism to monism, to accommodate these changes. Nevertheless, it was not uniform.

However, while treaties required to be transformed into law by legislation, a customary principle is automatically incorporated into English law. It is an important area that should be followed by Sri Lankan judges, meaning, even if the principles of stipulated treaties cannot be incorporated into law due to dualistic tradition, the customary international law principles embedded into the treaty law can sometimes be adopted by the judges by moving away from the dualistic nature. If we take one of the most important human rights treaties out of the ICCPR and ICESR, the twin treaties of 1966 are considered to be consisting of Customary International law. As a result, most of the later Human rights conventions largely spell out principles that are found on the afore mentioned human rights treaties. Many treaty law principles stipulated in Human Rights Conventions have now as a result become customary international law principles and it is the same with regard to International Humanitarian law which are also found in the Geneva Conventions, Hague Conventions and Regulations.

Now if we look at the proposed change, judges may creep through the dualist system and away from it toward monism, therefore there could be some objections. One argument is that this is an undemocratic law making by the courts, counter arguments could be that the States through their state practices and opinion juris undertake such customary international

law. Therefore, these customary international laws may be binding such states, which may not even be against the sovereignty of the Country. If the executive opposes to this kind of judicial activism, it can undo a judgment. In the Australian judgment of *Teoh v Minister of Immigration*, 1995, the Australian High court used the CRC (Convention on the rights on Children) to invalidate a deportation order against Teoh made by the judge on the basis of Teoh's conviction. The judgment of the Australian case has above has been subjected to much criticism and as a result, the decision of the High Court was overturned by the legislation.
If I am to take another example, which is from India, the Indian Courts have come to the view that it should be the executive who views the treaty. The executive should ensure that the treaty becomes law in the state. Where there is undue delay by the legislative and executive branches in passing the legislation, in transforming the treaty into domestic law, judiciary can take the view provided in order to protect the rights of people. Taking the Indian case of *Vishaka v State of Rajasthan*, 1977, the judgment was unprecedented for several reasons. The Supreme Court acknowledged and relied to a great extent on International Treaties that had not been transferred into municipal law. The Supreme Court provided the first authoritative decision of sexual harassment in India and confronted the Statutory vacuum, it went creative and proposed a root of judicial legislation. Therefore, I think there could be a brighter future that we can forecast even from the Sri Lankan cases. Thus, one of the recent Supreme Court judgments in Sri Lanka is brought up in here. *Manohari v Secretary of Ministry of Education, 2016,* where in relation to Fundamental Rights, sexual harassment experienced by a female teacher was determined as a violation of her right to equality and non-discrimination which invoked the Convention on the Elimination of all forms of Discrimination against Women.

Declaration contained in the Bangalore Principles on the Domestic Application of Human Rights Norms, 1988, were the result of a meeting of leading lawyers of common law world and this Declaration provides that, "it is within the proper nature of the judicial process and well established judicial functions for national courts to have regard the international obligation which a country undertakes whether or not they have been incorporated into domestic law, for the purpose of removing ambiguities or uncertainties from national constitution, legislation or common law". However, the Bangalore Principles have held that it is important for the judges of dualistic nations to be free from any rigid form of dualism developed by the English Common law. The crucial idea of the above principles was that International Human Rights Law might sometimes provide guidance to judges in cases concerning human rights and fundamental rights, where their domestic law is silent. Michael Kirby J of Australia states that, "after observing Bangalore Principles he had found some cases that came before him in his courts, and he began to see the way in which reference to International Law can be done when the domestic law seems to be silent".

I will now try touch on Sri Lanka and on its role of dualism, which has been diminished in the modern world but is still in occurrence in Sri Lanka. The Sri Lankan judicial activisms of

international law incorporation shows diverse ends as we are not very reformed. With regard to Treaty Law incorporation, Sri Lanka follows dualistic school of law as similar to many other Commonwealth countries, but in certain cases we proved to be more dualistic and very rarely have we shown our inclination towards monism. In cases like *Tikiri Bandara Bulankulama v The Minister of Industrial Development (Eppawala Case),* judgment used a concept which is only found in international environmental law which was the notion of equity. This Principle has been highlighted by Weeramantry J in the case concerning *Hungary v Slovakia* having made reference to the contents of Sri Lankan philosophy and our legacy. In his judgment Amarasinghe J stated 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" showing that we have creeped through monism in this particular judgment. Nevertheless, it is not so in every case and that we sometimes find that the trend has been reversed although the Bulankulama case was supportive of monism. In the controversial case of *Nallarathnam Singharasa v Attorney General,* decided by the Supreme Court it could be seen that the same positive reaction towards monism was not adopted in all cases of judicial activism in Sri Lanka. In this case it was expected that the International Covenant on Civil and Political Rights should be embarked on our country by having a way of enabling legislation.

In conclusion, it could be stated that, in Sri Lanka in some cases judges have become very positive and they have used judicial activism in order to creep towards monism while some did not and has been travelling reversely towards rigid dualistic system. Finally, I would like to touch on who would be benefitted, and the benefit should be given to the victims of those cases of violations of rights. As final analysis, what we should do is, as human rights have been tailored to protect the people and not the State, People should be protected by law as the rights of the people are paramount.