INTERNATIONAL LAW AND ITS APPLICABILITY IN THE SOMALIAN LEGAL SYSTEMS

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ABSTRACT

This study calls for discussion on the question of how international law is applicable in the Somalian legal systems. States achieve the incorporation into their national law of multilateral or bilateral treaties of which they are contracting parties, so that the rights and duties contained in such international law may become applicable and enforceable domestically. With regards to the application of international law, the Somalian judicial systems have chosen to considerably circumvent in pleasing with international law aspects when adjudicating in the parties concerned. One of the main objectives of the study is to examine Somalia's international law practice right from independence up-to date. During the study, it was based on doctrinal methodology. From primary sources of information and secondary sources of information were fully adopted such as the constitution of Somalia, Acts of parliaments, statutory instruments and Textbooks, Law of journals, legal dictionaries, and newspapers respectively. The study concludes that the government of Somalia through legislative should enact a new legal framework for the better implementation of international law such as adaptation and promulgating of treaty-making procedure act among others. The study finds that, any foreign policy submission put to federal Ministers, the Attorney General should give advices as to whether the state can ratify or accede to international treaties and conventions, since the Attorney General is the general legal adviser of the state, like any other nations in the world. At the end, the study therefore, recommends that all international agreements or treaties to which Somalia is contracting party shall be permissible in Somalia without any parliamentarian involvement. Hence, incorporation procedures take longer as it requires.

Keywords: Domestication, Dualistic, Monist, International, Law, National

INTRODUCTION

Entering into international agreements or conventions with foreign powers is one of the attributes of state sovereignty. No country can insulate itself from the rest of the world whether it can be in the matter of international relations or policies. This is truer since the end of the World War II. In this sense, Somalia is one of the developers to international law more specifically in the areas of international human rights law, environmental law, refugee law, the Vienna Convention on diplomatic relations and the Vienna convention on consular relations among others. However, it is very important to discuss how the international law is enforceable in the Somalian legal system.

STATUS OF INTERNATIONAL LAW IN THE SOMALIAN LEGAL SYSTEM

The theories used for the relationship between international law and municipal law are Monist and Dualism. Although the distinction between international law and municipal law has become less distinct during the 20th Century, the definition still holds true. Municipal law governs the national aspects of state and deals with issues between individual or individuals and the administrative apparatus, while international law focus primarily upon the relations between states. **(**Malcom, 1998). However, these two major principle theories on the relationship between international law and municipal law are discussed below:

A. Monism Theories

The monistic theory maintains that the subjects of two systems of law vis-à-vis international law and municipal law are essentially one or belongs to the same legal system. The monistic theory asserts that international law and municipal law are fundamentally the same in nature, and arise from the same science of law, which are manifestations of a single conception of law. (Ahuja, 2016). Treaties and conventions therefore apply as a source of law of the party state upon the signing thereof and ratification (Wilfred, 2019).

In a monist system, international law does not need to be incorporated into national law. According to this theory, national law is subordinated to international law e.g. the ICC statute, therefore, can be directly applied and adjudicated in national court. More so, in a monist state mostly they rely on the judges and not on the legislators, but if a judge in a monist state makes

mistakes when applying international law, then the country violates international law (Pieter ,1994).

B. Dualist Theories

According to dualist theory, international law and municipal law represent two entirely distinct legal systems. International law has an intrinsically different character from that of municipal law. (Sehrawat, 2019) Being a separate system, international law does not as such form part of the municipal law of a state; however, international law does not determine which point of view is to be preferred monism or dualism. Every country decides for itself, according to its legal customs. National courts may choose or be obliged to ignore international law until it is incorporated into national law (Sehrawat, 2019).

DOMESTICATION PROCESS OF INTERNATIONAL TREATIES OR CONVENTIONS IN SOMALIA

The constitution makes no reference of the statutes of international law in the Somalian legal system. Somalia belongs to dualist tradition which views international law and municipal law as two distinct legal systems. Domestication of international law by way of an act of parliament is the only means by which international treaties or any other foreign policies can be applied. Therefore, once a treaty is ratified, it has to undergo a separate procedure to make it admissible under Somalian law. The same only become applicable after domestication through domestic statute or legislative process. The dualist states like Somalia are also fortified under articles 11, 14, 15 and 16 of the Vienna Convention on the law of treaties. The convention underscores those treaties do not automatically become part of the corpus of a state party's laws unless and until the same have been domesticated pursuant to national legislation providing for the procedure therefor (Vienna Convention, 1966). The law of nations in the Somalian perspective may be generally breakdown into two ways, these comprises as follows: -

a) The Application of International law before the Constitution of Somalia

The relations between Somalia's Constitution with international law date back to the pre-independence days. These historical period before the constitution of Somalia was legally adopted, the two colonials ruled Somalia is better known as the pre-constitutional period. The British and the Italians declared a protectorate in northern and southern Somalia respectively

in 1889, not until in 1960 the Somali-Italian and the British Somaliland united and form the independent Republic of Somalia. In the course of this period, Somalia obeyed all the two principles and norms of international law. Additionally, the history of the Somalian legal system has been much connected with the formation of the former colonial rule in the country more especially the Italian laws and jurisprudence since the legal practice required knowledge of the Italian system as well as the Italian language.

b) The Application of International Law after the Independence Constitution of Somalia

Under the Somalian Constitution, there is no specific and definite reference to the status of international law in the Somalian legal system, it also does not explicitly require or authorize the judiciary to draw on international law. At least all the three constitutions which Somalia adopted have taken the same approach of not specifying the status of international law. The independence Constitution of Somalia in 1962 first provided for one general provision of Somalia's foreign policy. Under article 6 of the constitution stated that the generally accepted rules of international law and international treaties duly concluded by the republic and published in the manner prescribed for legislative acts shall have the force of law. It was understood that under this provision, parliament are the only authority to domesticate international law before the national courts can be applied (Constitution of Somalia, 1962).

In 2012, Somalia adopted provisional constitution which contains several mentions to international law principles. It references inter alia that economics social and political be achieved for all the citizens and aims to promote liberty of thought and expression to all in the country. These values are said to be the foundation of real democracy and are considered international in nature (the Constitution of Somalia, 2012).

THE EXECUTIVE, LEGISLATIVE AND JUDICIAL RECOGNITION OF INTERNATIONAL LAW IN SOMALIA

(a) The Somalian Executive Power Under International Law

The executive is one of the branches of government that enforces law, and has responsibility for the government of a state. The executive branch consists of the president and a Council of Ministers, led by the Prime minister of Somalia. According to the constitution, the Executive

has the power to make laws by the virtue of Article 90. Therefore, there is no restriction on the powers of the executive in relation to international law, and this allows the executive to enter into any treaty obligation.

- **The Attorney General**

The Attorney General of Somalia is the head of the Somalian State Law Office, the principal legal adviser to the government of Somalia. The Attorney General of Somalia is not part of the cabinet per se but works closely with executive. The Attorney General represents the government in international or regional courts or any other legal proceedings to which government of Somalia is a party. In recent example is that, the Attorney General of Somalia represents the state in the case concerning Maritime Delimitation in the Indian Ocean between Somalia and Kenya on 2014.

However, the Attorney General has no mandate or role to play in international treaty-making or give advice to the Government as to whether the state can ratify or accede to international conventions such that this Office provides for legal assistance regarding to international law.

(b) The Somalian Legislation under international law

Legislation has been defined as the main system of policy articulation, while policy is a general statement of aims or desirable goals in relations to given circumstances. policy is stated and approved by government through parliament. As noted above, the international law that Somalia has ratified have been translated into legislation, policies or programme, thus bringing the benefit of international standards into the national legal framework. This means that in order for any international treaty to be effect in Somalia's legal framework, a separate process of domestication must take through enactment of law or an act of parliament.

c) The Somalian Judiciary under international law

Although the Somalian judiciary does not have the power to make law or policies but one of its major roles is to interpret the obligations of Somalia under international law by adjudicating national cases concerning issues of international treaty or convention. Unfortunately, the Somalian judiciary played in active role in the implementation of Somalia's international obligations under international treaty specifically in the areas of environmental law, climate change and human rights law among other. Somalia is a dualist state, means for international treaties to acquire the force of law or become legally enforceable in a court of law, merely

ratification of the treaty in question is not enough. in this respect, national courts of Somalia may choose or be obliged to ignore international law until it is incorporated into domestic (Kumar, 2011). however, there is no state which can ignore its obligation under international law before international tribunals. International tribunals give effect to international law even if international law conflicts with the domestic laws of the parties to the case. Even the constitution of the parties is not considered if domestic law conflicts with their treaty obligation. This was illustrated in the international court of justice, in the applicability of the obligation to arbitrate case- was emphatic that international law overrides national or domestic law (PCIJ series A no.7).

THE PRINCIPLE OF SELF-EXECUTING TREATY IN SOMALIA

There is a significant school of thought in international law that holds that even in a dualist state, a domesticating act of parliament is unnecessary where the provisions of the international agreement are self-executing treaty, unless this principle is expressly excluded. (Ngolele, 2006). The permanent court of international justice, in the jurisdiction of the court of Danzig, held that, respecting the Danzig-polish agreement, made pursuant to the treaty of Versailles of 1919 that 'the very object of an international agreement according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligation and enforceable by national court' (Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928).

Generally, self-executing treaty is most commonly understood as a monistic doctrine wherein implementation legislations are generally not required for a treaty to have the force of municipal law. (*Spies vs. C. Itoh, 1981*). Conversely, non-self-execution, on the other hand, generally follows the dualist system wherein treaties require implementing legislation before national courts can apply it. (Amos O., et al, 2016).

Somalia acquired her full treaty-making power upon attainment of political independence on 1/ July/1960. International law does not prescribe how a country must exercise its treaty making power. the national law of state regulates who may enter into treaty on its behalf. The constitution of Somalia is silent on the specific question of which organ of government has the power to make treaties, thereby binding the state internationally. Accordingly, international treaty is not part of Somalian law in strict sensu. This supports the dualist system.

On the recent example of the most important of these doctrines came up in the case concerning the maritime boundary delimitation between Somalia and Kenya on 2009. Somalia and Kenyan are two neighbouring states but had a longstanding maritime dispute relating to boundaries including delimiting extended continental shelf. In 2014 Somalia submitted the dispute to the International Court of Justice. the ICJ, among other things, considered the argument by Somalia that the Memorandum of Understanding in 2009, which is a treaty entered into by the two countries, was not valid. Somalia assailed the validity of the treaty on the ground that 'it was never approved by the national parliament in contravention of Somalia's constitutional requirements.

These contentions were, however, rejected by the court. The ICJ observed that under customary international law, Somalia may not seek to revoke an international law obligation by virtue of internal law provisions regarding competence to conclude treaties; there was no reason to suppose that Kenya was aware that the signature of the minster may be insufficient (Ahmed Kheir, 2021). In the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria: Equatorial Guinea intervening*). In its judgment on the merits, the Court addressed an argument made by Nigeria that a Declaration, signed by its Head of State and that of Cameroon, was not valid because it had not been ratified in accordance with Nigerian law.

GAPS AND SHORTCOMING UNDER INTERNATIONAL LAW IN SOMALIA

The policies and practice of the Somalian government in respect to the insufficient implementation of international treaty revised so far approves the contention that Somalian acts to either lacks the ability or unwilling to implement and enforce the provisions, obligations, and standards enshrined in those treaties. Since it is a basic principle of international law that a state party to an international treaty shall ensure that its own national law and practice are consistent with what is required by the treaty.

Again, the judiciary has jurisdiction in all matters civil and criminal, including matters relating to the international law in which Somalia is a party or such other jurisdiction as by law conferred on it. However, the Somalian legal system remains reluctant to interpret international

law hence lacks a judicial enforcement role. Like any other states, international orders are rarely enforced, but usually obeyed (Harold, 1997).

Limited capacity in the institutions charged with compliance, in adequate institutional capacity to apply, implement and enforce several of the protocols, conventions, and treaties have been cited as a major shortcoming in Somalia. These include lack of experience, limited financial resources and technical expertise among others.

Fragmented obligation and responsibility as well as poor record keeping is another factor. In the Somalian context, the institutional responsibilities are the Ministry of foreign affairs, Ministry of justice and Attorney General are involved in the process but there is no information sharing between these institutions and across other Ministries. In addition to that, the registries of international agreements are not easily accessible especially electronically to ease retrieval information and also make monitoring easier, particularly by civil society organization monitoring implementation.

CONCLUSION

Somalia is signatory to several international treaties and conventions. Although the country is expeditiously ratifying or accedes to international law but its implementations are often slow or never materialize. Somalia belongs to the dualist tradition, thus views international law and national law are two distinct legal regimes and hence domestication of international law by an act of parliament is necessary before international law can be applied in the national courts of law.

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