The Treaty-making Procedure in South Asia: A Comparative Study of the Constitutions of Bangladesh and India

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Abstract

Treaty is a diplomatic instrument of international relation which creates a binding obligation in international law. Traditionally speaking, states are the subject matter of international law. Sovereignty of a country in international relations is the key issue. It is very often said surrendering sovereignty is also a sovereign decision. Treaty obligation and state's agreement to undertake them is also a sovereign decision which is often decided within purely domestic legal framework of the concerned state. Once the states undertake the obligation then it is considered that they have consented to become internationally obliged for those treaties. Hence, this is to note that treaty making is an executive function of state and regulated by the concerned constitutional framework. The domestic framework of treaty making of specific state compliments the international treaty making system as political independence is the essence of international law. This paper tries to understand, firstly the nature and source of international law and the position of treaty in this regard, secondly, how the treaty making procedure is regulated internationally and thirdly, the paper focuses upon the constitutional framework regarding treaty making among South Asian Nations. Finally, the paper deals with the commonality and difference in Indo-Bangladesh constitutional framework and judicial approach in the same area through a comparative analysis. The paper is based on qualitative and quantitative methods of research, both primary and secondary sources available on the subject have been used. Further, doctrinal and analytical techniques have been utilised for highlighting different aspects to arrive at solutions.

Keywords: Treaty, Diplomacy, Constitution, Political Independence, Sovereignty.

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1. Introduction

The notion of international law is a law of co-ordination.[3] The contemporary thinkers of international law have been advocating the theory of co-ordination.[4] Municipal laws are based on the subordination of persons to the legal rule but unlike that in the international law no superior can impose the law, this is what precisely the theory of co-ordination speaks about.[5] International law refers to those rules which are binding on the state in their intercourse with each other.[6] Hence it can be said that international legal system is a horizontal legal system where all the sovereign states takes obligation and function accordingly. Now an important question to be asked here is that what are the sources of international law and what is the procedure to write this law? This is to note that national and international legal system often has different understanding; hence it is not advisable to transfer ideas from national legal systems to international law, in order to explain and understand the working of the same. As it has been already argued that international legal system is a horizontal legal system, where both law makers and law followers are sovereign nations. Hence, it does not resemble the domestic legal system. Unlike the domestic legal framework, international law lack single law making body that is Parliament, which is mandated to make bindings laws. While there is an International Court of Justice and a range of specialized international courts and tribunals, but their jurisdictional operation is highly depend on the states discretionary power.[7]

Hence while understanding the nature of international law; the very first question need to be address is on the source of international law. As per art 38 of ICJ statute the followings are the primary source of international law namely: convention, customs and general principles of law. With addition

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3 H. Lauterpacht, 'The Nature of International Law and General Jurisprudence' 37 Economica (August 1932) 301-320.

4 *Volkerrecht als System rechtlich bedeutsamer Staatsakte* (1923). An English translation by manning of the abridged version of this book appeared at page 2 as stated in 'The Nature of International Law and General Jurisprudence'.

5 Lauterpacht (n 3).

6 Robert Jennings and Arthur Watts KCMG QC (eds), *Oppenheim's International Law*, v 1 (9th edn, OUP 2008) 4.

7 Professor Christopher Greenwood, 'Sources of International Law: An Introduction' <http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf> accessed 7 November 2016.

to this, judicial decision and juristic writing consider as subsidiary source of international law.[8]

Treaty is considered as the primary source of international law.[9] This creates a very clear international obligation and hence treaties in contemporary time are the most preferred instrument to create such obligation. This is to note that certain areas of international law, such as international environmental law, are almost exclusively regulated by treaties. Strictly speaking, a treaty is not a source of law rather so much as a source of obligation under law.[10] Hence, the binding nature of the treaties flow from the consent of the state, to put it more simple way one can conclude that treaties are binding only on states which become parties to them. The choice of whether or not to become a party to a treaty is entirely one for the state. In this degree of flexibility at place, one reasonable question that must be addressed, why is a treaty binding on those states which have become parties to it? The answer is that there is a rule of customary international law – *pacta sunt servanda* – which requires all states to honour their treaties. That is why treaties are more accurately described as sources of obligation under law.[11]

2. The Definitional Aspect of Treaty

The rule of *pacta sunt servanda* is a customary principle, and it will be not wrong if we say, this principle is the crux of the law of the treaty, but along with that Vienna Convention of Law of the Treaty (hereinafter refer to simply as VCLT) governs the law of the treaty in international legal framework.[12] The VCLT 1969 is not in conflict with customary international law rather compliments it.[13] Article 2(1)(a) defines treaty as an international agreement concluded between states in written form and

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8 Article 38(1) reads as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

9 ibid (n 8).

10 ibid (n 8).

11 Greenwood (n 7).

12 James Crawford (ed), *Brownlie's Principle of Public International Law* (Eight edn, Oxford University Press) p 349.

13 The Preamble of VCLT 1969 affirmed that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.

governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Hence, it can be inferred that treaty can only be concluded between two sovereign states and must be regulated by international law. Treaties concluded between states may be: bilateral (i.e. concluded between two states), multilateral (i.e. concluded by more than two states) or universal (i.e. if they bind almost all states (e.g. the 1945 UN Charter or the 1973 Convention on International Trade in Endangered Species of Fauna and Flora – CITES – which has almost 160 parties). Even treaties signed between nations can be consider as law making and contractual treaty. This is to note that only law making treaty are source of international law not all treaty.[14]

3. The Treaty Making Procedure: An International Perspective

Before we focus on the treaty making procedure in South Asia, it is very important to know the treaty making procedure under international law. Signature is the most commonly used to express the consent by states in international treaty making process. Multilateral treaties often seen listing the methods by which a signatory state can become party to them, e.g., by ratification, acceptance, approval or accession.[15] The subsequent question is who has the power to represent their respective state. The general understanding states that Treaty making is an executive function of the state. Hence the head of State, head of Government or minister for Foreign Affairs may sign a treaty or undertake any other treaty action on behalf of the State without an instrument of full powers. A person other than the head of State, head of Government or minister for Foreign Affairs may sign a treaty only if that person possesses a valid instrument of full powers.[16] The representative must possess full Power while singing the teary. This empowers the specified representative to undertake given treaty actions. This is a legal requirement reflected in article 7 of the VCLT 1969.[17] It is designed to protect the interests of all states parties to a treaty

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14 ibid (n 13).

15 Art 6 of Vienna Convention of Law of the Treaty 1969 states that every State possesses capacity to conclude treaties.

16 ibid (n 15)

17 Art 7 reads as follows:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) He produces appropriate full powers; or (b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and

as well as the integrity of the depositary. Typically speaking the issue of full power categorically related to signature of a specified treaty. This is to note that some countries have deposited general full powers with the Secretary-General. General full powers do not specify the treaty to be signed, but rather authorise a specified representative to sign all treaties of a certain kind.[18]

4. Treaty Making Procedure in South Asia: The Study of Major Practices

If we make a calculative visit to all the Constitution of the countries of the Eight SAARC Nations, we will conclude that they all have some provision regarding the status of treaty. Their constitutional framework has created machinery for the ratification or adoption of International obligation by treaties.

The kingdom of Bhutan is a newly emerging monarchical democratic country.[19] The constitution of Bhutan is relatively young constitution. It state that all international obligations taken by the country in the form of treaties (International Conventions, Covenants, Treaties, Protocols and Agreements) after the commencement of the constitution, becomes a law of the Kingdom of Bhutan only upon ratification by Parliament unless it is inconsistence with this Constitution.[20] The major technical issue here is as Bhutan has gone through a structural power change, what will be the position of those entire international obligations, which was taken by the country before entering into constitutional monarchy. All laws in force in the territory of Bhutan at the time of adopting this constitution shall continue until altered, repealed or amended by parliament. The provisions of any law, whatever made before or after the coming into force of this constitution, which are inconsistent with this constitution shall be null and void.[21]

Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

18 ibid

19 The Constitution of the Kingdom of Bhutan, art 1(2).

20 ibid, art 10(25).

21 ibid, art 1(10).

Generally speaking treaty making is an executive function but the implementation of the treaty is a legislative function. The respective constitutional framework of the states regulate both the practice, it empowers the parliament to ratify any treaty or conventions with a view to implementation as a law in the domestic level. Without ratification by parliament there is no legal status in the domestic legal system. In this context the provision regarding the ratification of treaty in the constitution of Maldives can be taken as an example. Article 93 of the Constitution of the Republic of Maldives 2008 provides that:

a) Treaties entered into by the Executive in the name of the state with foreign states and international organizations shall be approved by the People's *Majlis*, and shall come into force only in accordance with the decision of the People's *Majlis*.

b) Despite the provisions of article (a), citizens shall only be required to act in compliance with treaties ratified by the State as provided for in a law enacted by the People's *Majlis*.

In this context this is to note that Customary International Law and human rights treaties ratified by Sri Lanka have no status in national law. The constitutional framework of Sri Lanka states that mere ratification will not amount a binding nature of the international obligation in domestic legal system. Empirically speaking, Sri Lanka has ratified the following relevant international human rights and humanitarian law treaties: a) Genocide Convention (12 October 1950), b) Geneva Conventions 1949 (28 February 1959), c) ICCPR (11 September 1980), d) ICESCR (11 September 1980), e) CEDAW (5 October 1981), f) CERD (18 February 1982), g) CRC (12 July 1991), h) Convention against Torture (3 January 1994) i) Optional Protocol ICCPR (31 November 1997). But this is to note that these above mention treaties will have no legal implication in domestic legal framework or they cannot be directly invoked or enforced through the courts or by the administration in Sri Lanka. They must be transformed into domestic law before the courts or competent authorities can apply them. Even though, the Courts of Sri Lanka have referred to them in their judgements. For example: Sri Lanka has enacted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 to give effect to the Torture Convention.[22]

Under the constitution of Sri Lanka where Parliament by resolution passed by not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the national economy, any Treaty or

[22] Country Report of Srilanka, *Redress* (London) <www.redress.org/downloads/country-reports/SriLanka.pdf> accessed 18 July 2020.

Agreement between the Government of Sri Lanka and the Government of any foreign state for the promotion and protection of the investments in Sri Lanka of such foreign state, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement.[23]

Talking about Nepal, Article 279 of the Constitution 2015 provides the provisions relating to the ratification of, accession to acceptance of or approval of treaty or agreement. According to this article –

1) The ratification of, accession to, acceptance of or approval of treaties or agreements to which the State of Nepal or the Government of Nepal is to become a party shall be as determined by the law.
2) The laws to be made pursuant to clause (1) shall, inter alia, require that the ratification of, accession to, acceptance of or approval of treaty or agreements on the following subjects be done by a two-thirds majority of the total number of members of the Legislature-Parliament present in the House:- (a) peace and friendship; (b) security and strategic alliance; (c) the boundaries of Nepal; and (d) natural resources and the distribution of their uses.

   Provided that out of the treaties and agreements referred in the sub clauses (a) and (d), if any treaty or agreement is of ordinary nature and which does not affect the nation extensively, seriously or in the long-term, the ratification of, accession to, acceptance of or approval of such treaty or agreement may be done at a meeting of the Legislature-Parliament by a simple majority of the members present in the House.
3) After the commencement of the Constitution, unless a treaty or agreement is ratified, acceded, accepted or approved in accordance with this Article, it shall not be binding to the Government of Nepal or the State of Nepal.
4) Notwithstanding anything written in clauses (1) and (2), no treaty or agreement shall be concluded that may have detrimental effect on the territorial integrity of Nepal.

In this light, there is a Nepal Treaty Act 1990 which regulate the treaty making procedure of the country. According to the Treaty Act no one, except, the Prime minister and the minister of Foreign Affairs, shall negotiate, accept the final draft or a certified copy, or sign or maintain reservations, or perform any other function related to a treaty to which

[23] The Constitution of the Democratic Socialist Republic of Sri Lanka (as amended up to 3 October 2001), art 157.

Nepal or Government of Nepal is a party, without full power. Provided that nothing contained in this Section shall prejudice the power of a Nepalese Ambassador of Charge Affaires representing Nepal in any foreign nation or international organization to conclude a treaty on any matter with such foreign nation or inter-governmental organization, as well as the leader of a delegation participating in any international conference to negotiate or accept the final draft or a certified copy of the treaty to be signed in the conference.[24]

In case of Afghanistan, the Constitution of the Islamic Republic of Afghanistan provides that the State shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.[25] In Afghanistan, the National Assembly has empowered to ratification of international treaties and agreements, or abrogation of membership of Afghanistan in them.[26] In Pakistan there is no clear provision regarding the status of international treaty, ratification of treaty or foreign affairs at all.

5. The Procedure in India and Bangladesh

Talking about these two countries both India and Bangladesh follows dualistic approach as regards the ratification and incorporation of international treaty within the domestic law.

The constitution of Bangladesh contains two main provisions regarding the international law; one of them Article 25 which refers to the promotion of international peace, security and solidarity in accordance with the basic principle of international law and another one is Article 145A which governs the adoption and codification of international treaties in domestic law. According to the constitution of Bangladesh 'all treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before parliament, provided that any such treaty connected with national security shall be laid in a secret session of parliament'.[27] This provision of the constitution provides one kind of obligation to present treaty before the parliament only for discussion not for ratification. On the other hand, if any treaty relates to the national security then it will be discussed by the secret session of parliament and what does the secret session mean it is not explained in the constitution of Bangladesh. It can be

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24 The Nepal Treaty Act 2047 (1990), s 3.

25 The Constitution of the Islamic Republic of Afghanistan, art 7.

26 ibid, art 90.

27 The Constitution of the People's Republic of Bangladesh, art 145A.

explained here that a secret session is the secret sittings of the house where no stranger shall be permitted to be present in the Chamber, Lobbies or Galleries of the parliament except with the authorization of speaker.[28] There is another crucial debate correlated to that in this situation, the right to know of the people of the Republic is limited, if the government enters into a treaty related to national security then there is no scope for the people to know, what has actually been discussed in the Parliament. Treaty making power is an executive power rather than legislative in nature. It is stated in the constitution of Bangladesh that the President shall, as head of State, exercise and perform duties conferred and imposed on him by the constitution and by any other law.[29] The constitution also provides that all executive actions of the government shall be taken in the name of the President.[30] However, Bangladesh has a parliamentary form of government and the President is treated as a nominal head. So, the executive powers are performed by prime minister and the cabinet. Hence, the prime minister and cabinet determine the treaty making policies of Bangladesh, although there is an obligation to lay a treaty before the Parliament. But failure to lay a treaty before Parliament will not affect its validity.[31] The parliament of Bangladesh has no power under the constitution to modify or repeal any treaty but can implement any treaty by enacting legislation regarding the particular treaty into domestic law.

Courts in Bangladesh cannot enforce treaties even if ratified by the state. They must be incorporated in the municipal legislation.[32] However, the court does utilize international conventions and covenants as an aid to interpretation of the provisions of Part III of the constitution, particularly to determine the right to life and the right to liberty, but not to enumerate rights within the Constitution. In *Kazi Mukhlesur Rahman v Bangladesh*[33] where the Court dismissed the application on the ground that it was not ripe for decision. In this regard Court can examine the treaty making power of the executive under the constitution. The executive power of the Prime Minister shall be exercised in accordance with the Constitution, which imposes limitations on its treaty-making power, particularly when boundary settlement is involved. The Constitution of Bangladesh provides that Parliament may from time to time by law provide for determination of boundaries of the territory of Bangladesh and of the territorial waters and

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28 The Rules of Procedure of Parliament of the People's Republic of Bangladesh (as modified up to 11 January 2007), art 181.

29 The Constitution of the People's Republic of Bangladesh, art 48(2).

30 The second Proclamation Order No. IV of 1978.

31 *Major (Retd.) Akhtaruzzaman v Bangladesh*, Writ Petition No. 3774 of 1999.

32 *Chaudhury and Kendra v Bangladesh* 29 BLD (HCD); *Bangladesh v Hasina* 60 DLR (AD) 90.

33 26 DLR 44.

the continental shelf of Bangladesh.[34] On the other hand it was held in the case of *Ershad v Bangladesh and others*[35] that although universal human rights norms, whether given in the UDHR or in the Covenants, are not directly enforceable in national courts, they are enforceable by domestic courts if such norms are incorporated into the domestic law. Where there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective guidelines to be followed by all concerned until national legislation enacts laws in this regard.[36] The court found that Bangladesh is a state party to the International Convention of the Rights of Child 1989; and declared that the treaty is binding on Bangladesh. In another case the Court referred to the international instruments and on the basis of the jurisprudence from those instruments, it decided that the Government is responsible for ensuring a free and fair trial not only to the accused but also to the victim of a crime. In essence, the fair trial of the accused also implies that the victim must be able to give evidence without fear and insecurity. In support of this judgment, the court had recourse to the universal human rights norm of the right to life, liberty and security of a person. The court used article 3 of UDHR, Resolution 217 A (III); UN Doc A/810 91, UN general Assembly, to interpret Article 32 of the Constitution of Bangladesh.[37] However, the courts will not ideally enforce international human rights treaties, even if ratified by Bangladesh, unless these are incorporated in municipal laws, but yet they have looked into the ICCPR while interpreting the provisions of the constitution to determine the right to life, liberty and other rights.[38]

Although the Constitution of Bangladesh is the supreme law of the land, it does not contain any express provision as to ratification or requiring any legislative approval in cases of a treaty. In some situation, Court has tried to identify the status of treaty under the constitution and made some clarifications which have been discussed above. It is clarified at this juncture that the status of all treaties is not same particularly, some human rights treaties and conventions. However, the status of treaty under the constitution within the domestic law framework still remains unclear in many instances. It can be concluded that except to the extent that a treaty becomes incorporated into the laws of Bangladesh by an Act of Parliament, the Courts have no power to enforce the treaty rights and

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34 The Constitution of People's Republic of Bangladesh, art 143(2).

35 21 BLD (AD) 69.

36 *BNWLA v Government of Bangladesh* 31 BLD (HCD) 324.

37 *Tayazuddin and another v Bangladesh* 21 BLD (HCD) 503 [26].

38 *Bangladesh and another v Hasina and another* 60 DLR (AD) 90.

obligations at the behest of sovereign government or at the behest of a private individual.[39]

On the other hand, comparatively, the Constitution of India does not contain precise provisions regarding status of a treaty and its due incorporation into its domestic legal system. The main provisions of the Constitution of India relevant to the treaty and also from the perspective of International Law are Article 51, Article 73, Article 245, Article 246, Article 253, Article 260, Article 363, Article 372, and VIIth schedule.

According to the Constitution of India, the state shall endeavour to foster respect for International Law and treaty obligations in the dealings of organized people with one another.[40] Article 51 has been relied upon by Courts to hold that various International Covenants, Treaties etc., particularly those to which India is a party or signatory, become part of domestic law in so far as there is no conflict between the two.[41] In *Unnikrishnan v State of Andhra Pradesh* the Supreme Court of India has utilized Article 51, which merely required the State to foster respect for international law and treaty obligations, for the purpose of protecting human rights and bringing about a social order which did away with inequality and extended justice to the extent of the powers of the Supreme Court.[42] The executive power of the Union extends to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement. It is important to mention here that the President is empowered to enter into any treaty or convention because the executive power of the Union vests with the President of India.[43] But the president shall act subject to aid and advice of the Council of Ministers with the Prime Minister at the head.[44] So, treaty making power in India is an executive act. Article 253 gives the power to enact laws implementing treaties, conventions etc. to the parliament. According to the Article, parliament has power to make any law for the whole or any part of the territory of India for implementing treaty, agreement or

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39 Mahmudul Islam, *Constitutional Law of Bangladesh*, (3rd edn, Mullick Brothers 2012) 1026.

40 The Constitution of India, art 51(c).

41 *In Re Berubari Union and Exchange of Enclaves* (1960) AIR (SC) 845; *Ali Akbar v U.A.R.* (1966) AIR SC 230; *Maganbhai v Union of India* (1969) AIR SC 783; *Gramophone Co. v Birendra* (1984) AIR SC 667; *Jolly George Verghese v Bank of Cochin* (1980) AIR SC 470; *UPSE Board v Hari Shankar* (1979) AIR SC 65; *Prem Shankar Shukla v Delhi Adm.* (1980) AIR SC 1535; *Vishaka v State of Rajasthan* (1997) AIR SC 3011.

42 Narendra Kadoliya, 'A Paradigm Shift in the Role of Domestic Courts in Implementing International Treaty Provisions: An Indian Perspective' <www.manupatrafast.com/articles/articleSearch.aspx> accessed 18 July 2020 (Search article field for 'A Paradigm Shift in the Role of Domestic Courts').

43 The Constitution of India, art 53.

44 ibid, art 74.

convention with any other country or countries or any decision made any international conference, association or other body. However, it is important to mention here that all treaties are non-self-executing and hence domestic legislation is required to execute any treaty. There is no doubt that the Union Government has got unlimited treaty-making power under Article 253, read with Entries 13 and 14 of List I, Schedule VII.[45] As to the position of treaties in Indian law, two views exist. These are:

a) The traditional view held by Prof. Basu on one hand who advances the view that no treaties which have not been implemented by legislation are binding on the municipal courts, relying on Article 253 of the Constitution.

b) On the other hand, Alexandrowicz contends that not all treaties must be implemented by legislation. He cites several cases as authority for assuming that certain treaties only, such as treaties affecting private rights, must be enacted by legislation to become enforceable.

Under Article 246 of the Constitution (read with Entry 14 of List I of the Seventh Schedule), Parliament has power to enact a law regulating treaty-making power but it has not yet exercised that power. The Constitution Bench of Supreme Court of India observed that 'the effect of Art 253 is that' if a treaty, agreement or convention with a foreign state deals with a subject within the competence of state legislature, 'the parliament alone has notwithstanding Article 246(3) the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body'.[46] A virtual judicial incorporation of treaty law into the 'corpus juris' has been the Supreme Court's decision in *Vishaka v State of Rajasthan*[47] wherein the court held that international conventions and norms were to be read into fundamental rights in the absence of enacted domestic law occupying the field. Treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority. According to the Article 260 of the Constitution of India the Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force. On the other hand Article 363 of the Constitution provides that Notwithstanding anything in this constitution but subject to the provisions of Article 143, neither the

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45 Wali Ullah, 'The Treaty–Making under the Constitution of India' (1971) 2 SCC (Jour) 20 <www.ebc-india.com/lawyer/articles/71v2a5.htm> accessed 19 July 2020.

46 *Magnabhai Ishwarbhai Patel v Union of India* (1969) AIR SC 783 [25].

47 *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this constitution by any ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments were a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this constitution relating to any such treaty, agreement covenant, engagement, sand or other similar instrument . . . It was held by the Supreme Court of India exercising advisory jurisdiction under Article 143 of the constitution that in case of implementation of treaty related with the exchange of Indian Territory there must be needed a constitutional amendment and mere passing legislation is not sufficient.[48]

In *His Holiness Kesavananda Bharati Sripadavalvaru v State of Kerala*,[49] it was stated that in view of Article 51 of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of UN Charter and the solemn declaration subscribed to it by India. In *Apparel Export Promotion Council v A. K. Chopra*,[50] it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.[51]

6. Conclusion

At present, all the South-Asian countries have a written constitution and are heavily modelled on the framework of democratic set of governance, their participation and presence has become imperative in the geo-political arena. Unlike USA, treaties in these nations are not supreme law of the land, and they follow a dualistic mode of adoption and ratification of

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48 ibid (n 46).

49 (1973) 4 SCC 225.

50 (1999) 1 SCC 759. *See also Githa Hariharan (Ms) and another v Reserve Bank of India and another* (1999) 2 SCC 228; *R.D. Upadhyay v State of Andhra Pradesh and others* (2007) 15 SCC 337; *People's Union for Civil Liberties v Union of India and another* (2005) 2 SCC 436.

51 *National Legal Services Authority v Union of India,* Civil Original Jurisdiction, Writ Petition (Civil) No. 400 of 2012.

treaties. Though the status is almost same, only mode of ratification varies depending upon the institutions in these nations. Treaty making procedure in the entire South-Asian region is an executive function. Almost all the countries have a separate constitutional provision dealing with treaty making procedure. There is a two-step process which works generally in the cases of treaty making, the first one is the executive head of the state, who enters and participates into the treaty making process at an international level and then comes the legislative wing of the state whose responsibility is to implement the treaty. Once the treaty has been implemented into the domestic law the judiciary has to interpret the same, this mechanism is common among all the South Asian nations. However, the recent trend clearly shows the activism on the part of judiciary in using international conventions, covenants, treaties and practices related to human rights into their respective domestic legal system.

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