The Status of International Law in South Africa

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Constitution: Section 231

1) The negotiating and signing of all international agreements is the responsibility of the national executive.

2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, …. must be tabled in the Assembly and the Council within a reasonable time.

4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

- 5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Constitution: Section 39

1)When interpreting the Bill of Rights, a court, tribunal or forum :

a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b) must consider international law; and

c) may consider foreign law.

2)When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Constitution: sections 232 and 233

- Section 232:
  - Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament

- Section 233:
  - When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Mitigated dualism (1)

- South African Constitution of 1996
  - Treaties (Sec 231(4)) = dualist
  - But see self-executing treaties (Sec 231(4))
  - Customary law = monist (Sec 232)

- Conflict between Constitution and international law possible but unlikely

- Conflict prevented through interpretation
  - International law friendly interpretation (Sec 233)
  - Regard to international law when interpreting Bill of Rights (Sec 39(1))

Mitigated dualism (2)

- Controversy regarding self-executing clauses
  - Various interpretations in literature
  - Courts tend to reject self-executing nature of ‘treaty’ rather than ‘provision’ as required by Constitution

Status of implemented agreements (1)

- Adoption of Parliamentary Legislation
  - Implementation of the Rome Statute of the International Criminal Court Act, 2002 ('Implementation Act')
- Scheduling
- Delegated legislation
  - Two-step implementation approach (e.g. tax or extradition treaties)
  - Power to adopt and implement ad hoc agreements can be delegated (host-state agreement in *Al-Bashir* 2015 High Court case)

Status of implemented agreements (2)

- Rights and obligations in treaty enacted into law will have same status in domestic law as the act of incorporation (*Glenister* par 102)

- enacted treaties can rank below the Constitution and below a parliamentary act – depending on the manner of its incorporation

- *Al Bashir* case – North Gauteng High Court, June 2015
  - Implementation Act – parliamentary legislation
  - Host-state agreement (Al Bashir case) – subordinate legislation
  - In case of conflict the Implementation Act will prevail
  - Question whether host state-agreement tries to reintroduce immunity that was waived by Implementation Act

Status of implemented agreements (3)

- *Al-Bashir* case SCA, March 2016 (paras 102, 103)

- DIPA is general statute dealing with immunities of i.a. heads of state

- The Implementation Act specifically deals with SA's implementation of the Rome Statute.

- In that special area the Implementation Act must enjoy priority
  - Implementation acts excludes immunity for international crimes and SA's obligations to ICC
  - S 232 Constitution allows deviation from custom

Domestic requirements for withdrawal from treaties

- Sec 231(2) Constitution applies also to withdrawal from treaties:
  - Prior consent by both houses of Parliament required
  - *Democratic Alliance v Minister of International Relations and Cooperation* (North Gauteng High Court 2017, paras 47, 51, 57)

- Withdrawal from ICC Statute by Executive in accordance with Article 127 ICC Statute unconstitutional
  - No prior parliamentary consent
  - *Ex post facto* notice with request to approve does not cure unconstitutionality
  - *Democratic Alliance* case (paras 58, 59)

- The fact that notice of withdrawal in terms of Art 127 ICC Statute was lawful internationally is separate from question of constitutionality of withdrawal

Idealization of self-execution

- Over-estimation in literature regarding potential of monism
  - Lack of clarity of treaty clauses
  - Lack of intention to grant enforceable rights
  - Resulting legal certainty
  - Potential violation of legality principle in international criminal law

International law friendly interpretation

- Very broad interpretation of ‘international law’ (hard and soft)
- Lack of reflection on implications for democratic legitimacy and undermining of ‘hard law’
- Clear bias towards consulting human rights instruments compared to other international law instruments
- Still lack of familiarity with general international law amongst judges

Challenges

- Lack of knowledge of public international law amongst members of judiciary
- Inadequate implementation
- Teaching of international law tends to focus on HR with limited attention for nuts and bolts of the broader subject

STATUS OF INTERNATIONAL JUDGMENTS

- Unchartered territory in SA
- *Fick* case confronted ConCourt with issue and is our main 'achievement' in this instance
- Does our ConCourt's liberal approach to soft law also imply that non-binding decisions of e.g. African Commission/ HRC are binding before national courts?

Government of the Republic of Zimbabwe v Louis Karel Fick

- Enforcement of the *Campbell* decision of SADC Tribunal
  - Became known as *Fick* case
- Decisions enforceable "within the territories of the states concerned" (Art 32(3) Protocol on SADC Tribunal)
- Law and rules of civil procedure for the registration and enforcement of *foreign* judgments in force in the territory of the state in which the judgment is to be enforced shall govern enforcement (Art 32(1) Protocol on SADC Tribunal)

Fick case continued

- *Campbell* case (under name of *Gramara*) unsuccessfully enforced in Zimbabwe

- Enforcement of cost order attempted in South Africa
  - Attachment of Zimbabwean property
  - Immunity waived on basis of FSIA (commercial exception)

- No statutory provisions for enforcement of *international* judgments exists

Fick case continued

- Until this case common law was only used as vehicle for enforcing *foreign* judgments (originating from State courts)
- SA ratified SADC Treaty and Protocol in accordance with Section 231 of Constitution
- Section 39(1)(b) of Constitution requires consideration of international law when interpreting Bill of Rights
- When developing the common law the spirit and purpose of Bill of Rights must be considered (Section 39(2))

Developing the common law

- Court pinned argument on section 34 of Constitution:
  - everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum

- Cumulative effect of above sections was to interpret international judgment as foreign judgment for purpose of enforcement in this case

- Long term this raises the challenge of public policy exception which fits within conflict of law but not public international law

Challenges

- Public policy exception formed stumbling block in *Gramara* case in Zimbabwe
- At first sight SADC Protocol Art. 32(1) opens this escape route
- South Africa needs statutory provisions as long term solution
- Question arises whether our Constitution requires enforcement of non-binding decisions