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Relationship between international and municipal law: A case study of India

Karamdeep Saini
Assistant Professor Institute of Law Kurukshetra University, Kurukshetra, Haryana, India

Abstract
The relationship between international law and municipal law has always been a fundamental feature of the study of international law as an academic discipline. This research paper provides a comprehensive analysis of this relationship. Further this paper discusses the relationship between international law and municipal law with special reference to Indian practice. Indeed, the study and the analysis of relationship between the rules of international law and rules of domestic law has a particular importance, because the determination of solutions and dilemmas in regards to this multiple and multidimensional relationship inter alia defines the statues of the state in the arena of the international relation, and impacts directly to its status as an equal member of international community. In fact, the ensemble of rules which we define today as International Law cannot be understood separated from the states domestic law. In reality, these two categories of legal rules are essentially interrelated in a hierarchical manner. Borders and content of the states domestic law systems, today very often are defined in almost natural manner by the rules of the International Law, which gradually have ensured a sustainable prevalence upon the rules of Domestic Law. This paper also explain theories that were put forward to help explain the relationship between municipal and international law such as monism and dualism. It analyses municipal law issues that are better handled with international law and explains the process of dealing with international legal issues in municipal courts. This research paper considers the transformation of treaties into municipal law. It also suggests that the status of international law within municipal law is dependent on the approach taken by the State. It also analyses court decisions in some relevant cases and comments on the bases of the judgments made.

Keywords: municipal law, domestic law

Introduction
Law of Nations or International Law is the name for the body of customary and treaty rules which are considered legally binding by the States in their intercourse with each other. International Law consists of the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies. It may be described as 'the sum of the rules accepted by civilized States as determined by their conduct towards each other, and towards each other subjects.' Municipal law is the national, domestic, or internal law of a sovereign state defined in opposition to international law. Municipal law includes not only law at the national level, but law at the state, provincial, territorial, regional or local levels. While, as far as the law of the state is concerned, these may be distinct categories of law, international law is largely uninterested in this distinction and treats them all as one. Similarly, international law makes no distinction between the ordinary law of the state and its constitutional law. The question of the extent to which as a matter of municipal law the organs of the state – i.e courts and other agencies administering law- apply international law is clearly the question of Municipal Law. The application of international law in municipal court depends upon the Constitution of the State. Public international law leaves each country to decide on the relationship between international law and municipal law. In some countries international law automatically becomes part of municipal law whereas in some countries they specifically adopt international law. Legislature and court systems are different on the international and municipal levels. Where the municipal level uses a legislature to help enforce and test the laws, the international court system relies on a series of treaties without a legislature which, in essence, makes all countries equal. Enforcement is a major difference between municipal and international law. The municipal courts have a law enforcement arm which helps require those it determines to follow the rules, and if they do not they are required to attend court. The international court system has no enforcement and must rely on the cooperation of other countries for enforcement.

Meaning of International Law
L. OPPENHEIM defines International Law as, ***"Law of Nation or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized states in their relation with each other, within a community which by common consent of this community shall be enforced by external power"***.

Public International Law has been defined by J.G. Starke as ***"that body of Law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other."***

It is worth observing that, while International Law has traditionally concerned itself with the relations of independent sovereign states, increasingly, International Law is concerned also with the rules governing International organizations and the relations between states and individuals. Nevertheless, it is clear that states remain the primary subjects of International Law and, in that respect, much of the following discussion will focus on the role of states in the creation, observance and enforcement of International Law. The dictionary also states this concept as "public International Law; Law of nations; Law of nature and nations; *jus gentium*; *jus gentium publicum*; *jus inter gentes*; foreign relations Law; interstate Law between states (the word state in the latter two phrases being equivalent to "nation" or "country". Consequently, International Law may be described as the Law or rules that regulate the conduct of states and other entities which at anytime are recognized as being endowed with International personality. International conventions, whether general or particular, International customs, general principles of International and internal Law, judicial decisions of International tribunals and juristic opinion are the materials are regarded as the main sources of International Law. Article 38(1) of the Statue of the International Court of Justice, this is regarded as the standard material and is the most authoritative provision stating the Sources of Law till date.

Municipal Law

The Black's Law Dictionary, defines the term "Municipal Law" as: B. A. Garner (Ed. in Chief), Black's Law Dictionary Eight Edition (United States: Thomson West, 2004)

"The ordinances and other laws applicable within a city, town or other local government entity".

Thus Municipal Law is the acts made by the legislature or the Law making authority of a state, applicable to that state alone. Municipal Law governs the Municipal aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus. In its narrower and more common sense, pertaining to a local governmental unit, commonly a city or town. In its broader sense, pertaining to the public or governmental affairs of a state, nation, or of a people. Relating to a state or nation, particularly when considered as an entity independent of other states or nations.

Relationship Between Municipal Law And International Law

While international law is applied in the relations of the states and to other subjects of international law, national or state law which is called municipal law. Is applied with in a state to the individuals and corporate entities which are the bearers of rights and duties there under. Apparently, it might be looking that there is hardly any relationship between the two system as they constitute two different legal systems each of which is designed to operate in its own sphere and they applied distinctly to their subjects by different courts, but it is no so. The problem of relationship between the rules of international law and municipal law is one of the most controversial questions of legal theory. originally the relationship between the two laws was a matter of theoretical importance i.e, weather international law and municipal law are parts of a universal legal order to they are form distinct system of law but at present the question has acquired pas practical significance as well. When there exists a conflict between the rules of international law and municipal law, a court is faced with of the difficulty of arriving at a decision. Before an international tribunal, the question is one of primacy, whether international law takes primacy over municipal law, or vice versa. If the conflict arises international law between a municipal court, the answer depends on how far the constitutional law of the state allows international law to be applied directly by the courts. Almost every case, in a municipal court, in which a rule of international law is asserted to govern, the decision rises the problem. For instance, diplomatic immunities granted by international law would become meaningless unless they are recognized by municipal law. Futher customary rules of extradition are interpreted and applied by municipal courts only. It is also be noted that international law gives an individual certain rights or obligations which can be enforced directly in national court as was alleged in the Pinochet case Generally the manner in which international law is employed in the national courts of any particular country is largely determined by the national law of that country. In fact, international law cannot work without the co-operation and support of the national legal system. The question of relationship of the two systems has acquired importance in modern international law also because a very large part of it is directly concerned with the activities of individuals who come under the jurisdiction of municipal courts. Thus, it is in municipal courts an increasing part of international law is enforced.

Traditional Approch- Theories of Realtionship among Inernational Law and Municipal Law

Monism

Monism Considers International law and Municipal law to be a part of the same body of Knowledge i.e. Law. Monists assume that the internal and international legal system forms a unity. They both operate in the same sphere of influence and are connected with the same subject matter and thus can come into conflict, but if there is conflict then international law will prevails. Monism dictates national law that contradicts international law is null and void, even if it is the constitution. In Kelsen's view, the ultimate source of the validity of all law derived from a basic rule "Grundnorm" of international law. His theory led to the conclusion that all the rules of international law were supreme over international law that a municipal law inconsistent with international law was automatically null and void and that rules of international law were directly applicable in the domestic sphere of states. International Law and Municipal Law are two phases of one and the same thing. The former although directly addressed to the States as corporate bodies is as well applicable to individuals for States are only groups of individuals.

Dualism

The dualist doctrine developed in the 19th century. This theory considers International law and Municipal law to be separate legal orders operating and existing independently of one another. Dualists emphasize the difference between these two

laws and require translation of international law into the Municipal law. Without the translation, international law does not exist as law; international law has to be national law as well. International law is the law applicable between sovereign states and is dependent on the common will of states for its authority whereas Municipal laws apply within the state regulating the activities of citizens and have source of authority form state itself. But when both these laws will deal with same subject matter there will be conflict, a municipal court following the dualist doctrine would apply municipal law. Thus this doctrine considers international law as weak law as it is a law among state made out of an agreement.

Problems associated with the application of International Law in Municipal Courts

Many domestic courts lack professional capacity correctly to apply international law norms, as most domestic judges have little, if any, international law experience or training. The practical problems which the municipal judge may encounter in the application of such norms are essentially of two kinds: the first relates to the ability of the municipal judge to gain a knowledge of the content and meaning of International Public law while the second relates to the scope that is open to him to apply International Public Law in the face of the rules of his own legal system which define his status and role. The independence and quality of some municipal courts and judges in questionable; such problems of limited capabilities and politicization may be exacerbated if domestic courts were to deal more frequently with inter-national law norms, often characterized by a high degree of politically sensitive and legal complexity. Also, as compared to rules of municipal law, the rules of International Law suffer from greater uncertainty. International law lacks an effective executive authority to enforce its rules. Due to the lack of the effective sanctions, rules of international law are frequently violated. Its enforcement machinery is very weak. It cannot be denied that the concepts of Sovereignty and Domestic Jurisdiction are the formidable obstacles in the basic recognition. A great limitation is international law cannot intervene in the matters which are within the domestic jurisdiction of States. For example, whenever the U.S. raised the matter of alleged violation of human rights in Soviet Union (i.e., its treatment of dissidents) the latter took the plea of non-interference in the internal matters. One should note that the movement towards increasing the international law-applying capabilities of municipal courts and the greater utilization of that capacity in actual practice is by no means universal. Perhaps paradoxically, two groups of states have been largely left out of the process of increased international law-application: states that strongly resist the penetration of international law into their domestic laws already reflect to a large extent international norm – thus rendering redundant the invocation of the latter. Any long-term strategy for integrating domestic courts within the international judiciary by bolstering their role in implementing international law must therefore account for uneven geographical and political prevalence of the international law application.

Implementation of International Law in Indian Municipal Law

The constitution of India Under articles 51, 73, 245& 246 has given consideration to 'international laws' and 'treaties', but the clause 'c' of Art. 51 specially mention 'International law' and 'treaty obligation', but art. 51 do not give any clear guidance regarding position of international laws in India as well as the relationship of municipal laws and international law but we can gather the guidance from Prof. C.H.Alexan drowicz who says that expression 'international law' in Art. 51 connote 'Customary International law' and 'treaty obligation' stands for 'Treaties'. In India International law are part of municipal laws provided that they are not inconsistent with any legislative enactment or the provision of the constitution. Indian court can apply International law if they are not inconsistent with the rule of domestic law.

.Indian constitution follows the 'dualistic' theory with respect to incorporation of international laws in to municipal law. International treaties do not become part of national law in India automatically. They must be incorporated into legal system by an act of parliament. The court first look at the municipal law and if the municipal law is silent on a point then the court will refer to the Customary international for the reference, the same thing has been done by the SC time and again and in the case of Jolly George Varghese and Anr. VS The Bank OF Cochin AIR 1980 S.C 470 accepted this view.

In Shri Krishna Sharma VS The State of the West Bengal AIR 1980 S.C 470 the Calcutta HC stated that: "If the Indian Statutes are in conflict with any principle of International Law, the Indian Courts will have to obey the laws enacted by the legislature of the country to which they owe their allegiance. In interpreting and applying municipal law, the Courts will try to adopt such a construction as will not bring it into conflict with the rights and obligations deductible from rules of internal law. If such rules or rights and obligations are inconsistent with the positive regulation of municipal law, the courts override the latter. It is futile in such circumstances to seek to reconcile, by strained construction which really irreconcilable." In another case *A.D.M. Jabalpur VS Shukla AIR 1954 CAL 591* Justice H.R. Khanna in his dissenting held likewise by stating that if there is a conflict between municipal laws International Law (customary International Law), and the Courts shall give municipal law. However in some cases SC applied Customary International law also, the case of

Gramophone Company of India Ltd. VS Birendra Bahadur Pandey AIR 1984 SC 667 clearly state the observations of the Supreme Court which relates to the binding force of the customary rules of International Law. From the decision of this case it was made clear that the Indian Courts shall apply customary International Law in India to the extent they are not inconsistent with the municipal laws. it was held by jury that if there is not a law regarding any subject matter in India then for the same reference can be taken from Customary International law. As to treaties it has been stated by Basu in his commentary on Constitution of India that treaties are not implemented by legislation are not binding on municipal courts. The same thing is stated in Article 253 of constitution

that empowers parliament to make any laws for implementing any treaty, agreement or convention with any country or countries. The Division Bench of the Rajasthan High Court in Birma VS State *AIR 1951 RAJ 127* stated that 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. In the present case the treaty remained a treaty only and no action was taken to incorporate it in to a law. That treaty cannot therefore be regarded as part of the Municipal Law. In *Shin Kumar Sharma & others VS Union of India AIR 1958 DELHI 64 the court stated that "*In India, treaties do not have the force of law and consequently obligations arising there from will not be enforceable in municipal courts unless backed by legislation".

In India the Courts follow the Dualistic approach, the above views are constant with the dualistic theory according to which treaty becomes a part of the law of the land only after it is enacted by the legislature and implemented. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them.

In fact, the increasing scope of international law has prompted most states to accept something of an intermediate position, where the rules of international law are seen as part of a distinct system, but capable of being applied internally depending on circumstances, while domestic courts are increasingly being obliged to interpret rules of international law.

Indian Judiciary and International Law

A. Structure of Judicial System

In India, though the polity is dual, the judiciary is integrated. Therefore, India has an integrated judicial system. At the top of the system is the Supreme Court of India which exercises jurisdiction in different forms, namely – writ jurisdiction, appellate, original, advisory and that conferred under several statutes. At the next level are the High Courts in the various states. While most states have their own High Courts, some states have common High Courts. The High Court's also exercise writ jurisdiction, regular appellate jurisdiction as well as the power of supervision over all the Courts and Tribunals located in their respective States. The third tier is that of the subordinate judiciary at the district-level, which in turn consists of many levels of judges (both on the civil and criminal sides) whose jurisdiction is based on territorial and pecuniary limits. In addition to the subordinate judiciary there are specialized courts and tribunals at the district and state levels to hear and decide matters relating to direct and indirect taxes, labour disputes,

service disputes in state agencies, family disputes, motor accident claims as well as consumer complaints to name a few. The Supreme Court and the High Court's as the courts of records are the custodian of the constitution has an awesome responsibility. Articles 129 and 215 recognize the existence of such power in the Supreme Court and the High Courts as they exercise *inter alia* the sovereign judicial power. The Supreme Court and the High Courts also have writ jurisdictions under Article 32 and 226 of the Indian Constitution, respectively. Thus, they are empowered to provide remedy in the form of writs in case of violation of fundamental rights guaranteed under chapter III of the Constitution of India. P.N. Krishanlal v Govt. of Kerala 1995 SCC 187 Law Commission of India, "A continuum on the General Clauses Act, 1897 with special reference to the admissibility and codification of external aids to interpretation of statutes,"

B. International Treaty for Construction of Law

Wherever necessary, Indian courts can look into International Conventions as an external aid for construction of a national legislation.16 P.N. Krishanlal v Govt. of Kerala, (1995) Sup. (2) SCC 187; Law Commission of India, "A continuum on the General Clauses Act, 1897 with special reference to the admissibility and codification of external aids to interpretation of statutes," 183rd Report, November, 2002, p. 20.

The Supreme Court in ***Visakha v. State of Rajasthan*, AIR 1997 SC 3011** took recourse to International Convention for the purpose of construction of domestic law. The Court observed:

In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.

C. General Principles

1. Construing Existing laws to implement treaty Obligations

Obligations arising under international agreements or treaties are not, by their own force, binding in Indian domestic law. Appropriate legislative or executive action has to be taken for bringing them into force. Although not self-executing under Indian law, implementation of a treaty does not require fresh legislative or executive action if existing administrative regulations or statutory or constitutional provisions permit the implementation of the treaty in question. The Indian courts may construe, in this context, statutory or constitutional provisions that pre-exist a treaty obligation in order to render them consistent with such a treaty obligation.

2. Fostering Respect for International Law

The Directive Principles of State Policy as enshrined in Article 51 of the Indian Constitution enjoin upon the State to Endeavour, *inter alia*, to foster respect for international law and treaty obligations in the dealings of organized people with one another.

It is a fundamental principle of statutory interpretation in Indian domestic law that, wherever possible, a statutory provision must be interpreted consistently with India‟s international obligations, whether under customary international law or an international treaty or convention. If the terms of the legislation are not clear and are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that

Parliament does not intend to act in breach of international law, including therein a specific treaty obligation; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.

D. Judicial Activism

Judiciary has further broadened the ambit of its role. Higher Judiciary has fashioned a broad strategies that have transformed it from a positivist dispute-resolution body into a catalyst for socio-economic change and protector of human rights and environment. This strategy is related to the evolution of Public Interest Litigation (PIL).

E. Jurisprudence

Relying upon the Article 51, Sikri, C.J. in ***Kesavananda Bharathi vs. State of Kerala*, 1973 SCR 1** observed as under:

"It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all an intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

The Supreme Court in took recourse to International Convention for the purpose of construction of domestic law. The Court observed:

"In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.

the Court first attempted to deal with the emerging linkages between domestic law and human rights by reconciling Article 11 of the International Covenant on Civil and Political Rights (ICCPR) with Contractual provisions under municipal law to protect human rights of a the civil debtor whose personal liberty was at stake due to judicial process under Section 51 (Proviso) and Order 21, Rule 37, Civil Procedure Code.

In ***Additional District Magistrate, Jabalpur v. Shivakant Shukla AIR 1976 SC 1207*** the Supreme Court amplified the scope of Article 21 (right to life) of the Indian constitution by referring to Articles 862 and 963 of the Universal Declaration of Human Rights (UDHR).

The Court in *Vellore Citizens Welfare Forum v. Union of India and Others AIR 1996 SC 2715* Referring to the„ precautionary principle‟ and the „polluter pays principle‟ as part of the environmental law of the country, held as follows:

"Even otherwise, once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law."

A survey of Indian jurisprudence, thus, indicates the active role being played by the higher judiciary in the implementation of India's international obligations.

Recommendation

An introduction of a positive complementary rule in new treaty regime introduced in diverse fields such as human rights, international criminal law (i.e., beyond the core crimes currently covered by the ICC Statute), international investment law, and international environmental law may be the upshot of this. Under such a proposed structure, international courts and other suitable international institutions would be expected to exercise a predominantly monitoring role. Hopefully, a stronger set of incentives would increase the number of domestic courts able and willing properly to apply international law.

Secondly, states and international institutions could allocate more resources to develop the capacity of domestic courts to adjudicate cases involving international law norms. This may involve the wide dissemination of international norms and focused judicial training, but also supporting domestic legal reforms, aimed at strengthening the local judiciary and at internalizing international norms with in the domestic legal system. In some cases, the creation of new internationalized judicial structures, example special criminal courts, or the establishment of other forms of judicial cooperative networks such as EC preliminary ruling procedure or other forms of inter-judicial dialogue, such as judicial exchange programmers can be considered. An investment of resources into domestic legal systems could also improve the quantity and quality of international law application by municipal courts.

Thirdly, a more rational set of principals governing the division of labor between domestic and international courts ought to be developed, especially in fields where international courts are inundated with cases. Such principles should, as a rule, allocate to international courts the more important, difficult or sensitive international cases, as well as conferring upon them monitoring functions over municipal courts. International law cases exhibiting more mundane features, raising less politically sensitive and legal complex issues, would be handled, whenever possible, by municipal courts.

Fourthly, new international standards could be developed that would try to regulate the application of international law in domestic courts. Hence, for example, the development of international standards on the exercise of universal jurisdiction, designed to minimize and monitoring alleged abuses of the doctrine by domestic authorities, could be useful step towards encouraging greater application of the doctrine in a ales objectionable manner than has been the case up until now. Clearer rules on the proper standards for conducting investing of allegations of violation of prospects of serious law application exercises by domestic courts, especially if complemented by some international review mechanism.

Finally, serious conceptual work needs to be undertaken with the aim of redefining international law sources in a way that captures the various domestic legal forms in which international law standards are actually being implemented. A more pluralistic approach towards international law consider domestic laws not couched in the form and language on

international law, but reflective nonetheless of international standards in their substantive contents, as possible tools for international law application and as potential sources for international law interpretation. It would go a considerable way towards integrating domestic courts applying such norms in a multilevel international judiciary. As a result, the decisions of such courts, even if based on domestic laws, may attract deference by other judicial bodies in other states, and at international level and could affect the future development of international law.

Conclusion

Indian constitution embodies the basic framework for the implementation of international treaty obligations undertaken by India under its domestic legal system. According to this, the Government of India has exclusive power to conclude and implement international treaties or agreements. The President of India is vested with the executive power of the Government of India and thus is empowered to enter into and ratify international treaties. This does not mean that international law, *ipso facto*, is enforceable upon ratification. This is because Indian constitution follows the "dualistic" theory with respect to incorporation of international law into municipal law. International treaties do not automatically become part of national law in India. They must be incorporated into the legal system by an act of Parliament, which has the legislative powers to enact laws to implement India's obligations under the international treaty Thus, in absence of specific domestic legislation enacted by the Parliament, the India's international obligations are not enforced in Indian Courts. However, a perusal of the jurisprudence shows that a pro-active role is being played by Indian judiciary in implementing India's international obligations under International treaties, especially in the field of human rights and environmental law. Thus, Indian judiciary through judicial activism" fills up of the gaps in the municipal law of India and International law, thereby playing an important role in the implementation of international law in India.

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