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RELATIONSHIP OF MUNICIPAL LAW AND INTERNATIONAL LAW: AN OVERVIEW WITH SPECIAL REFERENCE TO INDIA

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Abstract-

The present paper aims to adumbrate the relationship between municipal law and International Law, and to provide clarity regarding the same. Special emphasis has been placed on India in the process. The paper has dealt with various theories propounded on the subject and their application. Article has also highlighted as to what are the laws of the various country including India, United Kingdom and United States of America with regard to international Law. In the process the paper also emphasized as to why it is important for municipal law and International Law to work in tandem. Light is also thrown towards the application of two important International law, i.e. Customary International Law and Treaties, and their application with regard to different countries. Each country covered in the article shares a different relationship with International Law. Judiciary of various countries have continued to play a paramount role as to developing and shaping relationship between municipal law and International Law, attempts are being made by judiciary of various countries as to eradicating the difference of application of International Law and to bring uniformity regarding it. The present article deals with everything stated above with detail.

Introduction-

International Law refers to the body of legal rules which regulates the relationship between the states and any other entity which has been granted international personality, whereas on the other hand, municipal law regulates its subjects within a state, therefore It might be misleading to many that since municipal law and International Law have different sphere of their operation and hence they share no relation with each other whatsoever. In the present time this misconception has hardly any substance and this question has assumed a practical significance over a period of time due to emerging conflicts. Whenever there is a conflict between the two, court encounters difficulty as to give priority to municipal or International Law?, for international court and tribunal, the question is that of primacy (Which law will prevail over the other) whereas for municipal court the question is governed by constitution and national laws of the country, as to what extent it allows the application of International Law by the courts. International Law can't operate effectively and will be left with no importance without the cooperation of national legal systems. The above

situation has necessitated of taking cognizance of the present matter from a more modern perspective. The views of the jurist with regard to the said matter are divergent which has resulted in propounding of different theories on the subject.

Theories as to Relationship Between municipal & International law (Dualistic & Monistic)-

Dualistic Theory

Dualistic theory was propounded by renowned German scholar Triepel in 1899. The theory was later on followed by Italian jurist Anzilloti[1]. According to dualistic theory, municipal and International Laws are two separate and self contained legal systems. International Law would not constitute the part of internal law of the state, it can only be applied by adoption of the International Law and by application of International Law through adoption it would be considered as internal law of the state. Each is supreme in its own sphere.[2] If International Law ever becomes part of domestic law, that can only be because domestic law, has chosen to incorporate it.[3]

Monistic Theory

Monistic theory was evolved in 18th century. It was expounded by two German scholars Moser and Martens. According to monistic theory, Monists on the other hand contend that there is only one system of law, of which International and domestic laws are no more than two aspects. They justify this by claiming that both of them govern sets of individuals (States being seen for this as 202 collection of individuals) both are binding, and both are manifestations of a single concept of law.[4] According to this theory, International Law and municipal law together constitute the part of universal legal system. It was denied by this theory that International Law is a separate body of law. It was stand of this theory that there is no need to incorporate legal rules into domestic laws since they are made by state themselves.

[1] Dr. H.O. Agarwal, International Law & Human Rights 44 (22nd ed. 2019).
[2] 1 Oppenheim's, International Law 53 (9th ed. 1992).
[3] THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW WITH BRIEF ACCOUNT OF STATE PRACTICES (OTHER THAN INDIA) IN THIS REGARD, Shodhganga (Apr. 30 , 2020, 3:25PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/76456/11/chapter%205.pdf.
[4] ibid.

Now a question arises as to which theory is correct among the two? It can be said that no theory is complete and self sufficient alone. The general practice follows that if a case is before an International tribunal or court, then primacy is given to International Law over domestic law. On the other and if a matter is before a municipal court, then greater importance is attributed towards domestic law, especially when there is a conflict between the two. It is submitted that if there is a conflict between International Law and municipal Law then every effort should be made towards harmonious interpretation, so as to give effect to both, since both are meant for solving the problems of humankind. The two systems 'are not like a gear, but like two wheels revolving upon the same axil'[5]. Hence whenever a conflict creeps between International Law and domestic law, every effort should be towards harmonising the effect of both, if the effort fails then state is governed by jurisdictional rules.

State Practice Regarding Relationship-

Every state has applied that theory which suited their social, political and economic structure. The relation between domestic and International Law varies from state to state in terms of application of Customary International Law and Treaties. The practices of few states are as follows-

1) India-

Article 51 of the Indian constitution expounds a general obligation upon the state to respect international law and treaties by stating-

The State shall endeavour to-

(a) Promote international peace and security;

(b) Maintain just and honourable relations between nations;

(c) Foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and

(d) Encourage settlement of international disputes by arbitration.

[5] Dr. H.O. Agarwal, International Law & Human Rights 48 (22nd ed. 2019).

Article 51 is a pledge that India shall respect International law and treaty in their dealing with international entities.

(a) Customary International Law-

Customary International Law refers to the general obligation of the states to observe certain established practices evolved through their intercourse with each other.

India follows doctrine of incorporation, thus, Indian courts would apply customary rules of International Law, if they are not overridden by clear rules of domestic law.[6] If there is a conflict between domestic law and International Law, then prevalence will be given to the former. It is true that the doctrine of Monism as prevailing in the European Countries does not prevail in India. The Doctrine of Dualism is applicable. But, where the municipal law does not limit the extent of the statute, even if India is not a signatory to the relevant International Treaty or covenant, the Supreme Court in a large number of cases interpreted the Statutes keeping in view the same[7] International customary law are only enforced if there is no municipal law running to contrary to it. In A.D.M, Jabalpur Vs. Shukla [8], Justice H.R. Khanna in his dissenting opinion stated that if there is a conflict between municipal law and International Law, the courts shall give effect to municipal law.

However if there is no municipal law which is running contrary to International Law then the doctrine of incorporation would be enforced to give effect to International Law. In Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey[9], Justice Chinnappa Reddy observed –

There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the

[6] 2nd D.D. Basu, 'Commentary on the Constitution of India' 404 (1956).
[7] State of West Bengal v Kesoram Industries Ltd. & others, A.I.R. 2005 S.C. 46 (India).
[8] A.D.M Jabalpur vs. S. S. Shukla, A.I.R. 1976 S.C. 1207 (India).
[9] Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey, A.I.R. 1984 S.C. 667 (India).

laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it.

Therefore from the above authorities cited the position in India with regard to customary International is crystal clear that if there is a conflict between municipal law and International Court then the primacy will be given to former in India, however if there is no conflict, doctrine of incorporation will be enforced to give effect to International Law.

(b) Treaties-

Treaty can be referred to as binding agreement between two or more sovereign states.

Article 253 of Indian Constitution states-

253- Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body

In India to give effect to treaty it's mandatory upon the parliament to legislate it. 'No treaty which has not been implemented by legislation shall be binding on the municipal court'[10]. In Birma Vs. State Of Rajasthan[11] The Court held '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'. The same principle laid was upheld in Maganbhai Vs Union of India[12] and Nirmal

[10] 2 D D Basu, Commentary on the Constitution of India 404 (1956).
[11] Birma Vs. State Of Rajasthan, A.I.R. 1951 Raj 127 (India).
[12] Maganbhai Vs Union of India, A.I.R. 1969 S.C. 783 (India).

Vs. Union of India[13] by stating that legislative power belongs exclusively to parliament, by placing reliance on Article 253 of constitution they made it unequivocally clear that treaty can be enforced only when the parliament has legislated on it. Further in Civil Rights Vigilance Committee, Bangalore Vs. Union of India[14] the court held- if parliament does not enact any law for implementing the obligations under a treaty entered into by the Govt. of India with foreign countries. Courts cannot compel Parliament to make such law. In the absence of such law, court cannot also, in our view enforce obedience of the Government of India to its treaty obligations with foreign countries.

However if human rights is in question, then the court would not shy away from incorporating International treaties into domestic law, even though the same has not been legislated upon in order to meet the ends of justice. The same position was illustrated clearly in Vishakha Vs State of Rajasthan[15] by application of Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women which prohibits discrimination against women in workplace, Where Apex Court held- Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place. 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.[16]

Therefore it can be inferred that the obligation is upon the parliament to legislate treaties, in order to bring them into effect, failure to do so will render the treaty unenforceable, nor the court will be in a position to order parliament to legislate on the subject of treaty. However if human rights are involved in a matter, then court will not shy away from incorporating them into domestic law, though the same has not been legislated by parliament.

2) United States of America-

[13] Nirmal Vs. Union of India, A.I.R. 1959 Cal 606 (India).
[14] Civil Rights Vigilance Committee, Bangalore Vs. Union of India, A.I.R. 1983 Kant 85 (India).
[15] Vishakha Vs State of Rajasthan, A.I.R. 1997 S.C. 3011 (India).
[16] Ibid.

(a) Customary International Law-

The most landmark case law on the status of customary international law in U.S. is that of The Paquete Habana and the Lola Case[17] The decision of the case extended the development of international law. The opinion observed in this case became a strong influence on the law of naval warfare. It more importantly declares that the international law is a part of the nation's law.[18] Further in Macleod vs. United States[19] the court stated that the statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law. If ever a conflict arises between municipal law and International Law, the former will prevail over the latter.[20]

Therefore from the above authorities cited it is palpable that United States of America follows doctrine of incorporation and incorporates International Law into domestic law when there is nothing in the municipal law running contrary to it.

(b) Treaties-

United States of America has a clear provision dealing with the aforesaid matter in their constitution, Article VI, Clause 2 of their constitution states-

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[17] Paquete Habana v. United States, 175 U.S. 677, (1900).
[18] S. Shridula, CASE ANALYSIS ON PAQUETE HABANA V. UNITED STATES, The Law Brigade (Publishing) Group (May 1, 2020, 12:53 PM), http://thelawbrigade.com/wp-content/uploads/2019/12/S.-Shridula_Paquete-Habana-V.-United-States-1900_IJLDAI.pdf.
[19] Macleod vs. United States, 229 U.S. 416, (1913).
[20] Banco Nacional de cuba Vs. Sabbatino, 376 U.S. 398, 423 (1964).

The treaty making power rests exclusively with the federal government under Article 1 Section 10 of the constitution. Once the treaty is ratified by the president, it becomes part of the land and enforceable provided nothing in the domestic law runs contrary to it.

In U.S. Vs Pink[21]the Supreme Court stated- A treaty is a "Law of the Land" under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity. In many cases rules of International Law were administered by the American Courts as a part of the law of the land.[22]

It is worth mentioning that United States doesn't regard all treaty as a part of the land. A distinction is drawn between self-executing and non-self-executing treaties, self-executing treaties are that treaty which doesn't require a legislation to implement them, they are considered as a part of the internal law of the state ispo facto, they override constitution and previously state enacted legislation. Whereas on the other hand non-self-executing treaties doesn't became law of the land until there is a necessary legislation to that effect.

To conclude, it can be inferred that U.S. considers treaties as part of its land, if there is a self-executing treaty then it will override the provisions of state legislature however if a conflict arises between self executing treaty and federal law, then latter will have primacy over the former.

3) United Kingdom-

(a) Customary International Law-

In United Kingdom, doctrine of incorporation is followed, which means that international law will be implemented provided they don't run contrary to the municipal law. The same principle was upheld by various authorities in United Kingdom. In Chung Chi Cheung Vs. The King[23], Court stated that- The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. Further in

[21] U.S. Vs Pink, 315 U.S. 203 (1942).
[22] The United States Vs. Smith, 18 U.S. 153 (1820).
[23] Chung Chi Cheung Vs. The King, [1939] AC 167.

Trendtex Trading Corporation Vs. Central Bank of Nigeria[24],Lord Denning stated ' I now believe that the doctrine of incorporation is correct', the thought was reaffirmed by Maclaine Watson Vs. Department of Trade and Industry[25] Hence above authorities makes it abundantly clear that doctrine of incorporation is followed in United Kingdom.

(b) Treaties

it has become established in England that the following categories of Treaties must receive Parliamentary assent through an enabling Act of Parliament and if necessary, any legislation to effect the requisite changes in the law must be passed: 1) Treaties, which affect the private rights of British subjects. 2) Treaties which involve any modification of the common or statute law by virtue of their provisions or otherwise 3) Treaties which require the vesting of additional powers in the crown 4) Treaties, which impose additional financial obligations, dissect or contingent upon the government.[26]

In short, when a treaty is intended to be implemented with regard to above stated matter, parliament is required or enabling act is required. Therefore it can be inferred that in U.K, municipal law has supremacy over International Law. The fact that International Law is part of the law of the land and is binding directly on courts and individuals does not mean that English Law recognises in all circumstances the supremacy of International Law.[27]

Conclusion-

It can be said that municipal law and International Law are not like a gear, but like two wheels revolving upon the same axil'[28] It is submitted that if there is a conflict between International Law and municipal Law then every effort should be made towards harmonious interpretation, so as to give effect to both, since both are meant for solving the problems of humankind. International Law and municipal law together constitute the part of universal legal system. Hence whenever a conflict

[24]Trendtex Trading Corporation Vs. Central Bank of Nigeria, [1977] 1 QB 529.
[25] Maclaine Watson Vs. Department of Trade and Industry, [1988] 3 WLR 1033.
[26] THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW WITH BRIEF ACCOUNT OF STATE PRACTICES (OTHER THAN INDIA) IN THIS REGARD, Shodhganga (May 1 , 2020, 5:30PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/76456/11/chapter%205.pdf.
[27] Oppenheim's, International Law 61 (1905-1906).
[28] Dr. H.O. Agarwal, International Law & Human Rights 48 (22nd ed. 2019).

creeps between International Law and domestic law, every effort should be made towards harmonising the effect of both, if the effort fails then state is governed by jurisdictional rules. It must be noted that, International Law can't function effectively and will be left with no importance without the co-operation of municipal law; hence they should work in tandem. In the view of the same, states should understand the growing relationship between municipal law and International Law, and should enact municipal law in such a manner, so as to effect can be given to both, such actions by states will result in growing cooperation among states, which will facilitate peace and avoid conflicts at global level.