Relationship between International Law and Municipal Law

INTRODUCTION

Earlier the role of the state is only to provide protection to their citizen. But in the present context, the role of the state is a complex one. According to legal theory, each state is sovereign and equal. However in reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most powerful of states can be entirely sovereign. Interdependence and the close-knit character of contemporary international commercial and political society ensures that virtually any action of a state could well have profound repercussions upon the system as a whole and the decisions under consideration by other states. This has led to an increasing interpenetration of international law and domestic law across a number of fields, such as human rights, environmental and international investment law, where at the least the same topic is subject to regulation at both the domestic and the international level.

With the rise and extension of international law, questions begin to arise paralleling the role played by the state within the international system and concerned with the relationship between the internal legal order of a particular country and the rules and principles governing the international community as a whole. Municipal law governs the domestic aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus, while international law focuses primarily upon the relations between states. That is now, however, an overly simplistic assertion. There are many instances where problems can emerge and lead to difficulties between the two systems. In a case before a municipal court a rule of international law may be brought forward as a defence to a charge, as for example in R v. Jones, where the defence of seeking to prevent a greater crime (essentially of international law) was claimed with regard to the alleged offence of criminal damage (in English law),¹ or where a vessel is being prosecuted for being in what, in domestic law, is regarded as territorial waters but in international law would be treated as part of the high seas. Further, there are cases where the same situation comes before both national and international courts, which may refer to each other’s decisions in a complex process of interaction. For example, the failure of the US to allow imprisoned foreign nationals access to consular assistance in violation of the Vienna Convention on Consular Relations, 1963 was

¹ [2006] UKHL 16; 132 ILR.
the subject of case-law before the International Court of Justice,\(^2\) the Inter-American Court of Human Rights\(^3\) and US courts,\(^4\) while there is a growing tendency for domestic courts to be used to address violations of international law\(^5\).

**International Law**

According to the Black’s Law Dictionary

“International Law” is defined as: “The legal system governing the relationship between nations; more modernly the Law of International relations embracing not only nations but also such participants as International organizations and individuals (such as those who invoke their human rights or commit war crimes)”

**International law** is the set of rules generally regarded and accepted as binding in relations between states and nations. It differs from national legal systems in that it only concerns nations rather than private citizens. National law may become international law when treaties delegate national jurisdiction to supranational tribunals such as the European Court of Human Rights or the International Criminal Court. Treaties such as the Geneva Conventions may require national law to conform.

The term "international law" can refer to three distinct legal disciplines:

- **Public international law**, which governs the relationship between provinces and international entities. It includes these legal fields: treaty law, law of sea, international criminal law and the laws of war or international humanitarian law.

- **Private international law**, or conflict of laws, is a body of law developed to resolve private, non-state disputes involving more than one jurisdiction or one foreign law element, which addresses the questions of:
  1. which jurisdiction may hear a case, and
  2. the law concerning which jurisdiction applies to the issues in the case.

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\(^2\) *LaGrand* case, ICJ Reports, 2001, p. 466; 134 ILR, p. 1, and the *Avena case*, ICJ Reports, 2004, p. 12; 134 ILR, p. 120.


• Supranational law, or the law of supranational organizations, which concerns regional agreements where the laws of nation states may be held inapplicable when conflicting with a supranational legal system when that nation has a treaty obligation to a supranational collective.

The two traditional branches of the field are:

• Jus gentium: is the body of treaties, U.N. conventions, and other international agreements [law of nations] – Law is common to all nations

• Jus inter gentes: agreements between nations

**Municipal Law**

According to the Black’s Law Dictionary

“Municipal Law” is defined as: “The ordinances and other laws applicable within a city, town or other local government entity”.

Basically, 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.

Article 27 of the Vienna Convention on the Law of Treaties provides that, where a treaty conflicts with a state's municipal law (including the state's constitution), the state is still obliged to meet its obligations under the treaty. The only exception to this rule is provided by Article 46 of the Vienna Convention, where a state's expression of consent to be bound by a treaty was a manifest violation of a "rule of its internal law of fundamental importance.”

**Relationship between International and Municipal Law**

It is important to understand how international law principles become part of domestic law, and to explain what happens if the rules conflict. The theories of monism and dualism are the two main theories that explain the relationship between international and municipal law.
The main differences between international and municipal law are thought to be the sources of law, its subjects, and subject matter. International law derives from the collective will of States, its subjects are the States themselves, and its subject matter is the relations between States. Domestic law derives from the will of the sovereign or the State, its subjects are the individuals within the State, and its subject matter is the relations of individuals with each other and with government.

Theories

Dualism

Positivism stresses the overwhelming importance of the state and tends to regard international law as founded upon the consent of states. It is actual practice, illustrated by custom and by treaty that formulates the role of international law, and not formalistic structures, theoretical deductions or moral stipulations. Accordingly, when positivists such as Triepel and Strupp consider the relationship of international law to municipal law, they do so upon the basis of the supremacy of the state, and the existence of wide differences between the two functioning orders. This theory, known as dualism, stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other.

This theory holds that international law and domestic law are separate bodies of law, operating independently of each other. Under dualism, rules and principles of international law cannot operate directly in domestic law, and must be transformed or incorporated into domestic law before they can affect individual rights and obligations.

According to dualist theory, international law and municipal law exists with a wide difference between its functioning. The dualist approach maintains that international law cannot interfere with the municipal lawsas long as such rules of international law are not incorporated in the municipal laws. The transformation doctrine is an integral part of the dualist approach, where international law is followed in by municipal law if the former is transformed into a national law. A wider thesis of dualist approach is the adoption doctrine; where the international law cannot confer rights on municipal laws as far as the rules are not recognized as inclusive in the domestic laws that gives rise to obligation to follow such international rules. This doctrine was noted in “Cristina Case”, where the judge mentioned
that the rule of international law is binding on the municipal courts to the extent the rule has been recognised and created precedence by the Courts.

Monism:

Those writers who disagree with dualism theory and who adopt the monist approach tend to fall into two distinct categories: those who, like Lauterpacht, uphold a strong ethical position with a deep concern for human rights, and others, like Kelsen, who maintain a monist position on formalistic logical grounds. The monists are united in accepting a unitary view of law as a whole and are opposed to the strict division posited by the positivists.

The Monist approach follows a Kantian philosophy of law, which favours a unitary conception of law where the states derive its laws from a superior source of law and a law that contradicts international law, stands invalid. The monist theory suggests that the effect of international law is incorporated in the domestic legal system and it does not require a specific law that would necessitate to explicitly mentioning its inclusion. For example, if a particular state has ratified international human rights convention and its national laws restrict a certain freedom; the person being prosecuted can include the argument that the national laws are in violation of international laws and the judge would require the national law to stand invalid. This approach places international law at a higher platform in respect of municipal laws; it creates a legal order which allows municipal laws to follow the international rules. However, if any contradiction arises between both the laws, then international law would supersede the municipal laws and the national law would stand invalid.

Germinating from these two prominent views, two other theories also came into existence.

Transformation or Specific Adoption Theory: It is based on the dualist concept. This theory says that, no rules of international law, by its own force, can claim to be applied by municipal courts, unless they undergo the process of transformation and be specifically adopted by the municipal courts and systems. The rules of international law are part of national law only if specifically-adopted.

Delegation Theory: This theory laid down that there is the delegation of a right to each state constitution by the rules of international law called “Constitutional rules of international/treaties”, which permit each state to decide or determine for itself as to how and
when the provisions of international treaty or convention are to come into force and in what manner they are to be implemented or embodied into State law.

Harmonization:

A third approach, being somewhat a modification of the dualist position and formulated by Fitzmaurice and Rousseau amongst others, attempts to establish a recognised theoretical framework tied to reality. This approach begins by denying that any common field of operation exists as between international law and municipal law by which one system is superior or inferior to the other. Each order is supreme in its own sphere, much as French law and English law are in France and England.

Neither monism nor dualism can adequately explain the relationship between international and domestic law, and alternative theories have developed which regard international law as having a harmonisation role. If there is a conflict, domestic law is applied within the domestic legal system, leaving the State responsible at the international level for any breach of its international law obligations.

The Harmonization Doctrine manages to remove the barriers between the two schools of monism and dualism and tries to remove the conflicts of ideologies between both schools. The argue that if both international law and municipal laws were different and independent from each other, calling them a “law” would be improper. This theory suggests that both the laws form one body of doctrine and the Courts should try and minimize the differences created amongst both the laws through a process of a judicial harmonization. The outcome of such a doctrine would render both of these laws at an equivalent platform. Such a doctrine does not harp on the supremacy or inferiority of either of the laws and rather uses the international laws to guide the municipal legal orders by a judicial process.

In Anglo-American system it is presumed that international laws should be respected and national laws should not be created that would violate international rules and norms. This system presupposes that state laws should not contradict international laws. It was seen in Martin v. Renold\(^6\), that states laws cannot derogate any international laws and in extreme instances where such legislation is passed that deviates or contradicts international law then that law would go through a judicial redrafting in order to harmonize with international law.

\(^6\) Martin v. Renold, Bundesgericht, 1909, 35(1.) BGE 594, 596 (Swit.).
This method of solving the problem does not delve deeply into theoretical considerations, but aims at being practical and in accord with the majority of state practice and international judicial decisions. 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 circumstance, while domestic courts are increasingly being obliged to interpret rules of international law.

The role of municipal rules in international law

The general rule with regard to the position of municipal law within the international sphere is that a state which has broken a stipulation of international law cannot justify itself by referring to its domestic legal situation. It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal laws.

Accordingly, state practice and decided cases have established this provision and thereby prevented countries involved in international litigation from pleading municipal law as a method of circumventing international law. Article 27 of the Vienna Convention on the Law of Treaties, 1969 lays down that in so far as treaties are concerned, a party may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement, while Article 46(1) provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent.

Such provisions are reflected in the case-law. In the Alabama Claims arbitration of 1872, the United States objected strenuously when Britain allowed a Confederate ship to sail from Liverpool to prey upon American shipping. It was held that the absence of British legislation necessary to prevent the construction or departure of the vessel could not be brought forward as a defence, and Britain was accordingly liable to pay damages for the depredations caused by the warship in question.

The International Court, in the Applicability of the Obligation to Arbitrate case, has underlined ‘the fundamental principle of international law that international law prevails over domestic law’, while Judge Shahabuddeen emphasised in the Lockerbie case that inability under domestic law to act was no defence to non-compliance with an international obligation.
However, such expressions of the supremacy of international law over municipal law in international tribunals do not mean that the provisions of domestic legislation are either irrelevant or unnecessary. On the contrary, the role of internal legal rules is vital to the workings of the international legal machine. One of the ways that it is possible to understand and discover a state’s legal position on a variety of topics important to international law is by examining municipal laws. For instance, a country will express its opinion on such vital international matters as the extent of its territorial sea, or the jurisdiction it claims or the conditions for the acquisition of nationality through the medium of its domestic lawmaking.

INTERNATIONAL LAW BEFORE MUNICIPAL COURTS

The problem of the role of international law within the municipal law system is, however, rather more complicated than the position discussed above, and there have been a number of different approaches to it. States are, of course, under a general obligation to act in conformity with the rules of international law and will bear responsibility for breaches of it, whether committed by the legislative, executive or judicial organs and irrespective of domestic law. Further, international treaties may impose requirements of domestic legislation upon states parties, while binding Security Council resolutions may similarly require that states take particular action within their jurisdictions. There is indeed a clear trend towards the increasing penetration of international legal rules within domestic systems coupled with the exercise of an ever-wider jurisdiction with regard to matters having an international dimension by domestic courts. This has led to a blurring of the distinction between the two previously maintained autonomous zones of international and domestic law, a re-evaluation of the role of international legal rules and a greater preparedness by domestic tribunals to analyse the actions of their governments in the light of international law.

In this section, the approach adopted by municipal courts will be noted. We shall look first at the attitudes adopted by the British courts, and then proceed to note the views taken by the United States and other countries.

The United Kingdom

It is part of the public policy of the UK that the courts should in principle give effect to clearly established rules of international law. Various theories have been put forward to explain the applicability of international law rules within the jurisdiction. One expression of the positivist–dualist position has been the doctrine of transformation. This is based upon the
perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically ‘transformed’ into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament.

Another approach, known as the doctrine of incorporation, holds that international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure. The best-known exponent of this theory is the eighteenth-century lawyer Blackstone, who declared in his Commentaries that: “the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land.”

The United States

As far as the American position on the relationship between municipal law and customary international law is concerned, it appears to be very similar to British practice, apart from the need to take the Constitution into account. The US Supreme Court in Boos v. Barry emphasised that, ‘As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law.’ However, the rules of international law were subject to the Constitution.

An early acceptance of the incorporation doctrine was later modified as in the UK. It was stated in the Paquete Habana case\(^7\) that international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.

The current accepted position is that customary international law in the US is federal law and that its determination by the federal courts is binding on the state courts. US courts are bound by the doctrine of precedent and the necessity to proceed according to previously decided cases, and they too must apply statute as against any rules of customary international law that do not accord with it. The Court of Appeals reaffirmed this position in the Committee of United States Citizens Living in Nicaragua v. Reagan case\(^8\), where it was noted that ‘no

\(^7\) 175 US 677 (1900).
\(^8\) 859 F.2d 929 (1988).
enactment of Congress can be challenged on the ground that it violates customary international law’.

It has been noted that the political and judicial organs of the United States have the power to ignore international law, where this occurs pursuant to a statute or ‘controlling executive act’. This has occasioned much controversy,9 as has the general relationship between custom and inconsistent pre-existing statutes.10 However, it is now accepted that statutes supersede earlier treaties or customary rules of international law.11

Other countries

In other countries where the English common law was adopted, such as the majority of Commonwealth states and, for example, Israel, it is possible to say that in general the same principles apply. Customary law is regarded on the whole as part of the law of the land. Municipal laws are presumed not to be inconsistent with rules of international law, but in cases of conflict the former have precedence.

The Canadian Supreme Court in the Reference Re Secession of Quebec judgment12 noted that it had been necessary for the Court in a number of cases to look to international law to determine the rights or obligations of some actor within the Canadian legal system.

The Indian Constitution refers only in the vaguest of terms to the provisions of international law i.e. the drafters of the Indian Constitution have been extremely vague in defining the status of international law in the municipal sphere. Our Constitution provides little guidance as to the relationship between international law and municipal law. A composite reading of the Articles 51(c),253 and 372 suggest that India has not deviated from the common law position. Therefore, India will have the same legal practice of treating customary International Law as part of the law of the land provided that it is not inconsistent with the existing statutory provisions and the national charter. Supreme Court has held in several cases such as Vishakha vs. State of Rajasthan, Randhir vs. Union of India, Unnikrishnan vs. State of Karnataka13, that domestic laws of India, including the constitution are not to be read as derogatory to International law. An effort must be made to read the domestic law as being in harmony with the international law in case of any ambiguity. At the same time, the

9 See Brown v. United States 12 US (8 Cranch) 110, 128 (1814)
11 Id.
constitution is still the supreme law of the land and in case of any directly conflict the
constitution will prevail.

Indian legal system witnesses instances where international laws and decisions of Privy
Council was binding on Indian cases. In Behram Khurshid v. State of Bombay, it was seen
that Privy Council decisions were not absolutely binding on Indian courts, the court would
analyse, see the principles and facts of that case, and the extent it would be applicable. The
Indian legal system would accept the International laws as long it would not override the
municipal laws and would respect and adhere to the rules laid down by international laws and
norms. This view was in consistent with the English law and the courts would act on the
general presumption that domestic laws would not directly violate international norms and
rules. It is seen that no international treaties would be binding on the domestic courts if the
legislation has not implemented such treaties. Therefore, only those treaties would be binding
on the municipal courts were enacted and enforced by the legislation of India, treaties of
international laws would not be binding as long as the legislative had expressly mentioned
that such treaties formulate a law of the land.

Conclusion

International law has grown over the years and emerges as a law; the sources are variant and
remain in a horizontal platform as opposed to municipal laws. In the light of the variant legal
systems it is seen that Anglo-American and Civil law systems follow the harmonization
doctrine. The Common Law countries differ from such a doctrine, accepting more of a dualist
approach towards the inclusion of international law in municipal law. Over the years that has
been a variance in ideologies in which of the schools that should be followed. The division
created by monism and dualism follow a philosophical doctrine and fails to adhere to certain
legal issues. Monistic theory is based on natural law which suggests that internal law as well
as international law is a part of the same law and there is no need for separation between
them. But the dualistic theory which is based on positive law says that domestic law and
international law are separate entities. The nation state need not obey international law unless
it accepts to do so. Though both theories has its own place in international law, few countries
in this world follow pure dualism or monism. The countries follow international law when it
is in their favour and do not follow when it is not. This is what we can see in the international
scenario. The doctrine intends to annul such divisions and craft a legal order that minimizes
the conflict created by the previous doctrines. The fundamental element of the doctrine is to
maintain an order in the working of both national and international laws. It removes the hierarchy amongst international law and municipal law and creates interdependence amongst both these laws for a healthier judicial process.