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PRACTICE IN RELATION OF INTERNATIONAL LAW IN INDIA*

INTRODUCTION

International Law is the law which governs the Relations of sovereign independent States inter se Municipal law or State law or national law is the law of a State or a country and in that respect is opposed to International Law which consists of rules which civilized States consider as binding upon them in their mutual relations. Kelsen observes that national law regulates the behavior of individuals International law the behavior of States or as it is put whereas national law is concerned with the international relations the so called domestic affairs of the State. International Law is concerned with the external relations of the State its foreign affairs.

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.

Very often, municipal courts are confronted with the situations calling for applications of rules of international law, sometimes at variance with municipal law, to the cases before them. It is in this context that the issue of relationship between two systems of law assumes importance.

There is a divergence of opinion among the jurists on the issue of giving effect to the international law within the municipal sphere the various national laws can be said to form a unity being manifestations of a single conception of law or whether International Law constitutes an independent system of law essentially different from the Municipal Law. The former theory is called monistic and the latter dualistic.

Apart from the aspect of theory, there is the important practical problem of more immediate concern to municipal courts, namely, to what extent may such courts give effect within the municipal sphere to rules of international law, both where such rules are and where they are not in conflict with municipal law. Besides, in the international sphere, international tribunals may be called upon to determine the precise status and effect of a rule of municipal law, which is relied upon by one party to a case.

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Monistic Theory: Monists assume that the internal and international legal systems form a unity. Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determine whether actions are legal or illegal. In most monist states, a distinction between international law in the form of treaties, and other international law, e.g. jus cogens is made. International law does not need to be translated into national law. The act of ratifying the international law immediately incorporates the law into national law. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority. In other states, like in Germany, treaties have the same effect as legislation, and by the principle of lex posterior, only take precedence over national legislation enacted prior to their ratification. In its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution.It maintains that the subject of the two systems of law namely, International Law and Municipal Law are essentially one in as much as the former regulates the conduct of States, while the latter of individuals. According to this view law is essentially a command binding upon the subjects of the law independent of their will which is one case is the States and in the other individuals. According to it 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.

Dualistic theory: Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law. According to the dualist view the systems of International Law and Municipal Law are separate and self contained to the extent to which rules of the one are not expressly or tacitly received into the other system. In the first place they differ as regards their sources. The sources of Municipal Law are customs grown up within the boundaries of the State concerned and statutes enacted therein while the sources of International Law are customs grown up within the Family of Nations and law making treaties concluded by its members. In the second place Municipal Laws regulates relations between the individuals under the sway of a State or between the individuals and the State while International Law regulates relations between the member States of the Family of Nations. Lastly there is a difference with regard to the substance of the law in as much as Municipal Law is a law of the sovereign over individuals while International Law is a law between sovereign State which is arrived at an agreement among them. The latter is therefore a weak law.

BESIDES THE ABOVE TWO THEORIES, THERE IS A REFERENCE TO TWO OTHER THEORIES NAMELY, THE TRANSFORMATION THEORY AND DELEGATION THEORY.

Transformation Theory: According to this theory it is the transformation of the treaty into national legislation which alone validates the extension to individuals of the rules set out in international agreements. The transformation is not merely a formal but a substantial requirement. International Law according to this theory cannot find place in the national or Municipal Law unless the latter allows its machinery to be used for that purpose.

This theory is fallacious in several respects. In the first place its premise that International Law and Municipal Law are two distinct systems is incorrect. In the second place the second premise that International Law binds States only whereas municipal law applies to individuals is also incorrect for International Law is the sum of the rules which have been accepted by civilized states as determining their conduct towards each other and towards each others subjects. In the third place the theory regards the transformation of treaties into national law for their enforcement. This is not true in all cases for the practice of transforming treaties into national legislation is not uniform in all the countries. And this is certainly not true in the case of law making treaties.

Delegation Theory: According to this theory there is the delegation of a right to every State to decide for itself when the provisions of a treaty or convention are to come into effect and in what manner they are to be incorporated in the law of the land or municipal law. There is no need of transformation of a treaty into national law but the act is merely an extension of one single act. The delegation theory is incomplete for it does not satisfactorily meet the main argument of the transformation theory. It assumes the primacy of international legal order but fails to explain the relations existing between municipal and international laws.

INTERFACE BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

International law has a very complex and uneasy relationship with the domestic laws of a country. The two systems are usually understood as distinct legal system of rules[1] and principles[2]. It is pertinent to note that international treaties are the result of the negotiations between the States and are governed by international law[3]. They are one of the most important sources of international law.

A. Divergent State Practice of Incorporation

Although international law requires a State to carry out its international obligations, domestic legal systems of different countries vary in respect of implementation of international law at national level. As a result, the process used by a State to carry out its international obligations varies from legislative, executive and/or judicial measures. States also follow different practices in incorporating treaties within its internal legal structure, so that the provisions can be implemented by State authorities. It is pertinent to mention that, international law automatically becomes a part of national law or municipal law in some countries. In other words, as soon as a State has ratified or acceded to an international agreement, that international law becomes national law. Under such systems, treaties are generally considered to be self-executing treaties.

In other countries, international law does not automatically become part of national law of the ratifying State. International law in these countries is not self-executing, that is, it does not have the force of law without the passage of supplementary domestic national legislation. If one examines the constitutional texts, especially those of the developing countries, which are usually

[1] Jolly Jeorge Vs. Bank of Cochin, AIR 1980 SC 470principles.
[2] See Hilary Charlesworth and others, eds., The Fluid State: International Law and National Legal Systems (Sydney, Australia: The Federation Press, 2005)
[3] The Vienna Convention on the Law of Treaties defines the term „treaty" for the purposes of the Convention to mean a written international agreement between States governed by international law, see Article 2(1). The Vienna Convention on the Law of Treaties United Nations, 1969, UN Treaty Series, vol. 1155, p. 331

keen on emphasizing their sovereignty, the finding is that most of the States do not gives primacy to international law over their municipal law.[4]

B. Schools of Law: Monists vs. Dualists

The divergent State practices pertaining to incorporation of international law into municipal law have been explained by two schools of law. These two schools of law on the relationship between international law and municipal law are – monists and dualists.

The dualists regard international law and municipal law as separate. According to this school of law, municipal law can apply international law only when it has been incorporated into municipal law. This incorporation can result from an act of Parliament or executive action or given effect by the courts. Thus, an unincorporated treaty has no formal standing in domestic law. Also, if international law conflicts with the domestic law, then domestic law will prevail. However, this does not necessarily mean that most states would disregard international law. In reality, what matters is the domestic legislations, the attitude of the domestic courts and the administrative practice, which is often inconsistent and ambiguous.[5]

On the other hand, monists regard international law and municipal law as parts of a single legal system. According to this theory, municipal law is sub-servenient to international law.

Indian constitution follows the „dualistic" doctrine with respect to international law[6]. Therefore, international treaties do not automatically form part of national law. They must, where appropriate, be incorporated into the legal system by a legislation made by the Parliament.[7]

IMPLEMENTATION OF INTERNATIONAL TREATIES IN INDIA

A. Executive Powers to enter into International Agreements

The Central government or government of India has executive power to enter into and implement international treaties under Articles 246 and 253 read with Entry 14 of List I of the Seventh Schedule of the Indian Constitution.[8]

[4] See Antonio Cassese, Modern Constitutions and International Law, 192. Rec. des COURS 331 (1985-ffl), p. 331.
[5] Peter Malanczuk, "International Law and Municipal Law", In: Akehurst's Modern Introduction to International Law, 7th Revised Edition, (New York: Routledge, 1997), chapter 4, p. 65
[6] Jolly Jeorge Vs. Bank of Cochin AIR 1980 SC 470
[7] Jolly Jeorge Vs. Bank of Cochin AIR 1980 SC 470; Gramophone Company of India Ltd. v. Birendra Bahadur Pandey AIR 1984 SC 667B.
[8] The Supreme Court of India has interpreted the constitutional provisions on the executive power in Samsher Singh v. State of Punjab, AIR 1974 SC 2192, by adopting the „residuary test" in defining the executive power. According to this, the executive power of the state is what remains after the legislative and judicial powers are separated and removed. The court went on to add that the real executive power is vested in the Prime Minister and his Council of Ministers and that the President has to act only on the advice tendered by the Council of Ministers.

The executive powers of Central government or government of India are derived from the legislative power of the Union of India. In this regard, it is to be noted that the executive powers of the Union and State governments are co-extensive with their respective legislative powers.[9]

Executive powers of the Union of India are specifically vested in the President under Article 53 of the Indian Constitution. Apart from vesting the executive power, this provision also provide for the exercise of such executive power either by him directly or through the officers subordinate to him in accordance with the Constitution.

It is pertinent to note that Article 73 of the Indian Constitution confers upon the government of India executive powers over all subjects in which parliament has legislative competence.[10]

Article 73(1) reads as follows :

"Extent of executive powers of the Union,

(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend

(a) To the matters with respect to which Parliament has powers to make laws; and

(b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect in which the Legislature of the State has also power to make laws."

Scope of Executive Powers

The executive power of the Government of India extends to matters with regard to which Parliament can make laws. The executive power of the Union extends also to the exercise of such rights, authority and authority as exercisable by the Government of India by virtue of a treaty or agreement (article 73(1) (b)) of the Indian Constitution). However, executive power of government of India to enter into international treaties does not mean that international law, ipso facto, is enforceable upon ratification. This is because

B. Legislative Powers to implement International Agreement

A treaty may be implemented by exercise of executive power. However, where implementation of a treaty requires legislation, the parliament has exclusive powers to enact a statute or legislation under Article 253 of the Indian Constitution. The Article 253 empowers the Parliament 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." Conferment of this power on the Parliament is evidently in line with the power conferred upon it by Entries 13 and 14 of List I under the Seventh Schedule. Article 253 makes it amply clear that this power is available to Parliament, notwithstanding, the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule. Where the Constitution does not require action to be taken only by

[9] Article 73 and 162 of the Indian Constitution.

[10] Subject-matter of the legislative competence of the Parliament has been enumerated in Article 256 read with List I and List III of the Seventh Schedule. See D.D. Basu, Introduction to the Constitution of India, 20th Edn. (Nagpur: Wadhwa Sales Corporation 2008).

enacting a legislation or there is no existing law to restrict the executive power of the Union (or the state, as the case may be),[11] the government would not only be free to take such action by executive order or to lay down a policy for making of such executive orders, but also to change such orders or the policy itself, as often as the government requires.

C. Implementation of International Obligations

The basic provision of the constitution of India, by virtue of which international law becomes implementable through municipal laws of India is Article 51 (c). Article 51 (c) of the Constitution enjoins the State "to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another."

It is pertinent to mention that article 51 enshrines one of the fundamental principles of State policy (DPSP), embodied in Part IV of the Constitution. The directive principles, according to article 37, are not enforceable through the court of law, nevertheless they are fundamental in the governance of the country and there is a nonobligatory duty on the part of the State to apply these principles in making of laws. Thus, the article 51 and the international law per se are not justiciable in the realm of Indian municipal law.

However, the non-justiciability of Article 51 does not preclude government to strive to achieve the objectives of the international treaty, which has been ratified by it, in good faith through executive or legislative actions. Further, judiciary, though not a empowered to make legislations, is free to interpret India‟s obligations under international law into the municipal laws of the country in pronouncing its decision in a case concerning issues of international law.[12]

An examination of the decisions and practice of courts in India is, thus, imperative to understand the implementation of international law in India.

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.[13] 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

[11] It is to be noted India is a federal State with a national government and a government of each constituent state. Although the structure of India is federal in a general way, yet there are certain aspects that are unique to federalism as practiced in India. The Indian government follows a strong central bias. Some of the special features of India are as follows: Single citizenship, unified Constitution, No state has the right to secede. India has a quasi-federal system of government with the legislative and executive powers divided between Union and States

[12] Relying upon the Article 51, Sikri, C.J. in Kesavananda Bharathi vs. State of Kerala, (1973) Supp. 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 a intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

[13] Provisions in regard to the judiciary in India are contained in Part V („The Union") under Chapter IV titled „The Union Judiciary" and Part VI („The States") under Chapter VI titled „Subordinate Courts" respectively. See D.D. Basu, Introduction to the Constitution of India, 20th Edn (Nagpur: Wadhwa Sales Corporation 2008).service disputes in state agencies, family disputes, motor accident claims as well as consumer complaints to name a few.

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 Courts 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 districtlevel, 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, The Supreme Court and the High Courts 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.[14]

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.[15] The Supreme Court in Visakha v. State of Rajasthan,[16] 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.[17]

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

[14] See D.D. Basu, ibid., n.14
[15] 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.
[16] AIR 1997 SC 3011
[17] Ibid., n.17, para 7

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.[18] 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).[19]

E. Jurisprudence

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In Jolly George Varghese and Another v. The Bank of Cochin,[22] 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.

[18] See D.D. Basu, supra, n.14.
[19] See S.P. Sathe, "Judicial Activism: The Indian experience," Washington University Journal of Law and Policy, vol. 29, no. 6, 2001.

[20] (1973) Supp. SCR 1
[21] AIR 1997 SC 3011
[22] AIR 1980 SC 470

In Additional District Magistrate, Jabalpur v. Shivakant Shukla,[23] 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,[24] 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.

Position in India

In India, SC has held in several cases such as Vishakha vs State of Rajasthan, Randhir vs Union of India, Unnikrishnan vs State of Karnataka, 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 constitution is still the supreme law of the land and in case of any directly conflict the constitution will prevail.

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 justiciable 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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[23] AIR 1976 SC 1207
[24] AIR 1996 SC 2715

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