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Incorporating International Law in India: The Transposition between the Incorporation and Transformation Theory

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ABSTRACT

International law seeps into the domestic realm through prominently two channels, domestication in the form of legislation or raw usage of international law. This penetration of international law into the domestic realm serves as the backdrop for the formulation of theories, to name a few, transformation and incorporation, acknowledging the indirect and direct implementation of international law in the domestic realm respectively, and reflecting the relationship between these two legal regimes. In India, reliance on the transformation model has been seen over the years however, in a few cases, a tilt from the same has also been observed, which is often connoted as a shift from Dualism to Monism.

The onset of this article thus strives to explain the concept and distinction between international law and domestic law and the legal discourse that throws light upon the transposition between these theories and international principles. In the end, the author suggests amiable recourse for balancing between these two tendencies.

Keywords: *International Law, Transformation and Incorporation Theory, Dualism and Monism.*

I. INTRODUCTION

International law and domestic law are often conjectured as the different branches of the same tree of law as they both share concurrence and divergence at the same time. The reason is that they may have different horizons for operational areas and the subject matter, but both bodies of law share the same aim of maintaining public order and protecting people's rights.

Domestic law is the law of an individual State or nation applied to its internal affairs[2]. Blackstone defined domestic law as the rule by which particular districts, communities, or nations are governed[3]. Again, as laid down by J. Kant in his commentary, it is the rule of civil

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[2] People Ex Rel. Ray v. Martin, 181 Misc. 925 (1946).

[3] The Avalon Project, *Blackstone's Commentaries on the Laws of England*, YALE LAW SCHOOL (Oct. 13, 2023, 02:10PM), https://avalon.law.yale.edu/18th_century/blackstone_intro.asp#3.

 [ISSN 2581-5369]

conduct, prescribed by the supreme power in a State[4]. To state precisely, domestic law is regarded as the internal law of the State that is created, interpreted, and enforced within the jurisdictional boundaries of that State. The horizon of the domestic law of any State is composed of several elements such as prevailing customs, natural norms, legislations, judicial decisions, executive or administrative orders, ordinances, guidelines, common law principles, etc. In India, Article 13(3) of the Constitution emancipates an inclusive definition of law and collates various facets under the ambit of domestic law, such as an ordinance, order, by-law, rules, regulations, notification, custom, usages, and legislation[5]. Thus, domestic laws are thus, the legal canons applicable within the boundaries of the State, to govern the conduct of its subjects.

On the other hand, international law addresses the rights and responsibilities of its subjects in the international community. The concept of international law is complex and multifaceted, different scholars have therefore circumscribed its meaning according to their cogitations. The expression international law is generally attributed to Jeremy Bentham who earlier referred to it as the law of nations and viewed it as a kind of positive morality that governs inter-State relations[6]. Oppenheim, whose book is considered a foundational work in the field of international law, defined it as the law considered binding by the civilized States[7]. International law is seen as the body of law which is composed of principles and rules of conduct that the States feel themselves bound to observe, and therefore, do commonly observe in their relations with each other[8]. It is often connoted as the body of rules and principles of action which are binding upon civilized States in their relations with one another[9]. It is also stated as the collection of usages that civilized States have agreed to observe in their dealings with one another[10]. According to the ICJ statute, it encompasses sources such as international conventions, customs, general principles, judicial decisions, and teachings of highly qualified publicists [11]. Thus, in general parlance, international law is understood as the set of agreements and customs that most nation-states, by virtue of their voluntary compliance, follow as a rule, in their international interactions.

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[4] Chancellor James Kent, *Commentaries on American Law (1826-30) Lecture 20 of Statute Law*, LONANG INSTITUTE (Oct. 13, 2023, 02:14PM), https://lonang.com/library/reference/kent-commentaries-american-law/kent-20/.
[5] INDIA CONST. art. 13, cl. 3.
[6] J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1st ed. 1789).
[7] L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE FOUNDED ON THE LAW OF NATIONS OR PRINCIPLES OF NATURAL LAW 2 (1st ed., Longmans, Green, and Co. 1905).
[8] I.A. SHEARER, STARKE'S INTERNATIONAL LAW 1 (11th ed. Oxford University Press 2013).
[9] J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 1 (6th ed., Oxford University Press 1963).
[10] Queen v. Keyn, 2 Ex. D., 63 (1877).
[11] Statute of International Court of Justice 1945, art. 38.

 [ISSN 2581-5369]

However, recent times have witnessed the usage of international law in the domestic justice delivery mechanism, even when it does not have any explicit international aspect. International law has therefore entrenched its roots in the domestic arena as well, irrespective of whether the matter in context has any international spring. Since both International and domestic law, now operate within the national framework, their difference is obliterated, although they still share polarity in some sense.

II. THE CONCURRENCE AND CONTRAST BETWEEN INTERNATIONAL LAW AND THE DOMESTIC LAW

In principles, both domestic law and international law share unwritten customs, natural law principles, etc, however, International law operates differently and therefore there are many critics to discern it as a law, as in contrast to domestic law, International law is not laid as the command by the political superior, and is not backed by sanction[12]. However, it satisfies the basic credential of law, which is a rule for modulating conduct, maintaining rules-based international order, and fostering peaceful relations among its subjects. Now, regarding the difference between these two regimes, in United States v. Forness et all it was held that the word 'municipal law' is often used to refer to the laws of a country dealing with intra-mural matters as distinguished from 'International law' dealing with its extra-mural affairs.[13]

The most popular differentiation between domestic and international law is that the latter is based on the consent and cooperation of the States. Notably, International law has under its canopy many sources, which are in generality volitional as the States create and accept treaties, conventions, and agreements by virtue of their free will. Conversely, the sources of domestic laws are not based on individual preference and rest on uniform rules accepted as laws by the State. Acquiescence among the States is thus a basic element for materializing any obligatory rules between the States, to qualify such rule as an international law. International law is often contested on this ground as the contesters append that any law based on consent can be easily withdrawn or ignored but then, even domestic law is not always just and effective and can be violated.

Another aspect of the difference between these two legal regimes is that in contrast to domestic law, international law is not backed by a central legislation or enforcing authority. The decision between the States is typically resolved through diplomatic negotiation, agreements, and resolution by international tribunals, or the international courts.

[12] Kushagra Bhatnagar, *Austin's Definition of Law and Its Applicability in India*, 4 IJLMH 208, 209 (2021).
[13] 125 F.2d 928 (2d Cir. 1942).

 [ISSN 2581-5369]

Further, there is no hierarchy in international laws, and the international courts are not symmetrically placed in a hierarchical order nor do they have an appeal mechanism as in the case of domestic courts. Also, unlike domestic courts, the cases involving international law can neither be taken *suo moto* by the international courts nor the cases can be filed individually and therefore, it has to be initiated by their respective States consenting to the jurisdiction of such court.

Furthermore, both domestic and international law are evolving concepts but in comparison, it can be said that international law is more dynamic as the agreements differ among different States. The States also face difficulty in identifying and recognizing the general principles and customary laws to be binding as the nation has to seek the confidence of others to regard such principles.

Succinctly put, both are distinct, however, whatever form the laws take and in whatever manner they are applied, both legal regimes check the conduct of their subjects and aim for a peaceful society.

III. SEEPAGE OF INTERNATIONAL LAW INTO THE DOMESTIC LEGAL REGIME

The modern States have witnessed reliance on international norms, apart from their respective domestic norms, owing to the complex nature of interactions between them. This has led them to introduce such international rules in their regime. Such accommodation of international law into the domestic horizon may be direct, which is often connoted as raw usage of international law or latent that needs to be transmuted into the domestic system through legislation. The theory that purports the idea of direct integration is the Incorporation theory and the latter one is referred to as the Transformation theory. It is pertinent to note that the assimilation of international law into the domestic legal system and choosing between these two schemes of integration by the nation-states, depends upon several facets such as their historical factors, legal tradition & framework, political persuasions, level of international involvement, constitutional structure, and the approach of the judiciary.

(A) The Transformation Theory - Domesticated International Law

The proponents of this theory suggest that to honour international commitments, international law can be accommodated into the domestic legal framework by passing laws or amending existing legislation[14]. This idea aligns with the dualist model where international law is not directly implemented into the domestic legal system unless there is legislative backing for the

[14] Union of India v. Agricas, Trf. Petition 496-509 of 2020.

 [ISSN 2581-5369]

same. India, like many other dualist countries, advances that both domestic and international legal regimes are distinct and separate which do not automatically become part of each other. The State, therefore, explicitly incorporates and adopts international law principles, provisions of treaties, conventions, and agreements through legislative actions. India handles dualism by virtue of its constitutional provisions[15] and the primary source of obligation is thus the domestic legislation and not the international principles, *per se*. However, such action should not be interpreted as edging international norms because relying on such principles, the laws or amendments are made thereon. The *jus cogens* rules and customary norms are, however, complied with by the State irrespective of legislation as they are the peremptory norms from which derogation is not expected from any civilized State. Various case laws accentuate transformation theory, for instance, modification in the environmental laws owing to the Stockholm Conference of 1972[16] and non-application of an unratified treaty regarding guardianship and custody of the child[17] while providing relief based on the ratified UNCRC[18]. Further, the Kesoram industry's case is a landmark decision in which the court held that the treaty entered by India can't be implemented unless Parliament makes law under Article 253[19]. In another case, the court held that the task of the domestic court is to apply domestic law by construing it according to its clear meaning even if its meaning is contrary to international law[20]. Again, in several other cases, the court stressed the domestication of international law, to make it applicable in India[21]. Furthermore, in the Jolly Verghese case[22], the court held that until domestic law is changed to accommodate a treaty, what binds the court is the domestic law and not the latter. So, basically, this theory relies more on domestic laws than international principles and even applies the former in case it conflicts with international law[23].

(B) The Incorporation Theory – Usage of Raw International Law

Incorporation theory is *prima facie*, swift application of international law into the domestic legal system as no additional domestic legislation is required to apply such international provisions. The followers of this theory often refer to it as the monism model, as advanced by Kelsen, where

[15] INDIA CONST. art. 51(c), 73, 245, 246, 253, 260, 363, 372, and VII schedule (Union List, Entries (10-21).
[16] See Attakoya Thangal v. Union of India, (1990) 1KLT 580; M.C. Mehta v. Union of India, (1992) Ori. 225; M.C. Mehta v. Union of India, (1996) SC1977; M.C. Mehta v. Union of India, (1998) 9SCC 93; AP Pollution Control Board v. Prof M.V. Nayudu, (1999) SC812; Indian Council for Enviro-legal Action v. Union of India, (1996) SC 1446; Almitra H Patel v. Union of India, (2000) SC1256.
[17] See Smriti Madan Kansagra v. Perry Kansagra, (2020) Civil Appeal No. 3559; Nithya Anand Raghavan v. State (NCT of Delhi), (2017) Cri. Appeal No. 972; Bhavesh Lakhani v. State of Maharashtra, (2009) INSC 1406.
[18] United Nations Child Rights Convention, signed in 1989, effective from 2 September 1990.
[19] State of West Bengal v. Kesoram Industries Ltd, (2004) Civil Appeal 1532 of 1993.
[20] Tractor Export, Moscow v. M/S Tarapore & Company, (1969) 2SCR 920.
[21] Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa & Anr., (1987) AIR 1281.
[22] Jolly George Verghese v. Union of India, (1980) 2SCC 260.
[23] Justice K.S. Puttuswamy (Retd.) v. Union of India & Ors., (2012) Writ Petition 494.

 [ISSN 2581-5369]

both International and domestic law are considered part of a single unified legal system and no further legislative intervention is required to modify those treaty provisions in the form of law. According to this monistic view, the provisions of the treaty signed by the nation-states, customary rules, general principles, and other sources of international law can be complied with and enforced directly into the legal system. Also, as specified by this theory both International and domestic statutes are placed on the same pedestal, and in the case of conflict, the latter in time prevails over the other i.e., '*lex posterior derogat priori*', however, in the case of conflict with the State's Constitutional provisions, the Constitution overrides such conflicting international law. The reason for such direct accommodation is the constitutional commitment of these monist States that suggests for direct usage of international law into their domestic regime[24]. Such treatment of international law is endorsed by them as a quest for progressive law, for filling the fallacies and vacuum in domestic law, or for conforming to globally unified standards.

(C) Transposition between these two Theories in India

Notably, India follows the dualism model but soon after the commencement of the Constitution, a shift was witnessed in many cases[25]. As prescribed by the court in the M/S Entertainment Network case[26], International law can be used to interpret domestic laws, justify the position taken by the court, fulfil the spirit of the international treaty entered, reflect international changes, provide relief that is given in a treaty but not in the domestic law, and to fill gaps in the domestic laws[27]. The reference to international law principles for construction of the domestic law has been seen in many cases[28]. In the Gramophone Company of India Ltd. case, the court opined that the rules of international law can be accommodated in municipal laws even without legislative sanction[29]. Further, in G. Sunderrajan's case,[30] the court held that though India is not a party to the Nuclear Non-Proliferation Treaty, it is a party to other international conventions and the same can be applied, irrespective of any legislative backing. Similarly, in the T.N. Godavarman case[31], the court held that international law can be directly

[24] Dinah L. Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Introduction)*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL (Oct. 13, 2023, 03:03PM), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1389&context=faculty_publications.
[25] V.G. Hegde, *International Law in the Courts of India*, ASIAN YEARBOOK OF INTERNATIONAL LAW (Oct. 13, 2023, 03:10PM) https://www.researchgate.net/publication/335522459_International_Law_in_the_Courts_of_India.
[26] M/S Entertainment Network v. M/S Super Cassette Industries, (2008) 13 SCC 30.
[27] Id.
[28] C.E.S.C. v. Subhash Chandra Bose, (1992) AIR 573; P.N. Krishnalal v. Government of Kerala, (1995) SCC 187.
[29] Gramophone Company of India Ltd. v. Birendra Bahadur Pandey & Ors, (1984) SCR (2) 664.
[30] G. Sunderrajan v. Union of India & Ors., (2013) Civil Appeal No. 4440.
[31] T.N. Godavarman Thirumalpad v. Union of India, (1995) Writ Petition 202.

 [ISSN 2581-5369]

imported if the treaties are not contrary to domestic laws. The court also welcomed ratified treaties that have not been legislated yet, provided they aligned with the domestic laws[32]. Indian courts have even referred to treaties ratified with reservations in providing relief to the victims[33]. In addition, with reference to the maritime treaties, the court suggested that an unratified treaty can also be referred to if the domestic statute is silent or not in conflict with the international law to provide a remedy[34]. The court backed its judgment by holding that certain rules of international law are recognized as general principles or customary norms, which can be applied even without domestic legislation to that effect[35]. The court also suggested that there is no harm in applying international principles that do not contradict domestic laws[36]. In addition, the court has held that only if the executive act of treaty-making affects the rights of the individuals, legislation is required[37]. The court thus opined that international law principles to which the State is bound as a result of being party to such a particular convention or conference can be applied in India[38]. The court contemplated that this is to ensure that the country does not lag behind in the development of international law because of the non-adoption of many treaties, and therefore recourse to the general principles and transnational laws should be made[39].

Such monistic inclination faces many critiques, such as undermining the popular opinion and sovereignty of the Parliament, overreach of power by the Executives, Judicial Activism, etc. Some legal luminaries have also alleged that this is creating a democratic deficit[40]. The rationale provided behind such statements is that Parliament which is the supreme law-making body in the country, is kept aloof from the treaty-making process as no prior consultation or approval is taken by the Executives before signing any treaty in India[41]. Further, as soon as the treaty is signed, there is no room for examination, amendment, or legislation by the legislature, if they

[32] See, Safai Karamchari Andolan v. Union of India, (2014) 11SCC 224; MCD v. Female Workers (muster roll) and Anr., (2000) 3SCC 224; Xavier v. Canara Bank, (1969) KLT 927.
[33] See The Chairman, Railway Board v. Chandrima Das, (2000) 2SCC 465; D.K. Basu, Ashok K Johri v. State of West Bengal, State of U.P., decided on 18 dec 1996; Smt. Nilabati Behera alias Lalit Behera v. State of Orissa & Ors., (1993) SCC (2) 746; for reservation to Article 9(5) ICCPR.
[34] See M.V. Elisabeth v. Harvan Investment & Trading Pvt. Ltd., (1993) Supp 2 SCC433; Shayara Bano v. Union of India, (2016) Writ Petition 118; National Legal Service Authority v. Union of India, (2014) SC1863; ADM Jabalpur v. Shivakant Shukla, (1976) SC1207.
[35] See Halliburton Offshore Services v. Principal Officer of Merchantile, (2017) Civil Appeal No. 5428; Ram Jeth Malani v. Union of India, (2009) Writ Petition (civil) No. 176; Jeeja Ghosh v. Union of India, (2016) 7SCC 761.
[36] See People's Union of Civil Liberties v. Union of India, (1997) 1SCC 301, Vishaka v. State of Rajasthan, (1993) 6 SCC 241; Gaurav Jain v. Union of India, (1997) 8SCC 114; Sheela Barse v. Secretary, Children Aid Society & Ors., (1986) SCC (3) 596; In Re Commissioner for Workmen Compensation (1951) All India Rep. Mad. 880.
[37] See Maganbhai Ishwarbhai Patel v. Union of India, (1969) SCR (3) 254; Union of India & Anr. v. Azadi Bachao Andolan & Anr., (2003) Civil Appeal No. 8161-8162; Birma v. State, (1951) Raj 127.
[38] Vellore Citizens Welfare Forum v. Union of India, (1996) SC 2715.
[39] Liverpool & London v. M.V. Sea Success, Civil Appeal 5665 of 2002.
[40] John O McGinnis, Ilya Somin, *Should International Law be Part of Our Law?,* STANFORD LAW REVIEW (Oct. 13, 2023, 03:57PM), Should International Law Be Part of Our Law? on JSTOR.
[41] See Union of India v. Manmull Jain, (1954) Cal 615; In Re Berubari Union, (1960).

 [ISSN 2581-5369]

are directly applied through the courts. They also criticize such a tendency by alleging that there is no uniformity and comparability in the judgments in similar cases, especially those related to refugees. They support this by stating that the courts relied on a particular customary norm in some instances[42], and in other cases, they defied that rule and principle[43]. For instance, in a few cases, the court ordered for deportation of the refugees to their home countries, provided they were not a threat to India's security, whereas in some, the court did not rely on the non-refoulment principle[44], stating that the same has not been ratified by India.

In a nutshell, it can be understood that by appreciating unratified treaties or reserved provisions of the international agreements, under the bracket of customary rules and general principles, the courts have now opted for a forward outlook in treating international law in India, for providing relief to its people amid overseeing the controversies attached to such integration.

IV. CONCLUSION: THE NOTION SUITING SOCIO-LEGAL-POLITICAL REGIME OF INDIA

The law that an individual considers near to them is domestic law when compared to international law. The role of the State is, therefore, to make people vigilant about basic international principles, so that they do not live in oblivion regarding remedies available to them outside their national framework in case there is any lacuna in their domestic laws. The State has to be therefore clear as to the mode of internalization of international law. Having said that, the ideal mode of integrating international law in the domestic sphere is a utopia as there cannot be a single notion befitting all. As far as India is concerned, the author is of the view that as far as it does not curtail the legal rights of individuals, choosing any of the theories is not an issue. However, the bone of contention is the transposition between these two theories in similar cases. The court should, therefore, outline the horizon of international law application in its cases, which can serve as a precedent for future cases. In doing so, the harmonization of these two ideologies is what is sought by any rational mind, as friction among them leads to confusion about the procedure and extent of adoption of international law in India. The court should also

[42] See Maiwand's Trust of Afghan Human Freedom v. State of Punjab, (1986) Writ Petition (Crl.) No. 125; N.D. Pancholi v. State of Punjab & Ors., (1988) Writ Petition (Crl.) No. 243; Malavika Karlekar v. Union of India, (1992) Writ Petition No. 583; Gurunathan & Ors v. Government of India, (1992) Writ Petition No. 6708; P. Neduraman v. Union of India, (1993) Writ Petition No. 3792; Khudiram Chakma v. Union of India, (1994) Supp I SCC 614; NHRC v. State of Arunachal Pradesh, (1996) SC 1234; Ktaer Abbas Habib Al Quatifi v. Union of India & Ors., (1998) 3SCC 433 where the court ordered not to deport the refugees in their home countries.

[43] See Luis de Raedt v. Union of India, (1993) 3SCC 544, Md. Salimmullah & Anr. V. Union of India & Ors., (2021) SC 1789, where the court ordered to send back the refugees to their home countries.

[44] See https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf and https://www.refworld.org/docid/438c6d972.html (Oct. 13, 2023, 03:40PM), for a basic understanding of the principle.

 [ISSN 2581-5369]

resort to consistent judgments for a better and more rational understanding of international law internalization in India. This balance and harmonization of international law and domestic law have been already earmarked by the Supreme Court in numerous decisions[45]. Further, the status of international laws should be crystalized as a law by the legislative bodies as they understand the public will, and through deliberate discussions in the House of Parliament, they can provide a clear procedure for its internalization as well. The practice of Parliament's participation in the treaty-making process shall also be encouraged. The Executives shall also make policies that can serve as an interface between the court and the legislature, till any robust mechanism is built. Lastly, the publication of international law is also important so that the citizens become conversant with international law.

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[45] See Keshavananda Bharati & Ors. v. State of Kerala & Anr., (1973) 4SCC 225; Sri Krishna Sharma v. State of West Bengal & Ors., (1954) Cal. 591; Kubic Dariusz v. Union of India & Ors., (1990) Cri. Writ Petition. 359 of 1989; Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environment Action Group, (2006) 3SCC 432.

 [ISSN 2581-5369]