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Analysis of the Relationship between International Law and Domestic Law in the light of prevalent theories.

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Abstract

Aim of law is to maintain peace and harmony in the society and with that aim, both International Law and Domestic Law are working at their level in their own spheres. They both perform the same function of defining a code of conduct and expected behavior from the subjects they govern. International Law governs the relations among the various nation states around the world while Domestic Law governs the relations among the individuals, corporations, bodies, organizations within a particular nation. The apparent difference between both the laws is that International Law is considered as a soft law and not that much stringent as National Law.

In this article, the author will briefly analyze the applicability of International Law and Domestic Law, the relation between the two in the light of prevalent theories, the difference between the two and why international law is called as soft law. The two famous prevailing theories which try to establish the relationship between International Law and Domestic Law, the criticism faced by the theories, why both the theories contend totally different from each other is also addressed. The major focus will be on how harmony could be established between the contentions of both the theories.

Introduction

"Public International Law" or "International Law" refers to the law of the nations. The term was coined for the first time by the eminent English philosopher, jurist, and social reformer Jeremy Bentham, in the year 1780. International Law could be defined as the body of legal

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rules, standards and norms that govern the relations between the sovereign states. It is the melting point of the jurisprudence of all the nations.

According to Black's Law Dictionary, "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)."[2]

Various definitions of International Law by eminent jurists

According to Prof. L Oppenheim, "Law of nations or international law is the name for the body of customary and conventional rules which are considered legally binding upon civilized states in their course with each other".

According to J.L Brierly, "The law of nations or international law may be defined as the body of rules and principle of action, which are binding upon civilized states in their relation with one another".

According to Torsten Gihl, "The term international law means the body of rules of law, which apply within the international community or society of states".

Domestic Law or Municipal Law

Domestic Law, also known as Municipal Law or National Law refers to the body of legal rules, standards and norms that are local or are grown on the land to which they apply. They aim at governing the conduct and behavior of the individuals and organizations within a particular Nation to which they belong or to which they apply. They play the role of maintaining peace and harmony in a particular society by defining what is right and what is wrong. Domestic laws define what is expected from an ideal citizen being a part of a particular country, what is expected from him/her to be observed and followed and what could be the consequences if s/he

[2] Black's law dictionary, https://thelawdictionary.org/international-law/.

breaks the law or does not follow the law of the Nation, eventually making the society to act and behave in a civilized manner.

According to Black's Law Dictionary, municipal law is defined as- "The ordinances and other laws applicable within a city, town or other local government entity".[3]

Emer de Vattel in the year 1758 said that, "Every sovereign state is free to determine for itself the obligations imposed upon it".

Difference apparent between International Law and Domestic Law

The major difference we observe between International Law and Domestic Law is that of applicability. While the domestic laws are binding and attract penalty or punishment for their violation, international Law, though binding on the nations who have ratified to it in relations among each other, but as no serious sanctions are attached for the violation of it, is not considered law in its strict sense and rather called as a soft law.

International Law governs the behavior of Nations when they interact with each other; while, National Law governs the behavior of that particular Nation and defines the rights and duties of the people of the Country. The relation between International Law and National Law is highlighted by the two conflicting famous theories, i.e., theory of monism and theory of dualism.

Major Differences between International Law and Domestic Law[4]

1. Domestic Law is concerned with governing the behavior and conduct of individuals within a particular Nation to which they are applicable. While, International Law is concerned with the behavior and conduct of not the individuals, but that of Nations

[3] Black's law dictionary, https://thelawdictionary.org/municipal-law/.
[4] Difference Between Domestic and International Law, Difference Between.com, (Jan. 5, 2015), https://www.differencebetween.com/difference-between-domestic-and-vs-international-law/.

among themselves in the international system which helps to guide the foreign relations of the Nations to a great extent.

2. Domestic Law comes into existence and is applied by the three main organs of a Nation, namely, Legislature, Executive and the Judiciary. While, there is no particular body creating the International Law and takes birth in the form of various conventions, treaties, customs, norms and various other forms of formal agreements taking place between the States.
3. Sanctions are imposed in the form of penalty, punishment or imprisonment when there is violation of a Domestic Law. While, when there is violation of International laws such as treaties, conventions, agreements, etc. sanctions are there in the form of international pressure, fear of malignant image in international community, fear of being boycotted by the nations, etc.

Theory of Monism

As per this theory, both the International as well as National Law got to fulfil the same purpose of maintaining the peace and harmony in the society and govern the way in which society should interact. It is just that International Law governs the behavior of society at International level, while National Law governs that at National level. They believe that both the laws are part of universal legal system and there is just a difference of hierarchy between both of them. For that, they believe that International Law prevails over the National Law in that hierarchy and it would prevail in case of conflict between the two.[5]

This theory is promoted by the advocates of Natural law which is a positive approach where they believe that the aim of law is to maintain peace and harmony in the society and to protect

[5] Madelaine Chiam, Monism and Dualism in International Law, Oxford Bibliographies, (Jun. 27, 2018), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml

the rights of an individual and both International as well as National Laws are fulfilling that very specific purpose at their own level.[6]

Versions of Exponents and Developers

Hersch Lauterpacht was considered to be a forceful exponent of the theory of Monism. As per him, individuals are the ultimate subject of International Law and State is just a distribution and acts as a vehicle for maintaining human rights.

Hans Kelsen developed the principles of monism on the basis of formal methods of analysis dependent on the theory of knowledge. According to him, scientific development of monism takes place when International and Domestic Laws are part of same legal system. He also said that International Law and National Law both form a single system of norms because they take their roots from the same source.

International Law is considered to be Superior as per this theory

This theory considers International Law to be superior and above National Law and as per this, if there is any conflict between both the laws at any point, International law should prevail and can supersede National Laws.[7]

Criticisms faced by the theory of Monism

The theory of monism faces certain criticisms which could be detailed as under -

1. This theory treats man to be the ultimate subject of the Universal Legal System, but in actual practice, States do not support this thing in strict sense. States somewhat accept the policy of International law to be separate from municipal law.

[6] Malcolm Shaw, International law and municipal law, Britannica, (Jul. 26, 1999), https://www.britannica.com/topic/international-law/International-law-and-municipal-law.
[7] The Relationship Between Domestic and International Law: Part 1, The Student Lawyer, (May- 25, 2012), https://thestudentlawyer.com/2012/05/25/the-relationship-between-domestic-and-international-law-part-1/.

2. Each State is sovereign and no State submits itself totally to the jurisdiction of International law; it is just ratification and agreement what brings the nations together. So again it will be wrong to say that states are just a subject to protect human rights and are only part of International system.

3. Monism's belief of considering the objects and minds to be the same throughout the world contradicts the fact that we share different cultures, views, ideologies, etc. throughout the world and it would not be feasible to treat the whole world as a society sharing the common values.

Theory of Dualism

The theory of Dualism was developed in the 19th century and it considers both International Law and the Domestic Laws to be separate and performing separate function. They consider both International Law and Domestic Law to be separate legal orders which operate and exist independent of each other.[8]

Thus, according to this theory, international law regulates the relationship between the sovereign states, and domestic law is involved in conferring the rights and defining the responsibilities of the people who are subject to that law within the sovereign state to which that law is applicable.[9]

Exponents of Dualist Theory

Heinrich Triepel, Dionisio Anzilotti and Lassa Francis Lawrence Oppenheim are the chief exponents of this theory.

Triepel said that, "International law was a manifestation of the 'common will' of sovereign states." He treated both the systems of state law and international law in an entirely different

[8] Rahul Saraswat, Relationship of International Law and Municipal Law, RACOLB LEGAL, (Dec. 1, 2016), http://racolblegal.com/relationship-of-international-law-and-municipal-law/.
[9] Id. at 7

manner. As per him, they both differ in the social relations they govern as in state law deals with individuals while international law deals with relations between the states.

Since, the theory holds the view that both laws are independent of each other and have their own different functions to perform, none of them is supreme and they are independent in their own spheres but in case there is conflict between National Law and International Law, International Law would not be binding on a State unless they are made applicable by any instrument to that state or in any other form.[10]

Criticisms faced by the theory of Dualism

Various criticisms are faced by the theory of dualism which can be detailed below[11]:

1. The view that International Law and National Law both are totally different suggests that International Law cannot be a part of Domestic Law and can never have operation as the law of the land unless they are given such force by the enactment. It could not be supported as some principles of international law are applicable on the States even without their assent to it.
2. As per this theory, International Law regulates the relations of States only, which is not correct to say because at present the International Law regulates certain activities of individuals as well. We can take examples of all the crimes which an individual commits for which they can be punished according to the rules of International Law.
3. The principle of International Law, namely *pacta sunt servanda*, which means, agreements must be kept, cannot be said to be the only principle of International Law as there are various other rules which binds the States.

[10] Studybix, Relationship between International Law and Municipal Law, StudyBix, (May 12, 2018), https://studybix.com/relationship-between-international-law-and-municipal-law/
[11] Ibid.

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Views and Opinions of Various Academicians in different cases[12]

Sir Fitzmaurice states that, "the two systems work in different spheres. This affords them an equal degree of supremacy and precludes them from entering into conflict".

In the case of Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)[13], it was stated that, "France cannot rely on its own legislation to limit the scope of its international obligations".

In Greco-Bulgarian Communities case[14], it was stated that, "it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".

In Brazillian Loans case[15], "it was stated that due regard must be paid to the decisions of municipal courts as they provide jurisprudential guidance on the effect of the particular domestic law in the municipal sphere".

Indian approach to International Law[16]

Under Articles 51, 73, 245 & 246 of the Constitution of India, consideration is given to international laws and treaties but Article 51 does not give any clear direction as to the position of international laws in India as well as relation between both the laws.

According to Professor C.H. Alexandrowicz, the expression 'international law' in Article 51 connotes 'Customary International Law' and 'treaty obligation' stands for 'Treaties'. International law is part of municipal law in the country of India to the extent that international law is not inconsistent with the domestic law of the country. It is also required to be observed that Indian Constitution follows the dualistic approach of incorporation of international law

[12] Id. at 7
[13] Free Zones of Upper Savoy and the District of Gex (France *v.* Switzerland) (1932), PCIJ, Ser A/B, no. 46,p.167.
[14] Greco-Bulgarian Communities case, (1930), PCIJ, Ser.B,no.17,p.32
[15] Brazillian Loans Case (France *v* Brazil), PCIJ, Ser A, No. 21 (1929) 124
[16] Id. at 8

into municipal law. The international treaties are required to be incorporated by the act of parliament and they do not become part of municipal law automatically.

In *Shri Krishna Sharma v. The State of West Bengal*[17], the Calcutta HC stated that: "If the Indian Statutes are in conflict with any principle of International Law, the Indian Courts will have to obey the laws enacted by the legislature of the country to which they owe their allegiance".

In *Shiv Kumar Sharma & Others v. Union of India*[18]**,** the Court stated that "In India, treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in municipal courts unless backed by legislation".

Conclusion

This is how we saw that both the theories, defining the relation between international law and domestic law are totally different from each other. Both the theories seem to be correct on their point and face criticism as well. It is correct to say that international law and domestic law are different and work in their different spheres, having different authority and binding force, but they are not different in its strict sense. It is true that they have similarities as pointed out by the theory of monism as they are to fulfil the same object of maintaining social order throughout the world and man is ultimately a subject of international law. But again, looking at the views of dualists, nations are not subject of international sphere in its strict sense as sovereignty and diversity of nations do not allow that. This is the reason that both the theories face criticism. It is therefore required to create harmony between both the approaches and not to follow them strictly and that would be the exact relation between international law and domestic law that both of them are working in their different spheres and also sharing mutual goals.

[17] Shri Krishna Sharma v. The State of the West Bengal, AIR 1954 Calcutta 591.
[18] AIR 1969 Delhi 64