THE INDIAN CONSTITUTION AND CUSTOMARY INTERNATIONAL LAW: PROBLEMS AND PERSPECTIVES

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"...International law today forms part of a legal hierarchy embracing a number of normative systems united by their ultimate dependence on those functional norms which may be well termed the international Constitution. It is this Constitution that the initial hypothesis or Ursprungsform of both international law and municipal law is to be sought."

-J.G. Starke

"It is almost an accepted proposition of law that the rules on 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."

-Justice Kuldeep Singh

Introduction

On the eve of golden jubilee of the Indian Constitution, it is of utmost importance to examine the relationship of international law and municipal law as provided under the Constitutional scheme. After the Second World War, one of the greatest legal phenomena, that the world has witnessed, is the colossal growth of international law. This has had tremendous impact on national legal systems, leading to international law acquiring a significant space in most of the Constitutions around the world. In the light of these significant developments, it is warranted at

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this juncture to situate the locus of international law in the Constitution.\(^4\) The jurisprudence of national application of international legal norms is based on the presumption that the legislature does not intend to derogate from established principles of international law.\(^5\) This jurisprudence has serious ramifications for the Constitutional law regime because the international obligations of the state become enforceable in the municipal legal setting.\(^6\) It is unfortunate to note that the relationship between international law and municipal law is not well understood even at a time when their relationship is evolving.

The Supreme Court’s *obiter* in *Vellore Citizen Welfare Forum v. Union of India*\(^7\); *A. P. Pollution Board v. Prof. M.V. Nayudu (Retd.)*\(^8\) and *PUCL v. Union of India*\(^9\) has raised a controversy in Indian legal circles as to whether principles of customary international law\(^10\) are deemed to be part of law of the land or not. The common *obiter* of these judicial pronouncements involves perennially contentious issue of the relationship of international law to municipal law. This issue has far reaching implications for the domain of domestic law. Interestingly, in all these decisions the Supreme Court did not touch upon *sine qua non* aspect as to how customary international law gets automatically incorporated into the body of domestic law of India.

This essay seeks to explore this issue at greater length by analysing the theoretical issues involved and highlighting the judicial approach to the relationship

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\(^{7}\) *Supra.*, n.2.

\(^{8}\) (1997) 1 SCC 301.

\(^{9}\) (1999) 2 SCC 710.

\(^{10}\) Hereinafter referred as CIL.
of international law to municipal law. It probes into whether our Constitution provides any guidance as to the relationship of international law and municipal law. A critique of the modern position that customary international law is deemed to be part of the law of the land is provided. This critique reveals that the modern position has been founded on a variety of questionable assumptions and is in tension with fundamental constitutional principles. The conclusion of this endeavour is that contrary to the modern position, Customary International Law should not have the status of law of the land.

Relationship of International Law to Municipal Law - Theoretical Postures

At this stage, it is desirable to give more than elementary theoretical treatment to the 'relationship of international law to municipal law' so as to determine the status of the international law in the domain of State law. A comparative study of a number of theories would be a good curtain raiser to understand the intricacies of the subject matter at hand. The predominant theories are Monism, Dualism, Specific Adoption (Incorporation), and Transformation.

Monism v. Dualism: A Traditional Dichotomy

Monism and dualism both schools of thought in essence assume that international law and municipal law can operate in a common field. This gives rise to the traditional controversy of supremacy of international law vis-à-vis international law and municipal law. It probes into whether our Constitution provides any guidance as to the relationship of international law and municipal law. A critique of the modern position that customary international law is deemed to be part of the law of the land is provided. This critique reveals that the modern position has been founded on a variety of questionable assumptions and is in tension with fundamental constitutional principles. The conclusion of this endeavour is that contrary to the modern position, Customary International Law should not have the status of law of the land.

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13 See, Supra, n. 1; see also, G.V.G. Krishnamurthy, Functioning of International law and the Internal law of States- Postures, Practices and Perspectives, 14 Ind.J.Int'l. L. 25, 26 (1966).
15 Fitzmaurice considers that the debate between monism and dualism is 'unreal, artificial and strictly beside the point' for there can be no controversy as there is no common field in which the two legal systems both simultaneously have their spheres of activities. G. Fitzmaurice, The General Principles of International Law considered from the Standpoint of the Rule of Law, (1957-II) 92 Recueil De Cours at pp. 70-71, 79-80.
municipal laws. Monism stresses that the whole legal system is one unified branch of which international law is a part and neither municipal law nor international law is above or separates from the system.\(^{16}\) On the other hand, dualism emphasises that the essential difference between international law and municipal law is consisted primarily in the fact that the two systems regulate different subject matter.\(^{17}\) Further, it holds the view that international law is a law between sovereign states; municipal law applies within a state and regulates the relations of its citizen with each other. In case of a conflict between international law and municipal law the dualist would presuppose that a municipal court would be duly constrained to apply municipal law. Oppenhiem\(^{18}\) aptly maintains that the difference between the two schools of thought lies in the difference in perception, firstly on the sources of international and domestic law; secondly with regard to the relationship regulated by the international law and thirdly with respect to the substance of the two laws. However, it is submitted that doctrines establishing the supremacy of the international law are antithetical to the legal corollaries of the existence of sovereign States, and reduces municipal law to the pensioner of international law.\(^{19}\) Nevertheless, it is universally agreed that within the international sphere, international law should have precedence over municipal law and that even outside the sphere, international law should also exercise some influence on municipal law. However any attempt to ensure the unconditional superiority of international law will conflict with claims of Constitutional supremacy. There exists no safeguard against the possibility that a valid rule of international law may nonetheless violate the Constitution of the concerned State.

**The Transformation Theory v. Incorporation Theory in Municipal Actions**

The inherent dichotomy between monism and dualism has given rise to two different modes of interpretation with regard to the application of international law in municipal law.\(^{20}\) According to the incorporation theory\(^{21}\), international law cannot directly and *ex proprio vigore* be applied within the municipal sphere by

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\(^{16}\) Lauterpacht and Kelsen are two forceful adherents of Monism. Lauterpacht supports the supremacy of international law in the municipal realm while Kelsen establishes monism on the formal bases of his own and he doesn't support the primacy of international law over domestic law.

\(^{17}\) See, I.A. Shearer, *Starke's International Law*, 64 (1994).


\(^{19}\) See, Iian Brownlie, *Supra*, n.8, p.33.


State courts or otherwise in order to be so applied such rules must undergo a process of specific adoption (incorporation) through the appropriate constitutional machinery in the internal legal order. As the positivist theory (dualism) postulates, international law and State law constitute two strictly separate and structurally different systems, the former cannot impinge upon the State law unless the latter a logically complete system, allows its constitutional machinery to be used for that purpose. In the special case of treaties, it has to be specifically transformed into legislation (acto expresso de incorporacio). This is not a formal but a substantive requirement that alone validates the extension to individuals of rules laid down in the treaties. These theories are based on the supposed consensual element of international law as contrasted with the non-consensual nature of state law.

British Practice Regarding International Law: A Critical Overview

It is imperative to understand the British position before undertaking the journey as regards the interpretation of domestic legislation. This can serve as a premise to understand and evaluate the Indian position in this regard as India has largely followed British practices. A brief overview of the British practices will suffice here. The position could be broadly stated in the following way:

1. Customary principles of international law form part of the law of the land (Blackstone’s incorporation doctrine);
2. Binding treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislature;

24 See generally, F.A.Mann, The Interpretation of Uniform Statutes, 62 L.Q.R. 278 (1976). The learned author emphasises that such an interpretation would only be in keeping in conformity with the practice in civil law countries because such countries firstly, such countries have a more liberal interpretation wherein precedents have only persuasive value as against any binding value; Secondly, the constitutional methods of transforming treaties into municipal law are in most countries such that the character of treaties is preserved and Thirdly; in most countries today there are theories relating to the interpretation of uniform legislation, and these have undoubtedly contributed to an understanding of its problems.
25 Supra, n.11 Starke, p.67.
3. In case of a direct conflict between a treaty and a law enacted by the Parliament, it has been decided that if a treaty had been enforced through law enacted by Parliament, then such a law would prevail over the earlier inconsistent British law and not otherwise.\(^{28}\)

It is in this context that the doctrine of incorporation has become the primary British approach. Such a position has found consistent restatement by the Courts starting from the case of the *Parliament Belge*\(^{29}\), *Solomon v. Commissioners of Customs and Exercise*\(^{30}\) and in the celebrated International Tin Council case\(^{31}\). However, in *Arab Monetary Fund v. Hashim*,\(^{32}\) the House of Lords, recently, has recognised a treaty (in this case the U.K. was not party to the particular treaty which was establishing the Arab Monetary Fund), consequently allowing an International Organisation which was established under Treaty to sue in the English Courts against the Respondent.

As regards customary international law, Lord Talbot declared unambiguously in the case of *Buvot v. Barbuit*\(^{33}\) that ‘the laws of nations in its full extent was part of law of England’ and this was reaffirmed in the dictum of Lord Mansfield in *Triquet v. Bath*\(^{34}\) wherein he stated that the ‘law of nations was part of the law of the land’. This doctrine of incorporation was modified and explained in *Chung Chi Cheung v. The King*\(^{35}\) wherein the Privy Council stated, “The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. Lord Denning clarified the position further in the *Trendext* case,\(^{36}\) that as regards customary international law, the doctrine of incorporation did apply and that Courts would incorporate changes in the principles of customary international law without the sanction of Parliament. Finally, the dominant incorporation approach was clearly reaffirmed by the Court of Appeal in *Maclan*
Watson v. Department of Trade and Industry. One of the major contentions raised in this case was whether a rule existed in international law stipulating that the state members of an international organisation with separate personality could be rendered liable for the latter’s debt.

Position of International Law within the Constitution Framework of India

Before exploring the issue of application of international legal norms in the Indian context, a brief overview of the Constitutional scheme would be useful. 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. This ambiguity looms large in the absence of any debate in the Constitutional Assembly on the subject and the studied silence of Constitutional pundits.

The primary issue is whether our Constitution makes a mere textual disposition of the relationship of international law and municipal law. Apart from the express provisions of the Constitution, we also need to rely on actual State practice. Article 51(c) (which falls within the realm of the Directive Principles that are non-justiciable in character) of the Constitution specifically mentions international law and imposes a duty on the state to respect it. But the jurisdiction of the court to enforce them in the domestic arena has been limited by virtue of Article 37.

In this backdrop, it is interesting to take note of ‘The Regulating Act of 1873’, which directed all Courts in India to act in accordance with “equity, justice and good conscience”. On the basis of this principle, Common Law rules (including

40 Article 51 of the Constitution corresponds to (I) Article 29 of the constitution of Eire, 1937; (II) Article 28, 29, 30 of the USSR, 1977 and (III) Article VI Cl. (2) of the Constitution of the United States. Apart from this it has close similarity to some of the International Charters and Covenants such as (a) Article 28, 29 of the Universal Declaration of the human Rights, 1948; (II) Articles 1 and 2 of the International Covenant on Economic, Economic, Social and Cultural Rights 1966; and (III) Articles 1, 4 and 22 of the International Covenant Civil and Political Rights, 1966.
rules regarding international law) were transplanted into the Indian municipal law.\textsuperscript{42} It seems that India has barely deviated from its pre-constitutional position in the matters of basic canons governing the principles of International law and municipal law.\textsuperscript{43}

It is a well-established principle that constitutional conventions may also breathe through legislative or constitutional enactments;\textsuperscript{44} therefore common-law rules automatically becomes unwritten Constitutional law of a supplementary character. It is an important principle of Constitutional interpretation that every provision of the Constitution must be given effect to.\textsuperscript{45} Therefore, these rules continue to be in force in the Indian legal setting by virtue of Article 225 and 372\textsuperscript{46} of the Constitution of India. These provisions are based on the universally recognised principle that law once established, continues until changed by some competent legislative power. It is not changed merely by change in sovereignty.\textsuperscript{47} The Indian Independence Act, 1947 also incorporated the same principles under section 18(3). Therefore such practices will be of binding nature in international law as well as in the municipal sphere.\textsuperscript{48} Hence under Article 372 of the Constitution such practices will have the force of law and India will be bound to observe the same. A composite reading of the Articles 51(c), 253 and 372 suggest that India has not deviated from the common law position.\textsuperscript{49} Therefore, India will have the

\textsuperscript{42} See, T.S. Rama Rao, \textit{Some of the Problems of the International Law in India}, 6 Indian Yearbook of International Affairs 3 (1957).

\textsuperscript{43} Ibid. It is important to note here that India has observed the rule of diplomatic immunity in the International law despite there being no legislative enactment in this respect.

\textsuperscript{44} Supreme Court on Record Advocate Association v. Union of India, (1993) 4 SCC 441.


\textsuperscript{46} Article 372 of the Constitution provides expressly that all the law in force in India before the commencement of the Constitution shall continue in force until altered, repealed or amended. This provision also applies to the common law. See, Durga Das Basu, \textit{A Commentary on the Constitution of India}, Vol. II, 328-330 (1962).

\textsuperscript{47} See, O’Conell, \textit{Supra}, n.21, pp. 211-212.


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.

Regarding treaties they have to be transformed into enabling legislation. In the Indian context, the ratification of a treaty doesn’t ipso facto transform it into domestic law. The *non-obstante* clause under Article 253 of the Constitution bestows on the Parliament exclusive competence to legislate upon the treaties entered into by the Government of India.  

However, Dr. P.C. Rao aptly cautions  that by virtue of Article 73, “the executive power extends to all transactions which bring the Union into the relation with any foreign country or other international person”. Accordingly, when there is a controlling executive, recourse cannot be had to principles of Customary International Law. Nor can such principles override the case law.

The above inspection of the Constitutional provisions amply clarifies the status of international law in the domestic field.

**Incorporation of Rules of Customary International Law into Municipal Law: A Critical Examination of the Judicial Approach**

The most debated issue is whether customary international law is really State law or not. In India there are no provisions either in the Constitution or other laws directly dealing with the question of relationship between Indian municipal law and customary international law. Indian Courts have generally had recourse to English law and sometimes even to American decisions for guidance without examining whether the same holds good for India after the commencement of the Constitution.

It is well known that there are two exceptions in the application of the customary international law by municipal courts:

conclusiveness of the statements made by the executive on the matters peculiarly within its competence, for instance recognition of states and Governments, diplomatic status of the foreigner claiming immunity etc. and

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50 Under Article 73 read with 253 and entries 14 of the List I of the Seventh Schedule, Government of India has only treaty making power and to legislate upon the same.


• An Act of State. The Act of State doctrine was discussed at length in *Pramod Chandra v. State of Orissa*.

The Supreme Court struck a different note in *Gramophone Co. v. Birendra Bahadur Pandey*. This was one of the clearest instances when the court dealt with the relationship of Customary International law to municipal law in extenso. The Court concluded that Indian position subscribes to the doctrine of incorporation. Unfortunately, the Courts have generally taken recourse to English and sometimes American decisions for guidance. But it is important to note that the final decision in the case did not require consideration of any rule of Customary International law.

However, the obiter of the *Gramophone Co. case* was fully relied on in *Vellore Citizens Welfare Forum v. Union of India and others*, wherein a three Judge Bench of the Supreme Court referred to the ‘precautionary principle’ and the new concept of ‘burden of proof’ in environmental matters. Justice Kuldip Singh, after referring to the principles evolved in various International Conferences and to the concept of ‘Sustainable Development’, stated that the Precautionary Principle, the Polluter-Pays Principle and the special concept of Onus of Proof have now emerged and govern the law in our country too, as is clear from Articles 47, 48-A and 51-A (g) of our Constitution. In fact, in the various environmental statutes, such as the Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied. The learned Judge declared that these principles have now become part of our law.

The Court observed that even otherwise the above-said principles are accepted as part of the customary international law and hence there should be no difficulty in accepting them as part of our domestic law. The Apex Court failed to

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54 AIR 1962 SC 1288.
55 AIR 1984 SC 667.
56 The Court made the summary disposal of the issue (regarding the doctrine of the incorporation) after a superficial scrutiny of extracts from selected judgements and writings; the position obtaining in some countries was projected as holding good for others as well; no legal theory was propounded by the court in consistent with the provisions of the Constitution as regards the relationship between Indian municipal and customary international law.
57 This conclusion of the Court based on the discussion of the theory of *monism* and *dualism* in the international law.
58 See, *Supra*, n. 2.
elaborate on the automatic incorporation customary international law into domestic law. It has merely approved obiter dicta of the earlier judicial pronouncements without going into validity of their reasoning.\textsuperscript{59} It is important to note that in the Vellore Case the Court relied on the obiter of the Gramophone Co. case. However, in the Gramophone Co. case the Court used International law as a canon of statutory construction not as a rule of law. The Court failed to recognise that use of international law as a canon of statutory interpretation cannot give force of law to the principles of customary international law in the municipal domain. Further, it is submitted that observations made regarding the position of customary international law under municipal law in the Gramophone Co. case cannot serve as binding precedent under Article 141 as these observation were made by the Court at the concession of the parties.\textsuperscript{60}

The recent decision of the Supreme Court in A. P. Pollution Board v. Prof. M.V. Nayudu (Retd.)\textsuperscript{61} reaffirmed the above proposition. The Supreme Court restated the proposition that principles of Customary International Law are deemed to be part of the law of the land in PUCL v. Union of India\textsuperscript{62} as well. However, the Court did not refer to any rule of Customary International law that has a direct bearing on the matter before the Court.

However, it is important to note that quite often the courts have erred in recognising the principle of the Customary International law involved. A typical example is the decision in Vellore Citizens Welfare Forum v. Union of India\textsuperscript{63}, where Justice Kuldeep Singh with proactive vigour declared that the Polluter Pays principle is widely acclaimed by the Indian judiciary and forms part of Customary International law. Therefore, it is deemed to be incorporated in the municipal law.\textsuperscript{64}

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\textsuperscript{60} In Gramophone Co. case the issue involved was whether International instruments could be taken into account while construing the provisions of the Copy Rights Act.

\textsuperscript{61} Supra, n. 4.

\textsuperscript{62} Supra, n. 5.

\textsuperscript{63} (1996) 5 SCC 647.

\textsuperscript{64} See, ibid, paras. 11-14 & 15.
Here, the question that needs reconsideration is whether the mere presence of a principle in a few instruments can have the effect of giving it the status of customary international law.

The International Court of Justice in the landmark case of *North Sea Continental Case*\(^6\) addressed the question as to whether a particular provision in the treaty had acquired the status of customary international law, thereby making it binding on those nations who were not signatories to the treaty concerned. According to its decision, widespread State practice and *opinio juris* can enable a treaty to acquire the status of customary international law. The former requires that there must be widespread acceptance by nations of new norms while the latter signifies that the practice must have been rendered obligatory by the existence of a rule of law requiring it.

The mere fact that 153 States were signatories of the Rio Declaration doesn't make the principle in the Declaration one of customary international law.\(^6\) What is essentially required is a demonstrable willingness to adhere to it and the practice of nations must alter according to the prescription of the new norm for it to attain the status of the customary international law. It is difficult to imagine how in the absence of the above requirements for the formation of customary international law, the polluter pays principle can be considered as a part of customary international law.

Furthermore, it is significant to note that Indian courts have characterised the whole of international law or, at least customary international law as 'comity of nations'.\(^6\) The non-appreciation of the elementary distinction between International comity and international law is most objectionable to an international lawyer. It is elementary that whereas international comity refers to rules of State behaviour which are followed as a matter of courtesy and without being legally bound by them, international law refers to principles which are followed as matter of legal obligation.

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65 It was also followed in the *Advisory Opinion on the Legality of the Threat of Nuclear Weapons*, (1997) 35 I.L.M. 809.


67 See, for example, *V/O Tractorexport v Tarapore & Company*, AIR 1971 SC 1, 8; *Gramophone Company Case*, AIR 1984 SC 667, 671.
Where Indian Courts have Utilized Customary Principles of International Law:

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<tr>
<th>Subject</th>
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<th>Application of customary international law</th>
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<tr>
<td>1. Sovereign Immunity: Section 86 of the Civil Procedure Code, 1908</td>
<td>I. <em>Veb Deauteracht Seereeder Rostock v. New Central Jute Mills Co.Ltd and another</em>&lt;sup&gt;68&lt;/sup&gt;</td>
<td>The Court rejected the argument based on the proposition that customary International law differentiates between <em>jure-imperii</em> and <em>jus-gestionis</em>.&lt;sup&gt;69&lt;/sup&gt;</td>
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<td>II. <em>Sagarmall Agarwala v. Union of India</em>&lt;sup&gt;70&lt;/sup&gt;</td>
<td>The Court to allow the incorporation of customary international principles of Absolute Sovereign immunity in this case law</td>
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<td>III. <em>Madan Lal v. Reza Ali Khan</em>&lt;sup&gt;71&lt;/sup&gt;</td>
<td>The Court did not allow the incorporation of customary international law principles.</td>
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<sup>68</sup> AIR 1994 SC 516; The facts of the case were that the appellant had ordered certain automobile spare parts from the Respondent. Alleging that the Appellant had not paid for the spare parts, the Respondent had filed a suit in the trial Court against the Appellants, who raised s.86, C.P.C. in defence. While the trial Court upheld the objection raised by the Respondent, the High Court overruled the judgement, stating that the objection of s.86 can only be raised at the time of trial. (Under Article 12 of the German Constitution, the Appellant was considered a Department of the German Government and the German Consul General had made the representation to this regard.


<sup>70</sup> AIR 1980 Sikkim 22; The case relates to a situation before the incorporation of Sikkim into the Union of India under Article 367 (3) of the Constitution. Here, the Union of India was sued in a Sikkim Court in 1972 when Sikkim was a foreign State in 1972. Since it was a 'foreign State', the provisions of s.86, C.P.C could not be made applicable. In addition to that, the Union of India, had not raised the defence of 'absolute sovereign immunity' under International law in its Written Statement.

<sup>71</sup> AIR 1940 Cal. 244.
### 2. Citizenship and the Change in the Sovereignty.

<table>
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<th>Case</th>
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<tr>
<td>I. G.Y. Bhandare v. E.J. JSeqiera</td>
<td>The Court applied customary international law that with the change of sovereignty, the population may be given a choice so as to choose to retain the citizenship of erstwhile state.</td>
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<td>II. G.Y. Bhandare v. Erasmo</td>
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### 3. Right against the old sovereign continues against the new sovereign.

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<tr>
<th>Case</th>
<th>Description</th>
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<tr>
<td>I. Pema Chibar's case</td>
<td>The rights, which arose out of the old laws prior to the conquest or annexation, can be enforced against the new sovereign only if he has chosen to recognise those rights.</td>
</tr>
<tr>
<td>II. Vinod Kumar Shantilal Ghosalia v. Gangadhara Narsingdas Agarwala and others</td>
<td>The Courts chose not to recognise the rights of the respondent taking into note the general principle that with the change in sovereignty, the duties of the new sovereign are not to be related back to the obligations undertaken by its predecessor.</td>
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<tr>
<td>III. Rung Rao v. State of Madras</td>
<td>The Court said that non-repudiation of the Grant for a period of time implied recognition of the grant and that once the grant had been recognised (impliedly) it was not liable to be cancelled.</td>
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72 AIR 1972 Goa 11.
73 AIR 1972 Goa 28.
74 AIR 1966 SC 442; In this case the petitioner had licenses issued to him under the Portuguese Governments under the Portuguese After the annexation of Goa, though the Administration Act continued the previous laws, only certain type of import licenses were recognised. The petitioner contended that the very fact that the Respondent continued the laws meant that the Petitioner's rights had been recognised and secondly that even if the laws had not been continued, the rights of the Petitioner had to be protected. The Court negatived both these contentions.
76 AIR 1972 Mys. 98.
77 It is submitted that this judgement is highly questionable in the light of the numerous precedents emanating from the highest Court of the land. As stated earlier, in such cases, the right presumption would be the principle of International law that a new sovereign cannot be bound by the duties of its predecessor and this presumption can be displaced only be a positive act of taking on the obligation. The S.C. also followed a similar reasoning w.r.t. Tax evasion in Shri Subbalaxmi Mills Ltd. v. Union of India, AIR 1967 SC 750; However the same court in the same year gave a contrary opinion in Bansikhdas Premsukh Das v. State of Rajasthan, AIR 1967 SC 40.
Conclusion: The Unsettled Terrains of Jurisprudence and Conceptual Aberrations of the Indian Judiciary

"Lawyers don’t make it [the argument that Customary International law is supreme ...law], judges don’t consider it, and scholars have not thus far intervened to ask for explanation."78

It is clear from the above discussion that the municipal courts in India have shown stronger adherence to the principle of monism. However, the question still remains whether the Indian Courts are obliged to apply customary international law or not. Noticeably, unlike many other Constitutions, there are no express provisions contained in the Constitution directly dealing with the relationship of international law and municipal law. Interestingly though, the courts have applied rules of customary international law in the cases of sovereign immunity and more recently in environmental litigation.

The conclusion of the Supreme Court that principles of customary international law are deemed part of the law of the land is a reductio ad absurdum.79 It is respectfully submitted that in spite of the Supreme Court's obiter to the contrary, there is no support in the Constitution for upholding the doctrine of incorporation. Here, it is crucial to mention the recent decision of the House of Lords in Butter Gas v. Hammer80 which reflects a dualistic picture of the relationship between international law and English Common law.81 This clearly goes to show that even British practice regarding international law is changing from monism to dualism. Therefore, it cannot be propounded that the Constitution has adopted the doctrine of incorporation via English common law by virtue of Article 372. Neither has the Supreme Court relied on Article 372. There is no strong evidence that Indian Courts have applied the doctrine of incorporation before the commencement of the Constitution. Thus, there is absolutely no case for upholding the doctrine of incorporation via the English Common law by virtue of Article 372. It is submitted that Article 51 serves only as a code of interpretation82 and doesn’t therefore, furnish a basis for incorporation of substantive principles of international law into Indian law.

78 See, Bradly & Goldsmith, Supra, n. 50.
79 See, footnote nos. 50-64 and the accompanying text.
82 See, A.B.S.K. Sangh (Rly.) v. Union of India, AIR 1981 SC 298 at p. 335 (Chineppa Reddy J. observed: "it follows from Article 37 that it becomes the duty of the of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the Courts as a code of interpretation. See also, B.K. Bhat v. Union of India [JT 1990(2) SC 34, 35]."
At the same time, it would be incorrect to state that in India, international law will apply only when its principles have been incorporated into municipal law. Such a position would be incompatible with the obligation that India has undertaken the principle of good faith, which accompanies them.\textsuperscript{83}

Noticeably, Indian practice regarding international law has typically cloned English practice without going into the Constitutional repercussions of the same. While applying international law in the municipal framework, Indian courts have never gone deep into the interpretation of international law. Their approach is totally lackadaisical while interpreting the same. They have desisted from going into intrinsic legal issues of interpretation. This unjustified omission on the part of Indian courts has created various anomalies in the relationship of the International law and domestic law and has deformed this in many aspects. It’s rarely that the issues have been framed with reference to international law principles.\textsuperscript{84} Generally support has been drawn from the language of some enactment or other municipal principle to justify a claim. Even when International law has been resorted to, mainly English decision have been cited in support of it.\textsuperscript{85}

It has also to be appreciated that having resort to the doctrine of incorporation to insert principles of international law into municipal law unnecessarily fetters the discretion of the municipal court to apply principles of international law whenever they possibly can.\textsuperscript{86} There is no doubt that the Indian Judiciary has made concerted and continuous efforts to preserve the relationship of international law and the municipal law as transplanted into India under the British rule. However, Dr. P.C. Rao is correct in viewing\textsuperscript{87} that national courts should not assume the function of arbiters of issue of international law. This is on account of the various evidentiary and jurisprudential difficulties in determining such issues. There is also a need to allow the executive wing to represent the State in all matters international without any apprehension that the judiciary may express a conflicting stand in the municipal sphere and thus create an embarrassment in the conduct foreign relations. This inherent danger is reflected in the \textit{Vellore Case} where the Court, without regard to the requirements of customary international law, declared that the precautionary principle is a rule of customary international law. In this

\textsuperscript{83} See, Article 26 if the Vienna Convention on the Law of Treaties.


\textsuperscript{87} See, \textit{Supra}, n. 45, p.185.
regard, the approach of the Supreme Court in its watershed decision of *Vaishakha v. State of Rajasthan*[^88], should be appreciated. Before the Court went ahead to incorporate certain guidelines based on international instruments it sought the permission of the executing department of Government of India through the Attorney General so as avoid any conflicting stand on that issue.[^89] Though the Court did not record the reasons for doing so, the author’s opinion is that the Court was guided by the doctrine of separation of powers.[^90] It is for the Executive organ of the state to decide whether the State is bound by a particular norm of international law or not.[^91] While enforcing the principles of customary international law, the Court may violate the doctrine of separation of powers as the state might not have agreed to be bound by a particular principle of customary international law and has been a persistent objector[^92] to the same. It is submitted that in the absence of the authorization by the executive branch of the State, customary international law should not have the status of municipal law or law of the land. In this situation, the Court should refuse to consider the justiciability of the issue on the basis of doctrine of political question[^93] as it is for the executive organ of the State to decide whether it is bound by a rule of customary international law or not. No doubt, this position may be different in the case of treaty obligations where the State has expressed its consent by ratifying the treaty.

[^89]: Ibid.
[^90]: Constitution of India provides for the doctrine of separation of power under Article 50. However, eminent constitutional jurist H.M. Seervai contest the same. See, H.M. Seervai, *3 Constitution of India*, (1996) at p. 2636: According to him, there exists a rigid separation of powers in America and therefore there is room for the Political Question doctrine. In America, the Executive, Judicial and Legislative powers are expressly vested in the respective organs. Since the same has not be done in Indian Constitution, Seervai argues, there exists no “real” separation of powers and therefore, there is no place for the Political Question doctrine in India.

However, it is respectfully submitted that the Indian Constitution does have “real” separation of powers as:

- Executive power is vested in Article 53(1) and its extent is defined in Article 73, 292 and 296.
- Legislative power is implicitly vested through Articles 245-255 and the extent of Legislative power is demarcated in the VII Schedule in the three lists.
- Judicial Power is vested through Article 50 and its extent is defined in Article 32 and 226.

[^91]: Under the constitution only the executive has been vested with the power of entering into treaty and participating in International relations. By virtue of Article 73, “the executive power extends to all transactions which bring the Union into the relation with any foreign country or other International person”.

[^92]: The doctrine of persistent objector in the International denotes when a state has refused to accept a particular principle of International law binding upon it from its very inception and subsequently if that rule attains the status of the customary International law. It cannot bind that state which has persistently objected to that principle of International law. See I. MacGibbon, *Some Observation on the Part of Protest in the International Law*, 29 Brit. Y. B. Int’l L. 293 (1953).
Another major criticism, which has been surfaced against the municipal courts in enforcing customary international law, is that most judges are unversed in international law. This creates considerable problem in determining the issues of international law.

No doubt, it is undisputed that 'International friendliness' under Article 51(c) leads to a strong presumption that neither the Constitution nor Parliament intends to violate international law. Incorporation of more express provisions in the Constitution is desired so as to make the relationship of international law and the Constitution clear. Serious consideration should be given to achieving this. The Draft Declaration on Rights and Duties of State prepared by the International Law Commission in 1949 has elaborated these principles in unequivocal terms in Articles 13 & 14, according to which, no State can take the refuge under its Constitutional or municipal law for the breach of an international law principle. Professor Lauterpacht has defined it as the development towards the supremacy of the law nations over the law of the land. However, it is necessary to ensure that international obligations entered into are scrupulously complied with. Yet, the Court must act with due circumspection when applying the rules of customary international law.

93 The doctrine is essentially a function of the doctrine of Separation of Powers. It recognises that both the Judiciary and the Executive have been vested with certain powers and the areas regarding the use of such powers have been clearly demarcated. This doctrine was approved by the Indian Supreme Court in the landmark judgment of S.R. Bommai v. Union of India, (1994) 3 SCC 1. See also, Latham, Earl, The Supreme Court as a Political Institution, 31 Min. L. Rev. 205 (1947): “In a democratic society, the basic political questions are for the people to decide, acting directly or through the representatives responsible to them. To vest the authority to decide these basic questions of the organisation and distribution of political powers in other officials than those who owe an immediate responsibility to the electorate, is to take out of popular control the making of important political decisions”

94 Supra, n. 50.


Article 13: Every state has duty to carry out in good faith its obligation arising from treaties and other sources of International law, an it may not involve provisions in its Constitution or its laws as an excuse for failure to perform this duty.

Article 14: Every state has duty to conduct its relation with other states in accordance with the International law and with the principle that sovereignty of every state is subject to the supremacy of International law.

96 See, Lauterpacht, supra, n.24, pp.51-58.