Domestic Implementation of International Law (IL) in India

Dr. V. B a l a k i s t a R e d d y
Professor of Law, Registrar &
Head, Centre for Aerospace and Defence Laws (CADL)
NALSAR University of Law, Hyderabad
E-mail: balakista@gmail.com

Scheme of Discussion

- What is Law and What International Law?
- Difference between Domestic and Int. Legal Environment
- Nature of and Perspectives of IL
- Perspectives, Demands and Achievements of LDCs
- Relation between IL and Municipal Law
- Why and How Domestic Implementation?
- Domestic Implementation of IL in USA and Russia
- Domestic Implementation of IL in Indian
- Indian Constitution and IL
- Indian Judiciary IL

What is Law?

- The meaning of law has been defined by various jurists
- Perspectives on Law---Divine origin, commend of sovereign, Social Engineering, proven Conclusions etc..
- Idealistic, Positivistic, Historical, Sociological, and Realistic.
- Law may be defined as a body of rules, created by the state, binding within its jurisdiction and enforced with the authority of the state through the use of sanctions
- A set of rules and procedures usually intended to regulate some aspect of society
- Law is a system of rules and guidelines which are enforced through social institutions to govern behavior, wherever possible.
- Law provides rules and it tells us what we can and cannot do
- It shapes politics, economics and society in numerous ways and serves as a social mediator of relations between people.

What is IL?

- What is International Law? International Law is also known as the Law of Nations, Public International Law, Inter-State Law, Trans-national Law, etc. However, Private International Law or Conflict of Law is different.
- Definitions of I.L.—Traditional and Modern
- Traditional Definition – IL Regulate the relations between or among states. For example Oppenheim, J.L.Brierly, Hackworth etc.
- Modern View of IL: International Law not only regulates the relations between states but also International organizations, individual's non – state entities etc.
- For example: Charles G. Fenwick, Whitman, J.G.Starke, Gorge Schwarzenberger etc.
- Sources of I.L.– Art. 38 of the Statute of ICJ
- Subjects of I.L.--- States and other Entities
- Relation Between IL and ML

Domestic and Int. Legal Environment

- At a very basic level, international law and domestic law differ in magnitude.
- Domestic law governs the behavior and actions of individuals, whereas IL governs the behavior and actions of bodies of government: states or countries.
- Domestic law- which can also be called national law or municipal law, come from legislature and customs and presidents, whereas international law consists of treaties and customs.
- The difference between IL and ML is how they are enforced. IL lacks a common executive
- IL No world legislature, No world executive and No world judiciary
- International Court of Justice is not a "world court" in the true sense of the term. The Court can only deal with a dispute when the States concerned have recognized its jurisdiction.
- Thus, the states operating under international law often have a weak sense of community

Cont..

- Domestic law, on the other hand, consists of all three branches of government – executive, judicial, and legislative.
- these three branches are separate from each other and are based on a system of checks and balances. This limits the power of each branch so that no one becomes too powerful.
- Approaches– Domestic Law Coercion , Compulsion, Danda will work.
- On the other hand IL is should be based on Cooperation, Coordination, Consensus, Convincing etc..

Nature of IL and IML

- There are two views on the subject :
- International Law is not a true law: John Austin, Hobbes, Holland, Pufendorf, and Bentham.
- Austin Definition of Law- Law is a Commend of Sovereign given by political superior to political inferiars
- IL is not a true law: Austin's Classification Laws
- The rules of international law are positive morality:
- Holland Bentham, Brown etc., denied the legal character of international law.
- International law is not law because
- No agency for international legislation. . No organised force, No a determinate impartial arbitrator,
- The ICJ is no compulsory jurisdiction, Some writers called international law as a quasi-law,
- Starke: International law is a weak law, Queen Vs. Keyn: International law is not an exactly law.

Nature of IL and IML Cont..

International Law is true Law:

- Luis Henkin: Almost all nations observe almost all principals of IL almost all their obligations almost all the times.

  (a) Objective of any law is implementation (b) Means & Methods are not so important **--**Oppenhiem, Brierly, Starke, H.L.A.Hart, Pollock, etc.
- Sir Henry Maine – Historical jurisprudence – In primitive societies there was no sovereign political authority yet there were laws.
- Austin's concept of law denied customary rules of international law.
- Treaty and conventions are legislation of international law.
- When international questions states do not rely upon moral arguments but rely upon treaty precedents and opinion of specialists.
- States do not deny the existence of international law
- Some state (U.K. and USA) IL treated as part in their own true sense.
- As far as sanctions are concerned, IL does not completely lack it.
- Violations of law is in municipal laws also--Decisions of ICJ are binding upon parties to the dispute.

Perspectives on IL and IML

- First world - consisting of western industrialized countries and major contribution in the development of International Law is by capitalist countries
- Second world-socialist countries including Russia, chine etc.. Peace co-existency, un-equal treaties, national liberation movements etc..
- Third world -- Problems or Characteristics of LDCs
- Colonial past, Under developed economies, Population Explosion , Agriculture based economies , Unemployment, Poverty and Low per capita income, Raw material exporting countries
- Developing Countries including non allied group, prohibition of apartheid, end of colonialism or de colonalisation process, reform of UN System

Demands and Achievements of Third World Countries

- Permanent Sovereignty over Natural Resources
- Code of Conduct for TNCs
- Transfer of Technology with know-how
- Right to form Producers Cartels
- Transfer of Resources
- Effective Participation in Int. Law- making
- Reforms in the Existing Institutions
- How far LDCs Achieved These Demands?
- LDCs and IMF, IBRD, GATT and WTO

State Responsibility and IML

- State responsibility in international law refers to liability.
- State responsibility applies both to obligations arising from breaches of principles of general international law and to obligations arising from treaties and conventions.
- State responsibility is closely linked to the procedure for making claims, the mechanisms for peaceful settlement of disputes, and the questions of remedies for breached of obligations.
- State responsibility including, its responsibility for breach of treaty, or in respect of contractual obligations, expropriation of property, and responsibility for international delinquencies and claims
- State Responsibility and Protection of Environment
- Sanctions or observance of IL and IML--Voluntary Consent, Good Faith Principle, Chapter VII of the United Nations
- Economic Globalization & Inter-dependency of World
- WTO & Changing notion of International Law

India and International Law

- India's contribution to international law, especially in the field of humanitarian laws, environment conservation and protection, technology and trade laws, cannot be over emphasized.
- At the same time, India has harmonized many of its domestic laws with international principles and norms in order to fulfill its international commitments.
- Prominent in this exchange are human rights, environmental laws, the intellectual property laws, arbitration law, trade law and space laws.
- The implementation of international law in India can be looked at either from the perspective of the role played by each governmental organ, or from the stand point of each field of law.
- India is party to more than one hundred and sixty treaties and conventions dealing with various fields of law. Prominent among them are human rights, environmental law, trade law, intellectual property rights, air law, space law and maritime law.

Why implementation of I.L.?

- Changing Notions of State Sovereignty
- Globalization and its Impact on Society
- Independent States to Interdependent states
- Law Makers to Law Takers
- Role of States as Regulator to Facilitator
- Status of IL is changing from a weak (unenforceable) to strong (enforceable) Law
- Implementation not by coercion or compulsion but by consensus or cooperation

How States Implement IL

Is IL and ML are same are different?

Difference of opinion among the scholars

1. Monist School
2. Dualist School
3. Transformation or Specific Adoption Theory
4. Delegation Theory
5. Harmonization Theory

Monistic Theory

- This theory initially was forwarded by Moser and Martens. It was later developed by jurists like Kelsen, Westlake and Lauterpacht.
- What is a "State"?
- Municipal law as well as International law are parts of one universal legal system.
- Municipal law is binding on individuals directly and International law is binding on them through States.
- Individuals are the root of all legal systems.

Dualistic Theory

- This theory was developed by German scholar Triepel in 1899. It was later followed by Italian jurist Anzilotti
- International law and Municipal law are two distinct, separate and self-contained legal systems.
- The two systems are distinct when it comes to sources, subjects, substance of law, principles and dynamism of subject matter.

Other Theories

Specific Adoption or Transformation Theory:

- Supported by dualist.

Delegation Theory:

- Supported by monists.

Harmonisation Theory- Fitzmauric.

Compromise Formula:

National Law before Int. Courts and Tribunals.

Sources:

- Art 38(1)(c) General Principles of Law Recognized by Civilized States
- *Resjudicata*, Estoppel, Principal of Natural Justice, etc.,
- Ex. Barcelona Traction Case 1970,

  (Concept of limited liability)

National Law & Int. Obligations

States cannot plead the provisions of National law as a valid reason for violating Int. obligations.

Ex. 1. Albama Claims Arbitration, 1872.

2. Exchange of Greek & Turkish population case

3. Lockerbie case.

4. Art 13 Draft Declaration on Rights and Duties of States, 1949.

5. Art 27 of Vienna Convention on Law of Treaties, 1969.

Globalization and Its Impact on Maritime Industry

- Globalization is the term used to characterize the processes of growing interconnection and interdependence among the different nations of the world.
- Globalization of markets was one of the most fascinating developments of the 20th Century. It involves the growing interdependence among the economies of the world.
- Globalization has been catalyzed by developments in technology, communications and international trade, which have also changed the traditional understanding of trade and commerce.
- In this age of globalization and interdependence, principles of international business transactions affect all states, small and large, rich and poor, weak and powerful alike.
- Many of the structural changes that have taken place in the world economy since the early 1980s resulted liberalizing of capital markets and the capital remains no longer domestic; it moved freely across borders.
- Manufacturing was also no longer a domestic process. This lead to the loss of control on local markets, goods, financial services including the banking sector by the National governments.

Positive and Negative Impact of Globalization

- On the positive side, it generated by growing international economic, cultural, and political cooperation and solved many global problems which were not answered.
- On the negative side, globalization also has profound implications for states such as the autonomy and policy-making capability of states is being undermined by economic and cultural internationalization.
- Role of States have Changed from Law-maker to Law-takers
- Regulators to Facilitators
- Many governments see their role as not to regulate markets but to facilitate their expansion.
- Globalization and regional interactions are wiping out national borders and weakening national policies.

Globalization and India

- India Globalized its economy in 1991 With Mounting problems- huge fiscal deficits, BoP crisis and foreign exchange crisis, Foreign investors and NRIs had lost confidence in Indian economy
- Major measures as a part of the Globalization strategy, Devaluation of Currency, Disinvestment, Dismantling of The Industrial Licensing Regime Abolition of the MRTP Act , Allowing Foreign Direct Investment, Wide-ranging financial sector reforms
- Reforms relating to the banking system-- Capital base of the banks were strengthened by recapitalization, public equity issues and subordinated debt, Prudential norms were introduced and progressively tightened for income recognition, classification of assets, provisioning of bad debts, marking to market of investments
- New private sector banks were licensed and branch licensing restrictions were relaxed., Credit delivery was shifted away from cash credit to loan method

Globalization and India Cont..

- Exchange Control and Convertibility-- Exchange controls on current account transactions were progressively relaxed culminating in current account convertibility.,
- Foreign Institutional Investors were allowed to invest in Indian equities subject to restrictions on maximum holdings in individual companies.,
- Restrictions remain on investment in debt, but these too have been progressively relaxed., Indian companies were allowed to raise equity in international markets subject to various restrictions.,
- Indian companies were allowed to invest a small portion of their assets abroad, Indian companies were given access to long dated forward contracts and to cross currency options.(Derivatives)
- Reforms in the capital market SEBI- the apex regulator of the Indian capital markets Regulations were framed for insider trading Abolition of capital issues control Introduction of free pricing of equity issues On-line trading was introduced at all stock exchanges

Domestic Implementation of IL in USA

- Customary Law: American practice regarding customary rules of international law is more or less same as the British practice as the American law has its roots in the English legal system so customary rules or international law are treated as a part of American law
- **In the Paquete Habana -** Justice Gray remarked that - International law is a part of our law, 175 U.S. 677 (1900). In the event of conflict between alleged international law and municipal legislation, the domestic courts will uphold the municipal provisions.
- **(B). American practice** regarding rules laid down by treaties is different from British practice. American Constitution Art. VI provides that constitution of United States, all laws made in pursuance thereof and international treaties entered into under the authority of the United States shall be the supreme law of the land.
- Thus international treaties have been placed in the same categories as state law of the land. American legislatures participate in the treaty making process. The president has power to make a treaty, but he may only ratify a treaty after the senate has given its advice and approval.
- In the event of conflict between a treaty and a subsequent statute, the latter prevails in Edye v. Roberson the court held that a treaty was a law of the land. As an act of congress was and there was nothing which made a treaty irreparable or unchangeable and that the constitution gave it no superiority over an act of congress in this respect, which may repeated or modified by an act of later date.

Self-executing Treaties and Non-self-executing Treaties

- **self-executing treaties:** directly incorporated into domestic law; can be directly applied in domestic system.
- **non-self-executing treaties:** directly incorporated, but need for additional implementing legislation before application in domestic system.
- Self executing treaties: Self executing treaties are those treaties which become applicable in America without any act or consent of the congress they become automatically part of American domestic law.
- Non-self executing treaties: Non-Self executing treaties are those treaties which can become applicable in America only after consent of congress or through its adoption by specific statute.

Soviet Practice

- In U.S.S.R, municipal law and international law were treated as two seperate legal system not subordinate to each other. Article 29 of soviet constitution, the relation of the U.S.S.R with other states were based on the following principles.
- Sovereign equality
- Mutual renunciation of theat or use of force
- Territorial integrity of states
- Peaceful settlement of disputes
- Non-intervention in internal affairs.
- Respect to human rights and fundamental freedoms
- Co-operations among states ,and
- Fulfilment in good faith of obligations arising from gererally recognised principles and rules of international law and from treaties signed by U.S.S.R.
- In U.S.S.R international treaties and internal statutes were given equal statutes.

Domestic Enforcement of I.L. in India

- India followed the Dualism and Transformation and adoption
- Constitutional provisions relating to I.L.
- Pre-constitution: British practice
- Constitutional provisions (a) General art. 51 (b) Executive Provisions art. 53, 73, & 77 and Legislative Provisions art. 245, 253, etc.

Pre–Constitutional Period:

- In this period Indian practice of international law is as if British practice. The British practice of implementation of international law with regard to their own domestic or municipal laws can dealt in two heads.
- **With regard to the customary rules of international law and the other:** British used to treat customary rules of international law as a part of their own laws. But subject to the conditions that The customary rules of International law should not be inconsistent with the British statutes.
- **In connection to the rules laid down by the treaties:** Regarding the practice as to the treaties it can be specifically mentioned that in Britain there are some exclusive treaties which requires the consent of the British Parliament for its enforcement. Such consent can be given directly or those treaties can be adopted in the state laws with the help of the statutes by the parliament.

Preamble to the Constitution of India

- These are the opening words of the preamble to the Indian Constitution
- "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
- **JUSTICE**, social, economic and political;
- **LIBERTY** of thought, expression, belief, faith and worship;
- **EQUALITY** of status and of opportunity;
- and to promote among them all
- **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the Nation;
- IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

General Provisions

- To know the provisions of international law it is necessary to examine the relevant provisions of Constitution of India. The most relevant provision is contained in article 51 which runs as: "The state shall endeavour to
- (a) promote international peace and security
- (b) maintain just and honourable relations between nations
- (c) foster respect for international law & treaty obligations in dealings of organised people with one another.
- (d) Encourage settlement of international disputes by arbitration.
- In Keshavanand Bharati v State of Kerala, Chief Justice Sikri observed;
- "In view of Article 51 of the constitution this court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of United Nations Charter and the solemn declaration subscribed to by India"AIR 1973 SC 1461

Executive powers of the union

- In India the executive was given the power to make laws through article 53, 73, 77. These Articles says that the executive power is vested in president and it shall be exercised by him in accordance with the constitution either directly or through officers subordinate to him.
- And all the executive functions are executed in the name of the president. But subject to the provision that he should not encroach into the spheres of Legislature and Judiciary.
- **Article 53**: Executive Power of the Union:"(1) The Executive Power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him accordance with this Constitution."
- **Article 73**: Extent of executive power of the Union;"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 power 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

Legislative Provisions

- **Article 246:** Parliament's exclusive power to make law on the matters enumerated in Schedule VII, List I
- **Article 245 (2):** extra territorial jurisdiction to the laws made by the Parliament of India
- **Article 253,** read with entry 14 of the Union List in Schedule VII, Parliament's exclusive power to make any law sfor implementing any treaty, agreement or convention with any other county or countries or any decision made at any international conference, association or body.
- ***Entry 41, List I, Schedule VII,*** *Parliament's exlusive jurisdiction with respect to trade and commerce with foreign Countries, import and export.*

Legislative Provisions Cont..

- **Art. 260** recognizes the Central Government's competence to act in legislative, executive, judicial capacity for any territory which is not part of India by agreement with the government of that territory, subject to any law relating to foreign jurisdiction for the time being in force

Observation: *D*elegated legislation as an Important means of domestic implementation of International Trade Law

- **Art. 363**, bars the jurisdiction of Indian Courts except the Advisory jurisdiction (Art. 143) in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar agreement entered into before commencement of constitution of India
- **Art.372**, pre- constitution laws to be continued in force unless repealed, altered or amended by a legislature or competent authority

Indian Judiciary and IL

- The Indian Supreme Court has decided numerous cases in which it has invoked international law in support of a constitutional holding and then "legislated from the bench" to remedy the constitutional violation.
- For example, in *Basu v. State of West Bengal*,156 a case involving deaths in police custody, the Court invoked the ICCPR in support of its constitutional holding.
- It also issued a set of "eleven requirements to be followed in all cases of arrest or detention," and ordered those requirements to be disseminated to every police station throughout the country.
- The Indian Supreme Court has also adopted procedural innovations so that public interest litigation "can now be initiated not only by filing formal petitions in Court but also by writing letters and telegrams or through the Court taking notice of articles in newspapers."
- The Court has "evolved the practice of appointing commissioners for the purpose of gathering facts and data in regard to a complaint of breach of a fundamental right made on behalf of the weaker sections of society."

Indian Judiciary and IL

- Indian Judiciary, though not 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.
- In this respect, the Indian judiciary has played a proactive role in implementing India"s international obligations under International treaties, especially in the field of human rights and environmental law.
- In plethora of cases beginning with **In re Berubari , Magan Bhai** v. **U.O.I, Keshavanada Bharati** v. **State of Kerala, Vishakha** v**. State of Rajasthan,** the Supreme court re-iterated that various international covenants, particularly to which India is a signatory or party, becomes part of national law, in so far as there is no conflict between the two.
- Supreme Court in **Bishambhar** v. **State of Uttar Pradesh** held that in the exercise of the inherent sovereign powers of the state, the parliament can even enact laws for extra territorial operation AIR 1982 SC32

Indian Judiciary and IL

- The Supreme Court reflect the dualist approach of the Indian legal system. In the words of justice Krishna Iyer in *Jolly George Vergese v. Bank of Cochin*, "until the [m]unicipal Law is changed to accommodate the [treaty], what binds the courts is the former not the latter". Further, Supreme Court in *State of West Bengal v. Kesoram Industries* reiterated that India follows the "doctrine of dualism" and that "a treaty entered into by India cannot become law of the land…unless Parliament passes a law as required under Article 253".
- *Vishaka v. State of Rajasthan*, 1997, a landmark judgment on sexual harassment of women at workplaces, it was noted that "regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law"

Int. Law and Indian Judiciary

- *National Legal Services Authority v. Union of India*, 2014 – The case that recognised transgender as a third category of gender. The Supreme court said: 'If parliament has made any legislation which is in conflict with the international law, then Indian courts are bound to give effect to the Indian law, rather than international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law.
- In *Vellore Citizens' Welfare Forum v. Union of India*, 1996, the court said that there is no difficulty in accepting Customary International Law, not contrary to domestic law, as part of the Indian legal system
- the Supreme Court in **Peoples' Union for Civil Rights** v. **Union of India**, held that it is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

Indian Judiciary and IL

- The Supreme Court's recent judgment in *Jeeja Ghosh v. Union of India* needs to be celebrated for reaffirming the rights of persons with disabilities to live with dignity.
- This case arose from a public interest litigation that was filed when Spice Jet forcibly de-boarded Jeeja Ghosh because of her disability.
- The court held the airline's action illegal and ordered it to pay Rs. 10 lakh to the petitioner.
- In reaching this conclusion, the court also referred to international law to underline the rights of persons with disabilities.
- For instance, para 13 of the judgment says: "The Vienna Convention on the Law of Treaties, requires India's internal legislation to comply with international commitments.
- Article 27 states that a "State party… may not invoke the provisions of its internal law as justification for its failure to perform a treaty

Indian and Int. Environmental Law

- Indian Judiciary and Protection of Environment
- The Indian Constitution was amended in 1976 to include environment protection as the mandatory duty of the state and its citizens.
- Article 48A was added to part IV of the Indian Constitution in the Chapter on Directive Principles of State Policy. It states "The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country".
- Article 51-A(g) Confers a Fundamental Duty upon every citizen of India to protect the environment: "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures."
- **Emergence of Environmental Rights and Jurisprudence**
- The Constitution of India is not merely a legal document; it is also the repository of the values and aspirations of people.
- The Preamble to the Constitution

Int. IP Law and India

- Design Act in May 2001
- Trade Marks Act in 1999
- Geographical Indications of Goods Act, 1999
- The Patents (Amendments) Act, 2005 in conformance with TRIPS
- Modernization of the current infrastructure
- New administrative initiatives including establishing Offices for Patents and Trade Marks in all four metros
- Geographical Indications Registry set up at Chennai
- Release of a Draft Manual for Examination and Patent Procedure by the Indian Patent Office

Indian Judiciary & IL: Conclusion

- Indian constitution embodies the basic framework for the implementation of international treaty obligations undertaken by India under its domestic legal system
- 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.

Conclusion

- Thus, the Government of India, though, has been becoming party to many international Maritime Law documents, to show its intention to implement International Maritime law.
- This practice of the Government also indicates Government's failure to fulfill norms under international law.
- The Government of India, from time to time has been enacting many draconian laws to face insurgency like situations, which do not comply with international standard of human rights and humanitarian principles
- India being a country beset with insurgency problems of various degree national security laws are indispensable to maintain the sovereignty and integrity of the country