HARMONIZING MUNICIPAL AND INTERNATIONAL LAW: AN ANALYSIS FROM THE LENS OF THE DECISION RENDERED IN JEEJA GHOSH V. UOI

Sriradha Rai Choudhuri, Hidayatullah National Law University

ABSTRACT

The application of municipal and international law within the territorial boundaries of a nation has always been a question of debate. Although a general understanding is to harmonise both the municipal and international law, with India following the same approach, the confusion arises when certain decisions seem to be primarily based on international treaties and conventions due to the absence or inability to apply the municipal legislations. Everything then boils down to a single inquiry into the merits and validity of the decision itself. Many a time, it is the international law that tries to fill in the gaps left by the municipal system, and barring such application can even result in human right failures. At the same time, too much emphasis on international norms without looking at corresponding municipal laws can ultimately destroy the basic foundation of a parliamentary democracy that maintains the sovereignty of the Parliament at its best. Through the analysis of the judgement of Jeeja Ghosh v. UOI, this paper seeks to bring forth how a judgement should be decoded or could be even minutely modified in a way that it ultimately promotes the balance between the municipal and international law, with regards primarily to the Indian scenario.

Introduction:

There has always been a debate surrounding the conflict between international law and municipal law. If both international and municipal law were to be applicable to the states, how exactly would they be applicable and what would happen if after or before application the standards expected in international law does not match with the standards in municipal law. In such cases either one needs to be given prevalence over the other or both needs to be harmoniously constructed in a way that none is arbitrarily rejected. Although there are in general two basic theories regarding this- Monism and Dualism but ultimately it depends upon each state as to how they want to resolve this conflict.

Body:

Before we go on to deal with how the Supreme Court of India resolved this particular conflict in **Jeeja Ghosh v. UOI**[1] and whether such an approach was justified or not, we need to first look at what the two basic theories state and about the three major approaches either of which are used by the states to bring about a cooperation between international and municipal law.

The two basic theories-

- **MONISM:** The name itself suggests that this theory talks about 'oneness', that is international and municipal law are part of one legal system. They are not two distinct entities. In this theory the naturalist concept is visible. Both international and municipal law have their origin in the law of nature and both their purposes is the betterment of the human community although their approach to fulfil this purpose may be somewhat different. Kelsen, Lauterpacht were some of the proponents of this theory. It stated that behaviour of state is ultimately reducible to the behaviour of an individual and hence there is a connection between international and municipal law.

In cases where states try to bring in international law into municipal law suggesting its oneness, a 'monistic approach' is said to develop.

- **DUALISM:** This name suggests 'two things', that is international and municipal law are part of separate legal systems. There is no unity between them. The positivistic strand is visible in this theory as it gives more importance to state practice. It proclaims

[1] Jeeja Ghosh v. UOI, (2016) 7 SCC 761.

that international law is ultimately a product of collective state practice and hence, state practice is paramount. The subject matter, sources, judicial origin- all are different for both. Chief proponents of this theory were Triepel from Germany and Anzilloti from Italy.[2]

In cases where states give more primacy to the municipal law, that is their state practice trying to keep international law separate from it and do not bring in international law to solve municipal issues, a 'dualistic approach' is said to develop.

- **A THIRD THEORY:** This theory has a different analysis. It has been developed by Fitz Maurice and Rousseau. It states that in reality there is no general primacy of international law over municipal law or vice versa but both can exist together without conflicts, being supreme within its own sphere. Both of them interact with one another and both of them hold primacy in their sphere. There is a harmonious connection between the two. If a state while working within its domestic parameters lawfully negatively affects any international law, the state would not be asked to disregard its lawful domestic approach but would be held liable as a state at international level.

Next, we come to the three approaches either of which most states adopt-

- **SPECIFIC ADOPTION/ TRANSFORMATION:** Under this approach no international law is automatically applicable in municipal law. It can be made applicable only by the willingness of the state if the state for example, ratifies any treaty or the Parliament enacts a municipal law based on the international law, that is by specifically adopting the international law into its municipal law.
- **INCORPORATION:** Under this approach international law is automatically made applicable in municipal law without any specific adoption. This is grounded on the fact that states have themselves consented to the international law during its formation and hence separate adoption is not needed. Only an express bar on its application can prevent an international law to be applied.
- **DELEGATION:** Under this approach, the international law again becomes automatically applicable in municipal law as it is considered to be a continuation of the consent given to international law. The difference from the above lies in the fact that here the municipal system is given the power to implement the international law as it

[2] MALCOLM N. SHAW, INTERNATIONAL LAW 97-100 (Cambridge University Press 2017).

wishes. This means at implementation level the municipal system has a right and not at the application level.

Let us now look at:

1. How the Indian Supreme Court incorporated international law into its decision while dealing with a municipal matter in the case of Jeeja Ghosh v. UOI?

2. Analysing why the same was called as 'creeping monism' in light of India's approach to resolve conflicts between international and municipal law?

3. What approach India could have adopted to use international law in its judgement while at the same time maintaining the primacy of its municipal law?

Answering the first question, the Supreme Court held that the act of Spice Jet in forcibly throwing out Jeeja Ghosh was against the principle of dignity and in gross violation of human rights and charged compensation for the same. The court did not solely rely on international agreements and conventions to lay down the judgement but also made use of several municipal acts. Some of these municipal acts is the incorporation of international law into municipal law.

A lot of regard was also given to the Indian Constitution. It was stated that dignity is realised in equality, that is embracing positive rights, affirmative action and reasonable accommodation are all concepts of equality given under Article 14[3] of the Constitution.

The court took up **international human rights law** into consideration and stated, "In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. It goes further in remedying discrimination against groups suffering systematic discrimination in society." This was also determined in the **Report of UN Consultative Expert Group Meeting on International Norms and Standards Relating to Disability of 2001**.

The court further built up its judgement on **Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995** that was created by the Indian Parliament based on two major declarations on disability adopted by the **UN General**

[3] INDIA CONST. art. 14.

Assembly in 1971 and 1975 and which was again reiterated in the **Beijing Conclave by the Governments of Asian and Pacific countries in 1992**. All these documents recognise the rights of disabled persons to equally participate in day-to-day activities. The most integral thing that these documents state and which this court also re-stated is that disabled people should not be shown pity and sympathy by just providing them with medical care. Along with medical care, inclusion of these people is also required in the society.

Even the rules framed under **Civil Aviation Requirements, 2008 (that were formed with regard to Article 10 of the UAE General Civil Aviation Authority Law of 1996 and authorised by Article 133A of Aircraft Rules of 1937)** were not followed and her deboarding could not be justified due to her disability. It is true that people who suffer from any mental disorder or epilepsy should generally not be allowed to fly by air but in cases where such persons are certified by medical practitioners to be fit for travel by air cannot be harassed. In this case Jeeja Ghosh was properly fit to travel by air and required no secondary assistance. Also, the fact that she was ill was presumed by the aircraft authorities and no medical check was conducted.

The court held, ***"Obligation under international covenants and instruments is not limited to Government and government agencies but extends to private entities that includes private air carriers as well."***

Several other international instruments were referred by the court. **Articles 5 and 9 of the UN Convention on the Rights of Persons with Disabilities, 2008** was incorporated in the judgement. Article 5[4] states that state parties have to prohibit all sorts of discrimination on basis of disability ensuring effective legal protection and reasonable accommodation. Article 9[5] ensures accessibility to all disabled persons so that they can independently and fully participate in all activities. It also clearly mentions that the state's responsibility also lies in ensuring that private entities providing public services also follow the same. This Convention was ratified by India in 2007.

The Vienna Convention on Law of Treaties, 1963 also was invoked to reaffirm the fact that India's internal instruments need to be in compliance with international commitments. Article

[4] UN Convention on the Rights of Persons with Disabilities, 2008 art. 5.
[5] ibid, art. 9.

27[6] of the Convention specifically mentions that no international agreement can be violated and thereafter justified on the ground of municipal law.

Thereafter the **Biwako Millennium Framework for Action Towards an Inclusive Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific of 2002** also provides that, "the existing land, water and air public transport systems should be made accessible and usable." This was also utilised in the judgement.

So, we see that a lot of importance was given to international instruments while concluding the judgement.

Let us now move on to the **second question** and understand how the above incorporation of international law was considered as 'creeping monism'.

The problem is that the scope of international law is quite wide and hence, it also has greater chance of intruding into municipal or domestic law. Unnecessary interference of international law into municipal law thereby giving primacy to international law is considered as 'creeping monism'. Whether this interference would be considered appropriate or not depends upon each state. This is because every state has its own way of incorporating international law into its municipal ambit. In case a country goes for incorporation approach whereby the international law is automatically applicable, there is no problem. The problem arises in countries like India which goes for the 'specific adoption' approach. International law does not become binding in Indian law until an appropriate domestic legislation is enacted to give effect to it. This is a principle of dualism that is given under **Article 253**[7] and this gives the Parliament the power to make laws that implement international law.[8] Although along with Art. 253, we also read **Article 51(c)**[9] which states that India and its people must foster respect for the international law but this should not overpower Article 253. If this is so, it would hamper the supremacy of the Indian Parliament to make laws. Parliament has power to make laws under **Article 246**[10] on matters in Union List under 7th Schedule. Through this power Parliament can make laws under Entry 10 dealing with foreign affairs and Entry 14 dealing with entering into treaties and

[6] Vienna Convention on Law of Treaties, 1963 art. 27.
[7] INDIA CONST. art. 253.
[8] Prabhash Ranjan et al., *Is the Supreme Court confused about the application of international law?*, THE WIRE (Sept. 28, 2016), https://thewire.in/law/supreme-court-international-law.
[9] INDIA CONST. art. 51(c).
[10] ibid, art. 246.

agreements. Even in 1954, in the case of **Shri Krishna Sharma v. State of West Bengal**[11], the Calcutta High Court pointed out the importance of dualism in our country by stating that, "If municipal laws are in conflict with international law, then municipal law would prevail over international law." Again, in the case of **Gramophone Company of India v. Birendra Bahadur Pandey**[12], it was held that, "National courts cannot agree and incorporate an international law into its judgement that the Parliament has already not accepted."

If we now move on to the **third question** as to how to make the judgement showcase more of the superiority of Parliament rather than of international law-

Certain important statements first need to be made:

1. In the judgement only international law has not been made use of. The Indian Constitution, legislative acts and even Aircraft rules as formulated by India has been taken into accord. From this very fact it would be quite improper to say that Parliamentary supremacy has totally been disregarded.

2. Even if we look at the international laws used, the judgement has always linked it with the municipal law. 'International human rights' has been used because it is such an international law that gets automatically applicable to all states whether they are parties to the UDHR or not and no specific adoption is required. Thereafter, UN General Assembly on disability rights and Beijing Conclave came into picture when they were already municipally adopted through the Persons with Disability Act of 1995. After this, the UN Convention on the Rights of Persons with Disabilities was ratified by Indian Parliament. This fact again implies Parliamentary supremacy.

3. The most important thing is that according to Indian system, the harmony over municipal and international law is generally kept but the primacy of municipal law mainly arises in cases where there is a conflict between international and municipal law. In the case of **PUCL v. UOI**[13], it was held, "Rules of customary international law which are ***not in contrary*** with municipal law would be deemed to be incorporated in municipal law." Even in case of **Vishaka v. State of Rajasthan**[14], the court held, "any International Convention not inconsistent with

[11] Shri Krishna Sharma v. State of West Bengal, AIR 1954 Cal 591.
[12] Gramophone Company of India v. Birendra Bahadur Pandey, AIR 1984 SC 667.
[13] PUCL v. UOI, AIR 1997 SC 568.
[14] Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

the fundamental rights and in harmony with its spirit must be read into the provisions to enlarge its meaning thereof."

This idea has been used by many courts and this gives primacy in a way to both municipal and international law. Even this judgement can be said to be proper on the basis of this as there was never any conflicting international law used. Moreover, as the previous point suggests they were actually in harmony with municipal law and hence, international law could be used to strengthen the municipal law.

4. The fact that India is totally separate from international law and should ONLY give primacy to municipal law even when both can be used in harmony is quite incorrect. India is liable to be asked to account regularly to a UN forum for its observance of human rights and its representative grilled to answer specific questions by a body of in- formed independent experts.

This is because the Janata government had ratified the UN International Covenant on Civil and Political Rights in 1979. It requires India to report on its observance of the covenant.[15] This fact properly states the link between municipal and international law.

To bring forth the Parliamentary supremacy in the judgement, we could take help of one decision related to conflict between municipal and international duties. In the case of **Attorney General for Canada v. Attorney General for Ontario**[16], the Privy Council stated, "Creation of obligations under a treaty are the function of the executive alone. Once they are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and leave the State in default."

Ultimately, although the judgement has focused in essence on both international and municipal law, the same could be written in a different manner to show Parliament supremacy along with complying with certain basic international norms. To do this, a statement could have been mentioned in the judgement as:

"In the Indian system, specific adoption is followed whereby an international law can become part of the municipal system only when Parliament consents to the same. This consent or ratification could be found in Vienna Convention, in UN Convention on Rights of Persons with

[15] A G Noorani, *India's International Accountability on Human Rights*, 26 ECONOMIC AND POLITICAL WEEKLY 2035, 2035-2036 (1991), https://www.jstor.org/stable/41498616.
[16] Attorney General for Canada v. Attorney General for Ontario, (1937) AC 326 (Privy Council).

Disabilities. In certain cases, the Parliament has even made laws following international laws like the Persons with Disability Act of 1995 and the Aircraft Rules. International human rights have been incorporated as they are considered as a jus cogens and automatically applicable. In fact, if such international law is not automatically accepted it would be in direct derogation of the Indian Constitution itself. In fact, following the principle of dualism, primacy would always be given to the municipal law when both the municipal and international law are correct in its own sphere but in conflict. Harmony would be there between both when both can exist together and help in expansion. In no case, municipal or international law can be used as a defence to commit a wrong in the other sphere. The same has also been ratified by the Indian Parliament through the Vienna Convention for municipal law and must not be challenged as monistic attitude.

Moreover, if in a particular case based on its circumstances a lot of reliance needs to be given on international law, it would not automatically become the accepted principle for all subsequent cases. There always needs to be a differentiation between 'good', 'not-so-good' and 'bad' treaties and it is for the Parliament to decide which are 'good' and in compliance with municipal law and apply it thereafter[17]."

Conclusion:

To conclude, the judgement of Jeeja Ghosh v. UOI did highlight the monistic approach wherein the court brought forward various international agreements to strengthen the argument in favour of the petitioner. Although this judgement has been highly praised for its strict approach against the airlines and for its protection of the principles of dignity and equality for disabled persons, it has also received criticism as going against the Indian policy of dualism and its practice of specifically adopting the international law. This was termed as a creeping monism.

If we would analyse the judgement then we would notice how the court has linked the municipal and international law. The judgement has made use of certain international agreements that have already been formulated as domestic acts like the Persons with Disability Act of 1995. Thereafter, the judgement has also brough in international conventions that have already been ratified by the Indian Parliament like the UN Convention on Rights of Persons with Disabilities. The content of the judgement is not so much monistic as the presentation of

[17] Rajeev Dhavan, *Treaties and People: Indian Reflections*, 39 JILI 1, 39-43 (1997), https://www.jstor.org/stable/43951677.

the judgement seems to be. The usage of few international treaties for a number of times has brought the judgement in bad light. The main content can never be disregarded even if international principles have been used. This is because it is clearly the Indian principle to harmonise both municipal and international law if they are not in conflict with each other and this has been portrayed in several other cases. Hence, what was required of the court was to present the judgement in a manner that would expressly provide that all such international agreements have either already been specifically adopted or ratified by the Parliament and that such agreements actually enhance the scope of municipal law rather than degrade it. And hence, it does not affect either Parliamentary supremacy or importance of municipal law.

In fact, the conclusion would end well if the conclusion of Jeeja Ghosh itself could be stated here too. It was stated, "Some people see a closed door and turn away. Others see a closed door, try the knob and if it doesn't open, they turn away. Still others see a closed door, try the knob and if it doesn't work, they find a key and if the key doesn't fit, they turn away. A rare few see a closed door, try the knob, if it doesn't open and they find a key and if it doesn't fit, they make one!" Similarly, some judgements may be restricted just because they see a closed door in the municipal system or they cannot find the key. But there are certain judgements which on finding the closed door of the municipal system, try to find the key in the international laws, and in case that key does not fit, try to modify it to fit and open the closed door, just like harmonising the municipal and international law. One such judgement is Jeeja Ghosh out of the many more, and these judgements deserve respect solely on that ground.