AN INDIAN CONSTITUTIONAL APPROACH TOWARDS THE INTERNATIONAL LAW WITH RESPECT TO THE LAWS OF U.S.A AND U.K

Akash Chikara, Student of BA LLB, Law College Dehradun, Uttaranchal University, Dehradun, Uttarakhand

Mr. Khaleeq Ahmed, Assistant Professor at Law College Dehradun, Uttaranchal University, Dehradun, Uttarakhand

ABSTRACT

In recent years, the world witnessed the lack of international cooperation among the states. The International law plays the vital role in the international community to resolve the issues which arises between the two-nation state. International law regulates the relationship between two nations, international organisations, individuals, and other institutions which are bind by the mutual understandings to agree upon certain terms and conditions. These mutual understandings are formed by the way of treaty, agreement, covenants, conventions, conferences, etc. these treaties, agreements, etc. cannot become a part of Municipal law so easily, they have to be implemented by the proper procedure of law.

In India, the provisions related to International law are provided under the Article 51, Article 253, Article 372 of the Constitution of India, 1950. The provisions states us how the Parliament can make any international law a part of municipal law, how it should be implemented and effective under the Constitution of India.

Like India, U.S.A also has the provisions related to the implementation of International law in relation to their municipal laws and the same is provided under Article 6 of United States Constitution and on other hand Britain does not have any written constitution but it also have some rules and regulations related to the implementation of international law. Here, the laws related to international law within the constitution of both India, U.S.A and laws of Britain are compared to look after the effectiveness of the laws of these countries.

Keywords: Law, International Law, Article, Constitution of India, United States Constitution, Crown, Treaty, Agreement, Conventions, Conference, Britain, Law of Nations, Statute, Provisions

INTRODUCTION

The word "International law" signifies, such laws which regulates and maintain the relationship between the two states. Before the term "International law" in Ancient times authors uses the term "law of nations" to signify or to determine the "International law". It can be said that the word "law of nations" and "International law" are similar to each other.

In year 1780, Jeremy Bentham coined the word "International law" in his book Principles of Morals and Legislation which was later published in 1789.[1]

According to L. Oppenheim, International law is nothing but the collection of customs, traditions, rules, etc which are enforced by the civilized societies upon each other for regulating their relationship with the other socities.[2]

Many writers and authors used the word "International law" and "Law of nations" as similar to each other because they thought and considered that only state is the subject matter of international law but on the other hand such as individuals, treaties, international organizations, customs, etc. are also or can be considered as the subject matter of international law. Oppenheim shows that the "Customary and Conventional rules" are also the source of international law like customs, treaties, etc.

According to William E. Hall, The International law is consist of certain practices and rules of conduct which modern states think that it is binding upon them in their relation with each other by using a force or degree on the person to obey such laws of the country and which they also consider to be enforceable by proper means in case of any infringement.[3]

J.G. Starke describes the word International law, "the body of law which is formed by such principles and rules of conduct by which state consider themselves made bound to follow such principles and rules of conduct and by which they observe to regulate their relationship with each other and which also includes:

(a) such rules of law which regulates the working of international institutions and their relations

[1] Dr. H.O. Agarwal, *International law and Human Rights,* p.1(Central law Publications, 2021).
[2] V K Ahuja, *Public International Law,* p.1, (LexisNexis, 2016).
[3] V K Ahuja, *Public International Law,* p.2, (LexisNexis, 2016).

with each other, and also regulates the states and as well as individuals; and

(b) such rules of law which are directly or indirectly related to individual and non-state entities and, which also includes the rights and duties of such individual and non-state entities which are under the consideration of the international community".[4]

Starke tried to describe his definition of international law in a broader sense or way. As Starke tries to put focus on the subject matter of International law which not only regulates the states but, it also focuses on the rights and duties of individuals, international organizations, and other existing non-state entities.

As, it is known that various jurists have played very crucial and significant role in the development of international law from Ancient time till the Modern time.

International law has evolved from the time of Hugo Grotius, who was a writer, a poet, a philosopher, a diplomat. He wrote a book called "De Jure Belli ac Pacis" (The Law of war and peace) and it was published in year 1625. he has been described as the father of "Law of nations" on the basis of his work. He considered customs and treaties as a source of international law but he put the law of nature above them because law of nature is also an independent source of international law.

In 18TH and 19TH century the international law has grown at a very rapid speed because of the expansion of the various colonies throughout the world. The expansion of European colonies in the world leads to the war between them for the resources which eventually leads to set the stage for the cooperation between these colonies.

In 20TH century World War 1 leads to the formation of first international organization which is formed after the Paris Pact 1919 and known as "League of Nations". But after some years conflicts arise between the member countries because of un-adequate sanctions forced on the Germany which leads to the start of World War 2 and when war ends the idea of formation of a new and impactful international organization has been brought which eventually leads to the formation of "United Nations" and its subsidiary bodies. The formation of United Nations leads to the significant and promisable cooperation between the signatory states.

[4] *J.G. Starke*, *Starke's International law*, 1994, p.3 *cited in* Dr. S. K. Kapoor, "International law and Human Rights", Central Law Agency, 2017, p.37.

In 1947, India got its Independence from British rule and India adopted its constitution on 26TH January 1950. Prior to the independence, India was governed by the rules and regulations set by the Britishers and the laws which was imposed upon the Indians have to be followed by them and same has to be on the part of international law. But after Independence in 1947, and after adopting the constitution, India become the signatory member of "United Nations" and which lead India to be a member of international community.

Firstly, Under the Constitution of India, there are some Articles which has been made on the part of international law, these Articles helps in maintaining a good-relations with other nations and states. Article 51, Article 253 and Article 372 talks about the how the International treaties, International customary, International agreements should be followed and how they should be implemented under our Municipal laws to make the lives of our people easy, smooth and effective. The Article also talks about who will implement the International treaties, customs and agreement. As it was stated by the Hon'ble Supreme Court in case of ***Chairman, Rly. Board v. Chandrima Das***,[5] that all the signatory nations and members must be abide by the signed covenants and declarations which are established by the UN and the applicability of such signed and adopted covenants is such which help in the enforcement of rights which are provided in the adopted covenant or declaration.

Secondly, On the other hand American practices of "International law" within their Municipal law falls under the various categories such as Article 6 of United States Constitution which says that International treaties are the part of Municipal laws and laws related to international law should be made in presence of their constitution. It also states that if any conflict arises between International treaty and Constitution then, the Constitution will prevail over the treaty and Justice Gray provides his remark that the International customary are and as part of Municipal law.

Thirdly, The British practices of International law within their Municipal law is basically based on the International customary as, initially the International customary considered as a part of their Municipal law but, while implementing these international customary it should be kept in mind that they should not be against the act of state and should not limit the power of Crown.

PRACTICE UNDER INDIAN LAW

[5] (2000) 2 SCC 465.

Before the enactment of "The Constitution of India", India is governed by the laws of Britain or such laws which are passed by the crown. In ancient India or in the ages of Ramayana and Mahabharata it was mentioned that at that time the ruler or the king used to maintain the friendly relations with the king of another state, which clearly shows the importance of peaceful relations with other kings. And, when Mughals arrived in India they also tried to maintain peaceful relations with the foreign states. Mughals used to do trade with Arab countries. Then, East India Company arrived in India and established their rule which later falls under the rule of English Crown. The Britishers used to do trades with other states as well but the war between the Europeans never end which leads to many conflicts between them and result of which Indians also have to take part in those wars. Later, in 1947, India got its Independence from the British rule which leads to the formation and enactment of Indian constitution known as "the Constitution of India".

Under the "The Constitution of India" there are several Articles on the part of "International Law" such as "Article 51", "Article 253", "Article 372" which shows the importance of "International law".

Article 51[6], It states that the government of India should aim to establish the peaceful and honourable relationship with the other nations and they should also develop the international security which helps in maintain the peace throughout the world and they should also respect all the international laws which are made by treaty and which regulates the relations between the organized peoples with each other.

The above Article 51 falls under the Part 4 of the "Constitution of India" which is "Directive Principles of State Policy". The Articles which falls under the Part 4, they cannot be enforced by the court of law, they are simply enforced by the state. The Article 37 of the "Constitution of India" states that, It is the duty of the State to apply such rules and regulations (principles) while making any laws.[7]

The Directive Principles are those which provides the guidance to the state and its authorities and if state did not apply such principle then the no citizen can be able to seek any remedy against such non-compliance of these principles and judiciary cannot force the state to apply

[6] Dr. J. N. Pandey, *Constitutional Law of India*, p.497, (Central Law Agency, 2019).
[7] Dr. J. N. Pandey, *Constitutional Law of India*, p.484-485, (Central Law Agency, 2019).

or to enforce such principles because such principles are totally based on the compliance of state and its appropriate authorities.

In India, the concept of "Vasudhaiva Kutumbakam", which simply translates to "The World is One Family" was followed from the ancient times, which shows that India treat everyone equally. The word "International" is used to indicate the respect towards the laws of every other country and nation-state. In the Article it was mentioned that we should maintain the peace on our national level as well as at the international level which simply leads to the security and safeguard of the nation and world. If peace is maintained among the nation and states then, no war like situation can arise and if the peace is not maintained among all the nation and states then that may lead to the war or disputes among the states which may not be a healthy sign for international peace and security.

The Article also states that India should maintain the honourable relations with the international community and other states. It also states that India, should respect all the international laws and treaties which are made on the part of to maintain peace, and to uplift the life of people of a nation and if any dispute arises between the two nation- states then, they should resolve such dispute with the help of arbitration or by mutual agreement and understanding. But on the other side before the Supreme court of India in the case ***A.D.M. Jabalpur v. Shivakant Shukla***,[8] the court states that anything which is against the constitutional provisions will not not be implemented within our municipal laws because in this case the municipal laws are becoming the subordinate to the international laws which is against the spirit of our constitution.

Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore v. Union of India,[9]
In this case court said that, Article 51 can not enforced by the court and judges can't force the government to make any law related to any treaty which they signed with the other nations, court also said that if there is no law made for the enforcement of international treaty then court can not make government abide to their obligations with other states.

Article 253[10]**,** It states that the Parliament has the right to enact any law for the implementation of any treaty, convention, agreement which they signed or agreed at any conference or at any

[8] AIR 1976 SC 1207.
[9] AIR 1983 Kant 85.
[10] Universal's *The Constitution of India*, p.115, (Universal Law Publishing, 2019).

international organization.

As, it was provided in Union List (List 1) Entry 14, it said that the Parliament has the power to make any law regarding the treaties and agreement with the other nation states or with the foreign states. But it is known that no law existed or made by the Parliament in this behalf and this non-existence of any law on the part of treaty, agreement with foreign nation will not affect or degrade the power of the Executive to enter into the treaty, agreement with the foreign states or nation states.

As, it is known by the Article 51 that it is not enforceable by the court of law and on the other hand Article 253 states that the Parliament has the power to make any law for the implementation of international treaty, agreement and conference and if there is no law exist in respect of Article 253 and 51 then, court cannot be able to enforce any international treaty, agreement or conference, it is totally depend upon the will of the Executive that which of treaty or agreement they have to adopt.

However, Calcutta High Court have held that for the implementation of international treaty in India, a statute or a proper law is required until then court cannot enforce any treaty.

In the case, ***Union of India v. Manmull Jain***,[11] the court held that, "the signing or making any treaty is the power of executive and the law is required to execute the signed terms of a treaty and if there is a matter related to the payment to the other state or nation then no legislation is required for such payment because such treaty is complete even without any law or legislation.

In India, all the Executive powers are vested in the President of India and when President uses his powers to enter into the treaty or agreement with the foreign state under Article 53 then, the Municipal court have no jurisdiction to question such treaty or the validity of such treaty. It is an inherent power of the sovereign state to enter into the treaty or agreement with or state.

Nirmal Bose v Union of India,[12] Article 253 is very important as it permits Parliament to make law for the entire or for any part of India to implement the signed treaty, agreement or to implement any decision which is made at any international conference or at any organization, this article is similar to the directive principles which are laid down in Article 51.

[11] AIR 1954 Cal 615.
[12] AIR 1959 Cal 506.

Article 372[13]**,** this article is important when it comes on the part of International customs. Article 372(1) provides that all the laws which are enforced in India before the Constitution of India shall be continue until they are changed or revoked by the other laws or by the authorized authority which the Parliament.

The clause 1 of Article 372 clearly states that the laws which are applicable before the Constitution of India can be or will be applicable in the India until and unless they are changed, repealed or revoked by the Parliament. It states that the laws which are applicable before the independence are those laws which are the part of English common law and such laws can be termed as customary laws. This means that the English common law or customary law which are applicable prior to the Constitution of India are enforceable and applicable under the Constitution of India, 1950 as International customary law.

In India, court may follow two rules to apply the International customary laws and they are:

(a) the rule of incorporation of International customary law, which the Supreme Court applied in case of ***Gramophone Company of India Ltd. v. Birendra Bahadur Pandey***,[14] Justice Chinnappa Reddy have observed that: there cannot be a question on that all nations must stand with the international society and domestic law must show respect to the International law. The goodwill of nation requires that the rules and regulations of International Law may be promoted in the domestic law without any legislative sanction by the Parliament. But when conflict arises, the sovereignty and the integrity of the nation and the supremacy of the constitution and domestic laws may not be subjected to any external rules and regulations except which are legitimately accepted by the legislatures. The doctrine of incorporation also recognizes and signifies the position that the International Law can be incorporated into the domestic law and considered to be the part of national law, until and unless they are not in the conflict with the laws made by the Parliament.

(b) Courts can only apply customary rules of International law, if they are not overridden by the rules of municipal law.[15] If International law is in any sort of

[13] Universal's *Constitution of India*, p.186, (Universal Law Publishing, 2019).
[14] AIR 1984 SC 667.
[15] D.D. Basu, *Commentary on the Constitution of India,* Vol.2, p.404, 1956.

conflict with the domestic law then domestic law shall be apply.

It is clear from the above two points that if International law is not against the spirit of the Municipal law then, such International law or International customary law are applicable in India and the Parliament can make any law for the implementation of such International customary law but if they create any sort of conflict with the laws of India or Municipal laws of India then, such International customary laws or International la would not be applicable in India.

Comparison Between India and U.S.A

In India the International law basically falls under the provisions of Article 51, Article 253 and Article 372, by which it was made clear by the court of law in various cases that in India International customary laws and International law will be prevail or can become effective if they are not against any provision of the Constitution of India and Parliament can make laws in regard of the International treaty , agreement and convention for their effective application on the lives of the people but if Parliament didn't make any law in this regard then no person can move to the court of law to make them effective by the Judiciary. In Indian Constitution it is provided that we should respect all the International law, treaties, agreements etc.

In United States of America, the implementation of both international customary and treaties are different and they are treated differentially in the court of law.

As, it is provided that in United States the customary laws or International customary rules are considered as a part of their law or part of the law of their land. In The *Paquete Habana case,*[16] Gray J. observed that the International law is an integral part of the domestic law and it has to be recognize and applied by the competent courts. He also observed that if there is no treaty existed, no judicial decision present and no legislative act present then final resort is to follow the customs which are made by the civilized society.

In United States the courts while deciding any case on International customary can ask the Executive for the suggestions and sometimes courts find themselves bound with the provided suggestions.

[16] 175 US 677 (1900) 700.

But on the International Treaty, the United States Constitution provides the Article 6 which talks on the implementation of International treaties. it provides that the treaties which are made in the presence or in consideration of the United States Constitution will be treated as the supreme law of their land and all the judges and courts are bound with such said treaties. As, it was observed by Chief Justice Taft in the *Arbitration between, Great Britain and Costa Rica*[17] that The Constitution of the United States presents that any law or treaty which are made and passed as per the constitution are treated as the supreme law of the land. Under that provision, a treaty may repeal a present statute, and a statute can also repeal a treaty.

Article 6 of United States Constitution provides the general principles for the enforcement and applicability of treaties. There are basically two types of treaties under the said article and they are as follows:

(a) self-executing, the treaties which does not require any kind of legislation for their implementation under the municipal law and such treaties can be replaced by another subsequent treaty.

(b) Non-self-executing, the treaties which are only applicable and implemented after the proper consent of Congress by a statute.

The Supreme Court of California observed in ***"Sei Fujii v. The State of California"***[18] that, If the terms of the treaty are self-executing then it can not replace the local laws automatically if they are in conflict with each other. In such case the court will lool after the language of such treaty and also look the intent of the legislature behind such treaty and after that the court will decide the execution of such treaty.

In comparison to the provision of International law of both the countries i.e. India and U.S.A, the implementation of international treaty or agreement is based on the statute formed by the Executive. In India, to implement the International treaty or agreement by the court of law, a statute on such treaty or agreement is required but in the case of U.S.A, the constitution clearly provides the implementation of International treaty as law of their land in the form of self-executing treaty or in the form of non-self-executing treaty.

[17] 18 A.J. (1924), 160.
[18] 38 Cal (2d) 718 (1952) (Cal Sup Ct.).

In India, court cannot force the Executive to implement a treaty until and unless it was made a statute by the parliament and if a treaty was converted in the form of law and it was duly passed by the Parliament then the court can compel the Executive for the implementation of such treaty in India. In U.S.A. International customary rules are considered as a part of their land and International treaties depends on the provisions of Article 6 of United States Constitution in which the courts in U.S.A. derives its applicability on the basis of whether it is a self-executing treaty or a non-self-executing treaty.

Comparison Between India and U.K

In Britain, the International custom and International treaty both are treated differentially. As, it is known to all that there is no written Constitution in England, it's Constitution is considered as a, ever evolving constitution which is changing and evolving by every passing day.

In Britain, International customary are considered as a part of their municipal law. According to *Encyclopaedia Britannica*,[19] It is of no doubt that the courts of Britain considered the customary international law as part of the law of their land, for the same they take "judicial notice" of it.

For the applicability of international customs it should qualify two essential conditions i.e. firstly, such international customs should be inconsistent with the laws of Britain and secondly, where higher British courts have denied the applicability of such international customs. For the applicability of the International customs by the Municipal courts also depend upon the following two exceptions, which are as follows:

(a) Act of State, and

(b) If it limits the Crown's power

In Britain, It was stated in the case of ***Vervaeke v. Smith,***[20] that there is a presumption that the Parliament had no intention to violate or to break the international law and the acts of Parliament and other statutory laws should avoid to violate the international laws.

[19] *Encyclopaedia Britannica*, Vol.12, p.424.
[20] (1981) Fam 77

On the part of International treaty, the implementation of such treaty is subject to the various obligations such as:

(a) Treaties in which Parliament consent is necessary: for the implementation of treaties which are affecting the rights of British citizen, treaties which requires amendment or modifies the laws of British, treaties which de-limit the powers of Crown, which imposes financial burden on government, which affect the territory of Britain, requires the consent of the Parliament for the implementation.

(b) In which consent is not necessary: treaties related to Environmental issues, Human Rights, and such treaties which are made on the principles of International Community.

According to D.W. Greig, the rules which are stated in the treaty are not same as they are stated as a principle in customary international law, a treaty which is passed by the crown under international law should also be passed by the parliament as a law to provide effective legal rights.[21]

In India, there is no one above the Constitution but in Britain the Crown has all the powers vested in him. In Britain, the courts are also bound by the powers of the Crown. But in India the Constitution is supreme. The Indian courts have no jurisdiction towards the implementation of any international treaty or agreement until there is statute is present in regard of such treaty or agreement and customary laws to be applicable until they are repealed or amended by the Parliament and in Britain, the customary laws are considered as a part of their land but in the case of international treaty, such treaty should not limit the powers of Crown and should not be against the Act of State.

In both the countries the Parliament have the power to implement any international treaty, by the way of statute in India and the same for Britain which depends on the consent of the Parliament after examining its nature whether it delimits the powers of crown or not and also subject to the other above-mentioned conditions.

[21] *D.W. Greig*, *International Law*, 1976, p.60 *cited in* V K Ahuja, *Public International Law*, Lexis Nexis, 2016, p.47

Conclusion

International law is nothing but the set of rules, regulations, customs, etc. which have been in practice from the long to regulate the relations between the two nations or nation states by which a peace and mutual understanding is maintained among the nations. In India, the Article 51, Article 253 and Article 372 provides the provisions related to the regulation and implementation of International law by way of International customary rules, International treaties, agreements, etc. In India, the executive has the power for the implementation of International treaty or agreement and court cannot compel the Parliament for the implementation to any International treaty or agreement unless there is a statute is made for the implementation of International treaty or agreement.

In U.S.A, the customary rules are considered as a part of their laws and implemented accordingly, but when it comes on part of implementation of International treaty it is subject to that it should fall under the provision of Article 6 of United States Constitution which is further subject to the nature of the treaty whether it is self-executing treaty or non-self-executing treaty.

On the part of Britain, the customary laws are to be considered as part of their law of land and when it comes on the part of International treaty, it is subjected on the various conditions such as the treaty should not made against any Act of State and should not delimit the powers of the Crown.