International Law- Sources, Development & Relation With Municipal Law

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Abstract

Laws are the set of rules and regulations which serves the purpose of providing justice and maintaining discipline in the society. Laws can be intra state and interstate. Intra state laws are municipal laws or domestic laws. They govern the internal relations between the state and its people. On the other hand, interstate laws are known as international laws. These laws are meant to govern the relation between two or more states. Status of municipal laws is well defined in the society. They are considered as real laws which are prepared by the supreme authority and back by sanctions. However, International laws are quite different in comparison with municipal laws. Definition, interpretation, nature, development and sources of international law differ from Jurist to Jurist.

Meaning of International Law

'International law' term was first used by Jeremy Bentham in year 1780. This term was used in contraction to National law or Municipal law. He considered International law as a synonym to 'Laws of Nations'. International law defines the set of rules and regulation which regulate mutual affairs of state.

According to the Traditional Jurist L.F.L Oppenheim, *International law is the name for the customary and conventional rules which are considered as legally binding in civilized states in their intercourse with each other.*

Professor Hans Kelsen stated that *International law is the body of rules, which according to regular definition conducts the affair of states in their intercourse.*

Professor Oppenheim and Kelsen tried to define the international law as rules which are made specifically to govern the states only. However, in criticism of traditional definition, Modern Jurists believed that "states" are not the only subject matter of international law. International laws also include individuals, body corporate and international organizations. [2]

Jurist Starke who gave the modern definition of International law considered it as a body of law which is composed of principles and rules which state themselves bound to observe. In his definition, he included non state entities as well as a subject matter of international law.

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[2] INTERNATIONAL COURT OF JUSTICE, *ABOUT US*, Permanent Court of International Justice (March. 09, 2018, 06:21PM), http://www.icj-cij.org/en/statute

Whiteman interpreted International laws as a "standard of conduct" for states and its subject matters.

Nature of International Law

In the formative years, the nature of international law quite clear. According to Natural school of Jurisprudence, International law is just like municipal laws and they shared common basis and sources. They both were considered equal in terms of enforcement. But after the emergence of Positivist school of Jurisprudence in the late 17th and early 18th century, they divided both the laws into two different categories. Positivist jurist Austin did not consider International law even as a law. Others believed International law was inferior to municipal law. Now question arises whether International law is a "real law" or not?

Positivist believed that International law is a "Positive Morality". Modernist believed that International law is a "Real Law"

International Law is Not True Law

Austin who is considered as founding father of analytical school of jurisprudence after Jeremy Bentham, defined law *as a command of sovereign which is backed by sanction.* He believed that common essentials of a law are – Sovereign, Command, Duty and Sanction. According to Austin, International law lacks all the common essential of a law. Therefore it cannot be even called as law. There are no terms like 'International Legislature, International Judiciary and International Executive'. It is just a "**Positive Morality**". It is called positive because it is made by man and it is definite. It is called morality because these are not binding upon the states.

According to Austin, International law is only in existence because of the mutual consent of the states. It is at the option of the states to get them binding by the international regulations. Without the consent of the states, international law has no binding effect.

On the basis of the theory propounded by the Austin, another positivist jurist Holland defined International law as *vanishing point of jurisprudence.* Holland believed that International law is standing upon the pillar of 'Consent' and 'Courtesy' of the states. International laws are merely moral codes which are voluntarily followed by the states

Concept of Positive Morality and Vanishing Point of Jurisprudence are highly criticized with regards to International Law. Positivist believed that only customary rules are the source of international law. However According to Article 38[3] of the ICJ statute, International Treaties, Conventions, Customs, General Principles and Judicial decisions all are the part of International

[3] INTERNATIONAL COURT OF JUSTICE, *ABOUT US*, Permanent Court of International Justice (March. 09, 2018, 06:21PM), http://www.icj-cij.org/en/statute

Law's sources. Moreover decisions made by the International Court of Justice are backed by sanctions[4]. Therefore it is not right to consider international law as positive morality.

International Law is Real Law

While contradicting the positivists, modernistic alleged that positivist jurist were trained and groomed under municipal law only. Positivist believed that no parallel system to municipal law can exist. Modernistic considered the analogy of positivist very narrow and backward.

Municipal Law relation with International Law

International law deals with the relation of state with other states. Municipal law is confined to the internal matters of the state i.e. domestic affairs.

Relation between International Law and Municipal law is both practical and theoretical. Problems of both laws is confined to - Status of Municipal law in International Tribunals, Status of International law in domestic court and Which law will supersede in case of conflict?

This may be put in another way, the first and second problems turned upon the theoretical questions as to whether international law and municipal law is a part of a single legal order, or whether they compromise two distinct systems of law. The third aspect turns upon the practical question as to what is to happen if there is a conflict in a situation where a case has been brought either before an international tribunal before a municipal court.

Now to deal with relation of both the laws, few theories were propounded by different jurists.

Monistic Theory

This theory was consolidated in the early 20th century by Kelson, who holds that there is a unity of law between municipal law and international law. Monists have a unitary concept of law and see all laws as an integral part of the same system. This theory holds that both the legal systems are part of a single legal structure. The monistic theory provided an answer to the points of difference regarding the relations, sources and substance of the two legal systems as follows- Both Municipal and International laws have a common underlying legal basis and it derives its origin from the law of nature which binds equally the state and individuals. They are intrinsically the same and form the part of the science of law which binds all human beings alike. They contended that both not only resemble each other but also, at the same time, spring from a single grund norm or standard which is the foundation head of all laws. They regarded law as single unified field of knowledge, consisting of rules whether binding on states, individuals or on entities other than states. Both ultimately regulate the conduct of individuals, one mediately and

[4] UNITED NATIONS, *ABOUT US*, United Nation Charter (March. 17, 2018, 02:29PM), http://www.un.org/en/charter-united-nations/

other immediately. Both are part of universal body of legal rules binding all human beings, collectively or singly. In both the systems the substance of the law is same i.e. a command binding upon the subjects irrespective of their will. Therefore the question of superiority or primacy of one system over the other doesn't arise. The fact that the national organs do not act according to the rules of international law is manifestation of weakness, but it doesn't invalidate the theory, since the state will incur international responsibility for the breach of the international legal rules. Exponents of monistic theory rejected the alleged differences between the two systems regarding sources, substance and subjects as laid down by dualist. Both are species of one genus and that is law. Law is seen as a single entity of which the national and international versions are merely particular manifestations.

Criticism – It is very difficult to disprove the view of Kelson that man lies at the roof of all law. But in actual practice states are in negation of this theory and they do not follow this theory and treat international law and municipal law as two separate systems of law. States do not like to compromise their sovereignty and they contend that they follow international law simply because they give their consent to be bound and due to other practical reasons.

Dualist Theory

In the 19th and 20th centuries, partly as a result of philosophic doctrines emphasizing the sovereignty of the state will and partly as a result of the rise in modern state legislature with complete internal legal sovereignty, there developed a strong trend towards the dualist view. The chief exponent of dualism has been positivist writers, Triepel and Anzilotti. Positivist philosophy emphasized on the will of the state as the sole criterion for the creation of rules of international law. According to this doctrine the difference between international law and municipal law is fundamental and these two systems are separate and self contained to the extent that the rules of one are not expressly or tacitly received into the other's system. Both laws are two different systems and independent of each other. They do not get the authority or validity from each other. Oppenheim observes that the law of nations and the municipal law are essentially different from each other. Dualist emphasized that these two are separate bodies of legal norms, emerging, in part, from different sources compromising different subjects and having applications to different objects. The area and method of their operation is also different.

Criticism – Firstly it is not correct to contend that *pacta sunt servanda*[5] is the only basis of international law. It fails to explain the binding force of customary rules of international law in regard to which states have not given their consent. Secondly it is not correct to contend that international law is binding only upon the states. It ignores other subject matter of the international law like individuals, international organizations and other non state actors.

[5] OXFORD DICTIONARIES, *PACTA SUNT SERVANDA*, Oxford Living Dictionaries (March. 19, 2018, 09:29PM), https://en.oxforddictionaries.com/definition/pacta_sunt_servanda

Harmonizing Theory

This theory tries to solve the differences between Monistic and Dualistic theories. According to this theory if there is a conflict between the subject matter of international law or municipal law, such matter should be solved with harmony. Proper principles of Equity, Justice and Morality must be applied.

Moreover states should not form such municipal laws which are contrary to the spirit of international law. Municipal laws must be consistent with International laws.

Sources of International Law

Article 38 of the ICJ Statute doesn't specifically use the words 'Sources' for International law, however it provides the tools which should be applied to solve the disputes relating to international matters. It states that –

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. ***international conventions****, whether general or particular, establishing rules expressly recognized by the contesting states; b.* ***international custom****, as evidence of a general practice accepted as law; c.* ***the general principles of law*** *recognized by civilized nations; d. subject to the provisions of Article 59, [.e. that only the parties bound by the decision in any particular case,]* ***judicial decisions and the teachings*** *of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*[6].

Now this Article highlights 4 important sources of international law, i.e. Treaties, Customs, General Principles and Judicial Decisions.

Treaties

Treaties are also known by the names of convections,[7] declarations, agreements etc. Treaties referred to an agreement between the participating states through which they bind themselves legally to act in particular way.

Article 2 of the Vienna Convection state that treaties are the agreements whereby 2 or more states establish relation between them and govern by International law.

Treaties can be classified under two categories i.e. Law making treaties and Treaty contracts. Law making treaties involve large number of participation from the states and it creates universal

[6] ICJ – Article 38 (1)
[7] UNITED NATIONS, *ABOUT US*, United Nation Charter (March. 17, 2018, 02:29PM), http://www.un.org/en/charter-united-nations/

norms. They are just municipal legislation at international level. For example - UN Charter, Vienna Convention[8], Geneva Convention etc

Treaty Contracts is between the two parties for a specific purpose and exclusively between those two states.

Validity of a treaty is bases upon the oldest principle of International law i.e. ***Pact Sunt Servanda.*** According to this principle, treaties are binding upon the parties and they must be performed in the good faith. States are bound to perform their duty. Process of completing a treaty takes a long time. Every state has the time to sign the treaty and ratify the same at diffremt point of time.

Customs

Customs are the oldest source of international law; however it has lost its significance after the growth and development of treaties in the modern era as a source of law. Customary rules are the obligations which state follows out of their own conscience. Establishing a custom in an international arena is a tough task. It must be proved that custom is being followed by large number of people and there is no conflict between customs and general principles of law. Customs are not being cleared defined in a set language. In the Asylum case of 1950, ICJ states that customs are recognized as a habit by states for a long period of time and they are backed by law. Custom starts where usage ends. Customs creates the fundamental norms. They are uniform and consistent throughout the lifespan.

General Principles

Some writers believe that general principles are affirmation of natural law concept. Some believes that general principles are the subhead of treaties and customary laws and they are incapable of adding anything new.

In reality, International law is derived from some advance legal systems. Most common principles which are being universal in nature form the part of International law. General principles which are universally accepted are as follows- Compensation to the victims, Act in Good faith, Res Judicata, Equity and Estoppels.

Judicial Decisions

Judicial decisions refer to the decisions taken by the judges when any dispute is presented before them. It works as quasi precedent in international law. Judicial decisions are based upon the facts

[8] VIENNA CONVENCTION, *DIPLOMATIC RELATIONS BEWTEEN STATES*, Optional Protocol 1961 (March. 11, 2018, 02:51PM), http://www.mfa.gov.tr/data/Kutuphane/MultilateralConventions/ViennaConventiononDiplomaticRelations.pdf

and circumstances on the case. After the careful study of the matter, judges implement the principle of law and take the decisions.

Such decision of judges is an important part of different sources of International law

Conclusion

At the end of this paper it can be concluded that in the recent time period, international law had shown immense growth. It has not only been recognized but is being properly implemented throughout the world. After comparing the monistic and dualistic theory, it is also affirmed that International law is different from Municipal law and Municipal law are being framed keeping in mind the international rules and regulations. Sources of International law are now being clearly defined in ICJ statute and with the penultimate growth of International treaties; future of international law is very bright.