The role of the state in the modern world is a complex one. According to legal theory, each state is sovereign and equal. In reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most

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powerful of states can be entirely sovereign. Interdependence and the close-knit character of contemporary international commercial and political society ensures that virtually any action of a state could well have profound repercussions upon the system as a whole and the decisions under consideration by other states.

This has led to an increasing interpenetration of international law and domestic law across a number of fields, such as human rights, environmental and international investment law, where at the least the same topic is subject to regulation at both the domestic and the international level. Municipal law governs the domestic aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus, while international law focuses primarily upon the relations between states. There are many instances where problems can emerge and lead to difficulties between the two systems.

In a case before a municipal court a rule of international law may be brought forward as a defense to a charge, as for example in R v. Jones, where the defense of seeking to prevent a greater crime (essentially of international law) was claimed with regard to the alleged offence of criminal damage (in English law), or where a vessel is being prosecuted for being in what, in domestic law, is regarded as territorial waters but in international law would be treated as part of the high seas. Further, there are cases where the same situation comes before both national and international courts, which may refer to each other’s decisions in a complex process of interaction. For example, the failure of the US to allow imprisoned foreign nationals access to consular assistance in violation of the Vienna Convention on Consular Relations, 1963 was the subject of case-law before the International Court of Justice, the Inter-American Court of

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2 R. A. Falk, The Role of Domestic Courts in the International Legal Order, Princeton, 1964
3 [2006] UKHL 16; 132 ILR, p. 668
4 LaGrand case, ICJ Reports, 2001, p. 466; 134 ILR, p. 1, and the Avena case, ICJ Reports, 2004, p. 12; 134 ILR, p. 120.
Human Rights\(^5\) and US courts,\(^6\) while there is a growing tendency for domestic courts to be used to address violations of international law.\(^7\)

**THEORETICAL PERSPECTIVE**

International jurists have suggested five theories to explain the relationship between the two laws.

**MONISIM/MONISTIC THEORY**

According to monist law is a unified branch of knowledge, no matter whether it applies on persons or other entities. International obligations and Municipal rules are facets of same phenomenon, the two deriving ultimately from one basic norm and belonging to the unitary order comprised by the conception of law. International law and Municipal law are the two branches of unified knowledge of law which are applicable to human community in some or the other way. All laws are made for men and men only in the ultimate analysis.

This school of thought believes in the supremacy of the state. Kelson emphasizes the unity of the entire legal order upon the basis of the predominance of international law by declaring that it is the basic norm of the international illegal order which is the ultimate reason of validity of the national legal orders too.\(^8\) In a pure monist state international laws shall become applicable directly.

**CRITICISM**

In practice states do not follow this theory. They contend that Municipal law and international law are two separate systems of law. Each state is sovereign and as such is not bound by international law. States follow international law simply because they give their consent to be bound and on account of other reasons.


\(^8\) Supra Note 5, pp. 180-181
International law and state are two separate laws. In the 19th Century the existence of state will and complete sovereignty of the state were emphasized. Dualism is based on the complete sovereignty of States. The chief exponents of this theory are Triepel and Anziloti.

Triepel has pointed out the following differences between Int. Law and Municipal law. Individual is the subject of state law, whereas State is the subject of International law. Origin of the State law is the will of the state whereas origin of the International law is the common will of States.

This theory, known as dualism, stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other. This is because of the fundamentally different nature of inter-state and intra-state relations and the different legal structure employed on the one hand by the state and on the other hand as between states. Where municipal legislation permits the exercise of international law rules, this is on sufferance as it were and is an example of the supreme authority of the state within its own domestic jurisdiction, rather than of any influence maintained by international law within the internal sphere.

In the modern period international law is applicable to states, individuals and certain other non-state entities. The conception of state will as the source of state law is incorrect, in fact state will is nothing but the will of people.

According to the positivist, international law cannot be directly enforced in the field of State law. In order to enforce it in the field of Municipal law, it is necessary to make its specific adoption. In short International law can be applied in the field of Municipal law only when Municipal law either permits it or accepts it specifically. This view is generally followed by states in respect of International Treaties.

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9 Supra Note 2, pp. 200-202
10 Oppenheim’s International Law, p. 53
It is argued that unless there is specific adoption of the international Treaties or there is some sort of transformation, International treaties as such cannot be enforced in the municipal field. Diplomatic Relations Act, 1972 was enacted by Indian Parliament to adopt specifically Vienna Convention on Diplomatic Relations, 1969.

Indian Extradition Act, 1962, The Anti-Apartheid (United Nations Convention) Act, 1981, the Anti-Hijacking Act, 1982 etc. In Jolly George V. The Bank of Cochin The Supreme Court of India observed that, the positive commitment of the state parties ignite legislative action at home but does not automatically make the covenant enforceable part of the Indian Legal system.

This view is not correct in respect of the whole of international law because there are many principles of international law (especially customary rules) which are applied in the field of municipal law without specific adoption.

The exponents of this theory contend that for the application of international law in the field of municipal law, the rules of international law have to undergo transformation. Without transformation they cannot be applied in the field of municipal law.

There are several law making treaties which become applicable to the States even without undergoing the process of transformation.

The critics of transformation theory have put forward a new theory called Delegation theory. These critics point out that the constitutional rule of international law permits each state to determine as to how international treaties will become applicable in the field of State law.

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12AIR 1980 SC 470
14V.K. Ahuja, Public International Law (Lexis Nexus 2016)
Thus, in fact, there is no transformation nor is there specific adoption in every case. The rules of international law are applied in the field of State law in accordance with the procedure and system prevailing in each state in accordance with its Constitutions.

**CRITICISM**

This theory can be regarded simply as a reaction against the theory of dualism and other theories based on positivism, one may ask where are and what are the constitutional rules of international law? When and how these rules have delegated power to state constitutions? This theory is far from truth.

In fact each state is equal and sovereign and does not recognize any authority over and above it. Thus there is great controversy in regard to application of international law in the field of municipal law. In order to arrive at right conclusion, it is necessary to go through the practice of states in this respect

**PRACTICE OF STATES**

Practice suggests that, in fact, a mixture of international law supremacy, municipal law supremacy and co-ordination of legal system exists. In view of the prevailing controversy, each situation must be analyzed by itself to decide as to whether there will be primacy of international law or that of the municipal law. In practice, national courts endeavor to interpret statutes in such a way as not to conflict the provisions of IL

**UNITED KINGDOM**

For the application of international law in Britain, distinction is maintained in regard to the customary rules of international law and the rules laid down by treaties. It will, therefore, be desirable to discuss them separately.

**CUSTOMARY RULES OF IL**

In Britain customary rules of international law are treated as a part of British laws. British courts treat them as a part of their own law subject however to following conditions\(^\text{15}\)

1) Rules of international law should not be inconsistent with the British Statutes.

\(^{15}\)J. E. S. Fawcett, The British Commonwealth in International Law, London, 1963, chapter 2
2) If the highest court once determines the scope of a customary rule of international law, then all the courts in Britain are bound by it.

The British courts interpret the parliamentary statutes in such a way that they should not go against international law. This rule is applicable only when the provisions of the statutes are ambiguous. If they are clear and unambiguous they prevail over IL.

EXCEPTIONS: following are the exceptions of the British practice in regard to customary rules of international law.

1) Acts of State do not come within the purview of the British courts, irrespective of the violations of IL.

2) In some matters the British courts are bound to obey the prerogative powers of Crown, e.g. if the Crown grants recognition to any State, the British courts are bound to accept it

PRACTICE AS TO TREATIES

The British practice is based on the constitutional principles governing the relationship between Executive or Crown and Parliament. In regard to treaties, the matters relating to negotiations, signatures etc. are within the prerogative powers of the Crown. In Britain it is necessary that some type of treaties should receive the consent of parliament. Either the parliament accords its consent or adopts it state law through the help of a statute. Such types of treaties are

1) Treaties which amend or modify common law or statute law of Britain.

2) Treaties which affects the rights of British Citizens.

3) Treaties which confer additional power on Crown.

4) Treaties which impose additional financial burden on the government.

In addition to these, treaties which expressly provide that for their application the consent of the Parliament is required, consent of the parliament is essential for their application. The consent of the Parliament is also necessary for the treaties which cede the British Territory.

Other types of treaties do not require the Parliamentary consent. Now the question arises if there is a conflict between a law enacted by parliament and treaty, which will prevail. In this

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16 S. Fatima, Using International Law in Domestic Courts, Oxford, 2005
18 Ibid p. 931
connection the House of Lords declared in *Ostime v Australian Mutual Provident Society*. That if a treaty has been enforced through law enacted by parliament, then this will prevail over an earlier inconsistent British Law.

**UNITED STATES OF AMERICA**

In America also, the practice regarding customary rules of international law and the rules laid down by treaty is different

**CUSTOMARY RULES OF IL**

In America also customary rules of international law are treated as a part of American Law. Besides this, American Courts also interpret the Statute law of the Congress in such a way that may not go against International law.

**RULES OF TREATIES**

In America everything depends upon the provisions of the Constitution. Article VI of the American Constitution provides that Constitution of the United States, all laws made in pursuance thereof and the 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 category as State law in America. It may, however, be noted that in America the practice is that if there is a conflict between international treaty and a State law, whichever later in date shall prevail. If there is a conflict in between American Constitution and international treaty, the former (i.e. the Constitution) will prevail. Besides this, in America treaties have been divided into two categories, self-executing and non-self executing treaties. Self executing treaties are those treaties which become applicable in America without any Act or consent of the Congress.

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19 Ibid p. 940
20 J. F. Murphy, The United States and the Rule of Law in International Affairs, Cambridge, 2004, chapter 2
21 D. Vagts, ‘The United States and its Treaties: Observance and Breach’, 95
22 Ibid p. 355
On the other hand non-self executing treaties are those which can become applicable in America only after the consent of the congress or through its adoption by a specific Statute.

Before the adoption of Indian Constitution the Indian practice was similar to the British Practice. After adoption of the Constitution practice depend on the provisions of the constitution. In order to know the position of International Law in the post-Constitution period, it is necessary to examine the relevant provisions of the Constitution. The most relevant provision in contained under Art. 51 which runs as follows “The state shall endeavor to-

- Promote international peace and security
- Maintain just and honorable relations between nations
- Foster respect for international law and treaty obligations in the dealings of organized peoples with one another;
- Encourage settlement of International disputes by arbitration.

It is significant to note that Art.15(c) specifically mentions international law and treaty obligations. However, this Article is a part of Part-IV i.e. Directive Principles of State Policy. Art. 37 clearly provides that the provisions contained in this part shall not be enforceable by any court. But it also states that nevertheless these provisions are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

Therefore it cannot be contended that they are of no significance or even of less significance that the fundamental rights. This view has been affirmed by the 24th and 25th Amendments of the Constitution.

But Art. 51 does not give any clear guidance regarding the position of international law in India as well as the relationship of municipal law and international law. Weather the Constitution has altered the position prevailing in pre-constitution period. Article 372(1) clearly provides: “Notwithstanding the repeal by this constitution of the enactments referred to in Article 395 but subject to other provisions of this constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall

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continue in force hereinafter until altered or repealed or amended by a competent Legislature or other competent authority.

Therefore the position prevailing immediately preceding the commencement of the constitution continues even after the coming into force of the Constitution. In India also customary rules of international law are part of their municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution of India. As regards the Treaty rules also, India follows more or less the British dualist view, that is to say international law can become part of municipal law of India if it has been specifically incorporated.

**State of Madras V. G.G. Menon.**24 The Supreme Court held: Indian Extradition Act, 1903 has been adopted but the Fugitive Offenders Act, 1881 of the British Parliament has been left severely alone. Therefore the provisions of Fugitive Offenders Act, 1881 have no force in India.

**ARTICLE 253 OF THE CONSTITUTION**

Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or other body. In **Shiv Kumar Sharma V Union of India**25 and in **Maganbhai Ishwarbhai Patel v union of India**26 it was held that treaties settling boundary dispute does not require legislation.

In **A.D.M. Jabalpur V. Shivkant Shukla**27 whether UDHR, 1948 and ICCPR, 1966 and ICESCR, 1966 were part of Indian municipal law. By majority the SC held that, they were not part of Indian Municipal law. However J. H.R. Khanna in his dissenting judgment held that, if there is a conflict between municipal law and international treaty it is the former that will prevail. But if two interpretation of municipal law are possible the court should adopt such interpretation which will bring harmony municipal law and treaty. In his view, the constitutional provision should be interpreted in such a way as to avoid conflict with the UDHR.

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24 AIR 1954 SC 517
25 AIR 1969 Del 64
26 AIR 1969 SC 783
27 AIR 1976 SC 1207
Jolly George Varghese V, Bank of Cochin\textsuperscript{28} in case of conflict between provisions of International treaty such as Art. 11 of ICCPR, 1966 and Sec 51. and Order 21 rule 37 of CPC It is the later which shall prevail if the international treaty in question has neither been specifically adopted in the municipal field or had gone under transformation. Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore V. Union of India\textsuperscript{29} The Government of India’s obligation under International Treaties cannot be enforced, at the instance citizens of this country or associations of such citizens, bh Courts in India, unless such obligations were made part of the law of this country by means of appropriate legislation.

Gramophone Company of India ltd. V Birendra Bahadur Pandey\textsuperscript{30} Supreme Court observed that if in respect of any principles of international law the parliament says ‘no’, the national court can not say ‘yes’. National court shall approve international law only when it does not conflict with national law. Vishakaha V. State of Rajasthan\textsuperscript{31} Art. 14,15,19(1) (g) and 21 of Indian Constitution and CEDAW.

Apparel Export Promotion Council V. A.K. Chopra\textsuperscript{32} The court while applying the vishakha guidelines dismissed the superior officer of corporation for molesting a subordinate female employee. Court further observe that, in cases involving violation of human rights, the courts must forever remain alive to the international instruments and conventions and apply the same to a given case. When there is no inconsistency between international. Norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case.

Chairman, Railway Board & others Vs Mrs. Chandrima Das and others.\textsuperscript{33} The applicability of the Universal Declaration of Human Rights and Principles thereof may have to be read, if needed into the domestic jurisprudence. The international covenants and declarations as adopted by the United Nations have to be respected by all signatory states and the meaning

\textsuperscript{28}AIR 1980 SC 474
\textsuperscript{29}AIR 1983 Kant 85
\textsuperscript{30}AIR 1984 SC 667
\textsuperscript{31}AIR 1997 SC 3011
\textsuperscript{32}AIR 1999 SC 625
\textsuperscript{33}AIR 2000 SC 988
given to the words in such declarations and covenants have to such as would help in effective implementation of those rights.

CONCLUSION

International Law governs the behavior of States in the international community and municipal law governs the behavior of individuals within the territory of a State. International Law deals with external affairs of States, whereas, Municipal Law deals with internal affairs. International Law is not law above, but between States, and therefore it is considered weak when compared to Municipal Law. International jurists have suggested five theories to explain the relationship between the two laws.

Firstly, the monistic theory whose exponents believe that international law and municipal law are one and the same. Secondly, the dualistic theory, the exponents of which believe that the two laws are totally different from one another in respect of subject matter and also origin. The subject matter of International Law is States and individuals are the subject matter of municipal law. While the origin of municipal law is the will of the State and the origin of International Law is the common will of the States.