

The relationship between the english legal system and international law internati...



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The essay deals with the relationship between the English legal system and international law. Although there is some discrepancy among the two systems, they merge at some points. Looking at the theories around this issue, our domestic legal order seems to follow the dualist approach. Nonetheless, both the attitude of international law towards municipal rules and the approach as regards the law of the nations by the English legal system need to be examined. Even though the international legal machine does not permit a state to use its domestic law as a defence to violation of its international obligations, it does not entirely ignore municipal law rules. This means that there is an overlap between the two systems. Apart from that, by observing the reaction of the English legal system to treaty law it appears that conventions should be domesticated, through transformation, by an Act of Parliament. It should be noted that this is an expression of the dualist approach. In addition, mention is made to the attitude of our domestic legal system towards customary international law, which tends to be unsteady. Despite the fact that international custom was considered to be incorporated in English law for years, according to recent cases there seems to be a change towards the transformation doctrine. Moreover, though there are areas of international law where the English courts cannot intervene, the law of the nations is not utterly distant from our domestic legal system. As a matter of fact, albeit some differences between the two legal systems they have influence upon each other.

Introduction

Nowadays, a close observation of international law will reveal an enormous development in its substance. As a matter of fact, this distinct system of law,

which regulates the interrelationship of sovereign states, deals with exceptionally significant matters like human rights, war and international crimes. At this point, a question that might be asked by a person reading regularly the International News section in a British newspaper will be the following: ' Given the importance of international law and its common interests in certain fields with the English legal system, what is their relationship? Is there an overlap or a gap between them? ' In order to provide a reliable answer, we should examine the position of municipal law within the international sphere and mainly how the English legal system responds to treaty and customary international law.

Theories on the relationship of international and internal law

Among other things, scholars attempted to explain the relationship between international and domestic law through various theories. Most persistent have been the theories of monism and of dualism. On the one hand, monists (like Lauterpacht) argue that there is a single legal order with international law at the peak and all national rules below it in the hierarchy.[1]In contrast, under the dualist theory supported, supported by Oppenheim and Triepel, international and municipal are two different legal systems existing side by side but operating in different arenas.[2]Indeed, jus gentium is a law between independent states whereas domestic law applies within a state regulating the relations of its citizens with each other and with the executive. Accordingly, international law rules to be considered have to be domesticated through adoption or transformation by the national legislature.

In general, it seems that various countries have adopted one or the other doctrine with many common law countries supporting the dualist view while civilian systems subscribe to the monist school of thought. Nevertheless, there are elements of both perspectives in the jurisprudence of many states. Therefore, the opposing schools of dualism and monism do not adequately reflect actual state practice.[3] Specifically, Fitzmaurice characterizes the monist-dualist controversy as ' unreal and artificial' since each system is supreme in its own field.[4]

Even though the English legal system tends to employ the dualist approach[5], before forming a view whether or not it never meets the law of the nations, an assessment of their attitude towards each other ought to be conducted.

The position of English-municipal rules in international law

Undoubtedly, in the practice of international courts and tribunals there is a dividing line between international and domestic law. They have established principles regarding the application of municipal law within the international legal system. As a general rule, a state cannot justify the violation of its international obligations by relying upon its domestic legal situation.[6] This provision has been established by state practice and decided cases.

To start with, the Vienna Convention on the Law of Treaties 1969 (hereafter ' VCLT') states that a ' party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[7] In addition, non-compliance with municipal law rules on the competence to make treaties may not generally be invoked by a state to invalidate its consent to a

convention, except if the infringement of its domestic law in question is ' manifest and concerned a rule of fundamental importance'.[8]

Apart from that, case-law illustrates the above principle. For instance, in the Alabama Claims Arbitration[9], albeit the absence of British legislation necessary to intervene with the private construction and sailing of the ship concerned, Great Britain violated its obligations as a neutral in the United States Civil War by allowing the departure to occur. Further, reference should be made to the decision of the International Court of Justice in the Applicability of the Obligation to Arbitrate under Article 21 of the UN Headquarters Agreement of 26 June 1947[10], where it was emphasized that ' the fundamental principle of international law is that international law prevails over domestic law'.[11]This was re-affirmed in the La Grand[12]case, where the US procedural default rule could not affect the liability of the USA for the breach of the Vienna Convention on Consular Relations 1963.

Besides, it is obvious that there is a general duty for states to bring domestic law into conformity with international obligations. As shown in the Exchange of Greek and Turkish Populations[13]case, international law rules can be translated into internal law by any method that the domestic jurisdiction of states wishes to apply. Even a failure to bring municipal law into line with its international obligations is not in itself a direct contravention of international law and a violation occurs only when the state concerned could not fulfil its obligations on a specific occasion.[14]

Additionally, it must be noted that international law cannot entirely ignore municipal law which plays a crucial role in the operation of the international legal machine.[15]We should not forget that domestic law may be used as evidence of international custom leading to the growth of this source. There have been occasions that were decided solely on the basis of the municipal law of a particular case.[16]What is more, in the case of Certain German Interests in Polish Upper Silesia[17]it was underlined that domestic court decisions and legislative measures may comprise evidence of conduct by the state concerned which can essentially create international responsibility. As a result, internal law rules have numerous functions on the international plane and they should not be utterly marginalized.

The attitude of English law to international law

Aside from the response of the international legal apparatus to municipal rules, it is more essential to take note of the approach of the English legal system to the law of nations in our attempt to find whether they have a hidden meeting place. It is inevitable that the escalating permeation of international legal rules within domestic systems influences the way English law reacts to jus gentium. The next two sections pertaining to the status of international treaties and customary law in our domestic system will help us discover if the two systems merge. National legal systems are free to select how they implement these two sources of international law and their choice of materials varies greatly.[18]It is worth mentioning that there is a dichotomy between the rule for treaties and that for customary law, surrounding the application of international law by English courts.[19]

Treaty Law Approach

In England, the fact that the conclusion of treaties is within the prerogative of the Crown determines the way that treaty law is approached. There is no doubt that in the absence of a transformation doctrine, which leads to the conversion of international law into municipal law by an Act of Parliament, the executive would be able to legislate without the legislature.[20] This doctrine is an expression of the dualist position, separating the two systems of law and requiring the translation of treaties into domestic legislation.[21]

One of the first cases establishing that a treaty cannot adversely impact private law rights unless it has been made a part of British law by Parliament is the *Parlement Belge* case.[22] This principle was reinforced in the *International Tin Council Case*[23] where Lord Oliver clarified that 'a treaty is not part of English law unless and until it has been incorporated into the law by legislation'.[24] On the other hand, Jennings criticizes the doctrine in the above judgment because it underestimates the role of international law and creates a distance between the two systems.[25] Although only treaties in relation to the conduct of war and cession do not require transformation, Fox points out that the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex. Parte Pinochet Ugarte (No. 3)*[26] disregarded such a constitutional principle and implemented in English law unincorporated treaty obligations on the immunity of the Former Head of State.[27]

Furthermore, the distinct reaction of the English legal system to the European Convention on Human Rights (hereafter 'ECHR') and to binding decisions of the United Nations should be examined. Since 1974, English courts have consistently taken ECHR into account while applying statutes, <https://assignbuster.com/the-relationship-between-the-english-legal-system-and-international-law-international-law-essay/>

though it was unincorporated.[28] Andrew Cunningham maintains that such an approach is not well justified when other unincorporated conventions and instruments are sidestepped.[29] Nonetheless, an obscure point that should be elucidated is that the English legal system did not abandon dualism in human rights cases as it insists that an unincorporated treaty cannot prevail over a contradicting statute.[30] Even after the enactment of the Human Rights Act 1998 which incorporated the ECHR, the validity of any incompatible primary legislation might not be affected given the provision in section 3(1). As regards the resolutions of the Security Council, the UK has implemented the United Nations Act 1946. It is evident that even Security Council decisions are not self-executing and in the case of UN sanctions they can be only enforced as a consequence of this piece of domestic legislation with which the Crown can adopt Orders in Council.

It is noteworthy that in spite of the 'Ponsonby rule', where signed treaties subject to ratification, acceptance, approval or accession have to be laid before Parliament at least twenty-one days before any of these actions is taken, the UK practice suggests that a ratified treaty becomes effective only in international law. Apparently, the English legal system is hesitant to apply directly treaty law in its municipal law. Yet, it is at least accepted that the text of Conventions can be used as an aid to statutory interpretation.

Admittedly, in the *Salomon*[31] case it was made clear that the Crown does not intend to break an international treaty and the convention might be utilised when domestic legislation is ambiguous. The above principle was strengthened when Lord Diplock in *Fothergill v Monarch*

Airlines[32] encouraged the courts to use the rules for interpretation of

unincorporated treaties in the VCLT. Despite this, Gardiner has observed that the judiciary in England is not eager to apply the Vienna rules systematically, indicating a reluctance to acknowledge the importance of international law in the domestic system.[33]

Customary International Law Approach

Moreover, we need to analyse the status of customary international law in the English legal system to find out its relationship with the law of nations.

The decided cases illuminate that the attitude of our domestic system towards customary international law is in a state of flux. Initially, the dominant British approach to international custom was the doctrine of incorporation where customary rules are regarded part of the law.

According to Lord Talbot in *Buvot v Barbuit*[34] 'the law of nations in its full extent was part of the law of England'. This principle was restated twenty-seven years later by Lord Mansfield in *Triquet v Bath*.[35]

On the contrary, nineteenth century cases appear to displace the doctrine of incorporation by that of transformation.[36] In fact, the case of *R v*

Keyn[37] demonstrates that a customary rule can become a rule of English law only if it is translated into the latter by statute or a judicial decision.

Conversely, this judgment is considered to be equivocal since it dealt primarily with the existence of a rule of international law relating to

jurisdiction in the territorial sea.[38] Mention should be also made to Lord

Atkin's speech in *Chung Chi Cheung v The King*[39] where he highlighted that international law is invalid unless adopted by the English law.[40] However,

O' Keefe claims that Lord Atkin's statement did not mean that customary

international law was not part of our municipal law.[41] Instead, his Lordship
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tried to pass the message that international custom does not take precedence over English law and it is admitted in our domestic legal system where it can play a vital role.

It is axiomatic that the approach of the English judiciary to customary international law is relatively unstable. Although, Lord Denning followed the dualistic-transformation doctrine in *R v Secretary of State for the Home Department ex parte Thakrar*[42], he changed his mind in *Trendtex Trading Corporation Ltd v Central Bank of Nigeria*[43] where he adopted the incorporation approach. This was because he believed that *jus gentium* does not recognise *stare decisis* and the latter doctrine would help English law to react to the frequent changes that customary international law undergoes. White feels that transformation is inflexible and the decision in *Trendtex* is welcome as it helps English courts to be more responsive to international law.[44] Yet, it ought to be clarified that in a case of conflict between international custom and an Act of Parliament, the statute prevails.[45]

On balance, by bearing in mind the seminal decision in *Trendtex* which was followed by *Maclaine Watson v Department of Trade and Industry*[46], O'Keefe correctly deduces that dualism is the principal principle in English law which just permits customary international law a limited direct applicability.[47] Alternatively, in the light of recent cases he might have second thoughts for his conclusion. In particular, Lord Bingham in *R v Jones*[48] was unwilling to accept that international law is a part of our domestic legal system. As an alternative, he preferred that perspective expressed by Brierly that 'international law is one of the sources of English law'.[49] Despite the fact that it was acknowledged that international custom

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' may be assimilated into domestic criminal law', the incorporation approach was not applied to the international law crime of aggression.[50] Aside from this, in *Al-Haq v Secretary of State for Foreign and Commonwealth Affairs*[51] Cranston J recognised that customary international law applied in municipal law without transposition is inconsistent with our dualist system. [52]

Consequently, it is clear that the question whether international custom ought to be incorporated into domestic law is tremendously complicated and according to Pill LJ is ' not susceptible to a simple or general answer'. [53] Obviously, there are doubts even about the restricted direct applicability of customary international law in the English legal system. With regard to the role of the English judiciary, Capps supports that it acts as a ' gatekeeper' between the international and our domestic legal order.[54]

Non-justiciability issue and the relation of executive and judiciary

A brief reference on the doctrine of non-justiciability will explain why the domestic legal system might be distant from the international legal order. It is inescapable that there might be questions of international law that English courts are not competent to answer. For example, in *Buttes Gas and Oil Co v Hammer (No. 3)*[55], which concerned a dispute about the territorial waters of Sharjah in the Persia Gulf, an English court did not have the judicial standards to judge the issues of international law. Lord Wilberforce stressed the principle of judicial restraint in adjudicating upon the acts of foreign sovereign states.[56] Nevertheless, the non-justiciability rule is subject to exceptions. It is unavoidably inapplicable in instances relating to the

transactions of foreign states which infringe international law. In illustration, the case of *Kuwait Airways Corporation v Iraqi Airways Company*[57] showed that an English court could not ignore a breach of international law committed by Iraq against Kuwait as far as the violation was 'acknowledged'. [58]

It should not be omitted that the special nature of international law is reflected in the practice of the British courts which will defer to the executive on certain factual issues. The courts need to seek the guidance of the Foreign Office which produces certificates on the determination of a number of topics such as the sovereign status of a foreign state, the recognition of governments, the commencement and termination of a state of war against another country and the incidence of diplomatic immunity.[59] Such certificates are conclusive when they are unambiguous as to facts based on the 'one voice' doctrine where the judiciary and the executive ought to follow the same line on matters relating to foreign affairs.[60] In the case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Trawnik*[61] it was maintained that a certificate under the State Immunity Act 1978 is not subject to judicial review unless it constitutes a nullity. On the other hand, it is worth noting that the courts may sometimes go outside the information given in the Foreign Office certificate in their attempt to resolve the issue before them. This was proved in the case of *Re Al-Fin Corporation's Patent*[62] where it was held that Foreign Office certificates are not considered as conclusive in the interpretation of statutes or the construction of documents.

Conclusion

In conclusion, it is plain that there are numerous difficulties raised in this complex area of the interaction of international and municipal law.

Nevertheless, the person reading the International News section in a British newspaper will realise that in spite of the preference shown to the dualist approach by the English legal system and its various differences with the international legal apparatus, the two systems trust each other and have some meeting places. As we have seen, the international legal machine takes heed of municipal rules and at the same time in the United Kingdom judicial notice is taken of the rules of public international law. Even though treaty and customary international law need to be exchanged to 'domestic currency', the English legal order and the law of nations are not completely distinct legal systems and indisputably influence each other. A happy relationship exists between international and domestic law but it will always experience changes.