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Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice?

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1:0:0 INTRODUCTION

The issue arising out of the relationship between International law and municipal law remains a topic of controversy[1] among legal scholars and has caused difficulties especially for domestic judges[2] though; in practice the controversy has been resolved within the domestic jurisdiction of each state[3]. As a result of the issue of superiority between International law and municipal law, different schools of thought have emerged. These are the Monist and Dualist schools of thought.[4] Within the monist school of thought, there are sub-categories of schools.[5]

The Naturalist Monist School as represented by Lauterpacht holds the view that international law is superior to municipal law on the basis that the former offers better protection in respect of human rights.[6] The Radical Monist School of thought is represented by Kelsen who holds the view that international law is superior on a formalistic doctrine of the grundnorm.[7] The Policy-Oriented Monist encompasses post-colonial African states and the new democratic blocks of the Eastern Europe.[8]

On the other hand, the Dualist school of thought has proponent like Triepal and

Anzilloti.[9] The dualists are of the view that international law and municipal law are two different systems of law,[10] dualist take the position that international law embodies rules that regulates activities of states within the comity of nations while municipal law governs the domestic activities of states.[11]

According to the dualist, international law and municipal law can never be in conflict[12] and where there is a conflict between the two systems, municipal law will prevail on the ground that international law is given effect to operate domestically by municipal law.[13] The exponents of the dualist doctrine maintain that the sovereignty of states is clearly provided for in Article 2(4) (7) of the United Nations Charter.

In recent times, some scholars have described the two doctrines as outdated doctrines because of their unsatisfactory nature in resolving legal issues.[14] However, the theoretical framework of resolving the issue of primacy between international and municipal law remain elusive[15], but in practice, states have enshrined in their constitution the appropriate procedure for the reception of international law in their corpus juris.[16] Some states gives primacy to international law especially the civil law jurisdictions while some states adopt strict dualist system like the Commonwealth states adopting the common law.[17] But whichever system that is applicable in

[1] B.R. Opeskin, 'Constitutional Modelling: Domestic Effect of International Law in Commonwealth Countries: Part1P.L. 2000, Win, 607-626; S.L.Paulson, 'The Theory of Public Law in Germany 1914-1945', OJLS 2005 25 (525)
[2] Manisuli Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court',C&S Law 2005 10 (405)
[3] George Roebling, 'Invoking the Agreement on Government Procurement', P.P.L.R. 1999, 4, 187-208.
[4] Carl Landauer, 'Antinomies of the United Nations: Hans Kelsen and Alf Ross on the Charter', E.J.I.L 2003, 14(4), 767-799.
[5] M.N. Shaw, 'International Law' Cambridge University Press, Cambridge, 2008, P.131
[6] I.Brownlie, 'Principles of Public International Law', Oxford University Press, Oxford, 2008, P. 33
[7] Stephane Beaulac, ' Recent Developments on the Role of International Law in Canadian Statutory Interpretation', Stat Law 2004 25 (19)
[8] T. Maluwa, 'International Law in Post-Colonial Africa', Kluwer Law International, Hague, 1999, P.48-51
[9] F. Morgenstern, 'Judicial Practice and the Supremacy of International Law ', 27 BYIL. 42
[10] Antonis Antoniadis, 'The European Union and the WTO Law: a Nexus of Reactive, Coactive, and Proactive Approaches', World T.R., 2007, 6(1), 45-87; Certain German Interest in Polish Upper Silesia (Germany v. Poland) 1925 PCIJ (Ser. A), No 7 at 19; H. Lauterpacht, 'International Law', Collected Papers, edited by E. Lauterpacht, Vol 1, Cambridge University Press, Cambridge, 1970, p.152-153
[11] Elizebeth Wicks, 'A New Constitution for a New State? The 1707 Union of England and Scotland', L.Q.R. 2001, 117(Jan), 109-126
[12] R.K., Gardiner, ' International Law', Longman Law Series, London, 2003, P. 130
[13] Ibid, P.141
[14] Armin Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: on the Relationship Between International and Domestic Constitutional Law', I.J.C.L.2008, 6(3/4), 397-413.
[15] D.P.O'Connell, 'International Law', 2nd ed., Sweet & Sons, London, 1970, P. 44
[16] G.Fitmaurice, 'The General Principles of International Law Considered from the Stand Point of the Rule of Law' 92 HR, 1957 1, P.5, 70-80; D. Radosavljevic, 'An Overview of the Complementarity Regime', Review of International Law and Politics, Vol. 3, No.10, 2007, P.96-114
[17] T. Maluwa, supra n 8 at 37

any given state it must be noted that international law precludes states from pleading their internal law to evade their international obligation.[1]

In view of the primacy controversy, some scholars like Rousseau and Fitzmaurice have adopted the middle position by not supporting either school of thought, thereby developing a harmonising theory that is referred to as the Theory of Coordination.[2]

The overt implication of the theory of coordination is that it seeks a means by which international law and municipal law are applied with some degree of equality[3] and thereby avoiding conflict between international law and the internal law of a state.[4]

2:0:0 LEGAL ORIGIN OF MONISM

Monism as a concept was developed from the teachings of natural law theory which was espoused by early naturalists such as Aristotle in his Nicomachean Ethics, Cicero in De Re Publica, Thomas Aquinas in his Summa Theologica, and the Justinian Institutes and Saint Augustine.[5]Natural law thinkers believe that natural law is eternal and unchanging[6]and it applies universally and is in accordance with reason.[7]

The natural law doctrine influenced the writings of Francisco Suarez and Vitoria which formed the theoretical origin of monism.[8] It was Hugo Grotius who emasculated the theist teachings of Catholic Church writers that sovereignty is superseded by a superior legal order.[9] Grotius' writings did not make any distinction between international law and municipal law, but he noted that the law of Nations is binding universally.[10] In the 15th century, Jean Bodin adopted the views of Grotius by emphasising that there is a higher legal order from which states derive their sovereignty.[11] However, the classical era of Roman-Dutch scholarship followed the position of Grotius by not differentiating international law and municipal law.[12] Likewise, modern authors like Lauterpacht, Kelsen and Dugit drew inspiration from the writings of the early naturalist to support the primacy of international law.[13]

3:0:0 LAW AND PRACTICE OF THE RECEPTION OF INTERNATIONAL LAW IN MONIST STATES

In monist states, there are constitutional procedure for the reception of international law; though, in practice there is no state that could be identified as a purely monist state.[14] However, many states have been identified as monist state, to wit: Netherlands, Austria, San Marino; [15] Belgium and France; [16] Switzerland, and Liechtenstein;[17] Denmark, Greece,[18] France, Germany, and Spain;[19] Mali,[20] Japan,[21] Morocco,[22] and Gabon.[1]

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[1] Article 26 and 27 of the Vienna Convention on Law of Treaties; Article 13 of The Declaration of Rights and Duties of States, adopted by International Law Commission in 1949; Treatment of Polish Nationals in Danzig (PCIJ) Ser. A/B. no. 44

[2] Ilona Cheyne, 'International Agreements and the European Community Legal System', E.L. Rev. 1994, 19(6), 581-598

[3] L. Erades & W.L Gould, 'The Relationship Between International Law and Municipal Law: Netherlands and in the United States', (1961), Oceana, P. 348.

[4] Ibid, P. 348.

[5] M.D.A, Freeman, 'Lloyds Introduction to Jurisprudence', 7th ed., Sweet & Maxwel, London, 2001, P.140-142

[6] R W M Dias. 'Jurisprudence', 5th ed., Butterworths, London, 1985, P.478

[7] H. Davis & D. Holdcroft, 'Jurisprudence: Text and Commentary', Butterworths, London, 1991, P.150

[8] George Slyz, 'International Law in Municipal Courts', in International Law Decision in National Courts, Ed., Thomas M. Franck & Gregory H. Fox(1996), Transnational Publishers, P. 73

[9] Joseph Starke, 'Monism and Dualism in the Theory of International Law' BYIL 17 (1936), reproduced in J.G. Starke, ' Studies in International Law', Butterworths, London, 1965, P. 1-19

[10] J. Dugard, 'International Law –A South African Perspective(2000), 2nd , Juta & Co. P. 44

[11] Joseph Starke, supra n 26 at P. 539

[12] J. Dugard, supra n 27 at 44

[13] Joseph Starke, supra n 26 at 540

[14] George Slyz, supra n 25 at P.88

[15] Luis Wildhaber, 'The European Convention on Human Rights and International Law', I.C.L.Q. 2007, 56(2), 217-231

[16] Xin Zhang, 'Direct Effect of the WTO Agreement: National Survey', Int. T.L.R 2003, 9(2), 35-46

[17] Per Christiansen, 'The EFTA Court', E.L. Rev. 1997, 22(6), 539-553

[18] A. Fatouros, 'International Law in the New Greek Constitution', 70 AJIL 501–503 (1976)
cited in Achilles Skordas, 'Why Greece is not a Safe Host Country for Refugees' IJRL 2004 16 (25)

[19] Ignacio Aurrecoechea, 'Some Problems Concerning the Constitutional Basis for Spain's Accession to the European Community', I.C.L.Q. 1987, 36(1), 14-31

[20] Xin Zhang, supra n 33

[21] Article 98 Section 2 of the Japanese Constitution; Hiroyuki Hata & Go Nakagawa, 'Constitutional Law of Japan', Kluwer Law International, Hague, 1997. P.31-32; Craig VanGrasstek, 'The Consistency of WTO Rules: Can the Single Undertaking be Squared With Variable Geometry?', JIEL 2006 9 (837)

[22] Ecoffard v. Cie Air France 39 I.L.R.151.

Proponents of monism posits that international law is superior[2] to municipal law and there is no constitutional barrier towards the application of international in municipal courts[3] and all organs of government are enjoined to consciously implement the rules of international law within the state.[4] Some examples of monist states shall be discussed.

3:0:1 AUSTRIA

The Austrian Federation Constitution makes elaborate provision for the reception of international law in the state. Article 65 enables the President to negotiate and conclude Treaties.[5] Sometimes the parliament is involved if a Treaty in question as stipulated in Article 50 would alter existing legislation. Article 18 permits direct application of Self-Executing Treaties, which are accorded higher status than existing law, or the Constitution.[6] Moreover, as a European Union member, Treaties concluded within the European Union by virtue of Article 249 of the European Union Community Treaty apply directly in Austria and supersede conflicting or existing statutes in Austria.[7]

3:0:2 SWITZERLAND

The Swiss Federal Constitution came into force on January 2000 and Articles 140(1) (b), 141(1) (d) and 182(2) provides the procedure for the conclusion of Treaties.[8] Treaty making is the function of both the Federal Council which exercises executive powers to negotiate Treaty by virtue of Article 54(1) and the Federal Assembly approves Treaties pursuant to Article 166(2) and authorise the Federal Executive to ratify, but approval is not needed in respect of Treaties within the powers of the Federal Government.[9] It is worthy to note that Article 7(a) of the Federal Statute on the Organisation of Government and the Administration is the legal basis for the Federal Council to conclude Treaties.[10]

It is constitutionally provided in Articles 193(4) and 194(2) that further amendment of the constitution must comply with customary rules of international law and Article 139(3) subjects all popular initiatives to be in conformity with norms of international law.[11] Furthermore, some Treaties are subjected to mandatory referendum in line with Articles 140(1) and 141(1) (d) especially those Treaties that would affect the future of the Swiss state like the EEA Treaty.[12]

The Federal Tribunal has consistently maintained in accordance with Article 191 that Swiss is a monist state and international law is superior to the laws of Switzerland.[13]

3:0:3 FRANCE

Under the French Constitution of 1958, the President is empowered in line with Article 52 to negotiate and ratify Treaties.[14] The National Assembly and Senate authorises the ratification of a Treaty that would affect the sovereignty of France or modify an existing Statute, though, such authorisation have no normative value.[15] Treaties that affect the rights of citizens are required to be published in order to prevail over French legislation.[16] Article 55 gives superior status to international Treaties over Acts of parliament. In *Administration des Dovanes V. Societe Cates Jacques Vabre*[17] it was held that by the provision of Article 52 of the French constitution that EEC Treaty has superior status than French laws

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[1] In Re : Draft Ordinance Modifying Law 6/61 Governing Expropriation 89 L.L.R 151
[2] Alexander Somek, 'Kelsen Lives', EJIL 2007 18 (409)
[3] George Slyz, supra n 25 at P. 72
[4] Louis Henkins, 'The Constitution and U.S Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 Harv. L. Rev. 853, 864 (1987) in George Slyz, supra n 25 at P. 73
[5] D.B. Hollis, M.R Blakeslee & L.B. Ederington (eds.), 'National Treaty Law and Practice' Martinus Nijhoff Publishers, Leiden & Boston, 2005, P. 64
[6] Ibid, P. 67-68
[7] Ibid, P. 69
[8] Ibid, P.658
[9] Ibid, P.639
[10] Ibid
[11] Ibid P. 634-635
[12] Ibid P.655-656
[13] Luzius Wildhaber, 'Switzerland' in Federal and International Relations: The Role of Sub National Units, 249-252 (Oxford: Claredon Press, Hans J. Michelmann & Panayotis Soldatos, eds.), 1990, cited in D.B. Hollis,et.al supra n 44 at P.660
[14] D.B. Hollis,et.al supra n 44 at P. 254
[15] Aust, 'Modern Treaty Law', 2nd ed.,Cambridge University Press, New York, 2007, P.183
[16] V. Kronenbreger, 'A New Approach to the Interpretation of the French Constitution in Respect of International Conventions' (2000) NILR 323-58 cited in Aust, supra n 54 at 184
[17] [1975] 2 C.M.L.R. 336.

3:0:4 NETHERLANDS

The Kingdom of the Netherlands adopts the monist approach, Article 45 of the Constitution empowers the Cabinet to negotiate Treaties and Article 91 stipulates that the approval of the State-General is required for the Kingdom to be bound.[1] However, Article 91 provides that an Act of Parliament may exempt Treaties from receiving the approval of the State-General and in furtherance of Article 91, Article 7 of the Kingdom Act of 1994 exempt some Treaties from parliamentary approval[2] making it possible for those Treaties to apply directly and have higher status than the laws of the Netherlands. *In Re Rauters*[3], it was held that international law has a higher legal value than the laws of the Netherlands.

Within the European Union, the European court of Justice has maintained a monist position as was seen in *Ireland V. United Kingdom*.[4] The practice is towards 'European Monism', which regards European Union Treaties as the supreme laws of the Union and binds all members[5]. Article 24 and 38 of the European Union Treaty provides that Treaties concluded by the European Union are binding on European Union members.

Germany being a member of the European Union and adopting the practice of monism by virtue of Article 25 of its Basic Law makes international law part of the laws of Germany and it is submitted that European Union Treaties also forms part of the integral laws of Germany.[6]

4:0:0 LEGAL ORIGIN OF DUALISM

Dualism originated from the writings of 16th century legal positivist like Herder (1744-1803), Montesquieu (1689-17755), Hume (1711-76), Ferguson (1723-1816) and Milla (1735-1801)[7]. Legal positivism is premised on the notion that the foundation from which law derives its binding effect is the sovereign.[8] Dualism gained momentum by the writings *of Emmerich de Vattel* and *Hegel* where Vattel stated that every sovereign has the freedom to determine the obligation that is binding on it and Hegel based his argument on the notion that the state is a form of metaphysical reality with its own will and fettered with the powers to choose whether it should be bound by law.[9]

Hegelian notion of the 'state-will' influenced *George Jellinek* who advocated the doctrine of Auto-limitation; *Albert Zorn* was also influenced by Hegelian theory which made him to see international law as an 'external state law'.[10] These theories reinvigorated the Austinian theory of legal positivism when in 1832 he stated that international law is not a law.[11]

Jeremy Bentham also emphasized the supremacy of municipal law, which nurtured the writings of modern scholars like *Heinrich Triepal, Strupp* and *Anzilloti*.[12] In England the Blackstonian view of the binding effect of international law was swept away in the 19th century and replaced by the doctrine of parliamentary supremacy.[13] Monism as nurtured by natural theorist lost its grip of Europe in the 19th century and was replaced by the dualist theory.[14]

The incidence of colonialism introduced the concept of dualism in most post-colonial states of the Commonwealth. Hence, the application of international law in dualist entities would depend on the incorporation of such international customs, treaties, conventions or protocols in the domestic terrain of states by means of incorporation.

It must be noted that international law has tacitly recognised the existence of dualism by different

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[1] D.B. Hollis, supra n 44 at P. 485
[2] D.B. Hollis, supra n 44 at P. 489
[3] Judgement of Jan. 12, (1949) N.J. 1949, no. 87, Annual Digest, 1949, no. 193 cited in L.Erades & W.L Gould, supra n 20 at 347.
[4] (1979-80) 2 E.H.R.R. 25; National Pensions Office v Jonkman [2008] All E.R. (EC) 1017
[5] N'gunu N. Tiny, 'Regionalism and the WTO: Mutual Accommodation at the Global Trading System', Int. T.L.R. 2005, 11(4), 126-145; Neil Walker, ' Legal Theory and the European Union: A 25th Anniversary Essay', OJLS 2005 25 (581); Peter G. Xuereb, 'The future of Europe: Solidarity and Constitutionalism: Towards a Solidarity Model', E.L. Rev. 2002, 27(6), 643-662; Dora Kostakopoulou, 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?', OJLS 2002 22 (135); S. Farima, 'Using International Law in Domestic Courts', Hart Publishing, Oxford, 2005, P.197-200.
[6] D.B. Hollis, supra n 44 at P 317; Michel Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism', I.J.C.L. 2008, 6(3/4), 415-455
[7] M.D.A Freeman, 'Llyolds Introduction to Jurisprudence'7th ed., Sweet & Maxwell, London, 2001, P. 120
[8] H.L.A Hart, 'The Concept of Law', Oxford University Press, Oxford, 1961, P. 49 & 97
[9] Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism', EJIL 2001 12 (269)
[10] Ibid
[11] Anthony Aust, 'Handbook of International Law', Cambridge University Press, Cambridge, 2005, P. 3
[12] George Slyz, supra n 25 at P. 75
[13] J. Starke, supra n 26 at P. 540
[14] Vaughan Lowe, 'International Law' Oxford University Press, Oxford, 2007. P. 25

decisions of international and regional courts upholding the principles of immunity of Heads of States,[1] extradition[2] and exhaustion of local remedies.[3]

5:0:0 LAW AND PRACTICE OF THE RECEPTION OF INTERNATIONAL LAW IN DUALIST STATES

5:0:1 CUSTOMARY INTERNATIONAL LAW

Dualist states have constitutional mechanism for the implementation of customary international law or Treaties within their domestic jurisdiction which is common among the Anglo-Saxon and Scandinavian states.[4] Customary rules of international law are recognised and applied by the courts on the condition that such customary rules are not contrary to Acts of parliament or a decision of the apex court[5]. In the United Kingdom, which is a classical example of what is obtainable in most Commonwealth states shall be used to illustrate the situations in dualist states.

The issue of the reception of customary international law was argued in *Buvot v. Barbuit*;[6] and *Triquet v. Bath*[7] where the courts held that the Law of Nations is part of the law of England. Attempt was made to replace the incorporation doctrine with that of transformation in *R.V.Keyn*[8]. But in *West Rand Gold Mining V. The King*,[9] Lord Alverstone maintained that the transformation doctrine holds sway. In *Morensen V.Peters*,[10] Lord Dundein insisted on the transformation theory which was adopted by Lord Atkins in *Chung Chi Cheung V. R*.[11]

Reawakening of the incorporation doctrine was seen in *Trendtex Trading Co.V.Central Bank of Nigeria*[12] where Lord Denning M.R. while reversing his decision in *R. V. Secretary of State for the Home Department, Ex parte Thakira*[13] upheld the incorporation theory. Considering the changing nature of customs, Lord Denning in ***Trendtex Trading Co case*** **(supra)** noted that such changes would be applied by English courts irrespective of the doctrine of stare decisis. This view was adopted in *Maclaine Watson V. Department of Trade and Industry*[14] and approved by Lord Slynn in *Ex parte Pinochet (No.1)*;[15] also in *Ex parte Pinochet (No.3)*[16] it was noted that customary international law is part of the laws of the United Kingdom.

In the United States there are conflicting decisions in respect of the rules of customary international law, in *Paquete Habana case*,[17] customs were recognised as part of the laws of the United States, but recent decisions favours incorporation theory, for instance, in *U.S V. Belmont*[18] customary law was elevated to the status of a Federal law, but in *Boos V.Barry*[19] it was held that customary international law rules are subservient to the constitution.

Other Commonwealth jurisdictions like Canada,[20] Australia[1], Ireland[2], Nigeria,[3] Malawi[4] maintains the

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[1] Arrest Warrant (Democratic Republic of Congo V. Belgium) Case, ICJ Reports, 2002, P.3 at 21-22; Djibouti V. France, ICJ Reports, 2008, Para. 161-180; Ilias Bantekas, 'Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War'J.C. & S.L. 2005, 10(1), 21-42

[2] The Prosecutor V. Semanza, Judgement and Sentence-ICTR-97-20-T[2003] ICTR 2 (15 May 2003)

[3] International Pen V. Sudan, Communication No. 92/93(1995); Ceesay v. The Gambia, Communication No. 86/93 (1995); Fernando Ribadeneira Fernández Salvador V. Ecuador, case 12.267, report 67/00*; Ambatiloes Case (Greece *v.* United Kingdom) 23 ILR 306 ; Interhandle Case (Switzerland v. United States of America) ICJ Reports, 1959, P. 6 at 27; Diallo (Republic of Guinea v. Democratic Republic of The Congo) Case, ICJ Report, 2007, para 42 and 44

[4] Luzius Wildhaber, 'The European Convention on Human Rights and International Law', I.C.L.Q. 2007, 56(2), 217-231

[5] Peter Rowe, 'The Effect on National Law of the Customary International Humanitarian Law Study', C&S Law 2006 11 (165)

[6] (1737) Cases t. Talb. 281 cited in D.J Harris, ' Cases and Materials on International Law', 6th ed., Sweet and Maxwell, London, 2004, P.72

[7] 1764) 3 Burr. 1478 cited in D.J Harris, supra n 76

[8] (1876-77) L.R. 2 Ex. D. 63, cited in D.J Harris, supra n 76 at 73

[9] [1905] 2 K.B. 391

[10] (1906) 8 F. (J) 93. cited in D.J Harris, supra n 76 at 79

[11] [1939]A.C. 160; (1938) 62 Ll. L. Rep. 151; [1939] 1 W.W.R. 232

[12] [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881;

[13] [1974] 2 W.L.R. 34; [1974] 1 All E.R. 415

[14] [1989] Ch. 72; [1988] 3 W.L.R. 1033; [1988] 3 All E.R. 257

[15] [2000] 1 A.C. 61; [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897;

[16] [2000] 1 A.C. 147; [1999] 2 W.L.R. 827; [1999] 2 All E.R. 97;

[17] 175 U.S 677 at 700 (1900)

[18] 301 US 324, 331, 57 S.Ct. 758, 761 (1937)

[19] 99 L Ed 2d 333, 345-7 (1988)

[20] Baker V. Canada (1999) 2 S.C.R 817 at para. 79

legal position that international law must be given legislative effect domestically.

5:0:2 RECEPTION OF TREATIES IN DUALIST STATES

As it is peculiar to classical dualist states, Treaties must be signed and ratified in order to give domestic effect to its operation within the domestic jurisdiction of dualist states[5]. Different systems of incorporation of treaties shall be discussed hereunder with specific examples of dualist states.

5:0:3 SOUTH AFRICA

Customary international law apply as part of the laws of South Africa in accordance with Section 232 of the 1996 constitution and where there is conflict, Section 233 gives primacy to the constitution or Act of parliament.[6] Prior to the coming into effect of the Interim Constitution of 1994, South Africa's system of law has always applied customary international law as part of municipal law.[7] In case of Treaties, the effect of Section 231(2) of the Interim Constitution of 1994 and Section 231(1) (2) of 1996 constitution respectively is that the Executive can negotiate treaties, the National Assembly and the National Council of Province must ratify treaties.[8] Section 231(4) of 1996 constitution enacted the concept of self-executing treaties which is so complex and confusing to determine whether or not a treaty is self-executing.

5:0:4 NIGERIA

The issue of superiority between international law and municipal was raised in *Abacha V. Fawehinmi*[9] where the respondent brought an action under the Fundamental Rights (Enforcement Procedure) Rules 1979 for the enforcement of his fundamental rights as guaranteed under Sections 31, 32, and 38 of the 1979 constitution and Articles 4, 5, 6, and 12 of the African Charter on Human and Peoples' Rights which was incorporated as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990.

The court held that where there is a conflict between Treaties and Nigerian laws, laws of Nigeria shall prevail. This decision was delivered during the military dispensation, it is submitted that Sections 1(1) (3), 12 and 58 of the 1999 Constitution places Nigerian laws above international law; the supremacy of the Constitution is sacrosanct.[10]

It is interesting to note that the African Charter has been accorded superior status in some African countries. In *A.G of Botswana V.Unity Dow*[11] the court in Botswana upheld the African Charter to be a superior law to Botswana's internal law. The Ghanaian court held in *New Patriotic Party (N.P.P) V. I.G.P of Ghana and Ors*[12] that the African Charter is superior to Ghanaian laws.

5:0:5 UNITED KINGDOM

British constitutionalism has been described as a dualist de facto by Rivka[13], which supports Dicey's position that Britain is a dualist state.[14] With respect to the application of the European Union Treaty and its consequent obligation upon the United Kingdom and its citizens, the position is that parliamentary approval is necessary.[15]

In Scotland, the Scotland Act 1998 of Scottish Administration enables Scotland to abide by United Kingdom's Treaty obligation in subject matters that have been devolved to Scotland; and in Northern Ireland the situation is the same under the Northern Ireland Act of 1998 which makes both Scotland and Northern Ireland to follow the

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[1] Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 287

[2] William Phelan, 'Can Ireland Legislate Contrary to European Community Law' E.L. Rev. 2008, 33(4), 530- 549

[3] Ibidapo v. Lufthansa Airways (1997) 4 NWLR (PT. 498) 124 at p. 150

[4] Chakufwa Chinhana v. The Republic M.S.C.A, Criminal Appeal No.9 of 1992

[5] Marco Roscini, 'Great Expectations: The Implementation of the Rome Statute in Italy', ICJ 5 2 (493)

[6] J. Dugard, supra n 27

[7] South Atlantic Island Department Ltd V. Buchan 1971 (1) SA 234 © at 238 B-F; Nduli v. Minister of Justice 1978 (1) S.A 893 (A) at 906 B

[8] Azapo V. President of the Republic of South Africa 1996 (4) SA 671 (cc) at 688 (para. 26)

[9] Abacha V. Fawehinmi (2000) NGSC 1

[10] D.O Aihe, 'Selected Essays on Nigerian Constitutional Law', Idodo Umeh Publishers Ltd., Benin City, Nigeria, 1985. P. 29

J.O Akande, 'Introduction to the Nigerian Constitution', Sweet & Maxwell, London, 1982. P.12

P. A. Oluyede, 'Nigerian Administrative Law', University Press, Ibadan, 1988, P. 53

B.O. Nwabueze. 'Nigeria's Presidential Constitution 1979-1983: The Second Experiment in Constitution Democracy', Longman Inc, New York, 1985, P. 14

B.O. Nwabueze, 'Constitutional Law of the Nigerian Republic', Butterworth, London, 1964, P. 106; J.A. Yakubu, 'Constitutional Law in Nigeria', Demyaxs Law Books, Ibadan, 2003, P. 44-45

[11] (1998-) HRLRA P. I

[12] No. 4/ 93 delivered on (30/11/93) cited in Abacha V. Fawehinmi supra n 99

[13] Rivka Weill, 'Dicey was not Diceyan', C.L.J. 2003, 62(2), 474-493

[14] Rivka Weill, 'We the British People', P.L. 2004, Sum, 380-406

[15] M.N.Shaw, supra n 5 at 149

dualist pattern of the United Kingdom.[1] Similarly, Article 29(6) of the Irish constitution maintains a dualist system.[2]

5:0:6 UNITED STATES

Article 11 of the constitution empowers the President to enter into international agreement and later sign such Treaty into law after approval from the Senate and Article V1 Section 2 deems such Treaties to be equivalent to federal laws and superior to state laws.[3] However, where there is a conflict between an Act of Congress and a Treaty, the former shall prevail.[4]

Under United States practice, there are self-executing Treaties which the constitution did not expressly provide for. Self-executing Treaties have caused so much confusion in the United States legal system, though; self-executing Treaties apply without any ratification while Non-self executing Treaties needs legislative approval[5]

5:0:7 SOUTH AMERICAN STATES

The Brazilian Constitution makes provision for incorporation of Treaties, by virtue of Article 5(2) of the constitution; Treaties are subordinate to the constitution.[6] The provision of Recital V111 to Article 84 empowers the President to negotiate Treaties, but it must be ratified by the parliament before Treaties apply internally.[7]

In Uruguay, Article 256 and 239 gives primacy to the constitution over international law[8] while in Argentina the issue of supremacy was resolved by the Supreme Court in favour of municipal law.[9]

5:0:8 ASIAN STATES

Within the Asian block, dualism reigns supreme. In India, executive powers are exercised pursuant to Articles 52 and 53 of the Indian Constitution and by virtue of Article 73 executive powers extend to legislative functions in respect of making of Treaties.[10] Article 253 requires the Union Parliament to make laws for the implementation of Treaties and such Treaties are by the provision of Article 51 accorded the status of Directive Principles of State Policy.[11] In *Maganbhai Ishwarbhai Patel V. Union of India*,[12] the Supreme Court held that where a Treaty does not affect the justiciable rights of citizens no legislative measure is necessary, but legislative approval is absolutely necessary if such Treaty restrict the rights of citizens.

In Singapore, any international Treaty must be incorporated before national courts will apply it as domestic law.[13] Also, in Hong Kong Article 151 of the Basic Law requires formal incorporation of Treaties into the laws of Hong Kong.[14]

The 1954 Constitution of the Peoples' Republic of China did not make explicit provision for the application of Treaties,[15] but under the 1982 Constitution Article 89(9) empowers the State Council to conclude Treaties and agreements while Article 67(14) provides that the Standing Committee of the National Peoples' Congress ratifies and abrogate Treaties; the President of the Republic in line with the decision of the Standing Committee of the National Peoples' Congress ratifies and abrogates Treaties.[16]

5:0:9 ARABIC STATES

In Arabic states dualism is widely entrenched in their legal system. With specific reference to World Trade Organisation Agreement, the Arab League adopts the monist approach.[17] Other international Treaties must be ratified by their parliamentary equivalent.[18] For instance, Article 37 of Bahrain's Constitution makes provision

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[1] Aust, supra n 54 at P.192

[2] Ignacio Aurrecoechea, 'Some Problems Concerning the Constitutional Basis for Spain's Accession to the European Community**',** I.C.L.Q. 1987, 36(1), 14-31; Society for the Protection of Unborn Children (Ireland) Ltd v Grogan [1990] 1 C.M.L.R. 689; [1989] I.R. 753

[3] M.N.Shaw, supra n 5 at 161

[4] Breard v. Greene 140 L. Ed. 2d 529(1998)

[5] Foster v. Neilson 27 US (2 Pet.) 253, 311, 7 L.Ed. 415(1829) cited in in M.N. Shaw, supra n 5 at 162

[6] John A.E. Vervaele, 'Mercosur and Regional Integration in South America'**,** I.C.L.Q. 2005, 54(2), 387-409

[7] Ibid

[8] Ibid

[9] Ekmekdjian, Miguel Angel v. Sofovich, Gerardo & ors, decision of 7/7/92, La Ley, 1992-C, 543 cited in John A.E. Vervaele, supra n 111

[10] D.B Hollis, supra n 44 at P. 351

[11] Ibid

[12] A.I.R 1969 S.C.at 784

[13] Xin Zhang, 'Direct Effect of the WTO Agreements: National Survey', Int. T.L.R. 2003, 9(2), 35-46

[14] Ibid

[15] Hungdah Chiu, 'The People's Republic of China and the Law of Treaties', (1972) Harvard University Press, P.6-7

[16] D.B Hollis, supra n 44 at P. 156-7; Wang Guiguo & M.O John, ed., 'Chinese Law', Kluwer Law International, Hague, 1999, P.11-15

[17] Xin Zhang, supra n 118

[18] Ibid

for parliamentary approval[1] and Article 151 of the Egyptian Constitution of 1971 (as amended in 1980) provides that the President shall conclude Treaties and communicate them to the Peoples' Assembly and the Treaties shall have force after ratification and publication.[2]

6:0:0 CONCLUSION

In theory, the relationship between international law and municipal law remains controversial. Different schools of thought have divergent views on the theory of supremacy between international law and municipal law and the views of the proponents of these schools of thoughts differ substantially based on the legal perception of scholars as influenced by their political or pious backgrounds.

Most jurisdictions have tested the question of supremacy in municipals courts and the courts in monist states are of the opinion that international law is superior to domestic laws. But in dualist jurisdictions, the courts have consistently maintained the position that international law is given effect to operate domestically by municipal law and the legal implication or logical conclusion to draw from that assertion is that municipal law or constitution confers validity on international law, therefore, municipal law is supreme and supersedes international law.

After careful evaluation of the theories on supremacy, it is important to note that in practice states have resolved the issue constitutionally or through judicial interpretation. Proponents of monism maintain the position that international law is superior while dualist emphasise the superiority of municipal law over international law in terms of conflict between the two systems, but the theoretical framework of resolving the issue of primacy between international law and municipal law remain elusive.

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