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LL.M Notes

Law and Justice in Globalizing world

1. The Role of International Law in Ensuring Justice in a Globalized World

Introduction By carefully reexamining fundamental international legal concepts and structures like boundaries, sovereignty, legitimacy, citizenship, and territorial control of resources, the international law of a society of states may be reshaped into the global public law of a global society. Globalization is transforming the nature of international social relations, hastening the demise of the society of states model, and calling for a fundamental shift in the social theory of international law toward a global society of persons by effectively eliminating both time and space as factors in social interaction. Globalization demands that the basic normative standards for international law be expanded from the domestic to the global level and that international law be recast as global public law as a result of these developments. In this work, even on the strictest communitarian grounds, the author examines how globalization is changing the structure of social ties at the national and international levels, paving the path for global justice and community. The article examines how Public International Law has evolved, with increased participation and communication becoming a source of power. Globalization is not a new phenomenon. However, the current phase of globalization, facilitated by the collapse of the iron barrier and technological advancements, raises the question of how to explain the growing global legal community using international legal theory.

Obstacles to transforming the revised criteria into treaty obligations The first observation is that the criteria were initially written to be applied to “global partnerships” as understood in Millennium Development Goal 8, and only expanded at a later phase to all aspects of the right to development, a process to be continued in the ongoing revision of the criteria. For most States, the obligations a treaty might establish in relation to such “global partnerships” are the principal motivation for a treaty. However, in international law a treaty is an agreement between two or

more States or other subjects of international law. No international institution has ratified any of the human rights treaties and the obligations of these institutions are a matter of some discussion. It is obvious that no non-State subjects of international law, such as the World Trade Organization (WTO), the Association of Southeast Asian Nations (ASEAN), the World Bank or other entity, would be solicited to be parties to any convention on the right to development. Their cooperation might be provided for, as was done with respect to the specialized agencies in part IV of the International Covenant on Economic, Social and Cultural Rights or to international organizations in the case of the Convention on the Rights of Persons with Disabilities, but the obligations would

be those of States parties to an eventual convention rather than “global partnerships” as such. Globalization is a controversial topic, with different opinions on its scope, impact and nature.

Transforming criteria into treaty norms: a thought experiment6 It is theoretically possible to move quickly from the current state of development of normative standards with respect to the right to development to an omnibus treaty by transforming the criteria as further revised into articles of an international convention on the right to development. However, such a course of action might not be in the best interests of advancing the right to development owing to obstacles arising from the nature of the criteria and to the limitations of a general convention as a tool of international law. After examining the obstacles to transforming the revised criteria into treaty obligations (sub-sect. A), this part of the chapter will attempt a thought experiment to see what articles of a right to development treaty might look like if those obstacles were overcome (subsect. B). at its widest, it refers to a multidimensional process of human action that extends globally and across multiple cognitive frameworks. Reference. The phenomenon is likely to contain both "real" and "ideational" components, which interact and influence each other. Globalization is a normative term that generates diverse viewpoints on its acceptability, sustainability, and governance. Its implications for international law are both vast and ambiguous at times. Globalization is expected to have a considerable impact on international law due to its all-encompassing nature. Similarly, it should after the demise of the Holy Roman Empire, public international law has always denied the possibility of really global administration and interaction. International law focuses on the existence and status of states and their ties with other governments. International law is particularly vulnerable to a phenomenon that threatens a state's legitimacy and function. The impact of globalization on international law is unpredictable and likely to remain so for a long time, as it is tied to the evolution of the law itself. International law is particularly vulnerable to a phenomenon that threatens a state's legitimacy and function. The impact of globalization on international law is unpredictable and likely will stay so for a long time, and are tied to the evolution of the international law itself.

Function of International Law in global issues: To establish a stable and peaceful international order, states must prioritize their citizens' dignity, human rights, freedom, and the protection of shared goods. The sovereignty of states is often recognized as the foundation of such a system. The community of states bears secondary responsibility for the behavior of its recognized

sovereign members. Transnational human rights guarantees are an illustration of the international community's responsibility to uphold a civilizational norm among nations. The current United Nations organization does not appropriately reward national governments for developing and maintaining global common goods including peace, international security, justice, and environmental sustainability. Individuals lack sufficient incentives to engage in collectively responsible activity. Creating incentives should be a primary goal in any UN reform.

Promoting Peace and Stability: International law's main goal is to promote stability and peace in global matters. Treaties and agreements, like the United Nations Charter, serve as the foundation for maintaining international peace and security. They describe states' rights and obligations, restrict the use of force, and offer methods for peaceful conflict resolution. International law serves as a platform for diplomacy, negotiation, and dialogue, minimizing the likelihood of violent conflicts and promoting national stability.

Resolving Disputes and Promoting Justice International law serves as essential for resolving conflicts and encouraging global fairness. Arbitration, mediation, and adjudication are included as methods for resolving conflicts peacefully. The International Court of Justice and the International Criminal Court are crucial in holding offenders of human rights and crimes responsible. International law sets legal norms to ensure accountability for individuals and governments, irrespective of their position.

Protection of Human Rights and Advancing Global Justice: Protecting human rights is a crucial part of international legislation. International gives, such as the Universal Declaration of Human Rights, define the rights that must be protected internationally. Both people and organizations can use international law to seek compensation for human rights violates, discrimination, and unfair treatment. It provides a framework for campaigning for the rights of marginalized, vulnerable, and oppressed people, as well as advancing global justice. **Regulating Global Commons and Preserving the Environment:** International law protects the high seas,

outer space, and the environment, including guidelines set by treaties such as the UN Convention on the Law of the Sea for marine resource use and conservation. Global environmental agreements address issues like climate change, biodiversity protection, and pollution control. International law promotes collaboration and joint action to safeguard our common planet through the establishment of regulations and laws.

Fostering Cooperation and Collaboration: Treaties and agreements in international law promote global cooperation in areas such as nuclear nonproliferation, disarmament, trade liberalization, and public health. Institutions like the United Nations, World Trade Organization, and World Health Organization provide forums for states to discuss, negotiate treaties, and work together on global issues, facilitating the sharing of resources, knowledge, and information for collective progress towards common goals. International law has an absolutely critical part in world affairs. It serves as the cornerstone for international peace, stability, fairness, and collaboration. International law helps to create a more just, equitable, and harmonious world order by supporting peaceful conflict resolution, preserving human rights, regulating global commons, and encouraging collaboration. Despite its flaws and difficulty in enforcement, international law continues to be an important tool for addressing global issues and increasing humanity's collective welfare. We may work toward a better future for all by continuing to adhere to and improve international law. Circumstantial Justice at the International Level Globalization is creating the same situations for justice as Rawls described at the local level. This is an important thing to remember. Globalization has led to increased competition for the same resources on a global scale, all on the same piece of land: our planet. Globalization has revealed that government actions, as well as personal choices, have a significant impact on the living conditions of others. Commercial globalization allows us to directly profit from the economic and social conditions of other countries. International justice situations illustrate the importance of justice on a worldwide scale, bolstering the case for global society. Another idea posits that globalization is fostering a worldwide community rather than just an international one. Empirical Understanding Of Globalization Impact In the 20th century, worldwide average income per person increased significantly, even though this was not consistent across nations. Over many years, the wealth gap between rich and poor countries has been increasing. The most recent World Economic Outlook analyzes 42 Nations for which data from the entire twentieth century are available. The report indicates that, while per capita production has improved, wealth distribution has become more uneven than at the turn of the century. This has given greater weight to measures geared

primarily at reducing poverty. Countries with a strong development track record and effective policies could expect to see long-term poverty reduction, as new data show that there is at least a one-to-one relationship between growth and poverty reduction. Implementing supportive of the poor measures, such as targeted social investment, can boost economic growth and lower poverty rates. It's concerning that the difference between the

richest and poorest has grown. The world's extreme poverty rate is alarming. There is no reason to believe that globalization is to responsible for the disparity, or that there is no means to improve matters at this moment.

Conclusion: Findings and Suggestions for improvement Globalization presents both a threat and an opportunity in terms of international law. Globalization has the potential to require significant normative efforts, which international law appears to be capable of fulfilling. Globalization has a significant impact on the themes, purposes, and core of international law, making it difficult to regulate. Individuals are recognized as subjects of international law for their contributions, both positive and negative. Individuals may be held personally liable under international law for certain activities in the worst-case scenario. International criminal culpability appears to be substituting more traditional state blame as a means of attribution. The development of private non state actors has increased the significance, type, and quantity of international organizations. International organizations have been around since the late 1800s. It has influenced existing institutions and encouraged the creation of new ones, emphasizing the global nature of certain challenges, including inter-state and transnational issues. Previously, international law was primarily focused on inter-state issues like war and peace, or diplomatic ties. Although international law continues to address such issues, globalization has significantly transformed how it does so. Globalization has significantly impacted the control of violence under international law. While inter-state wars remain a key worry for the international community, large-scale incidences of non-international violence, such as internal conflicts or mass crimes committed by the sovereign, have drawn attention both within and without the state.

International relations theory has historically been unduly concerned with global (dis)order. Global justice academics have helped to broaden the scope of IR theory by shifting the focus to humans on a planetary scale, allowing them to confront challenges of global cohabitation in novel ways. Despite hints of progress in academia, states appear to be more concerned with managing conflict, distrust, and chaos than reaching global agreements and treating one another equitably.

As a result, global justice as an issue has been underrepresented in policy, and global justice studies has yet to gain the prominence of major IR ideas like realism or liberalism.

1. Globalization of Law and Practices

The term 'globalization of law' refers to the degree to which the whole world lives under a single set of legal rules. Such a single set of rules might be imposed by an international body, adopted by global consensus, or arrived at by parallel development in all parts of the globe. In today's world of increasing international trade and inter-dependence the need for transnational law has increased many folds. Since more and more countries, open their economy, either partially or completely, there is a growing need to recognize and work towards a uniform system of law. This process of globalization is evident in all facets of law. It is the intent of this paper, to bring forth the concept of globalization of law in regard to different facets and discuss the merits or demerits of such globalization and harmonization.

Globalization of Commercial and Contract Law

There are various connotations to the term 'Globalization of law'. It may be viewed as a concomitant of the globalization of markets and the business practices of the multi-national corporations that operate in those markets. There has been some movement toward a relatively uniform global contract and commercial law. It is well established that contracts are a kind of private lawmaking system. By that we mean that a contract may be defined as a law between the parties to the contract. The two or more contracting parties create a set of rules to govern their relationships, as laid down under the terms of their agreement. In international trade too, the parties enter in contracts and the contracting parties invariably agree to submit to a nongovernmental arbitration mechanism or the courts of some particular nation state, or both, to resolve contract disputes. They may also chose the governing law of the contract under which any contract dispute between them shall be resolved. In today's world of inter-dependence and international commerce, there is increasing importance of growth of harmonization of international commercial law. Most of the countries have now recognized the need for a uniform, predictable and transparent system of law for encouraging foreign investment and international trade with other countries. As a result of this, the courts and law of most of the countries recognize

and enforce the judgments of the others. Hence there is a tentative movement towards the formulation of transnational commercial law through contracts.

Towards a definition of transnational law

The transnational or a national law, in its purest form, is defined as the law that has been created and accepted beyond the rigid boundaries of the West phalian model of state or as a result of the

international law. In other words, transnational law is a "privatised law" created as the result of the private actions of the individuals. The example of such form of laws can be the contractual obligation undertaken under UNIDROIT Principles applied between the international merchants or the Islamic law of contract employed between the parties adhering to Islamic Banking and Finance15. On the other hand, the concept of transnational law in its broadest understanding is proposed by Philip Jessup in 1956. In his lectures delivered at Yale Law School, he proposed that the doctrinal boundaries of both the private international law and the public international law should give way to a broader concept of "transnational law". Therefore, Jessup's definition of transnational law includes "all law which regulates actions or events which transcend national boundaries". Although Jessup's analysis is vital as global conduct is now regulated by law and policies that arise from many different sources, this lens propose a superficial eclipsed role of state and international law. However, given the present international scenario, such assertions seem too aspirational in the contemporary political reality. Therefore, there is a need for providing a more nuanced definition for the transnational law that neither ignore the changing realities of the contemporary world nor limits itself to impractical narrowness. Glenn, in his comprehensive comparative analysis of world's leading legal traditions, both religious and secular, rejects the idea of nationstate law in favour of transnational law which he terms as "cosmopolitan law". In Glenn's methodology, each legal tradition is analysed in terms of its institutions setup and substantive law, its foundational principles and techniques, its understanding of the idea of "adaptive changes", and its teachings about engagement with other traditions and peoples. The key component of the idea of a legal tradition is law as ideas, which are not always institutionalized as social practices. Thus, the idea of legal tradition is characterized as non-conflictual and compatible with new and inclusive logic forms, beyond the traditional idea of "right to co-existence" towards "sustainable diversity" in law. For the purpose of understanding transnational.

law, the study of norms alone is not enough, applying equally to studies focused on theory and

“aw in context” and to broader studies that analyse actual practices and institutions. Under this definition of transnational law, it is important here to distinguish between transnational law and international law. International law is that branch of law whose primary function is the regulation of international relations. It emerges mostly out of the consent and practice of the state, through the signing of the treaties by the states or by the state action coupled by opinio juris. However, various other international organizations, non-governmental organizations and, to a lesser extent,

individuals also contribute to the development of the international law. Another way for the creation of binding law at international level is through the principle of good faith. Thus, the states follow certain practices, prohibition or boundaries of permissibility in good faith. The states feel obligated to follow its customary practice in good faith. It is the good faith which ensures that the state must develop the commitment it signed in the treaty. Apart from this, state respects the protection of human rights, protection of the environment and strives for the peaceful settlement of international disputes under the principle of good faith. Therefore, this principle has emboldened the rights and duties of the state towards other states, international organizations and individuals, including environmental and other global concerns. However, the enforcement mechanism and adherence of international legal order are highly dependent on the cooperation and commitment of the states. Without understanding the link between international law and state action, scholars cannot hope to give fruitful analysis concerning compliance of international law by states. Compliance in international law comes out of two primary concerns; either because of the concern of the reputation or to prevent direct sanction that follow the violation of international law, particularly for the less-powerful states. Therefore, it can be argued that, although the international legal order has developed in leap and bound and has been immensely influenced by the creation of international organizations such as United Nations and human rights case-law, global terrorism and environmental concerns, the centre of all the discourse still lies within the boundaries of the state. Transnational law, instead, is the branch of law that deals with the protection of private interests beyond the encompassing idea of the state. It emerges and grows with minimum interference and assistance of the state, and its compliance mechanism is ensured without much interference of the state authority. Transnational law dealing with trade, as discussed and dealt in this paper, can also be distinguished from mercantile law or lex mercatoria. Lex mercatoria refers to the collection of norms, procedures and institutions that have been developed by and for global commerce, mainly by the merchants and the parties of the transnational trade without any state interference. The foundational theory of the development of uniform rules of trade independently, i.e. without the role of the state, is highly contested. There is a fine line of distinction between transnational law and lex mercatoria. However, the concept of lex mercatoria shares important overlapping with the transnational law jurisprudence. Although lex mercatoria has been passionately projected as the proper law of trade by some legal scholars, the overwhelming majority believes that these rules can, at best, be called general principles or norms of contract

rather than a proper law of contract. The controversies surrounding the origin and development of lex mercatoria makes one precautious to apply lex mercatoria as the proper law governing the commercial contract. Transnational laws have instead continued to be applied in arbitration forums for more than three decades and continue to develop through the increasing power of the non-state actors in international conduct in specific private issues like BIT regimes and WIPO structure for the protection of intellectual property. Transnational law must also be distinguished from its juxtaposed concept of localized law and practices of the society and the community. In the words of Erich, these are the "living law" or the "law in action" in the society28. Chiming has famously argued that there is a third world within the third world29. Thus, there is a need for distinguishing between the phenomenon of transnationalisation of law and localization of law. These two paradoxically opposed processes seek to ensure justice from the two extreme points of observation. For transnational law, the position of departure is from the global to the local. It talks about the universality of values, upholding the tried and tested best practices and norms, ensuring fair and equitable treatment of the subjects and objects of law. The localization of law seeks instead to look into the rights and interests of the individual from the local level. It seeks to empower the local communities to guard their interest against the state and global hegemonic interests towards decentralization and fragmentation of laws, in order to address local needs. Scholars in transnational law assert that the local struggles and claims such as mining and community issues have emerged in the global policy arena, particularly in the global South. As such, the global policy arena relating to the corporate and local community rights over their natural resources is characterized by contesting the regime of transnational law. This phenomenon can be seen in the protection of the rights of the tribal, indigenous communities and the laws of the indigenous or cultural communities beyond the idea of the state and international agencies.

Conclusion

The impact of transnational law on the effect of globalization cannot be ignored. It has a vital role in the running of global affairs and securing the rights of the individuals regarding their private

affairs and human rights claims. Simultaneously, this calls for a precautious approach towards transnational law in the uneven world.

2. Origin of Common Law

Introduction

Common Law is said as a fundamental legal system which has helped many countries shaping its judicial landscape, especially those who have been historical ties to UK. Common law was originated in medieval England and is set apart by its dependence on judicial precedents and decisions instead of statutory laws. This system has been changed and progressed with the passage of time, starting from the amalgamation of different local court practices and customs in the 12th century in the period of influence of King Henry II.

The advancement of Common Law can be seen as a dynamic process that is subjective to economic, social, and political changes. It has been adapted through the concept of stare decisis, where courts generally follow precedents. These precedents are put in place by previous rulings to make sure predictability and consistency in law.

Some common examples of common law can be found in countries like the United States, Australia, and Canada. In jurisdictions where common law is practiced, landmark cases have played a pivotal role in shaping the legal landscape. These cases do more than just resolve individual disputes; they establish significant legal principles that serve as precedents for future judicial decisions. Understanding common law is essential for appreciating how past judicial decisions influence current legal practices and how this system evolves to address contemporary needs.

Stare Decisis?

One fundamental tenet of the judicial system's hierarchical structure is the doctrine of precedent. A court's ruling or judgment that is referenced as support for the underlying legal concept is known as precedent. The idea that similar cases ought to be resolved similarly is the foundation of the precedent doctrine, commonly referred to as stare decisis, or "stand by the decision."

Article 141 of the Constitution of India

Once our Constitution came into effect after independence, Article 141 was put into effect, strengthening the standing of court precedents in the Indian law system.

Article 141 stipulates that any court operating within the borders of India must follow the law issued by the Supreme Court.

The declared law must be interpreted as a legal concept derived from a Supreme Court ruling or interpretation of the law, which determines the outcome of the case.

Article 141 lacks a proviso or exception that would enable the Supreme Court to declare what constitutes a precedent that cannot be followed.

After a verdict is rendered, the Supreme Court's involvement comes to an end, and Article 141 takes over.

A ruling issued by the Supreme Court is not final and binding.

Only the ratio decidendi portion of the ruling is legally binding and will be taken into account when making decisions on similar situations and facts.

Definition of Common Law

Common law is defined as a legal framework in which rulings from courts set precedents that direct matters that come before them. It differs from civil law systems based on codified legislation, having its origins in England. By interpreting the law and applying previous decisions to new instances, judges are essential in establishing a framework for the law that is both consistent and flexible. These precedents alter throughout time to reflect shifts in cultural norms and values. Because of common law's adaptability to changing circumstances and new concerns, the legal system is able to stay effective and relevant in dispensing justice.

common law important

Common law gives some latitude for interpretation but emphasizes precedent. A common-law system has the advantage of allowing the law to be modified to address circumstances that the legislature had not previously considered.

Origin of Common Law in India

In India, the emergence of common law dates back to the British colonial era. Here's a quick rundown of how it developed:

Early History

Pre-Colonial Period: Prior to the British invasion, India has a variety of legal systems. Muslims were controlled by Islamic law and Hindus by Hindu law. Local traditions and customs also had a big impact on how justice was carried out.

British East India Company

Arrival of the British (1600s-1757): After concentrating on trade at first, the British East India Company began to impose governmental authority over areas of India.

Early Judicial Developments: The courts established by the East India Company were designed to settle conflicts between native workers and British people. Originally, the local laws and customs served as the foundation for the judicial systems.

Establishment of British Rule

Regulating Act of 1773: This Act resulted in the Supreme Court of Judicature being established in Fort William in Calcutta. It signaled the start of India's official adoption of British legal ideas.

Charter Act of 1833: The Law Commission was established as a result of this Act, which also consolidated British India's government and gave it authority to codify and combine Indian laws.

Introduction of Common Law

Codification of Laws: A number of statutes were codified with the help of the Law Commission and legal authorities like Thomas Macaulay. Important instances consist of:

Bharatiya Nyaya Sanhita (BNS) (1860)

Indian Contract Act (1872)

Bharatiya Sakshya Adhiniyam (1872)

Judicial Reforms: The British established a judicial hierarchy, with the Privy Council serving as England's highest court of appeal. As a result, a common law-based judiciary was founded.

Post-Independence

Continuation of Common Law: The common law system remained the cornerstone of India's legal system even after the country attained independence in 1947. Adopted in 1950, the Indian Constitution upheld several common law foundations.

Supreme Court of India: The Privy Council was superseded as the highest court of justice by the Supreme Court, which was founded in 1950.

Modern Influence

Integration of Local and Common rules: The legal system in India today is a hybrid that combines personal and common law rules that are relevant to many groups with common law principles.

Key Features of Common Law in India

Adversarial System: Parties submit their claims to an unbiased judge in an adversarial judicial system.

Precedents: Judicial rulings are binding on subordinate courts and act as precedents.

Judicial Review: Laws that violate the constitution may be examined by the judiciary and declared unconstitutional.

India's legal structure has been significantly shaped by the common law system, which maintains uniformity and stability while taking into account the nation's many cultural and legal traditions.

What is an example of common law?

One example of common law in practice today is the idea of common-law marriage, which grants couples who are not legally, married the same rights as those who possess a marriage license if certain requirements are satisfied.

Final Discussion

In the end, common law can be said as an introductory element of several legal systems that has evolved over the period of time. The origin of common law in the English legal system is influenced by Norman traditions as well as Anglo-Saxon. This has developed a solid framework

prioritizing judicial interpretation and precedent. Through the principle of stare decisis, common law ensures consistency and fairness in legal rulings by adhering to established case law. While it is not the only legal framework in use today, its impact is profound, particularly in countries like the United Kingdom, Canada, Australia, and India.

The examples of common law in action, such as its role in handling criminal cases, marriage laws, and even specific instances like the Namibian Supreme Court's ruling on adultery, highlight its

adaptability and relevance. Common law continues to evolve, reflecting societal changes and new values, thus maintaining its significance in modern legal systems. By understanding its definition, origins, development, and practical applications, we gain a comprehensive appreciation of how common law shapes and sustains the rule of law in various jurisdictions.

Feature	Common Law	Civil Law
Written constitution	Not always	Always
Judicial decisions	Binding	Not binding on 3rd parties; however, administrative and constitutional court decisions on laws and regulations binding on all
Writings of legal scholars	Little influence	Significant influence in some civil law jurisdictions
Freedom of contract	Extensive – only a few provisions implied by law into contractual relationship	More limited – a number of provisions implied by law into contractual relationship
Court system applicable to PPP projects deal with these issues	In most cases contractual relationship is subject to private law and courts that	Most PPP arrangements (e.g. concessions) are seen as relating to a public service and subject to public administrative law administered by administrative courts

Civil Law Systems - Key Administrative Jurisprudence that can impact PPP arrangements

In many civil law countries a separate administrative law governs PPP arrangements. It is important to seek local legal advice to check whether these rules apply in a particular civil system. It is also important to note that in a civil law jurisdiction, unless the contract specifies that the parties have agreed to arbitration, the contract will be enforced by the administrative courts. Some of the key administrative rules that apply to delegated management arrangements are listed below.

Governments may wish to include these rules in the arrangement, and when they are part of the underlying law it may not be necessary to repeat them in the contract. But relying on just the underlying law is problematic because the rules are sometimes ambiguous. For example, the jurisprudence on restoring the “financial equilibrium” of the contract is not clear on what “financial equilibrium” really means.

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Conclusion- A contract that takes a background administrative law principle and spells out exactly how it is to be applied will generally be effective. But, changing or overriding an administrative law principle may or may not be legally possible—that would need to be checked. For example, it may not be possible to completely remove the ability of a contracting authority to unilaterally change service standards. In France the law makes void any attempt to override the contracting authority's ability to unilaterally cancel a contract. Some civil law codes also contain mandatory notice periods before termination for breach of contract that cannot be avoided or overridden.