Proceedings of the International Conference on Global Politics and Socio-Humanities (ICGPSH 2023)
DOI: 10.54254/2753-7064/12/20230049

General Application of International Treaties in China

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Abstract: The world today is undergoing major changes unprecedented in a century. World multipolarization, economic globalization, social informatization and cultural pluralism are developing in depth, and the pace of reshaping the global pattern and international order is accelerating. As an objective historical process, the globalization of law has also become an irreversible trend of the times, which undoubtedly challenges the traditional theory of the relations between international law and domestic law. Under such a new world pattern, China pursues and advocates a new type of international relations and values, and has always attached great importance to the implementation of international law and related international obligations. However, in China, the study of how to apply treaties is limited to theoretical discussions, there are many uncertainties in judicial practice, and there are still legislative gaps in the hierarchy and method of treaty application in the domestic legal system, which are all issues that need to be solved urgently.

Keywords: application of international treaties, transformation, adoption

1. Introduction

International law, known as Law of Nations [1] in the past, has been given many definitions, and these understandings and definitions have changed over time. With the growing closeness of the international community, international law began to gradually integrate into the domestic legal order, with the result that it played an increasingly prominent role in domestic law. Nowhere is this more evident than in international treaties, many of which must be implemented in domestic law in order to enter into force.

In applying treaties domestically, a State needed to consider, on the one hand, how to fulfil its international obligations while preserving the sovereignty of the State, and on the other hand, it needed to strike a balance between principle and flexibility in establishing a regime for the application of the treaty.

With the continuous improvement of its international status, the number of bilateral and multilateral treaties concluded by China has increased year by year. The question of how to apply international treaties with different contents has become a hot research issue in the field of international law in China. However, China has not yet directly incorporated international law into its domestic legal system, which creates obstacles to its cooperation with other countries. In view of this situation, China needs to establish a sound and systematic treaty application system as soon as possible.

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DOI: 10.54254/2753-7064/12/20230049

On the basis of collating and reading domestic and foreign literature, this paper will discuss the general principles of domestic application of international treaties from a macro perspective, point out the theoretical and practical problems in the application of treaties in China, and finally put forward some personal suggestions for improving the treaty application system.

2. The Relationship Between International and Domestic Law

2.1. Scholars' Theoretical Study of the Relationship

According to the literature of international law scholars, there are generally two traditional theoretical claims on the relationship between international and domestic law: dualism and monism.

Dualism holds that the relationship between international law and domestic law is relatively independent. International law is not directly binding on domestic law, nor does domestic law have a direct impact on international law. The main representatives of the doctrine are Triepel and Strupp. In contrast, Monists like Kelsen and Lauterpacht argue that international law and domestic law belong to the same legal system [2]. Wang Tieya summarized it in his book *Guojifa Yinlun* as "two factions and three theories".

Most scholars, believing that neither traditional dualism nor monism adequately reflect the actual practice of the State. Sir Gerald Fitzmaurice argued that the entire monist-dualist controversy is untrue, artificial, and completely irrelevant [3]. A third approach, formulated by him and Rousseau amongst others, denies that there is any common field of operation between international and domestic law, namely, that there is no situation in which one system is superior or inferior to another, since each system is supreme in its own domain [4].

However, the inability of States to act domestically in the manner required by international law may prevent States from fulfilling their responsibilities at the international level. Rousseau advocated a similar view [5]. This approach to problem solving does not go deep into theoretical considerations, but is intended to be practical and consistent with most State practices. O'Connell proposed the Theory of harmonization, arguing that international and domestic laws are harmonious and do not contradict each other [6].

Chinese scholars have adopted new ideas on the relationship between international and domestic law. They often fiercely criticized monist and dualist theories and developed dialectical views.

Zhou Gengsheng's "theory of natural coordination" pointed out that careful adherence to international obligations by states would automatically lead to a coordination of international and municipal law [7]. The "idea of the harmonization of legal norms" advocated by scholars Li Long and Wang Xigen believes that the harmony and consistency of legal norms is a theoretical starting point for accurately grasping the relationship between domestic and international law. The inherent "universality" of law and the basic requirements of a society governed by the rule of law for the integration of legal systems determine that domestic and international law must and can only coexist harmoniously under the guidance of legal norms. Wang Tieya, another well-known international law scholar, believes that the international and domestic legal systems are closely linked, and the two penetrate and complement each other [8]. Liang Xi's "theory of the interrelationship between international law and domestic law [9]" holds that the existence and development of these two different legal systems are not isolated from each other, but are interrelated. Tang Yingxia also pointed out that the two different legal systems are not opposed to each other, but penetrate each other and are closely linked [10].

From the above, it can be concluded that Chinese scholars currently mainly hold eclectic views. On the one hand, it agrees with the distinction between the dualism proposed by international law and domestic law in terms of the object of adjustment, the source of law and the subject of legislation; On

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the other hand, it does not put international law and domestic law in complete opposition, but considers them to be the unity of opposites.

2.2. Domestic Application of International Law

By analyzing the different legal practices of various countries, scholars have summarized the traditional methods of domestic application of international treaties into two main categories: transformation and adoption.

The main feature of “transformation” is that international treaties cannot directly acquire legal effect in domestic legal norms, and must be transformed into domestic law through legislative acts, treaty enactments or other constitutional procedures in order to be applied and enforced domestically [11].

The most typical country that adopts this method is the United Kingdom, which has provisions in Articles 20 to 25 of the *Constitutional Reform and Governance Act 2010*. These provisions indicate that international treaties binding on the United Kingdom do not in themselves affect or form part of the laws of the United Kingdom itself until they have undergone the process of “transformation”. Therefore, individuals may not directly invoke these rights or obligations as a basis for asserting legal rights or obligations in court. Under the British Constitutional law, it is the “prerogative of the Crown” to conclude and ratify treaties, meaning that treaties can have the force of law and be applied by the courts only after Parliament has passed a decree consistent with its content [12].

The method is also suitable for Italy. Article 80 of the *Constitution of the Italian Republic 1948* provides that “the Houses authorise by law the ratification of international treaties that are of a political nature, or that call for arbitration or legal settlements, or that entail changes to national territory or financial burdens or changes in the laws.”

Another method is adoption, whereby, once a State concludes or accedes to an international treaty, the international treaty automatically becomes part of its internal law and is directly applicable to that State, without altering its nature, subject and content as a source of international law. Countries that adopt this method are usually explicitly stated in their constitutions, such as the Art. 94 of the *Constitution of the Kingdom of the Netherlands 2018,* Art. 91 of the *Constitution of the Republic of Poland 1997,* etc.

It is noteworthy that, in judicial practice, a State is often not inclined to adopt a single approach to the treaty application. For example, Article VI, Clause 2 of the *Constitution of the United States* clearly defines the status of treaties in the domestic legal system, that is, treaties are the supreme law of the United States and have the same legal force as the Constitution and laws made in accordance with the Constitution. However, jurisprudence actually distinguishes between self-executing and non-self-executing treaties [13], so that not all treaties have the effect of being directly invoked by individuals before the courts.

In this regard, Scholar Li Haopei also held: “With the exception of those States whose implementation of treaties must be transformed into domestic law systems, it is virtually necessary for all States that generally accept treaties as their domestic law to distinguish between self-executing and non-self-executing treaties [14].”

3. General Application of Treaties in China

3.1. Chinese Scholars’ Theoretical Research

At present, *Constitution of the People’s Republic of China* (hereinafter referred to as the *Constitution*) and basic laws such as the *Civil Code of the People’s Republic of China* (hereinafter referred to as the *Civil Code*) lack uniform and clear provisions on the application and enforcement of international treaties. Scholars also have different views on how treaties should be applied and enforced.

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The prevailing view is that China's application of the treaty is based on the principle of "adoption". It conforms to the trend of centralization in international law and is also in line with China's consistent stand in practice. Some scholars have also made some amendments to it, arguing that the application of treaties in China mainly adopts the method of automatic incorporation, but it does not rule out the formulation of domestic legislation that does not violate the provisions of international treaties according to national conditions [15].

The second view is based on the principle of "transformation". Some argue that transformation should be the only way for China to fulfil its treaty obligations [16]. It was also suggested that the principle of transformation and the exception of adoption should be made [17].

In addition, the idea of "hybrid model" is becoming increasingly prominent [18]. This model flexibly combines elements of "adoption" and "transformation" and is more in line with national interests.

3.2. Problems Arising in the Application of Treaties

3.2.1. Limitations in Theoretical Research

By reading the literature of domestic and foreign jurists, it can be concluded that scholars' research on the theoretical basis for the application and enforcement of treaties is coherent and logical. But their theories also have their own limitations of the times and are somewhat detached from reality.

As a result, scholars had been forced to revise their original positions in many respects in order to bring them closer to each other, but unfortunately they had not been able to provide conclusive answers to the true relationship between international and domestic law [19].

Zhou Gengsheng's "theory of natural coordination" seems to be comprehensive, but in fact it avoided the substantive question of the relationship between domestic and international law: the question of how a State could implement international law domestically, that is, how it could fulfil its obligations under the level of international law [20]". The "idea of the harmonization of legal norms" ignores the fact that, in a truly international community, there is an incompatibility and inconsistency in the relationship between international law and domestic law. This is also the limitation of Professor Liang Xi's theory of the interrelation between international and domestic law, emphasizing the connection between the two while ignoring their differences and conflicts.

While these concepts have advanced significance, they do not provide an effective mechanism for resolving conflicts that inevitably arise between domestic and international law.

3.2.2. Lacks of General Principled Legal Provisions Applicable to Treaties

Since joining the WTO, although China has conducted many theoretical studies on the domestic application of international treaties, there are still legal gaps in the *Constitution*, Constitutional Amendments, *Legislation Law of the People's Republic of China* (hereinafter referred to as the *Legislation Law*) and other laws.

With the increase in the number of international treaties concluded by China, it is imperative to regulate the application of international treaties, including how to apply international rules domestically and how to understand the hierarchical status and legal effect of international treaties in the legal system. Even if the issues concerned are complex, they should not be avoided but confronted. The following discussion will be discussed from the point of view of the legal hierarchy of treaties.

Scholars generally agree that the status of domestic laws and treaties in national legal systems is broadly divided into four categories: (1) domestic law is superior to treaties; (2) domestic law and treaties are equal; (3) treaties are superior to domestic law and (4) treaties are superior to constitutions. In addition, the following two solutions were applicable to avoid conflicts between domestic law and treaties: (1) The application of Lex posterior derogat priori, i.e. the effect is determined in

DOI: 10.54254/2753-7064/12/20230049

chronological order; (2) The application of lex generalis non derogat legi speciali, i.e. the international treaty was regarded as lex specialis and a presumption was made that the treaty was not incompatible with domestic statutory law.

Article 5, paragraph 2, of the *Constitution* stipulates that "No law, administrative regulation or local regulation shall be in conflict with the Constitution." Articles 87 to 91 of the *Legislation Law* establish the hierarchy of China's domestic legal system, with the *Constitution* having the highest level, followed by laws, administrative regulations, local regulations, local rules, etc. However, International treaties were not included in legislative law, which led to the question of how to apply international treaties that were incompatible with domestic law.

The constitution is the foundation of a country's law and the source of power for all state authorities, so international treaties cannot take precedence over the Constitution. As for the legal hierarchy between treaties and domestic laws other than the Constitution, there are several views.

The first view is that the legal hierarchy of international treaties in comparison with other sources of law should be determined on the basis of the organ ratifying the treaty, which is referred to as the "theory of comparison with domestic legal hierarchy". In this regard, scholars have summarized the legal hierarchy as follows: (1) the Constitution; (2) the treaties ratified by the Standing Committee of the National People's Congress; laws; (3) treaties approved by the State Council; administrative regulations; and (4) treaties which do not need to be ratified by the Standing Committee of the National People's Congress or approval by the State Council; local rules. They are of the view that when the provisions of a treaty acceded to or concluded by China conflict with its domestic law, the treaty shall be applied in preference. However, the precondition for the priority effect of a treaty is that it should be on the same legal hierarchy as internal law.

The second view is that treaties are of a lower rank than the Constitution and are on the same level as other laws, while a third view holds that the legal status of treaties is lower than that of the Constitution and higher than domestic law [21].

However, how to regulate the application and enforcement of international treaties has long been limited to theoretical discussions, and Chinese legislation has no clear and uniform provisions on this.

Specifically, the *Constitution* and the Basic Law do not clearly define the status of treaties in the Chinese legal system, nor do they specify the method of application of treaties and preventive measures for resolving conflicts with domestic laws. Taking the legal provisions related to civil and commercial affairs as an example, although Article 142 of the *General Principles of the Civil Law of the People's Republic of China* [22] previously stipulated provisions on the principle of priority of international treaties, the law has become invalid with the promulgation and implementation of the *Civil Code*, and the above provisions have not been incorporated into the *Civil Code.* Due to the lack of superior law in the application of treaties, the accurate and reasonable application of treaties has encountered obstacles, which ultimately led to confusion in judicial practice involving foreign-related civil and commercial cases.

4. Recommendations for the Domestic Application of Treaties

4.1. Theory of the Dialectical Unity of International Law and Domestic Law

The relationship between international and domestic law should be based on reality and comprehensively grasped. The relationship between the two should be that there is a difference in the connection, and there is a connection in the difference. It is necessary not only to recognize the fact that the boundaries between them have become blurred under the new world pattern, but also to grasp how to fulfill international obligations while safeguarding the principle of national sovereignty.

One of the most striking features of the traditional theory of the relationship between domestic law and international law, whether monist or dualist, is that States often conclude or ratify international

DOI: 10.54254/2753-7064/12/20230049

treaties on the premise that they must not harm national sovereignty and the public interest [23]. In its Article 26, the *Vienna Convention on the Law of Treaties* contains the principle "Pacta sunt servanda", a fundamental principle of the law of treaties, namely, that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

The way to accurately grasp the essence of the relationship between domestic and international law lies in striking a balance between the principle of State sovereignty and Pacta sunt servanda. This paper therefore advocates the theory of the dialectical unity of international law and domestic law. They essentially belong to two independent legal systems, and there are differences in many aspects such as the subject of law formulation, the source of law, and the implementation of law. However, both international and domestic law are formulated by States, and as laws they have the general characteristics of law. Lenin once said that dialectics in the proper sense is the study of contradiction in the very essence of objects. Therefore, we should analyze the connection and difference between international and domestic law from the perspective of dialectical unity, and study their essential contradictions and relationships.

4.2. General Recommendations on Main Issues of Application of Treaties

In fact, for international law to be effective in domestic law, it usually needs to be first made into domestic law through some act of State, such as expressly provided for in the constitution of the State itself. As the eminent jurist Kelsen once said, "the question whether a transformation of international law into national law is necessary can be answered only by positive law, not by a doctrine of the nature of international or national law or of their mutual relation [24]."

Indeed, theoretical interpretations lack a clear legal guidance function and have limited binding force, which naturally complicates the application of treaties in domestic judicial practice, so it is necessary to resort to positive law for regulation. The following are general opinions and suggestions on three main issues related to the treaty application, which mainly discuss the solution strategy of how to improve the domestic application system of the treaty from the perspective of China's legislative and judicial system.

4.2.1. The Legal Status of Treaty in China

International treaties acceded to and concluded by States are, of course, an important part of a Country's legal system, and although their form and formulation process are different from domestic legislation, they are also a reflection and embodiment of the sovereign will of States. There are only provisions in the Constitution relating to competence to conclude treaties, such as Art. 67, Art. 81 and Art. 89 of the *Constitution*.

In addition to international treaties involving civil and commercial matters, China's domestic law does not have uniform and systematic provisions on the status of some concluded political, civil and criminal treaties and how to implement them, which makes the domestic legal status of treaties very ambiguous [25].

It is therefore necessary to include provisions on the legal hierarchy of treaties in future constitutional amendments and legislative law amendments. Provisions containing relevant expressions may be added, such as "international treaties acceded to or concluded by the People's Republic of China shall be observed and performed", "international treaties ratified and entered into force through legal procedures are part of domestic law and are equally legally binding on domestic law", or "legislation shall abide by the basic principles of international law". These uniform principles can guide the application of treaties and avoid confusion in judicial practice.

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4.2.2. The Methods of Treaty Application

How a State incorporated international treaties into its domestic legal system was an internal matter of a State. Both the adoption and transformation methods have their advantages and disadvantages. Therefore, combining the advantages of both, that is, the strong applicability of transformation and the high efficiency of adoption, will contribute to the better application of the treaty.

In determining the method of application of international treaties, The *Restatement (Third) of Foreign Relations Law of the United States* (1987) adopted an approach whereby treaties are presumed to be "self-executing" and that only those treaties that satisfy one of the three conditions of paragraph 111(4) [26] are "non-self-executing".

Similar to the specific distinction between "self-executing" and "non-self-executing" treaties in the United States judicial practice, continental Europe generally uses the terms "directly applicable treaties" and "indirectly applicable treaties" to express the same meaning, and stipulates that the distinction between the two is premised on the recognition that the treaty has been ratified and adopted as domestic law [27].

Drawing on the above-mentioned practice of the United States, China needs to establish a system of self-executing and non-self-executing treaties according to the nature of treaties and accept this way of applying, that is, adoption is the principle, and transformation is the exception. The treaty application system thus established will help save legislative costs and resources, improve the current application of international law in China, and promote China to embark on a standardized legal system.

4.2.3. Hierarchy of Treaties in China

On the one hand, the *Constitution* is the fundamental law of the country, and international treaties should be lower than the C*onstitution* in terms of legal rank. In view of this, the term "international treaty" should be added to Art. 5 para. 2 of the *Constitution* and amended to read "No law, international treaty, administrative regulation or local regulation shall be in conflict with the Constitution".

On the other hand, directly applicable treaties should take precedence over general domestic law. Like Art. 25 of the *Basic Law for the Federal Republic of Germany (1949)*, many countries have made it clear in their constitutions that treaties take precedence over laws.

It should be noted, however, that treaties do not have absolute priority, and in fact when domestic law takes precedence over international treaties or agreements, they may still be applied in domestic courts, even if their content is inconsistent with the provisions of international treaties. This would result in a state party facing a breach of its treaty obligations under Art. 27 of the *Vienna Convention on the Law of Treaties*, which prohibited the invocation of the provisions of internal law as justification for its failure to perform a treaty and would entail responsibility under international law if such failure resulted in injury to the other State party to the treaty or its nationals [28].

International law is actually based on the consensus of different countries, so it is generally impossible for a country to deliberately formulate laws and regulations that are incompatible with the content of international law. Domestic law should also strive to be interpreted in a manner that did not conflict with international treaties, i.e. the rational application of the doctrine of consistent interpretation, also known as the Charming Betsy doctrine. Moreover, in order to avoid such conflicts, more precautions should be taken in the conclusion of treaties, such as reservations, suspensions of ratification or amendments to laws, in an effort to strike a balance between the principles and flexibility of the application of treaties.

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5. Conclusions

The current international situation is in a complex pattern, with close exchanges between countries and a tendency for international law to become centralized. International law and domestic law are, in a certain sense, the product of conflicts and adjustments of the will and interests of sovereign States [29], and their integration and coordination are the reality of today's society.

As the primary source of contemporary international law, international treaties are an important legal tool for regulating international relations and play a pivotal role in today's increasingly close international exchanges and cooperation. The vast majority of international treaties can play their proper role only if they are applied domestically by States parties. How a State applies a treaty in its domestic courts reflects whether a State has complied with its content and fulfilled its international obligations. It is therefore extremely important to properly improve the way in which treaties are applied in China.

First of all, the Constitution does not make principled provisions on the implementation and application of treaties, and the provisions related to treaties formulated by other laws and regulations are not detailed and scientific enough, resulting in confusion in judicial practice, so it is very valuable to explore the theoretical issues of the judicial application of treaties. The analysis of the theory is to better solve the problems in reality. By expounding and enumerating various theories, analyzing their advantages and disadvantages, summarizing the theoretical development process, the research paper is committed to improving the theoretical system of the relationship between international law and domestic law.

With the interdependence of international commerce and the political community, international and domestic law are increasingly penetrated in many areas, and they can be effectively integrated, while at the same time maintaining their respective independence on the other. It is therefore inappropriate to treat them as rules of exactly the same or completely different nature. They are distinct but interconnected.

The concept of the theory of the dialectical unity can faithfully and concisely reflect the relationship between domestic law and international law, focus on the balance between the principle of national sovereignty and Pacta sunt servanda, and bring certain academic value to enrich and promote the development of the theory of treaty application.

Secondly, studying the application of the treaty in China is also of great practical significance. Putting forward constructive opinions on the current legislative gaps and improving the unified treaty application system are conducive to standardizing the specific application of treaties, eliminating contradictions and confusion in judicial practice, improving the uniformity, stability and predictability of treaty application, and meeting the requirements of standardization and integrity of the legal system.

Finally, the establishment and improvement of domestic laws in line with international treaties can enhance China's ability to fulfill its international obligations and enhance China's international influence. China's sincere fulfillment of its international obligations is not only conducive to China's own development, but also conducive to its adaptation to the trend of increasing integration of international and domestic rule of law, as well as disseminating the concept of jointly building the "Belt and Road" and building a community with a shared future for mankind advocated by China.

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