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IMPLEMENTATION OF INTERNATIONAL OBLIGATION AND LEGISLATIVE POWERS IN INDIAN LEGAL SYSTEM

ABSTRACT

International law has a wide range of effects on national legal systems around the world. International treaties are not immediately incorporated into India's domestic legal system, despite the country being traditionally categorised as a dualist when it comes to its relationship with international law. As India adopts a dualist approach, such integration is instead dependent on parliamentary legislation.

When rendering decisions in situations involving international law, the Indian judiciary is free to interpret India's obligations under international law within the confines of domestic legislation, even in the absence of legislative authority. Notably, especially in areas like environmental law and human rights, the Indian court has aggressively supported the enforcement of India's foreign duties resulting from international treaties. This paper highlights the relevant constitutional provisions in this context and examines the proactive role that the Indian judiciary has played in enforcing international law in India.

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INTRODUCTION

As is well known, the functioning of the international legal system is mostly horizontal and decentralised, as opposed to the national legal systems. The sovereignty and equality of the basic and core legal entities of the international legal order, namely states, are the underlying basis for this feature of the system. The development of international law and its actual application both demonstrate this unique quality.[1] Since there isn't a single legislative body that can impose legally binding regulations on all of the system's legal entities, the main entities have created their own legal norms. [2]Following the emergence of these standards, mostly as a result of treaties or customary practices, the nations are tasked with upholding the rules through a process that is commonly referred to as 'self-help'.[3] Although sanctions or actions taken against states for alleged violations of international law may appear to be above national concerns, these procedures ultimately depend, either directly or indirectly, on the consent of the participating parties. States are important in matters governed by international law that are more locally focused, as well as in interactions amongst states. For example, a state can support the maintenance of international law when a person files a complaint alleging that the state's security services violated their human rights.

Depending on the terms of their constitutions, states vary in how they incorporate international law into their national legal frameworks. That's why different nations have different procedures for applying international law at the national level. Both monist and dualist legal theories clarify the divergent approaches taken by states when incorporating international law into local law. India follows the dualist method when putting international law into practice at domestically. [4]This method claims that international accords do not inevitably find their way into Indian national law. Rather, in order to incorporate international law into the nation's legal system, parliamentary legislation is required.

Indian courts are positive in applying international law to domestic cases, and they are constantly evolving in their thinking. India affirms that it is committed to the development and use of international law. However, India does not have a role in formulating some of the basic

[1] Cassese distinguishes between three functions: law making, law determination and law enforcement. Law determination and law enforcement may be considered to fall under the header ‘realisation’. A. Cassese, International law (2nd edn OUP, Oxford 2005) 5-6. See also M.N. Shaw, International law (6th edn CUP, Cambridge 2008) 6.
[2] Lauterpacht, E. (ed), International law, being the collected papers of Hersch Lauterpacht, vol I, The General Works (CUP, Cambridge 1970) 13-16.
[3] Ibid 13-14
[4] Jolly Jeorge Vs. Bank of Cochin, AIR 1980 SC 470

principles of international laws[5]. This article explores the general position of domestic legal systems and international law with respect to the legal consequences of international law in the Indian legal system. The process of incorporating international law into the Indian domestic system is also examined. Furthermore, India has had a major influence on the development of international law, notably in regards to trade agreements, environmental rules, human rights, and arbitration. Nevertheless, India is wary of drafting treaties that could curtail its sovereignty, particularly if they specifically entail the use of local courts for implementation. The article sheds insight on how international law is applied in India by examining the underlying contradiction in the domestic constitutional framework that underpins treaty creation and implementation. It looks at the duties imposed by international law, how local and international legal theories interact, and suggests new legislation to improve how well international law is applied.

INTERSECTION OF INTERNATIONAL LAW AND DOMESTIC LAW

International Law

As per the United Nations, "International law outlines the legal obligations of States in their interactions and dealings with one another, as well as their treatment of individuals within the boundaries of a State. Its scope covers various global issues, including human rights, disarmament, international crime, refugees, migration, nationality concerns, prisoner treatment, the use of force, and the rules of war, among other matters. Additionally, it governs shared global resources, such as the environment and sustainable development, international waters, outer space, global communications, and world trade."[6]

Two primary categories exist for international law. First up is private international law, which deals with conflicts involving private parties with significant ties to many countries, including individuals or corporations. Private international law applies, for example, the lawsuits resulting from hazardous gas leaks at Union Carbide-owned industrial facilities in India. This area of law decides which country's laws apply in particular circumstances and attempts to

[5] V.G. Hegde, Indian Courts and International Law, 23 LEIDEN J. INT'L L. 53, (2010) https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S09221565099903 31.
[6] U.N., UPHOLD INTERNATIONAL LAW (2020), https://www.un.org/en/sections/what-wedo/uphold-international-law/.

settle problems between national legal systems.[7] Public international law, which comprises broad laws, regulations, and principles that apply to the conduct of nation-states and international organisations, is the second category. It regulates how countries and international organisations deal with each other and with persons, whether they be people or things with legal status. Another name for public international law is the "law of nations" or just "international law."[8] It covers a wide range of topics, including economic, diplomatic, environmental, human rights, and humanitarian law as well as marine law.[9]

Domestic Law

Unlike international law, domestic law—also known as municipal law—relates to the legal framework that governs a particular state or nation. In contrast to international law, municipal law refers to the internal, national, or domestic legal framework of a sovereign state. Legal restrictions at the federal, state, provincial, territorial, regional, or local levels are all included in municipal law. International law treats them all equally, despite the fact that state law may distinguish between these as distinct groups. Similarly, a state's constitutional law and normal law are not distinguished by international law. In accordance with Vienna Convention on the legislation of Treaties Article 27, a state shall uphold its obligations under a treaty even in case it clashes with municipal legislation. The one and only exception to this norm is stated in Vienna Convention Article 46, which states that a state's express permission to be bound by a treaty is a manifest breach of a "rule of its internal law of fundamental importance."[10]

Although states are obligated by international law to carry out their global responsibilities, national implementation of these obligations differs amongst nations. States enforce compliance through executive, judicial, and/or legislative actions. The way that treaties are incorporated into each nation's legal framework varies as well, which has an impact on how state authorities apply treaty obligations. In many nations, treaties have the automatic effect of becoming national law upon ratification, thereby making them self-executing. In other nations, on the other hand, the enforcement of international law necessitates extra domestic legislation.

[7] Public International Law: Introduction to Public International Law Research, U. OF MELBOURNE https://unimelb.libguides.com/internationallaw
[8] Ibid
[9] FINDLAW, supra note 12.
[10] Municipal law, DEFINITIONS, https://www.definitions.net/definition/municipal+law

Most states do not prioritise international law over their local laws, particularly those that place a strong emphasis on sovereignty.[11]

SCHOOL OF LAW: MONISTS VS. DUALISTS

Two legal theories, monism and dualism, account for the variations in how states apply international law to their own legal frameworks. According to the monistic theory, the entities covered by domestic and international law are virtually the same. According to this idea, local and international law are manifestations of the same overarching legal notion and have similar characteristics, deriving from the same legal foundations. Supporters of this view believe that both municipal and international law are essential parts of a universal system of laws that apply to everyone, whether they are acting individually or collectively. International law does not need to be expressly incorporated into national law in a monist system. Rather, when an international treaty is ratified, international law is automatically incorporated into the national legal framework. This idea holds that international law is superior to domestic law.

International and domestic law are seen as distinct from one another in the dualist perspective. This view holds that international law can only be publicly embraced by means of parliamentary decisions, executive measures, or court enforcement before it can be incorporated into domestic law. Therefore, an international agreement has no legal force if it hasn't been properly approved domestically. In the event that domestic and international laws clash, domestic law takes precedence. This does not imply, however, that most states disobey international law. Domestic laws, the methods used by domestic courts, and sometimes ambiguous administrative practices are the important variables.[12]

In the past, India's stance on international law gave it the label of dualist country. In India, the government has the power to take on foreign commitments, and the Parliament must provide its assent before they may be incorporated into domestic law. In the Indian Constitution, Article 253 is the embodiment of the dualist principle: -

"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty,

[11] See Antonio Cassese, Modern Constitutions and International Law, 192. Rec. des COURS 331 (1985-ffl), p. 331.
[12] Peter Malanczuk, "International Law and Municipal Law", In: Akehurst's Modern Introduction to International Law, 7th Revised Edition, (New York: Routledge, 1997), chapter 4, p. 65

agreement or convention with any other country or countries or any decision made at any international conference association or other body."[13]

Furthermore, the Supreme Court's and high courts' numerous decisions demonstrate the dualist orientation of the Indian legal system. For example, Justice Krishna Iyer stressed in the case of **Jolly George v. Bank of Cochin** [14]that the courts are bound by municipal law unless it is changed to comply with the treaty, saying that "what binds the courts is the former, not the latter." Similar to this, the Supreme Court upheld the "doctrine of dualism" in the **State of West Bengal v. Kesoram Industries**[15] case, holding that an agreement signed by India cannot become a law until Parliament passes legislation in accordance with Article 253.

CONSTITUTIONAL FRAMEWORK: INCORPORATING INTERNATIONAL LAWS

The willingness of states and the constitutional distribution of authority among the several tiers of government are prerequisites for the effectiveness of international law. The way state parties carry out international treaties in their sovereign domains—both internal and external—is influenced by this power differential. [16] The Indian Constitution does not provide a clear mandate or authority for the judiciary to refer to international law, nor does it clarify the specific place of international law within the domestic legal system. [17]Nonetheless, the Indian Constitution places a strong emphasis on morality and international law across the board for the Indian government.

The Universal Declaration of Human Rights' (UDHR) tenets serve as a major source of inspiration for the Indian Constitution, which was adopted on November 26, 1950. The UDHR was created by the UN General Assembly with the intention of protecting the fundamental rights that are inalienable to every person. In spite of this effect, the Constitution has a number of clauses pertaining to the authority to make treaties. Ratified treaties do not automatically have legal standing in Indian courts, as per the Indian Constitution. The Constitution does, however, also reaffirm the Indian government's dedication to carrying out its treaty duties.

[13] The Constitution of India, 1950, Art 253
[14] Jolly George Verghese & Anr v. The Bank of Cochin, 1980 AIR 470
[15] State of West Bengal v. Kesoram Industries Ltd. And Ors, AIR 2005 SC 1646
[16] AMAL GANGULI, Interface Between International Law and Muncipal Law: Role of the Indian Judiciary, in INDIA AND INT'L L., supra note 41, at 12 (2005).
[17] Jagadish Halashetti, The Status of International Law under the Constitution of India, LEGAL INDIA (May 8, 2011), https://www.legalindia.com/the-status-of-international-law-underthe-constitution-of-india/).

The Indian Constitution's Article 51(c)[18] places a strong emphasis on encouraging respect for treaty obligations and international law in dealings between organised groups. Following revisions suggested by H.V. Kamath, P. Subbarayan, Ananthasayanam Ayyangar, and Dr. Ambedkar, the draft Article 40 was added to the Constitution as Article 51. All of the speakers at the Constituent Assembly's sessions emphasised India's commitment to upholding international law, treaty responsibilities, and international peace and security. Notably, "international law" and "treaty obligations" are mentioned separately in Clause "c" of Article 51. Professor C. H. Alexandrowicz states that whereas "treaty obligations" refers to duties resulting from international treaties, "international law" in this case refers to customary international law. This reading makes sense in light of the wording of the proposed Article 40, especially in light of the Indian courts' preferences with regard to matters of international law. Furthermore, Article 51(c) accords equal treatment to treaty obligations and customary international law. It is important to note that the Indian Constitution does not address the place of international law in the country's domestic legal system and does not give the judiciary the authority or mandate to take international law into account when making decisions.

ENFORCING INTERNATIONAL TREATIES WITHIN THE INDIAN LEGAL FRAMEWORK

Negotiating treaties with foreign powers is the responsibility of the executive branch in India. Treaties and agreements may be signed by the Indian government and ratified by it. Unless the treaty expressly specifies that legislative consent is required, the government is not required to seek approval from the legislature before implementing such treaties.[19]

Executive Authority in Formulating International Agreements

The Indian Constitution's Seventh Schedule, Entry 14 of List I, and Articles 246 [20]and 253[21] grant the Central government, also known as the government of India, the executive ability to negotiate and carry out international treaties. [22]The legislative authority of the Union of India

[18] The Constitution of India, 1950, Art 51(c)
[19] Lok Sabha Secretariat (1976). Parliament and International Law. New Delhi: Lok Sabha Secretariat, p. 4.
[20] The Constitution of India, 1950, Art 246
[21] The Constitution of India, 1950, Art 253
[22] Samsher Singh v. State of Punjab, AIR 1974 SC 2192

is the source of these executive powers. The Union's and the States' distinct legislative powers complement each other, and this is a crucial point to make.

The President of India is expressly granted executive powers under Article 53 [23]of the Indian Constitution. These powers may be used directly by the President or, in compliance with the constitutional framework, through subordinate authorities.

It is imperative to emphasise that the Indian government is endowed with executive powers over all matters falling under the legislative purview of Parliament by virtue of Article 73 [24]of the Indian Constitution. According to Article 73(1),

“Extent of executive powers of the Union,

1) Subject to the provisions of this Constitution, the executive power of the Union shall extend

a) To the matters with respect to which Parliament has powers to make laws; and

b) To the exercise of such rights, authority and jurisdiction as are exercisable

by the Government of India by virtue of any treaty or agreement: Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect in which the Legislature of the State has also power to make laws.”

The subjects covered by the legislative purview of Parliament are included in the executive authority of the Government of India. Moreover, the exercise of rights and powers specified in treaties or agreements signed by the Indian government is included in the Union's executive power (Article 73(1)(b) of the Indian Constitution). It is crucial to stress, though, that international law is not *ipso facto* enforceable upon ratification because the Government of India's executive authority to negotiate international treaties does not provide such authority. This is explained by the Indian constitution's adherence to the 'dualistic' theory of international law. As a result, international treaties are not automatically incorporated into national law; rather, where appropriate, legislation enacted by Parliament is required for their inclusion.

Legislative Authority for Executing International Agreements

[23] The Constitution of India, 1950, Art 53
[24] The Constitution of India, 1950, Art 73

The executive branch may use its authority to carry out the terms of a treaty. On the other hand, under Article 253 of the Indian Constitution, only the Parliament has the right to pass a statute in order to carry out a treaty. According to this article, the Parliament has the power to create laws that will apply to all or a specific portion of India's territory in order to carry out "any treaty, agreement, or convention with any other country or countries or any decision made at any international conference, association, or other body." This empowerment is consistent with the powers granted to Parliament by the Seventh Schedule's Entries 13 and 14. Article 253 explicitly states that Parliament can exercise this legislative competence in spite of the powers shared by the Centre and the States as specified in Article 246 in connection with the Seventh Schedule.

The government is free to start an action through executive orders or to set up a policy for issuing such orders when the Constitution does not require the exclusive enactment of legislation for that particular action or when there is no existing law restricting the executive power of the Union (or the state, if applicable). In addition, the government is still able to alter these directives or the policy in question as needed.

Implementation of International Obligations

The task of putting international law into practice inside states has grown increasingly important. As a general rule, a state that disobeys an international law rule cannot use domestic law to defend its acts because doing so would undermine international law by introducing appropriate domestic legislation. The Vienna Convention on the Law of Treaties (1969) clearly states this position in Article 27[25]. A state must honour its international obligations even if doing so requires amending its domestic legal system, according to the *pacta sunt servanda* principle. Several international cases have supported this viewpoint, including the Alabama Claims Arbitration, in which the British government's attempt to avoid accountability by arguing that there was no domestic legislation was denied.

When there is no central legislative body that may impose legally binding regulations on the legal entities that make up the system, the main subjects themselves create the legal standards. Following the emergence of these norms, which are frequently established by treaties or custom, states are in charge of enforcing the standards in a process known as "self-help." But when there is a disagreement between domestic and international law, courts have difficulty

[25] Vienna Convention on the Law of Treaties, 1969, Art. 27

reaching a verdict. The answer is contingent upon the degree to which a state's constitution permits the judiciary to apply international law directly. Conflicts frequently surface in domestic courts, creating challenges such as the acceptance of diplomatic immunity provided by international law, which are only meaningful if local law also recognises them.

Moreover, domestic courts are the only ones authorised to interpret and enforce customary extradition laws. Notably, as demonstrated by the Pinochet case, international law grants people rights or obligations that are directly enforceable in national courts. In general, the state apparatus is necessary to carry out the goals and ideals of international law on a domestic level. In this context, a number of state agencies are important, and domestic courts frequently play a major role in applying international law.

As a result, several state organs may be involved in the application of international law; nevertheless, scholars primarily concentrate on the operations of domestic courts, particularly with regard to the application of international law. In conclusion, with the exception of Article 26[26] of the Vienna Convention, there are no particular implementation requirements in international law. If states could be provided with more detailed implementation requirements, that would be advantageous. As of March 2020, domestic law is not required to follow certain guidelines set forth by international law.

ROLE OF JUDICIARY

Indian courts' positions on international law have been constantly changing. The Indian Supreme Court has emphasised on multiple occasions the significance of taking into account the basic ideas included in international agreements and instruments when debating constitutional requirements. The court has argued in favour of using these international instrument principles, particularly when there is a void and no conflict with local law. When creating domestic legislation, Indian courts have the authority to use international conventions as an external source of guidance. One prominent instance is the case of **Visakha v. State of Rajasthan**[27], in which the Supreme Court used an international convention to help shape domestic law.

Indian courts face difficulties in applying, precisely referencing, and identifying international legal rules. This challenge is prevalent in many developing nations, where international law is interpreted cautiously and frequently seen as a separate legal framework due to historical

[26] Vienna Convention on the Law of Treaties, 1969, Art. 27
[27] Visakha v. State of Rajasthan, AIR 1997 SC 3011

context. This cautious approach is probably used to preserve compatibility with similar domestic legal norms or to expand the interpretation.

When rendering decisions in instances involving international law, the Indian court is allowed to interpret India's obligations under international law within the framework of domestic laws, even if it is not empowered to enact laws. In this regard, the Indian judiciary has aggressively supported the application of international law, especially where treaty accords are concerned with environmental law and human rights.

In the 2014 case of **National Legal Services v. Union of India**[28], the court emphasised that Indian courts have an obligation to enforce Indian law in the event of a legislative conflict between Indian law and international law. Municipal courts in India would, however, take the principles of international law into appropriate consideration if there were no competing laws. Comparably, the Calcutta High Court said in **Krishna Sharma v. State of West Bengal** [29](1954) that courts ought to aim for a harmonious interpretation of the two legal systems where there is a disagreement between them. In addition, courts have to carefully read and interpret international instruments, such as treaties, conventions, and declarations.

The Indian judiciary has seen a notable increase in inquiries concerning international law at all levels. As such, it is imperative to investigate the current patterns of how domestic and international law interact, as well as the changes that have been noted in the treaty-making procedures. This analysis is essential to comprehending the true development and progression of developing jurisprudence.

RECOMMENDATIONS

Primarily, parliament ought to pass legislation pertaining to "entering into treaties and agreements with foreign countries and implementing treaties, agreements, and conventions with foreign countries," as specified in List 1 Entry 14 of the seventh Schedule to the Revised Constitution. This law should control the "treaty-making power," which includes the ability to negotiate and carry out accords, conventions, and treaties. The process of drafting treaties has to be made more democratic so that Parliament is involved instead of just the Executive. Treaty-

[28] National Legal Services v. Union of India, AIR 2014 SC 1863
[29] Krishna Sharma v. State of West Bengal, AIR 1954 CAL 591

making is a powerful tool that has significant effects on the populace and the political system, making real parliamentary participation, accountability, and transparency imperative.

A parliamentary committee should be formed to examine each proposed treaty, accord, or convention before it is signed or ratified in order to bring accountability and openness. This committee, which should be elected by both Houses and have both statutory and parliamentary committee powers, should consist of roughly ten to fifteen members representing different political parties. The legislation should divide treaties into three categories: those that the executive can negotiate and conclude on its own, those that need legislative approval to be ratified, and those multilateral accords that are so important that the legislature must be involved from the outset. To strengthen the democratic aspect of the treaty-making process, a consultation procedure including impacted groups, organisations, and stakeholders should also be required. In the vital area of international treaty-making, this strategy seeks to establish responsibility, openness, and democratic involvement.

CONCLUSION

The dualist approach that has developed India's legal system necessitates parliamentary action in order to incorporate foreign norms into the national legal system. The way that domestic and international law interacts is influenced by the changing roles of the judiciary, parliament, and the constitutional framework. India's legal system is based on the dualist paradigm, which emphasises the country's dedication to democratic ideals. Parliamentary examination is necessary to ensure that international law is seamlessly integrated and aligned with national interests.

Although the constitutional structure places emphasis on a dedication to international legal commitments, more investigation is necessary because it is unclear how the judiciary is to reference international law. In India, enforcing foreign treaties is done through two different processes: parliamentary legislation under Article 253 and executive talks under Article 73. Because of its dualistic structure, which emphasises legislative scrutiny, treaties cannot be automatically incorporated. Notwithstanding its lack of legislative authority, the judiciary aggressively implements the principles of international law, especially in matters involving human rights and the environment. This indicates that the legal system is dynamic and adjusts to changes in global norms.

Legislative legislation, the creation of an oversight committee, and stakeholder consultation are suggestions for a more democratic treaty-making process. These steps are intended to

promote democratic engagement, accountability, and openness in the application of international law inside India's legal system. These ideas aid in the proper integration of international norms into the national legal framework as India navigates the intricacies of international legal dynamics.