

Indian Practices on Implementation of International Law

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Abstract: *Through this paper, the author aims to highlight the complex but interesting relationship between Indian and International law. There are various provisions in the Constitution that deal with the extent of power with the legislature as well as the executive on the subject of implementation of international law. These provisions have been elaborated in the paper along with the necessary case laws. Dynamic interpretations have been made by the Judiciary on various matters such as both the laws being harmoniously constructed and the purposive interpretation of Human Rights Conventions by the Indian Courts. Another section deals with the various issues being faced by the Indian government and Courts in implementing the international legal setup in India; e.g. Poor law enforcement and inability to cope with the dynamic nature of international law. The paper ends with a conclusion and brief suggestions.*

Keywords: Dualism, international law, judiciary, municipal law, treaties

1. Introduction

India, being a follower of Dualist theory of International Law cannot invoke the international laws and principles in municipal Courts if they are not being expressly incorporated into the municipal law. The relation of India with International law is very old dating back to the pre-independence days when India had been a separate member of League of Nations. For example, the fundamental rights under Part III of the Constitution and Directive Principles under Part IV have much in common with the Universal declaration of Human Rights (UDHR). Further, the fundamental duties under Article 51A give effect to the Article 29(1) of the UDHR [1]. Further Clause(c) of Article 51 puts an obligation over India to respect International Law. [2] The application of this clause is quite visible while tracing the development of environmental jurisprudence and human rights in India. But Article 51 being a part of Directive Principles is not enforceable, still, International Law has been accorded highest importance by the Indian Courts. [3]

Powers of Executive and Legislature in Matters of International Law:

A) Article 73: Power of the Executive

Even through a bare reading of Article 73 of the Indian Constitution, it can be inferred that the executive enjoys unbridled power with respect to international law; and thereby allowing it to enter into treaty obligations [4]. Further, the Court, in the cases of *Vishakha v. State of Rajasthan* [5] and *NALSA v. Union of India* [6], the Apex Court has remarked that it is in all cases that international law becomes a part of domestic law except in the cases when there is any sort of inconsistency with the provisions of domestic law.

Also, consideration is required to be made to Article 53 which vests the executive power with the president. Therefore, in the cases where the President has entered into a treaty, its validity cannot be questioned by the domestic courts.

B) Articles 246 and 253: Power of the Parliament

Article 246 states the subject matter with respect to which Parliament can exercise legislative power. Entry 14 in the Union List specifically relates to India being a participant of International Conferences, associations and implementation of decisions made there whereas Entry 14 is about India entering into agreements and treaties with foreign countries. Further, matters under the Union List upon which the Parliament has exclusive competence includes:

- Foreign affairs
- United Nations Organization
- Diplomatic, Consular and Trade representation
- War and Peace, etc.

Article 253 is important in this regard in this regard which gives the Parliament the law-making power for furthering the implementation of any agreement, convention or treaty. The Apex Court in the case of *Keshavananda Bharti v. State of Kerala* [7] has made a very important observation saying that the cases where the Municipal Law has very vague or contrary language, then, the Courts need to rely on the parent international authority for that very Municipal Law.

If the Parliament has made no law in accordance with Entry 14 of Union List I, which shall have no effect on the power of the executive regarding entering into treaties But an enabling legislation is required for the implementation of a treaty in India. The Calcutta High Court in the *Union of India v. Manmull Jain* [8] remarked:

Treaty making is more of an executive Act in India but often a legislation is required for giving effect to the terms of the treaty. A treaty is said to be complete even without a legislation.

The bottom line is that, in general, international law forms a part of domestic law except in the scenarios where it is inconsistent with the provisions of any of the domestic law. And the Parliamentary approval is necessary only for those treaties:

- That have an effect on the rights of citizens
- Or the ones that require a new law to be made

- Change in any existing municipal law [9]

Role of the Judiciary and the Dynamic Stances taken by IT

In cases where there is no 'treaty regulating legislation', The Courts in India have the following roles to play:

- Interpreting a legislation to implement a treaty

The doctrine of *Pacta Sund Servanda* [10] which makes the treaties in force binding upon the parties is no exception to the rule that it is the states who determine their obligations under international law

A) **International law and municipal law has to be constructed harmoniously**, was remarked by the Court in the case of *ADM Jabalpur v. Shivkant Shukla*. Further, in the case of *Mackinnon Mackenzie v. Audrey D'Cousta* [11], the Apex Court has observed the fact that India, being a party to the International Convention on Equal Remuneration for Men and Women, and adopting a principle therein to construe the Equal Remuneration Act, 1976 for providing relief to the petitioner by holding that the action of the employer to be unconstitutional.

But the international law does not operate in vacuum, and if at any point of time, if there is conflict between international and municipal law, the Supreme Court has laid down that it is national law which prevails.

B) **How Human Rights Conventions have been purposively interpreted by the Courts**, while giving decision in the case of *Xavier v. Canara Bank limited* [12], Krishna Iyer J. had taken the help of Article 11 of International Covenant on Civil and Political Rights, 1966 for interpreting a provision of CPC, 1908 in order to minimize the imprisonment where civil debts are not paid but also emphasized that the law of the land cannot be overridden by international treaties. '*Jolly Verghese v. Bank of Cochin* [13] is another important case where it was observed that- *Till the time change is brought in the Domestic law to incorporate international law, the Court is bound by the former and not the latter*. Therefore, before the international law becomes a part of the domestic law, it has to go through a process of transformation.

In the case of *Jolly Verghese* what happened was that the Judge, while widely interpreting Article 21 had also alongside interpreted the treaty provisions of UNDHR and ICCPR and therefore, international standards were taken directly and applied at the national level. Through these kind of Covert operations, Indian Judiciary has looked upon the international standards as points of reference [14]. This is how the absorption of the Human Rights Principles had started in the Indian judiciary.

In '*Sheela Barse v. Secretary, Children's Aid Society* [15], the Court while taking a break from its prior judgments had come to a conclusion that even if the treaties are not incorporated into the national law, they have a binding effect.

C) **Divergence from the traditional stance:** From earlier being used just as a 'tool of interpretation', International law, is being increasingly cited by the Courts as a 'Source of law'. The decision in *D.K. Basu v. State of Bengal* [16] is crucial here as it highlighted not just the recognition of ICCPR, 1966 ratified by India but also emphasized the readiness to ignore any reservations apprehended by our country in ratifying the convention. '*Peoples Union of Civil Liberties v. Union of India*' [17] and *Nilabati Behera* [18] case, the Court has dealt with the question of reservations by the state in detail.

In Indian Scenario, it has been held through various judicial pronouncements that international treaties can be read into the already existing Indian Law for expanding the protections under it. International treaties and conventions are often cited by the domestic Courts, for example; In the landmark case of *Vishakha v. State of Rajasthan* the Court remarked that international norms and conventions must be used to construe domestic law to fill the void in domestic law. Here, the Court used international law to find meaning of domestic law. Further, in *Gita Hariharan v. Reserve Bank of India* [19], the Court observed, India, being a signatory to CEDAW has interpreted section 6(a) of the Hindu Minority and Guardianship Act in a manner that it gives effect to the principles contained in these instruments.

Challenges while enforcing International Law in India

- Inability to cope up with the dynamic nature of international law:** The international law plays an important role of reflecting the international changes in the domestic legal scenario. The Indian courts fail to keep pace with the fast-changing international norms and thereby, making its enforcement a bit difficult.
- Poor law enforcement:** The domestic law enforcement agencies of India simply include underpaid, undertrained and overworked government employees who don't perform their duties diligently. Further, a thorough understanding of international law is not possessed by the domestic Border Patrol Officials, federal agents as well as the local police officials.
- Inadequate numbers of experts and professionals:** Public international law does not receive a lot of attention from the Indian Universities and the students are also more inclined towards the subjects which they think will be beneficial for their private practice. Even among the ones who opt for international law, arbitration is the most popular option because of its high potential of profitability. The other areas are generally ignored.
- International law as 'Power Mirrors':** The evolution of international law could be traced to a specific socio-political background where unequal distribution of power and resources was prevalent. The members of the United Nations Security Council are often immune as majority of the norms and regulations in international law are aligned with the interests of the ones who occupy the positions of power.
- Terrorism and disturbance from neighbors:** India, had on various occasions engaged in territorial disputes with its neighbors, mostly Pakistan and China. This in turn results in grave human rights violations. But even after facing major terrorism threats and politicized

violence for decades, India's anti-terrorism legislation is not efficient in preventing terror attacks. India's conflicts' with its neighbors have plagued the country most often; for example, For so many years, India has been trying to find a border solution with China but has not been able to do so because of the formal techniques adopted by it (filing petitions, submitting dossiers, and complying with treaty provisions. [20]

2. Conclusion

The link between the international and municipal law in India is quite complex and not free from ambiguity. India had time and again taken different stances on adopting international law, often depending on the domestic scenario. A paradigm shift had been witnessed in the approach of the Court ranging from Jolly Verghese to Vishakha case to 2014 NALSAR Judgment. Further, the above mentioned problems can be dealt with effectively by solutions such as:

- Citing treaties more frequently
- Signing more treaties
- Creation of a new legal document that specifically lays down the legal framework for the implementation of international law in India. [21]

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