



EXPLORING THE CONTEMPORARY ROLE OF INTERNATIONAL LAW IN INDIAN COURTS

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ABSTRACT

In the contemporary era of globalization, legal systems worldwide are witnessing a convergence, underscoring the need to reconcile their disparities in interpreting international law principles. Striking a harmonious balance between municipal law and international commitments is essential, as conflicting contours between these parallel legal systems can impede the effective implementation of ratified treaties and conventions. The research paper delves into India's application and interpretation of international law within domestic legal frameworks, particularly examining how these global norms are incorporated or challenged by the Indian judiciary. Through analyzing key judicial decisions and the legislative response to international treaties and customary international law, the paper identifies critical areas where India's legal landscape aligns with global standards and explores cases where cultural and constitutional values create divergence. It underscores the challenges and benefits of harmonizing international principles with India's unique socio-legal context.

Keywords- International Law Principles, Contemporary Perspective, Globalisation, Indian Courts, Rule of Law

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INTRODUCTION

The advent of globalisation in the 20th century ushered in a new wave of dialogue between international law and Indian courts. As India's presence expands globally, there emerges an intensive dialogue between these two separate legal systems. Traditionally, international law was applied in relation to states and other subjects of international law, whereas municipal law was applied within states and individual/corporate entities. However, the steadily evolving nature of interplay between domestic and international law has augmented the need for sovereign states to develop legal regimes in harmony with international law regimes. The dynamic interaction between municipal and international law is conventionally governed by two theories,

i.e., monism and dualism. Monism emphasizes the scientific explanation of law's internal structure and believes it is a single branch of legal regime that extends to everyone. It implies that the act of giving consent to any international treaty or convention will immediately incorporate those principles into the municipal law, and any contradicting rules will be rendered null and void. "On the other hand, dualism implies that international and municipal law are distinct and independent and that state sovereignty has to be emphasised, as the former originates from the common will of states, whereas the latter signifies the will of the concerned state only".



Notably, an evolved contemporary perspective governing the liberal discourse of synergy between international and municipal law is the rise in populist governments and movements that entail a perceived world order against the existing order¹, pose a significant threat to the independence of judiciary², and are widely perceived as ‘foreign’ elements detached from the interests of its domestic citizens, especially minority interests.³ Nevertheless, “domestic courts might not necessarily adhere strictly to such compartmentalized perspectives, as elaborated earlier, when delving into and understanding the intricate nature of the relationship between international and municipal law. There has been a rise in exploring the manner in which domestic courts apply international law in resolution of legal conflicts. Such an endeavor is even more momentous in the Indian context, as a number of courts in commonwealth countries have frequently cited the judgements by Supreme Court of India (SCI)”⁴. However, the SCI has faced criticism for its inability and unwillingness to adopt an appropriate methodology to fathom the interplay of international and domestic law, and still accords significance to the two traditional theories, namely monism and dualism.⁵ The apex court has also received backlash for its shift from formal dualism to showcasing monist tendencies in its application, resulting in decreased

parliament oversight, diminished executive accountability, erosion of federalism, devaluation of legal pluralism, and exacerbation of the democratic deficits within international law.⁶

In today’s globalised world, the increasing exposure of domestic courts to international principles and legal disputes with ‘foreign’ element is inevitable.⁷ The need to deploy international principles primarily arises at the higher judiciary. As a result, the current study examines the Supreme Court of India’s judicial practice and how the supreme court has incorporated principles of international law when determining legal disputes. The first part explores the normative Indian constitutional framework that lays down the obligations of the executive, legislature and judiciary while implementing international law. The methodology that Indian courts use to regulate the extent to which international law is applied in domestic legal systems is the subject of a comprehensive discussion in the second section. The following third part focuses on the shifting trends in the Indian judicial practice and the way forward. It involves an examination emphasizing the necessity for Indian courts to articulate the reasons for utilizing and incorporating principles of international law in interpreting domestic law and applying them through well-informed and rational judgments.

PART I: NORMATIVE CONSTITUTIONAL FRAMEWORK

Several constitutional provisions in India establish and uphold the country’s commitments under international law. This section examines India’s constitutional framework for incorporating international law into its domestic legal regime while adjudicating disputes.

¹CasMudde and Cristobel RoviraKaltwasser, ‘Populism: A Very Short Introduction’ (2017) Oxford University Press 9.

²Nick Friedman, ‘Impact of Populism on Courts: Institutional Legitimacy and Popular Will’ (2019) Foundation Law, Justice and Society 2.

³Heike Kreiger, ‘Populist Governments and International Law (2019) European Journal of International Law 971-996.

⁴Mitali Gupta, ‘Is the global reputation of india’s supreme court in decline?’ *Article 14* (30 November 2020) <<https://www.article-14.com/post/is-the-global-reputation-of-india-s-supreme-court-in-decline>> accessed 30April 2024.

⁵Aparna Chandra, ‘India and International Law: Formal dualism, Functional Monism’ (2017) 57 (1-2) *Indian Journal of International Law* 25.

⁶Id.

⁷VC Hedge, ‘International Law in the Courts of India’ (2013) 19 *Asian Yearbook of International Law* 80.



From the ChampakamDoraijan case to the Minerva Mills case, “the journey establishes that while adjudicating conflicts between Part III (fundamental rights) and Part IV (directive principles of state policies) of the Indian constitution, the higher judiciary aims to strike a balance between the two parts through its various interpretations in order to maintain the equilibrium between the exercise of individual rights and parliamentary sovereignty. Any law made in contravention of Part III is void to the extent of the contradiction.⁸ However, Part IV is not enforceable in court but is nevertheless vital for the governance of the country.⁹ They have to be implemented through appropriate and legitimate legislation. Article 51 under part IV of the Indian constitution delineates the directive principles of state policy aimed at promoting adherence to international law and treaty obligations.¹⁰ This article urges the Indian state to make every effort to honor and respect international law, yet it doesn’t specify any conditions necessary for its implementation, underscoring its non-binding constitutional directive. Yet, the act of maintaining this regard can be indirectly inferred from other constitutional provisions and judicial precedents”. “Article 253 of the Indian Constitution vests the power to implement ratified international instruments in the Parliament by passing appropriate national legislation in this regard. The parliament can make laws for the whole country or any part of it in order to implement its treaty obligations on matters within its legislative competence. Article 73(1)(a) extends the central executive power to all matters in which parliament can make laws and empowers them exercise their authority and jurisdiction by virtue of any treaty or agreement. Article 246 is the source of the legislative power of the Parliament

to make laws on matters under the Union list. On reading articles 253 and 73 conjunctly, it can be observed that since Entry 14 under the union list endows the parliament to enter and implement treaties and agreements with foreign countries, an executive act would suffice to enforce this obligation. However, any modification of the existing domestic legal regime would definitely require legislative action”.¹¹ In the landmark case of “*Maganbhai Shwarbhai Patel v. Union of India*,”¹² the court while delineating the constitutional scheme between articles 51, 73, 246 and 253 and adjudicating upon the adjustment of national boundaries under international law, highlighted that the executive is competent to represent the Indian state in international matters and can incur binding obligations through treaties, agreements or conventions. This judgement overruled the apex court’s previous judgment, which held that executive actions aren’t enough to alter boundaries.¹³ It was also held that if there is no affect on the rights of citizens and others, then no legislation would be needed to give effect to such international obligations”.

The international legal regime does not obligate states to incorporate their international obligations and commitments into their municipal law. However, international law can’t exist alone; to bring about progressive changes in society, it is necessary for sovereign states to collaborate and cooperate. The Indian executive is bound to fulfill its obligations under treaties and conventions, yet the judiciary may not consistently incorporate international law into its decision-making

⁸Constitution of India 1950 a. 13 (2)

⁹Constitution of India 1950 a. 37

¹⁰Constitution of India 1950 a. 51 c

¹¹Hedge (n 8) at 71.

¹²AIR 1969 SC 783.

¹³In re TheBerubari Union and Exchange of Enclaves (1960) 3 SCR 250.



process.¹⁴ Notwithstanding any persuasive rationales, Indian courts encounter obstacles in wholeheartedly adopting international law principles. Domestic agendas, apprehensions regarding sovereignty, and historical scepticism towards international bodies might impede India's inclination to fully embrace global legal standards. However, international relations are of paramount importance to India in contemporary times as they can help embrace stability and predictability in the era of globalisation. By upholding international law, India strengthens its position as a responsible actor capable of upholding the rule-based international order.

PART II: METHODOLOGY DEPLOYED BY INDIAN COURTS FOR THE DOMESTIC LEGAL APPARTUS' INTERPRETATION AND INTEGRATION OF INTERNATIONAL LAW

"Article 38 (1) of the Statute of the International Court of Justice (1945) lays down treaty and custom as the two most important sources of international law. The Indian courts utilize international law principles, primarily treaty obligations, commitments under conventions, customary international law and principles that attained *jus cogens* status, as a means of supplementing their legal arguments¹⁵ and filling voids in domestic law and policy".¹⁶ In cases of interpretation, fulfilling international obligations and upholding national commitments when international law is not in conflict with municipal law, reflecting changes in the international order, and providing relief contained in international conventions, international law is also understood in conjunction with municipal law.¹⁷ However, this

practice is contingent on certain constitutional approvals and procedures in order to be systematically and legitimately be implemented in the Indian legal regime, as international law is not a stand-alone norm.¹⁸ There are primarily four types of situations that highlight the different stances adopted by the Indian judiciary while governing the relationship between international law and municipal law:

1. Municipal law will take precedence when international law conflicts with municipal law.
2. In accordance with international law, the judiciary adopts the interpretation where there are two constructions of municipal law.
3. The court will give a harmonious interpretation when international and municipal law are in conflict, and
4. To fill the void left by the absence of municipal law, the courts can investigate international law principles.

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TRACING THE INDIAN JUDICIAL TRAJECTORY

In contemporary times, it is evident that states increasingly find it necessary and tricky to relinquish aspects of their sovereignty to implicit norms. Since India's independence, the SCI has deployed the transformation doctrine, which calls for the use of constitutional machinery by parliament in transforming international law into municipal law by passing national legislation. This also highlights the formal dualistic tendencies of the Indian state, where it is vital to have national legislation prior to enforcing international obligations under a treaty or convention. For example, "India has amended or enacted legislation to give effect to obligations under agreements with the World Trade Organization,

¹⁴VivekSchrawat, 'Implementation of International Law in Indian Legal System' (2021) 31 (1) Florida Journal of International Law 97.

¹⁵VG Hedge, 'Indian Courts and International Law' (2010) 23 Leiden Journal of International Law 53.

¹⁶Sunil Kumar Agarwal, 'Implementation of International Law in India: Role of Judiciary' (Doctoral Seminar, Montreal, June 2011).

¹⁷M/s Entertainment Network (india) Ltd. v. M/s Super Cassete Industries Ltd (2009) (9) SCALE 69.

¹⁸Id.



Such as the 1996 Arbitration and Conciliation Act or the 1999 Geographical Indication of Goods (Registration and Protection) Act. Primarily, the Indian constitutional framework is embedded in the transformation doctrine, as can be inferred from reading articles 73, 246 and 253 together. In the case of *V/O Tractor Export, Moscow v. M/S Tarapore & Company*, the court reiterated that an international treaty would not come into application in India unless domestic legislation is passed.¹⁹ In *Jolly George Vergese v. Bank of Cochin*, the court dealt with the arrest and detention of an individual and held that it couldn't read article 11 of ICCPR into municipal legal regime as there was no domestic legislation regarding the same.²⁰ This similar stance was also reiterated in the case of *State of West Bengal v. Kesoram Industries Ltd. & Ors*.²¹

There are instances where the court has referred to ratified international conventions and treaties while adjudicating on domestic legal issues. However, no references are made to the comments by committees, which are a valuable source in understanding the concerned legal provision more aptly. For example, "in the case of *Chairman Railway Board v. Chandrima Das*, the court held that the Indian Constitution has embodied all basic and fundamental human rights set out in UDHR.²² In *National Legal Services Authority v. Union of India*, the court addressed the absence of domestic legislation protecting transgender people in India and recognised their rights to be protected under UDHR, ICCPR, ICESR and Yogyakarta principles.²³ On the other hand, even though India is signatory to human rights treaties that have provisions upholding the principle of non-refoulement, in *Mohammed Salimullah v. Union of India*, the court did not acknowledge their obligation to take the principle

into consideration while delivering their judgement on the deportation of Rohingyas back to Myanmar, where they face a threat of persecution.²⁴ The court stated that they could not apply this principle in the Indian context as the country is not a signatory to the 1951 Refugee Convention".

In 1984, the court remarkably shifted from the transformative doctrine to the incorporation doctrine. The case of "*Gramophone Co. of India v. Bhirender Bahadur Pandey* laid down the incorporation doctrine that emphasizes international law being an implicit part of municipal law, specifically those international law principles that have attained the status of customary international law.²⁵ The court held that those principles not in contravention with the national legislation can be endorsed as part of domestic law. The apex also held in the case of *ADM Jabalpur v S.S. Shukla* that in cases of conflict between international and domestic law, the latter will prevail, and in cases where there are two constructions of domestic law, then the one in harmony with international law must be adopted.²⁶ This highlights that the court has been advocating for a harmonious interpretation of international and municipal law. In the *Vellore Citizens Welfare Forum v. Union of India* case, the court held sustainable development to be part of customary international law and read the precautionary and polluter pays principles as part of the Indian environmental law²⁷. However, this judgement adopted a very cursory understanding of international law rather than delving into its history and the development of the international law principles being referred to. The court resorted to CERD and CEDAW in the case of *Safai*

¹⁹(1969) 1 1970 SCR (3) 53.

²⁰AIR 1980 SC 470.

²¹(2004) Appeal (civil) 1532 of 1993.

²²(2000) 2 SCC 465.

²³AIR 2014 SC1863

²⁴Interlocutory Application No. 38048 of 2021 in Writ Petition No. 793 of 2017.

²⁵AIR 1984 SC 667.

²⁶AIR 1976 SC 1207.

²⁷AIR 1996 SC 2715.



KaramchariAndolan v. Union of India, where it was held that since India has ratified these conventions, they are binding to the extent they are consistent with domestic law”.²⁸

Similarly, in the case of “*Vishaka v. State of Rajasthan*”, the court conclusively addressed the application of the incorporation doctrine and held that those international conventions (in the current case, the court referred to CEDAW) whose provisions are inconsistent with the fundamental rights in the Indian constitution but are in harmony with its spirit can be read into such provisions for widening its meaning and content and promoting the object of constitutional guarantee²⁹. However, this stance taken by the apex court was heavily criticised for its inability to account for the experiences of women in the informal sector, as the judgment passed focused on extending protection to women against formal workplace sexual harassment only. In the case of *AbanLoyd Chiles Offshore Ltd. v. Union of India*, the court reiterated that in the absence of domestic legislation, the principles enunciated in those treaties and conventions that are not in conflict with domestic law can be looked into.³⁰ The apex court also held in the *Republic of Italy v. Union of India* case that, in the absence of domestic legislation, conventions whose principles are based on the common law of nations can be read into the common law of India in the enforcement of maritime claims against foreign ships”.³¹

The incorporation of treaties to which India is not a party is yet another strategy utilized by the Indian judiciary. In “*M V Elizabeth v. Harwan Investment*”, the court stated that non-ratification of maritime treaties does not imply they can’t be implemented in India, as the embodied principles in these treaties are generally applicable to all

common law states. This stance was also reiterated by the courts in the case of *Liverpool & London v. M V Sea Success*, where international maritime laws were considered common across the world.³² This practice can also be observed in cases of granting refugee status to claimants. Even though India is not a signatory to the 1951 Refugee convention, it has still granted refugee status to certain groups, such as Tibetan and Sri Lankan refugees”.

Hence, the above detailed case analysis highlights that there has been a shift in the trends of doctrines of governance deployed by Indian courts when dealing with issues pertaining to international law. Even more, it underscores that the Indian judiciary exhibits inconsistency regarding the interpretation of the relationship between international law and domestic law. This inconsistency in its application can also be a consequence of the drastic developments in international politics and its impact on international relations with India. This difference varies from case to case based on the subject matter in question and the extent of state sovereignty that will be compromised.³³ The *Maganbhai* and *Gramophone* cases have predominantly laid down the extent to which international law can be read into domestic law. This highlights the gradual efforts by the judiciary to move from transformation to incorporation doctrine, even though the Indian courts generally use the former for reasoning in their judgements. However, the golden thread running across these cases is that as long as international law principles, whether emanating from treaties,

²⁸Writ Petition (Civil) No. 583 of 2003.

²⁹AIR 1997 SC 3011.

³⁰2008 (6) SCALE 128.

³¹(2013) 4 SCC 721.

³²Appeal (Civil) 5665 of 2002.

³³Regarding subject matter, there is a difference in the approach adopted by the Indian courts in matters pertaining to international human rights and environmental protection as compared to international economic treaties. Refer to *Union of India v. Agricas* Transfer Petition (Civil) No. 496-509 of 2020. In this case, the court refused to integrate GATT provisions into the domestic law, despite India being the founding member of GATT.



conventions or customary international law, are not in contravention with domestic law and in sync with Indian constitutional guarantees, the apex court may consider reading them into the domestic legal regime. The Indian courts will not hesitate to resort to international legal norms in cases where there is no domestic legislation pertaining to the issues in question.

PART III: ADDRESSING THE SHIFTING TRENDS AND WAY FORWARD

As “international law principles evolve in process and mechanism, there is an expansion in the scope of subject matters falling within its jurisdiction. Indian courts are endeavoring to keep pace with these developments by instituting requisite modifications in their domestic legal framework as well. The apex court has also held that the interpretation of law should evolve with the pace of developments in ground realities, highlighting that the interpretation of any statute can’t be static.³⁴ It has also accommodated international law within the domestic legal system, though without wholly relinquishing supremacy to domestic law in instances of conflict. Nevertheless, it can be concluded that the Indian judiciary has gradually shifted from formal dualism to exhibiting monist tendencies in the incorporation of international principles into municipal law”³⁵.

As mentioned in the “*Maganbhaicase*, the state must equip itself with the necessary power to address any deficits in the constitutional system. The Indian judiciary comes across a number of cases that have ‘foreign’ elements in them or cases that may require only the implementation of international law principles. Hence, the scope and interpretation of international law have significantly broadened since its inception. With the developing operational complexities in global

regimes, India has shown some reluctance in relying on international law principles as they are primarily influenced by Western countries, and it is difficult to hold them accountable if need be. Nevertheless, the Indian judiciary should pursue systematic integration of international law into its domestic legal apparatus. The arguments favoring the precedence of international law principles over domestic laws must be thoroughly contextualized to address any gaps and align with the aspirations of the nation’s populace. When applying international law, the judiciary must exercise informed discretion. Non-universal application of international law across cases could lead to inconsistencies and undermine the credibility of the legal system if not backed by well-defined and logical reasoning”.The Supreme Court must also investigate the development and history of international law principles in order to apply them to the Indian context. The court must also factor in the existing legal, political, cultural, social and economic landscape of the country and not blindly adopt international law principles without being sensitive to the indigenous differences. The momentum of this can be felt in the backlash the judiciary received in the *Vishakacase* and the *Vellore Citizens Welfare Forum case*. Indiscriminately adopting international law principles without accounting for cultural and social differences risks disregarding the unique challenges and aspirations of the Indian populace. By factoring in the multifaceted dimensions of Indian society, the court ensures that its decisions resonate with the realities on the ground. Lastly, “the court must also deploy the appropriate methodology while incorporating international law into the domestic legal regime. This ensures consistency, clarity, and legitimacy in their

³⁴Supra note 20.

³⁵PrabashRanjan. ‘The Supreme Court of India and International Law: A Topsy-Turvy Journey from Dualism to Monsim’ (2022) 43 (3) Liverpool Law Review.



decisions. An effective methodology involves thorough research, careful analysis, and consideration of relevant precedents. By adhering to principles of justice, respecting sovereignty, and fostering consistency and transparency in judicial decision-making, the adoption of an appropriate methodology would safeguard the integrity of the legal system and uphold the rule of law”.

CONCLUSION

In the contemporary era of globalization, legal systems worldwide are witnessing a convergence, underscoring the need to reconcile their disparities in interpreting international law principles. Striking a harmonious balance between municipal law and international commitments is essential, as conflicting contours between these parallel legal systems can impede the effective implementation of ratified treaties and conventions. This terrain remains largely unexplored, presenting a significant area for

judicial inquiry. By delving deeper into this intersection, the judiciary can ensure interpretations consistent with both Indian constitutional principles and international legal norms. The Indian judiciary’s readiness or reluctance to draw upon international law for constitutional and legislative interpretation is evident from numerous precedents. In these instances, the Supreme Court has construed international norms to align with domestic law, avoiding conflicts wherever possible. However, in cases of inevitable conflict, domestic law retains primacy. While the judiciary endeavors for the harmonious coexistence of municipal and international law, the authoritative normative force of legal principles emanates from specific sources. Hence, it is incumbent upon constitutional authorities to fairly discern whether an international law principle holds sway within domestic jurisdiction or not.

