

USING INTERNATIONAL LAW IN DOMESTIC INDIAN COURTS

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I. INTRODUCTION

States generally accept international law within their domestic framework either by ratifying treaties and upholding their requirements or through customary international law. The international law framework does not, in itself, obligate states to incorporate treaties within their domestic framework. Therefore, states could, in theory, choose to ignore international law until it is incorporated into domestic law.¹ To best meet the aims of international law, it must be incorporated into the domestic legal paradigm which has more widespread authority and trust within a state. International law alone may not be powerful enough as a tool for change.

This commentary attempts to trace the recognition of international law within the domestic legal framework of the Indian subcontinent. International law oftentimes gives the disadvantaged population a vocabulary to assert their rights. Its domestic importance is unparalleled. The first section of this commentary explores the Indian Constitution's position on international law. It explains the obligations of the legislature and the judiciary, both of which derive their authority from

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1. Vivek Sehrawat, *Implementation of International law in Indian Legal System*, 31 FLA. J. INT'L L. 1, 3 (2021).

the Constitution, when implementing international law. It then moves on to discuss certain examples wherein the judiciary, primarily the Supreme Court of India, has attempted to refer to, analyze, and derive precedent and legal theory from international law treaties and customs. The final section of the commentary critiques the rather unclear methodology used by the judiciary and discusses the broader role of the judiciary when it comes to international law. Throughout, the article focuses on public international law and its sources as mentioned in Article 38 of the Statute of the International Court of Justice.²

II. JUDICIAL POWERS UNDER THE INDIAN CONSTITUTION

There are two theories in place to understand the interplay between international law and domestic law: monism and dualism. Monism views both international law and domestic law as arising from a single set of principles binding all human beings and propounds that international law is incorporated into domestic law the moment a treaty is signed or a custom is accepted.³ In contrast, dualism views international law and domestic law as separate entities.⁴ It requires that international law be actively incorporated into a domestic legal framework through legislation.⁵ At first glance, it appears that India has traditionally followed the dualism theory—international law does not become binding in the country until it is incorporated through domestic legislation.⁶ This article disputes this notion.

Within the Indian Constitution, understood as the *grundnorm* (fundamental norm) establishing the largest democracy in the world, there is no stated obligation to conform to international law. While it provides that the Indian government obey its treaty obligations, it does not obligate the judiciary to factor international law into its decision-making pro-

2. Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945, 832 U.S.T.S. 993.

3. Sehrawat, *supra* note 1, at 6.

4. Sehrawat, *supra* note 1, at 7.

5. Sehrawat, *supra* note 1, at 7.

6. India Const. art. 253, Entry 13 and 14 of List I of the VII Schedule; National Legal Services Authority v. Union of India, AIR 2014 SC 1863 (2014) (India).

cess.⁷ Further, questions of the country's international law obligations have been assigned to the central government. According to Schedule VII of the Constitution, which delineates the respective powers of the central government and the states under India's quasi-federal structure, state governments have no role to play in international law obligations. List I, found under Schedule VII, read with Article 246, lists the subjects solely under the power of the federal government.⁸ Entries 13 and 14 of List I give the federal government the power to enter into treaties, agreements, or conventions. Additionally, as per Article 253 of the Constitution, a treaty or convention ratified by India cannot become a part of national law unless the federal parliament enacts a law.⁹

The Indian Constitution does not mandate that the state uphold international law obligations. Rather, Article 51 merely encourages the Indian state to *endeavor* towards a set of ideals and “*foster respect for international law and treaty obligations.*”¹⁰ In order to interpret Article 51, it is important to pay special notice to the placement of the article in the Constitution. It appears in part IV of the Constitution, titled Directive Principles of State Policy.¹¹ The principles under this section are not enforceable, but they are considered ideals for good governance of Indian society.¹² The Indian polity strives to achieve these ideals. An alternate interpretation, the soft approach to Article 51, is attributed to its border issues with neighboring countries.¹³ Shri. H.V Kamath offered yet another perspective in the Constituent Assembly Debates, emphasizing that India must look at international relations through a lens of paramount importance.¹⁴ This viewpoint was particularly important at the time of independence when there was immense dis-

7. Sehrawat, *supra* note 1, at 10; India Const. art. 51(c), 253.

8. India Const. art. 253, Entry 13 and 14 of List I of the VII Schedule.

9. India Const. art. 253; *National Legal Services Authority*, AIR 2014 SC 1863; *State of West Bengal v. Kesoram Indus. Ltd.*, (2004) 10 SCC 201, 210, ¶ 490-492 (India).

10. India Const. art. 51 (emphasis added).

11. *Id.*

12. *Id.*

13. V.G Hegde, *Indian Courts and International Law*, 1 LEIDEN J. INT'L L. 53, 59 (2010).

14. *See* Constituent Assembly Debates, Volume VII, Nov. 25, 1948, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25 [<https://perma.cc/FBD2-5VJY>] (At the end of British Rule in

trust amongst people and a natural tendency to equate international relations to compromised national security.¹⁵ In the debates, Kamath interestingly referenced disarmament, the World Wars, and the U.N. blocs in the context of international law and international relations.¹⁶ The aim was to promote peace and break down imperialistic tendencies through the incorporation of the article.¹⁷ This suggests that Article 51 was incorporated more as a symbol of India's allegiance to peaceful international relations rather than as a means of strict adherence to international law.

Article 51(c) refers to international law and treaty obligations separately. No concrete information is found in the Constituent Assembly Debates on what each category entails.¹⁸ Professor Alexandrowicz¹⁹ states that "international law" in Article 51 connotes customary international law and "treaty obligations" stand for treaties.²⁰ This derivation would be the most logical given the terminologies used in the article. It is important to note, however, that in practice, the Constitution treats both customary international law and treaties the same. The Indian Judiciary can uphold international law merely to the extent permitted within the realms of the Constitution. Knowing this is important when considering the next section.

III. TRACING PRECEDENTS

The Indian judiciary has played an important role in implementing India's international law obligations. There are certain international law principles that the Indian judiciary follows while interpreting municipal law. For example, when there are two possible constructions of domestic law, the judi-

1947, the Constituent Assembly was elected to frame the Constitution of India. They constituted the first parliament of India).

15. *Id.*

16. *Id.*

17. *Id.*

18. M.K. Nawaz, *International Law in the Contemporary Practice of India: Some Perspectives*, 57 CAMBRIDGE UNIV. PRESS 275, 278 (1963).

19. Prof. CH Alexandrowicz was an eminent lawyer and professor of international law. He taught for a brief period at the University of Madras and published on Indian Constitutional Law before moving to the University of Sydney. DAVID ARMITAGE & JENNIFER PITTS, *THE LAW OF NATIONS IN GLOBAL HISTORY* 1-31 (2017).

20. Nawaz, *supra* note 18, at 278.

ciary gives an interpretation in line with international law.²¹ Similarly, when domestic law and international law are contradictory, the courts attempt to give them a harmonious interpretation.²² Furthermore, in the of absence of domestic law on a subject, international law may be followed.²³ But where domestic law conflicts with international law, Indian courts are bound to give effect to the former.²⁴ While the judiciary attempts to reconcile domestic and international law where possible, only the parliament can, through the Constitutional framework, eliminate the discrepancies in the domestic and international law. Nevertheless, domestic legislation cannot evade the international law obligations of a state.²⁵ To summarize, international law in India must be used within the domestic framework in one of the following ways:

1. As a means of interpretation;
2. Justification or fortification of a stance taken;
3. To fulfill the spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;
4. To reflect international changes and reflect the wider civilization;
5. To provide a relief contained in a covenant, but not in a national law;
6. To fill gaps in law.²⁶

Indian courts have regularly cited international law sources while expanding constitutional interpretation, especially in the context of human rights. In the landmark case *Vishaka v. State of Rajasthan* (1997), the Supreme Court stated that “gender equality included protection from sexual harassment and right to work with dignity” under the Indian Consti-

21. See *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, ¶ 1467 (1973) (India); *ADM Jabalpur v. Shivkant Shukla*, AIR 1976 SCC 1207, ¶ 542 (1976) (India).

22. See *Krishna Sharma v. State of West Bengal*, AIR 1954 Cal 591 (1954) (India).

23. See *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863 (2014) (India).

24. See *id.*

25. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

26. *Entertainment Network (India) Ltd. & Ors. vs. Super Cassette Industries Ltd.*, 2008 (9) SCALE 69 (India).

tution,²⁷ referencing the Committee on the Elimination of Discrimination Against Women (CEDAW) and India's commitment at the Fourth World Conference on Women in Beijing. The court drafted guidelines that were later adopted by the Indian parliament titled: The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act of 2013. While the implementation of CEDAW into the *Vishaka* guidelines was an important first step, it failed to consider the socio-economic backdrop of the Indian subcontinent, thus failing to protect the large sector of daily wage workers and others outside the formal employment system.

In *Chairman Railway Board v. Chandrima Das*, the Supreme Court, while discussing the Universal Declaration of Human Rights (UDHR) as a "Moral Code of Conduct" in detail, explained that the Indian Constitution "guaranteed all basic and fundamental human rights set out in the UDHR."²⁸ The fundamental rights in the Constitution were read in consonance with the UDHR, International Covenant on Civil and Political Rights (ICCPR), and CEDAW to extend the constitutional right to life to a non-citizen rape victim. In the *Ashok Kumar Thakur* case, the court questioned the validity of the 93rd Amendment Act (Act) furthering affirmative action for socially and educationally backward classes. One of the issues confronted by the court was whether the Act was in violation of Article 26 of the UDHR.²⁹ In *National Legal Services Authority*, the Supreme Court, while acknowledging that there is no law protecting transgender people in India, recognized that transgender people have a "third gender" by which their rights could be protected by referring to the UDHR, ICCPR, International Covenant on Economic Social and Cultural Rights (ICESCR), and Yogyakarta Principles.³⁰

State high courts in India have also occasionally referred to international conventions to expand the rights of its citizens. The Andhra Pradesh High Court, looking to Article 26 of the ICCPR, interpreted "sex" to include transgender per-

27. *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

28. *Chairman Railway Board v. Chandrima Das*, (2000) 2 SCC 465 (India).

29. *Ashok Kumar Thakur v. Union of India*, (2007) 4 SCC 397 (India).

30. *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863, ¶ 53 (2014) (India).

sons.³¹ It mentioned that Article 9 of the ICCPR's right of liberty to "everyone" includes persons of LGBTQ+ identity.³² Despite this decision, it is pertinent to note here that most international law jurisprudence is laid down by the Supreme Court and not state courts in India. Instances of state courts referring to international conventions, treaties, or customary law are sparse.³³

Notwithstanding the discussion above, the Indian Supreme Court does not often engage in the determination of whether a particular principle is in fact a part of customary international law.³⁴ An example is the *Vellore Citizens Welfare Forum* case, in which the Supreme Court held that sustainable development is a part of customary international law and thus, by extension, of domestic law.³⁵ The court did not, however, engage in any discussion to determine if sustainable development was in fact a part of customary international law. Thus, while reliance on international treaties can be straightforward, there is an extensive lack of juridical application of mind in the case of customary international law. This limits the precedential value customary international law can have in the domestic setting.

Furthermore, acceptance and enforcement of international law through domestic constitutional interpretation within the higher judiciary reflects a superficial understanding of international law, with almost no discussion of the history and development of the convention, its articles, or customary international law.³⁶ This often leads to situations such as the *Vishaka* case, wherein terms from international conventions are borrowed, but placed out of context in Indian jurisprudence. Additionally, the implementation of international law

31. *Matam Gangabhavani v. State of Andhra Pradesh*, 2022 SCC Online AP 200, ¶ 49 (India).

32. *Id.*

33. Hegde, *supra* note 13, at 55.

34. Prabhash Rajan, *How India has Approached Customary International Law*, INDIAN EXPRESS (Jan. 11, 2022), <https://indianexpress.com/article/opinion/columns/how-india-has-approached-customary-international-law-7716742/> [https://perma.cc/EX37-YNLG].

35. *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 (1996) (India).

36. While treaties are often cited, there are almost no references to comments by committees under the treaty or case laws.

principles is not consistent. In a recent interlocutory order in *Mohammad Salimullah* challenging the deportation of Rohingya Muslims, the Supreme Court refused to accept non-refoulement as a part of customary international law while noting that India is not a party to the Convention Relating to the Status of Refugees of 1951.³⁷ This case is yet another example of the lack of dialogue in the Supreme Court of India on any attempt to determine customary international law.

IV. UNANSWERED QUESTIONS AND A WAY FORWARD

The approach of the Indian judiciary raises the question of whether the Indian stance on international law is that of monism or dualism. Courts have, as late as 2020, claimed that India follows dualism.³⁸ This is incorrect. Monism and dualism are formalistic constructs that do not reflect the reality of interflow between them for India. India does not adhere to strict dualism and has most definitely attempted to inculcate the jurisprudence with international law developments that have not been translated into domestic legislation. International law is automatically treated as part of domestic Indian law by national courts unless there are divergences between the two, though on paper the Constitutional scheme is based on dualism. As discussed in the previous section, there have been multiple instances wherein international conventions have been invoked to further constitutional rights despite the absence of a domestic law incorporating the relevant international law. This approach does not conform to formal dualism. Further proof is found in *G. Sunderrajan v. Union of India*,³⁹ wherein the court referenced the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive

37. Unreported Judgments, *Mohammad Salimullah v. Union of India*, Interlocutory Application No. 38048 of 2021 in Writ Petition No. 793 of 2017, decided on Apr. 8, 2021 (SC), https://main.sci.gov.in/supremecourt/2017/27338/27338_2017_31_1502_27493_Judgement_08-Apr-2021.pdf [<https://perma.cc/87QC-J8Z9>]; U.N. Hum. Rts. Off. of the High Comm'n, *The Principle of Non-refoulement Under International Human Rights Law* <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [<https://perma.cc/YT45-4B34>] (last visited Feb 13, 2022).

38. *Union of India v. AGRICAS LLP.*, (2020) SCC Online SC 675, ¶ 44 (India).

39. *G. Sunderrajan v. Union of India*, (2013) 6 SCC 620 (India).

Waste Management to draw attention to the importance of safety concerns and environmental assessment within the international community while acknowledging that India was not a signatory to the Convention.⁴⁰ Article 51 of the Constitution also does not distinguish between international law formally adopted by domestic legislation and that which is not. The Supreme Court's refusal to acknowledge these blurred lines of international law's adoption by the domestic legal regime is an indication of a rather conservative and limited understanding.

This leads to the question of separation of powers between the judiciary and legislature in India—whether the Indian judiciary should, itself, reform the jurisprudence of international law within the domestic framework without the help of the legislature. One can argue that the principles of monism exercised by the Supreme Court essentially render the Constitution of India superfluous, undermining the separation of powers and diluting the supreme law of the country. To add to this, the theory of democratic deficit in developing countries⁴¹ acknowledges that the signing of international treaties is not an electorally democratic process.⁴² The executive, a constitutionally elected body of the nation-state, makes decisions on international treaties, but often under the influence of other nations. This is furthered by the fact that it is extremely difficult to hold Western countries accountable.⁴³ To make matters worse, when Indian courts fail to look at the history behind an international law rule, democratic deficit is advanced, making it impossible for them to place these rules within India's socioeconomic context.

As discussed in the previous section, the Indian Constitution does not mandate courts to implement international law. The ideal way forward would be to make such an amendment to this effect in the Constitution⁴⁴ though realistically, amending the Indian Constitution is a slow process. Moreover, given

40. *Id.* at ¶ 224.

41. Shubhangi Agarwalla, *Using International law in Indian Constitutional Adjudication*, INDIAN CONST. L. & PHIL. (Dec. 24, 2018), <https://indconlawphil.wordpress.com/2018/12/24/guest-post-using-international-law-in-indian-constitutional-adjudication/> [<https://perma.cc/35D8-MQFT>].

42. *Id.*

43. *Id.*

44. Sehrawat, *supra* note 1, at 20.

its colonial history, as evidenced by the Constituent Assembly Debates, a developing country like India may be wary of the overspread of international law within its domestic jurisprudence. In such circumstances, the Indian Judiciary is the most suitable organ for enhancing international law jurisprudence within the municipal legal apparatus. Therefore, systemic integration within domestic jurisprudence is the most plausible way forward. This can be achieved by courts citing international instruments more often. A detailed discussion when citing an international treaty or customary international law would not only assist in contextualization but also encourage lawyers to make comprehensive arguments on international law, an almost obsolete practice currently.

Indian judges have traditionally played a proactive role in the development of laws as instruments for empowerment. This is evidenced through numerous interim guidelines that the judiciary has developed while waiting for the legislature to fill a void in the law.⁴⁵ These guidelines have furthered rights extensively and have been welcomed within the liberal rights jurisprudence of the country. Similarly, the judiciary could play a proactive role in making formal recommendations through judgments to the parliament to sign a particular treaty or convention while the court builds the jurisprudence into the domestic framework. Such an inclination is required to keep up with changing international norms.⁴⁶ Lastly, reliance on international law forces courts to confront why domestic law is different. It emphasizes the importance of international law within the Indian legal education and profession while strengthening its international obligations. It lends a voice to those who are not protected in the domestic legal space but gain recognition within the international legal community.

45. *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India) (establishing the Vishaka guidelines for prevention of sexual harassment at workplace); *Laxmi v. Union* (2014) 4 SCC 427 (amending the Indian Penal code for acid attack victims); *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863, ¶ 53 (2014) (India) (establishing NALSA guidelines for transgender persons).

46. Especially in the context of human rights and environment.

V. CONCLUSION

The difficulties in applying international law within the domestic framework have multiplied in the past couple of decades with increasingly changing norms. Specifically for India, there have been multiple doubts cast on the feasibility of a system in which the judiciary plays a role more extensive than that of a simple upholder of law, often venturing along the lines of legislating. But it cannot be denied that such an activist role of the Indian judiciary has furthered law as an instrument for empowerment under both domestic law and international law. References to international law, albeit restricted, have inevitably led to the development of domestic law, especially in the context of constitutional interpretation. The monist approach of this formally dualist⁴⁷ country has been a source of the limited discussions on international law within the legal space. With increasing globalization and vast inter-country disputes, the Indian judiciary can expect to come across more frequent brushes with international law. Ideally, the parliament should play a proactive role in preempting the increased influence of international law through its legislative responsibilities, and the judiciary should equip itself for a deeper jurisprudential analysis of international law regimes in domestic cases, cautiously adding it to the domestic jurisprudence.

47. Through strict interpretation of the Constitution.