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# **ANALYZING THE ROLE OF INDIAN COURTS IN THE INTERSECTION BETWEEN PUBLIC INTERNATIONAL LAW AND INDIAN DOMESTIC LAW.**

AUTHORED BY - EESHAN SINHA

## **Introduction**

Intersectionality between public international law and Indian domestic laws explores a complex yet fascinating area where global legal frameworks intersect with local judicial practices. As globalization intensifies, the relationship between international treaties and national legislation becomes increasingly significant, particularly in countries like India where societal norms are deeply ingrained within the fabric of its diverse culture. This paper examines how international laws influence Indian domestic statutes across various sectors including human rights, environmental protection, and trade regulations, highlighting both synergies and conflicts. Through this exploration, it aims to delineate the challenges posed by the interaction between different legal systems while suggesting pathways towards more effective integration that respects both universal mandates and unique cultural contexts. The Indian Constitution is the supreme law of the land, and the legal system in India is based on a hierarchical framework of rules. This relationship is made more complex by the court system's involvement in resolving conflicts between domestic and international laws, as well as the absorption of international treaties and conventions into domestic law.<sup>1</sup> This paper will examine the subtleties of the relationship between Indian domestic laws and public international law, as well as the difficulties in implementing it. In the past, the ideas of dualism and monism envisioned two different ways that domestic courts might combine international and domestic law.

## **Monism and Dualism**

According to monism, domestic and international law are complementary aspects of the same legal order, with normative connections between them. Monist perspectives hold that international law should naturally become part of the domestic legal system without the need for

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<sup>1</sup> Rajamani, L. (2016). International Law and the Constitutional Schema.  
<https://doi.org/10.1093/law/9780198704898.003.0009>.

further state adoption or amendment.<sup>2</sup> After being incorporated, international law is placed in the hierarchy of sources that apply to domestic law and is used by the judiciary and other governing bodies in that jurisdiction as part of the governing normative framework. The concept of monism explains the relationship between the international and domestic legal domains by stating that the recognition required for municipal law to have jurisdiction over a particular topic or region comes from international law.<sup>3</sup>

Conversely, dualism is predicated on the knowledge that domestic and international law function in separate and compartmentalized domains and that foreign law is not inevitably integrated into the home legal system. Since domestic and international law function in different domains, regular domestic law-making processes are the only way to convert international law into domestic law. Therefore, dualism does not maintain that international law has no place in the domestic order but rather that any such function must be explicitly approved by domestic legal procedures.<sup>4</sup>

The need to go beyond the ideological frameworks of monism and dualism in order to distinguish the relative authority and interaction between domestic and international rules has been fueled by the expanding scope of international law. The concepts of monism and dualism are remnants of political discussions about the nature and purpose of law, as well as any possible restraints on state power, that occurred in Europe in the late 19th and early 20th centuries.<sup>5</sup> Attempts have been made to reinterpret these concepts in order to address modern issues in recent literature. In modern discourses, monist ideals are justified as fulfilling the needs of global government and advancing or reflecting a cosmopolitan culture and the universalization of values.<sup>6</sup>

As doctrines, dualism and monism are formalistic, formulaic constructions that fail to capture the reality of the many ways that cross-border legal exchanges occur, particularly considering the growing interconnectivity of local and international legal systems.<sup>7</sup>

It is not contended that the ideas of dualism and monism are insignificant, despite some

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<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> Chandra, A. (2017) 'India and international law: Formal dualism, functional monism', *Indian Journal of International Law*, 57(1–2), pp. 25–45. doi:10.1007/s40901-017-0069-0.

<sup>6</sup> *ibid.*

<sup>7</sup> Bogdandy, at 400; F. Francioni, *International Law as a Common Language for National Courts*, 36 *Texas Intl L J* (2001) 587.

reservations about them. The reason they are significant is that judges, decision-makers, and other state authorities value them. India, for instance, follows the dualist paradigm when dividing up authority in respect to international law. Because Parliament has little authority over the domestication of international norms, the Executive frequently takes on and internalizes obligations under international law with little to no supervision from Parliament, or with very little oversight that occurs after the fact. As a result, Indian practice contradicts the precise division of powers between the Executive and the Legislature that dualist theories envision. Judicial dicta that permit courts to adopt standards of international law without first having the legislature domesticate them exacerbate this.<sup>8</sup>

### **Article 51(c)**

*“(c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another.”<sup>9</sup>*

Part IV of the Constitution, which lists the Directive Principles of State Policy (DPSP), includes this article.<sup>10</sup> The DPSP are "fundamental in the governance of the country," even if they are not meant to be "enforceable by any court."<sup>11</sup> The State has a duty to "apply these principles in making laws."<sup>12</sup> As stated by the Supreme Court, "the court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India,"<sup>13</sup> in accordance with Article 51 of the Constitution. Furthermore, the Court's jurisprudence reads the DPSP and fundamental rights together, "like two wheels of a chariot, one no less important than the other."<sup>14</sup> Several international legal standards have been incorporated into fundamental rights, such as the environmental right's application of the precautionary principle. This has broadened the scope of international law and the courts' authority.<sup>15</sup>

Further there is a mere obligation for states to try and establish respect for international law, this obligation can be constituted as an obligation of result rather than result.<sup>16</sup> They also escape the

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<sup>8</sup> Hegde, V. G. (2017). International Law in the Courts of India. In K. Y. L. Tan (Ed.), *Asian Yearbook of International Law, Volume 19 (2013)* (pp. 63–87). Brill. <http://www.jstor.org/stable/10.1163/j.ctv2gjwtcs.4>.

<sup>9</sup> Constitution of India 1950, art 51(c).

<sup>10</sup> Constitution of India 1950, art 51(c).

<sup>11</sup> Rajamani, L. (2016). International Law and the Constitutional Schema. <https://doi.org/10.1093/law/9780198704898.003.0009>.

<sup>12</sup> Constitution of India 1950, art 37.

<sup>13</sup> Kesavananda Bharati v State of Kerala (1973) 4 SCC 225.

<sup>14</sup> Minerva Mills v Union of India (1980) 3 SCC 625 [56].

<sup>15</sup> Rajamani, L. (2016). International Law and the Constitutional Schema. <https://doi.org/10.1093/law/9780198704898.003.0009>.

<sup>16</sup> *ibid.*

test of justiciability. As a result of the complex nature of the Article, the courts have limited themselves and not delved deep into the provision but have applied it in a broad and expansive manner. In theory, unless relevant domestic legislation is in place to give effect to international legal norms, these laws are not directly enforceable in India. However, by internalizing and adopting a number of international legal standards into domestic law, the courts have actually promoted respect for treaty responsibilities and international law. Although there are important differences between sources of international law, it is worthwhile to investigate how various sources of international law have been brought up and handled by Indian courts. The courts' approach to international law appears to favor a certain "give and take and mutuality of influence"<sup>17</sup> between various sources of international law.

### **Role of the Courts**

International conventions and treaties have been brought up, utilized, and "incorporated" by the courts in a number of ways. Firstly, courts have interpreted domestic laws in consonance or concord with an international treaty to which India is a party, where the terms of the treaty are vague or imprecise and have been incorporated into domestic law. They take this action based on the initial assumption that Parliament did not intend to act in a way that would violate international law or its commitments under treaties. In contrast, the courts have ruled that it is not essential to search outside (i.e., international law) where the law as determined in India on the matter is sufficiently clear.<sup>18</sup> We may trace this back to the *Salil Bail v. Union of India* decision, in which the court used a variety of declarations and conventions ratified by the international community, as represented by the United Nations, in addition to provisions of the Constitution to calculate the age of majority.<sup>19</sup>

Secondly, courts have ordered the State to give effect to an international treaty even if it has not been integrated into domestic law and to which India is a party. *People's Union for Civil Liberties v. Union of India*<sup>20</sup> is an example of an unincorporated treaty being implemented; in this case, the Court interpreted Article 21 to include the right to privacy on the basis that local law had to be interpreted in harmony with international law. The right to privacy is protected by the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and

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<sup>17</sup> Effectuation of International Law in the Municipal Legal Order: The Law and Practice of India (1995) 5 Asian Yearbook of International Law 145, 157.

<sup>18</sup> Rajamani, L. (2016). International Law and the Constitutional Schema. <https://doi.org/10.1093/law/9780198704898.003.0009>.

<sup>19</sup> *Salil Bail vs. Union of India* (2013) 7 SCC 705.

<sup>20</sup> *People's Union for Civil Liberties v. Union of India* (1997) 3 SCC 433.

Political Rights, both of which India is a signatory. The Court stated that "courts can certainly rely upon the covenant's provisions as facets of those fundamental rights and hence, enforceable as such," since they "elucidate and go to fulfil the fundamental rights guaranteed by our Constitution."<sup>21</sup>

Furthermore, the Court has, at least in one significant case, judicially "incorporated" or legislated an international treaty to which India is a party in addition to giving the treaty effect. The Supreme Court established "guidelines and norms" on sexual harassment in *Vishaka v. State of Rajasthan*,<sup>22</sup> ruling that employers must adhere to these standards until relevant legislation is passed. This was done "in the absence of enacted domestic law."<sup>23</sup> The Court held, under the accepted rule of judicial construction, that consideration must be given to international conventions and standards for interpreting domestic law when there is a vacancy in the domestic law and there is no disagreement between them. Furthermore, other international conventions that are consistent with the spirit and not in conflict with the fundamental rights must be inserted in order to further the objectives of the constitutional guarantee and to broaden the meaning and content of these provisions—Articles 14, 15, 19, and 21 of the Constitution. The Supreme Court used international law to make law in this case. The Court used the 1980 Convention on the Elimination of All Forms of Discrimination Against Women, to which India is a signatory, albeit with significant restrictions, to support its decision to enter the legislative process. The Court justified its capacity to enact laws by stating that it was doing so "in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights". The court emphasized that this would be recognized as the law announced by this Court in line with Article 141 of the Constitution.<sup>24</sup> It is important to remember that the Court's authority under Article 141 of the Constitution is to "declare law," which only applies to Indian courts and tribunals. Contrary to what has been implied, the Court is not able to "make law" that is obligatory for all Indian citizens.<sup>32</sup> It is a usurpation of the legislative function in and of itself to give effect to unincorporated treaties,<sup>33</sup> let alone to make laws that serve as stopgap measures until Parliament intervenes. By adopting a broad interpretation of international law in *Vishaka*, the court "made law," expanded its own purview, and intruded on Parliament's purview.

In the same spirit, courts also readily make favorable references to treaties to which India is not

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<sup>21</sup> *People's Union for Civil Liberties v. Union of India* (1997) 3 SCC 433.

<sup>22</sup> *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

<sup>23</sup> *ibid.*

<sup>24</sup> Rajamani, L. (2016). *International Law and the Constitutional Schema*.  
<https://doi.org/10.1093/law/9780198704898.003.0009>.

a party. *G Sundarrajan v. Union of India*<sup>25</sup> is a recent case in which the Supreme Court was requested to rule on whether or not the establishment of the nuclear power station in Kudankulam was against public policy. Even while the Court ruled that it was not because it benefited the greater public interest, it emphasized that the relevant authorities still had a duty to make sure that sufficient nuclear safety measures were in place before the plant started operating. The Court brought up a number of international accords in this context, one of which India had not ratified. The Court utilizes this unfulfilled pact to set standards and offer context, even if it did not want to give it effect. The *National Legal Service Authority v. Union of India* (Transgenders case)<sup>26</sup> is another recent example of this. In this case, the Court cited multiple treaties under the heading "India to follow International Conventions," including the 1980 Convention against Torture, to which India is not a party. The Court listed many pertinent treaties, noting their legal implications while omitting to say whether India is a party to any of them.

The ruling in *Ktaer Abbas Habib Al Qutaifi v Union of India*<sup>27</sup> by the Gujarat High Court may go the furthest in regard to treaties to which India is not a party. In this instance, the Court interpreted Article 21 to include the non-refoulment norm, which it took from the Refugee Convention—to which India is not a signatory. The Court found that "the principle of "non-refoulment" is encompassed in Article 21 of the Constitution of India and the protection is available, so long as the refugee's presence is not prejudicial to the national security," citing Article 51(c) and Article 253.<sup>28</sup> Nevertheless, it mentioned that the non-refoulment principle "forms part of general international law" and that "there is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent"<sup>29</sup> in doing so. This assertion gives the Court cover in its endeavor to adopt the idea into domestic law, even if it was stated rather than established as a general international law principle.

Similar to treaties, Indian courts seem to be prone to include both international customary and non-customary rules into their own legal systems. The landmark case in this area is the case *Vellore Citizens Welfare Forum v. Union of India*,<sup>30</sup> the court determined that the concepts of precaution and "the polluter pays" found in international environmental law apply to both domestic environmental law and, to some extent, customary international law. The Court

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<sup>25</sup> *G Sundarrajan v. Union of India* (2013) 6 SCC 620.

<sup>26</sup> *National Legal Service Authority v. Union of India* (2014) 5 SCC 438.

<sup>27</sup> *Ktaer Abbas Habib Al Qutaifi v Union of India*, 1999 CriLJ 919.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> *Vellore Citizens Welfare Forum v. Union of India* 1996 (5) SCC 647, 1996 AIR SCW 3399

reasoned that India's network of statutory environmental regulations, along with Article 21 and other pertinent constitutional provisions, were adequate to incorporate the precautionary and "polluter pays" concepts into domestic environmental law.<sup>31</sup> It is important to remember that the network of environmental legislation aims to further the constitutional duty "to protect and improve" the environment. The idea of precaution was not included at the time in any environmental laws, and the Court did not specify one either. The Court further stated that "international law jurists have not yet finalized the salient features of sustainable development, but it has been accepted as a part of customary international law as a concept that balances ecology and development."<sup>32</sup>

The method the Court used in this instance raises several questions. First, the Court effectively presented itself as the exclusive judge of what constitutes (or does not constitute) a circumstance necessitating the application of the precautionary principle, despite providing few definitions and making many promises. Decisions must be determined on an individual basis and by the Court alone, as there are no definitions, standards, or boundaries.<sup>33</sup> Second, courts adopting so-called customary international law so readily betrays an underlying democratic quality.<sup>34</sup> Contemporary customary international law is distinct from traditional customary international law in several keyways: it can emerge swiftly; it draws more from international declarations, such as resolutions of the UN General Assembly and multilateral treaties, many of which are aspirational; and it aims to govern a state's treatment of its own citizens rather than the relationships between states.<sup>35</sup> Ultimately, a great deal of what are referred to as common law norms—such as the sustainable development principle—frequently lack the legal substance or specificity necessary to qualify as "norm creating" standards. As demonstrated by the Court in the Vellore case, when judges adopt such customary law into domestic systems without giving it the required specificity and legal substance, they are effectively expanding their own discretion at the expense of democratic processes.<sup>36</sup>

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<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> Rajamani, L. (2016). International Law and the Constitutional Schema. <https://doi.org/10.1093/law/9780198704898.003.0009>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Curtis Bradley and Jack Goldsmith, 'Customary International Law as Federal Common Law' (1997) 110(4) Harvard Law Review 815.

<sup>36</sup> Rajamani, L. (2016). International Law and the Constitutional Schema. <https://doi.org/10.1093/law/9780198704898.003.0009>.

## Conclusion

Indian courts have closely followed international law in the development of its jurisprudence on constitutional rights and international law. This demonstrates both the Indian polity's openness and responsiveness as well as its commitment to the constitutional project. Nonetheless, the courts must apply international law with greater force, discipline, and rigor. When determining pertinent international norms, they require discipline. They must be rigorous in their analysis of these norms; the more clarity, nuances, and legal substance they can incorporate into the international legal norms they aim to incorporate into domestic law, the more logical the jurisprudence will be, the higher its precedential value will be, and the more significant a role it will play in the formation of international legal norms. They require vigor because they should vigorously defend customary international law in the small number of cases where it is correctly referred to as such and valued considering state practice and *opinio juris*.<sup>37</sup> In a broader sense, to influence normative content in the development of international law, courts must engage substantively with its rules. For its part, Parliament must use the authority granted to it by the Constitution. It is necessary to enact laws to limit the executive branch's unchecked authority and to integrate international law into domestic law, as advised by the National Commission and several constitutional theorists. Despite the broad authority bestowed upon it by the Constitution, the executive branch must utilize its powers with appropriate respect for Parliament and the general public.

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<sup>37</sup> *ibid.*