CROSS-JURISDICTIONAL INFLUENCE IN INDIA'S IMPLEMENTATION OF INTERNATIONAL LAW

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ABSTRACT

This research paper seeks to disentangle the complex relationship between international law and India's domestic legal system, contrasting it with the dualist approach of the United Kingdom. The study addresses India's constitutional and judicial management of international norms, particularly in the context of environmental law and human rights, utilizing the dialectics of dualism and monism. The goals include an examination of India's constitutional directions, legislative processes, and the role of the Supreme Court in interpreting and applying international law. The study focuses on India's distinctive blend of dualist and monist doctrines, which reflects a varied and developing legal practice. The practical implications of these ideas are demonstrated using key case laws such as M.V. Elizabeth. The paper concludes with insights into the Indian Supreme Court's cautious yet progressive engagement with international law, underscoring the need for more coherent and strategic integration of global legal norms within India's legal framework. This research contributes to understanding the complexities and dynamics of international law assimilation in a country with a rich legal heritage and diverse legal challenges.

Keywords: Indian Constitutionalism, International Law Integration, Dualism, Monism

I. Introduction

International law, a fundamental cornerstone in global governance, serves as a critical framework guiding states in their interactions on the global stage. It holds the promise of

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stability, order, and common ideals as a culmination of conventions, treaties, and customary practices. However, its incorporation into national legal systems is difficult and differs between nations. Some countries, such as the United Kingdom, take a dualist approach, in which international and domestic law are viewed as distinct entities. Others, on the other hand, demonstrate monism, in which international law is regarded as an inherent element of the municipal law. The interaction of these perspectives impacts how a country interprets and implements international norms.

India, with its colonial past, presents a particularly intriguing case in the global discourse on the assimilation of international law. While its legal heritage might suggest an inclination towards a staunchly dualist approach, the analysis undertaken in this research paper reveals that India's engagement with international law features an intricate interplay of dualism and monism. The oscillation between these theories makes India's approach both multifaceted and challenging to delineate.

The thesis at hand aims to embark on a journey through the labyrinth of India's engagement with international law. By juxtaposing the UK's dualist paradigm with India's nuanced trajectory, the research aspires to unravel the various ways through which international law finds its place in India's legal regime. Through this exploration, the research ultimately underscores the pressing need for a more cohesive dialogue and coordination between the various arms of the Indian state, ensuring a coherent, consistent, and informed approach to international law adherence.

II. Part I: The Dialectics of Dualism and Monism in India's Legal System

The idea that international and domestic laws function in separate realms, distinctly separated by clear normative and tangible boundaries, is no longer the dominant framework used to describe or theorize their interrelation. International law, once viewed solely as rules for state-to-state relations, now increasingly represents a normative structure encompassing interactions between states, their citizens, other individuals, and non-state entities, covering areas previously deemed strictly domestic[2]. In today's globally interconnected landscape, the surge

[2] Aparna Chandra, India and International Law: Formal Dualism, Functional Monism, 57 Indian J. Int'l L. 2 (2017).

in transnational legal exchanges means that the comprehensive rules of international law are so expansive that it's challenging to pinpoint any "matters which are fundamentally within the sole jurisdiction of a state"[3].

Monism views international and domestic laws as interlinked, considering them part of a single legal order. In this approach, international law is directly absorbed into domestic law without state action and operates within the local legal system, including court application. In contrast, dualism perceives international and domestic laws as separate, distinct entities, and does not automatically assimilate international law into the domestic realm[4].

The Constitution of India does not clearly state how international laws should apply within the country. While Article 51 of the Constitution[5] advises the state to respect international laws and treaties in its dealings, this advice is just a guiding principle and cannot be enforced by the courts. Article 51 was clearly designed to direct India's foreign policy and serve as the cornerstone of its international relations, not to specify how India should treat its domestic international law duties, according to the debates in the constituent assembly, which showed that it was not regarded mandatory[6].

Article 51(c) differentiates between international law and treaty obligations, implying "international law" might refer to customary international law[7]. Yet, this doesn't mean that customary international law is automatically part of India's domestic law. This provision merely encourages respect for it, and it's not legally enforceable by courts.

This contrasts with English law, which, with some exceptions, views international law as part of domestic law[8]. However, for a customary international law rule to be adopted in England, it must be universally recognized or accepted by the nation. The US follows a similar stance.

In India, while the Parliament holds the authority to formalize and implement treaties, it hasn't established specific legislation for this. Instead, India adopts the British approach to international obligations, anchored in Article 73 of the Constitution[9]. This provision aligns the

[3] Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI, art. 2, para. 7; see also Kumm
[4] Aparna Chandra, India and International Law: Formal Dualism, Functional Monism, 57 Indian J. Int'l L. 3 (2017).
[5] India Const. art. 51.
[6] B. Shiva Rao, The Framing of India's Constitution: Select Documents, vol. 2, at 150 (Indian Institute of Public Administration, New Delhi 1967)

[7] India Const. art. 51.
[8] V.G. Hegde, International Law in the Courts of India, 19 Asian Yearbook of International Law 63 (2013).
[9] India Const. art. 73.

Union Executive's powers with those of Parliament, allowing it to act in areas the Constitution empowers Parliament, even without direct legislation. Hence, The Constitution and existing statutory laws don't mandate the Executive to obtain pre-ratification approval from Parliament before accepting international obligations. As a result, the Executive can take on extensive international responsibilities, without Parliament's consent[10].

This dual role of India's Executive in handling international treaties has stirred debate. While Article 253 of the Constitution[11] empowers Parliament to turn international obligations into domestic law, Article 73 allows the Executive to unilaterally accept such obligations without Parliament's consent.

In recent years, the Indian Supreme Court's case law appears to lean towards the "incorporation'" doctrine[12], similar to a shift seen in UK courts in 1977 with the *Trendtex Trading Corporation v. Central Bank of Nigeria* decision[13]. Lord Denning in this case noted that, initial proponents of the transformation doctrine eventually shifted to favor the doctrine of incorporation, allowing for the seamless application of contemporary international law as it evolves.[14].

This shift in legal thinking was reflected in *Gramophone Company of India Ltd. v Birendra Bahadur Pandey*[15], the Indian Supreme Court, drawing from the *Trendtex* decision, highlighted that while international law can be integrated into national law, it cannot override domestic laws, especially if they conflict.

However, the position of Indian courts becomes less clear when domestic laws conflict with customary international law. For instance, in the case of *Additional District Magistrate, Jabalpur v. Shivakant Shukla*[16], the Supreme Court clarified that domestic law would take precedence over international law or treaty obligations in the event of a clash. Yet, if two interpretations of the domestic law exist, the court would favor the interpretation that aligns with international law.

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[10] V.S. Mani, Effectuation of International Law in the Municipal Legal Order—The Law and Practice in India, 5 Asian Yearbook of Int'l L. 162, 162-63 (1997).
[11] India Const. art. 253.
[12] The doctrine of incorporation permits courts to apply international law directly, without requiring it to be transformed into domestic legislation, unless there is a conflicting domestic rule of greater importance. This approach is aligned with monist doctrine.
[13] *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (C.A.), 64 I.L.R. 111.
[14] ibid.
[15] *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, (1984) 2 S.C.C. 534.
[16] *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

In environmental matters, this nuanced stance becomes even more evident. Unlike English courts, the Indian Supreme Court has not elevated customary international law above domestic law[17]. However, in the case of *Vellore Citizens Welfare Forum v. Union of India and Others*[18], the court indicated that international norms like the "precautionary principle" could become part of India's legal framework if they don't conflict with existing domestic laws.

Although India supposedly follows a dualist approach where Parliament should approve international laws for domestic use, in practice, we can observe that the Executive and the courts often incorporate these laws without always going through the parliamentary process. In the cases of *Bhavesh Jayanti Lakhani v State of Maharashtra*[19] and *Peoples' Union for Civil Liberties v Union of India*[20], the Supreme Court of India emphasized that while India adheres to the dualism doctrine, international treaties that bind India influence the interpretation of domestic law.

In India's current system, the executive can adopt international obligations without Parliament's consent, bypassing extensive public and legislative review. This allows international laws to enter India's legal framework without comprehensive scrutiny. For example, despite a Parliamentary Committee's caution, the Indian government ratified the TRIPs agreement[21], altering India's patent system. Additionally, a Civil Nuclear Deal with the U.S., considered not in India's favor[22], wasn't presented for Parliamentary approval, hindering informed debate. Given these events, there's a strong case to make treaty-making in India more democratic.

While much attention has been given to the Executive's broad treaty-making power, the Indian judiciary plays a significant role in the actual implementation of international law. The courts, particularly the Supreme Court, often serve as the arena where the tension between Parliament and the Executive is resolved. Given their influential role, it's crucial to focus on judicial actions and interpretations as they navigate the complexities of integrating international law into the domestic legal framework.

[17] V.G. Hegde, Indian Courts and International Law, 23 Leiden J. Int'l L. 53, 9 (2010).
[18] *Vellore Citizens Welfare Forum v. Union of India and Others*, AIR 1996 SC 2715.
[19] *Bhavesh Jayanti Lakhani v. State of Maharashtra*, (2009) 9 S.C.C. 551.
[20] *Peoples' Union for Civil Liberties v. Union of India*, AIR 1997 SC 568.
[21] Commission to Review the Working of the Constitution, supra note 38
[22] Aparna Chandra, India and International Law: Formal Dualism, Functional Monism, 57 Indian J. Int'l L. 14 (2017).

III. Part II: Navigating the Intersection: The Role of Indian and UK Courts in Balancing International Law and Domestic Interests

There is significant literature discussing how national courts globally help in executing international law[23]. Many believe the primary role of domestic courts is to enforce international law. They are seen as the most reliable entities to activate and realize international law at the local level. This perspective, however, might be overly simplistic, picturing international law as merely being "plugged into" the domestic legal system for automatic execution[24]. This "mechanical view" assumes a straightforward transition of international law into domestic practice. Such a viewpoint tends to downplay the complexities and judgments domestic courts must exercise. As India becomes increasingly integrated into the global economy, there's a tension between embracing global norms and protecting domestic interests.

A critical issue arises when an international executive body, like the UN Security Council, imposes a decision that has criminal implications and which the domestic authorities have to enforce. In the case *of Ahmed v H M Treasury*[25], a landmark case decided by the UK Supreme Court, Mohamed Ahmed and other British citizens had their financial resources frozen due to orders influenced by UN Security Council resolutions, effectively making them "prisoners of the state"[26]. Enabled by the United Nations Act 1946, this action fulfilled the UK's international obligations but raised concerns about domestic individual rights. The international resolutions lacked a mechanism for individuals to challenge these actions. In essence, the Ahmed case serves as a prime example of the complexities and potential conflicts that arise when translating international directives into domestic actions, especially when such actions might infringe upon the rights of individuals.

Post independence, the Indian Supreme Court initially engaged with international law for cases concerning territorial changes[27]. More recently, the Indian Supreme Court has progressively integrated emerging international environmental norms into domestic law. In cases, specifically

[23] Giuseppe Cataldi & André Nollkaemper, National Courts and the International Rule of Law, 23 Eur. J. Int'l L. 897 (2011).
[24] Campbell McLachlan, The Interaction of International Law and Municipal Law, in Foreign Relations Law 3 (Cambridge University Press 2014).
[25] Ahmed v. H M Treasury, [2010] UKSC 2, [2010] 2 A.C. 534, 149 I.L.R. 641.
[26] ibid.
[27] V.G. Hegde, Indian Courts and International Law, 23 Leiden J. Int'l L. 53 (2010).

environmental ones like *The Vellore Citizens Welfare Forum v. Union of India and Others*[28], the Court recognized concepts like "sustainable development". In *M. C. Mehta v. Kamal Nath*[29], it discussed the public trust doctrine, emphasizing the balance between environmental protection and development. The Court has accepted principles like the "precautionary principle" and the "polluter pays principle" as part of domestic law. The Court holds that international laws must not clash with existing domestic laws, a position it has maintained for over six decades. This suggests that international norms are acceptable only if they align with India's legal framework. Consequently, the Indian Supreme Court has demonstrated significant autonomy in interpreting international law, occasionally exceeding the views of the executive or legislature.

IV. Part III: The M.V. Elizabeth Case: A Legal Nexus Between India and Global Normative Frameworks

The *M. V. Elizabeth and others v. Harwan Investment and Trading Pvt. Ltd*[30] case is an ideal illustration of how different jurisdictions have an impact on how India applies international law. This case demonstrates not just India's complex relationship with international norms and its own domestic legal systems, drawing on a variety of legal sources including the Admiralty Court Act of 1861 and international treaties like the Ship Arrest Convention of 1952. In this case, the central question before the Indian Supreme Court was whether Indian courts had the admiralty jurisdiction to take action against a ship involved in carrying goods from an Indian to a foreign port. Previous High Court decisions held that Indian admiralty jurisdiction was limited and based on the British Admiralty Courts Act of 1861. Contradicting these earlier rulings, the Supreme Court stated that while colonial laws remained due to Article 372 of the Indian Constitution, this shouldn't hinder the evolution of law to meet current and future justice needs.

The Indian party presented an innovative argument, asserting that Indian courts should possess admiralty powers equivalent to those of English admiralty courts. The reasoning was grounded in the reference to English statutes, specifically an 1867 statute that granted admiralty powers to the High Courts of Madras, Bombay, and Calcutta. The Indian party highlighted that an 1890 amendment to the English statute expanded the jurisdiction of English courts to both inbound

[28] *Vellore Citizens Welfare Forum v. Union of India and Others*, AIR 1996 SC 2715.
[29] *M.C. Mehta v. Kamal Nath*, MANU/SC/1007/1997.
[30] *M.V. Elizabeth and Others v. Harwan Investment and Trading Pvt. Ltd.*, 1993 Supp (2) S.C.C. 433.

and outbound vessels. They argued that, in accordance with this development, Indian High Courts should similarly possess this extended power. Essentially, the argument was that developments in English and Scottish law should inform and be integrated into Indian legal practice, as these could be considered customary international law.

Although the Supreme Court's ruling is significant, this ruling is not free from criticism, it missed the opportunity to broaden its engagement with more general international legal issues. The ICJ Statute's Article 38(1)(c)[31], which underlines "general principles of law recognized by civilized nations," was not invoked because the court was primarily concerned with maritime law. This can be viewed as a drawback when trying to integrate Indian admiralty law into a larger international legal framework.

The importance of Article 38(1)(c) resides in its broad application, which provides a flexible yet solid foundation. Article 38(1)(b)[32], which mentions "international custom," should be studied in conjunction with it to get a more complete understanding of the law. The court's lack of participation in this complex interplay points to India's incomplete absorption and underappreciation of the diversity of sources in international law. An expansive approach that incorporated varied sources from international law would have strengthened India's commitment to international norms and its reputation as a country that understands and respects the complicated tapestry of global legal principles.

In conclusion, while the M.V. Elizabeth case demonstrates India's involvement with international legal norms, it also reveals areas where further introspection and a broader perspective might enhance the integration of international law inside the Indian legal framework.

V. Conclusion

The Indian Supreme Court's relationship with international law is cautious and conservative. Even though the Court acknowledges international principles, especially in the fields of environment and human rights, it often sticks to a fixed set of sources and arguments. The Court sees international law as a persuasive tool rather than binding precedent. While the Supreme Court has been integrating international legal standards into domestic law, it does so

[31] Statute of the International Court of Justice, art. 38, para. 1(c).
[32] Statute of the International Court of Justice, art. 38, para. 1(b).

carefully. This careful approach is mainly because understanding, sourcing, and interpreting the evolving norms of international law can be challenging due to the intricate process of international lawmaking. In the future, to navigate the complex interplay between international and municipal law, the Indian courts will need to develop new strategies and clearer interpretative frameworks.