

IMPLEMENTATION OF INTERNATIONAL LAW IN INDIAN LEGAL SYSTEM

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Abstract

This Article explores the general stance of international law and domestic legal orders regarding the legal effects of international law in the Indian domestic legal system. This Article argues that India has been a significant contributor to the field of international law. However, India remains reluctant to draft treaties that restrict free rein and that seek expressly to accord domestic courts a judicial enforcement role. This Article examines the implementation process of international law in the Indian domestic system and addresses the requirements imposed by international law. It critically examines the fundamental dichotomy in approaches at the domestic constitutional level that give legal effect to treaties to address the question of who has treaty-making power. This Article examines the role of the judiciary in the implementation of international law in India. Finally, this Article provides suggestions for the new legal framework for the better implementation of international law.

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INTRODUCTION

This Article explores the legal effects of international law in the Indian domestic legal system. Sovereign states are free to enter into international treaties, agreements, and custom. The issue of how States implement such law becomes critical as states should adhere to the changing horizons of international law to respect past conceptions, fulfill present requirements, and for future world order. On the one hand, this Article emphasizes the need to study state practice as evidence of existence and development of international norms and standards; on the other hand, it demonstrates the rarity of this genre in the Indian context because of its adherence to international law. This Article examines the implementation of international law in the Indian domestic system.

States can carry out their international obligations by ratifying international treaties or by following custom. However, there are no specific requirements imposed by international law to fulfill obligations

to incorporate treaties or custom into domestic legal systems. Additionally, international law generally does not govern the process of incorporating international law into domestic law. There is no international enforcement authority.¹ States follow different processes of incorporating international law into their domestic legal system in accordance with domestic law, such as constitutional provisions and custom. Also, the constitutional provisions of States for the implementation of international law are different.² Domestic courts may choose or be obliged to ignore international law until it is incorporated into domestic law.³ Therefore, implementation of international law in a State depends upon the policy objectives and values of that state's domestic legal system.

However, the state cannot ignore its obligations under international law before international tribunals.⁴ International tribunals give effect to international law even if international law conflicts with the domestic laws of the parties to the case.⁵ Even the Constitution of the parties is not considered if domestic law conflicts with their treaty obligations.⁶

State sovereignty is the core issue in implementation of international law. One scholar put it: "States consider that the translation of international commands into domestic legal standards is part and parcel of their sovereignty and are unwilling to surrender it to international control."⁷ States enjoy a wide margin of freedom in the choice of means and methods to fulfill their international law obligations.⁸ However, implementation sometimes requires the involvement of the State body entrusted with the task of adopting legislation: the national legislature.⁹

Indian courts are optimistic about the implementation of international law in domestic courts, and their approach is continuously evolving. India has argued its commitment to the development and implementation of international law. However, India has no role in formulating some of the basic principles of international law.¹⁰ This Article explores the general

1. Sunil Kumar Agarwal, *Implementation of International Law in India: Role of Judiciary*, DEAN MAXWELL & ISLE COHEN DOCTORAL SEMINAR IN INT'L L., MCGILL U., at 1.

2. V.K. AHUJA, PUBLIC INT'L L. 42 (2016).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Mario Mendez, *The Legal Effects of EU Agreements*, OXFORD SCHOLARSHIP ONLINE, (May 2013) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199606610.001.0001/acprof-9780199606610-chapter-2#acprof-9780199606610-note-40>.

8. E.B. Beenakker, *The implementation of international law in the national legal order: a legislative perspective* (June 5, 2018) (Ph.D. dissertation, U. of Leiden), <https://openaccess.leidenuniv.nl/bitstream/handle/1887/63079/01.pdf?sequence=3>.

9. *Id.*

10. V.G. Hegde, *Indian Courts and International Law*, 23 LEIDEN J. INT'L L. 53, (2010) <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S09221565099903> 31.

stance of international law and domestic legal orders regarding the legal effects of international law in the Indian domestic legal system and explores the implementation process of international law in the Indian domestic system.

Further, it argues that India has been a significant contributor in the field of international law, especially in human rights law, environmental law, arbitration, and trade law. However, India remains reluctant to draft treaties that restrict its sovereignty and seek expressly to accord domestic courts a judicial enforcement role. By studying the fundamental dichotomy in the treaty-making power and approaches at the domestic constitutional level that give legal effect to treaties, this Article examines the role of the judiciary in the implementation of international law in India. It addresses the requirements imposed by international law and relationship theory of international law and domestic law and suggests a new legal framework for better implementation of international law.

I. DEFINITIONS

The term “international law” and “domestic law” is consistently and materially employed throughout this Article. As such, there is a need to stipulate to a working definition because of the term’s importance here. This preliminary definition should help readers address the legal issues underlying the implementation of international law in Indian domestic law.

A. *International Law*

According to the United Nations, “International law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries. Its domain encompasses a wide range of issues of international concern, such as human rights, disarmament, international crime, refugees, migration, problems of nationality, the treatment of prisoners, the use of force, and the conduct of war, among others. It also regulates the global commons, such as the environment and sustainable development, international waters, outer space, global communications and world trade.”¹¹

International law falls under two different categories: The first category is Private international law: “deals with controversies between private entities, such as people or corporations, which have a significant relationship to more than one nation.”¹² For example, lawsuits arising from the toxic gas leak from industrial plants owned by Union Carbide

11. U.N., UPHOLD INTERNATIONAL LAW (2020), <https://www.un.org/en/sections/what-we-do/uphold-international-law/>.

12. *What is International Law?*, FINDLAW (June 20, 2019), <https://hirealawyer.findlaw.com/choosing-the-right-lawyer/international-law.html>.

the U.S. corporation in India, is a matter of private international law.¹³ Private international law resolves the conflict of national laws and determines which country's laws are applicable to specific situations.¹⁴ The second category is Public international law: "is composed of the laws, rules, and principles of general application that deal with the conduct of nation states and international organizations among themselves as well as the relationships between states and international organizations with persons, whether natural or juridical. Public international law is sometimes called the "law of nations" or simply "International Law."¹⁵ Public international law includes the laws of the sea, economic law, diplomatic law, environmental law, human rights law, and humanitarian law.¹⁶

This Article primarily focuses on public international law. Public international law should not be confused with private international law. Also, there are five sources of international law: (1) treaties; (2) custom; (3) general principles of law; (4) judicial decisions; and (5) legal scholarship.

B. Domestic Law

Domestic law is the law applying within state or internal law of a state, as opposed to international law. The terms domestic law and municipal law are used interchangeably for the purpose of this Article.

Municipal law is the national, domestic, or internal law of a sovereign state defined in opposition to international law. Municipal law includes law at the national level and the state, provincial, territorial, regional or local levels. While, as far as state law is concerned, these may be distinct categories of law, international law is uninterested in this distinction and treats them all as one. Similarly, international law makes no distinction between the ordinary law of the state and its constitutional law. Article 27 of the Vienna Convention on the Law of Treaties provides that, where a treaty conflicts with a state's municipal law, the state is still obliged to meet its obligations under the treaty. The only exception to this rule is provided by Article 46 of the Vienna Convention, where a state's expression of consent to be bound by a treaty was a manifest violation of a "rule of its internal law of fundamental importance."¹⁷

13. *Id.*

14. *Public International Law: Introduction to Public International Law Research*, U. OF MELBOURNE <https://unimelb.libguides.com/internationallaw>.

15. *Id.*

16. FINDLAW, *supra* note 12.

17. Municipal law, DEFINITIONS, <https://www.definitions.net/definition/municipal+law>.

II. THEORIES ON THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

It is vital to discuss theories used for the relationship between international law and domestic law. There are two principal theories on the relationship between international law and domestic law, Monism and Dualism.¹⁸

A. *Monism Theory*

The monistic theory maintains that the subjects of two systems of law vis-à-vis international law and municipal law are essentially one.¹⁹ The monistic theory asserts that international law and municipal law are fundamentally the same in nature, and arise from the same science of law, which are manifestations of a single conception of law.²⁰ The followers of this theory view international law and municipal law as part of a universal body of legal rules binding all human beings, collectively or singly.²¹

In a monist system, international law does not need to be incorporated into domestic law.²² International law immediately becomes incorporated in domestic legal system upon ratification of an international treaty under monist system.²³ According to this theory, domestic law is subordinate to international law.²⁴ The ICC Statute, therefore, can be directly applied and adjudicated in national courts.²⁵

There are some exceptions to the monist approach:

- In some Constitutions, direct incorporation of international law into domestic law occurs on ratification.²⁶
- In other States, direct incorporation occurs only for self-executing treaties.²⁷

18. AHUJA, *supra* note 2, at 43.

19. M.P. Tandon and V.K. Anand, *International Law and Human Rights*, at 50 (Allahabad L. Agency 2017).

20. *Id.*

21. AHUJA, *supra* note 2, at 43.

22. *How does international law apply in a domestic legal system*, THE PEACE AND JUST. INITIATIVE, <https://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist>.

23. *Id.*

24. Agarwal, *supra* note 1, at 4.

25. *How does international law apply in a domestic legal system?*, *supra* note 22.

26. *Id.*

27. *Id.*

B. Dualism Theory

According to dualism theory, international law and municipal law represent two entirely distinct legal systems.²⁸ International has an intrinsically different character from that of municipal law.²⁹ International law is not directly applicable in the domestic system under dualism.³⁰ First, international law must be translated into state legislation before the domestic courts can apply it.³¹ For example, under dualism, ratification of the ICC Statute is not enough—it must be implemented through state legislation into the domestic system.³²

Most states and courts presumptively view national and international legal systems as discrete entities and routinely discuss in dualist fashion incorporation of rules from one system to the other.³³ Unlike monist countries, under the Indian Constitution, international law does not become binding until appropriate domestic legislation is enacted to give it effect.³⁴

Traditionally, India is described as a dualist country in its application of international law.³⁵ In India, the power of assumption of international obligations is allocated to the executive, and the domestic implementation requires Parliamentary sanction.³⁶ Article 253 of the Indian Constitution reflects the principle of dualism:

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference association or other body.³⁷

Additionally, Supreme Court and high courts reflect the dualist approach of the Indian legal system in deciding several cases.³⁸ For example, Justice Krishna Iyer in *Jolly George v. Bank of Cochin*, “until the municipal Law is changed to accommodate the [treaty], what binds

28. AHUJA, *supra* note 2, at 43.

29. *Id.*

30. *How does international law apply in a domestic legal system?*, *supra* note 22.

31. *Id.*

32. *Id.*

33. MARK JANIS, *INT’L L.* at 88 (Wolters Kluwer 7th ed., 2015).

34. Prabhash Ranjan, Anmolan, and Farheen Ahmad, *Is the Supreme Court Confused About the Application of International Law?*, *THE WIRE* (Sept. 28, 2016), <https://thewire.in/law/supreme-court-international-law>).

35. Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, 57 *INDIAN J. INT’L L.* 25 (2017), <https://link.springer.com/article/10.1007/s40901-017-0069-0>.

36. *Id.*

37. INDIA CONST. art 253.

38. Ranjan, Anmolan, and Ahmad, *supra* note 34.

the courts is the former not the latter.”³⁹ Also, in *State of West Bengal v. Kesoram Industries* the Supreme Court of India followed the “doctrine of dualism” and that “a treaty entered into by India cannot become law of the land . . . unless Parliament passes a law as required under Article 253.”⁴⁰

These cases demonstrate that the Indian approach leans towards dualism. The dualism approach is to transform international law into domestic law. Also, there is no mention of whether India follows a dualist or monist approach. Therefore, the controversy between monism and dualism is somewhat unreal because it does not reflect the actual state practice in the implementation of international law within the domestic system.⁴¹

Finally, Gerald Fitzmaurice, former ICJ judge, argues that “the logical consequences of both theories conflict with how international and national organs and courts behave. No system is superior or inferior to the other; each operates within its own sphere as a distinct legal system. Therefore, the systems do not come into conflict as systems. Still, a conflict of obligations may occur or an inability for the state on the domestic plane to act in the manner required by international law. The consequence of this “inability” by the state is a breach of the state’s international law obligations for which it will be internationally responsible and in respect of which it cannot plead the condition of its domestic law by way of absolution.”⁴²

III. IMPLEMENTATION OF INTERNATIONAL LAW OBLIGATIONS

The implementation issue of international law in the States has become critical.⁴³ The general rule is that a State which has broken a rule of international law cannot justify itself by referring to its domestic law; otherwise, international law would be evaded by passing appropriate domestic legislation.⁴⁴ Article 27 of the Vienna Convention on the Law of Treaties, 1969, is very clear about this. Under the principle of *pacta sunt servanda*, a state is under the duty to honor its international obligations even if it means changing its domestic law.⁴⁵ This view has been applied in various international cases.⁴⁶ For example, the British in

39. *Id.*

40. *Id.*

41. BIMAL PATEL, *Introduction*, in *INDIA AND INT’L L.* at 1–2 (Bimal Patel ed., Martinus Nijhoff Vol. 2 2005), <https://brill.com/view/title/14246>.

42. Judy Obitre-Gama, *The Application of International law into National Law Policy and Practice*, WHO INT’L CONF. ON GLOBAL TOBACCO CONTROL L. at 6 (2000), <https://www.who.int/tobacco/media/en/JUDY2000X.pdf?ua=1>.

43. AHUJA, *supra* note 2.

44. Obitre-Gama, *supra* note 42, at 7.

45. *Id.*

46. *Id.*

the Alabama Claims Arbitration sought to rely on a lack of domestic legislation to avoid liability.⁴⁷ Their defense was defeated on the ground that the British government could not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action it possessed.⁴⁸

In the absence of a central legislative authority that has the power to impose binding rules upon the system's legal subjects, legal norms have been developed by the primary subjects themselves.⁴⁹ As soon as the norms have emerged, most notably through treaties or custom, states are entrusted with enforcing imposed rules by what has been called 'self-help.'⁵⁰

Courts face difficulty in decision making, when rules of international law and domestic law conflict.⁵¹ For example, it is important for an international tribunal, whether international law takes superiority over domestic law or vice versa.⁵² If the conflict arises before a domestic court, the answer depends on how far the state's constitutional law allows international law to be applied directly by the courts.⁵³ Almost universally, in domestic courts, in which a rule of international law is purported to govern, the decision raises the problems.⁵⁴ For example, diplomatic immunities granted by international law would become meaningless unless they are recognized by domestic law.⁵⁵

Further, customary rules of extradition are interpreted and applied by domestic courts only.⁵⁶ It should also be noted that international law gives individuals certain rights or obligations that can be enforced directly in domestic courts as was alleged in the Pinochet case.⁵⁷

Generally, implementation of international law relies on the machinery of the state for the realization of its policy aims and values on the domestic level.⁵⁸ This is the result of the importance of state organs for the realization of international law: decisions rendered by domestic courts may refer to applicable international law.⁵⁹ For example, a state's executive can be involved in the education of military personnel for law of armed conflict obligations, or the state legislature may provide for the

47. *Id.*

48. *Id.*

49. Beenakker, *supra* note 8, at 1.

50. *Id.*

51. H.O. AGARWAL, INT'L L. & HUMAN RIGHTS at 43 (Central L. Publ'n 22nd ed. 2019).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Beenakker, *supra* note 8.

59. *Id.*

establishment of jurisdiction for the punishment of certain terrorist acts.⁶⁰ The implementation of international law could be entrusted to multiple organs of the state; however, scholars are selective and focused on domestic courts' activities, especially in the application of international law.⁶¹

Therefore, it can be concluded that there is no particular implementation requirement in international, except Article 26 of the Vienna Convention. It will be helpful for the states if specific implementation requirements can be drafted. As of March 2020, there are unknown requirements specified by international law for the implementation of domestic law.

IV. CONSTITUTIONAL PROVISIONS FOR INTERNATIONAL LAW

Before exploring the issue of application of international law in the Indian context, a brief overview of the Constitutional provision would be useful. The effectiveness of international law depends upon the will of the states and the nature of the constitutional distribution of power between the different levels of governmental methodology of implementation of international treaties by state parties in their external and internal sovereign spheres.⁶² Under the Constitution of India, there is no specific and definite reference to the status of international law in the Indian domestic legal system; it also does not explicitly require or authorize the judiciary to draw on international law.⁶³ The Indian Constitution ensures that in the entire Indian administration, high regard shall be given to international law and also to international morality.⁶⁴

The Indian Constitution, adopted on 26th November 1950, was greatly influenced by the values imbibed in The Universal Declaration of Human Rights (UDHR). Adopted by the United Nations General Assembly, the UDHR's primary motive is to protect and preserve the basic fundamental rights which all human beings are entitled to. However, there are several provisions in the Constitution on treaty-making powers. According to the Indian Constitution, ratified treaties do not automatically have the force of law in domestic courts, but the Constitution also provides that the Indian Government adheres to its treaty obligations.⁶⁵

60. *Id.*

61. *Id.*

62. AMAL GANGULI, *Interface Between International Law and Municipal Law: Role of the Indian Judiciary*, in *INDIA AND INT'L L.*, *supra* note 41, at 12 (2005).

63. Jagadish Halashetti, *The Status of International Law under the Constitution of India*, *LEGAL INDIA* (May 8, 2011), <https://www.legalindia.com/the-status-of-international-law-under-the-constitution-of-india/>.

64. Tandon and Anand, *supra* note 19, at 57.

65. Tandon and Anand, *supra* note 19, at 57.

Article 51(c) of the Indian Constitution says, foster respect for international law and treaty obligations in the dealings of organized peoples with one another. The acceptance of amendments moved by Dr. Ambedkar, H.V. Kamath, Ananthasayanam Ayyangar and P. Subbarayan, draft Article 40 was adopted by the Constituent Assembly in its present form as Article 51.⁶⁶ All the speakers emphasized the commitment of India to promoting International Peace and Security and adherence to principles of International Law and Treaty obligations during the debate.⁶⁷

Significantly, the clause 'c' of Article 51 mentions explicitly 'international law' and 'treaty obligations' separately. According to Prof. C. H. Alexandrowicz the expression 'international law' here represents customary international law and 'treaty obligations' and stands for obligations arising out of international treaties.⁶⁸ This interpretation seems logical in the context of the text of the draft of Article 40, especially when one considers the attitudes of courts in India on questions of international law.⁶⁹ Also, the Article 51(c) treats both international customary law and treaty obligations on the same footings.⁷⁰ The Indian Constitution is silent on the status of international law in its domestic legal system. It does not obligate or authorize the judiciary to draw on international law in its decision making.⁷¹

V. TREATY MAKING: CONSTITUTIONAL APPROACH

This section explores the treaty-making process in India. In India, implementation of international law occurs either according to the role played by each of the organs of the government or from the viewpoint of applicability in each field of law.⁷²

66. Halashetti, *supra* note 63.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See generally NIHAL JAYAWICKRAMA, *The Role of Domestic Courts in Treaty Enforcement*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 209–42 (David Sloss ed., Cambridge University Press 2005), <https://www.cambridge.org/core/books/role-of-domestic-courts-in-treaty-enforcement/india/446E26E90C05AC7AFD1EF206B26013BC>.

72. Srishiti Chawla, *The Constitution of India and International Law*, IPLEADERS BLOG, (Apr. 19, 2019), <https://blog.ipleaders.in/constitution-of-india/>.

A. *Executive Power of the Union and International Treaties: Articles 53, 73, and 253*

The treaty-making in India is, by large, an executive act.⁷³ A joint reading of Articles 73, 246, 253 and Entry 14 of List I of the Seventh Schedule of the Indian constitution results in the position that the executive power of the union government is co-extensive with the legislative power in the matter of entering into and implementation of treaties.⁷⁴ Thus, the union executive enjoys somewhat unbridled power in the conclusion of treaties and in deciding the extent to which a treaty should bind India.⁷⁵

1. Article 73: Extent of Executive Power of the Union

Article 73, Extent of executive power of the Union- (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

- (a) To the matters with respect to which Parliament has power to make laws;

Therefore, under the Constitution of India, there are no restriction on the powers of the executive in relation to international law, and this allows the executive to enter into any treaty obligations.⁷⁶ *Vishaka v. State of Rajasthan* and *National Legal Services Authority v. Union of India*, the supreme court said that international law forms a part of the domestic law in India except when there is inconsistency with the provisions of the domestic law.⁷⁷ Thus, parliamentary approval is considered necessary only for the treaties that infringe the rights of citizens or those which require any further change in the existing domestic law.⁷⁸

Article 246 states the subject matters for which parliament has legislative power.⁷⁹ Subject-matter of laws made by Parliament and by the Legislature of States-

Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the

73. Narendra Kadoliya, *A Paradigm Shift in the Role of Domestic Courts in Implementing International Treaty Provisions: An Indian Perspective*, <https://www.manupatrafast.com/articles/articleSearch.aspx> (Search article field for "A Paradigm Shift in the Role of Domestic Courts.").

74. *Id.*

75. *Id.*

76. Chawla, *supra* note 72.

77. *Vishaka and Others v. State of Rajasthan and Others* (1997) 3 LRC 361 (India); *Nat'l Legal Servs. Authority v. Union of India and Others* (2014) 5 SCC 438 (India).

78. Chawla, *supra* note 72.

79. INDIA CONST. art 246.

matters enumerated in List I in the Seventh Schedule in this Constitution referred to as the “Union List.”⁸⁰

The subject matter that is covered under entry 13 of the Union List is: “Participation in international conferences, associations and other bodies and implementing of decisions made thereat.”⁸¹ Entry 14 empowers the Parliament to enact a law on the following subject matter: “Entering into treaties and agreements with foreign countries and implementing of treaties agreements and conventions with foreign countries.”⁸² Union List provides 97 matters for which Parliament has exclusive competence to make laws. This list includes foreign affairs, diplomatic, consular and trade representation, United Nations Organization, participation in international conferences, associations and other bodies and implementing of decisions made thereat, entering into treaties and agreements with foreign countries and implementing of treaties, agreements and implementing of treaties, agreements and conventions with foreign countries, and war and peace.

2. Article 53: Executive Power of the Union

When the President has entered into a treaty, the domestic courts cannot question the validity of the treaty. Article 53 reads: “(1) The Executive Power of the Union shall be vested in the President and shall be exercised by him either directly or through officers’ subordinate to him accordance with this Constitution.”⁸³

3. Article 253: Legislation of Giving Effect to International Agreements

Article 253 of the Constitution is a significant provision on the subject it reads as under:

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the Territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any International Conference, Association or Other body.⁸⁴

In 1973, Honorable Chief Justice Sikri in case of *Keshavanad Bharti v. State of Kerala* said, “when there is a situation where the language of the municipal law is vague or contrary then the court must take the

80. *Id.*

81. AHUJA, *supra* note 2, at 59.

82. *Id.*

83. INDIA CONST. art 53.

84. INDIA CONST. art 253.

support of the parent international authority of that particular municipal law. This is because Article 253 of our Constitution gives exclusive power to our parliament to make laws for giving effect to any treaty, convention or agreement with any country or any decisions made at any international conference.”⁸⁵

According to Entry 14 of the Union List I, it is in the competence of the Parliament to enact a law on “entering into treaties and agreements with foreign countries.”⁸⁶ But no law has been made by the Parliament for entering into treaties and agreements with foreign countries.⁸⁷ This will not affect the powers of the executive to enter into a treaty with foreign countries.⁸⁸ Thus, until the Parliament makes a law on the subject, the President’s power to enter into treaties remains unfettered by any internal constitutional restrictions.⁸⁹

However, for implementing a treaty in India, an enabling statute may be required, without which the courts in India may not give effect to such treaty provisions.⁹⁰ On treaty-making, the Calcutta High Court in *Union of India v. Manmull Jain* held:

Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus if a treaty, say, provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent, but the treaty is complete without the legislation.⁹¹

The executive in India can enter into any treaty, whether bilateral or multilateral, with any other country or countries.⁹² All the Constitutional provisions show that treaty-making power exclusively lays with the Union Government and State Government in India does not have treaty-making power. Therefore, there are several treaty-making provisions in the Constitution of India. However, there are unknown provisions that discuss the procedure for entering into or implementing treaties in India.

To conclude, the Supreme Court held that international law forms part of domestic law except when they are inconsistent with the provisions of domestic law. The current position in India is that parliamentary approval is required only for treaties that affect the rights of the citizens of which require a new law or a change in existing municipal law.

85. Chawla, *supra* note 72.

86. AHUJA, *supra* note 2, at 59.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. INDIA CONST. art 253.

VI. TREATIES

Treaties are primary sources and an important part of international law. India is a party to more than one hundred sixty treaties and conventions dealing with different fields of law such as air law, space law and maritime law.⁹³ The Vienna Convention on the Law of Treaties defines a treaty “as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁹⁴ However, under the Indian Supreme Court’s interpretation in *State of W.B. v. Kesoram Industries Ltd.*, 2004, a treaty entered into by India cannot become a law of the land and it cannot be implemented unless Parliament passes a law under Article 253.⁹⁵

As discussed above, the principle of *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of Treaties states that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹⁶ However, treaties should be performed in good faith. Still, there are no exceptions to the principle of the basic rule that states are free to determine their international obligations under international law.⁹⁷ It is said that the Vienna convention is the convention of conventions. The doctrine of *pacta sunt servanda* contained in article 26 and article 27 of the—Vienna convention, 1980 lays down that every treaty in force is binding upon the parties to it and must be performed in good faith.⁹⁸ A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.⁹⁹

Various judicial pronouncements have made it clear that the provision of international treaties might be read into existing Indian law to expand their protections.¹⁰⁰ The Indian courts regularly cite treaties and other provisions of international law for constitutional interpretation.¹⁰¹

For example, in 1997 *Vishaka v. State of Rajasthan*, case on sexual harassment of women at the workplace states, “regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”¹⁰² The court used international law to find the meaning of domestic

93. Chawla, *supra* note 72.

94. Vienna Convention on the Law of Treaties art. 2, Jan. 27, 1980, 1155 U.N.T.S. 331.

95. INDIA CONST. art 253; *State of West Bengal v. Kesoram Industries Ltd. and Other*, (2004) 10 SCC 201 (India).

96. Mendez, *supra* note 7.

97. *Id.*

98. Vienna Convention on the Law of Treaties art. 26.

99. Kadoliya, *supra* note 73.

100. Tandon and Anand, *supra* note 19, at 57.

101. JAYAWICKRAMA, *supra* note 71.

102. *Vishaka and Others v. State of Rajasthan and Others* (1997) 3 LRC 361 (India).

law, and also held that international conventions not inconsistent with fundamental rights must be read “to enlarge the meaning and content thereof.”¹⁰³

In 2014, *National Legal Services Authority v. Union of India* case recognized transgender as a third category of gender.¹⁰⁴ The court said: “If parliament has made any legislation which is in conflict with international law, then Indian courts are bound to give effect to the Indian law, rather than international law. However, in the absence of contrary legislation, municipal courts in India would respect the rules of international law.”¹⁰⁵

In 1993, *Neelabati Behera v. State of Orissa*, the court relied upon Article 9(5) of the Covenant on Civil and Political Rights (1966) while granting compensation to the victim for the matter of custodial death.¹⁰⁶ Also, in 2000 in the case of *Chairman Railway Board v. Chandrima Das*, the court utilized the principles of the UDHR while widening Article 21 of the Constitution’s scope by providing security to rape victims of foreign nationals.¹⁰⁷

The Indian courts have incorporated international law to fulfill its obligation by interpreting international law into domestic legislation.¹⁰⁸ Hence, the Indian judiciary has played a proactive role in implementing India’s international obligations under international treaties, especially human rights, development, and environmental law.¹⁰⁹ For example, in 2017 periodic report of India’s UN country team welcomed the “whole-of-Government” approach for the implementation of Sustainable Development Goals.¹¹⁰ The team appreciated India’s commitment to addressing climate change; the country team referred to concerns at the relaxation of norms for environmental impact assessments and application procedures under the Forest Conservation Act.¹¹¹

However, in the third universal periodic review 2017, the United Nations country team indicated that India did not implement recommendations contained in the previous reviews regarding the ratification of several international instruments.¹¹² For example, the Special Rapporteur took note of reports regarding deaths resulting from the excessive use of force by security officers with little adherence to the

103. Ranjan, Anmolam, and Ahmad, *supra* note 34.

104. *Id.*

105. *Id.*

106. Chawla, *supra* note 72.

107. *Id.*

108. JAYAWICKRAMA, *supra* note 71.

109. *Id.*

110. RANBIR SINGH AND APARNA CHANDRA, NAT’L. U. DELHI, INDIA’S THIRD UNIVERSAL PERIODIC REVIEW 2017, at 69.

111. *Id.*

112. *Id.* at 164.

principles of proportionality and necessity as defined under international human rights law standards.¹¹³ Section 46 of the Criminal Procedure Code authorized law enforcement officials to use “all means necessary” to perform an arrest forcibly resisted.¹¹⁴ Further, it was recommended that India review the Code and legislation in all states regarding the use of force, including the exceptional use of lethal force, by all security officers to ensure compliance with international human rights law principles.¹¹⁵

In the above-discussed cases, the Supreme Court of India explained that if international law conflicts with the domestic law then the courts will be bound to give effect to domestic law. However, India remains reluctant to draft treaties that restrict this free rein and that seek expressly to accord domestic courts a judicial enforcement role. The treaties which are consistent with domestic law are per se part of domestic law and do not need legislative Act for their implementation.¹¹⁶ India should not evade international law because it conflicts with domestic law. India should look for ways to implement international when it conflicts with domestic laws.

VII. CUSTOMARY INTERNATIONAL LAW

Customary international law refers to international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties.¹¹⁷ Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation.¹¹⁸ State practice includes domestic legislation, regulations, treaties, judicial decisions, diplomatic communications, NGO and IGO practice, for example, General Assembly Resolutions and state voting practice.¹¹⁹ A state may escape the application of customary international law by being a persistent objector.¹²⁰

The Constitution of India does not provide any provisions for customary law. However, customary rules of international law are part of the Indian legal system.¹²¹ But there are unknown instances of

113. *Id.* at 70.

114. *Id.*

115. *Id.*

116. Halashetti, *supra* note 63.

117. See MALCOLM N. SHAW, *INT'L L.* at 80 (Cambridge U. Press 5th ed., 2003); see also *Customary International Law*, LEGAL INFO. INSTITUTE, CORNELL L. SCH., https://www.law.cornell.edu/wex/customary_international_law.

118. *Id.*

119. *International Law Research Guide: International Treaties*, U. OF CAL. HASTINGS C. OF L. <https://libguides.uchastings.edu/international-law/treaties>.

120. *Id.*

121. Halashetti, *supra* note 63.

enforcement of customary rules in India.¹²² Customary international law does not require any formal agreement, treaty, or statement of acquiescence to rise to the level of binding authority.¹²³

The common law treats international custom as part of domestic law unless it is inconsistent with domestic law; however, in that case, domestic law prevails over international law.¹²⁴ The Blackstonian doctrine treats international law as part of municipal law without any limitation.¹²⁵ According to common law, international treaties which affect private rights, require modification of statute law and enabling Act of Parliament for their implementation.¹²⁶ Therefore, common law maintains that the rules of international customary and treaty law are part of domestic law if they are consistent with domestic law, including the UDHR, which contains customary norms of International Human Rights law.¹²⁷

However, a rule of customary international law will not be binding on a state that has objected to its substance, while such rule was in the formation process.¹²⁸ Also, failure to object is considered to be implicit consent in applying that rule and includes an assumption that the non-objecting state agrees to be bound.¹²⁹

VIII. ROLE OF INDIAN JUDICIARY IN IMPLEMENTING INTERNATIONAL LAW

The approach of Indian courts towards international law has been consistently evolving.¹³⁰ In numerous cases, the Indian Supreme Court has emphasized that, while discussing the constitutional requirement, courts should keep in view the core principle embodied in international conventions and instruments and, as far as possible, give effect to the principle contained in those international instruments—particularly when there is no inconsistency between them, and there is a void in domestic law.¹³¹ Wherever necessary, Indian courts can refer to International

122. *Id.*

123. Rex Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 198 (2011).

124. Halashetti, *supra* note 63.

125. *Id.*

126. *Id.*

127. *Id.*

128. Glensy, *supra* note 123.

129. *Id.*

130. Hegde, *supra* note 10.

131. SHYLASHRI SHANKAR, *Descriptive overview of the Indian Constitution and the Supreme Court of India*, in, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA at 133 (Oscar Vilhena, Upendra Baxi, and Frans Viljoen eds., Pretoria U. L. Press 2013).

Conventions as external aid for the formation of domestic legislation.¹³² For example, the Supreme Court in *Visakha v. State of Rajasthan* took recourse to the International Convention for the formation of domestic law.¹³³

Application, accurate sourcing, and identification of international legal norms is challenging for Indian courts.¹³⁴ Most developing countries treat international law cautiously as a different legal tool for historical reasons, probably to broaden the interpretation or sustain a comparable domestic legal norm.¹³⁵

The Indian judiciary is not empowered to make legislation; however, the Indian judiciary is free to interpret India's international law obligations into the domestic laws in pronouncing its decision in cases concerning international law.¹³⁶ In this respect, the Indian judiciary has played a proactive role in implementing international law under treaty law, especially human rights and environmental law.¹³⁷

As mentioned above in 2014, *National Legal Services v. Union of India*, case the court said: "If parliament has made any legislation which is in conflict with international law, then Indian courts are bound to give effect to the Indian law, rather than international law."¹³⁸ However, in the absence of contrary legislation, municipal courts in India would respect the rules of international law."¹³⁹ Similarly, in 1954, the case of *Krishna Sharma v. State of West Bengal*, the Calcutta high court said that when there is a dispute between international law and domestic law, the courts shall try to make a harmonious construction between the two laws.¹⁴⁰ Also, courts are required to review the text and interpretations of international instruments, such as treaties, conventions, and declarations.¹⁴¹

The Indian judiciary at all levels has been witnessing a manifold increase in the questions of international law.¹⁴² Therefore, it can be argued that an examination of the current trends in the interface between international and domestic law and the changes that are visible in the treaty-making processes is thus inevitable for ascertaining the real growth and development of new jurisprudence.¹⁴³

132. Agarwal, *supra* note 1, at 8.

133. *Id.*

134. Hegde, *supra* note 10.

135. *Id.*

136. Agarwal, *supra* note 1.

137. *Id.*

138. Ranjan, Anmol, and Ahmad, *supra* note 34.

139. *Id.*

140. Chawla, *supra* note 72.

141. PATEL, *supra* note 41.

142. *Id.*

143. *Id.*

IX. LEGAL FRAMEWORK FOR INTERNATIONAL LAW

This section discusses the different possible solutions for the better implementation of international law in India. Despite attempts to evade international law and not signing certain treaties and conventions, India should strive to clarify international law's better application because international law is rapidly developing. There is a need for a new legal framework for better implementation of international law. This section presents four possible solutions.

A. *Applying Existing Laws as Written in the Constitution Law and Treaty Law*

The Constitution is the supreme law of the land. The Indian Constitution ensures that in the entire Indian administration, high regard shall be given to international law and also to international morality.¹⁴⁴ The core precept of the law of treaties is the principle of *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of Treaties and which states that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

However, as of August 2019, according to the constitutional law, treaty laws are not binding. It is entirely up-to-the Indian courts whether they want to cite international law. Given the rapid development in international law using constitutional law and treaty law would not be sufficient. The Constitution of India needs to be amended, wherever it is inconsistent in implementing international law.

When there is a conflict between international law and domestic law, constitutional law becomes ineffective and insufficient in implementing international law. The constitutional law gives preference to domestic laws over international laws. Any international convention consistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.

Ignoring international law is not the solution, but amending the Constitution to assist international law is the solution. However, the amending Constitution is slow, challenging, and involves politics. It provides the opportunity to explore more options to implement international law in the domestic system.

B. *Citing Treaties Often*

India is a significant contributor to the field of international law. India is the most populous democracy in the world; therefore, it should play a leading role in implementing international law in a domestic system by

144. Tandon and Anand, *supra* note 19, at 57.

citing treaties more often. International law defines the legal responsibilities of states in their conduct with each other, and their treatment of individuals within state boundaries and it regulates the global commons.¹⁴⁵ Countries come together to make binding rules that they believe benefit their citizens. Adhering to international law will strengthen the domestic system of India.

India tried to incorporate and utilize international law in several judgments and decisions when they are consistent with the domestic laws.¹⁴⁶ The applicability of several Articles has been strengthened by international treaty law and international customary law to build India's legal framework and position in the international community.¹⁴⁷

In India, the judges can use the principle of systemic integration and carry out integrationist interpretation of international law.¹⁴⁸ Therefore, judges in India can potentially elevate themselves into architects of the consistency of the international legal system.¹⁴⁹ Systemic integration favorable to the greater development of international law can be of various degrees.¹⁵⁰ Therefore, it is suggested that Indian courts should cite treaties more often and it will strengthen the Indian domestic laws.

C. *Signing More Treaties*

International law, particularly international conventions, is based on the will and consent of sovereign states. It is therefore imperative that will be moved to adopt, apply and implement the proposed treaty in national jurisdictions. Each stakeholder in this process has a crucial role to play if the treaty is to be truly successful. Signing more treaties will make India resilient in implementing international law. The application of international norms found in treaties by domestic judges has been relatively uncontroversial. Generally, ratification of a treaty constitutes a legally significant act and that domestic courts should strive to hold national governments accountable to their legal commitments embodied by such ratification.¹⁵¹ At least, once a treaty is signed then India will be committed to protecting the interest of the treaty and local laws can be legislated to support the treaty.

145. U.N., *supra* note 11.

146. Chawla, *supra* note 72.

147. *Id.*

148. JEAN D'ASPREMONT, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of Consistency of the International Legal Order*, in *THE PRAC. OF INT'L AND NAT'L CTS. AND THE (DE-)FRAGMENTATION OF INT'L L.* 141–65, at 161 (Ole Kristian Fauchald and André Nollkaemper, eds., Oxford Univ. Press 4th ed. 2012).

149. *Id.*

150. *Id.*

151. Glensy, *supra* note 123.

Also, treaties are reliable indicators of the content of international law.¹⁵² The only exception is when a treaty is deemed to conflict with a peremptory norm of international law, such as *jus cogens*. This results in the invalidation of the treaty.¹⁵³ However, there are few peremptory norms, for example, the prohibition of genocide, slavery, piracy, and torture.¹⁵⁴ Therefore, it is rare for a treaty to be voided, and reinforcing the notion that it is safe to consult treaties when seeking to ascertain the content of international law.¹⁵⁵

Somewhat disturbing is a state's claim that it may not accept even certain framework treaties such as the Vienna Convention on the Law of Treaties or framework and substantive obligation conventions like the Refugee Convention 1951 or the International Criminal Court established by the Rome treaty. The most effective and efficient way to bridge the gap between international law and domestic law is by signing as many treaties possible. India should sign conventions and treaties in which India remains reluctant to draft treaties that restrict this free rein and that seek expressly to accord domestic courts a judicial enforcement role.

It can be argued that a large number of states found accession or adherence to international conventions consonant with their apperceived national interest whereas very few did not. This work also shows how non-acceptance of such conventions has not prevented India from accepting certain "practical" obligations, akin to and often exceeding these instruments.

D. *New Legal Document*

Another possible solution for better implementation of international law would be to develop a new legal document to define a new legal framework specifically for the implementation of international law in India. The issue of how and when international law should be utilized as persuasive authority within the context of Indian constitutional reasoning is one of great import and almost equally great complexity. Comparative uses of different bodies of law have grown exponentially over the last few years as the world has become more globalized—this trend so far shows no signs of abating.

A group of scholars could convene to review the problems presented by the inconsistency and ineffectiveness of international law in India, propose solutions to these problems, and draft proposed regulations and rules for the protection and development of international law. A group of scholars could consist of retired judges, lawyers, and academics. They

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

can work on issues such as evading international law when it conflicts with the domestic law and implementation of international law.

CONCLUSION

State practice and international law are constantly evolving. International law's much-vaunted values and norms are, in turn, negotiated by state practice based on perceived national interests. Indian practice shows that the relationship between international law and domestic law is complex and vague. India has different positions in adopting international law; sometimes it is willing to adopt international law, sometimes it is not.

The Indian Constitution has the basic framework for implementation of international treaty obligations in its domestic legal system.¹⁵⁶ Additionally, the government of India has exclusive power to conclude and implement international treaties or agreements.¹⁵⁷ The President of India is vested with the exclusive power of the Government of India and empowered to enter into and ratify international treaties.¹⁵⁸ Indian courts cite international law when there is no inconsistency between them and there is a void in domestic law.¹⁵⁹ However, better implementation can be attained. This Article provided four suggestions for the better implementation of international law in the Indian domestic system.

156. S. Vinayaditya Reddy, *Vertical Allocation of Authority- The Scope of International Law in the Indian Constitution*, 3 INT'L J. OF L. AND LEGAL JURIS. STUD. 164-83, 182 (2016).

157. *Id.*

158. *Id.*

159. SHANKAR, *supra* note 131.