



“IMPEMPLEMENTATION OF PRIVATE INTERNATIONAL LAW ON DOMESTIC COURT: A STUDY WITH INDIAN PERSPECTIVE”

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ABSTRACT:

Domestic legal system concerning the legal effects of international law National Legal System of India. This article is from India Significant contribution to the field of international law. but India remains reluctant to draft contracts restricting and seeking free sovereignty expressly endows national courts with judicial enforcement functions. of articles examine the process of implementing international law Indian domestic system and meets the requirements of International Law. It critically examines the underlying dichotomy National Constitutional Approach to Giving Legal Effect The contract is to clarify who has the authority to enter into the contract. of articles explore the role of judiciary in enforcement International Law of India. Finally, in this article New Legal Framework for Better Implementation of International Law.

INTRODUCTION:

Austin called international law “positive international morality”. According to Austin, law is the command of the sovereign, and the indeterminacy of sovereign at the international level and the lack of coercive force had made him classify international law as mere positive morality. Indeed, the sovereignty of the nation-State is one of the foundational principles of international law. International norms were binding on the States only to the extent expressly consented to by them. Enforcement was based on, what may be called, “naming and shaming”. The loss of good faith at the international arena functioned as the only mechanism to ensure compliance with international norms. Over the years now the concept and vigor of international law has seen gradual and momentous change. The concept of sovereignty as traditionally understood is no longer valid to the current world. The human pursuit for development and growth brought people together breaking the barriers of time, space and distance. From arrangements for facilitating smoother trade relations, we have come to a scenario where the individual needs and aspirations are taken care of by the international community. The contours of sovereignty have evolved so much that we no longer speak with a prescriptive notion of sovereignty, but are rather trying to devise effective mechanisms, both at national and international levels, for furthering the benefits of people individually as well as collectively. The corollary to the traditional conception of sovereignty was the respect for and non-interference with the domestic legal system. But with the transition in the idea of sovereignty nation-States now have to ensure harmony of domestic law with international law. Compliance with international law is no longer an act of morality, but necessary and, in fact, enforceable. This transition primarily occurred due to the

interdependence of the States in all walks of life – a move from self-dependence to globalization. States no longer are mere contributors of law, but are both contributors and recipients of law. India is no exception to this.

INDIA AND INTERNATIONAL LAW:

India's contribution to international law, especially in the field of humanitarian laws, environment conservation and protection, technology and trade laws, cannot be Over emphasized. At the same time, India has harmonized many of its domestic laws with international principles and norms in order to fulfil its international commitments. Prominent in this exchange are human rights, environmental laws, the intellectual property laws, arbitration law, trade law and space laws. The implementation of international law in India can be looked at either from the perspective of the role played by each governmental organ, or from the stand point of each field of law. In this paper, I propose first to look at the constitutional provisions dealing with interaction and inter-relation of international law and Indian law, and then look at various important branches of law where the exchange is most prominent. India is party to more than one hundred and sixty treaties and conventions dealing with various fields of law. Prominent among them are human rights, environmental law, trade law, intellectual property rights, air law, space law and maritime law. In this scheme, Part II deals with the relations of international law with India law. Part III deals with provisions of the Indian Constitution dealing with international law and relations. I have specifically dealt with the general interaction of international law with the Constitution of India, 1950 the powers of the executive and the legislature in connection with international law. In Part IV I have discussed various important fields of law where the interaction of municipal and international law is pronounced.

RELATION BETWEEN INTERNATIONAL LAW AND INDIAN LAW

A cursory look at the practice of India in relation to international law would be pertinent here. The application of international law in the municipal sphere in India can be understood through the interpretations by the courts in its various decisions. India's approach to international law can be looked at from two perspectives – Indian law vis-a-vis treaties and Indian law vis-a-vis international customs. India follows the dualist theory of international law. Therefore, international law principles and norms cannot be invoked in municipal courts without being expressly incorporated into the domestic law. The courts have held that in the light of the provisions of Article 51 [1] treaties to which India is an assenting party should be implemented in good faith, but at the same time, the executive cannot be directed to follow the treaty in absence of a domestic law. However, paradoxically treaties are considered self-executing, that is, they apply in the municipal sphere automatically, except where it requires an amendment to the Constitution or an existing law, or where a new law is required to be enacted. Therefore, the Courts can take aid of the treaty principles not inconsistent with the provisions of laws of India. [2] Customary international law, on the other hand, is not considered to become part of municipal law automatically. Therefore, where there is a conflict between municipal law and customary international law, the former will prevail. [3] Nevertheless, the courts have played an active role in the implementation of India's international obligations and have taken cognizance of both treaty as well as customary principles of international law in cases involving violations of human rights or questions of environmental law. [4] Although Article mandates respect for international law, it is not an enforceable Article. Article 253 confers exclusive power on the Parliament with respect to international affairs. But the Constitution contains no express provision settling the relation and status of international law in Indian courts. This "silence" has given the flexibility to courts to implement international law in a progressive and measured manner.

THE CONSTITUTION OF INDIA AND INTERNATIONAL LAW:

The ties of India's Constitution with international law date back to the pre-independence days. Even during the British rule, India was the separate member of the League of Nations. It is also the founding-member of the United Nations. In this section, I have sketched general scheme of the Constitution with reference to international law and further proceed to analyses certain important provisions and aspects.

THE PREAMBLE:

The Preamble contains certain basic values and philosophies that India guarantees to its citizens and strives to achieve as a nation. The Preamble states inter alia that social, economic and political justice will be secured for all citizens and that liberty and equality will be promoted. These values are the cornerstone of true democracy and are universal in nature. Every nation strives to achieve them.

FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY

The Fundamental Rights in Part III and the positive mandates to the State in the form of Directive Principles in Part IV can be compared with the Universal Declaration of Human Rights (UDHR) and commonalities can be traced. Shri Subhash C Kashyap has prepared a detailed chart on the common principles in these two parts as well as certain other laws of India. [5] The developments at the international level through the centuries had a great influence on the rights discourse in the world. The United Nations Organization (UNO) was founded as an international agency to prevent the breaking of the third world war, maintain international peace and security and to promote human rights. With this objective in mind, the nations came together and adopted and proclaimed the Universal Declaration of Human Rights on 10th December, 1948. It should be noted that the Indian Constitution which was adopted on 26th November, 1950 was greatly influence by the history of the human race and the values the Universal Declaration of Human Rights sought to promote and preserve.

FUNDAMENTAL DUTIES

Article 51A gives effect to the declaration in Article 29(1) of the Universal Declaration of Human Rights, which emphasizes the duties owed by individuals to the community at large. These duties benefit community and also help in the full flourishing of the individual. International Peace and Security, and International Relations Indian Constitution is one of the few constitutional texts in the world which expressly provides for fostering of international relations. The text of Article 51 reads as follows:

“51. Promotion of international peace and security – The State shall endeavor to –

Promote international peace and security;

Maintain just and honorable relations between nations;

Foster respect for international law and treaty obligations in dealings of organized peoples with one another; and Encourage settlement of international disputes by arbitration. “Article 51 mandates the State to endeavor to promote international peace and security, to maintain good relations with other nations, to respect international law and to settle international dispute by peaceful means. This Article is inspired from the Declaration of Havana adopted on 30th November, 1939. The Declaration proclaimed the ‘unshaken faith’ of the parties in international co-operation and promoting international peace and security.

Clause (c) of this Article obligates India to respect international law. A combined reading of this with Part III of the Constitution facilitated the judiciary in developing human rights and environmental jurisprudence in India. Clause (d) of the Article provides for ‘settlement of international disputes by arbitration’. The wisdom of using the term arbitration is doubted. Most countries do not prefer arbitration to other means and in fact the practice of

various States shows that arbitration is not the first choice of different nations. India too has not preferred arbitration as the first means to settle international disputes. [6] The UN Charter too suggests various means like negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means. In these circumstances, it is obvious that the use of the term arbitration is misplaced. It should be remembered that Article 51 is part of the Directive Principles which are not enforceable. Nevertheless, highest importance is given to international law and the courts in India have done so.

POWERS OF THE EXECUTIVE IN MATTERS OF INTERNATIONAL LAW AND RELATIONS

By virtue of Article 73, the powers of the Government of India extend to matters in respect of which the Parliament has the power to make laws, subject to constitutional provisions or any law made by the parliament on that behalf. As per Article 253, the Parliament can enact laws to implement international obligations, notwithstanding the constitutional distribution of powers. So far, in India, there is no legislation that limits the power the executive in matters of international law and relations. Hence, we can state that the executive has extensive powers in this regard. The power of the executive is vested in the President of India and is exercised by directly or through majors subordinate to him. [7] All contracts entered into by India should be made in the name of the President. [8] The President, in the exercise of her powers should act according to the advice of the Council of Ministers. [9] All executive actions are taken in the name of the President of India. [10]

TREATY MAKING POWER

As mentioned above, there is no law in India that restricts the exercise of powers by the Government of India under Article 73. This enables to executive to incur any kind of treaty obligations. The legal status of such international obligations in respect of the Constitution can be analyzed by a study of various judgments of the Supreme Court. [11] This peculiar situation arises due to the lack of clear provisions as to the status of international treaties in the Constitution, that is, regarding adoption of international law into Indian law. Article 51 obligates respect for international treaties. Article 253 confers powers on the Parliament to make laws to implement international agreements. Here we have to draw a distinction between formation of treaty and adoption of that into domestic legal system. Making laws is the exclusive domain of the legislature. Therefore, generally, ratification (approval) by the legislature is necessary to make the treaty binding on the State. Whereas, the executive is the agency of the State, that can incur legal obligations on the State's behalf. But, as already explained, there are no fetters on the executive's power in respect of international law. Therefore, the Supreme Court held that international law forms part of municipal law except when they are inconsistent with the provisions of municipal law. To sum up, the current position in India is that approval of the Parliament is required only for treaties that affect the rights of the citizens or which require a new, or change in an existing, municipal law.

EXTRA-TERRITORIAL JURISDICTION

The Government of India, as per Article 260, can enter into an agreement with any other foreign State to undertake legislative, executive or judicial functions in such territory.

THE POWERS OF THE PARLIAMENT

The power of legislating is divided by territorial extent and competence over subject matter. The Parliament can make laws for the whole of India on subjects specified in List I of Schedule VII, and the legislature of the any State can make laws applicable within the territory of that State over the subjects contained in List II. List III is designated as Concurrent List over which the Parliament as well as the legislature of the States can exercise jurisdiction, subject to the overall power of the Parliament. [12] Article 253 confers exclusive power on the Parliament to enact laws to implement international agreements. The Article reads as under:

“253. Legislation for giving effect to international agreements – 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 conference, association or other body.”

This power overrides even the other provisions in Chapter 1 of Part XI of the Constitution which deals with the distribution of powers between the Union and the States, as explained above. The provisions of Article 253, therefore, gives power to the Parliament to enact laws on matters listed in List II of Schedule VII, in order to implement international treaties, agreements, conventions or decisions taken international conference, association or other body. Hence, the power of the Parliament on matters of international law can be stated to be plenary. Further, the residuary power of legislating is also with the Parliament. [13] This enables the Parliament to legislate on matters not listed in Schedule VII.

The Parliament also possesses the power to admit foreign territories into the Union by way of a law (Article 2). But, if territory of India has to be ceded, a constitutional amendment will be required, as the Constitution does not specifically empower the Parliament to do so.

VARIOUS BRANCHES OF LAW AND THEIR IMPLEMENTATION IN INDIA

HUMAN RIGHTS IN INDIA

Fundamental rights under the Indian Constitution and the international humanitarian law contain similar principles and values. Developments in international law have paved way to various human rights legislations in India. A greater role is being played by the judiciary in developing human rights jurisprudence in India based on international principles. [14]

As highlighted earlier under the section “Indian Constitution and International Law”, the Fundamental Rights and Directive Principles in the Constitution echo international human rights principle. Special legislations and provisions like the Child Labor (Prohibition and Regulation) Act, 1986, the Mental Health Act 1987, the Human Rights Act, 1993, the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the Right of Children to Free and Compulsory Education Act (or the Right to Education Act), 2009 have also been enacted to ameliorate the marginalized sections of the society. The Indian judiciary has broadly interpreted the scope of the fundamental rights to best further the objectives of human rights. It has relied upon various international norms and principles in order to recognize and enforce various rights. [15] Human rights in India, thus, has greatly benefited from international law.

ENVIRONMENTAL LAW AND JURISPRUDENCE

The steep rise in global temperature and the growing realization that natural resources – living and non-living – are finite created a global concern for the protection and conservation of environment. To address this concern, the world met at Stockholm in 1972 in what has come to be known as the First Earth Summit. India was an active participant at this Conference and since then is committed to the cause of environmental conservation. At the same time, she is also the champion of the developmental aspirations of the developing nations.

INTERNATIONAL CONFERENCES AND ENVIRONMENTAL LAW IN INDIA

Subsequent to the Stockholm Conference and in order to give impetus environmental preservation, India enacted the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and Control of Pollution) Act 1981, and the Environment (Protection) Act 1986. These legislations along with other laws, like the Forest Act, 1927, the Prevention of Cruelty to Animals Act, 1960, the Wildlife (Protection) Act, 1972, Forest (Conservation) Act, 1980, the Public Liability Insurance Act, 1991, the National Environment Tribunal Act, 1995, the National Environment Appellate Tribunal Act, 1997 and the Biological Diversity Act, 2002 form the corpus of environmental law in India. The Indian courts have played a very significant and vital role in environment protection in India by applying the principles of international law. The scope of right to life under Article 21 of the Constitution has been widened through the concept of public interest litigation (PIL)

and clean environment is now a fundamental right of every Indian. [16] Thus, the impact of international law on India's environmental law, similar to that on human rights, is profound and has been highly beneficial.

TRADE LAW

International trade is the cross-border exchanges between subjects of international trade law. In order to institutionalize international trade regulations, International Trade Organization (ITO) was sought to be established. But the ITO could not materialize due to wide differences among nations. As a stop-gap arrangement General Agreement on Trade and Tariffs (GATT) was signed. The GATT did not include trade in services. Later, after prolonged discussions in the Uruguay Rounds of negotiations the GATT system was replaced by the World Trade Organization (WTO), which included two important aspects of trade – the General Agreement on Trade in Services (GATS) and the Trade Related aspects of Intellectual Property Rights (TRIPS). India is a founding-member of the WTO. The unique feature of WTO is that the States could not make any reservations to the provisions of the WTO. The WTO regulations have to be accepted unconditionally and in full. WTO also has stringent enforcement mechanism. WTO today has 153 member States. The growing important of international trade and the strong WTO system ensures that States implement their international trade law obligations. India has implemented its obligations under the WTO, which include regulation of tariff and taxes, anti-dumping and intellectual property rights. A wide variety of laws and amendments were brought in subsequent the establishment of WTO. The major acts are the Foreign Trade (Development and Regulation) Act, 1992, the Special Economic Zones Act, 2005, the Special Economic Zones Rules, 2006, the Agriculture and Processed Food Products Export Development Authority Act, 1985, the Marine Products Export Development Authority Act, 1972, the

Competition Act, 2002, and the range of amendments to the Tea Act 1953, the Coffee Act, 1942, the Rubber Act, 1947 and IPR laws in India and the opening of the Indian service sectors to foreign players.

INTELLECTUAL PROPERTY RIGHTS

The intellectual property rights (IPR) system in India is based on the developments in international law. India is a member of the World Intellectual Property Organization (WIPO), and party to the World Trade Organization (WTO) managed Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). Therefore, India has brought its domestic law in harmony with the international IPR regime. The legislations in this regard include the Patent Act, 1970, the Copyright Act, 1957, the Trade Marks Act, 1999, the Geographical Indications of Goods (Registration and Protection) Act, 1999, and the Design Act, 2000.

ALTERNATIVE DISPUTE RESOLUTION

India enacted the Arbitration and Conciliation Act, 1996 in order to bring uniform rules regarding settling commercial disputes based on the Model Law on International Commercial Arbitration, 1985 and the

Conciliation Rules, 1980 adopted by the United Nations Commission on International Trade Law. Amendments to the Code of Civil Procedure, 1908 were also made.

SPACE LAW

The launch of Sputnik 1 by the erstwhile USSR (Soviet Union) on 4th October, 1957 marked the beginning of the space era and since then this field has seen tremendous progress. Law responded to this “revolution” immediately. In 1959 the United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS) was established in order to create a specialized agency for dealing with peaceful use of outer space and promote international co-operation. UNCOPUOS has two standing subcommittees: the Scientific and Technical Subcommittee and the Legal Subcommittee.

India has played a pioneering role in the development of international space law. India is one of the founder-members of the UNCOPUOS. It has participated in all conference on space law and has been an active participant. India is also a leader in space technology and this gives great weight to her contribution to law-making. [17]

The international legal framework on space laws consists of five treaties and five important declarations of principles. The following are the treaties:

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty),

1967 Agreement on the Rescue of Astronauts, Return of Astronauts and the Return of Objects Launched into Outer Space (the Rescue Agreement),

1968 Convention on International Liability for Damage Caused by Space Objects (the Liability Convention),

1972 Convention on Registration of Objects Launched into Outer Space (the Registration Convention),

1975 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement), 1979 The declarations of principles are given under:

The Declaration of Legal Principles Governing the Activities of States in Exploration and Uses of Outer Space, 1962 The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, 1982 The Principles Relating to Remote Sensing of the Earth from Outer Space, 1986 The Principles Relevant to the Use of Nuclear Power Sources in Outer Space, 1992 The Declaration on

International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, 1996 Although India has played a vital role at the international level and made invaluable contributions to the development of international space law, she does not have domestic law dealing with subject. This deficiency in the legal system exists in spite of the fact that India is a leading space technology country and has been actively involved in scientific and legal developments at the global level for over five decades. This is an appalling condition.

CYBER LAW

Cyber law in India is governed by the Information Technology Act, 2000. This legislation was enacted subsequent to the UNCITRAL Model Law on Electronic Commerce (E-Commerce). The various legislations passed in this regard include the Information Technology Act, 2000 and amendments to Evidence Act, 1872.

