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Dualist Approach of India

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ABSTRACT

International law can civilise a society but never regulate it.

-Anonymous

India is known to be a dualist country regarding its implication with the International law. Formally at least, the application of international treaties and conventions rests with the Executive, while its domestic implementation requires Parliamentary sanction. Once international law treaties are signed, they are ratified and are infused into domestic law through various channels, not all of which require Parliamentary approval. Further, there have been instances when Indian judiciary also applies these signed international laws in various ways that reflect shades of monism. In this paper, I have impliedly argued to the flexibility of the Indian judiciary to have contradictions against what it displays to be a dualist state and on the other hand how it functions as a monist state from time to time. This paper aims to bring out the fact that India vis-à-vis International law is not as per the constitutional policy and the failure of applying dualist approach in the courts are covered up by a theory called 'Judicial Activism', thus usurping the parliamentary powers.

INTRODUCTION

The Indian nation has a clear and non-disputable constitutional policy of dualism approach to international law. However, it displays a monist tendency in lot of circumstances which raises eyebrows of many observing these clashes between the theory and practicability of the aforementioned. It is also said to be an uprising issue in many developing and developed nations. The assumption that international and domestic laws operate in distinct spheres which are kept clear and do not surpass each other's physical and normative borders no longer prevails[2]. The current paradigm is a display of international law as an increasing normative framework which is both constitutive and reflective of the relationship not just between states inter se but also their citizens and non-state entities[3]. The International law unlike early times is branching into the municipal law which was once purely domestic sphere, but this change has its roots deep into how a nation wishes to display itself as an ideal subject of international law[4]. Primarily there are two main theories for implying the international law in a state; a state can directly incorporate the international policy; this approach is known as the theory of incorporation. (Monist). On the other hand, certain nations require ratification of these laws and policies as a legislation before incorporating which is known as theory of modification (Dualist). International Jurist condemn the fact of how doctrines of Monism and Dualism are formalistic and formulaic constructs that do not speak about the multitudinous truth of practice of global legal interactions especially of the increasing interpenetrations of international and domestic legal orders.

DUALIST INDIA

The Indian constitution has always been a great issue for both discussion and debate throughout the years since it has never spilled the beans about the mode of engagement with the international regulations. The constitution exhorts the sovereignty of the state to foster regard for international treaties, conventions and policies via Article 51[5]. Article 51 is drafted in a form where it is to be

[2] A. M. Slaughter & W Burke-White, The Future of International Law is Domestic (or, the European Way of Law), 47 Harvard Intl LJ (2006) 327. Last seen on 04-10-2020.

[3] https://blog.ipleaders.in/international-and-municipal-law-an-ultimate-guide/ Last seen on 08-10-2020.

[4] Ian Brownlie, Principles of International Law, 5th edn (Clarendon Press, Oxford, 1998) 31–33; Last seen on 07-10-2020.

[5] Constitution of India, art 51 (Providing that the 'state should endeavour to (a) promote international peace and security, (b) maintain just and honourable relations between nations, (c) foster respect for international law and treaty obligations in the dealing of organized people with one another; and (d) encourage the settlement of international disputes by arbitration'). Last seen on 08-10-2020.

interpreted as judicially non-enforceable principle of governance[6], also the constituent assembly has been engaged into fewer debates regarding the scope, intent and content of this provision. The source of such a provision can be traced back to the Havana declaration, where the signatories understood the need for international peace by maintaining justice and respect for international laws and its application to among the subjects of the state[7]. Other than Article 51, the Article 246 when read along side with entries 10-14 of the Union list of the seventh Schedule clearly interprets that the legal competence over foreign affairs, entering into a treaty, amending laws and its application is solely bestowed upon the parliament. Article 253 further elucidates the clarity of power vested in the parliament to form laws for implementation of international treaties/conventions which may even extend to the legislative competencies of the state[8]. Another provision of the constitution which supports the virtue of dualism is the Article 73[9] of the constitution which when along with Article 246 and entries 10-14 can be arrived at three main conclusions:

- The parliament can pass a law which regulates to how an international law is to be implemented domestically.
- The power to entry into treaties is devolved upon the executive[10].
- The Union executive can act on all matters and only on the matters, over which parliament has been awarded power by the constitution even in the absence of the respective legislation[11].

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[6] Article 51 is in Part IV of the Constitution, dealing with Directive Principles of State Policy ("DPSP"). Last seen on 08-10-2020

[7] B. Shiva Rao, The Framing of India's Constitution. Last seen on 08-10-2020.

[8] 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. Last seen on 08-10-2020

[9] 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; and
- (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
  Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

Last seen on 08-10-2020

[10] In Union of India v Azadi Bachao Andolan, (2004) 10 SCC 1, the court had interpreted that the Union executive has the power to decide on which international obligation to be entered after thorough scrutiny even in the absence of a particular legislation if it does not violate law or policy of the state.

[11] In Ram Javaya Kapur v State of Punjab, AIR 1955 SC 549, the court has interpreted that the executive has power over matters in the union list even in the absence of legislation.

In Jeeja Ghosh v. Union of India, the supreme court in 2016 had to rule upon the issue of reaffirming the rights of a person to live with dignity despite the challenges of physical disability. Here the petitioner was de-boarded because of her disability. The court held such an act to be illegal and state that every person had the right to live a dignified life[12]. The court even stated that as per Vienna Convention on law of treaties, 1963, an International law had to be applied if the sovereign state is a signatory to the treaty. The court in this instance read the Article 27[13] that a state party who is a signatory to a treaty cannot invoke or use an internal law as a coverup for its failure to perform a treaty. Jurists claim that the court in this case is justifying its act of overpowering itself by bringing in International standards and relating it to Article 27 and not rather imply Article 26 which elucidates about 'pacta sunt servanda' of the same convention that directs a state to perform a treaty in good faith to which it is a signatory. In National Legal Services Authority v. Union of India, the court claimed that if incase there is a conflict between implementing an international or municipal law, the court has to go for the Indian law[14]. However, in this circumstance, the court has recognised transgender as the third gender in the country and since there is no law against it and the fact that even though the nation has not signed any convention in respect to it, the court can rule in favour of the third gender[15]. India, unlike other international issues have a clear perspective with respect to customary international law; the court in the Vellore Citizen case[16] has stated that the principles of Customary international law shall be directly deemed as part of the domestic law unless they are contrary to domestic law. Also, In G. Sundarrajan case[17], the court had to rule upon setting up of a nuclear plant in Kudankulam. The court in here referred to various international treaties which were not even in signed by India[18].

Theories on Dualism:

- As per Hans Kelson's Grundnorm theory, International and municipal law is nothing but 'manifestations of a single unit of law' and a state should behave in the same manner it has behaved customarily. Kelson argues that International law is derived from as state's practice and is a system of rules of a legal character, on the other hand, municipal law is a depiction

[12] https://thewire.in/law/supreme-court-international-law Last seen on 08-10-2020.
[13] A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Last seen on 08-10-2020.
[14] https://thewire.in/law/supreme-court-international-law Last seen on 08-10-2020.
[15] https://indiankanoon.org/doc/193543132/ Last seen on 08-10-2020.
[16] https://indiankanoon.org/doc/1934103/ Last seen on 09-10-2020.
[17] https://indiankanoon.org/doc/184104065/ Last seen on 09-10-2020.
[18] https://www.latestlaws.com/latest-caselaw/2013/may/2013-latest-caselaw-359-sc/ Last seen on 09-10-2020.

of the internal affairs of a state. Hence, he considers international law as a single and coherent system and places it at the top of the pyramid in his Grundnorm Hypothesis[19].

- Hersch Lauterpacht is an advocate of Natural law and a practicing judge who mentions that international law serves percepts of natural law. He urges that irrespective of the law that is prevailing, it is the individual of a state that is the unit of law in the end. Lauterpacht claims that International law is for the states and not for the government, that the international community is a community of individuals and not of sovereign states and that states are mere channel which expresses the will of the individuals or the subjects of the states[20].
- Triepel considers international and municipal law to be distinct from each other and made certain contentions which claimed the following[21]:

- International law governs states whereas municipal law govern individuals and both laws differ in particular social relations between the subjects they govern.
- There is a clear difference between subjects, sources, and content hence there is a dire need of translating or ratifying an International obligation before implementing in the state.
- He argues that the judicial origins are different; The international law is a common will of the states and municipal law is solely the will of the state itself.
- He claims that the most important and inventive source of international law is the mutual will of the states because the law is only as good as the application[22].

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[19] https://watermark.silverchair.com/ajj-19-94.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc485ysgAAAp0wggKZBgkqhkiG9w0BBwagggKKMIIChgIBADCCAn8GCSqGSIb3DQEHATAeBglghkgBZQMEAS4wEQQMvPLZi119A4UkvCKjAgEQgIICUKmFISjk1fNHBAxG1lbKCuErWg3S2ROEki5Yoyl4kkKLktJGv43e8oi6jwcC-5iw1NKfi2nP7wQXowwEoF5w3xZeNBkovgcN8WNpNOzy0sf5ROG_GsBE7C2D7WZ7Ye_r5vatUNynNt0jeM1O3y6bxZxvzxvtJGyqjBpUe5b6A9756iIJivpVMkeJdTR8eWkHvYuokhXCn3d81dzlqH4GkimlWoHScmWCrfArvQf4_4ufHko9ZPxcwIGVK3v_0p9pawyvjCb8eQQEVMHrUmJgY_3U6GGhPEaJpYbGft7WcbP_wTUVCh4cVJDm5fIkC5XtTlVTvNiBriv00__4Jv3HpXN9pUiKh6vMhCPBRjSHCbHiFrXNmp8NGBL0FLFK1v_wBJ5qwYqh3koY0YTE8OWZV8V6UrJhV_B-VTy2FHYxkAR2C3AHWUxOiNLmIK7U3qT3SVo6oUdIHruBLXqmUT9kSKbdJ7llHYSaA_gJY3ZAnLy5aQHfGtDs26tdjSBY5tZo5my2-a6c8C-Dq0CGR02zRozHgsnm9WyRN-F6RiIFeKDVN4wCnESgvc7tuT13XA24uhWuMeA_CcjGV3PR8NpveQt_EpKtGCb5C7X_br8kl4bxSNsD1J8_c5OvIbr8LVebgj1urOnLKfaA3vsWGtWjuNQdBTGshQ1QXfUCiXj1uSEFCcg7lvmGYOvfJyiVwsXjlfDRut01nd30FbDs1L08g4AFrJWP0gDr7eTTxLzlixWt2y94_Vy2GK_v1jH_EmupRNuZ6tzXDMLxSFxoxU3OnEA Last seen on 10-10-2020

[20] http://www.ejil.org/pdfs/8/2/1429.pdf Last seen 10-10-2020.

[21] https://publishing.cdlib.org/ucpressebooks/view?docId=kt209nc4v2&chunk.id=ch05&toc.id=&brand=ucpress Last seen on 10-10-2020.

[22] https://blog.ipleaders.in/international-and-municipal-law-an-ultimate-guide/ Last seen 10-10-2020.

THE ISSUE OF LEX POSTERIOR

A nation which follows the dualist theory should translate or ratify the international treaty/convention it has signed so that the obligations that arise out of the treaty/ convention can be applied appropriately. This translation affects the current law prevailing if any in the same subject matter. In a monist state, the prior/ prevailing law is null and void once the state has signed the treaty/ convention. In a dualist state, when an international law is translated into national law, it can be overridden by another national law based on the legal maxim 'lex posterior derogat legi priori'[23] which states that the latter law replaces the earlier law. Thus, there needs a time to time check or screening of national laws for incompatibility with earlier international law.

CONCLUSION

From the aforementioned, it is evident that there exists a practice of Indian courts to act against the dualist approach of the nation towards International law. However, every country facing this issue claims to have a soft corner taking the deficit of democratic values in international law. Other contentions claiming to allow the courts to do such practice include lack of executive accountability, impact of federalism, loss of value of legal pluralism, etc[24]. Many countries try to set up stringent parliamentary committee procedures scrutinise the executives assumptions of international legal obligations[25]. The success of such a committee is another thing but the matter to be considered is that the countries which take effort to resolve such an issue and how they mend their domestic divisions of power, system of functioning to respond to new international obligations. For the reasons aforementioned, India should also put in effort to tackle such an issue.

[23] https://advocatespedia.com/Lex_Posterior_Derogat_Priori Last seen on 10-10-2020.
[24] https://library.unej.ac.id/repository/_Indian_Journal_of_International_Law0A.pdf Last seen on 11-10-2020.
[25] Joanna Harrington, Scrutiny and Approval: The Role for Westminster Style Parliaments in Treaty- Making, Last seen on 11-10-2020