



# THE STANDING INTERNATIONAL TREATIES UNDER CONSTITUTION: AN INDIAN PERSPECTIVE

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## ABSTRACT

*International law is the body of law that governs the interdependence of sovereign states. These are the rules that govern how the states interact with one another. Municipal law, often known as national law, is the law of a country that governs the behaviour of its citizens. International law could be different from the domestic laws of a country. The two systems have different set of rules and principle. Even though international law requires States to carry out its international obligations, it does not lay down uniform pattern to incorporate the same in their municipal sphere. This results in domestic legal systems of different countries which varies in respect of implementation of international law at national level. So, the States follow different processes of incorporating international law into their domestic legal system, as per their constitutional provisions. The different State practices relating to incorporation of international law into municipal law have been explained by two schools of monist and dualist. Monist school regards international law and municipal law as parts of a single legal system<sup>1</sup>. International law automatically becomes a part of municipal law in these countries. International law and municipal law, according to the dualist school, are two independent laws. International law does not immediately become part of the national law of countries that follow the dualist school of thinking.*

<sup>1</sup> DJ Latham Brown, Public International Law, London, Sweet & Maxwell (1970), at 265,

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### **Implementation of International law in India:**

Few provisions of Indian Constitution specifically deal with international treaties and its implementation. Article 51(c) is one of the Directive Principles of State Policy provides that the State endeavors to foster respect for international law and treaty obligations<sup>2</sup>. Art. 51(c) mentions 'International Law' and 'Treaty obligations' separately. According to Prof. C. H. Alexandrowicz the expression 'International Law' connotes Customary International Law and 'Treaty Obligations' stands for obligations arising out of International Treaties. This interpretation seems to be logical in the context of the article as well as the attitudes of courts in India on questions of International Law<sup>3</sup>. Thus, the Indian Constitution attaches much importance to international legal obligations and imposes a positive obligation on the State adhere to the same. Same view has been adopted by the judiciary. In *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*<sup>4</sup> the Supreme Court held that the Indian Courts should apply to customary International Law in India to the extent that they are not inconsistent with the municipal laws. Similarly in *People's Union for Civil Liberties v. Union of India*<sup>5</sup>, the Supreme Court observed that "It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law." These decisions of Supreme Court make it clear that customary International Law are implementable in India without enabling legislation provided it does not oppose municipal law.

### **India's Implementation of International Treaties:**

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<sup>2</sup> The state shall endeavour to:

- a) promote international peace and security
- b) maintain just and honorable relations between nations
- c) foster respect for international Law and Treaty obligations in the dealings of organized people with one another; and
- d) Encourage settlement of International dispute by arbitration

<sup>3</sup> M. K. Nawaz, "International Law on the contemporary Practice of India Some Perspectives, Proc, ASIL, April 25-27(1965), p 275 at p.278; see also CH. Alexandrowicz, International Law in India, ICLO (1952), p.292. Cited in Dr. S. K Kapoor Human Rights under International Law & Indian Law', Central Law Agency, Allahabad 15 ed, 2004, p.109.

<sup>4</sup> AIR (1984) SC 667

<sup>5</sup> AIR 1997 SC 568



Treaties acquire a prominent place in international relationship, Entering International treaties is one of the characteristic features of State sovereignty.

A treaty is a legally binding written agreement between two or more countries. International treaties are the outcome of agreements between states controlled by international law. Here, the process of implementation of international treaties at national level varies in different countries. In other words, countries which follow monist school, when the State ratifies or accedes to an international treaty this becomes part of municipal law. Under such systems, treaties are generally considered to be self-executing treaties. Countries following dualist school, treaties in are not self-executing, that is, it does not have the force of law without the passage of supplementary domestic national legislation.

India has signed various international treaties as a sovereign state. The requirement for states to carry out their commitments under international treaties is a well-known basic premise of international law. To fulfil this, Article 253 of the Constitution of India provides that 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 any decision made at any international conference, association, or other body.<sup>6</sup> Ordinarily speaking, Constitution of India provides for division of legislative powers between Union and State Governments. The Parliament cannot make a law with respect to a matter in State List. Article 253 is one of those set of Articles, which provides certain exceptional situations in which the Parliament can legislate with respect to which matters falls under the State List. Although India is a federal nation with separation of legislative powers between the Centre and the States, the Union Parliament enjoys wide powers when it comes to the implementation of a treaty. Parliament in India cans even intrude upon areas within the legislative competence of States in giving effect to the provisions of an international treaty or convention. Further, under Article 246, Parliament has exclusive power to enact a law on the matters listed under “List I” of Seventh Schedule of the Constitution (Union List). As Entry-14 of Union List deals with treaty-making power, Parliament is empowered to enact legislation for the same. Thus, under the scheme of the Constitution, international treaties can be legally enforceable within the municipal sphere of India only when Parliament enacts an enabling legislation incorporating it under the domestic system. But Article 73 of the Constitution provides that the executive power of the Central Government shall extend to the matters about which Parliament has power to make laws and to the exercise of such rights,

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<sup>6</sup> Article 253 reads "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 of convention with any other country or countries or any decision made at any international conference, associated or other body."



authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

Executive powers of the Union of India are specifically vested in the President under Article 53 of the Indian Constitution. Apart from vesting the executive power, this provision also provides for the exercise of such executive power either by him directly or through the officer's subordinate to him in accordance with the Constitution.

However, executive power of government of India to enter international treaties does not mean that international treaties are enforceable upon ratification. This is because Indian Constitution follows the "dualistic" doctrine with respect to international law. Henceforth, international treaties do not automatically form part of national law. They must, where appropriate, be incorporated into the legal system by a legislation made by the Parliament. The requirement of ratification by Parliament will ensure that international agreements and treaties with far reaching implications are subjected to a closer legislative scrutiny and a wider political and public discussion. But in the absence of a specific provision stipulating the procedure for the negotiation and ratification of treaties, the exercise of this power has by and large remained a preserve of the executive, which has tended to interpret Article 73 to mean that its authority extends over the subjects included in the Union List.

An examination of Constitutional provisions clearly shows that even though executive has the power to enter treaty, implementation of treaties has been made a subject of Parliament and thus treaties do not automatically become part municipal law. They must be transformed into domestic law by a legislative Act. Although signing and ratifying an international treaty is within the domain of the executive, implementation of such treaty falls under the domain of Parliament as is explicitly provided under Article 253.

### **Judicial Impact:**

Thus, how far these treaties entered by the executive bodies are enforceable in the municipal sphere of democratic country like India without an enabling legislation is a controversial issue.

In *Bangalore v. Union of India*<sup>7</sup> Karnataka High Court held that "*if the Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries, courts cannot compel Parliament to make such*

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<sup>7</sup> AIR (1983) Kar 85



*law and in the absence of such law, Court cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries."*

The Division Bench of the Rajasthan High Court in *Birma v. State*,<sup>8</sup> while considering the question as to whether a treaty between the British Government and the Princely State of Dholapur, which was not given effect to by means of legislative enactment, could be regarded as part of municipal law, held that "...Treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority,"

In *Nanka v. Gov. of Rajasthan*<sup>9</sup> Court held that "**Treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislative authority.**"

Hence according to these decisions treaties entered by the Union of India do not become enforceable at the hands of our courts and they do not become part of our domestic law.

#### **India's compliance with international human rights treaties:**

Even in case of Implementation of International Human Rights Treaties in India courts are facing same dilemma. example in *Xavier v. Canara Bank Ltd*<sup>10</sup>. the issue was whether provisions of International Covenants/Treaties to which India is a party become part of the municipal law of India. In dealing with this question, the Kerala High Court answered the question negatively.

The remedy for breaches of International Law in general is not found in the law courts of the State because International Law per se or proprio vigor has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Right merely sets a common standard of achievement for all peoples and all nations but cannot create binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated, but individual citizens cannot complain about their breach in the municipal courts even if the country concerning has adopted the covenants and ratified the Optional Protocol. The individual cannot come to court but may complain to the Human Rights Committee, which in turn, will set in motion other procedures. In short, the basic human rights, enshrined in the International Covenants above referred to may at best inform judicial institutions and inspire legislative

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<sup>8</sup> AIR 1951 Raj 127

<sup>9</sup> (1951) AIR (38) Raj. 163

<sup>10</sup> 1969 Ker LT 927



action within member-States but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of Judiciary.

Same view was expressed by the Supreme Court in *Jolly Verghese v. Bank of Cochin*<sup>11</sup> "India is now a signatory to international Covenant on Political and Civil Rights and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Even so, until the municipal law is changed to accommodate the Government what binds the court is the former, not the latter.

But in *Visakha v. State of Rajasthan*<sup>12</sup> a while dealing with the question the Supreme Court through judicial activism went one step ahead and held that international Human rights treaties which are ratified by India and which are promoting fundamental rights are enforceable without any enabling legislation.

The court was concerned in this case with the protection to be afforded to working women from sexual harassment at workplace to make their fundamental rights meaningful. Relying upon Articles 14, 15, 19(1)(g) of the Constitution, the court observed that "any international convention not inconsistent with the fundamental rights and in harmony with this spirit must be read into these provisions to enlarge the meaning and content thereof to promote the object of the Constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact law for implementing international conventions and norms by virtue of article 253 read with entry 14 of the Union List in the Seventh Schedule to the Constitution. Article 73 is also relevant. It provides that the executive power of the Union shall extend to matters with respect to which Parliament has power to make laws. The executive power of the Union is therefore, available till Parliament enacts legislation to explicitly provide the measures needed to curb the evil." The Court relied upon the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) which has been ratified by the Government of India.

In *D.K Basu v. State of West Bengal*<sup>13</sup> the Government of India had acceded to and ratified the International Convention on Civil and Political Rights, 1966. Article 9(5) of the said. Convention declares that "anyone who has victim of unlawful arrest or detention shall have enforceable right to compensation". The Government of India had, however, made a reservation to this clause while ratifying the said Convention saying that Indian law does not recognize any such right. The Supreme Court however opined that "That reservation,

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<sup>11</sup> 1980 (2) SCC 360

<sup>12</sup> (1997) 6 SCC 241

<sup>13</sup> 1997 (1) SCC 416.



however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right of a citizen. There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life; nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life." This decision indicates not only recognition of an International Covenant ratified by India but also a readiness to ignore the reservations appended by our country while ratifying the Convention, in the light of the law developed by the Supreme Court.

In *Githa Hariharan v. Reserve Bank of India*<sup>14</sup>, where the Supreme Court held that "the CEDAW and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June, 1993. The interpretation that we have placed on Section 6(a) of Hindu Maintenance and Guardianship Act, 1956 gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to international convention and norms for construing domestic laws when there is no inconsistency between them."

Thus, in absence of specific domestic legislation enacted by the Parliament, implementations of treaties are not justifiable in Indian courts. However, a perusal of the jurisprudence shows that even though initially the domestic courts in India have been reluctant to incorporate international treaty provisions into our domestic courts unless enabling provision has been passed to that effect by the legislature, in the later years pro-active role is being played by Indian judiciary in implementing India's international obligations under international treaties particularly when the matter deals with protection of Human Rights.

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<sup>14</sup> AIR 1999 2. SCC 228