Harmonious Construction and the International Law Allegory in India

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23 November 2022

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23 November 2022
Last update: 21/11/22 19:18

Introduction

The debate on whether international law can be considered as true 'law' has been unremitting, with no definite answer to the bindingness of international law. This paper analyses a contemporary constitutional practice—and tries to look at the way in which the Indian Supreme Court ("SC") has applied the doctrine of 'harmonious construction' to incorporate international law to the domestic legal system of India, and its implications. Legal frameworks of most countries, including India, provide for international law within the domestic/municipal system. Typically, there are two traditions in this respect: First, as per the monist tradition, international law is automatically incorporated within domestic law, without the need for an enabling legislation; Second, as per the dualist tradition, the state has exclusive legislative authority, and international law must undergo a 'transformation' into a domestic legislation to be applied in the municipal legal system. Constitutionally, India falls within this dualist tradition. This paper also reflects on the slow-shift from dualism to monism by the use of 'harmonious construction' by the SC.

As per Article 253 of the Indian Constitution, for the implementation of any international treaty, an enabling domestic legislation must be enacted, and treaties are not automatically incorporated into municipal laws. Other constitutional provisions relating to international law include Article 51(c), as per which the State has to foster respect for international law (both custom and treaties); and Article 246(1) read with Entry 14 of the Union List of the Seventh Schedule of the Constitution, as per which the Parliament has legislative competence to enter into treaties with foreign countries.

Harmonious Construction

The doctrine of 'harmonious construction', in the present context, simply means that in case of a conflict between two laws, their interpretation should be in a way in which the spirit and essence of both laws are maintained, which is done by 'harmonising' the laws. One way in which the SC has harmonised conflicting laws is by restricting the scope of broader laws to make way for specific laws. The SC has also looked at the intent of the laws in question to determine their applicability, and has harmonised them to ensure that they are in line with their legislative intent.

Harmonising International Law

As opposed to an enabling legislation under Article 253, the SC has been incorporating international law in India through its judgements, primarily by harmoniously constructing international law vis-à-vis domestic law. The SC first applied the doctrine of harmonious construction in *A.D.M. Jabalpur*. Here, firstly the SC accepted the primacy of domestic law, and then opined that municipal law should be constructed in a manner in which it harmonises with the international law obligations of the State. Even in *Maganbhai*, the SC held that deficiencies in the constitutional system should be removed, and the state should equip itself with international law tools—through a harmonious and holistic interpretation of domestic and international law. *Maganbhai* also overruled *Berubari I*, holding that an enabling legislation is not necessary to give effect to a treaty/agreement if rights of citizens are not affected, and the same would be included in the international law obligations of the State.

In *Gramophone Company,* the SC held that even without an enabling legislating, international law can be a part of domestic laws. It was held that if the international law is not conflicting with domestic laws, the former would be deemed to be in force in India. If, however, international law conflicts with domestic law, the SC would harmoniously construct the norms, making way for both laws. In *NALSA*, with respect to the ICCPR, the SC reiterated that the absence of conflicting domestic laws leads to an incorporation of international laws. Here, the SC also ruled that international conventions such as the ICCPR should be read into the existing laws, like the articles on fundamental rights, and a joint meaning should be given to the laws, while supporting 'progressive jurisprudence'. ICCPR has also been referred by the SC in *Jolly George Vergese*, *Nilabati Behera* and *DK Basu*. This is important, because India, in spite of having reservations with the ICCPR, has incorporated its norms in the domestic legal system through the SC. In *Visakha* and *Safai Karamchari Andolan*, the SC opined that conventions such as the CEDAW and CERD also become a part of domestic law of India in the absence of domestic laws.

It's important to note that the SC, in *Puttaswamy*, has clarified that Courts cannot operate under an assumption that international law and domestic law would be in conflict with one another—they have to make every effort to harmonise the two with a 'presumption of compatibility'. That being said, if they cannot be harmonised, domestic law must always prevail over international law. This is similar to the logic that in case of a conflict between a Union law and State law over a subject in the Concurrent List, if the Union and State laws cannot be harmonised, the Union law prevails over the State law. This is denotive of the primacy of domestic law over international law. For example, in *Shayara Bano*, with respect to the practice of *talaq-e-biddat*, there was a conflict between Muslim personal laws, which provided for the mentioned practice, and the ICESCR, which promulgated gender-based equality. Here, the SC opined that since these are directly in conflict, without the possibility of harmonisation, Muslim personal laws would prevail over ICESCR, as the former is a part of India's domestic laws.

The SC has applied the doctrine of harmonious construction to not just international treaty law, as discussed above, but also to customary international law. In *Ram Jethmalani v. Union Of India*, the SC recognised that the VCLT acts as a general principle

of interpretation and customary international law, which can be incorporated in India, despite India not being a party to it. Further, as per *PUCL*, in relation to the Universal Declaration of Human Rights, the SC drew the conclusion that the Declaration, containing customary international law norms can be applied in India, as it can be harmoniously constructed with existing domestic laws.

The SC has not actively engaged with the debate on monist-dualist tradition while rendering its judgements, but has generally tried to accept the principles of international law, and interpreting domestic law in a way where these international law principles can be effectuated harmoniously with domestic law. It is important to note that typically, the SC has not gone into the interpretation of international law; it has excavated the principles upon which international law is based, and has tried to harmoniously construct domestic law in tandem with these principles. In *Vellore Citizens*, while dealing with sustainable development, the SC recognised the "precautionary principle" and the "polluter pays principle" to be a part and parcel of international law. Even when such principles are in conflict with India's municipal law, without the scope for harmonisation, the SC has rejected its application. For example, in *Mohamad Salimullah*, the SC refused to apply the principle of non-refoulment (prohibiting a country from returning refugees to the persecuting state) with respect to the deportation of Rohingya refuges. Thus, this is how the SC has been applying the principle of harmonious construction in reference to international law in India.

Implications of Harmonising International Law

It is important to understand why the SC has been employing the doctrine of harmonious construction in the context of international law, even when Article 253 expressly lays down the foundation for the dualist system and provides that international law becomes a part of municipal law only through an enabling legislation. As discussed earlier, harmonious construction is applied when there is a federal conflict between Union and State laws. It might be argued that the SC has analogised these conflicts with the conflict between domestic and international law, and has decided to similarly apply its interpretative tools.

Applying the doctrine here, while allows the broadening of the scope of fundamental rights available to citizens, also undermines constitutional provisions and judicial practice. Both textually and practically, the SC and the Legislature has followed the dualist tradition of transformation of international law into an enabling legislation, but this change in practice adopted by the SC demonstrates a shift towards monism and the 'incorporation' principle. While critically analysing this shift to monism, certain concerns regarding the application of international law might be relevant—including, but not limited to—an opaque decision-making process in international law, unequal bargaining power of parties, and the emergence of an unscrutinised internalization of international law without parliamentary scrutiny and executive accountability.

Conclusion Presently, it is unclear whether India follows the monist tradition or the dualist one. Relying strictly on the text of the Constitution, and judgements such as *West Bengal v. Kesoram*, India would fall within the dualist tradition. However, as the SC has applied the doctrine of harmonious construction in many judgements, allowing the adaptation of principles and obligations of international law within the domestic legal framework, it can be argued that India is slowly shifting to a monist system. Therefore, this use of harmonious construction by the SC has created an international law allegory within India, which can be viewed from the lens of judicial activism (or possibly judicial overreach). This allegory can be rectified by a legislative enactment (preferably in the form of a constitutional amendment), laying down the approach to be used by Courts while applying international law in India.

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