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Indian Domestic Courts Ascertaining of Customary International Law

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ABSTRACT

Within any primitive society, specific rules of behaviour materialize and lead to the prescription what is allowed and what is not. These rules developed subconsciously within the society are not codified at that time. But as the society modernized, it created a code of behaviour which would be upheld with the aid of legal machinery. This is how a custom has come to be and this ultimately gave rise to the Customary law. It's a dynamic source of law in light of the nature of international system and the lack of centralised government organs. This article aims to analyse the international obligations that arise through the practices of customary international law, through a study of its growth timeline in the Indian jurisprudence. Further, the article provides suggestions on how the customary law is capable of improving within the Indian legal regime.

Keywords: *Customary International Law, Dualism, Monolism, India.*

I. INTRODUCTION

Customary International Law ("**CIL**") essentially refers to international obligations that arise from established international practices, as opposed to obligations arising from formal written conventions and treaties[3]. In the absence of international treaty norms, CIL is deemed to be superior. The two basic elements of CIL would be uniform and consistent practice and '*Opinio juris*' which essentially means that states should comply with the norm not purely out of habit, convenience or coincidence but rather out of a sense of legal obligation. It is to be noted how important the aspect of consent is when it comes to acceptance of CIL when a state adopts a customary norm, a rule of CIL will not be binding on a state that has objected to its substance, although no objection would be considered as implied consent.

Due to its 'nostalgic value'[4], there have been contentions about Customary law being a source of International Law. It was contended that many of the existing norms claimed to be a part of CIL do not qualify as such. Many claim that it is undefined and indeterminate as it lacks

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[3] Vivek Sehrawat, *Implementation of International Law in Indian Legal System*, 31(1) Florida Journal of International law (2021).
[4] Malcolm N. Shaw, *International Law*, Cambridge University Press (2018).

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procedural legitimacy as a process of norm creation. Despite such contentions, CIL continues to be an integral part of the International Legal System. This paper will elucidate the importance of CIL, evaluate its position in India during its transition from Dualism to Monism and will further understand the changing perceptions of the Indian Courts over the years. Lastly, the paper would provide our opinion on the matter, and how we believe the Indian Courts should look towards CIL.

II. POSITION OF CUSTOMARY INTERNATIONAL LAW – THE START OF DUALISM TO MONISM

Before understanding the shift of India's practice from Dualism to Monism, it is vital to highlight India's relationship with international law. International law was said to be implemented even before India achieved independence. India observed British system of advocating international law. Before Independence, the British incorporated customary laws in the Indian legal system, this changed post-independence. While drafting the constitution, there were some articles made in regard to international law. There are mainly three provisions in this regard, namely Articles 51, 253, and 246 in the Indian Constitution. While Article 51 asserts that it is the duty of the state to promote international peace and security, it does not mention the incorporation of international laws into domestic ones.

These provisions further raise the question if India adheres to the Transformation Doctrine of international law, which is mainly based on the dualist model concept.[5] This doctrine essentially considers international law as a part of municipal law, mainly in reference to CIL. Transformation doctrine requires international law to be specifically transformed into municipal law using appropriate constitutional machinery, such as an act of parliament.[6] Although the relationship between Articles 51, 73, 246, and 253 was discussed in the case of **Maganbhai Ishwarbhai Patel v. Union of India**[7], it was in the case of **Gramophone Co. of India v. Birendra Bahadur Pandey**[8] where the Apex Court had recognized the Incorporation Doctrine. The court contended that doctrine of incorporation recognises the position that the rules of international law are incorporated into domestic law and considered to be part of the national law unless they are in conflict with an Act of Parliament.[9] Although the recognition of the

[5] Patna Law College, *Relationship between International Law and Municipal Law*, http://www.patnalawcollege.ac.in/econtent/Relationship%20between%20International%20Law%20and%20Municipal%20Law.pdf.
[6] Brahm A. Agrawal, *Enforcement of International Legal Obligations in a National Jurisdiction*, All India Reporter 71 (2009).
[7] Maganbhai Ishwarbhai Patel v. Union of India, A.I.R. 1969 S.C. 783 (India).
[8] Gramophone Co. of India v. Birendra Bahadur Pandey, A.I.R. 1984 S.C. 667 (India).
[9] Id.

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doctrine took place in this case, the court did not highlight any basic rules and principles for such incorporation, which took longer than expected.

III. CUSTOMARY INTERNATIONAL LAW: CHANGING PERCEPTIONS

As had generally been the case, questions related to international law have been dealt by the higher judiciary, i.e., the Supreme Court of India, instead of the lower judiciary. The cases dealt by the higher judiciary in India, especially in the last 5 decades, has shown great emphasis on the transformation doctrine.[10] However, for the application of CIL, their application has mainly been subject to the constitutional guarantees.

In the case of **Vishaka v. State of Rajasthan**[11], the Supreme Court expressly highlighted that as long as the international convention was in consonance with the fundamental rights enshrined in the Constitution of India, and the convention further helped in the promotion of the constitutional guarantee object, it shall be accepted.[12] However, if this is not the case, and if the international conventions conflict with the domestic norms or laws, many conciliatory approaches (mainly the conflict-free understanding of domestic laws) have been suggested to highlight that the domestic laws shall prevail in such scenarios. Courts have been encouraged to try reading the domestic laws in harmony with CIL.[13]

Such changing perceptions, had for the first time been discussed by the courts in the **Gramophone**[14] decision, when while referring to the jurisdictions of United Kingdom and France through the **Trendtex** decision[15], the court noted the observations made by Lord Denning. He, while accepting the doctrine of transformation, had expressed his preference towards the doctrine of incorporation and expressed how modern rules of international law must be applied when there is a change in the older rules of international law.[16] However, the problems of such changing international laws and their applications had also been expressed by

[10] See Gramophone Co. of India, A.I.R. 1984 S.C. 667 (India); Maganbhai Ishwarbhai Patel, A.I.R. 1969 S.C. 783 (India); In re the Berubari Union and Exch. of Enclaves, (1960) 3 S.C.R. 250 (India); Jolly George Verghese v. Bank of Cochin, A.I.R. 1980 S.C. 470 (India); Midnapore Zamindary Co. v. Province of Bengal, (1949) F.C.R. 309 (India); Ram Kishore Sen v. Union of India, A.I.R. 1966 S.C. 644 (India).

[11] Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India).

[12] Id para 14, "*The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that 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.*"

[13] Maganbhai Ishwarbhai Patel, A.I.R. 1969 S.C. 783 (India).

[14] Gramophone Co. of India, A.I.R. 1984 S.C. 667 (India).

[15] Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] 2 W.L.R. 356 at 365 (England).

[16] Id. at para 691.

the judgment.[17]

Such problems have been expressed by the Indian courts as well, related to the application of international law, especially CIL. With changes in the international law-making process, evolution of international norms, and the evolution of the expectation of implementing the changed norm in a shortened timeframe, impact and implementation of international laws in domestic laws is a substantial issue.[18] The last two decades, especially have seen some fast-changing international norms that India has had to deal with. Some key areas have been related to environment, terrorism, trade, maritime, and extradition issues.[19]

The Supreme Court in the case of **Vellore Citizens**[20], held sustainable development aspects to be a part of CIL, and a part of the domestic laws as well, especially while dealing with the "precautionary principle" and "Polluter pays Principle". However, even in this case, the court was reluctant in providing a blanket primacy to CIL over the domestic laws. [21]

Therefore, it can be seen that as long as CIL is not contrary to the municipal/domestic laws of India, they are passed to be applied, otherwise they are not. It is only in the past decade that the basic principles related to the acceptance of CIL have been laid down by the Supreme Court. This was done by the court in the case of **M/s Entertainment Network (India) Ltd. v. M/s Super Cassette Industries Ltd.**[22] The main point of contention in this case were the sound record broadcasting done by many FM radio stations, in the absence of any valid compulsory

[17] Id, *"…it is the nature of international law and the special problem of ascertaining it which create the difficulty in the way of adopting, or incorporating, or recognising as already incorporated, a new rule of international law.*"
[18] India, being a member of the World Trade Organization (WTO), is in different stages of the implementation of amended, changed, or formation of new domestic laws. Other examples include the binding resolutions for International Terrorism, as passed by the United Nations Security Council (UNSC). In the Sixth Committee of the UNSC, the topic of which was "Measures to Eliminate International Terrorism" (G.A. Res. 66/105, U.N. Doc. A/RES 66/105 (Jan. 13, 2012)), India had informed that it had amended their domestic laws related to terrorism, mainly the Unlawful Activities (Prevention) Act, No. 37 of 1967 and the Unlawful Activities (Prevention) Act, 1967 (India).
[19] Some examples include: Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715 (India) dealing with environmental issues; Mumbai v. Morgan Stanley & Co., (2007) 7 S.C.C. 1 (India) related to double taxation agreements; Sarbananda Sonowal v. Union of India,A.I.R. 2005 S.C. 2920 (India) related to illegal migrants issues; Karnataka Industrial Areas Dev. Bd. v. C. Kenchappa, A.I.R. 2006 S.C. 2038 (India) related to environmental degradation issues; M.C. Mehta v. Kamal Nath, (1997)1 S.C.C. 388 (India) which laid down the 'Public Trust Doctrine' in India; G. Bassi Reddy v. Int'l Crop Research Inst., (2003) 4 S.C.C. 225 (India) related to the implementation of the UN Convention on Privileges and Immunities under domestic legislation; among many others.
[20] Vellore Citizens Welfare Forum, A.I.R. 1996 S.C. 2715 (India).
[21] Id. at para 15, "*Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficultly in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in Addl. Distt. Magistrate Jabalpur vs Shivakant Shukla (AIR 1976 SC 1207) Jolly George Varghese's case (AIR 1980 SC 470) and Gramophone Company's case (AIR 1984 SC 667).*"
[22] M/s Entm't Network (India) Ltd. v. M/s Super Cassette Indus. Ltd., 2008 (9) S.C.A.L.E. 69 (India).

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license under Section 31 of the Indian Copyright Act, and without the payment of any royalty.[23] The main issue also included the various obligations under the copyright-related international conventions. The court, while taking into account both international and domestic laws, highlighted that it is not possible for the interpretation of the statute to remain constant, and would be dependent on the ground realities.[24] Further, the court provided an outline of how international law affects the domestic legal sphere in a country. The 6 points given by the court include – "*(i) as a means of interpretation; (ii) Justification or fortification of a stance taken; (iii) To fulfil spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law; (iv) To reflect international changes and reflect the wider civilization; (v) To provide a relief contained in a covenant, but not in a national law; and (vi) To fill gaps in law*."[25] Here, the court was ready to accord maximum reliance to the negotiated international conventions, and also prepared to follow the conventions to which India was not a signatory or party to, so long as the norms falling from such conventions were a part of some Parliamentary statute already enacted or added to the Parliamentary statute through an amendment later.[26]

In the case of **Aban Loyd Chiles Offshore Ltd. v. Union of India**[27], the application of the obligations under the United Nations Convention on Law of the Sea (UNCLOS)[28], in comparison with the domestic laws of Customs Act, 1962[29], Customs Tarriffs Act, 1975[30], and Maritime Zones Act, 1976[31], were under question. Interestingly, the domestic laws in this case were enacted much before the existence of the international obligations under UNCLOS. However, even in this case, the court continued its position stating, "*even in the absence of municipal law, the treaties/conventions can be looked into and enforced if they are not in conflict with the municipal law.*"[32]

The court has continued this position over the years. Even in the recent case of **Mohamad**

[23] Id.; The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).
[24] Id, "*While India is a signatory to the International Covenants, the law should have been amended in terms thereof. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in societal conditions vis-à-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.*"
[25] Id.
[26] Id, "*Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible.*"
[27] Aban Loyd Chiles Offshore Ltd. v. Union of India, 2008 (6) S.C.A.L.E. 128 (India).
[28] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.
[29] The Customs Act, 1962, No. 52, Acts of Parliament, 1962 (India).
[30] The Customs Tariff Act, 1975, No. 51, Acts of Parliament, 1975 (India).
[31] The Maritime Zones of India Act, 1981, No. 42, Acts of Parliament, 1981 (India).
[32] Aban Loyd Chiles Offshore Ltd. v. Union of India, 2008 (6) S.C.A.L.E. 128 (India), para 87.

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Salimullah v. Union of India[33], the Supreme Court refused to rule against the deportation of Rohingya refugees to Myanmar. This was despite the fact that the principle of non-refoulement has been recognised to be a part of CIL, along with being recognised as a jus cogens norm.[34] With the court retreated its position from the earlier cases, the court refused to consider non-refoulement principle within the municipal laws of India.[35]

Therefore, it is important for CIL to not be in conflict with the domestic laws of India for the courts to take them into account. Further, if there is any absence of clear legislation or enactment related to the subject-matter of any CIL norm, then the test applied by the court is that of constitutional guarantees. So long as the CIL is in consonance with the basic structures of the Indian Constitution, they shall be applied even in the absence of any legislation.[36] With an analysis of the cases discussed, it can be seen that India has been steadily moving towards the monist model from the dualist model, since it directly recognises the application of international law, even in the absence of any supported legislation. This may also be described to be the phenomenon of "creeping monism" in India.[37]

IV. OUR OPINION ON THE MATTER

Despite labelling itself as Dualist, India has exhibited monist tendencies over the years. The Parliamentary committee of external affairs in its report of "India and International law"[38] further corroborates to such observations. This transition was led by the judiciary. In the beginning, the apex court contended that incorporating CIL into domestic laws is consistent with the practice of other common law countries. However, it was observed how easily the court

[33] Mohamad Salimullah v. Union of India, AIR 2021 SC (CIVIL) 1753 (India).

[34] Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INTERNATIONAL JOURNAL 44 OF REFUGEE LAW 533–558 (2001), https://doi.org/10.1093/ijrl/13.4.533; Alice Farmer, *Non-Refoulment and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEORGETOWN IMMIGRATION LAW JOURNAL 1 (2008), https://heinonline.org/HOL/Page?handle=hein.journals/geoimlj23&id=3&div=&collection=.

[35] Mohamad Salimullah v. Union of India, AIR 2021 SC (CIVIL) 1753 (India), para 12, "*There is no denial of the fact that India is not a signatory to the Refugee Convention. Therefore, serious objections are raised, whether Article 51(c) of the Constitution can be pressed into service, unless India is a party to or ratified a convention. But there is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law. Regarding the contention raised on behalf of the petitioners about the present state of affairs in Myanmar, we have to state that we cannot comment upon something happening in another country.*"

[36] V.G. Hedge, *International Law in the Courts of India*, 19 Asian Yearbook of International Law, 23(1), 53-77 (2013), doi:10.1017/S0922156509990331.

[37] Creeping Monism is "*a gradual shift in judicial orientation toward a more flexible interpretive approach to unincorporated human rights treaties*". See Melissa A. Waters, *The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 Columbia Law Review, 628–705 (2007), http://www.jstor.org/stable/40041716.

[38] COMMITTEE ON EXTERNAL AFFAIRS (2020-2021), *INDIA AND INTERNATIONAL LAW INCLUDING EXTRADITION TREATIES WITH FOREIGN COUNTRIES, ASYLUM ISSUES*, INTERNATIONAL CYBER-SECURITY AND ISSUES OF FINANCIAL CRIMES, 9th Report, 17th Lok Sabha, http://164.100.47.193/lsscommittee/External%20Affairs/17_External_Affairs_9.pdf.

had accepted certain laws that were contested in various other countries amid international debates. For instance, the Supreme Court's willingness to readily accept the precautionary principle as part of CIL showcases the lack of effort and analysis that the Court should undisputedly put in.

Further, the Apex court hasn't been consistent in incorporating CIL. This could be seen in the case of **Mohamad Salimullah**[39]. International law-making is frequently criticized for democratic deficit. Possibly, judicially incorporating international law without parliamentary scrutiny legitimises such democratic deficit. Accordingly, judicial incorporation of international law is questioned because it amounts to the judiciary overriding the Parliament.

One of the advantages of judicial incorporation would be the progressive development of law when the parliament and executive for political or ideological reasons fail to enact laws transforming a liberal international legal norm into domestic law. India's failure in enacting a refugee law incorporating the principle of non-refoulment is a classic example of this.

The recommendation made by the Parliamentary committee of external affairs in its report of "India and International law" stating that executive should take note of the vacuum in domestic legislation on customary norms in international law and develop suitable domestic laws is crucial for the development of our domestic laws. That being said, expansion of domestic law does not necessarily mean that certain domestic laws should be developed that are keen on rejecting the binding customary norms in international law. On the contrary, India should enact domestic laws that are harmonious with CIL.[40] CIL is a vital component of the international legal system which deserves a stronger and a relevant role in domestic law. Despite the valid criticism of CIL by various jurists, its role can still not be overlooked. The judiciary, on its part, should demonstrate greater analytical rigour in interpreting and applying CIL as part of the Indian legal regime[41].

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[39] Mohamad Salimullah v. Union of India AIR 2021 SC (CIVIL) 1753 (India).
[40] Prabhash Ranjan, How India has approached customary international law, Indian Express (Jan. 11, 2022, 09:45 AM), https://indianexpress.com/article/opinion/columns/how-india-has-approached-customary-international-law-7716742/.
[41] Id.

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