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Monist vs. Dualist Theory of International Law

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ABSTRACT

The monist versus dualist theory of international law has long been debated as two contrasting approaches to the relationship between international and domestic law. While these theories may have limited explanatory value in practice, they serve as valuable analytical tools for understanding the interplay between the two legal spheres. Monism posits that international law is incorporated into and superior to domestic law, creating a unified legal system where international law governs over domestic laws. On the other hand, dualism argues for a clear separation between international and domestic law, with international law requiring domestic implementation to be binding at the national level.

This paper examines the monist and dualist theories of international law and their implications in India's legal framework. India follows a dualist approach, requiring enabling legislation by Parliament to give effect to international treaties. However, recent judicial decisions have deviated from this approach, allowing for the direct integration of treaties into domestic law in certain cases. This raises concerns about the separation of powers and the infringement on Parliament's law-making authority.

The paper also highlights the mixed approaches to international law adopted by many countries, including the United States, which combines elements of both monism and dualism. It discusses the challenges posed by the democratic legitimacy of international law and the translation of treaty commitments into enforceable norms.

In conclusion, the paper argues that India's international legal standing is inconsistent with its constitutional policy, as the courts have been incorporating international treaties without enabling legislation. It emphasizes the need to strike a balance between monist and dualist perspectives to promote the rule of law in the international sphere while respecting constitutional safeguards. The ongoing scholarly and legal interest in this topic demonstrates the quest for understanding how international legal norms can be enforced in a democratic and politically legitimate manner to advance human rights, economic growth, and world peace.

Originally, Monism and Dualism were thought to represent two conflicting theories of the relationship between international and domestic law. Many modern scholars believe that monism and dualism have limited explanatory value as theories because they fail to represent

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how international law operates within states in practise. Despite their downfall as theories, monism and dualism continue to be useful analytical tools. They serve as a consistent starting point for investigations into the interplay between international and domestic law.

A state can embrace and incorporate international law into its domestic system in one of two ways, according to international law. International law is considered to be joined with and a component of a state's internal legal order in a Monist legal system. On the other hand, in a Dualist legal system, international law is separate from domestic law, and international law must be "domesticated through legislative action in order to have any effect on rights and obligations at the national level."[2] Between World Wars I and II, the conflict between two opposing views of international law reached a pinnacle in Europe when legal experts began to seriously investigate how and to what degree formal international institutions and binding international legal responsibilities could reduce the prospect of war. The distinction between a Monist and a Dualist theory, on the other hand, is based on two competing and significant purposes. Monist theory emphasises the importance of establishing a formal international legal order to ensure the rule of law among nations, whereas dualist theory emphasises individual self-determination and state sovereignty.

In Monist theory, international law serves as a source of law that is incorporated into and superior to domestic law, not just as a legal framework to guide state-to-state relations in the international order. As a result, a treaty that has been legally ratified or approved becomes part of the national legal system. The fact that international law can be applied and enforced directly in domestic courts without the need for domestic implementation is a significant benefit of this conception. As a result, this framework establishes a single, unified legal system, with international law at the top and local, municipal law subordinate. The monist perspective is most credited to Austrian legal expert Hans Kelsen, who argued in the 1920s for the primacy of international law as a derivation of natural law, rather than merely a representation of individual states' decisions to be bound by specific rules through customary practise. As stated in his classic work, Peace Through Law, Kelsen's monist theory was meant to foster international peace by introducing binding responsibilities enforceable against state participants in formal international judicial systems.

Dualist legal theories arose as the theoretical antithesis of Kelsen's unitary vision of law at the same time as he was striving to redefine the connection between the state and the international legal system. In a Dualist paradigm, there is a distinction between international legal duties that

[2] Dubay, C. A. (2014). General Principles of International Law: Monism and Dualism. International Judicial Monitor. May 2, 2022, from http://www.judicialmonitor.org/archive_winter2014/generalprinciples.html

nations as sovereigns agree to acknowledge in their foreign interactions and domestic legal standards that bind the state and its citizens or subjects in internal relationships. As a result, international law can only have binding legal force at the national or municipal level if it is enforced there. Heinrich Triepel, one of the most prominent proponents of the dualist theory of international law advocated that international law was a manifestation of sovereign states' "common will." As a result, there was a clear distinction between international and state law. The prevalent concept of Dualism has arisen from this theory, which states that international law is not superior to domestic law, and that the applicability of international law in the domestic legal regime is a matter for local political processes to decide. For example, once a treaty is signed by the head of state, it takes effect and becomes legally binding in international relations. "The treaty must be specifically implemented by relevant legislation to be binding at the domestic level and enforceable in a domestic court."[1]

International law is a form of soft law that is founded on the permission of the states involved. The process for incorporating international law principles into a country's domestic framework differs in every country. India is a dualist country, which means that in order to give effect to a treaty, Parliament must pass appropriate laws. A writ petition[3] was recently filed in the Supreme Court of India requesting that the Parliament establish legislation to enforce the UN Torture Convention of 1984, which India adopted in 1997. The petition is in line with the principle of dualism, which states that Parliament has the ability to implement treaties. India's position on Customary international law is crystal clear. In the Vellore Citizen case[4], the Court decided that the principles of Customary international law should be regarded as part of domestic law unless they are in conflict with it. This is an accepted stance, and there has been no debate about it so far. In the case of treaties, however, this is not the case, as India's position on treaties is in flux.

Article 253, read with Entries 13 and 14 of List I of the Indian Constitution, gives the Parliament the authority to implement any treaty, convention, or agreement entered into by the Indian government. This reflects the Indian Constitution's dualist approach, which requires enabling legislation from Parliament before any international agreement may be enforced in the domestic legal system.

However, India has strayed from its established stance due to the rapid rise of human rights and environmental law. The Court concluded in the Azadi Bacho Andolan case[5] that enabling

[3] Dr Ashwini Kumar vs Union Of India Ministry Of Home (5 September, 2019)
[4] Vellore Citizens Welfare Forum vs Union Of India & Ors (28 August, 1996)
[5] Union Of India And Anr vs Azadi Bachao Andolan And Anr (7 October, 2003)

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legislation by Parliament is only required where a treaty or convention impairs citizens' rights. It means that treaties, with the exception of those affecting people's rights, can be directly integrated into domestic law. In the Vishakha[6] decision, the Court went a step further, holding that international treaties and laws could be considered by the Court in construing domestic law if they are not in conflict with domestic law. The court upheld the unincorporated provisions of the International Covenant on Civil and Political Rights (hereafter referred to as the ICCPR) in the PUCL case[7]. This demonstrates that the court can refer to and rely on international treaties and conventions, even if they are not part of municipal legislation.

The Court has also relied on accords to which India is not a signatory in a number of cases. In the G. Sundarajn case[8], the Court was asked to rule on the construction of a nuclear power facility in Kundankulam, Tamil Nadu. In answering this question, the Court referred to a number of international treaties that India had not signed.

Separation of powers is a part of the Constitution of India's basic structural doctrine, which states that the executive, judiciary, and legislature are intended to work independently of one another. Policymaking is a function of Parliament, and the court is not expected to interfere with that role. Furthermore, the Constitution mandates that the government rule its people not merely by making the right judgments, but by making the right decisions by the proper authority. The Indian judiciary's actions to include an international treaty without its ratification result in the usurpation of Parliament's law-making authority, and thus violative in nature of the idea of separation of powers.[9]

Despite continuous academic interest in the implications of the monism vs. dualism issue, most countries' approaches to international law are a mix of monist and dualist. In the United States, the standing of international law reflects this combination of perspectives. According to Article VI of the United States Constitution[10], this explicit inclusion of treaties into binding (and supreme) domestic law was accompanied by the recognition that customary international law "is part of our law," as the United States Supreme Court memorably stated in The Paquete Habana case[11]. “However, since the establishment of formal international institutions in the

[6] Vishaka & Ors vs State Of Rajasthan & Ors (13 August, 1997)
[7] People’s Union Of Civil Liberties vs Union Of India (Uoi) And Anr (18 December, 1996)
[8] G.Sundarrajan vs Union Of India & Ors (6 May, 2013)
[9] Agarwal , K. (2021, April 26). Are the Indian courts still following the constitutional principle of dualism? not quite so. The RMLNLU Law Review Blog. Retrieved May 1, 2022, from https://rmlnlulawreview.com/2020/04/01/are-the-indian-courts-still-following-the-constitutional-principle-of-dualism-not-quite-so/
[10] "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”
[11] 175 U.S. 677 (1900)

twentieth century, as well as an expansion in the quantity, variety, and scope of international accords, the United States has taken rather a dualist approach to international law's place in the domestic view."[1] Recently, concerns have been raised about the democratic validity of international law and international tribunal judgements. Further, according to the Supreme court case of Medellin v. Texas[12], which dealt with the domestic enforceability of the Vienna Convention of Consular Affairs, and the Guantanamo Bay detainee cases, which dealt with the domestic application of the Geneva Conventions. This determination of whether a treaty obligation is self-executing or non-self-executing affects the translation of treaty commitments into judicially enforceable norms.

The above reasoning leads us to the conclusion that India's international legal standing is inconsistent with its constitutional policy. The dualist approach, as stipulated in the Constitution, is not adopted by Indian courts in practise. Other affluent countries, such as the United States, are experiencing similar ambivalence. The judiciary is usurping Parliament's jurisdiction to enforce international treaties and conventions in the name of judicial activism and to bring the Indian Constitution into compliance with international law. Parliament is entrusted with the responsibility of making laws for its people since it represents the citizen's will. The core constitutional concepts are violated when an international treaty is incorporated without any enabling legislation. Article 51 of the Indian Constitution argues for international law and treaty obligations to be respected, but not at the expense of constitutional safeguards. However, the blending of monist and dualist perspectives in both domestic and international politics, Kelsen and Triepel's contrasting ideologies reveal the best method to advance the rule of law in the international domain. The ongoing scholarly and legal interest show how and under what circumstances international legal norms that advance the aims of human rights, economic growth, and world peace can be enforced in a democratic and politically legitimate manner has resulted from the rivalry of these ideologies.

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[12] 552 U.S. 491 (2008)